

Regulation of Election and Political Broadcasting

Lesley Hitchins examines the regulation of election and political broadcasting.

In August 2001, the Australian Broadcasting Authority (ABA) released a report of its investigation into commercial radio licensee, Malbend Pty Ltd, operating radio station 3MP, which broadcasts to an area within Victoria.¹ The investigation concerned alleged breaches of the *Broadcasting Services Act 1992 (BSA)* Schedule 2 clauses 3 and 4, which form part of the licence conditions applicable to commercial radio licensees (clause 8(1)(i)). Given the revelations of the ABA's Commercial Radio Inquiry² which so dominated broadcasting affairs in 1999 and 2000, the circumstances of the 3MP investigation provide further evidence that commercial radio licensees seem to have a tentative grasp of their responsibilities. Although the broadcast under investigation predated the outcome of the Commercial Radio Inquiry, it is interesting to note that the broadcast and the arrangements for it took place after the ABA had announced that it would investigate commercial radio station 2UE and several other commercial radio stations regarding their commercial arrangements. The allegations concerning those radio stations at that time do not appear to have had an impact on 3MP. Apart from concerns about licensee responsibility, the 3MP investigation also highlights the lack of a cohesive government policy on political and election broadcasting.

THE FACTS

The 3MP broadcast was a live broadcast from a shopping centre situated within the Frankston East electorate, which at the time of the broadcast was subject to a supplementary Victorian state election. The broadcast took place on 13 October

1999, just prior to the election scheduled for 16 October. The supplementary election was necessary because the sitting member for Frankston East had died on the day of the Victorian state election. Neither the Labor Party nor the Liberal Party had emerged from the state election with a clear majority. The outcome of the supplementary election was important because it would determine whether Labor had any chance of forming a government with the aid of the three independent members (something it wouldn't be able to do if it didn't win the supplementary election).

The broadcast lasted for five hours, four of which were paid for by the Liberal Party Victorian Division (the Liberal Party). The broadcast included a standard mix of music, news, weather, and paid advertisements but, more particularly, it included interviews with the Caretaker Premier, Jeff Kennett, the Liberal party candidate for Frankston East, Cherie McLean, and five other Liberal Party members of Parliament. The selection of the interviewees and the order for the

interviews were arranged by the Liberal Party, whilst 'lead-ins,' or discussion points, were also provided to 3MP by the Liberal Party in relation to each of the interviewees (with the exception of Mr Kennett). The ABA took the view that the documents relating to the arrangements for the broadcast established "...that the Liberal Party was responsible for making the arrangements for the series of interviews which occurred during the outside broadcast as part of a paid media package".³ As a result of complaints received from the Victorian Branch of the Australian Labor Party (the Labor Party), the ABA investigated whether the broadcast had been in breach of the licence conditions set out in the BSA, Schedule 2, clauses 3 and 4.

THE BROADCASTING OF ELECTION MATTER

Licence condition clause 3 applies during an election period. Under clause 3(2) a broadcaster, who broadcasts election

INSIDE THIS ISSUE

Regulation of Election and Political Broadcasting

Where Possums Fear to Tread Invasion of Privacy and Information Obtained Illegally

Espionage and Related Offences Bill

Gutnick Goes to the High Court

The New Privacy Obligations and the Media Exemption

Spam - Is Enough Being Done?

CONTENTS

Regulation of Election and Political Broadcasting

Lesley Hitchins examines the regulation of election and political broadcasting.

Where Possums Fear to Tread Invasion of Privacy and Information Obtained Illegally

Glen Sauer describes the implications of a recent High Court decision on broadcasters.

Espionage and Related Offences Bill

Rebecca Sharman examines the rise and fall of controversial provisions of the *Criminal Code Amendment (Espionage and Related Offences) Bill*.

Gutnick Goes to the High Court

Glen Sauer analyses the recent Gutnick case dealing with internet defamation.

The New Privacy Obligations and the Media Exemption

Glen Sauer reviews how the new privacy regime deals with the media.

Spam - Is Enough Being Done?

