Radio and television broadcasting services are popular, influential and almost universally available. For most of their history, they have been provided free-to-air. Listeners and viewers were conceived as audiences rather than consumers. This is no longer the case. Pay TV, audio- and video-on-demand services and many forms of interaction between broadcasters and their audiences mean the users of TV and radio are already consumers. They have relationships with broadcasters and expectations about them and their services that are familiar to consumers of voice and mobile telephony and internet access services.

Drawing on a study for the Australian Communications Consumer Action Network (ACANN) in mid-2009, this article explores three areas where telecommunications and broadcasting legislators, regulators and service providers are adapting to this changed landscape. First, in audio- and video-on-demand services, they are learning about new and evolving kinds of consumer behaviour. Second, the regulation of content that has always been so important a part of broadcasting regulation has expanded to telecommunication services, which historically were largely free of content restrictions. Third, the obligations of broadcasters and telecommunications providers to offer universal access to all potential consumers are being reworked. In each of these areas, as broadcast audiences become consumers and the users of carriage services become viewers and listeners, the institutional arrangements for setting and enforcing standards about communications services are being tested.

INTRODUCTION

Radio and television broadcasting services are popular, influential and almost universally available. For most of their history, they have been provided free-to-air. Listeners and viewers were conceived as audiences rather than consumers. This is no longer the case. Pay TV, audio- and video-on-demand services and many forms of interaction between broadcasters and their audiences mean the users of TV and radio are already consumers. They have relationships with broadcasters and expectations about them and their services that are familiar to consumers of voice and mobile telephony and internet access services.

Drawing on a study for the Australian Communications Consumer Action Network (ACANN) in mid-2009, commissioned to inform ACCAN’s strategic direction (Given and McCutcheon 2009), this article explores three areas where telecommunications and broadcasting legislators, regulators and service providers are adapting to this changed landscape. First, in audio- and video-on-demand services, they are learning about new and evolving kinds of consumer behaviour. Second, the regulation of content that has always been so important a part of broadcasting regulation has expanded to telecommunication services, which historically were largely free of content restrictions. Third, the obligations of broadcasters and telecommunications providers to offer universal access to all potential consumers are being reworked.

These three areas are examined in the context of several recent trends in media and communications policy and regulation – the merger of the telecommunications and broadcasting regulators in 2005 to form a single regulator, the Australian Communications and Media Authority
(ACMA); the demonstrated limits of self-regulatory or co-regulatory models pioneered in the Broadcasting Services Act (BSA) and Telecommunications Act (TA) of the 1990s; and the reassertion of the state’s role in communications policy, through the funding of the National Broadband Network, the proposed structural changes to Telstra (Conroy 2009a and Conroy 2009b) and the switchover from analogue to digital television.

**AUDIO- AND VIDEO-ON-DEMAND**

On-demand services are now widely deployed by broadcasters and used by consumers. These raise some consumer issues that are new to both broadcasting and telecommunications regulation. They also test the existing institutional arrangements for code development and complaint-handling.

Audio- and video-on-demand services offered by TV and radio broadcasters include streaming and downloads (podcast and vodcast), as well as related sales of physical CDs and DVDs. Streaming and downloads are marketed as ‘catch-up’ TV and radio, clearly identifying their relationship to the broadcast service. They encourage or require users to opt-in to a contractual relationship with the content and application provider, such as by clicking approval of terms and conditions when downloading player software, even where no direct payment is made for the content. Because the services themselves are not broadcasting services, they have been beyond the regulatory ambit of the BSA, although consumers may see them as integral parts of a broadcast service. They are now covered by the BSA Schedule 7 convergent content regulatory scheme discussed in the next section, but they raise a significant number of consumer issues that are not addressed by that scheme.

A brief review of the information available online about the on-demand services offered by the five Australian free-to-air TV networks gives an indication of the issues that are already significant for consumers. These include registration, privacy of personal information, technical requirements for use, limits on the functions performed by the services and the programs available, age verification, content metering, the availability of help services and complaints-handling. These are discussed in turn.

**Registration:** No service makes registration compulsory but users that do register get ‘a greater level of personalization of content and promotional elements’ (Nine), such as social networking features, competitions and email (Yahoo/7 and Ten).

