COMMUNICATIONS LAW BULLETIN

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NEWS

NEW PUBLIC BROADCASTING LEGISLATION

The Government has announced that it will introduce amendments to the Broadcasting Act 1942 in the current budget sittings of Parliament, to reinforce community control of public broadcasting and community participation in programing.

Basically since 1976 the legislation applying to public broadcasters has been the same as that relating to commercial stations. Public broadcasting was separated out from commercial broadcasting by the Broadcasting and Television Act 1985.

The provisions to be introduced include the following:-

- when a public licensee is a corporation it must be a non-profit organisation;
- apart from limited exceptions, a licensee's funds can only be used to advance its station;
- no person or entity can control more than one public broadcasting licence;
- applicants for public licences must satisfy the Australian Broadcasting Tribunal that they have community support;
- public licences cannot be transferred;
- if a change of control occurs which may adversely affect the purpose of the licence or detract from the licensing criteria, the Tribunal may take remedial action; and
- a public licence must be conducted in accordance with its specific purpose, either community or special interest.

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The *Communications Law Bulletin* welcomes articles, case notes, letters, news items, notes on recent publications, details of forthcoming events and other contributions. Forward all correspondence and contributions to:- **Editorial Board, P.O. Box K541, Haymarket, N.S.W. 2000.** Registered by Australia Post — Publication No NBH 4474.

ACLA SEMINAR ON VAEIS SATELLITE VIDEO ENTERTAINMENT SERVICES - IS OUR LAW OFF THE PLANET TOO?

Despite the fact that Sky Channel, Club Superstation and Sportsplay are commonly referred to as 'new media', from what I have read and heard of them, they seem to me to be just a variety of subscription television, with the special feature of being marketed not to private households but to pubs and clubs. Clearly, the target audience makes a difference to the economics of the service, and avoids placing the service in direct competition with free to air television, but conceptually what we have here is good old 'pay-TV'.

Pay-TV is not a new concept, having been available in North America for many years. The introduction of pay-TV in Australia has been looked at in past years. Many of the issues relating to pay-TV were given a thorough canter round the course in the Tribunal's Cable and Subscription Television Report of 1982.

Having said that, I must then say that the Tribunal has no current position on what should be done in a regulatory sense with video entertainment services. At present, so we are told, they do not fall within the definition of 'broadcasting'. Therefore, the Tribunal simply has no jurisdiction over them. We do not regard it as our role to offer policy advice to Government in this area, unless the Minister asks us to, which he has not. We simply await with interest the ultimate decision about how to classify these services.

However, we can and frequently do offer gratuitous advice on the deficiencies of the legal framework under which we all have to labour. What the headscratching over video entertainment and information services shows yet again is that we do not have a systematic body of communications law which allows new technologies, and new uses of old technologies for that matter, to be conveniently slotted in to their correct place in a single integrated regulatory framework.

Consider the fundamental proposition that video entertainment and information services are not 'broadcasting'. How does one decide what is 'broadcasting'? In short, after cross-referencing and synthesising various sections and definitions in the Broadcasting Act and the Radiocommunications Act, you arrive at the following: you are broadcasting if you are using a transmitter emitting electromagnetic energy (including laser beams), otherwise than along a continuous cable, for the purpose of transmitting radio programs or television programs to the general public. This definition only dates from last year, although the change from the old definition of broadcasting (which, as it related to television, referred to 'images and associated sound intended for reception by the general public') is said by the Department of Communications to be 'policy neutral'. I have doubts about that, but in any event the definition is policy neutral to the extent that it perpetuates the long-standing practical difficulties in defining the limits of a broadcasting service, particularly in two respects - it does not define what is meant by 'the general public', and it does not define what is meant by 'radio programs' or 'television programs'. What is the general public? When is one transmitting to the general public? It is said that if you charge a fee for the receipt of a service, you are not transmitting to the general public. To me that is like saying that the fact that the Urban Transit Authority charges people to use its buses means that its service is not for the general public. Putting that aside, one might also ask if many people are setting up to transmit programs to five people in a remote homestead, is it transmitting to the general public? If not, is it because there are only five of them, or because all the recipients of the service can be identified with precision? If they are the general public, then one might innocently ask why the patrons of 5,000 pubs are not the general public. The answer might be that even if the patrons of 5,000 pubs were the general public, the material being transmitted to them is not 'television programs'.

That raises the question of how one identifies a 'television program'. Perhaps we should apply the well-known objective 'duck' test: if it looks like a duck, quacks like a duck, and waddles like a duck, then it's a duck. If, applying the 'duck' test, you say that a piece of video footage 30 minutes long is not a

television program, does that mean it is not broadcasting if you transmit it to the general public using radiocommunication? As an alternative approach to the 'duck' test, we could say that a television program is any video item which is transmitted to the general public. Of course, this makes your definition of broadcasting rather circular, or elliptical, or possibly both. Anyway, does any of this legal masturbation really matter? The answer to that question is 'yes', but only because very practical consequences follow from classifying a service as broadcasting or not broadcasting.

What happens if the desired service is characterised as broadcasting? In short, the consequences are these. A planning proposal must be prepared. It must be consistent with established broadcasting planning policy. The Minister for Communicaitons must decide to invite applications for a licence. There must be an inquiry into the grant of the licence by the Australian Broadcasting Tribunal. Ultimately, the licence may be granted, subject to a variety of rules (depending on the kind of licence) laid down by statute and by the Tribunal, relating to the structure of the applicant, its ownership and control, the content of the broadcasts and so on. If the service is not characterised as broadcasting, a licence under the Radiocommunications Act can simply be issued over the counter (on the Minister's authority) by a clerk in the Radio Frequency Management Division of the Department of Communications with no public inquiry, no involvement of the Tribunal, and no complex rules relating to structure, ownership or content (unless specially imposed by the Minister as licence conditions).

The point I am making is that we are maintaining two completely different licensing regimes in the Broadcasting Act and the Radiocommunications Act, but the criterion which divides them (the slippery definition of broadcasting) is the product of a past era. Fifty years ago it made sense to classify services broadly as either inter-personal or intended for reception by the general public. There was no real need for subtle gradations between those extremes because the technology was not really used in subtle ways. These days we are seeing more and more services which are not really intended for the undefined general public, but are not person-to-person either. Our current legal structure is directing our minds to the wrong questions - instead of being forced to decide whether the service is or is not broadcasting, we should simply be able to concentrate on the rules that are appropriate to that kind of service.

What can be done to create a legal structure in which each kind of service, including services we have commonly called broadcasting, can grow within a properly co-ordinated telecommunications system? There are several options available, and I will mention three.

Option 1, of course, is do nothing. That is always popular. I will say no more about it.

Option 2, is total integration. By that I mean the creation of a legal structure for a single multifaceted telecommunications system, which applies (as far as possible) common principles to the whole spectrum of services. Within that basic structure, there would naturally be a need to apply different rules to different kinds of services according to certain enumerated criteria such as the need to control frequency allocations, whether the service was for private communication or not (which raises its own definitional problems), proposed content of the service, whether a cost was payable in order to receive it and so on. I say nothing about the level at which rules should be pitched in each case, only that the structure would need to provide flexibility within broad policy objectives applicable to the development of the whole telecommunications system. This concept is consistent to some degree with the approach taken by the Davidson Committee (if anyone still remembers it), and with the long term scenario suggested by the Tribunal in the Cable and Subscription Television Report. Even assuming that this option were regarded as conceptually attractive (and it may not be for many), its implementation would face the same difficulty as the tourist in Ireland who asked a farmer the way to Cork and received the answer: 'If I were you, I wouldn't be starting from here'. There are, of course, severe practical problems (political, commercial, logistical and industrial) with this course.

Option 3, is partial integration. The Davidson Committee proposed a new Telecommunications Act which would bring together radiocommunications and wired communications into a single Act based on common principles. It saw the separation of 'system' from 'service' as leaving a much simplified but still separate Broad-

casting Act, regulating content alone. This could well be true, if the existing broadcasting definitions are completely reworked. It may be possible to move down this track without a major dislocation of the existing system.

In summary, I believe that our present legal framework is a shambles. Unless urgent action is taken to try and bring some flexibility into it, the introduction of new services will always be a mad scramble of law trying to catch technology.

Leo Gray

The views expressed are not necessarily those of the Australian Broadcasting Tribunal or any of its members.

ACLA SEMINAR ON VAEIS
VIDEO AND AUDIO ENTERTAINMENT AND INFORMATION SERVICES

First I want to suggest that the subject of tonight's discussion deserves another name. Video and Audio Entertainment Services is such a mouthful and, in typical Department of Communications style, it has now been abbreviated to VAEIS.

No-one can hope to communicate to the general public or even limited sections of the public with terms like this.

I recognise that the policy makers are intent on distinguishing these services from subscription TV, broadcasting, and satellite program services, but terms like "quasi broadcasting" or even "like services" (which someone in the Department used at one stage last year) are so much simpler.

The program menus of several of these new services - in particular Bond's Sky Channel and the Holmes a Court - RCA venture "Club Superstation" (we don't know the Packer group's program plans yet) indicate that these services are "like" television and radio broadcasting.

As for the distinction between information and entertainment - information in the form of images, sound and text can entertain, and entertainment can inform. And if a technological framework is used, it won't be long before images, data, sound, and text are integrated and transmitted in digital form.

Perhaps we should borrow the term audiovisual services from the French?

If I understand the Department's reasoning correctly, because the services are only available to certain sections of the public they are not defined as broadcasting under the Broadcasting and Television Act. For example, services will be limited to subscribers or customers who lease special equipment to pick up the video, audio or text signals.

If the services are not regarded as broadcasting, then they escape the program and advertising standards laid down by the Broadcasting Tribunal. There is no requirement for a quota of Australian programs, no limit on advertising time or type, no need to broadcast childrens' programs at certain times, and no restriction on ownership and control - let alone foreign ownership. Even the Tribunal's public licensing and monitoring processes are redundant.

In theory, service providers could deliver 24 hours of news, rock video or sports direct from the USA, movies specialising in explicit sexual violence, and an unlimited amount of foreign or even Australian-made advertising for products like cigarettes.

These services are not tied to any one mode of delivery. They can be transmitted to subscribers via satellites or via "over-the-air" techniques which are very similar to broadcast TV and radio ... techniques called "MDS" by the Department and engineers. Telecom's broadband fibre optic cable network remains an option in the future.

It seems that as long as the service is not delivered into the domestic environment it is not defined as broadcasting. The recipients or subscribers could be places like pubs, clubs, sports grounds, racecourses, TAB's, hospitals, prisons, luxury hotels, office complexes, schools or shopping centres ... anywhere but the home. The boundaries are somewhat blurred for someone who happens to live in a combined office/residential complex ... or in a hotel or club.

And no! These services are not strictly pay TV either. The Government argues they are not being offered to the general public - and anyway subscribers to these "private networks" will be paying for the lease of the receiving equipment rather than the service.

Actually, a number of people, including the Shadow Communications Minister, Ian McPhee, have been using the term "subscription TV". McPhee observes that instead of individuals paying directly, they pay by virtue of being members of a club

or a client in a hotel.

My first initiation into the mysteries of these new services began in October 1984. The occasion was the Sydney launch of the service offered by Australian Associated Press, called "Corporate Report". Basically this is a text service, similar to teletext but recycled and repackaged for corporate subscribers.

Corporate Report was launched by Minister Duffy who made a number of observations about "video entertainment and information services", and "audio and video services" for special interest groups during his speech.

