COMMUNICATIONS LAW BULLETIN
The Official Publication of the Australasian Communications Law Association (ACLA)
ISSN 0705-9043 EDITED BY JOHN MANCY LLB Vol. 1 No. 3 October 1981

Future Regulation of Television

It is a daunting task to attempt to discuss the Future Regulation of Television, particularly in the longer term, because, among other things, it involves making judgements and assumptions about the future of television itself, which is futurologist's delight or nightmare depending on your point of view.

How quickly developments occur is, perhaps, well illustrated by the following comments made by the well known futurologist, Alvin Toffler, in 1975:

"What we call television is no more than a primitive pre-runner of video systems that could turn out to be the electronic spine of tomorrow's society. TV today is essentially an entertainment medium and, as such, peripheral to our lives. Tomorrow we might well base much of our economy and our political system on what we still anachronistically call "the tube"...

Right now television, in every country, is a tool used by "them" to influence "us". The "them" may be advertisers selling a product, politicians pushing a party line, or celebrities offering their views. But the messages flow only in one direction. Now imagine a system in which each of us becomes not merely a passive viewer, but also a sender — a system that permits each of us to communicate privately with others. Imagine, in short, a video equivalent of the lowly telephone".

This may have been regarded in 1975 as fantasy, Alice in Wonderland, but of course we are all aware that at least some of it has already come true in other parts of the world and is being discussed as a likely future reality in this country. Such developments have substantial regulatory implications — how should the new technologies be regulated in the public interest and what impact should their introduction have on the regulation of traditional services.

An extract from an address by Mr **DAVID JONES**, Chairman of the Australian Broadcasting Tribunal, to a FACTS seminar on The Future of Australian Commercial Television, on 21 September, 1981.

In order to discuss future regulation it is necessary to examine the principles upon which past and current regulation have been said to be based. Different sources reveal common themes.

In 1956 the former Post Master General, Mr. Davidson, said to Parliament:

"The conduct of a commercial television service is not to be considered as merely running a business for the sake of profit. Television stations are in a position to exercise a constant and cumulative effect on public taste and standards of conduct, and, because of the influence they can bring to bear on the community, the business interests of licensees must at all times be subordinated to the overriding principle that the possession of a licence is...a public trust for the benefit of all members of our society."

In April 1978 this theme was developed further by another Minister, Mr. A.A. Staley, when he said to Parliament, some 22 years later:

"In short, broadcasting is so powerful a social and communications instrument, so valuable a national resource, so crucial to the public interest, that no government can afford to ignore it. The problem for government of course, is the extent to which the system can, or should, be regulated. Where does sensible planning and policy implementation finish, and totalitarian control start? A basic premise accepted by most governments in free societies is that the electro-magnetic frequencies — or airwaves — used by broadcasting and in most forms of communications, are public property. That premise leads logically to an assumption that government must accept the role, and attendant responsibilities, of custodian of those airwaves for, and in, the public interest".

In November 1979, this underlying theme of public interest was stressed by the High Court in the **2HD case** when it said:

"From the elaborate provisions made by the Act in relation to the grant, renewal, revocation and suspension of licences, the limitation on the ownership of shares, the

Continued Page 18

In This Issue

• Address of Australian Broadcasting Tribunal Chariman, Mr David Jones, to FACTS Seminar, Canberra, 21 September 1981 (extract only) ....1 CLB — 17

• Paper by Mr Matthew Smith on Judicial Review and the Broadcasting and Television Act .... 1 CLB — 19

• Further submissions to Cable and Subscription Television Services Inquiry .... 1 CLB — 21

• How to obtain papers presented at the seminar NEW MEDIA: LAW AND POLICY in Sydney on August 22 .... 1 CLB — 21

Registered for postage as a publication, Category B. Printed by Beaver Press, 29 Alberta Street, Sydney 2000. Inquiries and contributions to: The Editor, Australasian Communications Law Bulletin, 1/167 Phillip Street, Sydney. 2000 (DX 423).

Future Regulation of Television

From Page 17

determination of program standards and the extensive role which it gives to the Tribunal in connection with these matters, we infer that it is the purpose of the Act to ensure that commercial broadcasting is conducted in the interests of the public."

Most recently, Mr. Justice McGregor (sitting as the AAT), when discussing the regulatory policy inherent in the Broadcasting and Television Act said:

"The holding of a radio or television licence is in its nature monopolistic, at least in a given area. There is potential for great profit and for the exercise of significant influence over manners, customs, education, political opinion and even morals of viewers."

