

5. The Public Interest - In Whose Interests?

Introduction

Chapter Four revisited the rationales that have been put forward to justify regulatory intervention, and noted that most of these rationales are unable to be sustained in the emerging technical environment which promises diversity on an unprecedented scale, globalisation of media, a rise in what I have termed transactional services such as pay TV, and the emergence of a wide range of other electronically mediated derivatives of existing media forms such as newspapers, magazines, books, films, and software. Some of these services may use new techniques, such as multimedia, to deliver hybrid services that alter conventional understandings of electronic mass communication.

Only the public interest rationale that exists in isolation is left unchallenged in this evaluation, although it should be noted that some of the rationales cited construct a public interest from the foundations of other sets of conditions such as scarcity of radiofrequency spectrum, or that spectrum is public property. In these circumstances, once the underlying sets of conditions change, then so does any dependent public interest. For example, Bill Bonney noted that:

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”.¹

Obviously, any public interest that exists as a consequence of *scarcity* of a *national resource* must decline, if it does not disappear entirely, when scarcity is replaced by abundance, and use is made of resources that are not national in character (i.e. they are private). There may be other public interests, but these need to be identified and considered separately.

While there may be a public interest in many aspects of the media in Australia, and that is by no means proven, it is not possible, under the current system of Australian government, based on Westminster tradition, to derive a useful practical mechanism for identifying what it is, so that policy makers can make better policy for the benefit of Australian society. This is because, in each of the major theoretical constructions of the public interest that are able to be applied to Australian broadcasting policy, there appear to be significant logical dysfunctions that act to preclude the needs and wants of the public from actually being served. However the problem of the public interest is approached, there are practical difficulties, contradictions and inconsistencies at every turn.

This is illustrated by two groups of public interest theories that express contradictory directions in understanding the relationship between individuals and society. On the one hand, there is a focus on the sovereignty of rational individuals, acting in pursuit of their own ends, and on the other hand, there is a focus on the primacy of society over individuals, towards the expression of a higher good steeped in moral ideals. A third group of theories acknowledges that there is no, and there can be no, ideal of the public interest. This group of theories seeks to create an operational tool for policy makers, but it never pretends to satisfy the real needs and wants of the people.

Said another way, I propose that there is a struggle for the public interest between those who argue that collective will should determine the direction of society, and those who believe that collective will is far too crude, and is incapable of determining what is best for society. Ultimately, this struggle will be subordinated to pragmatism, and deliver outcomes that are suboptimal from the points of view of both camps.

Since this conflict is unlikely to be resolved satisfactorily using the existing political mechanisms, the process of determining what the public interest is will tend to be corrupted by the frailty of humankind. It is, therefore, probably better to resist using claims that there is a public interest as a rationale for regulation, and instead define more operationally bound rationales, such as has been done in the past when using foundations such as scarcity of radiofrequency spectrum. It is a set of circumstances that indicate that there may be a matter of legitimate concern in public policy, and the role of Government ought then be to deal with that concern in a manner that is satisfactory to the community. Regulation must be directed to objectives.

To illustrate some of the basic difficulties with the public interest concept, it seems fairly obvious that governments intervene in the working of society to advance the interests of the public, for that is what governments exists to do. As Jackson notes:

In a democracy the popular election of a government is taken to indicate a *prima facie* verdict on the public interest. I say *prima facie* because our democracy is constitutional and each government of the day inherits office within a complex set of institutions and conventions.²

In this country, executive government exists by convention by being able to command the confidence of the House of Representatives. The House of Representatives is constituted of elected representatives of the people of Australia, so Governments have, at least in our representative democracy, a form of mandate from the people to govern. Statute law initiated by the Government will, according to this model, reflect the public interest as mandated by the people.

Despite this *prima facie* legitimacy, media commentators such as Chadwick suggest that Australian Parliaments have not acted in the public interest in their approach to media regulation. In *Media Mates*, Chadwick charges that the ownership and control changes to broadcasting law enacted in 1986/87 benefited a few key media players at the expense of the public and effectively increased the concentration of media ownership into fewer hands.³ This suggests that, in Chadwick's view, concentration of ownership as authorised by the Parliament runs contrary to the public interest. Chadwick's central thesis is that these policy changes were brought about at the behest, or at the very least to promote the interests of certain prominent media proprietors. Similar claims are advanced by Barry.⁴ Although Chadwick may be right, and there are plenty of other commentators who share his view, he can hardly claim to represent the public interest in the same rationally legitimate sense as Executive Government, because he has no mandate from the people - he is a journalist and author. By what right can he speak on behalf of the Australian people about what constitutes their interests? Of course, he cannot. The reality is that he has no such right; only an opinion as to what is best for the people. So does Government, and because of the rational legitimacy of the institutions of Government, the Government prevails, as it did in relation to media ownership changes.

This points to one of the central questions regarding the public interest. Is it possible for the rational legitimacy of a democratically elected Parliament to break down, and thus allow statute law to be inconsistent with the public interest? Under what circumstances can this take place?

In fairness to Chadwick, Jackson's suggestion that an elected Government holds only *prima facie* legitimation of the public interest suggests that it is indeed possible for Governments to act outside of it:

The duty public servants owe to the government of the day is engaged only as long as the government is acting in the public interest. This duty is disengaged where the government contravenes the public interest.

In this case, as in all others, the standard of judgement is that which would be made by a reasonable person who was uninterested in the matter at hand. This detached perspective is characteristic of the ethical point of view.⁵

Jackson thus establishes a potential conflict between the ethics of unelected officials in the discharge of their duty to the people, and the will of an elected Government that represents the people. This conflict is indicative of the difficulties in the concept of the public interest. How are officials to know what is in the best interests of the people, for they never have to seek the endorsement of the people for their actions.

The Courts have a role in Australia in protecting the interests of the public in their capacity to review statute law for its validity, its legal correctness and its fairness. The ultimate test of the public interest, therefore, seems to lie in the Constitution of the state. This is of little help in framing policy, for legal review is usually only applied after the development of policy and its implementation into law, although it is legitimate for Government to seek the advice of counsel as to what might or might not offend the Constitution when drafting Bills, over and above the advice inherent in drafting Bills through the Office of Parliamentary Counsel.

