

Cultural and Social Policy Objectives for Broadcasting in Converging Media Systems

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Executive summary

This report has been prepared by the Australian Key Centre for Cultural and Media Policy as part of the ARC SPIRT research partnership with the Australian Broadcasting Authority. The paper explores strategies for the achievement of cultural objectives in broadcasting in converged television environments, assuming the continuation of the cultural and social objectives currently embodied in s. 3 of the *Broadcasting Services Act*.

The report examines regulatory frameworks in place around the world and proposals for new approaches, and considers the potential for their application in the Australian policy environment. While the ecology of converged television environments will vary from country to country, it is widely expected that such environments may be characterised by a series of technological and market changes, including:

- the transition to digital transmission;
- more efficient and extensive use of spectrum;
- a more competitive environment;
- multichannel programming; and
- interactive services.

These are some of the features of an 'ideal type' of modern broadcasting system. None of these developments are inevitable; we can make few assumptions about when or whether such an environment will exist in Australia. Nevertheless, these assumptions enable us to begin to consider the future options and problems for broadcasters, producers, policymakers and viewers.

Cultural and social policy objectives

While the balance and relevance of current policy objectives may be called in to question by any far-reaching industrial and technological change, this report assumes the *persistence* of cultural and social policy objectives for broadcasting. However, the multiplicity and complexity of the BSA's current objects makes the development of alternative regulatory mechanisms difficult. Fewer and clearer policy objectives would also facilitate the evaluation of cultural content regulation.

The relation between cultural and industry development, competition and digital economy priorities is complicated by the absence of an explicit industry policy objective in the Act such as that embodied in Canadian policy. Instead production industry objectives are claimed to be implied by cultural ones. While a sustainable production sector is clearly necessary for the achievement of content-related screen cultural policy, cultural policy objectives cannot

logically be considered a proxy for the development of the production industry. There is no clear view or consensus as to how these different interests should be balanced.

At the same time, a counterproductive tension has developed in Australian broadcasting policy debate between the cultural dimensions of broadcasting, the commercial interests of the industry and the putative economic benefits of a more liberal policy approach. This unnecessarily sets cultural development against industry development and information economy policy priorities. While there are circumstances in which these priorities may be in conflict, there is no reason to assume that these priorities should always be counterposed. Cultural and economic benefits may well coincide in a growing, more competitive and more dynamic industry. Anti-competitive regulation comes at a high cost to producers of content, setting limits on both the size of their market and what they can produce.

Looking Forward

There are a number of emerging pressures upon the current blend of cultural regulation and policy in the broadcasting sector, including the problem of regulatory convergence; issues of access and interoperability; and the changing structure of the Australian audiovisual production industry.

Further, only small changes to the current rules relating to datacasting and multichannelling would require considerable revision and rethinking of the existing system of quotas.

In our view we should not assume that the forward policy environment will *necessarily* be a more difficult one for achieving cultural policy outcomes such as ensuring a place for local television content.

International Policy Models

There is considerable value in a discussion of international models for cultural regulation of broadcasting and their applicability to Australia. Local broadcasting practice and policy making does not occur in isolation from international practice and policy. Considerable policy learning occurs throughout the system as international innovations are modified and adapted to local circumstance and Australia is no exception in this regard. Under conditions of convergence and internationalisation, not only policy makers but also industry associations, broadcasters and interest groups increasingly need to consider international practice and developments.

Of all these international models the Canadian one is of most interest and warrants the closest attention in consideration of future options. Canada has a mixed broadcasting system with a long history, it is of a comparable size to Australia, it has content regulations which bear a significant resemblance to Australian examples, it has a regulatory agency driven by similar concerns, and operates predominantly in the English language. In addition Canadian policy has sought to enhance competition, facilitate the entry of new players and respond in a timely

fashion to the development of new delivery technologies while still retaining a place for Canadian content across the broadcasting system. Finally, the Canadian model takes as its starting point a modern competitive environment. This encourages innovation by building flexibility into broadcasting regulation.

Options for Australia

A series of medium term pressure points are foreseeable for the social and cultural regulation of broadcasting. We have explored a number of possible ways of meeting social and cultural objectives in the medium term, including modifying the existing quota system, replacing or augmenting quotas with subsidies, redefining the role of the national broadcasters, and regulating distribution through must carry and other policy measures.

Further work on the practicalities and implications of these options will be critically important over the next several years, accompanied by careful study of the development of digital television and other new audiovisual media. The immediate problems of the production industry do need to be addressed, but in our view longer term policy development is equally important.

Some analyses suggest that cultural regulation in this field will need to be more 'results-oriented' than in the past. The point was made in DCITA's recent Convergence Review. Such a focus on outcomes would not only free policy formulators to consider alternative non-traditional policy options but would also require ongoing evaluation of the effectiveness of policy.

The challenge facing policy makers and regulators is to combine the advantages of modernising Australia's media environment with a continuing commitment to social and cultural objectives. This report emphasises that retaining cultural and social objectives is not incompatible with a flexible, efficient and competitive system in which audiences have access to a diverse range of programming and services. While converging media environments are sometimes thought to compromise the viability of cultural regulation, there is ample evidence of a continuing community demand for both the positive and negative content regulation of invasive and pervasive media. In our view, it is not only possible but necessary to place cultural and social policy at the heart of a broadcasting system designed for a converging environment.

Introduction

This report has been prepared by the Australian Key Centre for Cultural and Media Policy as part of an Australian Research Council partnership with the Australian Broadcasting Authority. The report explores strategies for the achievement of cultural objectives in broadcasting in converged television environments, assuming the continuation of the broad cultural and social objectives currently embodied in s. 3 of the *Broadcasting Services Act*.

The report examines both regulatory frameworks currently in place around the world and proposals for new approaches, and considers the potential for their application in the Australian environment. It should be noted at the outset, however, that the cultural objectives which inform some of these models often differ not only in wording but also in intention from the objectives of Australian legislation. Further research may be necessary in order fully to test their application in the Australian environment.

While the ecology of converged television environments will vary from country to country, it is widely expected that such environments may be characterised by a range of technological and market changes, including:

- the transition to digital transmission;
- more efficient and extensive use of spectrum;
- a more competitive environment;
- multichannel programming;
- interactive services;
- rapid development and innovation in applications and content;
- the growth of subscription and pay-per-view media, and the continuing relative decline of free to air broadcasting;
- new economies of scope in the provision of broadcast and telecommunications systems; and
- the elision of distinctions between those systems.

In addition, it is as yet uncertain how viewers will respond to the new broadcasting environment. Viewer response to new services will undoubtedly influence the shape and extent of technological and commercial developments. Regulatory systems will need to be responsive to, and flexible enough to accommodate, changes to industry shape, structure and output wrought by the ways in which new services are taken up by viewers.

These points are features of an 'ideal type' of next-generation broadcasting system. None of these developments are inevitable; we can make few assumptions about when or whether such an environment will exist in Australia. Nevertheless, such an ideal type can serve a useful heuristic purpose, enabling us to begin to consider a range of options for policymakers and regulators. This paper takes this ideal type as a point of departure for considering the challenges of new media, rather than the letter of current digital conversion policy.

This paper is divided into four main parts:

- Part One examines the mix of *cultural and social objectives* reflected in current media policy and legislation, and considers additional rationales for cultural regulation.
- Part Two explores the *forward policy environment*, considering domestic dynamics and pressures upon current policy objectives and regulation in the broadcasting sector.
- Part Three describes *international policy models*, summarising key instruments for achieving cultural policy objectives including competition policy mechanisms, public broadcasting, and subsidy and subvention mechanisms. It offers a preliminary assessment of the application of certain of these models to the Australian media environment.
- Part Four explores *strategies* which have emerged in the current Australian debate over these issues and in the consideration of international models in the previous part, and indicates areas for future work.

1 Objectives for Cultural and Social Regulation

While the balance and relevance of current policy objectives may be called in to question by any far-reaching industrial and technological change, this report assumes the *persistence* of cultural and social policy objectives for broadcasting. These provide the basis for the various regulatory options discussed later.

The cultural regulation of broadcasting would be a more straightforward matter if there were one or two clear objectives guiding the system. This is rarely the case: most national policy in the field reflects the convoluted history of electronic media, creating considerable difficulties for the design and evaluation of practical policy instruments. In this part we consider the range of cultural and social purposes driving public intervention. There are, at the outset, the stated objectives of broadcasting law. These have accumulated over time, reflecting changing aspirations and fears for national media systems. They overlap and may conflict.

In addition to these stated policy objectives, there are also the less explicit, but no less important, underlying rationales for intervention. These are the particular assumptions concerning the influence of the media, the value of the spectrum, and regulatory trade-offs, which function as further justifications for regulation in many jurisdictions. Clarifying these somewhat murky arguments is also critical for developing policy options for the future.

Clarifying cultural and social policy objects

The following broad aspirations for media policy recur across many of the jurisdictions considered in this report:

- Broadcasting is intended to have a nation-building role, as a source of public information and shared experience, as an expression of national cultural identity, and as a means of connecting diverse and remote communities.
- Broadcasting is intended to be an important means of cultural expression. Broadcasting has the capacity to sustain cultural diversity.
- Broadcasting is intended to enhance civic life. Broadcasting should promote a well-informed, knowledgeable democracy; it creates 'common knowledge'; and it should reflect and communicate different points of view.
- Broadcasting is intended to embody community standards of taste and decency.
- Broadcasting industries are intended to be competitive, efficient and responsive.

The Australian *Broadcasting Services Act* (BSA) sets out a much-amended sequence of 18 objects which correspond with one or more of the broad goals noted above. While this is not the place for an exhaustive analysis of this part of the BSA, a brief survey makes it clear that these objects reflect a multiplicity of cultural and social policy ambitions as well as economic aims. This is significant because, although the BSA's objects may in many ways appear remote from the real history and current practice of Australian media regulation, they embody many of the key terms and ideas which frame debate over future policy directions.

Promoting the availability and diversity of services. The BSA aims 'to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information'. A further object is to 'to ensure the maintenance and, where possible, the development of diversity, including public, community and indigenous broadcasting, in the Australian broadcasting system in the transition to digital broadcasting'. The term "diverse range" or "diversity" appears five times in this section in reference to audience access to services. Diversity or pluralism is a key principle of democratic broadcasting systems. It embeds the concept of choice in the system, with objectives such as these two designed to make the broadest possible choice of services available to all. The second object quoted here is the only one which makes explicit mention of digital broadcasting, and is of interest also in identifying the indigenous broadcasting sector as a distinct element in Australia's diverse broadcasting system.

The expression "throughout Australia" highlights the social objective of access for all citizens, although the word "promote" suggests that, unlike telecommunications, the goal of universal availability is aspirational rather than obligatory. This may be seen as a concession to the economic realities of the broadcasting industry, where service provision to all Australians may not make sound financial sense as well as a tacit acknowledgment that access to broadcasting services is not considered to be of the same importance as access to the telephone network. High fixed costs and low returns tend to be the reality of ensuring universal access for consumers marginalised because of their economic, social or geographic position. However, the aim of universal access to communications products and services — meaning digital television as much as telephony — both permits all consumers to participate in the effective working of the market, and meets civic interests in ensuring that geographically and otherwise marginalised citizens have access to the same services as metropolitan inhabitants.¹ It is interesting to note that the principle of universal access

¹ Stephen McElhinney details the emergence of the concept in Australia in the context of debates over the future of the telegraph network soon after Federation in 1901, and traces its development over the course of the twentieth century into the set of arrangements elaborated in the Telecommunications (Consumer Protection and Service Standards) Act 1999. McElhinney, Stephen (2001) "Telecommunications Liberalisation and the Quest for Universal Service in Australia" *Telecommunications Policy* vol. 25 pp. 233-48.

occupies a central position in the new British communications policy framework, as the Box below explains.

Universal access in UK communications policy

The principle of universal access appears to occupy a central position in the UK government's new convergent communications policy framework. But what does it involve? It applies in different ways to different parts of the communications system:

Public service television: the recently released White Paper *A New Future for Communications* flags the British Government's commitment to ensuring universal access to public service television channels, free at the point of consumption, both before and after analog switchoff. These channels must be made available by cable and satellite service providers, and they must be given "due prominence" on devices such as electronic program guides (EPGs).

BBC Radio: the universal availability of BBC radio services is to be maintained.

Telecommunications: "those telephone services which are used by the majority, and are essential to full social and economic inclusion" will be made available to all consumers "on reasonable request, at an affordable price".² The universal provision of these services is viewed as "a valuable safety net for those on low incomes and those living in remote areas",³ but the White Paper also acknowledges the cost of providing such services. The proposed new single regulator, OFCOM, will monitor the cost of provision, and if net costs to providers are deemed significant, OFCOM will have the power to create a universal service fund to which all operators of telecommunications services must contribute in order to share the costs of meeting the obligations.

The Internet: the Government plans to achieve universal access to the Internet by 2005, with progress monitored through quarterly surveys by the Office for National Statistics, and reported on in the annual state of e-commerce report and monthly reports by the e-Minister and e-Envoy. Access to the Internet may be via a variety of devices including computers, digital television, Internet-enabled games consoles, mobile telephones and personal digital assistants. In order to ensure that all citizens and consumers have the necessary knowledge and skills to use the new communications technologies to their full potential, the Government also proposes the establishment of a range of education and training initiatives.

Developing a competitive, responsive industry. The Act aims 'to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs'. The intent is a modern industry structure, implicitly emphasising the economic and consumer benefits of a market-driven system — an aim belied by the reality of Australia's heavily subsidised and closely protected commercial broadcasting sector. There is little here to form a basis for any explicit 'industry

² Department of Trade and Industry and Department of Culture, Media and Sport [UK] (2000) *A New Future for Communications*, December, p. 28.

³ Department of Trade and Industry and Department of Culture, Media and Sport [UK] (2000) *A New Future for Communications*, December, p. 29.

policy' approach to supporting local production, although the object begs the question of which 'audience needs' might be most significant, or how these needs might be determined.

Encouraging diversity in control of broadcasting services. The Act aims 'to encourage diversity in control of the more influential broadcasting services'; and to 'to ensure that Australians have effective control of the more influential broadcasting services'. Restrictions on foreign ownership are common features of broadcasting legislation around the world. In addition to national interest arguments, these restrictions have a cultural rationale. Requirements that citizens of the relevant territory own or have a majority share in media outlets, in common with creative elements tests which determine the provenance of a film or program, can be based on the assumption that a citizen will bring particular sensibilities to decision-making processes which a non-citizen would not necessarily share. They assume that Australian cultural identity and cultural diversity will be better represented and maintained through Australian rather than foreign controlled media. Or, to paraphrase former Canadian Minister of Communications Marcel Masse, Australian ownership and control will better enable Australians to recognise each other through the values reflected and projected by the media.⁴ There is a tension however between the two objectives, and most public submissions to the Productivity Commission's Broadcasting Inquiry broadly supported the removal of foreign ownership restrictions in favour of increasing diversity and competition in the sector. The aim that Australians have effective control of "the more influential broadcasting services" foreshadows Part 4 of the BSA which states that different levels of regulatory control should be applied "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".

Developing Australian culture; promoting quality and innovation. The Act aims 'to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity', and 'to promote the provision of high quality and innovative programming by providers of broadcasting services'. These are perhaps the most plainly 'cultural' objectives of the Act. The former object informs the development and implementation of the Australian content standard by the Australian Broadcasting Authority. But these objects can and are also seen as combining cultural and industry goals. The fostering of a culture of innovation lies at the core of "new economy" strategies, and is particularly apposite in the digital broadcasting sector. Content as well as technological development is an engine of new media industry growth and will be the key factor

⁴ Explaining the reasons for the removal of the phrase in the former Broadcasting Act requiring the CBC to "contribute to the development of national unity", Minister Masse stated before a parliamentary Standing Committee that "In removing (the phrase), we will ... place greater emphasis on the capacity of Canadians to recognize each other through their values". Cited in Peter S. Grant and Anthony H.A. Keenleyside (2000), *Canadian Broadcasting Regulatory Handbook* 5th edition, Ottawa: McCarthy Tétrault, p. 23.

encouraging consumers' adoption of new services. In New Zealand, a similar objective ("Encouraging innovation and creativity in broadcasting") has been interpreted by the current Minister for Broadcasting as a means to generate an "increase in the level of local content [which] would allow the provision of more programmes which would promote and support Maori language and culture [and] ensure that broadcasting creates indigenous types of content, and adapts innovative forms created internationally".⁵

The production industry ramifications of the quality objective are apparent in the regulatory sub-quota for drama. High programming budgets and the genre of drama have functioned as a proxy for high quality, in the place of any process of qualitative assessment. In the context of a falling market for licence fees, the sub-quota ensures that high budget drama remains available to Australian audiences, while simultaneously generating employment and opportunities for the local production industry.

Providing fair, accurate and appropriate coverage. The Act aims 'to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance'. This objective appears designed to address the needs of audiences as citizens of liberal democracies. This objective would temper commercial pressures in the provision of news, current affairs, information and local programming. In encouraging "appropriate coverage of matters of local significance" the objective has the social purpose of ensuring that broadcasters have a presence in and a connection to the local areas they serve, and that due prominence is given to local issues and concerns. This objective could feasibly support efforts to expand regional programming and production along the lines of the Canadian experience outlined in part three below.

Unlike similar objectives guiding New Zealand and Canadian broadcasting policy, the function of the viewer as citizen is presented as passive. There is no acknowledgement of a role for participation by viewer-citizens, implying that coverage of matters of public interest will always be a one-to-many, one-way process. It is worth noting that digital transmission and reception technologies offer considerable potential for interactivity. Experience of the use of email by British digital television subscribers, and its popularity in existing network environments in other countries, suggest that email may be widely used by viewers with access to digital television. This presents the opportunity for broadcasters to encourage interaction and integrate viewer involvement in programming. In Canada, where one of the objectives of the recent digital pay and subscription services licensing process was to foster innovation and push the capabilities of interactive technology, many of the new Category 1 services promise to offer opportunities for viewer involvement in programming through

⁵ Office of the Minister of Broadcasting [NZ] (2000) *Broadcasting Policy: Objectives and Delivery Mechanisms* Cabinet Policy Committee paper, 6 July.

email forums, live opinion polling, and similar initiatives which make use of the proximity of email and television.

Protecting children and respecting community standards. The Act aims ‘to encourage providers of broadcasting services to respect community standards in the provision of program material’; ‘to encourage the provision of means for addressing complaints about broadcasting services’; and ‘to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them’. These objectives anticipate that broadcasters will be constantly responsive to and engaged with popular tastes and prevailing social values which may be gauged through whatever complaints mechanisms are established. The provision of means for viewers to complain about programs or services addresses the need for viewer input, but only in a negative form.

Working with complex and multifarious policy objects

In Australia and elsewhere, governments’ stated objectives in this field are accumulations of the aspirations and anxieties which have surrounded national broadcasting systems for decades. Long-standing policy aims are occasionally discarded: often they continue alongside more recent, and sometimes conflicting goals. We are left with a mix of old and new, all of which must be taken into account when considering new policy options. The BSA objects as they stand clearly cannot be read as a coherent statement of cultural and social policy for broadcasting. Instead they represent and provide statutory authority for a multiplicity of potentially conflicting cultural, political and social aspirations. Cultural and social concerns are not confined to distinct elements of the statutory objects: they are threaded through almost every aspect of media policy, and appear closely connected to economic and industry aims.