As these statements illustrate Government regulation of television has been based on such principles as the scarcity of the resource, the influence that it can exert, the use of a public property and the overall need for the medium to be used responsibly in the public interest.

The greatest challenge for the regulator (whether it be government or statutory agency such as the Tribunal) in the future is to be able to adjust and mould the regulation of television to meet the changes in the technology and in the attitudes and aspirations of the Australian society that will inevitably occur.

As these changes take place inevitably the public interest will alter and the regulation of television to ensure that the public interest continues to be served will have to be adjusted accordingly. The regulator cannot work in a vacuum or cocoon or in blinkers. He must react and adjust constantly to what is happening in the real world around him otherwise, inevitably, his regulation will inhibit, rather than protect and serve the public interest. I regard this as one of the great challenges to the regulator (whether it be government or agency) in the field of communications; to be able to continually assess the best method of achieving the public interest in an atmosphere of continuing and sometimes dramatic technological, social and cultural change.

This I think was well summed up in the following comment by Ian Sinclair, the Minister for Communications, when he said to the AANA in March of this year:

"The balance between the level of necessary regulation and elimination of unnecessary regulation is one of the great challenges of the 80's."

As a regulator I would, respectfully, endorse, that comment. It is a real challenge that confronts us in the Regulation of Television and one which we must constantly remind ourselves of. Mr. Mark Fowler, the recently appointed Chairman of the FCC, had this to say when addressing the Oregon Association of Broadcasters in June:

"A primary goal of the Commission in the months to come will be to strip away the layers of Rules, Policies, and Programs that now encrust the basic "Public Interest" concept. The new age of alternative communications media cable television, low power television, MDS, STV, Video Discs and cassettes and perhaps DBS — clearly make some of these rules and policies as anachronistic as the vacuum radio tube. But our scrutiny of the broadcasting rules will not begin and end with those rendered obsolete by new technologies. Many rules have simply lost what usefulness they may have had because of the changes in American society that the passage of time has wrought. But many others, quite frankly, were ill-advised to begin with. Top to bottom, we will take a look at each regulation imposed on broadcasters and ask, frankly, candidly, what would happen to the world if this regulation were eliminated? Does the regulation perform a function best undertaken by the regulators or by the industry? Do consumers really get enough back from this requirement to outweight its costs on business and on the public."

Although there are many substantial differences between the American and the Australian systems and experience I believe the principles he enunciated have application here. There is a need to keep regulation up to date, effective and responsive to the true public interest. It was a policy that the Tribunal pursued recently in its complete overhaul of the Broadcasting Program and Advertising Standards. In a statement accompanying the release of the new Standards I summed up the policy of the Tribunal in this way:

"Radio, particularly with the development of public broadcasting and FM broadcasting both National and commercial, has become a more specialised and competitive medium. This trend is likely to continue as more services are introduced....Increased competition means less regulation is necessary to maintain the public interest. The Broadcasting Standards have not kept pace with these changes in the market and the community. Consequently many of the provisions have become irrelevant and no longer necessary to ensure that broadcasters act in the public interest. The new Standards are designed to regulate those areas that the Tribunal feels clearly require positive statutory regulation. The new standards are intended to provide broadcasters with the flexibility to exercise their own judgment in determining the best way to serve their community's needs and interests in a manner that reflects the realities of today's broadcasting market".

Although the issues are different and more complex the Tribunal is pursuing a similar policy in its review of the Television Standards. Many of them are also irrelevant and no longer necessary to protect the public interest. What the tribunal is addressing are the real issues such as violence, criteria for classification of programs, children's programs, advertising of particular products, which may require positive statutory regulation. Otherwise the content of programs will be left to the judgment of licensees acting within their overall statutory obligations. I believe, as with radio, that in principle, increased television services in the future should mean that less regulation is necessary to maintain the public interest.

The Tribunal certainly intends to keep all Standards under review in the future to ensure as far as possible that they are relevant to the current broadcasting market place and community attitudes, aspirations and values.

In view of the Tribunal's current inquiry into Cable and Subscription (RSTV) Services it will be understood that I cannot provide concluded views about the regulation of those services if they are introduced and the consequent impact on the regulation

Continued Page 20

Future Regulation of Television

From Page 18

of existing services. However, the following are some of the important regulatory issues that appear to arise. There are, of course, substantial economic, social and cultural issues as well.

