6. Implications and Conclusions

Introduction

If the rationales for industry specific regulation of broadcasting are as fragile as suggested in this dissertation, then the regulatory arrangements based on the rationales would seem to be redundant, and therefore ought to be able to be dismantled without harmful consequences for society.

This chapter considers the implications of repealing the current regulatory scheme for broadcasting by examining the effect of each Part of the BSA being lifted, and the sorts of issues this might raise for further investigation. In essence, it explores whether the existing general legal framework for business in Australia is able to deal effectively with the issues currently dealt with under industry specific broadcasting law.

Planning of Broadcasting Services

At the moment, management of the broadcasting services bands is undertaken by the ABA separately from the management of the rest of the radiofrequency spectrum. There is no technical or physical imperative for such a separation, yet despite the different approaches, the underlying regulatory philosophy of creating a licensable property right and allocating that right according to price-based means is common to both.

The principal difference is that the spectrum management regime defines spectrum property so that technical factors are optimised, while the property created in broadcasting law is defined to optimise a range of non-technical factors including demographics, social and economic characteristics, demand, technology and the number of existing services.[1]

There is little doubt that the spectrum management approach can be applied to broadcasting, as advocated by the BTCE in its report *Economic Aspects of Broadcasting Regulation*. The BTCE vision of a spectrum property right was based on a model proposed by De Vany et al. and included:

- initially defined polygonal area boundaries;
- a state maintained register of titles and boundaries (because of the natural monopoly inherent in this information);
- free transfer in all dimensions (time, space, frequency and signal strength) of the property so defined; and

- no protection from intermodulation interference.[2]

Under such a model, an operator wishing to expand coverage beyond the standard polygonal boundaries would need to acquire, in the market place, additional property rights. It is this vision of a spectrum property right that underpins the direction of reform to spectrum management.

If this approach is ultimately extended to the broadcasting services bands, it does not automatically follow that the social and demographic factors currently expressed in the planning regime would be abandoned, although it does suggest that these issues would need to be understood and responded to in a different way. For instance, demographics and coverage issues may actually be better left to licensees who, after all, have a commercial interest in maximising their audience by extending their service as widely as possible. They will therefore seek to acquire the spectrum necessary to expand their services, if this is economic. If it is not, then they still have access to a wide range of alternative delivery mechanisms to reach their audience. Spectrum property rights create an imperative of efficiency in the use of radiofrequency spectrum and this may become as important to the community as social and demographic targeting. In essence, broadcasters, if they have a commercial interest in efficient spectrum use, are more likely to make efficient utilisation of the spectrum than would be planned by supposedly disinterested officials. In fact, the history of Australian broadcasting suggests that central planning of spectrum by officials acting on behalf of the community has generally resulted in inefficient under-use of the spectrum, and this is only now being addressed through the public planning processes of the ABA set out in the BSA.

The currently free issue of broadcasting spectrum to national broadcasters and community broadcasters also distorts the efficient use of the broadcasting spectrum. The nation will not know for some years what the true value of the broadcasting services bands is to broadcasters, but when this value is known, the currently free issue of spectrum to the national and community broadcasters will need to be seen as revenue foregone to the Commonwealth. By protecting the national and community broadcasters from the economic pressures of a broadcasting spectrum market, these broadcasters are insulated from the pressures that promote efficiency, and the community is denied the opportunity of comparing the relative worth of the free access granted to these broadcasters with the many other competing demands on an increasingly limited public purse.

This is an important issue for research and investigation, once pricing information under the new rules begins to become available.

It also needs to be recognised that the planning regime in the BSA has only limited

longevity. The old planning regime articulated in the *Broadcasting Act 1942* depended on an incremental approach to planning. That is to say, if and when Government policy approved the introduction of a new service, the old planning regime required the Department of Transport and Communications to plan channels from the unused spectrum available in that area. This incremental approach to planning required the maintenance of a permanent group of engineering planners, able to meet any planning demands initiated by Government decisions to increase the number of services in an area. It also meant that the task would take a very long time to complete: it has already taken 70 years and is still not "complete".

The new rules take an entirely different approach. They intend that the coordination between users of the broadcasting services bands be planned once, up front, and then for licensees to undertake their own engineering planning of their own services. The new rules require that all of the planned channels be offered for use, firstly for reservation by the Government for national and community services, then for commercial services by a price-based allocation method, and then to narrowcasters and other new media forms by either price-based or administrative allocation. If no broadcasting service user can be found, the ABA is required to consider allocating it to non-broadcasting uses.[3] Once planned channels are allocated to users, it will be difficult to replan the spectrum without affecting all of the users, for all users will be affected by any replanning decisions. This is another reason to support the application of full spectrum property rights in broadcasting spectrum, so that any replanning of spectrum can be undertaken by those affected with appropriate market compensation, negotiated between the affected parties.