Statements of public purpose in many policy domains are characterised by open-ended combinations of principles and objectives. But the result of a complex and extensive list of objects may be the loss of valuable flexibility in a period of uncertainty and rapid change. More specifically, there are several consequences of particular relevance here:

- Alternative ways of satisfying the current cultural and social policy objectives become more complex than would otherwise be necessary.
- A detailed evaluation of the effectiveness of existing regulatory instruments is precluded. Which objectives are they intended to achieve?
- The discussion of options for change is also made far more difficult. Any given option is highly unlikely to satisfy *every* policy objective — the different flavours of diversity, cultural identity, broadcasting and production industry goals, and so on — precisely because of the potential for internal conflict between the Act’s aims. But the existing instruments are not evaluated against the same mix. *Status quo* arrangements may then have illusory advantages over alternative options.

- The close connections between cultural, social and other objectives mean that changes in one area, for example ownership and control, may well have ramifications for other areas of cultural regulation.

Clarifying the basis for cultural regulation

Justifications for the social and cultural regulation of broadcasting vary historically and internationally. Are explicit policy objectives a sufficient reason to intervene? Are existing regulations designed to meet those objectives, or other considerations at work? In the United States, the notion of the 'sacred trust' in broadcasting emerged for specific reasons. In the United Kingdom, policy commentators speak of a 'new settlement' around content regulation.⁶ Debate has emerged in Australia over appropriate rationales for intervention here, especially in the light of the Productivity Commission's criticisms of the 'quid pro quo' philosophy said to drive Australian regulation. Steve Vizard, the Seven Network, and others have referred to the 'social contract' of Australian broadcasting.⁷ Malcolm Long notes:

in the United States, if you read the Gore report, most of the obligations which are developed for digital television, all of them are developed for network television and they still make reference to that belief that the justification for intervention is the fact that broadcasters have a sacred trust using the public airwaves.

In Canada, of course, where equally more than 80 per cent of people actually watch all television through cable, not the spectrum over the air, there is rarely a reference to that. It is just accepted, I think, certainly in Government circles in Canada and probably in the society, that there is a general ability of Government to really use industry policy to achieve social and cultural outcomes. I think we have a confusion about that in Australia. If you read the Productivity Commission report, there is, I think it is fair to say, a line of argument that says - it is, in fact, a justification for an ABC - that it is not going to be easy and even a hint that it is not appropriate to achieve social and cultural objectives in the commercial media, whether it is free-to-air or cable or other platform delivered, and that this is a good reason to have an ABC because it is clearly funded by Government and the public person and that is justification for it to achieve social goals.⁸

⁶ See Damian Tambini et al. (2001), *Communications: Revolution and Reform*, London: IPPR.

⁷ Steve Vizard (2000), "Seachange in Australian content", *ABCzine*, no. 1, p. 22.

⁸ ABA (2001), *The Transition to Digital: Implications for Content Regulation*, Transcript of Proceedings of ABA Workshop, 21 February, p. 10.

Notions of the 'sacred trust', the 'quid pro quo' or the 'social contract' are associated with real or artificially created conditions of spectrum scarcity: privileged access to the spectrum is said to be balanced by requirements to provide particular kinds of program services.

The Productivity Commission noted that:

Participants have emphasised how broadcasting policy is a structure built by *quid pro quos*: barriers to entry are balanced against programming obligations; free to air networks are prohibited from multichannelling to help subscription services which in turn are disadvantaged by restrictions on advertising and antisiphoning rules; free to air networks are required to broadcast in high definition because they have been lent the spectrum to do so; and so on and on.⁹

The Commission, among other observers, has raised the question of the sustainability of these tradeoffs, while pointing also to their complexity and lack of transparency. Although in Australia policy prohibits new entry for the present, digital conversion promises to free up spectrum in the medium term. Digital conversion of cable networks will also significantly increase their capacity and the range of services which may be offered; while the diffusion of broadband Internet services over the medium term will also create new channels for multimedia content. On the other hand, the Government's approach to digital terrestrial conversion appears to have created a new generation of quid pro quos, including the prohibition on new commercial broadcasters until 2007 and the provision of substantial additional subsidies to regional broadcasters.

Some researchers consider the quid pro quo approach a necessary, pragmatic response to the dynamics of Australia's existing industry structure. Marion Jacka has commented that:

Yes, in theory Governments can do anything ... but it is Australia, it is a kind of a context where we have had many years of regulation based on a particular rationale and it is a situation full of negotiation, not to mention some players having a huge amount of power.¹⁰

It is important to note, however, that the potential declining relevance of the system of quid pro quos does not mean that content regulation will be impossible to achieve or to justify. It should be remembered that while the increase in spectrum availability promised by digitisation brings in to question justifications for restrictions on market entry, it does not follow that justifications for content regulation are also compromised. Content regulation has traditionally been based on the social influence of the medium; while new market conditions

⁹ Productivity Commission (2000), *Broadcasting*, Report no. 11, Canberra: Ausinfo, p. 254.

¹⁰ ABA (2001), *The Transition to Digital: Implications for Content Regulation*, Transcript of Proceedings of ABA Workshop, 21 February, pp. 14-15.

may encourage debate about the *relative* influence of discretionary and free-to-air media, the basic premise for content regulation is not completely undermined. Until that premise disappears, citizens are likely to continue to expect governments to sustain both positive and negative content regulation.

The further difficulty of the quid pro quo approach is that it implies that the cultural dimensions of broadcasting are *always* to be counterposed against the commercial interests of the industry or the economic benefits of a more liberal policy approach. In fact this need not be the case: cultural and economic benefits are more likely to coincide in a growing, more competitive and more dynamic industry. While there is at present no means of financing innovative interactive television content in Australia, because of the government's rules on datacasting, a liberalisation of those rules would encourage new production in that sector.

In addition, many other countries achieve local content goals without relying on a system of trade-offs. Canada is one example of a diverse multichannel television environment in which content regulation is a core part of broadcasting policy but is not so obviously premised upon quid pro quo arrangements. At the core of the new Canadian television policy framework (discussed in detail in Part 3 below) is a concern to maintain a financially successful, competitive and efficient broadcasting system which permits broadcasters and producers to operate flexibly and adapt successfully to the new environment. In developing a flexible system of content regulation, Canada has attempted to balance the needs of broadcasters and producers for financial stability and growth with the needs of audiences – and the system itself – for a diverse range of Canadian programming. While New Zealand does not utilise content regulation, it has nonetheless evolved a series of mechanisms designed to ensure a place for local programming in a deregulated broadcasting environment.¹¹

¹¹ See below, Part Three.

2 The Forward Policy Environment

The transition to digital broadcasting presents a range of political, economic and technical challenges for policymakers, regulators and media players. Certain of these challenges are specific to the particular mode of distribution – cable, satellite, terrestrial transmission – while others, including challenges to the rationales for social and cultural objectives of broadcasting policy, are not necessarily determined by the mode of distribution. A number of countries including Australia and Canada have developed or are in the process of developing differential content regulation on the basis that certain media may be more influential than others. But for at least twenty years some figures in the broadcasting industry have argued that differential content regulation for different media sectors will be hard to sustain as it becomes feasible, at least in principle, to distribute content through a range of distribution channels.

Of course, it is a mistake to assume that the forward policy environment will *necessarily* be a more difficult one for achieving cultural policy outcomes such as ensuring a place for local television content. While it is difficult to predict with certainty the full shape of the new environment, or to anticipate unerringly the impact of coming changes, it is generally expected that the choices available to viewers will continue to increase over the next decade. It is likely that the majority of these new services will be discretionary services, but it is also possible that licences may be issued for new free-to-air services. While the entry of new services will result in fragmentation of audiences and revenue, they may well increase competition for local audiovisual product, and offset the historical decline in licence fees. Since digitisation enhances the capacity of different platforms to carry essentially similar kinds of services and content, program rights may be exploited across multiple platforms or through multiple “windows”. Rights holders therefore have the potential and the incentive to maximise revenue by distributing their product across a number of delivery systems.

Experience elsewhere in the world also points to new opportunities for the achievement of cultural policy outcomes such as the promotion and representation of cultural diversity in the new broadcasting environment. In Europe, the number and type of available television channels expanded dramatically during the 1990s. Partly in response to a backlash from viewers demanding local and regional programming, partly due to the emphasis at EU level on regionalism over nationalism, and partly as a result of policy developments which encouraged regional service as part of their public interest obligations, both public and private channels and networks began to rethink the emphasis they had placed in previous years on centralised operations and international entertainment programming. As one set of commentators put it, the broadcasters “became receptive to ‘proximity programming’ as a global competitive strategy”:

On a local scale, more and more cities set up their own channels, whether public, private or mixed. Even large national private networks became interested in this

phenomenon and began to place their bets on more regional or local windows. This is the case, for example, of the Spanish channels Antena 3 TV and Tele Cinco, or the British channel ITV. In Denmark, the commercial channel TV2 has a network of eight regional centres that broadcast daily off-the-network programming to their respective territories Something similar happens with the private Swedish channel TV4, which broadcasts 15 local windows on a daily basis through the same number of associated local television stations. In Germany, the national private channels SAT.1 and RTL broadcast regional disconnections, though it must be said that they do so by legal obligation more than by their own desire to do so.¹²

While the ways in which this strategy is pursued are not homogenous or uniform,¹³ they share an imperative to respond to and represent cultural, linguistic, political, demographic and geographic diversity. And in Canada, where the television environment is significantly more diverse and fragmented than Australia, content regulations have recently been extended rather than relaxed.¹⁴

In the new environment, a number of new challenges to content regulation are emerging. These include:

The future role of the national broadcasters

What are the tasks of the national broadcasters in the new environment? There is now considerable international discussion revising previous estimations of the necessary marginalisation of public broadcasters in the transition to a multichannel environment. In particular, a number of commentators argue that regulation for social and cultural objectives may be most transparently and efficiently achieved by public broadcasters funded by Government for those specific purposes.¹⁵ In its final report on Broadcasting, the Productivity

¹² Miquel de Moragas Spà, Carmelo Garitaonandía and Bernat López, (1999) "Regional and Local Television in the Digital Era: Reasons for Optimism" in Miquel de Moragas Spà et al (eds) *Television on Your Doorstep: Decentralisation Experiences in the European Union*, Luton: University of Luton Press, pp. 8-9.

¹³ De Moragas Spà et al identify seven different models of regional television development in Europe.

¹⁴ See below, part 3.

¹⁵ The future role of public broadcasters is further discussed in Andrew Graham et al (1999) *Public Purposes in Broadcasting: Funding the BBC* Luton: University of Luton Press; Steve Vizard (2000) "Seachange in Australian Content" *ABCzine* no. 1, pp. 22-3, 34 in which it is suggested that the national broadcaster "would need to provide exclusively Australian content programming, information and entertainment services" in order for Australian voices to be heard; Miquel de Moragas Spà, Carmelo Garitaonandía and Bernat López (eds) (1999)

Commission similarly noted that in a convergent media environment, the national broadcasters “may be required to play an even more significant role in promoting the social and cultural objectives set for broadcasting”.¹⁶ In its consideration of its multichannel options, the ABC is investigating the possibilities of extending its regional programming and coverage. Both multichannelling and datacasting may substantially increase levels of Australian and children’s content available to viewers.

Access and interoperability.

Technological convergence and the transition to digital television may work to shatter some bottlenecks (for example, restrictions on market entry due to spectrum scarcity), but they may also create new problems at different points in the supply chain.¹⁷ New, increasingly powerful conditional access (CA) systems, navigation aids, and information management tools such as electronic program guides (EPGs) will require regulators to develop mechanisms (standards and must-carry requirements, for example) to ensure that viewers are not prevented from accessing the full range of channels and services. Cross-ownership exists between the developers of CA systems and media organisations. For example, News Corporation has a 100% interest in the UK-based NDS, a leading global provider of CA and interactive television systems.

While these may be predominantly issues for competition regulators, they do have implications for content regulators. As the British telecommunications regulator OFTEL has noted, “In the absence of rules to the contrary, an EPG might be designed to give greater prominence to one group of services or to facilitate the selection of one group while making selection of another group considerably more difficult”.¹⁸ If, as expected, the new multichannel environment fragments audiences for broadcasting services, navigation aids

Television on Your Doorstep: Decentralisation Experiences in the European Union Luton: University of Luton Press; the NZ On Air symposium on broadcasting policy in New Zealand *Counting the Cultural Beat* held in August 1999, available online at http://www.nzonair.govt.nz/noa_symposium/symposium.html.

¹⁶ Productivity Commission (2000) *Broadcasting*, Report no. 11, Canberra: AusInfo, p. 26.

¹⁷ On new bottlenecks, see for example Richard A Cawley (1997) “European Aspects of the Regulation of Pay Television” *Telecommunications Policy* vol. 21 no. 7, pp. 677-91; David A. L. Levy (1997) “The Regulation of Digital Conditional Access Systems: A Case Study in European Policy Making” *Telecommunications Policy* vol. 21, pp. 661-76; Dermot Nolan (1997) “Bottlenecks in Pay Television: Impact on Market Development in Europe” *Telecommunications Policy* vol. 21, no. 7, pp. 597-610.

¹⁸ OFTEL (1997) *The Regulation of Conditional Access for Digital Television Services: OFTEL Guidelines*, available online at <http://www.oftel.gov.uk/broadcast/conacc.htm>.

become essential devices to enable the viewer to locate desired content. Navigation aids therefore have the potential to influence viewing patterns, and “any bias in the listing will have serious implications for content providers” and for viewers.¹⁹ The European Directive on the Use of Standards for the Transmission of Television Signals, adopted in 1995, attempts to deal with some of these issues by mandating equal access for all broadcasters to conditional access systems.²⁰

Regulatory Convergence

New market structures for both broadcasting and telecommunications are in Richard Collins’s words changing “the contexts and rationale for regulation”. In many national and international forums both the “substance and the means of regulation” are being reviewed to account for the gradual convergence of communication technologies and services that were one regarded as separate.²¹ Convergence here can be defined as “the combination of both new and existing media—e.g., broadcasting, cable, fibre optics, satellites—into one integrated system for delivery of video, voice, and data”.²² These extensive and interrelated technological, and commercial changes are widely seen as requiring related policy changes to the regulated media and communications sectors. Characteristically the unit for thinking about regulating in this converging environment is no longer that of the specific industry-level of free-to-air TV but the entire envelope including free-to-air, pay-TV, online services including web-TV, datacasting and the telecommunications infrastructure.

A growing body of commentary from the academic, industry and government sectors has argued that convergence creates irresistible pressures to integrate the institutions of telecommunications and media regulation both at the organisational level of regulation, and

¹⁹ Campbell Cowie and Christopher T. Marsden (1998) “Convergence, Competition and Regulation” *International Journal of Communications Law and Policy* no. 1, par. 20. Available online at http://www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_6_1_1998.html.

²⁰ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals *Official Journal L 281* , 23/11/1995 p. 0051 – 0054.

²¹ Richard Collins (2000), "Realising social goals in connectivity and content: the challenge of convergence", in Christopher T. Marsden (ed.) *Regulating the Global Information Society*, London & New York: Routledge, p. 108, 113.

²² Botein quoted in National Association of Broadcasters (NAB) 2000, *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, Comments of the National Association of Broadcasters, MM Docket No. 99-360, Federal Communications Commission. See Botein, *Antitrust Issues in the Telecommunications and Software Industries*, 25 Sw. U.L. Rev. 569 (1996).

at the level of norms, or laws.²³ Some proponents of this view point to regulatory inconsistencies between jurisdictions and between sectors, as well as systemic inflexibility and incapacity to deal with what are now fluid areas and activities. These inconsistencies are said to create inefficiencies and inhibit the achievement of the full benefits of convergence. Others argue that the movement to transaction-based models and the decline of mass universal channels weaken the case for the special regulation of broadcasting. Yet digitisation may actually increase public dependence on screen-based media for information, entertainment, education and other public services. It seems likely then that there will be a continuing need for regulators with specialist skills and expertise in managing a regulatory framework which serves the public interest in broadcasting, and in particular protects the interests of children. The social bases for regulation may need to be strengthened, informed by arguments for children's programming, regional programming, and diversity in programming on social rather than cultural grounds.

The notion of convergence calls for systematic re-evaluation of both the content of the differing objectives undergirding telecommunications and broadcasting regimes and an evaluation of the compatibility of their various instruments for delivery. The recent DCITA *Convergence Review* provides a step in this direction. It argued that "(p)olicy strategies designed to address industry-level issues must be constructed within a common policy framework for the entire convergence sector".²⁴

While there is broad agreement on the need for the convergence of telecommunications technology to be accompanied by a convergence in regulatory treatment to guard against disparate treatment among content providers and take advantage of the benefits of convergence, there is no broad agreement on how regulatory convergence can be achieved. Telecommunications policy in the aftermath of deregulation has tended to define the

²³ Much of this debate was sparked by a report prepared for the European Commission's Information Society Directorate-General, KPMG (1996) *Public Policy Issues Arising From Telecommunications and Audiovisual Convergence*, a report prepared for DG XIII, London September 1996. The idea was taken up and promoted by Commissioner Martin Bangemann in a number of key speeches. See also Natascha Just and Michael Latzer (2000) "EU Competition Policy and Market Power Control in the Mediamatics Era" *Telecommunications Policy* vol 24 pp. 395-411; Richard Collins (1998) "Back to the Future: Digital Television and Convergence in the United Kingdom" *Telecommunications Policy* vol 22 pp. 383-96; Trine Syvertsen (2000) "From PSB to Me-TV? Television, Convergence and Media Policy: The Case of Norway", paper presented to IAMCR Conference, Singapore, July; Productivity Commission (2000) *Broadcasting Report no. 11*, Canberra: Ausinfo; DCITA (2000) *Convergence Review Report*.

²⁴ Department of Communications, Information Technology and the Arts (2000), *Convergence Review*, Canberra: DCITA, p. 31.

regulatory function as one of serving the public interest by securing competition and assisting the smooth functioning of the market. Broadcasting policy on the other hand has traditionally been oriented around controls on market entry whereby the public interest is secured and served by the exercise of particular regulatory powers as trade-offs (or *quid pro quos*) for those controls.

Various proposals have been advanced for the development of a framework within which regulatory convergence might be achieved. Around the world there is a discernible trend towards the agglomeration of telecommunications and broadcasting regulators into single regulatory bodies. This trend marks the acceptance of the argument that in Collins' words "integration and substitutability mean that a single regulatory doctrine is required".²⁵ In Britain, one of the key recommendations of the recently released White Paper *A New Future for Communications*, is the establishment of a single regulator, OFCOM, with broad responsibilities for communications regulation. In countries as diverse as Bosnia Herzegovina and India bills are either before Parliament or have recently been passed which have similar aims. Any "single regulatory doctrine" would need to bring together the rationales for broadcasting and telecommunications in some way. Emerging regulatory models are increasingly favouring a consumer orientation derived from telecommunications and emphasising notions of access, consumer rights and market facilitation. The civic thrust of older broadcast regulatory regimes with its emphasis on gate keeping appears to be giving way to a regulatory regime based on market facilitation.

