The Parliament of the Commonwealth of Australia

THE ROLE AND FUNCTIONS OF THE AUSTRALIAN BROADCASTING TRIBUNAL

Report from the House of Representatives
Standing Committee on Transport, Communications
and Infrastructure

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REVIEW OF THE ROLE AND FUNCTIONS OF THE

AUSTRALIAN BROADCASTING TRIBUNAL

Terms of Reference

Examine the role and functions of the Australian Broadcasting Tribunal in regulating the Australian commercial broadcasting sector, and in particular:

1. the basis and conditions upon which licences are granted and renewed, and options for change;

2. the role of the ABT in relation to changes of ownership and control of commercial broadcasting licences, including the extent to which such changes should require prior or subsequent approval;

3. the role of the ABT in establishing and enforcing program and advertising standards; and

4. appropriate sanctions for breaches by licensees of provisions of the Broadcasting Act, including undertakings given pursuant to the Act as to adequate and comprehensive services and use of Australian resources.

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABC Corporation	Australian Broadcasting Corporation
ABCB	Australian Broadcasting Control Board
ABT Tribunal	Australian Broadcasting Tribunal
Act Broadcasting Act	*Broadcasting Act 1942*
ARC	Administrative Review Council
Bond Media	Bond Media Limited
BRRU	Business Regulation Review Unit
CLC Centre	Communications Law Centre
Department	Department of Transport and Communications
FACTS	Federation of Australian Commercial Television Stations
FARB	Federation of Australian Radio Broadcasters
SBS	Special Broadcasting Service
Seven Network	Australian Seven Network
NVLA	National Viewers and Listeners Association (WA)
Network Ten	Network 10 Australia
VAEIS	Video and Audio Entertainment and Information Services

PREFACE

This is the first major report resulting from Committee inquiry from the House of Representatives Standing Committee on Transport, Communications and Infrastructure. In time it may well prove to have been the most difficult.

The regulation of broadcasting has had a long and controversial history. It will almost certainly continue to attract controversy because of the unique nature of broadcasting. This uniqueness is never more obvious than with the power of television to inform, to educate, to entertain and therefore to influence.

The inquiry into the role and functions of the Australian Broadcasting Tribunal stimulated considerable community interest. I appreciate the time, the contributions and the efforts of other Members of the sub-committee appointed to take evidence - Neil Brown and Russ Gorman. We were joined and well supported by Alexander Downer and John Scott.

On behalf of the Committee I thank all those who made submissions, particularly those who made substantial submissions and appeared before the sub-committee at public hearings. The Committee was also impressed by the contributions from people not directly involved in the industry. Whilst many of their submissions were not long in detail, they represented a clear concern of some sections of the community. The Committee appreciates that many more contributors would also have liked to appear personally before the Committee; it believes that the cross-section of witnesses accurately reflected the views of the community.

I would like to place on record my appreciation of the work of the secretariat: Malcolm Aldons, the Secretary, and project officers Patrick Regan and Christopher Paterson, who collated and sorted the submissions, assisted in the organisation of the inquiry and the preparation of the report; and, in particular, June Murphy who had the onerous task of keying in our numerous drafts and amendments. I also thank Leo Grey our adviser.

Needless to say, this report is very much the product of considerable deliberations by Members. It represents the views of the Committee.

JOHN SAUNDERSON, MP
Chairman

24 November 1988

CONCLUSIONS AND RECOMMENDATIONS

The Conclusions and Recommendations of this report are brought together in this section and arranged in the order of the chapter of the report in which they appear.

The Conclusions highlight matters or issues the Committee considers to be important. The Recommendations are specific suggestions for change and are directed at the Government, a particular Minister or the Australian Broadcasting Tribunal.

OVERRIDING ISSUES

OBJECTIVES IN ACT

Recommendations

1. The *Broadcasting Act 1942* be amended to include the objectives of broadcasting policy. These objectives amongst others should be -

   (a) to maintain the viability of the broadcasting system;

   (b) to maximise diversity of choice;

   (c) to discourage concentration of media ownership and control;

   (d) to restrict foreign ownership and prohibit foreign control of commercial broadcasting;

   (e) to encourage Australian content;

   (f) to provide services that are relevant and responsive to local needs;

   (g) to improve quality; and

   (h) to protect the public and particularly children from offensive material by the setting of appropriate standards.

(paragraph 3.26)

2. The *Broadcasting Act 1942* be amended to make provision for the relevant Minister, from time to time, to make a statement in the Parliament detailing the ways in which the policy objectives specified in the Act would

be achieved: and to require the Australian Broadcasting Tribunal to have regard to such a statement.

(paragraph 3.26)

3. The *Broadcasting Act 1942* be amended to provide that, subject to judicial review by the courts and by the institutions of the administrative law, the role of the Australian Broadcasting Tribunal is to protect the public interest by:

   (a) undertaking those functions set down in the Act; and

   (b) having regard to the policy objectives in the Act and policy statements on broadcasting made by the relevant Minister pursuant to the Act.

(paragraph 3.30)

THE CASE FOR REGULATION

Conclusions on Program Regulation

1. There is a clear case for program regulation of television which should cover the establishment and maintenance of program and advertising standards - children's programs, standards on taste and violence and Australian content.

2. There is also a clear case for the regulatory authority to have the power to improve the quality of television.

3. Self-regulation, where appropriate, should be the outcome of a public participation process with licensees being accountable to the regulatory authority.

(paragraph 3.47)

Conclusions on Structural Regulation

4. The regulation of entry into commercial television markets should continue until the possible effects of Pay TV (satellite and cable) have been fully considered.

5. The Government should keep under constant review the issuing of new licences as a means of providing greater competition and increased variety in programs.

6. Regulation which prevents undue concentration of ownership and control of commercial broadcasting should be maintained.

7. Regulation of foreign ownership and the prohibition of foreign control of commercial broadcasting should also be maintained.

(paragraph 3.60)

PUBLIC ACCOUNTABILITY

Conclusions

8. Licensees are not directly accountable to the public but to the regulatory authority, i.e. the Australian Broadcasting Tribunal, by means of a process of public participation.

9. Such participation should be encouraged, whenever possible, by use of Section 17C(1) inquiries which are non-adversarial.

10. The Tribunal should endeavour to widen public involvement in the development of standards through the use of alternative processes other than public hearings, such as qualitative surveys.

(paragraph 3.70)

LICENCE GRANTS AND RENEWALS

LICENCE GRANTS

Exclusive Licensing Criteria

Recommendations

4. The licensing criteria for licence grants be made non-exclusive by allowing the Australian Broadcasting Tribunal to take into account any other matter or circumstance the Tribunal considers relevant.

5. The exclusive licensing criteria be retained for licence renewals and approval of transactions but provision be made for the new matters taken into consideration in licence grants to apply to renewals and transactions, if relevant.

(paragraph 4.38)

LICENCE RENEWALS

Extension of the Period

Recommendation

6. The current maximum renewal period of three years for a licence be retained.

(paragraph 4.49)

LICENCE RENEWALS

Area Inquiries

Recommendations

7. Section 18A(1) of the *Broadcasting Act 1942* be amended to:

   (a) specify that in addition to the inquiries and hearings already provided for in the Act there be separate area inquiries for television and radio services provided for in the area, and that such inquiries to be held at the discretion of the Tribunal; and

   (b) require the Australian Broadcasting Corporation and the Special Broadcasting Service to attend and take part in area inquiries.

8. Section 18A(1) be amended and brought into operation as soon as possible.

(paragraph 4.61)

LICENCE RENEWALS

Networking Licensing

Recommendations

9. Networks not be licensed.

10. Pursuant to Section 134 of the *Broadcasting Act 1942*, a regulation be made allowing the Tribunal to apply to all licences under common ownership a decision made at any licence renewal hearing which deals with matters common to all these licences.

11. Pursuant to Section 134 of the *Broadcasting Act 1942*, a regulation be made empowering the Tribunal to require that all licensee agreements, whether with respect to ownership or with respect to provision of programs, which result in networking arrangements be registered with the Tribunal.

12. The Minister refer to the Tribunal for inquiry and report under Section 18(2) of the *Broadcasting Act 1942*, the need to set minimum hours of local programming that licensees must transmit.

(paragraph 4.89)

OWNERSHIP AND CONTROL

Recommendations

13. (a) a person shall provide the Australian Broadcasting Tribunal with specified details of -

(i) any proposed transaction in respect of shareholding, voting or financial interests, where a result of the transaction will be that the person acquires an interest which (together with any other such interests held by the person) exceeds the minimum prescribed interest threshold for the affected licence(s).

(ii) any other proposed transaction, agreement, arrangement, understanding, resolution or appointment (or class thereof) which might be the cause of a real change in control of the operations or selection or provision of programs of a licensee.

(b) a person shall lodge an application seeking the approval of the Australian Broadcasting Tribunal for any transaction, agreement, arrangement, understanding, resolution or appointment (or class thereof) referred to in (a) above, where -

(i) in the case of a transaction in respect of shareholding, voting or financial interests - the transaction causes the interests held by the person in a licence to reach or cross, for the first time, one or more of the following levels: 15%, 30%, 50%, 75% and 100% of the relevant class of interests (excluding deemed interests) in the licence.

(ii) in any other case - the Tribunal serves a notice on the person requiring the person to lodge an application within a certain period of time (say 28 days), on the basis that, in the Tribunal's preliminary view, the proposed action would be likely to cause a significant change in control of the operations or selection or provision of programs of a licensee.

(c) there shall be no prohibition on completion of any transaction, arrangement, understanding etc., before the Tribunal gives its decision on the application, but the Tribunal shall have the power to issue an order staying the operation of any such act for which an application for approval has been or is to be lodged;

(d) pending the completion of an inquiry by the Tribunal into the application for approval of a share or debenture transaction, any shares or debentures acquired by the applicant shall be vested in the Tribunal or another suitable trustee and held on trust for the applicant; strict rules along the lines of the US model should govern contact between the applicant and the trustee, and the duties of the trustee in the interim period;

(e) in the case of a share or debenture transaction -

(i) if the Tribunal approves it - the shares or debentures held on trust shall be forthwith transferred to the applicant.

(ii) if the Tribunal does not approve it - the shares or debentures shall be retained on trust until such time as another person to whom the trustee proposes to sell the shares or debentures has submitted an application and received the approval of the Tribunal.

(f) in the event that the Tribunal refuses to approve any action for which an application was lodged, the Tribunal may, if it sees fit, issue directions to the applicant and any other relevant person for the purpose of ensuring compliance with the Tribunal's decision.

(paragraph 5.51)

14. (a) consideration should be given to strengthening the obligations on licensees to police compliance with the ownership and control provisions by their own shareholders, and by other companies further up the corporate ladder; and

(b) the 'periods of grace' under the Act for the disposal of excess interests should be ameded to ensure that they cannot be used deliberately to acquire excess interests.

(paragraph 5.52)

PROGRAM AND ADVERTISING STANDARDS

CONCLUSIONS ON STANDARDS

Conclusions

11. It is clear the Australian community believes that TV programs should reflect and maintain community standards.

12. The Tribunal is the appropriate body to determine how these standards are reflected in TV programs through the processes of the Tribunal, including public inquiries.

13. There is public concern about what are perceived as declining standards, relating particularly to the quantity of violence in TV programs, how violence is portrayed on television and the possible link between such programs and violence in the community.

14. There is a heavy obligation on the Australian Broadcasting Tribunal to lay down program standards which properly reflect community views. This obligation extends to ensuring these standards are observed.

15. Likewise, appointments to the Australian Broadcasting Tribunal are important and there is a heavy obligation on the Government to appoint members to the Tribunal who understand the community's high expectations of them and who are capable of reflecting the community's standards. The Government should therefore engage in a consultative process before appointments to the Tribunal are made.

16. Regulation of Australian content including the determination of quotas for Australian drama should continue, and should continue to be determined by the Australian Broadcasting Tribunal.

(paragraph 6.44)

REGULATION OF ABC AND SBS BY THE TRIBUNAL

Recommendations

15. The *Broadcasting Act 1942* be amended:

    (a) to make the Australian Broadcasting Corporation and the Special Broadcasting Service subject to all of the Australian Broadcasting Tribunal's powers to regulate program standards; and

    (b) to require the Tribunal, when enforcing such standards, to take account of the special responsibilities of the national broadcasters.

16. Section 6(2)(a)(ii) of the *Australian Broadcasting Corporation Act 1983* be repealed.

(paragraph 6.60)

OTHER MATTERS

17. The *Broadcasting Act 1942* should be amended to allow the Australian Broadcasting Tribunal to exempt licensees from adhering to particular standards in order to broadcast other, significant events. Any such exemptions should involve making up the program(s) so exempted.

(paragraph 6.66)

ENFORCING STANDARDS AND SANCTIONS

ENFORCING STANDARDS

Conclusion

17. Current sanction powers available to the Tribunal are appropriate, but a monitoring system is required to ensure compliance with standards.