Of course, Chadwick is not alone in his criticism of communication policy on public interest grounds. An examination of virtually any issue of journals such as *Communications Law Bulletin* will identify critiques of various elements of communication policy from legal practitioners and from groups that have an interest in policy. These include media industry groups such as the Federation of Australian Commercial Television Stations (FACTS) and the Federation of Australian Radio Broadcasters (FARB), and the “public interest advocacy groups” such as the Communications Law Centre (CLC). The processes of criticism and comment are not unique to communication policy, and are true of all other spheres of government activity.

None of this is to suggest that there is anything wrong with commentators advancing views about what is good or not good in terms of public policy. Such commentary and debate informs the electorate and helps it to form views about how the public's interests are best represented in a democracy. However, it should be recognised up-front that all those who participate in the debate are advancing either their own private interests, or their own opinion as to what constitutes the public interest. None has any legitimacy to claim that they truly represent the public's interest.

This provides a clue as to what may be happening in debates about what is and what is not in the public interest in media policy. One could suppose that there is a process of negotiation going on between the elected representatives of the public on the one hand, and various organised private interests on the other. The outcome of that negotiation process is *public policy*, which can be seen as representing a *compromise* falling somewhere along a multidimensional continuum, with the private interests of the actively interested parties at various extremes, and the interests of the public as defined by rational legitimacy on another. This suggests that there is a likelihood that the negotiation process will tend to deliver outcomes that are not wholly in the interests of the community.

Australian Broadcasting Policy and the Public Interest

A useful place to commence an analysis of the usefulness of a concept of the public interest in Australian broadcasting policy is with a 1993 study undertaken on the

evolution of public interest discourse in relation to the Australian media by Flinders University Researcher, Jo Hawke. The currency of this study means that it takes account of the directions set by the introduction of the *Broadcasting Services Act 1992* (BSA). Hawke tracks the evolution of the public interest discourse of broadcasting policy and in so doing, identifies three main discourses - the "market", "participatory" and "trustee" discourses.⁶

The Market Discourse

In Hawke's analysis, market considerations originally provided the public interest justification for Government to regulate broadcasting. Government was concerned for the orderly use of the purportedly limited radiofrequency spectrum, so it intervened in the sphere of private activity in order to coordinate use of the spectrum so that signals could be sent free of unacceptable interference. Control of programs was minimal and subject only to general censorship provisions.⁷ The market based public interest construct, therefore, emerged out of concern for the orderly development and use of a limited radiofrequency spectrum.

In recent times, there has been a return to market principles as a basis for organising broadcasting regulation. The BSA removes virtually all of the limitations on access to spectrum, the only exception being in the bands of the radiofrequency spectrum that have traditionally been used for broadcasting. These bands have been reserved for priority allocation to national, commercial and community radio and TV. In the case of television, access is further restricted to prevent any more than three commercial services in an area. The Act provides for technological transparency so that broadcasters may use any means of transmission to deliver their service, and it compels the regulator to plan all allocated broadcasting spectrum and then release it for licensing, subject to public planning priorities. Many of the new service types introduced by the BSA are free from the intense regulatory pressure that traditional broadcasting services have had in the past, and industry self-regulation is the norm in all areas except Australian content and children's programs on commercial television, and children's programs on community television.⁸

These fundamental shifts in the direction of regulation reflect acceptance that there has been an equally fundamental change in the assumptions about scarcity that have historically underpinned broadcasting regulation. In short, if there is no scarcity, then scarcity should not be used as a rationale for public interest intervention by Government.

Public Trustee

Hawke traces the emergence of the public trustee discourse in broadcasting policy to the Joint Parliamentary Committee on Wireless Broadcasting (Chaired by Senator W G Gibson) which reported in 1942. The Report noted that:

There is no reason why the public should be asked to accept anything less than the highest possible ethical standard that can be attained by those who hold commercial broadcasting licences.⁹

Hawke suggests that this change in regulatory direction from the market approach occurred, in part, following acceptance of the view that the “airwaves” were not only scarce, but they were also public property. The acceptance of this view led to Governments applying moral as opposed to purely commercial considerations to the development of regulation, and this is reflected in the Gibson Report. Hawke notes that the Gibson Report provided a basis for Governments to become directly involved in regulating the content of programs, initially in the areas of political and religious programming.¹⁰

The practical articulation of the trustee approach to regulation was the establishment, firstly, of a series of Advisory Committees to the Minister, and then in 1949, the establishment of a statutory body, the Australian Broadcasting Control Board (ABCB), acting as trustee for the public and acting in concert with the Minister to determine the needs of the public.¹¹ Hawke makes clear that the trustee approach distinguished between the *needs* of people and their *preferences*:

There was a clear recognition that people’s needs should not be confused with their preferences. Public services were expected to meet social needs determined as appropriate by the state trustee.¹²

The trustee approach to regulation can thus be said to reflect a high level of State paternalism and a clear intention to deny the public what it might want, in preference for what would be good for it, as determined by the State.

One could argue the validity of the rationale that spectrum is public property, for it represents only one possible solution to the underlying problem that developed in the early days of radiocommunication; that problem being the propensity of early users of the radiofrequency spectrum to interfere with each other. The problem of interference is essentially one of a need for cooperation between users and by defining spectrum as public property, the state gained a means of *imposing cooperation*. This led to the creation of a bureaucracy to make decisions about spectrum usage on behalf of the community.

By 1992, it was clear that this approach was not efficient, not equitable and was incapable of delivering the flexibility that rapidly developing technology required. So, in 1992, spectrum management began to turn to an alternative means of providing for *voluntary cooperation* between users, where users have a material incentive to cooperate within a framework of rules administered impartially by the

Courts. Spectrum management now depends on the alternative view that radiation is able to be considered a form of property. By considering radiation as property, and allowing it to be treated as property, spectrum management has been able to rely on the mechanisms of private voluntary cooperation that have existed in property law for a long time.

If government is now able to treat radiation as private property, then the continued existence of a public trustee model based on a notion of the spectrum being public property is probably unsustainable.

Public Participation

In response to concern about the overt paternalism inherent in the public trustee approach to regulation, the next incremental move identified by Hawke was to add public participation to the work of the trustee. This is said by Hawke to have emerged in response to the 1954 Royal Commission on Television which, as Hawke quotes, noted that:

If the public puts up with inferior television, it will only have itself to blame if it fails to take advantage of the means provided for the expression of dissatisfaction. What is needed is a vocal public which will offer constructive criticism and refuse to be satisfied with inferior programs.¹³

Rather than encouraging the public to deal directly with licensees about programming preferences, as would be expected in virtually every other area of business activity, the Government's regulatory response was to introduce public hearings by the trustee to enable viewers and listeners to make their views known to the trustee as part of the regulatory process. The trustee would then impose on licensees what it believed to be in the public's interest.

