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129

NEWS

NEW LEGISLATION

Three bills relating to broadcasting have been introduced into Federal Parliament. These are the ABC/SBS Amalgamation Bill 1986, the Television Licence Fees Amendment Bill and the Broadcasting Amendment Bill 1986. The ABC/SBS Amalgamation Bill has been rejected by the Senate and the Broadcasting Amendment Bill referred to a Senate Committee. That Committee is due to report on 28 February, 1987. The Broadcasting Amendment Bill relates to the equalisation of regional commercial television, repealing the television supplementary licence scheme and providing the statutory basis for aggregation of regional television service areas. It provides a legislative base for the indicative plans.

TELEVISION STATION DRAFT CLEARANCE TIMETABLE

In September the Minister for Communications issued a draft timetable setting out when certain television stations would have to move from their existing channels to make way for new FM radio services. In the early 1960s Channels 3, 4 and 5 of the broadcasting (known as band II) frequency spectrum were assigned to television stations in regional Australia, although throughout the world band II frequencies were being allocated for FM radio services. Planning is already underway for one major commercial station, WIN4 Wollongong, to move to the UHF band. Submissions have been invited before the end of the year on the draft timetable.

CONTENTS

Address by C.C. Halton, Secretary to the Department of Communications to A.C.L.A., 5 December, 1986.....2

Guidelines for Provision of Video and Audio Entertainment and Information Services.....6

The Radiocommunications Act and Television Programs Not Transmitted for Reception by the General Public.....9

A.C.L.A. News.....12

News Briefs.....12

The New Inquiry - A Practical Perspective.....13

International Satellite and Cable Television Symposium.....16

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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.

ADDRESS BY C.C. HALTON, SECRETARY TO THE DEPARTMENT OF COMMUNICATIONS TO THE AUSTRALIAN COMMUNICATIONS LAW ASSOCIATION ON 5 DECEMBER 1986

Ladies and gentlemen, I would like to thank your Association for inviting me to address this luncheon today. I will speak about the Government's policy of minimum regulation and the challenges this raises in the field of communications.

It is well known now that the various methods of communications available to us are coming together driven significantly by advances in data processing and data transmission.

In the "old days" the worlds of broadcasting, film, music, computing, publishing and telecommunications were self contained, separate in their traditions and practices. Today, these industries are finding themselves sub-industries of an overriding area of activity - information and communications. They continue to operate under different regulations and conventions, yet the continuing progression towards convergence of technology blurs regulatory distinctions and makes traditional structures seem inequitable or contradictory.

We are frequently confronted with conflicting "scenarios" for the future. For several decades technological optimists have emphasised the wonders of the so-called communications revolution. Pessimists have talked about the "electronic nightmare".

When television was first introduced into Australia it was seen as the beginning of a new communications era in this country. Television was regarded as the most effective means of communication known, with both a potential to contribute positively to the development of a better society or if uncontrolled, a threat to Australian society, as each new technological innovation is introduced there are similar references to new communications eras and similar predictions of dire consequences or untold benefits.

In the past decade or so technologies have developed which pose acute dilemmas for Governments. Some of the more dramatic technological developments have been in the areas of biotechnology, the new energy sciences, and communications and information technology.

Regulators have had difficulty in keeping pace with the problems which technological change presents. A recent writer (Weeramantry) described those responsible for the law as "the sleeping sentinels" because they are not equipped to deal with the issues arising from the rapid rate of scientific and technological advance. One of the major challenges for Government is to ensure that the benefits of technology are maximised and the negative consequences minimised.

The commercial application of satellites, lasers, digital techniques and optical fibres over the last 15 years, has created an environment where convergence is not only feasible but attractive on both social and economic grounds. As long ago as 1974 the 15th edition of the Encyclopaedia Britannica identified the 'technology of information processing and of communication systems' as the fifth of eight major fields of technology. Unfortunately the encyclopaedia is not required reading for regulators.

Recent Developments

The difficulties that regulators have in keeping pace with the problems raised by technological change are illustrated by the Federal Communications Commission's (FCC) hearings on computers. In its Computer I decision (1971) the FCC sought to distinguish between "data processing" and "communications services". It also adopted distinctions between "hybrid communications" and "hybrid data processing" services, both of which were mixed services involving elements of both data processing and communications capabilities.

The Computer II decision (1980) attempted to draw new boundary lines between "basic" and "enhanced" services. Corporations providing enhanced

services were required to do so through a fully separated subsidiary. The 1986 Computer III decision eliminated this structural separation.

Rather than drawing distinctions like these between services, the Japanese have adopted a regulatory approach based on a split between infrastructure (or facilities) and services. Convergence of technology however, makes these apparently simple distinctions, increasingly difficult to maintain.

The weakness of the present legal and regulatory framework developed in a more stable less dynamic period have received considerable attention. In a field which is broad and rapidly changing, it is very difficult to capture each piece, fit it neatly into some master plan and ensure that the pieces stay in place. The social, economic and technical regulatory issues associated with existing and new communications technologies and services have to be addressed in a manner which provides flexibility and does not inhibit new solutions.

