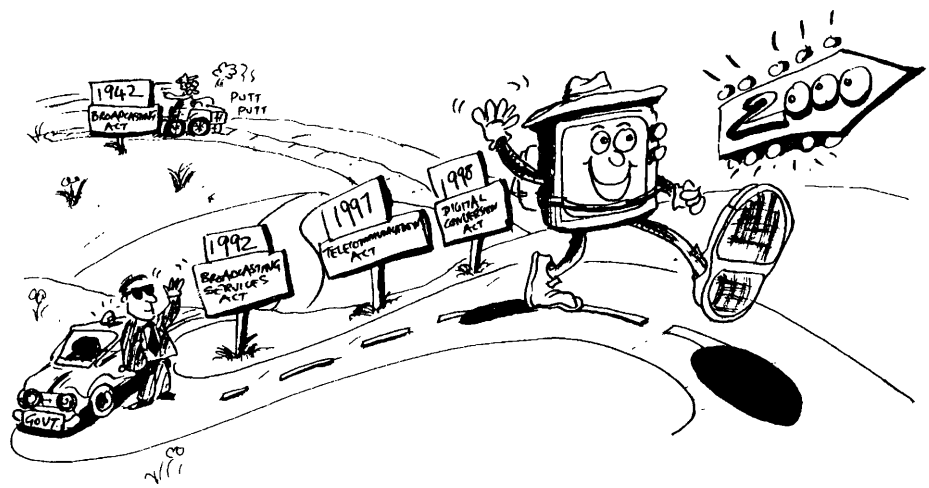
The following is an extract taken from a paper presented to the Bertelsmann Foundation's Communications 2000 - innovations and responsibilities in the information society, by ABA Deputy Chairman, Gareth Grainger on 9 September1998, in Gutersloh, Germany.

Supervision of broadcasting and telecommunications— an international comparison: The Australian experience



From 1992 the Australian Government has progressively signalled its strong intention that the broadcasting and telecommunications industries should be freed from excessive centralised regulation and should move firmly in the direction of industry self-regulation with industry associations developing industry codes of practice and dealing directly with complaints in respect of various matters to do with their services. Accordingly, both the 1992 broadcasting regulatory reforms and the 1991 and 1997 telecommunications regulatory reforms have installed independent statutory regulators responsible for overseeing industry's compliance with self-regulatory codes.

The key ingredients to the operations and success of the co-regulatory schemes in Australia are:

- the continuation of separate regulatory functions for the broadcasting and telecommunications industry based in large part on the content nature of the broadcasting function and the carriage nature of the telecommunications function. Competition issues for both industries are generally the responsibility of the competition (anti-trust) regulator.
- The empowerment of industry to accept responsibility through its own industry associations for development, implementation and enforcement of its own codes of practice.
- The establishment of independent statutory regulatory authorities representing the public interest in ensuring that industry meets its obligations under the self-regulatory schemes.
- The requirement for both industry associations and regulatory bodies to engage in regular community consultations about the development, implementation and operations of the self-regulatory schemes.
- The capacity of the public to make complaints to operators, industry associations and the regulatory authorities about service problems in respect of carriage for telecommunications and content and related issues for broadcasting.

One area of critical importance which has yet to find a formal place in this regulatory framework is that of on-line services notably the Internet. Largely as a result of an investigation by the Australian broadcasting regulator in 1996, Australian Government policy is now clearly to bring the content aspects of the Internet into a self-regulatory framework appropriate to that emerging industry, and that the ABA be responsible for registering industry codes. We believe that self-regulation is the best approach for these industries. However, self-regulation does not mean no regulation. It requires industry to devote serious commitment, energy and resources to the acceptance of its responsibilities to the public as part of the price for having substantial public resources, the broadcasting and telecommunications spectrum, entrusted to them. It requires government to maintain a responsible watching brief to ensure that the public interest is satisfied by the effective implementation of self-regulatory schemes. It also requires that the public itself be aware of and educated in its rights and responsibilities under the self-regulatory schemes.

We believe that this makes our Australian approach of co-regulation a most effective method of balancing these objectives.

