4. Convergence and the Rationales for Regulation

Introduction

Chapter Two outlined a series of rationales that have been advanced over the years for applying regulation to Australian broadcasting services. It was noted that these rationales still underlie the objectives of the BSA and are manifest in the provisions of the Act. Chapter Three described an environment which challenges traditional rationales. These challenges mostly follow as a consequence of the convergence of telecommunications and computing technology, and the effect that convergence has on service concepts and service provision.

This Chapter reviews the rationales for regulation in the light of the challenge of technological development.

Status of the Rationales in the 90s

Scarcity

One of the most enduring rationales for industry specific regulation of broadcasting services has been the purported scarcity of radiofrequency spectrum.[1] This purported scarcity is supposed to prompt a need for an allocating mechanism that operates in the "public interest".

An examination of past practice suggests that the scarcity rationale was largely an artificial construct. There is no evidence that, at any time in the history of Australian broadcasting, the number of broadcasting services in any area in any radiofrequency band has ever reached the limit of the capacity of the radiofrequency spectrum, nor is there any evidence that demand would have met the capacity likely to be available had the services been planned on a less conservative basis. In fact, whenever conditions of "scarcity" of spectrum for a particular purpose have been approached, Governments have shown the flexibility, when moved, to open new bands of spectrum for broadcasting use. The introduction of radio services in the 88 to 108 MHz FM radio band in 1974 and the introduction of UHF television in the mid-1980s are both cases in point. It is the same in the US, where, according to Levy, the 28 GHz band is now being developed for video services with capacity for perhaps hundreds of digitally compressed services. This is to meet demand in the US for additional video channels.[2]

Even though there has been no actual scarcity of transmission capacity, Governments have, at one time or another, created artificial scarcity of *licences* by refusing to permit new services. The introduction of FM radio in Australia could have taken place up to 20 years prior to 1974, when its use was finally authorised by

Government, if the Government had been willing to open it to new services. Instead, Government allowed the FM radio band to be used for television services, thus effectively precluding competition to the incumbent radio operators. In the 1980s, Government was forced to relocate these television services to the UHF television band to satisfy community demands for additional FM radio services with high quality stereo sound.

Despite there being provision across all of Australia for 6 high powered television services, only five high powered services are licensed for continuous operation. The sixth channel is currently being used in some centres for temporary transmissions by community broadcasting services, but it has not been allocated permanently.[3]

The ABA is required, at ss. 25-26 of the BSA, to review planning in the broadcasting services bands against a set of statutory planning criteria and public planning assumptions. Past planning practices may have been overly conservative and may have artificially limited the number of services able to be provided.

Spectrum scarcity for broadcasting has, at least for a decade, been a demonstrable myth. As long ago as 1980, Cooper said, in respect of the rationale that spectrum scarcity warranted regulatory intervention:

> If this argument was ever true, and the writer doubts it, it is certainly spurious today, when, if the full electromagnetic spectrum was efficiently utilised, a number of additional television and radio stations could be instantly licensed. Further, cable and pay television currently are available should the Government wish to permit such media to be authorised and, shortly, transmission by means of satellite will be upon us, enlarging the range of options available still more. Any visitor to a city such as New York will be aware of the number of television and radio stations which are available and must immediately realise the absurdity of the argument that the electromagnetic spectrum is a limited resource which must be treated differently from other community resources such as forests, and so on.
>
> The reasons for the degree of regulation of the electronic media must be sought elsewhere than this traditional myth.[4]

The promotion of this myth, and the interests that it has served, are worthy of detailed study, but they are beyond the scope of this paper.

The BSA has begun the process of undoing the myth by firstly permitting any technology to be used to deliver broadcasting services, and secondly, by requiring the ABA to re-evaluate the planning of broadcasting spectrum, and then to allocate all planned channels according to agreed publicly determined priorities. The past practice of always holding spectrum in reserve appears to be no longer acceptable.