(paragraph 7.44)

Recommendations

18. The Tribunal should institute a system of monitoring television and radio broadcasts based on random spot checking to detect breaches of program standards and licence conditions.

19. In the case of television and radio broadcasts, a complete record of each day's transmission should be retained by the Corporation or licensee, as the case may be, for a period of six weeks from the date of transmission, and these records be made available to the Tribunal on request.

(paragraph 7.45)

20. Both industry and the Australian Broadcasting Tribunal develop and undertake a public education campaign with the objective of improving the understanding of the operation of the broadcasting system and responsibilities of both licensees and the Tribunal.

(paragraph 7.50)

COMPETITIVE LICENCE RENEWAL

Recommendation

21. The *Broadcasting Act 1942* be amended to provide that where the Australian Broadcasting Tribunal grants a licensee a short-term renewal and where at the end of that period the Tribunal determines that the licensee has not corrected the deficiency that led to the short-term renewal, the Tribunal can invite applications for that licence and select one of those applicants.

(paragraph 7.68)

1: OVERVIEW

Introduction

1.1 This inquiry by the House of Representatives Standing Committee on Transport, Communications and Infrastructure into the role and functions of the Australian Broadcasting Tribunal has generated significant community interest. An unprecedented number of submissions - over 4000 - has been received. The majority of them are one or two page letter submissions from persons all around Australia requesting that the powers of the Tribunal to establish and enforce program standards be either retained or increased.

1.2 The Committee has endeavoured to make its inquiry processes both public and participatory. Oral evidence was taken on 15 occasions, in all the State capitals and in Canberra. Over 100 witnesses appeared before the Committee and they represented a wide variety of interests - consumer protection groups, general interest groups, religious groups, industry (radio and television), government departments and agencies and private citizens. Details of the inquiry processes are shown in Appendix 1.

1.3 This report deals mainly but not exclusively with television. Radio does not raise the same concerns as television. This is not because there has been any easing of the regulations covering the licensing of radio stations. The need for close supervision has been reduced by increased competition and diversity, particularly in metropolitan radio markets. This is not the case with television and is unlikely to be so for a considerable time.

1.4 Broadcasting, and particularly television, is a subject about which people hold strong if not passionate and widely different views. These views reflect the enormous capacity of television to inform, to educate, to entertain, and thereby to influence. It is television's powerful capacity to influence combined with the fact of the oligopolistic structure of the industry[5] that has produced regimes of regulation and control throughout the Western world.

1.5 In Australia, as elsewhere, technological developments are offering new opportunities and presenting new challenges. Satellite and fibre optic cable offer the potential for greatly increased diversity of choice for viewers.

1.6 It is against this background of significant community interest and concern, the new opportunities presented by technological change and the influence of television that the Committee has conducted its inquiry and constructed its report. This Overview Chapter is more than a summary. It

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[5] Control by a few.

brings together and re-interprets the salient features of the report and in doing so reinforces the broad **focus and purpose** of what the report attempts to achieve.

1.7 This report attempts to achieve six things. First, it supports the continued regulation of commercial broadcasting, particularly commercial television, by the Australian Broadcasting Tribunal. Second, the report endorses some increases in the power of the Tribunal to improve quality in broadcasting. Third, it calls on the Tribunal to introduce random spot monitoring of programs for compliance with ABT standards. Fourth, it clarifies the respective roles of government and Parliament and the Tribunal. Fifth, it defines and simplifies the role of the Tribunal in the ownership and control of broadcasting. And finally the report re-defines the concept of public accountability and supports the continuation of appeals to the Administrative Appeals Tribunal against decisions of the ABT.

1.8 A striking feature of broadcasting is the strong interconnections between the various parts and even the bits and pieces. It is what a House of Commons committee (Westminster) calls the 'seamless robe' of broadcasting: that finance, structure and technical developments are all interrelated and that changes in one area would affect the whole of the current structure of broadcasting.[6]

Commercial Viability

1.9 A clear and important example of these interrelationships is the commercial viability of the system. When the need for various policy objectives of broadcasting are scrutinised and the interrelationships between objectives analysed, it becomes clear that maintaining the commercial viability of the system is a major objective. This guarantees the capacity of industry to sustain many other objectives, particularly the encouragement of Australian content (and drama quotas), maintenance of and improvements in quality and increased diversity of choice.

1.10 There have been numerous calls for the Broadcasting Act to contain a concise set of policy objectives. The Committee supports these calls but emphasises that there should also be more detailed Ministerial statements which explain how government proposes to implement the broad policy objectives contained in the Act.

Structural and Program Regulation: Roles and Responsibilities

1.11 The need for regulation is conceded by all licensees and others who made submissions or appeared before the Committee at public hearings. What may be at issue is the coverage, extent and nature of that regulation.

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[6] House of Commons Home Affairs Committee (Westminster) 1988, *The Future of Broadcasting*, June 1988, p.vi.

1.12 The Committee has seperated structural regulation from program regulation. A key feature of the former is controlling (or regulating) entry into the market, a by-product of commercial viability. Other objectives of structural regulation include preventing undue concentration of ownership and control of commercial radio and commercial television.

1.13 The primary responsibility for structural regulation should lie with the government of the day which is answerable to the Parliament. This means that government would regulate the number of licences in any given area and also that the Tribunal would not have the power to impose its own rules or limits of undue concentration in preference to those of Parliament in licensing or ownership changes matters.

1.14 Program regulation deals with the establishment and enforcement of standards to promote or protect the interests of all or targeted groups within society. Such regulation covers moral standards, children's television standards, advertising standards and the rules relating to Australian content and drama quotas.

1.15 The primary responsibility for program regulation should lie with the Tribunal. Such regulation is more suited to a regulatory body than a Minister because of the public processes for decision-making and the administrative workload of monitoring those decisions.

1.16 This division of responsibility between government, the Parliament and the Tribunal should make it clear where primary responsibility lies. The role and functions of the Australian Broadcasting Tribunal then would be to protect the public interest in matters given to it by the Parliament (having regard also to the Ministerial statements referred to in paragraph 1.10) but subject to judicial review by the courts and the institutions of administrative law.

The Tribunal as Quality Controller

1.17 One of the objectives of broadcasting policy is to improve quality. In commercial broadcasting quality is determined in part by ratings. Ratings have been criticised for producing lowest common denominator programs for the largest possible audience, and thus for forsaking quality for ratings. The report recognises and endorses the important role of the Tribunal in establishing and enforcing standards and improving quality.

1.18 Quality can be maintained by not increasing the period of licence renewal. Quality can be increased by giving the Tribunal the power to conduct area inquiries and in special circumstances to make renewals competitive. Appropriate recommendations have been made.

1.19 The Committee is of the opinion that the Tribunal should continue to have powers to establish and enforce program standards. As part of its quality control function, the Tribunal should conduct spot checks of broadcasts to find out whether its program standards are being complied with.

1.20 Another part of this function is to bring both the Australian Broadcasting Corporation and the Special Broadcasting Service under the control of the Tribunal in respect of program standards. It makes little sense for these organisations to be exempt from Tribunal standards.

Ownership and Control

1.21 One of the Tribunal's major roles is the supervision of changes in ownership and control of licences. As long as there is a licensing system, there is a need for a system of vetting changes in ownership or control in order to prevent licensing decisions from simply being subverted by the sale of a licensee company or the signing of an exclusive program supply agreement. But the present system is far too complicated, administratively burdensome and unclear about its basic policy base to continue in its present form.

1.22 The Committee has re-examined the basic policy and has concluded that the Tribunal should concentrate on preventing changes in ownership or control of a licensee company which would nullify the Tribunal's decision to grant the licence to that company. By focussing on that policy objective, it is not only possible to produce a more effective system but also to eliminate much of the regulatory dross that currently consumes Tribunal and licensee resources for little public benefit.

1.23 The Committee has proposed a package of measures, incorporating the adoption of a 'trustee' system for major share transactions along the lines of that in force in the United States, and the holding of mandatory inquiries whenever a purchaser of shares cross certain shareholding 'hurdles'. The Committee has also proposed a widening of the scope of the Tribunal's supervisory powers to cover any kind of change in control, not just that arising from a share transaction, coupled with the discretion to concentrate just on those changes which are significant in terms of the policy objective.

Accountability

1.24 The concept of accountability as it applies to broadcasting can be divided into three parts. The first part is the major one and requires a re-definition of the concept. The Committee does not accept that broadcasters are accountable to the public. They are accountable to the Tribunal through a process of public participation. Recognition of this reality should confirm the role of the Tribunal as the protector of the public interest as described in paragraph 1.16.

1.25 The Tribunal in turn is accountable to the Administrative Appeals Tribunal for the quality of some ABT decisions. This is the second tier of accountability. The Committee has rejected calls for this appeals process to be abolished. In its broadest sense appeals to the AAT are a check against the possible misuse of power. They should be retained for that reason.

1.26 The Tribunal is also accountable to its creator, the Parliament. The work of examining the usefulness of regulatory agencies such as the Tribunal is unsuited to the chamber proceedings in the two Houses. Standing committees of the Parliament with their procedures of public inquiry and public participation are well placed to undertake this work.

Technological Change

1.27 A reference which the Committee has received but has not activated as yet is the examination of the possibilities for the development of and the appropriate means of regulating new broadcasting-related services. It may well be that 'Pay TV' requires a lesser and lighter type of regulation to what exists with free-to-air television. Nevertheless, some social regulation may be necessary. There is community concern about violence in society and violence on television. The effectiveness of any regulation of the portrayal of violence would be diminished if it did not cover Pay TV or Video and Audio Entertainment and Information Services systems such as Sky Channel.

Other

1.28 During the course of the inquiry numerous proposals, suggestions and recommendations calling for improving or increasing broadcasting regulation were put to the Committee. It has not been possible to deal seperately with each of these proposals. By establishing or confirming the rationale and direction of broadcasting regulation the Committee hopes that its report covers directly or indirectly most of these proposals.

1.29 The Communications Law Centre says that legal aid should be made available for organisations to participate in Tribunal inquiries and in judicial or administrative appeals from Tribunal decisions.[7] As it stands the request is open-ended and the Committee would have no idea of the costs of legal aid. It is said that the 'broad aim of legal aid delivery is to ensure that needy persons get access to justice in respect of their legal problems'.[8] There is then the additional problem of determining whether and why exceptions should be made to general rules governing eligibility for legal aid.

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[7] Submission No. 3188, p.33.

[8] Administrative Review Council, *Report to the Attorney-General, Access to Administrative Review*, Report No. 30, May 1988, p.3, Australian Government Publishing Service, 1988.

1.30 There are alternatives to legal aid for public participation in Tribunal inquiries. The Committee has commended the Tribunal for using the non-adversarial s.17C(1) inquiries. Public participation would be more forthcoming if there were broad-based inquiries such as the current ones on children's television, Australian content and drama quotas and violence on television. It is this type of inquiry rather than renewal hearings that are likely to promote public interest and participation.

1.31 If the community wants representation at specific types of hearings, then a prerequisite is the formation of a national association. If such an association can be formed there would be Committee support for government funding.

Conclusions

1.32 The inquiry into the role and functions of the Australian Broadcasting Tribunal has been long, extensive and complex. Any report on this subject will tend to be judged differently by those who win and those who lose from its outcomes. The Committee report should be judged by the contribution it makes to policy formulation in the regulation of commercial broadcasting.

2: BACKGROUND

2.1 Government recognised the significance of telecommunications services from their beginnings and moved to ensure government control with the introduction of regulations in 1905 under the Wireless and Telegraphy Act. Broadcasting became technically viable by the 1920's and specific broadcast regulations were introduced in 1923. They were amended in 1924 to provide for two classes of radio licence, 'A' and 'B'.

2.2 'A' class licences were to be supported primarily by receiver licence fees. These were never commercially viable and this class of licence was replaced by the Australian Broadcasting Commission in 1932. The 'B' class stations were the beginning of today's commercial broadcasters.

2.3 By the 1930's the commercial stations were becoming profitable and influential. In 1935 there were 65 commercial radio stations of which Amalgamated Wireless (Australasia) Ltd owned or controlled 13 and the Melbourne Herald owned or controlled 11.[9] The newspaper owners were becoming involved in broadcasting and there were concerns emerging among political interests that undue influence was accruing to a small number of people. concerns which are still being expressed today. As a consequence, regulations were introduced to control concentration of ownership.

2.4 At the same time, broadcasters objected to the overriding regulatory authority of the Postmaster-General with claims of political patronage in the granting of new licences. This concern over the extensive powers of the Minister led to calls for a seperate broadcasting Act.

2.5 In 1942 Parliament's Joint Committee on Wireless and Broadcasting inquired into broadcasting and recommended a consolidated Act. Issues related to the potential for Ministerial interference; standards and ownership and control were also considered.

