Regulation and the Portrayal of Cultural Diversity: The Legal Framework

This is the text of a speech by Peter Webb, Deputy Chairman of the Australian Broadcasting Authority, at a conference organised by the Communications Law Centre for the Office of Multicultural Affairs on the portrayal of cultural diversity in the media & self regulation at The Powerhouse Museum, Sydney on 31 May 1993

I want to place my remarks today only partly within the legal and regulatory framework provided by the Broadcasting Services Act.

I will only do so sketchily and I then intend to say something about the role that the Australian Broadcasting Authority (ABA) is presently fashioning for itself in achieving its objectives in a number of areas, including Australian content on television, planning, narrowcasting and community television and the relationship of these activities to an increase in diversity.

Objects of the Act

The objects section of the Act (section 3) is the point at which any examination of the Act's significance and scope must start.

There is a style of legislative drafting that has become more popular in recent years, particularly in relation to those Acts of Parliament which call for balanced decision-making and involve a deal of subjectivity, in environments of challenge and change.

The formulation of legislation in environments of that kind can turn into a nightmare of prescription, particularly when events move faster than the Parliament can cope with and when the forces in an economic market affected by it are continuously teasing away at the fabric of the Act.

So we sometimes resort to the general preamble in legislation which acts as a guide to the outcomes that the Parliament wishes to see achieved. So it is with the Broadcasting Services Act.

The objects of the Act are ten in all and they range over the whole of the Act's reach: they speak about a broadcasting industry that is efficient and competitive; about the promotion of high quality and innovative programming; about respect for community standards; about the protection of children from harmful program material; about Australian control and diversity of ownership and services; and a number of other matters.

The objects are filled with concepts of public good and they have not, to my ears, been the subject of criticism.

I mention them in particular because I am not sure that a sufficient degree of notice is being taken of them. Attention seems to turn more to the specific provisions of the Act and the mechanics of administration.

Well, as fascinating as these things are, the context in which the Broadcasting Services Act is meant to operate is really to be found on the second and third pages of the Act.

As well as its own objects the Act deals also with (a) regulatory policy (in section 4) and (b) the role of the ABA (section 5).

(a) Regulatory control is to be applied according to the degree of influence that services are able to exert in shaping community views in Australia and broadcasting services should be regulated in such a manner that, among other things and in the opinion of the ABA, enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on broadcasters.

(b) The role of the ABA, 'In order to achieve the objects of the Act in a way that is consistent with the regulatory policy in section 4', is to monitor the broadcasting industry and to use its functions and powers in a manner that, in the ABA's opinion, 'Produce regulatory arrangements that are stable and predictable' among other things. [It is the express intention of Parliament that the ABA use its breach powers in a manner commensurate with the seriousness of the breach.]

The combination of these sections is meant to provide the broadcasting industry and the ABA with sufficient stars to steer by as we all head off on our voyages of exploration.

One can assume that Parliament was asked to adopt this drafting approach with the Broadcasting Services Act so that all the stakeholders in the various industries which are caught by or affected by broadcasting law, could obtain a clear appreciation of the outcomes the Act is designed to achieve.

This does not mean, however, that it is all plain sailing. There are a couple of other points to make about the legal and regulatory framework.

Clearly, the objects of the Act are not all completely independent of each other:

- diversity of control doesn't necessarily always produce diversity in programming;
- efficiency and competition don't necessarily always produce diversity of programming;
- the promotion of a sense of Australian identity and character doesn't necessarily always translate to economic efficiency - nor does high quality and innovative programming; and
- respect for community standards won't always produce radio and television services that are entertaining, educational and informative.

Moreover, while the ABA is implicitly given the task of achieving the objects of the Act, through monitoring the broadcasting industry and regulatory arrangements that are stable and predictable, it must be borne firmly in mind that these objects of the Act are just that. They are objects of the Act and, as such, it falls to all the stakeholders in the industry to bear them in mind as their responsibility, every bit as much as, and in some important respects more than, they are the responsibility of the ABA.

