Forum

The Broadcasting Services Bill

Peter Westerway

Peter Westerway examines the major features of the most sweeping overhaul of broadcasting regulation to take place in Australia

There has been some speculation in the past that the government intended to abolish the Australian Broadcasting Tribunal. Those fears may now finally be put to rest. As the Minister, Mr. Beazley, said in his speech on Friday 29th November, far from disappearing, the Tribunal "will be at the heart of the move to implement the reforms".

The Australian Broadcasting Authority (ABA), which is to rise from the ashes of the Tribunal, will be both more powerful and more flexible than its predecessor. Indeed, the Minister did not exaggerate when he described it as having "unprecedented powers to enforce its demands".

It therefore seems appropriate to concentrate for a moment on those powers. In what respects are the powers of the ABA to be different from those of the ABT? Such an approach leads us to three main areas: policy, planning and enforcement.

Policy

Section 3 of the Bill is a breakthrough in Australian broadcasting law and represents the fulfilment of a personal crusade. I first read the Canadian *Broadcasting Act* in 1978 — and returned to Australia recommending to my Minister that we should also have policy objectives spelled out in our legislation. So you will understand if I now tell you that this part of the bill has my enthusiastic personal support.

The content of the objectives is also significant. In 1984 I succeeded in persuading the then Minister, Michael Duffy, to take a list of broadcasting policy objectives to the cabinet. The subsequent cabinet decision listed five policy objectives, basically those spelled out by the Tribunal of the day in its 1982 *Satellite Program Services* report. Briefly, they were:

1. To maximise diversity of choice;
2. To maintain the viability of the broadcasting system;
3. To encourage an Australian look;
4. To provide broadcasting services responsive to local neecds; and
5. To discourage concentration of media ownership and control.

Like that cabinet decision, the Broadcasting Services Bill lists multiple, competing objectives, which will allow both the regulator and those appearing before it full play for their forensic skills. I have no problem with this. Only fools and innocents believe that the formulation of public policy is a linear process. I will not attempt to list them all, but there are also some significant additions and omissions from the 1984 list.

Firstly, the Bill omits "viability" and lists efficiency, competition and responsiveness to consumer needs as objectives. Apart from noting that these three (all of which are listed in the first subclause) are often mutually contradictory, we might also note that none of them has ever been mentioned in the same breath as the words: "broadcasting policy". Up to this point, broadcasting, both in Australia and overseas, has typically been heavily regulated and oligopolistic. Implicit in these objectives is the concession that crucial assumptions about scarcity which lie at the heart of existing broadcasting policy have now been abandoned. We are looking at a new era of managing for abundance.

Secondly, we should note two objects which the Act (and therefore the regulator) is to promote. Subclause 3(e) gives Broadcasting Services a role in "developing and reflecting *a sense of national identity, character and culture*". Subclause 2(f) requires the Act "to promote the provisions of *high quality and innovative programming*". Paradoxical as it may seem, neither promoting a sense of national identity nor quality programming have ever before been listed as objectives of broadcasting policy.

Thirdly, commercial and community broadcasting services providers (but not the others) are to be *encouraged* to provide "a balanced coverage of matters of public interest" and "an appropriate coverage of matters of local significance", to respect "prevailing community attitudes to matters of taste and decency" and to establish "appropriate means for addressing complaints".

Fourthly, and applying to all the categories of service, regulatory policy is to be applied across the range of services according to the *degree of influence* that the relevant service is able to exert in shaping community views. In speeches since the release of the Bill, the Minister has used the words "pervasive" and "persuasive" to expand on this notion. On other occasions departmental officers have spoken of "modular regulation". To put it bluntly, the more clout your service has, the more regulation you can expect.

The implications of these four matters collectively represent a watershed in the way Australian governments have thought about broadcasting. They are radical in the classic meaning of that term; in going to the very roots of the conceptual framework we bring to the subject.

Planning

Let me take you now to planning. If there is a bomb waiting to explode in this Bill it is in planning. Again, I am not unwilling to hear the explosions, but I do know that they are coming.

You will recall that I referred earlier to the concept of managing for abundance. The rationale for regulating braodcasting has rested upon three central notions: scarcity, public interest and accountability.

Scarcity, because the electromagnetic spectrum is a limited (albeit renewable) natural resource. Public interest, because broadcasting is uniquely powerful. Accountability, because the privilege of controlling these scarce, uniquely influential, natural resources can be granted to only a few. This implies a reciprocal obligation to serve the community; ie. the broadcaster is a *trustee*.

Use of Spectrum to be Maximised

The new regime demolishes scarcity as a planning imperative. Indeed, it tells the ABT that unless the Minister has deliberately reserved capacity for national or community broadcasters, it is to "ensure that the *maximum use* is made of the Broadcasting Services Bands" (section 28(1)).

