

# Right of reply

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**Peter Bartlett discusses the current ABT inquiry into a new program standard to create a right of reply**

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**T**he Australian Broadcasting Tribunal (ABT) is considering whether to determine new television and radio program standards to provide a right of reply to any person or group directly affected by broadcasts on controversial issues of public importance.

Standards imposing a duty on broadcasters to present news programs in an accurate and fair manner already exist. Television Program Standard 15 requires that news programs present news accurately, fairly and impartially while Radio Program Standard 5 requires radio news programs to present news accurately.

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## Should there be a right of reply?

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Acknowledging that there are many sides to a debate it follows that it will be almost impossible to allow every shade of opinion to be heard. Unlike a newspaper, a radio or television station cannot simply expand its output to make room for all the views which wish to be heard: the right of reply will be broadcast at the expense of other material.

The ABT's proposal goes far beyond the overseas examples cited in its Information Paper for this inquiry.

The American Fairness Doctrine simply requires that a broadcaster provide opportunities for the presentation of opposing viewpoints, and does not confer an enforceable right for people possessing certain views to be heard. The Canadian Broadcasting Commission merely requires equitable treatment of more than one view. The European right of reply is only available in defamation cases. The British guidelines deal only with corrections, where an individual or organisation has been misrepresented.

A right of reply requires broadcasters to make available their resources and broadcast time in order to transmit views and opinions which may be unrepresentative and peripheral. It implies a shift of editorial control from journalists and broadcasters to the ABT which will ultimately have to enforce the right of reply.

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## Who will have the right of reply?

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The proposed test for entitlement to a right of reply has two distinct parts:

1. any person or group directly affected; and
2. broadcasts on controversial issues of public importance.

The first part of the test would probably be broad enough to encompass people who were distressed or shocked by a broadcast as well as those whose reputation or financial interests were damaged by it. It seeks to ensure that people seeking a right of reply must have sufficient connection with the controversial issue of public importance. But is it the right connection?

For example: a broadcast on a local radio station endorses a controversial new development in a wilderness area, which would degrade the nearby farming land and affect the livelihood of local fishermen and which is opposed by national conservation bodies. If the development proceeds the developer will be enriched, and the fishermen and farmers impoverished. The conservation bodies will not be affected. Who has a right of reply?

**T**he second part of the test is satisfied, because in the area where the radio station broadcasts the development is very controversial. However it can only be said that anyone is affected if one assumes that the broadcast improves the development's chances of approval, and even so it is unlikely that the broadcast's effect on any particular individual or group will be sufficiently direct to attract a right of reply. How is full and fair debate ensured by this process?

The requirement that someone must be directly affected by a broadcast may exclude those who have a legitimate interest in participating in debate on public issues because it requires that a person be affected by the broadcast rather than by the issue itself.

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## How will the right be recognised?

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To be effective a reply should reach exactly the same audience as those who received the original material, at a time when the original material is still in their minds. The greater the delay between the broadcast of the original material and the broadcast of the reply the less relevant will be the reply, the greater the chance that it will reach a different audience, and the less likely it is that the audience will remember the original material. Far from redressing the bal-

ance, the reply might simply be a second one-sided broadcast on the issue.

The most likely way for the right to be enforced is by the ABT or court upon the application of a person who has viewed or heard the broadcast. The longer the ABT or court takes to reach its decision about whether a right of reply exists the less relevant and effective will be the exercise of that right. On the other hand the quicker the determination the greater the injustice which may be done to the broadcaster, who may suffer an order that a right of reply exists simply because it is unable adequately to defend defensible material at short notice.

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## Liability for reply

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Who will be liable for defamatory remarks made by a person exercising a right of reply?

If the broadcaster is to be liable it may suffer a great injustice if it cannot control the contents of a reply. On the other hand, the broadcaster may then be able to rob the person exercising a right of reply of its value. Further, if the broadcaster is not liable a person injured by a widely broadcast reply may be left with no remedy except an action against an insolvent person exercising a right of reply.

If a broadcast reply is capable of generating further replies, a broadcaster may find that its broadcast time is taken over by a controversy fuelled by material it never wanted to broadcast. If replies to replies are not allowed, the content of replies would be more protected than other broadcast material.

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## Conclusion - a right of reply is not necessary

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There is no practicable way of making a right of reply achieve its purpose. The best way of ensuring a full and fair debate is simply to impose an obligation upon television and radio stations that broadcasts, and not just news programs, should be accurate, fair and impartial.

*Peter Bartlett is partner in the Melbourne office of Minter Ellison, Barristers and Solicitors. The above is an edited version of a submission to the ABT on behalf of the Media and Communications Law Committee of the Business Law Section of the Law Council of Australia.*