The Department provides policy advice to the Minister for Communications on all matters related to the provision of postal, telegraphic, telephonic and other like services, including television and radio, which are subject to Commonwealth legislation for which the Minister is responsible. The Department also is responsible for the broadcasting infrastructure and has a planning, licensing and regulatory function in the administration of the electromagnetic spectrum.

The Department's statement of purpose now requires it to pursue 'economic and technological regulation to the minimum extent necessary' to achieve the Government's objectives. This reflects the Government's general stance on regulation, as well as the corporate view of deparmental management.

The key to the Government's approach is to look at the purpose which is served by regulation: Is regulation necessary? Do the benefits outweigh the costs? Do the regulations enhance efficiency? Do they, in general, serve the community? Cannot self-regulation achieve the same ends?

VAEIS: New Service: New Rules

The self regulatory framework which the Government has adopted for the introduction of the new video and audio entertainment and information services - commonly referred to as VAEIS - demonstrates how the use of today's technology to provide new services fits with an approach which stresses the minimum level of economic and technical regulation. In the broad context of meeting the challenge of regulating new applications of technology, the significance of the approach to VAEIS should not be underestimated.

On 2 September, 1986 the Minister for Communications announced that the Government had decided that a moratorium on pay-TV (i.e. subscriber services to households) would apply for at least four years. He also said that video and audio entertainment and information services to non-domestic environments would be introduced once guidelines had been determined.

VAEIS can be delivered by one or a combination of technolgies, such as terrestrial microwave multipoint distribution systems, AUSSAT transponders or Telecom's cable and microwave network. They can be authorised under the Radiocommunications Act 1983 and/or the Telecommunications Act 1975.

Club Superstation and Sky Channel are the first operational examples of VAEIS delivered via the AUSSAT system. The Minister for Communications has recently obtained expressions of interest from entrepreneurs wanting to distribute VAEIS services through MDS.

The 2 September, 1986 announcement foreshadowed the development of guidelines setting out content and technical licensing requirements for these new services, which would form the basis of a self-regulatory code of practice to be observed by service providers.

After a round of consultations with interested parties, these guidelines were tabled in Parliament on 17 October, 1986. Service providers give the Minister a written undertaking to comply with these guidelines before approval is given for the commencement of a service.

The primary aims of the guide-

lines are to protect the public interest and to provide for similar program standards where there are similarities in the nature of entertainment programs being offered by both free-to-air broadcasting services and the new services.

To meet the two primary aims, the guidelines refer to relevant Australian Broadcasting Tribunal standards as the basis for content and advertising requirements. Service providers are expected to observe the spirit and intent of these standards. Given the specific nature of some services, however, some standards will not apply in all cases.

Content requirements in the guidelines cover:

- Prohibition on cigarette advertising and restrictions on alcohol and gambling advertising
- Program classification
- Maintenance of levels of Australian content appropriate to the nature of the respective services
- Provisions to inhibit the removal from free-to-air broadcasting services of profitable areas of programming already available to the general public
- Annual reporting requirements.

In addition to these guidelines, service providers are, of course, subject to relevant Commonwealth, State and Territory laws - in particular those concerning copyright, gaming and betting, defamation, obscenity and blasphemy, trade practices, privacy and consumer protection.

Avenues for complaints are also outlined in the guidelines and service providers are required to report on compliance with the guidelines and to keep a complete record of all material transmitted for a period of six weeks after transmission.

The onus is on the providers to comply with the spirit and intent of the guidelines and thus ensure the success of the self-regulatory scheme.

We expect that the guidelines will be reviewed after 12 months - not only to see how well they are protecting the public interest but also if they are facilitating the introduction of new and varied services. It is against this backdrop that the success of any such self-regulatory approach must be assessed.

Television: Review of Existing Rules

A number of areas of existing social, economic and technical regulation also need scrutinising in terms of the Government's minimum regulation objective. For example, the arrangements surrounding ownership and control of broadcasting licences.

A report, Ownership and Control of Commercial Television: Future Policy Directions, by the Forward Development Unit (FDU) of the Department, suggests that the current system of ownership and control rules currently regulate the interests of many people who neither "own", nor "control", nor "influence" commercial television companies and therefore can have no effect upon program decisions. You will know that one of the Parliament's objectives in commercial broadcasting policy is to ensure diversity of choice of quality programs. The FDU report says that, to the extent that there is a need to regulate at all, that regulation should affect those who take programing decisions.

As the FDU report points out, current legislation in the Broadcasting Act 1942 also requires the Australian Broadcasting Tribunal (ABT) to apply artificial and inflexible criteria to many ownership transactions. This imposes a considerable regulatory burden on affected persons and on the ABT.

The FDU's report suggests there is a clear need to review enforcement provisions and associated administrative procedures, to simplify the regime and to make it more appropriate to modern commercial practice.

As you may know, the Minister has already invited comments on the FDU report. I hope that the comments will address such fundamental questions as "What principles should underlie the economic and social regulation of broadcasting?" If the answer to that

question includes "encourage competition" and "discourage monopolies", such principles would be likely to produce a very different regulatory regime from that first introduced thirty years ago.