In addition to these changes in policy, the environment outlined as being likely for the future envisages the use of satellites in Australia for delivering both pay TV and the new subscription and open narrowcasting services introduced in the BSA. MDS is also likely to be available, initially for narrowcasting services and ultimately for pay TV. There is no reason why these technologies cannot also be used for the more traditional forms of broadcasting service such as commercial television; indeed, Australia has been using satellites for ABC and commercial television to remote areas since 1986.[5] Even if Australia chooses not to adopt the optical fibre cable to-the-home strategy that was advocated by the Government for investigation in the 1993 Federal election campaign, the ADSL technology currently being trialed may eventually deliver digital television to the home over standard copper telephone lines at some time in the future.

There is only one factor that maintains the relevance of "spectrum scarcity" as an issue, and it, too, is in decline. There is a large population of radio and television receivers in Australian homes that are only capable of receiving signals in the broadcasting services bands. These represent a significant investment by the Australian people and the equipment is unlikely to be replaced overnight with alternative systems. Nevertheless, the Government has already mandated the introduction of a digital transmission system for satellite delivered pay television. Digital transmission systems, as noted in chapter three, offer significant productivity improvements over current satellite usage, with manifold improvements in the service utilisation of each satellite transponder. If a substantial base of satellite television receivers is established in response to the introduction of pay TV, that may pave the way for migration of television from terrestrial systems to satellite systems. The same is true of pay TV driving cable systems to the home, should such a strategy evolve.

If and when government begins to recover the true economic value of radiofrequency spectrum, the value of the spectrum currently occupied by broadcasters may place economic pressure on the broadcasting industry to adopt digital compression techniques for their terrestrial radiocommunications, simply in order to optimise productive use of that spectrum. To aid such a transition for consumers, one could imagine that very attractive packages will be offered to entice viewers to adopt new technology, whether it be for transition of existing services to new more efficient technologies, or to establish new markets with new technologies.

It is reasonable to conclude that one consequence of convergence, and its effect on the technical environment in which broadcasting operates, is that scarcity will soon become unsustainable as a rationale for regulation, if it is not already so.

Economic Management

Bonney and Wilson, among others, noted that Governments have used regulation as a tool of economic management in the broadcasting sector, particularly to limit foreign investment in media and to promote diversity of services.[6] It is important to note that all areas of the Australian economy are subject to concerns about diversity and foreign investment, but these concerns are not applied as rigorously or in the same way as they are for broadcasting.

Foreign investment in most sectors of the Australian economy is managed by the Government through the Foreign Investment Review Board (FIRB) and the Federal Treasurer, who has a power of veto over foreign investment proposals. Competition policy is dealt with under the provisions of Part IV of the *Trade Practices Act 1974,* administered by the Trade Practices Commission (TPC). Both of these mechanisms apply across most sectors of the Australian economy. The application of tighter restrictions to broadcasting appears to flow from rationales for regulation such as concern about the influence of the media. Limitation of foreign investment is said to promote Australian ownership of media assets, and thus the presentation of distinctly Australian points of view, consistent with the national interest. Promotion of diversity is similarly concerned with influence, taking the view that the influence of any one player is likely to be diluted by the presence of competitors, and that plurality of media sources is a desirable end in a democratic society.

A question arises as to whether these issues are sufficiently powerful to warrant industry specific regulatory intervention, especially when restrictive regulation tends to exacerbate the problem. In this regard, it is worth noting that under the BSA, only commercial broadcasting and subscription broadcasting services are subject to statutory limitations on ownership and control. The BSA describes a competitive environment in which these services form only one part of the overall electronic mass media environment. The rise of alternative media, and the challenge that these media pose to traditional broadcasting media is not unique to Australia. For example, Levy notes that free-to-air television services are going to continue to be under pressure from the expansion of alternative media.[7] While Levy was concerned primarily with the development of alternatives such as pay TV, the possibility that newspapers will move into the electronic domain, using multimedia formats, and that dial-up television services will become technically feasible, only serves to amplify the potential competitive pressures on traditional media.

The point is that even today, narrowcasting services in the BSA are exempt from the broadcasting specific limitations on ownership and control, whether they be for foreign ownership or multiple ownership. The safety net of regulation provided by the TPC and FIRB seems to be sufficient for these types of services.