The *Broadcasting Services Act 1992* and the role of the ABA

One of the most difficult tasks any government can try to undertake is to design regulation for an industry where the only real constant is change. Industry legislation in the rapidly changing world of new technologies needs to be able to balance the competing needs of flexibility and certainty. This is what the Australian Parliament sought to do in enacting the Broadcasting Services Act in 1992.

The January 1993 Edition of the Broadcast Reform paper titled *A New Approach to Regulation* gives an overview of the then Government's reforms objectives.

'The review of broadcasting regulation, foreshadowed as part of the Government's 1987 micro-economic reform agenda, culminated in the proclamation of the *Broadcasting Services Act 1992* on 5 October 1992. The review was prompted by widespread disquiet about the complexity and inefficiency of the *Broadcasting Act 1942*, especially in its ability to deal with emerging technologies and services. Consistent with Government's wider reform objectives, the review set out to:

- develop broadcasting legislation to serve Australia into the next century, and complement the landmark reforms in telecommunications;
- move away from the closely prescriptive approach of the *Broadcasting Act 1942*;
- provide a framework which would accommodate the future and which promoted an industry that could adapt to new commercial and technological realities;
- produce regulatory arrangements that were consistent and predictable and which did not unnecessarily impede commercial activity;
- provide opportunities for public consultation in transparent and accountable decision-making processes and;
- provide a regulatory framework which was, to the greatest extent possible, consistent with the wider commercial law.

In proposing a new broadcasting regime in 1992 the then Australian Government had the clear intention for the Act to establish an appropriate regulatory framework for the broadcasting industry that would serve Australia well into the twenty first century.

The underpinning feature of the legislative framework is its 'light touch' and 'co-regulatory' approach to regulation. The Australian Government's clear intention was that different levels of regulatory control should apply across the range of broadcasting services according to the degree of influence that such services are able to exert. The Act sought to achieve this through not defining services by their technical means of delivery but rather by their nature, for example, commercial television broadcasting, community radio broadcasting or subscription narrowcasting.

In this way the Broadcasting Services Act aimed to facilitate new types and greater numbers of services to emerge; ensure greater public access to the regulatory processes; achieve a continuation of obligations on commercial television broadcasters in relation to Australian content and children's television standards; and ensure that Parliament's objectives about diversity of ownership were effectively delivered.

Telecommunications Industry Codes and the role of the ACA

As with the Broadcasting Services Act , the new Australian telecommunications legislation sets out a number of clear guiding objects.

Among the objects of the *Telecommunications Act 1997* are:

- the promotion of the long term interests of end users of telecommunications services;
- the efficiency and international competitiveness of the Australian telecommunications industry; and
- the greatest practicable use of industry self-regulation.

The Act provides a key plank of the new industry self-regulatory regime through a scheme of industry codes.

Industry codes can be developed by telecommunications industry bodies on any matter which relates to a telecommunications activity, which is defined in the Telecommunications Act. Codes can be presented by industry bodies to the Australian Communications Authority (ACA) for registration and where the ACA is satisfied that the code meets stipulated criteria it is obliged to include the code on a codes register.

Where the ACA considers a code to be necessary or convenient to provide appropriate community safeguards or deal with the performance or conduct of the telecommunications industry, it may request that a representative industry body develop a code and present it to the ACA for registration. In the event that the code is not developed, or does not meet the registration criteria, the ACA may develop an industry standard, compliance with which is mandatory.

Role of industry bodies

The Act places considerable emphasis on the achievement of industry self-regulatory activities through industry bodies. Industry bodies will initiate and develop codes in consultation with industry, consumers and government and administer the provisions of registered codes.

The Act requires that industry bodies represent the sections of the telecommunications industry which will be covered by the code they have developed. Sections of the industry are defined under subsection 110(2) as:

(a) carriers;
(b) service providers;
(c) carriage service providers;
(d) carriage service providers who supply standard telephone services;
(e) carriage service providers who supply public mobile telecommunications services;
(f) content service providers;
(g) persons who perform cabling work (within the meaning of Division 9 of Part 21);
(h) persons who manufacturer or import customer equipment or customer cabling.

The ACA also has the power to determine a section of the industry.

Industry bodies do not have to be incorporated associations, but should endeavour to ensure that, in their membership composition, they are as representative as possible of the sections of the industry which are covered by their

codes. This will have the dual benefit of fostering the widest possible voluntary industry subscription to their codes, as well as supporting applications for code registration with the ACA.

