The Digital Channel Plan: Administrative Action Or Law?

Holly Raiche considers the nature and significance of the digital channel plan and the role of the Australian Broadcasting Authority as law maker.

The digital channel plan ("**Plan**") forms an essential part of the process of moving from analog to digital television broadcasting in Australia. It will determine which broadcasters will be allotted which channels in the VHF and UHF spectrum bands to broadcast in digital mode in the licence or coverage areas in Australia.

For broadcasters and audiences alike, the Plan has enormous significance. Will the Plan require some broadcasters to move from the VHF to UHF bands, or visa versa? If so, what costs will be involved and who will bear them? Will the Plan allot digital channels with the potential to overlap with existing signals, forcing the reallocation of broadcasters elsewhere in the broadcasting parts of the spectrum? Will broadcasters be forced to install additional translator towers to reach audiences in digital mode because of the Plan, and at what cost to whom? With any of those moves, will the audiences want to or be able to follow those broadcasters? And will the advertisers continue to pay?

The issue raises important questions not only at a practical level, but as importantly, about the changing concepts of 'law' in the modern administrative state.

At a practical level, because the Plan has the potential for such significant impact, all free-to-air ("**FTA**") broadcasters (and possibly others) will be vitally concerned as to whether they will be able to use the *Administrative Decisions (Judicial Review) Act* ("**ADJR**") to challenge the ABA's final Plan or whether a court will find that the Plan is a legislative instrument, following reasoning in the recent *SAT* decision,[1] which cannot be challenged under ADJR.[2]

The issues involved in determining the nature of the Plan also pose a larger question on how law should be understood in today's world. With the size of the modern state, the technical complexity of issues facing legislatures, the need for Parliamentary majorities, and the constraints of time and expertise on Parliamentarians, should modern legislation be better understood as 'directives' to an expert body, whose task becomes formulating the detailed rules/ laws which regulate conduct?[3] The nature of the Plan begs this very question.

LEGISLATIVE BASIS FOR A DIGITAL CHANN.EL PLAN?

The digital legislation[4] provides a framework for the conversion from analog to digital television broadcasting. Yet neither the legislation itself nor the Explanatory Memorandum and Second Reading Speech mention the development of a digital channel plan. The need for a Plan is, however, obvious from the conversion legislative framework.

The actual process of conversion begins with the ABA developing Conversion Schemes for commercial and national broadcasters,[5] following a consultative process.[6] Each broadcaster then develops individual implementation plans in accordance with the relevant Conversion Scheme.[7]

One of the most important elements of the conversion process, which must be reflected in ABA Conversion Schemes, is the requirement for all FTA broadcasters to transmit their programs in both analog and digital mode in an area during a 'simulcast' period, to allow time both for broadcasters to make the necessary technical and programming changes and audiences to purchase digital reception equipment.

Obviously, to provide simulcast programming, all FTA broadcasters will need a channel additional to the one used for analog broadcasting. Indeed, both Conversion Schemes must require the Australian Communications Authority (ACA) to issue additional transmitter licences authorising television broadcasting in digital mode.[8]

That must also imply the need to develop a Plan to determine which broadcasters get which additional channel in either the VHF or UHF bands. And the ABA, as planner of broadcasting spectrum, is the obvious body to undertake the task.[9]

While the legislation does not provide for the Plan, both draft Conversion Schemes do make identical provision for the development of the Plan.[10] Under the Schemes, the Plan must allot additional channels to both commercial and national broadcasters for digital transmission, with such allotment done in accordance with a digital channel plan[11] made by the ABA.

Before finalising the Plan, the ABA must publish a draft Plan, having regard to specific factors including:

- the objectives of the digital legislation[12]
- the cost to broadcasters and transmission infrastructure owners and operators
- the likely cost and disruption caused to consumers in conversion to digital transmission
- other relevant factors.[13]

The ABA must also issue a public notice of the Plan and invite public comment, although such consultation does not necessarily have to be undertaken for variations to the Plan.[14]

Both Schemes claim authority for the development of the Plan but, oddly, give 'section 11'[15] as that authority. If the ABA's power to develop the Plan cannot be implied from the ABA's planning powers and the intention of the legislation, possible support for the Plan's development comes from the digital legislation itself. Both the commercial and national Conversion Schemes 'may' confer on the ABA a 'power to make a decision of an administrative character'.[16]

The issue then, is whether the ABA's development of the Plan is an extension of one of its current planning powers or something analogous to them, in which case the Plan would be a legislative instrument and not subject to ADJR

review. If not, is the development of the Plan simply an ABA exercise of the 'administrative' power permitted under the digital legislation, conferred by both Conversion Schemes, and reviewable under ADJR?

