AUSTRALIAN MEDIA REFORM – DISCERNING THE POLICY

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I INTRODUCTION

When the Federal Government's media reform package passed through Parliament in October 2006, it was the realisation of a long-anticipated aspiration. While the Government had wanted to reform media ownership and control regulation since the '90s, it was not until its return to power in both Houses of Parliament in 2004, that it was finally able to achieve this reform. Initially, the Government had only been interested in tackling media ownership, but the final reform package was broader than this, including also digital media, the regulatory powers of the communications regulator, the Australian Communications and Media Authority ('ACMA'), and indirectly, the anti-siphoning regime which protects certain events for free-to-air television access.[1] In part, this broader reform package was made necessary because the *Broadcasting Services Act 1992* (Cth) ('*BSA*') included provisions which would, on certain dates, automatically trigger changes to the media framework. These looming deadlines required the Government to consider whether the changes which would occur were consistent with current media policy. The *BSA* also provided for an analogue switch off date to commence in 2008, but it was clear that this date was unrealistic and a new timetable would be needed.[2]

The broader reform package can also be attributed to the awareness of Senator Coonan, Minister for Communications, Information Technology and the Arts, that if there was to be genuine scope for new entrants and services to the media sector, reform had to embody more than just media ownership reform.[3] Senator Coonan's understanding echoed the conclusions of the Productivity Commission's investigation into broadcasting, completed in 2000.[4] The Commission's report had been critical of the way in which government policy and regulation had artificially constrained the potential for competition and

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1 This article is mainly concerned with the media ownership and digital reforms.

2 The switch off date was determined by the period for simulcasting of analogue and digital: *Broadcasting Services Act 1992* (Cth) ('*BSA*'), sch 4, cl 6(3)(c).

3 Senator Helen Coonan, 'The New Multimedia World', (Speech delivered at the National Press Club, Canberra, 31 August 2005): <http://www.minister.dcita.gov.au/media/speeches/the_new_multimedia_world_-_address_to_the_national_press_club_-_canberra_-_31_august_2005> at 28 June 2007 ('2005 Speech').

4 Productivity Commission, *Broadcasting*, Report No 11 (2000).

diversity in the broadcasting market. It referred particularly to the policies of digital broadcasting, anti-siphoning, and pay television as examples of artificial constraints. The report was also critical of the way in which the long-standing preference for protection of the free-to-air broadcasting services had skewed media policy. Whilst the Productivity Commission concluded that there was scope for media ownership reform, it did not consider that such reform, particularly cross-media, was appropriate until there were also structural changes which would tackle some of these artificial constraints.[5] Senator Coonan's 2005 Speech was essentially the first acknowledgement by the Government of the Commission's view.[6] The media reforms were therefore significant, in that they attempted to deal with these structural limitations by including changes to the digital and anti-siphoning regimes in the reform package.

Australia has not been alone in wanting to pursue media reform, particularly of media ownership regulation. The United Kingdom and the United States have also sought to implement change. In the case of the UK, substantial reform of media ownership laws was implemented along with a major redesign of communications regulation. These changes were introduced by the *Communications Act 2003* (UK). In the US, the Federal Communications Commission ('FCC'), the communications regulatory authority, introduced new rules in June 2003. However, these rules, which constituted a major relaxation of the existing rules, were successfully challenged by various public interest groups, and the rules were stayed.[7] In July 2006, the FCC initiated a new rule making process, and at the time of writing this remains ongoing.[8] As noted in the next section, both of these jurisdictions engaged in lengthy policy debates about the reform proposals.

The 2006 Australian reform process seemed initially to promise a similar deliberative process, however the later rush through Parliament, with only two days allowed for Senate Committee hearings (which included testimony from over 30 witnesses) appeared to disavow the earlier signs. Policy soul searching does not seem to come naturally to Australian law-makers.[9] However, policy articulation and deliberation has an important role to play in ensuring a more transparent and comprehensive law-making process. Explaining and developing the policy arguments allows assessment of whether the rationales for reform are sustainable. Articulation of policy also enables a better judgement of how well the policy has translated into law, and, at a later stage, to evaluate its impact. The risk of brief or off hand policy references is that they speak only to the initiated – which in the media policy context usually means industry. Yet, the wider public

5 Ibid 364-66.

6 See Coonan, above n 3.

7 *Prometheus Radio Project v Federal Communications Commission* 373 F 3d 372 (3rd Cir, 2004).