Repeal of the broadcasting spectrum planning regime is not inconsistent with the assertion by ABA planners that planning of the broadcasting services bands will be completed under the new rules, and all channels offered for allocation by the end of 1994.[4]

In summary then, there do not appear to be any compelling reasons why it is necessary to retain a broadcast spectrum planning mechanism in broadcasting law, especially once the current planning process is completed.

Licensing

The licensing provisions in broadcasting law have acted as a mechanism to allocate purportedly scarce means of delivery and to provide a means for policing a range of public service obligations placed on broadcasters. Neither justification necessarily holds in an environment where technical convergence has altered both the nature of services and the environment in which services operate. As shown in Chapter Three, now that the act of broadcasting has been defined as the provision

of a service, independent from the technical means of delivery, there is no longer any necessary scarcity of broadcasting licences. That is not to say that there is no scarcity of some parts of the radiofrequency spectrum, but that is a different issue, able to be dealt with by other mechanisms in communications law such as the *Radiocommunications Act 1992*. Broadcasting licences are essentially an abstraction in the new Act, able to be manufactured and issued as required. This is illustrated by the provisions at s.40 and s.82 of the BSA which provide for the grant of commercial and community broadcasting licences over-the-counter where access to the broadcasting services bands is not required. If, as is suggested above as being possible, the planning regime for broadcasting services is dismantled and replaced by a system based on spectrum property rights, then the issue of spectrum scarcity and the rationing that it entails, will be able to be dealt with under spectrum management law. All broadcasting licences will then be able to be issued over-the-counter.

The question that remains is the extent to which licensing is necessary in order to provide for effective policing of social obligations.

The answer to this question is provided in Part 8 of the BSA which implements generic and universally applicable class-licences for some categories of broadcasting services.[5] The Act makes clear that any social obligations that attend class licences are able to be enforced.[6] The class licence regime sets universal rules for all service providers of a particular class. Class licensing is able to substitute for individual licensing for all of the new electronic mass media types, so the same mechanism could equally apply to the existing broadcasters, and to the services of the future..

In summary, those objectives of the licensing scheme in broadcasting law that are still valid are able to be served by mechanisms other than the issue of licences to licensees, as illustrated by the class licence provisions in the BSA. Whether or not even these provisions are warranted is considered below.

Ownership and Control of Commercial and Subscription Broadcasting Services

The ownership and control regime sets out to advance the objectives of service diversity and Australian ownership and control of the more influential media. Chapter Four outlined a number of concerns about the application of industry specific economic regulation (such as concerns about industry capture), and how industry specific regulation appears to be out of step with wider moves for a national competition policy.

Ownership and control provisions are likely to be irrelevant to many of the services likely to be provided in the emerging media environment. Narrowcasting services are already exempt from ownership and control rules. As noted elsewhere in this paper, once the Government has actively promoted satellite delivered pay TV, and a market then develops, it will be difficult to prevent the owners of the equipment from receiving services from foreign satellites. Restrictions may be impossible to police without an unparalleled intrusion into civil liberty. All Australians have access to the international telecommunications system. Transactional services from overseas are already available to Australians, for example, INTERNET and other computer-based networks. There is no difference, except perhaps for data volume, between digitised text in the INTERNET services of today and the digitised sound or video of future media systems. The multimedia environment in computing is already beginning to emulate some existing media forms and telecommunications networks make for a very diverse customer base for these services. When Australians have the ability to tap into a wide supply of services that originate offshore and are able to be accessed using telecommunications systems, the continued existence for limitations on foreign ownership, over and above those applying to other sectors of the economy, seems very difficult to justify.

Australia currently has tight Australian ownership and control requirements for the electronic media, yet these do nothing to influence the selection of program material, which after all, is the thing that supposedly influences people. Australian television and radio already carries a large amount of product manufactured in the US, despite tightly controlled ownership. Perhaps it is time to ignore the ownership of media and concentrate attention on the programming.

The other goal in applying ownership and control rules was to promote diversity of services. For a long time, these provisions have been a necessary corollary to the Government's control of the market structure created by rationing licences and thus creating artificial scarcity of licences. The BSA, however, sets out different mechanisms for achieving the goal of diversity. It sets out to permit unrestricted entry to the broadcasting industry, thereby removing administrative and institutional barriers to entry for all sectors except the commercial television sector, which, in any event, is to be reviewed before 1 July 1997. The BSA also introduces subscription broadcasting, and subscription and open narrowcasting as directly competing sectors to the traditional broadcast media.