Trade Liberalisation

Although the World Trade Organisation's (WTO) Third Ministerial Conference in Seattle in November 1999 failed to agree on a work program for the Millennium Round of multilateral trade negotiations, and disagreed over the scope of the issues to be covered by the round, negotiations on trade in audiovisual services must recommence at some point during the current round. It is often erroneously assumed that the European Union, with assistance from Canada, Australia and a number of other countries, negotiated a cultural exemption in the 1994 General Agreement on Trade in Services (GATS). Some basic obligations entailed in the GATS are outlined in the box below. In fact, the EU negotiated a cultural *exception*, or an agreement to disagree, which must be revisited in accordance with the WTO objective of "progressive liberalisation" which requires Member countries to progressively extend market access to foreign service suppliers.

²⁵ Richard Collins (2000) "Realising social goals in connectivity and content: The challenge of convergence" in Christopher T. Marsden (ed.) *Regulating the Global Information Society*, London & New York: Routledge, p. 109.

Obligations under the GATS

General obligations under the GATS apply to all service sectors. They include:

Most-Favoured-Nation Treatment (Article II). Unless specific exemptions are taken, member states must “immediately and unconditionally” treat the services and service suppliers of any other members “no less favourably” than they treat like services and service suppliers of any other country. That is to say, signatories of the GATS must not discriminate against services or service providers, but must treat them as favourably as the “most-favoured” trading partner.²⁶

Transparency (Article III). Members are obliged to inform other members of all relevant trade measures including international agreements, changes to existing laws, regulations or administrative guidelines which affect trade in services covered by the member’s specific commitments under the GATS.

Economic Integration (Article V). Members are able to enter into bilateral or multilateral agreements liberalising trade in services as long as these agreements work to eliminate “existing discriminatory measures” and prohibit “new or more discriminatory measures”.²⁷

Subsidies (Article XV). Member states are expected to exchange information concerning all subsidies related to trade in services that they provide to domestic service suppliers, and “enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects”.²⁸ Subsidies will be another focal point of the current round. There is no current obligation on Members to eliminate subsidies. However, the wording of this article makes it clear that negotiations are expected to explore ways to eliminate measures which benefit domestic suppliers.

Specific obligations apply to particular sectors nominated by each member. They include:

Market Access (Article XVI). In sectors where members make market-access commitments, they will *not* be able to limit the number of service suppliers; limit the total value of service transactions; limit employment in a sector; restrict the supply of a service by placing conditions on joint ventures; or limit foreign capital investment or levels of foreign shareholding.

National Treatment (Article XVII). Members are required to treat foreign services and service suppliers no less favourably than they treat domestic services and service suppliers.

Like the EU and the majority of negotiating nations at that time, Australia did not make specific commitments to liberalise trade in the audiovisual sector in the Uruguay round which concluded in 1993. Australia, again like the EU, took out exceptions to the “Most Favoured Nation” rule for the purposes of cultural preservation to enable the retention of measures which support the domestic audiovisual sector, such as broadcasting quotas, subsidy mechanisms, and co-production agreements.

²⁶ General Agreement on Trade in Services, as reprinted in World Trade Organisation (1999) *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* Cambridge: Cambridge University Press, p. 287.

²⁷ *Ibid.* p. 289.

²⁸ *Ibid.* p. 298.

In 1999 the Department of Foreign Affairs and Trade conducted public consultations on its future negotiating strategy. It received a number of submissions arguing for the retention of protections on account of the existing prominence of imported material on Australian screens. As the effects of convergence begin to be felt in the media and communications sector here and overseas, including the consolidation of media corporations and calls for regulatory reform, both external and internal pressures may be brought to bear on government to adjust previous positions. Although negotiations have not yet reached the 'request and offer' stage during which WTO members negotiate additional commitments, it is clear that the Australian government's primary focus in this round is on agriculture. Despite the fact that on a number of occasions a commitment to some form of cultural exception or exemption has been made by Australian Government agencies, departments, ministers, and Parliamentary committees,²⁹ positions on audiovisual services and other lower priority areas could become bargaining chips to be traded away in order to achieve the desired result in agriculture.

In April 2001, Australian Trade Minister Mark Vaile announced the Australian Government's intention to seek a bilateral trade treaty with the United States of America. At the time of writing, formal negotiations have yet to begin and Australia's position on cultural industries, products and services is unclear. The experience of other countries in dealing with the United States bilaterally or trilaterally on cultural issues may however be instructive of both possible strategies and ramifications.

In its bilateral free trade agreement (CUSFTA) with the United States, the Canadian government negotiated an exemption for cultural industries which allowed the Parties to make and maintain cultural policies which gave preferential treatment to their cultural industries. In practice of course, only Canada made use of this provision since the United States' position on trade in cultural goods and services has always been that they are no different from other goods and services, and should not be subject to "protectionist" measures which distort market activity. The cultural exemption in the CUSFTA has been interpreted as a hollow victory for the Canadians because the United States retained the right to retaliate in other trade sectors if Canada took any steps which were perceived to be against American interests. Canada was free to maintain cultural measures which acted as barriers to free trade, as long as it was prepared to wear retaliatory action as and when the Americans

²⁹ See for example ABA (1998) Submission to the Joint Standing Committee on Treaties' Inquiry into the Multilateral Agreement on Investment; Joint Standing Committee on Treaties (1999) *Multilateral Agreement on Investment Final Report* Report no. 18, p. 72-3; Senate Environment, Communications, Information Technology and the Arts Legislation Committee (1999) "Australian Content Standard for Television & Paragraph 160(d) of the *Broadcasting Services Act 1992*" Report, February; DCITA (1999) "Australian Content on Television" media release 27/99, 19 March.

determined that their interests were threatened.³⁰ In fact, despite the negotiation of the cultural exemption, the Canadian Government did abandon or amend some existing measures on which it could have been challenged under the agreement, such as the Capital Cost Allowance incentive for investment in Canadian films and television programs which was dramatically reduced, and a 1985 policy restricting foreign control of book publishers and distributors which was quietly dropped. The addition of the clause allowing the United States to take retaliatory measures effectively meant that for the first time Canada acknowledged that by taking any action to limit the operation of American companies in Canadian cultural sectors it would be acting in a manner that could invite legitimate commercial retaliation in any other sector.

During negotiations to establish a North American Free Trade Agreement (NAFTA) which would extend the bilateral agreement between Canada and the United States to include Mexico, American media interests lobbied strongly against the inclusion of a cultural exemption along the lines of the bilateral treaty. Canadian negotiators were however able to secure agreement that in matters relating to cultural industries, “the rights and obligations between Canada and any other Party ... shall be identical to those applying between Canada and the United States”.³¹ That is to say, the cultural exemption under the CUSFTA was maintained under NAFTA and expanded to include not only cultural enterprises, but also natural persons working in the cultural industries. American sectoral interests may have been pacified by the inclusion of broad intellectual property provisions in NAFTA. The Canadian Government has subsequently included a similar cultural exemption agreement in bilateral free trade agreements with Chile and Israel, and in a number of bilateral Foreign Investment Protection Agreements.³² But while the exemptions in these subsequent agreements are absolute, because the exemption in NAFTA is based on that in the 1988 bilateral agreement with the USA, it is conditional because it retains the right of retaliation for commercial losses.

The compromise between the United States and Canada over the cultural exemption had its most serious test in a dispute over “split-run” magazines. In 1965, the Canadian government imposed a tariff which prohibited the importation in to Canada of American magazines which contained editorial content not specifically directed at Canadian readers, and advertisements primarily directed to the Canadian market which did not appear in identical

³⁰ Ivan Bernier (1998) “Cultural Goods and Services in International Trade Law” in Dennis Browne (ed.) *The Culture/Trade Quandary: Canada’s Policy Options* Ottawa: Center for Trade Policy and Law, p. 123.

³¹ Ivan Bernier (1998) “Cultural Goods and Services in International Trade Law” in Dennis Browne (ed.) *The Culture/Trade Quandary: Canada’s Policy Options* Ottawa: Center for Trade Policy and Law, p. 122.

³² Dennis Browne (1998) “Introduction” in Dennis Browne (ed.) *The Culture/Trade Quandary: Canada’s Policy Options* Ottawa: Center for Trade Policy and Law, p. 11.

form in all issues of the magazine distributed in the US. The tariff formed part of the wide-ranging set of measures developed in Canada to protect cultural industries and practitioners. The imposition of the tariff assisted in building the number and circulation of Canadian magazines within Canada, but the market remains dominated by American magazines. In 1993 the Time-Warner publication *Sports Illustrated* announced plans to publish a “split-run” Canadian issue. Technological advances, specifically the capacity to transmit the magazine’s content into Canada via satellite and print the magazine at Canadian plants, allowed Time-Warner to circumvent the 1965 tariff. In response, the Canadian government established a Task Force on the Canadian Magazine Industry to investigate options for federal support. The Task Force recommended the imposition of an 80% excise tax on advertising revenue generated by split-run magazines, which was enacted in December 1995. The imposition of the excise tax immediately forced the cessation of publication of *Sports Illustrated’s* Canadian edition. In March 1996, the United States began proceedings against Canada through the WTO’s dispute resolution mechanisms alleging that the excise tax and a number of other measures including a postal subsidy for Canadian magazines were inconsistent with Canada’s commitments under the General Agreement on Tariffs and Trade (GATT) 1994.

The decision to tackle Canada under WTO rules rather than under those of NAFTA ensured that Canada was not able to invoke the cultural exemption as a defence of its actions. In March 1997, the panel established by the Dispute Settlement Body of the WTO released its final report, which ruled against Canada on three of the four measures contested by the US. The matter then went to the Appellate Body which released its report in June 1997. That report ruled against Canada on all four measures. As a result Canada was forced to repeal the original tariff, amend the Excise Tax Act, amend the postal subsidy, and harmonise commercial postal rates. Although the panel had declared that “cultural identity was not at issue”³³ in the dispute, many commentators have read the rulings as an indication that the WTO is fundamentally unable to evaluate the cultural content of goods and services or to understand the cultural rationales behind particular policies, regulations or laws.

In response to the outcome of the periodicals dispute, a number of proposals have been made to ensure that cultural policy making of this kind remains possible and does not breach obligations under WTO rules or under any other trade agreement. These include the development of a multilateral agreement on the rules of trade in culture;³⁴ the negotiation of a

³³ WTO Panel Report (1997) *Canada – Certain Measures Concerning Periodicals*, 14 March, WT/DS31/R.

³⁴ Trevor Knight (1999) “The Dual Nature of Cultural Products: An Analysis of the World Trade Organisation’s Decisions Regarding Canadian Periodicals” *University of Toronto Faculty of Law Review* vol. 57 no. 2 pp. 165-91.

cultural waiver;³⁵ and the initiation of a new international instrument on cultural diversity.³⁶ The Department of Canadian Heritage has been prominent in exploring opportunities for international discussion and collaboration on cultural issues at both governmental and non-governmental level. These include the International Network on Cultural Policy, a network of over 40 national cultural ministers which was established in 1998 following the Stockholm UNESCO *Intergovernmental Conference on Cultural Policies for Development*, and the International Network for Cultural Diversity, a network of over 200 non-government organisations. The Canadians see these fora as important sites at which international coalitions premised on the preservation and maintenance of cultural sovereignty mechanisms such as content regulations may be established. They offer, in John Braithwaite and Peter Drahos's terms, an example of the practice of "forum shifting" whereby discussion and the potential for multilateral or a series of bilateral deals moves to a new decision-making forum.³⁷

New support mechanisms in New Zealand

The introduction of new production support mechanisms in New Zealand may affect the levels of New Zealand programming purchased by Australian broadcasters to fill the current local content quota. In May 2000, the New Zealand government announced the allocation of NZ\$22 million to a new feature film production fund as part of a new program of assistance for the arts. The government contribution will be supplemented by a contribution of NZ\$5 million from the New Zealand Film Commission.³⁸ NZ On Air's budget for television production has also been increased by NZ\$8 million to NZ\$54 million for the year 2000-2001.³⁹

³⁵ Chios C. Carmody (1999) "When 'Cultural Identity was not at Issue': Thinking about Canada – Certain Measures Concerning Periodicals" *Law and Policy in International Business* vol. 30, no. 2.

³⁶ The Cultural Industries Sectoral Advisory Group on International Trade (1999) *Canadian New Strategies for Culture and Trade: Culture in a Global World* Report. Available online at <http://www.infoexport.gc.ca/trade-culture>.

³⁷ John Braithwaite and Peter Drahos (2000) *Global Business Regulation* Cambridge: Cambridge University Press, pp. 28-9.

³⁸ Sandy George (2000) "New Zealand boosts production with \$10m Fund" *Screen Daily* 22 May.

³⁹ NZ On Air (2000) *Statement of Intent 2000-2001* p. 12. Available online at <http://www.nzonair.govt.nz/soi2021/index.htm>

Changes in the Australian production industry

A more significant issue, with immediate consequences for policy, is the impact on the Australian audiovisual production of increases in production by non-Australian companies. Foreign players are increasingly prominent in the domestic market, both in terms of the growth in “runaway” production and of co-production or joint venture arrangements. Industry opinion is divided as to the long term value of this wave of investment. Some see co-production or joint venture arrangements as presenting a new challenge to the current cultural policy framework. Under such arrangements foreign firms may make product which complies with the creative elements test, but which is perceived by some commentators, industry and agency representatives as having little Australian cultural relevance. The effect of these arguments may potentially recast the creative elements test in the direction of a ‘look and feel’ test.

3 International Policy Models

Australian policymakers can learn from new initiatives in other countries. At the workshop organised by the ABA in February 2001, a number of speakers raised the issue of how applicable international models and practice were to Australian circumstance. It is worth remembering that the Australian system has distinct rationales and objectives; that it is the result of the distinctive history of communications in this country; and that it remains an unusual combination of public, commercial, community and subscription sectors. There is however considerable value in a thorough discussion of international models and in exploring their applicability to Australia. Local broadcasting practice and policy making does not occur in isolation from international practice and policy, and considerable learning occurs throughout the system as international innovations are modified and adapted to local circumstances; Australia is no exception in that regard. Furthermore, policy makers, industry associations, broadcasters and interest groups see themselves as working in a context of convergence and internationalisation, and depend increasingly on a working knowledge of international practice and developments. Perhaps the most compelling reason for looking overseas, however, is that Australia has a comparatively undeveloped broadcasting industry in comparison to our US, Canadian, Western European, Singaporean and Hong Kong counterparts.

This part describes a selection of recent policy developments overseas, and considers their relevance for Australia. As David A Levy (1999) notes in *Europe's Digital Revolution: Broadcasting, the EU and the Nation State*, there has been no common response to digitisation. Models developed in different countries have been driven by the particular political and market structures pertaining in those countries. For this reason, caution is urged in mapping models on to the Australian context.

European models

The European Union: Quotas, “Must Carry” rules and Public Service Broadcasters

The *Television Without Frontiers* Directive⁴⁰ requires broadcasters to screen a majority of European programming “where practicable”, and to reserve 10% of air-time or program budget for productions sourced from independent companies within the EU. Additional cultural or public interest obligations on broadcasters tend to be confined to the public broadcasting sector. In the private terrestrial broadcasting sector, measures to achieve the public interest goal of media pluralism or diversity tend to take the form of ownership and control restrictions such as market share (or “share of voice”) limits. This can be seen to be a legacy of the relatively recent end in many countries of the monopoly in broadcasting

⁴⁰ 89/552/EEC and 97/36/EC.

services enjoyed by state-owned public broadcasters. The digital television market in Europe is dominated by subscription satellite and cable services. Given that additional cultural or public interest obligations tend to be concentrated in the public broadcasting sector, most EU member states have introduced “must carry” requirements on digital cable and satellite operators to ensure that as transmission services multiply, viewers retain access to public service broadcasting.⁴¹ In a number of countries, priority access or “gifted” capacity has been given (or is planned to be given) to incumbent terrestrial broadcasters, as in Australia.⁴² And several countries have reserved capacity for local or regional stations.⁴³ A number of public broadcasters including ARD, BBC, France Television, RAI and ORF either have launched or are preparing to launch themed channels and interactive services in order to compete with the c. 650 channels now available in Europe (c. 300 of which might be described as “thematic”).

A number of European commentators point to the difficulty of adequately policing the combination of an air-time or program budget based quota system, and question the effectiveness of the policy in achieving its stated aims. One commentator argues that the quota system was counter productive, since at a time when broadcasting markets were expanding, production costs and licence fees were pushed up by the imposition of production quotas.⁴⁴ In addition, not all European member states supported the system with

⁴¹ The following EU member countries have introduced “must carry” requirements: UK, Denmark (which requires cable operators carrying 8 or more channels to make one available for local television programming), Austria, Belgium, France, Germany, Finland, Ireland, the Netherlands, Portugal (which requires cable operators to distribute “video or radio signals from non-profit entities for research, educational and cultural purposes”), Spain, Sweden. Source: OECD (1999) *Communications Outlook 1999: Broadcasting: Regulatory Issues Questionnaires*.

⁴² “In Ireland for instance, RTE will be allocated exclusive use of the widest coverage multiplex of the six multiplexes identified. The second multiplex will jointly be allocated to TV3 and Tnag, while the third will be granted to the UK terrestrial TV channels. In Italy, the government orientation is to assign one terrestrial multiplex to public broadcaster RAI, one to commercial TV Mediaset and two to other operators, eventual new entrants. In Spain, 4 channels will be granted to the existing terrestrial national and regional TV stations. It is likely that in France, capacity (at least 2 channels) will be given in priority to 6 terrestrial national broadcasters.” IDATE (2000) *Development of Digital Television in the European Union* Final Report, June, p. 36.

⁴³ This is the case in Sweden and Spain, and is mooted in France. Ibid. p. 38.

⁴⁴ Bill Grantham (2000) *‘Some Big Bourgeois Brothel’: Contexts for France’s Culture Wars with Hollywood*, Luton: University of Luton Press, p. 145.

as much dedication as did France because of their desire to retain national controls.⁴⁵ This creates difficulties in that EU policy and guidelines are interpreted in different ways, leading to varying degrees of compliance within national borders. Another commentator has argued that the directive worked to weaken national controls and actually enabled the entry of American programming because no limits were placed on imported programming, and because the definition of ‘European works’ extended to official co-productions and programs made in Europe by non-European producers.⁴⁶ And while many of these directives have been aimed at creating a pan-European broadcasting market, there is now considerable evidence to suggest that benefits (in terms of popularity) have flowed to national programming rather than European programming.⁴⁷ The EU has been more successful in its development of pan-European production subsidy systems.

United Kingdom 1: Production Quotas and the Digital Licence Fee

As a member of the EU, the UK requires terrestrial, cable and satellite broadcasting service providers to comply with Article 4 of the *Television Without Frontiers* Directive and devote a majority of transmission time to European works. In addition, a proportion of programming provided by all providers in specific categories must be sourced from independent production companies.⁴⁸ Channel 3 (ITV) regional licensees are expected to produce or commission 65% of programming (measured by time), of which 80% must be made in the region served.

