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I. ABSTRACT

Commercial television broadcasting is a sector where the “cultural exception” has been used as a justification for not applying the neoliberal deregulation. Nevertheless, there have been significant regulatory changes in both Australia and Canada in that sector. Canada has continued the along the path of cultural exception. Australia has reduced its diversity requirements and has eliminated foreign ownership and control provisions. As a result, the Canadian broadcasting sector is definitively Canadian whereas the Australian sector is controlled by US private equity firms and a Canadian broadcaster.

This paper examines the reasons why two similar states have taken such different paths. It examines the use of cultural protection arguments and considers which of the Australian and the Canadian examples represent current regulatory norms. It also analyses whether the Australian path can be part of a “race to the bottom” in an environment where no competing states have joined the event.

II. INTRODUCTION

Although this paper presents a comparison of the regulation of broadcasting in two countries with similar political systems and with similar institutions and history, to some extent it is actually an examination of the role of the state in regulation. In particular, the role of the state in the regulation of a sector where there has traditionally been a strong state presence. This presence has been characterised by the “cultural exception”, a term which was coined during France’s international trade negotiations and has been used by many states to justify different norms for the regulation of broadcasting compared with other network industries.

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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 theory is based on economic theory rather than the demands of social regulation and the effects of this, particularly on pluralism, have been lamented by some scholars (for example, Arino 2004). At the same time that 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 et al. 2006).

For example, 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 sector, 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.

In this paper, we begin with a review of the use of the cultural exception in both international trade and the adoption of international norms of regulation. After this review, we examine a model which can be used to analyse the broadcasting sector. This model is then applied to the regulation of broadcasting in each of Australia and Canada which are states with a number of

similarities (Ravenhill 1998). The paper goes on to consider the differences between the approaches to regulation of broadcasting in each state and suggests some areas where there has been divergence in cultural policy. The paper concludes by considering whether and why Australian liberalisation is out of step with current global regulatory norms.

III. CULTURAL EXCEPTION AND THE STATE

To begin, we examine the role of the state in preventing the regulation of broadcasting from coming under international norms from a trade in services perspective. The rationale behind this approach is that trade negotiations present a public view of a state's position on trade and domestic regulation. Before the concepts of trade in services were understood, there was a view that services were untradeable and this view was only changed with the introduction of implementing technologies (Hoekman and Kostecki 2001). Any restriction in trade in services, including protectionism, is effected by a state imposing domestic regulation on that service. In many cases, domestic regulation is focused on internal market failures but warnings against the impact of any regulation in the services sector which have a protectionist outcome are offered by economists (Findlay 2000):

Avoiding protectionist outcomes will lead to significant gains from regulatory reform. These gains include not only the gains to the importing economy as a whole, but also the gains to foreign service providers from the removal of discriminatory burdens associated with bad regulatory choices.

The original call for a "cultural exception" for trade in cultural services was made by France during the pre-WTO negotiations on the General Agreement on Tariffs and Trade (**GATT**) (Delacroix and Bornon 2005; Frau-Meigs 2002). Indeed, Delacroix describes the French position as: "France has special interest because it has adopted the most active and most vocal policy of cultural protectionism".

Importantly, the French government was influenced by other stakeholders in coming to this decision. This included civil society expressing concerns for French culture (or, at least, the French way of life) and French firms which deliver audiovisual services espousing a similar view. The role of firms is important as firms in the media sector generally have significant influence on governments (Given 2003) and, on that basis, are trusted with a partial self-regulatory environment (Bardoel and d'Haenens 2004). Although some civil society actors

associated with the audiovisual sector may have some influence on the state (Flew and McElhinney 2001; Wagner 2001), other civil society actors have less influence. For example, indigenous groups with important roles in the cultural sector were largely ignored in the negotiations of the Australia-US Free Trade Agreement (**USFTA**) (Malbon 2004).

Sophie Meunier (2000) argues that, from a French perspective at least, the decision not to trade in audiovisual services is one taken in the context of a decision on agricultural goods and services and the preservation of a “rural way-of-life”. She also points out that the European Court of Justice requires a majority to rule on matters of agricultural trade but unanimity on cultural trade (Meunier 2003). There is a similar argument that the legal protection of the cultural exception may need to be extended if agreement on the role of cultural services in WTO is to be achieved (Broude 2004).

