

Reactive, Not Proactive: Recent Trends in Australian Broadcasting Regulation

Carolyn Lidgerwood

This paper explores how the introduction of digital technologies and the resulting convergence of broadcasting services with other communications services is challenging the current broadcasting regulatory regime in Australia. As the Productivity Commission (2000) recently observed:

With advances in digital technology, broadcasting, telecommunications and the Internet are converging rapidly. They are being fundamentally redefined in terms of what they are, who provides services, and how they are produced and delivered. Broadcasting ... is not what it was when the Broadcasting Services Act was introduced in 1992.

The *Broadcasting Services Act* (1992) (BSA) appears ill-equipped to deal with 'new media' services which challenge our understanding of what distinguishes a 'broadcasting' service from other services. The legislature's move away from the original assumptions underlying the BSA (particularly the principle of technological neutrality) means that there are no unifying regulatory principles driving the 'converging' broadcasting and communications industries in Australia. The anticipated 'policy and regulatory lag' (Cutler, 1999) is becoming evident.

The first part of this paper uses examples of emerging new media services to illustrate how content which looks or sounds the same from the perspective of the audience may be regulated in different ways — depending on how that content is delivered. This will illustrate the mismatch between recent amendments to the BSA and the BSA's 'foundation principles', particularly technological neutrality.

The second part of this paper will suggest some possibilities for the way ahead, particularly by reference to the proactive (and pro-convergence) proposals announced in the United Kingdom's *Communications White Paper* (Department of Trade and Industry and Department of Culture, Media and Sport, 2000). The proposed UK scheme contemplates that regulation will be 'rolled back' when competition deems it unnecessary.

If we accept that 'convergence involves a blurring of industry boundaries (for example, broadcasting and online services) and enables firms from traditionally separate industries (for example, broadcasting and telecommunications) to compete in new converged markets' (Telstra, 1999), then as 'new media' content services start gaining a foothold in the Australian marketplace, we need to ask what Australia should be doing to address the 'regulatory lag'.

Carolyn Lidgerwood is a Special Counsel at Gilbert and Tobin Lawyers in Sydney, where she specialises in broadcasting regulation.

The Divergence of the Regulatory Scheme

In the second reading speech for the *Broadcasting Services Bill* 1992 (Senate Hansard) the then Minister for Transport and Communications said:

We need new legislation capable of allowing the broadcasting industry to respond to both the complexities of the modern market place and the opportunities created by technological developments. Continuing to inhibit the natural development of this industry through outdated and cumbersome regulation will disadvantage consumers and be detrimental to the longer term prospects for Australia.

The limitations of the current Act have constrained development and structural development of the broadcasting industry, and thus diversity of choice for consumers.

The Minister also observed that some 20 substantial amendments had been made to the Broadcasting Act 1942 since 1983 and that further ‘ad hoc amendments will only add to its complexity and the potential for more loop holes to be created and exploited’. These comments explain why those who use broadcasting legislation on a regular basis may be occasionally struck by a feeling of *déjà vu*. Certainly in the last few years the scope of the BSA has expanded dramatically, with the enactment of literally hundreds of pages of amendments.

Since July 1998, the BSA has been expanded with the insertion of regulatory regimes for:

- digital television conversion — *Television Broadcasting Services (Digital Conversion) Act* 1998; *Broadcasting Legislation Amendment Act (No 2)* 2001;
- regulation of online services — *Broadcasting Services Amendment (Online Services) Act* 1999;
- expenditure on new Australian and New Zealand drama programs by pay television licensees and channel providers — *Broadcasting Services Amendment Act (No. 3)* 1999;
- anti-hoarding (in relation to rights to events on the anti-siphoning list) — *Broadcasting Services Amendment Act (No. 1)* 1999;
- the licensing of digital datacasting services — *Broadcasting Services Amendment (Digital Television And Datacasting) Act* 2000; and
- international broadcasting services — *Broadcasting Services Amendment Act* 2000.

