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ACLA NEWS

This is the last edition of the Communications Law Bulletin (CLB) as the official publication of ACLA. After much debate, the long-awaited merger of ACLA and the Media Law Association (MLA) will take effect as of 1 January, 1988. Notice of the new organisation is included with a membership form.

The merger is a result of ACLA and the MLA combining the skills, expertise and membership of the respective organisations to advance and promote knowledge and understanding of communications and media law. As with any merger, there are terms and conditions of which our members should be aware.

Under the terms of the merger agreement, the MLA shall change its name to the "Communications And Media Law Association" (CAMLA). As of 1 January, 1988, ACLA shall cease to have or accept any members and all members of ACLA will become members of CAMLA upon application.

The initial Committee of the new organisation shall comprise all members of the ACLA Executive and the Committee of the MLA and will hold office until the first annual general meeting (AGM). All members of the Committee shall retire at the AGM but will be eligible for re-election. It is intended to form specialist sub-committees to manage CLB, organisation of seminars and other such functions, where necessary.

It has also been decided that membership fees of CAMLA will be on a calendar year basis and that the following fees shall apply: $70.00 for corporate members, $40.00 for individuals and $20.00 for students.

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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.

BROADCAST REGULATION IN TURMOIL: THE NORTH AMERICAN EXPERIENCE

I. "The Public Convenience, Interest, Necessity" (47 U.S.C. s309)

Broadcast regulation in the United States is in the advanced stages of a transition so major that, it would have been as unforeseeable in the 70s as putting a man on the moon would have been in the 50s. A combination of new technologies, different regulatory philosophies, and ideology have transformed not just the specifics, but the broad outlines, of broadcast regulation in the U.S.

Today, broadcasters are caught in the middle of a maelstrom produced by technological competition, politics, and the larger economics of the marketplace. This paper attempts to highlight some of the major shifts in broadcast policy and discusses some of the current "hot" issues being debated by policymakers and industry participants. By way of further illustration, the paper also touches briefly on the Canadian experience with broadcast regulation.

At present, U.S. policy on many questions remains unsettled. This paper will not, and cannot, canvass the questions, let alone the answers, exhaustively. Rather, it hopes to suggest the scope and centrality of the issues now being discussed.

II. Structure of U.S. Broadcast Regulation

At the outset, it might be instructive to outline the institutions and structure of broadcast regulation in the U.S. The principal (indeed only) relevant statute is the Communications Act of 1934 (1934 Act), which established the Federal Communications Commission (FCC) as the sole regulator of communications in the U.S. The FCC's jurisdiction is exclusive and pre-empts jurisdiction of the various states. In the U.S., the FCC is supreme, except that state public utility commissions can regulate intrastate common carrier services. The Act establishes a unified and comprehensive system for allocating and regulating radio spectrum in the U.S.

An Independent FCC

Unlike the system in other countries, the FCC is an "independent" regulatory commission free from control of the executive branch. Its five members are appointed by the President and confirmed by the Senate; they serve for seven years and cannot be removed by the President. The statue mandates bipartisanship, with no more than three of the five commissioners being from one political party.

The extraordinary - political sensitivity in allocating and assigning spectrum for broadcasting and other uses underlies this attempt to guarantee independence. As well, however, Congress has historically recognized that an independent expert agency was needed to cope with the dynamism inherent in the evolution of the industry.

The historic insulation of the FCC is now being eroded, in some cases quite significantly. The Congress is certainly taking a far more active role in overseeing the FCC and making broadcast policy. Even the current President, with his ties to the motion picture industry, is rumoured to have had a hand in at least one FCC proceeding.

Title III of the Communications Act confers on the FCC plenary authority to allocate non-governmental radio spectrum to particular classes of uses and to assign licenses to individuals in accordance with the allocation scheme (47 U.S.C. ss303 & 309). The President and the executive branch have no authority over the licensing of radio transmitters for non-governmental purposes (47 U.S.C. s305). The rationale is to ensure the clearest possible separation between necessary government supervision and the free flow of ideas that is protected under the First Amendment of the Constitution.

One of the principal functions of the FCC is allocating spectrum to particular categories of use, and then to develop a regulatory framework for each "use" or technology. The three major categories are broadcast, common carrier and private services. Differ-

ent procedures and substantive standards of regulation are applicable to each one. The boundaries between the categories have never been defined with precision, either in the Communications Act or in regulation. The lines inevitably blur.

Spectrum Allocation

New technologies are increasing the demands on usable spectrum; obviously, the supply is not keeping up with those demands. The FCC is constantly besieged with proponents of more spectrum for "broadcasting", more for "private radio", "mobile satellite," and, most recently, "advanced television technologies". All comers cannot be accommodated.

It can take years, and in some cases up to a decade, to authorise new services. Historically, the FCC issues a rulemaking notice that suggests the allocation of spectrum that it is contemplating. It receives comments from the public and makes its final decision on the evidence presented. The decisions are reviewable by courts. All this is measured under the "public interest" standard.

Increasingly, a restive - and ideologically-driven - FCC is exploring alternative methods of allocating spectrum. The process of comparative hearings takes a long, long time to complete. In 1982, the FCC obtained authorisation from Congress to award some licences by lottery, in the cellular radio service and some microwave services, for example. These lotteries, too, have not greatly expedited the delivery of service to the public.

Consistent with the marketplace approach that has been adopted in recent years, the FCC has been exploring allocation alternatives that rely on the market and profit incentive. One example may suffice.

The Commission has been considering proposals that would re-allocate and affect existing broadcasting spectrum. First, in a still-pending proceeding, it has proposed to reallocate at least two UHF channels to land mobile services in eight major markets. Second, it has proposed that licensees for UHF channels 50 through 59 would have broad flexibility to use spectrum as they chose. A flexibile approach is desired, it is said, to increase licensee discretion and serve the market.

Broadcasters are, obviously, in favour of the latter and opposed to the former proposal. Flexibility in managing spectrum is, in the latter, delegated in some sense from the FCC to the licensee. It is anticipated that some of the channel 50 to 59 spectrum might be available for HDTV and broadcast auxiliary needs; for example, the FCC believes that a licensee might be able to join with a VHF licensee to provide one form of HDTV service.

There are not insignificant legal and policy ramifications by ceding authority to allocate spectrum to services from the government to licensees. As will be noted below, the FCC is moving from a "public trusteeship" concept of regulating broadcasting to a "marketplace approach". Although it may be prudent, even preferable, to have each licensee program in accordance with marketplace demands, it is not at all clear that it is wise to parcel off pieces of spectrum based on the marketplace - profit incentives - alone.

A Case Study: ATV

In the recently issued Advanced

The merger will not only result in broader range of activities and information available to members of both organisations but also in a "new-look" Communications Law Bulletin. Next year, the CLB will be published on a quarterly basis and it will have a new format (gone is that dreadful television transmitter). ACLA has already employed an editor to oversee the CLB's production and the first issue of Volume 8 will be available in March 1988.

With the greater range of information and material available the CLB will be able to provide its readers with an up-to-date and regular account of the rapid developments in communications law in Australia and overseas.

Television Systems proceeding, the Commission is taking a longer-range look at new advanced technologies that use different transmission and reception methods which cannot be displayed or decoded on existing receivers. Some of these will have a significant impact on existing broadcast technology - the NTSC standard in use in the U.S.

The Commission is charged with carefully weighing the improvements in television quality that are possible with the incident higher costs. When it secures information on what improvements are possible, the Commission will be in a position to decide whether adoption of some form of ATV is in the public interest. At this point, ATV is defined very broadly as anything that would improve audio or video broadcast quality: improvements in NTSC, new transmission technologies, with the same number of scan lines, and new technologies with a larger number of scan lines (i.e., HDTV).

Leaving aside the technical matters, the principal question facing the FCC is how to allocate spectrum. The issues at stake are typical of the FCC's spectrum allocation process. If it allocates more spectrum to ATV, and treats it as a separate service, there will be fewer incentives to improve existing technology. Over time, then, it is likely that the present broadcast standard could fall into some disuse; spectrum might be "wasted", because the FCC could not readily reassign broadcast spectrum to other services.

However, if it "conserves" spectrum and consolidates ATV with the existing broadcast service, exciting new technologies may be stalled - to the detriment of the public interest. For this reason, the FCC has already concluded on a tentative basis that allocating additional spectrum is warranted.

Where is there spectrum to be found? One possibility is the existing VHF and UHF spectrum under current or modified technical criteria; additional spectrum could be obtained from adjusting or eliminating the broadcast-to-broadcast interference standards, such as co-channel or adjacent channel protection. Another possibility is taking spectrum away from other, non-broadcast services or sharing with such services. Yet another, is "finding" or creating "new" spectrum capacity.

Beyond spectrum allocation issues alone, the FCC will have to address issues of standard-setting in ATV. It has some experience in this area, with AM stereo, FM stereo and stereo TV. Indeed, although the FCC prefers a marketplace approach, AM stereo is somewhat moribund in the U.S. precisely because there is no marketplace standard. For ATV, the FCC will need to determine whether new ATV technologies are compatible with NTSC, or whether the new technologies are compatible with one another.

At the same time, the FCC may use the ATV proceeding to begin relaxing the mandatory NTSC standards; if various systems are "compatible", the reasoning might go, then the consumer should be given the choice of which quality of service he might prefer (and pay for). In addition, there may be regional needs and demands that might reduce the requirement that the same standard be used nationwide. So long as the rules prevent interference, why not give licensees the discretion to deploy augmented spectrum as they choose?

Regulatory Classifications: Making Sense?

Once it allocates spectrum based on its "public interest" calculus, the FCC still has to decide the appropriate regulatory regime for ensuring that that spectrum is used in the "public interest" by the licensee. In one sense, these issues are governed by the Communications Act, which, as noted above, categorises services and then sets out a legal framework for them. (Title II of the Act governs common carriage; Title III governs broadcasting).

Beyond the skelatal outlines of the Act, the FCC must decide what is the appropriate regulatory regime for the services within the category.

More fundamentally, what is the FCC to do regarding new or hybrid services that do not fit neatly into a regulatory box?

The Communications Act defines "broadcasting" as the dissemination of radio (and, subsequently, television) communication "intended to be received by the public (47 U.S.C. s153(o)). Some commenters have noted that "broadcasting" had originally been described as the scattering of seeds in all directions. New services - DBS, STV, and MDS - do not, however, match in every particular the criteria of "broadcasting" as they are evolving under this statutory standard. It might be useful to examine how the FCC, and the courts, have treated these new technologies.

Direct Broadcast Satellite

The history of the classification and regulation of Direct Broadcast Satellite (DBS) amply illustrates some of the "fall-between-the-cracks" problems besetting the FCC. There is little debate that DBS, in most instances, is a broadcast service. Indeed, the FCC has conceded as much from the technology's name. Direct transmission from a satellite to an individual subscriber's antenna falls within the statutory definition.

The issue of how to regulate DBS illustrates the inflexibility and, perhaps, outmoded nature of that definition, however. If DBS is "broadcasting", then the plethora of broadcast regulations found in Title III (equal time, reasonable access,and Fairness Doctrine rules, for example) of the Act apply to a DBS programmer, regardless of whether it is the licensee of a DBS transmission facility. If regulated under Title III, potential DBS programmers might shy away from the service altogether - and the technology could be stillborn.

Of course, by contrast, programmers of over-the-air broadcast television are not licensed or subject to any regulation whatsoever. Nor, of course, are HBO or other programmers that use C-bands to transmit programming directly to large "backyard" dishes, although such programming is ostensibly aimed solely at cable operators and satellite master antenna television operators.

Tailoring its regulatory regime to the specifics of the technology, the FCC had set up a three-part scheme for DBS operations. First, a DBS licensee could choose to operate as a common carrier, offering capacity on a non-discriminatory basis to any programmer. This licensee would be regulated under Title II of the Act.

A DBS operator might also operate as a conventional broadcaster. It would control the transponder and would select the programming, just like a regular television licensee. Such an operator would be subject to Title III.

Third, the FCC developed a hybrid category of "customer-programmer"; this group would program all or part of a DBS service offered by a common carrier DBS operator. The FCC believed that Title III need not apply to this category, unless it found that such regulation was necessary to serve the public interest. In any event, the underlying carrier would be subject to regulation. By analogy, noted the FCC, customer-programmers of MDS have never been licensed as broadcasters; DBS programmers should be treated in the same way. Finally, because the Act speaks of "licensees", there was, believed the FCC, no intent to regulate "mere" programmers.

On review, the U.S. Court of Appeals for the District of Columbia Circuit gave a narrow reading to the definition of "broadcasting" in the Act to conclude that the technology must be subject to the full scope of Title III regulation (National Ass'n of Broadcasters v FCC, 740 F2d 1190 (D.C. Cir. 1984); U.S. Satellite Broadcasting Co., Inc. v FCC, 740 F2d 1177 (D.C. Cir. 1984)). The courts had already held, some 25 years earlier, that "background music" was a broadcast service because it was of interest to the "general" radio audience and that the touchstone of "broadcasting" is the "intent" of the broadcaster to disseminate to the public (Functional Music, Inc. v FCC, 274 F2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959)). The court was convinced that no matter how the technology is configured, if it

uses the airwaves to disseminate mass-appeal programming, it is "broadcasting". Thus, it imposed Title III regulation on programmers - those who have no stake in the underlying licensee or radio transmission facility.

The ramifications of the decision are significant. First, of course, DBS has never "gotten off the ground" in the U.S. Second, the court questioned the framework for regulating MDS; it held that no court had yet passed on the validity of the regulatory framework for that service, and thus the FCC's attempt to regulate by analogy was unpersuasive. Third, and most fundamentally, the decision seemed to tie the FCC into a regulatory straightjacket, removing much of the flexibility that is necessary to configure regulation to technological imperatives.

Subscription Television and MDS

Responding to the court's decision, the FCC initiated a proceeding to determine what criteria should be used to determine whether a communications service should be treated as "broadcasting" under the Act (In re Subscription Video, Gen. Docket No. 85-305, Report and Order (released Feb 17, 1987)). It opined that the definition of "broadcasting" is intended to differentiate between services intended to be received by an indiscriminate public and those intended only for specific receive points. Examination is had of the licensee's specific business practices.

Under this rubic, both subscription television and subscription DBS are classified as "non-broadcast". The consequences are significant. The equal employment opportunity rules will not apply and equal time and equal opportunity provisions will not apply.

What happened to the "customer-programmers" at issue before the Court of Appeals in the DBS case? The FCC has concluded that most of those will provide a fixed, subscription service; hence, they will be out from under Title III regulation. The FCC has sidestepped the question of what jurisdiction it can or will exercise over non-subscription customer programmers.

The FCC also has changed regulatory treatment of MDS to permit MDS operators to elect classification as either broadcasters or common carriers. Before this action, all MDS systems were regulated as common carriers. It was thought that because an MDS licensee was obligated to make non-discriminatory offerings of its service to the public, it was critical that MDS be designated as a common carrier service.

MDS was, however, a unique common carrier service in that it used broadcast technology to distribute multiple addressed broadband communications. The FCC's reclassification action corrected this somewhat anomalous situation and allowed subscription television services to be treated similarly, regardless of whether they are delivered by MDS, DBS, or traditional over-the-air broadcast technology.

Under the Commission's revised regulatory scheme, an MDS operator may select common carrier status and be treated as a non-dominant carrier, as to which the Commission will forbear from regulating. As such, MDS operators will not have to file tariffs for their services; they will, however, still be subject to Title II complaint procedures, which guard against unfair pricing practices. Those selecting non-common carrier status will be regulated under Title III of the Act.

III. The Fundamental Tension: First Amendment

The fundamental tension in U.S. broadcast policy is the relationship between the First Amendment and exercise of the regulatory function. This tension is played out in the factors taken into account in the assignment of licences, in renewal of licences, and in content-based regulation - the Fairness Doctrine, the equal time rule for political candidates, and the prohibition on "indecency". At a minimum, the FCC is empowered to act as a "referee", to prevent interference and chaos.