The role of the United States as a leading exporter of audiovisual services is identified as being largely “immune to cultural imports” (Swann 2000). This was reflected in the introduction by the United States of the concept of “virtual” services (Wheeler 2000) which were incorporated into the USFTA. This is an example of the US characterising cultural services as e-commerce. This US policy position takes the view that there is now a “new audiovisual services sector” which reflects a digital age. The argument has been analysed using a neoliberal perspective (Hauser and Wunsch-Vincent 2004; Wunsch-Vincent 2003, 2005) and the paper from 2004 suggests that “Currently, the WTO members are not ready to update the multilateral trade system in the way the U.S. believes is necessary to have a modern trade framework for the digital economy”. A rather more favourable view of United States’ opposition to the cultural exception was taken by neoliberal commentators (Pryce-Jones et al. 2002) in a specifically Republican partisan analysis.

The appropriate role of the state in the trade treatment of audiovisual services (including broadcasting) divides between the economic scholars who argue against any differentiation from other goods or services (Footer and Graber 2000; Mas-Colell 1999) and political science and cultural studies scholars who suggest the opposite (Feigenbaum 2002; Lieber and Weisberg 2002). The WTO process has led to some movement away from the cultural exception and a high degree of unpredictability about future directions (Pauwels and Loisen 2003). This unpredictability has also led to calls for regional cultural identity to be recognised and acted upon (Janeba 2004; Pace et al. 2004) and an analysis of the potential that the

cultural exception will lead to negotiating blocs in multilateral trade discussions (Acheson and Maule 2004).

The European Union has the potential to create a cultural bloc (Meunier 2003; Neill 2005) and the EU maintains a rigid stand in the exclusion of audiovisual services from WTO negotiations. However, its internal market requires the free flow of trade in such services. This dichotomy is emphasised by the recent changes in EU legislation as part of “Television without Frontiers” and has attracted a range of analyses (CEC 1989; Chalaby 2003, 2005; Esser 2002; Kerrigan and Özbilgin 2004; Mazzoleni 2000; Wheeler 2004).

The approach of the European Union can be contrasted with the issues facing Canada (Mulcahy 2002a). For geographic reasons, the Canadian government is concerned with maintenance of its culture apart from that of the USA (Acheson and Maule 1994; Galperin 1999; McFadyen et al. 2000; Mulcahy 2002b). Canada has the specific experience of excluding cultural services from the US/Canada free trade agreement and maintaining this cultural exception in the negotiations for the North American Free Trade Agreement (**NAFTA**) (Barfield 1998; Lie 2001). However, Canada found that its cultural exception was the subject of an appeal by the USA to the WTO when it tried to limit US magazines on newsstands (Magder 1998).

From a global perspective, the cultural exception has been a norm. However, the position of the United States has created exceptions using the USFTA in the case of Australia and the NAFTA in the case of Canada. The next section of the paper considers whether there are international regulatory norms which might impact the broadcasting regulation of each state.

IV. GLOBAL REGULATORY NORMS AND THE STATE

This section considers the role of the state in regulation over time from the perspective of international regulatory norms. As we have seen, the analysis of the role of state in trade in services tends to be limited as there are a limited number of international political economy perspectives. This is reflected in Anne Capling’s lament in respect of trade analysis generally, that it is “perhaps a bit stodgy, arcane and unexciting compared to ... war and peace” (Capling 2001).

It would be reasonable to expect that the role of the state in regulation would reflect the lens used by the analyst. A realist lens would emphasise the importance of the state in regulation and a liberal one would emphasise the role of the market. However, this simple analysis does not hold in the case of the 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 et al. 2003).

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 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 realist 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.