Further complications arise in response to electronic newspapers and similar media. Newspapers and magazines are currently only subject to limits on ownership and control expressed in general Commonwealth legislation. If, as has been suggested, newspapers and magazines migrate to the electronic domain, then they will fall outside the current definition of broadcasting, but will fall within the ambit of Commonwealth regulation generally. Can it be said that an electronic newspaper, with pictures, graphics, and even full motion video in a multimedia environment is capable of any less *influence* than broadcasting?

Hull has noted the obvious contradiction in printed newspapers being able to exist unregulated by the Commonwealth, but electronic newspapers being potentially subject to Commonwealth law by virtue of s.51(v) of the Constitution. Hull concluded:

> We need a more definitive constitutional guarantee of free speech to ensure that the words "postal, telegraphic and other like services" are not used by governments as a back-door way of controlling the "newspapers" of tomorrow.[8]

Hull's suggestion begs the response: why can the argument not be extended to broadcasting? Although the Constitution has been interpreted to extend a power to the Commonwealth to specifically regulate broadcasting, does that make it necessary that the Government exercise that power? Is an electronic newspaper so different from broadcasting in the sorts of concerns that it raises that it warrants different treatment in law? If Hull's suggestion of a Constitutional guarantee of freedom of speech is pursued to exempt newspapers from Commonwealth control, then to what extent would such a guarantee apply to broadcasting services? These sorts of questions lead to the conclusion that industry specific broadcasting regulation is out of step with the regulation of other similar, or potentially similar, media.

The economic management rationale for regulation is also under challenge from a change in the Government's overall approach to economic regulation. There have been recent moves to question the whole approach of industry specific regulation. One compelling rationale for general regulation, as opposed to industry specific regulation, is that it provides clear, stable and universal rules for the operation of businesses in Australia. The application of regulation imposes costs not only on the taxpayer, who must fund the administrative costs of the regulatory body enforcing regulation, but on industry who face increased overheads in order to comply with the additional regulation. These overheads are ultimately passed on to the consumer. *Every additional layer of regulation imposes costs which are inevitably shouldered by the community at large.*

Only the regulation that is absolutely necessary to achieve Government objectives should be applied. That principle is enshrined in the BSA[9] but it leaves unanswered

the question why broadcasting *needs* industry specific regulation. If the rationales for applying industry specific regulation to broadcasting can be shown to be weak, as Mayer was suggesting as long ago as 1979, then the case for continued industry specific regulation is reduced.

The merits of industry specific regulation have been publicly questioned by statutory officers such as Professor Alan Fels, Chairman of the TPC, who has been quoted as saying that he does not favour industry specific regulators and would prefer the job to be done by a general regulator, such as the TPC:

> Industry specific regulators can sometimes be captured and they also tend to pursue self-preservation tactics to ensure they're in the business for a long time as regulators.[10]

Regulatory capture, as described by Fels, is no new concern in Australian broadcasting, and has been specifically acknowledged by Armstrong, who noted that:

> Writings which refer to the Australian Broadcasting Control Board and its successor the Australian Broadcasting Tribunal do suggest that, whatever the motives of individual members and staff, the main functions of these bodies have been: to delay innovation in broadcasting; to protect the interests of major incumbents against competitors; to represent the interests of those incumbents within the bureaucracy; to perform industry "housekeeping" in the engineering and programme areas; and to allay public concerns about broadcasting.[11]

If regulatory capture can be proved to exist in broadcasting policy, and if the existence of capture is felt to be detrimental to the development of the system for the public at large, then that would add another justification for abandoning industry specific regulation of broadcasting.