According to the Minister, AAP first approached the Radio Frequency Division of the Department of Communications in 1981 inquiring about a licence to provide customers with over the air services using a multipoint distribution system.

The Department took several years to re-assess the use of the microwave band and finally set aside a limited number of frequencies in each capital city. At this stage, I was told there could be five or six possible services in each capital city, though now I understand there may be additional frequencies.

AAP planned to begin with Corporate Report in capital cities and then eventually extend the range of services to places like schools and integrate them nationally using AUSSAT. Customers would lease special receiving equipment for their premises.

By October 1984, the Department had issued radiocommunications licences for Sydney and Melbourne, and Duffy announced that there were several other companies who had applied for licences to "begin various video entertainment and information services using non-broadcasting frequencies...".

He did not name the companies, but it was clear that one of these companies was part of the Packer group who had floated the idea of providing US satellite delivered TV programming into inner city hotels. I understand that Mr Packer and his family can receive these US programs at home, in the office or even when they are in hospital... so why not make them widely available to American tourists away from home?

Duffy indicated his support and enthusiasm for the commercial opportunities opened up by these new services, commenting that a whole range of audio and video programs could be provided to businesses, schools, universities, hotels, and other special interest groups.

However, he pointed out that some of the services "raise important economic and social problems", and his department was still grappling with the "significant legal, technical and policy issues involved.

"For example", he said, "The content or availability of video services may need to be subject to some form of censorship ... Also some would claim that some of these services resemble broadcasting to such an extent that they may compete with, rather than complement, television services. Therefore, perhaps it may be necessary to apply some special conditions..."

He concluded: "We have embarked on the process of considering the implications of these potential new developments and I hope it will not be very long before I am able to indicate the guidelines we have under consideration, and to invite public comment".

Since 1984, another "over-the-air" service has been licensed. This is The Real Estate Channel which has radiocommunications licences in Sydney, Melbourne, Brisbane and Adelaide.

The Real Estate Channel

The Real Estate Channel is promoted as an "exciting new television service for the real estate industry" using a "specially licensed UHF television frequency". The service can be received on Channel Three with the assistance of a leased down-converter and small antenna.

A recent press release says "transmissions are received in participating real estate agencies, offices of property investors such as banks, stock brokers, international hotel rooms, and public areas such as shopping centres and malls". I understand there are plans to operate at Tullamarine airport, and subscribers are told they could run the videotape in the front window so passersby can watch it late at night.

The "Melbourne Proposal"

Meanwhile, there were others trying to secure licences. At some stage last year I recall doing a story on a Melbourne group seeking a radiocom licence to provide old movies and TAB results.

Every time I called up the Department to find out what was happening, I found myself moving backwards and forwards between the radio frequency division and the

communications strategy division.

My notes read something like this. "radio Frequency says it is a matter for communications strategy. The Real Estate Channel is licensed to transmit pictures, sound and text of houses. AAP is licensed to supply piped music to subscribers. Communications Strategy says all other licences are 'on hold' until policy is determined. The guidelines are coming. This is not broadcasting. The Melbourne proposal is pay TV and contrary to policy".

The Policy Dilemma

There was no real secrecy - just confusion. Why did some groups get licences while others were put on hold? Was it about providing opportunities for "new players" (to use a Department phrase)? After all, AAP hardly qualifies as a new player, given that it is owned by HWT, Fairfax and Murdoch.

There was also confusion associated with the satellite mode of distribution and the new transmission system, B-MAC. I think it is important to recognise that this system, (which was selected at the last minute by the Department), is especially designed to address individual subscribers for services like pay TV. It is capable of delivering sound, text, and data, alongside the TV signal.

This capacity to deliver multiple audiovisual services via satellite raised a new set of policy issues. It was no longer a matter of the Department quietly allocating scarce "over the air" frequencies to some companies rather than others, without a public inquiry.

Now it was a question of allocating licences to those corporations who could afford to access a satellite transponder and who had signed a contract with AUSSAT. My attention switched to AUSSAT but it would not reveal its customers "on commercial grounds".

The policy dilemma was becoming more and more complex, and it was virtually impossible to find out what was going on.

One thing was becoming clear. It was too late for the Government to exercise some form of control over who was allowed to offer these quasi broadcasting services. The next question was whether it would try to regulate content and limit the type of subscriber?

It would seem sensible to deem the services "broadcasting" or even "subscription TV" and introduce legislative amendments to the Broadcasting Act. But this takes time to draft - and time is running out. AUSSAT needs customers for its 30 watt transponders and Bond, Holmes a Court and Packer are ready, willing and waiting.

The Present Situation

As far as I understand the present situation, the Minister and his Department are still putting the final touches on a policy paper which is expected to go to Cabinet some time in the next few weeks.

The details are not known at this time, though there is some suggestion that licences specifying the nature of the service, the intended recipients and encoding requirements will be issued under the Radiocommunications Act. Service providers will be asked to agree to a self-regulatory code of practice covering content and advertising.

This policy framework is likely to have a number of implications. Touching on them briefly.

First, there is the question of parity. Why should broadcasters be subject to advertising and content regulation and monitoring, when quasi-broadcasters can operate under self-regulation? Is this the first step in a general move towards self-regulation? (ALP and Coalition).

Second, there are questions surrounding the principle of public accountability. Should there be some public input into allocating licences to operate these services over scarce radio frequencies or over AUSSAT and Telecom's publicly-owned facilities? Do we care about foreign ownership, increasing the concentration of media ownership, diversity of information sources and so on?

Third, several broadcasting lawyers have questioned the wisdom of using the Radiocommunications Act as a vehicle for regulating these services, and there is the chance that the imposition of licence conditions could be subject to legal challenge. The policy would then be determined by the Federal Court, rather than the Minister and his Department.

Fourth, there is the question of public input into the policy process. We have witnessed a public inquiry by the Tribunal into satellite program services, which was restricted to exploring the delivery of programs to broadcasting licensees. Delivery to non-licensees was not part of the terms of reference.

Then in October 1984, the Minister promised guidelines for public comment.

Where are these guidelines?

What happened to the process of public consultation? The Broadcasting Council has been excluded, the unions and ACTU have been excluded, despite the Accord.

As far as I can ascertain, the only discussion which has taken place is between the Department and some of the service providers.

The whole issue begins to assume the proportions of a scandal. It has not been discussed widely anywhere.

I recognise that the issues are complex and there are conceptual problems involved in formulating a policy which takes account of the convergence of the information, entertainment, broadcasting and telecommunications sectors.

The Tribunal does not have the telecommunications expertise and the Department doesn't have a monopoly on expertise in the audiovisual area. So why not throw the issue in to the public arena and attempt to develop policy using a range of expertise?

Maybe tonight's meeting is the first step in this process... but I fear it is too late!

Liz Fell

ACLA SEMINAR ON VAEIS
HOW NOT TO INTRODUCE TECHNOLOGICAL CHANGE

I'll resist the temptation this evening to respond to John Hodgman's comments on the delights awaiting us in the event of a deregulated market place. The arguments on this question in the broadcasting industry are well rehearsed. I suspect most of the people here tonight have long taken one position or another. Nothing I or John would say will change that position.

My purpose is to announce to you the publication of a forthcoming book which I'm in the process of writing. It's entitled "How Not to Introduce Technological Change". It will be a case study, the subject of which is the introduction of Video and Audio Entertainment and Information Services ("VAEIS").

It does have a nice ring to it doesn't it! Somebody remarked to me this afternoon that it sounds a bit like a Platters song. And of course as a result of the Platters controversy, you'll all be well aware that Equity doesn't just represent actors. We also represent those variety artists who work in New South Wales clubs and who may well be competing with the delights of systems such as Club Superstation.

The point of my case study is that disaster awaits those who simply impose technological change upon an industry where trade union organisation is the norm. Indeed, I can personally verify that even industrial relations students currently being trained in that bastion of deregulation, the University of New South Wales, are taught that simple fact.

The first of my points this evening will be that clearly, the Department of Communications ("DOC")knows nothing about such concepts. At every step of the way, they have resisted the very idea of consultation with those to be affected by the new services. Let me outline, as evidence of this fact, the chronology of consultation to date.

In our quite recent discussion with Club Superstation we've been told that they first approached the Department in April 1985. They've had a series of meetings with the Department since that time. At not one of those meetings, was any concern expressed by the Department about Australian content or about the regulation of advertising. On 21 August 1985 a meeting was held between DOC and the Media and Communications Council (MACC). Equity of course is a member of that Council. Let me read to you two quotations from the minutes of that meeting. First Col Cooper, Federal President of the ATEA, expressed the view that "more consultation on MDS (services transmitted to subscribers via satellites or via "over-the-air" techniques similar to broadcast TV and radio) will be required as MDS is seen to be basically broadcasting". (VAEIS was seen at that time as one part of MDS).

The Department's representatives informed the meeting that "MDS applications are not being processed at the present time until the relationship of MDS to pay television services has been examined".

Clearly, unions and other community organisations, could be forgiven for thinking that they had nothing to worry about. A further meeting was held in April 1986, a year after the first approach by Club Superstation to DOC. At that meeting MACC was told that "the Government's priority is equalisation, so that consideration of Pay TV and similar services will have to wait". On the basis of that, was it unreasonable for us to consider that we had no great problems?

Between that meeting and MACC's next

meeting on 2 July 1986, there was a substantial degree of press coverage of the new services. Equity's secret weapon, Anne Britton, raised the issue in no uncertain terms at this meeting with DOC. The Department was absolutely unwilling to provide further information on the proposals and indeed would not even tell us at what stage the processing of proposals had reached. The first and only time the unions have been able to engage in any kind of consultation was with the Minister himself in the context of the ALP National Conference held in Hobart. At a late night meeting with the Minister on 9 July 1986 Equity's concerns were raised and the draft of a resolution, eventually carried by the conference the next day, was agreed.

For the benefit of those who haven't seen it, it reads:

> "The Government will ensure that non-broadcasting services utilising radio communications technology and providing video or audio entertainment, maintain adequate levels of Australian content appropriate to the nature of the respective service and observe advertising restrictions comparable with those imposed on the broadcasting media."

Like all such resolutions it's heavily qualified, but nevertheless it at least represents a commitment in principle by the Government to the concept of protection for Australian performing artists.

In summary then, Liz Fell was quite correct in describing the Department's secretiveness on this issue as simply scandalous. They have given us just two pieces of information. They've told us that whatever else this kind of medium is, it's not broadcasting. Secondly, they've told us that it's to be called VAEIS!

Throughout the period under review, we've been told that it was "too early" to consult with the industry. Presumably, with a Cabinet decision in the offing, it is now "too late" for consultation to occur. Indeed, I understand one bureaucrat has suggested to one of those interested in the issue that consultation could only occur once Cabinet had made a decision on the Department's submission. What use consultation at this stage would be, I'm not quite sure.

The next issue which I wish to raise tonight, at least in a cursory way, is the appropriate Act to govern these services. What I want to suggest to you is that VAEIS is at least a quasi pay television service. Let's go through those things which make it quite similar to a traditional pay television concept. The services represent video entertainment; they will be carrying mass appeal programming; they are delivered via a mass delivery system, i.e. the satellite; they are paid for by a subscriber - the pub or the club; they will even carry advertisements; and they will be viewed - at least that's the hope of their sponsors - by millions of Australians daily, rather than by any limited or specialist audience.