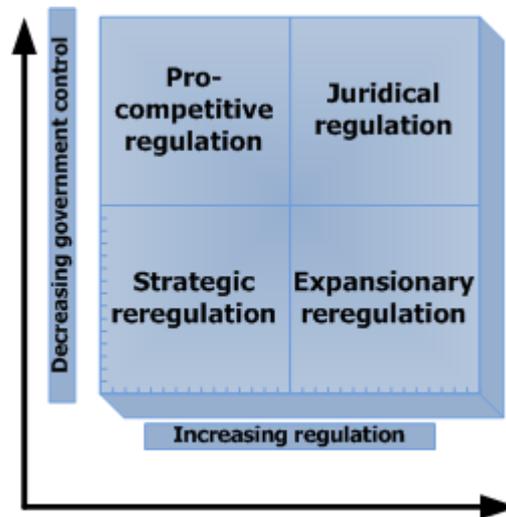


Figure 1 – Simplified form of Steven Vogel’s model

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 a little 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 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 realist 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. Vogel 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.

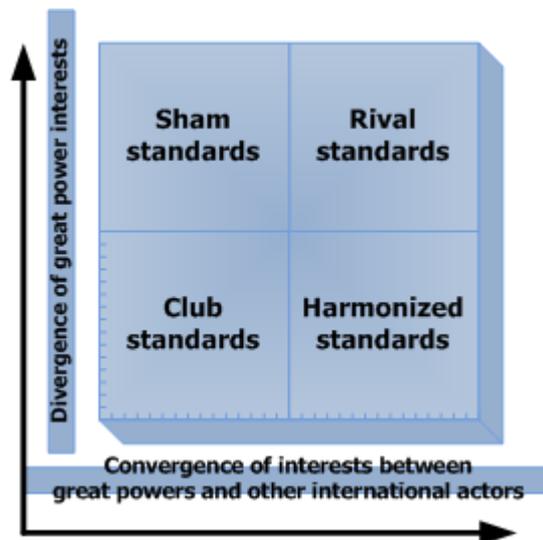


Figure 2 – Simplified form of Drezner’s model

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 2001a p 55). Although his work has strong realist 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 2001b).

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.

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

Table 1 – Radaelli’s eight issues

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. It is partly on the basis of this insight that the state similarities of Canada and Australia form a basis for a case study.

We have now looked at two approaches to considering the role of the state in the making of when there are evolving global norms. From an international trade perspective, we would expect the regulation of broadcasting to be a domestic matter if the cultural exception applies, except to the extent that the US has an influence. From a review of states' roles in internationally harmonised regulation, we find that there are arguments for the continued importance of the role of the state, especially where states have common cultural values. We now move on to consider the types of regulation which apply to broadcasting as a prelude to the regulatory approaches taken in each of Australia and Canada.

V. MODEL OF BROADCASTING REGULATION

A. Regulatory issues

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 2.

Regulatory issue
Number of licences
Reach
Foreign control
Cross-media control
Domestic content requirement
Censorship

Table 2 – Approaches to the regulation of broadcasting

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.

As the regulatory “levers” are limited, any changes in the regulatory environment for broadcasting can have extensive implications. To some extent, this is a rationale for the cultural exception. A small change in the rule for trade in broadcasting service will need to be implemented by amendments to domestic regulation. The effect of this is to amplify the calls for the cultural exception.

In order to test that these issues are the appropriate ones to consider in regulation, it is useful to take a view of the degree of integration in the broadcasting sector.

B. Integration

Vertical and horizontal integration are often regulatory concerns in network industries. However, although issues in media ownership and control might be affected by competition law from a vertical integration perspective, there is less regulation in respect of vertical integration than is found in other industries. Examples of limitation include a prohibition on owning a multiplex licence as well as a content delivery licence.

In contrast, there has been significant regulatory attention to limiting horizontal integration in the broadcasting sector. For example, in Australia, the limitations on commercial television were extensive before the recent changes to legislation set out below. In general, a horizontal integration analysis is significantly easier in a broadcasting environment and can be described using the model set out in Figure 3.