Under this new approach, where diversity is being promoted though promotion of additional services in direct competition, it is difficult to see the need to treat the electronic media differently from other sectors of the Australian economy. If the current rules are eventually abandoned, the broadcasting sector will continue to be subject to the limitations on market behaviour set out in Part IV of the *Trade*

Practices Act 1974, and to any other mechanisms developed as part of the current initiative of developing a national competition policy. Once the Australian media are subject to international competition, however, the need to promote diversity through specialist regulation will become largely irrelevant.

In the environment already being promoted by Government initiatives for diversity through competition, it is difficult to see any continued relevance for industry specific ownership and control rules.

Codes of Practice and Program Standards

Programming issues in the Australian electronic media have moved away from the prescriptive censorship of old, to a more liberalised approach where licensees classify programs for the information of viewers. Viewers may then avoid programs that they feel are unsuitable. It is a similar classification scheme to that applying in the cinema and to the home videocassette rental market. Abandonment of specialist rules for broadcasting services would still leave an underlying framework of classification at Commonwealth level. This would seem to be more appropriate to the new media than the existing rules in broadcasting law, and in practical terms, it would mean little to the material selected by licensees for broadcast.

Abandonment of the current approach, however, would leave no mechanism to deal with issues such as cultural protection, the protection of children from harmful programs, and for provision of children's programs.

Cultural Protection

The traditional approach of applying program quotas on Australian media is unlikely to be sustainable on two main grounds. Firstly, it would not apply to many of the potential program sources from offshore, and thus would place Australian media at a competitive disadvantage relative to offshore competitors. Secondly, if, as is predicted, there is a move to services of a more transactional nature, quotas would interfere with the operation of the market; substituting state determined choices for free choices. While it may be culturally desirable that there be some Australian produced material as part of the overall program mix, it should be a matter of choice as to whether people choose to enjoy it.

The central issue, then, is the type of mechanism that is used to ensure that Australian material is available for show at a price and quality at least comparable to programs manufactured offshore. Options seem logically to focus on the production side, rather than on the display side, and thus would fall outside broadcasting

regulation as currently constructed. Perhaps the approach adopted for other forms of cultural promotion, such as through the Australian Film Commission and the Film Finance Corporation, offers a model for dealing with Australian program content on television.

Protection of Children from Harmful Material

Once digital transmission systems become the norm for broadcasting, and this cannot be expected to be too far away given the economic advantage offered by these systems, then the way will be open for program material to be classified, like any other material, and subject to tiered access using passwords or personal identification numbers (PINs) set by the users. The B-MAC transmission system already used in Australia for broadcasting is capable of program tiering, and levels of access are able to be programmed by the user so that different levels of programming can be either available or not available on the basis of user-programmed PINs.

With such a system, it is possible to transfer the onus of protecting children back to the parents, negating the need for state intervention.

Children's Programs

Children’s programming presents similar issues to those raised by Australian content, in that it is potentially uneconomic for broadcasters to transmit. Current requirements for children’s programming should be seen for what they are; a social obligation and no more. If society sees the provision of children’s programs to be a desirable end, then society has the means to pay directly for that end by direct subsidisation, rather than disguising the true cost behind quotas and other mechanisms. In the context of micro-economic reform, licensees operating in a competitive commercial environment should not be forced to shoulder socially driven financial burdens, especially when they may place these broadcasters at a competitive disadvantage compared with other media operators, especially those originating offshore.

The key to the fulfillment of this social policy objective seems likely to emerge in the same way as for Australian content. Any mechanism for promoting children's programming ought to be transparent, and should not discriminate between media forms. It should thus focus on production rather than display.

Unfortunately, the interest groups who advocate children’s programming and Australian content requirements have no incentive at all to support transparent funding, because this requires full disclosure about the true costs and benefits of

the measures, where these are able to be measured. These are then able to be compared with other public goods, and choices made between competing goods. Interest groups may be concerned that their particular issue of concern will be judged less worthy than other social goods such as health care. Nevertheless, while these mechanisms remain buried in quotas and the compliance costs are transferred to industry, the information necessary for society to make sensible choices through the Parliament will never be available. The role of interest groups in considering matters of public policy, and the problems that interest groups represent, are considered in Appendix A.