**Privacy of personal information:** Provisions range from Ten’s generally worded commitment to comply with the National Privacy Principles to Yahoo!7’s more detailed statements about what it will and won’t do. It ‘will not sell or rent your personally identifiable information to anyone’. It will use information ‘for three general purposes: to customise the advertising and content you see on our pages, to fulfil your requests for certain products and services, and to contact you about specials and new products’. Nine expressly indicates that personal information can be used to customise the advertising served into the content requested.

**Technical requirements for use:** Nine uses the HIRO platform, developed by an Israel-based company to enable video downloads and streams with advertising inserts. The ABC uses its own iView to deliver streamed video for free, full-screen viewing and ABC Shop downloads. Some content is also available for downloading to mobiles. Users of the ABC and Nine services have to download the free iView and HIRO player software. Yahoo!7, Ten and SBS use players em-
bedded in internet browsers. The SBS player also operates as a standalone player (HIRO 2009; ABC 2009; SBS 2009; Ten 2009a; Ten 2009b; Yahoo!7 2009). Specifications for the user’s equipment are set or recommended, including the platform that the services are available for, other software required and desirable minimum broadband access speeds. At present, all the networks’ services are available for both PC/Windows Media Player and Mac/Quicktime but only the ABC offers a Linux option as well. All require a version of Flash. The ABC’s iView streams at 650 kbits/sec and recommends a broadband connection of at least 1.1 Mbps. Ten offers a choice of 300 and 700 kbits/sec options; Yahoo!7 and the SBS suggest at least 128 kbits/sec.

What the applications don’t do: Nine’s player doesn’t install pop-ups or spyware and doesn’t permit ad-skipping.

Programs available: Not all broadcast programs are available on demand and the duration of availability varies. ABC programs are generally available the day after broadcast and remain available for 30 days. This reflects storage costs and rights arrangements. Its services are geo-blocked so they are only accessible to users in Australia. Some of Nine’s videos are not available in some territories.

Age verification: Not all broadcasters refer to this in their terms and conditions although the content services regime discussed in the next section clearly imposes obligations in this area. Nine says it will not play restricted videos to young audiences that are not permitted to view them. Age restrictions are set according to broadcast classification codes. Yahoo!7 requires users to warrant that they are of legal age to form a binding contract and are not barred from receiving services. It says under-18s are barred from viewing adult content.

Metering of content streamed or downloaded: Nine and the ABC both have arrangements with particular internet service providers that allow their customers to stream and download content unmetered. ISPs have been interested in offering this facility as a way of differentiating their services.

Help and complaints: Information available online ranges from limited technical assistance to the detailed online FAQs provided by Nine and the ABC. None of the networks indicate whether consumers can make use of established broadcasting complaints processes if they are dissatisfied with aspects of these services.

This brief review shows that new issues are emerging about content that do not appear to be dealt with adequately or at all under existing regulatory and complaints-handling schemes for broadcasting or convergent content. These include threshold questions such as: What programs are available for download and/or streaming? How soon and for how long after broadcast? In what formats? Requiring what customer equipment, levels of connectivity and complementary applications?

But the review also identifies a deeper issue. Consumers do not appear to have any process available to them to make complaints about these new forms of service and there is no mechanism for setting industry-wide performance standards. On-demand services are not covered by broadcasting codes of practice and broadcasters are not required to join the Telecommunications Industry Ombudsman (TIO) Scheme because they are not ‘eligible service providers’. An important threshold question is about broadcasters’ responsibility for the actions of third parties, like the suppliers of the software used on the sites. Consumers perceiving on-demand services to be integral
parts of licensed TV and radio services might expect issues arising from them to be dealt with under the same regulatory scheme(s).

The Productivity Commission’s 2008 Review of Australia’s Consumer Policy Framework drew attention to related problems about the coverage of the various schemes for handling consumer complaints about communications services. It recommended immediate expansion of the TIO Scheme to cover pay TV services, ‘because they share so many features with standard communications services and are often bundled with them’, and ‘longer-term transition to more integrated complaint arrangements’. Options would include ‘a single consumer entry point for communications services complaints’, or an ‘umbrella arrangement encompassing all individual dispute resolution services in this area’, such as it also recommended for financial services (Productivity Commission 2008: xxiii, 202–4).

