

FUTURE STRATEGIES FOR REGULATION

THE TEXT OF A SPEECH GIVEN BY PAT MANSER, DIRECTOR, POLICY AND COMMUNICATIONS BRANCH, AT THE 1993 BROADCASTING SUMMIT, 11-12 NOVEMBER 1993, SYDNEY.

There is an essential tension between commerce and art, information and entertainment that is distributed by means of it.

Nothing changes very much - the dilemmas are the same. I want to return to that notion from time to time in the course of this paper.

Well, what has changed? We have a new Act to regulate broadcasting; we have a new philosophy guiding it; new processes to embody that philosophy; and new behaviours as a result.

Let's look at the easy bits first: processes and behaviours.

The new processes the Act imposes or allows - for there is far greater discretion for the ABA itself in choosing process - are a blessed relief from the those the old Broadcasting Act imposed. In planning, we have moved (as enjoined by the Act) to a completely new and open, public process. Every element of the planning process is open for question and scrutiny by the industry and the public. The next stage of the process involves staff in visiting all the regions outlined in the planning priorities document which will feed into the ABA's determination of the licence area plan for each region and lay the foundations for the licence allocation process.

The consultative process has provided a unique opportunity for anyone at all to have their say about broadcasting services. In addition, it has provided us with useful data on each of the regions which will help us respond to the Minister's request for advice on reservations and on the mix of services in each region. The licence allocation processes will then take over.

I think the transparency of the planning process has been precisely what Parliament intended.

In other, more commercially sensitive areas, it has been trickier to get the balance of public and private processes accepted. For example, in the ownership and control area there have been a

number of interesting issues on the agenda during the year - most notably, the purchase of the Ten network by a consortium led by the Canadian company, Canwest Global Communications. The ABA spent a good deal of time working its way through the issues and negotiating some significant changes. However, it made a conscious decision to do this away from the public gaze and in the climate of consultation and negotiation provided for in the Act. This has not been a universally popular decision. Public interest groups, for example, have claimed that the process should have been akin to the old public inquiry process. The ABA's view was that it can be an essentially punitive process and while commercial deals are still in the pipeline would have been inappropriate. It must be said that the issue has not gone away - the monitoring of events at Ten, the Seven float, and UCOM and Hi-Vision's ownership issues are all part of our ongoing ownership and control agenda. The ABA is always conscious that public hearings are a possibility in this arena, as are private examinations on oath. All these become simply tools in a much wider armoury than was available to us before.

Equally interesting for its new processes and new behaviours has been the determination by the industry of its codes of practice. Both the Federation of Australian Radio Broadcasters (FARB) and the Federation of Australian Commercial Television Stations (FACTS) took the lead in these crucial processes. FARB and FACTS created climates of co-operation within their own industries that probably have no real precedents. With ABA staff assisting them in relation to the areas the ABA would like to see addressed and the proper interpretation of the Act's enjoiners regarding codes, they have replaced many of the former Australian Broadcasting Tribunal's standards with comprehensive codes of practice. The national broad-



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casters have done the same.

The kinds of consultation, negotiation and co-operation created and fostered by these processes mark a significant change in an industry accustomed to competition and confrontation with the regulators. In themselves they are significant achievements. What they may subsequently be able to deliver should not be lost. In addition to increased co-operation with industry, the ABA has formed working relationships with other regulators, such as the Trade Practices Commission, the Australian Securities Commission and the Foreign Investment Review Board.

RESEARCH

Another new process for us has been an interesting mix. As you will be aware, the Tribunal had substantially upgraded its research program away from one of responsiveness to complaints and towards a more substantial program of research. This program has a special focus on community attitudes to program issues.

The new Act created an obligation on the ABA to continue this research as a matter of course and to use it to feed information on issues of concern and changes in public attitudes on particular issues back to the industry. This should ensure that the process of examining public standards and mores is a continuous loop, helping the industry sectors to know where attitudes are going. It is then a matter for them to

respond. In essence, the ABA is a resource for the industry in this process.

In this framework, the ABA is presently conducting the research into R movies on pay TV, asked for by Parliament (you will recall that the section was inserted in May 1993).

It contains some interesting provisions and there have been some equally interesting consequences.

Section 10 (1) (g) of schedule 2 of the Act says:

The licensee will ensure that access to programs classified as R by the Office of Film and Literature Classification is restricted by disabling devices acceptable to the ABA but will not broadcast such an R classified program until the ABA has completed extensive, Australia-wide qualitative and quantitative research on community standards of taste and decency in relation to classifications for pay television and on what levels of violence and depiction of sex should be allowed, and the ABA has recommended, and the Parliament has, by resolution of each house, approved the broadcast of such programs.

So, in effect, Parliament must make the final decision on whether R movies are shown on pay TV. This insertion of Parliament as final arbiter is rather akin to the American process now occurring in which congress is 'negotiating' with the broadcasters and the cable industry on violence on television.