On my reading, this deceptively simple phrase "maximum use" has all the revolutionary potential of "liberty, equality and fraternity". Perhaps the authors understood what they were saying or perhaps they knew not what they wrote.

That is not to say that future developments like digitisation are not recognised; they are. However, those who have not worked in the field often do not realise that to change even one of the quite simple assumptions made by the engineers in developing their planning guidelines can have huge consequences. Let me remind you that if the old PMG planning guidelines had specified lower levels of protection against interference, we could have had some 4000 radio stations in Australia since the 1930s. Equally revolutionary consequences would follow simple changes in the existing planning rules.

I am also unsure whether the authors have fully allowed for the inherent plasticity of the spectrum. The VHF band can be used for radio, television or telecommunications; the UHF band can be used for radio, pay TV or cooking chops. The planner who seeks to maximise use of the broadcasting bands is opening Pandora's box.

Public Consultation

On the other matter of opening up the planning process, however, I find myself in enthusiastic agreement. In performing its functions the ABA is to make provision for "wide public consultation" (Section 27(1)), which presumably means that we should never again witness the spectacle of decision makers hiding behind their technical advisers in order to avoid debating unpalatable truths. Public consultation processes are already widely used in the Tribunal and I see considerable benefit for all concerned in their translation into the planning process.

Before we leave planning, let me remind you of the social contract supposedly implicit in the granting of a broadcasting licence: the broadcaster, as trustee, in return for enjoying the privilege of a licence, accepts the social obligation to act in ways which do not maximise its profits. (For example, it provides high levels of relatively expensive Australian programs or children's programs).

Community Service Obligations

It is something of a surprise to me that the policymakers who were the architects of the bill did not transpose the notion of community service obligations (CSOs) from the telecommunications legislation into this Bill.

CSOs are a concept borrowed from the social welfare debate surrounding European integration and they rest upon three legs: firstly that an organisation enjoys a privilege bestowed by government; secondly, that the government imposes reciprocal obligations on the organisation; and, thirdly, that these obligations can only be met at a cost to the organisation. Their advantage is that they provide a conceptual framework for rational analysis and debate about what are otherwise hidden cross subsidies. Moreover, they reflect a specific time, place and technological environment, so that they are dynamic, or capable of adaptation to meet changing social and political expectations.

Few of the quite onerous conditions imposed upon broadcasters by regulation are accurately costed. While this has suited the broadcasters (who are vertically integrated and not above padding their costs to impress the public and the politicians) it is not helpful to rational decision making. There can be little doubt that the quality of the debate about telecommunications policy improved with the use of the notion of the CSOs. And while broadcasters have also profited from fuzzing the figures in the past, they now stand to lose unless a similar approach is imported into the broadcasting debate.

I mean by this that the world of abundance in which they will now be obliged to live makes no allowance for subsidising the local production industry or showing great children's programs. Instead of trying to defend the indefensible, that is, to maintain their oligopolies, they might be well advised to ask how the cost of providing these socially desirable, but very expensive, programs is to be spread over other, competing service providers.

Commercial Viability

Let me make myself clear. I am *not* suggesting that there should be, for example, no Australian content requirements. But I am concerned that the immediate reaction of some network spokesmen (supported by some public interest groups) has been to argue that the concept of "commercial viability" should be retained. We should be clear in our minds that commercial viability reflects a regime with substantial barriers to entry. Unless we intend to have such barriers (and it is probably impossible to maintain them), it is fruitless to dwell on the past. In order to address the watershed of 1997 we need to think about *new* arrangements. To quote the Minister: "The future cannot be avoided."

Enforcement

Finally, a few brief words on enforcement. The Minister has made a point of stressing that the Bill deemphasises ownership, preferring to address the concept of control. The manifest deficiencies of the 1942 Act, he says, sprang largely from its obsession with numbers. "...the Act tried to specify every means by which control could exist, was preoccupied with numbers and lacked the flexibility to deal with the complex corporate structures of the modern market place". (The new Broadcasting Services Bill, 29 November 1991).

I would agree with this. In the past I have likened the 1942 Act to Dr Johnson's dog, which you may remember danced on two legs. The marvel was not that it danced badly, but that it danced at all. In recent days I have moved on to a different analogy. I now think of the Act as one of those obstacle courses used to train the police, SAS and similar modern heroes — the sort in which figures suddenly pop up out of nowhere and the candidate has to shoot or be shot. If he shoots a woman with a child in her arms, he is a failure; if he hesitates and the figure is a villain, he is also a failure. He can only win if he shoots the villain. *Cherchez le criminel.*

The problem with the 1942 Act has always been to decide who is a villain before he or she dies of old age.

Accordingly, we welcome the flexibility provided by the proposed regime and, in particular, the capacity to address matters

at issue *before* major transactions are undertaken.

Let me finish by saying that the Tribunal welcomes the *Broadcasting Services Bill* and I congratulate both the departmental officers who produced it and the Minister who has already brought it to this point for their industry and their initiative. The debate in which we will all now have to take part should be frank and explicit if it is to be useful. But I should not want my frankness to be interpreted as opposition.

