Is there method in the madness?

Grantly Brown analyses content regulation as a series of compromises

Broadcasting legislation is a crucible of conflicting policies, based on conflicting views in turn based on, more often than not, mutually inconsistent interests.

A representative of one of the networks stated recently that the industry was confused to find the Broadcasting Services Bill ("the Bill") provided for the abolition of barriers to entry without doing away with content quotas. Confused because it had been assumed that under the "social contract" theory — the satisfaction of social objectives by broadcasters in exchange for protection from competition — that these matters were inexorably linked.

Consistent Policy

There is the rub: the notion that there is a consistent policy rationale underlying the Bill, or even that such a thing is now achievable in Australian broadcasting regulation.

In the Ministerial Paper accompanying the Bill, in November 1991, the then Minister Kim Beazley told us that the Bill must be "viewed in the context of the Government's broader micro-economic reform agenda." Any attempt to justify the Bill solely on the basis of economic rationalism, however, is doomed to failure. To take but one example, the Explanatory Paper states:

"...given the important role broadcasting plays in sustaining and developing Australian cultural life and its democratic, pluralistic society, the Government also has a responsibility to the community to intervene to correct perceived market failure. This would include the inability to reflect community standards."

However, if viewers do not like what they see in a program they will not watch it and ratings will suffer. This is how the market operates to control content. If Government intervention is to be justified, therefore, the rationale must be found elsewhere.

This Bill does not represent a coherent vision, though some aspects of it might be called visionary. It is a collection of compromises between the interests of warring factions. If you approach this Bill from the point of view that it should be rational and consistent you will be disappointed.

So what does the Bill provide in relation to content regulation? How does it resolve, or fail to resolve, or delegate to the ABA to resolve, the policy conflicts in this area?

Codes of Practice

The principal method of regulating content is to be found at Part 9 the Bill, which provides that the members of the various classes of broadcasting services identified in the Bill are to consult together and with the ABA in the development of Codes of Practice applicable to each class of broadcasters in the industry.

Subsection 114(2) sets out a number of matters to which Codes of Practice may relate. These are:

- Methods of classifying programs that reflect community attitudes.
- Accuracy and fairness in news/current affairs reporting.
- Preventing broadcasts which:
  - offend community attitudes;
  - simulate news/events in a way that misleads or alarms;
  - depict the process of putting someone into an hypnotic state or which induces that state; or
  - use "subliminal processes" or techniques to convey information below or near the normal awareness threshold.
- Complaint handling procedures.

Subsection 114(3) provides that in developing Codes of Practice which are sensitive to community attitudes, the following matters are to be taken into account:

- Portrayal of:
  - physical and psychological violence.
  - sexual conduct and nudity.
  - use of drugs, including alcohol and tobacco.
- Use of offensive language.
- Matters likely to incite or cause hatred against, or which vilify any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, age, religion, physical or mental disability.
- Other matters of concern to the community.

Subsection 114(4) provides that where an industry sector has developed a Code of Practice and the ABA is satisfied that that Code deals adequately with the matters covered by it and is endorsed by the majority of the members of that sector, the ABA must include that Code in its register of Codes of Practice.

Clearly, the touchstone in determining whether a Code of Practice deals adequately with the matter contemplated by the Bill will be the reference to community attitudes. The Bill is silent on whose responsibility it is to determine exactly what these elusive "community attitudes" might be. However, paragraph 147(g) of the Bill provides that the primary functions of the ABA include the conduct or commissioning of research into community attitudes on issues relating to programs.

Further, section 116 provides that where the ABA is satisfied that a Code of Practice is not operating to provide "adequate community safeguards", or where one of the matters referred to at subsection 114(2) has not been dealt with in a Code within a reasonable time, the ABA may determine program standards in relation to such matters.

Clearly, were the ABA minded to play an interventionist role in the formation, rather than just the policing of these Codes of Practice, there would be ample opportunity for it to do so within the existing provisions of the Bill.

Standard Licence Conditions

The next method in the Bill for regulating content is by means of standard licence conditions as set out in Schedule 1 which will apply, as relevant, to all members of the various classes or broadcasters.

The first seven clauses of Schedule 1 deal with such matters as the broadcasting of political or controversial matter during election periods and requiring copies of political or current affairs broadcasts to be kept for certain periods. There is nothing new in these clauses which just pick up and simplify several of the provisions of Part IV of the current *Broadcasting Act*.

Parts 3 and 4 of Schedule 1 set out the standard conditions which will apply to commercial television and radio broadcasters.

Television & Radio

- No sponsorship from an organisation that is known for its association with tobacco products.
- Will comply with ABA determined program standards.
- Will comply with the requirements of clauses 3, 4, 5 and 6 of Schedule 1.

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Television (only)

- Will provide a service that, when considered together with other services in the licence area, contributes to an adequate and comprehensive range of services.
- Will broadcast religious matter during periods directed by the ABA.