In addition, as detailed in the Liberal Party’s ‘Broadcasting for the 21st Century’ policy paper (Liberal Party, 2001), the Commonwealth Government proposes to amend the existing cross media and foreign ownership laws (at the time of writing, it is understood that draft legislation will soon be introduced).

These substantial amendments to the BSA have expanded the breadth of matters regulated by the Australian Broadcasting Authority (ABA) significantly. The ABA's jurisdiction now reaches beyond the regulation of 'traditional' broadcasting services to the regulation of datacasting services provided in the broadcasting services bands and to online services hosted in Australia. However, these amendments leave the impression of having been progressively 'cut and pasted' into the BSA, without having been planned in an integrated way.

The consequence of these apparently *ad hoc* amendments has been a significant shift in the original assumptions underlying the BSA, namely that the regulation of broadcasting services would be technologically neutral, and that there would be a direct relationship between the degree of regulatory intervention imposed under the BSA and the 'degree of influence' which a type of broadcasting service was able to exert in shaping community views in Australia (see Explanatory Memorandum to *Broadcasting Services Bill* 1992).

The 'degree of influence' of the different categories of broadcasting service was assumed. For example commercial television services were deemed to be the most 'influential' category of broadcasting services in 'shaping community views' — presumably because of the type of content they provide, and their ubiquity. As the most influential kind of services, commercial radio and television broadcasting services are required to comply with content standards, content codes, wide ranging licence conditions, and are subject to stringent ownership and control rules. By contrast, those broadcasting services categorised as 'open narrowcasting services' are barely regulated at all, being subject to a class licensing scheme and minimum licence conditions, with no restrictions on ownership or control.

That the regulation of broadcasting services be 'technology neutral' was also a core objective in 1992. The definition of 'broadcasting service' in the BSA was originally intended to ensure that the method by which broadcasting services were delivered did not matter, with 'broadcasting service' defined as a 'service that delivers television programs or radio programs ...whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or combination of those means (BSA, subsection 6(1)). Before 1998, with the exception of the regime for satellite subscription broadcasting (BSA, Part 7), the principles of technological neutrality and degree of influence guided much of the legislative scheme for broadcasting and its implementation by the ABA.

With the recent amendments to the BSA, it can no longer be said that the driving principles of regulation under the BSA are technological neutrality or 'degree of influence'.

As the Chairman of the ABA has observed, the current BSA 'does not contain one system of regulation. In fact, it contains several widely divergent regulatory schemes' (Flint, 2000). These so-called 'divergent regulatory schemes' for broadcasting, datacasting and online services also appear to be based on divergent regulatory policies. The question is whether this approach is sustainable, or whether the 10th year anniversary of the commencement of the BSA should coincide with a regulatory overhaul.

Departures from Technological Neutrality

The Explanatory Memorandum to the *Broadcasting Services Bill* 1992 explained that the new broadcasting legislation would provide ‘a simple regulatory regime for broadcasting services that applies irrespective of the technical means of delivery’ (Senate Hansard, at 3600). This is what is described in the broadcasting industry as the principle of ‘technology neutral regulation’.

As noted above, the Explanatory Memorandum explained that this principle supported the creation of ‘categories of service’ which would be described by their nature, rather than by their technical means of delivery. This would ‘ensure that the Act did not need constant amendment as technical conditions change’, as the BSA would allow for the ‘continuing development of the delivery of broadcasting services’ (Senate Hansard, at 3600).

The introduction of new categories of service for broadcasting was one of the key differences between the BSA and the previous regulatory regime (as contained in the *Broadcasting Act* 1942 and related legislation). It was intended that the ‘categories of service’ for broadcasting would determine the level of regulatory intervention which was appropriate for commercial broadcasting services, subscription broadcasting services, community broadcasting services, open narrowcasting services and subscription narrowcasting services. The regulation of the national broadcasting services (SBS and ABC) was ‘removed’ to the governing legislation of the national broadcasters, the *Australian Broadcasting Corporation Act* 1983 and the *Special Broadcasting Service Act* 1991 (Department of Transport and Communications, 1991), although the BSA does give the ABA a complaints handling function in respect of the national broadcasters.