Ben Kuffer and Rebecca Sharman take a hard look at spamming issues.

matter during an election period, "must give reasonable opportunities for the broadcasting of election matter to all political parties contesting the election".⁴ However, a broadcaster is not required to broadcast such election matter without charge (clause 3(3)). The Labor Party argued that 3MP had breached this condition because 3MP had not informed it of the broadcast or provided it with an opportunity to respond. The ABA rejected Labor's submission that it had been offered no opportunity to respond. Although 3MP had not approached the Labor Party, the Labor Party, on learning of the broadcast, appears to have approached 3MP. 3MP was willing to grant a response but only "if the Labor Party was willing to approach 3MP with a similar proposal".⁵ The reference to 'similar proposal' would seem to be a reference to the commercial terms.

Whilst the wording of clause 3(2), particularly the phrase "must give reasonable opportunities", might appear to require some positive action on the part of the broadcaster, in the ABA's view this was not so. Indeed, very little of a proactive nature is expected of the broadcaster. According to the ABA, clause 3(2) did not impose upon a licensee an obligation to ensure balance or to broadcast a range of competing opinions. Nor did the licence condition amount to a requirement to promote accuracy and fairness. The requirement to give 'reasonable opportunities' simply amounted to "...an obligation not to refuse or deny access to a political party" which sought airtime.⁶ Further, clause

3(2) did not require the broadcaster to solicit material or to provide equal format or time opportunities.⁷

Thus in determining whether 3MP had provided "reasonable opportunities", the question for the ABA was really whether the licensee had refused or denied access to airtime. Examining the evidence, the ABA concluded that 3MP had not breached clause 3.⁸ The ABA considered several factors relevant. As already mentioned, 3MP was willing to provide airtime to the Labor Party subject to terms. Secondly, the Liberal Party understood that the broadcast would not be exclusive to it and that 3MP was free to broadcast music and other items as well as paid advertisements. Thirdly, the ABA noted that these advertisements included advertisements for the Labor Party and for the Independent candidates standing in the supplementary election and that they were broadcast during the live broadcast.⁹ These appear to have been pre-recorded advertisements, not directly referable to the Liberal Party's broadcast. Taking these factors into account, the ABA concluded that reasonable opportunities had been given to all political parties to broadcast election matter.¹⁰ The ABA reached this conclusion even though, as it acknowledged, the Labor Party would have been unlikely to have been able to broadcast in a similar format as the Liberal Party's live broadcast took place on the day on which the election blackout would commence.¹¹ The fact that this did not deter the ABA from its conclusion is perhaps not surprising given its

interpretation of clause 3(2), but it does indicate what limited scope is given to the term "reasonable opportunities".

The ABA's interpretation of the clause 3 obligation appears limited, yet it is not at odds with the legislative intention. Clause 3 was originally introduced in 1956 following the recommendation of the Royal Commission on Television although the Commission had recommended an obligation to provide "equal" opportunities.¹² It is clear that clause 3 demands a low threshold for compliance and it is difficult to envisage many situations in which a licensee would be found in breach. Clearly, a blatant refusal to broadcast the election matter of a particular political party would almost certainly constitute a breach. It might also be possible to determine that a political party has effectively been denied an opportunity to broadcast, if, for example, the licensee set airtime rates for a particular party well in excess of what might normally be expected for a broadcast of that nature and during a particular time period. However, the 3MP Report clearly indicates that the format and timing of an election broadcast is unlikely to be a relevant consideration. This is well-illustrated by the facts of the 3MP case. As the ABA stated clause 3 does not invoke any requirement of balance.