THE PLAN: A FAP OR LAP?

The ABA's current planning powers include the development of Frequency Allotment Plans ("FAPs") and Licence Area Plans ("LAPs"). Under the *SAT* decision, if the Plan could be classified as either a FAP or LAP, given the similarity of both planning processes it is highly likely that the ABA's development of the Plan would also be considered a legislative decision.

Frequency Allotment Plans

FAPs are plans which determine 'the number of channels that are to be available in particular areas of Australia to provide broadcasting services'.[17]

While the Plan must also consider the number of channels that are available in particular areas to provide digital broadcasting services, the main function of the Plan is to determine which broadcasters will be allotted which channels in each area, not simply the number of available channels.

Licence Area Plans

The ABA, in its LAPs, then determines the 'number and characteristics, including technical specifications, of broadcasting services that are to be available in particular areas of Australia with the use of the broadcasting services bands'.[18] For example, LAPs, based on the number of channels in an area, will determine how many, if any, commercial, community or other types of broadcasting licences can be made available for allocation to individual prospective broadcasters.

Again, while the Plan will have the effect of determining the number of channels available for allotment to broadcasters to provide digital services, the Plan's purpose is not to determine the 'characteristics' of those services. It does not determine whether channels in an area are to be made available for different types of broadcasting service; it simply allots additional channels to the incumbent FTA broadcasters to provide broadcasting services in digital mode similar to the programming those broadcasters currently provide.[19]

It is arguable, therefore, that the ABA's development of the Plan does not come under its powers to determine either FAPs or LAPs. But could the Plan nevertheless be considered as a legislative rather than administrative decision by the ABA?

LEGISLATIVE INSTRUMENT OR ADMINISTRATIVE DECISION: THE SAT TESTS AND THE PLAN

The first hurdle for the Plan being reviewable under ADJR is whether it is a decision 'made under an enactment'.[20] Because the Plan is not mentioned in the digital legislation, a Court will need to imply the ABA's power to develop the Plan either as a necessary component of the conversion schemes, or as a decision of administrative character, both of which are provided for in the digital legislation.[21]

If the authority for the ABA's decision does lie in the ABA's power to make 'administrative' decisions under the Schemes,[22] the mere labelling of decisions as 'administrative' does not mean a Court will necessarily find the decision of an 'administrative' rather than legislative character under ADJR,[23] and the *SAT* tests[24] for distinguishing the two will be considered. Those tests will be set against the various provisions for the Plan to determine if the Plan meets those tests, and the consequent likelihood that the Plan will be held to be a legislative decision.

Rules of general application

The Court in *SAT* found that the development of LAPs *created* 'rules' rather than *applied* those rules to specific cases, citing the classic test to determine whether a decision is of a legislative or administrative character:

> *...legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.*[25]

Applying that test, the Court in *SAT* said that LAPs determine the number and characteristics of broadcasting services that are to be *available* in areas for allocation, as opposed to determining the application of rules to a specific circumstance (ie, allocating individual licences).[26]

As Gummow J observed more recently, however, that test is not the end of the issue. Decisions made by Ministers under an enactment may operate upon a particular case without losing their character as legislative decisions.[27] The *Aerolineas* decision reinforces this warning that some decisions made by a Government agency under an enactment, which appear on their face to be of general application, may nevertheless be held to be of an administrative character.[28]

Arguably, the Plan can be seen as a rule of general application. It merely allots channels to broadcasters. The actual issuing of licences to individual broadcasters is made by the ACA.[29]

However, the legislation says the ABA's Conversion Schemes must make provision for 'requiring the ABA to issue transmitter licences' for digital broadcasting.[30] The *Radiocommunications Act*, under which the transmitter licences are allocated, also uses the words 'if the ACA is required... under the Schemes'.[31] And both Conversion Schemes require the ABA to 'make arrangements with the ACA' to issue transmitter licences for broadcasting in digital mode.[32]

It could also be argued, therefore, that the actual decision as to the allocation on individual digital licences will be made by the ABA's Plan, and merely implemented by the ACA under ABA direction. It is the Plan which determines how individual transmitter licences will be allocated, with the ACA little more than an issuing authority.