However, there is another element in the process here at home. The Senate Committee on Community Standards Relevant to the Supply of Services Using Electronic Technologies has taken a deep interest in our research. Our Director of Programs and our research team have spent (and continue to do so) many hours briefing the members of the committee on all facets of the research. The members of the committee are Senator Reynolds, Senator Tierney, Senator Burns, Senator Bourne, Senator Loosley, Senator Herron, Senator

Cooney and Senator Harradine.

To have sectors of Parliament so actively involved in this industry process is a new experience for all of us.

So: the new processes involve far greater public transparency for the planning process; greater responsiveness to commercial transactions and a choice of strategies, at the discretion of the ABA in relation to ownership and control issues; licensing processes which will be contingent upon commercially sensitive, market-driven auctions or tender processes; consultation and negotiations, and co-operation with all those seeking it.

The *Broadcasting Services Act 1992* was a response to the government's focus on improving the economic efficiency of a rapidly internationalising Australian economy. 'Light touch' regulation - for which read minimum intervention - has replaced the heavier hands of previous regulatory bodies. While this may well advance the goal of economic efficiency, it can also facilitate the achievement of certain social goals. These are clearly enunciated in the

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objects of the Act itself and the ABA has taken them as guiding principles for its corporate plan.

Four important factors underpin the way the ABA is approaching the regulatory philosophy of the Act: regulatory certainty; the role of self regulation in achieving a range of social objectives; low cost regulation; and the need for innovation together with the industry in the face of startling and speedy technological change.

INFLUENCE

One of the principal concepts of the philosophy of the Act has to do with the notion of influence. The writers of the legislation had in mind a 'brave new world' of regulation in which the degree of intervention by government is indexed to the degree of influence the particular medium is perceived to have on society as a whole. In simple terms, television is influential, radio is not.

In addition, a raft of new services is provided for at the bottom end of the influence scale. These narrowcasting services cover almost any kind of technology, from cable television to subscription radio services. Indeed, so devoid of influence are these services conceived to be that they do not require an individual licence at all. They are accessed by means of a 'class licence' - defined as a standing warrant for people to provide these services, provided they adhere to the rules of the class licence regime as specified in the Act.

But who is to say radio is less influential than television? Who is to say that a specific language narrowcaster whose message may be received by a very large proportion of, say, the population of Melbourne who happen to understand Greek - that this service will be less influential than the free-to-air broadcaster that these people are **not** listening to. Is the aural chewing gum of some

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free to air radio stations still more influential than the service I've referred to?

How do you compare a talk-back radio station and a pay movie channel?

NARROWCASTING

There is no doubt that the notion of narrowcasting was an interesting attempt to shake some diversity into an industry perceived by some to be static, lacking in diversity - indeed, increasingly homogeneous in its program offerings.

There is equally no doubt that the competitive answer to narrowcasting is diversity - to have so few niches that a narrowcaster cannot find one in which to insert his programming.

There have been some marked successes in narrowcasting already: tourist information services reaching people with useful and helpful information as they approach areas where tourism is an important facet of the economy - they are the equivalent of a brochure in fact.

Racing services, supplying fuller racing programs and race-related information to the small percentage of the community who care and putting a stop to the distortion of the program formats of mainstream stations. A radio station providing a niche service for those who are devotees of dance music. Other services - both radio and television - responding to the needs of migrant communities in all their diversity.

But who is to judge their degrees of influence? If this is difficult - possibly impossible - the category system of class versus individual licences loses its logical underpinning.

The ABA, faced with the difficulties presented by this conundrum, has taken a cautious and measured approach to narrowcasting which still, of course, does not please all its industry groups. In its attempts to come to grips with what is narrow and what is broad, the ABA has developed a number of useful 'handles':

- first of all, people's bona fides. If you are a narrowcaster who wants to be a broadcaster, you are generally fairly obvious. People have at

times asked for opinions on the category of a service they proposed to offer with the clear intentions of building the service into broadcasting.

- the publishing metaphor. Another useful 'handle' on the concept of narrowcasting has been to draw analogies with the publishing world. Is this service a *Sydney Morning Herald*?, a *Financial Review*?, or a *Surfer's World*? What would you do with the *Women's Weekly*?

While the ABA applies considerable time and effort to its interpretations of this central tenet of the Broadcasting Services Act, various sectors of the industry are even more puzzled. The processes required by the Act don't always assist - though their intention is laudable. For example, the Act requires the ABA to keep its own counsel on opinions on particular services until they are on air - recognising the intellectual property elements of ideas for narrowcast services and preventing them being 'gazumped' by a speedier operation. While this is essentially very proper, it makes it very hard to discuss with people the actual cases that have presented themselves to the ABA. None of the 'no' cases can be discussed, only the 'yeses' that reach completion and have gone on air.

In addition, because narrowcasting is a class licence regime, not all narrowcasters seek opinions from the ABA on the category of service to which they belong. They take a calculated risk that their own view is correct and proceed without us. This, of course, they are entitled to do. However, one offshoot of that is that it is hard to know the size and scope of the industry and its impact on other sectors of the industry.