There is ongoing discussion in Britain about the viability of introducing an additional Digital Licence Fee (DLF) to fund BBC digital programming. In a report for the Department of Culture, Media and Sport on future funding options for the Corporation, the Independent Review Panel identified additional licence revenue as one of the two main sources of finance for digital programming. The Report strongly recommended a digital “user pays” model. To avoid unfairly charging “analogue households” for the development of digital services which they would be unable to receive, the Report recommended charging a digital supplement on the licence fee at a set rate until the date specified for analog switch off, at which point the

⁴⁵ Heather Field (2000) “European Media Regulation: The Increasing Importance of the Supranational” *Media International Australia incorporating Culture and Policy* no. 95, p. 95.

⁴⁶ Shalini Venturelli (1998) *Liberalizing the European Media* Oxford: Clarendon Press, pp. 202-5.

⁴⁷ See Miquel de Moragas Spá, Carmelo Garitaonandía and Bernat López (eds) (1999) *Television on Your Doorstep: Decentralisation Experiences in the European Union* Luton: University of Luton Press.

⁴⁸ For BBC, channel 3 and channel 5 licensees the quota is 25%, while for cable and satellite broadcasters the quota is 10%. Source: OECD (1999) *Communications Outlook 1999 Broadcasting: Regulatory Issues Questionnaire: UK* pp. 5-6.

rate would fall with the expectation that the supplement would eventually be phased out “so as not to preclude an early date for analogue switch-over”.⁴⁹ Commercial broadcasters opposed the additional fee, arguing that “by April 2008 the DLF would reduce digital homes by 5.2 million or 20% of television households”.⁵⁰ In its response to the Panel’s Report, the Government agreed with the recommendations that the BBC required additional funding “to ensure that it continues to act as a benchmark of quality in the digital world”, and that the majority of the additional revenue (c. £1.1 billion) would be raised internally through “increased efficiency savings, reduced bureaucracy, and from public-private partnerships and joint ventures”.⁵¹ But the Government did not adopt the Panel’s recommendation for a DLF, choosing instead to increase the television licence fee by 1.5% above the rate of inflation between April 2000 and 2006-07. This move was expected to earn the BBC an additional £200 million per year on average.

Proposals for fees or levies to subsidise content production have been made in the Australian context. For example, in a submission to the recent Productivity Commission inquiry, the Federation of Australian Commercial Television Stations (FACTS) proposed the establishment of a production fund “drawn from a modest levy on subscriber revenues for subscription broadcasting services, and on datacasting services (if they are permitted to provide television-like services)”.⁵²

Similarly SPAA has argued for an independent production quota modelled on these British precedents and adjusted to Australian circumstances. SPAA argues that “The independent sector largely competes for the approximately 10% of transmission time (from 6am – midnight) devoted [to] Australian drama, children’s programs and documentaries”. To increase this share, SPAA proposes the introduction of an independent production quota set at a minimum of 25% overall transmission and 50% for drama. But there are some difficulties in applying an independent production quota in the Australian context. The British

⁴⁹ Independent Review Panel (1999) *The Future Funding of the BBC* Report to the Department of Culture, Media and Sport, July, p. 6. The Board calculated the appropriate level for the DLF supplement as an average of £1.57 a month over the seven years to 2006, falling to 99p a month at the end of the period.

⁵⁰ Stephen Creigh-Tyte (2000) *The Impact of a Digital Licence Fee on Digital TV Adoption: An Assessment* Department of Culture, Media and Sport Technical Paper no. 1, February, p. 11, citing a report commissioned by a group of commercial broadcasters. Creigh-Tyte argues that the commissioned report overestimates the negative effect on digital take-up.

⁵¹ Department of Culture, Media and Sport (2000) *The Funding of the BBC: Government Response to the Third Report from the Culture, Media and Sport Committee, Session 1999-2000*, March, p. 1.

⁵² FACTS (1999) Submission to the Productivity Commission Broadcasting Inquiry no. DR231, p. 11.

regulations are designed to open up the BBC and ITV production slates to independent production companies, giving such companies greater power in their negotiations with these broadcasters. Moran's study of television drama production in Australia documented the significant outsourcing of drama production by Australian commercial television networks in the mid-1960s.⁵³ This practice has continued to the present day and provided the basis for the development of production companies such as Grundys, Artist Services, and Southern Star.

The emphasis on regional programming both in the UK and in Canada⁵⁴ as a means to increase local content may be worth exploring further in the Australian context. The introduction of datacasting and any future extension of multichannelling may offer the opportunity to institute some form of regional requirement upon service providers.

United Kingdom 2: A Sliding Scale of Regulation

The UK Government's media policy White Paper, *A New Future for Communications* proposes a sliding scale of content regulation for complex media environments. The proposal was foreshadowed, although not precisely anticipated, in a paper by Damian Tambini and Liz Forgan which outlined a regulatory model calibrated by "consumer expectations and market share" (see the box below). The two indicators would determine the "broad regulatory band" in to which a service would fall. In addition, the Tambini and Forgan model offered the benefit of constant testing against consumer attitudes, since "consumer expectations" could be systematically determined by a cumulation of methods: traditional research methods employed by market research companies; special surveys; complaints logs; and "citizen's juries", or community panels. And it can be adapted to apply to a range of current or future broadcasting services. The 1998 document *Charting the Digital Broadcasting Future* by the U.S. Advisory Committee on Public Interest Obligations of Digital Television Broadcasters made a similar recommendation for ongoing public input through postal and electronic mail services whereby digital broadcasters gauge community needs and interests.⁵⁵

⁵³ Albert Moran (1985) *Images and Industry: Television Drama Production in Australia* Sydney: Currency Press.

⁵⁴ See below, Part 3.

⁵⁵ See below, Part 3. The Advisory Committee is popularly known as the Gore Commission. Its report is available online at <<http://www.ntia.doc.gov/pubintadvcom/pubint.htm>>

Regulation according to consumer expectations and market share

As part of the British Government's development of a regulatory framework appropriate for the digital broadcasting environment, a number of 'expert papers' were commissioned from leading scholars, consultants and industry figures. These papers informed the Government's thinking in developing the White Paper, *A New Future for Communications* which was released in December 2000.⁵⁶ The expert papers are available on the website of the Department of Culture, Media and Sport.⁵⁷

One such paper focussing specifically on content regulation was prepared by Liz Forgan and Damien Tambini. Forgan and Tambini recommend the replacement of the principle of detailed regulation of all broadcasting with a formal version of the "existing de facto sliding scale of regulation according to the degree of consumer expectation of regulation and market share", or CEMS.

At opposite ends of the scale are the heavily regulated core public channels (BBC and Channel 4) with a remit to provide a broad, universally accessible service, and lightly or unregulated channels targeted at niche audiences. Beginning from the twin premises that regulation can no longer be technology-specific, and that a distinction must be maintained between "invasive mass media where content regulation applies" and "private media where freedom of speech concerns prevail", Forgan and Tambini propose "a single graded classification of communications services irrespective of delivery method which would take account both of historic and of developing circumstances". Under this scheme, content regulation is determined partly on the basis of the "privileges" the content provider enjoys (for example, extent of spectrum access, EPG prominence, or "must carry" status), and partly on the basis of an index measuring invasiveness, pervasiveness, "publicness" and influence by the two indicators, consumer expectations and market share.

But while the model offers the benefits of flexibility and adaptability, it also contains substantial "regulatory risk" in that the proposal to submit content regulation to constant testing against community attitudes may offer little certainty for investors and local content producers in planning production activity. In the Australian context, considerable thought would also need to be given to the ways in which citizens' juries or community panels might be constituted and function, given Australia's geographically dispersed and culturally diverse population. A community assessment panel system was established in 1996 to test whether the Classification Board's decisions are in line with community standards, but the six panels conducted to date have all been in major metropolitan or large regional centres. Nonetheless the principle of the sliding scale provides an important elaboration of what a system of a differential content regulation system involving more individuated negotiations between regulator and regulated might look like in a multichannel environment.

The White Paper, released in December 2000, does not adopt the CEMS model in its entirety, but the new regulatory framework does appear to borrow from Forgan and Tambini's ideas.

⁵⁶ Department of Trade and Industry and Department of Culture, Media and Sport (2000) *A New Future for Communications*, December.

⁵⁷ http://www.culture.gov.uk/creative/dti-dcms_comms-reform_white_paper.html

The priorities of flexibility and the sliding scale or differential regulation among broadcasters are maintained. The White Paper proposes four tiers of regulation for broadcasting. The first establishes standards across all broadcasting services for negative content, advertising and sponsorship, fairness and accuracy in news. The second empowers the new single regulator, OFCOM, to regulate quantitative and measurable obligations of 'the public service broadcasters', which the White Paper understands to include not only the BBC, Channel 4 and Channel 5, but also the commercial ITV network. These statutory obligations include independent and original production quotas, regional production and programming targets, and peak time news services. The third tier consists of qualitative obligations relating to program mix in the form of legislated levels of educational, children's, religious, arts, science and international affairs programming for public service broadcasters other than the BBC. The BBC must fulfil additional content requirements under the terms of its Charter and Agreement. The fourth tier, "tier zero"⁵⁸ governs broadcasting on the Internet and via telephony. Certain evaluative mechanisms are flagged. OFCOM will have the power to conduct surveys and citizens' juries, and to "establish bodies to reflect the public interest in the content of communications services".⁵⁹ In addition, an independently appointed consumer panel will ensure that consumer interests, which are described as "the heart of future regulation" are protected.

United Kingdom 3: Public Service Fund

In its submission to the Communications Reform White Paper, the Producers' Alliance for Cinema and Television (PACT), a trade association representing independent producers, proposed the establishment of a public service fund independent of public service broadcasters and financed from revenue raised from the auctioning of spectrum freed by the switchover to digital. PACT suggested the fund work towards encouraging "the provision of local television services and public service programming for groups who are ill-served by current provision, such as minority groups".⁶⁰ No mechanism was suggested to ensure that programming produced through such a fund would be screened.

⁵⁸ Department of Trade and Industry and Department of Culture, Media and Sport (2000) *A New Future for Communications*, December, p. 56.

⁵⁹ Department of Trade and Industry and Department of Culture, Media and Sport (2000) *A New Future for Communications*, December, p. 72.

⁶⁰ PACT (2000) "Consultation on the Scope of the Communications Reform White Paper", available online at <http://www.pact.co.uk/pprel00/default.asp>.

Iceland: Public Broadcasting and Advertising Supported Subsidy⁶¹

As in most European countries, in Iceland cultural obligations are centred on the public broadcasting sector, although both public and private broadcasters are expected to promote Icelandic culture and language. 10% of advertising revenue is directed to the Broadcasting Cultural Fund (Menningarsjodur utvarpsstodva). The Fund provides finance to broadcasters and independent producers for the production of cultural and educational programming. Between 1994 and 1999, domestic content comprised just over 30% of programming on the public broadcaster RUV-TV, just over 13% on the private Channel 2, and under 3% on the private Vision TV which began operation in 1996.

The Icelandic approach has the advantage of transparency, although the system has failed to meet its objectives of achieving 50% Icelandic content on any channel. As submissions to the Productivity Commission inquiry made clear, Australian broadcasters would be likely to resist anything that looked like a levy or a tax on their revenues to support program production, especially since the current broadcasting licence fee is derived from advertising revenue. Recent Australian governments appear to have been more inclined to discount or rebate broadcasting fees rather than add new elements to them.

Finland: Contestable funds

Under the *Yleisradio Oy Act 1993* the state-owned broadcaster YLE has a series of public interest obligations. To enable it to fulfil programming requirements, YLE's operations are funded in three ways: a public television licence fee, "public service fees" levied on commercial television operators, and revenue raised from advertising during sports broadcasts. The Finnish Competition Authority raised concerns about the obligation upon YLE's competitors to support the public broadcaster's news, current affairs and cultural and minority language programming output since other broadcasters themselves provide similar programs. The Authority recommended the tendering out of YLE's public service obligations to allow all producers to compete for the funds necessary for their production. This suggestion is taken up by the OECD in its report *Regulation and Competition Issues in Broadcasting in the Light of Convergence*.⁶² Subsidies to public broadcasters are argued to distort competition and possibly "contravene the EC Treaty rules on State Aid". As an alternative, the OECD recommends the introduction of "a system of contestable funds under which

⁶¹ See Ragnar Karlsson, Hilmar Thor Bjarnason, Thorbjörn Broddason & Margret Lilja Gudmundsdottir, (2000) "Performance of Public and Private Television in Iceland 1993–1999: An Assessment 1" *Nordicom Review* no 1, pp. 101-42.

⁶² OECD (1999) *Regulation and Competition Issues in Broadcasting in the Light of Convergence*, DAF/CLP(99)1.

broadcasters compete with each other for the screening of content which meets the ‘public service’ criteria”.⁶³

While this report is by no means recommending the reallocation of some or all of the public broadcasters’ budgets to contestible funds of the kind outlined above, the question remains where the funds would come from. A reconnection to the licence fee schedule might be one method, but this has a number of problems. An alternative might be the treatment of local content provision as a universal service obligation which can be auctioned in much the same way that spectrum is auctioned.

The United States: Pay or Play and Spectrum Checkoff

Examining US policy-making is particularly important given the pre-eminence of the US broadcasting system internationally, its complex multi-service environment, and the thorough-going character of its regulatory practice. However, despite the concept of broadcasters as “public trustees” with attendant obligations, the US regulatory system is “light touch” in comparison with Australia. While this may limit the relevance of US policy, it may also give us a sense of what a more complex, open and competitive Australian media environment might look like in ten or more years time.

The transition to digital in the United States has given rise to sustained debate over the relevance, meaning, character and best means of realising public interest obligations. Of particular interest are attempts to consider how the public interest “might be achieved in other ways than traditional public trustee content regulation”. Driving this interest in new models has been a concern that “any consideration of digital broadcasting policy should seriously consider the environment of other television and information media within which this new service is being born”.⁶⁴

The public trustee model requires each broadcaster to act as an “agent of the public to ensure that content is transmitted that members of the public wish to receive or from which they might benefit”. Broadcasters have been assisted by the Federal Communications Commission (FCC) and Congress in determining what that content should be by developing a

host of affirmative obligations as well as prohibitions on broadcast content. Among the affirmative obligations have been local coverage, fairness, access and equal time for political candidates, and programming suitable for children. Among the

⁶³ Ibid p. 11.

⁶⁴ Forrest P. Chisman (1998), “Achieving the Public Interest in an Era of Abundance”, in Charles M. Firestone and Amy Korzick Garmer (eds.), *Digital Broadcasting the Public Interest*, Washington, DC: The Aspen Institute, p.121.

prohibition have been cigarette advertising, obscenity, payola, rigged quizzes, and cross-ownership that might bias news reporting.⁶⁵

In practice broadcasters have been given “both discretion and responsibility to decide what they must do to satisfy public wants and needs”. Many affirmative obligations are vague (or flexible, depending on your viewpoint) and do not entail defined public interest obligations. Broadcasters, particularly the National Association of Broadcasters (NAB), promote their role as custodians of the public interest, publicising their collective expenditure on public interest programming and arguing against the introduction of defined numerical quotas “as improperly infringing on the editorial discretion of licensees and implicating First Amendment concerns”.⁶⁶

In this context various models have been advanced for achieving public interest outcomes outside the public trustee framework. Of particular interest here are “pay or play” and “spectrum checkoff” proposals. The “pay or play” option gives broadcasters the option of providing public interest programming of a specified level or quality, or paying another broadcaster to provide that programming. This model draws on the precedent of the *Children’s Television Act* which allows licensees to meet part of their obligations by demonstrating “special efforts ... to produce or support [children’s educational] programming broadcast by another station in the licensee’s Marketplace”.⁶⁷

A variation of this approach, the “spectrum checkoff” model, requires broadcasters to adhere to public interest programming obligations, or pay a fee for the use of spectrum. The revenue raised would then be devoted to the production of public interest programming. The “spectrum checkoff” model is a one-off (or annual) deal, while the “pay or play” model could allow a number of trades in any given year. Both options were among the approaches canvassed by the 1998 report *Charting the Digital Broadcasting Future* by the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters⁶⁸ (popularly known as the Gore Commission) and the Aspen Institute’s Working Group on Digital Broadcasting and the Public Interest (1998).

⁶⁵ Ibid, p. 123.

⁶⁶ Henry L. Baumann, Jack N. Goodman and Jerianne Timmerman (2000), Comments of the National Association of Broadcasters, *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, Federal Communications Commission, Washington, DC: FCC, March 27, p. 36.

⁶⁷ 47 USC 303b(b)(2).

⁶⁸ Available online at <http://www.ntia.doc.gov/pubintadvcom/pubint.htm>.

While both models have not gained acceptance from regulators or Congress to date (and are unlikely to in the near future), they are of interest firstly for their attempt to shift regulatory attention to outcomes in the television market as a whole and away from individual broadcasters; and secondly for their adaptation of regulatory systems developed elsewhere (in this instance, the environmental field through the trading of pollution rights). The goal in these models is that the public in each television market should be well served rather than that particular broadcasters satisfy its [the public's] needs".⁶⁹

Rather than holding each station "responsible for achieving *all* public service goals", the starting point is a much broader view of the mass media service which retains these goals in an era of multicasting and the provision of niche services. As Forrest Chisman puts it "the public simply gets a 'cut of the action' to subsidize other service, for which there is now ample spectrum space". These schemes would "take advantage of the creative resources of broadcasters for public service purposes" and "inject public service programming into the diet of what are presently the dominant media outlets".⁷⁰ The schemes were also presented by proponents as elegant on both administrative and constitutional grounds as "it would be more efficient to simply charge broadcasters a fee to subsidize meritorious programming, rather than try to micro-manage their content". Another feature of both models is that they invite policy makers to distinguish longstanding goals (which do not change) from outcomes (which can). Here the goal of public service by the television industry is achieved through a different means—"pay or play" and "spectrum checkoff" rather than via the public trustee notion. "Pay or Play" is also the first model for tradeable quotas in broadcasting.

In the Australian context, where one could envisage one network paying another to meet some of its drama quotas, these proposals would amount to an adjustment to existing practice. In the United States, they were presented as part of a thoroughgoing restructuring of the broadcasting system. They were promoted as enabling a trade-off where "commercial broadcasters would be relieved of some or all of the content regulation that has been imposed on them as a quid pro quo for paying a spectrum fee or accepting a 'pay or play' system". This deregulatory aspect to the proposals made them distinct from environmental credits where there is no such quid pro quo. At the same time the adoption of either scheme would see the formal abandonment of the public trustee role for broadcasters—something broadcasters and their critics were reluctant to accept, albeit for different reasons.

