Broadcasting deregulation

Bob Campbell identifies the issues broadcasters feel need to be taken into account in any overhaul of the Broadcasting Act

In an age of international deregulation of broadcasting our government was busy:

- reducing the permissible levels of foreign ownership in broadcast holding companies from 50 per cent to 20 per cent;
- introducing extraordinary tracing provisions for foreign ownership that were designed to ferret out any hint of irrelevant and remote foreign interests in holding companies;
- introducing sweeping concepts of actual control and association into the *Broadcasting Act*;
- affirming the continuing regulation of Australian content and children's programming.

It seems to me that there is a real danger the deregulation debate in Australia will end up being a one way street, a street that could potentially lead the broadcasters to be no less regulated than they currently are and in some financial peril.

Foreign ownership provisions have been tightened thus cutting off a critical source of investment finance while at the same time, the government contemplates new forms of economic rent, such as licence auctioning, and is contemplating a relaxation of barriers to market entry.

Continued regulation of Australian content and of children's programming is affirmed while the government contemplates so called "self regulation" of the ownership and control provisions of the Act. These provisions carry attendant penalties for noncompliance and sweeping powers for the regulatory authority to demand information from licensees.

Additional licences

It will come as no surprise that I fundamentally endorse the position of the Minister that he has no present intention to grant any additional commercial television licences in this country.

My support for his position will be regarded as a blinding glimpse of the obvious and before it is taken as being simply self-serving, it is wise to reflect on the quality of service that commercial television provides in this country where every significant Australian population centre in the near future will be able to see three commercial services, a national service and the SBS.

It is high time we as commercial broadcasters got on the front foot again and said to

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the academics, theoreticians and commentators that what we have here, in the most general sense, is as good as it is going to get and comparable to the best in the world.

A small and scattered population seeing as it does a diverse and quality range of domestic and international production is something for which this country can be justifiably proud, and for which it receives international recognition.

The successful export of much of our production is testimony to not just the country's critical eye of our local viewers but the critical eye of those viewers in countries which our critics would regard as being more sophisticated and highly developed.

Economic viability is a critical measure of what can and cannot be sustained in this nation and by any test of economic viability, three commercial networks, compatible with the sophisticated service that is provided, are at the limit of what can be sustained.

Commonsense says that the high levels of viewing in this country and television's large acceptance by our viewing constituents are a ringing endorsement of the three competing services striving as each of us does for quality, diversity and localism. This represents an infinitely better alternative than a multiplicity of low budget import-orientated stations with a maze of repeat programming as their principal fare. This, of course, is largely the characterisation of independent television in the United States.

The second threshold question that needs examination is "on what basis should competing licences be allocated?"

Should licences be awarded to the most suitable applicant or should they be awarded to the richest applicant via a tender or auction process or should they be merely drawn out of a hat? It is our firm view at the Seven Network that licences should be allocated in the most general sense on "the basis of the most suitable applicant".

The auction system for new licences is simply a disguised tax in an environment where television licensees pay company tax, payroll tax, sales tax and licence fees - this business makes more than its fair share of contributions to consolidated revenue.

The auction process, of course, in addition to having the potential to be financially debilitating, provides no guarantee as to the general suitability of the applicant or his future ability to provide a suitable service.

Financial capability when married to localism or management capability or suitability or service or commitment to domestic production is a necessary and appropriate basis on which to judge the allocation of licences. Financial muscle, on the other hand, via the auction system is not a suitable basis to judge the prospective licensee.

The results of financial muscle or at least perceived financial muscle, have been adequately demonstrated firstly, in the 1987 round of network acquisitions and secondly, in the AM/FM conversion process with the resultant handback of FM licences by over enthusiastic licensees who have revisited their balance sheets to find their initial bids over the top.

Administration

The determination of the need for new licences in our view should continue to be done by the Minister on advice from an expert group of people.

The judgment of the need for the allocation of new licences should be:

- apolitical;
- based on sound social and economic research; and
- be informed by independent expert opinion.

If reasoned opinion deemed further licences are to be issued then the best body to allocate the new licences is the Australian Broadcasting Tribunal (ABT) or its successor body.

The ABT has a wide perspective across all broadcasting issues, it has the powers and capability of gathering a broad range of information and presumably, it will continue to have a blend of legal, broadcasting, bureaucratic and technical expertise on which it can call.

If the future direction of planning is to be

contained within the ABT, and this is not a suggestion I would endorse, I would caution that the body responsibility for determining whether there should be additional licences should be separate from the body given the responsibility of judging the successful applicants for such new licences.

Licence criteria

In assessing the most suitable applicant the regulatory authority would inevitably need to satisfy itself that the eligible applicants fulfilled basic licensing criteria. These criteria currently include:

- financial capability in providing an adequate and comprehensive service;
- technical and management capability;
- commitment to domestic production;
- the commercial viability of competing services, and
- fitness and propriety.