Now it would appear to me that we have two options. Either we lump VAEIS under the broad umbrella of broadcasting, so that it stands alongside free television and pay television. Or we put it under the radiocommunications umbrella alongside CB radio or taxi radio services. These juxtapositions give quite a clear conclusion to me at least. It is simply impossible to escape the reality that VAEIS looks and sounds like television - it carries both programs and ads. It looks and sounds nothing like the kind of data and communications services which we would categorise as non broadcasting services.

Obviously, this is in part a legal question. We have sought legal advice and that advice will form part of our submission to the Minister on the question. Perhaps I should make one small comment given the presence here of a number of copyright lawyers. The main justification given by the system's proponents for being regulated under the Radiocommunications Act is that these represent private broadcasts. My own limited knowledge of copyright law would indicate that the courts have interpreted the term "public broadcasts" very widely. Indeed, my recollection is that one decision has categorised a motel owner relaying programs to individual motel rooms to be a public communication. We shall see.

The last issue I need to raise is what kind of regulation Equity sees as necessary. First, we believe the issue of advertising regulations must be looked at. It would represent a totally unacceptable undermining of existing regulations relating to both place of manufacture and content, if the advertising to be relayed by services such as Club Superstation and Sports Play were to be unregulated. It is an important prop to the continued development of the Australian film and tele-

vision production industry for all advertisements to be made in this country. That must continue. Similarly, I find it difficult to believe that the Government could contemplate the banning of tobacco advertising on free television but permit it on VAEIS.

The second problem we face is the potential for conflict between the video entertainment provided by the systems and the existing live entertainment performed in clubs and pubs around the country. Club Superstation, to its credit, has indicated that it does not see its broadcasts as competition for live entertainment. That is, it won't be broadcasting a Shirley Bassey spectacular up against Australian performers in a club auditorium on a Saturday night. The commercial rationale for this is that clubs already attract audiences on Friday and Saturday nights. Club Superstation will be used earlier in the week when the attraction of audiences is difficult. Nevertheless, we must ask what guarantees do we have that this will continue into the future. If the commercial perceptions of Club Superstation should change, the potential exists for some 800 competent and dedicated performers to be thrown out of work overnight.

Finally there is the issue of the content of video services to be broadcast. We are told that a large part of the entertainment services will be devoted to the broadcast of music clips. Again to their credit, Club Superstation have indicated that they are anxious to broadcast middle of the road music videos having a relatively high proportion of Australian content. The problem here is that most of Australia's middle of the road entertainers are not recording artists. This means that they simply don't have ready made music clips. Given that the production of one rock clip at the moment costs at least $20,000 - and in America this figure can go into the millions of dollars - the difficulty of providing appropriate levels of Australian content can readily be perceived.

We acknowledge that the drafting of regulations appropriate to these services will be a difficult task. We are not so bloody minded as to demand that Sports Play broadcast 104 hours of first release prime time television drama as the television channels are required to do. Beyond the drafting of appropriate regulations however is the even more difficult problem of enforcement.

So in conclusion I can only stress that Equity's interest in VAEIS is a very real and genuine one. We simply will not tolerate the secretive tactics which have been used to date by the Department of Communications. Our members have rights and those rights will be enforced by us.

Michael Crosby

ACLA SEMINAR ON VAEIS
SUPERSTATIONS: A BASIC PROBLEM

My concern today - which is not necessarily the only one I have - is with the pressure the superstations are putting on a basic structural concept we have lived with comfortably for many decades, and cling to still. A very similar pressure is being applied by another initiative: the various kinds of Ancillary Communications Services (short title ACS, previously known as SCA, SMT and SCS). The pressure has developed because the proposed services have been ruled not to be broadcasting, but they share some important characteristics with it.

For many decades we have had communications and broadcasting neatly packed into two separate conceptual and legal boxes, and everything done with electromagnetic communications has been subsumed by those two system concepts. For a long time they seemed to serve, but life became less simple when they began to converge.

In Australia, VL2UV began 'broadcasting' (or did it?) in 1961, with educational material meant for students of the University of NSW, but not in a broadcasting band. It was put in the middle of a marine communications band, a good quarter-of-a-dial away from 'real' broadcasters, and there it remained. Its directors were considerate enough not to enlarge their ambitions so as to pose any real challenge to our neat distinction between communications and broadcasting.

The directors of VL5UV in Adelaide were not so co-operative. Right from their start in 1972 they complained and carried on, until in 1975, at the same time as FM broadcasting was initiated, 5UV was admitted to the AM broadcasting band and allowed, just a little, to resemble a broadcasting station. Until 1978 its licence remained a communications one.

In the same period (the early 1970s) special radio stations for print handicapped people were proposed, which were

also to be treated as 'communications' and hived off into the marine band. This was to be an interim solution until FM subcarrier services were introduced, which were very suitable for services which were not 'real broadcasting'.

These specialised radio services are one illustration of how smudgy the distinction has become between what is broadcasting and what is communication - and it has not all happened just now, or the year-before-last. Yet we had and have just two kinds of Act of Parliament, one explicitly for broadcasting and the other explicitly for everything else - 'communications'. The Department of Communications has been wrestling for some 18 months with the definitional problems posed by the ACS - those which are carried piggy-back by another service, such as subcarriers on an FM radio service or ancillary channels on a satellite television service. The Minister has announced that all these ancillary services are to be dealt with under one or other of these Acts. Yet only a week ago a discussion involving the Department and all sectors of the broadcasting industry showed just how far away we still are from ways to license and regulate these ACS services with which everyone will be happy.

And now we are to have the early arrival of superstations, in the club-and-pub circuit. It has been ruled by the legal pundits that they will not be 'broadcasting'. Therefore, under the simple conceptual frameworks we still cling to, they will be 'communications'. They must be we have not up to now conceded that there can be anything else.

The broadcasting industry, especially its commercial sectors, are outraged that the supply of just the kind of material they provide themselves is to be free of all regulation, when for decades they have had government agencies obliging them to meet standards on things like Australian content, use of the services of Australians, the foreign content of advertisements, how much advertising you can carry in an hour and so on, and also on supposedly moral matters like obscenity and blasphemy. Can this new activity really be treated quite differently from broadcasting, when it is carrying the same kinds of program with the same basic kind of technology, to a great many people, if not the whole population?

I am not arguing there has to be regulation, but only that a case has been put for it. I am looking at the problem of how we are to regulate if we decide in favour of it. Functionally as well as legally, these are not 'broadcasting' services. They are more like subscription services where the material is received not free-from-air, but as a result of a contract for it. Consequently, content regulation which purports to protect the listener from outrage will (in my view) constantly create virtually insoluble problems of definition.

Michael Law

The previous 4 papers were all presented at ACLA's Seminar, "New Video Entertainment Services - Out of the Sky ... and into the Pubs and Clubs", held on 13 August 1986. Papers were also presented by Michael Owen, Lyall McCase and John Hodgman. It is hoped to publish these in the next issue of the Communications Law Bulletin.

ACLA SEMINAR ON VAEIS
NEW VIDEO ENTERTAINMENT SERVICES

The advent of the new via satellite "closed circuit" television services complements the "coming of age" that Australia achieved with it's ownership of it's own satellite.

The fact that such services are vital to the economic viability of AUSSAT seems to have been overlooked in some early bureaucratic considerations.

These services, represent Australia's first departure from the norm of public broadcasting and it's licensed system of control.

These services will not be operated under the Broadcast and Television Act, which will prevent the issues we are opposed to in public licensing being applied. We define our "anti" issue as:-

1. Protection of the vested interests with the underlying realism that a licence granting can and has been a favoured act on numerous occasions.

2. Protection of economic viability to ensure that consumers are never deprived, because of financial failure, of a service that they have been receiving.
   This is a total fallacy. The fact that there has never been a financial

financial failure in the Australian broadcast industry is not a tribute to licensing. (The only public broadcast licence that has ever been threatened with withdrawal because of financial failure was sold earlier this year for $7 million. Obviously a commercial operator believes it to be commercially viable.)

We are in favour of regulation. This is the only purpose, in our opinion, for which any form of licensing should exist and we maintain this can be effected to the total satisfaction of all interests by the "up link' licensing provisions under the R&T Act.

Free Market Forces

What the legislators have created in providing for "point to point multi-point" distribution under the AUSSAT legislation is the emergence of ourselves, Bond, Holmes a Court and no doubt many more who will be creating and offering programme services.

The commercial winners, in terms of the number of outlets required to operate a profitable venture, will be solely dependent upon the market acceptance of the "product" or programming offered by each operator.

It will be proved that without the alleged protection against loss of services in the event of financial default that whilst there could be future reductions in the number of services on offer, there will be no financial failures under the free market force operation.

The key element for all the new operators will be the number of outlets supplied with a signal. As has been proved in the U.S.A. experience an operator may be incurring substantial trading losses but the number of his subscribers creates considerable asset value. Should any of the operators establish that, say 1,500 outlets are their break even point, with everyone operating on what is basically a fixed cost basis it will mean that every outlet over 1,500 becomes 100% profit. As such, an operator that has achieved, say 1,000 outlets can make a very substantial purchase offer to another operator who has 1,000 outlets.

In short, there is no doubt that the "free market forces" will bring about future rationalisation.

Would anti-monopoly laws in Australia be sufficient to ensure that one takeover merchant could not control the entire market? If they don't they should, and the only other limiting factor then becomes AUSSAT transponder capacity.

It has been suggested that rationalisation could create a reduction in usage of AUSSAT. It may well do but we would be prepared to bet that other new services will be lining up to absorb any available capacity.

Is there an unused or financially failing communications satellite anywhere in the world today? We doubt that there is, or ever will be, in any society that does not seek to restrict commercial availability.

John Hodgman

Mr Hodgman had the comments set out below on some of the other speakers at the seminar:

LIZ FELL - Her criticism of the MDS licence issue to the Real Estate group is argued on the basis that those people are using the facility as a delivery system, in down time, at a dramatic cost and efficiency benefit.

MICHAEL CROSBY - Whilst we are opposed to the imposition of restrictions that essentially enable a performer without talent to earn income simply because they have decided to offer services to people who do not want to buy those services, we do feel that the alleged annual $72 million expended by licensed clubs on "live" entertainment should not be replaced by overseas entertainment telecasts.

SPORTSPLAY - believes and would support up to 70% "local content" requirements as a condition of "up link" licensing but under no circumstances would we provide any local content if it was only to absorb a second rate performance.

We argue that if we are providing any service that involves, say, 98 Australian jobs and 2 overseas performers who collectively are earning as much as the 98, that is a commercial decision, not a content decision.

THE AUSTRALIAN BROADCASTING TRIBUNAL - We were most disturbed at the stated Tribunal position of having "no opinion".

In 1982 we, with many others, expended millions of dollars submitting "pay" television concepts to the Tribunal's hearings which resulted in recommendations

to the then Government that "pay" television be introduced.

Now we hear they have "no opinion" other than to join in the description of our services as "pay" television which from their previous findings could be interpreted as support.

GENERAL - Perhaps our position in the entertainment industry should be as electronic remote delivered cinemas who, instead of having a roll of film delivered by a truck, are receiving it as a transmitted signal which would seem perfectly logical in the satellite age.

Whatever, we are providing entertainment to which the method of delivering the "product" should be totally immaterial.

Club "live" act patrons do not care if Liberace takes a cab or a helicopter to his performing venues. How he gets there is irrelevant.

Finally, we support the view that tobacco company advertising should not be allowed and we promote the view that it is services, like ours, that will provide the replacement revenue to Australian sport if tobacco company sponsorship is to be banned.

SPORTSPLAY, alone, have already contracted to expend in excess of $1 million a year (which is totally new revenue) and we estimate that collectively Australian sport could be receiving up to $10 million a year, within 2 years of service commencement.