The categorisation of broadcasting services was supported by the regulatory policy in section 4 of the BSA which provided that broadcasting services are to be regulated in a manner that, in the opinion of the ABA, ‘will readily accommodate technological change’ (BSA, paragraph 4(2)(b)). This regulatory principle has now been extended (by amending legislation) beyond broadcasting services to datacasting services, Internet content hosted in Australia and Internet carriage services supplied to end users in Australia (BSA, paragraph 4(3)(b)).

However, it can be argued that the application of the regulatory policy in section 4 of the BSA is quite meaningless in the context of recent legislative amendments that were specifically introduced to address technological change, particularly the use of digital technologies for datacasting in the broadcasting services bands (BSB). In such circumstances, the ABA has little flexibility to ‘accommodate technological change’ because the practical effect of the legislative scheme is not technologically neutral. This is explained in more detail below.

As observed in a submission to the Productivity Commission’s inquiry into broadcasting (Papandrea, 1999), landmark decisions in broadcasting since the BSA was introduced in 1992 have ignored the concept of technological neutrality. The first inroads into the principle of technological neutrality happened almost immediately after the commencement of the BSA, with the enactment of a ‘clumsy’ (Cutler, 1999) technology-specific regime for satellite subscription

broadcasting services (now Part 7 of the BSA, as amended by the *Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992*).

More recently, the undermining of the principle of technological neutrality has continued with the introduction of the regulatory regime for digital datacasting services. Under the present regime, a digital datacasting service which uses spectrum contained in the broadcasting services bands will be subject to the restrictive regulatory regime contained in the new Schedule 6 of the BSA. However, a service which looks like a digital datacasting service but is delivered outside the BSB may not be regulated under the BSA at all, despite the fact that it may look very similar from an audience perspective. This is because Schedule 6 of the BSA only applies to services provided in the BSB.

While it may not have been intended that the regulatory scheme for digital datacasting be ‘technology specific’ rather than ‘technology neutral’, this is the practical effect. When datacasting services begin to be provided in the BSB (whether by incumbent free to air broadcasters or by other parties who acquire datacasting transmitter licences at auction), they will be transmitted to domestic reception equipment from terrestrial transmission towers (that is, in the way that the free to air broadcasting services are usually provided). By contrast, datacasting services provided outside the BSB are likely to be delivered to set top reception equipment by cable or satellite or microwave (that is, in the way that subscription broadcasting services are provided).

If a datacasting-like service is provided by cable or by satellite using spectrum outside the BSB, it will not be regulated under the datacasting scheme in Schedule 6. Some examples of these kinds of services are illustrated below. By contrast, if the identical service is provided in the BSB, it will be subject to strict regulation.

Certainly, it is difficult to say that the service in the BSB will be more ‘influential’ than the non-broadcasting services bands service (that is, in the early years of free to air digital conversion, the proliferation of pay TV reception equipment is likely to make the non-broadcasting services bands service more ‘accessible’). This is not to suggest that non-BSB services should be regulated heavily — to the contrary. The point is that new media services which look the same from an audience perspective are regulated differently, and this is not justified by the principles of ‘degree of influence’ or ‘technological neutrality’.

If the policy reason for these regulatory distinctions is that datacasting services provided in the broadcasting services bands use scarce spectrum, then this would appear to be an issue for the allocation process or an issue to be covered through the imposition of licence fees — and not an issue which determines how the service should be regulated on an ongoing basis.

By moving the BSA away from technological neutrality, the ability of the regulator to respond to technological developments must be compromised. New content services are increasingly regulated according to how they will be or are delivered, not according to their ‘nature’ or ‘influence’ or how they appear to the audience. The question is whether this is an appropriate policy response to the regulation of converging services. Some examples for consideration follow.

