

FORUM

Regulation of Pay TV content

To date, the introduction of subscription television, or Pay TV as it is more generally referred to, has been the subject of three inquiries. The first was the 1982 Australian Broadcasting Tribunal's (ABT) 'Cable and Subscription Television Services for Australia'. The Department of Transport and Communications (DOTAC) issued in February 1989 entitled 'Future Directions for Pay Television in Australia'. This was followed in November 1989 with the House of Representatives Standing Committee on Transport, Communications and Infrastructure report 'To pay or not to Pay'

All these reports endorsed, explicitly or implicitly, the introduction of Pay TV services

although their proposals in relation to regulation of these services, including content regulation varied greatly from the free-to-air broadcasting type regulation proposed by the ABT; through the more moderate proposals of the Saunderson report which recommended only some of the current programming requirements prevailing in the broadcasting arena should be adopted; to the deregulatory publishing industry type mode discussed in the DOTAC report.

A moratorium on the provision of Pay TV services was announced in September 1986. The Governor General may lift this moratorium by proclamation anytime from September 1990.

so that it is a complementary service rather than one that largely duplicates commercial television. The simplest way of doing this is to ensure that Pay TV is a purely subscription medium. If it is even partly advertiser-supported it will inevitably seek to attract the same audience as commercial television.

The only other constraint we would want to see on Pay TV is in relation to the televising of major live events. We do not see any cause to deny Pay TV access to events like the Melbourne Cup or the AFL Grand Final. However, we would oppose to the last any approach that allowed Pay TV exclusive access to events like this. Even on the most optimistic projections, it will be many years - if not decades - before most people are Pay TV subscribers, so access to live coverage of these events would be restricted to a fortunate minority. Most politicians seem to be aware that this will be perceived as an equity issue, and could very easily become a major political liability if not properly handled.

We have not seen any persuasive case for detailed regulation of any other aspect of Pay TV services. They are discretionary services, like commercial videotape rental or book purchase, and it makes no more sense to regulate the content of Pay TV services than it would to tell booksellers or video shops what they must stock or - more importantly - what their customers must rent or buy.

Tony Branigan of Network TEN

Pay TV in some form is inevitable within the next few years. It is a curious example of a demand which has been created by government reports and intense political interest in what is perceived as a high-profile, costless issue in the notoriously difficult area of broadcasting policy. Public demand has been zero and aspirant Pay TV operators of any real substance have been in short supply. But it has been on the agenda in this ghostly form for so long now that its time has probably come.

It is bound to have some effect on television viewing levels and revenue. Given the state of the industry at the moment, this has to be a major factor in deciding when and how Pay TV is introduced.

Television cannot expect, as of right, to be protected from competition from this or any other quarter. However, the community has a substantial investment in television and the production industry it supports and government has to take this into account in framing policy. At the very least, it must aim to ensure that the introduction of any new service does not lead to a net decline in the entertainment and information services available overall. In a larger economy like the United States that would not be a concern for government - both commercial television and the program production industry over there have the sheer size to be able to cope with the sort of buffeting that would mortally damage their modest counterparts here.

Australian television and quality program production generally are operating at the economic margin. A relatively small decline

in revenue may be enough to bring about a drastic fall in Australian television production. The transfer of that revenue to Pay TV will not give it the critical mass - even with its subscription revenues - to pick up this lost production. It took the US Pay TV industry more than a decade - and annual revenues of more than \$20 billion - to become a program producer of any significance.

In our view, the best way of guarding against this outcome is to structure Pay TV

Hoyts Entertainment

Hoyts Entertainment in its submission to the Saunderson Committee outlined its views on what the company saw as the central issues for consideration on implementing Pay TV services in Australia. Those views have not altered. Following is a summary of Hoyts' position on content regulation of pay TV.

Generally, there should be no program content regulation along the lines of existing broadcasting services.

There should be no regulation for minimum Australian content in programming on the grounds that there is no practical or workable means of establishing such regulation, and because the demand for Australian programming represented by Pay TV will outstrip any level of required content.

There should be no barriers to the carriage of advertising on Pay TV. The volume and type of advertising included should be at

the discretion of the Pay TV operator who will need to pay careful attention to the attitude of subscribers to frequent and irritating advertising interruptions.