Administrative Provisions

If the active provisions of broadcasting regulation are dismantled, in the way outlined above, then the administrative provisions that support them, such as for the creation of a regulator, for investigations and inquiries, and for sanctions and remedies, may also be dismantled.

An Alternative Vision of Regulation

All of the preceding discussion leads to the conclusion that if the existing industry specific broadcasting regulation is repealed, we would be left with an electronic mass communication sector where business conduct and economic regulation would be limited to the application of corporations, trade practices and foreign investment law, while content issues would be managed by the uniform application of the Commonwealth film and literature classification. Social obligations identified by the Parliament would be able to be directly and transparently funded so as to not interfere with the overall conduct of the business of electronic mass communication. Australian services would be placed on equal competitive footing with services originating offshore and all of the new or emerging media would be treated in a consistent and transparent way.

In short, society would be no worse off.

Some New Issues

The ability of national Governments (including ours) to regulate new electronic media within their own borders is now rapidly eroding. One only needs to look at transnational satellite broadcasting in Europe, America and South-East Asia to see that this is so. Australia has already become a participant in this new world of mass communication through the export of our expertise and capital (for example, through the international activities of Messrs. Murdoch and Packer) and through Government sanctioned initiatives such as the ABC's ATVI satellite service to

South-East Asia. It would be hypocritical, and present some obvious diplomatic embarrassment, for us to attempt to stop foreign operators from providing services into Australia, *even if we had the technical means to do so without intruding into civil liberty.*.

Many of new services in the developing environment will be foreign, but they may have only limited appeal, and therefore constitute little concern. Others will be in the familiar international cultural format to which we have all become accustomed and appreciate through our exposure to films and television. Nevertheless, the issue of cultural sovereignty, and the need to investigate new mechanisms to protect it, *should that be judged worthwhile*, has already been noted elsewhere in this paper, where a transparent approach to satisfying cultural objectives is advocated. That is to say that cultural objectives should be set by the Parliament and that mechanisms for their satisfaction should be directly and transparently funded.

Media Content as a Commodity

One of the major emerging issues extending into the realm of subscription services, is the cost of access to the new technology necessary to receive services, and where service charges are levied, the cost of access to programs. Consumer access to all but a range of basic services is likely to be defined in terms of ability to pay, and thus media participation will become increasingly a function of socioeconomic status.

This leads to two complementary concerns which are new to understanding electronic media, although they are not new concerns to other media forms (software, film, video, books, magazines and newspapers). These are concerns about the *commoditisation* of information and the creation of an underclass of *information poor* in society. Both of these issues have been flagged as issues of concern and as requiring further investigation in the study *Grasping New Paradigms: Australia as an Information Society* by the House of Representatives Standing Committee for Long Term Strategies.[7]

Media content has been a commodity ever since artists first received remuneration for the product of their labour. That information is a commodity is not unique to capitalist systems of organisation, since even in Marxist states, artistic endeavours are supported by the state.

Consumers have come to expect that our current broadcasting media are free goods, because for the last 20 years, they have not had to pay directly for access to the ABC, and since the 1920s, they have not had to pay directly for commercial television. Compulsory receiver licence fees once provided funding for the ABC,

but this was never transparent. The ABC is now funded primarily by Budget appropriations which are ultimately funded by tax collections. Commercial media are funded by advertising, collected from the consumer as part of the price paid for every consumer item purchased. *There is no free lunch - there has never been a free lunch!*

For many years, patrons from a range of socioeconomic groups have had to pay to attend the cinema, to hire videos, and to buy newspapers and magazines. To put the issues in its proper perspective, subscription to *The Canberra Times* costs about $20 per month and subscription to pay TV may only be of the order of $40 per month, roughly twice as much. One premium release videocassette movie hire per week would amount to at least $20 per month. The alleged commoditisation of information took place long ago when humans first sat down to develop symbol sets that to provide for the storage of information.

This concern, however, needs to be understood much better than at present, for it is almost certainly not commoditisation that is occurring today. It is more likely that we are now seeing a transfer of some types of information that have traditionally resided in the public domain (for example, public libraries, national broadcasters, Government printers), where it had been subsidised by the community through tax receipts, to the private domain where it is funded under the principles of user-pays. While interest groups complain loud and long about the change to the redistributive arrangements that is currently taking place, it will be impossible to understand the effects of these arrangements without well directed research about the relative costs and benefits.

The existence of subscription services may actually prove to be cheaper for the poor in terms of their usage, provided they are relieved from the burden of paying for the services that they don't use. There is, of course, no gain at all if the poor are compelled to support national services through the taxation system, and commercial services through advertising overheads, when they choose not to watch them. The so-called commoditisation of media is an area deserving of further inquiry.

