Deregulation in the Communications Portfolio

POLICY BACKGROUND PAPER

No. 1

November 2013

Department of Communications Policy Background Paper No 1

The Department of Communications publishes an occasional series of policy background papers to inform debate on current and future regulatory arrangements in the communications sector. Observations and descriptions of possible future arrangements are for discussion purposes only—the do not represent Government policy or indicate commitment to a particular course of action

Disclaimer

While we make every effort to ensure that the material is this publication is accurate and up-to-date when we publish it, you should exercise your own independent skill and judgement before you rely on it. In any important matter, you should seek professional advice relevant to your own circumstances. The listing of a person or organisation in any part of this publication does not imply any form of endorsement by the Commonwealth of the products or services provided by that person or organisation.

Please note that some material in this publication includes views or recommendations of third parties, which do not necessarily reflect the views of the Commonwealth, or indicate its commitment to particular course of action. The Commonwealth cannot verify the accuracy of information that has been provided by third parties.

Copyright

Context

The Australian Government is committed to reducing the regulatory burden on industry to encourage innovation and boost productivity across the economy.

Although some degree of regulation may be an essential element of efficient markets, excessive and unnecessary regulation can reduce productivity and investment and stifle growth.

The communications sectors—broadcasting, telecommunications, and radiocommunications —are subject to substantial levels of regulation. This regulation goes well beyond market design and technical regulation. It reflects a complex balance of public policy objectives including access and social inclusion, competition and choice, consumer protection, public safety, privacy and reliability.

The Government considers that there is substantial opportunity for reducing the regulatory costs of business in the communications sector, while maintaining important and enduring outcomes for the Australian community.

The rapid changes in the communications sector also make it timely to consider whether the current communications regulatory framework remains appropriate for the modern communications environment.

For example, while radio and television continue to be popular and influential in Australian civic life—with commensurately high level of regulation—their position is being challenged by a combination of general economic conditions and the rapid growth in online and mobile services. These new services and sectors compete with traditional brands for advertising and erode audiences. Demand for high-quality programming remains strong, but consumers increasingly want to see and use content on different devices at a time convenient to them.

Similarly, in telecommunications, radiocommunications and post, rapid technological change and innovation is changing the way most Australians communicate and the services they use. The rise of the digital economy and the digital citizen raises issues for existing regulatory structures in all these areas.

This Policy Background Paper—*Deregulation in the Communications Portfolio*— is intended to help frame a conversation about deregulation for communications

industries and provide a backdrop for a more specific set of consultations on a range of short, medium and long-term regulatory issues.

It draws on current thinking on communications regulation as it relates to the traditional telecommunications, broadcasting and radiocommunications sectors to set out, at a high level, principles and concepts that might underpin any incremental assessment of communications policy and regulation, and guide a deregulatory agenda.

It provides an important first step in what will be a complex debate about what parts of the current communications and media regulatory framework should be removed, simplified, or retained.

Existing objectives for communications policy

Broadcasting

The existing aims of broadcasting policy are enshrined as objects in section 3 of the *Broadcasting Services Act 1992* (BSA). There are 19 in all, which represent an accumulation of long-standing and more recent cultural, social, and economic aspirations for the broadcasting and production industries.

They also reflect the views of parliaments over more than two decades about (primarily) traditional broadcasting and include elements of the role of these media in 'nation-building':
> expressing a national cultural identity
> connecting remote communities
> informing the public
> underpinning the democratic processes.

The breadth of the objects of the BSA also means that unambiguous policy objectives for broadcasting are difficult to discern. It also means that measures often need to be balanced against a number of objectives, which presents issues for administration of regulation, particularly where there is a requirement that regulatory activity be focused specifically on 'furthering the objectives of the BSA'.

Telecommunications

There are currently 14 regulatory objectives for the telecommunications sector. These are set out in Section 3 of the *Telecommunications Act 1997* (Tel Act) and also apply to the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, which brings together consumer specific regulation related to telecommunications.

The objects must be read in conjunction with Parts XIB and XIC of the *Competition and Consumer Act 2010* which apply a telecommunications-specific competitive access regime. There are additional specific objectives for NBN Co Limited included in the *National Broadband Network Companies Act 2011* which set out Parliament's ownership and wholesale-only intentions for the company.