Having been involved in several similar attempts at reform of the legislation I have no illusions about the dimensions of their achievement.

Peter Westerway is Chairman of the Australian Broadcasting Tribunal.

Bob Campbell gives a commercial broadcaster's perspective on the Bill

The provisions in the Broadcasting Services Bill which are of concern to the Seven Network are a consequence of two fundamental misconceptions by government.

The first misconception is a belief that if irreparable damage to our existing television services occurs on a sufficiently extended timetable, the damage is acceptable. And secondly, the belief that a dramatically increased number of services will offer viewers greater program diversity.

At present, on any given night, a viewer might choose between, say, one or two local drama series, a local sitcom, local current affairs and one or two overseas offerings (all of them first runs). The alternatives are quality alternatives — and the choices are meaningful. This is real program diversity. A choice between 10 or more broadcast and pay services, each running inexpensive, studio-based programs, re-runs and overseas product does not represent genuine or meaningful program diversity.

What is at risk is an internationally recognised quality television system, generating large scale local production. Our government advisors have chosen to draw from the experience of the northern hemisphere and ignore the economic realities of a large and isolated country with a small population.

The high quality of the existing system is no accident. Limited restraints on entry have created an environment in which it has been possible to develop and nurture an expanding inventory of quality local programming. By any measure and all relevant international comparisons, commercial broadcasters in this country have devoted an extraordinarily high proportion of revenue to programming. The latest available Tribunal figures indicate that metropolitan broadcasters spent 85 percent of net revenues (after the deduction of compulsory licence fees and agency commissions) on programming. Seventy percent of this expenditure is spent on Australian programming.

Cost Cutting

Our high quality system devoting, as it does, such a large proportion of revenue to programming is fragile. Not fragile because of entrepreneurial excesses, mountains of debt or mismanagement, but fragile simply because in all markets, five very competitive services divided up between one million people at one end of the spectrum and 3.7 million people at the other end of the spectrum continually push the financial and creative resources of the system to breaking point. Before interest and tax, free-to-air commercial television of the quality currently enjoyed in Australia is a marginal business.

Revenue growth over the short to medium term will be nominal. Thereafter, faced with stagnant revenue growth and with the application of such a high proportion of revenue to programming, there are very few options that the commercial broadcaster can pursue to cut costs in order to maintain marginal viability without cutting back on Australian produced programs. Cost cutting at the margin involving staff, capital expenditure and administration is all but complete in the commercial industry.

Therefore, revenue erosion as contemplated post 1997 will leave existing broadcasters with only one choice. That is, to take the cleaver to the current level of domestic production. For those programs that remain, the quality of writing, casting and overall production will suffer.

Pay TV and Advertising

One of the big issues in the Broadcasting Services Bill is the introduction of pay TV. From the experience gained in overseas markets, it is clear that as penetration rates for pay TV become significant (upwards of 20 percent) broadcast networks will face a significant reduction in audience levels.

This reduction will put a cap on advertising rate increases below the cost of living increases and, if the overseas experience is anything to go by, well below the rate of increase in program prices. With 20 percent penetration, pay TV will (after 1997) begin to become attractive to advertisers, thus diverting advertising revenue from broadcasters. This expanding revenue base available to pay operators, will mean aggressive competition for available programming thereby driving prices even higher.

Advertising budgets are finite and therefore there is a substitution effect between free-to-air broadcasters and pay operators. Pay operators the world over set subscription rates to cover programming and other operating costs. The high margins associated with the advertising streams will enable pay TV operators to offer advertisers deep cost per thousand discounts.

Effect on Programming

In the United States, the audience and revenue erosion of U.S. broadcasters' schedules has resulted in a market trend towards what is termed more 'cost effective programming'. This means:

- few expensive one-offs;
- a marked decrease in the number of drama series produced;
- a shift from expensive drama series formats (including location shooting) to less expensive formats;
- a significant increase in relatively inexpensive studio based situation comedies;
- a significant increase in magazine style (reality) programming.

This means more *Hard Copy* and *Cops* and less *LA Law*, *Murder She Wrote* and *60 Minutes*, which would be replaced by an extensive menu of repeat programming — especially off-peak and in prime-time shoulders.

1997 Sunset

The logic of having a proposed sunset clause of 1 July 1997 for three commercial broadcasting services that coincides with the expiration of the proposed moratorium on advertising for pay TV and the introduction of unlimited additional pay services, is perverse.

Australian broadcasters will be facing a period of profound structural adjustment in the period leading up to 1997. Unless proper care and attention is provided to the correct balance between free-to-air broadcasters and the new subscription services, the landscape could look like this:

- audience erosion from pay will be biting hard;
- advertising on pay will become intrusive;
- there will be a completely new programming landscape.