While there is no doubt some self-interest in Fels' proposition that industry specific regulation should be reduced, the case against industry specific regulation has been further advanced by the Independent Committee of Inquiry into a National Competition Policy (the Hilmer Committee), which reported to the Government in August 1993:

> ...the domestic pro-competitive reforms implemented to date have all been progressed on a sector-by-sector basis, without the benefit of a broader policy framework or process. Reforms undertaken in this way are typically more difficult to achieve, with the ground-rules including the respective roles of Commonwealth, State and Territory Governments - having to be negotiated on a case-by-case basis. A national competition policy presents opportunities to progress reform more broadly, to promote nationally consistent approaches and to *avoid the costs of establishing diverse industry specific and sub-national regulatory arrangements.*[12] *(my emphasis)*

The use of industry specific regulation to deal with issues of economic management therefore appears to be out-of step with trends in national economic management.

Public Property - Public uses

The proposition that spectrum is public property, and must therefore be used for public purposes, predicts its own downfall. As soon as broadcasting services began to use what are essentially private means of transmission, such as cable, or for that matter, satellites, where access to the required spectrum has been conferred solely on the satellite operator, the whole rationale ceased to have application. As noted in Chapter Three, Australia has permitted use of private means of transmission of broadcasting services since 1985 when the satellite system commenced operations. The 1992 reforms to broadcasting regulation regime provide for broadcasters to use any means of transmission, public (if such a thing exists) or private.

The notion that the radiofrequency spectrum is public property should also be opened to question, for it represents only one possible response to the central issue of concern, that is the need for cooperation between people using radiocommunication so that they do not spoil the utility of others. For whatever reason, when the issue of interference first emerged, Governments intervened and the notion that there is a *spectrum* that *belongs* to the Government, as trustees of the people, was accepted. Conceptually, however, the notion of a spectrum that has the characteristics of property that allow it to carry communication is too close to the now discredited idea of an "ether" through which radio "waves" travel.

Modern understandings of physics tell us that there is no “ether”. It is a long discredited idea. Radiocommunication is now seen to be dependent on *radiation*. Radiation can be measured by its energy (or wavelength) and the quantity (or amplitude). Radiation is manufactured in machines, and these machines are able to respond to human control to either create, or not create, radiation. Here we have the foundations of an alternative conceptualisation of radiation as measurable property belonging to (or at least under the control) of individuals.

The public property conceptualisation of spectrum leads inevitably to state enforced, centrally planned cooperation, where the state determines who may have access to spectrum and under what terms. Australia has a long history of this approach. However, around the world there has been concern at the failings of centrally planned stated enforced cooperation, wherever it is applied. With this has come a realisation that it is not necessary to conceptualise the spectrum as public property in order to achieve cooperation between users. If radiation is private property, then there are parallels in the management of land that offer a guide as to how cooperation might be arranged. There are already comprehensive mechanisms in law that mediate in property disputes. There is a general acceptance in

law that one should have a generally unfettered right to go about one's lawful business on one's property, provided that the rights of others in exercising the utility of their property are not infringed. The civil courts provide adjudication and relief for transgressions of this principle. The state's only role in this system is the provision of a court structure and the prevention of monopolistic practices which act to harm the general interests of the community in pursuing individual utility. In land, the state does this by occupying the natural monopoly created by land titles. There is no reason why the spectrum cannot be treated similarly.

The Government's spectrum management reforms recognise this principle and introduce, for the first time in Australia, a concept of a spectrum property right which is essentially a right of private property.

There are other issues with the proposition that spectrum is public property and therefore *must* be centrally planned. These are illustrated by the position taken by Governments in response to Crown land. There has never been anything to prevent Governments from realising the value of Crown Land as an asset (through an auction) and using the proceeds for community advancement. It is possible to apply caveats on land use, and the same is true of any spectrum property right created in the same way as a land title.

The acceptance that spectrum is an asset which can be used either for community purposes or for private purposes brings recognition that if spectrum is used for community purposes, then it is unavailable for private purposes, and that if spectrum has value (because it is in demand), then this has an accompanying cost to the community in terms of revenue foregone. There may be circumstances where private users place a higher priority, and thus value, on a piece of spectrum than does the community. At the moment, broadcasting spectrum is reserved for broadcasters, and is thus insulated from effective competition from alternative users. This means that the community is denied the opportunity of comparing the benefits of having broadcasting services use that spectrum, with the other public goods that are foregone by Government reserving that spectrum.