As both schemes were seen as an attempt to allow or require broadcasters to "subsidize meritorious programming in kind", public broadcasters were seen as the schemes' major beneficiaries. Indeed both schemes have been actively promoted by public interest and public broadcasting advocates who have seen the transition to digital as an opportunity to quantify and elaborate measurable public interest obligations despite the fact that other public interest

⁶⁹ Chisman, *op. cit.*, p.138

⁷⁰ Chisman, *op. cit.*, p. 140, pp.137-138.

advocates have been amongst the most vocal critics of the schemes. Henry Geller, one of these models' most vocal advocates, promoted spectrum check-off as eliminating:

the public trustee content obligation, which requires broadcasters to act to foster the public interest. In its place, the spectrum fee model, or “pay/public broadcasting” model as I will refer to it, would impose a spectrum usage fee on the gross advertising revenues of stations and station sales; the sums so obtained would go to a trust fund for public broadcasting and, in connection with campaign finance reform, a political time bank.⁷¹

With this pedigree, both schemes were widely seen as further attempts to wean public broadcasting from Congressional support by opening up a revenue stream generated from commercial television. The scheme tended to be characterized as another version of developing a “publicly subsidized system to compensate for the deficiencies of commercial broadcasters”—previous attempts included the Killian Commission’s recommendation that public broadcasting be supported by a tax on television set sales (Congress did not support this proposal); in 1979 the Carnegie Commission on public broadcasting suggested support by a spectrum usage fee.

Both models raised a number of issues for both sides of the US broadcasting debate. The proposals met with substantial opposition from representatives of broadcasters and public interest advocates alike. On the one hand both proposals seemed to abandon “the longstanding notion that each broadcaster should be regarded as a public trustee, at least in the sense that each should be required to fulfil all public interest obligations by their own broadcasting operations”.⁷² If implemented broadcasters would be “able to buy themselves out of the deal they had struck”, broadcasting would be conceded as being “just another business”. On the other hand they encountered opposition from the commercial broadcasting industry who were proud of their public interest programming and opposed moves to codify public interest requirements and abandon the public trustee model. With few quantitative regulations in place, “pay or play” in particular could be seen as reinventing previously abandoned principles of regulation.

At the same time a number of objections were raised:

- In neither case was it clear who the recipients should be. Candidates included PBS, public affairs and children’s cable channels, winners of competitive tenders for subsidies, disadvantaged groups whose cable service might be subsidised.

⁷¹ Henry Geller, “Implementation of “Pay” Models and the Existing Public Trustee Model in the Digital Broadcast Era”, in Charles M. Firestone and Amy Korzick Garmer (eds.) (1999), *Digital Broadcasting the Public Interest*, Washington, DC: The Aspen Institute, p.227.

⁷² Chisman, *op. cit.*, p. 138

- Government was putting itself in the business of “determining who is the best purveyor of certain types of content, and, by extension, of determining what content should be supported”.
- The plans offered broadcasters a deregulation quid pro quo in a context where broadcasters could only be relieved of some of their affirmative obligations and none of their negative obligations; given that it is not known how broadcasters would use their digital capacity “it would be best wait and see how the market works”.
- The “public may be confused by more choice and not take advantage of the options available”, with the consequence that subsidising public interest programming may “accomplish very little, because very few people may watch it”.⁷³

When Vice-President Gore wrote to William E. Kennard, then Chairman of the FCC on 20 October 1999 to encourage the FCC to examine ways in which issues raised by the Gore Commission might be implemented,⁷⁴ neither the “pay or play” or “spectrum check-off” model was specified as an area for further investigation. The four issues highlighted in Gore’s letter were “the need for higher quality political discourse, disaster warnings in the digital age, disability access to digital programming, and diversity in broadcasting”. The last issue refers not to programming as such, but rather to “new methods of increasing opportunities for and participation by minorities, women and small businesses”. This focussed on equal opportunity or affirmative action policies and emphasised social obligations and objectives in the regulation of broadcasting. On December 15 1999, the FCC opened an inquiry into the public interest obligations of digital television broadcasters.⁷⁵ The appointment of Commissioner Michael Powell as FCC Chairman in the new Republican Administration has signalled a change of focus for the FCC away from the access and equity issues identified with the Clinton era.

The Gore Commission acknowledged that questions remain as to how public interest obligations should apply to digital television broadcasters that choose to multiplex or multicast. The Report considers whether the licensee’s public interest obligations apply to the signal as a whole, thereby enabling the licensee to determine which of its program streams, or what mix of program streams, would air the public interest programming. Alternatively, the obligations might be applied to each program stream offered by a licensee. The Report recommended that digital television broadcasters who choose to multiplex should assume *greater* public interest obligations, but be permitted the flexibility to choose between paying fees, providing a dedicated public service programming channel, or making in-kind

⁷³ Chisman, *op. cit.*, pp.140-142.

⁷⁴ The FCC letter is reproduced online at <http://www.benton.org/PIAC/vpltr.html>

⁷⁵ FCC 99390/Mass Media Docket No. 99-360.

contributions to fulfil public interest obligations. By contrast both the NAB, members of the Aspen Institute's Working Group on Public Interest Obligations and the current Powell FCC are arguing for a lessening of public interest obligations in a digital environment.

Canada: A refined system of quotas⁷⁶

Canada provides the most sustained example of complex, differential content regulations. As an early adopter of cable and satellite television, Canada has had a long history of operating local content regulations in a fragmented media environment. While there are, as elsewhere, some Canadian concerns about the long term viability of local content regulations, these concerns are not tied up as they are in Australia with the development of additional free-to-air television services (or "conventional" services as they are known in Canada) and a viable subscription television services industry. Rather the concern in Canada is related to further fragmentation of the television audience through "the introduction of new specialty and premium broadcasters", the challenge to the "long-standing primacy of cable" of direct-to-home satellite and wireless cable, and web casting.⁷⁷ Canadian concerns relate to whether these several developments do or do not reshape the economic foundations of an already extensive and mature multichannel television marketplace.

Canadian content requirements apply to both programming services and distribution undertakings. Under the Broadcasting Distribution Regulations, all licensees of cable services, Direct-to-Home (DTH) satellite distribution undertakings, and multi-point distribution systems (MDS) must ensure that a majority of video and audio channels received by subscribers are Canadian programming services. Expenditure requirements also apply, with distribution service providers required to make financial contributions to an independent production fund which will support the production of new, quality Canadian programming. Typically the contribution is expected to be a minimum of 5% of annual gross revenues, of which a minimum 80% must be directed to the Canadian Television Fund (see below), and the remainder directed to one or more independently administered funds.

As in Australia, the Canadian system of local (program) content regulation is a mix of general and generic content quotas. The *Broadcasting Act* 1991, specifies under section 3(1)(e), that public, private and community elements of the broadcasting system operating in the French and English languages are required "to contribute in an appropriate manner to the creation and presentation of Canadian programming". Section 3(1)(s)(iv) requires that programming "include a significant contribution from the Canadian independent production sector" as a means to ensure that a diversity of inputs into the broadcasting system is maintained.

⁷⁶ All financial figures referred to in this part are in Canadian dollars.

⁷⁷ Canadian Conference of the Arts (1998) *Report of the Working Group on Cultural Policy for the 21st Century*, Ottawa: Canadian Conference of the Arts, p. 38.

Levels of Canadian content for conventional (ie. free to air) public and private broadcasters are specified in the Television Broadcasting Regulations (SOR 87/49). As per section 2(6), all licensees are required “to devote not less than 60% of the broadcast year and of any six month period specified in a condition of licence” to the broadcasting of Canadian programs.

Under section 2(7)(a), public broadcasting licence holders (ie. the Canadian Broadcasting Corporation) are required to “devote not less than 60% of the evening broadcast period” to the broadcasting of Canadian programs. The new television policy *Building on Success – A Policy Framework for Canadian Television* lays particular emphasis on the broadcasting of Canadian programs in peak or prime time,⁷⁸ and with this in mind the CBC English and French language television services committed to a minimum level of 75% Canadian content throughout the broadcast day and a minimum level of 80% during peak viewing periods at hearings on the renewal of the Corporation’s licences in 1999.

Private broadcasting licence holders are required under section 2(7)(b) of the Television Broadcasting Regulations to “devote not less than 50% of the evening broadcast period to the broadcasting of Canadian programs”. The criteria used to define a Canadian program are set out in two appendices to Public Notice CRTC 2000-42 dated March 17, 2000, entitled *Certification for Canadian Programs - A Revised Approach*.

Analog and digital pay television services (defined as television services such as those consisting of movies only which are offered via cable or direct satellite feed on a per channel basis), specialty television services (which offer a specific type of programming aimed at a specific audience group), and pay-per-view services have differing Canadian content regulations which are defined by condition of licence. These conditions are reviewed at licence renewal time.

Building on Success — A Policy Framework for Canadian Television

The new television policy, which came in to effect on 1 September 2000, refines the objectives of the *Broadcasting Act* 1991 to five core principles or objectives. These are:

- Ensure quality Canadian programs at times when Canadians are watching;
- Reflect the diversity of Canada’s regions and peoples;
- Support an economically successful broadcasting industry;
- Require regulation only where the goals of the Act cannot be met by other means;
- Ensure that regulations are clear, efficient and easy to administer.

⁷⁸ Public Notice CRTC 1999-97, *Building on Success - A Policy Framework for Canadian Television* 11 June 1999, p. 3.

The key terms for the new framework are flexibility, diversity and choice. In particular the policy is designed to provide “the flexibility that will assist the industry in preparing for and managing” the “watershed change” from analog to digital transmission.⁷⁹ This is an important point; the new policy is expressly designed to assist broadcasters and producers to achieve financial success.

The new framework has made a number of substantive changes to the mix of measures regulating the amount and type of Canadian programming which conventional television stations are expected to screen. The list of “under-represented” or priority program types has been expanded to include several new categories. New requirements for regionally produced programming and programming which reflects local and regional interests have been introduced. The regulations relating to programming requirements and licence renewal proceedings for the largest multi-station ownership groups have been amended. The system of time credits for Canadian drama has been altered.⁸⁰ The previous requirement that conventional, local television stations make quantitative commitments on local news programs has been dropped because the CRTC is convinced that the market will sustain a variety of outlets for local news. And the existing absence of a quota for childrens and youth programming is maintained because of “the excellence of Canadian childrens’ programs”, their “exportability”, and their “extended life cycle, as ‘evergreen’ programming enjoyed by many generations”.⁸¹

New priority program categories: In addition to existing transmission quotas which require that Canadian programs make up not less than 60% of the broadcast year, and not less than 50% of the 6pm to midnight evening broadcast period, the new framework defines three new types of priority programs: Canadian long-form documentary (at least 30 minutes in duration); Canadian regionally-produced programs (programs at least 30 minutes long in which principal photography occurred at least 150km from Montreal, Toronto or Vancouver, excluding programs defined as news, analysis and interpretation, reporting and actualities, and sport, but including game shows, religious and educational programming); and Canadian entertainment magazine programs (at least 30 minutes long which devote at least

⁷⁹ Public Notice CRTC 1999-97, *Building on Success - A Policy Framework for Canadian Television* 11 June 1999, par. 113 p. 22.

⁸⁰ See Public Notice CRTC 1999-97, *Building on Success - A Policy Framework for Canadian Television* 11 June 1999, and Public Notices 1999-205, (*Definitions for New Types of Priority Programs; Revisions to the Definitions of Television Content Categories; Definitions of Canadian Dramatic Programs that will Qualify for Time Credits Towards Priority Programming Requirements*), 23 December 1999, and 1999-206 (*Implementation of TV Policy*), 23 December 1999. available online at http://www.crtc.gc.ca/Canrec/Canrec_e.htm.

⁸¹ Public Notice 1999-97 (*Building for Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 66, p. 16.

two-thirds of running time to the promotion of Canadian entertainment including television programs, movies, soundtracks, plays, music, musical and performing arts events, performance artists and off-screen personnel associated with these activities and artists). The new schedule of programming definitions is also extended to apply to pay and specialty licensees in addition to conventional licensees. Music video clips and programs devoted to music videos are no longer eligible for priority program status.

Licence renewals: The new rules extend the practice of differential regulation of broadcasting undertakings based on both type of service, and size of undertaking. The decision to introduce new procedures for the renewal of conventional television licences held or controlled by large multi-station groups⁸² is designed to reduce cost and administrative burdens for both the CRTC and the broadcasters and provide an opportunity to “make a strategic assessment of the contribution of all aspects of a licensee’s operations to the broadcasting system”.⁸³ While this decision is designed to be responsive to corporate strategies, to build flexibility into the regulatory system, and to allow each group “to differentiate itself and brand its programming and scheduling to attract maximum audience”,⁸⁴ it has raised some concerns about the reduction in opportunity for public scrutiny of broadcasters’ activities and input into assessment procedures.

Peak time and time credits for drama: The largest multi-station ownership groups will be required to broadcast an average of at least eight hours per week of priority Canadian programs during the 7pm to 11pm viewing period, but this amount may be reduced by including Canadian drama programs which qualify for the new time credit system. The four largest multi-station ownership groups will earn a 150% time credit against the required hours of Priority Canadian drama programming by broadcasting new drama with a duration of at least half an hour which contains “a minimum of 90% drama content”.⁸⁵ Similar programs which do not contain a minimum of 90% drama content will qualify for a 125% time credit. The existing 150% dramatic time credit will continue to apply for conventional television stations not part of the largest multi-station ownership groups.

⁸² Defined as “those licensed to operate in several provinces with a potential reach of more than 70% of the audience in their language of operation”, Public Notice CRTC 1999-97, (*Building for Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 14, p. 8.

⁸³ Public Notice CRTC 1999-97, (*Building for Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 12, p. 8.

⁸⁴ Public Notice CRTC 1999-97, (*Building for Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 13, p. 8.

⁸⁵ Public Notice CRTC 1999-97, (*Building for Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 48, p.13.

Regional production: The new framework provides a number of incentives for the largest multi-station groups to increase program production in regional areas. Programs in all categories apart from news, analysis and interpretation, reporting and actualities, and sports which are produced at least 150km from Montreal, Toronto and Vancouver now qualify as priority programs when screened between 7pm and 11pm. This new regulation is designed to redress the decline in non-news programming produced in regional areas over the past decade which the CRTC considers to have been caused in part by the expansion of the largest multi-station groups. Economies of scale afforded by such consolidation of ownership have made the production of programming outside the major metropolitan centres an unattractive financial proposition. The CRTC appears to have recognised that in their ultimate focus on the bottom line, the largest multi-station groups have sacrificed the interests of regional communities and diminished the opportunities for regional expression and representation by reducing those communities' access to locally produced programming.

Expenditure requirements: The previous regulatory requirement for expenditures on Canadian programming for stations earning over \$10 million annually in advertising revenues will no longer apply to the largest multi-station groups. Stations not part of the largest multi-station groups which earn over \$10 million in advertising revenue may apply to have the expenditure condition of their licence removed, subject to further discussions on minimum levels of exhibition of Canadian programs. Differentially applied minimum expenditure requirements on Canadian programming for pay and specialty channels will be maintained. Exhibition requirements will also continue to apply to pay and specialty services.

Differentiation between networks based on size: Smaller groups are also encouraged under the new system to “experiment with new genres of Canadian programming and new ways to meet the needs of their audiences”.⁸⁶ The revised categories of priority programs, revisions to the time credit arrangements for Canadian drama and new requirements regarding the broadcast of priority programs in peak time only apply to the larger multi-station groups. The CRTC flagged its intention in the new framework to discuss amendments to the Canadian content commitments of smaller multi-station ownership groups at their next license renewal hearings.

Aboriginal People's Television Network: From 1 September 1999, all cable networks were required to carry the Aboriginal People's Television Network (formerly Television Northern Canada) as an essential national service along with the CBC and the commercial channel CTV.

Benefits Policy: Building on Success amended the benefits policy that applies to all transfers of ownership or control of television broadcasting undertakings, including conventional, pay, pay-per-view and specialty television undertakings. In general the CRTC expects applicants

⁸⁶ Public Notice CRTC 1999-97, (*Building for Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 15, p. 8.

to commit to “clear and unequivocal tangible benefits representing a financial contribution of 10% of the value of the transaction”.⁸⁷ The first instance of the amended policy applying to a transaction was the acquisition of CTV Inc., licensee of a number of conventional television stations across Canada with interests in several licenced pay and specialty television undertakings, by BCE Inc., Canada’s largest telecommunications company whose subsidiaries include the largest Canadian Internet service provider Sympatico/Lycos and which effectively controls one of the main satellite distribution undertakings, Bell ExpressVu.⁸⁸ The transaction is one of the largest to have come before the Commission to date, with BCE offering approximately \$2.3 billion for the shares of CTV. The tangible benefits proposed by BCE consisted of \$230 million in expenditures over seven years. A minimum of \$140 million, representing 175 hours of original programming, is to be directed to the development, production and promotion of new priority programming, including drama development, new drama series, extensions of existing drama series, new documentaries and a major annual variety program. None of this programming will be able to draw upon existing independent production funds, but at least 95% must be directed to independent production companies (defined as companies in which BCE and any related company own less than 30% of the equity). An additional \$72.6 million is to be allocated to non-priority programming, primarily news and current affairs. A number of BCE’s proposals for programming entailed investment in the development of interactive television applications.

The CRTC determined that BCE would not be able to dedicate a proportion of the benefits package to internet-based elements of interactive television in order that the company’s subsidiary Sympatico/Lycos would not be the primary beneficiary, and that the interactive elements are “truly integrated” with program content “and thus of clear, significant benefit to the broadcasting system”.⁸⁹ One of the company’s proposals for priority programming development is an interactive entertainment series *Groundbreaker* which will be produced “in the regions”. The remaining \$17.4 million of the total benefits package is to be directed to Canadian talent development including the creation of new college programs and courses, funding for various not-for-profit, broadcasting related community and interest groups, and similar initiatives not directly program related. This is consistent with the new emphasis on developing a “star system” in English Canada. The Commission’s decision to allow the takeover subject to a variety of conditions indicates that the Commission views in a positive light the consolidation of ownership in the sector. The Commission cited increased

⁸⁷ Public Notice CRTC 1999-97, (*Building for Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 22, p. 9.

⁸⁸ Decision CRTC 2000-747 (*Transfer of Effective Control of CTV Inc. to BCE Inc.*), 7 Dec 2000.

⁸⁹ Decision CRTC 2000-747 (*Transfer of Effective Control of CTV Inc. to BCE Inc.*), 7 Dec 2000, par. 35.

efficiencies, new synergies, and the greater investment in Canadian program production that would result as grounds for approving the takeover since benefits would flow to “Canadian audiences, the Canadian broadcasting system and the public interest” in a manner anticipated by *Building on Success* as vital to the financial and cultural health of the Canadian broadcasting system.

Video on Demand: the Canadian regulatory framework

Canadian media policy provides an interesting instance of an attempt to regulate interactive broadcasting, where the viewer has much greater control over what content is received in the home and when it is delivered.

In July 1997 the CRTC issued licences to five applicants for national video on demand (VOD) programming undertakings.⁹⁰ Licensees are required to meet the cultural objectives of the *Broadcasting Act* 1991. Feature films represent the vast majority of program offerings, but the Commission indicated that licensees should test consumer demand for all types of programming in order to provide a diverse range of offerings to viewers. VOD licensees, in common with pay and specialty channel licensees, are required to contribute a proportion of gross annual revenues (in this case a minimum of 5%) to an independently administered Canadian program production fund. The licensees are also subject to Canadian content regulations, with specified amounts of “shelf space” needing to be provided on video servers and made available to subscribers. Bilingual services and English language services are required to maintain in their inventories a minimum Canadian to non-Canadian ratio of 1:20 for feature films, and 1:10 for all other programming types. French language services are required to maintain a minimum ratio of 1:12 for feature films. In addition, licensees are required to ensure that not less than 25% of the titles promoted each week on the licensee’s barker channel (the entry point to the service which details program offerings) are Canadian titles, and that Canadian titles are given equal treatment to comparable foreign product on the menu-based navigation system.