Example 1: Streaming audio and video

The advent of ‘streaming video and audio’ services has meant that content previously identifiable as a ‘television program’ or a ‘radio program’ is now accessed from a PC (personal computer). However, streaming audio and video services are not broadcasting services if they are delivered using the Internet. This is because the Minister for Communications, Information Technology and the Arts (the Minister) has formally determined that ‘a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands’ did not fall within the definition of ‘broadcasting service’ in subsection 6(1) of the BSA (Commonwealth Government Gazette, 2000).

This determination was made as part of a review that was required under the BSA. Section 216E of the BSA required the Minister to review whether, in the context of converging media technologies, streamed audio and video content obtainable on the Internet should be regulated as a broadcasting service. On one hand, making the determination was a way of reassuring providers of streamed audio and video services over the Internet that the ABA would not prosecute them for providing commercial broadcasting services without a licence. However, specifying ‘Internet’ delivery has the practical effect of drawing a technological distinction which inevitably raises further regulatory issues.

It is possible that if streamed audio and video services are accessed from ‘walled gardens’, they may not be covered by the determination (and therefore, may be broadcasting services) whether they are delivered to a television set or to a PC (Nicholls, 2000)¹. The Minister’s determination applies only to programs ‘using the Internet’ and arguably, programs streamed over proprietary networks are not delivered using the Internet. The Internet does not discriminate on the basis of access (or ‘traffic’ flows), whereas walled gardens only allow traffic to flow within specified areas. In other words, walled gardens provide restricted ‘carriage’ access. It may only be a matter of time before this issue will need to be considered by the ABA. This is an example of how a move away from technological neutrality can lead to regulatory uncertainty. Clearly, it is not desirable for almost identical ‘new media’ services to be potentially subject to very different levels of regulation, but this is the kind of loophole which will always emerge when technological distinctions between different types of communications or content services are made by the legislative scheme.

Example 2: Digital datacasting

The introduction of digital broadcasting and datacasting and other interactive services will mean that services previously only available on computer screens

¹ A ‘walled garden’ is an environment that controls access to content and services on the World Wide Web by directing a user’s navigation within particular areas (for more details, see <http://whatis.techtarget.com>)

will be available on television screens — with the use of set top boxes and infrared keyboards. However, as introduced above, the regulatory regime in the BSA provides that some of these services (particularly datacasting) will be regulated only if they are delivered in the BSB. Otherwise, they may not be regulated at all.

For example, if a text-based service is provided outside the BSB, it won't be a datacasting service, and it probably won't be a broadcasting service either (text based services are excluded from the definition of broadcasting services in the BSA). Datacasting services do not fall into any of the broadcasting 'categories of service' because their determining characteristic will be as much about how they are delivered as how they look.

Subject to some exceptions, currently datacasting content licensees are prohibited from providing, in the BSB, content 'genres' including drama, sports, music, infotainment, documentary, comedy, quiz, children's and light entertainment programs (see clauses 14 and 16 of Schedule 6 of the BSA). However, content such as Internet carriage services, interactive computer games and 'ordinary' e-mail is permitted and will be treated as a 'datacasting service' when it is provided by a datacasting licensee. Consequently, such content will be a datacasting service for the purposes of Schedule 6 of the BSA if it is delivered under the authority of a datacasting content licence, using the BSB. However, if it is delivered by use of spectrum outside the BSB, it will not be datacasting for the purposes of the BSA and probably won't be a broadcasting service (depending on how the content is accessed).

If that is likely to be confusing, then it is just the beginning. Computer games consoles such as Playstation 2 will allow access to the Internet through television sets, personal digital assistants (for example, palm pilots) are able to download and display video (see Department of Trade and Industry (UK), 2000:7) and mobile phones will be able to be used to receive services which may sound very like commercial radio. These services won't be regulated under the BSA, unlike identical content delivered by other methods.

The viewer, listener or user is unlikely to care much about this. Certainly, there are strong reasons why the delivery of content by 'new media' should not be regulated in the way that broadcasting services have traditionally been regulated. However, by *not* approaching the regulation of content services in a technologically neutral way, providers of content services may be prejudiced or favoured depending on what delivery mode they choose and whether or not they exploit a loophole in the regulatory scheme.