Only by opening reserved broadcasting spectrum to open competition will sufficient information about spectrum value become available for Governments to make informed choices. Opening reserved spectrum to competition also places the onus on broadcasters to make the best and most efficient choices about how they market their services to the community. As the BTCE noted:

> From the point-of view of efficient resource use of the radiofrequency spectrum, it would be desirable to use a market-based system for the allocation of spectrum access rights and to separate the broadcasting and the spectrum-use functions inherent in the present licensing arrangements. Although such a system might require broadcasters to purchase spectrum rights in competition with other users, it would also provide them with flexibility

> to choose alternative delivery mechanisms (e.g. cable, satellites) should they prove to be more commercially attractive.[13]

The rationale that the radiofrequency spectrum is public property, and therefore that it should be put to the best possible public use is able to be questioned on a number of fronts. The Government has acknowledged the counter-position and has implemented reforms of spectrum management that treat spectrum as private property. This suggests that the rationale can now be abandoned as a justification for industry specific broadcasting law.

Impact, Influence and Pervasiveness

As noted in Chapter 3, this rationale operates from the proposition that broadcasting has a powerful influence on the public. This capability for influence creates, in the minds of those who advance this rationale, an obligation on Government to develop and apply regulation to ensure that those who have the power to influence do not abuse it. Regulation, however, has its own negative consequences, and research needs to be directed to questioning whether the purported dangers of media, in terms of their capacity to influence, are worth these negative consequences.

The issue of influence is perhaps the other most widely touted rationale for regulation after scarcity of radiofrequency spectrum. Despite this rationale being directed ultimately to the influence of programs on audiences, it appears that it has been used to justify the application of a whole range of regulatory imposts, including provisions related to ownership and control, and to ensure that licensees are suitable (under the BSA), and fit and proper persons (under the old *Broadcasting Act 1942*).[14] One can conclude that those advancing this view feel that only suitable broadcasters have the capacity to broadcast suitable programs and that unsuitable broadcasters maycarry unsuitable programs. This is unlikely behaviour for a service provider. No broadcaster, no matter what their suitability, would want to willingly risk unnecessarily offending the sensibilities of its audience by broadcasting unsuitable programs. To do so would be to alienate the audience, thus reducing audience share, advertising revenue and ultimately profit. Rupert Murdoch and Kerry Packer did not make their fortunes by alienating their customers!

Secondly, throughout the history of research into mass communication effects, concern has been directed primarily to the *negative* effects of the media,[15] and despite this academic attention (over more than 70 years), understanding of human mass communication processes has still not developed to the point where theory allows these purported effects to be predicted with any confidence. In the summation of Lowery and De Fleur:

> ...it will probably never be possible to indicate exactly what ideas, beliefs or behaviours will be influenced, among whom, or by what modes of media presentation.[16]

Concern over alleged *harmful* effects of the media pervades the logic of those who promote the impact rationale, yet it ignores the equally probable counter position that the media have positive effects, of potential value to society. It seems to be overlooked that regulation may very well restrict or curtail some of these positive effects, just as it is intended to curtail harmful effects. The question that is apparently not asked is whether the application of regulation, and all of its consequences, both intended and unintended, is worth the loss of the potential positive effects of media experiences to the community.

There is also a clear and obvious inconsistency in applying restrictive regulation to broadcasting media, justified on the basis of its alleged impact on viewers, when similar restrictions are not placed on comparable media forms such as the cinema, and more importantly, on the home video rental market, which shares the pervasiveness of television. If television has effects on audiences, then the cinema and videocassette rental tapes *must* also have effects. Both of these other forms of media are subject to program classification, which applies generally and is not industry specific. From the point of view of concern about alleged media effects, it is thus hard to sustain the logic of maintaining a specialised program regulation regime solely for broadcasting.

This is especially so in the environment emerging in response to convergence. The likely abundance of highly specialised services raises questions about the impact of any one service on the audience. Even so, common sense cries out that service providers will be unwilling to alienate their audiences - their financial survival depends on audience loyalty.