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ACLA SEMINAR ON VAEIS
COPYRIGHT LICENSING OF VAEIS

Whilst video and audio entertainment and information services are "radiocommunications" under the present demarcation between the Broadcasting Act and Radiocommunications Act, they are, or shortly will be affirmed as, "broadcasts" for the purposes of the Copyright Act. In addition, such broadcasts will give rise to other copyright uses of the material transmitted, in particular, by public performance.

The Copyright Amendment Bill 1986, passed but proclaimed only in respect of its piracy amendments, provided a new definition of "broadcast", with the apparent intention of including point to multipoint transmissions but excluding point to point transmissions. The new definition in section 10 was to have read:

> "broadcast" means broadcast, other than from point to point by wireless telegraphy."

A new subsection 10(1A) was to have stated:

> "a broadcast shall be taken to be from point to point if it is intended by the broadcaster to be received only by particular equipment at a particular location."

The Explanatory Memorandum had this to say:

> "Amendments to broadcasting legislation, and the introduction of broadcasting via AUSSAT, have highlighted possible uncertainty as to the meaning of the current definition, which provides that "broadcast" means "broadcast by wireless telegraphy". It is proposed to make clear that only transmissions intended to be received by the public (whether the "general" public, within the meaning of the Broadcasting Act 1942, or part of the public) are covered, and not those intended for a particular recipient ("point to point" transmissions) such as, typically, microwave communications."

This explanation offers some assistance in indicating the purpose and intend-

ed effect of the provisions. For example, it appears that the intention was to ensure that transmissions to members of the public would be broadcasts and that genuine point to point transmissions - satellite program services - would not. It may therefore be the case that, interpreted with reliance on s15A of the Acts Interpretation Act, the provisions would have been construed in this way. On the other hand, it is also arguable that no such intention or result is evidenced or achieved in the drafting.

Rather than a clarification of the meaning of "broadcast", it was asserted by a number of commentators that the new proposed provisions confused the issue - both by purporting to exclude what was generally not considered under existing law to be a broadcast (that is point to point transmissions) and by the way in which "point to point" was defined.

Point to point transmissions have never been considered for copyright purposes to be broadcasts, because the "public" element is not satisfied (see, for example, the Berne Convention which refers to an author's right to "broadcast to the public"). One is then faced with two possible interpretations of a proposal to exclude from "broadcast" transmissions which would otherwise have not qualified as "broadcast".

The first interpretation is that the provisions are of no effect whatsoever, because they do not attempt a definition of a "broadcast". Instead, they merely purport to exclude from the ambit of broadcast non-broadcast transmissions. On this interpretation, the provisions amount to a clarification of dubious value. The second interpretation is that the provisions broaden, by necessary implication, the narrow construction to date of "broadcast". This interpretation relies on the need to give the purported exclusion some meaning and effect; namely that a "broadcast" would have to include point to point transmissions, for there to be an effective exclusion.

If the second interpretation were adopted as the intended operation, it is then a matter of considering the effect of defining the excluded "point to point" broadcasts as those "intended to be received only by particular equipment at a particular location".

Arguably, VAEIS, RCTS and RSTV are all intended by the broadcaster to be received only by particular equipment, and at particular locations. Accordingly, giving full effect to the exclusion might have resulted in excluding a variety of transmissions that under existing law would have been construed as "broadcasts". As an alternative, if the exclusion was interpreted to require singularity (i.e. one particular location) many genuine point to point transmissions would not fall within the exclusion and would be considered to be broadcasts, for example where a broadcaster transmits to more than one earth station.

In respect of VAEIS the proposed definition may arguably have excluded such services from the ambit of "broadcast" (although from the Explanatory Memorandum it would appear that such a result was not intended). Furthermore, it appears that without the amendment VAEIS would have been a "broadcast", relying on general principles of "broadcast" and "public" and the discussion of "public" in the Rank decision.

To clarify these issues, the Government has undertaken to introduce consequential amendments to redefine "broadcast". It is expected that the new definition will provide simply that a broadcast is a transmission by wireless telegraphy to the public. It is intended that the new definition will be introduced in miscellaneous amendments and that the Copyright Amendment Bill will be proclaimed to take effect at the same time.

Under such a definition of "broadcast", VAEIS will clearly be included. Accordingly, VAEIS providers will need to obtain the licence of copyright owners to "broadcast" their copyright material.

This does not mean, however, that VAEIS providers will own the copyright in their "broadcasts". Ownership of copyright in broadcasts depends on satisfying the criteria in s91; VAEIS providers can only own the copyright in the "broadcast" if they are "prescribed" under s91.

As far as VAEIS receivers are concerned, they will have to obtain public performance licences, for example where the received material is "performed" in pubs and registered clubs.

Under s27, broadcasting is deemed not to constitute a performance of any visual images or sounds that are seen or heard. Accordingly, whilst VAEIS providers will be broadcasting copyright material, they are not at the same time causing that material to be seen/heard in public.

However, s27(3) provides that, where an occupier of premises allows a receiving apparatus to be situated within his prem-

ises whereby a work or other subject-matter may be performed, he is deemed to be the person giving the performance. Accordingly, any persons who contracts with VAEIS providers will be deemed to be "performers" of copyright material. If that performance occurs in public, for example a pub or club, the occupier will generally require a public performance licence.

Pubs and clubs are used to APRA licences and the new services will therefore not involve any unfamiliar mechanism to VAEIS users as far as public performance of music made available through VAEIS is concerned.

However, VAEIS users are also users of films and sound recordings which will also be "publicly performed". They may not be able to rely on s199 of the Act in regard to this material.

Section 199(2) provides:

> "A person who, by the reception of a television broadcast or sound broadcast, causes a sound recording to be heard in public does not, by doing so, infringe the copyright if any, in that recording under Part IV."

Section 199(3) provides:

> "A person who, by the reception of an authorised television broadcast, causes a cinematograph film to be seen or heard in public shall be treated, in any proceedings for infringement of the copyright, if any, in the film under Part IV, as if he had been the holder of a licence granted by the owner of that copyright to cause the film to be seen or heard in public by the reception of the broadcast."

For the purposes of s199, "broadcast" has been accorded the following special meaning:

> "in the case of a television broadcast, a broadcast made by the ABC, the SBS, the holder of a licence for a television station or "by a person prescribed for the purposes of subparagraph 91(a)(iii)"; and
>
> in the case of a sound broadcast, a broadcast made by the ABC, the SBS, the holder of a licence for a broadcasting station or "by a person prescribed for the purposes of subparagraph 91(b)(iii)"."

As a result of the operation of s199 (2) and (3), pubs and clubs have never had to obtain public performance licences for films and sound recordings that are performed by reception of "free to air" broadcasts.

Whilst VAEIS users can continue to rely on s199(2) and (3) in the case of reception of "free to air" TV etc, the VAEIS providers will have to be both holders of a radiocommunications licence and "prescribed" under s91, if users are to be able to rely on s199(2) and (3) in the case of their VAEIS programming.

It appears that no person has yet been "prescribed" under s91 and it is not known whether any VAEIS provider has sought to be prescribed or indeed whether prescription is a matter beyond their control. Because of the very real difficulties in obtaining public performance licences in relation to cinematograph films (where there is no collecting society to facilitate the granting of licences), it is interesting to speculate whether VAEIS users have raised this point with providers. It is also interesting to speculate whether any VAEIS provider has expressly authorised the public performance of the materials which it transmits on its service.

Catriona Hughes

NOVEMBER 5-7 CONFERENCE "AUSSAT '86 - NEW HORIZONS"

From 5-7 November 1986 AUSSAT is conducting a conference under the title "AUSSAT '86 - New Horizons". It is seeking submissions on the areas of network implementation and management, applications and systems development. The applications of the satellite system to be considered include broadcasting, information services, private networking and teleconferencing.

There will also be an AUSSAT users' exhibition with some 37 stands. The conference will be held at the Hyatt Kingsgate Hotel, Kings Cross, Sydne. Inquiries from AUSSAT's Public Affairs Department, GPO Box 1512 Sydney, NSW 2000, Tel: 238 7800, Telex: 2 6921.

ADDRESS TO AUSTRALIAN COMMUNICATIONS LAW ASSOCIATION - JULY 1986
By Brian White, Managing Director, Consolidated Broadcasting Corporation

If you can have such a thing, commercial radio in Australia is currently an exciting mess.

It is exciting because of what is happening at the programming and management levels. It is a mess because nobody has the faintest idea which direction Government policy is taking.

1986 is likely to be remembered in this industry for a long time. It has been the year which saw government rush towards large scale expansion of services - in country Australia at least - then back right off, but then start tiptoeing back towards it. It might be - and I know these metaphors are getting a bit florid - the year they opened Pandora's Box.

It may end up being the year in which commercial radio services to regional Australia, as well as TV, begin to expand quite rapidly.

It may also be the year in which a change could start in the capital cities, with most broadcasting being on the FM band. It may be the year that heralds a change in the number of stations that can be owned by individual corporations.

If most of these things happen, it will be because government has finally cleaned up a mess, which has been growing for generations.

In being critical of government, I mean that criticism to apply to every body which has controlled the administration of broadcasting in Australia. It has been pointed out only this past week that one of the heaviest restrictions in the existing legislation - the limits on ownership - came into force in the thirties, when radio was about as fledgling as an industry can be. But the same limitations apply today, as then: no more than four capital city stations in the one set of hands, no more than four stations in any one state, no more than eight stations around Australia. If that was a proportional calculation fifty years ago, to apply the same proportions today could mean limits of no more than ten capital city stations, no more than ten in one state, and no more than twenty around Australia. Let me say I am not advocating that - because with only 138 commercial stations currently in existence, seven groups could eat up the whole nation. But that was the way things were back in the thirties.

Time changes everything. Nothing could bring that home more than the reminders this week that when the Cahill Expressway was built, its construction was lauded by leader writers in the Sydney Morning Herald. And Harry Jensen reckons he won an election for Lord Mayor of Sydney back in the sixties on a platform which called for the demolition of the Queen Victoria building. Good public servants managed to avoid carrying out the destruction order and instead have kept a workforce busy for five years rebuilding it.

This is not dissimilar to broadcasting policy in Australia.

No government did anything very sensible about broadcasting legislation for the best part of forty years. It was one restriction, one hurdle, after another. Ministers came and went like the seasons, but the faithful public servants stayed pretty much the same, rebuilding, renovating, keeping the grand old structure up. Between 1975 and the arrival of the Hawke Government, we had a procession of ministers - Doug McClelland, Moss Cass, Reg Withers, Vic Garland, Eric Robinson, Tony Staley and Ian Sinclair. With so much change, power rested entirely in the hands of the public servants. Michael Duffy has now had the portfolio three years and has impressed all who deal with him with his pragmatic and sensible approach, but it is still a mess and only an unbounded optimist, like me, can believe it will ever end.

The story of FM is indicative. We tried it, back in the fifties, on an experimental basis but only devotees ever got to hear it. Then government decided that contrary to universal policy, FM should go on the UHF band, and that regional TV should be allowed to use VHF. Nothing happened with FM, but regional TV moved into the space given it, and thirty years later they're trying to clean up a mess of their own making. It is quite droll to read the report of the Department of Communications Forward Development Unit and see the gentle, unkind but accurate, things they have to say about past policy

- regrettably made by people very much like themselves.