For it must be also borne in mind that the ABA is not the only regulator at work under the Act - and I am not referring to the role performed by the Trade Practices Commission in certain matters.

Included among the regulators are:

- the national broadcasters (ABC/SBS),

by reason of their codes of practice;

- the radio and television licensees, (commercial, community and narrowcasting) under their codes of practice;
- the Parliament, which has given itself the power to amend standards and codes in certain circumstances and the power to decide whether 'R' certificate movies can be shown on pay TV and which has also established a number of policies in the Act which only it can change;
- the Minister, who is empowered to issue general directions to the ABA as to the performance of its functions and to direct investigations; and
- the government, which can develop general policies, apply them to the ABA and assume international obligations under conventions and the like which require consistency from the ABA.

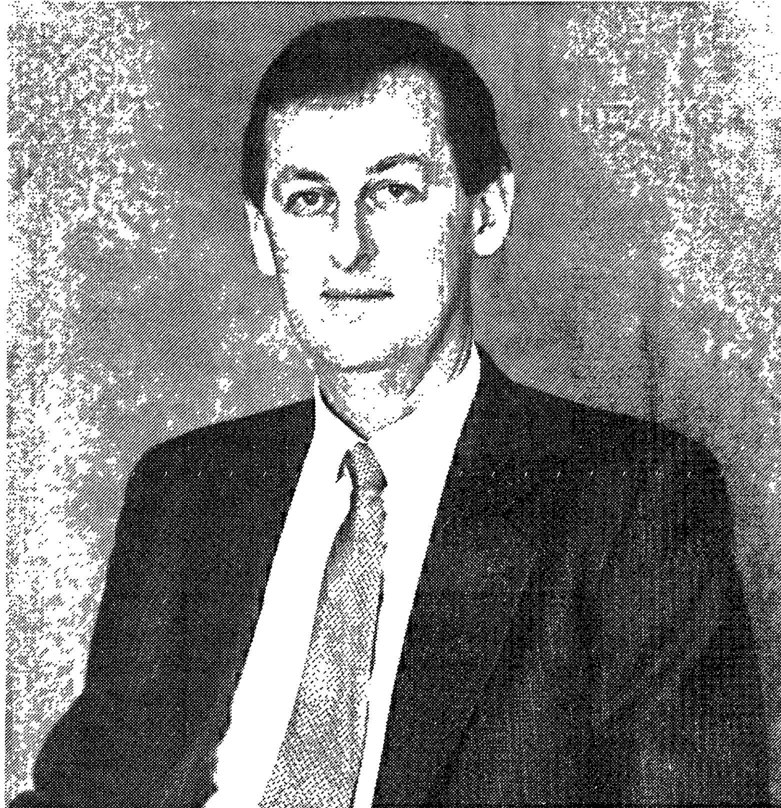
Finally, of course, the Administrative Appeals Tribunal and the law courts stand ready and available to anyone (including the ABA) who thinks that this regulatory system has not done them justice or even natural justice, under the Act. The courts are already in use.

So that is an outline of the regulatory environment in which the performance of the broadcasting and production industries must be considered, whether on the issue of cultural diversity or any other issue.

I must say immediately that I don't mean to imply, by reason of my reference to the roles of others, that the ABA is looking to vacate the general field of regulation. We feel that many participants and potential participants in the industry, many service providers to it and many consumers of its product are keen to see the ABA provide a final sense of certainty about a great range of matters, be they economic, social or cultural.

The ABA is prepared to provide that certainty wherever it is empowered to do so, and wherever and whenever appropriate.

But the current environment is essentially one in which self-regulation is first to be given its opportunity in certain areas and in that respect the ABA has already been notified of the codes of practice of the ABC and SBS, and has registered the codes of practice of FARB (Federation of Australian Radio Broadcasters).



Peter Webb, ABA Deputy Chairman

FACTS (the Federation of Australian Commercial Television Stations) has lodged its draft code with the ABA and the ABA will need to be assured that the pre-conditions to code approval specified by the Broadcasting Services Act are, in fact, present before it moves to approve them.