The limited scope of clause 3 illustrates the failure of government in Australia to articulate the place and conduct of election broadcasting in political debate¹³ and to recognise the importance of the public's interest in accessing that

debate.¹⁴ It might be argued that, subject to financial resources, the present regime, with its lack of restraints, leaves those wishing to participate in political debate free to do so. Yet as Barendt comments something more may be required:

[Political broadcasting...] now plays a crucial part in the efficient working of an informed democracy. That role justifies regulation to ensure fairness and balance between political parties. It is perfectly legitimate for a broadcasting authority to take ordinary commercials on a 'first come, first served' basis But balance and impartiality, if not absolute equality, are rightly required in the case of political and election broadcasts. This is primarily a matter of (constitutional) principle.¹⁵

It needs to be remembered also that the freedom of political communication is a freedom which exists not just for the benefit of the speaker but for the listener (the general public) also, whatever the qualitative value of paid political broadcasting might be. Protecting the public's right to access open political debate may also justify more proactive regulation. In its present terms clause 3 offers limited protection, and such protection it offers is for a limited class of speakers, namely those political parties already represented in parliament. As noted earlier, the ABA specifically rejected the idea that clause 3 had a role to play in the promotion of balance or fairness. If that is correct, then, given Barendt's comments, it would seem all the more appropriate that legislative attention be given to ensuring that election broadcasts are regulated in a way which will more actively promote fairness. The *ACTV* decision, and the cases which have succeeded it, should not be seen as prohibiting appropriately designed rules.¹⁶

There is a certain irony in the ABA's view that clause 3 has nothing to do with the obligation to promote accuracy and fairness, given that the same broadcast, and hence content, was also considered by the ABA under clause 4. As discussed in the next section of this note, clause 4 does come within the obligation to promote accuracy and fairness. Further, the ABA had earlier noted in the *3MP Report* that it considered that some of the Commercial Radio Codes of Practice were relevant to the broadcast.¹⁷ The ABA didn't specify which codes, but one assumes that it had in mind Code 2, dealing with news and current affairs programs and, possibly, Code 3 which

covers advertising.¹⁸ The purpose of Code 2 is to promote accuracy and fairness in news and current affairs programs. Again, it is ironic that if the ABA had been considering whether there was a breach of Code 2, issues of fairness would have been relevant to the same 3MP broadcast. In fact, because the Labor Party had not followed the correct procedure for Code breaches the ABA was unable to consider this matter.¹⁹ These apparent inconsistencies would seem to strengthen further the need for a more cohesive approach to the role of regulation in the broadcasting of political speech.

THE BROADCASTING OF POLITICAL MATTER

The ABA also investigated whether the broadcast had been in breach of clause 4. Under clause 4(2) a broadcaster who broadcasts 'political matter' "...at the request of another person ... must, immediately afterwards, cause the required particulars in relation to the matter to be announced...". For the purpose of this broadcast, the 'required particulars' meant the name of the political party, the place of its principal office, the name of the natural person responsible for authorising the broadcasting of the political matter, and the name of every speaker delivering an address or making a statement forming part of the political matter (Schedule 2, clause 1).

There was little doubt that what was broadcast was 'political matter'.²⁰ However, as the ABA noted, "during an election period a significant proportion of what is broadcast on radio can be described as 'political matter'".²¹ Clause 4 is applicable only when the political matter is broadcast at the request of another person. This requirement will be satisfied if it can be shown that another person was responsible for approving the matter's content and for the decision to present it for broadcasting.²² As already noted, the Liberal Party had selected the interviewees and had provided 'lead-ins' for the interviews. 3MP argued that the broadcast was not one in which the content, that is the political matter, had been approved, and that, by its very nature, a live radio interview was a broadcast in which the content couldn't be approved.²³ Further it submitted that every interview which contained political matter and included a politician, as a result of arrangements made by the politician or relevant political party, would fall within clause 4.²⁴ The ABA did not accept 3MP's submissions:

... there is a difference between on the one hand, arranging for a live interview with a politician or representative of a political party in the course of news or current affairs programs and making a payment to a licensee to enable a person to dictate the arrangements for the program including the content of the interview and the questions to be asked by a now partial and not disinterested interviewer.²⁵

