Senator Button has some more to say on Media Regulation

A DISCUSSION PAPER BASED ON A SPEECH GIVEN TO THE AUSTRALIAN COMMUNICATIONS LAW ASSOCIATION BY SENATOR JOHN BUTTON, SHADOW MINISTER FOR COMMUNICATIONS, ON MARCH 20, 1981 IN SYDNEY.

Senator John Button, Federal Labor Party spokesman on Communications, was widely reported earlier this year for his speech to the March 20th luncheon of the Australasian Communications Law Association, in Sydney. Here is a Discussion Paper by Senator Button based on the ACLA speech:

Once again, the Government is proposing to amend the Broadcasting and Television Act. There is a danger that we are now in for another bout of short-sighted policy making and knee-jerk responses to particular situations. It is disappointing, especially when it is considered that this Government made a reasonable start in 1976/77 with the Green Report and the subsequent introduction of the public hearing process before the Australian Broadcasting Tribunal.

As a result of all that, it looked for a time as though a true 'public interest' concept was growing up in broadcasting administration. The Tribunal made mistakes, and its performance has been erratic, but nevertheless progress was made.

In the 2HD case, and in the ATV-10 case, the discretion allowed as to what is in the public interest enabled it to extend the bare bones of the ownership and control restrictions. It is the latter case, of course, involving the Murdoch interests, which is the prime reason for the proposed amendments.

The Minister, in answer to a question last December, said: "It (the Government) is concerned that there should be three major networks operating, if at all possible, in the Brisbane, Sydney, Melbourne and Adelaide context".

This short discussion deals briefly with some of the lessons of the history of broadcasting development, and the need for a proper policy. This leads up to some of the current problems, especially those connected with hearings.

The ALP has always argued the case for diversity in the media. We do this not just for political reasons, but for social and cultural reasons as well. I refer to diversity in two areas — of ownership and control and of programming. It is worth making the distinction, because it does not necessarily follow that diversity of ownership and control, especially within any one sector, leads to real diversity of programming. We are, I note, not alone in this view of the importance of diversity. Malcolm Fraser's excursion into the realm of philosophy, delivered recently in a major speech in Adelaide, saw him say, referring to the Liberal Party, "it believes that society is healthier, and the lives of people happier, when responsibility, enterprise and power are spread widely through the community, rather than concentrated in one or a few places." Thus the argument now ought to be about how these noble sentiments are to be realised.

A good broadcasting system should provide the widest possible range of programming in all areas — entertainment, education and information. It should be dynamic and react quickly to change. It should exhibit competition, both between categories of broadcasting and within categories of broadcasting, and be characterised by a diversity of sources of funding. It should be recognised that there are national, regional and local communities of interest, and the diversity of sources, programming rules and related arrangements should recognise this sensibly. There should be public accountability, free from political interference.

In some useful respects we have reached this point in Australia, even if it has been done in a series of ad hoc decisions. It is necessary now to pause and consider where we have arrived at, and where we go from here.

Accountability

I believe it is necessary to concentrate on two areas: firstly, the role of program regulation and its interrelationship with broadcasting structures and, secondly, the mechanisms of public accountability. Much effort in the past has gone into the day-to-day regulation of program standards. This seems to have been the rationale for the setting up of the old Broadcasting Control Board in 1948.

This was done by a Labor Government, of course, but the belief was bipartisan. In 1956 the Menzies Government's Minister of the day dealt at length with the social power of television when introducing the amendments of that year. He said that self-regulation would not be sufficient to secure programs which would be of a suitable standard to satisfy the public.

Today this belief has been largely replaced by the view that governments have a strictly limited place in regulation. I agree with this view. For one thing, program standards tend to be negative — you can only exhort licencees to make better programs — not compel.

In general, industry codes, coupled perhaps with the encouragement of professional standards within groups involved such as journalists and producers, are a better way of encouraging standards.

There are, of course, exceptions.

Children's programming

There is special and widespread recognition of the need for better children's programming. I would support the 'C' classification system. I welcome the setting up through the Australian Education Council initiative of a Children's Television Foundation. I also support the establishment of Australian content levels — I believe in an "Australian look" — and some regulation of advertising. There are things which are comparatively easily defined, and they set a framework in which licensees know in a clear-cut way what they have to do.

But it must be realised that the consequence of governments largely withdrawing from regulation is that they have to ensure that the broadcasting structure is right. In other words, they have to get a structure which is financially viable, and in which broadcasters are encouraged to produce diversity of high quality programming.