The extent to which this was a response to the indirect nature of the relationship between supplier and consumer is problematic. Some commentators, such as Dallas Smythe, argue that commercial media see audiences as being a commodity for sale to advertisers,¹⁴ and that this fundamentally changes the economics of broadcasting operations to the point that the relationship between audience and broadcaster does not operate as a normal market mechanism. Such a position, however, seems to overstate the case. After all, licensees must provide programming that audiences find satisfying. The relationship, instead of being bipolar, as is the case in normal supply/demand situations, is triangular with the forces of supply and demand acting on each of the three parties to the relationship; audience, advertiser and broadcaster. Whatever the relationship between the players, one central truth remains: if consumers do not watch the programs offered by broadcasters, then the whole relationship that provides for the interests of all three parties breaks down. Smythe's argument does not alter the basic requirement that broadcasters

must attempt to satisfy audiences, no matter how indirect the relationship is.

Nevertheless, public hearings were introduced in Australia to replace the normal market mechanism, and extended to all licensing and programming issues. They were later used as a tool to investigate and advise Government on all manner of policy issues. By the early 1980s, public inquiries by the Australian Broadcasting Tribunal (ABT) had become a significant input to the process of development of broadcasting policy, and this continued until the demise of the ABT in 1992. Whether or not it will be continued under the Australian Broadcasting Authority (ABA) remains to be seen. Examples of significant policy related inquiries include the ABT's inquiries into *Cable and Subscription Television Services*,¹⁵ *Satellite Program Services*,¹⁶ *Remote Commercial Television Services*,¹⁷ and programming issues such as the Report on *Kidz TV*.¹⁸

The difficulty with the public inquiry approach to determining the public interest is that there is a risk that inquiries will become the subject of concerted campaigns by organised groups with a particular issue to advance. Procedurally, the appearance of groups, rather than individuals, suggests that an issue has importance, because there is a perception, rightly or wrongly, that the greater the level of involvement in a group - the more powerful the issue they represent. Individuals, however, tend to be disenfranchised from a public hearing processes because they must inevitably weigh the potential investment of their time and energy against their likelihood of obtaining direct benefits from the processes. It seems reasonable to believe that many will conclude that there is little point in becoming involved.

Hawke also tracks the withdrawal of the ABT from true public participation as it attempted to deal with the legalism of a litigious industry and an absence in law of any powers that would aid public involvement in the ABT's processes:

Advocacy of radical participation became marginalised and the Tribunal's framework for interpretation was being reorganised by aspects of the trustee discourse which favoured a more proceduralist and hierarchical form of decision making.¹⁹

Public inquiries, then, became the domain of those with an issue to push, and generally, those with the strongest issues to push were those directly associated with the industry, and thus had something to lose or to gain from public intervention. It is here that the danger of industry capture emerges, and it is possible that broadcasting regulators have been captive to industry and interest group concerns for many years. As Armstrong points out:

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.²⁰

One could speculate that the conduct of inquiries, if oriented towards the interests of those appearing before those inquiries, quite possibly has delivered outcomes that are suboptimal for the community. The relationship between policy and the various inquiries conducted on policy issues by the ABT may be worthy of a detailed study to consider whether or not policy options developed and considered by the ABT, and then offered to Government, were artificially limited by the conduct of the ABT’s business through public inquiries. While such a study is well beyond the scope of this paper, it may offer fruitful exploration for another day.

From Hawke’s analysis it appears that the market discourse arose in the early days of broadcasting in response to what was believed to be scarcity of radiofrequency spectrum, while the public trustee discourse emerged in the 1940s in response to concerns that the radiofrequency spectrum is felt, rightly or wrongly, to be public property. The public participation discourse later emerged in response to concerns about the ability of the trustee to fully understand the interests of the public. This tends to suggest that arguments for there being a public interest in Australian broadcasting policy have emerged in response to various sets of circumstances, and that there is no self-supporting public interest that informs policy to the point where it enables mechanisms to be developed so that this public interest is served.

If regulation is based on a public interest, and this interest is in turn predicated on a set of circumstances, and those circumstances are removed, then the public interest that was established is similarly removed. Translated to contemporary experience, if the public interest in regulating broadcasting exists as a function of the arguments of scarcity of radiofrequency spectrum or that the spectrum is public property, then in 1993 with all the changes in other areas of policy that have been made, that public interest can no longer be sustained logically as a rationale for regulation.

The Public Trust Confronted

Such a conclusion about the public interest in broadcasting policy seems justified when one considers the changes to policy implemented with by BSA. The BSA seems to operate outside of the assumptions of the public trustee model, for the trustee function is all but removed from practical application. One could argue that the assumptions of scarcity, and that the spectrum is public property, that Hawke proposes underpin the public interest discourse in broadcasting policy, are contradicted in the BSA, and the other communications reform legislation of 1992.

The public trustee approach has also come into question in other countries. Perhaps the most prominent critic to question the whole basis of the public trust model is former US FCC Chairman Mark Fowler. Fowler, writing in collaboration with Daniel Brenner, suggested that the public trustee model fails to deliver the public interest and should therefore be replaced by a market model, where communications policy:

...should be directed toward maximising the services the public desires. Instead of defining public demand and specifying categories of programming to serve this demand, the Commission should rely on the broadcaster's ability to determine the wants of their audience through the normal mechanisms of the marketplace. The public's interest, then defines the public interest.²¹

Smythe's overstated concern about the distortion of the market mechanism between broadcasters and the audience is sometimes put forward as rebuttal of Fowler's proposition, however, as noted above, even though the relationship between audience, advertiser and broadcaster is triangular, the strength of the set of relationships as a whole is still dependent on each of its sides; i.e., it depends on people watching broadcasting programs, just as much as it depends on broadcasters carrying advertisements. Without a satisfactory relationship between audience and broadcaster, the relationships between all three parties will inevitably collapse. Smythe's position also fails to account for the many alternative media forms that do not exist in a dependent relationship with advertisers, such as subscription services, and in this country, community based services, where there is a direct relationship between suppliers and consumers that influences programming strategies.