8 FCC, *Notice of Proposed Rule Making,* 17 FCC Rcd 18503 (28 October 2002) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf> at 30 June 2007.

9 I have argued elsewhere that the history of media policy making in Australia, particularly in relation to media ownership lacks articulation: see Lesley Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (2006) 122-24 and generally. This is a comment that seems to be applicable in other areas: see Andrew Lynch and George Williams, *What Price Security?* (2006) 68-69.

has an important stake in how media policy is informed. The media is crucial to the public's participation in and understanding of its community. Policy articulation should offer a greater opportunity for the public to be involved in the policy choices which are implemented. This article will examine the scope and validity of policy claims for the 2006 media reforms.

II THE PATH TO REFORM

The Government made two attempts during 2002-2003 to reform media ownership, intending to remove foreign ownership rules and relax cross-media, but its failure to control the Senate hindered these efforts.[10] Apart from the odd ministerial reference, no policy process had preceded the introduction of these bills, and, indeed, the first bill could be seen as something of a green paper, designed to test the likely areas of opposition. However when the Government was returned to power in 2004, media reform was anticipated. The first significant indication of the Government's thinking came with Senator Coonan's 2005 Speech.[11] This was followed by a discussion paper in March 2006 on options for media reform,[12] and, in July, a statement announcing the Government's legislative plans.[13] The legislation was passed in October, with only limited time for debate. Although the Discussion Paper had appeared to offer a more open policy-making process, it too was constrained by a period of only five weeks for submissions. Apart from the July announcement, there was no follow-up paper by the Government responding to the submissions.

This approach can be contrasted with the reform processes in the UK and in the US. Although both these processes had weaknesses, they nevertheless provide evidence of a policy and law-making process which ensured that opportunities for timely input and debate were available.[14] In 2000, well before the final legislation, the UK Government published a white paper, *A New Future for Communications*.[15] The Government released several other documents during the process, designed to flesh out further detail of aspects of its proposals or to enable further consultation, and, in 2002, a draft Communications Bill.[16] In addition to parliamentary debates in the course of the legislative process, parliamentary committees also considered and reported on the reform proposals. The most influential of these committees was a joint House of Lords and House of Commons committee, chaired by Lord Puttnam. Many of the recommendations of the Puttnam Committee were accepted by the UK

10 Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth) and Broadcasting Services Amendment (Media Ownership) Bill 2002 (No 2) (Cth).

11 Coonan, above n 3.

12 Australian Government, *Meeting the Digital Age, Reforming Australia's Media in the Digital Age*, Discussion Paper on Media Reforms (2006) ('Discussion Paper').

13 Senator Helen Coonan, 'New Media Framework for Australia', (Press Release, 13 July 2006).

14 A more detailed consideration, and critique, of these processes can be found in Hitchens, above n 9, 268-93.

15 Department for Culture Media and Sport ('DCMS') and Department of Trade and Industry ('DTI'), *A New Future for Communications,* Cmnd 5010 (2000) [1.2.1]-[1.2.12].

16 Draft Communications Bill (2002) (UK).

Government, either wholly or in part, and incorporated into the legislation which passed in 2003.[17]

The US process operated somewhat differently, but consistent with the FCC's extensive rule-making powers. A regular review was required under the *Telecommunications Act of 1996*.[18] The review which led to the 2003 rule announcement was launched in September 2002.[19] Following the initial notice of the review, the FCC received extensive submissions and undertook further studies of its own initiative. It also received communications from about two million members of the general public by email, letters, and petitions expressing opposition to the proposed changes.[20] In June 2003, it released a lengthy report, which set out its reasoning and announced extensive changes to almost all of the media ownership rules then in place.[21] As noted earlier, the ruling was subject to a legal challenge, as a result of which the new rules were stayed, and a new rule-making process instituted.