Self-regulation

The public interest groups have been appeased (at least to some extent) by the effective continuations of quotas relating to children's programming and Australian content, while at the same time proposing an open skies policy of new frequencies and pay TV. But even the most elementary economics student can see the conflicts. Certainly even the architects of the new Bill recognise that program standards in the new environment are "increasingly difficult to justify".

Much has been said of the new Australian Broadcasting Authority and self-regulation. Given recent experience, you will have to excuse a broadcaster's cynicism in saying that guided self regulation under the ABA is likely to be more of the same with much more draconian penalties than is currently the case. In our view, there should be either true self-regulation with substantial penalties or the retention of the status quo.

Audience Reach

One superficially pleasing aspect of the draft Bill is that the Government proposes to implement its 75 percent audience reach policy, thus allowing capital city national networks to remain in place as opposed to having four cities in a capital city network and one city in isolation.

Pleasing as this is, and despite the hard work we have put into achieving this, I would give it up tomorrow for the security and belief that proper thought had been given to both the on-going commercial viability of operators and proper consideration had been given to the retention of the quality and depth of television that this country has become renowned for.

The new Broadcasting Services Bill, in our contention, represents an unrealistic and uninformed policy agenda and will be subject to vigorous representation by us in Canberra.

This the edited text of a speech given by Bob Campbell to a CAMLA luncheon on 21 November 1991.

Bob Campbell is the Managing Director of the Seven Network.

Les Heil finds that the new Bill will cause vast changes to Australian commercial radio

From the standpoint of commercial radio, the essence of the Broadcasting Services Bill is that barriers to entry are going to be either removed or reduced to the absolute minimum, without regard to whether stations can remain viable. Also significant is the fact that radio will be excluded from the cross-media ownership rules.

At the outset, let me say that I have great doubts whether the final result of this revolutionary piece of legislation will be a better commercial radio system than the one we have. Both in technical and program service terms, the current system provides a high quality service. Time spent listening to Australian commercial radio is among the highest in the world.

More Services

It certainly does not follow that more is necessarily better. Advertising, which is the sole source of revenue for commercial radio, is finite. The more thinly that revenue has to be spread, the more pressure there will be to reduce costs, a fact which ultimately will have to be reflected in the services provided.

The approach being proposed is highly derivative of other countries — New Zealand in particular. In my opinion it is far too early to conclude that the New Zealand experiment is anything more than that — an experiment. We really have no evidence that New Zealand listeners are benefiting from the new regime; no indication, for example, that the public is better served as a result of the fact that almost all radio news now emanates from one central source. And finally, is the experiment in New Zealand designed for a population of three million, really relevant to the far more diverse service which already exists in Australia, currently serving a population of 17 million people?

Radio Formats

It is not difficult to predict what at least some of the consequences of the Bill will be. Formats will become more and more specialised. For every format there is an economic limit dictated by the number of listeners it can attract, and obviously the potential number of listeners in every market is finite. More stations therefore mean fewer listeners per station, on average, and intensifies the task of identifying particular program preferences in a cost-effective manner. However, it can be fatal to get too deeply into niche radio. If you are delivering fewer and fewer customers per station, niche broadcasting — extended too far — is not the panacea that some people think. In addition, advertisers will be able to target their customers with increasing precision. This is simply a logical outcome of increased program specialisation.

Cost-cutting will be refined to an art form. There will be less duplication of resources, more sharing of facilities, more syndication of programs, less localism in regional markets. Deals will be made even between competitors to reduce expenses. There will be staff reductions and in some cases a reduction in the level of service provided.

Stations will be bought and sold like second-hand cars. This will probably give rise to the emergence of a new industry such as they have in the United States — station brokers.

According to the essay which accompanied the Bill, the new broadcasting authority will have to work out a mechanism for a price-based, competitive process for determining who will receive licences. Consideration may have to be given to the transition of existing licensees to whatever new approach is adopted, and to moving from an on-going taxing regime to a once-only, "up front" payment as economic rent.

Digital Audio Broadcasting

There does not appear to be any guarantee or assurance that the existing licensees will be given any preference or even a guaranteed place in the continuing march of technology — in DAB, for example. The imperative of disposing of FM frequencies as quickly as possible also raises questions. A cynic could be forgiven for discounting the lofty ideals set out in the ministerial statement and postulate that the Government, having indicated that DAB will be with us in five years or less, must move quickly to sell off the remaining FM frequencies before they become either worthless or have to be sold off at giveaway prices.

The "one to a market" limitation which would apply in markets of less than seven commercial radio services is unnecessarily restrictive. With radio removed from the cross media restrictions, there would be

nothing to stop a local television station or a local newspaper from also controlling a local radio station, thus gaining two media outlets in the one market. Why, therefore, prevent the holding of two radio outlets in any market when the system is supposed to be committed to providing listeners with as many services as possible?