The FCC, in reality, does far more than serve as a mere traffic cop. It is charged with regulating "in the public interest, convenience, and necessity", a standard that is both vague and permissive of far-

reaching regulatory scope. And, to the extent that the FCC is perceived as having been unnecessarily intrusive, today's policymakers - both at the FCC and elsewhere - are strenuously trying to reduce its role.

The New Regulatory Approach: Relying on the Marketplace

The traditional philosophical approach toward broadcasters has been that they hold their licences as "public trustees". This perspective has been used to justify FCC regulation or, as some would say, intrusiveness that exceeds permissible First Amendment boundaries. Under the vague "public interest" standard guiding the Commission, the trusteeship role has been developed: broadcasters and programming obligations, including an emphasis on service to the community. Indeed, the application process itself required a fairly onerous exercise known as "ascertainment", which was used by the station to determine how best it could program to meet community needs.

Since then, the FCC had adopted percentage guidelines for news and public affairs programs. Non-specific content obligations had also been specified in the area of children's television and under the Fairness Doctrine.

The public trusteeship model was spawned in an age of spectrum scarcity. Now, however, the FCC - and many commenters - believe that the so-called "alphabet soup" of new technologies has alleviated whatever 'scarcity" had existed. Citations are made to MDS, DBS, low-power television, STV, cable, fixed-satellite services, videocassette recorders, and videodiscs. Of course, none of these alleviate actual spectrum scarcity with respect to broadcasting. Rather, they supply competitive alternatives. With these new technologies (some of which are yet to be seen), the view is that there is a "marketplace" of ideas that obviates the need to ensure that the broadcast service alone supplies the full range of programming to the public.

The alleged reduction in scarcity is justified somewhat illogically, by the fact that there are more broadcast outlets, by far, in the U.S. than there are print media. As of July 31, 1987, there were 4,888 AM stations, 3,970 FM radio stations, 459 UHF commercial television stations, and 543 VHF commercial television stations. In total, given educational, noncommercial, and low-power stations, there are 10,131 total radio stations and 1,623 total television stations currently licensed in the U.S. Thus, continues the argument, there is no greater justification for regulating broadcasters more strenuously or closely than there is for regulating the print media. Because the print media, however, are essentially unregulated, so, too, should be broadcasters.

Of course, the marketplace suggests that broadcast properties are anything but plentiful. Most communities have only three VHF outlets, for example, although some UHF channels in smaller markets do go wanting. Individual television stations in major markets are being sold for half a billion dollars. The highest price was just paid for an AM-FM combination in Dallas: $82 million. High prices do not necessarily mean scarcity. Nevertheless, it is fair to say that there is something special about broadcast outlets - despite the attractions of the new media. And, just because one can buy a station does not mean that the market itself is not limited by the laws of physics.

In any event, the former chairman of the FCC was convinced that scarcity analysis is misguided, if not constitutionally prohibited. There is some legal support for movement toward a "marketplace" approach. The courts have not made it impossible for the FCC to adopt such an approach, given their focus on the importance of competition. More importantly, the most important constitutional value in broadcasting is the "right of the viewers and listeners". Broadcasters are accorded somewhat lesser status but are also entitled to substantial rights as "speakers" and as the "press" under the First Amendment. A marketplace approach, which responds to what viewers and listeners actually want, rather than what the FCC thinks they should see and hear, and treats the electronic and print media alike,

may, therefore, pass constitutional muster.

Transition to a Marketplace Regime

The FCC has moved decisively toward a marketplace regime. In its first stages, the FCC has done away with regulation that it deems burdensome or unnecessary.

The FCC has now "deregulated" radio: no longer are non-entertainment and commercial level guidelines on the books. No longer is ascertainment required for television or radio. Some responsibility to the community is required, but its contours are unspecified. Radio station renewals can be filed on a postcard. In an ongoing series of "underbrush" proceedings, the FCC has done away with regulations as disparate as those dealing with licensee distortion of audience ratings, promotion of non-broadcast business of a station, sports announcer selections, and false and misleading commercials.

The FCC has greatly reduced the "character qualifications" that it applies to applicants for broadcast licences. It essentially no longer looks at non-FCC misconduct. Conduct more than ten years old is considered irrelevant.

The FCC's "deregulatory" process has had its full share of critics. They note the extraordinary churn in the broadcast market and the fact that broadcast licences are treated as if they were ordinary marketplace commodities. The FCC justifies its approach by focusing on consumer welfare and not on the policies that bureaucrats or Washington policymakers might like pursued. Calls for re-regulation are resisted: the marketplace appears robust, news programming is increased, and new technologies are entering the fray.

The long and the short of it seems to be that there is little turning back from the path on which the FCC has now embarked. Indeed, like much of the agenda on the plate of the current Administration, it seems that the policy debate has changed, if not inalterably, for the near and medium-term. The starting point is now not "how should broadcasters be regulated" but "can regulation improve on the marketplace".

Economics at Work: Auctioning Spectrum and the Spectrum Licence Fee

If broadcast licences are property, ask some in Washington, then why not charge for them? Deregulate the marketplace and sell off a frequency for a fee. Already broadcasters enjoy an expectation of renewal that comes close to a property right. In recent years, licences are almost always renewed, and the FCC has shown the greatest reluctance to revoke a station licence.

One proposal is to charge for spectrum usage via a fee. The fee could be charged on a percentage of a station's profits, or it could be a flat charge based on bandwidth. Given the general belief that the airwaves do belong to the public, perhaps a price should be put on broadcasting - the method of distribution.

For some time, there has been a proposal floating around to channel the proceeds from a spectrum fee into public broadcasting - which is often under fiscal, if not political, seige. The question of financing has long remained unsettled and politicians, responsible for authorising monies, have taken a hard look at a broadcasting service that has aired programming deemed offensive to those in power.

Another possible use for a spectrum fee could cover services rendered by the Commission in enforcement and licensing. The FCC has, however, recently adopted a proposal that charges fees for each application filed; the fees must be based on the "value to the recipient", not on the cost of services that inure to the public generally (National Cable Television Ass'n v United States, 415 U.S. 336 (1974)).

In general, the spectrum fee concept has not met with widespread acclaim. Broadcasters have opposed it, hoping to win deregulatory concessions at the FCC without having to pay for them. Frequency has always been "free", at least in a direct, monetary - though not necessarily in a conditional - sense. Furthermore, not all broadcast properties are profitable and would generate the revenues to pay such a fee. Congressional opponents of a spectrum fee proposal have gener-

ally charged that it would result in giving away an important public asset.

Another "marketplace" proposal is to use "auctions" to assign initial licences. Unlike the spectrum fee proposal, there would be no "quid pro quo" for auctioning off spectrum. Rather, given the high administrative expense and procedural hurdles posed by the comparative licensing process, it may make sense to assign vacant channels to the "highest bidder".

Auctions should not be used for existing licensees; the renewal expectation would be destroyed. An auction process also would make clear what is now understood by the communications bar: in reality, subsequent resale, private bargains between applicants, and private auctions after assignment all mean that the licence is, most often, going to the deepest pocket after all. And, of course, auctions save money, reduce delay, and compensate the public with funds from the private sector.

IV. A Structural Approach to Regulation

One way in which the FCC "regulates" the broadcast sector is structural - not content-based. That is, if the objective is to ensure diversity and competition in the marketplace, one way of doing so is to prevent concentration and to encourage the maximum number of outlets in a particular community.

Historically, the FCC had barred any entity from owning - or having interests in - more than seven AM stations, seven FM stations, and seven television stations. In 1984, however, it revised the ceiling to permit ownership of a maximum of twelve AM, twelve FM and twelve television stations (49 Fed. Reg. 31, 877 (Aug 9, 1984)). Congress reacted swiftly and negatively to this change; in response, the Commission modified its initial decision (49 Fed. Reg. 32 581 (Aug 15, 1984)).

Nevertheless, in December 1984, it decided to retain the twelve-station limit for the three broadcasting services and, for television, it adopted an additional ownership limit, which allows entities to acquire ownership interests in television stations reaching a maximum of 25% of the national audience (with some greater audience reach possible for UHF stations).

Also in 1984, the Commission eliminated the rules that had limited the number of AM, FM or television stations that an entity could own in a particular geographic region. The purpose of the rules had been to promote diversity of programming and economic competition on a regional basis. The FCC concluded, however, that those goals could be met by the marketplace because the increase in media outlets had reduced the potential influence of a single broadcaster.

More recently, the Commission has proposed relaxing its duopoly and one-to-a-market rules (Amendment of section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Notice of Proposed Rulemaking, MM Docket No. 87-7, 2 FCC Rcd 1139 (1987)). The duopoly rule prohibits common ownership of two or more commercial radio stations in the same broadcast service (AM or FM) that serve the same local area. The one-to-a-market rule restricts common ownership of service combinations in the same market; thus, a person or company can own just one commercial AM-FM combination, or one television station, or one daily newsaper in a local market. Under its proposal, the FCC would revise the duopoly rule to allow common ownership of multiple stations, except in situations where the stations have very powerful overlapping signals. The one-to-a-market rule would be changed to permit common ownership of AM-UHF, FM-UHF, and AM-FM-UHF stations serving the same local area. The Commission also would consider other local combinations on a case-by-case basis.

The FCC has now come to believe that large broadcast operations with substantial resources can produce programming that would otherwise never be made. The strong public interest in diversity is enhanced, it is said, by fostering an environment in which broadcast conglomerates can develop programming over "quasi-networks". Smaller, independent licensee station owners can do little more than channel network programming or buy prepackaged programming from syndicators.

As must be well-known to Australians, the easing of the structural rules has led to significant chain broadcasters: though the fate of the Fox Television Network is still uncertain, the FCC can point to the fact that that enterprise might not have been created unless the necessary economies of scale - made possible by the rule changes - permitted.

V. Current Policy Debates

A significant question in ongoing policy discussions is whether broad deregulation of the broadcast industry - as the FCC has carried out in recent years - is consistent with existing legislation and desirable as a matter of public policy. On the one hand, critics of recent Commission actions believe that the FCC has eroded the public trustee concept and has turned broadcasting into just a money-making business. Supporters of the FCC's actions contend that the Commission is upholding First Amendment principles by allowing broadcasters to operate relatively free of government oversight; such an approach, they argue, reflects the vigorous media marketplace that now exists.

Reform of the Licensing Process

Congress is considering comprehensive legislation that would dramatically alter the process by which broadcasters renew their station licences. However, what was once envisioned as deregulatory legislation has become entangled in a broader policy debate about whether the FCC has gone too far in its reliance on market forces to discipline broadcasters. As a result, Senate legislation seeks to balance marketplace ideology with public trustee concepts by providing broadcasters with a greater assurance of licence renewal if they conform to certain specific standards of conduct. The legislation, s1277, has been criticised broadly, and its chances of passage do not appear to be particularly good.

At present, applications for renewal of a broadcast licence are subject to potentially broad challenges for a wide range of conduct, including alleged violations of FCC rules and policies or other conduct not thought to be "in the public interest". A station also might find itself involved in a comparative hearing if there is a competing application filed for its frequency.

The Senate bill seeks to give incumbent broadcasters more protection from challenges at renewal time. The quid pro quo, however, is that licensees conform to a standard of conduct that Congress believes is consistent with the concept of a "public trustee". The bill would entitle broadcasters to renewal of their licences if they could prove that their service has been "meritorious". The bill also would require that licensees provide "meritorious" children's programming. In addition, it would codify rules regarding preferences for station applications by women and minorities and restrictions on multiple station ownership that are current prospects for repeal by the FCC.

Finally, the bill would protect an incumbent licensee from a comparative hearing unless the incumbent could not satisfy the "meritorious" service standard.

This tradeoff - stability in ownership in exchange for what many view as "renewed regulation" - has not won much support. In many respects, however, the legislation captures the heart of the current debate about the future of broadcasting: should it be a business infused with a strong public service obligation or governed by the demands of the market?

The industry and the FCC have criticised the "meritorious" service standard as being too vague and as requiring the FCC to return to the days when it closely scrutinised a licensee's programming in deciding whether the licensee was "fit" to continue operating a station.

In mid-August, the Justice Department announced its strong opposition to the bill, which is co-sponsored by Sen. Daniel Inouye (D. Hawaii), chairman of the Senate Communications Subcommittee, and Sen. Ernest Hollings (D.S.C.), chairman of the parent Commerce Committee. The Department said the bill was inconsistent with the First Amendment because of its "intrusive, content-based" provisions. The Department

also said that it would recommend to President Reagan that he veto the bill if it were to win passage in the House and the Senate.

House Legislation, H.R. 1140, involves fewer tradeoffs and has received broadcast industry support. Under that legislation, an incumbent licensee would be entitled to renewal if it could demonstrate compliance with FCC rules and policies. Despite industry support, the bill's future is in doubt because the powerful chairman of the House Energy and Commerce Committee, Rep. John Dingell (D. Mich.), opposes its deregulatory approach. Dingell has been a vocal critic of the FCC's efforts to deregulate broadly.

Regulating Trades in Broadcast Properties

A second major area of attention is the flood of broadcast station sales that has developed since 1985. Congress has proposed anti-trafficking legislation to combat the perception that broadcasting has become solely a profit-making venture.

Under an anti-trafficking rule that the FCC repealed in 1982, a licensee was not permitted to sell a broadcast licence for three years after acquiring that licence. Legislators are seeking to re-impose that holding period in the form of an amendment to the Communications Act.

The industry has not taken a unified position on the legislation. There appears to be significant support for the legislation in both the House and the Senate, however, where there is a feeling that licences have become a profitable trading commodity, rather than a commitment to serve the public interest. The House bill is H.R. 1187; the Senate has included an anti-trafficking provision in s1277, its general licence reform legislation.

Statistics suggest that station "flipping" - rapid buying and selling of broadcast stations to make a profit in the bullish broadcast market - has become relatively commonplace. According to one study done by Paul Kagan Associates, Inc., more than half of the 160 television stations sold in 1986 were held for less than three years; almost one-fourth were held for less than two years. In 1983, just five percent of the television stations sold were held less than three years, but that percentage has risen steadily in the last three years.

In addition to the large number of stations being bought and sold in the last two years, many of the major group owners of broadcast stations, including two of the three national networks (ABC and NBC) have changed hands. The third network, CBS, fought an expensive battle to thwart a takeover bid by Ted Turner, and many industry observers believe that CBS still has not recovered from the financial trauma of the experience. In fact, some observers believe that the defence that CBS adopted to fight off Turner's bid effectively has changed the control of CBS. To protect itself from Turner, CBS turned to a "white knight", businessman Larry Tisch, who purhcased 25% of the CBS stock and is now the company's chief executive officer and an influential board member. Periodically, there have been rumours that Tisch would end up acquiring outright voting control of CBS. A public interest group filed a request with the FCC seeking a ruling that Tisch had in fact assumed control of CBS. The FCC ruled, however, that CBS continued to be controlled by its diverse group of public stockholders.

In response to this active market, the FCC adopted new policies to accommodate the growing market in broadcast station mergers and acquisitions. This accommodation drew the anger of many congressmen and public interest groups, who saw it as strong evidence that the FCC seeks to foster a trading marketplace more than anything else. In the Commission's view, it was merely trying to bring its policies in line with the demands of the market and with other federal policies, such as the federal securities laws.

In 1985 and early 1986, a number of broadcast companies - including CBS - were the subjects of hostile tender offers and proxy contests. The FCC found itself in the middle of a difficult policy dilemma because these corporate maneuvers required speed and secrecy, whereas the Communications Act required broadcast transactions

receive prior Commission approval after completion of a time-consuming public notice and comment process. Where there is a substantial and material question of fact about an applicant's qualifications to assume control of a broadcast property, the FCC is required to hold a hearing to resolve the question. Such a hearing could take months or years - in any case far longer than a tender offer could be held open.