The potential for the siphoning of specific programs from free-to-air to Pay TV should be met by the development of a schedule of events of national importance for which exclusive Pay TV rights could not be granted. Rights holders for such events should be encouraged to negotiate the assignment of both free-to-air and Pay TV rights separately so that consumers of each have access.

In determining prospective Pay TV markets and the allocation of licences/franchises to aspiring Pay TV operators, each market should be considered as a natural monopoly with only one Pay TV service (irrespective of the number of channels) available in each. This is to ensure that the introduction of Pay TV services actually results in the provision

is wide a range and diversity of programming, including comparatively low interest programming (narrowcast) services, as possible. Allocation of Pay TV on a competitive channel basis within systems will result in all operators chasing the same maximum interest programming and the same diversity of subscribers.

Premium services, involving both premium channels and tiers and pay-per-view,

Janette Paramore of the Australian Writers' Guild

The apparent inevitability of the introduction of Pay TV in Australia represents yet another example of technology-driven change in our communications/media services.

While some of these recent changes have brought obvious benefits, many of those related to broadcasting services and policy have been questionable at best and, for those concerned with the cultural and social implications of such, disastrous. Disastrous due to concentration of power and benefits (largely misused) associated with the manner of their introduction; the failure of our policy makers to recognise the practical effects of their decisions, and the lost opportunities to use the technological developments which created changes in the broadcasting system to diversify control of Australia's mass media culture and create the opportunity for innovation and variety in the programming offered.

Perhaps the introduction of Pay TV will be seized upon as a second chance. Perhaps the creators of the programming upon which this service depends will be provided with some power in the system, and perhaps the community which it is intended to service will receive better, rather than simply more, choice. Choice which contributes positively to Australian mass media culture and to our sense of an Australian heritage and society.

However, there is a sense of uncertainty and confusion surrounding the processes of introduction which belies these possibilities.

True, the recommendations of the Saunterton Committee are on the public record. However, officers of the Department of Transport and Communications "boffin away" reviewing Pay TV and its introduction, providing advice to the Minister about the most suitable delivery technology, the number of services, the licensing system, suitable regulation and the appropriate regulatory authority, if any.

While the Departmental working party talks to itself and other government agencies within the grey caverns of the bureaucracy, the program makers, public interest groups and the general community remain in ignorance of any terms of reference established

should be able to be marketed by Pay TV operators, subject to subscriber demand.

Decisions by the government, or its agencies, on the ownership structure of Pay TV or the allocation of specific market licences/franchises should take no account of claims that the majority of rights to potential programming are held already by particular commercial interests.

by or for the working party, the priorities to which it is working, or what options are receiving serious consideration.

In addition there are powerful vested interests involved in any introduction of Pay TV services to Australia. Those interests range from the controllers of the various technologies which could be utilised to provide the service, to the controllers of program rights and current broadcast and other entertainment services. All these interests are well resourced and have access to government: both parliamentary and bureaucratic.

At the other end of the equation are the program creators and makers, with little power, much to offer and, already suffering from the financial decisions of the owners of existing services, much to lose. In a similar position is the community generally, particularly the growing numbers whose financial situation leads them to rely heavily on free-to-air broadcasting and other home entertainment services for their entertainment.

Will the decision on Pay TV result in a

positive outcome with regards to the social and economic impact of its introduction? Will the choice of delivery technology facilitate servicing the widest possible area of the Australian community or, encourage operators to service only areas meeting particular specifications of demographics and population density? Will the number and nature of the services introduced provide a revenue base which supports the production of new programs? Will the licensing system and regulation governing Pay TV ensure diversity, innovation and Australian programming?

If not, Pay TV will make no positive contribution, rather, it will further serve already powerful interests.

The Australian Writers' Guild is painfully aware of its members' incomes dropping by 50 per cent during the current financial year. A direct result of financial decisions made by owners of television networks. We, therefore, can only welcome the introduction of Pay TV if the same requirements for Australian content apply to pay services as currently apply to free-to-air television, and the ownership and control of Pay TV services are regulated to ensure they are securely in Australian hands, not merely subsidiaries of foreign program producers, distributors, or broadcasters, seeking to expand their market.

If Pay TV is introduced without such regulation Australian creators of programs will be ill-served by it. So too will the Australian community, as the introduction of additional services without such regulation will lead, ultimately, to the collapse of the Australian production industry and with it the community's access to its own cultural identity in the mass media.