Program standards

The highly commendable attempt to simplify the drafting may not always achieve the intent of reducing legalism and potential litigation. I think this particularly applies in the area of program standards, and in clauses such a sub-clause 43(3) which provides that where a commercial radio licensee "broadcasts a significant proportion of contemporary popular music, the ABA may impose a condition on the licensee requiring the licensee to broadcast a specified percentage of Australian contemporary popular music." It is not clear if words like "significant", "contemporary" "popular" and "music" refer to compositions, performances or both. All are badly in need of definition — including the word "Australian".

We need to remember that the proposed legislation may undergo significant change. The Opposition may well introduce substantial amendments and the Bill may be extensively modified during the general consultation process. Many of us, however, remember the charade involved in the consultation processes for other activities such as the Forward Development Unit for radio. That so called 'consultation' left us with a feeling that it was more of a formality than a desire to benefit from the experience of the industry which has been serving the people of Australia extremely well for 65 years.

But I am optimistic that the approach will be different this time. We must await the outcome of such perennial issues as commercial viability, regulation versus self-regulation, public accountability and Australian content.

Les Heil is the Managing Director of KZFM Radio and has received the Order of Australia for services to the radio industry.

John Griffiths inspects the teeth of the proposed Australian Broadcasting Authority

The Broadcasting Services Bill contemplates a very different regulatory body to administer broadcasting legislation than is the case at present. The Australian Broadcasting Tribunal ("ABT") will be replaced by the Australian Broadcasting Authority ("ABA"). The Government expects the ABA to operate as an overseeing body, more akin to the Trade Practices Commission or the Australian Securities Commission, than to the ABT. The ABA is expected to be proactive rather than reactive, to conduct informal and *in camera* investigations in preference to public hearings, and to exercise wide discretionary powers on a range of matters with much less parliamentary guidance than is contained in existing legislation.

Incomplete picture

The Bill paints only part of the picture of the Government's expectations of the new ABA. Many matters are entirely omitted or left teasingly unanswered in the Bill. The Minister's Explanatory Statement paints a fuller yet still incomplete picture of how the Government expects the ABA to operate; for example, how it will enforce not only the letter but also the spirit of broadcasting law; how it will use external consultants and corporate lawyers in its investigatory work, particularly in the areas of control and suspected criminal offences; and how it will conduct control audits behind closed doors to detect breaches of control provisions.

We are told in the Explanatory Statement that this brave new world of broadcasting regulation is necessary to put a stop to the bad old days in which licensees are portrayed as exploiting loopholes in ownership and control restrictions and generally avoiding their obligations in the face of a powerless, cumbersome and largely ineffective ABT. However, the picture painted of the ABT as an ineffectual regulator frequently outsmarted by a broadcasting industry hell-bent on legalism, avoidance and exploitation of loopholes grossly distorts reality. The ABT's involvement in inquiries such as those relating to Alan Bond, the Seven and Ten restructures and, more recently, Tourang's bid for Fairfax, demonstrate just how sharp its bite can be. It is also important not to lose sight of the fact that the overwhelming majority of licensees and their shareholders generally comply with their legal responsibilities. No-one could deny the need for some reforms of both a procedural and substantive nature. But the distorted perspectives described above have produced a Bill which contains many overreactions and proposes "solutions" which pay inadequate attention to the need to:

(a) allow appropriate public participation in broadcasting regulation;
(b) safeguard individual rights and interests; and
(c) ensure proper accountability of public administrators.

ABA's role

The ABA will have a wider range of tasks to perform than the ABT. Its primary tasks will include quasi-legislative, licensing, regulatory, administrative, advisory, planning, arbitral and quasi-judicial functions.

Is it desirable or appropriate to vest such a wide and disparate range of functions in a single body? Would it not be more sensible to create a two-tier system, along the lines of the Trade Practices Commission and the Trade Practices Tribunal, and divide administrative responsibilities from quasi-judicial functions?

It is not clear whether the proposed powers to issue binding opinions on control and categorisation of broadcasting services are invalid on the grounds that they amount to the conferral of judicial power on an administrative body, contrary to the separation of powers required by the Constitution. The Bill provides that the ABA's opinion on categorisation of a broadcasting service or whether control of a licence exists or will exist, confers protection against penalties being applied elsewhere under the Bill. That protection or immunity runs for five years in the case of categorisation opinions and indefinitely in the case of control opinions, assuming circumstances remain substantially the same as in the original application. Accordingly, those opinions have a conclusive or binding quality about them which distinguishes them from other administrative discretions.

ABA procedures

A feature of the proposed reforms is the sharp shift away from the conduct of inquiries by way of public

hearing to a much more informal and flexible system involving the conduct of private investigations by the ABA with public hearings being held only as a last resort. While such a system may result in administrative efficiencies and cost savings, real issues are raised as to whether such processes allow appropriate public participation in, and knowledge of, the ABA's activities and also as to whether adequate safeguards exist to protect important individual rights and interests. Although the Bill confers a right to have an adviser present during a private investigation, curiously there is no express guarantee of legal representation in an ABA public hearing: the matter is left entirely to the ABA's discretion. Furthermore, the ABA's powers to conduct investigations seem to be at large and are virtually unrestricted.

