‘ACCORDING TO THE DEGREE OF INFLUENCE’: WHY REGIONAL COMMERCIAL RADIO IS MORE HEAVILY REGULATED THAN METROPOLITAN COMMERCIAL TELEVISION

ROB NICHOLLS *  (Refereed)

Abstract

This paper considers the effects of the most recent changes to the broadcasting regulatory regime in Australia, and compares the outcomes for commercial television broadcasters with those for commercial radio broadcasters. It begins by reviewing the path to the current regime and highlighting the differences in the review of regional radio compared with television. It reviews political economy theories in respect of harmonisation of regulation and analyses the distinctly Australian outcome in respect of regional commercial radio. The paper concludes by examining whether the co-regulatory and ‘light touch’ regulation aspects of the broadcasting regime in Australia have been asymmetrically applied – reversing the outcome intended by section 4 of the BSA.

Introduction

There are two key factors which influence the regulation of broadcasting services which are distinct from the regulation of other services. The first is a social policy issue associated with diversity and can be summarised by the question: ‘How many voices should people be able to hear?’ The second is that an input to broadcasting (and in more recent years to mobile telecommunications) is spectrum, which is usually subject to economic regulation. Recognition of this duality is vital to the analysis of broadcasting regulation. Most regulatory practice is based on economic theories of mechanisms to promote competition (and specifically infrastructure based competition) rather than the demands of social regulation. This has had adverse effects on pluralism (for example, Arino 2004) and causes practical problems for regulators. At the same time as regulation of broadcasting has come under the influence of economic regulatory theory, state control of regulation has been diffusing from direct control to independent regulators (Gilardi, Jordana et al. 2006) in a process characterised by those authors as ‘regulatory capitalism’.

Given that the regulatory capitalism literature represents the heart of current European thinking on the political economy of regulation, it seems to provide a limited basis for review of a regulatory framework which is directed towards social policy, rather than efficient economic outcomes. The stark contrast between the two positions was provided by the Australian Communications and Media Authority (ACMA) in 2008. One position paper outlined the ACMA’s approach to spectrum allocation and management which was summarised in 5 principles (ACMA 2008: 15):

- allocate spectrum to the highest value use or uses;
- enable and encourage users to move spectrum to its highest value use or uses;
- use the least cost and least restrictive approach to achieving policy objectives;
- balance certainty and flexibility; and
- balance the cost of interference and the benefits of greater spectrum utilisation.

* Rob is a consultant at Gilbert + Tobin and a PhD candidate at UNSW. He can be contacted at rnicholls@gflaw.com.au or +61 2 9263 4023
On the other hand, the ACMA’s position on considering social welfare maximisation was summarised (Burdon 2008: 4):

When a total welfare standard is applied, the impact of a regulatory proposal on the public interest is measured as the sum of the effects on consumers, producers, government and the broader social impacts on others in the community.

That is, the spectrum management part of the ACMA, driven by competition regulation and economic efficiency, can do little more than maximise price. The ACMA’s principal economist recognizes that there are social implications to regulatory change.

In Australia, the broadcasting industry has long been subject to interventionist regulation based on perceived social and cultural needs rather than economic efficiency. The industry itself has been both reactive and responsive to this regulation and has a long history of involvement in lobbying for regulatory positions (both for and against intervention). Until early in 2007, there were strict rules prohibiting horizontal integration. In addition, there are business models, particularly in the commercial television and commercial radio sectors, which are characterised by limited vertical integration. The former limitation was brought about by the cross-media ownership and control restrictions which provided that, as summarised by Paul Keating (then the Treasurer), media owners could be ‘princes of print or queens of screen, but not both’.

The broadcasting sector has also had strongly asymmetric regulation with the degree of regulation, at least in the Australian environment, depending on the extent to which the industry had the potential to influence audiences. This regime is established in the regulatory policy set out in section 4(1) of the Broadcasting Services Act 1992. The result was significantly higher levels of intervention in respect of commercial television broadcasters than, for example, community radio broadcasters.

The broadcasting sector has also had strongly asymmetric regulation with the degree of regulation, at least in the Australian environment, depending on the extent to which the industry had the potential to influence audiences. This regime is established in the regulatory policy set out in the Broadcasting Services Act 1992 (BSA) which announces in section 4 that, ‘The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services … according to the degree of influence that different types of broadcasting services … are able to exert in shaping community views in Australia’. Despite this, the regulatory burden which falls on regional commercial radio broadcasters on change of control matters is markedly greater than that for metropolitan commercial television broadcasters.

This paper examines the use of localism as a mechanism for the asymmetric regulation of broadcasting services. It recounts the steps which were taken to change the obligations of regional commercial radio broadcasters to create a regime which reverses the expected outcome under the BSA. It charts how the reasonable call for localism in regional radio have changed to face of broadcasting regulation so that regional commercial radio broadcasters are subject to both increased content obligations as well as requirements not to change their business models if there is a change in control. Despite the likely conflict with the Australia-United States Free Trade Agreement, there are obligations for localism which are significantly greater than those imposed on the commercial television networks when a change of control (or other ‘trigger event’) occurs.

