The New Face on the Regulator

Peter Webb outlines the role of the ABA

This article gives me the chance to articulate the nature of the role that the Australian Broadcasting Authority is likely to play on and after 1 October 1992, the planned date for the proclamation of the *Broadcasting Services Act* 1992. I cannot speak with absolute conviction about this because quite obviously the Authority has not yet been constituted.

Nevertheless it is possible to give some reasonably clear indication of the difference in approach that the Authority will certainly take to the discharge of its functions from that which has been taken by the Tribunal over the years. This difference is mandated by the new Act which, both procedurally and substantively, stands in marked contrast to its predecessor of 50 years, the *Broadcasting Act* 1942. In order to illustrate the difference it is best first to glance backwards to what will soon be the regulatory environment of the past.

Background

In the few years shortly after the conclusion of the Second World War, the Australian Broadcasting Control Board was established with the objective of helping the Government to cope better with the remarkable post-war development of broadcasting. The Board was given limited roles in planning the broadcasting system, in recommending licence grants and in regulating programs, but all major powers were left for the Government to exercise.

A judicialised form of inquiry was introduced by the Board which presumably saw this, and perhaps quite correctly, as the answer to very difficult broadcasting issues, including those posed by the introduction of television to Australia in the mid-1950's, and the emergence of that volatile mix of newspaper and broadcasting interests.

When the Control Board was abolished and the Australian Broadcasting Tribunal established in 1976, the Tribunal was given what the Control Board had been denied – the right to licence commercial broadcasters. For the first time in the history of broadcasting in this country, the important licensing power was to be entirely removed from government control and influence. The planning process, designed to protect the frequency spectrum as a national resource, remained under direct government control.

The ABT, for its part, retained the model of quasi-judicial hearings that it inherited from the Control Board, and, in the occasional circumstance where it was most needed, that model proved quite useful. Unfortunately, however, the mandatory nature of inquiries – made necessary by Parliamentary Act and later Ministerial Regulations recommended by the Administrative Review Council, that the Tribunal found as stifling as did the industry – served only to bureaucratise both the licensing and programming processes of the Tribunal to the intense frustration of all.

The 1976 Green Inquiry, which recommended the Tribunal's creation, placed emphasis on the legitimate interest of the public in the whole of the licensing process. The holding of public inquiries by the proposed Tribunal was seen by Mr Green, and I hope I do him no disservice in my reading of his report, as an end in itself rather than as a means to an end. Unfortunately, too literal an interpretation seemed to be placed on this inquiry recommendation in the Green report, and in many instances where a formal inquiry by the ABT was clearly not only not necessary but was actually inimical to the public interest, it was, nonetheless, unavoidable under the Act.

Public Participation

Public participation remains, obviously, an important element in broadcasting policy. The Government has proposed, and the Parliament has agreed, that the Australian Broadcasting Authority (the "ABA") should be given some of those planning powers, hitherto reserved unto government, for independent determination.

Other references appear in the new Act to the need for public involvement in certain processes, but, and clearly quite intentionally, the Parliament has not sought to dictate the procedure by which that might be achieved, leaving it instead to the good sense of the responsible parties.

The sweeping away of these procedural barriers to efficiency and effectiveness by the new Act should not be taken as some sign that the Parliament feels that the public interest is not as important as it once was. I am sure this is not the Parliament's view. Rather, I think, it deserves to be seen as an acknowledgement that at this stage of our history a more mature approach can now be taken to regulation of the broadcasting industry. No longer is it thought necessary that the future legislative framework for regulation should be as prescriptive of procedural detail as it now is. Instead, the Parliament has had the confidence to prescribe the outcomes that it wishes to see achieved and to stay comparatively silent about the means of getting to them.

The public consultation requirement for broadcasting planning is designed to make those decisions more transparent. The new Act places a duty on the ABA to undertake wide public consultation on all aspects of planning, especially in the setting of priorities, and the development of guidelines, frequency allotment plans and licence area plans.

Planning to be driving force

In so doing, the ABA will consider the range of demographic, social and economic factors set out in the new Act. This contrasts with the previous system where public interest decisions were largely left to the Minister of the day, while channel allocation decisions were considered to be in the realm of physics and engineering. It will be a new experience for all of us to focus the debate on public policy outcomes of engineering options, before engineering decisions lock the outcomes into place. The planning process will, in fact, become the driving force of broadcasting regulation.

It is at the planning stage, and in response to the public process, that the Minister and the ABA will make judgments about the number and types of services to be made available in each market area. This does not mean that planning will be a single one off event, after which there will no longer be any scope to respond to changing circumstances. Variations to frequency allotment plans and licence area plans will undoubtedly be necessary from time to time. However, consideration of all such changes will be through an open public process under which the full public impact of the change can be assessed. I would expect however, that once planning for a market is completed it could be several years before any significant planning or market review occurs, and then only in response to clearly evident market and public demand.

Developments in technology will change the face of broadcasting service delivery over time. It is highly likely that within a few years new technology will make it possible to accommodate more services of comparable or better technical quality in the existing spectrum allocated to broadcasting services.