In response the FCC devised a "two-step" transfer procedure to permit tender offers and proxy contests to proceed quickly without violating the Communications Act (Tender Offers and Proxy Contests, 59 Rad. Reg. 2d (P&F) 1536 (1986)). Under this procedure, a potential buyer can form a trust into which tendered voting stock may be placed until the FCC has approved the buyer's application to assume control of the broadcasting company being acquired. Relying on s309(f) of the Communications Act, the Commission decided that - without requiring a minimum thirty-day wait for the completion of formal public notice and comment procedures - it could grant a Special Temporary Authority (STA) to an independent trustee appointed to administer the trust. This STA would permit the broadcast company to be controlled by the trustee for the period during which the FCC was reviewing the ultimate buyer's application.

If the application is approved, the trustee is permitted to transfer the stock to the buyer and the trust is dissolved. If the application is denied, the trustee is required to seek another qualified buyer for the stock held in trust.

Critics of this decision have argued that it circumvents the intent of the Communications Act by effectively allowing a hostile buyer to "get its arms" around a broadcasting company - albeit through an intervening trust. Nonetheless, they contend, the Commission is unlikely to "unwind" a transaction once it has gotten as far as the trust stage; thus, it is said, the Commission has created a fiction to accommodate the trading market for broadcast stations. According to critics, the Commission's "fiction" is saying that a transfer is not a transfer; they argue that the Commission is being disingenuous when it says that a transfer of ownership to a trust is something other than a transfer to which the Communications Act's prior approval and public notice and comment procedures apply.

A court challenge of this two-step transfer procedure recently was dismissed on the grounds that it was not ripe for judicial review (Office of Communication of the United Church of Christ v FCC, No. 86-1278 (D.C. Cir. Aug 14, 1987)). In the 2-1 decision, however, the dissenting judge said she would have over-turned the "two-step" policy on the ground that it "goes beyond [the FCC's] statutory power".

Minority Preferences

For many years, the FCC sought to encourage the diversity of broadcast programming by encouraging station ownership by minorities and women. Recently, however, the FCC reversed its position completely and proposed eliminating its various "minority preference" policies on the ground that they violate the Equal Protection Clause of the U.S. Constitution. In the FCC's view, the preference policies have not resulted in more diverse programming. The FCC's current view is that these policies have discriminated in favour of women and minorities without justification.

In 1985, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit held that a Commission decision awarding a licensing preference on the basis of gender "r[a]n counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy" (Steele v FCC, 770 F2d 1192, 1199 (D.C. Cir. 1985)). After a motion for rehearing en banc was granted, the FCC submitted a request that the case be remanded to it before any further proceedings were held before the court. The Commission submitted a brief questioning the validity of its preference policies for women and minorities and said it would institute a proceeding to examine their continued constitutionality. Accordingly, the FCC released a Notice of Inquiry in December

1986 in which it proposed eliminating these preference policies for women and minorities.

These preference policies permit applicants to gain advantages in licence lotteries or in comparative hearings by demonstrating that they would involve women or minorities in the ownership and operation of the station. The FCC's policies also have allowed station sales to or purchase by women and minority owners to qualify for advantageous tax treatment.

In many cases, non-minority owners have abused these policies to gain station licences. In an effort to gain a licence or some other financial benefit, they have touted minority involvement that ends up being either token or fleeting. Shortly after a licence is awarded, the minority owners and managers quietly walk away from the station, usually with a significant amount of additional money in their pockets.

A number of Congressmen, together with a range of women's and minority groups, have expressed outrage at the FCC's action and have sought legislation to nullify expected FCC action. The Senate's comprehensive broadcast reform legislation, s1277, would adopt into law the FCC's current preferences for women and minorities. The House is considering similar legislation. Nevertheless, the FCC is expected to act this fall on the proceeding in which it has proposed to eliminate the various preferences.

Fairness Doctrine

For almost four decades, the Fairness Doctrine has been the cornerstone of "behavioural" regulation in the broadcasting industry. It has required broadcasters to present balanced coverage of controversial issues of public importance (see 47 C.F.R. s73.1910 (1986)). For critics of the policy, it has symbolised broadcasting's second class status under the First Amendment; the Fairness Doctrine, it is argued, unconstitutionally invades the editorial discretion of broadcasters. For supporters of the policy, it has been an essential element of the "public trustee" scheme of regulation.

On August 4, 1987, the FCC ended the lengthy debate of the Fairness Doctrine by repealing it (In re Complaint of Syracuse Peace Council, FCC No. 87-266 (released Aug 6, 1987)). The Commission decided that the policy was inconsistent with the public interest because it tended to chill broadcasters' speech, rather than enhance the vigorous discussion of public issues. In the FCC's view, the Fairness Doctrine caused broadcasters to avoid covering public issues for fear that their coverage would be deemed unbalanced. Such a finding would constitute a violation of the FCC's rules and could result in the imposition of penalties that, in theory, could be as severe as the revocation of broadcasters' station licence. (The FCC has erected significant procedural barriers in the way of Fairness Doctrine complaints; these place a very great burden on parties trying to prove a Fairness Doctrine violation. Most complaints fail to meet this burden and are dismissed).

Although the FCC's action was not unexpected, it still provoked an uproar in Congress and among public interest groups. Repeal of the Fairness Doctrine was characterised as the FCC's most brazen effort to eviscerate the "public trustee" concept embodied in the Communications Act. Broadcasters, of course, praised the FCC's action as vindicating their First Amendment rights.

At present, Congress is considering re-imposing the Fairness Doctrine through legislation. In June 1987, President Reagan vetoed a bill that would have amended the Communications Act to include the Fairness Doctrine. Congress is considering another codification effort, however; proponents of the legislation would seek to attach a new bill to other "must pass" legislation in order to avoid another presidential veto. The future of such legislation is uncertain, although there is substantial support for the Fairness Doctrine in Congress - particularly among influential committee chairmen.

The saga of the Fairness Doctrine's repeal - and its possible re-enactment - provides a vivid illustration of the dynamics of broadcast policymaking in the U.S. This debate has involved the legislative, judicial, and executive branches of the federal government in sparring with

the FCC, an "independent" administrative agency.

Although the FCC has long wanted to eliminate the Fairness Doctrine, it was uncertain as to whether it had the authority to do so. The FCC considered the Doctrine to be inconsistent with its deregulatory views and has avoided actually eliminating the Doctrine because of concerns that the Doctrine had been codified (and thus could not be repealed by the FCC) and due to a belief that significant support for the Fairness Doctrine in Congress would make an FCC action eliminating the Doctrine unwise. It was feared that if the FCC were to eliminate the Fairness Doctrine (assuming it had the power to do so), Congress might act quickly to punish the Commission - possibly through the appropriations process or through other legislation that would require the Commission to re-regulate broadcasters in a variety of ways.

There was disagreement as to whether Congress, when it amended the Communications Act in 1959, had actually included the Fairness Doctrine in the statute. The language in the statute and the legislative history were ambiguous. Thus, the FCC was unsure as to whether the Fairness Doctrine was a legislative mandate, which only Congress or the courts could change, or merely an FCC rule, which the FCC could repeal if it found the rule to be inconsistent with the public interest.

In September 1986, however, a federal court ruled that the Fairness Doctrine was only an FCC rule. According to the court, Congress had not codified the Fairness Doctrine in the 1959 amendments to the Communications Act (Telecommunications Research and Action Centre v FCC, 801 F.2d 501 (D.C. Cir.), pet. for rehearing en banc denied, 806 F.2d 111 (D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3821 (U.S. 1987)). Four months later, the same court remanded a Fairness Doctrine case to the FCC with directions that the agency consider the constitutional arguments being made by the broadcaster, which the FCC had found in 1984 to have violated the Fairness Doctrine (Meredith Corp v FCC, 809 F.2d 863 (D.C. Cir. 1987) (reviewing the decision in response to the Fairness Doctrine complaint of the Syracuse Peace Council)).

As a result, the FCC found itself in a difficult position. It had been ordered by a court to consider the constitutionality of the Fairness Doctrine. That same court, by finding that the Doctrine was only an FCC policy, had given the FCC an opening to act on its conclusion that the Doctrine should be repealed. At the same time, Congress had indicated its strong support for the Fairness Doctrine by passing legislation that would have codified it and by broadly criticising President Reagan's decision to veto that legislation. President Reagan, on the other hand, had expressed his Administration's clear opposition to the Fairness Doctrine.

When it repealed the Fairness Doctrine, the FCC claimed that court decisions left it no choice but to act decisively. It remains to be seen whether Congress, which believes that the FCC usurped a decision that it should have made, will respond. It is quite possible that the courts will have the final say on the issue. If Congress successfully codified the Fairness Doctrine, the court almost certainly will be asked to rule on the constitutionality of that legislation. At that point, there is likely to be some judicial clarification of the First Amendment status of broadcasting.

Children's Programming

Regulation of children's programming is an issue that the industry thought was dead, despite the continued efforts of one of the most outspoken leaders of a public interest group, Peggy Charren, president of Action for Children's Television (ACT). The issue was revived in June 1987 when a federal appeals court decided that the FCC had acted arbitrarily and capriciously in 1984 when it lifted its "commercialisation guidelines" for children's television The decision returned the children's television debate to the FCC - at least for one more round.

At issue in this dispute is ACT's assertion that many broadcasters are using children's programming as vehicles for disguising commercials,

rather than as an opportunity to provide educational programming. In ACT's view, many children's programs are nothing more than "program-length commercials". Advertisers have turned children's programming into a series of advertisements for products, according to ACT.

A major problem in the ongoing debate about children's programming is whether the FCC can constitutionally dictate the content of any programming, including programming for children. How can the government draw a line between something that is "commercial" and something that is "educational" without having to make editorial decisions? Nonetheless, there continues to be significant concern about the perceived "overcommercialisation" of children's programming. Senate legislation would require broadcasters to provide at least seven hours per week of educational children's programming. It also would require the FCC to launch an inquiry into program-length commercials.

The FCC originally regulated children's programming on the theory that the market did not adequately protect children from commercial exploitation. In 1984, however, the FCC decided that deregulating children's television would be consistent with its overall change in regulatory philosophy.

Although there is legislation in the Senate on the children's television issue, it does not appear to have a high priority. Things could change, however, for a number of reasons. House hearings on the topic are scheduled for this fall, and there is some feeling that children's television is one of the issues that Congress will pick up on in an effort to punish the FCC for eliminating the Fairness Doctrine. Children's television standards could be included in s1277. They also might be attached to other legislation, such as an appropriation bill, in an effort to force them into law.

Indecent Broadcasts

The recent rise of what is known in the U.S. as "blue" or "shock" radio has caused the FCC to involve itself in a controversial effort to regulate allegedly "indecent" broadcasting. In general, the courts have held that the First Amendment prevents the government from regulating speech unless the regulation will serve a compelling governmental interest. The FCC has argued that it can regulate indecent broadcast speech because of the government's strong interest in protecting children from indecency. The FCC also has pointed to the uniquely pervasive nature of broadcasting; because listeners may not be able to avoid hearing indecent broadcast speech as they tune in their radios and televisions, it is argued, the government should be able to protect them from an unwanted "verbal assault".

The FCC has proceeded under the authority of a federal statute that criminalises the broadcasting of "obscene, indecent, or profane language" (18 U.S.C. s1464). The Commission also has relied upon a 1978 Supreme Court decision that upheld an FCC decision finding that a broadcaster had aired "indecent" speech (Pacifica case). That case involved the broadcast of a monologue by comedian George Carlin in which he satirized the "Seven Dirty Words" that could not be said on radio or television programs.

Until recently, however, the Commission has tended to avoid getting involved in cases alleging the airing of obscene or indecent speech. It generally has viewed the Pacifica case as being limited to its facts - instances in which some or all of the seven words used in the Carlin monologue are repeated incessantly. Such "verbal shock treatment" was given a special, although not prominent, place in the FCC's regulatory lore.

In general, the FCC has left the task of prosecuting cases involving allegedly indecent or obscene speech to the Justice Department (under s1464 of the federal criminal code) or to local prosecutors (under state or local obscenity or indecency laws). The FCC would take account of any convictions for broadcasting obscene or indecent speech in considering a licensee's qualification to continue to hold a broadcast licence.

This policy of agency restraint, the FCC contended, was consistent with an important aspect of First Amendment

jurisprudence: namely, that courts are the proper fora in which to determine whether particular speech is obscene or indecent. In this way, the FCC avoided becoming enmeshed in trying to decide what speech was consitutionally protected. Such interpretation of the constitution was the province of the courts, not of an administrative agency.

In April, 1987, however, the Commission altered its position abruptly and announced that, in the future, it would vigorously enforce the federal prohibitions on obscene or indecent broadcasting (Public Notice No. 87-153 (released April 29, 1987)). The Commission decided that it would henceforth use the generic "definition" of indecent broadcast speech that had been used in the original Pacifica decision and that the Supreme Court did not overturn: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience".

The FCC's decision has been the subject of broad criticism, requests for reconsideration by a large group of broadcasters, and an appeal to the federal courts. The future of the policy is far from clear; it has not yet been applied to another broadcaster.

Proponents of the FCC's action contend that it is long overdue and is a vital part of the FCC's statutory obligation to ensure that broadcasters operate in the "public interest".

Critics contend that the FCC's decision involves it in a very sensitive area of constitutional law and requires the FCC to make judgments that amount to unconstitutional censorship. They also assert that the Commission's legal rationale for regulating is very flimsy.

First, critics say, the Commission has neither provided a precise definition of what "patently offensive" offensive means nor established a mechanism to determine the "contemporary community standards" by which such patent offensiveness is to be measured. In its April 1987 decisions, the Commission simply asserted its conclusion that the broadcasts being complained of violated the enunciated definition; it was as if the community standard of patent offensiveness existed as an objective measure.

Moreover, the Commission has said that indecency need not be judged by local mores; it can be determined in light of some national standard (which is not defined). This approach conflicts with the Supreme Court's mandate in the obscenity area, which requires obscenity to be considered in light of local sensitivities. It is difficult to understand - without the benefit of an explanation from the FCC - why indecency is any less of a subjective issue.

Finally, the Commission has said that speech may be indecent even if it has "literary, artistic, political, or scientific value". In the obscenity area, the Supreme Court has held that speech must be totally without such value to be considered obscene. Once again, the basis for the Commission's reasoning is not apparent. The Commission has contended simply that indecent and obscene speech - particularly when the federally regulated airwaves are involved - are not to be judged by the same standards. Although this conclusion may have merit, there is little evidence being offered to support it.

It remains to be seen whether the FCC really will take an active role in deciding what speech can and cannot be carried by broadcasters. Such an activity is inconsistent with the FCC's general advocacy of deregulation: under such a marketplace approach, listeners would prevent broadcasters from carrying undesirable speech by tuning out and thereby expressing their economic disapproval of particular programs.

VI Broadcasting in Canada: Legal and Policy Issues

Despite its physical and apparent cultural proximity to the United States, Canada faces very different issues of law and policy in structuring its broadcasting market. U.S. developments affect these issues, because U.S. programming is popular in Canada and program delivery mechanisms make transborder transmissions relatively simple. However, Canadian broadcasting faces a national agenda

of issues that are related, although not parallel, to developments in the U.S.

The character of Canadian broadcasting has developed to a large degree in response to two geographical phenomena - Canada's large landmass and widely scattered population and its nearness to the U.S.

First, Canada has had to select a market system that it believed would reach its wide dispersed population. Canadian policymakers have adopted a European model of public broadcasting, rather than a U.S. model of commercial networks, to ensure that all Canadians receive adequate broadcasting services. Thus, Canada established a public broadcasting network, the Canadian Broadcasting Corporation (the CBC).