If transactional services rise in popularity, as is predicted, then it is hard to see the justification in Governments feeling compelled to regulate these private transactions, except to ensure proper business conduct and consumer protection, again through general regulation. Governments already have well developed mechanisms to deal with these issues.

The alleged, but still unproven, impact, influence and pervasiveness of broadcasting media is not, of itself, sufficient to justify the regulatory intervention that is currently applied.

The Public Interest

The public interest represents difficult territory to traverse. There are deep divisions in the literature about what constitutes the public interest and whether or not such a concept is useful in any but a theoretical sense.

Because of the complexity of the issues, the public interest rationale is treated separately in the following Chapter, where the various constructions of public

interest theoryare considered. The Chapter concludes that a generally stated public interest is not sufficient to justify regulatory impositions of any kind.

Cultural Protection

The need to apply measures that protect Australian cultural values is based, in part, on the proposition that the most significant media program producing centre in the English speaking world is based in the US, and thus produces programs with US cultural values. The size of the US market enables the costs of program production to be amortised in that market, enabling programming to be sold on foreign markets at a substantial cost advantage compared with locally produced programs in those markets. Profit driven commercial broadcasters are assumed to be attracted to this material because it allows them to retain a greater surplus from advertising revenue.

Even if this proposition is accepted unreservedly, it does not necessarily compel the sorts of regulatory approaches that are applied in broadcasting - particularly the quotas of Australian content that are a feature of current law. Direct subsidies to producers that allow cost equalisation and thus fair competition for Australian material with that sourced from offshore is one way. Tariffs barriers are another method, although trade barriers are generally inconsistent with Australia's current policy stance in respect of international trade. Nevertheless, dumping of product in Australian markets at below manufacturing cost is also contrary to current trade policy.

The problem, however, is that the cultural protection rationale cannot be advanced through quotas in the technical environment envisaged in this paper. It would be absurd to attempt to apply an Australian content obligation at the cinema or to the videocassette rental market; for example, compelling cinemas to show 20 per cent Australian films, or requiring 20 per cent of all video rentals to be of an Australian film! What is now absurd for the cinema and for video rentals must also be questionable for their future derivatives in the technical environment of tomorrow. It would be difficult to defend the placement of an Australian viewing requirement on dial-up television, or on the channels delivered into the home using ISDN or B-ISDN technology should that emerge. If the services of tomorrow increasingly have a transactional nature, the intervention of the state to ensure that a fixed quota of transactions are of a particular type would be contrary to our current expectations of civil liberty.

Welfare of Children

The rationale of protecting the welfare of children has two dimensions in relation to the media; firstly to provide programming that is suitable for them and helpful in

their social development, and secondly to ensure that they are protected from material that is harmful to them by only showing it when they are less likely to be watching. The main mechanism for implementing these objectives has been to schedule programs around the viewing interests of children. Therefore, programs directed to children are shown in the morning and in the afternoon after school, while material thought to be unsuitable, such as programs depicting violence or human sexuality, is only shown later in the evening (after "bed time").

The objective of providing programming for children's viewing presents some problems for commercial media. For example, there are few if any economic incentives for commercial broadcasters to transmit Australian children's drama.[17] Broadcasters must also compete with a number of activities (playing, sport etc.) for the attention of children. This suggests that on purely economic grounds, provision of children's programming is not necessarily sound business for broadcasters. Whether there is an alternative, more commercially attractive audience available at the times when children's programming is displayed has never been tested in Australia, but if there is not, broadcasters have the choice of either catering to children, possibly at a loss, or going off air. Whatever the case, if there is a cost in providing children's programs, it is currently being absorbed by the broadcasters, distorting the efficient operation of their business. This has hidden costs for all Australians, since the inefficiencies are passed on to consumers through the advertising component of retail sales.

If society feels it necessary to impose non-commercial obligations on broadcasters, then it may be more equitable to do this transparently with mechanisms such as direct subsidies to production, where the costs are identified and considered by the Parliament in competition with the other demands on public resources. This would allow the people and their Parliamentary representatives to know and to understand exactly what the costs of providing these public goods are, and would allow them to make informed choices about how limited resources are allocated.