Jock Given of the Australian Film Commission

The real debate surrounding Pay TV must not be about regulation, it must be about television - broadcasters and program-makers, their programs and their audiences.

Policy on Pay TV must be considered as part of an overall plan for the development of the Australian television system. Such a plan must cover all of the range of television policy questions which currently are being considered by government - charters and funding for the ABC and the SBS, aboriginal broadcasting, broadcasting regulation reform, public television and others.

In the early 1980s, as video began its extraordinary penetration of Australian homes, the Australian Film Commission (AFC) opposed the introduction of Pay TV in Australia. We believed it would only further fragment existing program markets,

thus diluting the resources available for programs, and contributing nothing to program diversity.

At the beginning of a new decade, we are all a little wiser. There is considerable evidence that cinema and home video markets are at least partly complementary rather than purely competitive. The AFC now is hopeful that Pay TV might provide some opportunities to improve the diversity of program choice for Australian viewers, to encourage innovation in programming and to diversify media ownership.

However, we must be realistic in our expectations. We will not see a massive number of new quality channels, because of the size of the Australian market. Competition amongst marginal operations may homogenise rather than diversify program choices. Finally, at a time of considerable

nancial pressure for existing television networks, it would be counter-productive to the interests of the film industry and its audiences to recommend a commercial free-for-all which substantially fragments the capacity of existing stations to finance local production.

Initially, a single Pay TV operator delivering multiple channels from one of the second generation Aussat satellites will maximise the chances of real benefits accruing to audiences and program-makers. Concerns about the competitive position of such a monopoly operator will be mitigated by competition with existing free-to-air broadcasters.

A licence to provide the service should be granted for ten years (the life of the second generation Aussat satellite is estimated at fourteen years). The renewal inquiry should encompass a complete review of Pay TV. The Minister should invite applications for such a licence to be made to the ABT. It is hoped that the Tribunal would, by then, be exercising powers under revised legislation which provided a consistent regulatory framework for all point-to-multi-point communications services. The Tribunal should be required to select the most suitable applicant, having regard to revised "quality of service" criteria. Those criteria should exclude commercial viability, which is better considered by the Minister before exercising his or her power to invite applications.

Holly Raiche of the Communications Law Centre

Over a year ago, the Communications Law Centre called for major reform to the current legislative framework covering communications (a call echoed in Les Free's article in the Autumn issue of CLB). With the 1 September date for the possible lifting of the "moratorium" on Pay TV approaching, reform to the current regulatory structure is becoming urgent.

In its submission to the Saunderson Committee, the Centre called the current regulatory regime a "complex and contradictory one, causing anomalies in the way different sorts of services can be licensed". The same sorts of service can now be regulated under three different content regulation schemes, provided under three different Acts: regulation under ABT standards for broadcasters licensed under the Broadcasting Act, voluntary guidelines for video-audio entertainment and information services (VAEIS) licensed under the Radiocommunications Act, and no guidelines as yet for value added services (VAS) licensed under the Telecommunications Act.

Control over the content of all broadcast-

The ABT should have similar powers to make program standards for Pay TV services as are currently available in respect of other licensed services. The more direct relationship between the service provider and the consumer will require a more tolerant and flexible exercise of those powers.

For example, the licensee should be required by the Tribunal to direct a minimum proportion of its total revenue to Australian program expenditure. This would ensure that Pay TV provides some opportunities for local production without prescribing the programming diversity which will be the essence of a successful service. It would be counter-productive to seek to establish program quotas for Pay TV along the lines of those which exist currently for commercial television. Censorship requirements might be eased.

The Pay TV licensee should be permitted to advertise. However, to ensure Pay TV does not simply replicate commercial television, the ABT should monitor the total proportion of revenue derived from advertising with a view to setting specific standards if that proportion rises above 10 per cent.

Broadcast copyright should extend to any new video services capable of reception by a section of the general public.

Broadly, regulation of Pay TV should focus on market structure rather than on detailed programming matters.

ing and broadcasting-related (point-to-multipoint, or PTM) services should be given to the ABT. In that way, all issues of content could be dealt with by the one body with the expertise and established procedures for exercising such control, whatever the technological mode of delivery.