We are of course trying to address these issues as we proceed. Guidelines on narrowcasting are in preparation, to assist sectors of the industry to inform themselves on the view the ABA is taking; in addition we have commissioned some research into the uses people make of radio services to try to see whether the influence argument stands up to scrutiny.

However, you would not be wrong if you were thinking - yes, but this is a

small area of the Act with nothing like the capacity for chaos that events such as the changes in markets will have, for example. What about the globalisation of markets, the convergence of industry technologies such as telecommunications, computers and television?

The convergence of these technologies is of course, in itself a huge furphy. Technologies are (and always have been) means to ends. The economic factors - the large corporate players who are dividing the world into markets, establishing factories which will assemble media packages tailored to specific market niches to be delivered by global communications corporations - are the dealers of the cards. The large corporate operators will decide what we get, how and when. Dollars will determine outcomes - as they always have.

In the face of this, old national scale regulatory strategies seem to lose their grip. Essentially, this was a social contract where a media licensee paid a price for entry to a national market, obtained access to the spectrum and was asked to provide certain key features of program quality in return.

The two concerns of ownership and control on the one hand and program content and quality on the other begin to lose their pertinence in an industry where the issues have become global.

It is possible to anticipate pressure on ownership issues shifting and the focus of concern becoming more directly placed in program content and output.

The desire to retain a national agenda, a cultural component for programs and a say in the intellectual property to which people are exposed will remain.

Basic principles rarely shift and governments' brief to pursue cultural, social and economic goals through media will remain. Access to information (universal if possible), promotion of democratic participation, social equity in communications, consumer rights including the costs of services and the preservation of cultural identities will all remain as issues for the global industry to confront.

To address these in their new, global context, regulators themselves will need 'strategic alliances'. Just as industry op-

erators are seeking these now, across the three industries we see converging, so regulators need a forum which goes beyond the national to deal with them.

The Prime Minister has recently been pointing the way in this regard. In a speech to the Sydney Institute he said:

Our prosperity, our national well-being, our ability to maintain and build a good society, depend upon our courage in moving boldly to integrate our economy with the economics of east Asia.

This will be, incidentally, an integration that enhances rather than diminishes our national identity, and in which our national institutions and way of life are part of the contribution we can make to the success of the

region and the region's culture.

In a list of examples through which he stressed APEC's ability to pursue an agenda of enhanced economic integration round the Pacific rim, he said:

We ought to be able to work towards compatible rules on competition, company law and business practice, to accommodate ourselves to the fact that business is increasingly international in character.

We ought to be able to agree on intellectual property rules, if the Uruguay round fails to agree on global rules.

If this can be achieved, countries with some common goals in terms of ownership of information and the right to analyse and clarify it for ourselves -

and the right to reflect our own cultural values to our societies will be able to have an international influence and not simply lose our place at the table.

So, in essence, while the scale and magnitude of the issues has changed and the focus may move from one area of influence to another, the underlying issues remain. Strategies for resolving them will of course have to move to a greater, global scale and may be more difficult to achieve since they will hinge upon negotiation and the formation of clever and successful alliances; rather than the invention of rules for our own observation. While this is a dramatic change of focus, we need not let its size blind us to the essential principles for which regulations exist at all.



PLANNING BROADCASTING SERVICES AND FUTURE DEMANDS FOR SPECTRUM

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The ABA is responsible for planning of those parts of the radio-frequency spectrum known as the broadcasting services bands. These bands are parts of the spectrum specifically designated by the Minister for Communications to be used primarily for broadcasting and for which planning by the ABA is required. The bands currently so designated are the existing AM radio band, the FM radio band and the spectrum set aside for VHF and UHF television broadcasting.

The term 'planning' as applied to these bands and to broadcasting is perhaps poorly understood. A spectrum planning engineer may associate it with the determination of technical details such as transmitter location, power and antenna details. For a station engineer it might mean deciding what type of tower, transmitter and building to purchase and how to go about the task of building the station. For the less technically inclined, planning might extend from budget and program provisioning (for a station manager), while a policy maker may see it as detailed analysis of the social and eco-

nomical factors that might determine the need for a station.

For the ABA, planning is concerned with allocating the available spectrum resource in a manner which best meets the needs of the Australian community. It involves social, economic, and technical dimensions, but does not get down to the detail of station construction or the particular type of programming that will be provided. Planning therefore takes on firstly a strategic national focus of efficient allocation of channel capacity to various parts of Australia in accordance with assessed needs and then a local perspective as planning moves down to detailed consideration of how those channels should be used to provide services within specific parts of Australia.

These tasks are not particularly novel. They have been part of planning for broadcasting services world-wide for many years; however, there is a unique feature in the ABA's charter. It must undertake this planning task through a



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process of wide public consultation and base its decisions on specific criteria set out in the *Broadcasting Services Act 1992*. In other words, the ABA must investigate what the public (in its broadest sense) wants from the spectrum.

In all of this the ABA is not an entrepreneur. It does not provide funds for setting up new stations. It does not dictate the type of program format a

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