This alone is not enough to secure a perfect system, but in a country with our traditions, it has obvious philosophical attractions. I do have some misgivings, for instance, about bias in news and current affairs broadcasting. The ALP has on occasions suffered from this, and has documented it, but I do not see that you can correct

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it by any kind of government or public authority paternalism. Bringing it out at a public hearing is a much better way of controlling it.

It is a pity that the focus within the last few years on ownership and control questions in the commercial sector has distracted attention from other developments which are also important, such as the Inquiry into the ABC and the beginnings of. multicultural television.

Both of these developments lead to consideration of broadcasting structure. There are considerable shortcomings with the ABC, but in my view a vigorous and viable ABC is vital to the well-being of the Australian system. I believe that competition *from that body — almost certainly in*volving a second television channel — could have a more positive effect on commercial broadcasting than whole books of program regulations.

Government regulation of broadcasting structures is said to rely on the *physical scarcity of channels. At the* moment, of course, that still applies — if anything it is getting more critical. But with cable systems it could be removed. It may be asked, is there then any justification for any structural regulation?

I believe that the answer is 'yes', because economic constraints will still apply. There is a limit to the number of licencees, and there will be competition for that limited number.

Revenue

I think commercial broadcasters realise this better than most. They have to be sufficiently viable to both do good programming and to make a profit. Therefore there is litle or no justification for a proliferation of stations which would put this viability at risk.

It is sometimes claimed that many more commercial licences should be allotted, and it is the licensee's own responsibility as to whether he goes broke or not. The effect of this sort of policy is likely simply to fragment the sources of revenue, and the failing licensees would simply limp along with a very low, cheap standard of *programming, to no-one's benefit, in*cluding the public's.

Limitation of the number of licensees has had a bad name in Australia because it was practised for too long in radio and passed off as a technical limitation. But that does not negate a good policy, it simply indicates that a sensible application of it is needed.

It does not follow, of course, that making an adequate profit will ensure good programming. It is a prerequisite — a necessary but not sufficient condition. The real task is to devise a market situation, a professional atmosphere, and a system of public accountability which ensures that licensees do deliver in return for use *of a valuable public resource. (I might* not that the proposed Sinclair amendments ignore this real task completely; they are concerned ultimately with jeopardising much of the progress we have made.)

I do not think that within the commer*cial sector, therefore, we should move* to the American situation. It would accordingly be wrong to expect a future ALP Government to launch into vast increases in numbers of commercial stations. (There may, of course, be commonsense arguments for new ones in growth areas.) Instead one would expect further extension of public broadcasting and proper provision of ABC and multicultural broad*casting and along with that you would* expect disciplined management by those organisations.

Public interest

I now turn to the question of public accountability and the question of public interest. In effect, broadcasters operate in a market protected by the government against new entrants. *You need a licence to enter.* Therefore, they should be accountable for their performance, and it is reasonable that the State, or the public, expect a return on their investment. This is especially so when it is considered that the State takes care to ensure that the licence is potentially viable.

But also, it must be recognised that licensees have a considerably property interest in a licence. It is the resolution of this apparent conflict that is proving difficult. Questions of what is the public interest and who is entitled to represent it have arisen quite critically since the 1977 legislation.

The present government took a very wide view when the 1977 broadcasting legislation was introduced. In the Senate, Senator Carrick in reply to a comment of mine discussing the detailed provisions of the Act, had this to say:

"Some question has been asked about Clause 10 and the interest of a person or organisation in intervening before the Broadcasting Tribunal. The Bill does not say 'pecuniary interest'; it says 'interest'. My understanding is that any genuine person who can show an interest — an interest as a viewer, as a family, or as an oganisation in a particular program or activities — would be regarded as quite bona fide and would have access to the Tribunal."

They are his words, not mine. They are not the words of any Chairman of the Tribunal. But evidently it is what this Government had in mind when it introduced this present legislation in 1977.

The real problems arise in the practical matters of Tribunal inquiries. In the beginning the Tribunal was very liberal in its admission of parties. It later became more selective, and appeared to be working out some rules.

Licensee

There has been considerable opposition from within the commercial licensee ranks to wholesale admission of the public. One objection is that people who appear are not representative of the public. I might add that neither are they fair examples of the public, in any sense that a statistician *would recognise. They are represen*tative of interest groups. That is not the same as saying, of course, that they are therefore unable to put evidence that goes to the licensee's performance. In fact, the so-called public interest groups, similarly to public interest groups in other areas, are characterised by the fact that they have a general or altruistic interest in broadcasting policy, rather than a vested or financial interest.