The current mechanisms for protecting the interests of children only work well in the restricted broadcasting environment created by past government policies which have restricted the market. In an environment where there is a wider diversity of services and the likelihood of a range of transactional services, the objective becomes harder to apply equitably to the display side of the industry. For instance, should *all* media services be required to meet children's programming requirements? Even is this means that the requirements must be applied to potentially tens if not hundreds of services? What of the services that originate offshore?

The currently applied program quota arrangements appear to have only a limited future.

The Quid Pro Quo Rationale

The quid pro quo rationale suggests that governments have extended economic protection to broadcasters in return for broadcasters providing a range of public goods such as Australian and children's programming and limiting programming that some consumers find distasteful (such as advertising, and indecent, obscene or blasphemous material).

This rationale is able to be questioned on a number of fronts. Firstly, it treats the media differently to other industry sectors. For example, governments do not, as a matter of course, license food preparers and then guarantee freedom from competition in return for them guaranteeing to provide pure food - they simply apply pure food legislation with a range of sanctions that make the risk of non-compliance uneconomic.

This rationale only works while the Government is able to guarantee protection from competition. While that may once have been the case, it cannot be held true today. Satellite services know no national bounds, neither do services over international telecommunications networks. It is simplistic to suggest that Australian Governments will either have the will or the ability to try to restrict access to foreign satellite signals once it openly promotes access to Australian satellites for pay TV. In an environment where there is the possibility of increasing use of telecommunications for media dissemination, it would be difficult to continue to try to protect local service providers from competition from overseas, when the major thrust of regulatory reforms in telecommunications is towards open international competition.

Finally, the quid pro quo rationale sits uncomfortably with calls for a national competition policy, and with the Prime Minister's One Nation statement that

> ... the engine which drives efficiency is free and open competition.[18]

It is also inconsistent one view recorded by the Hilmer Committee:

> Competition is also a positive force that assists economic growth and job creation. It has triggered initiative and discovery in fields ranging from the invention of the telephone to the opening of new retail stores and small manufacturing operations. In fact, it is these developments in small firms, prompted by the belief of these firms in their ability to compete, that are the main source of both new jobs and value-added exports.[19]

The quid pro quo rationale is considerably out of step with contemporary political and administrative thought.

Summary

The rationales for industry specific regulation of broadcasting are being rapidly eroded by technological development and by other factors which flow as a consequence from such development.

The scarcity rationale has been shown here to be largely a myth, even during those times when broadcasting was technologically determined and depended on the transmission of analogue signals in a limited range of radiofrequency bands. Digital transmission techniques which offer substantial productivity improvements are now available for distributing broadcasting services. Satellites and cable are also available. There is no longer any scarcity of means for delivering services.

Economic management of discrete industry sectors is now seen to be out of step with contemporary economic policy in Australia, where there are calls for national uniform approaches to competition policy. Industry specific regulation creates dangers of regulatory capture, and the suspicion that Australian broadcasting administration has been susceptible to capture has been noted.

The notion that spectrum is public property and should therefore be put to uses that benefit the public, can be shown to flawed, but in any event, such a rationale is not relevant to private means of transmission, such as cable, satellite or spectrum being utilised under a spectrum licence granted under the *Radiocommunications Act 1992*.

Concern over the potential negative impact and influence of broadcasting ignores the equally probable outcome that broadcasting has positive beneficial dimensions for society, and that these may, in fact, be compromised by the application of restrictive regulation. In any event, if the media do have negative effects, this rationale has never been developed to the point where it could support specific types of regulatory intervention. In the emerging environment where there is likely to be a multiplicity of services, and where no one service is likely to dominate the mass audience, the selection of services and thus the impact of services is likely to be a matter of personal consumer choice, and thus not a matter for state intervention.

The rationale of a generally stated public interest for regulation is a loose concept which offers no guidance at all about the type of regulation that should be applied. As will be shown in Chapter 5, there are such deep divisions and contradictions in the literature as to what constitutes the public interest that it is impossible to use it as a guide to the development of policy and law. One study that is cited, by Hawke,[20] even suggests that the public interest discourse in Australian broadcasting policy has emerged in response to other noted regulatory rationales, such as spec-

trum being scarce and it being considered to be public property. Whatever the case, a generally stated public interest seems to be a very weak basis on which to make policy.