In addition, Canada has had to foster national programming - and its associated cultural and national values - in the face of stiff competition from readily accessible U.S. programs. From the early years of broadcasting, U.S. signals have been viewed throughout Canada's populous southern border. More recenlty, with the advent of satellite and cable technology, the competition between U.S. and Canadian programs has intensified and spread; U.S. programs are routinely retransmitted throughout Canada. Canadian programmers have been, and continue to be, at a competitive disadvantage due to the large broadcasting market in the U.S. that enables their U.S. counterparts to produce more expensive and - frequently - more popular programming. To assist Canadian programmers in competing with U.S. broadcasts, Canadian policymakers have required that all delivery media carry at least specified amounts of Canadian programming.

The twin policy concerns of a public national network and preservation of Canadian programming were incorporated into Canada's 1968 Broadcasting Act. However, the issues that these objectives raise are far from settled.

A. Regulatory Structure

Federal governmental entities, as well as the provincial governments, have authority to address broadcasting issues in Canada. The dominant actor is the Canadian Radio-television and Telecommunications Commission (the CRTC). Established as an independent regulatory body, the CRTC (originally the Candian Radio-Television Commission) is charged with imposing licensing requirements and regulating broadcasters. Since its inception, the CRTC's authority has been expanded to meet demands created by technological advancements. For example, in 1976, recognising the integrated nature of telecommunications and broadcasting, the government enlarged the CRTC's mandate to include telecommunications regulation (adding the word "telecommunications" to its title).

The CRTC is an independent agency; however, it is subject to oversight and other controls by the federal government, primarily through the actions of the Cabinet and the Minister of Communications, who acts through the Department of Communications (the DOC). CRTC members are government appointees, and the agency is subject to federal budgeting processes. In addition, the Cabinet has the power to set aside or refer back CRTC decisions - either on its own initiative or upon request. In proceedings before the Cabinet, the Minister of Communications advises the Cabinet. The DOC also plays a role in formulating national policies that, of course, affect the CRTC and in overseeing technical issues, such as spectrum allocation. Finally, the government can introduce legislation in the Parliament that will affect the CRTC and broadcast policies generally.

The Parliament also can affect national broadcasting policy by a method of "direction by inquiry". Parliamentary inquiries into specific broadcasting issues often act as catalysts for policy and regulatory changes. An example of "direction by inquiry" is the 1986 Report of the Task Force on Broadcasting Policy, co-chaired by Gerald L. Caplan and Florian Sauvageau, (the "Caplan-Sauvageau Report"); it recommended, inter alia, adoption of a new broadcasting act.

As provincial broadcasters grow in importance, the role of provincial governments in broadcast regulation also has expanded. Traditionally, education is within the jurisdiction of individual provincial governments. With the development of local broad-

cast stations, provincial governments increasingly have exercised their authority in this area. They have sought to pursue educational programming and other related objectives.

Not surprisingly, these various authorities often become entangled in jurisdictional conflicts. For example, the CRTC and provincial authorities disagree over the definition of "educational broadcasting" and whether provincial broadcasting should be within the sole jurisdiction of the federal agency. At the federal level alone, the DOC and the CRTC have clashed over new technologies. Given its statutory mandate to provide an essentially "Canadian" broadcasting system, the CRTC has given priority to Canadian broadcasters and programming. The DOC, by contrast, has advocated more rapid development of new technologies, such as satellite and electronic print services.

B. Current Issues in Broadcasting

Defining New Technologies

An issue of continuing importance in the Candian broadcasting industry is grappling with technologies that threaten to circumvent regulatory controls aimed at preventing an "Americanization" of the Canadian airwaves. If, for example, the CRTC had not stretched the Broadcasting Act to include authority over cable systems, satellite-delivered cable programming could have supplied Canadians with vast quantities of U.S. programming free of Canadian content restrictions. Because there typically is just one cable system in a community, this arrangement might have deprived many localities of cable-delivered Canadian programming.

Although the CRTC managed to bring cable systems within its jurisdiction, definitional issues continue to plague the CRTC and other regulatory entities seeking to determine their authority over newer delivery systems. With the advent of satellite and cable technology, Canada needs workable definitions for new services, so that future services can enter the market without disrupting Canada's long-standing policy goals.

As noted by the Caplan-Sauvageau Report, the Broadcasting Act and the Radio Act do not presently cover all available broadcasting technologies. Both acts define broadcasting as transmissions that are intended for "direct reception by the general public". This definition appears to exclude program services, such as STV.

The Caplan-Sauvageau Report, therefore, recommended amending the Broadcasting Act to bring all forms of transmission, distribution, and reception clearly within its scope.

Another fundamental definitional issue involves the ability of the Broadcasting Act to extend to new delivery systems. Although the Broadcasting Act has been interpreted to include cable systems in their capacity as "broadcast receiving undertakings", new systems such as satellite-delivered cable networks could stretch the Broadcasting Act well beyond its intended scope.

To date, Canada, like the U.S., has attempted to work within the confines of existing legislation, rather than adopt an entire new legislative scheme. New issues have been addressed through both aggressive interpretations of existing laws and new regulatory provisions. For example, the CRTC addressed a number of definitional issues in new cable television regulations that it issued in August 1986. The CRTC's definitional approach is evident in the agency's distinction between such new technologies as alphanumeric and other electronic text services and other types of video transmissions. The distinction enables the CRTC to apply different regulatory schemes to video and textual services, saving alphanumeric service providers from having to comply with cable regulations drafted to regulate video programming content.

Minority Broadcasting

Providing access to broadcasting media for native peoples has presented Canadian policymakers with problems. Originally they focused on ensuring that native peoples living in isolated rural areas received broadcast services. Satellite television helped solve this problem; however, it created another problem. Satellite television

brought with it easily delivered non-aboriginal culture - in the form of Canadian and U.S. programming. Without local native programming to balance the influence of these programs, aboriginal groups saw their language and culture gradually being eroded by satellite services.

In response, Canadian policy-makers have shifted their focus to providing native communities with a mechanism to participate in the program delivery system. The CRTC launched a program to create an aboriginal satellite television network (Inuit) and a satellite radio network for the Yukon and Dene Indian groups. Since its inception, this program has grown to the point where it now produces and transmits regular local television and radio programming in several native languages.

Despite this progress, unresolved issues remain. A number of small aboriginal groups still do not enjoy access to the program delivery system. Can CBC afford to provide access for even these small groups? And, what portion of CBC's programming should be allotted to native programs? Even in the Northern Territories, native groups are often in a distinct minority. Should they receive air time at the expense of other ethnic groups? Perhaps, the CBC could establish an aboriginal language service, just as it established English and French services.

Private Stations

Although it has relied primarily on the CBC to provide programming to its disparate population (through CBC-owned stations and affiliates), Canada has managed to encourage private broadcasters to provide significant amounts of service. Presently, privately owned television stations attract more than half of the country's English and French-language viewing. (Some of these private stations are CBC affiliates and carry both CBC and independently produced programming; others are not affiliated with the CBC).

The major policy issues raised by private stations derive from the conflict created by the stations' need to carry popular programming (typically U.S. programming) while also satisfying Canadian national content requirements. The CRTC has had to balance these commercial and cultural interests. However, the balancing process has itself created problems.

In its efforts to ensure that private broadcasters carry a minimum percentage of Canadian programming, the agency has been accused of failing to promote high quality, as opposed to mediocre, programming. Some critics assert that satisfying the carriage requirements by substituting poor quality Canadian programming for quality foreign programs is not beneficial overall. First, the total mix of programming is of a lower standard. Second, because poor quality Canadian programming can be used to satisfy the regulations, Canadian programmers can avoid having to develop higher quality programming to be competitive. If Canadian programs were not protected from having to compete with U.S. imports, it is argued, Canadian programmers might face a more urgent need to raise the level of their productions.

Copyright & Cable

At present, Canada's sixty-year-old Copyright Act does not deal effectively with modern broadcasting technologies. Consequently, in May 1987, the government introduced legislation to amend the Copyright Act. This legislation, as well as other proposed changes in Canadian copyright law, would affect both broadcasters and cable system operators.

One particularly significant proposed amendment would give program creators (or other copyright holders) the right to control the retransmission (such as via a cable system) of their copyrighted programs (House of Commons, Standing Committee on Communications and Culture, A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright (1985)). This proposal also would extend to foreign works, consistent with Canada's obligations as a signatory to international copyright conventions.

A new retransmission right could have an adverse economic impact on cable television system operators.

Expanded copyright protections such as the right to control the retransmission of works could increase programming costs for cable operators. Presently, cable systems deliver foreign and domestic programming to their subscribers without paying royalties to the owners of the copyright in the programs being retransmitted. (Copyright holders receive payments in the first instance, when they sell the rights for the original transmission of their works - usually to broadcasters). If changes in the copyright law were to cause cable systems to pay a royalty for each program that they carried, the systems and, ultimately, their subscribers, would have to bear the additional expenses.

As it did in the U.S., the retransmission issue in Canada involves a complex mix of social and economic considerations. On the one hand, it is recognised that program creators have a right to be compensated for the commercial use of their works. On the other hand, there is concern about the effect on viewers and distribution media (such as cable systems) of imposing additional significant copyright fees. The problem is especially delicate in Canada because it involves a substantial foreign relations and trade component: U.S. program creators also want compensation for the retransmission of their works, and the popularity of U.S. programming in Canada would require Canadian cable operators to make substantial payments to U.S. programmers. The outflow would contribute to Canada's current status as a net importer of cultural products.

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Paper given before the
Australian Communications Law Association
Sydney, AUSTRALIA
27 August, 1987

TELECOMMUNICATIONS SEMINAR

Date : 7 December 1987 - 4:30 pm

Location : Allen, Allen & Hemsley
Level 47
19-29 Martin Place
SYDNEY

Speakers : John King "Procedures and Pitfalls of Privitisation: The British Experience".

Mr King is the Managing Director of British Telecom's Overseas Division and was actively involved in the Privitisation of British Telecom.

: Tony Hartnell "Liberalisation of Telecommunication in Australia".

Mr Hartnell is a partner in Allen, Allen & Hemsley and was legal adviser to the Davidson Committee.

Each paper will take approximately 45 minutes and there will be an opportunity for questions.

All ACLA members are invited and should ring (02) 229 8549 to confirm attendance.

A PROJECT APPROACH TO A NEW COMMUNICATIONS LAW

The views in this talk are purely personal ones, and in no way attributable to any organisation such as the Broadcasting Tribunal.

There has already been much discussion of the serious problems which have arisen in communications law in the last few years. There is no dispute that these problems call for reform of the law. The most important issues are about how to reform, not whether. The conventional approach to such a project is to work from problems to solutions. This short talk follows the opposite approach.

What Kind of Reform?

People will never agree on what our communications laws should say, on what the rules should be. There are natural and healthy differences between different constitutencies, such as: existing operators vs. new challengers; mature vs. youthful technologies; commercial vs. government funding; local vs. international services. We usually see these differences, and others, as negative. It is better to see them as part of the diversity which gives our system the opportunity to develop and grow.

People can agree about how our communications should lay down the rules. This contrasts with the disagreement about what the rules should be. They can agree about the 'carriage' of communications laws but not about their 'content'. In public and private discussions over the last few years there has been clear agreement about the need for reform, and about the broad direction which the reform should take. The result is that there is a clear path to reform of the laws, provided it skirts around disagreements about content. Luckily, the worst problems are about the 'carriage' of the laws, their form and content.

A more serious problem is the difficulty of promoting reform which does not relate to the content of the law. All governments are reluctant to face the legislative obstacle course unless there will be some tangible benefit to show at the end. It is not easy to show in concrete terms how any particular person, licensee, will benefit from revision of the structure or form of communications laws.

The benefits are most easily described in abstract terms like simplicity, efficient administration, and removal of jurisdictional obstacles. Lawyers and decision-makers may know the enormous benefits to the community of laws which are better written, but those benefits are not easily turned into concrete examples or tangible political objectives.

The Hierarchy of Legislation

At the constitutional level, we have a very fortunate situation. Although the words of s51(v) of the constitution were written in the last century, their history shows that it was no accident that the words "or other like services" were added at the end of the reference to 'telegraphic and telephonic' services. No other section of the constitution carries with it such a built-in reminder of the need to allow for new technology. The High Court in R v Brislan (1935), Jones (1965), and the Herald & Weekly Times case (1966) left little doubt about Commonwealth power in any area of communications for which law reform is proposed.

The Trade and National Economic Management Committee of the Constitutional Commission has just surveyed this power in its June 1987 report. Although the Committee did not point to any outstanding deficiencies, it is nevertheless recommended that s51(v) be amended to take account not only of all existing forms of communication (including television, broadcast, and other like media) but also of new, projected, and even unforeseen developments in all fields of communication (p46). Against this, it can be argued that s51(v) serves all the purposes indicated by the Committee. The only redrafting would appear to be to replacement of 'telegraphic' with a more modern expression. Such a stylistic gain would be small compared with the

Pandora's box which might be opened if any change were made. When a section of the constitution is not broken, I would prefer not to fix it.

The legacy of a clear national constitutional power in a federal system is a very fortunate one. Anyone who doubts this might like to study the division of legislative powers over broadcast communications which operates in the Federal Republic of Germany, or cable communications in the United States.

The next tier of legislation after the grant of constitutional power is a Bill of Rights. Much of the complexity of US communications law flows from the First Amendment. Many laymen, and a few lawyers, see Bills of Rights as instruments for directly increasing the rights which the citizen enjoys in practice. Would that such a simple solution were possible! In Australia a Bill of Rights might or might not improve the position of the citizen; but it most certainly would effect a transfer of decision-making power from the parliament to the courts. In other words, the bench would take over more of the decisions which the citizen influences through the ballot box.

In an era when government policy favours conduct of public communications services by privately-owned corporations, it should be remembered that Bills of Rights generally offer protection only against public power, not private power. Such a Bill could in the long run discriminate against public bodies. A more effective place to recognise freedom of speech is in the Communications Act itself.

The third tier of legislation consists of statutes enacted by the Parliament. It is here that nearly all our current problems lie, including the overlapping and underlapping jurisdictions and terminologies of a number of Acts. The main Acts concerned are:

- Australian Broadcasting Corporation Act, 1983
- Broadcasting Act, 1942
- Overseas Telecommunications Act, 1946
- Postal Services Act, 1975
- Radio Licence Fees Act, 1964
- Radiocommunications Act, 1983
- Satellite Communications Act, 1984
- Telecommunications Act, 1975
- Telecommunications (Interception) Act, 1979
- Television Licence Fees Act, 1964

All should be united into one document, which can in turn be divided into separate parts or chapters. The exceptions are the Licence Fees Acts (although both could conveniently be merged into one) and the Postal Services Act. Postal services are now using more electronic transmission, and they have a considerable economic connection with electronic communications services.

There should be one set of common definitions in the new Act, and common provisions for all the 'housekeeping' matters like service of documents and conduct of hearings. There should be one package of licences to cover all communications services. At present we have a multitude of different ways for permission to be given. These include licences bearing various titles, including warrants, permits and authorities. To each different form of licence attaches a different method of grant and a different regulatory regime. Other examples of unnecessary differences in terminology and detail could be given by most lawyers who work in this area.

Delegated Legislation

The fourth tier of legislation is that delegated by Parliament to the Governor-General or other authorities to make. There is much detail in the Acts mentioned earlier which one would expect to appear in delegated legislation, and not in a document as important as an Act of Parliament. There are many reasons for failure to use delegated legislation. One is a concern that the Senate Standing Commit-

tee on Regulations and Ordinances may take the view that delegated legislation unduly trespasses on individual rights and liberties, or otherwise infringes the standards applied by the Committee. Another reason is the complex path draft regulations must take before being made by the Governor-General. This leads some to believe that it is just as easy to include the material in question in an Act of Parliament itself, despite the resulting congestion of parliamentary process and cluttering of the statute book.