Not all services, however, should attract the same degree of content regulation. The submission, in attempting to draw meaningful, service-based distinctions between the various PTM services, suggested criteria

which could help determine the appropriate level and form of regulation for a service, whatever its mode of delivery. Those criteria were:

- (a) the availability of the material, for a fee or otherwise, to the general public, or a significant proportion thereof, especially of domestic environments;
- (b) the nature of the material, and its cultural significance, such as current affairs or entertainment;
- (c) the form in which the material is transmitted (eg. moving pictures, text, data);
- (d) access to material (eg. charge for the material, necessity for expensive equipment to access the material); and
- (e) whether the material would be received, in the ordinary course of events, in environments where children are present.

Various categories of PTM services could attract different levels of content regulation, based on the nature of the service provided. Each service (whatever the mode of delivery) would be matched against the suggested criteria and categorised, and would then be subject to that category's content requirements. The suggested categories ranged from free-to-air broadcasting, attracting higher levels of content requirements, through categories for entertainment channels, to information services, to videotext or teletext services.

Once current legislation is amended to give the ABT control over the content of PTM services, the government, or the ABT itself, would determine the criteria for delineating the various PTM services into particular categories. Given those guidelines, the ABT could then conduct an inquiry into the sorts of regulation appropriate for particular categories of service.

The result would be more appropriate levels of regulation for all PTM services - less regulation for those services not raising social or cultural concerns, and for those services of cultural and social importance to the community, appropriate regulation, whatever the technological form of delivery. We await the overdue reforms.

Joanna Simpson of the Screen Producers' Association of Australia

Naturally, independent film producers in this country have an interest in the development of new technologies as potential windows for their product.

The Federal government will have to decide what delivery technology or technologies should be in place for transmission of Pay TV and must also establish the most appropriate regulatory delays.

Of the suggested choices - the ABT, Austel or an independent authority - Screen Producers Association of Australia (SPAA) favours the ABT to avoid unnecessary costs of setting up an independent body and the consequent delays. However, the fundamental point distinguishing Pay TV from free-to-air television is that it is a subscriber-based or "narrowcast" service with a resultant range of distinctions.

Pay TV can be seen as competition against network television but it should NOT be considered a similar service. It will not be commercially viable if it seeks to duplicate what is already freely available on our televisions today. Fears about program siphoning from the networks to Pay TV services are at least in the foreseeable future groundless.

A commercially realistic Pay TV service, as history has shown in other markets around the world, will be predominantly fuelled by movies. Accordingly, SPAA supports the concept of levels of Australian content in programming that will assist producers by creating another window beyond theatrical, free-to-air television and home video product releases. Questions as to content should be addressed by way of contractual negotiation and licence conditions. Because Pay TV differs so much from free-to-air television no uniform quota or points system would be applicable.

Peter McBurney, of BIS Shrapnel, gives a consumer perspective

Much of the debate over recent years concerning Pay TV in Australia gives the appearance of having ignored one crucial set of questions: do Australian consumers in fact want Pay TV services, and are they willing to pay for them?

With the aim of answering these questions, BIS Shrapnel late last year undertook a multi-client market research study of the Australian population, questioning awareness and attitudes to Pay TV services. We contacted 1433 households throughout Australia, and interviewed the residents of each household both individually and as a group. In brief, the answers to both the questions above was a resounding YES. The study found a considerable level of awareness of the concept of Pay TV (whether satellite or cable delivered): almost two-thirds of Australians were aware of, and positive towards, the concept. No doubt the government's moratorium and the ensuing debate has helped build this awareness.

By far the most common reason people gave us for favouring Pay TV services was dissatisfaction with the program content of the existing broadcast television services.

The principal specific criticisms of the commercial broadcasting networks were:

- insufficient Australian programming;
- too much US programming content;
- a perception of a "cynical disregard" of viewers by broadcasters outside rating periods;
- long, frequent and intrusive advertising breaks;

As with home video in the early days, products are unlikely to be produced especially for Pay TV. In other words, it will not be commercially viable. Only when the service has been established and penetration rates are significant will it be realistic to make programs especially for Pay TV.

To maintain consistency with censorship regulation governing theatrical and home video, product movies intended for screening on Pay TV which have already had a theatrical or home video window should retain that rating if the version is the same.