ACS: New Services: Which Rules

The policy decisions this year on ancillary communications services illustrate how we are responding to the regulatory issues raised by converging technology. New technology is increasingly enabling the electromagnetic spectrum to be used in ways more efficient and previously available in theory but not in practice. The term "ancillary communications services" (ACS) refers to additional communications services carried on the same signal as a main broadcast service, and which depend for their existence on the transmission of the main service. Although ACS cannot be transmitted independently of the primary (or host) service, they may be quite distinct from it in content or purpose.

ACS are either broadcasting or non-broadcasting in nature, depending on the audience and the material being transmitted. They will therefore be licensed either under the Broadcasting Act, or under the Radiocommunications Act.

As potential ACS service providers develop their business plans, some interesting problems are bound to arise for the policy makers and for the regulators.

Radio Frequency Management

The introduction of new technology and services may also place increasing pressure on spectrum space and increase the likelihood of interference. The Department is developing a spectrum plan, based on the existing Australian table of frequency allocations, for adoption under the Radiocommunications Act and is establishing technical standards for some equipment likely to cause interference. Technical standards for cellular radio, cordless telephones and radio controlled toys are currently available for public comment.

Use of the spectrum by governments, companies, groups and individuals is regulated by the issue of licences and our basic objective is to ensure interference-free communications because the relevant parts of the electromagnetic spectrum are both finite and of vital importance to all radiocommunications. Without them 20th century transport, business, entertainment and social activities would be virtually impossible.

The Way Ahead

I mentioned earlier that it is very difficult to capture each piece of technology and fit it neatly into some master plan. At present traditional broadcasting services are regulated under the Broadcasting Act and other services like VAEIS are regulated under the Radiocommunications and Telecommunications Acts. If we were to move to some "Communications Master Plan", what would it look like?

Technology is being used in increasingly subtle ways and criteria and definitions developed in the past are not always an adequate guide. When is a service directed at a particular group of people "broadcasting" or simply a radiocommunications or telecommunications service?

How can we accommodate minimum regulation for person-to-person services, services to the general public and services designed for identified end-users?

Within such a framework, how do you ensure protection of the public interest?

Do the policy principles and assumptions developed in earlier days, still form an adequate basis for planning?

A question, then, I would like to put to you is what is the minimum level of regulation given the competing demands of:

- The dynamic nature of technological change
- Difficulties in adjusting the legal framework to technological change
- The desire to provide a flexible framework for encouraging incentive and opportunity for entrepreneurial

initiative and investment in new services, generating new employment opportunities

- Protection of the public interest

Obviously, duplicating existing regulatory regimes is not an acceptable answer. In addition, we need to maximise our use of existing legislation such as that relating to trade practices, defamation, consumer protection, obscenity and blasphemy.

So far as VAEIS are concerned, I am confident that the policy framework which has been adopted is a reasonable, pragmatic solution. The services are exciting and innovative applications of state of the art communications technology - and the adoption of a self-regulatory framework for both terrestrial and satellite applications is no mere coincidence. With the FDU report, too, the same trend is there - to prune existing regulations back as a means of making the regime more flexible and more appropriate to modern circumstances.

It is not only the domestic environment which provides regulatory challenges, we are seeing a trend towards the internationalisation of business activity. Companies are being bought and sold across national boundaries - a globalisation of mergers and acquisitions. This globalisation is occurring in finance, advertising, communications and entertainment. Technology is increasingy ensuring that no country can be comfortably isolationist. The associated legal issues - such as copyright, national sovereignty, content regulation - have already received considerable attention.

The world economy is becoming increasingly oriented to the production of services. Technology now enables worldwide networks to develop which link services, such as banking, with investment advice and credit rating services. Any service which can be reduced to electronic information can now be traded instantaneously anywhere in the world.

Conclusion

Farsighted technically literate lawyers and lawmakers are needed to develop regulatory frameworks designed to promote co-operation in an emerging international economy.

In meeting these challenges, the focus should be on the goals we are trying to serve. In achieving our objective of minimum regulation, whether by means of self-regulation, some legislative provisions or through deregulation, the policy goals should remain of paramount importance. To meet those policy goals through a minimum of regulation is my Department's objective.

GUIDELINES FOR PROVISION OF VIDEO AND AUDIO ENTERTAINMENT AND INFORMATION SERVICES

Preamble

Set out below are the VAEIS guidelines issued by the Minister for Communications.

"1. On 2 September, 1986 the Minister for Communications announced the policy framework for the introduction of Video and Audio Entertainment and Information Services. This announcement foreshadowed the development of guidelines setting out content and licensing requirements for these new services, which would form the basis of a self-regulatory code of practice to be observed by service providers. The Minister for Communications has now determined the Guidelines which are to apply.

2. For the purposes of these Guidelines, the following definitions apply:

- VIDEO AND AUDIO ENTERTAINMENT AND INFORMATION SERVICES (VAEIS) are transmissions of programs by telecommunications technology on a point to multipoint basis to identified categories of non-domestic environments. VAEIS may be funded by advertising revenue and/or charge for service and/or lease of equipment.

- NON-DOMESTIC ENVIRONMENTS include hotels, motels, registered clubs,

hospitals, educational institutions, shops, government, commercial and industrial buildings, coaches, trains, aircraft, and marine vessels. Domestic environments, that is, private, long-term residential dwellings, households and places of permanent residence do not qualify to receive VAEIS.