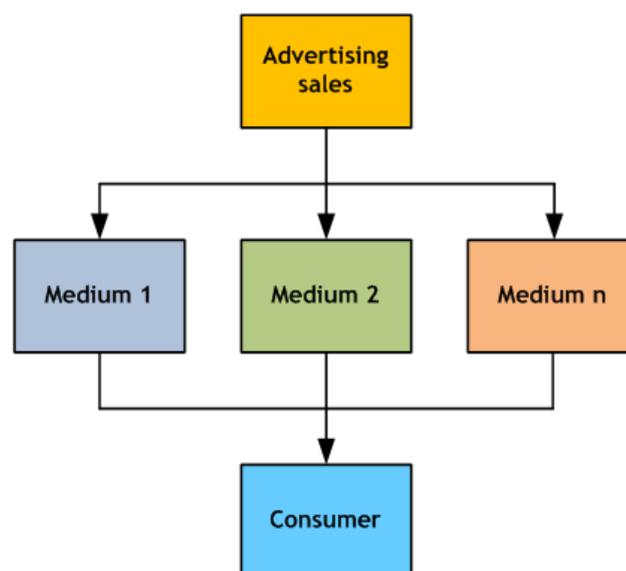


Figure 3 – Model for horizontal integration

VI. THE AUSTRALIAN PATH 1992 – 2007

A. Regulatory framework – an overview

In Australia, the *Broadcasting Services Act 1992, (Cth) (BSA)* is the principal instrument governing broadcasting services. The BSA sets up a licensing regime for broadcasting services, regulates the content on such services and sets restrictions on ownership and control of providers of broadcasting services. The Australian Communications and Media Authority (**ACMA**) is the body responsible for the allocation of broadcasting licences and administering the licensing scheme generally. Using the model for regulation introduced in the last section, we can analyse the Australian regulatory framework in early 2006 as set out in Table 3.

Regulatory issue	Initial position in early 2006
Number of licences	Limited in television to 75% national reach, one commercial in any one licence area. Two commercial licences in any area and no national reach limit for radio
Reach	Audience reach limited by geography determined by transmitter power output. Obligation to serve licence area
Foreign control	Foreign control of commercial television limited to 15% individual and 20% cumulative with no limitation for commercial radio
Cross-media control	No cross-media ownership of between radio, television and newspapers in a licence area
Domestic content requirement	Quotas by genre and absolute requirements
Censorship	Established co-regulatory approach through industry codes

Table 3 – Regulatory environment in Australia in early 2006

B. Foreign ownership

The *Broadcasting Services Amendment (Media Ownership) Act, 2006* included in its Schedule 2 an amendment that commenced on proclamation. This amendment simply stated in respect of paragraph 3(1)(d), “repeal the paragraph”. This simple amendment changed one of the primary objectives of the *Broadcasting Services Act, 1992*. This object was “to ensure that Australians have effective control of the more influential broadcasting services”.

C. Cross media ownership

Previously, under the BSA, a person could not control: a commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area; a commercial television broadcasting licence and a newspaper associated with that licence area

(associated newspaper); or a commercial radio broadcasting licence and an associated newspaper. Similar restrictions applied to being a director. A person who has company interests in a company which exceed 15% is regarded as being in a position to exercise control of the company. This 15% rule does not only apply to direct interests held in a company, but also applies to an interest of more than 15% which is carried through a chain of companies and combined to determine a person's relevant interest in a company. The 15% rule is not the only determinant of control. The BSA states that "in some cases, it may be important to look at agreements and arrangements between people and at accustomed courses of conduct between people" and sets out rules to determine when a person is in a position to exercise control.

These cross-media ownership and control provisions have been replaced by a significantly less onerous regime under which cross-media ownership is permitted, provided that there is an appropriate level of diversity. A cross-media transaction would be subject to there remaining a minimum number of commercial media groups in the relevant market (four in regional markets, five in mainland state capitals). This has been called the 5/4 rule. There is also a safety device called the "two out of three" rule which applies in regional areas (Senate 2006). This restricts a person from owning more than two of: a commercial television licensee; a commercial radio licensee; or a newspaper, in a regional radio licence area. The two out of three rule applies concurrently with the 5/4 rule.

The effect of these changes is set out in Figure 4.

