

# ALLOCATION AND BROADCASTING SERVICES SPECTRUM PLANNING

THIS SPEECH WAS GIVEN BY GILES TANNER, PRINCIPAL LEGAL OFFICER, ABA, AT THE IIR CONFERENCE, 1993 BROADCASTING SUMMIT, 11-12 NOVEMBER, SYDNEY.

## A MORE STREAMLINED LICENSING PROCESS

Last year, the Government promised Australia a more streamlined licensing process for broadcasting. The Broadcasting Services Act, said the Minister in his Second Reading Speech to the Bill, would allow 'new types and greater numbers of services to emerge.'

Thirteen months on, only pieces of the new broadcasting licence allocation regime are in place. With few exceptions, allocation of new broadcasting services using the AM or FM radiofrequency bands or VHF and UHF television bands must await the completion by the ABA of spectrum planning. The highest priority areas will not be planned until the first half of next year. In markets where there are already three commercial television services, allocation of further commercial television licences must await a Ministerial review 'to assess the benefits that would accrue if more than three commercial television broadcasting services were permitted in licence areas<sup>1</sup>. This review must take place before 1 July 1997. The two

satellite pay television licences, intended to inaugurate the era of pay television in Australia, have not yet found an owner despite months of cascading bids. In the wake of these delays, the Government has intervened to delay the introduction of other pay television services using MDS transmitters to deliver their programs.

Meanwhile, on the positive side of the ledger, visible achievements include the proliferation of niche broadcasting services both on and off the airwaves, the number of pay television licences that have been issued already to groups proposing to use cable to deliver their programs and, pending completion of the Minister's review, the offer of the vacant sixth television channel to community and educational groups.

We are in the middle of an evolving process, a process whose few, relatively simple ground rules will permit an enormous variety of possible outcomes. Those outcomes are difficult to predict. Just how difficult is well illus-

trated by recent Government amendments to protect the satellite pay television licensing process from an unexpected market interest in that 'inferior technology', MDS. You might say that it took the markets scarcely two months, working within the new allocation rules, to produce an outcome that confounded early expectations.

So I will not try to predict outcomes but will instead concentrate on some interesting features of the new allocation process.

How an aspiring broadcaster enters the industry under the present regulatory scheme will depend on:

- what type of service it wants to provide (i.e. radio or television, broadcasting or narrowcasting, if broadcasting then what kind of broadcasting, and whether the service can be characterised as a retransmission); and
  - whether it wishes to use broadcasting services bands spectrum as a means of delivering its service.
- Some of the things I want to show you are:

- how allocation decisions might flow out of the ABA's public planning process and how the three processes of planning, Ministerial reservation of spectrum for national or community uses and the ABA's own discretionary powers will combine to shape future opportunities for using broadcasting services bands spectrum;
- how, with few exceptions, the Broadcasting Services Act has removed the barriers to the exploitation by broadcasters and aspiring broadcasters of new technologies such as cable.

## ABA'S PLANNING MEETINGS

The ABA has held the first of its public meetings to canvass community views on planning radio and television services. The first meetings were in Griffith, NSW and Darwin, NT. The ABA will also hold meetings in Mildura, Vic. and Berri, SA in November. December meetings are planned Geraldton, Northam and Albany in Western Australia and the Mt Gambier/Spencer Gulf regions of South Australia.

The ABA wants to hear from all members of the community with an interest in shaping the mix of services to

be available in their area. Members of organisations who would like to meet with ABA staff separately from the public meeting should phone the Planning Officer on 008 810 241.

Written submissions are also invited. They should be addressed to the Planning Officer, Australian Broadcasting Authority, PO Box 34, Belconnen, ACT 2616. An information booklet is available to help prepare written submissions and can be obtained by writing to the above address or phoning 008 810 241. This booklet will also be available at the public meetings.



### THE NEW ALLOCATION PROCEDURE

The new allocation procedure wid-  
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ened the definition of broadcasting and created categories for several new types of broadcasting service, each one permitted and with its own allocation process. For the less influential services, the so-called 'narrowcasting services', allocation is as simple as publishing a class licence in the (Commonwealth of Australia) *Gazette* permitting any potential service provider to start up. For the more influential services, commercial, subscription or community broadcasting services, individual licences must still be obtained from the ABA.