Australian law-making processes do not seem eager to incorporate extended deliberative policy processes similar to those in the UK and US. The *BSA* incorporates a set of explicit policy objectives (s 3), and all reforms could be seen to develop from these objectives. Yet even if these objectives act as the policy backdrop to the reforms, this does not necessarily ensure that the policy is explicit: the realisation of some of the statutory objectives will necessarily involve trade-offs with others. In fact, in the various reform documents, there is almost no mention of these statutory objectives: the Discussion Paper makes one reference,[22] and a few references can be found in explanatory memoranda accompanying the media ownership and digital bills. In the absence of extended policy discussions one is left with brief indications only. The key to identifying the policy basis for reform is the 2005 Speech and the Discussion Paper. In reviewing the documents, it is apparent that the main policy concerns driving the reform were the provision of diversity, and the provision of an open and competitive market.[23] Diversity is described as relating to diversity of services and ownership.[24] The provision of an open and competitive market is identified as recognition that, in a 'converged environment', the traditional regulatory controls on market structures need to give way to a regulatory framework which 'allows some efficiencies of scale and scope while encouraging new players, new investment and new services'.[25]

The Discussion Paper was the major source of information about the Government's policy rationales and ideas for reform, and is what launched the

17 Joint Committee on the Draft Communications Bill, House of Commons and House of Lords, *Report and Minutes of Evidence with Appendices, Draft Communications Bill* (2002) HL 169-I and HC 876-I.

18 Pub L No 104-104, 110 Stat 56 (1996).

19 See FCC, above n 8.

20 *Prometheus Radio Project v Federal Communications Commission* 373 F 3d 372 (3rd Cir, 2004).

21 FCC, *Report and Order and Notice of Proposed Rulemaking*, FCC 03-127 (2 June 2003).

22 There is a reference to s 3(b) (provision of a regulatory environment which will facilitate the development of the broadcasting industry): Discussion Paper, above n 12, 38.

23 Coonan, above n 3, 3.

24 Ibid.

25 Ibid.

public consultation process. However, there is very little explicit discussion or elaboration of the policy basis for reform, or the evidence justifying the policy.[26] Generally, there is little more than a repetition of the ideas expressed in the 2005 Speech. What the Discussion Paper does do is link the reform proposals to the policy settings. For example, encouraging and expediting the conversion from analogue services to digital is seen as valuable both to industry and the public because it would provide opportunities (through the availability of additional spectrum) for the provision of new services.[27] Similarly, proposals to exploit the spectrum set aside for datacasting services favoured new digital services instead of allocating the spectrum for a fourth commercial free-to-air television service. These proposals are justified on the basis that they will 'contribute to diversity and provide extra content and services for viewers'.[28] By proposing relaxation, and not removal, of the cross-media rules, media services most widely used by, and accessible to, the general public will be protected.[29] With media ownership reform there is more emphasis on the policy goal of creating an open and competitive market. The Discussion Paper cites the cross-media laws as stifling the development of new services and investment, and constraining media companies in the changing media environment.[30] In contrast, reforms to cross-media rules and to foreign ownership are envisaged as enabling new services and players to emerge.[31] There is a link between the two policies because there are two senses in which the Discussion Paper refers to 'diversity'. First, the reform proposals aim to protect diversity, and, secondly, diversity is promoted by the policy goal of providing an open and competitive market.

III ANALYSING THE POLICY RATIONALES

The central policy focus, and justification for the media reforms, as outlined above, was encapsulated by the Minister during her second reading speech:

> The current set of media laws are based on a 20th century model of radio, free-to-air television and daily newspapers. Even in the late 1980s, it was clear the media landscape was accelerating towards the explosive changes that we have witnessed in the last decade. … Amending the ownership rules will let the media market operate more efficiently, benefiting industry and consumers alike by permitting greater competition and economies of scale and scope and investment in the services consumers expect and want. … In combination with [the digital reforms] … the bill will open up opportunities for a range of new innovative new services for consumers while maintaining the existing services that the community already relies on and enjoys, including quality free-to-air television services. The proposed reforms will enable existing players to make the most of emerging digital technologies and give them the flexibility to structure their businesses to be globally competitive media companies and to continue to deliver quality services to their audiences.[32]

26 See Discussion Paper, above n 12, 3-4.
27 Ibid 16.
28 Ibid 21.
29 Ibid 40.
30 Ibid 38.
31 Ibid.
32 Commonwealth, *Parliamentary Debates*, Senate, 11 October 2006, 115-16 (Senator Helen Coonan).