Notice gazettal

The requirement in section 35 of the *BSA* that an ABA determination of LAPs must be notified in the *Gazette* was held in the *SAT* decision to be another indicator of the LAP's legislative character.

Although the Plan itself is not required to be notified in the *Gazette*, the Conversion Schemes, under which the Plan is being developed, will be disallowable instruments.[33] There is some support, therefore, that the Plan may come close to meeting this *SAT* test.[34]

Because the Plan was not mentioned in the legislation, the issue arises in this and later tests as to whether that implies a Parliamentary *intention* for that omission. Or did the Parliament simply not consider the possibility of a Plan and therefore nothing should be read into the failure to deal with the Plan under legislation? The fact that the Plan was not mentioned in Parliamentary debates on the legislation, the Explanatory Memorandum or the

Second Reading Speech suggests the latter as a real possibility.

Wide Public Consultation

Section 27 of the BSA requires that the ABA, in carrying out its planning functions, including the determination of LAPS, 'must make provision for wide public consultation'; another feature of LAPs which suggested their legislative character.

The only legislative requirement for public consultation in the digital legislation is in relation to the development of the Conversion Schemes.[35] Again, however, it is not clear what should be read into that Parliamentary omission.

POLICY CONSIDERATIONS

The *SAT* judgment also referred to the requirement in section 23 of the BSA that the ABA must have regard to a wide range of public interest considerations such as an area's demographics, its social and economic characteristics, the demand for services, etc when carrying out its planning function - similar to the complex policy questions of a general legislative function.

In both developing and varying the Plan, both Conversion Schemes require the ABA to have regard to the objectives[36] of the digital legislation, and the impact of digital conversion on both broadcasters and the public.[37] Arguably, those considerations would also invest the process of developing the Plan with a legislative character.

Power to vary Licence Area Plans

The ABA has power to vary LAPs but only, again, after wide public consultation and once a plan is made - similar in the *SAT* Court's view of the process of amending legislation.

As in the *SAT* decision, it is the ABA which is given power by the Schemes to vary the Plan.[38] And, again under the *SAT* decision, the Schemes do not confer power on the Minister to vary the ABA's Plan.

Not Reviewable by the AAT

Section 204 of the BSA lists ABA decisions which are reviewable by the AAT. The promulgation and variation of LAPS are not included on that list. The *SAT* Court found that this omission 'has been seen as an indication' that such decisions which are not reviewable by the AAT were not of an administrative character.[39]

The digital legislation does provide for some ABA decisions under the digital conversion process to be reviewed by the AAT.[40] The development of the Plan is not amongst those decisions. Again, however, the omission can be read either as deliberate, or as an issue simply not addressed by the Parliament.

Binding Legal Effect of Licence Area Plans

The *SAT* Court found that, once a LAP is determined, other legislative provisions come into play, including the determination of a licence area and the rules about the number of licences a person can control, or the determination of a licence area population, which determines the total number of television commercial licences a person can control. The LAP, therefore, has a 'carry-on' effect, supporting its characterisation as a legislative measure.

The 'carry-on' effect of the Plan, referred to in the *SAT* decision, is that the Plan will be the basis on which the ACA allocated individual transmitter licences for the individual broadcasters.

CONCLUSIONS

Using the *SAT* tests and administrative law decisions, there are arguments that the Plan should be held as an ABA administrative decision. The effect of the Plan is to virtually require the ACA to allocate individual licences in accordance with the Plan: the application of law to particular cases. Further, it is the ABA's plan and not the ACA's issuance of licences which determines what additional channel individual broadcasters will be allocated. And while wide consultative processes have been followed, the ABA does not have to use those processes to vary the Plan. There is no provision for the Plan to be published in the *Gazette* and it is not subject to notification and disallowance.

There are, however, contrary arguments that the Plan is an ABA exercise of legislative power. The Plan is being developed through public consultative processes, taking into account public interest criteria. And the final decision simply allots channels to broadcasters; it does not actually license individual broadcasters to transmit on the channel they have been allotted.

Rubin's[41] analysis of the nature of 'law' in the modern administrative state suggests that the ABA's Digital Channel Plan should be seen as legislation rather than a decision of an administrative character.