So we have a situation today where it is claimed by government, that there is very little that can be done to expand FM to the full until all television is cleared of what is known as Band Two - that part of the broadcasting spectrum which, everywhere else in the western world, is restricted to FM. The Communications Department's boffins are working up a grand new plan for the allocation of broadcast frequencies. Until it is complete, they say little or nothing more can be done even to think about increasing FM services in the cities.

My simple little untechnical mind keeps wandering back to a conundrum however, which is this: in Australia, all up, there are only about 250 radio stations - AM and FM, commercial, national and public. In the United States, which is only slightly bigger than we are, there are more than 9,000. One reason for this is that the Americans are much more flexible about what is known as separation, which can be described as the distance on the spectrum separating one signal from another. Broadly, stations are closer together in American than they are here. But the outcome is that instead of urban conglomerates like Sydney - Newcastle - Wollongong having about thirty broadcast signals, they could have a hundred or more. Instead of two commercial FM stations in Sydney, there could be several dozen.

This creates another conundrum. In recent years, it has become fashionable for elements of the government and elsewhere to suggest that it is commercial radio which keeps on trumpeting about the need for commercial viability of the industry. But we have been playing under their rules, and the industry has gone in certain directions because of them. The way viability has come to be interpreted, however, is that the commercial industry doesn't want any expansion, or very little. In fact it is the commercial industry which has kept hammering away, trying to establish the real situation with frequency availability, and which has argued that there could perhaps be as many as 700 or 800 FM stations in Australia even under the existing rules or a slight modification of them, rather than the handful there are now.

The passion for FM is quite simple. It produces a better signal.

My colleagues in the FM branch of the industry, while agreeing with this argue that the real differences lies in better programming and better management. To an old talker like me, I regret to say that this notion of better programming seems only to mean more ways to play more music. I remember back in his AM days when Rod Muir used to offer his disc jockeys or "jox" as we called them, a bottle of champagne if they could get fifteen records into the hour.

Better management is not so easy to deny. It is certainly true that many AM stations have had to look at leaner and more efficient operations than they had before FM arrived. The other night I came across an old advertisement for 2SM, where I worked in the late seventies. It consisted of a mass portrait of the staff, and there were eighty faces there. The number now would be probably less than forty. The only big employers surviving are the Macquarie group and my own, but in our case, because of our method of operation we are a lot leaner than they are.

Both Macquarie and ourselves are bigger than the others because the moment music ceases to be your main ingredient, you need more people. But by constructing our network operation, we are running with less than 120 people, while Macquarie's two stations between them would have close to 160.

There are probably some dinosaurs still out there, once big and flush, who nowadays are inefficient. In one part, that has to do with the very human element. Radio stations which have been in the same hands for many years accumulate ways of doing things which they find hard to change. That almost invariably means people are employed to do things no longer really necessary, like firemen on an electric train.

To give one example of the very real problems which can exist - no commercial FM station in Australia is much more than five years old, built with technology still very up to date. When I took over 3AW five years ago, it was relying on equipment which was up to 25 years old; 3AK in our group has been operating in the same way, and so has 2UE. The first thing this means is that repairs and maintenance are extremely high costs, and you need more people to carry them out. Not enough AM stations have yet modernised themselves properly, but these would now be caught in the situation where the only way out is heavy capital expenditure, which during tough times - and these have been pretty

tough times for all electronic media - is money not easily come by.

I think one other thing needs to be emphasised about the radio industry, especially in its current state of very great uncertainty. And that is that it could not be more diverse. It ranges from the big capital city stations with turnovers of more than ten million dollars each, to little "ma and pa" country operators who are lucky to see revenue of $400,000. Of the 138 commercial stations in Australia, 28 last year came in with revenue of less than half a million.

One intriguing thing about them though is that I have never heard of anyone sustaining a capital loss on the sale of a radio station in this country.

I guess the final question is how do we try to fix it?

In a book I wrote more than ten years ago, I suggested that the Broadcasting Control Board, nowadays called the Broadcasting Tribunal, could be just as efficient if it employed about half a dozen people instead of the platoons they had. I stand by that view, because it seems to me that the Tribunal is now thoroughly bogged down under the weight of administrative issues on its plate. It has recently circulated draft plans for the supply, to it, of financial information from television stations. Currently, a handful of pages is what is required and supplied. The draft proposal consists of some fifty pages, with sixty pages of explanatory notes.

Is anyone going to be better off?

One wonders why the example of the American equivalent, the Federal Communications Commission or FCC, is not followed. The FCC, recognising the enormous diversity of broadcasting in America, has reduced its role to the point where it is like a SWAT unit, rather than an entire police force.

Ownership and control rules should be changed drastically. I recognise that I am saying that as a representative of Kerry Packer, although it wouldn't hurt to recognise that the excitement in this industry which I referred to at the start of this address stems in large part from his decision to buy into radio, and particularly into AM.

But I also have interests of my own in some radio stations in Victoria, in partnership with Mark Day. Under the existing legislation, Mark's company cannot get any bigger in Victoria, because he already now owns his maximum of four stations. Mr Packer could own three more Victorian stations before reaching his limit there, ergo, Mark Day's company is bigger than Mr Packer's.

The industry is weighed under with regulations of one kind or another and faces difficulties from countless sources. Most Sydney AM stations, for example, have their transmitters and masts on the shores of Homebush Bay, in swampland, which is ideal for AM transmission. The state government wants us all out of there. 2UE wants to move itself to the grounds of Channel 9 at Willoughby, but the local Council has declined to rezone the Channel 9 patch of land, currently zoned specifically for television purposes, because radio isn't television.

If I look as harried as most executives - in radio and television - maybe what I have said will help you understand why.

ACLA NEWS
OCTOBER 30 ACLA GM AND DINNER

The Annual General Meeting of the Australian Communications Law Association will be held at 6.30 p.m. on 30 October 1986 at Sandimans Restaurant, the Pitt Club, 49 Market Street, Sydney (next to the State Theatre).

The meeting will be followed by a dinner to be addressed by Mr Mark Armstrong, a member of the Australian Broadcasting Tribunal. Mr Armstrong will speak on "Who Will Guard the Guardians of the Guardian and also Who Will Guard Them? The Chilling and Expensive Effects of all Laws so far made to Encourage or Protect the Media and Freedom of Speech". This will be a roaming, somewhat facetious, and often humorous look at bills of rights, communications and competition.

The cost will be $35 for members and $38 for non-members.

Notices have been sent to financial members. Others are invited to attend what should be an enjoyable occasion. All enquiries to Ros Gonczi on 660 1645.

GOVERNMENT OPTS FOR AGGREGATION

On 20 May 1986 the Minister for Communications, Mr Michael Duffy, made a major statement on the future development of Regional Commercial Television Services to the House of Representatives.

In May 1985 the Minister had announced that equalisation of commercial television services was the Government's highest priority in broadcasting policy. In July 1985 the Forward Development Unit ("FDU") of the Department of Communications delivered to the Minister a report entitled "Future Developments for Commercial Television", which was subsequently published. The Ministerial statement arose out of the FDU's report and the Government's priorities. First, the Minister stated that in the decade 1986 to 1996 the Government was seeking to achieve three strategic goals:

1. provide services in those regional areas comparable to those in capital cities - this is what we call equalisation;

2. create larger, more viable markets in regional Australia by means of aggregation; and

3. prevent extension of existing regional monopolies; that is, encourage competition.

In relation to the equalisation of services, the Minister said that in the states of Queensland, New South Wales and Victoria the Government expected to achieve three commercial television services generally around 1988. In the less populated states development was expected to be slower and in small isolated areas only two services might initially be available. However, he said that nearly all Australia in regional areas could expect at least one extra service by 1990, and that most would have two.

The FDU report had indicated two means of moving towards the equalisation. One was aggregation of existing markets in order to provide a sufficient population growth for competitive services and the other was multi-channel services ("MCS"). This would allow non-competitive, regional licensees to provide up to three services within their existing markets instead of only one.

The Government clearly favours aggregation and financial incentives have been given to encourage licensees to opt for it and to implement aggregation at an early stage. Contrary to the figures put forward by the Regional Television Association, the Government noted that the growth of regional stations' revenue has ranged between 9.3% and 13.9% per annum from 1975/76 to 1983/84. The Minister said that it was a quite modest assumption that long term revenue increases, in real terms by an average of 4%, was sufficient to provide a financial base for aggregation in most markets.

The Government's plan is for regional stations to make a choice between aggregation and MCS. A draft indicative plan of approved markets on the basis of which investors and affected licensees will make decisions related to equalisations would be submitted for consideration by the Government by 31 July 1986 and then published. A final plan will be submitted on 31 October 1986. If no licensee in an approved market chooses aggregation, all licensees will be granted MCS permits. However, if one licensee in a market chooses aggregation all other licensees in that market will also be obliged to aggregate. The decision of one licensee is to be taken as prima facie evidence that the aggregation involved is viable.

The Government then expects licensees to know their equalisation paths by 31 January 1987 and to commit themselves to their implementation plans throughout 1987 and 1988. MCS permits will be re-issued in approved markets only until 1996, by which time three competitive services would be required throughout such markets.

As far as amendment to the Broadcasting Act is concerned there will be two major changes. The first will be the repeal of the Supplementary Television Licence Scheme. The Minister is to write to the Chairman of the Australian Broadcasting Tribunal and other interested parties suggesting that the only television supplementary inquiry yet commenced, being one commenced in Canberra, be deferred pending this legislation. The same will not necessarily apply in relation to radio, in which area parties are awaiting the release of the FDU's report and future developments in commercial radio.

The second major change will be to

facilitate the indicative plan. The Minister for Communications will be empowered to authorise multi-channelled services by use of supplementary television permits, each allowing for the provision of an additional service. The Australian Broadcasting Tribunal will not be used. Such permits will:

(a) not be available for metropolitan areas except in Tasmania;

(b) be issued for one year only and require annual re-issue;

(c) will allow for one or two new services in any one area;

(d) will require the holder to commence transmission at times to be set by the Australian Broadcasting Tribunal and under similar undertakings;

(e) involve similar program standards to those for commercial television licences;

(f) will not be capable of being transferred or sold; and

(g) will incur licence fees on gross earnings earned through the permit and the main licence.

Another change will be to enable consolidation of licences in a case where the same company owns 100% of two contiguous licences. There will also be automatic conversion of "Old System" Broadcasting and Television Act licences to "New System" service-based Broadcasting Act licences.

The financial incentives referred to above will be the exemptions from sales tax of all Ultra Higher Frequency television transmitters purchased specifically for equalisation. This has been costed at about $10 million. Further, if licensees opt for aggregation their fees paid under the Television Licence Fees Act 1964 will be rebated between 1986/87 and 1989/90. The rebates will be calculated on a tapered scale falling from a maximum of 100% in the first year to 25% in the last. This has been costed at approximately $22 million. There will be provision for the Tribunal's monitoring and reporting on progress towards aggregation at licence renewal inquiries.

To assist in aggregation the Government has agreed to a capital works program to upgrade Commonwealth transmitting stations to accommodate equalisation and the ABC's second radio network and clearance of Band II television channels in order to provide for commercial FM and radio services.

The Minister specifically said that the Government did not intend to in any way regulate networking this time, as it was adequately covered by the Trade Practices Act 1974.

Naturally the issue which will run hand in hand with aggregation will be that of ownership and control. The FDU is currently considering amendment to the current ownership and control rules in the Broadcasting Act. It would appear that this report has been completed and shall be given to the Government by the end of July 1986. The Minister has agreed that an announcement will be made on ownership and control changes by 31 October 1986. However, it is likely that such a statement will only relate to regional commercial television stations and may not address broad issues.