In place of mandatory vetting of licence applicants by a gatekeeper, the new Act introduced the idea of regulation by exception. There is still a strong regulator to evict troublemakers, but it no longer guards every door into the industry and need not make inquiries unless it suspects there is a problem.

As this new scheme is substantially 'technologically neutral' it will not matter in the longer term how a broadcaster delivers its product to its audience. But the full implications of this technological neutrality will only become apparent as alternative technologies provide viable alternatives to the airwaves. In the meanwhile, the industry will continue to operate in a kind of sunset era dominated by existing AM, FM, UHF and VHF delivery technologies. Under the Broadcasting Services Act, obtaining access to those parts of the spectrum is less simple and almost certainly more expensive than obtaining a licence to broadcast using some other delivery technology.

A couple of examples should illustrate the point:

Suppose an entrepreneur wished to provide a package of pay television services by cable or optical fibre. They can apply right now to the ABA for as many service licences as necessary. The ABA will allocate them unless the Trade Practices Commission raises an objection on competition grounds or unless

the applicant is found not to be a suitable licensee. If there is no reason to query its suitability, the ABA will look no further. It is virtually an 'over the counter' procedure. Of course, the entrepreneur must still find a cable system. How it does that, as far as the regulator is concerned, is the entrepreneur's own business.

Note that applying for a commercial radio licence or a community television licence using cable, MDS, satellite, or any other means of delivery other than broadcasting services bands spectrum is even easier, as there is no requirement of TPC involvement. However, access to commercial television licences by alternative technologies must await the outcome of the Ministerial review of the three stations rule in markets where the three commercial networks are already received. Also, subscription television broadcasting services wishing to use satellite or MDS as a means of delivery must wait a little longer, to give satellite licences A and B a head start.

This means the ABA can allocate any number of pay TV licences [or community licences, or, subject to the two station per market limit, commercial radio licences] to any would-be operator. The licences themselves will be worth little or nothing. As cable or other delivery systems become viable, the licence allocation regime will not hinder the free operation of the market as it moves to exploit the new opportunities.

Suppose, on the other hand, an entrepreneur wished to obtain a commercial radio broadcasting licence using the FM band. A entirely different procedure would apply. First the ABA must complete planning in the area where the service is proposed, by preparing a licence area plan. This plan may show a vacant channel with an appropriate licence area. Provided the channel is not reserved for some other purpose, the ABA may decide to auction it off as a commercial radio broad-

casting licence. At that time, the aspirant would have to bid against other aspirants. If successful, it would be entitled to keep that FM channel for as long it held that licence<sup>2</sup>. [Of course, the ABA could still refuse to grant the licence if it found the applicant was not a suitable licensee.]

This means the total number of broadcasting services bands licences will remain strictly limited. The licences themselves are likely to retain considerable intrinsic value.

In conclusion, the Broadcasting Services Act to a large extent severs content regulation from regulation of the means of delivery of services, freeing broadcasting services to exploit new technologies with minimal hindrance from broadcasting regulation. Already, aspirant service providers are free to experiment with satellite, cable or other means of delivery as a means of providing a number of different types of service, including narrowcasting services, subscription broadcasting services and commercial radio broadcasting services.

However, some restrictions remain, most notably the moratorium on more than three commercial television broadcasting licences in any market and the temporary prohibitions on delivering pay television services by MDS or, with the exception of satellite licences A, B and C, via satellite. Also, allocation of remaining broadcasting services bands spectrum must await completion of a public planning process by the ABA and a competitive allocation process.

The amendments to the subscription television broadcasting licence regime earlier this year to delay exploitation of MDS licences provide a telling contrast between the old and new regulatory schemes. Whereas the Broadcasting Act required a new amendment every time the Government wished to start new types of service, the Broadcasting Services Act may well require an amendment to stop them.

1 S.215, *Broadcasting Services Act 1992*.

2 S.102 of the *Radiocommunications Act 1992* relates.

## THE ROLE OF PLANNING IN ALLOCATION

I intend to take a brief look at the relationship between three processes:

- public planning of vacant spectrum;
- Ministerial reservations for national and community broadcasting; and
- ABA allocation of vacant spectrum.

These processes, although separate, are closely interrelated. Between them they will shape the future development of broadcasting using broadcasting services bands spectrum. How, when and for what purpose any vacant broadcasting services bands spectrum is ultimately put to use will depend on a sequence of decisions taken inside and outside the planning process by the ABA, by the Minister, and to some extent by incumbent broadcasters.