Information Classes in Society

However the concern about commoditisation is understood, one cannot escape the conclusion that once media access is transferred from the public to the private domain, then access to the media will tend to be determined by socioeconomic divisions. Since access to *basic* information is important to the proper functioning of a democratic society, society needs to guarantee that basic information is available equitably to all.

Traditionally, this has been the role of the national broadcasters, but through a combination of circumstances, the national broadcasters find themselves moving further away from this traditional role. They face a terrible dilemma. On the one hand, the national broadcasters have an obligation to stand apart, so that they are able to offer a legitimate alternative to commercial services, fulfilling the social objectives that are important to our social and political institutions. Commercial broadcasters pursue an objective of providing popular programming of mass appeal, and thus the national broadcasters, in order to differentiate themselves, ought to adopt marginal program strategies. When it finally happens that their audience declines, they face questions about their overall relevance. After all, why should the public fund any organisation when the public at large do not seem to benefit from its existence?

There are perceptions, at least to some, that the national broadcasters have sought to pursue popular program strategies, and so to maximise their audience and thus maximise their justification for continued Commonwealth funding. And so, in full circle, questions are then asked as to why the national broadcasters are seeking to occupy the territory occupied by the commercial broadcasters. They are damned if they do, and damned if they don't.

Nevertheless, the national broadcasters have always offered a mechanism for the pursuit of social objectives and they remain a legitimate mechanism for meeting social objectives relating to providing minimum levels of information, without charge, for all those who require it.

In this instance, the issue for further research is the nature of the social objectives to be served in the emerging technical environment and how they might be articulated in a charter for the operation of the national broadcasters. There needs to be a better understanding of the basic requirements for the functioning of a healthy democracy. Perhaps people need to be informed about issues that the commercial broadcasters will want to avoid, for purely commercial reasons, and this may form part of the role for national broadcasters. Perhaps people also need to be informed about the functioning of all three arms of the state; the Parliament, the Executive and the Judiciary, so that they may properly understand the issues about which they exercise electoral mandate.

Conclusions

This dissertation has identified the rationales underpinning broadcasting regulation in Australia and noted how they have been applied in the current provisions of broadcasting law. A series of challenges to these rationales for regulation have been identified. These emerge from a technical environment in which digitisation,

globalisation and commoditisation are the driving trends. When tested against this new environment, the rationales for regulation have been shown to be difficult to sustain. This suggests that the provisions that exist in broadcasting law may be dismantled without any significant detriment to society, but with the potential gain of savings to the budget and an improvement in overall industry performance.

If the existing approach to broadcasting regulation is abandoned, there is the prospect that new services of benefit to society will emerge. These services may be driven more by personal choice, thus reducing the need for overt regulation. Certainly, some of the new services will originate offshore, and this will require new approaches to dealing with issues of cultural protection and the protection of children from harmful programming.

As services move into the private domain, issues of class and access emerge and research needs to be undertaken to understand these issues and to develop mechanisms that are able to ensure equitable access to basic information services to enable the proper functioning of democratic society.

However this is done, one thing is clear: the old approach of industry specific interventionist regulation of electronic mass communication is rapidly becoming irrelevant.

Notes on Chapter Six

1 Australia, Parliament (1992) *Broadcasting Services Act 1992*, Canberra: AGPS, s.23.

2 Australia, Bureau of Transport and Communications Economics (1991) *Economic Aspects of Broadcasting Regulation*, AGPS: Canberra, pp. 138-141.

3 This is provided for at s.34 of the *Broadcasting Services Act 1992*.

4 Based on a presentation to industry on the Australian Broadcasting Authority (ABA) planning process by Mr Colin Knowles, Director of Planning at the ABA in Melbourne on 19 November 1992 and again in Brisbane on 24 November 1992. The author was present at both presentations. Mr Knowles stated his expectation that the ABA would complete its planning processes within 2 years.

5 *Broadcasting Services Act 1992*, ss.117-121.

6 see in particular s.144 of the *Broadcasting Services Act 1992* which provides for the ABA to seek a Federal Court order to an offender against a class licence requiring that they comply with the licence. Note that any subsequent breach then becomes a matter of contempt of the Federal Court, able to be sanctioned directly by the Court.

7 Australia, House of Representatives Standing Committee for Long Term Strategies (1991) *Grasping New Paradigms: Australia as an Information Society*, Canberra: AGPS.