There are clearly delineated distinctions between free-to-air and Pay or subscriber-based television. Therefore, at all points along the regulatory and programming road, the differences should be constantly borne in mind along with the interests of maintaining reasonable film production levels in this country so as to support our local industry at every step along its way.

- too few educational programs;
- low quality children's programs.

Consumers feel that Pay TV will lead to an increase in the range of programs available, and more than half of the respondents gave this as a reason for their favourable response to the concept of Pay TV.

In addition, almost one-half of those interviewed cited a reduction in advertising as the major improvement that can be made

George Frame of Independent Television Newcastle Ltd

Australians over the years have been "blessed" with some of the highest quality local television programming in the world. Programs such as "Flying Doctors", "Neighbours", "Home and Away" etc. are enjoyed by viewers around the world. The stark reality of these programs' sales overseas, however, is that an Australian production costing \$300,000 per hour to make may only sell overseas for \$2,000 per hour. Petty cash to some overseas operators.

The Australian market must pay for the bulk of program production. As the financially strapped networks prepare budgets for programming, it is obvious that new and expensive quality productions will be limited. That magic mix of high ratings and cost efficient programming is a little like "panning for gold". You have to spend considerable time sifting through the rubbish in the hope of finding "gold".

Without program content regulation on

to television in Australia. Advertising is clearly another cause of the dissatisfaction consumers express towards broadcast networks, and so a reason for favouring an alternative.

To test this, we presented the respondents with a choice of two options for a Pay TV service:

- no advertisements and full subscription costs; or
- some advertisements and half the normal subscription costs.

Despite the expressed criticism of advertising on broadcast television, Australian consumers were evenly divided in their preferences for these two choices.

As would be expected, high-income households have a significantly stronger preference for the no advertisements option, but all groups showed a preference for less frequent advertising breaks in programs. We also examined preferences for "blocked" periods of advertisements, for example only in between programs.

In addition to these views, there was a clear feeling from some consumers interviewed that the broadcast television industry had exploited self-regulation in the permitted number and length of advertisements at the expense of the viewers.

In conclusion, our survey found that a market exists for Pay TV in Australia, but only if the programming content and advertising format adopted are such as to differentiate the new service from that offered by the existing broadcasting networks. Content and format will be crucial components of the benefit consumers will be provided - and pay for - by satellite or cable-delivered television.

Australian productions (including ABT's program rating points system for drama, sports, quiz shows etc.) the networks may not strive to find that gold, but produce low cost programming to meet content requirements only.

As a fledgling industry Pay TV would initially be devoid of Australian program software other than limited feature films. Current Australian content software would not be attractive. The networks hold the television rights to these programs or, even if those rights are held by independent producers, they may have been shown on free-to-air television previously.

Pay TV would gradually develop new program concepts, rather than a straight continuation of current free-to-air styled programs; otherwise subscribers would not perceive difference in Pay TV programming to what they receive now.

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"real story" hidden in the paperwork is the catalogue of corruption, incompetence and the exercise of power for wrong reasons. I would not deny that such things can occur, and when they do, FOI is one of the processes that helps expose it. But the observation should be made that in my long experience with public servants I have found nearly all I know to be decent, honourable people with a keen sense of public interest doing the best job they can.

How to use FOI

A good use of FOI is to master the routine of decision-making. As often as not though, this can be done by looking up a government directory and simply asking someone obviously concerned or by otherwise working out a department's scheme of administration and the types of powers exercised and by whom.

The result of such preliminary enquiry is a focused FOI request which is likely to be processed faster. Moreover, where something has obviously been irregular in the decision-making process, a knowledge of how the system ought to have worked can provide often critical footprints for working out what went wrong and who really was to blame.

The second point I would make is that a process may well have been perfectly regular but a public servant may quite properly, from her or his own perspective, be less than keen on disclosing it to journalists. The mere fact that it is argued that some material is exempt from FOI is not of itself proof-positive that there is some secret scandal being concealed.

A loyal public servant, anxious to protect the Minister, or indeed the Minister himself or herself may attempt to conceal information concerning options canvassed during the decision-making-process so as not to provide the opposition with ammunition drawn from draft justifications of possible alternative decisions.