Global issues in regulation

Before considering the Australian broadcasting environment, it may be useful to consider whether there are effects from the diffusion of regulation which might lead to an outcome which reverses the object of the BSA. In order to do this, we consider some of the theoretical mechanisms for diffusion of regulation. This section considers the role of the state in regulation over time from the perspective of international regulatory norms.
Most global regulatory theory concentrates on the regulation of industries which have been privatised as a result of the impact of neoliberalism. In general, these are network industries such as telecommunications, power and water. These industries are often associated with previous state owned monopolies which considered ‘natural monopolies’ before the neoliberal approach of regulation to encourage new entrants in ‘workable competition’. This change was important as it justified the privatisation of utilities without the risk of monopoly behaviour after denationalisation (Palast, Oppenheim et al. 2003). On most analyses, broadcasting would be characterised as a network industry. However, the use of the ‘cultural exception’ has limited the application of this approach to broadcasting (Nicholls 2008).

In services which would have been characterised as natural monopolies, current regulatory theory seeks to promote competition in markets by minimising entry costs and reducing switching costs to consumers. The political desire to open markets is prevalent even when some economic theorists argue that the credible threat of entry is more efficient than entry itself (Baseman 1981). Examples of the application of this approach include telecommunications (de Bijl and Peitz 2002), electricity (Doove, Gabbitas et al. 2003) and financial services (Brown and Davis 2003).

This economist’s approach to regulation reflects the interests that stakeholders have in terms of ‘rent seeking’ or profit maximisation. Work by Jung and Duso attempted to correlate the cost of lobbying with the pay-offs received in the telecommunications sector in the US based on the proposition that ‘companies operating in regulated industries have an incentive to lobby politicians and bureaucrats for concessions’ (Jung and Duso 2004). Their conclusions were, unsurprisingly, limited by the ‘limited observability of regulatory decisions’ (Jung and Duso 2004 p 21).

There are a number of approaches to the role of stakeholders in regulation. Steven Vogel summarises the alternative analyses of deregulation as one of (Vogel 1996 Chapter 1):

- the triumph of markets over governments;
- the triumph of interests over governments; or
- regulation as the reorganisation of government control.

Vogel’s approach is to accept the third analysis as the appropriate view and he develops a model to analyse this which is summarised in Figure 1.

**Figure 1 – Simplified form of Steven Vogel’s model**

Vogel goes on to provide empirical data to support his views drawing on examples from telecommunications and financial regulation in both the United Kingdom and Japan. He concludes that the UK has engaged in pro-competitive regulation and that Japan has adopted strategic reregulation. However, the analysis seems somewhat dated in an environment where Japan’s
telecommunications deregulation is comparable to that in the UK and the United States and where government support for domestic standards was rejected by the incumbent NTT (Maeda, Amar et al. 2006). Vogel also argues that there should not be consideration of the state as a monolithic entity in regulation. Rather, he uses the term ‘government’ to describe the collective role of state entities but considers them separately in his empirical analysis.

Daniel Drezner also takes a state-centric approach in his analysis of globalisation effects on regulation (Drezner 2007). Drezner develops a model which proposes four forms of standards which can be adopted at the state level. The types of standards are: sham; rival; club; and harmonised. Drezner recognises that there are roles for both international governmental organisations and non-governmental organisations in the establishment of standardised regulation and describes these and the role of the state, for each of the standards types which he proposes. Drezner’s model is shown in simplified form in Figure 2.

Figure 2 – Simplified form of Drezner’s model

Drezner’s assertion that there is an important role for states to play in the harmonisation of regulation is based on a game theoretic approach. Drezner sets up a simple two-player game with no coercion to argue that coordination between states is often mutually beneficial. Having established this premise, he does not consider the role of actors other than states as game players but rather examines their roles once the coordination game has begun. The analytical framework for the regulation of broadcasting will need to encompass the coordination between states when it is appropriate.

Drezner’s 2007 book builds on earlier work which related state influence to market size. He took the view that ‘State power is defined as the size of a state’s internal market; the larger the market, the more powerful the state’ (Drezner 2004). This is also consistent with earlier work by Drezner where he argued that ‘the evidence on policy convergence across multiple issue areas suggests that the structurally based theories lack support’ (Drezner 2001 p 55). Although his work has strong state-centric tones, Drezner takes the view that state influence, particularly in respect of technology development, should not be based on centralised state power: ‘a decentralized state structure is a necessary condition for states to sustain themselves at the technological frontier’ (Drezner 2001).

Drezner also suggests that ‘gravity models’ are key to understanding relative influence and trade (Drezner 2007 p 34). However, gravity models assume that technology deployment is not globalized in a way which allows near contemporaneous adoption of advantageous consumer devices. Further, Drezner’s game theoretic approach requires that the European Union be regarded as one country. Although this approach is supported in regulatory influence analysis by some scholars (Bach and Newman 2007), it does not always hold true in respect of the domestic regulation of broadcasting. Drezner also invokes the concept of ‘political voice’ which he characterises as the actions by a stakeholder to change the regulatory status quo. Drezner regards
political voice as having an economic cost and that the ultimate power of those with political voice is initially the power to exit from a regulated market. When the exercise of political voice works, then the stakeholder continues in the expectation of being able to achieve change (Drezner 2007 p 48).

Radaelli argues that there are eight issues which must be addressed in understanding international regulatory convergence (Radaelli 2004). These are set out in Table 1.