2.6 Commercial broadcasters had been seeking the establishment of an independent regulatory authority since the introduction of multiple ownership regulation. This was viewed as the best means of limiting the potential for government interference in the allocation of licences and programming. Security of licences had become an issue after the Government revoked 2KY Sydney's licence in 1938 following criticism of the Government by that station. Further licences were revoked for wartime security reasons in 1941 and granted to new interests.

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[9] House of Representatives, *Debates*, 3 December 1935, pp.2365-2367.

2.7 The *Australian Broadcasting Act 1948* was a response to these concerns and led to the establishment of the Australian Broadcasting Control Board (the Board). The authority of the Board covered commercial stations and the Australian Broadcasting Commission (ABC).

2.8 While the role of the Board included the adequacy of technical standards, adequate and comprehensive programming and a number of program objectives, major powers remained with the Minister. The Board could only make recommendations to the Minister, it had no substantive powers.

2.9 In 1951 the issue of ownership and control again became prominent, on this occasion it was the matter of foreign ownership. The trigger for this concern was an attempt by British interests to take control of a number of commercial radio stations. This prompted a resolution in both Houses of Parliament that there should be no foreign control of Australian broadcasting.

2.10 The Royal Commission on Television in 1954 provided the basis for the *Broadcasting and Television Act 1956*.This extended the radio regulatory system to television and provided for a public inquiry prior to the granting of licences. It also removed the ABC from Board regulation.

2.11 The first television licence grant inquiries (under interim legislation) in Sydney and Melbourne demonstrated a number of procedural problems. Applicants used legal counsel as representatives and proceedings became very formal, lengthy and expensive. Although changes were made in the *Broadcasting and Television Act 1960*to address these problems, many would make the same criticism of current inquiry procedures.

2.12 At these initial licence grant inquiries, control of broadcasting was a major issue. Of particular concern were local ownership and concentration of ownership as well as cross-media control. This concern was demonstrated in 1958 when Sydney and Melbourne interests succeeded in gaining the Brisbane and Adelaide television licences, after the Government rejected the Board's initial recommendation.

2.13 Further controversy ensued in 1964 when Ansett Transport Industries Ltd was unsuccessful in bidding for a Brisbane television licence and simply purchased a controlling interest in the successful applicant. In 1981 News Corporation Ltd behaved in a similar manner with regard to NBN-3 Newcastle and WIN-4 Wollongong.

2.14 Concern with concentration led to anti-monopoly provisions through the regulation of share transactions in the *Broadcasting and Television Act 1965*. These regulations were further amended in 1981 following concern after takeovers involving TEN-10 Sydney and WIN-4.

2.15 Prior to the establishment of the Australian Broadcasting Tribunal (ABT), concerns had been raised by the Senate Select Committee on the Encouragement of Australian Productions for Television concerning the lack of willingness on the Board's part to use licence conditions to enforce the obligations of licensees. Of particular concern was the issue of Australian content. The report on the structure of the broadcasting system by Mr F J Green, commissioned by the Government, in 1976, made a number of recommendations concerning planning, licensing and regulation. These recommendations formed the basis of subsequent legislation in 1976 and 1977.

2.16 The *Broadcasting and Television Amendment Act (No.2) 1976* abolished the Board and established the ABT with responsibility for licensing/inquiry and program functions. Further substantial changes were made with the *Broadcasting and Television Amendment Act 1977*which introduced three year licence renewals after a public inquiry. Powers over licensees and ownership and control were also transferred from the Minister to the ABT.

2.17 These changes were meant to address the question of the potential for political interference and to make licensees accountable to the public for their performance. Ministerial control had been of concern to licensees since the 1930's; with the establishment of the Tribunal it appeared as if their objective had been achieved.

2.18 The notion of public accountability through public inquiries was put to the test at the first renewal inquiry in Adelaide in 1978. The resultant confusion over the status of community groups and the legalistic approach of licensees was said to have reduced the public inquiry process to a farce.

2.19 The Act was further amended in 1985 and an attempt was made to make the inquiry process more accessible to the public. However, the most significant change was in the area of licensing, where licensing of services replaced licensing stations as a means of paving the way for the introduction of new technology.

2.20 The desire to extend the range of commercial services to regional areas and the launch of the AUSSAT satellite provided a challenge to the Government's broadcasting policy. The satellite put the networks in a position to provide three services throughout Australia and the Tribunal warned against the potential for domination by Sydney/Melbourne interests.

2.21 The Government opted for aggregation which involves the expansion and combination of existing service areas to create new service areas with sufficient population to support three competitive services. This approach was complimented by the introduction of new audience reach limits which were meant to address the question of economies of scale in broadcast enterprises, thereby increasing the potential for viability.

2.22 Since 1976 broadcasting and related services have developed dramatically. The Special Broadcasting Service was established, public radio has grown, commercial FM radio has been extended, satellite services to remote areas have been introduced and public television is being considered.

2.23 These changes have taken place against a background of rapid technological change in all spheres of broadcasting which has impacted upon existing services and opened up new opportunities through the use of satellites and optical fibre cable.

2.24 These changes have been influential in recent changes in media ownership. There are no longer clearly defined boundaries between free-to-air broadcasting and other electronic information and communications services.

2.25 The recent comprehensive changes in television and radio ownership appear to represent a decision by the private sector to establish a position in what is becoming an international communications industry. Many existing free-to-air broadcasters have become part of large conglomerates. While details of the long term commercial plans of these companies are not generally available, it is apparent that the acquisition of existing television, and to a lesser extent radio, operations are in some cases part of a strategy of taking a position in the expanded communications industry of the future.

2.26 Currently in Australia there are 140 commercial radio stations in 103 service areas. Changes in ownership in recent times have resulted in the creation of five major commercial radio groups: Bond Media Ltd (nine stations), Australian Broadcasting Co Pty Ltd (seven stations), Wesgo (17 stations), Sonance Pty Ltd (seven stations) and Hoyts Media Ltd (14 stations).[10]

2.27 With regard to television, there are 50 commercial licences. For practical purposes these stations are either linked through affiliation agreements or common ownership to form three national networks controlled by Bond Media Ltd, Northern Star Holdings/Westfield and Quintex Ltd.FSubmission No. 4056, Attachment C, p.C5.

2.28 The financial basis of free-to-air commercial broadcasting has not changed since commercial radio operations first commenced. The commercial licesee operates a business based primarily on selling a single commodity, air-time for advertising.

2.29 The basic concerns of government regarding broadcasting have also changed very little over the years, i.e. concentration of ownership, standards, regulation of entry into the industry and adequate and comprehensive services.

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[10] Submission No. 4056, pp.7-9.

On the other hand, licensees have always been concerned to have a 'fair' regulatory system with an independent arbiter and minimal direct political intervention.

2.30 Current broadcast policy is being determined against a background of changing ownership, rapid technological change and continuing concerns over concentration of ownership and program quality and diversity.

2.31 Policy formulation is still confronted by the requirement to balance the need for regulation of broadcasting to achieve social ends and the effects of regulation on the economic viability of broadcasting enterprises.

3: OVERRIDING ISSUES

Background

Terms of Reference

3.1 The reference received from the former Minister for Transport and Communications, Senator the Hon Gareth Evans, QC, asked the Committee to '(e)xamine the role and functions of the Australian Broadcasting Tribunal in regulating the Australian commercial broadcasting sector, and in particular:

(a) the basis and conditions upon which licences are granted and renewed, and options for change;

(b) the role of the ABT in relation to changes of ownership and control of commercial broadcasting licences, including the extent to which such changes should require prior or subsequent approval;

(c) the role of the ABT in establishing and enforcing program and advertising standards; and

(d) appropriate sanctions for breaches by licensees of provisions of the Broadcasting Act, including undertakings given pursuant to the Act as to "adequate and comprehensive services" and use of Australian resources.'[11]

3.2 Terms of reference for any inquiry require interpretation and expansion. Those for this inquiry raise questions that go to the heart of regulation of commercial broadcasting as it exists today and to the extent and type of future regulation, recognising the importance and opportunities of technological change. In short, Government, Parliament and the public need to recognise the importance of putting in place a regulatory framework that is relevant for the early 21st century. It is these matters the Committee proposes to address in this report.

The Position of Radio

3.3 In examining the rationale for regulation the Committee will concentrate on television. Radio is different because of historical developments, diversity of ownership and range of choice for listeners. It also does not raise the same concern as television. The opening up of the radio spectrum has resulted in specialisation. In metropolitan areas in particular there is now much greater variety in programs. Mr M Armstrong, a former member of the Tribunal and

[11] Attachment in a letter dated 18 November 1987 from the former Minister - see Transcript of 9 February 1988, pp.8, 8A.

author of a number of publications on broadcasting law and practice, says that compared with the similarity of commercial formats of earlier decades the listener benefits greatly from extra choice. The need for regulation, although still necessary in solus markets, is less than in the past. He adds that at the time the original radio standards were written, 'competition and diversity in radio ... were in the same kind of position as television is today and as television appears likely to be for some time to come'.[12]

The New Technologies

Background

3.4 A reference which the Committee has received but has not activated is the examination of the possibilities for the development of and the appropriate means of regulating new broadcasting-related services.[13] There is no wish to pre-empt the outcome of that inquiry. Nevertheless, it is appropriate to make some broad and general comments on the implications of the new and developing technologies.

3.5 The starting point for these comments is the Tribunal's 1985-86 annual report which said that the Broadcasting Act does not deal properly with converging technology at a time 'when the distinction between "broadcasting", "radiocommunications" and "telecommunications", as a whole is becoming increasingly irrelevant'. The Tribunal said any revision of the Act should cover all telecommunications services with point to multi-point potential.[14]

3.6 Point to multi-point (PTM) services are communications services transmitted from a central point to a number of receiving points. As a general rule PTM services deliver identical simultaneous transmissions to all receivers. PTM services may be delivered by satellite, terrestrial radio transmitters or the switched telecommunications network. The services may provide entertainment, education or informal programs to specific or general audiences.

3.7 Video and Audio Entertainment and Information Services (VAEIS) provide programming directed to identified categories of end users in environments outside the home such as licensed hotels, clubs and motels. Radiated VAEIS is not treated as a broadcasting service and requires a licence under the *Radiocommunications Act 1983*. Programs carried by entertainment-orientated VAEIS include sporting programs, live variety shows, televised racing to totalizator agency boards and audio programs. These services may be funded by

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[12] Armstrong M, 1986, 'Deregulation of Radio', *Media Information Australia*, Number 41, August 1986.
[13] Transcript of 9 February 1988, p. 8A.
[14] Australian Broadcasting Tribunal *Annual Report 1985-86*, Parliamentary Paper No. 374/1986, p.xiv, Canberra, 1986.

advertising revenue, service charges or equipment lease. Initially there were three satellite providers of entertainment VAEIS. One provider went bankrupt and another does not operate so that the Bond Group which operates Sky Channel is the only provider of satellite-delivered entertainment VAEIS today.[15] Other VAEIS may be delivered through the Telecom network.

3.8 Technological developments are blurring the distinctions between domestic and non-domestic (business) audiences. For example, viewing not traditionally associated with the home could become possible with fibre optic cable-channels for the stock market and the medical profession. Technological developments, that is special scrambling and decoding devices, could make it easier to levy charges directly on the receiver. One such development is Pay TV where, for a monthly fee or 'pay per view' (a charge per program), viewers are given a choice of programs that are different to that of free-to-air radiated programs.

Problems

3.9 The basic problem with current regulatory regimes is that they are based on the method of delivery. This results in **similar** services delivered by **different** technologies being regulated in **dissimilar** ways in **different** Acts of Parliament. Mr L T Grey says that the 'current legal structure is directing our minds to the wrong questions - instead of being forced to decide whether or not a service is broadcasting, we should simply be able to concentrate on the rules that are appropriate to that kind of service'.[16]

3.10 The Broadcasting Act which applies to free-to-air broadcasting is dominated by government policy rather than technical considerations. Briefly, it restricts entry into commercial radio and television and regulates the activities of the licensees.

3.11 In contrast, PTM services including VAEIS are licensed under the Radiocommunications Act which regulates technical standards and operating rules to minimise interference. This Act established a simple licensing regime which did not regulate entry and ensured 'reasonable' regulation.[17] There are guidelines on technical and content matters for all VAEIS operators but when they use the Telecom network the undertaking is an administrative procedure and is not based on legislation.

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[15] Submission No. 3169, p.3.

[16] Grey L, 1986 'Satellite Video Entertainment Services: Is our Law Off the Planet Too?', *Communications Law Bulletin*,Vol. 6, No. 3, October 1986, p.1.

[17] The High Court case, *Miller v TCN Channel Nine Pty Ltd* (1986) established that s.92 of the Constitution applied to radiocommunications and that regulations must be 'reasonable' - 67 ALR 321.