Fowler's proposition is quite unlike the participative vision of the public interest identified by Hawke, which sees consumer preferences being mediated by a public trustee, so that the choices ultimately offered to the community are state sanctioned choices. Fowler's proposition offers the opportunity for the public's interest to be satisfied by them making their own choices in an open competitive market that is free of artificial restrictions. As noted above, the trustee process is unlikely to reflect the public's wants as experienced by the public in all of its diversity, but instead, is likely to reflect the wants of various organised interests, for they will be the ones who *participate* in the work of the trustee. In practical terms, the market mechanism, when free, open and diverse, is a more *participative* vision of the public interest for the average member of the community than the one constructed in Tribunals that conduct public hearings from which the public tend to be excluded!

Fowler's proposition sees regulation (especially of the restrictive sort traditionally applied to broadcasting) as the removal of the right of individuals to make private transactions (i.e. to make free choice) on certain issues. Thus, it also represents the ability of the state to coerce individuals to particular courses of action for the

betterment of the whole community, even though those courses might be abhorrent to the individuals so affected. It should therefore be seen in company with the complementary concept of private interest, which is the ability of an individual to make free choices about the allocation of his or her own resources. It is the ability of individuals to make voluntary transactions with one another in an open and competitive market.

The issue in regard to any mechanism for defining and delivering the public interest, both in general theory and in relation to broadcasting, is the legitimacy of the mechanism that is put in place to advance the public interest and to thus curtail each individual's discretion to make private transactions.

The public interest, therefore, is affected by the issue of *legitimacy*.

Classifications of Public Interest Theory

A useful classification scheme which looks at the mechanism for ascribing legitimacy to various constructions of the public interest is offered by Glendon Schubert, based on his analysis of the literature on US public interest theory. Schubert's analysis is relevant to Australia because we share many common political traditions, including responsible representative democracy.

Schubert describes three broad groups of theory in relation to the public interest:

- *rationalist* theory which presumes the existence of a series of common interests which find their expression in popular will, through democratic processes - it is a reflection of rational legitimacy;
- *idealist* theory which believes there is a higher order of interest for society, which transcends the interests of the public as members of the public perceive it - it gives moral legitimacy to government, based on the moral constructs within society; and
- *realist* theory, which sees interest groups in a competition, and the role of public officials being to mediate the competition into compromise - this compromise being the public interest. In this vision, the legitimacy of the public interest is predicated on power relationships between interest groups.²²

Notwithstanding the criticism of the origins of the various discourses identified by Hawke, one can see clear parallels between Hawke's categories of discourse, and Schubert's general classifications of public interest theory:

- Hawke's market discourse correlates strongly with the rationalist theory of the public interest offered by Schubert, and has its correlates in utilitarianism

(social theory), liberalism (political theory) and economic rationalism (economic theory);

- Hawke's trustee discourse, which describes a trustee delivering what the public *needs* as opposed to what it *wants*, correlates closely with Schubert's idealist construct; and
- Hawke's participatory discourse describes an interest group trade system before a state trustee (because the general public is effectively and practically excluded from the trustee's business), and it therefore correlates with Schubert's realist construction, which sees the public interest as being the outcome of the competition between self-interested points of view.

Rationality and the Public Interest

The correlation between Hawke's market and Schubert's rational construct is found in the social theory of utilitarianism and its cohort in political theory, liberalism. Utilitarianism views society as:

...consisting, ideally or factually, in a plurality of discrete, separate, rational individuals, each of whom is motivated, to all intents and purposes exclusively, by the pursuit of pleasure (or "utility") and the avoidance of pain. On this view, the good society is one so organised as least to inhibit the individual in pursuit of his or her (but normally his) pleasures, one in which markets are as freely competitive as possible, and in which governments exist only so as to establish the legal framework within which such markets can freely function.²³

Liberalism develops the concept of utility into a scheme of political organisation. It advocates that the role of government in society is to maximise the utility of the citizenry, articulated as the greatest good of the greatest number in society. In liberal traditions, this can be achieved only by government being accountable to the greatest number of people,²⁴ and hence, the notion of democracy, or in Schubert's terms, the rational construction of the public interest. Thus, in utilitarian traditions, the market should be as free as possible, allowing people to pursue their own utility, but subject *always* to the caveat that a majority in society can intervene, through democratic processes, to temper market behaviour.

While the will of the majority may not be in the interest of everyone, the sacrifice of the minority is seen as necessary to the health of the political system. The public interest, as articulated in such a system, should ideally represent a coincidence of a majority of private interests.

Unfortunately, the process of *representative* democracy as provided in the Australian Constitution, and in the Constitutions of the states and territories, is unable to properly serve this ideal. The only true way of measuring the public's interest on

issues of concern in a society is to poll all individuals on each issue, and thus establish whether or not their private interests sufficiently coincide for a particular course to be forced on all members of the community.

The magnitude of such an undertaking, noting the demands on our political system, and the number and variety of issues that it must confront daily, has tended to make the conduct of formal referenda on each issue a practical impossibility. To deal with this practical shortcoming, our system of government modifies the liberal ideal so that instead of requiring a mandate on *issues*, the population is asked to grant a mandate to people seeking election as *representatives*, with these representatives offering a platform which will guide their actions if they are elected.

These representatives carry the community's proxy for a set term, normally up to 3 years (for the House of Representatives) or up to 6 years (for the Senate). This suggests that the only time that elected politicians are directly accountable to the people is at the time of election. This was recognised by J-J. Rousseau in the 18th century:

The English people believes itself to be free; it is gravely mistaken; it is free only during the election of Members of Parliament; as soon as Members are elected, the people is enslaved; it is nothing.²⁵

In Bates' view, a necessary response to the criticism advanced by Rousseau is for government to be constructed along the lines of a direct participative relationship between the citizenry and the government.²⁶ Unfortunately, while participative democracy offers a theoretical solution to the potential breakdown of rational legitimacy in a representative democracy, it has, until recently, remained an ideal because of concerns about its practical implementation.