By December 2000, when the Commission issued four new seven year licences for VOD services, none of the five original licensees had launched their service. The new VOD licences were announced on the same day as the decisions on Category 1 and Category 2 digital pay and specialty licences. The new VOD services are expected to enhance the attractiveness of new digital service offerings (and therefore build subscription numbers for the new services) by adding to the range of programming and delivery options available to Canadians. Despite the concerns of the Canadian Association of Broadcasters and the Specialty and Premium Television Association, the Commission amended the VOD conditions of licence to allow licensees to offer packages of programming to subscribers for up to a week. Feature films remain the majority of anticipated content on the new VOD services, but providers have “the flexibility to experiment with the type of programming they offer”. That is, unlike the new Category 2 digital pay and specialty licensees, VOD licensees are able to offer programming which may be directly competitive with existing pay and specialty services, including the new Category 1 digital services. The 1997 requirements remain in force.

⁹⁰ Public Notice CRTC 1997-83 (*Licensing of New Video-On-Demand Programming Undertakings - Introduction to Decisions CRTC 97-283 to 97-287*), 2 July 1997.

<http://www.crtc.gc.ca/archive/Notices/1997/PB97-83.htm>.

The Canadian Television Fund

The Canadian Television Fund (formerly the Canadian Television Production Fund) was created in 1996 as an independent, non-profit corporation. The fund is a partnership between the federal government and the Canadian cable and satellite distribution industries. Broadcasting distribution undertakings are required to allocate a percentage of their gross annual revenues to independent production funds, with at least 80% of the allocation going to the CTF. The Government of Canada contributes to the scheme through the Department of Canadian Heritage and Telefilm Canada. The CTF's Board of Directors contains representatives of the television, cable, production and film and video distribution industries, as well as representatives from the Department of Canadian Heritage and Telefilm Canada. In February 2001, Sheila Copps, the Minister for Canadian Heritage, announced that government funding for the CTF, amounting to \$100 million, would be extended for one year. At the same time, following the recommendation of the Review of the Canadian Television Fund, March 2000,⁹¹ Minister Copps, announced that the CTF will place greater emphasis on cultural objectives rather than economic benefits "in order to strengthen the cultural focus of the Fund in an environment of global concerns over industrial support mechanisms".⁹²

The review spelled this out in relation to the regional component of the Fund, arguing that regional bonusing on the basis of the location of the production company should be abandoned in favour of "depicting a regional story".⁹³

Market failure is acknowledged to be a factor in the Fund's operation, but the point is that this is argued on cultural grounds:

It is only by providing funding for individual programs that speak to distinctively Canadian concerns, experiences and themes that companies will be interested in directing their efforts to such programs, given that production for the larger foreign markets can be much more lucrative....⁹⁴

⁹¹ <http://www.canadianheritage.gc.ca/culture/brdcstng/ctf-fct/pubs/report-rapport/english.html>.

⁹² <http://www.canadianheritage.gc.ca/culture/brdcstng/ctf-fct/pubs/report-rapport/0-C-e.html>.

⁹³ <http://www.canadianheritage.gc.ca/culture/brdcstng/ctf-fct/pubs/report-rapport/0-C-e.html>.

⁹⁴ <http://www.canadianheritage.gc.ca/culture/brdcstng/ctf-fct/pubs/report-rapport/0-F-e.html>.

However, budgets “must be based to a considerable extent on recouping their costs in Canada.”⁹⁵

New Digital Pay and Specialty Service Licence Approvals

The Commission elaborated a new approach to the licencing process in announcing its approval of 21 Category 1 digital pay and specialty services in late 2000. Sixteen of the services are English-language, and five are French-language. The new licensing process allows Canadian content commitments to be made conditions of licence on a case by case basis. This new approach continues the new television policy framework’s emphasis on expanding flexibility, diversity and choice in the broadcasting system, and takes it further. The new approach “is designed to provide a bridge between traditional licensing mechanisms that provide significant regulatory support for emerging Canadian services, and a more open-entry, competitive framework that encourages greater risk-taking and allows the success of services to be increasingly determined by customers”.⁹⁶ The restrictions on distribution undertakings’ interest in programming services which apply in the analog environment have not been reproduced. As the Commission determined in its licensing of the four new VOD services, all of which involved distribution undertakings as partners, growing penetration and take-up of the new digital services depends upon the active involvement of existing distribution undertakings. New partnerships and joint ventures between existing program service providers, distribution undertakings and production companies characterise the new digital services. Flexibility in the ownership structure of the new ventures is matched by novel and amended arrangements for achieving cultural and social objectives.

Access: “Access” takes a number of different forms under the new licencing approach which relate to particular cultural and social objectives.

First, audiences have access to a range of programming and independent producers have access to distribution outlets, and therefore to audience. The Canadian content requirements and the additional independent production commitments which require at least 25% of all programming other than news, sport and current affairs to be sourced from independent producers provide a significant input over time to the independent production sector. They also ensure that Canadian programming and Canadian channels are available to audiences across Canada in both official languages. The affiliation of some licensees with operators of similar channels in other markets offers the possibility of Canadian programming being exported and broadcast internationally, thus giving Canadian independent producers access to international audiences.

⁹⁵ <http://www.canadianheritage.gc.ca/culture/brdcstng/ctf-fct/pubs/report-rapport/0-F-e.html>.

⁹⁶ Public Notice CRTC 2000-171, (*Introductory Statement – Licensing of New Digital Pay and Specialty Services*), 14 Dec 2000.

Second, particular audiences have access to programming specific to their interests or experience. All Category 1 digital pay and specialty services offer a bundle of programming not previously available. Many are targeted at niche audiences. *Book Television* is committed to devoting a maximum 13% of its schedule to programs for pre-schoolers. *PrideVision* offers programming targeted at gay and lesbian viewers, their friends and families. The majority of *Connect's* programming is aimed at teens aged 12-17.

Third, distributors have access to programming services: There are no restrictions on distributors holding equity in programming services, although other conditions have been made to ensure both that distributors do not provide preferential access to channels in which they have an interest and that distributors have access to all available channels. New industry codes of practice will be developed to ensure that the larger broadcasting and distribution undertakings do not give undue preference to production entities with which they may be affiliated.

Fourth, those audiences unable to access the new services digitally because their service provider (usually Class 3 distributors – those with the smallest subscription base) does not make use of digital technology will have be able to access them in analog format.

Fifth, specific provisions have been made to ensure disabled viewers have access to the full range of services. The requirement that disabled people be given access to broadcasting services is one of the basic social objectives common to much broadcasting legislation. Similar access provisions can be found in much telecommunications legislation. Consistent with section 3(1)(p) of the Broadcasting Act, however, the provision of programming in forms accessible to disabled viewers is dependent on “resources becom[ing] available for the purpose”. The fact that the provision of access is dependent on the availability of resources means both that not all disabled people are treated the same, and that the costs of providing accessible programming will be taken in to consideration when licensees are required to account for their efforts to meet these objectives.

Hearing impaired people are best served by the Canadian broadcasting system. In 1995 the Commission determined that the largest English-language stations (those earning more than \$10 million in annual advertising revenues and network payments) be required to achieve a target of close captioning a minimum of 90% of their programming by the end of their seven year licence terms.⁹⁷ Particular requirements were also imposed at this time on the captioning of news and current affairs programming including live segments in response to the concerns of hearing impaired viewers. The Commission determined that real-time captioning of live programming was no longer cost-prohibitive. The largest stations were therefore *required* to caption all local news programming including live segments from 1 September 1998. Medium sized stations (\$5-10 million in revenues) were *expected* to caption local news programming

⁹⁷ Public Notice CRTC 1995-48 (*Introduction to Decisions Renewing the Licences of Privately-Owned English-Language Television Stations*), 24 March 1995, section IV(A).

including live segments and to caption a minimum of 90% of programming by the end of their licence terms. Small stations (less than \$5 million in revenues) were *encouraged* to caption local news programming including live segments and at least 90% of programming by the end of their licence terms. *Building on Success* extended these requirements to French-language broadcasters. New digital pay and specialty licensees are required to close caption at least 90% of their programming by the final year of their licence term.

Visually impaired people are less well served. The Commission concluded in *Building for Success* that it was too early to impose specific requirements on licensees to provide descriptive video services (DVS) because of cost factors and the relative newness of the technology. Licensees are however “strongly encouraged to adapt their programming to include audio description wherever it is appropriate and to take the necessary steps to ensure that their customer service responds to the needs of the visually impaired”.⁹⁸ As part of the benefits package resulting from its takeover of CTV (see above), BCE allocated \$2 million to provide described video for 400 hours of programming, including all new priority programming to be produced as part of the package. The company made a further commitment to sponsor an industry event to investigate means of lowering the cost of producing described video programming. While the Commission requires all digital pay and specialty services to be technically equipped to deliver described video programming, not all applicants were able to commit to providing such services. Most did however make some commitment to providing audio description of visual information. Digital transmission of broadcasting content offers the opportunity to provide such services as part of the package of enhanced programming. In addition, the provision of closed caption and described video services is a potential growth area for the independent production sector.

Sixth, a number of channels make provision for viewer access to the means of production beyond the capacity to interact via a website. *Connect* proposes to establish a “Connect Council” to provide teens in Canada and around the world with webcams and software for the purpose of submitting reports to the channel. The Council will work with licensee to establish guiding principles for channel’s programming. *PrideVision* will involve gay and lesbian viewers in its management through a proposed Programming Advisory Board, and proposes to provide access for amateur producers to its studio and facilities.

Seventh, the CRTC has access to a range of documentation relating to the management and operation of the services. And through the CRTC’s public process, the public has access to a range of information relating to hearings, proceedings and decisions. Decisions and other information regarding CRTC activities are published in a variety of forms including on the web. Public hearings are televised. Written submissions are invited on specific issues from all

⁹⁸ Public Notice CRTC 1999-97 (*Building on Success – A Policy Framework for Canadian Television*), 11 June 1999, par. 133.

interested parties. The public also has access to a range of financial and other data submitted by licensees to the CRTC.

Availability: Category 1 services are available to all distributors of digital services; to all subscribers to digital services; and to subscribers of some analog cable services in smaller markets. A majority of digital services available to subscribers must be Canadian. Category 1 services are expected to launch no later than 24 November 2001 (1 yr after first announcement). Category 2 services are available at the discretion of distributors and subject to audience demand.

Canadian content: Two of the five objectives of the licensing framework for digital pay and specialty services relate specifically to the availability of Canadian content. They are: “increasing the variety and diversity of programming choices for viewers” and “maximizing the production and exhibition of new Canadian programming”.⁹⁹ Announcing the licensing framework policy in January 2000, the Commission advised that it expected licensees to commit to screening a minimum of 50% of Canadian programming over the broadcast year by the end of the seven year licence term. The commitments of Category 1 services licenced in November 2000 differ in relation to the broadcast of Canadian content over the broadcast day (6am to midnight) and during the evening broadcast period (6pm to midnight). Additional commitments to the production and broadcast of original Canadian programming also vary among applicants. Broadcast commitments range from a minimum of 85% of both broadcast year and evening broadcast period for the French language business and personal finance channel *LCN Affaires* (which has also committed to screening 100% Canadian content between Monday and Friday),¹⁰⁰ down to a minimum of 25% in the first year rising to 50% by the final year (*Biography*, and *techTV*). Production of original Canadian programming commitments range from a minimum of 4056 hours per year (or a minimum 28,392 hours over the licence term) for *LCN Affaires*, to a minimum 511 hours over the licence term (*Canadian Documentary Channel*).

Taken together, the licensees estimations of their own minimum expenditure on Canadian programming, calculated as a percentage of their annual gross advertising, informercial and subscription revenues, represents at least an additional \$584 million for Canadian content production over seven years.

English and French language Category 2 services must broadcast at least 15% Canadian content both over the broadcast year and in the evening broadcast period in the first year of

⁹⁹ Public Notice CRTC 2000-171 (*Introductory Statement – Licensing of New Digital Pay and Specialty Services*), 14 Dec 2000.

¹⁰⁰ The highest commitment by an English language channel is *TravelTV*: a minimum 750 in year one, rising to a minimum 1296 in year seven for a total of 8000 hours over the licence term.

operation, rising to 25% in the second year, and 35% in the third year and thereafter. Ethnic specialty services must devote at least 15% of the broadcast year and of the evening broadcast period to Canadian programs. Music video services have additional requirements. One in five music videos broadcast during each broadcast week in the first year of operation must be Canadian, rising to 25% in the second year and 30% in the third year and thereafter.

Expenditure on Canadian Programming: Commitments vary from licensee to licensee. Minimum expenditure levels are calculated by taking a percentage of annual gross advertising, infomercial and subscription revenues. These range from 37% for the *Independent Film Channel Canada* and the *Issues Channel* (estimated value over seven years \$17 million and \$42 million respectively), to 53% for the *Women's Sports Network* and *TravelTV* (estimated value over seven years \$36 million and \$41 million respectively).

Independent Production: 25% of programs broadcast by Category 1 services must be sourced from companies which are "not related" to the Category 1 licensee, meaning companies in which the licensee or any of its shareholders owns or controls less than 30% of the equity. 14 licensees also made minimum financial commitments to the purchase of programs from independent producers totalling approximately \$226 million over the seven year licence period.

Diversity of Ownership: The 21 Category 1 licences are controlled by a total of 30 companies, most of which have existing interests in the Canadian broadcasting system. Existing broadcasters are particularly well represented, with Groupe TVA having an interest in the largest number of channels (6). Cable distribution undertakings are also prominent, with Rogers Broadcasting and Shaw Communications having joint interests in two channels. (Rogers has an interest in a further two channels). Telecommunications company BCE has a direct interest in two channels, with an indirect interest in two others after the recent takeover of CTV. 3 of the companies are not Canadian owned or controlled, but all have minority interests in different channels.

Diversity of Services: Most of the 21 Category 1 services are the only dedicated channel of their type available in Canada. The 262 Category 2 services must not directly compete with existing pay, specialty or Category 1 service. The Commission has therefore encouraged the further diversification of content offering by effectively ensuring that Category 2 services are new niche services.

Diversity of Representation: In accordance with section 3(1)(o) of the Broadcasting Act, a number of Category 1 services have made provision for "programming that reflects the aboriginal cultures of Canada", or have made commitments to involve First Nations people in program production. *The Wisdom channel*, which describes its offerings as "wellness programming" plans to build on an existing production relationship with the Aboriginal Peoples Television Network and use representatives of cultural and racial minorities and

aboriginal people because they have “expertise for many elements” of programming.¹⁰¹ *The Canadian Documentary channel*, which makes substantive use of the archives of the CBC and the National Film Board of Canada, has commitments to ensure the representation of cultural and racial minorities and First Nations people. *Travel TV* will feature programs focusing on the geography, lifestyle, heritage and culture of First Nations communities. *Connect* has made commitments to include First Nations teens when developing their digital technology internship programs. Specific funds are to be allocated for First Nation teens to receive training grants and bursaries for advanced education related to broadcasting and new media production.

Regional programming is a feature of a number of the new services. One service, *Land and Sea*, is devoted to programming which represents and responds to the interests and experience of rural Canadian audiences. The channel, which is part owned by the Canadian Broadcasting Corporation, has substantial regional production commitments as conditions of licence. *The Independent Film Channel* is the first specialty service to be based in Atlantic Canada. The French language service *Réseau Info Sports* covers local, national and regional amateur and professional sports events not available on other French language channels.

Another service, *PrideVision*, provides programming targeted at gay and lesbian people. The service has also committed to making studio and other facilities available to amateur producers.

Gender specific programming will be offered by two new services, the *Women’s Sports Network*, and *Men TV*. WSN is committed to the positive portrayal of women through on-air representation as presenters, experts and commentators. Men TV claims to be the first channel to offer programming on a variety of subjects entirely from the perspective of Canadian men.

One service, *Connect*, offers programming targeted primarily at teens aged 12-17. This underrepresented demographic is argued to be group “too old for most children’s programming, and not generally well served by the programming aimed at adults”.¹⁰² The service aims to use teens from minority and regional communities as program hosts, writers and producers.

A number of ethnic services (services in languages other than English or French) have been granted Category 2 licences. None will be delivered as part of the basic package, but may be

¹⁰¹ Decision CRTC 2000-450, 14 Dec 2000,
http://www.crtc.gc.ca/archive/Decisions/2000/DB2000-450_e.htm.

¹⁰² Decision CRTC 2000-462, 14 Dec 2000,
http://www.crtc.gc.ca/archive/Decisions/2000/DB2000-462_e.htm.

delivered at the discretion of the distribution undertaking if audience demand is sufficiently strong.

Interactivity: One of the objectives of the new licensing framework for digital pay and specialty channels is to push the boundaries and capabilities of digital technology. Although a number of licensees have direct and indirect links with companies engaged in developing applications for the Internet, it is immediately apparent in reading the licence decisions that few have considered the possibilities offered by interactive technology in any great depth. At present, almost all licensees consider the Internet as the limit and focus of their interactive offerings, with all committing to developing web presences to complement their broadcast offerings. Most licensees promise to offer one or more of games and contests, additional program and channel information, streamed content, email forums, shopping. A number of licensees consider this presence to involve the construction of gateways or portals providing access to recommended web content linked to the genre of the channel. A few make specific commitments which are focused on traffic from the viewer to the channel: *techTV*, a channel devoted to computing and new technologies, plans to follow the example of its American namesake and provide “netcams” to viewers. The channel is part owned by the two largest cable companies, Rogers Broadcasting and Shaw Communications. The companies announced during licence hearings that they expected to provide Internet access through television “sometime within the next 12-18 months”.¹⁰³ The teen channel *Connect* plans to distribute 1000 webcams to teens across Canada. *Réseau Info Sports* hopes to offer multiple channels on demand.

Training, Educational and Other Initiatives: A number of the successful applicants committed to providing assistance to media training and education. *The Canadian Documentary Channel* committed to donating a minimum of \$100,000 annually in scholarships from the fourth year of its licence term, rising to \$200,000 in the sixth year, for “hands-on experience, and advanced education”.¹⁰⁴ *Connect* committed to spend \$800,000 over the licence term to develop new program concepts, interactive multimedia projects and support skills training for young Canadians interested in pursuing careers in digital broadcasting and new media. *Book Television* will allocate 2.5% of the previous year’s revenue to create WorldFACT, a foundation for Canadian writers, which will provide a maximum of \$15,000 to recipients through grants. *PrideVision* plans to establish internship programs. The French language fashion channel *Perfecto, La Chaîne* has committed to make available 5% of its gross revenues from previous year, representing \$1.9 million over 7 years, for stylists and designers to produce clips.

¹⁰³ Decision CRTC 2000-454, 14 Dec 2000,
http://www.crtc.gc.ca/archive/Decisions/2000/DB2000-454_e.htm.