In Australia, all commercial free-to-air television licensees must broadcast an annual minimum transmission quota of 55 per cent Australian programming and 80% Australian produced advertising time between 6am and midnight plus specific minimum annual sub-quotas for Australian (adult) drama, documentary and children’s programs. Pay TV drama channels must spend 10 per cent of their total program expenditure on new eligible (Australian and New Zealand) drama programs.

<p>If you own, control or are a director of a commercial television broadcasting licensee then you may not own, control or be a director of:</p> <ul style="list-style-type: none"> • a commercial radio broadcasting licensee in the same licence area; or • a newspaper associated with the licence area of such a licensee; or • another commercial television licence in the same licence area. <p>A person must not be in a position to exercise control of commercial television licences whose total licence area population exceeds 75 per cent of the population of Australia.</p>	<p>A cross-media transaction is subject to there remaining a minimum number of commercial media groups in the relevant market (4 in regional markets, 5 in mainland state capitals) – the 5/4 rule.</p> <p>2 out of 3 rule restricts a person from owning more than two of a commercial television licensee, a commercial radio licensee or a newspaper in a regional radio licence area. The two out of three rule applies concurrently with the 5/4 rule.</p> <p>A person must not be in a position to exercise control of commercial television licences whose total licence area population exceeds 75 per cent of the population of Australia.</p>
<p>A foreign person must not be in a position to exercise control of a commercial television licence; two or more foreign persons must not have company interests in a commercial television licence exceeding 20 per cent; and not more than 20 per cent of the directors of a commercial television licensee may be foreign persons. Foreign ownership (but not control) restrictions apply to subscription television broadcasting licences</p>	<p>Foreign ownership and control is limited by the Foreign Acquisitions and Takeovers Act and licensee acquisition will be regarded as an acquisition of a “sensitive” business by the Foreign Investment Review Board and under the USFTA – little practical restriction</p>

Figure 4 – Changes in the Australian broadcasting regulatory environment in 2006/7

D. Effects of the changes

The changes to the broadcasting regulatory regime in Australia were the most significant in terms of control provisions for 20 years. However, the effects of the changes were both more profound than was anticipated and more rapidly implemented. Australia has three commercial television networks (known as Seven, Nine and Ten) and each was subject to major change:

- a) The Nine Network was owned by a public company controlled by the Packer family called Publishing and Broadcasting Limited (**PBL**). While the legislation was passing through the parliament, PBL sold a 50% share of the Nine Network and ACP magazine business to a private equity group, CVC Asia Pacific, to form a new company, PBL Media. PBL received net cash proceeds of \$4.5 billion. This transaction was completed on an EBITDA multiple of more than 11 times and comprised \$3.8 billion in debt and \$2 billion in equity.

- b) In a similar vein to the PBL deal, Seven Network transferred its TV, magazine and online businesses into a new company, Seven Media Group. Seven Media is owned 50/50 by Seven Network and private equity group, KKR. The deal was valued at \$4 billion, with equity of \$1.5 billion and debt of \$2.5 billion. The transaction multiple was to be 12.5 times EBITDA for 2008.
- c) Ten Network has restructured so that CanWest’s economic interest has become a controlling interest.

The effect is that all three commercial networks in Australia are controlled by overseas entities – two private equity players and a Canadian broadcaster. This can be analysed as an unintended consequence of the legislation.

Two other transactions occurred within a few days of the legislation being passed (Murray et al. 2006). These were Seven acquiring a near 10% stake in Western Australian Newspapers (WAN). This stake is big enough to block an acquisition by another firm. Concurrently, News Corporation took a 7.5% interest in Fairfax (the major publisher of newspapers in Sydney and Melbourne). Subsequently, Seven has sought, but not gained, board of director control of WAN and News has left the shareholders’ register. It was the News transaction which was not reflected in the then government’s analysis of the legislative reforms. The changes are shown using the regulatory typology in Table 4.

