The following extract is taken from a recent address at the Department of Communications and the Arts forum, by ABA Chairman, Mr Peter Webb.

Pay TV: access or excess

Appearances to the contrary notwithstanding, the development of the pay TV industry, from a regulator's viewpoint, has not been overly eventful, although there has been plenty of hard work.

Of course, from the viewpoint of an operator or would-be operator, quite a different scene has presented itself.

The experience of the players on the field has been one marked by a high degree of activity and struggle, taking place on many fronts.

However, the areas of the Broadcasting Services Act which have caused the ABA the greatest difficulty have been the Australian content, codes of practice and siphoning licence conditions.

To date the ABA has licensed 1226 pay TV licences (other than satellite) to 31 licensees. The Spectrum Management Agency has issued well over two hundred MDS transmitter licences, although not all are being utilised for broadcasting. There are around twelve subscription narrowcast services operating under class licences, with three or four pay TV operators delivering those services.

Australian content on pay TV

On the cultural front, the importance of Australian content quotas to the issue of Australian identity is what resonates with the community at large.

Australians like to see Australian programs on the small screen, reaffirming the legitimacy of Australia's existence in the broader world, and reassuring them of the validity of their community values.

On the industry protection front, those in the industry have always staunchly asserted that there can be no chance of fulfilling the cultural imperative without an independent production sector of sufficient critical mass to be able to do so.

The pre-eminent justification for Australian content levels on free-to-air television remains the cultural.

When pay TV came face to face with the Australian content issue in the Parliament, it was resolved that, because of the need for substantial foreign investment in pay TV, and because of the potentially long lead time before operators might be cash flow positive, the obligation of the industry to Australian content would be confined to drama channels only, and was set at the level of 10 per cent of expenditure by the licensee on that channel.

All pay TV services are now to be the subject of a review, rather than only predominantly drama channels.

The ABA has, to date, published two quite different versions of draft guidelines in its efforts to give the industry some guidance about how the 10 per cent budget rule for drama channels can be complied with.

The first draft was published before any operator had begun transmissions, and the second in September of last year.

We have been consulting with both the pay TV and the production sectors about the shape of final guidelines since then.

Our new guidelines will aim to ensure that the spirit of the Act is not circumvented by the restriction in it to program expenditure by licensees.

We are currently obtaining information on program expenditure for each channel considered to be a predominantly drama channel before finalising our position, but we are endeavouring to ensure that the spirit of the Act is not circumvented by its too literal interpretation.

We expect to be able to publicly release aggregated information on program expenditure, and the information obtained from this process will ultimately assist the Ministerial review.

If it is apparent that the spirit of the legislation is not being followed, and that little or no expenditure is being made on new Australian drama by pay TV providers, the ABA will report this to the Minister pursuant to its obligation under section 158(n) of the Act to report periodically on the operation of the Act.

Codes of practice

On the codes of practice front, there has been slow progress, but progress nonetheless, and we are in the final stages of settling the industry's codes.

While it has been three years since the pay TV laws came into force, the creation of an entirely new industry sector on the Australian business scene is not something that happens overnight, and the parliamentary intention that codes would be brought into existence presupposed that there would be an identifiable and substantial industry sector and that a majority of the players in that

Mr Peter Webb, ABA Chairman

sector would be represented by an industry association.

Much of the past three years has been taken up with each of those phenomena gradually being realised.

Siphoning

In the siphoning area the ABA has been given the role of monitoring the television sector for the purpose of reporting on compliance with the Minister's gazetted list of sporting events.

This arrangement seeks to ensure that the Minister's opinion about which events should be available free to the general public is as informed as we can make it.

The Super League and rugby union initiatives are evidence of one very important matter - the determination of pay TV players to use sports programming to be competitive, and their business orientation will run directly contrary to the sentiments that underpin the present anti-siphoning list.

This is not to say that that determination would always lead to measures that entirely deprive free-to-air broadcasters of these sporting events — part of the frustration of multi-channel operators is that they have the capacity to show much more of these events than can the networks, and they want to be able to compete for the rights with that, at least, in mind.

Sporting bodies want to balance the need to expose their sport, and sponsors' messages, to a greater audience, which free-to-air presently provides, and the desire to receive income from the pay TV operators.

Some sports would prefer not to be on the anti-siphoning list, and, as pay TV audiences grow, they will become more restive for the greater exposure and income pay TV will likely be able to provide them.

The networks have proven to be formidable gatekeepers to sport, relegating pay TV operators at the present time to supplicant status and compelling them to strategic alliances that carry some access rights.

The cable pay TV operators themselves began life with a fairly robust attitude to gate-keeping.

As soon as it became obvious there would be more demand for cable channels than there was supply, and that cable operators didn't fancy having to grant access to these channels to anyone they didn't think deserved it, including their competitors, they started to swing their gates back and forth in quite a proprietorial fashion.

The former Minister for Communications sought to ensure that, at least until 1997, and possibly until 1999, pay TV operators were exempt from any obligation to provide access to their infrastructure to independent channel suppliers and to their competitors.

> 'The experience of the players on the field has been marked by a high degree of activity and struggle, taking place on many fronts'

The policy of the new government on this matter is very clear.

It says :

> The coalition will require subscription television network operators, from 1 July 1997, to provide access to their infrastructure under a compulsory interconnect regime, in line with the regime for telephony and interactive services.

So the pay TV hand will come off that particular gate in a little under 16 months time.

However I think there still needs to be a lot of thought given to the means by which that access will be managed. Unless digital compression arrives in the meantime, and hundreds of channels become available, there is going to be a capacity constraint. Many of those trying to get access to the infrastructures of Foxtel and Optus Vision will be disappointed.

The ABA stands ready to help in any way that it can, and I do feel that the process for adjudicating on access to the infrastructure of the pay TV operators after 1 July 1997 is one area where we may be able to provide meaningful assistance.

Community broadcasting

One of the unambiguously good things to come out of pay TV has been the attitude of the cable operators towards community television.

Both Foxtel and Optus Vision have been working with the ABA and the Department of Communications to structure community access to cable and they are both to be congratulated for meeting a community need in such a positive fashion.

But unfortunately there is still no presently ideal licensing option for community television on cable.

The problem lies in the definition of 'community broadcasting'.

Community broadcasting services must provide programs that are able to be received on commonly available equipment, and that are made available free to the general public.

This would seem to preclude any service available only to subscribers of proprietary subscription packages, whether or not the service was at no extra charge to subscribers, and whether or not the community licensee gained from the subscriptions.

Any attempt to present a community broadcasting service on cable would probably see such a service categorised by the Act as a subscription broadcast or narrowcast service, thereby requiring that service to comply with quite different licence conditions than those applying to community licensees.

There may be scope for the ABA to clarify the categorisation of non-broadcasting services bands community services, and thus facilitate access by community broadcasters to proprietary cable services, under their appropriate licence category.

We intend to clarify the criterion or determine new definitional criteria which would incorporate the concept that subscription fees would not be regarded as having been paid unless they are paid to the actual service provider, rather than to the carrier.

We will undertake consultation with industry groups and other stakeholders in the near future, based on draft wording changes which reflect this concept.