With the exception of fitness and propriety, there can be no fundamental objection with the overall thrust of these criteria. It is fair to say that sensibly administered, these criteria work well in underpinning the quality and consistency of our broadcast service.

One might quibble with the scope of adequate and comprehensive or argue at the margins about the limits of financial capability, but the criteria have, when sensibly administered, served both the industry and the public well in the past and in my view, will continue to do so in the future.

We are told continually that the Act is nightmarish. I happily concede it is not an easy read, however, it seems that the most complex aspects of the legislation are often those that have least application in the day to day running of our business, e.g. the grandfathering provisions, overlapping service areas, aggregation and MCS provisions. In any repeal or review process, the baby should not be thrown out with the bath water.

Adequate and comprehensive

While the definition of adequate and comprehensive may provide some comfort for the regulators, the service provided by commercial television will fundamentally be economically driven. That is, the proprietors and the bankers will only ever be in a position to provide a service that is affordable.

In sensibly administering provisions such as adequate and comprehensive, constant reference must be made to:

- the total services available in the market and the programming these services provide;
- the scheduling practice of a licensee and its competitors in providing a market perspective of what is available to the public; and
- the licensee or network's compliance with the statutory obligations in areas such as Australian drama and children's programming.

Financial capability

In operating a business, financial capability is a vital ingredient that is frequently and conveniently overlooked by commercial television's critics and commentators in pursuit of sectional and vested interests. In the broadest commercial sense, financial capability, as a concept, should not be seen simply as a tool for excluding licence applicants or for punishing the incumbents at the time of renewal. Also relevant under financial capability is what the industry can afford by way of impost.

An assessment of financial capability, of course, must take into account holding companies above the licensee companies. In prospect, it now seems that Australia's three commercial networks will be recapitalised at realistic levels. Tomorrow hopefully, the industry will not be required to service massive debts.

The fine balance of television profitability must take note of the historical earning power of the television market, in general, and of each of the three commercial networks in particular. It must also take into account current marketplace interest rates, the need for continual maintenance and update of capital expenditure, the seasonal nature of the television revenues and the economic sensitivities that are inclined to disproportionately affect these revenues.

Domestic production

In the 1989 debate on Australian content regulation, children's lobby groups, Australian independent production companies and groups such as Actors Equity paid little or no heed to what this business can afford in their pursuit of ambit and sectional claims for particular program types they wished to pursue for their own economic enhancement.

The ABT in this arena provided a valuable forum and distillation process for the range of views that was canvassed. It is important to note that two of the three networks were and are producing at levels significantly above the minimum statutory requirements. The market demands that commercial television has an Australian look and those who ignore the voice of their constituents do so at their own economic peril.

Regulation to protect and develop a domestic production base has well served its purpose. Twenty years on, viewers demand of us what quotas once obliged us to produce.

Fitness and propriety

The prolonged Bond inquiry amplified the fundamentally unworkable nature of the fitness and propriety provisions. It is the Seven Network's contention that there should be people who cannot own television licences and beyond that, all should be eligible to be involved in the television business.

People, for example, who should not own television licences or be eligible to own television licences are foreigners, people who have been convicted of certain criminal offences, and people who have displayed a lack of honesty or candour with the ABT or similar regulatory authorities, such as the Australian Stock Exchange. These are the only "fitness" conditions that should apply for people who wish to be granted broadcasting licences. The moment any broader criteria are included, the regulator is put in an impossible position.

Reforming the licensing process

There should be automatic licence renewal for five year terms unless an interested person has shown substantial reasons as to why the licence should not be renewed or why it should be conditionally renewed or why it should be renewed for a shorter period.

In our view the Act should focus much more on control and much less on ownership. After all control is the issue in relation to an Australian look for the Australian television industry. Control is the issue that the management of licenses must address in placing proper emphasis on the balance between returns for shareholders and the inherent responsibilities that come with the conduct of a license.

There should be a reduction in licence fees. This is particularly relevant while the industry recapitalises and gets itself back on its feet. The current licence fees are simply a disguised turnover tax and in our view, are very inequitous. The large producing stations taking all the financial risks with production and having all the infrastructure needed to carry out this production are bearing a disproportionate share of licence fees when compared to the smaller non-producing stations who simply put a piece of videotape on the air receive a satellite delivered signal for retransmission.

Any prospective pay television service should be subscriber based only and not have the dual income streams of subscription and advertising. The Australian market is too small, the economics are too fragile and the advertising dollar per capita spend too low for the market to support three viable free to air

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No rental right

Section 85 of the *Copyright Act 1968*, which specifies the nature of copyright in sound recordings, provides that it is the exclusive right to make a copy of the sound recording, to cause it to be heard in public or to broadcast it.