The difficulties are sometimes exaggerated. It should not be assumed that there would be objections from the Senate Committee or administrative delays if there was a fully considered and explained scheme of communications regulations and rules to replace the host of orders, by-laws, standards and other instruments which exist at present. Indeed, there could be increased opportunity to protect individual liberties if the role of the delegated legislation was defined to ensure that rights and principles were affected by Acts alone. Furthermore, some subordinate legislation which does not come before the Parliament could be subjected to tabling requirements, thus increasing the range of scrutiny.

It is not necessary that there should be one, unified set of regulations and rules. It is at the detailed, subordinate level that the different requirements of postal services, cellular radio, test broadcast transmissions or whatever subject-matter should be allowed for. The existence of a single Act, from which all subordinate legislation flowed, should be a sufficient unifying factor.

The Foolish Testator

There is another method for handling detail, which is used by every capable manager and administrator in the country. That is to leave it out altogether. The unnecessary inclusion of detail (which dates more quickly than statements of principle) is one of the greatest difficulties which the current Acts present. Detailed amendments generate a need for further detailed amendments, sometimes within a year or two. They also convert a question of administration of principle into a question of legal interpretation. In recent years those who make decisions about communications in the public and private sectors have been spending less time looking for the best solution to the problems; and more time sitting with lawyers asking what is the correct interpretation of the relevant law.

If the relevant Act did contain built-in solutions to future problems, the substitution of legal interpretation for decision-making would not be so serious. However, the process of legal interpretation is no substitute for a wise decision about the kind of communications service which should be given to a community, who should provide that service, or how. It is based on textual analysis, not on administrative problem-solving. The communications laws increasingly resemble the product of a foolish testator who rejects the advice of his or her lawyer that it is impossible to rule the family from beyond the grave. The result is a long and complicated will which tries to govern the finances, residence, education, religion and lifestyle of the grandchildren.

Objects of the Act

The Communications Act should begin with a statement of objectives. There are already statements in the Telecom Act and the ABC Act, but not in the Radiocommunications Act or the Broadcasting Act. Just as detailed prescription is dangerous in communications laws, so are broad statements of objectives important. It is possible to be clear about the functional objectives we require from the communications system without being limited by details of the technology. Furthermore, a statement of objectives can help to integrate the different components of legislation and aid legal interpretation through the ever-increasing communications litigation in the federal courts. The objects expressed in the Act should cover the following areas:

Statement of the services to be provided to the community, including the material now contained in s6(1) of the Telecom Act and s6 of the ABC Act.

Encouragement of complementary, integrated services. The need for integration has been recognised only recently, but can now be seen as urgent.

Encouragement of Australian industry and culture. Again, the critical importance of encouraging industry in communications planning, hardware and software has been publicly recognised only recently. There are many decisions on the large and small scale which should be made with express regard to this objective. The need to encourage Australian culture has received piecemeal recognition in earlier broadcasting legislation. It should be recognised as an overall objective, not as a point mentioned in some contexts but not in others.

Recognition of freedom of speech. The advantages of recognising this freedom as something to be taken into account in interpreting and applying communications laws are beyond dispute.

The Public Gatekeepers

The government exercises its control over communications through a ramshackle structure of powers and rights, ranging from holding shares in AUSSAT, approving Telecom rentals and charges, directly granting radiocommunications licences, and making plans for broadcasting after consultation. There are some inconsistencies. For example, even minor broadcasting licences are issued by an independent tribunal after public inquiry; but more valuable radiocommunications licences are issued by the Minister without an express obligation to hear the applicant.

The government should continue to have the power and responsibility for overall planning and spectrum allocation. That is part of national economic planning, and it is not something which lends itself to a process of hearing in particular cases. In the United States this planning is carried out by the FCC, but that occurs in a very different constitutional system where separate agencies must perform the work of the Australian governments.

Decisions about individual communications licences, permits, authorities or warrants are less appropriate for government. There is a legitimate concern for democratic principles when the elected government disburses rights on which communications media depend. There are very few democratic countries which allow such proximity between governments and communications media. Furthermore, governments are rarely equipped with time or resources to offer a form of hearing, oral or written. Yet basic fairness requires a form of hearing where the prize is a valuable one, particularly if there are competing applicants. Lastly, modern administrative law is increasingly demanding a hearing process before decisions affecting individual rights are made, as well as allowing individual decisions to be challenged in the courts.

It is not even the short-term interest of government to devote resources to conduct a hearing process or defend administrative decisions. Defences are likely to include extensive litigation and replies to frequent public criticism from disappointed applicants. They will need to increase under the current Acts as the values of communications services affected by ministerial decisions increase. Everyone would like to be Santa Claus, but only if there are enough presents for all the children.

The detailed implementation of government plans should be carried out by an independent body which can provide a hearing process allowing all contenders to have their say in individual cases. For the sake of discussion, this body can be called the "Communications Authority". It would carry out the licensing and regulatory tasks now performed by the Minister under the Radiocommunications Act, by

Telecom under its Act, and by the Broadcasting Tribunal under its Act. There are similar discretions in some of the other Acts already mentioned.

The Telecom Act role could be expected to expand as current government plans to allow bodies other than Telecom itself to provide telecommunications services are implemented. The Davidson Report outlines a number of regulatory roles to be performed. Some reasons for having all the licences, authorities, warrants and similar rights issued by the one body have already been stated. Furthermore the old distinction between broadcasting and other telecommunications services is rapidly disappearing. There is no reason for providing super-abundant natural justice and public process to broadcast licensees, but almost none to contenders for equally valuable non-broadcast services.

This is not a proposal for a "Big Brother" organisation or for the creation of any new powers. Rather, it is a proposal to co-ordinate most existing licensing and regulatory powers currently exercised by the Minister or in his name, and then to limit them by basic hearing and publicity requirements. The major powers of the Minister to control communications planning would not be removed or changed.

This re-allocation of existing powers would allow more flexibility in administration than exists at present. For example, it would allow a single State office of the communications authority to deal with the full range of licensing and regulatory matters. At present, there are separate offices of the Department of Communications and Broadcasting Tribunal, with others requiring to be established if an authority is established along the lines of **Oftel** in the United Kingdom. With a distinction established between the ministerial planning/policy role on the one hand and independent licensing/administration role on the other hand, it would be easier to provide expert staff closer to where the services are provided.

How would the communications authority work? Firstly, by whatever means its administrators find most efficient within normal legal requirements, and not according to some unrealistic syllabus laid down in an Act of parliament. There is an obvious need to guarantee those affected by the authority a fair hearing. One requirement is to know what the practical, detailed rules are. Apart from the basic requirements laid down in the Act and some regulations as mentioned earlier, the existing clutter of Radiocom Act standards, Telecom by-laws, Tribunal program standards, broadcasting inquiry regulations and similar documents should be replaced by one set of subordinate legislation made by the authority. The rules should be capable of alteration after public notification of a draft, with the opportunity for comment. The procedure for standards under the Radiocom Act is a good starting point. Subordinate legislation should be in two categories: the main body of rules made by the communications authority; and a smaller body of regulations made by the government and issued by the Governor-General.

For decisions in particular cases, there is no alternative to a form of public inquiry through which those affected can be heard in full. The hearing can take place in writing or orally, depending on the circumstances. The authority should be free to apply the appropriate level of hearing to the particular case. Many applications could be decided on a postcard basis. Particularly complex or important hearings should take place orally, with the opportunity to challenge opposing evidence.

The 'party vs. party' model copied from the courts should be applied only where there is a genuine contest between opposing interests. There are no parties in the true sense involved in most decisions about communications licences. There is only an applicant and a decision-maker. Large sums have been wasted trying to convert processes which are really administrative into a kind of second-rate litigious shadow boxing, in which the applicant spars with nobody, or only the referee.

These points about legislation relate to gatekeepers or regulators. What of the licensees of various

kinds, and other service providers like Telecom, the OTC and AUSSAT? The answer is that there is no need to change their duties or modus operandi in order to reform the law in the manner outlined. They will all benefit from the simpler law, clearer statement of their own objectives in relation to others, and a more coherent and open regulatory system. The basis rules appropriate for an Act of parliament would not be changed or repealed e.g. laws about which kinds of broadcasters may advertise, the conditions under which Telecom may enter private property, the powers which can be exercised against interference with telecommunications services, and the obligations imposed on those who deliver political broadcasts. There are many changes which should be made, but they should be addressed as separate policy issues. With a better overall scheme or legislation, the policy issues will be more clearly perceived, freed from much of the legal obscurities.

Conclusion

Even in the absence of a political demand for rewriting communications law history offers many examples of quiet achievements in codification and simplification which have been a priceless resource to the whole community. Those who undertook these major reforms were all faced with a maze of intersecting laws, laid down by statute or precedent. No suggestions for reform of communications law involve more difficulty than those. All the reformers faced the inertia of public administrators and lawyers who were comfortable with the current system and feared change. There is nothing extraordinary or insuperable about the task and is one which has been addressed and completed many times in different areas of law. The title of this talk refers to 'a simple project'.

Mark Armstrong

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WHAT IS CONTROL?

Introduction

The views expressed in this paper are entirely my own. They do not necessarily represent the views of any person or company for whom I act or have acted in matters arising under the relevant legislation.

This paper is primarily concerned with the answer to the question "What is Control?". That question must now be asked and answered in the light of the proposed new legislation announced by the then Minister for Communications, the Hon. Mr Michael Duffy MP on 27 November, 1986. In the absence of any more detailed information, it is necessary to speculate about the new regime to a considerable extent. There are clearly risks in such an exercise, but they are risks worth taking in the debate about the new rules relating to ownership and control. The mere announcement of them has brought about one of the greatest media reshuffles this country has ever seen.

For the sake of simplicity, and because the process of change in relation to ownership and control of television appears to be more advanced than in the case of radio, I propose to limit the scope of this paper to television. Except where expressly stated references to "the Act" are to both the Broadcasting and Television Act, 1942 and the Broadcasting Act, 1942.

Background

The origins of the development of the equalisation policy and the announcement of the 75% audience reach proposals can be traced back to the report presented by the Packer Organisation to the Fraser Government in 1977, relating to the introduction of a domestic satellite system. Since then, in the context of a series of studies, reports, inquiries and announcements, equalisation has become central to the present Government's commercial television policy as I perceive it. Equalisation means that all Australians, or as many as possible, should have access to a choice of three commercial television channels in the same way as viewers in five of the six mainland capital cities. The policy also made the grant of a third commercial television licence in Perth inevitable.

The means by which equalisation is to be achieved remain an area of controversy. The debate about the use of multi-channel services (MCS) or aggregation and the possibility of the staging of MCS followed by aggregation has excited the regional stations. It has also been followed with great interest by the networks. The timing, commercial viability and the relationship between MCS and aggregation are all matters dealt with in the Broadcasting Amendment Bill, 1986 which was reported on by the Richardson Committee.

The New Rules

The Government's proposal to expand ownership and control to enable any one television owner to reach 75% of Australia's population has opened up the whole market, both in respect of the metropolitan stations and the regional stations. The combination of proposed changes has given a new perspective to networking. While all this may not rectify "the structural imbalance" of the Melbourne and Sydney stations to which reference is so often made, it has produced a distinct shift in the balance, if not in the centre of gravity. Fears of undue concentration under the new ownership rule have been somewhat allayed by the limitation on cross-media ownership.

Despite the frenetic market activity of the past few months, the existing law remains unchanged. Section 92 of the Act still prohibits a person having a "prescribed interest" in more than two commercial television licences. In his press release dated 27 November, 1986 the Minister said that the "two-station" rule was to be abandoned. He said it would be replaced by a new rule which would limit the reach of any one commercial station owner to 75% of Australia's popu-

lation. An important feature of the abandonment of the two-station rule was the introduction of limitations on "cross-ownership". The press release said that the legislation which would be introduced would prevent a person from acquiring a television licence to serve an area in which that person, for example, owned a daily newspaper whose main circulation was in the same area, or who already held a licence for a commercial radio station which had a monopoly in the service area. Existing interests held on 27 November, 1986 which would otherwise offend the cross-ownership rules were to be "grandfathered". The Minister made it clear that future acquisitions of a prescribed interest in a television licence, whether or not that licence was "grandfathered", would require the new owner to conform to the cross-ownership test. This part of the announcement made it clear that the new package of rules was intended to be enacted with effect from 27 November, 1986.

The Recent Acquisitions

It is against this background that a whole series of acquisitions have been made. As at 27 November, 1986 the three existing networks were owned as follows:-

	Seven Network	Nine Network	Ten Network
Brisbane:	BTQ-7 Fairfax	QTQ-9 Bond	TVQ-0 Skase
Sydney:	ATN-7 Fairfax	TCN-9 Packer	TEN-10 NTHL
Melbourne:	HSV-7 HWT	GTV-9 Packer	ATV-10 NTHL
Adelaide:	ADS-7 HWT(18)	NWS-9 Lamb	SAS-10 Bell

In addition STW-9 Perth, also owned by Bond, was an affiliate member of the Nine Network. TVW-7, owned by Bell, was identified with the Seven Network and the proposed new station WTW-10, owned by Stokes, was identified with the Ten Network.

As a result of the various acquisitions, subject to the approval of the Australian Broadcasting Tribunal (ABT) and the passage of the implementing legislation, the Networks are now owned as follows:-

Brisbane:	BTQ-7 Fairfax	QTQ-9 Bond	TVQ-0 Skase
Sydney:	ATN-7 Fairfax	TCN-9 Bond	TEN-10 WCC
Melbourne:	HSV-7 Fairfax	GTV-9 Bond	ATV-10 WCC
Adelaide:	ADS-7 Stokes	NWS-9 Lamb	SAS-10 Bell
Perth:	TVW-7 Bell	STW-9 Bond	WTW-10 Stokes

Pending the enactment of the proposed legislation these various acquisitions must be the subject of applications under s92F.

Until the legislation is enacted, the Tribunal would be required to refuse the applications unless steps were taken by the applicant to comply with the two-station rule. Under s92FAA(11) where an applicaton for approval of a transaction is refused by the Tribunal, and notice of such refusal given to the applicant, the applicant has six months after the date of service of the notice, or such longer period as the Tribunal, on application, allows, to dispose of excess prescribed interests. The Act, therefore, recognises that transactions which would result in a contravention of s92 may be entered into. The contravention does not itself constitute an offence under the Act. The Tribunal may, however, give a direction for divestiture under s92N(1) where it is satisfied that a person is the holder of interests in a company in contravention of s92. If the circumstance arose that there was no reasonable prospect of the relevant legislation being passed in the foreseeable future, the Tribunal could give directions under s92(1)(a), if it thought necessary "to ensure that the person ceases to hold interests in that company in contravention of that

section". Such a direction cannot take effect during any period in which the contravention referred to in s92N(1) does not constitute an offence. Thus, the direction may not be given until after expiration of the period of six months after the date of service or notice by the Tribunal of its refusal to approve the transaction, or such longer period as the Tribunal allows. The directions when given would not necessarily require that the additional interest sought to be acquired by a party following the Minister's announcement be the subject of divestiture. The divestiture could cover existing interests, which were held prior to the acquisition of additional prescribed interests following the Minister's announcement. Alternatively, if it emerged that there was no prospect of enactment of the legislation in the foreseeable future, application for additional interests in excess of that permitted by the two-station rule could be approved, subject to a condition that any existing interests which, together with the new interests, would be in excess of the rule, should be disposed of.

In the period between acquisition and the determination of any application there is, however, a difficulty about directorships. Section 92C(1) of the Act provides that:-

> "Subject to this section, a person contravenes this section if, and so long as, he is a director of two or more companies that are, between them, in a position to exercise control of three or more licences."

There is an obvious loophole in this provision in that there is no prohibition against a person being a director of one company that is in a position to exercise control of three or more licences.