Discussion of these significant matters is handicapped by the host of issues left unanswered in the Bill regarding details of the ABA's procedures. For example, is it intended that the ABA will be master of its own procedures? If so, will the ABA formulate uniform procedures applying to each of its various functions? What will such procedures involve?

A person can be compelled to attend before a *delegate* of the ABA to answer questions on oath and/or produce documents. Failure to answer a question that is relevant to a matter the ABA is either investigating or is to investigate carries a fixed penalty of one year's imprisonment. The Bill stipulates that such investigations and examinations *must* take place in private, leaving no scope for a person summoned before the ABA's delegate to elect to have the matter dealt with publicly. The Explanatory Statement defends such secrecy on the grounds that publicity might prejudice criminal prosecutions. The broadcasting industry is effectively being told by Big Brother that it must suffer a loss of individual rights because of the possibility that a few may commit criminal offences.

This shroud of secrecy and private inquisition is heightened by the proposed power in the ABA to compel attendance at private conferences during the course of a public hearing. Such conferences may be ordered to take place in the presence of a member of either the ABA or its staff. Failure to attend can result in disqualification from participation in the public hearing.

Whether the ABA publishes a report about any particular investigation is left entirely to its discretion, except in those instances (which are likely to be rare) where the Minister has directed an investigation take place. Consequently, the requirement to provide a person affected by findings in an investigation with an opportunity to comment will not apply to all investigations conducted by the ABA or its staff. And since the Bill provides elsewhere that ABA members may reach decisions not only on the basis of the evidence or material put before them in an investigation or hearing, but also may rely on "their knowledge and experience" in arriving at decisions (clause 158), isn't there a clear risk that decisions adverse to individuals may subsequently be taken on the basis of untested and unpublished information which has come into the ABA's possession during the course of one of these private investigations conducted by a delegate? Where is the natural justice in that scenario?

The procedures to apply to public hearings are vague and uncertain. The few provisions in the Bill dealing with hearing procedures give rise to other problems. For example, where the ABA has completed a hearing, it must prepare and publish a report setting out its findings. That is a sensible requirement, but it is unclear if this obligation is different from the standard obligation on administrators imposed by both the *Administrative Decisions (Judicial Review) Act* and the *Acts Interpretation Act* to provide upon request written reasons for decisions and also identify findings of fact and refer to the material or other evidence upon which such findings were based.

Accountability

The Bill contains what are now standard provisions relating to the power of the Minister to notify the ABA of general policies of Government and to give specific directions of a general nature as to the performance of the ABA's functions. Otherwise, the ABA is not subject to direction by or on behalf of the Commonwealth. The ABA is charged with responsibility for advising the Minister on the operation of the Act.

The Bill expressly provides for various forms of ABA accountability but their adequacy is to be questioned. For example, the Bill sets out a range of ABA decisions which will be amenable to review on the merits by the Administrative Appeals Tribunal ('AAT'). That list includes some decisions which at present cannot be appealed to the AAT; for example, decisions relating to the alteration of service areas (to be called "licence areas"). Closer scrutiny, however, reveals several key omissions. Most notably, no right of appeal to the AAT is provided in respect of the ABA's power to give an opinion as to in which licensing category a particular broadcasting service falls, or whether a person is, or would be, in control of a licence. Consequently, not only is a disappointed applicant for such an opinion unable to seek merits review, but an affected third party aggrieved by an ABA opinion which is favourable to the applicant is unable to test that opinion before the AAT. Presumably the only recourse available to such a person would be to commence judicial review proceedings in the Federal Court challenging the ABA's opinion on grounds of error of law. But that course will not be free from difficulty due to doubts regarding standing and the procedural limitations of judicial reviews.

Other key decisions of the ABA which will impact on individual rights are also excluded from the AAT appeal list. For example, the ABA's decision to issue a notice under clause 71 aimed at rectifying a breach of provisions relating to control, foreign ownership, directorships, or cross media restrictions, is not subject to merits review. The failure to provide for AAT appeal of such notices was deliberate. The Explanatory Statement defends the position on the ground that notices are issued to correct a breach of the Act and will form the basis of a prosecution of a licensee for an offence. Accordingly, it is said that "it is inappropriate for the AAT to be in a position of considering whether a prosecution should be launched and, as such, notices are not subject to AAT appeal". Interestingly, the Bill provides that the ABA is empowered on application prior to a transaction taking place to approve a temporary breach and a refusal to make such a decision is amenable to AAT review at the behest of the unsuccessful applicant.