- VAEIS PROVIDER refers to the individual, group or organisation responsible for providing the content for the service and who has signed an agreement with the Commonwealth undertaking to abide by the Guidelines. With the exception of the Australian Broadcasting Corporation and such education, health and welfare bodies, Commonwealth statutory authorities and government business enterprises as may be approved by the Minister for Communications, no government department, statutory authority, agency or company set up by government may be a VAEIS provider.

- END USER refers to an individual, group or organisation which has made arrangements with a VAEIS provider to receive VAEIS and/or equipment capable of receiving VAEIS.

- BROADCAST includes both radio and television broadcasts unless otherwise specified.

- AUSTRALIAN means a person who was born in or is ordinarily resident in Australia.

3. VAEIS are regulated in three ways:

(a) VAEIS providers are subject to relevant Commonwealth, State and Territory legislation, in particular, concerning copyright, gaming and betting, defamation, obscenity and blasphemy, classification and exhibition of films and video program material, trade practices, privacy and consumer protection.

(b) special conditions of licence and/or contract.

(c) an agreement with the Commonwealth to comply with a set of Guidelines issued by the Minister for Communications.

4. VAEIS can be delivered by one or a combination of several technologies, such as Multipoint Distribution Systems, AUSSAT satellite, or Telecom's network. These Guidelines, which form the basis for a self-regulatory code of practice for VAEIS providers, will apply to all VAEIS regardless of the delivery method.

5. Radiocommunications licences issued to VAEIS providers will be subject to conditions covering the encoding of transmissions, identification of categories of end users, specification of the purpose of the service, and the technical parameters within which VAEIS is required to operate.

6. Those VAEIS providers who enter into contracts with Telecom will be subject to arrangements to those listed in paragraph 5 above.

7. VAEIS are communications services providing innovative types of programming and formats. The standards to be adopted in the provision of VAEIS are set out below. Given the specific nature of some VAEIS, some standards may not apply in all cases. Queries about the Guidelines or their applicability to particular services should be addressed to the First Assistant Secretary, Radio Frequency Management Division, Department of Communications, PO Box 34, BELCONNEN, ACT 2616.

8. Complaints concerning program and advertising content can be directed to the VAEIS provider, the Secretary, Department of Communications, or the Advertising Standards Council, as appropriate.

Standards

9. VAEIS will be restricted to people present in the non-domestic environments of end users. This condition is not meant to exclude limited provision of facilities for the pur-

poses of management and monitoring by the VAEIS provider.

10. VAEIS providers of entertainment services will make particulars of all program content to be supplied, including program classification in the case of video material, readily and regularly available to all end users.

11. Where the content of their service is similar to material that is currently subject to Australian Broadcasting Tribunal (ABT) program and advertising standards, VAEIS providers will observe the spirit and intent of these standards. More particularly, the standards to be observed include those listed in the attachment.

12. VAEIS providers will ensure that the Media Council of Australia (MCA) advertising code requirements are fulfilled.

13. Since the ABT and MCA standards change from time to time, it is the obligation of VAEIS providers to keep themselves informed of any changes, and to observe those changes.

14. VAEIS providers will not transmit AO programs at times other than those applying to free-to-air television except where arrangements have been made to ensure that the programs are not accessible to persons under the age of 18. Films or other material that is classified "R" or "X" will not be carried under the authority of VAEIS licence or contract.

15. VAEIS providers will not transmit advertisements for alcoholic drinks or advertisements relating to betting or gambling at times other than those applying to free-to-air television except where arrangements have been made to ensure that they are not accessible to persons under the age of 18. Advertisements soliciting business concerning forecasts of results of sporting events may not be transmitted at any time.

16. VAEIS providers will not transmit advertisements for, or for the smoking of, cigarettes, cigarette tobacco, or any other tobacco products at any time.

17. If, during an election period, a VAEIS provider transmits election matter reasonable opportunities will be afforded for the transmission of election matter to all political parties contesting the election.

18. VAEIS providers will ensure that the services are identifiably Australian by maintaining levels of Australian content appropriate to the nature of the respective service. Australians will be employed as far as possible in the performance, production and presentation of programs and advertisements. Where drama (including movies, plays, telemovies and serials) is a substantial component of a service, VAEIS providers will ensure that a reasonable balance is maintained between foreign and locally produced material.

19. VAEIS are not intended to remove from free-to-air broadcasting profitable areas of programming already available to the general public. VAEIS providers will not exercise any rights they may have to such programs in such a way that would preclude their availability for viewing by the general public.

20. VAEIS providers will maintain a complete recording of all material transmitted for a period of six weeks after transmission so that it may be recalled for inspection should the need arise.

21. All video entertainment services for which radiocommunications licences have been issued will be transmitted in B-MAC.

22. In providing the facilities and material for VAEIS, VAEIS providers will not participate in, or facilitate, arrangements that would be inconsistent with the spirit and intent of the Guidelines.

23. VAEIS providers will make available to the Minister for Communications, within six months after 30 June each year, a report of their compliance with these Guidelines and (on a commercial-in-confidence basis) an audited balance sheet and profit and loss account, and a statutory declara-

tion stating gross earnings during that year.

24. The Guidelines may be amended from time to time in accordance with Government policies after a period of consultation.