**CONTENT**

A good deal of the regulation of TV and radio broadcasting services has always been about its content. Issues addressed in program standards and codes of practice include the levels of Australian content in TV programs, music and advertising, fairness and accuracy in news and information programs, localism, and the advertising of unhealthy or potentially dangerous products. Telecommunications regulation almost completely avoided content issues. The internet and mobile communications, however, have made content services, and consumer concerns about content, inseparable from the carriage services used to deliver them.

As telecommunications and broadcasting services expanded and converged, the drafters of the BSA and TA in the 1990s imagined their regulation would also converge towards minimalism. In practice, equally powerful counter-trends are now visible. First, there has been pressure for regulatory consistency, encouraging equivalent services to be regulated in equivalent ways. The Australian Press Council, for example, applies the same standards to its members’ online and print publications. Second, rather than being less important than mass media, some have thought emerging media forms, especially highly personalised, hard-to-supervise online and mobile communications, might share or even exaggerate the special qualities of television and radio. By taking content services even closer to consumers than radio and TV broadcasting, delivering similar content across different platforms and making content inseparable from the carriage services used to deliver it, the internet and mobile communications are pushing telecommunications closer towards broadcast-like regulation of content.

At this stage, legislators have been mainly concerned about sexual, violent and offensive content, the traditional targets of censorship and classification regulation. The content regulatory regimes covering these issues were completely overhauled in 2007. Separate schemes for telephone sex services, stored internet content and premium mobile services were replaced by a single scheme in Schedule 7 of the BSA, that also extended regulation to live internet services and services linking to other content (Lindsay et al 2008). For broadcasters, this means several regulatory schemes may now apply, or be relevant, to their content. TV and radio content is regulated according to the rules applying to the relevant licence category under the BSA. This includes television and radio program services delivered over mobile devices (‘mobile TV’), which are encompassed by the definition of broadcasting service (s. 6). Broadcasters’ websites, including downloaded and streamed content, are now regulated under Schedule 7 of the BSA rather than
broadcasting content rules. The national classification scheme covering films (DVDs and videos) and computer games, established under the Commonwealth Classification (Publications, Films and Computer Games) Act 1995 and administered by the Classification Board, is relevant to both these schemes. They use the classification codes it establishes and the Classification Board and Review Board can be directly involved in classifying content under Schedule 7 (Part 2).

Content delivered over convergent devices challenged the old regulatory distinctions between telecommunications and broadcasting. In 2006, a highly-publicised incident exposed a gap in the rules governing ephemeral content such as live streamed audiovisual services. Sexually-explicit material was streamed live on the subscription-only website for Channel Ten’s Big Brother program. Copies of the material were then redistributed online by users. The live material was un-regulated because it fell outside the definitions of both a broadcasting service and online content. A 2000 Ministerial determination excluded from the definition of a broadcasting service ‘a service that makes available television programs or radio programs using the internet, other than a service ... using the broadcasting services bands’, and the 1999 online amendments to the BSA only covered stored content (Waterson and Dowsley 2009).

Also in 2006, ACMA approved a Mobile Premium Services Scheme, supported by a service provider determination made under the Telecommunications Act. This was an industry-based self-regulatory scheme requiring clear information to be provided about the costs and terms and conditions on which mobile premium services were offered, and about the handling of complaints. Initially, it also prohibited and restricted access to certain mobile premium services in line with the principles of content classification applying to films and games. Following the Big Brother incident, the then Department of Communications, Information Technology and the Arts reviewed the laws affecting ‘convergent content services’, finding that they cut across broadcasting and telecommunications regulation (DCITA 2006).