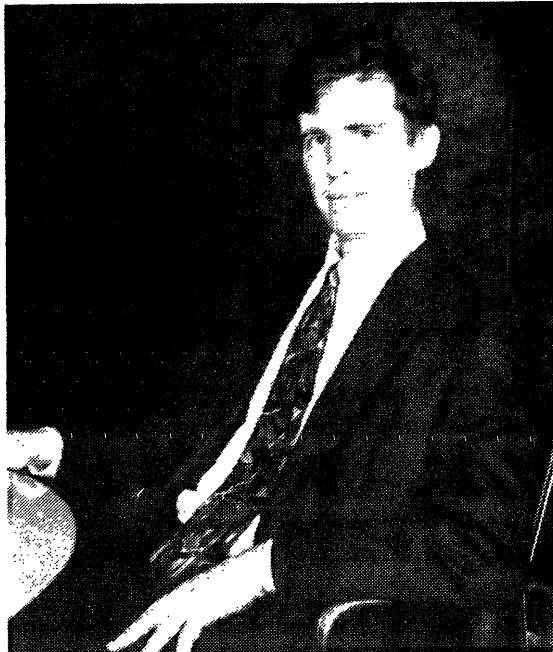
Following the national priority setting exercise, which the ABA completed on 30 September, the ABA must now prepare two public documents for each area of Australia and each part of the broadcasting services bands spectrum.

### FREQUENCY ALLOTMENT PLANS

The first of these documents is called a frequency allotment plan. This is likely to consist of long tables of geographical place names, each one with numbers beside it. The numbers will represent the raw number of channels to be available in each area. There will be different numbers for radio and television channels, and for AM versus FM radio channels and VHF versus UHF television channels. Already, implicit in those numbers, a range of decisions has been made bearing on the overall likely numbers of additional services - about how thinly the FM spectrum will be sliced up and how much space will be left between each slice to minimise interference, about the power and coverage area of the transmitter using each channel and, in broad terms, about which markets will have more channels allocated to them than others.

In other words, even at the frequency allotment plan stage the possible range of allocation decisions will have been greatly narrowed and assumptions will have been made about

numbers of services, what their markets will be and what audiences they might reach. An example should illustrate the point. In Melbourne, there are currently a number of high-powered FM radio services basically serving the entire city market. There are also 10 low-powered community FM services serving small areas of Melbourne, such as Melbourne West, Mornington and Plenty Valley.



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There is still a certain amount of vacant FM spectrum available in the Melbourne area. If the ABA planned on the basis that it would ultimately be used to provide more high-powered, city-wide services, then using present assumptions it should yield five extra channels.

Suppose for a moment that patterns of demand were entirely different and the ABA chose to plan on the basis of one extra low powered FM channel in each of those ten existing low-powered markets. This would reduce the number of those vacant high powered channels, perhaps by two.

### LICENCE AREA PLAN

Before the ABA can proceed to permanent allocation of any vacant spec-

trum in an area it must also complete a licence area plan (LAP). The LAP will be based on the raw numbers of channels shown in the frequency allotment plan and must be consistent with it. It will set out the number and characteristics, including technical specifications, of broadcasting services available in each area using of the broadcasting services bands. It defines the property available for allocation from a technical point of view, showing things like licence area. The number of services may not be same as the number of channels. For example, it is possible some of the channels shown in a frequency allotment plan might be appropriated to improve reception of an existing service in outlying areas or pockets of poor reception. In this way, the licence area plan could also influence the possible range of allocation decisions, by allowing tradeoffs between numbers of new services and improved reception for existing services.

From the point of view of allocation, the licence area plan is likely to prove particularly important because the Minister has foreshadowed making certain decisions about reservation of spectrum capacity before licence area plans are finalised. Under the Broadcasting Services Act, the Minister is empowered to determine how much spectrum in each area is reserved for national and community broadcasting purposes. Further, the Minister may give directions to the ABA to give priority to a particular community interest or interests, whether generally or in a particular licence area, in allocating community licences that are broadcasting services bands licences<sup>1</sup>. To date he has given a number of indications regarding the kinds of reservations we are likely to expect. For example, the Minister has asked the ABA to proceed on the basis of a minimum of one community service in each area<sup>2</sup>. We also know in general terms that reservations for national services in most areas might be in the vicinity of the six now enjoyed or proposed in the better served areas of Australia. The Minister also asked the