These conditions pick up for commercial television the current requirement at section 83(1) of the Act that licensees give a written undertaking to the ABT to provide an "adequate and comprehensive service". The requirement of "adequacy" must be of concern to broadcasters as the ABT has taken the view that this requirement catches qualitative aspects of programming. Should the ABA decide not to assume the back seat role in content regulation the Government contemplates, this is a wide open back door for intervention. This must be viewed as a loss for commercial television broadcasters, but a big win for the radio broadcasters, whom, we are told in the Explanatory Paper, are members of a mature but less influential industry and therefore deserving of "light touch" regulation.

Narrowcasting services

All narrowcasting services must comply with the conditions set out in Part 6 of Schedule 1. Insofar as they relate to programming these provide that narrowcasters:

- Will not broadcast advertisements for, or accept sponsorship from, an organisation known for its association with cigarettes or tobacco products.
- Will comply with ABA determined program standards.
- Will comply with the requirements of clauses 3, 4, 5 and 6 of Schedule 1.
- For subscription services — subscription fees must continue to be the predominant source of revenue.

These are unremarkable except perhaps for the last requirement. The obvious inference is that the commercial broadcasters have achieved another concession by having some limit placed on the capacity of these services to ever develop as a serious rival to them for advertising. This limitation may, however, have more profound long term inhibiting effects on narrowcasting services. These services will be the first of a myriad of new communications services that will be available in the medium term to the home including pay per view services, home shopping, home banking, etc. There would, but for this licence condition, have been some interesting scope for packaging these interactive services with subscription services.

Satellite pay TV

The conditions applicable to the satellite pay TV right (at Part 7 of Schedule 1) which are relevant to content regulation are that the right holders:

- Will comply with ABA determined program standards.
- Will comply with the requirements of clauses 3, 4 and 5 of Schedule 1.
- Will not broadcast advertisements or sponsorship announcements.
- Will not acquire the rights to broadcast an event on the Minister's list of events which should be available to the public free, unless a national or commercial television broadcaster has also acquired rights.

The first point to observe is that as the satellite pay TV rights will only last until 1 July 1997, these conditions will only apply to subscription broadcasting services provided by way of satellite until that time.

The prohibition on the broadcasting of advertisements and sponsorship announcements has clearly been inserted to appease commercial broadcasters. Curiously, this prohibition does not apply to providers of subscription broadcasting services by means other than satellite.

The program siphoning regime is cumbersome. The Minister is to prepare a list of events which he considers should be available to the public free of charge. He may amend this notice under section 112 of the Bill by removing an event from this list where he is satisfied that free-to-air television broadcasters have had an opportunity to acquire the rights to broadcast that event on a fair commercial basis but have not done so within a reasonable time. This means the pay TV operator must wait for broadcast rights to an event to be acquired either by a free-to-air broadcaster or for the Minister to delete the event from his list. A simpler approach would have been to prevent the pay TV operator from acquiring exclusive live broadcast rights to events specified on a ministerially or ABA determined list. This list requirement must be seen as yet another win for the commercial broadcasters and also, this time, for Sky Channel and other subscription narrowcasting services which do not have such a limitation placed upon them.

Other ABA content regulation powers

The ABA's powers to impose licence conditions is the final mode of content regulation. Under section 113 of the BSB the ABA may determine standards for commercial and community television broadcasting licensees for children's programs and in relation to levels of Australian content. The reservation of these two areas to the ABA is perceived by public interest and union groups as a win, but not an unqualified triumph for, not only is the ABA not required to consult with industry in its determination of appropriate standards on those matters, it is not required to consult with public interest and union groups either.

The ABA is also given a clear power at various sections of the Act to impose conditions on commercial (section 42), community (section 86) and class licence services (sections 93 and 101). This power is generally only limited by the requirement that such conditions must be "relevant to broadcasting". There is no reason why such power could not be used to determine conditions in relation to program content were the ABA to decide to take an interventionist role in content regulation. Indeed, the sections of the Bill which confer this power clearly contemplate the ABA may exercise these discretions in this way. For instance section 102(2), which sets out a number of the matters on which the ABA may impose conditions on the satellite Pay TV right holder, specify amongst other matters:

- Requiring a particular level of Australian content for programs.
- Ensuring compliance with film classification systems administered by the Office of Film and Literature Classification.
- Ensuring systems are implemented to restrict access to programs that are classified in certain ways.

Interestingly, the equivalent provision for commercial radio (subsection 43(3)) specifically foreshadows local content requirements being imposed as licence conditions on licensees which broadcast a significant proportion of contemporary popular music.

Conclusion

The debate over broadcasting law and policy is best understood in terms of a long running conflict between warring factions that occasionally come together to form unusual and frequently transitory alliances — such as the independent producers and Actors' Equity on local content requirements. The Draft Bill is neither inherently good nor bad – it is the sum total of a series of provisional political decisions. Whether any individual provision is good or bad depends simply upon the perspective from which it is viewed.

The Bill is also merely the first battle in this campaign. Who will win that campaign will depend largely upon the soundness of the various factions' strategy and tactics in Canberra in the next few months and, of course, the calibre of their guns.

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