The new ‘convergent content’ scheme introduced in Schedule 7 of the BSA commenced in 2008. ACMA administers it and approved a new Mobile Premium Services Code in July 2009, replacing the 2006 arrangements. The scheme covers most live and static content-related services provided over the internet and mobile phones. It excludes broadcasting and datacasting services, voice and video telephone calls, email, SMS and MMS that don’t specialise in prohibited or potentially prohibited content and are not adult chat services, internet directories and search engines (Lindsay et al 2008, Lawrence and Grant 2007). Four main categories of service provider are covered: live content service providers, hosting service providers who provide access to stored content, links service providers who provide access to content via links, and commercial content service providers who provide access to content for a fee as part of a profit-making enterprise (Bloch 2008, House of Representatives 2007). ACMA can investigate complaints and issue take-down, service-cessation and link-deletion notices if satisfied that age-restricted content (MA15+ and R18+ content) is being provided directly or via links without the access and other controls required. Failure to comply with notices constitutes a contravention that can attract civil and criminal (fines up to $11,000) penalties. The Code also deals with advertising, inadvertent or unauthorised purchases and protections for minors (ACMA 2009a).

The convergent content regime takes elements of the censorship and classification regimes developed for films, computer games, broadcasting and internet content and adapts and supplements them for the convergent environment. But at this stage, the content issues it addresses are only those relevant to advertising and classification – adult themes, violence, sex, language, drug
use, nudity. Many other content issues addressed in TV and radio codes of practice are not regulated for broadcasters’ online and mobile services. For example, one of the objects of the BSA is ‘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’ (s. 3(1)(g)).

This goal is reflected in the industry codes of practice for TV and radio services. But the same goal is not set for their online and mobile on-demand services, even though consumers may perceive the services to be substitutes for each other and expect the same standards to apply. Indeed, the marketing of ‘catch-up’ services encourages this. On the other hand, simply migrating rules from television and radio broadcasting to online and mobile platforms may discourage broadcasters from developing innovative versions of their services on websites or for mobile devices, including ones targeted at users beyond their broadcast audiences (Arasaratnam et al 2009, Keane 2009, Waterson and Dowsley 2009).

The pressure for regulatory consistency between emerging and established services and the perception of the increased importance of online and mobile services have occurred alongside a growing body of experience with the model of co-regulation established for broadcasting in the early 1990s and copied for telecommunications later in the decade. The BSA’s regulatory policy requires that different levels of regulatory control be applied according to the degree of influence of different types of service in shaping community views in Australia (s. 4). Commercial TV services were to be regarded as more influential than commercial radio, hence the more liberal ownership rules for radio, and both were to be regarded as more influential than narrowcasting services. Subscription broadcasters or narrowcasters did not have to be ‘responsive to the need for a fair and accurate coverage of matters of public interest’ or give ‘appropriate coverage of matters of local significance’, like commercial and community broadcasting services. Over time, the general regulatory policy was maintained but adapted to incorporate datacasting and Internet services. The underlying belief appeared to be that new services would not justify the same levels of regulation as established services, and perhaps that the rationale for regulation of even established services would diminish as services proliferated.

The growing body of experience with co-regulation of content has tested the assumptions on which it was based. Cutbacks in local commercial TV news in country areas resulted in the regulator imposing licence conditions with effect from 2004, an example of co-regulation in action, but the requirements were formalised in legislation in 2007 as part of the liberalisation of ownership laws. Similar deficiencies in radio news attracted parliamentary attention (HRSCCTA 2001) and eventually new legislative requirements (BSA 1992 Division 5C). An inquiry into ‘cash-for-comment’ on commercial radio found systematic infringement of the industry’s codes of practice (ABA 2000) that led to new program standards determined by the regulator, another example of co-regulation in action. But the inability to successfully prosecute breaches of the new standards prompted legislative changes, expanding the range of sanctions available to encompass the kind of graduated responses the 1992 reforms were supposed to have embodied. ACMA’s recently-announced investigation into live hosted entertainment programs on commercial radio will provide a further test of the co-regulatory model (ACMA 2009a). In telecommunications services, as Holly Raiche discusses elsewhere in this issue of the TJA, the failures of mobile premium services regulation were the catalyst not just for the overhaul of content regulation, but for the whole scheme of consumer representation and participation in the sector.
Universal access to services is often expressed as a goal for telecommunications and broadcasting services, but the standards have been differently expressed and different policy tools have been used to achieve them.

