

tial value of a kind not usually or generally available to others. The Chairman took this benefit.

This benefit had several extraordinary features. Firstly, it was a means of speedy reply to the savage and defamatory personal attack by Mr Hawke, and a means whereby the Chairman might vindicate his reputation; secondly, it was a means of broadcasting statements to advance a cause of which the Chairman was a prominent advocate; thirdly, it was a means of promoting the Chairman's book, *The Cane Toad Republic*.

Secondly, participation in the Radio 2BL program on 2 November 1999, and the statements made in it, and published statements in the press on numerous occasions thereafter. Thirdly, numerous public statements by the Chairman by way of explanation and exculpation which demonstrated that he had in fact prejudged and has provided the basis for the apprehension that he

might have prejudged the question whether he should immediately cease participation in the inquiry with the consequence, it would have been submitted, that he would not be seen by the parties or the public to bring an impartial and unprejudiced mind to the resolution of the very question which was to be raised by this application.

And by way of conclusion, members of the panel, it would have been submitted, perhaps what might seem to be obvious to the bystander, that an important aspect of this inquiry is of course the existence and effect of influence.

Ultimately, after taking the panel to the facts, had we needed to do so, it would have been submitted that the objective facts, when applied to the circumstances of this case, provide a reasonable basis for apprehension that the Chairman would not bring an independent and impartial mind to

the determination of the questions before the panel clear of the taint or suspicion of influence or favour; and thus we submit that the irregularity was of a fundamental kind which [required] the immediate cessation of [his] participation in this hearing as a member of the panel, otherwise the ultimate determination of the questions and findings made are likely to be flawed, and whatever the outcome of the hearing might have been neither the parties nor the public may have had confidence in it.

In a summary way, members of the panel, that is the basis of our application before we propose to take the panel to the background, the context, the circumstances and, what I choose to call, the immediate objective facts. Those are the matters for the moment that we wish to have recorded.

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High Definition Recommendations for the Broadcasting Industry

The CLC organised a seminar to discuss the recommendations contained in the Productivity Commission's Broadcasting Inquiry: The Draft Report. The seminar was organised by Clayton Utz 4 November 1999.

The Communications Law Centre's Sydney seminar on the Productivity Commission's Draft Report into Broadcasting provided many participants with their first opportunity to assess this report. The keynote speaker was Professor Richard Snape from the Productivity Commission, who provided an overview of the Inquiry, the main issues, and the Commission's preliminary findings. He described the main issues facing the Commission as: maximising the benefits from digital technology; maximising effective use of broadcast spectrum; ensuring media diversity; developing content policies which balanced social, cultural and economic objectives; and assessing standards and complaints procedures.

The most distinctive feature of the Productivity Commission's approach, according to Professor Snape, has been not so much its

economic methodology for analysing costs and benefits of regulation, but its rejection of a 'quid pro quo' approach to policy, where one section of the industry is given something in exchange for something else, whether it be spectrum access, the right to multi-channel, content quotas or program standards. He emphasised that such a policy approach, where competing interest groups are given 'enough to make them happy', was not, in the

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Commission's view, an adequate approach for a sector dealing with major technological changes, changing consumer expectations, and the implications of the National Competition Policy framework.

The other emphasis of the Draft Report is on creating the conditions for a more contestable market in broadcasting services. This does not mean, as many have reported, getting rid of cross-media ownership rules, at least not until other policies have been implemented such as the abolition of foreign ownership restrictions, the removal of barriers to entry such as the three stations to a licence area rule of the *Broadcasting Services Act*, introduction of a 'public interest' test for media mergers, and making more spectrum available and spectrum licences more tradeable.

Professor Snape also seriously questioned the current arrangements for digital conversion, with their mandating of high-definition TV and their guaranteeing of free access to large amounts of spectrum to the incumbent broadcasters during the simulcast period. The Commission has argued that consumers will take up digital TV more quickly if offered multi-channelling and interactive services, and the entry of new players and service types, rather than HDTV. More generally, the Commission argues that greater contestability of markets and the removal of barriers to entry should be the basis of broadcasting policy, rather than restrictions, controls and limits.

Most other presenters welcomed the Productivity Commission's Draft Report as well-argued, open minded and non-political. An issue emphasised by Deena Shiff (Director, Regulatory, Telstra Corporation) was how the change from current embedded spectrum

rights for incumbent broadcasters, to a system where spectrum became a tradeable resource, would take place. Ms Shiff also questioned the capacity for effective broadcasting and datacasting to occur with bits of spectrum of less than 7Mhz, although did not want to see the question of what is datacasting or broadcasting 'defined to death' by regulators.

Both Gina Cass-Gottlieb (Glibert & Tobin) and Ian McGill (Allen, Allen & Hemsley) wondered about the appropriateness of the ACCC to administer a 'public interest' test for media, as it has interpreted the public interest primarily in terms of maximisation of competition, rather than non-economic principles such as diversity and pluralism in the 'marketplace of ideas.' An interesting discussion ensued with economist Henry Ergas, who argued that such concepts could be understood in terms of economic categories of market power, and who was encouraged to put his thoughts in writing for the Commission's final report.

The session most critical of the Productivity Commission's Draft Report was on programs. Tony Branigan (General Manager, FACTS) believed that, if implemented, the Report would bring 'certain pain and possible gain' to the community. He doubted the viability of both news and current affairs programming if the transmission quota was lifted, and believed that the 'grim economics' of shutdown of some regional transmitters could occur in the absence of close attention to the structure of commercial broadcasting. Jenny Buckland (General Manager, Australian Children's Television Foundation) and Maureen Barron (Head of Business Affairs, Southern Star Group) also argued for the local content trans-

mission quota as providing the 'critical mass' of employment and skills in the industry to enable quality adult drama and children's programming to be produced, and both rejected the idea of tradeable quotas, concerned that this would lead to the 'ghettoisation' of local content and children's programming with the public broadcasters, and make it less internationally tradeable.

In the final session, David Bacon (CEO, FARB) emphasised the different situations of capital city and regional broadcasters, and the danger of a 'one size fits all' approach to broadcasting markets and their regulation. Debra Richards (Executive Director, ASTRA) welcomed the recommendation to lift anti-siphoning laws as being anti-competitive, but wondered whether, in light of the digital transition decision, the Report may have come 12 months too late for policy makers. Barry Melville (Policy Adviser, CBAA) welcomed the support for indigenous broadcasting as a distinctive media sector in Australia which should have its own licence category, but pointed to the need for government to resource the transition to digital for the community broadcasting sector. Giles Tanner emphasised the absence of an ABA 'corporate viewpoint' on the Report, but pointed to a need for clarification of the transitional issues in a new scheme for spectrum and broadcast licence allocation. He also wondered, as did other participants, whether a new form of Universal Service Obligation may be emerging for broadcasting, to ensure no-one or no part of the country is worse off from the transition to digital.

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