The 'public interest balance test'

The ACA, when exercising its powers to register a code, must act in a manner which enables public interest considerations to be addressed without imposing undue financial and administrative burdens on participants in the telecommunications industry. This obligation is referred to as the 'public interest balance test'. Under this test the ACA must have regard to, but is not limited to, considering:

- the number of customers likely to benefit from the code;
- the extent to which they are residential and small business customers;
- the legitimate business interest of the industry; and
- the public interest, including the efficient, equitable and ecologically sustainable supply of telecommunications goods and services.

The Explanatory Statement

Industry bodies can assist the ACA in its decisions regarding the application of the public interest balance test by providing Explanatory Statements to the codes.

Explanatory Statements give industry bodies the opportunity to represent an industry perspective on the need for the code and the balance achieved in the code between public interest matters and the imposition of administrative and financial burdens.

Consultation Processes

Consultation on codes are undertaken by industry bodies during the development of the code. The Act places great importance on broad and thorough consultation with all interested parties. Comments should be considered promptly and resolution referred back to the submitter. The ACA may take into account the extent to which concerns raised in the comment provided to industry bodies are addressed in a code when making decisions relating to the appropriateness of codes.

Industry bodies must undertake consultation on codes with the Australian Competition and Consumer Commission, Telecommunications Industry Ombudsman, at least one consumer representative organisation and, in the case of privacy codes, the Privacy Commissioner.

It is recommended that informal consultation with these agencies commence early in the code's development. However industry bodies must not rely on informal consultation, such as the participation of the agencies in code drafting committees, to satisfy the consultation requirements of a code registration application. Prior to submission of the code for registration a formal application must be made to each of the agencies for comment on the code. Formal comments provided by the agency as part of the registration application must be made on a final draft of the code

Industry and public consultation

Industry bodies are also required to undertake broad public consultation with affected industry participants and the general public prior to submitting a code for registration.

The announcement of invitations to comment on a code should be made in ways that are not likely to restrict opportunities for industry and the public to comment on the draft code. For example, an announcement in a trade journal of an invitation to submit comments could be appropriate notice for participants in the industry, but not for the general public, which might be better targeted through a medium such as major daily newspapers. Industry bodies should also consider utilising existing consumer, government and industry networks for disseminating information and stimulating discussion and comment on draft codes. These groups should include representatives of people with disabilities, rural and remote consumers and the elderly; local, state or federal government agencies; in addition to other industry bodies.

The future on-line and digital regulatory policy in Australia

Online Services

In considering the effectiveness of the Broadcasting Services Act and the work of the ABA in implementing the Act I consider the work of the ABA on online as one of its great successes. The skills that the ABA has developed in the areas of public and industry consultation has been the hallmark of our involvement in online services.

This has culminated with the development by the Department of Communications and the Arts of legislative principles for the governance of online services that has a level of support from the online industry.This is particularly gratifying as the online industry is one which has been an industry characterised by suspicion of government regulation and the perceived threat of censorship of content. The proposed approach draws heavily on the framework that applies to broadcasting services under the Act. The general acceptance of the usefulness of codes of practice in this area and the acceptance by State governments of a national regime overseen by the ABA reflects very positively on the strengths of the ABA and the Act. For more detail on the ABA's work in the area of on-line services I refer you to ABA Manager, Online Services, Ms Kaaren Koomen's paper delivered on 26 June 1998 entitled *Protecting Children on the Interenet: A co-regulatory approach in Australia.*

Digital policy

On 24 March 1998, Government announced that digital radio and television services will be available in Australia by 1 January 2001. The *Television Broadcasting Services (Digital Conversion) Act 1998* and the *Datacasting Charge (Imposition) Act 1998* came into force on 27 July 1998. These Acts provide a mechanism and process by which existing free-to-air commercial and national television services can convert from analog to digital transmission. A series of reviews must be conducted before 1 January 2000 and 31 December 2005 of various elements of the digital television regulatory regime.

The free-to-air commercial and national television services will be loaned 7MHz of spectrum free of upfront charges to enable them to simulcast their existing services in analog and digital format for eight years. After that period, they will be required to return the equivalent of their loaned spectrum

to the Commonwealth of Australia. The broadcasters must meet standards relating to the High Definition Television (HDTV) format for transmission of television programs in digital mode, but these standards have yet to be set.