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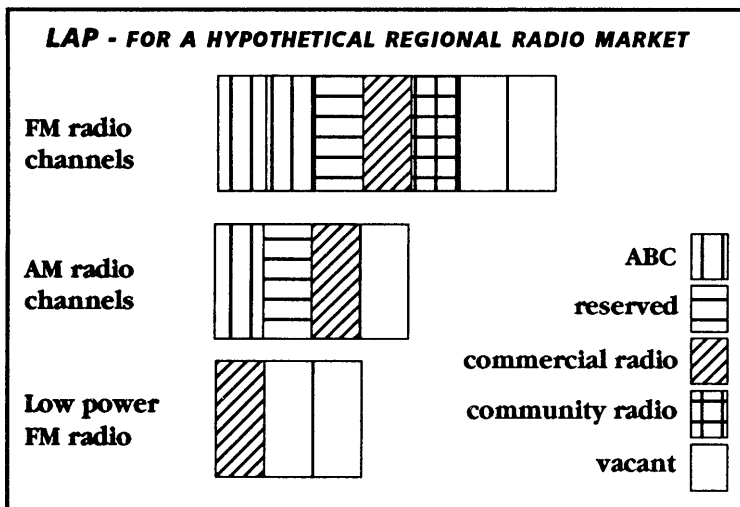
ABA for more specific advice:

When the time comes to exercise the reservation powers in section 31 and the power in section 84, I would prefer to do so with the benefit of advice from the Authority on the demand for community services, compared with national and commercial services, in areas as they are planned. The Authority's public planning processes should become the focus for obtaining information on needs and potential availability of services in individual markets. The Authority should, therefore, be well-placed to advise on the need for reservation of capacity for new community broadcasting and on conflicts between community and commercial needs.

The need for such advice becomes clearer when you consider an example.

forth that are likely to be taken on a national basis. More specifically, it is based on assumptions about differential allocations between the largest cities and regional areas. In the largest cities, it is likely that up to 16 high-powered FM channels will be made available, at the expense of surrounding areas. Finally, after these broad assumptions about differential allocation have been factored in, there is a certain amount of room for trading of spectrum capacity between adjacent areas. For example, because of the propensity of AM transmitters at night to interfere with other services on the same frequency for hundreds or even thousands of miles around them, transmitters using a given frequency will be extremely sparse and the planners have a wide discretion as to where they make a particular, vacant AM channel available for use. Thus, the vacant AM channel

shown represents a choice to favour this market over others. This is also true, though to a less marked extent, for FM channels. I understand there will be some adjacent markets, such as



The illustration represents a fictional example, but it resembles the likely planning outcome, if the ABA proceeds with existing planning assumptions, for radio spectrum in a large regional market such as Wagga or Shepparton. In this hypothetical regional market, there is room for four high-powered AM services, of which two are currently occupied, and eight FM, of which all but three are already occupied.

To recapitulate, this outcome is the product of the two processes of ABA planning and Ministerial reservation.

Dealing first with the planning contribution, at the most obvious level, the outcome is based on assumptions about bandwidth, channel spacing and so

Bathurst and Orange, where the ABA will have a discretion as to which market gets an extra high powered FM channel.

The next thing to note is the importance of the Minister's reservation power. It is certainly arguable that the Minister should be considering long term as well as short term spectrum requirements. Once a service shown in the licence area plan has been allocated to commercial or community broadcasting, then, until and unless the licence is surrendered or forfeited, that spectrum is permanently alienated<sup>3</sup>. It is possible any spectrum not reserved now will be allocated permanently to commercial uses or locked away for long but finite

periods of time for other uses.

In our hypothetical market, there are currently three channels in use and two reserved for national services. The largest cities currently enjoy six national radio services, including four ABC services, and SBS and parliamentary broadcasts. Should the Minister reserve spectrum only for planned or immediately foreseeable extensions of national services into regional markets? Or should he make reservations on the basis of the maximum number now available in the largest markets? A decision to reserve the full six channels would, as our present example illustrates, bite deeply into the relatively small number of available radio channels. The same is true for community reservations. These are not easy decisions, as to some extent they involve consideration of developments on our current technological horizon. For example, long-term reservations become much less important if one assumes digital audio radio technology will enlarge the supply of channels in the near future.