Under Part 4 of Schedule 6 of the BSA, datacasting licensees must develop and register codes of practice with the ABA, which will be periodically reviewed. The ABA may determine standards if it is satisfied that the relevant code of practice has failed. While codes and standards will not apply to an Internet carriage service or ordinary electronic mail (BSA, Schedule 6, clause 35), a licensee wishing to provide such content alongside other datacasting content, will also need to comply with separate code requirements (for example, Internet content hosts and service providers need to comply with the Internet Industry Association Codes registered with the ABA under Schedule 5 of the BSA).

If a person provides ‘datacasting-like’ content outside the BSB, then it will not fall within the regulatory scheme. However, the ‘broadcaster exemption’ from the definition of carriage service provider in section 93 of the *Telecommunications Act* 1997 may not apply (depending on whether the service can be described as a broadcasting service), which will mean that the service provider must participate in the Telecommunications Industry Ombudsman scheme, and will probably be deemed to be a carriage service provider. Other telecommunications industry codes of practice may also apply. The issue of the overlap of different regulatory regimes was raised in submissions to the Productivity Commission’s broadcasting inquiry (for example, Austar, 1999). Under the current regulatory scheme, how content looks does not always determine how it is regulated.

The application of different regulatory regimes to new services which look the same from an audience perspective does not seem to be an appropriate approach for a converging communications environment. Certainly, ‘regulatory risks’ may arise if regulations in converging sectors are incompatible (Productivity Commission, 2001). In that context, the key question would appear to be when and how the regulation of converging services can be made more consistent.

At the time of writing, the operation of Schedule 6 of the BSA (containing the datacasting services regulatory scheme) is under review. An Issues Paper was released by the Department of Communications, Information Technology and the Arts (2001). The review is limited to the regulation of datacasting services provided in the BSB, and does not address the broader issues set out above.

Not influential, just unfamiliar

The Explanatory Memorandum to the Broadcasting Services Bill 1992 explained that the ‘degree of influence’ test enunciated ‘the underlying philosophy to be pursued in the administration of the Act’:

The level of regulation to be applied to any particular type of broadcasting service is to be determined according to the degree of influence that that type is able to exert in shaping community views in Australia. Thus a high level of regulation is to apply to commercial broadcasting services as those services are considered to exert a strong influence in shaping views in Australia. At the other end of the scale, narrowcast broadcasting services are expected to play a minor role in shaping views in Australia and will be subject to low barriers to entry

Since that time, there has been a practical shift away from the principle of regulating services according to their degree of influence. This may be an unintended consequence of recent amendments, given that the regulatory policy statement in section 4 of the BSA was amended so that the ‘degree of influence’ test is used to justify the regulatory intervention in relation to online services and datacasting services. Subsection 4(1) of the BSA, as amended, now states:

The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and Internet services according to the degree of influence that different types of broadcasting services, datacasting services and Internet services are able to exert in shaping community views in Australia.

Despite this statement, while the ‘degree of influence’ test still applies to some extent in shaping traditional broadcasting regulation, it appears to have lost its central importance in the context of non-broadcasting services which have been brought within the scope of the BSA. For example, it would not appear that the test justifies the current regulatory regime for datacasting (which is currently under review, as noted above), as the legislative scheme effectively strips datacasting services of any influence they may have had in the absence of the ‘genre’ rules. It may be that the amendments to section 4 of the BSA were more ad hoc than representative of the true nature of the new regulatory scheme.

Similarly, the ‘degree of influence’ test is unlikely to justify the legislative regime for online services. In the course of the Productivity Commission’s Broadcasting Inquiry, the Communications Law Centre (2000) suggested that the test was particularly undermined by the online amendments, ‘whose interventions are informed less by any understanding of the degree of influence of on-line media than by the kind of naively apocalyptic vision of media power and influence which so often accompanies the introduction of new technologies’. It could also be suggested that the complicated scheme for expenditure on new Australian or New Zealand drama by pay TV operators and channel providers is also disproportionate to the amount of influence which those services individually wield, especially in light of the administrative burdens imposed by the ABA’s reporting requirements.