The Government has decided to use UHF channels for each of the two new commercial television services in given areas, although the existing ABC and commercial television stations will probably remain on the VHF frequency. However in some areas, such as Wollongong and Newcastle, where the existing VHF services may need to be cleared to make way for development of new radio services it is likely that all television services will be on UHF.

Although not covered in the Minister's statement, he has stated that the FDU's report on the future directions for commercial radio should be available by the end of this year.

NOTE TO MELBOURNE ACLA MEMBERS

Would any Melbourne ACLA members who require past issues of the Bulletin please contact ACLA's Administrative Secretary, Ros Gonczi, on (02) 660 1645 or ACLA, PO Box K541, Haymarket NSW 2000.

SYDNEY AND MELBOURNE LICENCE RENEWAL INQUIRIES: REPORT SUMMARY

In December 1985 the Australian Broadcasting Tribunal ("the Tribunal") announced its decision to renew the licences of TCN-9, ATN-7, GTV-9 and HSV-7 for a further three years. Subsequently, the Tribunal's report outlining the reasons for its decision was released.

Although the Tribunal considered applications for the renewal of the licences of TEN-10 in Sydney and ATV-10 in Melbourne the results of its inquiries have not yet been announced, awaiting the result of its inquiry into the restructuring of News Corporation Limited. However, inquiries into those two licence renewals were not joined with the restructuring inquiry.

1. Preliminary Matters

A number of preliminary points were considered in relation to the licence renewals. Those dealt with here include the right to participate at inquiries and whether the inquires for renewal of licences of stations in the same city could be conducted concurrently.

1.2 Joint Hearings

On the latter point the Tribunal said that the inquiries should be conducted separately, although the hearings for each station in the two cities followed each other. This was because different issues arose at the inquiries.

1.3 Participation

In relation to participation the Tribunal followed the principles set out in its report on the licence renewal inquiry into commercial television station TCN-9 (No. 11/82 R(T)). The two relevant matters were the general nature of the person's interest, the subject matter of the proceedings and the relevance of the case which was to be presented in those proceedings. Following the enactment of the Broadcasting and Television Amendment Act 1985, and in particular the amendments to section 22AA by that Act, a person's interest is no longer relevant.

In determining relevance the Tribunal said that the test was whether there was any real and significant connection between a matter that a person proposed to pursue at a licence renewal hearing and the issues which were to be considered by the Tribunal. The Tribunal said that it was required to make a judgment about the practical likelihood of it being assisted in its consideration of an issue relating to the renewal of a licence by such participation.

The relevant grounds are those set out in ss86(11B) and 83(5)(b) of the Broadcasting Act. ("the Act"). Such issues are:

(a) The licensee's undertaking to provide an adequate and comprehensive service. Consideration of that matter did not extend to making programming decisions for television stations, but rather consideration of whether -

  (i) the licensee is properly informed about its market;

  (ii) whether the licensee was capable of analysing and applying this information;

  (iii) the soundness of the process by which decisions about programming were made;

  (iv) how well the service compares with that provided in similar markets;

  (v) evidence of significant public concern about any areas of programming; and

  (vi) the way in which resources have been allocated to the acquisition and production of programs, bearing in mind the nature of the market.

(b) Circumstances which would justify the Tribunal in not renewing a licence for three years.

(c) Evidence which would lead to a decision by the Tribunal to insert a condition on the licence, for example, to remedy an aspect of programming performance.

(d) Matters included by the Tribunal in

its previous public report on particular aspects of the licensee's performance, together with observations or recommendations by it intended to bring about improvements in the future.

As far as relevance was concerned, the Tribunal referred to its obligations under s25(1) of the Act to make a thorough investigation, and also to conduct an expeditious and just hearing. It stated that usually a just and expeditious inquiry would require that the submittor be confined to the relevant matters raised in the submission which the Tribunal considers appropriate to investigate at a renewal inquiry.

2. Ascertainment

In relation to ascertainment the Tribunal relied on remarks made in its report into the Adelaide Licence Renewals 1984 (No. 308/84). Ascertainment was defined as a gathering of information about the circumstances of a market, and applying this information when making program judgments. The Tribunal gave greater prominence to the second part of the undertaking pursuant to s83(5)(b) of the Act at the Sydney and Melbourne licence renewals, than it had in Adelaide, in view of the fact that the Sydney and Melbourne stations provide the majority of Australian programs to other licensees.

However, on ascertainment, the Tribunal reiterated that the undertaking to provide an adequate and comprehensive service effectively required licensees, through audience and other research and by other means, to acquire detailed insights into the nature and diversity of the community being served and to go beyond the material presented in the Tribunal's background papers at the inquiry. Such knowledge should then be drawn upon in designing a service.

The Tribunal pointed out that in relation to the Sydney and Melbourne licensees they had a dual role in providing a television service for the communities they served and in providing the majority of Australian and overseas programming. This meant that at times they were arguing from two different points of view on ascertainment. It noted that as a major part of the licensees' programming effort was involved in providing programs for their networks this tended to dominate the stations' arguments.

Whilst the Tribunal endorsed the licensee's attitude to providing an adequate and comprehensive service in the manner stated by ATN-7, which was to provide a mainstream commercial television service based on programming which was such that would provide the most satisfactory service for most of the community for most of the time, it also endorsed comments from the Green Report on the requirement that the commercial sector should introduce a measure of innovation and experimentation. This, it said, would assist in achieving a diversity of programming in all three sectors of the broadcasting industry.

The Nine Network at both the TCN-9 and GTV-9 hearings criticised the Tribunal's perceived over emphasis on research studies.

The Tribunal said that it was clear from the wording of the undertaking that whatever methodology was employed a licensee had an obligation to have regard to the nature and diversity of interest of the community it was licensed to serve. The Tribunal considered this required a knowledge of such matters and some relationship between this knowledge and program decision making. Reliance on ratings data did not sufficiently discharge a licensee's ascertainment obligations. It was also open to the Tribunal to examine the licensee's practical interpretation of its ascertainment obligation and to challenge its methods of ascertainment with other evidence which suggested the service being provided was not adequate and comprehensive.

In relation to special interest programming, the Tribunal noted that licensees were required to produce special interest programming to satisfactorily fulfill their undertaking to provide an adequate and comprehensive service. This entailed supporting programs which might not be initially successful in economic terms. As far as special interest programming was concerned, in a multi-station market, it was reasonable that only one licensee met a particular need. However, it was not reasonable to rely solely on the ABC and SBS to meet such needs.

3. Encouragement of Australian Creative Resources

The Tribunal stated that this part of the undertaking gave rise to obligations on licensees beyond showing Australian programs and employing Australians. The

Tribunal endorsed the statement of Actors Equity that the Sydney and Melbourne licensees had a duty to innovate and push back barriers. The Tribunal suggested that this could be done by providing opportunities for new program ideas to be shown to the public, by developing innovative ideas and encouraging production houses to try out new ideas, and by encouraging and training new talent.

The Tribunal recognised the importance of drama on Australian television and stated that licensees must take financial risks to ensure that they met at least the minimum Australian drama content. This remark was specifically addressed to the Nine Network, which had only achieved this only through Tribunal dispensation.

4. News and Current Affairs

At the Sydney licence renewals one major issue was the role of licensees in the training of journalists. Whilst ATN-7 employed 3 cadet journalists, neither TEN-10 or TCN-9 employed any. They told the Tribunal they did not consider that metropolitan television stations were an appropriate place for the training of journalists. The Tribunal followed its comments in its Self Regulation Report, that it saw the employment and training of journalists as part of a station's obligation to provide the public with informed and impartial news and current affairs. It also considered that the training of journalists was one of the many ways in which a station might use, and encourage the use of, Australian creative resources, in fulfilment of part of its undertaking.

5. Classification of Television Programs

There was considerable evidence in relation to classification of television programs by licensees, particularly by TEN-10. The Tribunal noted the importance of this and said that it must be undertaken by people in touch with community standards and with sensitivity to shifts in community values. People undertaking this task would need contact with community organisations.

6. Reliance on Facts' Commercial Acceptances Division

Each of the licensees had continued to rely on the assessment of commercials by the Federation of Australian Commercial Television Stations ("FACTS") Commercial Acceptance Division ("CAD"). The Australian Consumers Association ("ACA") submitted that if it was established that a licensee had breached the television programming and advertising standards it could not claim as an ameliorating factor that the breaches were due to either reasonable reliance and information supplied by another person or the act or default of another person, in relation to which the licensee took reasonable precautions and exercised due diligence to avoid, within the terms of POS 06.

The ACA submitted that the licensees reliance on the CAD was not reasonable and they had not taken reasonable precautions and exercised due diligence.

FACTS had applied to the Trade Practices Commission for authorisation of the procedures of its CAD and the Trade Practices Commission had issued a draft determination and summary of reasons on 11 May, 1984. During the time prior to this draft determination the CAD had operated under an interim authorisation from the Trade Practices Commission. Following receipt of the draft determination FACTS withdrew its application and the interim authorisation lapsed. FACTS had then advised its members that the submission of advertisements to the CAD was no longer mandatory. However, each of the stations unilaterally decided to only televise commercials which had been submitted to, and approved by, the CAD.

The ACA had required the Tribunal to impose undertakings on the licensees that they would set up independent comprehensive checking systems to ensure compliance of advertisements with the Television Program Standards, in addition to requiring policy statements in relation to sexism, advertising of non-nutritional food, etc.

The Tribunal found that there were very few cases of CAD approved advertisements which breached the requirements of the Program Standards or the general law. Therefore, it considered it reasonable for licensees to continue to rely on the assessments of the CAD. It also said that it was appropriate to take this reliance into account when considering the weight to be attached to any breach by an advertisement that had been classified by the CAD.

The Tribunal said that it was not appropriate for it to pass judgment on the merits of the Trade Practices application. The Tribunal said that it was impor-

tant that licensees ensured that the CAD was sensitive to the concerns and attitudes of the community and in this regard suggested that it would assist licensees and the CAD if licensees met regularly on an organised basis with community and consumer groups. It also suggested that the complaints procedure of the station should be widely publicised. Only GTV-9 had done this prior to the hearing.

7. The Nine Network and Drama Content

The licences of both TCN-9 and GTV-9 were renewed for the full period of 3 years. However, the Tribunal recorded its dissatisfaction with their performance and stated that it would continue to monitor such performance. If it was found to be unsatisfactory the Tribunal said that it would use its powers pursuant to s85(1) of the Act to impose conditions on the licence relating to Australian drama. It characterised the Nine Network's drama strategies as unsound and said that whilst such strategies might save money they did not secure the production of successful peak time drama programs and fulfilment of the quota. The Tribunal said that a licensee must take sufficient financial risks to ensure that it met at least its minimum drama content.

The Nine Network had suggested that there should be greater flexibility to enable resources to be used in the development of other types of programming. However, the Tribunal noted the reliance of the Nine Network on television drama (largely imported) as a type of programming, and consequently expected the Network to commit greater resources to the production of Australian drama and the encouragement of the local drama industry. It stated that the major reason for the Network's current difficulties in the serial drama area appeared to be reliance on the success of a single serial, rather than adopting the safer strategy of developing more than one serial. In addition, it said that the Network would seem to have a lesser commitment to the encouragement of necessary creative talent and the type of creative environment required to produce successful indigenous drama. The Network seemed to be out of touch with conditions now required by creative talent, such as writers, in order to produce their best and most commercially viable work. In particular, it referred to evidence from the Australian Writers Guild to this effect.