While the planning process is pivotal in the release of broadcasting services band licences, the new Act is otherwise technology-indifferent and concerned principally with the service, not its delivery. That distinction is reinforced by the fact that the technology licences for broadcasting transmitters will be issued under the *Radiocommunications Act* 1983, not the *Broadcasting Services Act*. To streamline these spectrum licensing arrangements, the Minister is expected to provide appropriate delegations for the ABA to issue the relevant radiocommunications licence.

The ABA will arrange for broadcasting channels not immediately required for commercial national or community services to be made available for other uses for a fixed period of time determined by the ABA. At the end of that period the spectrum so allocated will once again become available for allocation to broadcasting.

Licences for commercial broadcasting will generally be allocated using a price based allocation system. Thus, the present lengthy and litigation-prone commercial licence grant procedure will be replaced by a simple auction or sale. In single markets, however, the new Act requires the ABA, on request, to allocate to incumbents licences equivalent to present supplementary licences where there are at least two commercial radio channels available.

I expect the ABA will approach these planning tasks in several stages so that it can quickly make licences available in the areas of greatest need. This may involve initial consideration of priorities and planning based on current work and the results of recent market studies, coupled with direct public consultation in the relevant markets.

At the same time the ABA will likely open the way for a more comprehensive but slower review of planning and service development needs. This will encompass the future planning framework and as far as possible match the distribution of channel capacity with identified demand and the planning criteria set out in the Act. This will involve reconsideration of the planning assumptions that have been used for the past few years.

Commercial viability

The Parliament has also decided that the much-litigated and difficult to determine concept of commercial viability should be discarded, and the issue approached in a different way. The ABT has, in the past, experienced quite a lot of difficulty in deciding whether incumbent radio licensees could remain commercially viable in the face of competition. No matter which way its final decision went, a disappointed party either became a litigant or a strong critic of the ABT, or more usually both. The ABT became a whipping post virtually every time it handed down a decision.

Market forces

The Parliament has decided to let market forces and risk assumption, steered of course by frequency planning, determine viability questions in future. The price-based allocation system will let an applicant bear the burden of its own judgment about the price it is prepared to pay for a licence. The Minister might give the ABA directions about actual reserve prices to apply to individual licences, and the ABA, for its part, might, in the absence of any such direction, set a reserve price. But that consideration apart, potential licensees will in future bear the risk themselves of pitching a price bid at a level that is economically viable for them.

"Beauty" or "Merit" contests will be no more, community licences aside; viability of the proposed service or existing services will not specifically be a factor to be taken into account in the licensing process, (although concepts of efficiency and competitiveness will be considered at a macro level in the planning process); a licence may only be refused or cancelled because the licensee is unsuitable.

All of this represents a marked departure from that which the industry has become used to, both substantively and procedurally. There are many challenges ahead for us all, and not least for the ABA in deciding its initial planning priorities.

Summary

In summary then, the Parliament has determined that the broadcasting industry has reached a stage of its development that is susceptible of lighter, less intrusive regulation than has been the case to date. The radio industry is obviously thought to be at a point where incumbents no longer need the protection of the commercial viability provisions, although incumbents in single markets, as something of a quid pro quo, will automatically be eligible for second licences.

The television "free to air" industry remains protected from further competitors for another five years, but pay TV could complicate that market in the not too distant future.

Planning will be more public, licensing will be streamlined, regulation will shift to a different, internal emphasis, and technological developments will be capable of much easier accommodation within the regulatory regime than is now the case.

The new Act, it can be said, has the marked advantage over its predecessor of being based on a vision — a vision of the future that tries to serve the public interest in all its dimensions — social, cultural and economic — while endeavouring to meet the present and future needs of the industry.

The new Authority will, I am sure, play its part in all this. It will be a business-like and professional organisation, doing its best to get in and help the industry where appropriate, but not afraid either to stand outside it or take firm regulatory action when that is clearly called for. The experiences of the past make it obvious that such action may be necessary from time to time but the Authority, in sympathy with its charter and the spirit that underpins it, will strive for balance in all things.

Peter Webb is the Acting Chairman of the Australian Broadcasting Tribunal.

Continued from p15

1991/1995. This compares with a figure of 4.2% in Australia. The Bureau has also estimated that Telecommunications Expenditure Forecasts for Malaysia will increase by an annual average rate of 17.1% from 1990 to 1995. This compares with 10.7% in Australia. The structure of the Malaysian industry appears to work extremely well with a privatised monopoly terrestrial carrier and strong competition in other services such as mobile, paging and value added services. Should the launch of the MEASAT satellite of services proceed in 1994 as planned, Malaysia will have positioned itself to become one of the centres for telecommunications development in South East Asia and will have established the infrastructure for its further development and industrialisation. Malaysia is planning to be a fully industrialised society by the year 2020, and is well on the way to achieving this goal by creating a state of the art telecommunications infrastructure.

Gerald Wakefield is a consultant with Sly & Weigall.