A similar provision is contained in the Act in relation to musical works which, in the case of records, are embodied in the sound recordings. Section 31 of the Act provides that, in relation to musical works, copyright includes the exclusive right to reproduce the work in a material form, to publish it, to perform it in public, to broadcast it, to cause it to be transmitted to subscribers to a diffusion service and to make an adaptation of it. Neither section contains any reference to a right to hire the sound recording or the musical work. It has generally being accepted that, in those circumstances, the owner of copyright in the sound recording or the musical work has no "rental right". That is, the owner does not have a right to prevent unauthorised rental of records embodying the sound recording or musical work or a right to receive royalties or other compensation for the rental of those records.

No distribution right

It has been argued, following the decision of the Frankfurt Am Main Regional Court (Germany) in *Andreas Vollenweider and Friends AG* v *Medienpool Gesellschaft* (1989) that, at least in relation to musical works, there is a right to prevent unauthorised hiring of such works. The court in that decision held that a right of distribution (such as is specifically provided in the German copyright legislation) is divisible and that an owner of copyright can reserve the right to lend or hire when selling or authorising the sale of an article embodying copyright material.

To apply that decision in Australia, where the legislation does not provide for copyright to include a right of distribution, requires the right of publication (as contained in Section 31 of the Act in relation to musical works) to be construed as a right of distribution or to include such a right. Whilst there has been some debate on that issue, Section 29(3) of the Act would appear to render such debate irrelevant, at least in relation to the distribution of records. That sub-section provides, in part, that "the supplying (by sale or otherwise) to the public of records of a ...musical work... does not constitute publication of the work." Accordingly, even if the right of publication was held to contain a right of distribution (arguably entitling the copyright owner to reserve rights of rental), the sale or other distribution of records, at which point the rental right would need to be exercised, will not constitute an exercise of that publication right.

Royalties should be remuneration for exploitation

On the assumption that no rental right presently exists under the Act, the growth of CD rental outlets in Australia poses a great threat to the continued viability of the sound recording industry and the artists and composers who rely upon it. The income of copyright owners, including recording artists and composers, is still largely tied to, and dependant upon, the sale of "original" copies of records manufactured and/or distributed by record companies. The artist or composer typically receives a royalty for each record sold. The linking of the royalty with the sale of the record, whilst understandable in historical and commercial terms, blurs the concept of the royalty as remuneration for the use of the sound recording and the musical work embodied therein. The fact that such use, up until recent times, has largely been limited to the manufacture of records is simply a result of the available technology. However, current technological developments enable the dissemination of high quality copies of sound recordings in a number of different ways that do not depend upon the purchase of the record. Each alternative method of distribution of a sound recording, including the rental of the record, nonetheless constitutes an exploitation of the sound recording and the musical work in respect of which the copyright owner is entitled to be remunerated.

Survey evidence from Japan has revealed that in excess of 90 per cent of the compact discs rented are used to make a home copy. There is little doubt that this experience would be repeated in Australia. If the income of copyright owners continues to be tied to the sale of records, then the level of income derived form the exploitation of sound recordings and musical works will decline. While the implications for recording artists who are presently under contract are serious, they are catastrophic for those who hope to obtain a recording contract in the future, especially if the artist's music is of limited or marginal appeal. Declining incomes will result in less money being available to foster developing artists.

Amending the Copyright Act

The *Copyright Act 1968* is intended to ensure that the exploitation of a person's intellectual property is properly protected and/or properly compensated, however that exploitation may occur. Advances in technology have, however, tended to undermine the protection afforded by the Act. CD rental, which enables high quality copies of sound recordings to be obtained at a significantly lower cost to the consumer, is nothing more or less than the commercial exploitation of another's intellectual property for personal gain. The copyright owner is not presently entitled to receive any compensation for this new, and now commercially viable, use of the copyright material.

There can be no moral or legal justification for the failure of government to adequately protect the rights of copyright owners and to continue to protect those rental rights have already been introduced into the copyright law of many countries, including the United Kingdom, United States of America, France and Germany, in recognition of the growing threat to copyright protection posed by CD rental. At a time when Australian music is contributing significantly to the growth in Australia's export income, the need to protect that income is self evident.

Submissions have been made by the Australian record Industry Association ("ARIA") to the Commonwealth Attorney-General seeking amendment of the Act to include a rental right. The Department is presently seeking submissions from other interested parties on the amendment proposed by ARIA and on the question of rental rights generally.

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commercial services and advertiser supported pay TV.

Finally, there should be continued, indeed expanded, self-regulation in appropriate areas. The voluntary codes on violence and self regulation of commercial airtime have been successful. It has been a co-operative effort between the broadcasters with the input, advice and overview of the regulators and we believe there is significant further scope using these role models.

In conclusion, I think it is fair to say you will be hearing from us a lot more and a lot less defensively than has recently been the case. We cannot underwrite our continued economic viability while, at the same time, adopting a heavy regulatory hand with what remains of our businesses.

The real test of how serious we are about self regulation will be to see how much progress is made in the review process of the Broadcasting Act and the significant scope for self-regulation within that review between now and the time of the next election.

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