Julie James Bailey dissented from the decision made by the majority of the Tribunal to renew the licences for TCN-9 and GTV-9 for a full term. Her reasons for that decision were given in relation to the TCN-9 renewal.

In particular, she found that these stations had failed to comply with their undertaking to encourage the use of Australian creative resources. She said that TCN-9 did not appear to recognise the importance of Australian drama as a means by which Australian lifestyle and values could be represented on television. Nor did it appear to give a great deal of commitment to developing people and ideas in order to improve the content of its programs. She said that it was important in the public interest that the stations took a much more responsible role in developing the skills and creative talent ncessary for the production of Australian television programs and, in particular, drama.

Ms James Bailey also said that there should be further investigation into management capability at the station, and particularly that of Mr K.F.B. Packer, the Chairman of TCN-9 and GTV-9. She considered that Mr Packer ought to have been required to give evidence at the hearing. She also questioned the fitness and propriety of the licensee, for example, the perceived lack of candour of the Nine Network in placing emphasis on its live variety programs "New Faces" and the "Mike Walsh Show", both of which were cancelled following the hearing.

8. Public Interest Advocacy Centre Submission

The Public Interest Advocacy Centre ("PIAC") had lodged a submission at the TCN-9 inquiry relating to the fitness and propriety of Mr K.F.B. Packer. The submission raised matters arising from the Costigan Royal Commission. During a preliminary hearing the Tribunal decided that, apart from a film tax minimisation scheme, it should not make any further investigation of the matters raised by PIAC.

The film tax minimisation scheme was one which Mr Packer had admitted two of his companies were parties to. The effect of it was that for a total outlay of $68,000 the two companies concerned had claimed deductions over two years totalling $1.8 million. The claims for deductions had failed, as the particular film did not earn any income, as required by Division 10BA of the Income Tax Assessment

Act, in the relevant years. However, it was pointed out that neither TCN-9 or any other part of the Consolidated Press Group had invested in this scheme.

The Tribunal found that it was appropriate for it to investigate this scheme, although it did not necessarily involve criminal conduct. Trustworthiness of a person in Mr Packer's position was relevant to fitness and propriety. It was also tied in with the undertaking given by licensees in relation to the use of Australian creative resources. It found that there was no evidence that either Mr Packer or his two companies had not been honest with the Commissioner for Taxation in relation to the film tax minimisation scheme and that there was no connection between the scheme and the provision of Australian programs by the licensees.

However, the Tribunal sounded a warning for the future. It said that it would take into account on the issue of fitness and propriety participation by licensees, or persons possessing significant interests in licensees, in artificial schemes which attempted to avoid the obligations and limitations imposed by the Act. In the context of the News Limited restructuring inquiry this appeared to sound an ominous note. In relation to the film tax minimisation scheme Mr Packer had relied on professional advice. The Tribunal said that this would not be a sufficient excuse in relation to matters regulated by the Act.

9. Max Gillies

Evidence had been led that TCN-9 had cancelled an appearance by the comedian Max Gillies on the Mike Walsh Show because of contemplated defamation proceedings by Mr Packer, and TCN-9, against Mr Gillies and the Australian Broadcasting Corporation arising out of an episode of the Gillies Report. The evidence was that the decision to cancel this appearance was made on legal, and not artistic and programming, grounds. The Tribunal said that whilst the private interest of a licensee, its directors or management, were recognised as entering into programming decisions from time to time this should be done objectively, balancing the private interests of those persons with the public interest in the provision of an adequate and comprehensive service.

10. Conclusion

Whilst the Tribunal in this report covered a very full range of issues, it would appear to have decided that caution was appropriate and that warnings were sufficient. On the two issues of ascertainment and drama content the Nine Network seemed to have disregarded the Tribunal's requirements. In the absence of an independent party prepared to invest substantial sums to show (possibly) that its stations were not providing any adequate and comprehensive service there appears to be no reason why this attitude should not continue.

Robyn Durie

NEWS

NEW COMMUNICATION SERVICES

The Government has foreshadowed the transmission of new communication services as part of existing radio and television signals. These services are to be known as Ancillary Communication Services and are expected to be provided by existing broadcasters, independent operators and entrepreneurs. The first may commence operation later this year.

It is anticipated the services will include commercial and public radio, educational tutorials, data/information distribution and background music. They will be transmitted either to simple receivers or attachments to existing television or FM radio receivers.

At present most television or FM radio signals can be used to transmit both broadcasting and non-broadcasting material. New technology now permits more efficient use of this capacity by providing additional channels at a modest cost and with potential benefits.

OWNERSHIP AND CONTROL OF COMMERCIAL TELEVISION - FUTURE POLICY DIRECTIONS

On 31 July 1986 the Forward Development Unit ("FDU") of the Department of Communication delivered its report on its study of ownership and control rules for commercial television to the Minister for Communications.

The purpose of the study was to:

(a) evaluate the effectiveness of the current regulation of ownership and control of commercial television stations by the Broadcasting Act 1942 ("the Act");

(b) identify principles which should underlie any new system of regulation; and

(c) develop alternative proposals.

The study was to provide information, and identify issues and options, but not make recommendations.

Broad Recommendations

The FDU, however, did make a number of broad suggestions or recommendations. These were:

(a) the Act should contain a statement of the broad objectives of the regulation of ownership and control.

(b) the current '2 station rule' should be replaced by either a rule allowing a person to hold interests in licences serving up to a specified population limit, or to categorise licences according to market size and allow ownership of certain numbers of stations of such categories.

(c) any rule in relation to cross media ownership should be discretionary, and tied to the public interest.

(d) there should be a relaxation of the foreign ownership rules to permit ownership of commercial television stations by long standing residents of Australia, and perhaps by 'naturalised companies'.

(e) the threshold of foreign ownership permitted should be lowered from 20% to 15% in aggregate.

(f) the current prescribed interest level should be lifted from 5% to at least 15%.

(g) directors and chief executive officers of licensee companies should be treated as having prescribed interests in those licences.

(h) the interests of associates of companies having an interest in a licensee should be taken into account when considering prescribed interests, as should those of parties to certain trusts.

(i) the Tribunal's approval role should be limited to transactions having a possible adverse affect on the service provided by a licensee; and

(j) approval of acquisitions by the Tribunal should only be mandatory if an interest in a licensee of 50% or more is acquired.

Introduction

The FDU started its report by outlining the present ownership and control rules. The licensees of commercial television stations must be Australian companies with share capital. Persons were then prevented from holding "prescribed interests" in more than two commercial television stations in Australia, one in a Territory or one in the capital city of a state. Persons then had prescribed interests if they were licensees, able to directly or indirectly control a licensee, its operations or programs or had a direct or indirect interest of more than 5% of votes, shares or financial interests in licensee companies. Every acquisition or increase in a "prescribed interest", through a share or loan transaction, was subject to approval by the Australian Broadcasting Tribunal ("the Tribunal").

General Principles

The FDU said there had never been a comprehensive statement by any Government of the purposes of the ownership and control regulations. From past statements by Ministers, regulatory authorities and committees of inquiry it identified the following key principles underlying the present system of regulation:

(a) the need to avoid undue concentration of ownership or control of commercial television;

(b) promotion of local ownership, and favouring "independent" applicants;

(c) limiting foreign ownership and preventing foreign control;

(d) preserving the integrity of licensing decisions; and

(e) encouraging a diverse shareholding of licensee companies.

Another issue often raised was that of cross media ownership.

The FDU said that the objectives of promotion of local ownership and encouraging a diverse shareholding within licensee companies were no longer attainable. On the other hand, the avoidance of undue concentration of ownership or control and limiting foreign ownership were examples of policy objectives which were still highly relevant, although they would benefit from restatement. These key principles were not regarded by the FDU as a sufficient basis for understanding the current rules. It considered that it was necessary to have "system objectives" which would clearly set out the type of interest which was subject to regulation and in what markets. The FDU said that ownership was a well defined concept and regulation of ownership could be simple and effective. Regulation of "control" was more difficult. It seemed to the FDU sensible to relate ownership and control rules to persons able to affect services and programs, the output, of the system.

Limits on Interests

The principal policy associated with the limits on prescribed interests was identified as the avoidance of undue concentration of ownership or control of commercial television. As the Tribunal had pointed out in its Satellite Program Services report ("SPS report") the "2 station rule" took no account of the size of audiences served. As television companies earn most of their revenue from advertising (which depends on the size of the audience) the result was a great disparity in financial strength. This, in turn, affected the ability of television stations to produce or buy programs.

The FDU identified two potential means of revising the two station rule. The first was to allow persons to hold interests in any number of licences, as long as the population served did not exceed a specified population limit. Another approach would be to divide licences into various categories, based on market size, and to have rules which, in effect, allowed persons to hold interests in a larger number of licences in smaller markets.

In addition, the introduction of competitive commercial television services to regional areas under the Government's equalisation policy would require extension of the "one station to a market" rule to regional areas to prevent people owning or controlling more than one commercial television station in a particular enlarged local market.

The next question was that of directorships and whether a directorship should be treated as conferring a prescribed interest. The current restriction in s92C of the Act, preventing a person from being a director of two or more companies which between them "controlled" more than 2 commercial licences was identified as supporting the current 2 station rule. It suffered from the same defects as that rule - as it applied to all companies deemed to "control" licensee companies. The FDU considered that there was a strong case for a radical change to the rule, and perhaps its abolition.

On the issue of cross media ownership, the FDU considered that there was a case for consideration of extended cross media ownership rules, particularly at local level. The perceived evils with cross media ownership were limiting diversity of opinion, inhibiting competition, resulting in monopolies and affecting employment opportunities. As the number of outlets at the local level was relatively limited, there was a stronger case for considering cross media ownership at a local level. However, any consideration of cross media ownership would have to take into account lack of Commonwealth power in relation to regulation of newspapers, film, video and tape production and news gathering organisations, together with substantial pre-existing cross media ownership. Certainly, the Commonwealth had power to take ownership of newspapers, film, video and tape production and news gathering organisations into account when considering broadcasting, and this was suggested. It was likely that divestment would be ruled out, and so any cross media rules would only operate in relation to

future transactions.

Rather than flat prohibitions of the type used by the Federal Communications Commission ("FCC") in the United States, the FDU preferred a discretionary test, requiring the Tribunal to take into account arguments that cross media ownership was not against the public interest in particular cases, and which would be consistent with the existing "media concentration" test for supplementary and remote licences. There would also need to be an amendment to the test relating to cross ownership between local radio and local television stations.

Foreign Interests

The current restriction on foreign ownership in commercial television restricts a single foreign person from holding more than 15% of the interests in a licensee company and a total foreign holding of in excess of 20% (s92D).

The FDU also considered the current "citizenship test". It contrasted this with the test in the Foreign Takeovers Act 1975 of a person "not ordinarily resident" in Australia. The FDU considered that if the citizenship test was retained, there were some areas in which more flexibility might be considered. One related to persons permanently resident in Australia for a long period of time. Prior to 1981 such persons were legally able to control television licensees and the FDU favoured an amendment in this regard. It also made reference to "naturalised companies". These are companies whose status is defined by the Foreign Takeovers Act, with majority Australia equity, a majority of directors who are Australian citizens and which have a general understanding between the company, major shareholding interests and the Government about the exercise of voting power in respect of the company's business activities in Australia. The FDU suggested either that the Act should be made consistent with the Foreign Takeovers Act or, alternatively, naturalised companies should have the right to put a case that their investments might not be against the public interest.