Anyone familiar with the media reform process in the US and the UK will be familiar too with this line of argument. In both jurisdictions, similar claims were used to justify radical change.[33] Thus, a common argument is that relaxing the restrictions on media industry will allow them to expand and compete more effectively, and this, in turn, will help to promote diversity and bring new entrants to the market. In this way diversity is simultaneously promoted and protected because some sector-specific ownership rules will, at least in the immediate and medium term, remain. The appropriateness of liberalisation is repeatedly justified by the new media developments. The public is no longer restricted to a small set of media services, but has access to an abundance of offerings. Yet, despite the confidence, and apparent certainty, with which each of the three jurisdictions state these arguments, it is not apparent they stand up to closer scrutiny. In the following sections, these policy arguments and justifications will be considered.

IV NEW MEDIA ABUNDANCE

The changing media landscape has been one of the key arguments justifying the appropriateness of reform, and it is described in some detail in the Explanatory Memorandum to the Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth).[34] In a recent speech given by Senator Coonan, this theme is again reflected when she refers to the newer means for 'delivering news and information to consumers' such as the internet, pay television, and mobile devices.[35] She also refers to the growth in 'online offerings' mentioning 'blogs, websites, podcasts and chatrooms'.[36] There is no doubt that the media environment has changed and is changing, and this impact may be particularly experienced in Australia as the digital media reforms are realised. It is true also that the public is no longer constrained by the set menu of traditionally delivered media, but has a wider choice both with regard to the content itself, and the means of accessing that content. Additionally, such content is now experienced differently. For example, there is no longer the same dependence upon a broadcasting schedule. Content and programs can be 'pulled' from the internet, for example, when it is convenient. Even newspapers are experienced differently when accessed online. Instead of working from the front to the back of the newspaper, accessing the content according to the editor's 'schedule', the online reader sets his or her own 'schedule', selecting items at random or according to the reader's interests. Even for those who still access visual content via the

33 See, eg, Tessa Jowell And Patricia Hewitt, 'Consultation on Media Ownership Rules' (Consultation Paper, DCMS and DTI, 2001) [1.2]; FCC, *Report and Order and Notice of Proposed Rulemaking*, above n 21, [4]-[5], [367].

34 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth) [17]-[21].

35 Senator Helen Coonan, '2007 – Reaping the Benefits of the Media Reforms' (Speech delivered at ABN AMRO Communications Conference 2007, Sydney, 17 April 2007) 3 <http://www.minister.dcita.gov.au/media/speeches/address_to_abn_amro_communications_conference_2007> at 28 June 2007.

36 Ibid.

traditional access point of television, the proliferation of more sophisticated recording devices, such as personal video recorders, offers greater flexibility in the way in which programs are selected and received. Nor does it remain necessary to take delivery of an entire newspaper or to sit through an entire program. Instead, the internet and iPods, as well as personal video recorders, make it much easier to access content discretely. The Minister noted that internet content particularly, has generated a range of content which is outside the traditional professional production processes. The prevalence of various new delivery platforms: podcasting, content for mobile phones, and internet originated content are certainly diversifying both the amount of content which is available, and the way in which this content is being produced.

This changing technological environment has provided the reform process with a basis for rationalising more liberalised regulation. However, there has been scant investigation into the impact of the new media abundance. As part of its rule-making process, the FCC developed an index, which included the internet and the traditional media, to measure the degree of diversity in local media markets. However, the index was flawed in its design and criticised by the court reviewing the resulting rules.[37] Accurate analysis of the impact of this new media environment is clearly important if it is to be used as a justification for reform. Whilst the internet is now a well-established content source, it is still relatively early days for the development and uptake of mainstream rivals, such as IPTV and mobile content, and so it is difficult to envisage precisely what the media environment might be like in the medium to long term. Nevertheless, it is clear there is change, with even traditional free-to-air broadcasting media affected as digital technology and relaxed regulation increases the capacity for additional program and other services.