Australian Broadcasting Tribunal Standards relevant to the provision of VAEIS

Interim Television Program Standards (for video programs):

- General Program Standards (2)
- Program Classifications (3b, 10, 11)
- Not Suitable for Television (9)
- News Programs (15)
- Contests (16)
- Interviews and Telephone Conversations (17)
- Production of Advertisements in Australia (18, 19)

Interim Television Advertising Conditions (for video programs):

- Children and Advertising (5a, 5b)
- Advertising for Cinema films, Video Tapes and Video Discs (6a, 6b)
- Advertising of Products of a Personal or Intimate Nature (8a)
- Policy Statement POS07 on "Advertising Matter Relating to Cigarettes or Cigarette Tobacco"

Radio Program Standards (for audio programs):

- Prohibited Matter (2, 3)
- Encouragement of Australian Artists (4)
- News Programs (5)
- Contests (6)
- Interviews and Talkback Program (7)

Radio Advertising Conditions (for audio programs):

- General (2)
- Australian Advertisements (3)

For the purpose of VAEIS, the term "licensee" should be read as "VAEIS provider".

THE RADIOCOMMUNICATIONS ACT AND TELEVISION PROGRAMS NOT TRANSMITTED FOR RECEPTION BY THE GENERAL PUBLIC

It is my intention to offer some thoughts in response to the question "How far can the Minister go to control content of programs transmitted pursuant to a licence granted under the Radiocommunications Act?".

The Radiocommunications Act ("the Act") was assented to in December 1983, but only proclaimed to come into effect in August 1985. It replaced the Wireless Telegraphy Act which was first enacted in 1905.

The Act is not ordinarily legislation that one includes in the bundle of law referred to as "media law" - often it is only given a passing reference in the context of technical matters.

Let me remind you of the background to the Act and the matters that that legislation addresses.

The constitutional basis of the legislative power of the Federal Parliament is the power to make laws for the peace, order and good government with respect to "postal, telegraphic, telephonic and other like services" (51(v)). In 1935 the High Court of Australia, when broadcasting was regulated under the Wireless Telegraphy Act, held that the Commonwealth power extended to the control of broadcasting. The Court placing a heavy emphasis on the notion of a "message". That emphasis persists in the definitions to be found in the Act.

This concern about "messages" may be illustrated by the definition of "radiocommunication" - that means:-

> "(a) radio transmission; or
> (b) reception of radio transmission,
>
> for the purpose of the communication of information between persons and persons, persons and things or things and things."

This leads to my favourite definition - s5(1) provides:-

"without prejudice to its effect, apart from this sub-section, this Act also has, by force of this sub-section, the effect it would have if the reference in the definition of "radiocommunication" in sub-section 3(1) for things and things, were a reference to parts of things and the same or other parts of the same things."

You may wonder what that is - it is a definition of radar.

The radio frequency spectrum is used by a multitude of services both space and terrestrial. Many of them are safety services. For example, there are the aeronautical services, the maritime services, the fixed service, land mobiles and even radio astronomy.

The Act has, I suggest, as its object the regulation of the radio frequency spectrum in all its aspects including planning of the use of the spectrum, the regulation of access to the spectrum and the regulation of activities that diminish the usefulness of the spectrum. The Act, when contrasted with the legislation in countries such as the United Kingdom, Canada, New Zealand and the United States is highly innovative, particularly in the area of "interference".

The Act provides the mechanism for the licensing of all radio transmitters other than transmitters licensed under the Broadcasting and Television Act, and for the licensing of receivers falling into a class specified by a regulation. What is licensed under the Broadcasting and Television Act is really only the transmitter radiating a program to the general public. For example, the Radiocommunications (Licensing and General) Regulations defined an outside broadcast television service as a "radiocommunications" service for transmitting programs" to a studio or transmitter for broadcast to the general public". That transmitter is licensed under the Act and not the Broadcasting and Television Act.

It should be noted that the Australian definitions of radiocommunications services accord with the definitions to be found in the Radio Regulations of the International Telecommunications Union.

The International Telecommunications Union is created by a convention which establishes the Union, a specialised agency of the United Nations, and which is responsible for, among other things, the international coordination of the use of the radio frequency spectrum and the international regulation of that spectrum. Australia is a party to the convention and the radio regulations form part of the convention.

The dichotomy between a broadcast service and, for an example, an outside broadcasting transmitter (as defined in the Australian Regulations) is perhaps made clearer in the definition of the broadcasting service found in the Radio Regulations of the ITU - there it is a radiocommunications service in which the transmissions are intended for direct reception by the general public. The only difference between the Australian definition in the Broadcasting and Television Act and the definition of the Radio Regulations is the use of the word "direct".

Mark Armstrong, in his book - Broadcasting Law and Policy in Australia, places considerable emphasis upon the frequency on which the transmission takes place as a test as to whether a transmission is a "broadcast" or not.

Clearly, for international purposes, a program can be transmitted on a non-broadcast frequency. For example, on a frequency in a band allocated to the fixed service, if that transmission is providing a feeder to a transmitter which is "intended for direct reception by the general public". It matters not that the average multi band receiver is as capable of receiving that frequency as it is of receiving the short wave bands allocated to the broadcasting service.