Rubin contrasts a more traditional view of law - a set of rules, set out either in the common law or legislation which the courts interpret and enforce - with his view of 'law' in a modern administrative state.

For Rubin, modern legislation is the 'initiation of government policies or programs... the mobilisation of governmental power to achieve particular results, ranging from securities regulation to public welfare to environmental protection'.[42] Legislation, under this view, declares that there will be a policy or program, but does not draft the rules to implement it; the drafting and implementation mechanism is the administrative agency.[43] And the drafting and implementation mechanism, the administrative agency, carries out general policy directives through a set of rules - laws.

The reason for the move towards law-making by the implementation mechanism - administrative agencies - lies in the nature of modern governance; the often technical complexity of the issue which is better handled by an expert person or agency, the need for majorities, the sheer constraints of time and resources available to a Parliament and its staff as opposed to the expertise which resides in an administrative agency, and the need for stability of policy, with flexibility for rule changes to meet changing circumstances but within stated policy parameters.[44]

The digital legislation closely fits Rubin's model of legislation as directives, as a set of policy goals left to the administrative agency to devise and implement through establishing the specific rules - laws - necessary.

The digital legislation requires the ABA to develop conversion schemes for both commercial and national broadcasters, with only 'policy objectives' as a guide as to what those Schemes are to achieve.[45]

The technical issues, the actual process of digital conversion, the dates for simulcast broadcasting and its ending, compliance with the schemes and their implementation are matters which Parliament left to the ABA to determine, in light of general Parliamentary

objectives. It is the ABA which develops the Schemes. It is the ABA which approves the Implementation Plan for commercial broadcasters (presumably having determined what an Implementation Plan must include). And through a process which Parliament did not set, it is the ABA which notifies the ACA about issuing transmitter licences to broadcasters for digital broadcasting - in accordance with a digital channel plan which Parliament did not even consider.

It is, using Rubin's analysis of modern 'law', legislation as a directive, leaving the implementation mechanism - the ABA - with the authority to actually make the rules - legislation - which will carry out that policy directive - the transition from analog to digital television.

Ultimately, however, the character of the digital channel plan will be one for the Courts. Given the significance of the Plan to all broadcasters, that issue may be resolved sooner rather than later.

1 SAT FM Pty Ltd v Australian Broadcasting Authority, No. VG 684 of 1996, Judgment by Sundberg J, 18 July 1997.

2 Under s. 3, ADJR, a 'decision to which' the Act applies is a 'decision of an administrative character made, proposed to be made, or required to be made... under an enactment.... The *SAT* decision concerned an ABA Licence Area Plan, made under the ABA's planning powers, holding it was a legislative instrument rather than a 'decision of an administrative character' within s. 3 ADJR.

3 See Edward L, Rubin, 'Law and Legislation in the Administrative State', *Columbia Law Review* (1989) No. 3, p. 369. (hereinafter, Rubin, CLR) See also Edward L. Rubin, The Concept of Law and the New Public Law Scholarship, *Michigan Law Review*, February 1991, 89:792.

4 *Television Broadcasting Services (Digital Conversion) Act 1998* and related legislation, which amend licence conditions for commercial television broadcasters in Schedule 2 of the *Broadcasting Services Act 1992* (BSA), provide a conversion process under a new Schedule 4, BSA and amend the *Radiocommunications Act 1992*.

5 Both Conversion Schemes, once finalised, are disallowable instruments. (Clause 17, Schedule 4, BSA for commercial broadcasters and Clause 31 Schedule 4 BSA for national broadcasters). The additional requirement for national broadcasters is that the national television conversion scheme cannot take effect until approved by the Minister under Clause 32, Schedule 4, BSA.

6 The ABA released the Draft Commercial Television Conversion Scheme and the Draft National Television Conversion Scheme for public consultation. This article is based on those draft Conversion Schemes, which may be changed by the ABA when released in final form. Clauses 18 and 33 (for commercial and national broadcaster Conversion Schemes, respectively) require that, in formulating or varying a Scheme, the ABA must make provision for public consultation, consultation with commercial and national broadcasters, the ACA and owners of transmission towers.

7 Part 2, Schedule 4, BSA for commercial broadcasters, and Part 3, Schedule 4 BSA for national broadcasters. The policy objectives to be achieved by both ABA Conversion Schemes include the commencement of digital broadcasting by set times, the provision of simulcast broadcasting, the provision of the same coverage area and reception quality for analog and digital broadcasting during the simulcast period and, at the end of the simulcast period, that all analog broadcasting cease.