Comment

3.12 These apparent inconsistencies between different regulatory regimes will extend into the future to an even greater extent with the introduction of cable and Pay TV unless regulation is based on service.

3.13 There are several regulatory strategies to choose from, for example, the current position or a comprehensive structure of regulation. The strategy the Committee has been made most aware of is the regulation in a single Act of all services which fall within a more expansive definition of broadcasting. This would mean that VAEIS and cable and Pay TV would come under the same regime as current radio and television stations. The Tribunal would thus have responsibility for all broadcasting-type services.

3.14 The major advantage of this strategy is consistency of regulation. A possible disadvantage is inappropriate regulation in some areas, a point made by industry and which, according to Bond Media, could stifle development of new services.[18]

3.15 The selection of a particular strategy depends initially on what one wants to achieve in broadcasting. The starting point for this analysis is the objectives of broadcasting and it is to this matter that we now turn.

Objectives In The Act

Background

3.16 Several witnesses have asked for a statement of policy objectives to be included in the legislation. The Communications Law Centre says the Tribunal operates in a policy vacuum with no clear idea of the legislature's intentions with respect to the overall purpose and objectives of the regulatory and licensing process. The Tribunal and Grey make their suggestions in the context of removing the restrictions to decision-making inherent in the exclusive licensing criteria. 'The Tribunal believes that any perceived inconsistencies in decision-making that could follow removal of the exclusive licensing criteria could be overcome if the Act contained a concise statement of policy objectives.' Grey says the broadcasting acts of New Zealand and Canada in particular contain a set of broad policy objectives. He also says that the policy objectives in Australian legislation should include some broad service objectives for each of the broadcasting sectors, i.e. national, public and commercial.[19]

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[18] Submission No. 3169, p.7.
[19] Submission Nos. 3153, p. 10 and 3064, pp. 9,10,20,21.

3.17 The policy objectives in the Broadcasting Act 1967-68, Canada, can be separated into several parts. These include:

- ***ownership*** - the system should be effectively owned and controlled by Canadians, 'so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada'; and
- ***quality*** - that the programming provided by each broadcaster should be varied, comprehensive, of high standard and use predominantly Canadian creative and other resources.[20]

Objectives of Broadcasting Policy

3.18 The objectives of broadcasting policy are not stated explicitly in the Australian legislation but some of them can be inferred from the Act. The former Minister has reiterated the stated objectives which are -

(a) to maintain the viability of the broadcasting system;
(b) to maximise diversity of choice;
(c) to discourage concentration of media ownership and control;
(d) to encourage Australian content;
(e) to provide services that are relevant and responsive to local needs; and
(f) to improve quality.[21]

3.19 These objectives are clearly incomplete. The objective on restricting foreign ownership is not listed and neither is the objective relating to the setting of appropriate program standards which is implicit in the legislation. To make objective setting more complete and explicit the following objectives of broadcasting policy should be added to those listed by the former Minister:

- **to restrict foreign ownership and prohibit foreign control of commercial radio and commercial television; and**
- **to protect the public and particularly children from offensive material by the setting of appropriate standards.**

3.20 Care has to be exercised in the setting of objectives. For example, the objective 'to **maximise** diversity of choice' (emphasis added) when read literally gives an unintended priority. A strict interpretation could make it the overrid-

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[20] Office Consolidation, Broadcasting Act (Canada), 1967-1968, Section 3.
[21] Senator the Hon Gareth Evans, QC, then Minister for Transport and Communications, in *The Price of Being Australian*,Conference Report, Sydney, 31 August - 1 September 1987. Australian Broadcasting Tribunal, March 1988.

ing objective. Clearly this is not the case. Other objectives would limit achieving maximum diversity of choice. The objective should read 'to **increase** diversity of choice'.

3.21 Yet even if all the objectives are set out carefully there would be still a number of important questions to answer. First, there is the question of whether the objectives should apply to all three sectors of broadcasting, ie national, public and commercial. Second, one needs to be aware of the 'trade-offs' or tensions between objectives. Third, there is the matter of alternative or different ways of achieving objectives and these include the alternatives of deregulation, self-regulation and regulation. Finally, one needs to know who (government, Parliament or the regulatory authority) has primary responsibility for (a) setting an objective; (b) detailing the requirements for specifications required to meet that objective; and (c) monitoring whether the requirements are adhered to.

3.22 The Tribunal refers to the inherent tensions in objectives (a) to (e) of paragraph 3.18 and to the possibility that each of these objectives could be in conflict with other objectives. For example, the Tribunal says the objective of maintaining the viability of the system can cause tensions with maximising diversity of choice, encouraging Australian artists, local needs and discouraging concentration.[22] The problem the Tribunal identifies is well known in public policy analysis. It is one of 'trade-offs', to achieve more of one objective, one has to trade-off or accept less of another objective.

3.23 As the Committee sees it, a basic objective is maintaining the economic capacity of the industry to sustain many other objectives, particularly those relating to the encouragement of Australian content and drama quotas and improvements in quality. The case for maintaining viability (i.e. economic capacity) by controlling entry into the market will be examined in paragraphs 3.48 to 3.60 of this chapter.

Conclusions and Recommendations

3.24 The Tribunal's call for the Act to contain a statement of policy objectives may have been prompted by uncertainty as to its role in a world of rapid technological change in broadcasting. A major purpose of setting out the objectives of broadcasting is for what is called 'program evaluation' - an overall assessment of performance against the stated objectives. Basing its views on overseas practice the Green Report (1976) outlined the major programming

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[22] Australian Broadcasting Tribunal 1984, report on *Satellite Program Services, inquiry into the regulation of the use of satellite program services by broadcasters*,Vol. 1 pp. 60,61, Australian Government Publishing Service, Canberra, 1984.

objectives for inclusion in broadcasting legislation.[23] This statement is not dissimilar to that in the Canadian legislation as reproduced in part at paragraph 3.17.

3.25 The problem with such statements, whether they be used to evaluate programs or to assist an organisation in its work, is their generality. They give an indication of broad directions and only that, because of the need to use words sparingly in legislation, and, the need to change direction if and when circumstances dictate. By itself the inclusion of policy objectives in the Act will not clear uncertainty. Therefore, such statements need to be accompanied by a more detailed Ministerial statement which explains how government proposes to implement the broad policy objectives contained in the Act. Taken together the two should assist evaluation and give the Tribunal a reasonably clear indication of what the Parliament and government wants to achieve.

3.26 The Committee recommends that:

Recommendation 1: The *Broadcasting Act 1942* be amended to include the objectives of broadcasting policy. These objectives amongst others should be -

(a) **to maintain the viability of the broadcasting system;**

(b) **to maximise diversity of choice;**

(c) **to discourage concentration of media ownership and control;**

(d) **to restrict foreign ownership and prohibit foreign control of commercial broadcasting;**

(e) **to encourage Australian content;**

(f) **to provide services that are relevant and responsive to local needs;**

(g) **to improve quality; and**

(h) **to protect the public and particularly children from offensive material by the setting of appropriate standards.**

Recommendation 2: The *Broadcasting Act 1942* be amended to make provision for the relevant Minister, from time to time, to make a statement in the Parliament detailing the ways in which the policy objectives specified in the Act would be achieved; and to require the Australian Broadcasting Tribunal to have regard to such a statement.

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[23] Postal and Telecommunications Department 1976, *Australian Broadcasting, A report on the structure of the Australian broadcasting system and associated matters*,Parliamentary Paper No. 358/1976, p. 25, Canberra 1977. This report is referred to as the 'Green Report'.

3.27 The primary responsibility for regulating entry into the market should reside with government which is answerable to the Parliament. This should always be the case in major matters of policy. Similarly the Parliament would set the limits on industry concentration. The only function of the Tribunal here would be to supervise compliance with these rules and not to set its own unless that function is prescribed clearly in the legislation.

3.28 The primary responsibility of the Tribunal would be to supervise and where appropriate enforce the rules set by the Parliament in respect of market entry and industry concentration, and more importantly to give effect to objectives (e) to (h) in the recommendation at paragraph 3.26.

3.29 It is necessary for the Tribunal to take account of this division of responsibilities between government, the Parliament and the Tribunal. It should be possible also for the legislation to give the Tribunal additional guidance on its role and functions.

3.30 The Committee recommends that:

> **Recommendation 3: The *Broadcasting Act 1942* be amended to provide that, subject to judicial review by the courts and by the institutions of the administrative law, the role of the Australian Broadcasting Tribunal is to protect the public interest by -**
>
> **(a) undertaking those functions set down in the Act; and**
>
> **(b) having regard to the policy objectives in the Act and policy statements on broadcasting made by the relevant Minister pursuant to the Act.**

The Case for Regulation

Introduction

3.31 The terms of reference require the Committee to examine the role and functions of the Australian Broadcasting Tribunal in **regulating** (emphasis added) the commercial broadcasting sector, particularly in respect of licence grants and licence renewals, ownership changes, establishment of program and advertising standards, and, enforcement of these standards and sanctions. These issues will be addressed in some detail in the succeeding chapters of this report. Taken as a whole they cover the case for and the need for regulation of mainly but not only commercial broadcasting.

3.32 The need for regulation is conceded by all licensees and others who made submissions or appeared before the Committee at public hearings. What may be at issue is the degree of regulation.

The Public Trustee Model of Regulation

3.33 The historical rationale for the regulation of commercial television is based on the acceptance of the public trusteeship' model of regulation. As put by the Catholic Communications Centre, the Hon I M Macphee, MP, and other witnesses, the model maintains that the spectrum is a scarce resource, that to grant a television licence is to bestow a rare privilege and that in return commercial television licensees have a responsibility to enrich the moral, emotional and cultural life of our society.[24] The concept of public trusteeship was referred to by the then Minister for Post and Telegraphs, Mr Davidson, when introducing the first bill covering the regulation of commercial television in the House of Representatives on 19 April 1956:

> *By its very nature, commercial television, like commercial broadcasting, is a business undertaking. Large sums of money have to be invested in stations, and the people who invest the money are entitled to expect a reasonable return on their outlay. But the conduct of a commercial television service is not to be considered as merely running a business for the sake of profit; television stations are in a position to exercise a constant and cumulative effect on public taste and standards of conduct, and, because of the influence they can bring to bear on the community, the business interests of licensees must at all times be subordinated to the overriding principle that the possession of a licence is, indeed, as the royal commission said, a public trust for the benefit of all members of our society.*[25]

3.34 The public trusteeship model, although still a useful starting point on the need for regulation, is too general as a guide which covers the type and extent of regulation. It is also in danger of becoming obsolete. The spectrum scarcity argument is being overtaken by technological change, particularly with the possibility of the introduction of cable and/or satellite television.

3.35 The Business Regulation Review Unit (BRRU) distinguishes economic regulation from social regulation and the Public Broadcasting Association of Australia separates structural from behavioural regulation.[26] The separation of regulation into these two categories helps to focus on the need for particular types of regulation.

3.36 Economic or structural regulation can be said to embrace several objectives. One is to control entry into the market and this includes limiting the number of stations or providers of radio or television, the specification of criteria for selecting a suitable licensee and prior or post approval of changes in

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[24] Submission No. 152, pp.1-4, Transcript of 10 February 1988, p. 199 and Transcript of 22 February 1988, pp. 468 - 471.
[25] House of Representatives, *Debates*, 19 April 1956, p.1534.
[26] Submission Nos. 3, pp.9,10 and 3215, pp.3-6.

ownership. Other objectives are the prevention of undue concentration of ownership or control of commercial television and the limitation of foreign ownership and the prohibition of foreign control of commercial television.

3.37 There could also be several objectives to social or behavioural regulation of television. The BRRU says that social regulation 'deals with the setting of standards and objectives to cater for or protect the interests of all or targeted groups within society'.[27] Social or behavioural regulation includes the establishment and maintenance of various standards for commercial television - moral standards, advertising standards and rules (quotas) relating to Australian content. Such regulation could also include a provision that certain programs be aired at certain times and rules that result in improvements in the quality of programs.

3.38 There are interrelationships between these two types of regulation, particularly between control of market entry and Australian content rules.

The Case for Program Regulation

3.39 If one sets down against a particular economic or social regulatory objective the purpose of that objective, what comes through quite clearly is the importance of television. Television watching is a major recreational activity. Over 80 per cent of Australian homes have a set and television is watched on average for four hours each day.[28] This takes up a considerable portion of recreational time. A distinguishing feature of free-to-air television is that it represents 'free' home entertainment. Programs are received in the house, into lounge rooms, and are seen by adults and children alike. As the Communications Law Centre (CLC) states it is a powerful and pervasive medium.[29] It deals with the particularly sensitive commodities of ideas, information, thought and opinion, compounded by the public perception of the mass media as opinion makers, image formers and culture disseminators.[30] This is what makes television broadcasting unique.