If the free-to-air television services in metropolitan areas fail to commence digital transmission by 1 January 2001, they will be required to return the loaned digital spectrum to the Commonwealth, unless they satisfy the ABA that exceptional circumstances exist. Free-to-air television services in regional areas may commence digital transmission of programming from between 1 January 2001 and 1 January 2004.

The free-to-air commercial television services will be required to preserve the current minimum Australian content requirements on digital television, and they will also be required to provide a closed captioning service for the hearing impaired during prime time and during news and current affairs programs. If the free-to-air commercial television services do not wish to use spare transmission capacity within the loaned spectrum for datacasting purposes, they can make it available for datacasting purposes to non-television companies on a competitive basis. However, they will be charged fees for use of broadcasting spectrum for datacasting purposes. If any additional spectrum becomes available for datacasting purposes, the free-to-air commercial television services will be precluded from bidding.

Free-to-air national television services may be allowed to broadcast multichannel programming. If they do not use their residual digital capacity to transmit datacasting services, they will be able to sub-lease it on a revenue-sharing basis to be negotiated with the Commonwealth of Australia.

The ABA is to formulate schemes for the conversion of the transmission of television broadcasting services from analog to digital mode. The ABA is currently in the process of drafting the two digital television conversion schemes for free-to-air commercial and national television services and expects to have them finalised before the end of the year. In formulating or varying the schemes, the ABA is required to consult with the public, national broadcasters, commercial television licensees, the ACA and the owners and operators of broadcasting transmission towers.

Owners and operators of broadcasting transmission towers will be required to give digital broadcasters and datacasters access to the towers for the purposes of installing or maintaining digital transmitters. The ABA is empowered to issue a written certificate that in its opinion, giving access to a tower or site is not technically feasible. If an access seeker and owner or operator of a broadcasting transmission tower cannot agree on the terms under which access should be given, the conditions are to be determined by arbitration. Where the parties fail to agree on an arbitrator, the ACCC shall be the arbitrator.

On 18 June 1998, the Digital Terrestrial Television Broadcasting Selection Panel of the Federation of Australian Commercial Television Stations Specialist Group, which includes the national broadcasters (ABC and SBS) and the ABA and NTA, announced that the industry choice is the European Digital Video Broadcasting (DVB) standard for digital terrestrial television broadcasting in Australia. For digital radio, Australia's planning will be on the basis of the Eureka 147 system, operating generally in the L band, but with supplementation from VHF spectrum in regional areas where this is possible.

Summary and Conclusion - the challenges ahead

The reforms to broadcasting and telecommunications industry regulation in Australia have generally been regarded as successful, balancing the needs of industry with the public interest. While it is yet too early to measure the outcomes of the telecommunications reforms, they indicate at this early stage that they are likely to be at least as successful as those in the broadcasting arena. Putting industry in charge of oversighting and scrutinising its own day to day activities, and using the industry's own associations and codes, places responsibility first and foremost with the operators. And that is where it belongs.

However, safeguards are provided for the public to be consulted and to register complaints about services. The right is well recognised and protected by the creation of regulatory bodies charged with working side by side with industry on the implementation and enforcement of the scheme, and is often referred to in Australia as co-regulation. However, this approach requires a mature acceptance by industry and this involving dedication of effort and resources on its part to make sure that the scheme works. Co-regulation does not mean no regulation. We believe in Australia that this approach provides a sound basis for government to work with industry on broadcasting, online and telecommunications issues as we advance confidently into the digital age.

The key challenges which lie ahead for policy makers in this area of communications. They are:

- to have industry, the public and government each understanding and accepting of their role in co-regulatory arrangements for the governance of communications industries
- for self-regulatory and co-regulatory schemes to maximise the capacity of industry to evolve, develop and change whilst addressing competition and consumer concerns
- to address real community concerns about illegal and harmful content on existing and new services such as the Internet and to do this through effective co-regulatory codes and content labelling and rating schemes
- to encourage the generation of new, interesting, intelligent and quality content for broadcasting and on-line services
- to maximise the capacity of all citizens to be able to access the emerging array of communications services.