Regulatory issue	Position as a result of the regulatory change
Number of licences	Multi-channels mean 3 services per licence per licence area for commercial television
Reach	No change
Foreign control	No practical restriction
Cross-media control	Five/Four rule (must be 5/4 voices) and 2 out of 3 rule in regional areas (2 out of commercial television, commercial radio and newspapers)
Domestic content requirement	No obligations for multi-channels
Censorship	No change

Table 4 – Regulatory changes in Australia in 2006

VII. THE CANADIAN PATH 1992 – 2007

A. Regulatory framework – an overview

In Canada, the *Broadcasting Act*, 1991 is the principal instrument governing broadcasting services. This legislation sets out the underlying broadcasting policy in Canada and incorporates a number of principles including that the Canadian broadcasting system should:

- a) be Canadian owned and controlled;
- b) produce programming that serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada; and
- c) encourage the development of Canadian expression

It is important to note that these objectives apply to the whole of the Canadian broadcasting media and that there are specific and additional requirements placed on the public service broadcasters in Canada.

The Canadian Radio-television and Telecommunications Commission (**CRTC**) is the body responsible for the allocation of broadcasting licences and administering the licensing scheme generally. Using the model for regulation introduced in the last section, we can analyse the Canadian regulatory framework in early 2006 as set out in Table 5.

Regulatory issue	Position in early 2006
Number of licences	Limited in television to one commercial in any one licence area. Three commercial radio licences in any area only two in any one band (AM or FM).
Reach	Audience reach limited by geography determined by transmitter power output. Obligation to serve licence area.
Foreign control	Foreign control of broadcaster limited to 20% in total
Cross-media control	No cross-media ownership limitations (other than competition law)
Domestic content requirement	Quotas by genre and absolute requirements
Censorship	Established co-regulatory approach through industry codes

Table 5 – Regulatory environment in Canada in early 2006

B. The Canadian position

Canada has traditionally had a relatively high tolerance for significant concentration of media ownership and high levels of cross media ownership. This is partly a reflection of the fact that almost all Canadian television stations and newspapers are owned by national media conglomerates. However, Canada has taken a firm line on the limitation of foreign ownership and control with the *Direction to the CRTC (Ineligibility of Non-Canadians)* 1997 explicitly restating the policy in the *Broadcasting Act*, 1991 that ownership and control of the media should be in the hands of Canadians.

As an active regulator, the CRTC ensures that programming reflects the aims of the *Broadcasting Act*. In particular, the CRTC is required to regulate to ensure that Canadians have “access to reasonably priced, high-quality, varied and innovative communications services that are competitive nationally, as well as internationally”.

C. Canadian Senate inquiry

In June 2006, a Canadian Senate Standing Committee examined media concentration (Canadian Senate 2006). This committee concluded that there were a number of problems which included high levels of concentration in news media ownership and that this was exacerbated by news media cross-ownership concentration. The committee also found that there was “no recognised mechanism that allows the public interest in media issues to be discussed and reviewed in an open, transparent and democratic manner”. In addition, the committee concluded that there was a lack of diversity as the result of media concentration.

In order to address these issues, the committee proposed media merger legislation. This legislation would limit cross-media ownership in particular markets. In doing so, it would amend competition laws to prohibit the development of a dominant position in particular advertising, production or distribution markets. In particular, the committee recommended a prohibition on mergers that involve acquiring more than 35% of a particular audience

The response to these positions was published by the Canadian government in November 2006. The key paragraph was (Canadian Heritage 2006 p 5):

... the CRTC is not only mandated to monitor and regulate the broadcasting and telecommunications systems, but in so doing, pursue social, cultural, and economic goals; this complements the Competition Bureau's application of economic criteria in reviewing mergers. Moreover, while there are no legislation or regulations prohibiting broadcasters from purchasing newspapers and vice-versa, the CRTC has imposed safeguards on a case-by-case basis by conditions of licence. It has also established maximum thresholds regarding the number of radio and television stations an owner may operate in a specific market through its radio and television policies.

That is, the Canadian government's response was not to reject the introduction of cross-media ownership and control restrictions. Rather, it argued that the restrictions were not required because the CRTC already had the power to impose such controls.