The ABA assessed each interview and concluded that political matter had been broadcast in each interview at the request of another person without the required particulars been given.²⁶ Even where the Liberal Party had not provided 'lead-ins' as in the case of Mr Kennett's interview, the ABA considered that it was nevertheless political matter broadcast at the request of another person because it formed "...part of an advertising package negotiated by or on behalf of the Liberal Party. The broadcast of the interview fulfils the Liberal Party's stated aim for the broadcast, ie the promotion of Liberal Party candidate Ms McLean".²⁷

Although the ABA found 3MP to be in breach of clause 4, and hence of a licence condition, by failing to announce the required particulars at the end of each of the 8 interviews, the ABA took no action beyond stating its intention to monitor 3MP's compliance with the BSA and with the codes of practice.²⁸ The ABA's response is curious given its comments on clause 4 in its final report for the Commercial Radio Inquiry. In that report, the ABA noted the importance of political broadcasting disclosure as a principle both in general and as recognised by the regulatory framework:

Broadcasting services play an influential role in the course of Australian political debate, and Parliament recognised this in a number of places within the Act. It is reflected in the Objects of the Act, particularly 3(c) and 3(d), where greater regulation is placed on the 'more influential broadcasting services', and it is recognised in the requirement to 'tag' political broadcasts....

Whereas other matters were left to the Authority and industry to develop guidelines for regulation, Parliament regarded the disclosure of the sponsor of political advertisements as a matter of such singular importance that detailed guidance was included in the Act. In accordance with the regulatory policy set down for it by

Parliament, the Authority regards it as a matter of the highest importance that, in the course of political debate, listeners and viewers clearly know who it is that is trying to persuade them.

... The Authority is strongly of the view that it is an essential element of fairness and accuracy that presenters advise their audience of the existence of commercial arrangements which may influence opinions broadcast on political matters....

... Licensees should also note the gravity with which the Authority will continue to view breaches of the Act in relation to political matter.²⁹

Given the strength of these comments it seems all the more surprising that the ABA took no action particularly since, as it noted in the 3MP Report, the obligation under clause 4 was not a new requirement.³⁰ Whilst the ABA might assert the importance of compliance with clause 4, in practice the message conveyed to licensees might be less clear. Not only was no action taken against 3MP but it was almost two years before the ABA released its findings. Such lengthy delays might encourage the perception amongst the industry that an investigation's outcome is of symbolic or historical significance only.

Whilst the ABA's lack of action may be surprising, there may be another difficulty here relating to the design of this obligation. Notwithstanding the emphasis upon the importance of political broadcasting disclosure and its relationship to the principles of accuracy and fairness, the actual obligation is rather narrowly drawn. Compliance with clause 4 demands essentially a formulaic response, namely the announcement of certain particulars. There is no broader inquiry concerning the political broadcast and its promotion of fairness. This can be contrasted with the more open-ended inquiry under Code 2. Despite the claims of the ABA regarding the seriousness of this obligation, there may be a tendency to view its breach less seriously given that once the elements of clause 4 are found to be present, the only issue is whether the particulars have or have not been given. There is no scope under clause 4 for taking into account the wider context of the broadcast such as the way in which the political matter has been presented. In other words, the lack of disclosure might be viewed more seriously, such seriousness being reinforced by appropriate action, if the other features

of the broadcast were able to be taken into account.

In this context, it is interesting to look at the 3MP broadcast where several aspects of the broadcast would seem to contribute to a failure on the part of the licensee to promote fairness. First, it is clear from the transcript of the interviews that the questioning of the interviewees was 'soft' as the following examples show:

- In leading up to a question directed to Mr Kennett, the interviewer, Mr Carter stated: "... it's an amazing thing to me to think about the track record of the Liberal Party over the last few years and how they've increased business and all the good things that the Liberal Party has done."
- When interviewing another MP, the then Treasurer, Mr Carter asked: "The Cain/Kirner [referring to a former Labor Government] was a very expensive one, wasn't it?" and further on: "Do you think Labor can actually afford some of their promises?"
- In the course of interviewing another Liberal MP, State Government minister, Louise Asher, Mr Carter provided the following lead-in for Ms Asher to comment upon: "I was speaking to her [the candidate] earlier this morning and she's obviously as she said herself, a quiet achiever, not somebody to blow her own trumpet and quite often, the quiet achievers, they're the people to have, because they actually get down and do stuff. Don't they? I think Cherie is one of those people who gets in and does it without sort of blowing her own trumpet too much." Needless to say Asher was happy to agree with this!³¹