There are some, such as C.B. Macpherson who see the advance of technology as one way of overcoming the practical difficulties of direct democracy, but even they require that there is a need for elected representatives to help frame the questions that are put to the electors:

No doubt something could be done with two-way television to draw more people into more active political discussion. And no doubt it is technically feasible to put into every living room - or to cover the whole population, beside every bed - a computer console with Yes/No buttons, or buttons for Agree/Disagree/Don't Know. or for Strongly Approve/Mildly Approve/Don't Care/Mildly Disapprove/Strongly Disapprove, or for preferential multiple choices. But it seems inevitable that some government body would have to decide what questions would be asked: this could be scarcely left to private bodies.²⁷

Note that in this vision, provision of the infrastructure necessary for effective participation (e.g. some form of terminal) becomes an issue of public policy, for if participation is considered to be a universal right of all people, the ability to partici-

pate needs to be freed from economic strictures. That is to say, terminals would need to be provided free to everyone. Nevertheless, the telephone is now almost universally available, and telephone keypads are able to perform all manner of functions once a connection is established. For example, payment of telephone accounts by credit card over the telephone is now possible without any contact with a human operator. The nature of the transaction and the relevant amounts are keyed in response to a computer synthesised voice commands. Voting by telephone is technologically no more difficult, but it does raise issues related to privacy of voting behaviour.

Macpherson is, perhaps, too pessimistic in another regard, for it certainly could be put to private bodies to formulate questions for public resolution. Macpherson seems to take the view here that only elected representatives have the skills to frame questions for resolution, while the reality is that the wider community is always going to be endowed with former representatives, lawyers, officials etc., all of whom would have the necessary skills. As Hull notes:

I'd reject out of hand criticism that citizens would not be capable of drafting legislation or that the results would be uncertain or unforeseen. There are plenty of ACT citizens who could make a better job of it than the present lot. The Federal Parliament, for example, has passed an average of 3583 pages of legislation a year in the last 10 years; that is hardly conducive to certainty, simplicity or comprehension.²⁸

The concerns of Rousseau about the workings of representative democracy are amply illustrated by a common sense understanding of its processes. It is obvious that candidates for public office will attempt to assemble a mix of public goods that they believe are attractive to a majority in the electorate. They cannot represent every person's interest for to do so would make an assumption that the interests of all people are alike, or at least can be polarised. The reality is that each individual has concerns that are more or less unique to them, if not in substance, then at least in the level of commitment.

It is open to groups that feel strongly about an issue to link with others groups with a similar agenda to pressure political candidates to align with their point of view. Depending on the relative support for different views, politicians may accommodate them into their policy outlook in order to secure support and, if they do, they will thus be representing the needs and views of pressure groups (in various coalitions) when they seek election.

It is possible (even likely) that the choice of *candidates* offered to electors is not the natural choice of the majority on all of the *issues* before the electorate, but is instead a choice between candidates offering bundles of goods assembled in order to secure support from key constituencies. If we are all individuals, there can be no such thing as a common universal set of choices. The choice voted on at elec-

tions is, for most people, for the more attractive of a selection of prepackaged bundles, or at the very least, against lesser attractive bundles. Even a bundle of goods that an individual supports may contain specific elements that they do not support. Instead of allowing the public to resolve individual *issues*, representative democracy only offers choices between *candidates* who may, for some electors, advocate stances on issues that these electors do not support.

This points to a fundamental conflict between practical representative government and the public interest if the public interest is truly the will of the people. It suggests that under the rationalist approaches as described by Schubert, a public interest, if it exists at all, may be quite independent of the representative political process that are a feature of Australian practice, and might not ever be served by it!

Idealist Constructions of the Public Interest

Idealist constructions of the public interest, as defined by Schubert, are the antithesis of rationality, for they ultimately deny the legitimacy of individuals in society determining their own direction, or participating in determining society's direction through democratic processes. Idealists are anti-democratic. As Schubert notes at the start of his consideration of idealist theory:

The idealists are social engineers. They view the public as an inadequate, indeed, as an incompetent source of public policy.²⁹

Idealist theories of the public interest take the view that there is a higher good than that advanced by statute law of Parliaments, and therefore this good is unable to be determined through the rationally democratic processes of man. Such a public interest is said, by those advancing this view, to be greater than the aggregate of private interests. The public interest emerges as public officials, guided by their conscience, discharge their duties with regard only for the best interest of society, *as they perceive it*.

Unfortunately, there seems to be no explanation offered, even by those who subscribe to this group of theories, as to how public officials come to know what is best for society, or how their consciences come to know it, and it is upon this point that idealist constructions of the public interest appear to come undone. As Schubert notes:

This necessitates a highly moral official world, which becomes personified in the image of the Independent Congressman, the Strong President, the Good Administrator, and the Wise Judge. The public interest is created by the imaginative manipulation of not-too-stubborn facts - including other persons, in and out of government - by official Philosopher Kings.³⁰

Our experience of political events over the last decade has been coloured by too many examples of a failure of official morality for this construction of the public interest to be accepted in anything but a theoretical sense. The very existence of the New South Wales Independent Commission Against Corruption is evidence of a failure of official morality in that state. There is nothing to suggest that the failure is not more widespread across all of the states and territories, indeed all legislatures. WA Inc. is perhaps another topical example of the failure of official morality from Western Australia.

The idealist position is characterised by theorists such as Griffith, who operates from the principles of basic Christian morality and general welfare in a community. Griffith proposes that the public interest can be defined as an:

intelligent altruistic decision designed to maximise the likelihood of the same type of decisions among those affected.³¹

Christian morality, however, is a construct unique to *Christianity*. Moral constructs founded in one religion might support practices that another religion finds abhorrent. No better example of this exists than the distaste that some western Christian cultures have for some features of fundamentalist Islamic law, where, for example, some crimes are punished by non-surgical amputation of body parts. Morality is a variable concept, even at a sub-cultural level, especially in a multi-cultural society such as ours, where many different religions and cultures, and thus many different moral constructs, are represented. Ideals of altruism and intelligence, as postulated by Griffith, might thus be in conflict with the moral views of those affected, or those who have a less altruistic outlook. In any event, who is to say what constitutes altruism? Griffith is proposing a definition that is predicated on people having similar constructs of the world in which they live, and in reality, that is neither possible, nor desirable.

Another idealistic proposition of the public interest is put forward by Cassellini:

The public interest is the highest ethical standard applicable to political affairs. Those who use the expression are always referring to the ultimate moral goals of political association, even though they may not be aware of it.³²

The *highest ethical standard* according to whom? Since ethics is a personal construct - a matter of conscience - there must, by definition, be many separate public interests (if they can be called that) each residing in the personalities and consciences of those people involved in developing public policy. Controversial moral issues in public policy, such as abortion, illustrate the difficulties of using conscience as a means of divining the public interest. In the conscience of some, abortion is a shameful and immoral thing, while in the minds of others, there are no such qualms. Even when the public interest is couched in terms of societal ideals

that ascend beyond the natural law of man, there is still an innate difficulty in resolving it for practical policy making. In fact, the public interest soon descends into being no more than a competition between different points of view, different moral constructs and different values systems.