¹⁰⁴ Decision CRTC 2000-455, 14 Dec 2000,
http://www.crtc.gc.ca/archive/Decisions/2000/DB2000-455_e.htm

Conclusions

We have spent some time considering the Canadian system because in our view it warrants the closest attention in the consideration of future strategies. Canada has a mixed broadcasting system with a long history, it is of a comparable size to Australia, it has content regulations which bear a significant resemblance to Australian ones, it has a regulatory agency driven by similar concerns, and operates predominantly in the English language. In addition it has sought to maintain a Canadian presence while enhancing competition and facilitating the entry of new players and new delivery systems in the broadcasting sector.

Further, Canadian moves to give greater weighting to regional and infotainment programming signal a shift in priority of content regulation to include these alongside a continuing emphasis upon drama. The focus on regional programming has an Australian precedent in what was a long-standing policy of localism in broadcasting and could be seen to fit contemporary governmental priorities for regional development. The infotainment regulation is unusual because of the substantially local character of much infotainment programming which has led some to suggest that such programming requires no protection. These regulations suggest that in the Canadian multichannel marketplace infotainment programming may need protection.

These developments warrant further study. Given the experience in the 1990s of depressed licence fees for drama, with little high end drama now being made without considerable international involvement, it is worth considering a hybrid model that builds in more funding support for drama and innovative social documentary (cf New Zealand's approach) justified in terms of core cultural objectives such as diversity and quality. In Britain, the acknowledgment that output regulation on its own may permit low end drama to be substituted for high end drama on a consistent basis has resulted in the implementation of quality benchmarks which supplement and strengthen commitments to diversity.

Our region

Singapore: Mandatory Public Service Broadcast programs¹⁰⁵

Licences for television channels require broadcasters to carry a minimum number of hours of Public Service Broadcast (PSB) programs, which are defined as socially desirable programs which serve the public interest and promote social objectives but which are not necessarily commercially viable. The main genres of PSB programs are news and current affairs; info-educational programs; children's programs; cultural programs; sports programs; locally produced English and Chinese language dramas; and minority language programs. But there are no set sub-quotas or fixed formulas for meeting the minimum requirement. PSB programs are not required to be locally made. The Singapore Broadcasting Authority funds

¹⁰⁵ See NZ On Air (1999) *Local Content and Diversity: Television in Ten Countries*, June.

broadcasters annually to carry more PSBs from licence fee revenue and from a special government grant, and also directly commissions programs.

It would seem unlikely that an Australian regulator could be as closely involved in program production and subsidy as the SBA. The broad thrust of Australian legislation in recent years has been to place the regulator at arm's-length from both government and the broadcasters, and to minimise as far as possible the micro-management of broadcasting output by bureaucrats. The Singapore Broadcasting Authority model appears to combine the regulatory role of the ABA and the funding role of the AFC.

New Zealand: An open market with public funding

New Zealand currently utilises three policy tools to ensure the presence of what is described as “desired types of content”: state ownership of the network Television New Zealand; subsidy for program production and provision of broadcasting services through the Broadcasting Commission (also known as NZ On Air); and reservation of radio spectrum (a form of subsidy) for the promotion of Maori language and culture.¹⁰⁶ In July 2000, the New Zealand Cabinet agreed to a new set of objectives which will guide broadcasting policy development. Like the new Canadian television policy framework, these objectives are notable in their brevity and in their breadth. They have been carefully worded to ensure that “local and international content are complementary”, that Maori language and culture is represented as part of the diversity of New Zealand life, that audiences (addressed as citizens rather than as consumers) have the opportunity to participate in political and social debate, that minority interests are represented and served, and that innovation and creativity is encouraged.¹⁰⁷ Although New Zealand’s decision to sign up to the General Agreement on Trade in Services (GATS) in 1993 would appear to preclude the adoption of local content quotas, this is an option that the Government continues to explore.

In September 2000, the New Zealand Government released a new Draft Charter for the state-owned broadcaster Television New Zealand (TVNZ) consistent with the government’s renewed focus on public service television.¹⁰⁸ The draft charter was described by the Minister for Broadcasting, Marian Hobbs as “a statement of objectives” which “sets out in broad terms the kind of broadcast content TVNZ is to feature and aspects of the way it is to go about

¹⁰⁶ Office of the Minister of Broadcasting [NZ] (2000) *Broadcasting Policy: Objectives and Delivery Mechanisms* Cabinet Policy Committee paper, 6 July.

¹⁰⁷ Office of the Minister of Broadcasting [NZ] (2000) *Broadcasting Policy: Objectives and Delivery Mechanisms* Cabinet Policy Committee paper, 6 July.

¹⁰⁸ Available online at <http://www.executive.govt.nz/minister/hobbs/tvnz/index.html>.

providing such content”.¹⁰⁹ While the draft charter does not contain specific programming requirements, TVNZ is expected to provide a diverse range of quality programming which include the presence of a significant Maori voice, which are innovative and contribute to a sense of citizenship and national identity, provide representation for minorities, serve the needs of children and young New Zealanders, and which serve the regions of New Zealand.

NZ On Air funds a range of programming to meet the social and cultural needs of different audiences.¹¹⁰ The public cost of the current model was \$50 million in 1998 (including Te Mangai Paho television programme funding), which paid for about 30% of the total cost (\$160 million) of all locally produced programming for TV One, TV2 and TV3. Until 30 June 2000, funding was generated from the Public Broadcasting Fee. Since 1 July 2000 funding for public broadcasting through NZ On Air has been sourced entirely from Crown revenue. NZ On Air recently announced that public funding would continue to be applied to areas experiencing market failure, with television funding provided for programming in five main genres: drama (which has received increased funding for the 2000-01 year); children’s programming (also increased funding); documentary; and two new areas: comedy and mainstream Maori programming. The organisation also flagged the introduction of “a new form of ‘general intent’ contracting with television networks and an Innovation Fund, to encourage broadcasters to ‘push the envelope’ of local content production and programming”.¹¹¹ The Innovation Fund is a one-off, NZ\$1 million award for “the production of a cutting edge project (or projects) for broadcast by the free to air broadcaster that best achieves local content targets during the year”.¹¹²

As the most recent survey of local content on New Zealand television observes,¹¹³ this model has not produced diversity of programming, with production concentrated in genres with low marginal production costs, such as news and infotainment. It was for this reason that the genres eligible for public funding from NZ On Air were expanded in 2000. The achievement of cultural objectives in this model relies upon the subsidising agency (in this case the Broadcasting Commission, NZ On Air) being adequately funded, and on a commitment to public interest programming by broadcasters. NZ On Air has a responsibility to assist in the

¹⁰⁹ Press release 19 September 2000. Available online at <http://www.executive.govt.nz/minister/hobbs/tvnz/news.htm>.

¹¹⁰ See NZ On Air (1998) *New Zealand Television and the Future of Local Content*, May, section 4.4. This report is available online at <http://www.nzonair.govt.nz/future/index.htm>.

¹¹¹ NZ On Air (2000) *Statement of Intent 2000-2001* p. 4.

¹¹² *Ibid.* p. 13.

¹¹³ NZ On Air *New Zealand Television Local Content 1999*, March 2000, available online at <http://www.nzonair.govt.nz/pubs/1999localcont.html>

achievement of certain social objectives by broadcasters; in April 2001 NZ On Air announced that it would provide \$1.4 million for teletext captioning of 65 hours of programming per week on channels TV One, TV2 and TV3. This model may be favoured by broadcasters, since the financial burden for the achievement of cultural and social objectives and in particular the production of what are generally expected to be non-commercially viable programs falls on viewers. But the introduction of such a system in Australia would have radical implications for broadcasters, producers and viewers.

4 Policy strategies for Australia

Recent events have stimulated discussion of future cultural policy strategies for Australian broadcasting:

- Transmission of digital terrestrial television services commenced on 1 January 2001;
- In April 2000 the Productivity Commission released its report on Broadcasting after a year-long inquiry;
- In 1998 the Australian High Court ruled in favour of New Zealand production interests in the *Blue Sky* case, forcing the revision of the Australian content standard;
- The Internet continues to develop as a media platform outside traditional broadcasting regulation.

This part considers a variety of options for future policy development. The strategies discussed below are capable of accommodating shifting objectives and regulatory requirements, such as changing emphases on regionalism and new categories of material considered culturally or socially desirable. The emphasis is not on what these changing objectives may be, but on which mechanisms may enable governments to secure desired social and cultural outcomes from Australia's broadcasting system. The following options should not be regarded as exclusive strategies: they may well be combined effectively.

Uncertainty and criteria for policy assessment

Before turning to these options, two points are worth emphasising.

The first is uncertainty, and the need for continuing study in this field. As we have noted above, it is not yet known how audiences will react to new media systems. Trends already in evidence are likely to continue; there appears, for instance, to be an industry consensus that audiences for free to air broadcasting will continue to decline. But trends such as these can only tell us a small part of the story. It has been realised for many years that digital television is more than simply a new transmission technology. It opens possibilities for a wide range of innovative services. We do not know what those services are and we do not know how they may evolve. The recent history of the Internet demonstrates the capacity of contemporary information economies to develop and adapt new services over a short period of time when substantial investments are made. Substantial commercial research and development is now occurring in digital television services and operating systems. Some outcomes of this work are widely known. However, detailed market information concerning interactive, multichannel television is scant and closely held.

The failure to date of high definition broadcasting to win market acceptance in the United States underlines the uncertainty surrounding future adoption and adaptation of digital

television. Sustained research and policy evaluation will need to be pursued in the early period of digital in order to comprehend the nature of the new medium. Research of this sort will have important consequences for the policy issues under discussion here. We do not know whether the market failures of digital television will correspond to those of analog broadcasting. We do not know how far new policy strategies will have to extend in order to achieve desired social or cultural outcomes. In this situation, continuing research is itself an important policy strategy.

The second point concerns the criteria we can use to assess alternative future strategies, given the level of uncertainty and contingency in the field. What principles should we apply? It is not sufficient that strategies simply seem capable of achieving their intended aims. We should aim to make new policy initiatives as fair as possible, for consumers of broadcasting services, for the various elements of the industry, and for the nation as a whole. When policy analysts speak of the need for technological and competitive neutrality in contemporary policy, the ultimate aim is to distribute the burdens and benefits of regulation as fairly as possible. “Fairness” in this context is related to what the distinguished US media economist Eli Noam has called the “friendliness” of policy reforms. In the context of universal service obligations, Noam noted that policy reforms require specific attributes of “friendliness” if they are to succeed.¹¹⁴

These attributes are worth considering in relation to broadcasting.¹¹⁵ Firstly, Noam suggests that policy reforms should possess *political friendliness*. They should deliver no shocks, windfalls or unilateral advantages to competitors. Secondly they should possess *collection friendliness*: they should offer stability for targeted revenues. Thirdly, they should offer *administrative and user friendliness*: as Noam says, “keeping things simple is a key requirement”. He goes on to note that policy reforms should be friendly towards pre-existing regulatory schemes, and should possess *productivity friendliness*: they should include incentives for economic efficiency.

Options

Modifying the quota system

This strategy involves modifying rather than substantially reforming the existing system. Quotas are designed for an analog broadcasting system characterised by a small number of single-channel stations. Quotas also assume a real-time programming stream controlled by the broadcaster. While analog simulcasting continues, the quota system will remain a viable

¹¹⁴ Eli M. Noam, (1994) “Beyond Liberalization III: Reforming Universal Service”, *Telecommunications Policy*, vol 18, pp. 691-2.

¹¹⁵ See Julian Thomas, (2000) “Digital television and its discontents”, CIRCIT seminar paper, July, for an application of Noam’s attributes of policy ‘friendliness’ to digital television policy.

regulatory device. As a settled way of doing things, quotas have the advantage of political and collection friendliness, to use Noam's terms. However, even minor changes to digital television regulation, such as the introduction of limited commercial multichannelling, will require a reconfiguration of the quotas. Such changes are likely to make the existing system more complex. Any easing of restrictions on datacasting would also raise questions about the application of the quotas. If interactive services are permitted to develop, and as the storage capacities of set-top boxes and disk-based video recorders increase, the time-based nature of the quota will be compromised.

The Canadian policy developments discussed above demonstrate the flexibility of quota systems in analog environments more complex than Australia's. For the duration of the simulcasting period, improvements and refinements to Australian quotas should be actively considered. This consideration should include the mix of sub-quotas and the general transmission quota. Regulation should be clearly targeted where it is possible for government to be specific about the kinds of programming believed to be socially or culturally desirable. The Productivity Commission recommended abolition of the advertising quota and pointed to the need for continuing evaluation of the system. The government has yet to announce its decisions on those matters.

However, modifications of this kind will plainly be insufficient to deal with a converged media system. Three issues which illustrate the policy problem concern the adaptation of quotas to multichannelling, interactive programming, and new media content.

Multichannelling. If Australian regulation takes a liberal turn over the digital conversion period — for example when the prohibition on new commercial television licences expires — the question will arise as to whether quotas should be applied to new licence holders. Once analog transmission ceases in any area, the efficiency of digital transmission is such that there are likely to be numerous new services, not merely one or two. If quotas are applied to new digital services, should they be applied at the same level as current requirements for analog services? Should they be applied differentially? Or should an agreed global quantum of local and children's content be maintained through periodic adjustments to quota levels?

The implication of the latter option is that quotas, and the policy objectives they support, relate to the commercial sector as a whole rather than individual stations, which nevertheless have a requirement to account for a certain proportion of the total. This then creates the possibility of a quota market, where quotas have a negative value and may be traded between different elements of the system, either licence holders, stations, or channels within a multiplex. The purpose of such an arrangement would be to improve the efficiency of the quota system by concentrating local or children's content broadcasting among those services best placed to provide them. In this way, for example, a Australian drama channel, or a sport and infotainment channel, would be effectively supported by a channel primarily offering U.S. drama. This would have the additional benefit of placing a clear value on the regulatory requirement.

In order to sustain diversity in the system a market mechanism of this sort might be applied only to certain quotas — for example sub-quotas but not transmission quotas — or to a certain proportion of the total quota requirement.

Interactive programming. We have already seen that the interactivity of digital television also creates problems for a quota system, as time-based programming rules lose their force when content can be either streamed in real time, ‘trickled’ down for local storage, or delivered on demand, or nearly on demand. While the viewing duration of programs can still be stipulated, this will no longer equate to transmission time. Regulations specifying the time of day when quota material must be broadcast may also need to be reframed around specific periods of *availability* rather than *transmission*.

New media content. Should any quotas — transmission quotas or sub-quotas — apply to content which differs from traditional broadcast programming? Should modified quotas capture, for example, a hyperlinked form of interactive drama, or a vector graphic-based educational puzzle designed for children? Such material may well meet the cultural and social objectives of broadcasting policy, and there may be other desirable outcomes to be achieved by encouraging the development of content of this sort alongside traditional screen content. Policymakers seeking to adapt existing rules will clearly need to review generic programming categories. The formal and technical evolution of broadcast material will require continuing attention.

Replacing or augmenting quotas with subsidies

Subsidy models are widely used internationally, as the discussion in Part Three above demonstrates. A number of commentators have pointed to subsidy models as an alternative or supplement to Australia’s quota system for local and children’s content. Subsidies have the advantage of transparency over quotas. As budgeted transfers, they are more likely than quotas to be the subject of continuing evaluation. And at present, subsidies do not contravene existing rules for international trade in services. Further, the overall size of the subsidy need not be tied to the output of a specific number of channels. For this reason subsidies appear likely to offer more flexibility and adaptability than quotas in a converged media environment.

Australia has a recent history of broadcasting subsidies under the Commercial Television Production Fund (CTPF) which operated between 1995 and 1997. The Fund’s \$60 million budget was distributed to commercial television licensees (45%), independent producers (45%) with 10% set aside specifically for financing children’s programming. According to ACTPF Report to 31 December 1998, the Fund assisted 38 new programs in a variety of genres. Six of these projects were subsequently developed into series (generating an additional 186 hours of drama content), and 17 secured overseas sales. By Flew’s calculations,

the Fund levered about \$2.50 of private funds for each \$1 of public money invested.¹¹⁶ But it is important to note that programs supported by the Fund did not qualify for drama, children's or documentary quotas.

In one of his submissions to the Productivity Commission, QUT academic Terry Flew proposes a less sector specific "Creative Production Fund ... accessible on a competitive basis" to commercial, national, subscription and community broadcasters.¹¹⁷ This Fund is envisaged as a cross between the Commercial Television Production Fund and New Zealand On Air.

Political constraints may well be a major factor in limiting governments' willingness to subsidise directly the commercial television sector. The CTPF ceased after the 1996 election. In Noam's terms, subsidies may lack collection friendliness and administrative friendliness. Nevertheless the structure and workings of a subsidy system — which may of course operate in conjunction with modified quotas — merits further discussion. Several preliminary questions arise.

Broadcasting subsidy or production subsidy? The objective of diversity of content might be assisted by a scheme which distributes funds widely among independent producers and broadcasters. But should the subsidy be paid to content producers or to broadcasters? Clearly the critical policy requirement is that subsidised material actually be broadcast. Michael Ward, then policy advisor to the Film Finance Corporation, told the Productivity Commission that the basic aim of the policy was to ensure that Australian viewers had the choice of seeing local content.¹¹⁸ One of the chief failings of the subscription television expenditure quota has been the failure to ensure that any subsidised material is actually broadcast which has the effect that the quota functions to increase production activity without the cultural benefit of the programming necessarily being available to Australian viewers.

How are broadcasters to be defined? Flew's proposal would limit the operation of the subsidy to the existing categories of commercial, national, subscription and community broadcasters. In a converged media system, the question arises as to why such a fund should not be available to providers of culturally or socially desirable screen content who may use other platforms, such as the Internet. Where should policy makers draw the boundaries around broadcasting? If the success of subsidies will be measured by audiences rather than technologies, then policy makers should avoid platform-specific regulation wherever possible. Where such

¹¹⁶ Terry Flew (2000) Submission to the Productivity Commission Broadcasting Inquiry, no. DR233, p. 14.

¹¹⁷ Ibid. p. 19.

¹¹⁸ Productivity Commission (1999) *Inquiry into the Broadcasting Services Act 1992: Transcript of Proceedings*, 10 June, p. 906.

distinctions are unavoidable, more sophisticated devices such as Forgan and Tambini's CEMS index (discussed in Part Three above) may be useful.

How should the quantum of subsidy be determined? The level of subsidy should logically be in proportion to the social or cultural value of the subsidised work. Compliance with competition policy would also require that the level of subsidy be no greater than necessary to offset market failure. This might be gauged by *a priori* determinations or by audience response. Problems will arise with both criteria. The production industry will seek to offset risk, valuing predictability in subsidy levels.

How should the subsidy be allocated? Should a subsidy fund be contestable, as some have suggested, or should it simply be allocated to eligible persons who fulfil necessary criteria? The answer may depend on the cultural or social purpose of the subsidy. For example, in the case of a cultural subsidy, allocation might be contestable according to cost, or critical merit, or both. The present system of Australian quotas does not aim to reward programming quality, although, as we have noted above, the UK government has instituted quality benchmarks for drama. The question of quality benchmarks for subsidised content may be worth considering. Options for allocating subsidies through market mechanisms are discussed below.