3.40 The broad functions of television are to inform, to educate and to entertain. The industry proposes self-regulation and deregulation for many of the objectives of program regulation, particularly for program and advertising standards. The Federation of Australian Television Stations (FACTS) supports the Tribunal's call for 'the minimum degree of mandatory regulation necessary to protect the public interest in a particular service ...' coupled with a clear statement in the Act about the matters to be covered by standards. FACTS concludes that Parliament should determine these matters.[31]

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[27] Submission No. 3, p.10.
[28] Shoebridge, A, 1988, 'Alcohol on Television', *Media Information Australia*,Number 48, May 1988, p.6.
[29] Submission No. 3188, p.3.
[30] Submission No. 4056, p.36.
[31] Submission No. 3168, pp.20, 21.

3.41 Bond Media travels further down the deregulation track. It says that a lot of regulation has proved to be unnecessary in recent years and gives as examples Australian programming which has nothing to do with rules or quota requirements, and, other standards including those relating to children's programs.[32] Bond Media says one approach is for licensees to develop, publish and periodically review, codes of practice which should not require approval by the Tribunal - 'that would substitute the Tribunal's view for the licensee's, in circumstances where the Tribunal could not be expected to have a more informed or better view of what is expected'.[33]

3.42 The Committee does not accept the Bond Media view that licensees are better placed than the Tribunal to regulate program standards. The weight of the unprecedented number of submissions received, which represent the views of an even greater number of other community members, and our collective experiences as Members of Parliament, lead us to conclude that there should be a neutral umpire to regulate program standards on commercial television. That umpire may well decide that self-regulation is the answer. Self-regulation is a form of regulation. It is the product of consultation between industry, the Tribunal and the public by which the rules so developed are applied by industry itself with accountability to the Tribunal.

3.43 The quality of television programs, including the requirement of Australian content, is another objective of program regulation. The need for the objective is challenged by industry.

3.44 FACTS says the undertaking to provide 'adequate and comprehensive services' cannot be a detailed commitment to provide specific services, specific programs or program types. It adds that the Tribunal has come close to doing this and intimates that this is inappropriate. The limit of the Tribunal's concern, according to FACTS, is what ends up on the screen in the form of a range of programs.[34] Bond Media says something similar in its submission. In evidence Bond Media said it would be apprehensive about any process which led to demands by the Tribunal that particular licensees program their stations in particular ways.[35]

3.45 The Tribunal apparently has a diametrically opposite point of view. Its Chairperson is reported as saying that the Tribunal's role is more as one of improving standards, that the Tribunal should be encouraging licensees to put more money, time and effort into various areas of programming and that the Tribunal should specify ways licensees should go about improving their programs.[36]

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[32] Transcript of 10 February 1988, p.16.
[33] Submission No. 3169, p.16.
[34] Submission No. 3168, pp.28, 29.
[35] Submission No. 3169, pp.12, 13 and Transcript of 10 February 1988, p.132.
[36] As reported in the *Sydney Morning Herald* (21.1.88), the *Melbourne Herald* (31.8.87) and the *Brisbane Courier Mail* (26.1.87).

3.46 Hidden at the heart of this dispute is the role of ratings in ensuring program quality. Audience ratings bring in advertising revenue, the lifeblood of commercial television. Australian Television Network Limited (7 Network) says it is judged constantly by the marketplace and that if it does not pass these critical assessments then Australian viewers simply will not watch commercial television.[37] On the other hand, ratings have been criticised for producing lowest common denominator programs for the largest possible audience, of delivering audiences to advertisers rather than offering programs to viewers and thus for forsaking quality for ratings.[38] Ms G Appleton, a freelance consultant specialising in cultural and policy matters, refers to the limited range of choice on commercial television and to criticisms of lack of diversity and of failure to reflect or cater to differing backgrounds or interests in the audience.[39]

3.47 Improving the quality of commercial television and increasing diversity of choice are not necessarily the same thing. Choice can be promoted by increasing the number of channels for use by Pay TV. But within the free-to-air system there is a role for regulation in improving quality. That role recognises the imperfections of ratings as a means of determining viewer requirements and the need for programs or parts of programs that cater for minority tastes - e.g. children's programs. It also recognises the importance of revenue for commercial television so that the role for regulation is essentially one of fine-tuning.

Conclusions: The Committee finds that:

(a) **there is a clear case for program regulation of television which should cover the establishment and maintenance of program and advertising standards - children's programs, standards on taste and violence and Australian content;**

(b) **there is also a clear case for the regulatory authority to have the power to improve the quality of television; and**

(c) **self-regulation, where appropriate, should be the outcome of a public participation process with licensees being accountable to the regulatory authority.**

The Case for Structural Regulation

3.48 Control of entry into the market has always been a feature of commercial radio and commercial television in Australia. It is being questioned seriously as an objective of structural regulation.

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[37] Transcript of 15 June 1988, p.1314.
[38] *Canberra Times*, 12 September 1988.
[39] Appleton G 1987, 'How Australia Sees Itself: The Role of Commercial Television', *The Price of Being Australian*, Conference Report, Sydney, 31 August - 1 September 1987, Australian Broadcasting Tribunal, March 1988.

3.49 Control of entry into the market is related to the need for maintaining viability. The traditional argument supporting viability is the 'trade-off'. Licensees are compelled to provide certain types of programs which results in additional costs and loss of revenue. The trade-off for such costs and losses is the protection of commercial viability by controlling market entry.

3.50 This is the case as put forward by licensees, Macphee and other witnesses.[40] In particular, it is argued that there is the risk of unregulated competition reducing or preventing increases in the levels of Australian content, particularly Australian drama, because of reduced advertising revenue and the consequential switch from high cost Australian programs to lower cost Australian programs, or, to much lower cost imports.[41]

3.51 The questioning of the need to control entry into the free-to-air commercial television market (and radio as well) attempts to rebut the trade-off case and to substitute a different logic. It is argued that the public interest lies in **industry** not individual station viability and the former is already fairly well protected by economies of scale.[42] The second argument is the 'same for all' one. If existing participants and new entrants both face identical requirements on Australian content and other constraints, then any risks of unregulated competition would be eliminated.

3.52 There would be no need for the Minister or the Tribunal to determine commercial viability. This could be the outcome of a tender process where all tenderers would have to give undertakings identical to those given by existing licensees.

3.53 What is at issue is whether entry into the market should be determined by regulation (Minister or Tribunal) or by the market itself by for example a tender process. The Department said there is room for one more UHF service for Sydney and Melbourne on the spectrum.[43]

3.54 It is not certain that an additional commercial television station will greatly increase diversity of choice by offering more variety in programs, it may simply continue the general similarity of programming that exists between the three current commercial channels.[44] It has been claimed that in the USA an

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[40] Submission No. 3169, paragraph 3 and Transcript of 22 February, p.477.
[41] Transcripts of 10 February 1988, p.171 and 15 June 1988, pp. 1353-55.
[42] Travers Morgan Pty Ltd, Planning and Management Consultants, 1988, *Review of the Regulation of Broadcasting*, p. 40. The review was commissioned by the Department of Transport and Communications.
[43] Transcript of 14 June 1988, pp.1244, 1247 and 1252.
[44] Travers Morgan, p.41.

additional five or six stations would be required before such diversity could be expected. [45] It has also been claimed that in France, increasing the number of channels has not greatly increased diversity of choice.[46]

3.55 Nevertheless, the Government should always keep in mind that it is possible to increase the number of television channels if there is a community need for a wider choice of programming. Additional licences must provide at least some increased variety in programming and must certainly provide increased competition and a generally better service. Likewise, the current licensees should be aware that additional licences can be issued if the Government believes that this course of action should be followed as a means of providing a wider choice of programs.

3.56 The question that needs to be answered is what is the best use of the available spectrum. It can be used for another free-to-air channel, for public broadcasting, another channel for the national broadcaster or for Pay TV. These are matters the Committee will examine in detail in its next inquiry (see paragraph 3.4). They raise issues connected with the relationship between viability and quality. The House of Commons (Westminster) Home Affairs Committee submitted a report titled *The Future of Broadcasting* in June 1988. It said that a 'major fear of an increasingly competitive and fragmented broadcasting environment is that the commercial channels in particular may not be able to generate sufficient resources to make the high quality and to some extent high cost, programmes ...' The conclusion drawn was that it was 'essential that more services are not launched than are capable of being properly financed, given the standards which are expected of a British television service'.[47] These conclusions reflect the way Australian rules have operated up to now.

3.57 The other objectives of structural regulation include the discouragement of concentration of media ownership and restrictions on foreign ownership and prohibition of foreign control. Both are based on the importance of broadcasting.

3.58 The Department says the 'need to avoid an undue concentration of ownership and control of commercial television stations is the key principle' underlying limits on ownership and control. According to the Department the major reason given for imposing strict limits on the ownership or control of

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[45] Travers Morgan, p.41.
[46] *The Economist*.26 December 1967, p.78.
[47] House of Commons Home Affairs Committee (Westminster) 1988, *The Future of Broadcasting*, June 1988, pp. x, xi, Her Majesty's Stationery Office, London.

commercial television licences, thereby restricting the capacity for any one person or organisation to control commercial television is 'its potential to influence public opinion';[48] in other words, the importance of broadcasting.

3.59 Foreign ownership and control of broadcasting has been a matter of concern since the early 1950's. In 1951 both the Senate and the House of Representatives passed resolutions which said that it was undesirable for any person not an Australian to have any substantial measure of ownership or control of any Australian commercial broadcasting station.[49] The regulation of foreign ownership and control is also based on the importance of broadcasting and its potential to influence to public opinion.

3.60 In respect of structural regulation the Committee concludes as follows:

Conclusions: The Committee finds that:

(a) **the regulation of entry into commercial television markets should continue until the possible effects of Pay TV (satellite and cable) have been fully considered;**

(b) **the Government should keep under constant review the issuing of new licences as a means of providing greater competition and increased variety of programs;**

(c) **regulation which prevents undue concentration of ownership and control of commercial broadcasting should be maintained; and**

(d) **regulation of foreign ownership and the prohibition of foreign control of commercial broadcasting should also be maintained.**

Public Accountability

Background

3.61 Western liberal democracies including Australia regulate broadcasting. The information given to the Committee indicates different approaches to regulation,[50] yet none of these appear to contain the special feature of the Australian broadcasting system: public accountability. There is considerable confusion about this concept and in the succeeding paragraphs the Committee will outline what the concept should mean.

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[48] Department of Communications 1986, *Ownership and Control of Commercial Television, Future Policy Directions*,Vol 1: Report, p.42, Australian Government Publishing Service, Canberra, 1986.

[49] As above, p.109.

[50] Travers Morgan, cited before, pp.25-37.

3.62 The public trusteeship model of 1956 may well have had an implied sense of accountability. However, the starting point is the Green Report (1976) which accepted the view put forward in many submissions that the whole of the licensing process is a legitimate area of public interest and that therefore licensing requires public inquiries and public participation in the area of socially important commodities such as broadcasting licences.[51]

3.63 In its 1977 report, Self-Regulation for Broadcasters, the Tribunal advanced a 'public accountability philosophy'. The report said the view that the 'uniquely powerful impact of broadcasting on society required that the public should have the means to make broadcasters accountable to them', and went on to say that the 'philosophy of direct public accountability is the basis of our approach to the regulation of broadcasting'. This approach was based on spectrum scarcity, the public utility of the spectrum and the uniquely powerful impact of broadcasting. Accountability was to be achieved through public inquiries on licence applications and renewals.[52]

3.64 This concept of public accountability has been recognised and confirmed by governments. In October 1977 the then Minister for Post and Telecommunications, Mr E L Robinson, said that broadcasters will be made to account, at renewal hearings, and in public, for their programming performances.[53] In September 1987 when responding to the Tribunal's self-regulation report the then Minister, Mr A A Staley, said that '(b)roadcasters will in future be held directly accountable to the public through public licence inquiry procedures and the requirement of broadcasters to adhere to a promise of performance as a condition of their licence'.[54]

Accountability to the Tribunal

3.65 The term accountability raises questions of who is accountable to whom, by what means (processes) and why. To be accountable or answerable carries with it the implicit inference that the organisation to which one is accountable has the power to require answers, the power to issue directions and the power to enforce compliance with those directions. Thus the concept of broadcasters being or being held accountable to the public is a misnomer. **Licensees are not accountable to the public but to the regulatory authority, the Australian Broadcasting Tribunal, through a process of public participation.**

3.66 In calling for a re-examination of public participation Bond Media ridicules the concept. It says the 'village meeting' model of public participation is of very limited practical value. The overwhelming majority of listeners and

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[51] Cited before, Parl. Paper No. 358/1976, p.69.
[52] Australian Broadcasting Tribunal 1977, *Self-Regulation for Broadcasters*, Parl. Paper No. 170/1977, Canberra 1977.
[53] House of Representatives, *Debates*,13 October 1977, p.2005.
[54] *Commonwealth Record*,11-17 September 1978, p.1216.