In telecommunications, there is a ‘universal service’ regime under Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act* (TCPSSA) that gives individual consumers the right to be supplied with voice telephony services on request, within certain timeframes. Broadcasters are not subject to any equivalent, enforceable obligations to provide services to all consumers within their licence areas. Indeed, as the industry-funded universal service obligation was being established for the competitive Australian telecommunications market created under the TA 1991, the bill that would become the BSA was being drafted, watering down the long-standing obligation on commercial broadcasting licensees to provide an ‘adequate and comprehensive service’ to one requiring them to offer services that contribute to the provision of ‘an adequate and comprehensive range of broadcasting services in that licence area’ when considered together with other broadcasting services available in the area (BSA 1992 Sched 2, cl 7(2)(a) and 8(2)(a)).

Commercial and community licensees are now obliged only to commence a service within twelve months of receiving their licences (BSA 1992 Sched 2, s. 7.1(h) and 9.1(h)). Until the mid-1980s, individual *transmitters* were separately licensed. Since then, broadcasting licences have authorised the provision of *services* to designated areas. For services using the broadcasting services bands, the regulator is obliged to issue *transmitter licences* under the *Radiocommunications Act* (RA) authorising the operation of facilities for transmitting the broadcasting service (s. 102), but broadcasters make their own decisions about how many transmitters they want to use. In doing so, commercial broadcasters trade off the expected incremental advertising revenue against the infrastructure cost. Householders who are unable to receive local free-to-air commercial television services may apply to ACMA for permission to have access to commercial satellite services (BSA 1992 Sched 2, ss. 7(2A)(d) and see ACMA 2009b). No permission is required for out-of-area access to ABC and SBS satellite services.

This regulatory difference between telecommunications and broadcasting does not imply that universal access to radio and TV services has not been a goal. On the contrary, successive governments have used many policy tools to achieve it. First, they established and continue to fund three national broadcasters – the statutory corporations, the ABC and SBS (established in 1932 and 1978), and the public company National Indigenous Television Limited, NITV (launched in 2007). Detailed decisions about service coverage are generally made by the broadcasters at arms length from government, although plans to introduce new services and expand existing ones are important parts of the proposals the broadcasters make to justify funding levels. Over the last 25 years, federal government funding of the national broadcasters has supported the introduction of satellite delivery for remote area television and radio services and the construction and operation of many more terrestrial transmitters for local services, including the national expansion of the JJJ youth radio service, creating and building the News Radio network and establishing new local stations in some regional centres and capital cities.

Second, spectrum is planned and licensed by ACMA and the Minister under the RA and BSA. ACMA prepares the national Spectrum Plan, dividing useable spectrum into frequency bands
and specifying the general purposes for which each may be used (RA s. 30). The Minister can reserve part of the spectrum primarily for broadcasting and refer it to ACMA for detailed planning (RA s. 31). ACMA can make spectrum available to retransmit radio and television services in areas of poor reception (BSA 1992 ss. 34 and 212). From the 1980s, spectrum has been allocated to enable major country centres to receive the same number of commercial free-to-air TV services as metropolitan areas (‘equalisation’), to greatly expand commercial and community FM radio services and, from the 1990s, to introduce narrowcasting services in areas where spectrum is available. Vital features of the spectrum allocation process include a structured and public planning process that takes into account the social and economic characteristics of local areas and currently available services, free allocation to national and community broadcasters and for self-help retransmission, and a charging regime for commercial broadcasting licences, via annual licence fees, that reflects the earnings of enterprises but not the amount of spectrum they use. These features all tend to encourage generous use of spectrum.

Third, direct funding has been provided to establish and support particular forms of broadcasting, to extend coverage and to upgrade technology. The initially state-owned domestic satellite system allowed commercial services to be provided beyond terrestrial footprints for the first time. Substantial sums were provided through licence fee rebates and sales tax exemptions to fund the extra analogue transmitters needed to introduce new ‘equalisation’ services in the late 1980s and early 1990s, and around $250 million was committed via licence fee rebates to fund half the cost of the transmission infrastructure regional commercial TV licensees needed to introduce digital transmission in the 2000s. Community broadcasters receive Commonwealth funds through the Community Broadcasting Foundation (CBF) – $16 million in 2009–10. Remote Indigenous broadcasting has also been supported since the 1980s. It is also currently funded through the CBF – $14.5 million in 2009–10 (Australian Government 2009, CBF 2009, Rennie and Featherstone 2008). Between 2003 and 2005 a Commercial Radio Blackspots Program provided more than $5 million to assist commercial radio licensees to extend their coverage to all communities within their licence areas (DICTA 2004). Similarly, SBS received $5.7 million over four years from 2002–03 to extend television transmissions to towns with populations of 5,000–10,000 people.