The media here is sometimes a little immature in this respect. If a document shows that an administrator gave a minister options then, no matter which the minister adopted, there is in this country a tendency to say that he or she ignored other material or was in conflict with his or her department and to give it a significance that it does not deserve.

This immaturity is aggravated by the scandal-seeking tendency. If a relatively full disclosure by a public servant or administrator reveals no obvious points of attack, research is most often promptly halted and attention is then focused on some other project. All too often, journalists drop the ball precisely when they have a good story because they have defined the story only in terms of a fairly naive outcome which did

not come about.

A successful or semi-successful FOI request ought to provide the springboard for follow-up telephone calls to the individuals whose names appear on the files seeking fresh information and sometimes the benefit of decision-makers' frank hindsight and perception of events.

Dealing with public servants

When FOI first came in I acquired some reputation for, firstly, making a lot of requests and, secondly, for being willing to litigate them if I did not get disclosure. That reputation as a litigant probably helps me now. In any event I rarely put in a formal FOI request but rather just say to people "look, this is material I could get under FOI if I put in a formal request. Why not save yourself the paperwork and me the time and the energy and just fork it over?" and, surprisingly, they often do.

In advising journalists how to use FOI, I reiterate that FOI is only part of the process of getting information on a story. Informed questions should be directed to the actors in any decision when requesting information on what material is available. A journalist should ask whether there is anything he or she ought read as background to the question being tackled. This can often provide a journalist with the information sought long before the drawn out and excessive bureaucratic process of putting in an FOI request.

Requests for documents should be focused and the advice of the public servant helping to identify the most useful documents available should be sought. A public servant who has helped a journalist frame a request for information is both more likely to comply with that request and to later remember, innocently, another source of relevant information capable of being disclosed.

Once a request is made, I recommend that the journalist making the request not sit around waiting a month or so wondering what is happening. Ring the relevant department and, if the public servants suggest any problem, parry them immediately.

Having assessed the possible uses of and the procedures in FOI, now the more bitter words. The exemption areas of FOI are too wide. The impediments to access, not least in its cost if it is demanded, are substantial. It is sometimes necessary to fight, and to fight hard, without being sure of what you will get in the end. More than ever FOI is not the complete answer to a maiden's prayer. But it is neither completely toothless, nor completely useless.

Jack Waterford is the Deputy Editor of the Canberra Times.

The networks have had about 30 years to perfect their Australian programming. Also to be considered is the significant budgeting which would be required to meet the current free-to-air level of Australian content for Pay TV.

In Pay TV's infancy, progress will be conditional on expenditure on suitable overseas software and early development of reasonable quality Australian programming for Pay TV.

There will be a demand by subscribers to receive some Australian content other than news, sport and music channels, which would have basic Australian content by their very content nature. Research under way may allow a further understanding of what levels of Australian content the public wish to view. Initially subscribers will be attracted by the choice available on Pay TV, but continued overseas material alone, with little Australian content, would increase the "churn" factor (the cancellation of service followed by reconnection at a later date) over a period of time.

In devising an appropriate regulatory regime, the Government will have to bear in mind the differences between free-to-air and Pay TV. The body to have regulatory oversight of Pay TV must be able to regulate with a clear understanding that "free-to-air" broadcasting is just that, while Pay TV is based on viewer choice.

A full "broadcast model" (as set down by the Australian Broadcasting Tribunal) would not allow Pay TV to develop fully in this country. There is a view that regulation of Pay TV should match a slightly deregulated free-to-air sector, however, it appears there will still be excessive regulation in that market on some major points, at a time when world trends are to introduce controlled deregulation. But let's not throw the "baby out with the bath water" — there are some proven legislative provisions that can be profitably adopted for Pay TV from the broadcast model.

Whatever regulatory body is to govern the regulation of Pay TV that body must recognise the specialised service that exists between the program provider and the viewer. There is a concern that rigid Broadcasting Act style legislation covering Pay TV would not allow in the resultant program mix, as was noted in the Sanderson Report, an "appropriate level of freedom for viewers to choose".

If that "appropriate level of freedom" is not realised because the legislation is too rigid then Pay TV operators would be forced into a full broadcast model type service. That is, these operators would be forced to schedule similar programs to those offered by the networks, which would not satisfy viewer choice and would defeat the purpose of choice and diversity in programming which should be the object of Pay TV.