Table 1 – Radaelli’s eight issues

<table>
<thead>
<tr>
<th>Issue</th>
<th>Problem</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Conventional explanations are based on simple mechanisms like arbitrage, but the conditions for arbitrage may be absent, and the mechanisms more complex</td>
</tr>
<tr>
<td>2</td>
<td>The concepts of ‘top’ and ‘bottom’ are elusive and normatively loaded</td>
</tr>
<tr>
<td>3</td>
<td>Explanations should account for races sideways or policy transfer</td>
</tr>
<tr>
<td>4</td>
<td>Conventional models do not turn analytic categories into variables</td>
</tr>
<tr>
<td>5</td>
<td>The ‘convergence or divergence’ dilemma requires more accurate approaches</td>
</tr>
<tr>
<td>6</td>
<td>Complex legal and policy systems exhibit low degrees of competition</td>
</tr>
<tr>
<td>7</td>
<td>Explanations of competition are flawed if they do not also account for cooperation</td>
</tr>
<tr>
<td>8</td>
<td>Regulatory competition is socially constructed</td>
</tr>
</tbody>
</table>

Radaelli suggests some approaches to these problems but does not provide a definitive set of solutions. He suggests that simple models may not be adequate and quotes the wise caution that ‘a social science that explains why those with guns and the money win most of the time is hardly an accomplishment’ (Braithwaite and Drahos 2000).

Beth Simmons argues that ‘Purely economic explanations of policy coordination … have consistently failed to capture government choices on the ground’ (Simmons and Elkins 2004 p 187). Her approach is to model ‘policy diffusion’ which has similarities to the concepts of power diffusion suggested by Susan Strange. Simmons’ liberal approach uses a model ‘measuring influence along other channels controlling for geography’ (Simmons and Elkins 2004 p 178). One of the key findings was the extent to which regulatory processes followed a cultural pattern. That is, countries with common cultural values regulated the industries in the study in similar ways.

All of these mechanisms for regulatory diffusion assume that there will be little differentiation in the approach taken in similar countries. They do not take into account the mechanism used in Australia to create a differentiated and unusually asymmetric regulatory regime and that is the use of obligations related to localism.

Localism as a differentiator

The first inquiries into localism occurred in the lead up to the proposed changes to the Broadcasting Services Act 1992 which were introduced as the Broadcasting Services Amendment (Media Ownership) Bill 2002. There were two inquiries. The first was by the House of Representatives Standing Committee on Communications, Transport and the Arts and was chaired by Paul Neville and investigated localism in regional radio. The second was by the (then) Australian Broadcasting Authority (ABA) and investigated localism in respect of news in regional television. It would be reasonable to view both of these as the first inquiries into localism since the passage of the Broadcasting Services Act 1992. In practice, the inquiries were effectively triggered by the legislative amendments which were being proposed that were associated with digital television. Nevertheless, the effects of the inquiries were ultimately to reverse some of the aggregation approaches which had arisen from the introduction of satellite technology.
The Bills Digest for the *Broadcasting Services Amendment (Media Ownership) Bill 2002* summed up the position:

> It would appear that the process of aggregation (and consequent networking), coupled with the economics of the broadcasting industry, have resulted in a reduction of local programming in regional areas. The cost of producing local programming (when compared with the cost of a network feed) is such that it is difficult to recoup through any additional advertising revenue that might be generated because of the popularity of the programs. Regional stations that continue to provide local programming tend to do so because it enhances their profile in the community, which may have some longer term benefits, rather than for short-term revenue. When economic conditions worsen and revenue declines, local programming tends to be the first casualty.

The legislation passed the House but did not complete passage through the Senate. The concepts behind the Bill were later used to form part of the major legislative package which passed both chambers in 2006. This paper sets out the key issues which arose from both inquiries and then examines the way in which the changes were applied in the major sectoral reform which was enacted in 2006.

**Local voices**

The local radio content inquiry was chaired by Nationals MP, Paul Neville. It had wide terms of reference:

> The House of Representatives Communications Committee shall inquire into and report on the adequacy of radio services in regional and rural Australia and the extent to which there is a need for the Government to take action in relation to the quantity and the quality of radio services in regional and rural Australia, having particular regard to the following:

- the social benefits and influence on the general public of radio broadcasting in non-metropolitan Australia in comparison to other media sectors;
- future trends in radio broadcasting, including employment and career opportunities, in non-metropolitan Australia;
- the effect on individuals, families and small business in non-metropolitan Australia of networking of radio programming, particularly in relation to local news services, sport, community service announcements and other forms of local content, and;
- the potential for new technologies such as digital radio to provide enhanced and more localised radio services in metropolitan, regional and rural areas.

The inquiry received a large number of submissions from 290 individuals and organisations. In context, this was a larger number than made submissions to the Productivity Commission’s investigation into broadcasting in 1999/2000. On the other hand, it was considerably fewer than the number of submissions made to the 1984 localism inquiry which was 890 (Department of Communications 1984). The output of the inquiry was a report entitled ‘Local Voices: An Inquiry into Regional Radio’ and was released in September 2001. ‘Local Voices’ made a number of recommendations which were influential in the drafting of the proposed reforms in 2002. The government responded to the 20 recommendations in 2003, while filing to pass the Broadcasting Services Amendment (Media Ownership) Bill 2002. The recommendations and the responses are set out in Table 2.
### Table 2 – Local Voices and the government response