But the Act goes very much further than simply to provide a mechanism for the licensing of transmitters. It establishes a regime that will, with time and by setting of standards, and requiring those standards to be adhered to, provide a regime that will lessen interference. Standards can be set for radio transmitters, radio sensitive devices

(audio amplifiers and even a pacemaker can be a radio sensitive device), receivers (for example, standards for television receivers to increase their immunity from interference), and devices that emit electromagnetic energy (that may include not only a plastic RF welding machine, but also a power line).

The Act has provision for radio frequency planning, providing for the publication, public comment and adoption of frequency plans.

Throughout the Act there is a continuing reference to the minimisation of interference.

The Act uses a series of definitions that require close examination. Many of the definitions interlock with other definitions. ""Radiocommunications" utilises a definition that depends in turn on the definition of "radiotransmission". "Transmitter" is defined, again in terms of "radiocommunications" and a transmitter (which includes the power line) is different from a "radiocommunications transmitter" which is really what one would ordinarily refer to as a transmitter.

In short I suggest that the purpose of the Act is to regulate the use of the spectrum, to regulate access to the spectrum, and to regulate the things that can effect the spectrum. I suggest that the identification of the purpose of the legislation is of critical importance.

Section 25 of the Radiocommunications Act provides that a licence to operate and possess a radiocommunications transmitter is subject to certain conditions. Section 25(1)(d) provides that amongst those conditions is a "condition that the holder of the licence shall not operate, or permit the operation of, the transmitter in such a manner as would be likely to cause reasonable persons, justifiably in all the circumstances, to be seriously alarmed or affronted, or for the purpose of harrassing a person". A somewhat lower standard than the standard imposed by the Australian Broadcasting Tribunal under the Broadcasting and Television Act.

Reference should also be made to s25(1)(j) which imposes on a licence "such conditions (if any) as are prescribed". An examination of the Radiocommunications (Licensing and General) Regulations seems to show that conditions have only been prescribed for citizen band radio stations and amateur stations. Reference should also be made to s25(1)(k) which imposes on a licence "such other conditions (if any) as are specified in the licence".

These last two provisions should be read in conjunction with s25(8) which provides that nothing in paragraphs (1)(a) to (h) shall be taken by implication to limit the generality of the condition that may be prescribed for the purposes of paragraph (1)(j) or specified under paragraph (1)(k). However, all that says is that nothing in those paragraphs shall be taken by implication to limit conditions - conditions may be limited for other reasons.

Section 86 of the Act provides that the decision of the Minister under s25 is a reviewable decision under the Administrative Appeals Tribunal Act. Equally the possible impact of the Administrative Decisions (Judicial Review) Act should not be overlooked.

Against this background one returns to the original question - "how far can the Minister go to control content of program transmitted pursuant to a licence granted under the Radiocommunications Act?". I take the question to refer to content in the sense that content is regulated by the Australian Broadcasting Tribunal under the Broadcasting and Television Act, in terms of program content, Australian content, advertising content and the like.

It is a general principle of administrative law that an authority cannot exercise the power granted for a particular purpose for a different purpose.

This principle can be illustrated by a decision of the House of Lords in 1964 - Chertsey Urban District Council v Mixnams Properties Limited (1965) AC 735. There the owner of a caravan site applied for a licence under the Caravan Sites and Control of Development Act 1960 for a site licence. A licence was issued but the licence imposed numerous conditions which the licensee objected to as being ultra vires. It was asserted that the local authority were entitled only to impose

conditions limited to matters of town planning and public health. The House of Lords held that there was nothing in the Act suggesting any intention to authorise local authorities to go beyond laying down conditions relating to the use of the sites and it was not permissible to regulate the user of the licensee's legal power of letting or licensing caravan spaces.

It is clear that that administrative principle applies to a Minister exercising a statutory discretion as much as it applies to authorities generally - re Toohey (Aboriginal Land Commissioner) ex parte Northern Land Council (1981) 56 ALJR 165.

It may be therefore, if my characterisation of the purpose of the Radiocommunications Act is accurate, that it could be argued that the Minister's power to impose conditions dealing with content in much more than the very broad way imposed by s25(1)(d) of the Radiocommunications Act is exercising a power for a purpose beyond which that power was granted. The Broadcasting and Television Act is legislation that clearly grants that sort of power. The question is - does the Radiocommunications Act?

One suspects that behind all of this lies a question of policy that no one is terribly anxious to grapple with.

Michael J. Owen

This was a paper delivered at the ACLA Seminar on 13 August, 1986 on New Video Entertainment Services. Other papers delivered at this Seminar were published in the Vol. 6 No. 3 (October 1986) issue of the Communications Law Bulletin.

NEW TRIBUNAL VICE-CHAIRMAN

Mr Bill Armstrong, the former managing director of Radio 3EON-FM in Melbourne, has been appointed as the new Vice-Chairman of the Australian Broadcasting Tribunal. Mr Armstrong took up his position on 1 December, 1986.