Cultural protection may continue to be a valid concern, indeed, it may become more of a concern as the Australian media are subjected to more competition from offshore sources. Nevertheless, the environment being contemplated here suggests that industry specific regulation of Australian services to promote cultural protection is unlikely to succeed. Instead, the focus of cultural protection needs to shift away from distribution and display, towards production so that material of Australian origin is able to be produced on terms that allow it to compete with material imported from overseas, both in terms of quality and cost. If that approach is taken, cultural protection may cease to provide a basis for industry specific regulation of broadcasting, although the rationale may ultimately promote other Government responses, such as direct subsidisation.

Protection of children is an important issue. In broadcasting policy, it has two dimensions:

- the production of programs specifically for display for children; and
- protection from material that is harmful to children.

Production of children's programs raises similar issues to Australian cultural protection and advancement. In the emerging environment, quotas for production on Australian services are likely to disadvantage Australian services compared with those originating offshore. For this reason, it may be more effective to shift the emphasis from display to the production side of the industry.

As will be discussed in Chapter Five, new digital transmission techniques allow for the possibility of transferring the responsibility for protection of children from harmful material to the parents and away from the state.

Finally, the *quid pro quo* rationale where economic protection is exchanged for a range of social goods is contrary to trends towards a national competition policy, but in any event it is wholly ineffective when Government is unable to guarantee that protection. That day is soon coming.

The traditional rationales for regulating broadcasting are weaker today than when Mayer was questioning them more than a decade ago. If the rationales do not stand scrutiny, then any regulation that is based on them should be able to be shown to be largely redundant. The final chapter of this dissertation considers the implications of repealing broadcasting legislation, and relying instead on the general rules already existing in law.

Notes on Chapter Four

1 Mayer, H. (1979) *Dilemmas in Mass Media Policies - The Academy of the Social Sciences in Australia Annual Lecture*, Canberra: Academy of Social Sciences in Australia, p.38.

2 Dr Jonathon Levy, visiting US Fulbright Scholar, in an address at the University of Canberra, 17 August 1993.

3 Australia, Department of Transport and Communications (1993) *Broadcasting Reform - a New Approach to Regulation*, Canberra: DOTAC, p.23

4 Cooper, M. as quoted in Mayer, H. *Broadcasting Regulation: The Eroding Bases* in Turbayne, D. (ed)(1980) *The Media and Politics in Australia*, Hobart: University of Tasmania, p. 13.

5 Australia, Department of Transport and Communications (1990) *Review of Remote Area Television Services - Discussion Paper*, Canberra: AGPS.

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

7 Dr Jonathon Levy, address at the University of Canberra, 17 August 1993.

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9 Australia, Parliament, *Broadcasting Services Act 1992*, Canberra: AGPS, s.4.

10 *The Canberra Times*, 20 March 1993.

11 Armstrong, M. (1982) *Broadcasting Law and Policy in Australia*, Butterworths: Sydney, p.18.

12 Australia, National Competition Policy Review (1993) *National Competition Policy - Report by the Independent Committee of Inquiry*, Canberra: AGPS, p.xviii.

13 Australia, Bureau of Transport and Communications Economics (1991) *Economic Aspects of Broadcasting Regulation*, Canberra: AGPS, p.150.

14 *ibid*, p.68.

15 for an overview of a selection of some of the more significant pieces of research from the US in the media effects tradition, see Lowery, S.A. and De Fleur, M.L. (1988) *Milestones in Mass Communication Research* (2ed.), New York: Longman.

16 *ibid*, p.460.

17 Australia, Bureau of Transport and Communication Economics, *op cit*, p.107.

18 Keating MP, The Hon P.J. (1992) *One Nation*, Statement by the Prime Minister, 26 February 1992, p.15.

19 Australia, National Competition Policy Review, *op cit*, p.1.

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