- The use of new television channels for the provision of RSTV also has the potential for the development of other additional non-subscription services. What should be the programming mix between subscription and free-to-air television (if any)?
- To enable RSTV channels to be used for various purposes it would probably be necessary to vary existing licensing provisions which do not allow frequency sharing. How could this be done to achieve the most effective utilisation of possible available television time?
- To what extent should time sharing be permitted on allocated RSTV channels by such bodies as religious, ethnic, local community and sporting organisations.
- To what extent should existing standards and regulations apply to programming provided on RSTV and cable channels; e.g. censorship, Australian content etc.
- Should, and if so what type and amount, of advertising or commercial sponsorship be permitted on RSTV or cable channels.
- Should there be any restrictions on RSTV or cable networking. To what extent should such networking be subject to regulation relating to ownership and agreements.
- Policy concerning RSTV and cable ownership and control may be consistent with existing provisions of the Broadcasting and Television Act or with new principles, which are more or less restrictive. For example:
- To what extent should existing licensees be eligible to hold RSTV and/or cable licences for services either within their current coverage area or in other areas.
- Should there be any differentiation in the participation allowed to existing licensees on a geographic or some other basis.
- To what extent should other associated media interests (e.g. cinema owners/operators) or new entrants to the media industry be eligible to hold RSTV and/or cable licences.
- To what extent should limitations be placed on overseas ownership and control on RSTV and cable services.
- Should the licensing processes for RSTV and cable be the same as, or similar to, those applying under the Broadcasting and Television Act or should a new system be developed which is more appropriate to each of them.
- In the event of a cable franchise being offered for an area served by an existing RSTV service should:
  (a) The RSTV licensee be eligible to apply for that service,
  (b) the RSTV licensee have some special consideration e.g. the cable system must carry the RSTV service if the RSTV licensee so desires.
- Should there be some "must carry" obligation on a cable operator with respect to other services provided in the area served by his franchise. Should there be any, and if so what, restriction on the number of imported distant signals that may be carried by a cable operator.
- What copyright liability should apply to a cable operator for local signals and distant signals carried on his system.

These are only some of the regulatory type issues that the Tribunal sees arising in this inquiry. With a view to obtaining as much assistance as possible from the forthcoming hearings the Tribunal will shortly release a detailed background paper which will detail significant issues which the Tribunal considers are raised by the Terms of Reference.

Judicial Review and the B & T Act

From Page 19

Similarly, the Minister's regulatory powers, for example to make technical specifications for particular licences and to certify technicians, are covered.

It may be argued that some decisions are so political or 'policy' in nature as to cease to be 'administrative'. Examples of these are the Minister's powers to direct an inquiry **(B & T Act s.18(2))**, to prohibit or direct a broadcast **(ss.99(3))** and **104)**, and to plan the development of services **(s.111C(1)(a))**. However, it is suggested that exercises of these powers would be reviewable under the ADJR Act,[6] although because of the unlimited nature of the discretions involved the possible grounds of challenge may be very circumscribed.

Based on more established classifications the Court has held that the word 'administrative' excludes acts which answer the description of legislative or judicial acts.[7]

This places the making of regulations and statutory amendments beyond the scope of the Act, but also raises some uncertainty in relation to powers to establish general criteria binding groups of people, for example the A.B.T.'s powers over program standards **(B & T Act ss.99(1), 100(4), and 100(5))**. Prima facie, exercises of these powers are legislative even if they directly affect the interests of identifiable people, but it is possible that the Court may draw a qualitative distinction between law-making under the scrutiny of Parliament and administrative legislation.

Even if these decisions are outside the ADJR Act, an administrator's general policies and standards lacking the status of 'laws' are open to review under the Act when applied in individual decisions, and indeed the inflexible application of them is a ground for intervention **(ADJR Act s.5(2)(f))**.

Also within the ADJR Act are procedural actions taken under the B & T Act in the course of substantive regulation. Many examples of procedural decisions potentially open to challenge appear, particularly in the steps taken by the A.B.T. in the conduct of its inquiries and the processing of applications to it. However, at times these actions may only be regarded as conduct in the course of making an ultimate or operative decision, and therefore only reviewable under **section 6** and not open to a demand for reasons.[8]

When a decision made under the B & T Act does not serve distinctively governmental functions of the

Continued Page 22