VIII. COMPARISON OF REGULATORY RESPONSES

Australia and Canada are two states with similar historical approaches to political and cultural issues which have similar geographic and demographic profiles. Each state has been demonstrably enthusiastic in its adoption of neoliberal policies in respect of the regulation of networked industries. Each has negotiated a free trade agreement with the US, the major power which does not accept the notion of a cultural exception, especially in the digital age. However, each state has adopted a distinctly different approach to foreign media ownership and control as well as cross-media control.

One of the striking points that comes from the analysis of the Australian Senate's review of the amendments to the BSA (Senate 2006) and the Canadian Senate's investigation into news media (Canadian Senate 2006) is the use of the term "public interest". The Australian Senate considers the term in respect of merger clearance and the potential for a "public interest" test associated with the increasing concentration of media ownership. The Canadian Senate used a large section of its report (Part III) to consider how the public interest is best served and the balance of the rights and obligations on media companies under the *Canadian Charter of Rights and Freedoms*. As Australia does not have a Bill of Rights, such an analysis was not conducted by the Australian Senate.

Canada takes its cultural exception seriously and sought to maintain this position during NAFTA negotiations. Australia was prepared to make commitments in respect of audiovisual

services in the USFTA which it has not done under any other trade agreement. For example, Australia did not make such a commitment to Singapore despite having a favourable balance of trade in audiovisual services with that country. Under the Australia-New Zealand Closer Economic Relations trade agreement, a High Court finding was needed in respect of New Zealand produced television programming (153 ALR 490) to cause the Australian government to change its policy of cultural exception.

However, there is further evidence to suggest that Australia has shifted its cultural policy. On 20 October 2005, when 148 nations signed the “UNESCO Convention on the Diversity of Cultural Expressions”, Australia, Honduras, Liberia and Nicaragua abstained with Israel and the United States voting against. This convention protects the rights of countries to continue using possible cultural exceptions to protect their own cultural industries – including the potential for cultural protectionism. In the context of an absence of an Australian cultural policy, Throsby argues that the failure of the Australian government to understand the issues in the convention could lead the country to become a “cultural pariah” (Throsby 2006). However, the analysis could be simply that the Australian government policy position was not a unique move. The UNESCO decision could simply be a consistent policy decision which is part of the abandonment of the use of the “cultural exception”.

IX. AUSTRALIA ALONE?

We have seen that the cultural exception has been used widely in international trade and that models of the role of the state in the harmonisation of regulation has changed but still remains important regardless of whether the analysis uses a realist or liberal lens. We introduced a simple model which can be used to describe and compare broadcasting regulatory environments and applied it to the regulatory regimes for broadcasting in Australia and Canada. This analysis showed that Canada is on a path which reinforces its current restriction on foreign ownership and control and is likely to limit cross-media control in the future. The analysis of Australia showed that it has effectively eliminated foreign media ownership restrictions and reduced diversity by removing limits on cross-media ownership. The comparison suggests that there has been significant divergence in cultural policy between Australia and Canada.

While Europe progresses in its replacement of “Television without Frontiers” and Canada reinforces its cultural independence, Australia went down a neoliberal path which the US has yet to tread. There is some irony that Rupert Murdoch, an Australian who changed his citizenship to own US media properties can now control an Australian television licence whereas an Australian cannot control a US, or Canadian television station.

Australia appears to be out of step with other liberalised regimes. It has started a race, whether to the bottom or otherwise, with no other contestants. This may be result in Throsby’s “cultural pariah” epithet being applied by others. However, it is likely that the reason behind the policy shift is an absence of a voice for the “public interest”. The Australian broadcasting regulatory environment encourages input from stakeholders, but this is best managed by the media owners rather than media consumers. It may be that the cynicism expressed by the main media union in Australia (Media Entertainment and Arts Alliance) in a submission to the Productivity Commission’s inquiry into broadcasting is a good indicator of the attitude of any form of civil society in Australia (MEAA 1999):

The Alliance has regretfully come to the view that foreign ownership of Australian media is a lesser evil than domination by a handful of Australian companies.

On the other hand, recognition of the absence of plurality in respect of telecommunications by the government elected late in 2007 (Conroy 2008) might indicate that there is still potential for the views of less jaded civil society actors to emerge in Australia.

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