Who should pay the subsidy? At present, broadcasters bear the costs of the quota system, passing these costs on to advertisers and indirectly to the consumers of advertised goods and services. The disadvantage of this system is that the costs of regulation are effectively hidden. Further, there is no continuing programme of evaluating the effectiveness of the quotas. The costs of the quotas may also fall disproportionately on those segments of the population who are successfully targeted by television advertising. In Australia, the heaviest viewers of commercial television tend to be in lower or middle socio-economic groups. Industry funding could be adapted for a subsidy-driven model of content regulation. Broadcasters could contribute levies into an industry fund, perhaps on the basis of a CEMS style index if technological neutrality was desired.

Alternatively, government could provide subsidies as a budgeted program of transfers. This would have the advantage of ensuring that all Australians paid for policy outcomes identified as nationally important by Parliament. Mark Armstrong has suggested that a portion of the funds derived from the sale of spectrum might appropriately be allocated to content production:

The problem with [regulatory options] is that they are nice to think about until you ask how you would actually have a workable scheme. So the other thing I just mention in this context is the vast amounts, the billions of dollars, that Governments now in Australia are taking out of the communications sector from sale of spectrum, or rent of spectrum in the case of commercial television, every possible form of money grubbing is being extracted by the current Government - to be bipartisan about this it started under the previous Government.

And it must be relevant (a) that there is a great big pork barrel rapidly being filled; (b) that so far it seems to be spent on retrospective and old economy issues, rural roads, patching up environmental damage, just about everything else except developing exciting communications content. I just think that might be part of the solution...¹¹⁹

Should subsidies be combined with quotas or other requirements? Some regulatory measures, such as conditions relating to taste and decency, are likely to persist in a converged media environment. It may be that subsidies will also be combined with quotas, at least over a transition period. Of course this is already the case, given that federal and state governments offer a range of subsidies and other support mechanisms for Australian film production. A combination of instruments may alleviate concerns over future levels of valued programming, with a modified quota system guaranteeing a floor for local or children's content in the event of varying levels of subsidy. But while a combination of measures is attractive in a transition period, the relationship between the two systems may become complex. Care would be required to ensure that the objectives of both measures are achieved.

Should subsidies be combined with market mechanisms? As we noted in the case of quotas, the efficiency of subsidies may be increased by market mechanisms for allocation.

Expand the role the national broadcasters

The option here is that publicly-funded broadcasters take over some or all of the cultural and social policy responsibilities currently attached to commercial broadcasters. In essence, this is a variation on the public subsidy option.

The advantages of this model derive principally from its simplicity:

- Public broadcasting entails transparent appropriations, in contrast to the opacity and complexity of quota systems, and the complexity of subsidising the commercial sector;
- The costs are borne by the entire community;
- The national broadcasters' charters can be updated and refocused;
- Liberalisation of the commercial sector offers competitive neutrality for new and existing services.

Recent debates over datacasting underline the policy difficulties in delineating the future boundaries of broadcasting regulation. The simplicity of focussing policy objectives on the national broadcasters may therefore be attractive for future governments, eliminating the need for complex and contentious policy adjustments, such as reconfigurations of quotas (or

¹¹⁹ ABA (2001), *The Transition to Digital: Implications for Australian Content Regulation*, Transcript of Proceedings, 21 February, p. 11.

other instruments) around necessarily imprecise assessments of relative influence, the capacities of new technologies, and the conflicting demands of aspirant and existing broadcasters.

Further, Australia's national broadcasters appear in some respects well-placed to take on such a role. They are cost-efficient content producers in comparison to both commercial broadcasters and comparable public broadcasters overseas. They have also proved innovative and adaptable on occasion: the ABC has successfully developed its online presence into one of Australia's most successful media web sites.

The television producer Steve Vizard proposed an option of this kind in his 1999 Andrew Olle lecture. Arguing from the premise that global convergence will soon make our current system of quotas unworkable, Vizard's proposal had three elements:

- The ABC should be the strongest future source of Australian content;
- The ABC should exclusively provide Australian content;
- The ABC should provide content over every available platform.¹²⁰

The Productivity Commission's final report on broadcasting briefly considered the role of the national broadcasters. The Commission commented on the continuing importance of the national broadcasters in a converged media environment, and noted that the national broadcasters might be funded to provide specific kinds of programming, subject to their charters.

Several considerations need to be weighed against this strategy. The national broadcasters are not funded to provide high levels of Australian content, nor do their charters suggest that this should be their exclusive task. Further, Australian public broadcasters are proportionately small in comparison to their European counterparts. It would appear politically unlikely that future governments would fund the national broadcasters to the necessary level, either through the budget or other mechanisms such as industry or viewer levies. The Finnish competition policy question raises a further issue. Why should independent producers or commercial broadcasters be denied access to a public subsidy for valued content?

From the point of view of cultural policy, the chief disadvantages of the model lie in the possible trade-off of one cultural policy objective against another. Even if the national broadcasters were able to show sufficient innovative, high quality Australian content, there is still a question over the capacity of one large and one small public broadcaster to satisfy the BSA's diversity objective. Both the ABC and SBS have cultural diversity policies. But they may seem unlikely to deliver the range of material currently offered by the commercial broadcasters.

¹²⁰ Steve Vizard (2000), "Seachange in Australian content", *ABCzine*, no. 1, p 34.

In addition to the opportunities highlighted by Vizard, there are clearly risks in focussing the demands of cultural policy on one principal institution. Although some ABC local drama, notably Vizard's own *SeaChange*, has been successful, much other material produced by the national broadcasters finds only a small audience. Would this change if the public broadcasters were reinvented? On commercial television, local drama currently rates well. In attempting to provide a vibrant home for diverse Australian voices, the national broadcasters must not create an expensive and irrelevant ghetto.

This is not to suggest that public broadcasting has a diminishing role in the digital era. Public broadcasters can do things which cannot be achieved through the regulation of the commercial sector. In a fissiparous media environment, the role of the national broadcasters in providing quality content, a sense of citizenship and community, and independent news and information is likely to become more important over time.¹²¹

Regulating distribution

The social and cultural objectives of broadcasting policy will be defeated if viewers cannot find or access content which has been supported by quotas, subsidies or other measures. This is not a problem in the sparsely populated world of Australian television today. Australian free to air broadcasters have fought not to be retransmitted on subscription services — the opposite intention of their counterparts' struggles in other countries. A more competitive, multichannel system would be different. We have seen how "must carry" rules are a key element of the Canadian system of content regulation. While Australia does not have Canada's ubiquitous cable distribution, the emergence of an expanded digital broadcasting system in this country would raise the issues of presence and accessibility which have been encountered in Canada and Europe.

Australian policymakers will need to consider whether "must carry" rules become necessary for the national broadcasters, community broadcasters and indigenous broadcasters in order to ensure that all Australians have ready access to all or some of these publicly supported services. In a digital environment, the presentation of available material on the EPG is another issue. OFTEL's comments and the relevant EU Directive have been noted in part one above.

¹²¹ See Andrew Graham (1998), "Broadcasting Policy in the Digital Age", in Charles M. Firestone and Amy Korzick-Garmer eds., *Digital Broadcasting and the Public Interest: Reports and Papers of the Aspen Institute Communications and Society Program*, Washington, D.C.: the Aspen Institute, pp. 151-92. Also available online at www.aspeninstitute.org/dir/polpro/CSP/DBP/dbpi22.html

Using market mechanisms to achieve universal access

Access to broadcasting services remains an issue for analog transmission today; the complexity and uncertainty of digital conversion will ensure that it remains a significant factor in future media policy. The benefits of digital broadcasting will not be fully realised until all Australians have access to digital services.

A number of relevant market models have been developed in the field of telecommunications policy. In telecommunications, auctions of universal service obligations are claimed to provide a mechanism which enables the regulator to intervene in the operation of the market to meet social policy goals without restricting competition. Dennis Weller, Paul Milgrom and David Salant have developed a model “in which the obligation is *symmetric* (in that it can be applied to firms other than the incumbent) and *multilateral* (it involves a transaction entered into voluntarily, in which the carrier takes on the obligation in return for compensation)”.¹²² Weller further notes that the model has a precedent in the US where subsidies to service “unprofitable” airline routes are competitively tendered. Any equivalent symmetry in broadcasting policy, would of course require some separation of licences for ‘content’ and ‘carriage’, perhaps along the lines the Productivity Commission recommended.

Another example is the model developed by Jon M. Peha¹²³ for tradeable universal service obligations for telecommunications providers, which is analogous to the regulation of air pollution in the US, and is claimed to work best at times when an industry is in transition, for example during privatisation, deregulation or the periodic release of spectrum. In this model, providers (or as Peha calls them, “operators” since they may not be the initial provider) are motivated to roll out or “build out” infrastructure in underserved areas under a system whereby those commitments are “bundled with one or more items of value” such as “the infrastructure of the government carrier, permission to operate (a license), access to spectrum, and freedom from regulation for some fixed period”.¹²⁴ To assist operators to achieve appropriate levels of expansion, Peha proposes a system of “universal service funds” – effectively subsidies for commercial provider’s expansion into unserved areas, and cites the example of Chile in which aspirant and established operators bid for the smallest subsidy necessary to fulfil particular milestones set by the regulator.¹²⁵

¹²² Dennis Weller (1999) “Auctions for Universal Service Obligations” *Telecommunications Policy* vol 23 p. 646 n.2.

¹²³ Jon M. Peha (1999) “Tradeable Universal Service Obligations” *Telecommunications Policy* vol 23 pp. 363-74.

¹²⁴ *Ibid.* p. 366.

¹²⁵ *Ibid.* p. 367.

In a 1998 report for the European Commission Directorate-General XIII, Analysys, Squire, Sanders and Dempsey, suggest that the model for universal service provision then operating in the telecommunications sector in Germany, Austria and Luxembourg might provide a model by which market forces can play a greater role in the provision of “public service missions” in the broadcasting sector:

Under that regulatory model, there exists a general presumption that universal service is being provided. Insofar as market failure suggests that universal service is not being provided, market players may tender to be able to provide such service. In the event that the provision of such service proves to be uneconomic, a mechanism has been established which foresees contributions being made by all relevant market players.¹²⁶

But other commentators argue that the universal service ideal either as it is understood in public service broadcasting or in telecommunications cannot be translated to broadband services because “it has to do with access to networks; it does not address access to services and content”.¹²⁷

There may then be an argument for government or industry subsidy in the form of a platform-neutral “equivalent digital coverage fund”. Participants in recent inquiries have raised the prospect of the government subsidising provision of set-top receivers. The Productivity Commission noted in its final report that ‘[d]uring the [digital] switch-over period, the Government may also consider policy options for assisting low income Australians to continue to receive their existing services — those that have been received as analog free to air broadcasts. Measures of this sort may be necessary to achieve a final analog switch-off in some areas, especially in regional areas where the value of the spectrum may not be sufficiently high to induce market-based spectrum clearance.’¹²⁸

¹²⁶ Analysys, Squire, Sanders and Dempsey, (1998) *Study on Adapting the EU Telecommunications Regulatory Framework to the Developing Multimedia Environment* Study for the European Commission (Directorate-General XIII), p. 219.

¹²⁷ Colin R. Blackman, (1998) “Convergence between telecommunications and other media. How should regulation adapt?” *Telecommunications Policy* vol 22 pp.163-70.

¹²⁸ Productivity Commission, (2000) *Broadcasting Report no. 11*, Canberra: AusInfo, p. 238.

Conclusion

The coming of digital television has often been described as a revolutionary change for broadcasting. But Australian viewers are for the most part still unable to see for themselves the much ballyhooed advances in picture and sound quality, or to judge the merits of interactive and enhanced programming. While digital transmission of free to air television signals commenced in January 2001, only a tiny fraction of the viewing audience currently has access to the technology necessary to enjoy the new broadcasting experience. This fraction will of course grow in coming years, although nobody knows what the rate of take-up will be. In the introduction to this report, we outlined a number of technological and market changes which the advent of digital will bring. We also noted that it remains uncertain how viewers will respond to the changes. What is certain, however, is that there will be far-reaching industry change, and that policy and regulation will play a significant part in shaping and responding to that change.

Cultural and social policy objectives

The BSA has eighteen objects, many of which have social and cultural implications. For reasons explained in part one of this report, the multiplicity and complexity of these objectives makes the development of alternative regulatory mechanisms difficult. Fewer and clearer policy objectives would also facilitate the evaluation of cultural content regulation.

The relation between cultural and industry development, competition and digital economy priorities is complicated by the absence of an explicit industry policy objective in the Act such as that embodied in Canadian policy. Instead production industry objectives are claimed to be implied by cultural ones. While a sustainable production sector is clearly necessary for the achievement of content-related screen cultural policy, cultural policy objectives cannot logically be considered a proxy for the development of the production industry. There is no clear view or consensus as to how these different interests should be balanced.

At the same time, an unproductive dichotomy has developed in Australian broadcasting policy debate between the cultural dimensions of broadcasting, the commercial interests of the industry and the economic benefits of a more liberal policy approach. This unnecessarily sets cultural development against industry development and digital economy priorities. While there are circumstances in which these priorities may be in conflict there is no reason to presume that these priorities should always be counterposed.

Cultural and economic benefits may well coincide in a growing, more competitive and more dynamic industry. Anti-competitive regulation comes at a high cost to producers of content, setting limits on both the size of their market and what they can produce. This point was made by Tom Kennedy:

... the current networks are actually restricted from multi-channelling. Datacasting has been blown out of the water. So ... players cannot necessarily produce new innovative content, be it cultural or otherwise, or get it funded in any way, shape or form. So we are actually imploding upon ourselves back to the status quo rather than looking at where we could take it.

I know the networks want to do innovative programming, they want to do interactive, they want to do all these other enhanced content services but from a production company point of view nobody is paying the freight.¹²⁹

The Forward Policy Environment

There are a number of emerging pressures upon the current blend of cultural regulation and policy in the broadcasting sector, including the question of regulatory convergence; issues of access and interoperability; and the changing structure of the Australian audiovisual production industry.

In our view it would be mistaken to assume that the forward policy environment will necessarily be a more difficult one for achieving cultural policy outcomes such as ensuring a place for local television content. It is generally expected that the choices available to viewers will continue to increase over the next decade and that the majority of these new services will be discretionary services, but it is also possible that licences may be issued for new free-to-air services. While the entry of new services will result in fragmentation of audiences and revenue, they may well increase competition for local audiovisual product, and offset the historical decline in licence fees.

International Policy Models

Of all the international models, the Canadian one is of most interest and warrants the closest attention in consideration of future options. Canada has a mixed broadcasting system with a long history, it is of a comparable size to Australia, it has content regulations which bear a significant resemblance to Australian ones, it has a regulatory agency driven by similar concerns, and operates predominantly in the English language. In addition Canadian policy has sought to enhance competition, facilitate the entry of new players and respond in a timely fashion to the development of new delivery technologies while still retaining a place for Canadian content across the broadcasting system. It is a model of meeting cultural and social objectives in converging media systems which has as its “starting point” the economic

¹²⁹ ABA (2001), *The Transition to Digital: Implications for Content Regulation*, Transcript of Proceedings of ABA Workshop, 21 February, pp. 30-31.

realities of a modern competitive environment. This encourages innovation by building flexibility into broadcasting regulation.

Options for Australia

A series of medium term pressure points are foreseeable for the social and cultural regulation of broadcasting. Even minor changes to digital television regulation, such as the introduction of limited commercial multichannelling, will require a reconfiguration of the quotas. Such changes are likely to make the existing system more complex at the very least. Australia's existing quotas are designed for an analog broadcasting system, characterised by a small number of single-channel stations. Quotas also assume a real-time programming stream controlled by the broadcaster.

As long as analog simulcasting remains the predominant element of Australian television broadcasting, the quota system will continue to be a viable regulatory device. However, any easing of restrictions on datacasting will raise questions about the application of the quotas. If and when interactive services are permitted to develop, and as the storage capacities of set-top boxes and disk-based video recorders increase, time-based quotas will begin to be compromised.

We identified a number of possible evolutionary responses to such developments, including modifying the existing quota system, replacing or augmenting quotas with subsidies, redefining the role of the national broadcasters, and regulating distribution through must carry and other policy measures.

Continuing research and public consultation on the practicalities and implications of these options will be critically important over the next several years, accompanied by careful study of the development of digital television and other new audiovisual media. Market cycles and the immediate problems of the production industry do need to be addressed, but in our view longer term policy development is equally if not more important.

Connecting Cultural and Social Policy with Information Economy Priorities

As policymakers and regulators around the world struggle with the implications and ramifications of the switch to digital, a cluster of problems recur:

- First is the need for flexibility within the system, with calls for regulation that allows innovation and creativity to flourish and business to grow by, amongst other things, not implementing rules or procedures which may inhibit as yet unforeseen developments.
- Second, there is an emphasis on access, which takes several forms. There is the need to provide access for viewers to a diverse range of services and programming, including local and children's programming. There is then the problem of ensuring access for producers to finance, to skilled creatives, and to domestic and international markets. A further problem is enabling access for program providers to delivery systems.

- A third challenge is to provide regulatory transparency, which is also a key theme of efforts to liberalise global trade.
- Despite the proliferation of new applications, ongoing technological development, and changes to forms of content and modes of its delivery, a further key demand for developing regulatory systems is simplicity, meaning in part clarity of regulatory purpose and the adoption of technology-neutral approaches.
- Related to the principle of simplicity is that of efficiency in the administration of regulation to permit the maintenance and development of an efficient broadcasting system. And running through all of these principles is an emphasis on evaluation, whereby objectives are tested against outcomes in order that necessary adjustments may be made as and when circumstances change or new situations arise. This suggests that cultural regulation needs to be more results-oriented than in the past. The point was made in the Convergence Review where it was noted that only “an ‘outcomes’ focus can provide the benchmarks needed to assess whether proposed policies are necessary or sufficient to address the gaps between actual national performance and desired national outcomes.”¹³⁰

Such a focus on outcomes would not only free policy formulators to consider alternative non-traditional policy options, but would also require ongoing evaluation of the effectiveness of policy. If this analysis is correct, much more work will need to be done on evaluating the outcomes of the cultural and social regulation of broadcasting.

A number of complementary approaches may be taken to this issue. The evaluative possibilities of interactive technology could be explored. Ongoing audience surveys and studies could be undertaken to ascertain public attitudes on issues such as Australian content, influence and other digital switch-over issues. A consumer focus could investigate the possibility of benchmarking the availability of programs in Australia against comparable countries and comparable remote areas. And a focus on contestability might benchmark barriers to entry for new players across different jurisdictions.

The challenge facing policy makers and regulators is to combine the advantages of modernising Australia’s media environment with a continuing commitment to social and cultural objectives. As we have indicated throughout this report, retaining cultural and social objectives is not incompatible with a flexible, efficient and competitive system in which audiences have access to a diverse range of programming and services. While converging media environments are sometimes thought to compromise the viability of cultural regulation, there is ample evidence of a continuing community demand for both the positive and negative content regulation of invasive and pervasive media. This research has been premised upon the persistence of social and cultural objectives in broadcasting policy. In our

¹³⁰ DCITA (2000) *Convergence Review* Canberra: DCITA, p. 31

view, it is not only possible but necessary to place cultural and social objectives at the heart of a regulatory system designed for converging media.

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