A.C.L.A. - NEWS

At the Annual General Meeting of ACLA on 30 October, 1986 the following office bearers were elected:

Stephen Menzies	- Chairman
Michael Law	- Vice-Chairman
Victoria Rubensohn	- Secretary
Stephen Menzies	- Treasurer (on a temporary basis)

Executive Members:

Richard Ackland
Mark Armstrong
Adrian Deamer
Noric Dilanchian
Robyn Durie
Dominque Fisher
Michael Frankel
Leo Gray
Kate Harrison
Catriona Hughes
Paul Marx
Judi Stack
Janet Strickland
Catharine Weigall

MULTIPOINT DISTRIBUTION SYSTEMS

Expressions of interest from entrepreneurs wanting to distribute video, audio or information material through multipoint distribution systems ("MDS") have been sought by the Government. Such systems use microwave transmitters to distribute video material or data to receivers at specified locations. The systems operate on different frequencies to television services and cannot be received without special equipment. They can stand alone, or operate as part of a hybrid delivery system combined with either satellite or Telecom cable or both. The fee for the transmitter sites in high density radio locations is $9,000 per annum, and elsewhere $2,130 per annum. Licences will be granted under the Radiocommunications Act.

NEWS

REGULATION OF PRINT HANDICAPPED STATIONS

The Government in October announced that radio for the print handicapped stations would in future be licensed under the Broadcasting Act, as special interest public radio station. There are four radio for the print handicapped stations operating in Australia, these being in Sydney, Melbourne, Hobart and Brisbane, whilst the fifth is temporarily off the air. The inclusion of the radio for the print handicapped stations on the broadcasting band will eliminate any need for modification of receivers to pick up their signals. When the new licensing arrangements come into effect holders of existing radio for the print handicapped licences will have to compete with other applicants for special interest (radio for the print handicapped) licences.

REMOTE TELEVISION COMMENCES

Golden West Satellite Communications, the RCTS licensee for the Western Zone, commenced broadcasting on 18 October, 1986. The satellite up-link facility is located at Bunbury, and is received by rebroadcasting facilities at Broome, Dampier, Derby, Carnarvon, Exmouth, Karratha, Kununurra, Port Hedland, Moora, Pannawonica, Roebourne and Wyndham.

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THE NEW INQUIRY - A PRACTICAL PERSPECTIVE

On 15 May, 1986 the Broadcasting (Inquiries) Regulations came into effect.

The Regulations were heralded as the means by which Inquiries could be expedited, costs minimised and delays averted. Whilst streamlined inquiries regulations had, for some time, been seen as desirable, the Tribunal's experience with the Inquiry into a third commercial licence for Perth was the catalyst for the promulgation of the new Inquiry Regulations although the Administrative Review Council had recommended changes to the Inquiry process several years ago.

The aim of this Article is to provide a commentary on how the new regulations have been put into practice and how they were applied in the first licence grant inquiry to be held under them - the Newcastle FM Licence grant. In addition, it is intended to provide some suggestions as to how the procedures can be improved and streamlined in the light of the procedures adopted.

The Newcastle Inquiry

After a false start when invitations for licence applications were withdrawn, applications were required to be lodged by 22 July, 1986.

After some preliminary meetings with the parties, on 12 September, 1986 the Tribunal met with all the parties and submitters to the Inquiry.

Initially the new inquiry procedures were explained:

> "Miss O'Connor explained that the new inquiry procedures are a vehicle to move the Tribunal into an administrative rather than a curial mode. The new procedures have more scope for co-operation between the Tribunal and parties and between parties themselves. A feature of the new procedures is the conference mode, designed to encourage discussion and identify major issues. Most issues will be approached in a

non-adversarial manner and conflict will hopefully be confined to a limited number of issues which, in the end, are irreconcilable and may need to be aired during a public hearing" (ABT report of public conference - 12.9.86).

During the conference the Tribunal made the point that the new inquiry procedures emphasised documentation and that hearings would focus on the "funnelling" of information the parties had provided as a result of the "pre-hearing procedures"; under the new procedures a public hearing is not automatic. Thus the inquiry emphasis has fundamentally changed from the presentation of an application at an oral hearing to the preparation of documentation, its filing and exchange, prior to a hearing (if any).

On the subject of cross-examination, the Tribunal said that because inquiries are not strictly adversarial "cross-examination is often not appropriate or of assistance to the Tribunal ... It has been the experience of the Tribunal that challenges to the qualifications, expertise or credibility of a witness who has given evidence in areas such as economics or market research are unlikely to be helpful to the Tribunal. The Tribunal will use its own expertise to give appropriate weight to the material produced to such experts. Parties who wish to challenge qualifications, expertise or credibility of experts should therefore seek leave of the Tribual first".

The conceptual structure given to the Newcastle inquiry by the Tribunal involved four steps:-

1. The funnelling stage - the stage where the parties determine the issues.

2. The Specifics Stage - where the parties file and serve documents to be relied on.

3. The Cross-Examination in Writing Stage - where the parties respond to the cases developed by the other parties.

4. The Hearing Stage - where all the facts and issues are before the Tribunal and any hearing is to tidy up loose ends.

The conceptual scheme was implemented by directions involving a fairly tight time schedule, the relevant stages being:

1. Parties provide lists of documents sought from other parties and the Tribunal.

2. Parties provide requested documents.

3. Parties provide documents upon which they will rely.

4. Parties provide statements of evidence and other material in support of their cases.

5. Conference to assess the conduct of the inquiry to date.

6. Parties to provide evidence and submissions in reply to the causes of the other parties.

7. Tribunal interviews the Boards of Directors of the parties and to hear closing submissions (unless evidence is to be heard orally).