Australia cited the internet as a source of content and contributor to diversity which could justify a more relaxed regulatory regime. This attribution requires closer examination. First, there is the issue of the extent to which this content is actually new material. One of the criticisms of the FCC's diversity index was its failure to take into account the extensive duplication of content, whereby the Internet is simply another means of accessing content already available on other platforms. Podcasting is similar, with mainstream broadcasters seeking to expand their audience reach by providing podcasts of content already delivered over the air. Duplication of content is likely to be an ongoing attribute of the internet, if the experience of the US remains relevant: as at 2003, the top 20 internet news sites were owned by the same corporate groups which controlled the broadcasting networks, cable networks, and major newspaper chains.[38] Certainly, the internet enables a much broader range of content to be accessed. Thus the reader is no longer confined to a limited range of local newspapers, but can access, for example, online newspapers from around the world much more easily than their paper counterparts. In this sense, there is an increased diversity of

37 *Prometheus Radio Project v Federal Communications Commission* 373 F 3d 372 (3rd Cir, 2004) 403 and 405-09.

38 Neil Hickey, 'Power Shift' (2003) (March-April) *Columbia Journalism Review* 26-31.

content, although the ability to access a variety of sources of information and opinion on local matters may be of greater significance and value to the public – something recognised by the local content rules required for regional media.

It is true, as the Minister noted, that the internet, and to a developing extent podcasting, has generated new content. This can range from the amateur blogs and websites, to the professional forums or virtual magazines, such as *Matilda* and *Crikey* generated in Australia, *Open Democracy* (UK), and *Salon.com* (US). Whilst many of these have become important media sources, in most cases the blogs and amateur podcasts, will remain niche sites, lacking professional resources, editorial control processes, and news gathering facilities.[39] The Minister expresses confidence about the richness of such sources of content,[40] but at this stage it is difficult to assess the extent to which these new sources of content are viable and comparable competitors to the established content providers. Indeed it is intriguing, given the rapid expansion and ubiquity of the internet, how few professional independent news and information sites actually exist. This might suggest that entry costs act as a barrier for new platforms, just as much as they do for the traditional media. Although production and distribution of an online site may be relatively inexpensive, generation and production of news and current affairs content is likely to be comparable in cost to other media. Mainstream content providers will have an important advantage, because they will be able to exploit the extensive content resources already available to them.

This brief review of 'new media modes' is a reminder of the need to exercise caution when speaking of the changing media environment. First, it is important not to confuse diversity of access or delivery with diversity of content. Secondly, it is necessary to look closely at the extent to which the content being delivered over these new delivery platforms represents new content, or merely the repackaging of content available elsewhere. Of course, it might be argued that a variety of delivery platforms available will open up opportunities for new entrants keen to access platforms for content delivery. But again, caution is needed as media and communications companies have shown a voracious appetite in the past for seeking control over as many components of the content and distribution chain as possible.

V THE INDUSTRY EXPANSION ARGUMENT

Particularly relevant to the cross-media reforms was the argument that relaxation of the rules would enable industry to realise efficiencies of scale and scope, and to compete more effectively in the new media environment. This was envisaged as benefiting the public because it would enable increased investment in and provision of new services. This argument was used also in the UK and US. Indeed, it has been an ongoing rationale for media ownership rule relaxation in

39 Trevor Cook et al, 'Regulation of news and current affairs in a distributed media environment' (2005-2006) 4 *ACMA Sphere* 16. See also Graeme Turner, *Ending the Affair: the decline of television current affairs in Australia* (2005) 137 and Terry Flew, *New Media: An Introduction* (2002) 99.

40 Coonan, above n 35.

the US: it has repeatedly been asserted that realised efficiencies would result in increased program spending.[41] Relaxing ownership rules generally results in consolidation.[42] This has been the pattern in the US, and when there was a particularly significant relaxation of the rules in 1996, the result was a massive increase in consolidation. After the 1996 reforms Clear Channel Communications Inc held the largest number of stations – 1200 – having controlled only 36 prior to the reforms.[43] The UK media reforms included a significant relaxation of radio ownership rules. Since then there has been substantial industry consolidation, as well as a move by the television industry into radio.[44] It is not readily apparent why consolidation should be expected to translate into increased expenditure and improved programming. Consolidation may well allow greater efficiencies to be realised, but there is no reason to expect that this will lead to something more than a return to investors. Indeed, consolidation may have a counter-productive impact by increasing the incentives and opportunities for repackaging of content across different media platforms and delivering automated and remote programming across outlets operating within the same platform type.[45] Increased expenditure on content is only likely to result if this also produces a better return on the investment.