Schubert notes Cassellini's antagonism to the concept that the public interest is a commonly held value³³, and Cassellini openly acknowledges the criticism.³⁴ As noted in the preceding discussion, how is anyone to know with certainty what the public interest is, if its vision is not and cannot be shared, and in fact lies only in a field of conflict.

If the public interest is not a commonly shared value, then the way is open for anyone in our society to claim that they represent the public interest, as a means of securing legitimacy for their own views - views that may be completely moral to them, but immoral to others. It also means that there is not, nor can there ever be, a definitive public interest. As Bonney and Wilson noted:

On the social theory we have espoused, there is no such thing as the public interest. There are class interests, individual interests, fluctuating group interests. But to suppose that there is such a thing as *the* public interest is to suppose that there is a single public with a unified set of interests which somehow override conflicting and varying individual, class and fractional interests.³⁵

Interests can also fluctuate over time, even at an individual level, so the whole notion of their being a generally stated public interest underlying any form of regulation is problematic.

Idealist constructions of the public interest inspire regulatory intervention that does not necessarily have popular support in the electorate, but is nonetheless felt to be important enough to be imposed on the public for the public's own good. That is to say, it sees the public interest as being more than individual interests, and presumably more than the aggregate of individual interests as expressed through democratic processes. This is a view that appears to be held in the national political sphere by the Australian Labor Party National President, the Hon Barry Jones MP:

This means that there is a public interest - health, safety, education - that is above and beyond individual interest and that the Government's role is more than arbitrating between competing interests.³⁶

All Government activity that emerges from such an idealistic notion of the public interest has consequences, and some of these are negative. A counter to Jones' view, which recognises the possibility of negative consequences, is articulated by

Australian public policy commentator and former Liberal Member of Parliament
John Hyde:

Markets are imperfect. However, the only alternative to a voluntary transaction (or failure to transact) is a compulsory transaction (or failure to transact). Since government has a monopoly on the legal use of force, the alternative to imperfect markets is imperfect government. The choice should be determined by excluding the more imperfect.

A wealth of experience from all over the world suggests that, flawed as they are, markets usually deliver the goods better than does economic planning - whether it is the Stalinist-type of planning that is backed up by terror, or the corporatist type of interventionism we see practised by the Commonwealth and State governments of Australia.³⁷

That is not to say that utilitarian thinkers such as Hyde see no role at all for Government. Utilitarianism does see government intervention authorised in order to ensure that there is a framework within which markets can operate freely. Hyde's concern is with Government action which acts to curtail freedom of market choice, substituting state mandated choices for free choices, or artificially limiting the range of choice available through restrictive regulation (such as has existed in the broadcasting sector).

There is plenty of anecdotal evidence of the imperfection of government involvement and intervention in markets. Over the last few years, we have witnessed WA Inc. in Western Australia, financial mismanagement of state owned enterprises in South Australia and Victoria, and the failure of the NSW Homefund scheme.

Hyde's utilitarian vision would see public interest being delivered through protection of consumer sovereignty, and the promotion of free and open competition to deliver maximum efficiency and private utility. Such a vision would not invalidate government intervention authorised in the name of free competition, such as that currently provided through the existing *Trade Practices Act 1974*, and the moves towards a national competition policy.

Perhaps the greatest difficulty relating to idealistic constructions of the public interest is the obvious difficulty that people have in articulating what it is. This opens the way for the self-interested and less scrupulous in our society to use the public interest as a justification for their own ends, particularly if they hold positions of office, but also if they are in a position to influence debate about issues. This leads to Schubert's third set of theories of the public interest. These theories offer a mechanism to guide the work of policy makers, and they neatly avoid the dilemmas of both the rationalist and idealist constructions, but they ignore the probability that the outcomes they deliver will tend not to coincide with the will of the people.

Realists and the Public Interest

In Schubert's realist construction of public interest theory, the focus shifts from politicians and their actions to issues and the resolution of these issues in the processes of government. Realists, according to Schubert, take the view that:

The public official is thus a catalyst by means of which conflict among special interests is transformed into the public interest.³⁸

The public interest, therefore, is the negotiated outcome of a struggle between self-interested groups (all claiming to represent the public interest), mediated by officials and politicians. Thus, it matters not at all what the public at large think, because they are not involved in the process and because, in this vision, it is felt that if members of the public are sufficiently concerned about an issue, they will seek to organise and participate in the process. Even when they are organised, there is no guarantee that they will be able to participate in the process of developing public policy. As Armstrong notes:

The means of making an input to policy making may need to be modified. It is notorious that Ministers and Departments do not willingly expose themselves to open processes such as public inquiries and hearings. They respond to more relaxed, informal contacts, and briefer documentationOne reason for the electoral success of the Hawke Government is that it has employed the relatively closed process of consultation with industry and community leaders to form policy.³⁹

The process of divining the public interest in realist theoretical constructions might yield outcomes that run counter to the interests of the general community, and this feature is noted by authors such as Drake and Nieuwenhuysen:

... politics becomes an amoral interest group trade system, with politicians as mediators. Consequently, general economic rationality often takes second place to the power of lobbying groups who have an interest in maintaining the existing economic pattern, however inefficient, or in creating others to suit their own interest, rather than that of the general public.⁴⁰

Realist constructions of public interest theory, therefore, are set apart from both rationalist and idealist constructions. The central difficulty with the realist approach lies in the nature and expectations of *interest groups*, and with their ability to capture and influence Government decision making, with potential to cause harm to society in general.