Of course, one might expect soft questioning for what was a paid political advertisement, but, secondly, it was apparent that there was an attempt to suppress the real nature of the broadcast. Although, 3MP had broadcast at various times throughout the program an announcement such as the following "3MP in a live broadcast till 2, paid for by the Liberal Party of Victoria ..."³², these announcements were never broadcast 'immediately after' the interviews. They were usually broadcast after other program material, such as music and advertising, and before the next interview. Interestingly, the announcement was not made at all before or near the interviews with Mr Kennett and, the candidate, Ms McLean. Indeed it seems that the information that it was

a paid broadcast was not given until the start of the fourth interview.

Finally, it is clear that 3MP made little attempt to ensure that listeners understood that the interviews were part of an advertisement by the Liberal Party. Not only was there a failure to give the required particulars, but more proactively, albeit clumsily, the broadcaster appeared to be trying to disguise the nature of the broadcast. The announcer regularly created the impression that the interviews were impromptu and not pre-arranged. For example, in introducing several of the interviews, he made statements such as the following:

- "We've just been speaking to our Caretaker Premier, Jeff Kennett about how things are going and Cherie McLean has dropped by."
- "It's 16 past 11. 3MP live today at the Karingal Hub Shopping Centre in the bowels of the Frankston East electorate and we're talking to some passing politicians. There seem to be a lot in this shopping centre today, just happen to be passing by."
- "And passing by, another passing politician, who I've managed to hook in with my big walking stick, is Denis Naphine..."³³

As was apparent in the Commercial Radio Inquiry, paid messages which can be disguised as such are of much greater value to the person paying than those which cannot be so disguised. The 3MP broadcast took place in the context of an election which would have an important bearing on which political party would be in a position to form the next government in Victoria, and the political matter paid for by the Liberal Party was presented in a way which attempted to disguise the true nature of the broadcast. Nevertheless, these important factors were beyond the scope of the ABA's inquiry.

CONCLUSION

The circumstances giving rise to the investigation into 3MP must raise concerns once more about the responsiveness of commercial licensees to their obligations. More broadly, the investigation highlights the limitations of current rules on political and election broadcasting as well as the lack of a coherent regulatory role for the ABA. The failure of government to place regulation of political and election broadcasting firmly within fairness principles means that existing rules and

their enforcement are limited in the protection of the public interest in open political communication.

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1 ABA, *ABA Investigation Report – Political Matter broadcast by 3MP*, Investigation No. 763, 2 August 2001 (3MP Report).

2 ABA, *Commercial Radio Inquiry, Final Report of the Australian Broadcasting Authority*, August 2000.

3 3MP Report, 6.

4 The obligation applies only to those political parties who are already represented in the relevant Parliament. See further Leonard, P et al, *Communications Law and Policy in Australia* (1987), paras 9300-10.

5 3MP Report, 33.

6 3MP Report, 32.

7 3MP Report, 32-33.

8 3MP Report, 34.

9 There were also advertisements for the Liberal Party candidate, Ms McLean.

10 3MP Report, 34.

11 *Ibid.*

12 Although the Commission was satisfied that outside of election periods, commercial television broadcasters should be free to determine the broadcasting of political matter, subject to the

principle of providing reasonable opportunities for the broadcasting of opposing views; during elections it considered that more precise rules were required, hence its recommendation of 'equal opportunities': *Royal Commission on Television* 1954 (Parliamentary Paper 38 of 1954-55), paras 461-463. The Commission was only making recommendations for television, but the legislation subsequently introduced applied both to radio and television.