For the record those pre-conditions (found in section 123(4)(b)) are:

- The code of practice provides appropriate community safeguards for the matters covered by the code; and
- the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and
- members of the public have been given an adequate opportunity to comment on the code.

If these elements are all present and accounted for, the Act says that the ABA must include the code in the register of codes.

So in the first instance - apart from Australian content and children's television standards - it will be the various codes which steer the commercial industry groups along the course they are expected to take between satisfying community expectations and providing competitive services.

Those expectations clearly include both diversity of ownership and diversity of programming - the former also having a part to play in leading to the latter.

Incidentally, the very existence of cultural diversity in the objects of the Act acknowledges the special status of this notion. This status that would not have occurred to the Parliament of 1942 when settling the new Act's predecessor. Mainstream Australia was then truly a fundamentally different place from what it is now.

Australian Content

However, codes aside, the Australian content standard for television (along with children's television standards) remains the preserve of the regulator and a matter about which the Parliament feels very strongly. The ABA takes its responsibility for this standard very seriously, given its obviously central role in the cultural orientation of Australian television. The content level in the standard, which has reached a plateau this year, will be retained in its present form both as a necessary guarantee for audiences

and as a valuable safety net for industry - it will not be lowered.

Brian Johns (chairman of the ABA) has however invited discussion about the way in which Australian content regulation might be made more effective and about how the trade-off between quality and quantity might be addressed.

The current standard seems designed to produce two outcomes - firstly, it is designed to compel the broadcast of sufficient programs that are obviously Australian in their look to satisfy the community's preference for viewing their own culture in reflection; and, secondly, it is designed to require a sufficient level of new programming to keep the local production industry assured of a steady demand for their services.

It strikes a balance between matters economic and matters cultural - perhaps this is just another way of looking at the difference between quality and quantity.

More importantly, it already provides an answer to the question, 'What is Australian?'. The standard makes reference to Australian themes, Australian perspectives and Australian viewpoints. One of the objectives of the standard is to encourage programs which recognise the diversity of cultural backgrounds represented in the Australian community.

As a consequence, the standard already goes out of its way to emphasise that Australianness is in a constant state of change, albeit incremental.

The standard is contemporary, reflecting the pluralist, multi-cultured Australia rather than an old generation view coloured too brightly by its own, quite legitimate, affection for an Australia that was predominantly a British derivative.

In other words, the definitions of Australianness in the Australian content standard are not fixed in time or space but are quite capable of moving with the times.

So, should the next step, if there is to be one, follow the existing direction, or should there be a change in course in favour of either matters economic or of quantity on the one hand or matters cultural or of quality on the other? The ABA doesn't have the answers to these questions yet but Brian Johns will continue his trawling for ideas on the future of the standard for some months to come.

The Role of the Rules

All this talk of codes and standards, laws and regulation, should not deceive us into thinking that rules necessarily make things work. We can become too focused on the rules and the consequences of transgressions to the detriment of the outcomes we want to achieve.

Professor Fred Hilmer said the other day, in a different context, that the boards of large public companies would be better advised to focus more on the achievement of the highest productivity through best practice than on regulatory compliance, because the latter might cause them to take their eye off the main game to the detriment of the shareholders.

In other words, slavish compliance with the rules won't produce the result that is your purpose for being there.

The ABA certainly doesn't want to create an atmosphere in the broadcasting industry in which everyone is looking over their shoulder for the regulator, to the detriment of the product.

In broadcasting - both radio and television - the creative program-makers need to be encouraged to consider how they might best achieve the outcomes of the Act, including the development and reflection of a sense of cultural diversity, than how they might ensure they don't breach the various rules that might bear on that outcome.

The rules must remain important, of course, but not as the raison d'etre for program-makers. Their reason for being is to make programs that are acceptable to the Australian audience, in all its complexity, and that are commercially viable.

Planning

I also want to say something about the planning process we are gently steering the nation through at the moment.

It is clear that the Government made a deliberate choice to shift decisions on market entry and on individual applications away from the Minister to an independent authority.