The primary objectives for telecommunications policy are to:
> foster the long-term interests of end users
> promote the efficiency and competitiveness of industry
> promote the availability and affordability of services.

The regulatory framework is based on long-standing competition principles and telecommunications concepts including any-to-any connectivity; choice; and technological neutrality. As with broadcasting regulation, there is some tension between the regulatory objectives, however, such tension generally reflects legitimate competing interests in the telecommunications sector (as in others) which must be taken into account.

Radiocommunications

There are eight objects of the *Radiocommunications Act 1992*, all of equal weight. The most often referred to are the first two objects:
> to maximise the overall public benefit from using the radiofrequency spectrum by ensuring the efficient allocation and use of the spectrum
> to make adequate provision of spectrum for defence, national security, law enforcement and emergency services agencies, and other public or community services.

Regulation impacts the traditional telecommunications and broadcasting sectors and many small spectrum users (e.g. amateurs, wireless microphones), the government (especially the Department of Defence) and the scientific community. Again, there is some tension between objectives, particularly the first two. This reflects the legitimate competing interests for spectrum and also tension between notions of value (economic value versus broader concepts of value).

Principles of regulation – rationale for intervention

While it is the clear objective of the Government to reduce the overall burden of regulation, a commonly-accepted set of principles will help guide the way in which regulation is structured or whether any regulation should be retained in an area.

On a first principles basis, effective and appropriate regulation may embody a number of key elements.
> It should serve clearly identified public policy goals, and be effective in achieving those goals.
> It should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical basis.
> It should produce benefits that outweigh the costs, including those imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, fewer services, and higher prices).
> It should minimise market distortions and harness competition to deliver policy outcomes by aligning market incentives with regulatory objectives.

> It should be consistent with other regulations and policies, including those relating to competition, trade and investment.
> It should be as technologically neutral as possible, to avoid creating regulatory distinctions between similar services that are delivered differently.

At one level, the application of these principles could lead to a minimalist or purist set of objectives for communications regulation. This would provide the bare minimum of government intervention to enable the market to coordinate activities and produce services.

In practice, however, high-level concepts of 'market failure' alone are unlikely to be particularly helpful in guiding the development of communications regulation given societal expectations on the wide set of public policy outcomes to be delivered by the communications and media sectors.

A more practical conversation is needed about which objectives stand the test of time given the rapid movements in technology, services and consumer or citizen expectations.

'Enduring concepts'

A more useful approach would seek to identity the broad groups of public policy objectives for the communications sector that have stood the test of time, regardless of changes in technology and consider the rationale for present and future intervention. The following list of such concepts draws on the Enduring Concepts—Communications and media in Australia paper prepared by the Australian Communications and Media Authority (ACMA) in November 2011.

> **Access to services / participation in society.** Citizens should enjoy reasonable and equitable access to communications infrastructure, services and the content necessary to promote their effective participation in society and the economy. Increasingly this extends to 'digital literacy'.
> **Competition.** Markets should be open and competitive so as to encourage investment, innovation and diversity of choice. Regulatory settings should embody competitive neutrality across platforms and among market participants and minimise potential market distortions.
> **Efficient allocation and use of resources.** Policy settings should be coherent, appropriately calibrated and predictable so that a minimum level of service is available to all and public resources are used efficiently over time. This would include ensuring that radiofrequency spectrum is allocated efficiently, managed for technical and dynamic efficiency (i.e. efficient use over time) and efficient pricing. This should be balanced with rights holders being able to secure an appropriate return on their investment and/or intellectual property.
> **Diversity of voices.** There should be a diversity of major sources of information and perspectives expressed in the public sphere to provide and sustain an informed citizenry and healthy democracy. It is equally important that this information be fair, accurate and transparent.