The degree of influence principle sounds rather hollow when these practical examples are considered.

If what determines the level of regulation upon a new class of content service is the fact that service uses scarce spectrum (that is, in the BSB) then shouldn’t that be stated as the determining regulatory principle? If the real driving factor of regulation of on-line services is the protection of children, shouldn’t that principle replace the degree of influence principle? If the imposition of the expenditure scheme on the pay TV industry is an industry protection measure for the local production industry, then call it that — not regulation which is justified because of the supposed degree of influence that pay TV drama services wield. In that context, the issue is not whether the central regulatory principles underpinning the BSA need to be restated and simplified, but when this should happen.

A Suggestion for the Way Ahead

This year marks the tenth anniversary of the commencement of the BSA. Given this, and the fact that ‘converging services’ are obtaining a foothold in the Australian media landscape, it is appropriate to consider whether the existing regulatory approach in the BSA is sustainable.

Under the digital television legislation, a number of reviews were required to be conducted prior to 1 January 2001. Clause 59 of Schedule 4 of the BSA required the Minister to cause a review to be conducted of whether ‘any amendments of laws of the Commonwealth should be made in order to deal with convergence between broadcasting services and other services’.

The Report of the Convergence Review (Department of Communications, Information Technology and the Arts, 2000) favoured the retention of industry-specific regulation. In relation to broadcasting, the Report concluded that existing structures were likely to persist until ‘digital technology substantially penetrates the broadcasting industries’, and that ‘this was several years off’. As a result, the review concluded that ‘the structure of the broadcasting legislation will remain sound for some time’ (Department of Communications, Information Technology and the Arts, 2000:8).

The approach of the Convergence Review was that the development of converged regulatory structures should be ‘evolutionary’. However, this is a less than proactive approach, in comparison with other jurisdictions (and indeed, with other industry sectors, as discussed below).

What the Convergence Review failed to do was to produce a vision for the ‘convergence’ of broadcasting and communications regulation. By comparison, the UK Departments of Trade and Industry and of Culture, Media and Sport have jointly published a White Paper titled ‘*A New Future for Communications*’ (December 2000), which sets out the UK Government’s response to regulation in a converging environment.

At the centre of the White Paper’s recommendations is the proposal to create a high level set of principles and objectives for the regulation of content across *all electronic communications* to be administered by one merged regulator, an Office of Communications (OFCOM) that will deal with competition, carriage and content issues. The White Paper states:

Taking full account of the differences between services and people’s expectations of them, OFCOM will be responsible for maintaining content standards in the electronic media. It will develop Codes underpinned by statute for the most pervasive broadcast services, and work with industry to ensure effective co- and self- regulatory approaches to protection for other services, such as the Internet, where they are appropriate.

This framework can be compared with a simplified and updated version of the scheme currently contained in the BSA.

The White Paper proposes (8.5.1) that OFCOM will have the following central regulatory objectives:

- protecting the interests of consumers in terms of choice, price, quality of service and value for money, in particular through promoting open and competitive markets;

- maintaining high quality of content, a wide range of programming, and plurality of public expression; and
- protecting the interests of citizens by maintaining accepted community standards in content, balancing freedom of speech against the need to protect against potentially offensive or harmful material, and ensuring appropriate protection of fairness and privacy.

The White Paper states (8.5.2) that OFCOM is also to give weight in all its activities to the promotion of efficiency, including efficient use of spectrum and telephone numbers, and the promotion of innovation. Effective regulation is seen as the main challenge in a converging communications environment. The White Paper proposes that OFCOM will develop and maintain the necessary rules in full consultation with industry and consumer representatives, within this broad framework of guiding principles (established in statute).