**AFTER LICENCE AREA PLAN FINALISATION**

The foregoing shows how the future development of new services throughout Australia will be to a large extent determined during the ABA's public planning process or through the process of Ministerial reservations.

I will now briefly examine the allocation options once a licence area plan has been prepared.

In each market, the licence area plan will show vacant spectrum packaged neatly into available services, and those services can in turn be broken down into three categories by Ministerial reservations. The reservations are not technically a part of the LAP but they should be known by the time licence area plans are finalised.

**SPECTRUM RESERVED FOR NATIONAL SERVICES**

National services, meaning the ABC, SBS and parliamentary broadcasts, do not require licences under the Broadcasting Services Act as they operate pursuant to Acts of Parliament. However, they need permission to use broad-

casting services bands spectrum and this can be given by the Spectrum Management Agency or its delegate the ABA issuing a transmitter licence under the *Radiocommunications Act 1992*.

What happens if spectrum is not needed by the national service for some time? Section 34 of the Broadcasting Services Act allows the ABA to make spectrum available for allocation, for a period specified by the ABA, for a number of purposes. For some reason this is referred to as dropping the spectrum through. The term makes sense if one imagines the ABA dropping bits and pieces of spectrum not immediately needed for commercial broadcasting licences, national licences or community licences to the Spectrum Management Agency to be put to other uses until it is needed. Section 34 ensures that no spectrum need remain idle.

When it drops spectrum through, the ABA must specify a time and a purpose. Some possible purposes include:

- temporary transmission or the re-transmission of programs; or
- subscription broadcasting services, subscription narrowcasting services or open narrowcasting services; or
- other purposes - for example, land mobile radio services for taxis.

As well as ensuring spectrum does not remain unnecessarily idle, section 34 has the potential to increase the diversity of services available in an area and provide a testing ground for new broadcasting ideas.

#### **SPECTRUM RESERVED FOR COMMUNITY SERVICES**

This spectrum may be advertised by the ABA for community broadcasting use. If more than one applicant comes forward, the ABA will award a licence to the applicant that best satisfies the matters set out in section 84 of the Broadcasting Services Act [Allocation of community licences].

If there is no immediate demand for the spectrum, the ABA may drop it through or leave it available for test transmissions by aspirant community broadcasters.

#### **UNRESERVED VACANT SPECTRUM**

The ABA has a discretion to make unreserved spectrum available for allo-

cation to commercial services. The allocation system will be price-based, that is, it will be an auction of some kind. The ABA is required to determine an auction system and the Minister may give it specific directions for the purpose of the determination<sup>4</sup>. The ABA is currently working on a price-based allocation determination to a timetable dictated by the highest priority areas for planning. [Of course, in addition to bidding the highest amount, applicants should be able to satisfy the licence eligibility requirements and be 'suitable licensees'. These requirements are discussed in Part 3, to be included in the next issue of *ABA Update*.]

Alternatively, the ABA may drop vacant, unreserved spectrum through for a specified period and purpose. It may decide to drop spectrum through only after it has offered it up for price-based allocation for commercial services, in the case of any unsold spectrum, or it may drop spectrum through without first attempting to allocate it to commercial services. Where there is more than one service available for allocation, the ABA may choose to allocate some to commercial broadcasting and drop others through. In exercising these discretions, the ABA must have regard to the objects of the Broadcasting Services Act.

If the ABA decides to drop spectrum through for narrowcasting purposes, it may also do so by way of an auction. Narrowcasting services using broadcasting services bands spectrum require only an apparatus licence under the Radiocommunications Act. This Act makes provision for the Spectrum Management Agency to determine price-based systems for allocating licences.

#### **THE SPECIAL CASE OF SOLUS RADIO MARKETS**

In markets where there is only one commercial radio licence and there are at least two commercial radio broadcasting licences that are broadcasting services bands licences available for allocation, s.39 of the Broadcasting Services Act permits the solus operator to request the ABA, in writing, to allocate it another commercial radio broadcasting licence. If these preconditions are

satisfied, the ABA must grant the licence.

Until now the ABA has taken the view that it cannot allocate a s.39 licence until after the licence area plan for that area has been completed. This is because it is unable to determine whether there are at least two commercial radio broadcasting licences available for allocation in an area until after it has completed a licence area plan. As the foregoing description of the planning and allocation processes should make clear, the actual number and power of services available, and the uses to which they may be put, will depend on decisions taken during the planning process and by the Minister pursuant to his power to reserve capacity for community or national services. The ABA cannot properly decide how many commercial radio broadcasting services are available in any area in advance of those processes.

