

Regulating broadcasting services

In its submission to the Productivity Commission, the Communications Law Centre has proposed some changes to the regulation of broadcasting services in Australia

The rationale for the special regulation of broadcasting lies not in the scarcity or public nature of broadcast frequencies but in the social and cultural importance of what we currently know as broadcast services and the belief that the benefits of certain interventions in broadcast markets will outweigh their costs.

The primary objects of broadcasting regulation should be to encourage freedom of expression and enterprise. A number of further goals should motivate the regulation of all communications carriage and content services:

- diversity and competition;
- access;
- relevance to Australia and Australians;
- quality; and
- accountability.

Despite its central place in the rhetoric of regulation under the *Broadcasting Services Act*, the “degree of influence” of different services is not, and should not be, central to the mechanisms of current broadcasting regulation. It is an uncertain notion which is better replaced by the operative statutory concepts which actually inform assessments about appropriate levels of regulation.

A broader and more helpful concept on which to base key regulatory judgements might be “social importance”, the principle used in the *Telecommunications Act* to inform the particular services which are included in the universal service obligation. The concept might be used in a revised broadcasting services/radiocommunications regulatory scheme to inform decisions about which services should be subject to:

- the special “broadcasting” planning process;
- arrangements to make them universally accessible to customers and audiences;
- special ownership and control regulation;
- access obligations;
- requirements to carry significant Australian content; and
- service quality performance standards and monitoring.

Planning and licensing

The Centre broadly supports the current arrangements for planning broadcasting services. They preserve ultimate control in the hands of a democratically-elected Minister, who has the ability to make broad decisions about the uses to which particular parts of the spectrum can be put. They provide a mechanism for ensuring structural diversity in the provision of particular services, a crucial contributor to diversity in content. They also provide considerable capacity for market mechanisms to be employed to determine the uses to which particular spectrum is put. Increasing use of these mechanisms will provide clearer evidence of likely efficiency gains.

But the Centre has suggested that the Productivity Commission may wish to consider a long-term strategy for migrating the perpetual tenure of broadcast licences towards the limited tenure of spectrum licences. This would ensure that public decisions are able to be made about the most appropriate uses and users of broadcast spectrum, or the best ways to allocate it, at some point in the future, without presumptions that the uses being made of it by incumbents are necessarily socially optimal. This might involve:

- licensing the new digital commercial television services (not the national services) for a fixed duration of 15 years after the date of shut-down of analogue transmissions (or 2008, whichever comes first); and scaling down commercial television licence fees over a period of 20 years, commencing in 2003.
- To overcome the instability which might be caused at the end of the 15 year licence period when all three (or the original three, if there are more than that by then) commercial licences in an area are re-allocated, it might be possible to hold a “mini-auction” among the existing licensees before 2008, to allocate licences with different durations - for example, one of 15 years, one of 17 years and one of 19 years.

Diversity and competition

Australia’s laws governing ownership, control and competition in media and communications need revision if they are to ensure a competitive and diversely controlled sector in the future:

- Cross media rules should be retained, but responsibility for administering them should pass to the Australian Competition and Consumer Commission (ACCC), with formal advice from a revamped Australian

Broadcasting Authority (ABA) with an enhanced research capacity and public education role.

- A new threshold for prohibited conduct should be established in relation to a range of media assets which deliver bottleneck power over sources of information, entertainment and ideas. Though already subject to general competition regulation, the significance of these assets should be acknowledged through a "declaration" process. Mergers and contractual and other arrangements involving declared assets would be subject to a lower test of anti-competitive behaviour (i.e. behaviour would more easily satisfy it) than the "substantially lessening of competition" test in s46 and s50 of the *Trade Practices Act*.
- The ACCC should have flexible powers to impose a range of access and "use it or lose it" obligations on controllers of declared facilities.
- The federal government should consider liberalising the existing rules restricting foreign participation in pay television and perhaps commercial television in the context of the forthcoming round of multilateral services trade negotiations. It should only do so if this concession enables it to secure the ability to maintain, adapt or introduce measures to encourage domestic cultural activities and industries.

Access

One of the most important challenges in media and communications policy is to ensure universal access for consumers and audiences to the primary communications media of the day.

The BSA should include, as an object: to ensure that broadcasting services of social importance:

- are reasonably accessible to all people in Australia, on an equitable basis, wherever they reside or carry on business; and
- are supplied as efficiently and economically as practicable; and are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community. Consistent with the drafting of the *Telecommunications Act*, "social importance" should not be further

defined. The assessment of which services are of sufficient social importance to justify intervention to ensure their universal accessibility should involve a careful examination of the nature of the services and weigh the public benefits and costs of intervention. The principles outlined in the 1996 "Review of the Standard Telephone Service" might be used in practice to assist in assessing the social importance of particular services and the costs and benefits of intervening to ensure they are universally accessible.

Federal regulation should be only one element of the policy mix which addresses questions of accessibility of basic communications services. Targeted subsidies might be a transparent and cost-effective way of encouraging people to explore the possibilities of new technologies and innovative applications of them, at a time when penetration levels of particular services are still low. State and local governments, even without the constitutional power to regulate electronic communications, also need to play their parts, in such areas as libraries, the education sector and the work practices of government agencies.

Australian programming

The Centre supports the application of program quotas of the kind provided for in the Australian Content Standard for commercial television and the expenditure requirement for new Australian drama on pay TV drama channels.

It is critical that, in the context of multilateral trade negotiations, Australia does not accept obligations which compromise the national government's capacity to maintain, adapt or introduce measures to assist domestic audiovisual culture and industries.

Quality

The Centre supports the continued inclusion of "quality" object in the BSA. But it believes it should be broadened to encompass "telecommunications-style" quality of service issues: service connection times, faults, the keeping of appointments and other matters - where relevant to the particular discretionary services.

For "content" quality, the primary regulatory mechanism is structural diversity - different kinds of institutions deciding what quality might mean for different audiences, without any regulatory attempt to define quality in a prescriptive way. Structural diversity is promoted by the existing process for Ministerial reservations of frequencies for national and community broadcasting and the ABA's planning process for further allocation of services to service categories including narrow-casting. Further, service providers often need substantial capital to take significant risks about the production of content. This is not a justification for significant protection from competition, but it may be a public benefit to be articulated and weighed in seeking "authorisations" of mergers that would otherwise breach the diversity threshold.

For "service" quality, socially important services should be supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community. This requires the integration of discretionary broadcasting services like pay TV into the quality of service monitoring and customer service guarantee mechanisms applying to telecommunications.

Accountability

The CLC believes the accountability of current regulatory processes could be improved, particularly through greater transparency in the making of some decisions by the ABA: e.g. publication of information about individual complaints and the determination of licence categories for particular services, and the conduct of ownership and control investigations.

The CLC also believes the BSA's emphasis for the ABA's research and public education activities on "community attitudes" and the Authority's resource constraints unduly limit its ability to explore the full range of issues bearing on the exercise of its regulatory functions.

A copy of the Centre's full submission is available at www.comslaw.org.au or www.pc.gov.au

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