VI DIVERSITY

As noted earlier, one of the significant features of the 2006 reforms was that the Government did not address media ownership reform in isolation (as would have occurred with the 2002 reform attempts), but instead chose to deal also with the broader media environment. The digital reforms were important. First, because they sought to undo some of the constraints built into the digital television structure when it was first introduced in 2001, such as the limits on multichannelling and prescription of high definition TV ('HDTV') transmission quotas. These constraints were heavily criticised by the Productivity Commission and seemed to limit the scope for the diversity which digital technology offered.[46] The result was a slow uptake of digital television, although there are

41 Hitchens, above n 9, 107-18 and 286-87.

42 There are particular features of the media industry and content production which tend the industry towards consolidation. For an examination of this, see Gillian Doyle, *Understanding Media Economics* (2002) and Glenn Withers, 'Broadcasting' in Ruth Towse (ed), *A Handbook of Cultural Economics* (2003) 102.

43 Gregory Prindle, 'No Competition: How Radio Consolidation has Diminished Diversity and Sacrificed Localism' (2003) 14 *Fordham Intellectual Property, Media and Entertainment Law Journal* 279, 306.

44 See Office of Communications ('Ofcom'), *Communications Market 2004* (2004) 13; Ofcom, *Communications Market 2005* (2005) 35; Ofcom, *Communications Market 2006* (2006) 59, 62-3.

45 This has been identified as a significant problem in the US, see Future of Music Coalition, *Executive Summary, Radio Deregulation: Has it served its citizens and Musicians?* (2002) Executive Summary <http://www.futureofmusic.com/images//FMCradioexecsum.pdf > at 28 June 2007. *Media Watch* has also identified examples of insensitive local programming: *Regional Media Watch*, 2007, ABC Television <http://www.abc.net.au/mediawatch/regional/> at 28 June 2007.

46 Productivity Commission, above n 4, 244-59.

now signs of improvement.[47] Secondly, the reform proposal of two new digital channels, Digital Channel A and Digital Channel B, provided an opportunity for new services in place of the unsuccessful datacasting services. These reforms in combination with media ownership reform were seen as promoting diversity of services and content. The opening up of the market to competition and the opportunities provided by the new media and technology were regarded as promoting diversity. In the Australian regulatory context, diversity as a policy objective has two distinct limbs as demonstrated in the *BSA*: diversity of services (s 3(a)) and diversity of control (s 3(c)). Whilst the latter is a reference to diversity of ownership, the former refers to diversity obtained through the provision of different types of broadcasting services such as national, commercial, and community services. Being structured and financed in different ways, and having different programme mandates, a diversity of services and content is possible. Whilst the comprehensive media reform is to be welcomed, there are various aspects of the package which seem to weaken the diversity sought by the reforms.

The introduction of digital television into Australia was hampered by a number of arguably unnecessary restrictions. One of the priorities of the media reforms is the implementation of a digital action plan to drive digital take-up and to manage the transition from analogue to digital; the (somewhat optimistic) intention now being that the analogue signal will be switched off in the period commencing 2010-2012. The Government has recognised that a key driver for digital take-up is an increased choice of content,[48] so it is curious that the reforms to the digital framework have been somewhat cautious.[49] For example, although the genre restrictions which limited what could be shown on multichannels operated by the national broadcasting services, the ABC and the SBS, have now been lifted, the restrictions on commercial broadcasting services multichannelling will not be relaxed until 2009, and will not be removed until after analogue switch off. Bearing in mind that the new date for switch off is relatively near, this policy seems to limit one of the opportunities (increasing the range of content over free-to-air) for encouraging consumer take-up. The HDTV simulcast requirement has now been removed, which will allow broadcasters to offer a HDTV multichannel. However, this may have limited utility in encouraging digital take-up because HDTV reception requires much more expensive equipment.

Similarly, the design for the new digital channels appears to constrain the scope for diversity. Digital Channel A will be a free-to-air service which can be offered for reception on a standard digital in home television receiver, but it is limited by the type of content service it can offer to narrowcasting, datacasting or

47 ACMA, 'ACMA report finds take-up of digital free-to-air television has more than doubled since 2005' (Press Release, 30 May 2007) <http://www.acma.gov.au/WEB/STANDARD//pc=PC_310265> at 28 June 2007.