<table>
<thead>
<tr>
<th>No</th>
<th>Recommendation</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>As a matter of high priority, the Minister should establish a Radio Black Spots Program. The Program should be established along similar lines to the Television Black Spots Program. The program should apply to national and commercial radio services. First priority should be given to attempting to ensure all communities with 50 or more households have access to the most locally relevant ABC Local Radio Service and at least one commercial radio service.</td>
<td>Commercial station support only but not to level proposed</td>
</tr>
<tr>
<td>2.</td>
<td>The ABC should commit to the establishment of a 10kW AM transmitter at Meekatharra, Western Australia, as a replacement for the short wave service that the ABC withdrew in 1994. If necessary, the Government should finance this project specifically in the 2002–03 Budget.</td>
<td>Rejected</td>
</tr>
<tr>
<td>3.</td>
<td>The Minister should prepare amendments to the Act to enable communities in the RCRS zones which do not consider the service that they receive is adequate in terms of local relevance to be able to apply to retransmit another service.</td>
<td>The ABA will consider the committee’s suggestion in the context of its review of RCRS</td>
</tr>
<tr>
<td>4.</td>
<td>The Minister should prepare amendments to the Act to establish an additional category of broadcasting service relating to Indigenous broadcasting services.</td>
<td>Deferred to the review of the concept of an Indigenous television service</td>
</tr>
<tr>
<td>5.</td>
<td>The Minister should direct the Department to develop, in consultation with the ABA, RPH Australia, Radio for All Australians and other relevant organisations, a national strategy to ensure that people in non-metropolitan Australia have access to radio services for the print handicapped.</td>
<td>Rejected</td>
</tr>
<tr>
<td>6.</td>
<td>The Minister should establish a station manager employment and training scheme for the community broadcasting sector to allow community broadcasters to participate in accredited training courses. The scheme should be based on a self-help model in which Commonwealth funds are made available on a dollar for dollar basis to match locally generated funds. The level of Commonwealth funding should be capped at $5,000 per station.</td>
<td>Rejected – In general training is the responsibility of the relevant sector.</td>
</tr>
<tr>
<td>7.</td>
<td>The Minister should prepare amendments to the Act to require all non-metropolitan commercial, community and narrowcast radio services to identify the originating source of programming when giving their call signs. The ABC Board should determine that ABC regional radio services identify the originating source of programming when giving their call signs.</td>
<td>Rejected</td>
</tr>
<tr>
<td>No</td>
<td>Recommendation</td>
<td>Response</td>
</tr>
<tr>
<td>----</td>
<td>--------------------------------------------------------------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>8.</td>
<td>The ABA should continue its survey of program formats on an ongoing basis ensuring that it identifies the source and degree of local news and community content. The Minister should prepare amendments to the Act to require commercial radio licensees to report their program delivery operations and details of program formats to the ABA on an annual basis. The ABA should publish this material in full disaggregated according to licence areas.</td>
<td>Government and ABA to review</td>
</tr>
<tr>
<td>9.</td>
<td>The Minister should direct the ABA following the completion of the LAP process to conduct an audit of licence areas to determine the degree to which the planning process has provided for localism and diversity and the level of community satisfaction with the services in their area. The Minister should ensure adequate resources are provided to the ABA to enable it to complete the audits within a reasonable time frame.</td>
<td>Rejected</td>
</tr>
<tr>
<td>10.</td>
<td>The Minister should direct the ABA not to issue any further new commercial licences in regional areas, following the completion of the LAP process, until an audit of that licence area has been completed.</td>
<td>Rejected</td>
</tr>
<tr>
<td>11.</td>
<td>The Minister should prepare amendments to the Broadcasting Services Act to make provision for a test of commercial viability to be included, following the completion of the LAP process, before the issue of new licences. The Minister should ensure that the ABA is provided with adequate resources to develop and implement the test.</td>
<td>Rejected</td>
</tr>
<tr>
<td>12.</td>
<td>The Minister should prepare amendments to the relevant legislation to extend the boundaries of the Broadcasting Services Bands part of the spectrum to encompass the frequencies used for s.40 licences.</td>
<td>Rejected</td>
</tr>
<tr>
<td>13.</td>
<td>The Minister should prepare amendments to the Act to have narrowcast licences restrict narrowcast licences to a particular format and for open narrowcast licensees to require permission from the ABA before substantially changing the format.</td>
<td>Rejected</td>
</tr>
</tbody>
</table>
| 14.| The Minister should prepare amendments to the Act with the object of requiring broadcasters to take responsibility for:  
- ensuring the contact details for the relevant State Emergency Service contact person in the area are known to all relevant broadcasting staff at all times;  
- any emergency service announcements considered necessary by an accredited emergency service organisation or other such body are broadcast; and  
- providing to accredited emergency service organisations up-to-date contact details for staff with the authority to interrupt programmed radio services (particularly pre-recorded, automated and networked services) in order to broadcast emergency service announcements. | Rejected – to be dealt with by industry codes |
<table>
<thead>
<tr>
<th>No</th>
<th>Recommendation</th>
<th>Response</th>
</tr>
</thead>
</table>
| 15 | The Minister should prepare amendments to the Act to require:  
- that, as a condition of any broadcasting licence, broadcasters maintain properly developed emergency response plans; and  
- the ABA to regularly audit the emergency response plans maintained by broadcasters and check that the procedures in place would allow programmed services to be interrupted in the event of an emergency.                                                                 | Rejected – to be dealt with by industry codes                             |
| 16 | The Minister for Defence, in conjunction with the Ministerial Council of Emergency Service Ministers, should develop protocols to ensure that radio and television station managers (or their delegates) are represented on local and regional State Emergency Service Committees and disaster response coordinating organisations.                                                                 | Rejected                                                                 |
| 17 | The Minister should consider whether it would be appropriate to specify in legislation that, where broadcasting facilities are damaged in an emergency situation and where there is an expectation that broadcasters transmit emergency service announcements, telecommunications providers should give priority to repairing damaged equipment, infrastructure or links to essential broadcasting equipment. | Rejected – to be dealt with by industry codes                             |
| 18 | The Minister should ensure that some of trials that are proposed for digital radio broadcasting are conducted in regional and remote areas. The Minister should stipulate the trials take into account the fortuitous coverage areas of AM services as a basis for the new digital service footprints or coverage areas.                                                                                                                                                                                                 | Rejected – trials only in early stage                                      |
| 19 | In the context of these trials, The Minister should also consider the potential application of the hybrid satellite/terrestrial technology being promoted by AsiaSpace with particular attention to the provision of radio services to moving vehicles.                                                                                                                                   | Rejected – trials only in early stage                                      |
| 20 | The Minister should ensure that the community, Indigenous, Radio for the Print Handicapped broadcasters are included at all stages in the planning and implementation of digital radio.                                                                                                                                                                                                                                                          | Results of trials to be shared. Full consultation in later deployment.   |