There is also the considerable problem of unequal weight of representation — those who come forward from interest groups usually cannot afford the expensive legal representation and research that the licensees can.

One solution which has been suggested is that of separated hearings. At one, a general hearing into the state of radio or television in one area would be held. The licence would not be at stake. At another type of hearing, conducted in a more formal way, deci*sions on licence renewal would* be made.

This suggestion has been made to overcome the problems of standing and admissibility of evidence which have arisen. Some groups have wished, quite understandably, to make *general submissions relating to TV or* radio service in their area. At present, the only avenue for that is an inquiry on a particular licensee.

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The suggestion is an attempt to sidestep the real problem. Essentially, the problem is that our procedures are well worked out for adversary situations, where one type of interest confronts a similar type, but the idea of confronting a property interest with the public interest, put by the public, is fairly novel. Similar situations arise in other areas, e.g. in environmental decision-making.

I believe it must also be recognised that it is unrealistic to expect a licensee to lose a licence from individual complaints relating to program content. However proven, serious and repeated complaints must jeopardise the licence, i.e.g persistent offences. Nor is it to say that there should not be an adequate forum for complaints.

The Administrative Review Council has now reported on the procedure of the Tribunal. Their report is a serious and helpful attempt to grapple with the problem, and I believe that it contains some answers.

Fundamentally, the Council does not endorse the concept of separate hearings. It suggests instead the extensive use of pre-hearing conferences to handle much of the work. It envisages that a member or members of the Tribunal would preside over such conferences. They would be informal.

Conferences could lead to combining of witness groups, or refinement of complaints, into a forum to go to the formal hearing. Subject to a few conditions, I believe that such procedures could go a long way to expediting the formal hearing. It would be essential that such conferences be open to the press and public, and mandatory that an accurate report go forward from the pre-hearing conference to the hearing proper.

One difficulty arises with standards. If formal, general program standards are no longer to apply, it is difficult to see what yardstick the licensee's performance is to be measured against. It may, therefore, be necessary to have an agreed set of objectives, or standards which are not necessarily policed continuously, but which are available at renewal time to be compared with performance. Alternatively, the promise of performance concept may be developed further.

Finally, I believe that it is essential that those who appear in the hearing at least approach equality of representation with the licensees. This applies to both research and case preparation, and to the actual appearance before the Tribunal.

For information and case preparation, I believe that the concept of the Broadcasting Information Office was commendable. In my view it should have been separate from the Tribunal, as an independently funded office, charged with research and with providing information to the public. However, it has fallen foul of the Razor Gang and will not be continued.

So one by one, the bold reforms which the Government itself initiated in 1977 are being eroded. The most horrendous, of course, are the amendments currently under discussion, which threaten to put the commercial industry into turmoil, and for no good purpose which will benefit the viewer.

High Court

Despite its erratic start, the Tribunal, with some stiffening from the High Court, had begun to develop some important public interest precedents. In July 1979 it blocked the sale of 2HD Newcastle on the grounds that it would have given too high a concentration in one city across media — two out of three radio stations and the sole TV station. The High Court confirmed this decision, saying in effect that the limits set in the Act were ceilings, but not necessarily entitlements. Secondly, it refused to approve the ATV-10 transaction on the grounds that it would give too much power in the network to one interest.

The Tribunal could do this because it had a discretion. Spelling out the criteria in the Act would remove that. At the same time, what is spelled out in the Minister's statement of legislative intent is incomplete. It says nothing about the criteria involved in either the ATV-10 case, nor about some other matters of public interest.

I believe that it is in the interests of all involved to recognise realities and to recognise the need for recognition of the public interest.

There is no doubt that the advent of new technology will cause us to have to think a lot more about the kind of broadcasting system we want. The industry and the people of Australia need some direction in these matters. There is a need for a public inquiry as there was in 1954 prior to the introduction of television, with the aim of devising the best system in the interests of the Australian people.

Media Seminar

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Session Four

4.00-5.30 **CAN THE LAW AND POLICY CATCH UP?**

The Interface between the Broadcasting System and New Technologies
Martin Cooper
(News Corporation Ltd)

The Role of Government and Freedom of Speech
Mark Armstrong and Terry Buddin
(University of New South Wales)

The Gap Between Law and Planning
Helen Valier
(Australian Associated Press)

Discussion

5.30-7.00 **Informal Dinner at the University Union**
Guest Speaker: Rod Muir

Registration Form

Saturday, 22nd August

Registration fee (including all seminar sessions, morning and afternoon teas and luncheons) $45

Informal dinner at the University Union including wine $20

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