8 Clauses 8 (commercial broadcasters) and 23 (national broadcasters), Schedule 4, BSA.

9 Part 3, BSA gives the ABA planning functions in relation to the broadcasting service spectrum (the VHF and UHF bands) which has been allocated by the Minister, under s. 31 *Radiocommunications Act 1992*, to the ABA for planning.

10 Division 2 of Part A in both the commercial and national Conversion Schemes.

11 The digital channel plan may cover channel allocation for the whole of Australia, or may amount to a series of plans, covering specific areas, under Clause 6(2) of both Conversion Schemes. However, for this discussion reference will be made only to 'the Plan', which encompasses both possibilities.

12 see fn 5

13 Clause 8 of both Conversion Schemes.

14 Clause 9 to 12 of both Conversion Schemes.

15 Clause 6, Commercial Television Conversion Scheme; Clause 11, National Television Scheme. Section 11 BSA has no relevance to digital broadcasting. Clause 11, Schedule 4 BSA allows the ABA to conduct reviews and report to the Minister on 'specified matters' in relation to the commercial television scheme. It is not clear whether the development of the Plan could fall within this power, which in any case only relates to commercial broadcasters.

16 Clause 7, Schedule 4, BSA for commercial broadcasters and Clause 22, Schedule 4 for national broadcasters.

17 Section 25 BSA

18 Section 26 BSA.

19 Under Clause 7(1)(p) , Schedule 2, BSA and Clause 36(1) Schedule 4, both commercial and national broadcasters are prohibited from providing categories of service other than those provided under their analog BSA licence.

20 Sect. 3 ADJR

21 See fn 15.

22 See fn 16.

23 See D. C. Pearce, *Commonwealth Administrative Law*, Butterworths, 1986, at 107-8, where Prof. Pearce argues that the Federal Court has interpreted its jurisdiction to review decisions widely.

24 SAT decision, Id, pp 4-6.

25 *The Commonwealth v Grunseit*, *Grunseit* (1943) 67 ALR 58, at 82.

26 Reference was made to Latham, CJ in *The Commonwealth v Grunseit*, id at 82 where Latham concedes the difficulty of distinguishing between legislative and administrative decisions, but says that the 'general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases. See also O'Loughlin J in *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463 at 470-473 where the determination of a management plan for fisheries was held to be a legislative rather than administrative decision; Gummow J, in *Queensland Medical Laboratory and Others v Blewett and Others* (1988) 84 ALR 615 at 634-6 where it was held that a decision by the Minister to substitute a new pathology services table was a decision of a legislative rather than administrative character.

27 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 635-6, where Gummow J. found that a Ministerial determination substituting a new pathology service table for the previous one, which directly affected the plaintiffs was nevertheless of a legislative character.

28 *Aerolineas Argentinas v Federal Airports Corporation* (1993) 118 ALR 635, at 645. In this case, the FAC determined charges for landing aircraft at different airports, based on the costs of providing security, looking at the weight of the aircraft, number of passengers, etc, where the FAC determination' applies the law by making provision for particular cases'.

29 Sections 100B and 102A *Radiocommunications Act 1992*

30 Clauses 8 and 23, Schedule 4 BSA.

31 Sections 100B and 102A *Radiocommunications Act 1992*

32 Clause 33, Commercial Television Conversion Scheme and Clause 27 National Television Conversion Scheme.

33 Clauses 17 and 31, Schedule 4 BSA.

34 See also *Austral Fisheries v Minister for Primary Industries and Energy* (1992) 27 ALD 633 at 671, where requirements for the tabling and disallowance of the fisheries management plan was taken as an indicator for that plan being a legislative decision.

35 See fn 4.

36 See fn 6.

37 See fn 11.

38 Clause 12 in both Conversion Schemes.

39 *SAT* decision, Id, p. 5, citing Austral Fisheries (1992) 27 ALR 619 as authority.

40 Clause 62, Schedule 4 BSA.

41 Prof. of Law, Univ. of California, Berkeley. See fn 3.

42 Rubin, Columbia Law Review, Op Cit at 372.

43 Id, 373.

44 Id, at 384, 391-3. 395.

45 Clauses 6(3) and 19(3) Schedule 4, BSA.

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