Finally, also conspicuous by its absence from the list of decisions amenable to AAT review are ABA procedural decisions. The possibility of ABT procedural decisions being exposed to AAT review is one of the matters dealt with in the Administrative Review Council's current discussion paper reviewing ABT Inquiries Procedures.

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Beth McRae of Open Channel puts the community television case

In all the recent attention and debate surrounding Australian media ownership, regulation and control, the introduction of pay TV and current focus on the Government, draft Broadcasting Services Bill, there is a notable absence of consideration in circles of power about the meaning and effect of the imminent introduction of non-profit community television and its inclusion in the likely use for the remaining sixth television channel, UHF 31.

Tossed in with the grabbag of future television services, community access television is perched alongside consideration of educational television, parliamentary television and, in a somewhat mystifying move for the film industry, possibly an additional outlet for independent film producers. The House of Representatives Standing Committee on Transport, Communications and Infrastructure (HRSCOTCI) inquiry into the possible uses of the sixth high power television channel is expected to be completed for tabling in Parliament by the end of May 1992, which will allow sufficient time to garner convincing arguments for the community's right to access at least a small slice of airwaves.

However, the inquiry's objective of deciding on a fair and effective structure for the new channel that can accommodate all interests will be a herculean task. Already chinks in the argument have emerged with educational television advocates proposing use of evening prime time with community broadcasters relegated to the weekends. The community TV sector intend to maximise co-operation with other sectors but are not likely to tolerate being shoved aside to downtime viewing slots.

Any legislative changes that stem from HRSCOTCI will need to be tabled in Parliament by the end of May 1992 to allow for incorporation into the Government's draft Broadcasting Services Bill for which public comment closes by the end of February.

Already criticism has been voiced about the Broadcasting Services Bill's proposed changes to sponsorship regulation and the detrimental effect on the financial resourcing of any viable community TV service. The draft Bill restricts sponsorship to four minutes an hour, whereas the current *Broadcasting Act* has no restrictions, although there is little or no restriction on the content or form of sponsorship announcements.

There will presumably be detailed discussion about the self determination requirement for a code of practice and setting of limits for sponsorship announcements by both the television and radio sectors of community broadcasting during the coming weeks.

A further concern about the draft Bill is the allocation of the broadcast spectrum on a user pay basis, which will inevitably exclude any community use. This of course emphasises the critical urgency for community TV to prove that any decision about the use of UHF 31 should recognise the priority of the public interest.

During January and February, the co-ordinator of the Public Broadcasting Association of Australia will be organising seminars in Sydney and Melbourne culminating in a national seminar to formulate submission to the HRSCOTCI inquiry.

Beth McRae is the General Manager, Open Channel of Melbourne

Bob Weis puts the production industry's case for changes to the Bill

There is much to like about the Broadcasting Services Bill. It is, for instance, written in plain English and it is therefore relatively easy to understand. The Australian Broadcasting Authority (ABA), the new regulator, and broadcasters both present and future will have a clear understanding of the regulations and what can happen in cases of breach.

With the introduction of pay television via satellite and the possibility of a great many new services delivered by fibre optics toward the end of the decade, the BSB tries to be as technologically neutral as possible, while addressing the problems of allocation of frequencies and regulation of service providers.

There are some anomalies in the Bill as it stands. The most obvious one is the attempt to bring the ABC and the SBS within the control of the ABA.

From the SPAA point of view, however, the problems with the BSB are not related to the agenda as set out in the Bill but to those things that are not adequately dealt with or indeed not dealt with at all.

Reregulation in broadcasting is a global phenomenon as governments come to grips with the impact of new technologies and the proliferation of services. The major areas of concern in many of these attempts can be summarised under two broad headings: cultural and economic. In many ways the arguments about the broadcasting industries intertwine these two topics in beguiling ways.

Cultural Imperatives

Australia is the only country that has quotas for local content. Everybody else has quotas for foreign content. Largely a hangover of the cultural cringe we still have to fight about the preservation of domestic standards. The BSB allows for transitionary arrangements for content standards until the ABA sets in train the processes to determine new ones. Meanwhile the EC has determined a minimum 50% of local production for member states with individual states setting higher percentages.

The USA presents a curious case. Ostensibly they have no content regulations. Over the past fifty years of broadcasting the US networks have screened one foreign TV series. Clearly with this kind of cultural chauvinism there is no need for legislative protection.

The Canadian *Broadcasting Act* of 1991 gives tremendous importance to the role of locally originated programming in the Cultural life of the country and spends much language on the requirement for Canadian broadcasters to pay attention to the need for programming that reflects their society. It also talks of issues of quality and innovation. While the BSB certainly mentions issues of cultural identity and quality they are listed fifth and sixth in the objects of the Act. The cultural objectives of reregulation of broadcasting should be put right up front to let the industry and the Australian people know that what is being contemplated is a broadcasting regime for Australians.