viewers do not participate. Those who do are a small number of pressure groups representing union and specialist programming interests. All the available evidence about audience viewing tastes indicates that these groups are not representative of the community at large and their participation 'assumes that periodic exposure of licensees to a self-selected sample of listeners or viewers will make broadcasting services more "accountable" in some undefined way'.[55]

3.67 It has been put to us that licence renewal hearings are poorly attended by the public. One reason is the legalistic procedures which either deny the public participation or frighten people away. This has been the experience of the Federation of Parents and Citizens Associations of New South Wales.[56] It is also the view expressed by the Tribunal.[57]

3.68 In recent years the Tribunal has used a non-adversarial method of public inquiry. Inquiries under s.17C(1) are similar to that of parliamentary committees - the inquiry is advertised, submissions are invited and 'evidence' taken at public conferences at which cross-examination by counsel is kept to a minimum. In addition, the Tribunal publishes background papers and commissions research which it also makes public. The Tribunal has described the value of public conferences as being 'candid and helpful, undiluted by the skills of professional advocates'.[58]

3.69 The Committee commends the Tribunal for its innovative approach to public participation and would like to see this non-adversarial approach used wherever possible. It notes that the former Minister for Transport and Communications has directed the Tribunal, pursuant to s.18 of the Broadcasting Act, to inquire into violence on television.[59]

3.70 In view of much of the foregoing the Committee draws the following conclusions:

Conclusions: The Committee finds that:

(a) **licensees are not directly accountable to the public but to the regulatory authority, i.e. the Australian Broadcasting Tribunal, by means of a process of public participation;**

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[55] Submission No. 3169, p.6.
[56] Transcript of 10 February 1988, pp.251-254 and Submission No. 4072B, p.3.
[57] Submission No. 3153, pp.3,4.
[58] Australian Broadcasting Tribunal 1987, *Advertising Time on Television* p. vii, Australian Government Publishing Service, Canberra, 1987.
[59] Media Statement, then Minister for Transport and Communications, Senator the Hon Gareth Evans, QC, 22 August 1988.

(b) **such participation should be encouraged, whenever possible, by use of Section 17C(1) inquiries which are non-adversarial; and**

(c) **the Tribunal should endeavour to widen public involvement in the development of standards through the use of alternative processes other than public hearings, such as qualitative surveys.**

Accountability to the Parliament

3.71 What one sees in Australia is the Tribunal as the primary regulator of broadcasting subject to judicial review by the courts and the institutions of the new administrative law, combined with the concept of licensees being accountable to the Tribunal through a process of public participation. What may perhaps tend to be ignored in debates is the ultimate responsibility of the Tribunal to its creator, the Parliament. It is the Parliament that has brought the Tribunal into existence and it is the Parliament which retains power to abolish or amend its charter by enacting fresh legislation. The work of examining the usefulness of regulatory agencies such as the Tribunal is unsuited to the chamber proceedings in the two Houses. Standing committees of the Parliament with their procedures of public inquiry and public participation are well placed to undertake this work.[60]

3.72 One of the reasons for establishing the ABT was the principle of a broadcasting system not subject to political interference.[61] This in turn requires the need for the Tribunal to keep and maintain an 'arms length' relationship with the government of the day. The general approach of the Tribunal to the Committee inquiry is that it should not be giving preferred solutions to policy issues because there could be some embarrassment if these were not accepted. The Tribunal could end up having to implement legislation it did not support in the pre-legislation stages.[62]

3.73 The Committee concurs with this view. But the moment the Tribunal accepts membership of a departmental committee that is reviewing the role and function of the Tribunal its views go underground. There is a Departmental review of broadcasting regulation and the current Chairperson of the Tribunal is a member of the steering committee which oversees the work of the group. There is thus an opportunity for policy input from the Tribunal through the group to the Minister. The Tribunal could be giving its preferred solutions to policy issues, something it did not want to do at public hearings. While the Committee does not attach undue importance to this participation, it points out that such participation could put at risk the arm's length relationship the Tribunal should have with the government of the day.

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[60] Wettenhall R and Bayne P, 'Administrative Aspect of Regulation,' *Business Regulation in Australia*(ed R Tomasic), p.99,100, CCH Australia Limited, 1984, p.99, 100.

[61] House of Representatives, *Debates*, 13 October 1977, p.2005.

[62] Transcript of 29 March 1988, pp.898, 899.

Appeals to the Administrative Appeals Tribunal

Background

3.74 The Administrative Appeals Tribunal (AAT) was established under the *Administrative Appeals Tribunal Act 1975* as a general appeals tribunal to review the merits of certain administrative decisions. The essential feature which distinguishes AAT review from that by the courts is the power of the AAT to set aside an administrative decision and substitute its own decision in its place.[63]

3.75 Under s.119A(1) of the Broadcasting Act many decisions made by the Australian Broadcasting Tribunal under a 'substantive power' (s.17A(2)) are subject to a complete review on the merits by the AAT. Thus the AAT can review decisions relating to the variation, revocation or imposition of licence conditions, refusal to renew a licence, renewal of a licence for a period of less than three years and refusal to consent to a licence transfer or share transaction.

3.76 In 1982 the Administrative Review Council (ARC) recommended that all decisions made by the Australian Broadcasting Tribunal under its substantive powers be subject to review by the AAT with the leave of the president of that tribunal. This matter was referred back to the ARC for reconsideration, that is for re-examination after the new ABT inquiry procedures had been in operation for some time.[64]

3.77 The ARC says that there is potential for duplication and conflict between its inquiry and that of the Committee. The Council adds that because it is likely that the Committee inquiry will be completed first the 'Council will of course take the views and any conclusions of the committee into account in any recommendations that it makes'.[65]

The Case for Abolition of Appeals

3.78 The Australian Broadcasting Tribunal, the Department and Grey are all opposed to review on the merits of ABT decisions by the AAT.[66] The arguments they advanced restate views put several years ago to the ARC inquiry without attempting to rebut the contrary views advanced by that body in its

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[63] Submission No. 4087, p.3.
[64] Administrative Review Council, *Report to the Attorney-General, Review of Decisions Under the Broadcasting and Television Act 1942* (Report No. 16), p.1, Australian Government Publishing Service, Canberra, 1982 and submission No. 4087, p.2.
[65] Submission No. 4087, p.2.
[66] Submission No. 3153, pp.5, 6 and No.3064, pp.10, 11.

1982 report. It thus became necessary for the Committee to ask the ABT and the Department to respond to the arguments in favour of retaining appeals to the AAT made in the 1982 ARC report.

3.79 The ABT case for abolition of appeals against its decisions to the Administrative Appeals Tribunal distinguishes the special features of ABT decision-making from those of other organisations which are also subject to review on the merits by the Administrative Appeals Tribunal. The two special features appear to be the public inquiry process and the expert body argument.

3.80 According to the ABT its public inquiry process 'now ensures maximum public scrutiny of the exercise of all of the Tribunal's substantive powers ..., a circumstance not envisaged by the Green Report' (1976).[67] Thus although the Administrative Appeals Tribunal has a role to play where the decision-maker is unaccountable and not subject to the public process this does not apply to the ABT.[68]

3.81 The expert body argument maintains that the Administrative Appeals Tribunal does not have the background on broadcasting the ABT has and review by such a generalist body undermines the usefulness of the specialist. The question, according to the ABT, is whether a non-expert body with comparable procedures 'will necessarily reach a better conclusion'.[69]

3.82 It appears that from these two special features the ABT concludes that review by the AAT results in duplication, unnecessary costs and delays. Grey considers that AAT review simply adds another layer of expense and delay with little prospect of superior decision-making. He recommends that review of ABT decisions by the Administrative Appeals Tribunal be abolished.[70] The Department shares the view of the ABT, and uses the expert body argument.[71]

Consideration of Issues

3.83 In examining the need for appeals to the AAT from decisions of the Australian Broadcasting Tribunal it is important not to get sidetracked by marginal or irrelevant matters. One such sidetrack is 'capture theory' alluded to in the 1982 ARC Report as 'a common tendency for regulatory bodies to form symbiotic relationships with those they are supposed to be regulating ...'[72] The Committee has received no evidence on regulatory capture but it can hardly be

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[67] Submission No. 4095, pp.3, 5. The Green Report recommended appeals to the AAT because the Australian Broadcasting Tribunal which it recommended be established would be exercising substantial powers.
[68] Submission No. 3153, p.5.
[69] Submission Nos. 3153, p.6 and 4095, p.4.
[70] Submission No.3064, pp.10,11.
[71] Transcript of 14 June 1988, p.1268.
[72] Administrative Review Council Report, (No. 16), cited before, p.14.

argued that appeals to the AAT are a safeguard against such capture. Almost without exception such appeals can be made only by or on behalf of the licensee (see s.119A.(2) that is, the organisation being regulated.

3.84 The public inquiry processes and expert body arguments require close and careful scrutiny. The proposal that appeals to the AAT should be abolished, because in part there is a public inquiry process which ensures maximum public scrutiny of the exercise of all the Tribunal's substantive powers, introduces a concept of public accountability which does not stand up to close scrutiny. The Committee fails to see how a public inquiry process allows the public to **scrutinise** what the ABT is doing. As explained at paragraph 3.65 this concept of public accountability is a misnomer. The correct concept is accountability of the industry to the ABT through a process of public participation in the Tribunal's proceedings. The AAT appeals process adds a second tier of accountability: **the accountability of the ABT to the Administrative Appeals Tribunal for the quality of ABT decision-making.**

3.85 The ABT believes itself to be an expert body. Bond Media says this expertise is restricted to ownership and control matters.[73] The CLC, which supports appeals to the AAT, says that expertise in broadcasting does not necessarily indicate expertise and ability to deal with wider issues. The Centre cites the AAT decision of Davies J in *re New Broadcasting Limited and Australian Broadcasting Tribunal and Treasure (party joined)* (1987) 12 ALD 1, pointing out that the case dealt with the question of whether the non-broadcasting activities of a person were relevant to the criteria of fitness and propriety in the renewal of a licence. The issues in this case did not require expertise in broadcasting.[74]

3.86 The ABT collects facts, interprets and draws conclusions from them and makes decisions. In doing this it probably draws on knowledge gained from experience. Now whether such knowledge deserves the tag of 'expert' is debatable. The guarantee the ABT seeks, that the reviewer should be capable of reaching a 'better conclusion' than the ABT, is impossible to give. What is 'better' is an opinion; and opinions can differ. Finally, the expert body argument is weakened when 'experts' disagree. This is precisely what happened in the ABT's report *Advertising Time on Television.*[75]

3.87 The review of administrative decisions in Australia has a long history and is based on the inability of the Parliament or individual Ministers to make officials adequately accountable to them for the large number of decisions made by officials. The rationale for review on the merits is the exercise by officials of significant discretionary powers which could affect the interest of individuals. A particular distinguishing feature of review on the merits by the

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[73] Submission No. 3169, p.1.
[74] Submission No. 4094, p.7.
[75] *Advertising Time on Television*, cited before, pp.vii, viii.

Administrative Appeals Tribunal is that the function is vested in a general appeals tribunal capable of hearing appeals from decisions made across the range of government activity.[76]

3.88 The review of ABT decisions by the Administrative Appeals Tribunal was conceived 'as part of the move to ensure adequate accountability in the administration of the broadcasting system ...' Provisions for appeal were explained by the then Minister for Post and Communications during the second reading of the *Broadcasting and Television Amendment Bill 1977* as giving 'redress for broadcasters who feel they have been unfairly treated by the Tribunal'.[77]

3.89 The system of parliamentary government in Australia is one of checks and balances. In its broadest sense, appeals to the AAT are a check against the possible abuse of power. It is in this way that the question of appeals to the AAT from decisions made by the Australian Broadcasting Tribunal should be resolved. If the decisions made by the ABT are not considered to be important then the appeals provisions should be abolished. If the ABT makes important decisions which could adversely affect the interest of individuals and organisations appeals should be retained. Thus matters such as public inquiry processes and expertise pale into insignificance.

3.90 The ABT makes important decisions which could affect adversely the interests if not the livelihood of persons and the interest of organisations, where there is the possibility of error of judgment by the primary decision-maker. The Committee endorses the view that review on the merits of ABT decisions is part of an accountability process which in its essence should be no different to other important decisions made by other organisations subject to review by the AAT.