Criticism of interest groups in the process of political decision making is growing on a number of fronts. For example, in his farewell article, former Editor of *The Economist*, Rupert Pennant-Rea, wrote of the dangers of organised interest groups and their lobbyists who seem intent on advancing their causes at a cost to others in the community:

The aim of most lobbying is simple: to get preferment. What ever they may say, lobbyists are not seeking to increase GDP; they want to pull what there is in their direction, via political action. The economic alternative to get more via success in open competitive markets, is regarded as just too difficult. But that behaviour has a profound implication: with lobbying, more for one group means less for the rest. It is, indeed, a zero sum game.⁴¹

In his farewell address to the Australian Senate, retiring former Minister and Senator, the Hon Peter Walsh, delivered a stinging attack on interest groups:

There is a small but noisy group which says that many things are more important than economic growth. Almost inevitably, these people display the following attributes: they have jobs - usually well paid; they are either on the public tit or have secure jobs in the semi-private sector; they are vociferous demanders of more government services and handouts to their own pet causes; and they are opponents of higher taxes, or at least higher taxes on themselves and their cronies.

and

Does anyone believe that Ben Chifley would have closed down mines and banned exploration in a sequence of highly prospective mineral provinces, not for any serious environmental reason but to appease the secular religious sanctimony of Balmain basketweavers? Would Chifley have allowed the long-footed potoroo, or whatever fad was in vogue with the chattering classes, to take priority over a million unemployed?⁴²

While public policy remains the domain of interest groups, rather than the people themselves, the interests of the people are likely to be compromised.

Circularity of the Theoretical Debate

Stepping back, one can see that those who support rationalist approaches are basically anti-interventionist, except under two conditions:

- to promote the proper operation of the market; or
- where the popular will of a majority of the people lends legitimacy to intervention.

Since there are difficulties in establishing the peoples' will in a representative democracy (for example, between elections), this leads to a need for a mechanism to operate at all times other than at elections. Perhaps this is where the idealist group of theories of public interest, rooted in ethics, have a role. Thus, in the intervening period between elections, politicians and public officials ought to be guided by morality and their conscience to implement policies that are in the best

interests of the public. The idealist approach to the public interest, however, also authorises intervention by Government in the workings of society in the name of a higher good. While this is a worthy ideal in theory, it breaks down in practice because the nature of the higher good is never known, never shared, and exists only in the consciences of those who seek to advance it. It is, therefore, able to be manipulated. In this way, the realist group of theories of the public interest emerges, suggesting that there will be many competing claims on the public interest, and that the role of government and government agencies is to mediate them. Unfortunately, though, the outcome of this process is unlikely to be a reflection of the best interests of the general population, which would, in all probability, be better served by them making decisions by themselves and for themselves.

We thus return full circle to the anti-interventionist rationalist approach.

This circularity, with all its contradictions, may have been one of the factors that prompted Schubert to question whether or not the concept of a public interest is valid in any but a theoretical sense.

American writers in the field of political science have evolved neither a unified nor a consistent theory to describe how the public is defined in governmental decision making; they have not constructed theoretical models with the degree of precision and specificity necessary if such models are to be used as description of, or as a guide to, the actual behaviour of real people. A theory of the public interest in governmental decision making ought to describe a relationship between concepts of the public interest and official behaviour in such terms that it might be possible to attempt to validate empirically hypotheses concerning the relationship. If extant theory does not lend itself to such uses, it is difficult to comprehend the justification for teaching students of political science that subservience to the public interest is a relevant norm of official responsibility.⁴³

In a similar critique on the usefulness of the public interest as an organising concept, administrative theorist Anthony Downs wrote:

...the term public interest is constantly used by politicians, lobbyists, political theorists, and voters, but any detailed inquiry about its exact meaning plunges the inquirer into a welter of platitudes, generalities, and philosophical arguments. It soon becomes apparent that no general agreement exists about whether the term has any meaning at all, or, if it has, what the meaning is, which specific actions are in the public interest and which are not and how to distinguish between them.⁴⁴

Nevertheless, to dismiss the notion of there being some public interest out of hand is, perhaps, to go too far. As Flathman notes:

The problems associated with the public interest are among the crucial problems of politics. Determining justifiable government policy in the face of conflict and diversity is central to the political order; it is a problem which is never solved in any final sense, but which we are constantly trying to solve. The much discussed difficulties with the concept

are difficulties with morals and politics. We are free to abandon the *concept*, but if we do so we will simply have to wrestle with the *problems* under some other heading.⁴⁵

While these problems pervade our current approach to politics, perhaps there is an escape from the circularity. This originates at the point where Rousseau noted representative democracy beginning to fail. If one could guarantee that the people could decide for themselves all of the important issues of public policy, then there would be no need for guiding principles such as the idealist construction of the public interest to operate between elections. This construction would then never have to be subjected to the practical requirement that it deliver outcomes for the good of the population, and then there would never be any conflict of ideals that would need to be resolved by Governments and officials. That is say, the circularity would be broken. As independent Federal Member of Parliament, Ted Mack, wrote recently:

People have a right to be involved in decisions that affect them and they know it. The traditional representative government system of electing a small group who make decisions largely in secret for three or four years and then receive the blessing or otherwise of the community is no longer practical or acceptable. People want to be involved in all decisions that affect them - when the decision is made. Representative government is disintegrating in favour of participatory democracy.⁴⁶

Direct, or participative, or participatory democracy (they are essentially the same thing) offers a solution to significant issues in public policy, particularly those that are driven by conscience or idealism, and over which there is conflict. Professor Geoffrey Walker, a leading Australian advocate of participative democracy, is reported as saying that mechanisms within the structure of participative democracy, such as citizen's initiative and citizen's veto, have the capacity to force extremist groups to put their views to the test.⁴⁷ As Hull notes:

Basically, concerned citizens who claim huge public support for the right to bear arms, for free/prohibited abortion, for banning nudity in films and fluoride in water etc. etc. can marshal signatures of, say, 3 per cent of the population and force a referendum.⁴⁸

In this way, interest groups are forced to either "put up or shut up". Hull also notes how citizen's initiative would disarm extremist minorities in the process of determining matters of public policy:

Politicians can tell them to go jump without fear of some targeted marginal seat or mail campaign. Go get your signatures, will be the reply.⁴⁹

Placement of Australian Media Within Public Interest Theory

In the context of Australian media and media policy, the non-broadcasting media (the press, magazines, books, videos, computer software etc.) appear to be operating with only minimal regulatory intervention, so in terms of public interest theory, there do not appear to be any indications that government has intervened in response to either idealistic or realistic constructions. One could, for argument's sake, equate the non-broadcasting media with rational public interest theory. That is to say regulatory intervention has not been authorised by popular will and the public interest is being served by allowing the people to trade freely, unencumbered by government restriction. One could note some exceptions where the government has acted specifically to protect and enhance consumer sovereignty against market failure, for example with the anti-monopoly and fair trading provisions of trade practices law, but, by and large, there is little restrictive regulation of these media.

