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