In effect, the result was that the report of a House Committee, chaired by a National Party member and which had proposed some fairly minor changes which were reflective of the submissions received was rejected by a government which included the National Party as the junior coalition partner. The effect of this was to harden the resolve of the Nationals in their next opportunity to review the regulatory environment.

Local faces

It was not just local radio that became a focus of attention. One of the effects of aggregation had been to create very large regional licence areas. For example, almost all of the northern part of New South Wales formed a single commercial television licence area. Initially, the regional licensees
maintained offices for both sales and local news production in each geographic area into which advertisements could be inserted. The business rationale for this was to sell more advertising and it does not make sense to advertise a regional service (such as panel beating), hundreds of kilometres away from the prospective customers.

Driven by the same need to reduce programming costs, regional television operators began to reduce the local news gathering and reporting capabilities. In June 2001 the regional Seven affiliate, Prime, closed its news production facilities in Canberra, Newcastle and Wollongong. In November of the same year, Southern Cross Broadcasting (a Ten and Seven regional affiliate) closed its news offices in Canberra, Cairns, Townsville, Darwin and Alice Springs. The ABA then investigated these closures in response to what it characterised as ‘community concerns’. The ABA did not provide any material that identified what communities had expressed concern. However, the issue had been raised by parliamentarians in the context of the local radio inquiry. For example, Queensland ALP Senator Jan McLucas issued a press release which was critical of the Howard government for failing to prevent the closure of ‘Channel Ten Local News Rooms in Cairns and Townsville’.

On 27 August 2002, the ABA reported that it had (ABA 2002):

formed the view that, in order to ensure that television licensees in regional Queensland, New South Wales and Victoria are sufficiently responsive to audience needs, an additional licence condition should be imposed on each commercial television licensee in those regional areas. The proposed additional licence condition requires licensees to broadcast a minimum amount of programs about matters of local significance to each sub-market.

The final form of the changed licence conditions essentially disaggregated the aggregated licence areas in respect of the licensees’ obligations to provide a news service. The local relevance obligation was expressed prescriptively with the Australian Communications and Media Authority (ACMA) advising.

Material that may be considered of local significance could include:

- material that deals with people, organisations, events or issues that are of particular interest to people in the area, in a way that focuses on the interests of people in the area;
- material about an individual in whom people in the area are particularly interested because of an association with the area, such as the individual having grown up, or lived, in the area;
- material that deals with the effects on the area of an event that occurs elsewhere;
- material about a sporting event that involves a team from the area or that involves a team from a nearby area, whose principal support base includes the area, or a significant part of the area;
- material about market conditions that closely affect a major business activity in the area, such as prices of a commodity in an area where that commodity is produced on a significant scale.

This disaggregation was extended to Tasmania from 1 January 2008 under the Broadcasting Services Amendment (Media Ownership) Act 2006 which revised the framework of controls over media ownership.

2002 proposed reforms

The 2002 reforms did not pass through the parliament as they were rejected by the Senate. The 2006 reforms were passed at a time when the Howard government had a (slim) coalition majority in the Senate. The next section outlines some of the compromises that were forced by the junior coalition partner. The reforms proposed in 2002 guided the requirements for those compromises.
The legislative package proposed in 2002 was expressed as media ownership reform rather than the comprehensive change to the regime that occurred in 2006. There were two key provisions in the reforms. The first was the abolition of the foreign media ownership rules and the second a change in the cross-media ownership limitations. The *Broadcasting Services Amendment (Media Ownership) Bill 2002* proposed to abolish foreign media ownership restrictions and to change the cross media ownership rules. The Bill was consistent with an earlier interview with the Minister and was subsequently incorporated into the Liberal election manifesto. On 29 August 2001 the Minister stated that the Government would consider a comprehensive review of the cross-media and foreign ownership rules. He indicated that the Government would grant exemptions in respect of cross-media if it obtained undertakings that companies would maintain existing levels of locally produced news and current affairs in respect of radio and television and that separate and distinct editorial processes were put in place. That is, the cross media reforms were expressed to include a commitment to localism.