In contrast, one could characterise broadcasting policy prior to 1992 as being more in tune with the public trustee model of regulation, fitting within an idealist framework of the public interest, where some higher good is being pursued and metered out on behalf of the community, by the state. Because of the intangibility of this higher good, the debate appears, however, to have shifted to one of public interest realism, or the participative discourse identified by Hawke. The participative approach that she describes is an interest group trading system that is primarily concerned with the exercise and manipulation of power by a small number of groups that have standing before the trustee. Despite the expectation that these mechanisms would provide a means for the public to participate in regulation, it was, perhaps, always doomed to failure for the reasons outlined here.

Chadwick argues that broadcasting law has failed the public interest in that it has delivered outcomes that are not compatible with his view of the social responsibility of the media. The work of Hyde, Drake and Niewenhuysen, and many others seems to predict that this is, in fact, the most likely outcome of Government intervention in the name of some ill defined public interest, because there is an almost natural and inevitable transition from the idealist vision, to a pragmatic reality.

One could argue that prior to 1992, Government was engaged in debate with interest groups who attempted to manipulate the legitimacy of the public interest to serve their own purposes. That is to suggest that the debate has been managed to the advantage of the interest groups and to the disadvantage of the Australian people in general. The BSA appears to signal a fundamental shift in this power relationship, away from interest groups and closer to the sovereignty of the Government, the Parliament and ultimately the people, by allowing the people to make

their own choices from an increasingly diverse range of services promoted by a distinctly different vision. The BSA seems to move away from the trustee approach, and away from the public hearings that extended a participatory role to the trustee. If that is the case, then the shift is towards a more rational conceptualisation of the public interest. It follows then, that many elements of the regulatory scheme constructed under the idealistic model will be able to be dismantled, further enhancing consumer sovereignty and thus promoting greater consistency with the regulation of other media.

This suggests that there is an opportunity for more detailed study of the public interest in media policy. The proposition for investigation would be that the BSA implements mechanisms to shift the public interest discourse from Schubert's idealist construction of public interest theory (and, as I have proposed, the consequential application of realist constructions) to a more rational construction founded on utilitarian principles. For the proposition to be proven, one would need to firstly establish that broadcasting policy had, in the past, been promoted on the grounds of some higher good (idealist), but that the outcomes ultimately benefited particular special interests (realist). One would then need to establish that with the passage of the BSA those interests had been marginalised in favour of consumer sovereignty and many of the old mechanisms had been rendered redundant.

The Public Interest as a Justification for Regulation

Hawke's analysis catalogues the evolution of the public interest discourse in Australian broadcasting policy in response to conditions and understandings about the nature of the broadcasting. In 1993, we can see that many of those conditions are no longer useful justifications for invoking such discourses. Any inherent public interest thus dies its natural death. Hawke tracks the development of the discourse from market concerns, rising to that of there being a public trustee based on an assumption that the radiofrequency spectrum could be treated as public property. Hawke then tracks how the public trustee approach was modified to allow public participation in the work of the trustee, and then declined, perhaps in response to growing suspicion that the "public interest" had proved to be nothing of the sort!

Interestingly, Hawke seems to lament the passing of the public participation approach, even though, from the consideration above, one can see that it effectively disenfranchises the public and may actually subvert the best interests of the people. The only true way for the public to participate in broadcasting policy (or any matter of public policy) is for them to be empowered to select what they want, when they want it, for themselves. That leaves Government's role as being simply to remedy societal imbalance by delivering mechanisms that promote social equity, by ensuring that choice is available, even to those disadvantaged by their circum-

stances. Even this ought to be guided by the peoples' will.

Schubert's classification system of general public interest theory correlates closely with the typology of Hawke, but is not affected by the historical contexts identified by Hawke. Schubert describes a system with inherent contradictions and practical difficulties at every turn. Like Hawke's analysis, it starts from a free market that envisages regulatory intervention only when mandated by the people. By recognising the practical difficulties in running a democracy along the lines of popular participation, Schubert has identified a set of theories that can be used to guide the behaviour of elected officials between elections. In the final analysis, though, there is recognition in Schubert's third group of theories that these higher goods, and the ethical morality that underpins them, are personal and individual constructs that will always be contested in a society that values individual expression and freedom. In the contest for the public interest, Schubert sees compromise, and thus acceptance that the outcome is unlikely to be related to the views and interests of the public. Thus, in full circle, one is left with the impression that there is a need to empower the people.

The way out of this circularity can be seen in the emerging calls for a more participative form of democracy, that empowers the population and takes conflict in matters of public policy out of the hands of minority extremists, and places it back in the hands of the majority, as all truly democratic traditions require.

Conclusions for Australian Broadcasting Policy

Under our current system of government the public interest is far too abstract a concept to have any usefulness in guiding the practical development of broadcasting policy. There is a need to develop response to *issues* that emerge. The matter at stake, then, is solely the legitimacy of any mechanism that is implemented in order to deal with these issues. From public interest theory, one can see that there are three means of securing the legitimacy of action:

- consumer sovereignty, with the possibility that a majority of the members of the community can mandate regulatory intervention, and here it is worth noting that the only way to do this with full democratic legitimacy under our current form of government is by referendum;
- allow politicians and bureaucrats to decide what is in the best interests of the public, acknowledging that this is effectively state paternalism and that if these "best interests" are defined in terms of moral constructs held by the decision makers, then there is a likelihood that they might not be supported by a majority of the people; or

- allow politicians and bureaucrats to mediate power relationships between organised private interests, and between themselves and these organised private interests, and acknowledge that if the outcome is a compromise, then logically, it is unlikely to coincide with the majority interest for which the government holds mandate.

To claim that there is a general public interest in broadcasting that exists in isolation says nothing about how that interest should be advanced, and it therefore does not provide any assistance in framing policy and legislation.

Without mechanisms that allow issues of public policy to be resolved by being put to the people who are affected, the public interest will remain a hollow concept, incapable of being used to advance practical public policy. In broadcasting policy, it would therefore be better to avoid using general claims that there is a public interest that legitimises regulatory intervention, and instead restrict the underpinning of policy to operationally defined rationales, such as has been done in the past with issues such as scarcity of radiofrequency spectrum, and the belief that spectrum is public property. When these eventually expire, as they now have, we will be forced to the inevitable question: does broadcasting regulation that is inspired by claims of a *public interest* actually serve the *public's interest*?

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