13 The most recent attempt was the Political Broadcasts and Disclosure Act 1991 which introduced into the Broadcasting Act 1942 new provisions concerning political and election broadcasts. These provisions were declared invalid by the High Court: *Australian Capital Television Pty Ltd v The Commonwealth of Australia (No 2)* (1992) 108 ALR 577 (the ACTV decision).

14 ACTV decision, 577, 594-595, per Mason CJ.

15 Barendt, EM, *Broadcasting Law A Comparative Study* (1995), 170.

16 Barendt, E, "Election Broadcasts in Australia" (1993) 109 LQR 168. See also Stone, A, "Rights, Personal Rights and Freedoms: the Nature of the Freedom of Political Communication" (2001) 25(2) MULR 374, 399.

17 3MP Report, 2.

18 Under Code 3.1 a licensee must not present advertisements as news programs or other programs.

19 Under the BSA, the ABA only has jurisdiction to deal with a code of practice breach if a complaint has been made first to the licensee. See BSA, s 148 for full procedure. In relation to code breaches, the ABA is more limited in the

enforcement action it can take.

20 See ABA, *Guidelines for the broadcasting of political matter* (1998), <<http://www.aba.gov.au/tv/content/political/index.htm>>.

21 3MP Report, 5.

22 *Ibid.* See also Schedule 2, clause 4(4).

23 3MP Report, 6-7.

24 *Ibid.*

25 3MP Report, 7.

26 The ABA treated each interview separately, having taken the view that the other parts of the programme, for example, music and weather reports did not fall within the arrangements between 3MP and the Liberal Party. This it believed was consistent with the understanding of the Liberal Party who had in a letter to 3MP stated: "Further to your advice we understand that the outside broadcast would not be exclusive to the Liberal Party" (quoted at 9): 3MP Report, 8-9.

27 3MP Report, 11-12.

28 3MP Report, 35. The ABA noted that 3MP now had in place compliance procedures.

29 Note 1 above, pages 55-56.

30 3MP Report, 35.

31 3MP Report, 38, 54 (interview with Denis Napthine) and 52.

32 See, for example, 3MP Report, 32. Such an announcement did not of course constitute the 'required particulars'.

33 3MP Report, 42, 45 and 54.

Where Possums Fear to Tread Invasion of Privacy and Information Obtained Illegally

Glen Sauer describes the implications of a recent High Court decision on broadcasters.

The High Court, in its recent decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (15 November 2001) has found that, in certain circumstances, media organisations can publish or broadcast material that has been obtained illegally by someone else. The High Court also alluded to the possible development of a new tort of invasion of privacy.

THE PROCEEDINGS

In this case, Lenah Game Meats Pty Ltd (Lenah) had applied for an interlocutory injunction to restrain the broadcasting by the ABC of a film made by Animal Liberation Limited of Lenah's operations at its "brush tail possum processing facility".

Lenah kills and processes Tasmanian brush tail possums for export at licensed abattoirs. A person or persons unknown broke into Lenah's premises and installed hidden cameras. The possum killing operations were filmed without the knowledge or consent of Lenah. The film was supplied to Animal Liberation Limited, which in turn supplied the film to the ABC with the intention that the ABC would broadcast it.

Lenah claimed that the broadcasting would cause it financial harm as the film was of the most gruesome parts of the possum processing operation, and showed possums being stunned then having their throats cut. Lenah did not claim that the film was confidential or that its broadcast involved any copyright infringement, and did not sue in defamation. Rather, it relied on broad principles which protect private property holders from unlawful

trespass and deprive media defendants of the fruits of such trespass. Lenah also asserted that the ABC would, by broadcasting the film, commit a tort (actionable wrongdoing) of invasion of privacy, despite the fact that Australian law has not yet recognised such a tort.

INFORMATION ILLEGALLY OBTAINED CAN BE USED BY AN INNOCENT PARTY

A majority of the High Court (Justices Gleeson CJ, Gaudron, Gummow and Hayne) held that the fact that the information which had been illegally obtained was not of itself reason to restrain an innocent party (the ABC) from publishing it. The mere fact that the ABC might act unconscionably in publishing the information was not a good enough reason for the High Court to grant an