While the BSB does not envisage dropping domestic content standards on free television it does not give any guidance on what they should be. The Bill should reflect the need to enshrine appropriate levels of domestic content. Our view is that this should begin at a minimum of 60% across all time zones.

Economists and flat earthers

It has been argued by the flat earth economists in favour of deregulation that our broadcasters are over-regulated and that the market should be left to decide on questions of content. If the market wants Australian programs, it should be prepared to pay the price. Further it is argued that content rules create price distortions that work against the free market.

While the subsidy/quota argument may be relevant to the shoe industry (read car, widget or any manufactured item) the production of intellectual property rights is fundamentally different. The cost of selling a licence for using a program does not have to bear any relationship to the cost of manufacture. A British production company can produce an hour of drama for $1,500,000, recoup most of its costs from the UK and onsell rights to an Australian broadcaster for say $30,000 per hour.

Having to compete with this product in our domestic market on price is clearly impossible. The recognition of this fact is that broadcasters all over the world pay a premium price for locally originated material because of local content rules or because of cultural barriers to imported material. In terms of cost efficiency the Australian producers are among the cheapest in the world and are significantly cheaper than their US, Canadian and UK counterparts.

Microeconomic Reform

The economic argument in broadcasting is focusing entirely on the wrong issue. While other government departments attempt to wrestle with the problems of microeconomic reform and structural efficiency the BSB does not examine the structural relationships in broadcast trading.

Australian business by and large prefers monopoly trading to genuine competition and the regulatory and cultural environment has traditionally encouraged it. In the USA networks cannot produce their own programs. Nor can they have equity in the future sales of the programs they commission. Producers and broadcasters deal at arm's length.

Similarly in the UK the new rules for broadcasters require a minimum 25% of all production be made by independent producers (ie structurally independent from the broadcasters they are supplying).

These arrangements deliver diversity, choice and economic efficiency. Independent producers with low overheads, competing for sales, are always going to be cheaper than the networks in delivering programs.

Australian networks, including the ABC, are basically built on the 1950's model of total vertical integration of manufacturing, distribution and exhibition (retailing).

SPAA would like to see a provision in the Bill that requires broadcasters to commission a minimum of 50% of their total Australian content from independent producers. Further anti-monopoly provisions need to be enacted to make sure that unfair market strength is not used to acquire future equity in commissioned programs.

The film and television industry has been subjected to thirteen separate government inquiries in the past two years. The bipartisan support for the industry for cultural reasons has been strong for the past twenty five years. It is time to translate that support into practical measures that affect the fundamental terms of trade.

Pay Television

The BSB will also pave the way for the introduction of pay television. Here again there is almost a complete abdication of policy making. The then Minister in his explanatory notes and elsewhere explains the need to tread softly in establishing local content rules for the new service by comparing it to a retail operation where the relationship between the customer and the retailer determines the stock to be carried.

In so far as it goes this is a reasonable model to apply. Subscribers pay a weekly fee and if they do not like the service they are getting they don't keep paying. Therefore, it is argued, local content rules might endanger the viability of the operators who will be risking large amounts of money to establish the service.

Elsewhere the then Minister argued that the late arrival of new technologies to our shores gave us the benefit of learning from other countries' successes and failures.

The retail argument on the face of it looks persuasive until we scrutinise it in detail and apply the overseas experience. Audiences here have demonstrated on free TV their overwhelming preference for Australian product. The concern for pay TV is the cost of local programming compared to the relatively small cost of acquiring overseas (predominantly American) movies for an entertainment channel.

Local Content on Pay

Here, we need to learn from the French in the regulations they applied to their pay TV operator, Canal Plus. The French government saw the possibility of a locally owned pay network having the majority of its profits being siphoned to Hollywood and its inventory stacked with studio product. They also wanted to see a high percentage of French language originated programming for cultural reasons. They are very proud of French culture.

The rules they enacted are ingenious in a number of ways. I won't list them all here but the significant ones are:

1. Canal Plus cannot buy packages of films, they must purchase transmission rights on a film by film basis. This means that the studio practice of selling blockbuster films as a package cannot be used and the channel's inventory is not filled with films they don't want.
2. A fixed acquisition cap expressed as a percentage of after tax revenues is imposed on program purchases. It doesn't say how much can be spent on any one film but it limits the total acquisition budget so that siphoning of profits offshore is prevented.
3. 10% of revenue goes toward local programming.

It should be pointed out that Canal Plus is the most financially successful pay operation in the world.

The French also have high levels of local content written into pay; 60% EC and 50% French language original programming. Canal Plus now accounts for 40% of total French TV investment in their local industry and 10% of overall French cinema production budgets.

SPAA is taking up these points with the current Minister and the department over the coming months. The opportunity is there to reregulate the industry in a way that delivers national objectives both culturally and economically. The draft BSB goes some of the way. The final Bill should go much further toward structural adjustments in the industry and securing the Australian peoples' right to see and hear their stories and perspectives on their screens.

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