#### **THE SPECIAL CASE OF COMMERCIAL TELEVISION**

Television spectrum will be planned in the same way as radio spectrum. It is also subject to any directions from the Minister reserving capacity for community or national uses. Based on the initial exposure draft of the frequency allotment plan, it is likely the planning process will show capacity for six high powered television channels in almost all markets. However, allocation options for television are in several respects different from radio.

Allocation of new commercial television broadcasting services is affected by the prohibition on allocating more than three licences, whether using broadcasting services bands spectrum or otherwise, in any market before the Minister has conducted a review:

assessing the national benefits that would accrue if more than three commercial television broadcasting services were permitted in licence areas...<sup>5</sup>

The review must be conducted before 1 July 1997. Meanwhile, the Minister has reserved the sixth channel for

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community and national purposes and asked the ABA to make it available for temporary community and education uses.

As with radio, the Broadcasting Services Act makes special provision for markets with only one commercial television broadcasting licence. The ABA may exercise this discretion following a written request from the licensee, as long as additional commercial television broadcasting licences can be allocated in that area and:

the ABA is satisfied that it is unlikely that another person would be interested in, and likely to be in a position to, operate another commercial television broadcasting service in the licence area<sup>6</sup>.

Unlike s.39 radio licences, the permission to operate a second television service is only valid for ten years or less.

A final distinctive feature of commercial television allocation, as opposed to radio, is that the price-based allocation system is not restricted to broadcasting services bands spectrum but applies to commercial services using other means of delivery. Note that commercial television broadcasting services in remote areas already use satellite as a means of service delivery. In markets with less than three commercial television broadcasting licences at present, it is open to the ABA to allocate additional non-broadcasting services bands commercial television services, and to take

into account any demand to provide such services in exercising its discretion to permit operation of a second service by existing solus licensees. Otherwise, the allocation options for television are similar to those for radio.

#### **ALLOCATION OF BROADCASTING SERVICES BANDS SPECTRUM IN ADVANCE OF PLANNING**

So far, I have only talked about allocation options following the completion of public planning. However, certain allocation decisions may be made before planning is completed. In particular, the ABA may drop spectrum through for a specified period before planning is commenced or completed in an area.

The ABA has already made extensive use of s.34 for the following purposes:

1. in accordance with notified Government policy, to enable community and educational television groups to use the vacant 'sixth channel';
2. to allow low power information services to use an area of the FM bands [87.5-88 MHz] currently vacant virtually Australia-wide. In areas where this spectrum is not vacant, the ABA has made one-off decisions to make other parts of the FM spectrum available for low-power information services in response to applications under the Radiocommunications Act.

3. To allow pre-existing users of the spectrum [other than broadcasters] to have continued access to the spectrum. e.g. aviation users.
4. To allow re transmissions of broadcasting services outside a licence area, e.g. in Alpha to retransmit WIN television.
5. To allow special event and other temporary transmissions, e.g. for community radio or to test equipment.
6. To allow access to vacant, high power AM channels to narrowcasting operators.

In May 1993, the ABA determined a new policy for access to vacant AM radio channels where no further engineering work was required before they were made available. These were generally channels left vacant by AM-FM conversion. The ABA proposes to make these channels available in markets where licence area planning is unlikely to be completed for a considerable period, eg. major metropolitan area markets. It is proposed that allocation of transmitter licences to use the spectrum will be by way of a price based allocation system under the Radiocommunications Act. The spectrum will be available only until the likely completion date of planning in that market, so as not to preempt allocation decisions made by the ABA at that time in the light of information gathered during the public planning process.



1 *Broadcasting Services Act 1992*, ss.31 and 84. The Minister may notify the ABA in writing that capacity in the broadcasting services bands is to be reserved for a specified number of national or community broadcasting services. Notices under s.31 are disallowable by Parliament. S.84 deals with Ministerial directions about priority to particular community interests.

2 Letter of 1 October 1993, Senator Collins to the ABA Chairman.

3 S.102 of the Radiocommunications Act 1992 relates.

4 Ss 36 and 38 of the Broadcasting Services Act relate. Note that the Minister has given directions under s.36(2).

5 S.215(a) of the Broadcasting Services Act.

6 S.73 of the Broadcasting Services Act relates.