> **Australian identity.** Australians should be able to experience Australian voices and stories when using or consuming media and communications services.
> **Values and safeguards.** Services should reflect community standards, meet community needs and be 'fit-for-purpose'. Users should be provided with effective and accessible avenues of complaint and redress if standards are not met. In relation to content, children, in particular, should be protected from harmful material.
> **National Interest.** The communications sector settings should reflect the national interest both domestically and through international forums (for example, radiocommunications planning is governed by treaty). Citizens should be confident that their use of these services is secure and they are protected, for example, from electronic attacks and fraud. Ensuring adequate access to spectrum resources for defence, national security, law enforcement, emergency services and other public and community services (such as meteorology and the scientific research community) is also important.

Each of these concepts arguably remain in the public interest regardless of the technology providing the service or the industry in which those services are produced – that is, they are, or should be, technology neutral. These concepts will form the initial basis for discussion with industry, consumers and government on future focus of government intervention.

Tools

The effect of convergence is fundamentally changing the efficacy of the tools available to government to address these enduring concepts.

Significant among these changes is a move from 'siloed' production and delivery – where services are produced and delivered by vertically integrated providers using a particular platform to a particular consumer device – to one of a 'layered' IP-based service delivery model which is 'agnostic' to infrastructure and distribution, and consumption potentially taking place on multiple devices, with multiple interactions in real-time (e.g. Twitter).

Layered approaches are reflected to a degree within each of the existing acts. However, layering is not considered across the acts. For many traditional services, reorientation to a layered regulatory model across current regulatory boundaries will be a significant shift.

At a practical level, the growth of online and mobile platforms and use of over-the-top and social media platforms profoundly challenges the way communications services are regulated, and indeed whether regulation will be effective at all. For example, international jurisdictional issues are now at play which previously had virtually no impact on traditional content businesses. Other non-regulatory tools may be available and prove more effective.

The following provides an outline of the range of 'tools' available to government to deal with the enduring concepts.

> **Black letter law:** primary or subordinate legislation (including regulations and delegated instruments) that requires or prohibits particular actions or behaviours from industry participants. Likely to have a place in establishing 'ground rules' for infrastructure provision and for industries that require some government authorisation (such as a licence), although shortcomings will remain at the application / service level and for user-generated media.

> **Administered law:** standards, directions or 'service provider rules' made by the relevant regulator (the ACMA or the Australian Competition and Consumer Commission) to affect the behaviour of participants in a particular sector or industry. More flexible than black-letter law, although with similar shortcomings.

> **Co-regulation:** a model whereby industry is given the opportunity to self-regulate in the first instance, supported by sanctions and a more explicit role for the regulator / legislation if self-regulation is found to fail. The experience of the past 5 to 10 years suggests that co-regulation is only effective where an industry is clearly defined with small number of participants. Fragmented and heterogeneous markets, as is increasingly the case for audio-visual content, are not well suited to co-regulatory models in which codes are required to be agreed by all or a substantial sector of the affected parties.

> **Quasi-market instruments:** for example, mandating a particular outcome via black-letter law or regulation (such as an overall target for children's content), and establishing tradeable quotas to allow this target to be produced in the most efficient manner. This has been contemplated but never given effect in media policy, in part due to the high costs of oversight and administration, and lack of immediate interest by affected industry sectors.

> **Contestable funding / tax incentives:** relevant for encouraging investment in infrastructure or services in non-commercial areas, Australian identity (provision of Australian content) and to a lesser extent, diversity of voice (provision of news services). The Government could make available incentives for the provision of particular infrastructure, services or content genres as an alternative to regulation.

> **Self-regulation:** allowing industry to establish appropriate benchmarks for the provision of services and to assess and respond to consumer complaints and concerns. As with co-regulation, this approach can work with clearly defined industries with few participants, but will struggle to accommodate fragmented and heterogeneous markets.

> **Education and awareness:** informing consumers of their rights and options in relation to communications and media. A consumer education function is likely to continue to have a place in terms of consumer protection initiatives (i.e. online safety and privacy).

> **Public sector provision:** Government can also directly fund activities required to achieve particular public policy outcomes, for example, as it does with content delivery through the SBS, ABC and NITV. However, this is a tool that is subject to fiscal pressures.

Different tools, or a combination of tools, will be required to effectively achieve outcomes. The relative merits of the use of these tools will also form part of the consultation process.