48 Coonan, above n 3, 8.

49 For a discussion of how Australian content requirements might be influencing these decisions, see Jason Bosland, 'Regulating for Local Content in the Digital Audiovisual Environment – A View from Australia' (2007) 18(3) *Entertainment Law Review* 103.

community broadcasting. This means that it will be limited to niche programming, and will not be able to offer the type of content which might be attractive to a broader audience as well as being commercially more attractive to the industry. This is presumably so as not to undermine the position of the current free-to-air commercial broadcasting services which will have greater regulatory obligations, but in combination with the other limitations in the digital framework, it seems again to limit the potential offered by digital. Digital Channel B has greater flexibility depending upon how it is received. If it is to be received on a domestic digital receiver it cannot provide a commercial or subscription service, but if the channel is provided for reception by some other means, such as a mobile device, then there is flexibility in the type of services which can be offered. Senator Coonan has already begun to refer to the type of content which might be distributed on a Digital Channel B service as 'snack television' – a revealing clue perhaps to the true diversity offered by this new media abundance.[50] Diversity of control is also in issue in relation to the allocation of these new digital channels. Commercial television broadcasting licensees and the national broadcasters will not be able to control a Channel A licence. However, aside from general competition law, there are no control restrictions on a Channel B licence, provided it is not used for in-home services.

The design of the digital channels has been subject to some media industry criticism. For example, Fairfax Media have argued that the content restrictions on Channel A make it commercially unviable, and the lack of control restrictions on Channel B will limit the scope for diversity, because commercial television licensees would be likely to bid for Channel B and will simply repackage material.[51] The Media, Entertainment and Arts Alliance doubted whether there was any industry confidence that the new digital channel model would work.[52] The legislation does provide for an access regime for Channel B, but it will remain to be seen whether this provides an opportunity for greater diversity of providers and content, or acts as a further disincentive to industry.

VII CONCLUSION – THE MISSING CITIZEN

The policy goals and justifications for the reform have weaknesses, and some aspects of the new laws appear to undermine the goals sought for the reform. Despite some early signs of a different approach, the 2006 media reforms were ultimately implemented with a process which minimised debate and deliberation. Media policy and regulation is always a sensitive matter, and Australian media policy has a rich history of such sensitivity. The sensitivities of the media sector

50 Senator Helen Coonan, 'Australian Consumers to benefit following passing of Media Laws' (Media Release, 18 October 2006), <http://www.minister.dcita.gov.au/media/media_releases/australian_consumers_to_benefit_following_passage_of_media_laws> at 28 June 2007.

51 Evidence to Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, Broadcasting Services Amendment (Media Ownership) Bill 2006, Canberra, 28 September 2006, 2-4 (James Hooke, Managing Director, Fairfax).

52 Ibid, 21-2 (Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance).

might certainly give rise to shortcomings in policy and policy process, but perhaps another reason can be suggested also, as revealed in the language of the policy. In the Discussion Paper and the speeches made by the Minister during the reform process, the public is only characterized as a 'consumer', never as 'citizen'. In the 2005 Speech, the reference is only to 'consumers'. The Discussion Paper makes forty-two references to 'consumer' or 'consumers', whilst the only reference to 'citizen' was a reference to French citizens. Similarly, in Senator Coonan's announcement of the reforms in July 2006, there are ten references to 'consumer/s', but none to 'citizen/s'. Indeed, it is interesting to observe that one of the few occasions a different label is used is when the Discussion Paper refers to protection of local content in regional areas: here, the reference is to 'regional Australians'.[53] During the UK reform process however there was a protracted debate about the need to recognize both citizen and consumer interests in the new regulatory framework.

To focus on this distinction between consumer and citizen might be thought to be reading too much into the policy process. The public clearly has a consumer interest in the reforms. Digital policy directly affects the consumer decisions which must be made, for example, about what equipment to purchase. But, as members of the public, we function as both consumers and citizens. In our character as consumers, we can be said to engage as private individuals. To speak of the public's interest in media policy as only a consumer interest is to reduce the role of media to an individual and transactional one. However, as citizens, we have a collective interest in the role that the media plays in that wider community, the public realm; an interest that is more than just the sum of our individual interests as consumers.[54] To ignore the interest the public has as 'citizen' risks leaving leave media policy half formed.

53 Discussion Paper, above n 12, 41.

54 Shalini Venturelli, *Liberalizing the European Media: Politics, Regulation, and the Public Sphere* (1998) 72.