Fourth, legislation reduces the risk of providing TV and radio services in certain circumstances, relieving ‘self-help providers’ from liability under laws including defamation and copyright where they merely retransmit unaltered broadcasts (BSA 1992 ss. 212–212B). This encourages local councils, mining companies and remote Indigenous communities to establish facilities to improve terrestrial reception of services. Commercial risk is also reduced by the long-standing though shifting forms of constraint on the allocation of new commercial TV licences (now expressed through the requirement for a Ministerial review under BSA ss. 35A and 35B) and the more recent six-year moratorium on new digital commercial radio licences in areas where digital services have commenced (BSA 1992 ss. 35C and 35D).

Introducing digital terrestrial TV and radio, broadcasters have been required only to replicate their analogue coverage, not universalise it. Standard definition TV broadcasts by commercial and national broadcasters are required to ‘achieve the same level of coverage and potential reception quality as is achieved by the transmission of that service in analog mode’ (BSA 1992 Sched 4 s. 6.3(f), 6.3(j), 19.3(f) and 19.3(j)). This still falls some way short of universal service in telecommunications; the aim is simply to ensure everyone currently receiving terrestrial analogue
signals is able to receive digital signals. The enforcement process also falls well short of the consumer-driven ‘customer service guarantee’, which provides for compensation to be paid to individual telecommunications consumers where basic services are not supplied within the designated timeframes (TCPSSA Part 5). ‘Same coverage’ in digital television, in practice, will not be a right, but the result of a set of decisions by government, the regulator and broadcasters about what frequencies will be available for TV broadcasting and what will be reallocated for other purposes – the so-called ‘digital dividend’ (see Given 2009). This may be contrasted with the tougher obligation imposed by licence condition on Telstra, requiring it to maintain its CDMA mobile network until the Minister was satisfied the coverage of its NextG network was ‘equivalent to or better than the coverage and retail services’ offered on CDMA (see ACMA 2008). In practice, the differences may not be great if conservative planning assumptions are used.

Although universal service has retained a firm place in the rhetoric of telecommunications policy since it was formally introduced into legislation in 1991, government subsidy and more recently ownership have become much more important tools for achieving it. The National Broadband Plan that the Labor Opposition took to the 2007 election already represented a striking shift back to public ownership and investment as telecommunications policy tools after nearly two decades of liberalisation, privatisation and safety-net regulation (Given 2008). The much more ambitious plan for a fibre-to-the-premises (FTTP) National Broadband Network announced in April 2009 (Conroy 2009c) promises 100 Mbits/sec download speeds to 90% of Australians within eight years and 12 Mbits/sec for the rest, way beyond the voice telephone service and basic digital data capability required to be supplied through the statutory universal service obligation. This reassertion of the state’s role is further supplemented by the regulatory changes proposed to effectively force structural changes on Telstra. These changes also include new ministerial powers over aspects of the standard telephone service required to be made universally accessible under the universal service regime and more stringent rules on the removal of payphones (Conroy 2009a and Conroy 2009b).

One of the critical things this new network might do is deliver television services. This may require further thinking about the types and standards of broadcasting as well as telecommunications services required to be made universally accessible to Australians and further convergence in the tools for delivering them.

CONCLUSION

As broadcast audiences become consumers and the users of carriage services become viewers and listeners, the regulatory and institutional arrangements for setting and enforcing standards about communications services are being tested. The video- and audio-on-demand services now being enthusiastically offered by broadcasters are falling between the complaints schemes set up for consumers of broadcasting and telecommunications services. The deep personal proximity of the internet and mobile communications are raising policy concerns about the content of these media, only some of which are familiar to the regulation of TV and radio. The policy demand for something close to universal access to fast broadband and digital television services is reviving a central role for the state in building and managing new communications networks and the switchover from existing ones. Telecommunications and broadcasting regulation and policy have
things to teach each other about consumer protection in this changing landscape, but the market is also throwing up challenges that are new to them both.

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