Importantly, it is proposed that OFCOM will have a duty to keep industry sectors under review and to 'roll back regulation promptly where increasing competition renders it unnecessary' and to 'encourage co-regulation and self-regulation will best achieve the regulatory objectives' (8.11). The White Paper states (at 8.11.2) that OFCOM will give full weight to the principles of proportionate regulation. This approach should be contrasted with the conclusions in the Australian Convergence Review (Department of Communications, Information Technology and the Arts, 2000).

It is worth noting that the House of Commons Select Committee on Culture, Media and Sport (2001) considered the White Paper in the context of the dramatic changes flowing from the introduction of digital television, and the growth of the Internet and mobile telephony in the UK. The Select Committee observed that:

The functional divisions of current regulators are ceasing to reflect the realities created by technology. Current operators, and in particular those concerned with networks and with innovation, face a confusing, overlapping and inefficient regulatory environment. In these circumstances, the case for a new regulatory framework of the kind proposed in the White Paper is overwhelming (Part II:13).

It can be argued that the same observations apply to the Australian communications environment.

What is most appealing about the UK proposals is the fact that the regulatory system aims to 'provide industry and consumers with certainty, while being flexible enough to recognise the differences between different services and to respond to rapid changes in technologies, services or public expectations' (White Paper:6.3.8). The proposed model recognises that different levels of regulation are appropriate for different kinds of services, but that these levels should not be set in concrete.

Draft legislation implementing the White Paper proposals is currently being prepared, although it is not expected to be published until early 2002 (Wintour, 2001).

Conclusion

As noted above, the White Paper recommended the creation of a high level set of principles and objectives for the regulation of content *across all electronic communications*. It is worth noting that (by contrast), the BSA contains not only the regulatory principles in section 4 (referred to in this paper), but 18 ‘objects of the Act’ in section 3, as well as detailed policy objectives for digital television conversion in Schedule 4.

In that context, the simplicity of the proposed UK approach is appealing — that is, establish some over-riding principles, and then trace out appropriate objectives in the relevant codes and conditions for the most ‘pervasive’ services. While this approach (if applied in Australia) may result in less regulation for those kinds of services which are currently deemed to be the most ‘influential’ (for example, commercial radio), and some code-based regulation for services that may not currently be regulated at all under broadcasting legislation (for example, computer games services), this approach would move beyond the historical distinctions which characterise much of the present regulatory scheme.

Recently, it was observed that broadcasting regulation in Australia reflected a legacy of *quid pro quos*, a history of political, technical, industrial, economic and social compromises (Productivity Commission, 2000). Broadcasting regulation has never been about a reliance on market forces or the promotion of competition. A stark comparison can be drawn between broadcasting regulation and telecommunications regulation in Australia, for example. The telecommunications sector has been steadily deregulated since the late 1980s, and in 1997 barriers to entry were significantly reduced. As the Productivity Commission (2001) observed:

The convergence of broadcasting and telecommunications accentuates the paradoxically pro-competitive orientation of policy towards traditional telecommunications and the protective pall of regulation that surrounds broadcasting.

It is inevitable that the boundaries between the broadcasting and telecommunications industries will become increasingly blurred in the short term. As the platforms available for ‘convergent’ services like video on demand services, messaging services and Internet services become more plentiful (for example, as a result of technological improvements), the separation of the broadcasting and telecommunications regulatory regimes is likely to be more difficult to sustain.

Even recognising the historical differences between the regulatory schemes of the UK and Australia, the UK proposals are worth serious consideration. Given

that the ownership and control rules in Australia are currently under review, it would be a lost opportunity if this process did not form the impetus for a broader review of the broadcasting regulatory regime. The UK has approached the task in the reverse order — with a review of the UK's complex media ownership laws currently underway (Harding, 2001).

A proactive convergence policy framework must be the way ahead, rather than 'reactive' legislative responses to broadcasting regulation which have been implemented in recent years in Australia. As the General Manager of the ABA has noted (Tanner, 1998) 'in a converged world, the prognosis for much traditional broadcasting regulation looks grim'. We can conclude with the observation that in a converged world, the prognosis for the principles of proportionate regulation should be bright.

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