The amendment to foreign media ownership limitations was simply a removal of those restrictions along with the objective of the then BSA, ‘to ensure that Australians have effective control of the more influential broadcasting services’. The cross-media ownership changes were more complex. The Bill provided that there was to be an exception to the existing cross-media ownership restrictions if exemptions from the cross media rules if the ABA issues a cross-media exemption certificate that is subject to conditions about meeting the objective of editorial separation and that the conditions of the certificate are satisfied. There was an obligation imposed on the applicant for a certificate such that it was obliged to undertake that the conditions of the certificate will be satisfied. There was an additional pair of obligations so that if an exemption from the cross-media rules was in force in relation to a commercial television or radio broadcasting licence, then the licensee was obliged to meet the objective of editorial separation and, in the case of regional radio, the ABA had to require the licensee to provide certain levels of local news and information. That is, regional commercial radio licensees were to be held to a higher standard than other broadcasters including commercial television broadcasters in metropolitan areas.

The concept of editorial separation was set out in the Bill by a definition of what is necessary to meet the objective of editorial separation. The requirement was for separate editorial decision-making for each of the entities that made up the set of media operations. That is, each of the television station, radio station and newspaper that makes up the set. The objective was met if, and only if, each of the entities has: separate editorial policies; organisational charts consistent with separate editorial decision-making, and separate editorial news management, news compilation processes and news gathering and news interpretation capabilities. The sharing of resources and other forms of cooperation between entities was to be permitted providing that the conditions were met.

One of the major concerns expressed in the Senate was the prospect that there might be an outcome where a certificate was issued but where the total number of media voices would be limited. As a result, there were changes to the Bill to introduce the first version of the 5/4 rule. This provided that that the minimum number of media groups test is satisfied if, for a set of media operations consisting of commercial radio broadcasting licence and either a commercial television broadcasting licence or a newspaper, there are at least the applicable number of points in the licence area of the commercial radio broadcasting licence. The ‘applicable number of points’ was five in mainland state capital cities and four elsewhere. Broadly, a point was awarded for each separate commercial television licensee, commercial radio licensee and newspaper and one point for each a group of two or more media operations controlled by the same person (operating with an exemption certificate).

As the draft legislation passed through the parliament, the Senate made 48 amendments to the Bill. On return to the House, 42 of these amendments were agreed and 6 were sent back to the Senate on 26 June 2003. The Senate insisted on its amendments and the Bill was laid aside by the House on 27
June 2003. As a result of the debates on the proposed 2002 reforms, there was an expectation of asymmetric regulation in respect of regional commercial radio. To some extent, the licence conditions imposed on regional television broadcasters as part of the disaggregation of news reinforced this view. The rejection of the ‘Local Voices’ report also contributed to the expectations for the proposed reforms in 2006 which are dealt with in the next section.

2006 reforms

Despite the changes in licence conditions for regional television news, local content in regional radio was not the subject of regulatory requirement. The exception was that the industry code of practice set out Australian music quotas if the licensees’ format included contemporary music. The government position on local content in regional radio was not expected to result in legislative changes (DCITA 2006 page 46):

ACMA and the Government will continue to monitor the provision of local content in other regional television licence areas and on regional commercial radio services and the Government may consider extending licence conditions relating to levels of local content to those markets if local content levels decline materially. However, the Government recognises that the imposition of greater regulatory requirements on regional broadcasters would involve additional costs. The capacity of this sector to meet additional obligations is ultimately linked to its commercial viability, including its capacity to achieve the economies of scale and scope that cross-media mergers can provide. The Government would balance these competing considerations when considering whether additional requirements such as local content requirements might be reasonably required.

However, by the time that the legislation was introduced, there was a significant push by the National party to ensure that a high level of localism in radio formed part of the policy. The government responded by introducing a range of requirements in the Bill which meant that a licensee would have to meet minimum service standards in four respects. Firstly, there would be a requirement for local news broadcasts. This was expressed as a requirement for regional radio stations to broadcast at least local five news bulletins per week during prime-time hours. The second requirement was that there be local community service announcements at least on a weekly basis. The third obligation was for any licensee to broadcast emergency warnings as requested by emergency service agencies. The fourth requirement was to broadcast designated local content programs which would be declared by the Minister, with the Minister to determine the weeks in which the content was to be broadcast.

This set of obligations was rejected by the National Party Senators (Joyce and Nash). In their dissenting report, they recommended that (Senate 2006 Nationals’ report formed pages 85 to 89):

The Minister agree to amend the legislation to provide for an immediate requirement that there be not less than 12 and a half minutes per day, Monday to Friday, of locally sourced and presented news, exclusive of weather reports, with scrolling repeats of the same bulletin prevented. The practice of ‘ripping and reading’ should also be prevented to ensure diversity of opinion and genuine locally devised content.

All radio stations be required to broadcast ‘local and live’ for a minimum of six (6) hours a day between the recognised ‘industry’ program times of Breakfast and Drive Time with programming locally sourced and presented.

Recognising that some views were expressed with regard to the requirement to comply with local content rules, we recommend that following legislative introduction and after a period of 12 months the committee further examine the issue of local content requirements in detail and report to the Senate.