The FDU referred to the current Tribunal inquiry into the restructuring of the radio and television interests of News Corporation Limited. It noted that the Australian Labor Party at its recent national conference had amended the communications platform to read as follows:

"Protect the commercial sector against foreign penetration of ownership and control. In particular, amend the Broadcasting Act's prohibition on foreign ownership provisions in such a way as to remedy any deficiencies revealed by the current Broadcasting Tribunal inquiry into the restructuring of the radio and television interests of News Corporation Limited."

(Australian Labor Party Platform, Resolutions and Rules, as approved by the 37th National Conference, Hobart, July 1986).

The FDU recommended simplification of the threshold of foreign ownership, by lowering the aggregate threshold to 15%, consistency with other foreign control prohibitions in other Commonwealth Acts, and ensuring that the provisions in the Act restricting foreign ownership and control should not be less than those applying to Australian interests.

Prescribed Interests or Attribution Rules

The FDU said that attribution rules could either be subjective, requiring determination that control exists in a given situation (discretionary attribution), or objective, requiring a measurement of quantifiable interests and identification of specified relationships. Discretionary rules based on a capacity to exercise control were seen by the FDU as overcoming some of the administrative difficulties in such rules. However, one drawback would be uncertainty in the application of the rules.

On the other hand fixed rules were unable to take account of individual circumstances. Rules with low thresholds, such as the present ones, captured large numbers of insignificant interests or relationships.

The FDU considered that discretionary attribution rules might be applicable where:

(a) the actual effects of an interest or relationships on a licensee company or its operations cannot be readily assessed without an inquiry; or

(b) where the interests or relationship would only give rise to the exercise of control in exceptional circumstances so that automatic attribution would not be warranted.

Automatic attribution rules would be appropriate:

(a) in situations which were capable of objective measurement;

(b) where the type of interest or relationship was ordinarily associated with the exercise of control; and

(c) where the objective rule would provide a reasonable and realistic indicative control, or at least a substantial interest.

Direct Interests

At the present time the Act focuses on measurement of voting power, shares and loans. The FDU said there was a strong case for a change in the interests regulated. There was also a need to take account of other forms of company control, such as the power to appoint or veto directors and changes in memorandum and articles of association of licensee companies. It said that a simple measurement based on a number of voting shares was inadequate as a measure of voting power. This was because the Memorandum and Articles of Association of a company might divide shares into various classes, with differing amounts of votes or rights to vote on different issues. Even a measurement based on the proportion of total votes which could be cast at a general meeting was inadequate, because it did not take account of different kinds of issues on which votes might be taken.

The Companies Code defined "voting shares" as excluding shares which carried voting rights only in relation to issues not affecting the ordinary course of the company's operation (s5(1)). Such issues included proposals to reduce share capital, to affect rights attaching to classes of shares, to wind up the company or to dispose of property or assets. The effect was to exempt "preference" shareholders, with guaranteed rights to dividends, but only limited voting rights.

Like the Act, the Foreign Takeovers Act 1975 measured the share value as an indicator of equity, but referred to issued rather than paid up, capital. The shareholding test had the disadvantage of widening the regulatory net to catch shareholders which a voting power test would exempt, ie, those with no control over the company and who were holding shares purely for investment purposes.

The FDU certainly considered the current 5% prescribed interest level as having little significance for current ownership patterns. Both the commercial radio ownership and control provisions of the Act and the Foreign Takeovers Act adopted a 15% threshold. The Companies Code adopted a 20% threshold.

If loan interests were to be subject to automatic attribution, the FDU said that alternative rules would have to be applied. It considered a more realistic measure would be to attribute a prescribed interest to loans above a fixed monetary amount, or dealing with loan interests under discretionary rules so that regulation would only exist in situations where control was real.

The FDU considered that if de facto control of the operations of a licensee company would be subject to limits, directors and chief executives should also be covered by the attribution rules. Given the direct controls such persons continually exercised in relation to a licensee company, there was a strong case for treating them as if they held prescribed interests. This was the case in any event in the United states.

Indirect Interests

The FDU agreed that the current legislative scheme was not effective to limit regulation to interests directly held in licensee companies. It found the current methods of tracing indirect interests not to be effective and to regulate insignificant interests. They caught people who neither owned or controlled or influenced licensee companies.

Unlike the Companies Code and the Foreign Takeovers Act, they ignored the company's associates. The Companies Code has a wide definition of "associate" for its takeover provisions (s136(3)), extending to "influence" as well as "control". It covers people acting in concert, and automatically deems the directors and secretaries of a company, and the companies related to it, to be "associates". The Foreign Takeovers Act includes family members, partners, companies of which a person is an officer, employees and employers and corporations or directors who are under an obligation to act on the instructions of a person.

The FDU suggested that the Act should include a list of possible associate relationships and empower the Tribunal to deem persons to be associates if there

was a probability that a real association existed. Alternatively, deemed associate provisions could be subject to rebuttal.

As well as associates, trusts should be regulated, as they have been used to avoid limits on interests. One approach to reducing the risk of avoidance would be to deem certain powers exercised through a trust as establishing an attributable interest. For example, this would apply where a person under a trust deed has power to either exercise voting rights attached to shares, dispose of shares, replace a trustee or vary or revoke the trust. Automatic "associate" provisions could also have particular application to trust arrangements. For example, trustees and beneficiaries could have attributed to them each others' interests as disclosed by the written agreement if immediate family relationships were involved.

The FDU concluded that reliance on mathematical formulae in the tracing of indirect interests was a poor substitute for identifying the interests or relationships of concern.

Operational Control

The current operational control provisions in s92A(1)(c) of the Act were found to be defective and uncertain in their application and to create problems with administration, proof and enforcement. The FDU considered that if the Act clearly identified the types of arrangements which were of concern, application of the limits to persons having operational control could be left to the Tribunal. In addition, new provisions could take account of legitimate commercial arrangements essential to the normal operation of commercial television stations. These would include advertising and networking arrangements. The FDU suggested the following alternatives to replace the existing operational control provisions:

(a) a clear identification of the nature and degree of control and the types of relationship and arrangments which were of concern;

(b) proper regard to the effects of any proposed regulation of legitimate commercial arrangements which are important to the operations of commercial television stations;

(c) adequate measures for enforcement which were administratively workable; and

(d) integration with Tribunal's approval procedures.

It said that operational control must be concerned with situations of effective commercial control, in relation to the nature and quality of the services provided to the public.

Attribution could be limited to situations where the control would, in the opinion of the Tribunal, have a significant impact on the service provided by the licensee. There would need to be a factual inquiry by the Tribunal. Station management agreements, which do not exist at present in relation to commercial television, would be subject to attribution of ownership.

Approval Requirements

The FDU considered that the Tribunal was required to approve many ownership transactions which had no impact on the performance of licensee companies, which was wasteful of its resources and imposed an unnecessary regulatory burden.

The problems caused by setting unrealistically low prescribed interest thresholds was that if a company acquired a direct controlling interest, greater than 15%, in a licensee company it would be subject to the Tribunal approval, which treated it as the holder of the licence despite the existence of a majority shareholder with more than a 50% interest, being a majority shareholder which in fact exercised direct control. In addition, bonus share issues would trigger the Tribunal approval process, even though there was no change in the proportion of interests held and, therefore, no possibility that any greater degree of control or influence could be exercised.

The criteria which the Tribunal must apply were highly artificial. For example, an investor acquiring a 16% direct interest in a licensee company is required to have the financial, technical and management capacity to provide an adequate and comprehensive service. This is despite the fact that the licensee company itself has a primary responsibility to provide this capacity and the Tribunal will assess it on this criterion at its licence renewals. It would be more relevant to arsess whether as a consequence of the transaction there was likely to be an adverse affect on the capacity of the licensee to meet its obligations.

Where a share transaction results in an actual transfer of the control of a licensee company the FDU considered that formal Tribunal approval requirements could be justified. The grounds were that changes in the nature and quality of the service provided by the licensee could occur in a period between the transaction and the next licence renewal inquiry. However, it saw no justification for requiring formal approval of other interest holders.

The FDU suggested that the Tribunal could be given discretion to require approval of a transaction which in its opinion:

(a) gives the interest holder a capacity to exercise effective control of the company holding the licence; or

(b) could have an adverse impact on the capacity of the licensee to meet its obligations under the licence, or breach the Act or be contrary to any specified objects or regulations.

The FDU also suggested that consideration could be given to placing the primary reporting obligation on the direct parties to a transaction, rather than indirect parties caught by the current rules.

If only significant transactions which might have an adverse impact were to be subject to formal approval processes, there would be a stronger argument for requiring prior approval of transactions. However, the FDU considered that this would need to be accompanied by streamlined procedures. For example, notification to the Tribunal by respective purchasers, and if the Tribunal did not respond within 14 days, the transaction might proceed. If it directed a transaction not to proceed, the Tribunal could freeze a transaction until it had reached a determination.

The FDU recommended consideration should be given to requiring prior approval of transactions which resulted in a person holding more than a 50% direct interest in a licensee company. This would mean that the procedures for licence transfers would automatically apply in the obvious cases where direct control over a licensee company was acquired through a share transaction.

Contraventions

Despite regular reporting of contraventions by the Tribunal to the Minister and the Department of Communications, no prosecutions appear ever to have been launched under the Act. The Tribunal has stated that it considers that the processes of the criminal law may be too severe and cumbersome in this area (Annual Report 1984, para 2.320). The FDU considered that the noticeable lack of prosecutions suggested that there should be review of offences, with the strong presumption that some be deleted from the Act.

Future Approaches

The FDU considered that the current system of ownership and control regulation displayed such fundamental flaws that major change was necessary. The heart of the problem was the failure of the Act clearly to identify the general principles and "system objectives" intended to underpin the detailed statutory rules. Central to this was the extent to which the Tribunal, as the expert administrative body, should be given discretionary powers and whether it should be empowered to determine detailed rules to implement the principles or system objectives set out in a Broadcasting Act.

Since the decisions of the High Court in Herald & Weekly Times v The Commonwealth (1966) 115 CLR 418 and R. v Australian Broadcasting Tribunal; Ex Parte 2HD Pty. Limited (1979) 27 ALR 321, and the 1981 amendments to the Act the Tribunal's power to refuse share and loan transactions had been heavily circumscribed. The FDU considered that the Tribunal should be given discretions which were exercisable within the parameters of clearly defined policy objectives incorporated in the Act.

The matters contained in the report are now open to public discussion and it is anticipated that any legislative amendments will be introduced gradually.

Robyn Durie

COPYRIGHT SOCIETY NEWS

At the Annual General Meeting of the Copyright Society on 25 September 1986 the following officer bearers were elected:

Peter Banki - President
Brett Cottle - Vice-President
C. Mary Still and William S. Lloyd - Secretary, Treasurer.

OCTOBER 30 CONFERENCE
"AUSTRALIAN COMMERCIAL RADIO: THE FUTURE"

On 30 October 1986 the Department of Communications is having a seminar entitled "Australian Commercial Radio: The Future".

The seminar will be addressed by the Minister for Communications, Mr Michael Duffy. The seminar follows the release of the report Future Directions for Commercial Radio. Topics to be covered include:

- Approaches to delivering additional services;
- The future of the supplementary licence scheme;
- Government policy objectives;
- Ownership and control;
- Networking;
- Financial issues; and
- Planning issues.

The other speakers will include Departmental officers, radio industry representatives and speakers from allied fields.

The registration fee is $70.00. Information is obtainable from:

Mr Jim Webster
Forward Development Unit
Department of Communications
PO Box 34
BELCONNEN ACT 2616

Tel: (062) 64 4216.

The seminar will be held at the Canberra International Motor Inn.

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