The Department of Transport and Communications and the Government deserve some acknowledgment for this. The surrender of a significant power, albeit for the greater good, doesn't come easy to any government department, but the traces were cut without obvious demur and Australia is undoubtedly going to be the better for it. Professional immodesty has nothing to do with that statement.

The ABA will, as a result of this transfer of power, be responsible largely for determining the market structure of the broadcasting industry, including the number and type of services which can be provided in different licence areas.

To assist us in formulating our priorities and in estimating the extent of community demand for new services, the ABA asked the people of Australia last December to tell us about their aspirations and their need for new television and radio services.

We received more than 550 submissions from organisations and individuals. The lasting impression they give is of a deep-felt desire for increased diversity in the services they receive. The popularity of SBS - both radio and television - is unquestioned. The demand for community radio is also very great and reflects the aspirations of ethnic communities as well as the general community.

Diversity is in the eye of the beholder of course. For example, the Community Broadcasting Association of Australia said that it could see no reason at all why the current SBS radio services should be expanded in the future.

That's simply an indication I am sure that the competition for a place on the radiofrequency spectrum is likely to remain intense for some time to come.

Narrowcasting

Diversity of programming has obviously been given a significant filip by the introduction of the concept of narrowcasting in the Broadcasting Services Act.

Narrowcast services are, in essence, services limited in appeal or by reception when compared with commercial services. Potential narrowcasters are able to obtain the ABA's opinion on their status and rely on that opinion for five years. The ABA has received 95 such applications but, because of commercial confidentiality provisions in the Act, is unable to tell the public much about them now.

The eventual extent of narrowcasting will depend upon the availability of spectrum and, at this stage, there is little scope

for high power narrowcasting. But the ABA is of the view that narrowcasting is an important part of the mix of services within a market and, when the planning process is complete in each of the twenty-three planning zones into which the ABA has divided Australia, we will examine the prospects for narrowcasting in each of these zones.

To date, I can say that we have made available considerable scope for low powered narrowcast services and have issued 252 transmitter licences for narrowcast services since December 1992 (for when the ABA first made spectrum available). The majority have been for tourist information services, but sporting, racing, religious, Aboriginal and special events services have been included.

The most obvious examples of high powered narrowcasting have been the pure racing services introduced in Queensland, New South Wales and the Northern Territory. Great pressure is being exerted in South Australia and Western Australia also. The contribution to diversity that this development makes should not be overlooked, given that some of those services are leaving programming gaps behind them in the band they vacated.

The ABA has also set out to encourage increased diversity by licensing community groups in Sydney, Melbourne, Adelaide and Lismore to use the sixth high powered television channel. The sixth channel has been released to providers of open narrowcasting services for community and educational non-profit use.

In order to cater for latecomers to the community television field, the ABA has required that each licensees comply with access rules. These rules detail the extent to which applicants should provide for new groups and individuals to take part in the community endeavour, thereby providing continual growth in membership, creative ideas and new sources of programming.

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Community television is not yet a permanent feature of the Australian television landscape. It will probably operate as a narrowcaster until February 1996, which is about the time that the results of the Minister's review of television will be known. But it does represent a terrific opportunity to produce a generation of television people that aren't in the respective moulds of the national broadcasters or the commercial broadcasters.

I have no personal knowledge yet of the public broadcasting industry in the United States but I am told that it has very high quality programs, with a consequent high level of respect and acceptance. One has the same hopes for the sixth channel groups, although they are more like the groups to which each US cable operator is required to grant channel access as part of the price for their licence.

Because of the limited time available I have not spoken about some other matters that have a bearing on program diversity. The part played by competition and the 'two stations to a market' rule, the implications of foreign ownership for effective Australian control of the more influential broadcasting services, the likely influence of pay TV on the free-to-air industry and on Australian audiences, and the developing globalisation of television (including the build-up of potential for foreign satellite-carried programming to drench Australia) are all matters that have implications for program diversity. I have attempted to give you some idea of the framework within which the ABA has been working since its inception and of some of the main developments in the administration of the new regime that touch on diversity.