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# Reforming the Broadcasting Act

**Peter Westerway discusses deficiencies in the Broadcasting Act revealed by recent Tribunal experiences**

The *Broadcasting Act 1984*, a poor, wretched animal, designed for reasons which are less and less relevant and made grotesque by years of patchwork amendment, has only one saving grace: it is scheduled to be put down at the earliest opportunity. One can only hope that it is not too long a-dying.

Meanwhile, it must totter along doing the best job it can and I want to look at what that means for some of the people involved and share with you some of the Australian Broadcasting Tribunal's more recent experiences. In particular, I want to discuss some issues on which we have been breaking new ground and some key points which the Government will need to address as it prepares its draft legislation.

## The Tribunal and the courts

It is always hard to know from the inside what impression others have of an institution. However, you would not be unusual if you regarded the Tribunal as legalistic, even litigious, in the way it goes about performing this function. Over its 14 year history, it has been party to many court cases. Fifty-five of these were in the Federal Court, six in the Administrative Appeals Tribunal and no less than 10 in the High Court.

Does this mean that the Tribunal is always running to the courts? Unequivocally, no. Throughout the whole of that period the Tribunal originated action on just three cases (all of them in the Bond matter). Experience shows that Tribunal decisions are challenged more often than those of most administrative tribunals.

What is not always so obvious is that any tendency to litigiousness among interested parties is greatly exacerbated by the complexity of the legislation. During my 15 years as a senior advisor in this area, it came to be accepted that the *Broadcasting Act* would require at least one major amendment Bill every year. The *Broadcasting Act's* complex provisions also encourage those who simply want to frustrate its processes - to prevent action, no matter towards what end that action might be directed.

The *Broadcasting Act* is also more subtly blighted. The Act is illogical (for instance, broadcasters having different obligations to those imposed on the press in relation to access to material which may be in contempt of court), incomplete (for instance, it does not address the role of receivers) and incapable of keeping pace with technological change. But, most important of all, it is inconsistent with accepted industry practice.

Networks are the central economic reality of commercial television, both here and overseas. Yet the extraordinary fact is that after 30 years of experience, the Act regulating commercial television in Australia not only fails to cover them but actually ignores their existence. There is no mention of networks or networking in the *Broadcasting Act*.

The Tribunal has returned to this issue in its recent first volume of the Sydney-Melbourne commercial television licence renewals. Thanks to the willing cooperation of the Tribunal, six licensees, several network owners, a considerable number of network executives, several other parties and hundreds of submitters, the proceedings were relatively rational. But this was despite the Act, not because of it. The Act assumes that each licensee makes independent decisions over a whole range of matters and is then properly held to account for them. Yet everyone concerned knows perfectly well that to conduct an inquiry on this basis would soon reduce the proceedings to high farce.

If one accepts that legislation which ignores commercial reality is bad legislation, there is an obvious implication that the Government should address this issue in its review and my understanding is that the Minister intends this.

## Financial capability

When the Tribunal is dealing with renewal of a commercial television licence, it is required to consider a number of quite specific criteria. Included among the criteria are 'financial, technical and management capabilities'. In most inquiries there is no problem in satisfying ourselves as to 'technical capability'. Indeed, until quite recent times, it was unusual for us to have to address the financial or management capability criteria in any great detail.

But time moves on and things change, not always for the better. Having spent a great deal of time considering submissions and argument on the point, the Tribunal ruled in the *Sydney Melbourne Report* that it would approach the term: 'financial capability' as requiring a licensee to demonstrate that it had "...the necessary financial resources, or access to the necessary financial resources, to broadcast programs that meet the standard imposed by the Act for the duration of the licence period".

There are various types of resources which a licensee can cite in support of its claims. The Tribunal has a distinct preference for equity capital rather than debt for pretty

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obvious reasons. If net cash flow is negative, lenders still have to be paid and there will always be a temptation to cut services to the public rather than to face up to less palatable measures.

Once the acquisition has occurred and been approved (retrospectively) by the Tribunal, the problem continues. The gearing of many licensees has deteriorated in recent times to the point where the Tribunal may need to fall back on the second leg of the approach, that is, it has to identify a 'guarantor' for the licensee. Enter commercial reality. The fact is that most licensees now work within groups involved in anything from beach resorts to breweries. This group is the natural candidate for guarantor. But what of a two-dollar company owned by the group borrowed the money to buy the licensee, the loan is guaranteed by a second two-dollar company owned by the group and this company in turn has a charge on the assets of the licensee (also now owned by the group)? It sounds complicated and it is, but refer to the *Sydney-Melbourne Report* for a helpful diagram.

The licensee is now one of many businesses in a group, not solely a broadcaster. Moreover, its broadcasting assets may have been mortgaged to buy not only its shares but also speculative assets, such as high risk property. Since the licensee has no better claim on cash available to the group than any of the other companies in it, there is a real danger that its primary responsibilities as a broadcaster will be overlooked or forgotten.

We now have ample evidence that the problems are real. Since the *Broadcasting Act* does not require a substantial injection of capital into a television station at the time of acquisition, two-dollar shelf companies with quite meaningless debt/equity ratios which do not reflect prudent management or banking practices could be and were utilised during the salad days of the 1980s. But television stations are no longer 'cash cows' and the 'upstreaming' of profits from broadcasting into speculative activities soon produced major problems. In one example, the group treasury gave the payment of licence fees such low priority that a licence was endangered.

If you are running beach resorts or breweries, you may choose to cut back the level of service you offer in response to market pressures. But in broadcasting that option is not available. Broadcasting is regulated. The primary purpose of that regulation is to guarantee the level and quality of services the community expects. The Tribunal has the job of holding that thin, bright line which differentiates a public service from a business.

I have nothing but admiration for people like Frank Lowy, who got into a business where the rules were foreign to him, learned the unpalatable truth and then chose to leave it with honour and dignity intact. How many of the experts could have made that choice? I also have considerable sympathy for those investors, bankers or businessmen who inadvertently find themselves contemplating ownership of a licence. They are entitled to assume that the *Broadcasting Act* will provide them with a valid chart around which to plot their course. And it does not.

*Peter Westerway is the Acting Chairman of the Australian Broadcasting Tribunal. This is an edited text of a paper delivered at the Royal Australian Institute of Public Administration, Sydney, on Thursday 14 March 1991.*

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