8. (If required) oral hearing.

In practice the tight timetable worked well - after all it was in all applicants' interests to hasten the licence grant.

However, some criticism can be levelled at the process.

First, there is no reason why applicants should not, when first filing their applications, file with them statements of evidence in support of their applications. Such statements should include evidence from the directors an major shareholders of the applicant companies together with evidence as to market research, technical planning and financial assumptions and predictions. This would require the redesign of the application form to accommodate the presentation of such supporting material. Similar-

ly, there is no reason why applicants could not lodge with their applications the documents upon which they propose to rely.

Such a procedure would augment the determination of the relevant issues at the Inquiry because, from an early stage, each of the licence applicants would be in a position to assess the cases being presented by other applicants rather than having to wait until some time later to ascertain the issues.

Secondly, the opportunities for applicants to obtain documents from other parties should be circumscribed, at least in terms of parties being entitled to request and receive documents from other applicants as of right.

My experience with the new procedures was that the "requesting documents" stage could be used oppressively or as a fishing expedition by applicants. So far as I could discern, the documents obtained from applicants served little, if any, significance in terms of the substantive cases ultimately presented by each of the applicants.

A more efficient procedure, given that the Tribunal might find it of some relevance to have access to documents such as the minutes of Board Meetings of applicant companies or other internal memoranda and reports, would be for the Tribunal to request them to be filed at the same time that applications are filed, or alternatively, that they should be filed shortly after the application and supporting material is filed. In any event, applicants seeking documents from their competitors should be required to submit the reasons why they require the documents the subject of their request.

Thus structured, the documentary phase of a licence inquiry could be reduced to:

1. Applications lodged together with:

   (a) Statements of Evidence in support of application.

   (b) Documents upon which the applicant relies.

2. Conference to discuss inquiry and to determine whether parties are to be entitled to other documents from applicants.

3. Parties to provide evidence and submissions in response to the cases put by other applicants.

4. Interviews with applicants' Boards and closing submissions.

5. Oral hearing (if any).

One of the most interesting innovations used by the Tribunal was its interviews with each of the Boards.

The interviews took the form of the members of the Tribunal directing questions to each of the Boards in a public hearing. The Tribunal was able to question the Board members on issues that they considered to be of significance. The interviews took place without the active participation of legal representatives.

As a result, the Tribunal was able to avoid hearing lengthy cross-examination of witnesses. The interviews lasted about 3-4 hours in each case and were an unqualified success.

The Tribunal left open the opportunity for the parties to request an oral hearing at which cross-examination would take place on certain issues after the requesting party had established the need for cross-examination. Ultimately, none of the parties considered it necessary to make such a request.

The result of the new inquiry procedure speaks for itself: the Newcastle inquiry was finished in about 4½ months. A decision is to be handed down in late February. However it is too early to determine whether the new procedures have led to significant savings in costs for licence applicants. Certainly barristers fees are likely to decline as there is no necessity for their use otherwise than in the context of an oral hearing. The costs of an inquiry are brought forward by the new procedures. They are incurred in the preparation and documentary phase rather than at a hearing. The result is the defoliation of forests rather than the launch of hot air balloons.

David Watts

INTERNATIONAL SATELLITE AND CABLE TELEVISION SYMPOSIUM TO BE HELD AT U.C.L.A.

The Fifth Biennial Communications Law Symposium to be conducted in Los Angeles on March 5, 1987 shall concern the topic of "Following the Footprints: Protecting Film and TV Rights in the World Satellite Marketplace".

The Symposium is being presented by the U.C.L.A. Communications Law Program in co-operation with the International Bar Association and the American Film Marketing Association at the Beverly Hilton Hotel in Beverly Hills, California. The Symposium is being held in conjunction with the American Film Market which will also be held at the Beverly Hilton Hotel, February 26 - March 6, 1987.

The brochure advertising the Symposium notes in part as follows:

> "Delivery of entertainment programs across national borders by satellite is a daily reality. As new international networks emerge, complex legal and marketing problems arise.
>
> - Markets are becoming defined by satellite footprints rather than geographic boundaries.
> - Governments are unable to control the programming reaching their citizens.
> - Copyright owners have difficulty maintaining compensation commensurate with those who see their product."

The registration fee for the Symposium is US$125.00 or US$100.00 for members of the International Bar Association. For those who cannot attend the Symposium materials may be obtained at a cost of US$50.00 (no postage charge is indicated in the Symposium brochure). All communication may be addressed to:

Mail to: 1987 Symposium
Communications Law
Program
U.C.L.A. School of Law
Los Angeles, CA 90024

Inquiries: Doris Davis
Conference Administrator

(213) 206-0534 or
(213) 825-6211

Telex: 910 342 7597

UCLA Communications Law
Program

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PanAmSat Corporation

Silvio Berlusconi*
Fininvest Broadcasting
Company
Milan

Daniel Brenner, *Director*
UCLA Communications
Law Program

Stuart Brotman
Senior Management
Adviser/Communications
Boston

Hon. Patricia Diaz Dennis
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