Possible Legislation Change

The Act as it stands contains elaborate provisions regulating ownership and control. Given that the two-station rule is abolished and replaced by a rule which limits station ownership or control to services which reach no more than 75% of Australia's population, it is quite possible that fairly elaborate provisions relating to ownership and control in terms of the new limit will continue to apply. It is to be hoped that the opportunity will be taken for simplifying and streamlining the existing provisions as far as possible.

It is interesting to speculate how the limitation might be expressed in the legislation. For example, s92(1) could be simply repealed and replaced by a provision to the effect that, subject to the section, a person contravenes the section if, and so long as, he has a prescribed interest in any licence or in each of two or more licences where the aggregate of the population in the service area of that licence or those licences, as the case may be, as determined by reference to the most recent census, exceeds 75% of the total population of Australia as so determined. Instead of expressing the limit in terms of population, it would also be possible to express the limit in terms of audience reach. Thus, the limitation could be expressed in terms of television homes.

There is a real question whether the concept of prescribed interest should necessarily be retained and a question whether the concepts of ownership and control should be defined more in terms of the ordinary meaning of those concepts, rather than using deeming provisions to extend them to cover situations where a mere potential for influence exists. A prescribed interest is, essentially, a shareholding, voting or financial interest of more than 5% in a company holding a commercial television licence: s91(2). A person is also deemed to have a prescribed interest if he is in a position to excercise control directly or indirectly of a licence: s92B.

Control

The definition of "control" in s91(1) is expressed in inclusive terms which do not define what control is, but describe the means by which control may be exercised. "Control" is defined as including:

"... control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights."

It is essential to determine what is meant by "control". This is because a person is deemed to have a prescribed interest in a licence, even if he has no direct interest in it, if he is in a position to exercise control either directly or indirectly of a licence: s92A. A person is deemed to be in a position to exercise control of a licence under s92A(1) if:

"(a) that person is the holder of the licence;

(b) that person is in a position to exercise control of the company that holds the licence; or

(b) that person is in a position to exercise control of the operations conducted under or by virtue of the licence, the management of the station in respect of which the licence is in force or the selection or provision of the programmes to be televised by that station."

Section 92B sets out various circumstances under which a person is deemed to be in a position to exercise control of a company. For the purposes of these provisions "person" includes a company.

Basically, the position is that a person who holds more than 15% of the voting power at a general meeting, or who holds shareholding interests exceeding an amount of 15% of the total of the amounts paid on all shares, or all shares of a particular class, in the company is deemed to be in a position to exercise control of the company. These deeming provisions are not, however, exhaustive: see In Re The News Corporation Limited and the Broadcasting and Television Act 1942 unreported, Fed. Ct. (Full Ct. Bowen CJ, Lockhart and Beaumont JJ) 20 January, 1987. This is because the definition of "control" in s91(1) is expressed in wide inclusive terms which are capable of extension to situations other than those specified as those in which a person shall be deemed to be in a position to exercise control under ss92A and 92B. Hence, for example, the expression "in a position to exercise control" in s92C(1) in relation to directorships has a meaning which is wider than that connoted by the various deeming provisions. It must be remembered, however, that the ordinary meaning of "control" is the power or function of directing and regulating. It does not extend to merely having a capacity to influence.

The wording in s92C is to be contrasted with the wording of the limitation on foreign shareholdings in s92D which refers to a person being "in a position to exercise control, either directly or indirectly, of the company holding the licence". This was the provision that was considered in the abovementioned case by the Full Court of the Federal Court. In that case it was held that The News Corporation Limited (TNCL) had a shareholding interest such that it was deemed to be in a position to exercise control of Network 10 Holdings Limited (NTHL) and its subsidiaries pursuant to s92B of the Act. More importantly, the Full Court held that the premiums paid on the relevant shares were to be included in the calculations of both "an amount equal to the value of the shares" and "an amount equal to the value ... of the person's interest in the shares", within the meaning of s91(3)(b) of the Act. It was also held that s92B did not exhaustively define the meaning of "being in a position to control, either directly or indirectly, of the company holding the licence" within the meaning of s92D(1). In my view, while some of the reasoning relating to the inclusion of the amount of any premium in the relevant calculations for the purposes of s91(3)(b) is open to question, the non-exhaustive construction placed upon ss90E and 92B is undoubtedly correct. There is, however, a clear distinction between ss92C and 92D. Section 92C refers to "companies

that are, between them, in a position to exercise control of 3 or more licences". Section 92D refers to a person being "in a position to exercise control, either directly or indirectly, of the company holding the licence". In my view, s92C refers to direct control of the licensee company in the sense of control of more than 50% of the votes which may be cast at a general meeting of the relevant company, or control of more than half of the members of the board of directors: cf W.P. Keighery Pty Ltd v FCofT (1957) 100 CLR 66 per Dixon CJ, Kitto and Taylor JJ at 84; Mendes v Commissioner of Probate Duties (Vic) (1967) 122 CLR 152 per Kitto J at 165; per Taylor J at 166; and per Windeyer J at 169; and Kolotex Hosiery (Australia) Pty Ltd v FCofT (1973) 130 CLR 64 per Mason J at 77-78; (1975) 132 CLR 535 per Gibbs J at 572-573. In FCofT v Commonwealth Aluminium Corporation Ltd (1980) 143 CLR 646 the High Court distinguished the meaning of "control" of a business. Stephen, Mason and Wilson JJ said at 659-660 that shareholders, through their power to control the company general meeting and, perhaps, through their power to elect directors, may be said to "control" the company, "but as a general rule they do not exercise de facto control of the company's business." The control referred to in s92C is control of the licence, which means control of the business rather than control of the company. This requires control of the company in the true sense rather than in any artificial or deemed sense.

Section 92B gives three instances of circumstances in which a person shall be deemed to be in a position to exercise control of a company. In substance these are, first, where the person controls more than 15% of the maximum number of votes that could be cast at a general meeting, whether with respect to all questions or only one or more of such questions. Secondly, where he holds shareholding interests in respect of voting shares on all questions at a general meeting, exceeding in amount of 15% of the total of the amounts paid on all shares of the same kind. Thirdly, where the person has shareholding interests in a company exceeding in amount 15% of the total of the amounts paid on all shares in the company. In the third case, the Full Court decision in Re The News Corporation Limited and The Broadcasting and Television Act, supra requires any premium paid in respect of shares to be taken into account in computing the amounts paid on shares in the relevant company. In my view this result was somewhat surprising. A premium is normally credited to a share premium reserve. While this reflects a shareholder's financial stake it does not, without more, have any significance in terms of control as distinct from mere influence. Even more surprising was the decision that the ability to nominate one half of the board of directors of a company amounted to being in a position to exercise control of that company. This equated a power of veto with control and also required an assumption that the nominees would vote en bloc as directed or required by the appointor.

Tracing Control

Once company A is deemed to be in control of company B, company A is deemed to have any shareholding interest that company B has in another company. Thus, as long as the 15% level in any relevant sense carries on up a chain from a company holding a licence, all persons and companies in the chain will be deemed to be in control of the companies further down the chain and, consequently, of the company holding the licence. The position is made even more complex by the provisions in s91A for a means of proportional tracing, even where the chain of deemed control of companies has been broken. The tracing exercise is required to be done both horizontally and vertically. Thus, a number of proportionately traced shareholdings in a licensee company obtained through shareholdings in a range of different companies may all need to be aggregated. This could result in a person being found to have a prescribed interest in a licence. There are also the provisions for loan interests. It is clearly a matter for consideration whether all of these

detailed provisions will need to survive the abolition of the two-station rule. There would be much to be said for a change which equated a prescribed interest (now 5%) with a deemed controlling interest (now 15%).

Networking and Control

The concept of networking, particularly in the context of the proposals for MCS and aggregation of regional television stations, raises important questions of control. Currently, a person is deemed to be in a position to exercise control of a licence if he is in a position to exercise control of the selection or provision of the programmes to be televised by the station the subject of the licence. It is generally agreed that the introduction of MCS or aggregation will stimulate the development of networking from the existing networks into the regional stations, unless an alternative network were to be established. Under the policy of equalisation there is a perception that this will entitle viewers to have the same choice of three commercial channels as do viewers in the mainland capital cities. It does not necessarily follow that this choice should be a choice between three programme line-ups which, apart from elements of localism, are identical with the programmes currently being shown on the three networks. Against this, however, it is necessary to ask what objection there could be to a situation developing where, local programmes apart, the bulk of programming in regional areas was the same as that shown in the cities. This could not occur if the 75% rule were drafted or interpreted in such a way as to limit network coverage to 75% of the population, thus arbitrarily depriving 25% of the population of the opportunity of watching programmes of a particular network. I doubt this is intended. It could occur, however, if the networking arrangements were in such a form that the person or company which controlled the originating stations in the network was deemed to control all participating stations (quite apart from the ownership and control rules) by reason only of the selection or provision of programmes.

Many people would now be familiar with the form of programme agreement entered into by STW9 with the Nine Network relating to the supply of programmes. It was shown as an attachment to the FDU Report on Future Directions for Commercial Television. Under this agreement STW9 was not bound to take any particular programme, nor was it bound to show the programmes at any particular time. Independence in relation to advertising was also assured. These and other provisions prevented the relevant programme agreement from having the result that STW9 was deemed to be controlled by Nine Network Pty Ltd, TCN9 Pty Ltd or any other company in the Packer organisation. In my view the mere fact that licensee A (owned and controlled by X) makes its full range of television programmes available to licensee B (owned and controlled by Y) upon terms which do not require licensee B to show all or any of the programmes made available, or to show them at any particular time, should not have the effect that the population in the area serviced by licensee B should be taken into account for the purposes of the application of the 75% rule to licensee A.

Notwithstanding the elaborate framework of rules regulating ownership and control which has now been in existence for many years, Australian commercial television stations have formed networks. There is an existing power under s134 of the Act to make regulations governing the operations of networks, but no such regulations have ever been made. In its Satellite Programme Services Report in 1984, the Tribunal listed four major economic advantages of networking:

(a) spreading the cost of programme development, production and acquisition over a number of stations;

(b) facilitating the national sale of advertising;

(c) reducing programme distribution costs;

(d) scheduling of several hours of

continuous programming when distributed simultaneously enabled the network to take advantage of "audience flow" from one programme to the next.

The Tribunal regarded some form of networking to be inevitable for commercial television in Australia. It regarded networking as economically rational and beneficial, insofar as it allowed high quality programmes to be made available to viewers throughout the country. The abolition of the two-station rule and the introduction of a 75% audience reach rule are themselves a recognition of the major part networking has to play in the future of commercial television in Australia. The report of the Richardson Committee also recognises the role of networking in commercial television broadcasting in Australia. The Committee pointed out that some types of networking arrangements may be advantageous or essential to the development of the Australian television industry, in particular in relation to the production of more Australian programmes. It was also indicated that, provided demand for local programming was strong, networking need not necessarily interfere with "localism" in commercial television broadcasting in Australia.

Conclusion

It may be anticipated that the policy of equalisation will bring about the introduction of competitive commercial television throughout Australia. The cross-media ownership rules should be accepted as an essential political step in an attempt to counter-balance the great increase in potential media ownership, control and influence provided by the adoption of the 75% rule.

David K. Malcolm QC

NARROWCAST: BRINGING LAW BACK ON THE PLANET

Broadcast radio and televison services have become an integral part of our lives. In some developed countries, cable television has also become part of everyday life. For example, nearly one half of the 86 million homes with a TV set in the United States are connected to cable. Three quarters of United States TV homes are already "passed" by cable - that is, can subscribe if they want to. However, in Australia we have only just begun the difficult process of formulating policies and establishing a legal framework to cover non-broadcast transmission technologies.

Such technologies include radiated, or "free space", services distributed by local area microwave or satellite (or a combination of the two) and cable reticulation services. The introduction of cable television and radiated subscription television for domestic reception (Pay-TV) has had a short-term setback with the announcement by the Minister for Communications of a moratorium on the introduction of such services. The advent of other narrowcast services - under the ancronym of VAEIS (video and audio entertainment and information services) - is the subject of this paper.

I will briefly outline the available communication technologies before turning to discuss the legal and policy questions posed by VAEIS. For convenience, and to contrast VAEIS with traditional broadcast services, I will refer to VAEIS as a "narrowcast" service, although the issue of whether some VAEIS services are really broadcast services is by no means settled.

Communications Technologies

Cable television (CTV) refers to the transmission of sound and visual images to an audience by use of copper or optical fibre cables, rather than solely by way of radiated electromagnetic energy. The advantage of cable as a means of communicating signals is that it facilitates high quality with less interference than off-air transmissions. Modern developments in coaxial cables and optical fibres mean that new cable systems may carry a band width of a very broad frequency range which enables such systems to transmit a considerable amount of information at the same time. A system with a frequency range of 350 MHz could transmit about 50 channels in the United States, about 25 in the United Kingdom and about 30 in Australia (the variations being due to the differing transmission formats). A television channel requires about 8 MHz of band width to carry the signals that make up its moving picture, but still pictures, sound signals and computer data can be transmitted over a much narrower band width at higher speeds.

Free-space transmissions of broadcast radio, broadcast television and microwave services respectively utilise different regions in the electromagnetic spectrums. Probably the most rapid growth in the utilisation of the spectrum is in the microwave frequency range. In most countries this range is comparatively "spacious". For example, the frequency difference between the S-band (wavelength around 10 cm) and K-band (wavelength around 1 cm) is roughly 200,000 MHz, about 100 times the combined frequency range of present day radio broadcasting and television. There are good prospects that this range can be increased 5 to 10 times by further improvements of power generation at the high frequency end of the microwave range.

Microwave transmissions suffer from a number of disadvantages compared to broadcast frequencies, including lesser diffraction effects. This means microwave is essentially line of sight, whilst broadcast frequencies can diffract around building and over hills. The effects of reflection or bounce (leading to "ghosting") are more pronounced in microwave transmission. Permitted signal strengths of broadcast transmission are approximately 500 times greater than those permitted for microwave, and accordingly the range of microwave services is much less than broadcast services.

The radio signals utilised in satellite communications are normally in the microwave frequency range and use much of the technology employed in terrestrial microwave radiocommunications systems.

The Department of Communications (DOC) requires non-broadcast video programs transmitted by AUSSAT, such as network program interchange, to be encoded to an acceptable standard. The B-MAC encoding system, used for direct broadcast services (DBS) such as the Remote Commercial Television Service (RCTS), requires about 24 MHz of the 45 MHz capacity available on AUSSAT transponders and requires about 90 per cent of transponder power. The excess capacity, up to 50 voice grade channels or three 2-megabit streams, is available to other users - subject to regulatory constraints referred to in this paper. In addition, the excess capacity would of course be limited to the relevant spot beam during regular broadcast hours. Downtime, when the TV station is off air, is also available for other utilisation.

Various communications technologies have potential for ancillary communications services (ACS), described by a DOC Communications Strategy Division Paper as services:

> "... carried on the same signal as a main broadcast service, ... which depend for the 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." (Para 1.2).

The DOC Paper identified three current transmission technologies whereby ACS can be delivered:

- B-MAC television signals allowing up to six high quality sound or data channels plus one lower capacity data channel;
- FM radio sub-carriers for transmission of additional FM audio or data services;
- the vertical blanking interval of a normal PAL TV signal potentially carrying teletext services.

Satellite links may also be used to feed local area radiocommunications services. These local area services may then transmit to subscribers who can receive signals with only a small antenna, rather than the comparatively sizeable satellite dish required for direct reception of satellite signals. Of course, such local area radiated services, better known as multi-point distribution systems (MDS), may be established and operate independently of the satellite system. Microwave MDS licence "expressions of interest" have been lodged with the DOC's Radio Frequency Management Division for both satellite-linked and stand-alone services.