All amendments pertaining to ‘local content’ be legislative in nature and not regulatory.
The legislation could not pass the Senate without the support of at least one of the senators who wrote the dissenting report. As a result, the government introduced amendments to the Bill which responded to each of the recommendations.

On local news, the legislation was amended to require that bulletins are broadcast on at least 5 days during the week and that the bulletins broadcast on each of those days have a total duration of at least 12.5 minutes. In addition, the news bulletins were required to be broadcast during prime time hours and adequately reflect matters of local significance. Further, none of the bulletins were permitted to consist wholly of material that has previously been broadcast in the licence area concerned.

In respect of ‘local and live’, the legislative response was much more invasive that the dissenting senators had proposed. The ACMA was required to ensure that, at all times on and after 1 January 2008, there was in force a condition that has the effect of requiring the licensee of a regional commercial radio broadcasting licence to broadcast, during daytime hours each business day, at least the applicable number of hours of material of local significance. The ACMA's view on ‘the applicable number of hours’ is discussed below but was an output of the review that the dissenting senators required.

The government amendments gave all of the changes legislative rather than administrative effect. The requirement that the local content be legislative in nature was to limit the appeals process. Broadly, a legislative decision can only be reversed under limited circumstance (for example when it is so manifestly unreasonable that no reasonable person would have made it). If the decisions had been administrative, they could have been reviewed under the Administrative Decisions, Judicial Review Act, 1977.

**Implementation**

The legislative package that was passed by the parliament in 2006 led to a range of subordinate regulation which established a regime that meant that from 1 January 2008 all regional commercial radio licensees were required to broadcast the applicable number of hours of local content (defined as material of local significance) during daytime hours (5 am to 8 pm) on business days. The ‘applicable number of hours’ was determined by the ACMA to be: 5 minutes for racing and remote area service licences; 30 minutes for small licences; and three hours for all other licences.

Material of local significance was defined in the Broadcasting Services (Additional Regional Commercial Radio Licence Condition – Material of Local Significance) Notice 19 December 2007. This stated that ‘material is material of local significance it is (a) produced in; or (b) hosted in; or (c) relates to, the licence area of the regional commercial radio broadcasting licence’. The balance of the notice described the meaning of each of ‘produced’, ‘hosted’ and ‘relates to’. There is a record keeping obligation imposed on licensees to assist the ACMA with enforcement. This represented a significant change from the originally proposed regime which anticipated content being locally produced and transmitted – effectively requiring that a talk radio format be adopted.

However, the requirements of localism imposed on commercial radio broadcasters were extended in the case of a ‘trigger event’. Broadly, a trigger event occurs when there is a change in control of the licensee (using the very prescriptive tests under the Broadcasting Services Act 1992). After a trigger event, the licensee has an obligation to broadcast a minimum number of:

- eligible local news bulletins
- eligible local weather bulletins
- local community service announcements
- emergency warnings, and
- designated local content programs
Under the regime, news and weather bulletins and community service announcements are considered ‘local’ if they relate to the licence area. The associated reporting obligations are much more onerous than those on existing licensees. If a trigger event occurs, the licensee must submit a draft local content plan to ACMA within 90 days of that trigger event. The draft local content plan must state how the licensee intends to meet the minimum service standards for local news and other information. Further, licensees are required to maintain the existing level of local presence where a regional commercial radio broadcasting licence is affected by a trigger event.

It is not clear that the obligations after a trigger event are consistent with Australia’s trade obligations. In particular, the Australia-United States Free Trade Agreement (USFTA) includes obligations which are inconsistent with the current regime. The requirements under Chapter 10 of the USFTA are that Australia must treat US service suppliers no less favourably than Australian service suppliers (Article 10.2), but this is subject to the reservation in Annex II. Australia has reserved the right to adopt or maintain, in respect of radio broadcasting services ‘transmission quotas for local content not exceeding 25 per cent of the programming (e.g., of musical items) on individual stations of a service provider transmitted annually between 6.00 a.m. and midnight’.

The term ‘local content’ is not defined in the USFTA, but the same term is used in Annex II to describe the Australian content provisions that apply to commercial television. That is, ‘local content’ in the USFTA means Australian content and thus includes content that is considered to be ‘material of local significance’ for the purposes of s43C of the Broadcasting Services Act 1992. It is likely that this reservation in Annex II was intended to reflect the existing ceiling of the Australian music obligations under the Commercial Radio Codes of Practice and Guidelines (Codes), given that the Codes are referred to at the end of Annex II as ‘existing obligations’ on the date that the USFTA came into force. The effect is that ‘material of local significance’ was required to include the ‘hosted in’ in order to be consistent with the USFTA.

The ‘local presence’ obligations are also potentially inconsistent with Australia’s obligations under the USFTA. Among the requirements under Chapter 10 of the USFTA are that Australia must not adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that impose limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test (Article 10.4(a)(iv)).

The type of ‘limitations’ that are covered by Article 10.4 are not defined in the USFTA, but if the ordinary meaning of the word is applied, it includes ‘restrictions’ or ‘boundaries’ that impose limits around a relevant commercial activity by a US enterprise in supplying a service in Australia.

Article 10.4 is drafted in different terms to Article 10.2, so the fact that an Australian service provider would be subject to the same restrictions is not relevant in respect of Article 10.4. If a US company purchased a regional commercial radio group, it would come into a position to exercise control of the licensees in that group. This change in control would result in a ‘trigger event’ in each of the licence areas in which the licensees operated, and the commencement of the ‘local presence’ obligations (as well as the ‘minimum service standards’ for local news and local information).