3.91 In fact the larger the activities of the ABT the greater could be the need for accountability to the AAT. The possibility of increased activities or powers is evident from an examination of suggestions or recommendations for extensions of the powers of the ABT made mostly during the course of the Committee inquiry. The first is the Tribunal view that any revision of the Broadcasting Act should cover all telecommunication services. This could give the Tribunal increased powers. The other suggestions and recommendations cover commercial free-to-air television and commercial radio. They include: removal of the exclusive licensing criteria; re-introduction of some form of prior approval by the ABT of ownership changes; new powers to improve quality through area inquiries and competitive licence renewals where the ABT would have the power to award the licence to someone other than the incumbent; and increased flexibility for the Tribunal to determine its inquiry

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[76] Administrative Review Council, *Eleventh Annual Report 1986-87*, Parliamentary Paper No. 247/87, p.22, Australian Government Publishing Service, Canberra, 1987.

[77] House of Representatives, *Debates*, 13 October 1977, p.2006.

procedures. This flexibility could be achieved by removing the power of parliamentary disallowance of tribunal regulations and by giving the ABT the power to determine its own inquiry procedures after public consultation.[78]

3.92 This long list of changes if implemented would give the ABT increased powers, perhaps significantly increased powers, of decision-making. The Australian Broadcasting Tribunal also wants the Parliament to abolish the power of the AAT to review decisions of the ABT. The Committee doubts whether any Parliament would give any regulatory body such power.

3.93 Section 119A(3) of the Broadcasting Act says that the AAT shall be constituted by a presidential member alone when it reviews ABT decisions. The CLC suggests that the Act be amended to provide that when reviewing such decisions the AAT consist of three persons at least one of whom has expertise in broadcasting matters. [79] This suggestion is worth further consideration. There could be advantages however in flexibility. This could be achieved by giving the President of the AAT the power to decide how many members a particular review requires and the type of expertise that is relevant for that review.

3.94 The ABT told the Committee of its concern of a development that has taken place in the last 18 months, namely that cases being run before the AAT are very different to those run at the renewal hearings.[80] This appears to be an abuse of the appeals process. It is another matter worthy of further consideration to find out whether the appeals process can be contained in such a way so as to prevent abuse.

Conclusions

3.95 The ABT considers appeals to the AAT to be a major hindrance to its operations. The Tribunal's submission says that the appeals system '... undermines the usefulness of the Tribunal and its contribution to broadcasting ...'[81] Clearly, the expectation of the ABT is Committee support for opposition of AAT review. Yet, this bid for support is made in a most curious way. For the ABT also says that its submission (or more strictly the Committee inquiry) is not the 'proper place' to canvass all the arguments for and against AAT review of the decisions of the broadcasting tribunal. In oral evidence the proper place was identified as the ongoing review by the ARC.[82]

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[78] Submission No. 4095, p.2.
[79] Submission No. 4094, p.7.
[80] Transcript of 14 June 1988, pp.1221, 1222.
[81] Submission No. 3153, p.6.
[82] Transcript of 29 March 1988, p.900.

3.96 Frankly, one would have thought that there is no more 'proper place' for the review of legislation or legislative proposals than the Parliament itself or one of its committees. The Committee is conscious of the inherent danger that those who do not understand adequately the workings of the Parliament may tend to ignore it and play down its importance.

3.97 Although the Committee is satisfied that its examination of the need for appeals to the AAT is sufficiently complete, the other matters discussed are not - flexibility of composition of AAT panels reviewing ABT decisions and possible abuse of the appeals process. In addition, the ARC is examining not only appeals to the AAT but also review by that tribunal of the ABT's procedural decisions.[83] In these circumstances the Committee does not propose to make any recommendations.

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[83] Submission No. 4087, p.2.

4: LICENCE GRANTS AND RENEWALS

The role and functions of the Australian Broadcasting Tribunal in regulating the commercial broadcasting sector with particular reference to -

(1) the basis and conditions upon which licences are granted and renewed, and options for change;

4.1 The Committee has interpreted this term of reference as covering all matters to do with licence grants and licence renewals. In some of these matters witnesses have put forward options for change. Where this has been done a choice has been made as to which is the better or more effective option.

4.2 The matters which will be discussed in this Chapter are as follows:

Licence Grants

- Balloting
- Commercial Viability
- Exclusive Licensing Criteria

Licence Renewals

- Extension of the licence period
- Area inquiries
- Network Licensing

The matter of competitive licence renewal is discussed in Chapter 7, Enforcing Standards and Sanctions.

Licence Grants

Balloting

Award of Licence by Ballot

4.3 The processes by which licences are granted require the Tribunal to apply certain exclusive criteria in the selection process and then to choose the most suitable applicant. The Federation of Australian Commercial Television Stations (FACTS) says that the task of selecting one candidate from two or more meritorious applications is most difficult. It is highly subjective and increases the potential for litigation. The organisation proposed that the successful

applicant be chosen by a ballot which contains the names of all candidates considered by the Tribunal to be suitable. FACTS said balloting would reduce the workload of the Tribunal.[84] Bond Media supported this proposal.[85]

4.4 At the 25 July 1988 hearing FACTS stated that changes in the legislation and Tribunal procedures have largely overcome perceived problems. FACTS was thus 'now entirely open on the matter of the selection of a suitable candidate'. Bond Media said that the reaction to the proposal had been universally hostile and, because of this, it did not want to pursue the matter.[86]

Licence Grants

Commercial Viability

Background

4.5 Provisions relating to commercial viability were introduced in the 1977 amending legislation. The criterion now applies to both commercial and public stations.

4.6 Commercial viability is one of the exclusive licensing criteria. When considering whether or not to grant a new licence the Tribunal has to consider the commercial viability of the existing stations. The ABT also must have due regard to the commercial viability of existing stations when determining conditions upon which a licence is to be granted and in varying, revoking or adding to the conditions attached to a licence.

4.7 The Tribunal interprets commercial viability as the ability to survive commercially; the ability of a radio or television station to survive as a commercial entity while effectively operating in accordance with the conditions of its licence and providing an adequate and comprehensive service.[87]

4.8 The Government's recently announced National Plan for Development of Metropolitan Radio Services has introduced a new approach to licence grants.

4.9 In considering the allocation of new commercial FM licences, the Government sought to 'ensure an appropriate financial return to the community from the right to profit from the receipt of a scarce public resource'.[88]

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[84] Submission No. 3168, p.14.
[85] Submission No. 3169, p.10.
[86] Transcript of 25 July 1988, pp.1544, 1592.
[87] Paragraphs based on Submission No. 4056, pp.64-66.
[88] Media Statement 83(a)88, Minister for Transport and Communications, Senator the Hon Gareth Evans, QC, 9 August 1988, p.2.

4.10 Additional FM licences will be offered through a system of open tender. The proposal involves the Minister establishing a reserve price and advising the Tribunal of that price. Applicants will be invited to lodge sealed bids. The Tribunal will then conduct a simplified inquiry to determine whether any of the applicants is unsuitable and then award the licence to the highest suitable bidder.

4.11 In order to make way for this tender process to operate, the Government proposes to amend the Act with regard to metropolitan radio licences. The Tribunal would no longer be required to take account of the effect on commercial viability of other licencees in the service area.[89]

4.12 On 9 October 1988 the Hon Ralph Willis MP, Minister for Transport and Communications, stated that the trade-off between regulation and protection from open competition is a concept that is not necessarily relevant today. On the matter of commercial viability, Minister Willis stated that 'the very readiness of a new entrant to pay a substantial fee for a new licence is, in itself, evidence of the existing industry's commercial viability'.[90]

Consideration of Issues

4.13 Industry says that increased competition will reduce advertising revenue and this in turn will affect the quality of television programs.[91] This argument raises the question of industry profitability. The networks refer to losses made by stations year after year; and to a 9 per cent return on turnover as not being excessive.[92] The Business Regulation Review Unit says that spectrum restrictions give monopoly profits estimated at $400m a year.[93]

4.14 The Committee is not able at this stage to comment on these widely different positions. Such comments would require examination of the reasons for the reported high prices paid for radio and television licences in 1987. Whatever the reasons for these purchases, as the Minister's statement at paragraph 4.12 indicates, there are other ways of controlling entry into the market than the Minister or the Tribunal determining commercial viability.

4.15 The Communications Law Centre endorses the continuation of the present system under which the Tribunal selects the most suitable applicant. The Centre implies that this system is better in identifying audience needs than a tender system which gives a licence to the highest suitable bidder.[94]

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[89] Media Statement 83(B)88, already cited, p.4.
[90] Speech to Annual Convention of FARB, 9 October 1988, by the Hon Ralph Willis MP, p.9.
[91] Transcript of 15 June 1988, p.1354.
[92] Transcript of 10 February 1988, p.154 and 3 March 1988, p.189.
[93] Submission No. 3, p.13 and Transcript of 22 February 1988, p.520.
[94] Submission No. 3188, p.12.

4.16 Consideration of commercial viability is one of the major issues in the regulation of broadcasting. Commercial viability is the means of regulating entry into the market. At paragraph 3.53 the Committee said the issue was whether entry should be determined by regulation (by the Minister and Tribunal determining viability) or by the market itself through a tender process.The personal view of an officer of the Department of Transport and Communications is that commercial viability has been overstressed and overdone and that the system should be freed up so that competition could play a greater role than allowed to with this detailed viability question. [95]

4.17 If the current approach to commercial viability is retained then the question is whether viability should be considered twice, first by the Minister and then by the Tribunal. This is what happens in respect of the granting of new licences.[96]

4.18 The Committee is of the view that the Tribunal is best placed to consider commercial viability because of its past experience and extensive database. The most appropriate way is for the Tribunal to consider the need for additional commercial licences through an area inquiry process. This would include commercial viability and the Tribunal could then make a recommendation to the Minister for consideration.

4.19 The question of commercial viability is relevant to the existing free-to-air television broadcasters as they were established under the existing system and any radical change may place those investments at risk. As there is room for only one more free-to-air station in Sydney and Melbourne there is little need to change the existing approach.

4.20 This situation could change dramatically if additional licences become available through the Pay TV option. The Committee considers that careful attention will need to be paid to current requirements related to commercial viability in conjunction with development of a Pay TV policy. The two choices for regulating market entry are the existing system or, for example, a tender process.

4.21 The arguments in favour of the two systems are quite different. On the one hand, there is the desire to use the regulatory process to promote what are considered socially desirable goals such as Australian content and an adequate and comprehensive service.

4.22 On the other hand, advocates of the tender system would claim that these goals, where they are still relevant, can be met through licence conditions. In addition by letting the market determine commercial viability through a tender process there would be gains to consolidated revenue. These funds,

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[95] Transcript of 14 June 1988, p.1237.
[96] Transcript of 14 June 1988, p.1213.

estimated at $190m for the FM radio licences to be offered in the near future (no estimates are available as yet for Pay TV), could be used to meet other Government broadcasting objectives currently neglected due to a lack of funds.[97]

4.23 The Committee proposes to give more detailed consideration to this question when dealing with the next reference concerned with the possibilities for development of and the appropriate means of regulating new broadcasting-related services.

Licence Grants

The Exclusive Licensing Criteria

Background

4.24 Prior to 1981 the general objects and purposes of the Broadcasting Act were virtually the only restrictions on the range of factors the Tribunal could consider in licensing matters. The extent of the Tribunal's discretion in ownership and control matters was set out by the High Court in 1979 in the 2HD case. The court said that the limitation of interests in commercial radio licences set by s.90C of the Act did no more than fix 'a maximum ceiling' on such limitations. The Tribunal was free to decide whether a licence transfer, although not contravening the maximum limit fixed in the Act, was in the circumstances in the public interest.[98]

4.25 This decision gave the Tribunal a clear discretion in respect of undue concentration of ownership. At this time changes in ownership had to be approved by the Tribunal before they could take effect. In 1980 there was the News Corporation Ltd takeover of Ansett Transport Industries Ltd. which held major interests in television licences, including the ATV-10 (Melbourne) licence. The Tribunal eventually refused approval of the takeover, largely because of the degree of influence News Corporation would obtain through ownership of television stations in Sydney and Melbourne and networking elsewhere.[99]

4.26 The controversy caused by these events eventually led to amendments to the Act in 1981. Two of the main amendments were the removal of the requirement that prior approval of the Tribunal be obtained for a takeover of a licensee company and the insertion of specific criteria for the Tribunal to use

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[97] Media Statement 83(a)88, already cited, p.3.

[98] Armstrong M,*Broadcasting Law and Policy in Australia*, pp.135, 145, Butterworths, Sydney 1982.

[99] Armstrong M, p.47. News Corporation appealed the ABT decision to the Administrative Appeals Tribunal which approved the takeover.

in its licensing decisions. The inclusion of specific criteria was said to introduce greater certainty. The incorporation of legislative guidelines for 'public interest' was said to 'provide a clearer statement of Government policy in relation to the major discretionary powers of the Tribunal' by codifying the 'public interest' [100]

4.27 The exclusive licensing criteria are so called because the amended Act asks the Tribunal to have regard **only** to specified matters or circumstances in licence grants, licence renewals and the approval of transactions. These criteria are:

- the fitness and propriety of the licensee or applicant concerned;
- the financial, technical and management capabilities of the licensee or applicant;
- undertakings to provide an adequate and comprehensive service and to encourage Australian programs and the use of Australian creative resources;
- whether there is undue concentration of interest in non-metropolitan areas; and
- the need for the commercial viability of existing services in the area.