Existing and proposed narrowcast services include:

- Australian Associated Press' Corporate Report - news, financial and business information distributed by microwave MDS to corporate subscribers' personal computers and AAP provided terminals.
- Corporate Data Services's Real Estate Channel - videos of homes for sale distributed by microwave MDS to real estate agents' VCRs for exhibition to potential home buyers.
- Bell's Club Superstation - video programs and ACS data services via AUSSAT to two-way earth stations on registered clubs in New South Wales: the two-way system also allows program interchange and data networking between subscriber clubs.
- Powerplay's Sportsplay - video sporting events via AUSSAT to R-O earth stations on hotels throughout Australia.
- Bond Corp's Sky Channel - video sport, variety, news and weather

and "the big events" via AUSSAT to earth stations on hotels throughout Australia.

Each of these services are licensed under the Radiocommunications Act, not the Broadcasting Act. There are important differences between the licensing frameworks established by these two Acts.

Radiocommunications & Broadcasting - Legislative Structure

Section 51(v) of the Constitution empowers the Commonwealth Parliament to make laws with respect to "postal, telegraphic, telephonic and other like services". The basic structure of communications regulation is found in seven Commonwealth Acts and their associated regulations and by-laws. The seven Acts are:

1. The Broadcasting Act, 1942 ("the Broadcasting Act");

2. The Radiocommunications Act, 1983 ("the Radiocom Act");

3. The Telecommunications Act, 1975 ("the Telecom Act");

4. The Satellite Communications Act, 1984 ("the SatCom Act");

5. The Postal Services Act, 1975 ("the Postal Services Act");

6. The Overseas Telecommunications Act, 1946 ("the Overseas Telecom Act"); and

7. The Australian Broadcasting Corporation Act, 1983.

This paper will only deal with the Radiocom and Broadcasting Acts, although certain of the other Acts will also be relevant to free-space and cable transmission services.

The Radiocom Act deals with spectrum planning, equipment standards, the settlement of interference disputes, the detection and prevention of unauthorised transmissions, the licensing of all radio transmitters other than transmitters licensed under the Broadcasting Act and the licensing of receivers falling into a class specified by regulations. If a radiocommunications transmitter is operated "for the purpose of the transmission to the general public of radio programs or television programs", the transmitter is not licensed under the Radiocom Act but must be licensed under the Broadcasting Act: Radiocom Act ss22, 24, Broadcasting Act ss4 (definitions of "broadcast by radio" and "televise"), 81, 89D.

The Radiocom Act is linked to the Broadcasting Act through s6A of the Broadcasting Act. Section 6A(1) makes it an offence to use a transmitter for broadcasting purposes except as authorised by a licence warrant issued under the Broadcasting Act. Section 6A(3) provides that a failure to comply with s6A(1) is an offence under the Radiocom Act as well as an offence under the Broadcasting Act. In general, the Radiocom Act precedence in spectrum control is reinforced by s89 of that Act which provides that Regulations made under the Radiocom Act have precedence over Regulations and other instruments made under the Broadcasting Act. Of course s89 does not provide a system of precedence to resolve conflicts between the provisions of the respective Acts themselves.

The regulatory regimes established by the Broadcasting Act and the Radiocom Act are quite distinct. Licences under the Radiocom Act may be granted by the DOC at the discretion of the Minister. Broadcasting licences are issued by the Australian Broadcasting Tribunal (ABT) after public inquiry. Broadcasting licences are, of course, subject to detailed rules relating to content and scheduling of programs and advertisements and the ownership and control of licences. There are no similar rules in the Radiocom Act. There are obvious advantages to a service provider in avoiding the complex Broadcasting Act requirements and obtaining Radiocom licences. The question of whether a particular service constitutes a transmission of radio or television programs to the general public is therefore of considerable importance.

Transmission "To the General Public"

The Broadcasting/Radiocom concept of "the general public" is also found in the Radio Regulations of the International Telecommunications Union (ITU). The ITU has, amongst other duties, responsibility to determine whether the radio frequencies which countries assign to their broadcasting stations are in accordance with the ITU Convention and Radio Regulations and would not cause harmful interference to other stations. The ITU Radio Regulations state, however, that a radiocommunications service is a "broadcast" service if "intended for direct reception by the general public".

In the copyright context, the English translation of Article 11 bis(1) of the Brussels (1948) text of the Berne Convention provides that authors have the exclusive right to authorise "the radio diffusion of their works for the communication thereof to the public by any means of wireless diffusion of signs, sounds or images". The Rome Convention (The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations) refers to "transmission by wireless means for public reception".

Whilst broadcast bands are specified under the ITU Radio Regulations, and Australian broadcast services are allocated frequencies within these bands, it is submitted that the frequency on which a transmission takes place should not be a relevant test as to whether a transmission is a "broadcast" or not. The relevant statutory considerations are whether there is a transmission of a "radio program" or a "television program" "to the general public". These phrases are not defined in either the Broadcasting Act or the Radiocom Act.

So far as the writer is aware, there are no Australian cases or reported cases from other common law jurisdictions, which provide any assistance in construing the words "transmission to the general public". In a copyright context, there are a number of cases concerning whether a cinematographic film is exhibited "in public": See Copyright Act 1968 s86(b), Rank Film Production Limited v Colin S. Dodds [1983] 2 NSWLR 553 part. at 560 per Rath J; Australian Performing Rights Association Ltd v Tolbush Pty Limited (1987) 7 IPR 160 per de Jersey J; Jennings v Stephens [1936] Ch 469 part. at 475 per Lord Wright; and subsequent English cases summarised in Performing Rights Society Limited v Rangers FC Supporters Club, Greenock [1975] RPC 626 part. at 634. These cases establish that in the copyright context the principal determinant of whether a performance is "in public" is the nature or quality of the audience.

The Rank case concerned the transmission by an operator of a motel of video programs by means of a VCR connected to suites in the motel. Mr Justice Rath reasoned as follows:-

> "... in the present case the Court is to consider the character of the audience, and ask whether that audience may fairly be regarded as part of the monopoly of the owner of the copyright. The relevant character of the audience is not its character as an individual or individuals in a private or domestic situation, but in its character as a guest or guests of the motel. In that latter character, the guest pays for his accommodation and the benefits (in-house movies) that go with it. In a real sense he is paying the proprietor of the motel for presentation to him in the privacy of his room of an in-house movie. He is in this character a member of the copyright owner's public."

The copyright cases thus distinguish performances in public from domestic or quasi domestic performances. The cases are, however, based upon the perceived policy that the Copyright Act seeks to protect the copyright owner's financial interests by ensuring that the copyright owner derives a benefit from performances in a paid environment. This appears clearly from the judgment of Lord Justice Clerk in the Rangers FC Supporters Club decision:-

> "In a situation where a person organises a private party in his own home, or what might reasonably be deemed an extension of his own home, then it seems reasonable to assume that the unauthorised publication or use of a copyright work is not rebounding to the financial disadvantage of the owner of the copyright, since the selected audience is not enjoying the work under conditions in which they would normally pay for the privilege in one form or another. A performance of the work in such circumstances would now ordinarily be regarded as being in private."

In the context of securities law, there are a number of well-known decisions on the meaning of "an offer to the public", including the decisions of the High Court of Australia in Australian Softwood Forest Pty Limited v Attorney General (NSW) (1981) 36 ALR 257 and the Australian Central Credit Union case (1985) 10 ACLR 59. In a joint judgment of four Justices in the latter case it was said that:

> "if ... there is some subsisting special relationship between offeror and members of a group or some rational connection between the common characteristic of members of the group and the offer made to them, the question whether the group constitutes a section of the public ... will fall to be determined by a variety of factors of which the most important will ordinarily be: the number of persons comprising the group, the subsisting relationship between the offeror and the members of the group, the nature and content of the offer, the significance of any particular characteristic which identifies the members of the group and the connection between that characteristic and the offer" (at 63).

If the characteristic which set the proposed offer apart from the group is "restrictive and well defined", and the proposed offer has a "perceptible" and "rational connection" with that characteristic, an offer will generally be considered to be private.

The securities cases show what some commentators have regarded as an unfortunate trend to concentrate on the development of criteria for determining whether an offer belongs to one class or another, rather than to the broader question of whether particular offerees need legislative protection. It would be similarly unfortunate if the interpretation of "transmission to the general public" followed a similar path. However, the difficulty of extracting the precise legislative purpose of the Broadcasting Act may well make such a development inevitable.

What is the particular "public" that the Broadcasting Act is attempting to protect? I consider that a strong argument can be made that the legislative intent of the Broadcasting Act is to ensure the provision of an adequate and comprehensive service to a community within a specified broadcast area. Regulation of the content of broadcast services and of the ownership and control of broadcasters is ancillary to this primary purpose. The need for public regulation derives from the fact that transmissions are free-to-air and available in an environment which cannot be predetermined or controlled by the service provider. Where the receiving audience is "carved out" of the general public by a restrictive criteria, such as the need to use decoding devices which are not readily available to any member of the public (at whatever fee), coupled with contractual restrictions imposed by the service provider on the use of the service by the end user; and the service provided has a rational and perceptible connection with the particular interests or concerns of that limited class of end users, then the service should be outside the purposive ambit of the Broadcasting Act. This is not, however, to suggest that such services should be free of regulation, or that the content of certain regulations applying to broadcasting is not equally applicable to certain narrowcast services.

It will be apparent from the

foregoing that I consider the criteria set out in the securities cases should provide some assistance in construing "transmission to the general public" in the Broadcasting Act. The use of the general public, rather than just public, gives some support to the distinction suggested above. The distinction between domestic and non-domestic environments made in the copyright cases does not, in my opinion, provide any useful assistance: the context of the copyright provisions is quite different. I find it difficult to see that a member of the public, if able to obtain a decoding device from retail outlets, or even directly from a service provider for use to receive television programs in his or her own home, is anything other than a member of the general public. To follow the securities cases, there is no rational and perceptible connection between the service provider, the service, and the subscriber.

Adoption of this view gives rise to some difficulties. A Broadcasting Act licensee must have a designated "service area" determined by the Minister. The Minister's determination must specify the "community or communities" to which the licensee is required to provide an "adequate and comprehensive service". Under DOC service area guidelines issued in November 1983, relevant communities are identified by reference to Australian Bureau of Statistics "Collector Districts" and "Local Government Areas". The references to communities in the Broadcasting Act give some support to the proposition that where encoded radiocommunications are addressed to, for example, subscribing customers situated in disparate communities around Australia, the transmission should not be regarded as broadcasting. So, contrary to the view expressed above, it may be suggested that encoded satellite DBS delivered to private subscribers should not be regarded as broadcasts.

In such uncharted and muddy waters it is perhaps not surprising that so many different views emerge. At least for the time being the most important opinions are, of course, those of the DOC and the Federal Government.

Enter VAEIS

On 2 September, 1986 the then Minister for Communications, Mr Michael Duffy, announced that the Government had "cleared the way for the introduction of new Video and Audio Entertainment and Information Services (VAEIS) to non-domestic environments such as hotels, licensed clubs, and TABs." He then foreshadowed regulatory guidelines which would apply to such services. These guidelines were released on 17 October, 1986: the guidelines were published in Vol. 7 issue [1] of this Bulletin.

At the time of his first announcement, the Minister also announced a moratorium on the introduction of Pay-TV services to "allow television licensees time to adjust to the requirements in regional Australia".

The guidelines define VAEIS as "transmission of programs by telecommunications technology on a point to multi-point 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.

Under the guidelines, VAEIS is restricted to people present in the "non-domestic environments" of "end users". End users may be groups or organisations (as well as individuals) which have contracted with a VAEIS provider.

The key definition is, of course, "non-domestic environments". These are defined to include "hotels, motels, registered clubs, hospitals, educational institutions, shops, government, commercial and industrial buildings, coaches, trains, aircraft and marine vessels".

"Domestic environments" are defined exhaustively: "that is, private, long-term residential dwellings, households and places of permanent residence".

The definitions have obvious limitations. For example:

(i) Is a suite in a hotel or motel rented by a person on a long-term basis in a domestic environment? If so, do the other suites in the hotel qualify for VAEIS delivery?

(ii) Is a unit rented on a "time-share" basis a domestic or non-domestic environment?

(iii) Is a long-term convalescent home or a private nursing home "a hospital" - non-domestic environment - or a "long-term residential dwelling" - a domestic environment. If a hospital has a ward catering for such people, will this affect the hospital's status?

The only specific encoding requirement in the guidelines is that video entertainment services must be transmitted in B-MAC.

But what is the distinction between video entertainment services and Pay-TV? The Minister's 2 September, 1986 statement states:

> "Pay-TV involves the transmission of programs to domestic environments and, unlike present television services which are free, requires the payment of a fee to the service provider and possession of a decoder to receive programs."

The SIARS Report (No. 38 - December 1986, p150) quotes the following "definition" of "Pay-TV", apparently adopted in a written legal opinion provided by the Attorney-General's Department at the request of the DOC's Legislation Unit:

> "(a) programs in the form of images and associated sound transmitted by means of cable, satellite or any other form of radiated transmission;
>
> (b) most of the material transmitted is similar to the material transmitted on free-to-air TV but some material which for censorship reasons is not currently broadcast on free-to-air TV may be transmitted, and advertising or sales promotion material shall not be transmitted;
>
> (c) the person providing the service is linked to the person receiving the service (not necessarily the viewer) through a contractual relationship;
>
> (d) reception of the service is available in a domestic or residential environment to members of the public, including special interest groups who are willing to pay.
>
> Pay-TV is not intended to include data services, services for commercial rather than entertainment purposes and educational and other non-profit welfare services. In order to receive a Pay-TV service it would be necessary for a subscriber to possess decoding equipment attached to this television receiver which would enable encoded signals transmitted by the provider of the service to be decoded and received on that receiver."

According to The SIARS Report, the Attorney-General's written opinion concludes, amongst other things, that Pay-TV services do not constitute a transmission of television programs to the general public, and are therefore outside the Broadcasting Act.

Contrast the proposed treatment of ACS in the DOC's "Statement of Policy Principles Governing Ancillary Communications Services":

> "An ACS will be regarded, prima facie, as a broadcasting service if:
>
> - it consists of radio or television programmes;
>
> - it is not proposed to place restrictions (in the form of encoding, addressability etc.) on its reception, other than restraints on reception outside the designated service area; and
>
> - the equipment needed to receive the service is readily available in Australia through retail outlets." (Para 2.7).

The Statement does not state whether an ACS must meet all the three

conditions to qualify as a "broadcasting" service, but does add the proviso:

> "(Note that the second and third conditions are intended as practical - though not exhaustive or definitive - tests of the "transmitted to the general public" criterion.)"

All this pigeonholing appears to be designed to achieve the following practical result:

1. The Minister may grant a transmitter licence under s24 of the Radiocom Act to a VAEIS provider, certain narrowcast ACS providers or a Pay-TV service provider. However, he will exercise his discretion not to issue a Pay-TV licence for "at least the next four years".

2. Video and audio entertainment services will not be regarded as transmissions to the general public because (so the Minister says) they operate on a different frequency to broadcast services, reception is only possible if a down converter is used, and the services must be encoded.

3. Pay-TV services will not be regarded as broadcast services because they are encoded, and the decoding equipment would only be available from the service provider.

4. The distinction between video and audio entertainment services and Pay-TV is not in the technology of delivery, or the requirement of encoding, but that Pay-TV is delivered to domestic environments and VAEIS to non-domestic environments.

5. ACS video (ie teletext) and audio services will not be regarded as broadcasting where encoding or addressability restrictions are placed on their reception and the equipment needed to receive the service is not readily available in Australia through retail outlets.

The frequency band distinction between VAEIS and free-to-air TV is not made between Pay-TV and free-to-air TV. Of course, Pay-TV may utilise broadcast frequencies - but does this mean anything? If it does, it supports the argument that Pay-TV is broadcasting. If it does not, why does the Minister purport to make a distinction between VAEIS and free-to-air television relying on the frequency band utilised by each? It is submitted that the frequencies utilised in relation to any transmission should be irrelevant to the determination of whether a service is a broadcast service.