Under the licence condition set out on 22 March 2007 by the ACMA in the Broadcasting Services (Additional Regional Commercial Radio Licence Condition – Local Presence) Notice, there is a requirement to maintain the ‘staffing levels’ that existed prior to the ‘trigger event’. Compliance with the licence condition requires that there be no ‘material reduction’ in staffing levels (under clause 9(1)).

For USFTA purposes, this obligation could be interpreted to be a measure that Australia has adopted on a regional basis, which imposes a ‘limitation’ (in this case a ‘floor’) on the number of people that a US company must employ. Alternatively these measures could also be described as ‘numerical quotas’. In this context, it may be that s43B and the resulting licence condition is a measure which
Record of the Communications Policy & Research Forum 2008

is inconsistent Article 10.4 of the USFTA. This is particularly likely given that there were no express ‘reservations’ made by Australia in respect of this matter under either of Annex I or Annex II of the USFTA.

Regulatory impact

There are a limited number of ways in which broadcasting can be regulated from a domestic perspective. These areas of regulation are set out in Table 3.

**Table 3 – Approaches to the regulation of broadcasting**

<table>
<thead>
<tr>
<th>Regulatory issue</th>
<th>Position as a result of the proposed regulatory change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of licences</td>
<td>Unchanged but initially digital radio was seen as a replacement for analog</td>
</tr>
<tr>
<td>Reach</td>
<td>Requirement to address areas smaller than the licence areas for the delivery of local services</td>
</tr>
<tr>
<td>Foreign control</td>
<td>Unchanged</td>
</tr>
<tr>
<td>Cross-media control</td>
<td>Unchanged</td>
</tr>
<tr>
<td>Domestic content requirement</td>
<td>Increased local content (and hence domestic content)</td>
</tr>
<tr>
<td>Censorship</td>
<td>Unchanged</td>
</tr>
</tbody>
</table>

Broadly, the number of licences for any geographic area for either television or radio must be limited if interference is not to occur and the extent to which an individual may own or control different types of licence may be limited. The size of that geographic area (and hence audience reach) must be determined. The degree to which a broadcaster is permitted to be subject to foreign ownership or control is often specified (as part of cultural protection). Similarly, the influence of any one media proprietor may also be limited by restrictions on cross-media ownership and control. Licensees may also be subject to obligations in respect of domestic content and censorship is also an area in which the state may have an interest. We can analyse the initial regulatory response to localism in radio and television using this typology as shown in Table 4:

**Table 4 – Analysis of the initial regulatory response to digital radio using the broadcasting regulatory typology**

<table>
<thead>
<tr>
<th>Regulatory issue</th>
<th>Position as a result of the proposed regulatory change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of licences</td>
<td>Unchanged but initially digital radio was seen as a replacement for analog</td>
</tr>
<tr>
<td>Reach</td>
<td>Requirement to address areas smaller than the licence areas for the delivery of local services</td>
</tr>
<tr>
<td>Foreign control</td>
<td>Unchanged</td>
</tr>
<tr>
<td>Cross-media control</td>
<td>Unchanged</td>
</tr>
<tr>
<td>Domestic content requirement</td>
<td>Increased local content (and hence domestic content)</td>
</tr>
<tr>
<td>Censorship</td>
<td>Unchanged</td>
</tr>
</tbody>
</table>

Analysis

Localism became an issue in both radio and television broadcasting but only in regional areas of Australia. The demand for local content was perceived to be more important away from the state capital cities. Despite there being no global harmonisation driver for the asymmetric regulatory outcome, there was a political driver. Most importantly, the Nationals had the balance of power during the key 2006 media reforms and the perverse outcome of a more highly regulated regional commercial radio sector than metropolitan television was an acceptable outcome for the Howard
government. However, the political expediency which gave the Nationals more than that which they had been denied in 2002 has led to some unintended consequences.

Firstly, the current regime appears on its face to be at odds with Australia’s obligations under the USFTA. It may be that nothing turns on this as there may not be any US firms which are adversely affected. However, as there are only limited (Foreign Investment Review Board) restrictions in both the commercial television and radio sector, US investors are likely to be puzzled to find that they can reorganise a commercial television broadcasting licensee to maximise efficiency but are unable to do the same with a regional radio licensee.

Secondly, the easiest way for regional commercial radio broadcasters to meet the local content obligations is to move to a ‘talk radio’ format. This is less likely to appeal to listeners in regional areas who tend to prefer music formats. That is, the localism obligations may lead to fewer listeners.

Australia has moved down two untried paths in the 2006 media reforms. The first was to deregulate the foreign ownership of commercial television broadcasting which sets Australia alone compared with similar jurisdictions in a rash neoliberal move (Nicholls 2008). The second was to reverse the deregulatory process and to asymmetrically impose a significantly harsher regulatory environment on regional commercial radio compared with metropolitan commercial television. Both paths are consistent with the absence of a coherent cultural policy and both lead to the risk identified by David Throsby that Australia is on the way to become a ‘cultural pariah’ (Throsby 2006).

**BIBLIOGRAPHY**

ABA (2002). News release NR 83/2002 ABA proposes condition to ensure minimum local program content in regional Queensland, New South Wales and Victoria. Sydney, ABA.