And does the proposed definition of Pay-TV mean anything, when it does not address the question of the availability of decoding equipment to the general public, other than to say that such equipment is only to be available from the service provider? After all, a person cannot receive a television signal in his home unless he has a television receiver: if he or she can readily and legally purchase a decoder, albeit under contract with the Pay-TV service provider rather than through retail outlets, is he or she any less a member of the public than his or her next door neighbour who cannot afford a decoder for his television receiver?

Of course, the same argument has been applied by some commentators to VAEIS services - is a person any less a member of the public because he or she leaves home to listen to music or watch television provided to him or her whilst he or she drinks in a hotel or a registered club? For the reasons outlined above, I consider that VAEIS services restricted (as the DOC proposes) to non-domestic environments, available only through contract with the service provider, and provided to a limited and identifiable class of recipients, should properly be regarded as non-broadcast services. The criteria specified by the DOC for determining whether ACS services are broadcast or non-broadcast are reasonable, if non-specific. The characterisation of Pay-TV, as defined by the DOC, as non-broadcast, appears hardest to sustain, although doubtless in tune with DOC deregulatory leanings. Until

the meaning of "transmission to the general public" is clarified by statutory amendment, or by the High Court, it is impossible to conclude with any certainty whether all narrowcast services escape the Broadcasting Act.

If it is accepted that VAEIS, Pay-TV and certain ACS services do not fall within the Broadcasting Act, another fundamental question remains: is it within the scope of the Minister's discretions provided by the Radiocom Act to impose conditions upon a Radiocom licence such as the proposed VAEIS guidelines?

Radiocom Act Licence Conditions

Section 25 of the Radiocom Act provides that a licence to operate and possess a radiocommunications transmitter is subject to certain conditions. The conditions primarily relate to the status of the operator and compliance with specified frequency requirements. The only content condition is a prohibition on operating a transmitter in such a manner as would be likely to cause reasonable persons, justifiably in all the circumstances, to be seriously alarmed or seriously affronted, or for the purpose of harassing a person: (s25 (1)(d)).

Section 25(1)(j) imposes on a licence "such conditions (if any) as may be prescribed". The Radiocommunications (Licensing and General) Regulations disclose the only relevant conditions prescribed are in relation to citizen band radio stations and amateur stations.

Section 25(1)(k) imposes on a licence "such other conditions (if any) as are specified in the licence". Section 25(8) provides that nothing in paragraphs (1)(a) to (h) should be taken by implication to limit the generality of the conditions that may be prescribed for the purposes of paragraph (1)(j) or specified under paragraph (1)(k). However, whilst nothing in those paragraphs should therefore limit further prescribed or specified conditions, the Minister's powers to impose such further conditions would be limited by general principles of administrative law.

Section 25(3) allows the Minister by notice in writing served on the holder of a licence to "impose one or more further conditions to which the licence is subject". This would appear to allow the imposition of additional conditions to those specified or prescribed in or pursuant to s25(1), but would also be subject to general principles of administrative law. Such principles include, of course, the principle that a Minister exercising a statutory discretion cannot exercise the power granted to him for a particular purpose for an unauthorised purpose (R. v Toohey (Aboriginal Land Commissioner): ex parte Northern Land Council (1981) 151 CLR 170).

If the Radiocom Act is characterised as an Act having as its object the regulation of the radio frequency spectrum and the diminution of interference in that spectrum, an attempt to impose content restrictions, for example, may well be ultra vires. Similarly, a refusal to grant Pay-TV licences grounded on the proposed content of such services, rather than non-availablity of frequencies, may also be open to attack.

It appears that the advice of the Attorney-General's Department on Pay-TV drew the Minister's attention to the regulatory problems. The SIARS Report quotes the opinion as follows:

> "While some form of control over Pay-TV could undoubtedly be achieved by way of imposition of such conditions [that is, conditions under s25], it would not be possible to regulate Pay-TV under the Act in a manner corresponding to the way to which commercial television licences granted under the Broadcasting Act are regulated under that Act."

The Minister has now moved to remove these difficulties pursuant to the proposed introduction of amendments to the Radiocom Act, the Communications Legislation Amendment Bill 1987, introduced into Federal Parliament on 2 April, 1987. Proposed new s24A would prohibit the Minister from granting a Radiocom Act transmitter

licence for the purpose of providing radiated Pay-TV services anywhere in Australia. Section 24A also includes a "sunset" clause, which would have the effect of maintaining the moratorium until 1 September, 1990 (at the earliest).

VAEIS Guidelines:

It is difficult to see that any different conclusion applies to VAEIS. For this reason the Minister will presumably rely upon the self-regulatory code of practice proposed in the VAEIS guidelines rather than such conditions as may be imposed on or in relation to any VAEIS licence.

In an address by the Secretary to the DOC, Mr C. Halton, to the Australian Communications Law Association on 5 December, 1986, Mr Halton noted:

> "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 schemes.
>
> We expect that the guidelines will be reviewed after twelve 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."

Service providers are also to be required to give the Minister a written undertaking to comply with the guidelines before approval is given for the commencement of any VAEIS service.

Many of the guidelines will be familiar to broadcasters and, perhaps unlike the manner of their implementation, should not give rise to much debate. Paragraph 19 may be an exception:

> "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 the general public."

This would appear to prevent VAEIS providers from obtaining exclusive rights to televise major events. The first draft of paragraph 19, as quoted in The SIARS Report No. 36 (p8), was even more explicit:

> "... In recognition of the public interest, VAEIS providers will offer rights which they hold to major sporting and other important events to free-to-air broadcasters on reasonable commercial terms."

The final guideline may have the same substantive effect although expressed in less explicit terms.

Paragraph 19 may constitute fertile ground for disgruntled broadcasters wishing to complain to the Minister over alleged exclusionary misdeeds of VAEIS providers. The guideline has already been the subject of a dispute between the ABC and Sportsplay concerning satellite rights to VFL live matches. One result of the guideline has been for each VAEIS operator to tie up with a particular commercial television network, the ABC or the SBS. Such ties involve exclusivity in terms of other VAEIS operators whilst allowing the free-to-air broadcaster access to the event. This considerably limits the ability of VAEIS providers to use exclusive programming as a drawcard to attract the public into pubs and clubs. No doubt VAEIS providers would be delighted to see the demise of paragraph 19 if its removal could be achieved without upsetting the self-regulatory system.

VAEIS "Expressions of Interest"

VAEIS/MDS licences have to date been issued to five licensees. On 20 October, 1986 the Minister invited expressions of interest from companies wishing to distribute VAEIS through multi-point distribution systems (MDS). The number or identity of those lodging expressions of interest

has not been officially announced, although The SIARS Report (issue 39 - February 1987) lists some 31 applicant companies and the cities in which they propose to provide services. That report also notes that a copy of this list was apparently circulated between FACTS members.

It is apparent that there are considerably more applicants than available frequencies. So far as I am aware, the manner in which available frequencies will be rationed between applicants has not yet been determined. The Minister may choose to hold a public inquiry under Part X of the Radiocom Act.

It would appear from a DOC Radio Frequency Management Division paper that the MDS licences will be de facto "service based" (whilst issued under the Radiocom Act):

> "The vast majority of MDS will be required to nominally cover the central business districts and metropolitan areas of the cities in which they are based.
>
> The nominal MDS service area is deemed to include all reception points which are within unobstructed radio line-of-sight of the MDS transmitting antenna and which are within a 50 km radius of the transmitter site. Reception of the signal in all other situations, including that involving the use of a repeater, is deemed to be fortuitous." (Technical Specifications and Planning Criteria for Multipoint Distribution Services in the 2 GHz Band" DOC 14 January 1987 p3).

Opposition Policy:

The dissenting reports of members of the Senate Select Committee on Television Equalisation reflect the divergence of views on new transmission services. Senators Lewis (Liberal Party), Sheil (Country Party) and Puplick (Liberal Party) recommended that in conjunction with the operation of the next generation of Aussat satellites (in 1992) the Government license a complete range of DBS and Pay-TV services and lift restrictions on VAEIS services. Senators Puplic (LP) and Powell (Australian Democrats) recommended that VAEIS services be bought under the operation of the Broadcasting Act. It appears from recent policy statements by the new Liberal Party spokesman on communications, Mr Julian Beale, that the Liberal Party may adopt as party policy proposals to amend the Broadcasting Act to bring VAEIS services within the jurisdiction of that Act. As at the time of writing this paper the nature of the regulatory framework that the Liberal Party would propose for radiated Pay-TV and cable services has not been announced.

Conclusion:

It is difficult to avoid the conclusion reached by Leo Gray in a recent paper to an Australian Communications Law Associaton Seminar on VAEIS aptly entitled "Satellite Video Entertainment Services - Is Our Law Off the Planet too?":

> "... we are maintaining two completely different licensing regimes in the Broadcasting Act and the Radiocommunications Act, but the criteria 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 interpersonal or intended for reception by the general public. There was no 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 structure."

The DOC has now stated its pur-

pose as being to promote "economic and technological regulation to the minimum extent necessary". The DOC's policy prescriptions for the new narrowcast technologies are consistent with that objective. Unfortunately the legislative framework within which it seeks to administer that policy is proving an increasing clumsy instrument. Self-regulation by service providers may work. However, communications legislation should be revised to ensure that such regulation as is required has the effective sanction of law and public accountability without, where inappropriate, the cumbersome machinery of the Broadcasting Act.

Peter G. Leonard

LIFE AFTER THE FDU TELEVISION AND FDU RADIO REPORTS

PART 2

You will have gathered that I am generally much happier with the quality of the approach taken in the FDU Radio Report although that is probably not the view of Janet Cameron from the Federation of Australian Radio Broadcasters who is scheduled to address you next. The point surely is, however, that irrespective of one's position, it is nevertheless grossly unfair to have restructured these two related industries on the basis of such profoundly divergent philosophical approaches to what, in any case, has been a shifting series of emphases in Government policy.

One needs also, in the context of television, to ask whether the proposed new ownership rules offer the slightest prospect of enhancing the qualitative diversity of program choice in the way contemplated in the FDU Radio Report. It has generally been argued by the Government that the development of new networks would result in economies of scale which would lead to more competitive programming. The evidence so far is to the contrary: Fairfax has dumped a group of Melbourne-based productions in favour of relays of Sydney-made equivalents. Premier Cain is unimpressed. I suspect the Minister is too.

But there is here an even more fundamental issue. Initially, the restructuring of television was undertaken with a view to providing additional services in regional Australia to meet the Government's first policy priority of giving consumers a diversity of choice. The proposed changes to the ownership rules will, however, have their impact ultimately upon all free-to-air commercial television services. To that extent the Government has an obligation to ensure that genuine diversity of choice - and in my view that must mean a qualitative diversity of choice - is achieved across all channels in all markets. And I do not believe the FDU Television Report and all that has flowed

from it will achieve that result.

That is why I and a number of others have been arguing so long, so patiently and with quite exemplary politeness, for serious consideration to be given to the creation of an Australian commercial television narrowcaster, something along the lines of the British Channel Four, to complement the existing commercial sector and bring to it a fresh and desperately needed additional growth dynamic.

We know there is a frequency remaining in each of the cities; we know, from the submission of the Association of National Advertisers to the Richardson Committee that there is commercial enthusiasm for this type of service; we know that the 10BA tax shelter will be letting in the rain increasingly as the personal tax margins come down and that something will have to be done for the independent production sector; and, not least, we know that private investors would leap at such a proposal. The restructuring now going on will shape our free-to-air media services until the end of the century. It would be a national tragedy if we were to pass up this option at this time.

A brighter spot for Mr Duffy, I think, has been in commercial radio where the Government's preference is for new independents to provide the additional regional services. The first cabs off the rank are to be Geelong, the Gold Coast, Gosford and Shepparton and there's to be an announcement later this year on Ipswich. In addition there are 10 new services planned for 1988 and 10 more for 1989. That is not to say there won't be continuing dispute over the supplementary licensing and AM/FM conversion issues, but at least the whole process has not yet been bottlenecked into a Senate Committee inquiry.

Looking over the equalisation process I couldn't help remarking, in preparing this address, just how similarly rocky and subject to political intervention has been the SBS' road towards and then away from structural reform: an inquiry announced in 1983 and commitment to corporation status and separate charter in March 1986 abandoned four months later in the budget context in favour of amalgamation with the ABC. The amalgamation is then choked off in the Senate, sent off to another committee and now, apparently abandoned as an option by the Government.

That decision, of course, has the whiff of the election about it as, increasingly, will everything else. Indeed, I don't think there's much point speaking to this general topic "Life After the FDU Report" without adding the rider "and the Federal Election".

I happen to believe that politically the question of media policy is still quite a hot one. Irrespective of how ordinary citizens may perceive the Government's handling of the television and print ownership affair, the private media interests directly affected are likely to behave, in the run up to this election, in ways which they believe will advance or protect their positions. This is particularly the case since the legislation which will set these changes in concrete is not yet law. The lobbying and the pressure will be intense and a whole new ledger of political and media creditors and debtors will be created. If the Government changes or there is a shift in the numbers or the balance of power in the Senate the whole wretched thing could finish up back in the melting pot.

Nevertheless, I am prepared to hazard the following few guesses at media life after the FDU Reports and the election.

On ownership and control I think the 75% audience cap with some cross-media restrictions will survive and be enacted. I also think it's possible some level of accommodation could be reached with Fairfax over HSV-7 and The Age.

A phased form of regional equalisation will probably go ahead but not before the Opposition parties have had their much postponed media policy crisis. Fully competitive services in aggregated markets will probably be delayed but not averted. RTA may still wring a few minor concessions from the system

There is a possibility that a new

television service could be established or an existing one, possibly the SBS, may be enhanced to deliver a wider range of special interest programs on a Channel Four or semi-commercial basis.

A secondary market shakeout of commercial TV network properties will occur in the medium term with the sellers sustaining some hefty losses. That will be followed by the much more serious business of stitching the more profitable regional markets into the network ownership.

Pay-TV on a DBS basis will follow the launch of the second generation of AUSSAT satellites due to start in 1991, only four years from now. Aspiring new players looking for large profits here should study the Canadian experience carefully.

The development of new regional radio services will proceed successfully and applications for additional new metropolitan FM licences could be called, possibly within the life of the next Parliament.

The publicly-funded broadcasting sector will be submitted to an inquiry similar to that into the funding of the BBC in the United Kingdom carried out by Professor Alan Peacock and his committee. The Australian inquiry will reach very similar conclusions. Significant changes to the role, structure and financing of the ABC and SBS, if it still functioning as now, will be recommended. But action will then be postponed until after the next election.

There is, of course, a much wider cultural question which, it seems to me, all too few people bother to ask in the context of "Life after the FDU Reports - after the Election". It is, quite simply this: will the programs on all these services be any better or more diverse?

I must confess that on the balance of the evidence, I am not persuaded that they will. I find myself increasingly tending to the view of a very senior member of the present Federal Cabinet who suggested to me only a matter of weeks ago that Australians are, by and large, a "low-spirited people". That is not a kind assessment so close to the celebration of our Bicentennial. But, in the priorities which we appear to have established for ourselves in the restructuring and administration of our media - those mercurial cultural mirrors of the post-industrial state - I regret to say that I believe the chances are high that that assessment will be proved to be true.

Huw Evans

The new Communications And Media Law Association has been formed from the merger of the Australian Communications Law Association and the Media Law Association so that the new group will be able to offer members a wider range of services and activities.

These will include:

- subscription to the Communications Law Bulletin;
- lunchtime and evening seminars on communications law and policy issues;
- conferences on law relating to broadcasting, print media and other communications services and developments;
- information about national and international conferences on communications law;
- seminars for practitioners on aspects of media and communications law practice.

Members of both the Australian Communications Law Association and the Media Law Association will become members of the new organisation. The new Association is also actively encouraging new members interested in the growing field of communications law and policy.

New membership rates are:

Members - $40.00 per year
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