4.28 All these criteria do not apply equally to licence grants, renewals and transactions. In the case of remote licences the criteria are not exclusive and the Tribunal can take into consideration 'many other matters or circumstances that the Tribunal considers relevant' - s.8611(B)(ca)(viii).

Consideration of Issues

4.29 The Tribunal's summary position is that 'the exclusive licensing criteria are difficult to administer, inhibit the ability of the Tribunal to act in the public interest, provide unnecessary scope for legal argument and litigation with the resultant delay and expense, and are detrimental to public participation in Tribunal inquiries'.[101] The Tribunal asks for greater discretion, 'not ... powers at large' but the removal of the word 'only' from the relevant sections of the Act together with a concise statement of policy objectives in the Act against which the discretion would be exercised.[102]

4.30 The Tribunal is supported by the CLC, the Department and Mr L T Grey. They all ask for policy objectives to be specified in the legislation. The Department in particular believes this would define the position and remove the open-ended position that existed before 1981.[103]

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[100] Senate, *Debates*, 9 June 1981, p.2810.
[101] Submission No. 3153, p.10.
[102] Transcript of 26 July 1988, p.1831.
[103] Transcript of 26 July 1988, p.1769.

4.31 Industry puts considerable store on the 'certainty' inherent in the exclusive licensing criteria and is opposed to giving the Tribunal any discretion. Their argument is that the Tribunal is an extraordinary body which fulfills the roles of 'police, prosecutor and judge', and that the exercise of Tribunal powers should be accompanied by clear policy objectives and some degree of certainty about what is expected of licensees. The exclusive criteria, it is said, serve this purpose.[104]

4.32 The matter of making the licensing criteria non-exclusive can be approached in two ways. The first is to examine the relevance of examples used to show how the criteria limit decision-making by the Tribunal.

4.33 In share transaction inquiries the Tribunal says it cannot address 'public interest questions' such as whether the overall result of the transaction will be better in terms of networking or joint-ownership of non-broadcasting services such as Sky Channel.[105] Grey argues that 'any system for the approval of changes in ownership and control should enable the Tribunal to look at the total effect of the transaction, rather than just the characteristics of the purchaser'. He says the criteria deny the ABT the opportunity to consider certain issues which are significant to the public interest. The example cited is a case where the Tribunal was unable to consider whether it was in the public interest that one group should gain control of all commercial television in Tasmania.[106] The CLC says the exclusive criteria prevented consideration of ownership concentration in the inquiry into the Bond Media take-over of TCN and GTV. The CLC believes the Tribunal should be able to examine issues of ownership and concentration whether or not the maximum audience reach level has been attained.[107]

4.34 The Parliament has established ownership limits for commercial broadcasting but not for other industries. The reason for this is the importance of broadcasting, particularly television, to influence public opinion. Thus there are cross-media rules which limit common ownership of television-newspaper and television-radio interests within television services areas. In respect of television ownership persons are allowed to hold prescribed interests in any number of commercial television licences so long as the combined population of their services area does not exceed 60 per cent of the Australian population - the audience reach rule. A key reason for this rule is the economies of scale associated with buying or making of programs for distribution to multiple outlets. Another is the ability to offer advertisers a mass market in the capital cities.[108]

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[104] Submission No. 4097, p.2.
[105] Submission No. 3153, p.8.
[106] Submission No. 3064, pp.9, 16.
[107] Submission No. 3188, pp.10, 11.
[108] House of Representatives, *Debates*, 29 April 1987, p.2193.

4.35 If the licensing criteria are made non-exclusive so that the Tribunal can establish lower audience reach limits than those specified in legislation, then there should be some special characteristics of a particular area that justify these lower limits. Otherwise, over time one of two things could happen. First, there could be inconsistencies with different concentration levels being applied to different areas. Or second, there could be established uniform concentration levels different to those set out in legislation. The will and the intentions of the Parliament would become subservient to that of the Tribunal.

4.36 The Committee has not received any evidence that shows that different areas possess such special characteristics as to preclude the application of common audience reach limits. It believes no such evidence exists. The comments made on industry concentration apply to networking and non-broadcasting services as well.

4.37 Another example given for making the licensing criteria non-exclusive relates to the straining of the meaning of some criteria. The Tribunal says that on several occasions it has been obliged to deal with the issue of whether an applicant was locally owned under the heading of fitness and propriety.[109] The Department's report on Ownership and Control of Commercial Television (1986) says, that there has never been a comprehensive statement by any government of the purposes of ownership and control regulation. It lists key principles, one of them being the promotion of local ownership. The report draws certain 'inescapable' conclusions. One of these is that certain policy objectives, including the promotion of local ownership, are no longer attainable.[110] In other words, the policy objective of local ownership as it relates to commercial television is a thing of the past, although it could apply to commercial radio.

4.38 The third example used for making the licensing criteria non-exclusive also relates to the straining of the criteria. The Tribunal says that in its decision to grant a public radio licence in Mount Gambier it considered the central issue of the structure of the applicants and the extent to which they were committed to community participation in decision-making under the head of fitness and propriety.[111] The Committee is puzzled by this example. This is because s.7(A)(c)(vii) (A) and (B) of the Act, which deals with the granting of public licences, requires the Tribunal to take into consideration the need for community participation, something the submission claims it could not do.

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[109] Submission No. 3153, p.8.
[110] Department of Communications, 1986, *Ownership and Control of Commercial Television*, Future Policy Direction, Vol 1, cited earlier, pp.41, 57.
[111] Submission No. 3153, p.8.

Conclusions and Recommendations

4.39 The arguments advanced for making the criteria non-exclusive are not convincing. The second way of approaching the need for exclusive licensing criteria is to recognise that they cannot always cover all the circumstances of each and every case. The Committee believes that this applies more to licence grants and much less to licence renewals and approval of transactions. The recommendations will ask for the removal of exclusiveness from licence grants only, with the proviso that the new matters Tribunal takes into consideration for licence grants would also, if relevant, apply in licence renewals and the approval of share transfers.

4.40 The Committee recommends that:

Recommendation 4: The licensing criteria for licence grants be made non-exclusive by allowing the Australian Broadcasting Tribunal to take into account any other matter or circumstance the Tribunal considers relevant.

Recommendation 5: The exclusive licensing criteria be retained for licence renewals and approval of transactions but provision be made for the new matters taken into consideration in licence grants to apply to renewals and transactions, if relevant.

Licence Renewals

Extension of the Licence Period

Background

4.41 A licence to broadcast may be granted by the Tribunal for a period of up to five years or seven years for remote licences. Section 87(2) of the Act states that a licence renewal continues in force for three years or a shorter period if the Tribunal is satisfied that the circumstances justify the shortened period. The Tribunal may refuse to renew the licence, renew it for a shorter period or renew it with conditions - s.86(12).

4.42 Like the power to grant a licence the power to renew a licence is a 'substantive power' - s.17A(2) (b) - and the Tribunal must hold an inquiry - s.17C(1). The procedures and rights of parties in these inquiries are governed by the Act (Part 2, Division 3) and the regulations made pursuant to the Act, viz. Australian Broadcasting Tribunal (Inquiries) Regulations (Statutory Rules 1986, No. 100). The licence renewal process commences with the licensee lodging an application with the Tribunal not less than 20 weeks before the

licence expires, in accordance with the regulations. One effect of the new regulations is that the Tribunal can inquire into and renew a licence without public hearings, a process which the CLC calls the 'manila folder inquiry'.[112]

4.43 FACTS says that although the word 'renewal' is used in the Act in fact the process is one of review of a licensee's stewardship and that in the absence of special circumstances the general attitude is of a licence granted in perpetuity.[113] The Department says that the expectation of renewal is given legislative weight in s.86(11A) of the Act in that **subject to certain specified conditions the Tribunal shall not** (emphasis added) refuse to renew the licence. [114] The Department is correct. Unless there is a serious breach of the Act, licence renewal is automatic. Nevertheless, the Committee is of the view that when the Parliament used the word 'renewal' it meant exactly that and did not mean review. The ultimate sanction is non-renewal of the licence and the Committee in fact supports a modified method of competitive renewal (see recommendation at paragraph 7.68).

Consideration of Issues

4.44 Two types of proposals have been made for increasing the period of licence renewals. In the first type licence renewals are tied with other proposals. The Tribunal says that with the advent of television equalisation and increased networking individual licence renewals have become less important. Referring to its last two annual reports (1985-86, 1986-87) the Tribunal adds that it has suggested that 'licence periods be lengthened provided that the Tribunal is equipped with other powers to better assess licensees performance such as a competitive system or area inquiries and provision for effective information collection'.[115]

4.45 Grey says the object of periodic reviews should be to improve and maintain the standard of service. Feedback from the audience could lead to fine-tuning of the service. He has no objection to indefinite licensing if the Tribunal is given a mandate to enforce changes to the service based on clearly stated program standards. In evidence he stated that three years is not long enough to get a picture of long term trends. The period should be extended, with area inquiries.[116]

4.46 In the second type of proposal the extension of the period stands alone. This proposal is made by industry. The extensions sought are seven years for television licences and five years for radio licences. Industry says a longer period would reduce costs, to industry of management time and to the Tribu-

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[112] Transcript of 26 July 1988, p.1724.
[113] Transcript of 9 February 1988, pp.22, 55, 56.
[114] Submission No. 4056, p.20.
[115] Submission No. 3153, p.17 Also see, Australian Broadcasting Tribunal *Annual Report 1985-86*, p.xv.
[116] Submission No. 3064, p.5 and transcript of 11 February 1988, p.297.

nal. The costs of the renewal hearings of Sydney, Melbourne and Adelaide (television) were said to be very high.[117] The second argument for the extension of the licence period is the 'track record' of the industry. The Federation of Australian Radio Broadcasters contends that the extension of the period from three years to five years is justified in the light of experience. Few commercial licences have been suspended, cancelled or not renewed and there are no grounds to assume that licensee behaviour will change just because the period is extended.[118] Hoyts Media Ltd says a longer period is necessary to allow the Tribunal to assess the effectiveness of the undertakings on adequate and comprehensive service and use of Australian resources.[119] Bond Media says the best way of ensuring an adequate and comprehensive service is competition in the marketplace. In competitive markets the role of the Tribunal should be supplementary, one of defining a baseline service rather than one of becoming involved in programming.[120]

4.47 FACTS undertook to provide the Committee with the costs of a television licence renewal. The association said later that the mean industry cost for all Tribunal-related matters is $15.0m a year. This figure covers all licensing matters, share transaction approvals and other matters where the industry has dealings with the Tribunal.[121] This figure does not isolate the cost of licence renewals, so it is not possible to use it to ascertain such costs. But even if a figure for renewals were available the problem is one of comparing these costs and those of the Tribunal with the loss of benefit that results from poor performance that could go uncorrected for a further four years if licence renewals were every seven years rather than every three years. The CLC which is opposed to an extension of the licence period gives as an example of poor performance the Channel 7 Adelaide 1984 renewal. This resulted in a short-term renewal because of the inadequate performance of the licensee in respect of programs for children.[122] The same argument can be applied to radio - that the few cases would go uncorrected for a longer period.

4.48 The uniform inquiry procedures (1986) enable the Tribunal to inquire into and renew a licence without public hearings. Hoyts Media says this concept could be extended so as to allow a more routine renewal unless there are grounds for more detailed review.[123] The Committee supports this view. For example, if the Tribunal could fix a date well before a licence expires after which it will not accept submissions relating to that renewal, this could reduce or eliminate the costs of the licensee preparing for the renewal. It is a matter worth further consideration.

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[117] Submission No. 3168, p.14 and Transcripts of 25 July 1988 pp.1622, 1623 and 9 February 1988, p.45.
[118] Submission No. 4054, p.16.
[119] Submission No. 1355, p.10.
[120] Transcript of 25 July 1988, pp.1593, 1594.
[121] Transcript of 9 February 1988, p.45 and letter of 22 November 1988.
[122] Transcript of 26 July 1988, p.1723. See also Submission No. 3188, pp.19, 20.
[123] Submission No. 1355, p.4.

4.49 The problem with the Bond Media argument about competitive markets is one of identifying what is a competitive market. Given the existence of the new inquiry procedures, the possibility of streamlining them even further, and the reality of proven poor performance the Committee does not accept the stand alone proposal: that the period for licence renewals be extended. Judgmental though it is and ever can be, our view is that the benefits of the present period exceed the costs. The Tribunal says there is no logical argument for extending the licence renewal period without any other mechanism. The accountability of the players should not be reduced.[124] The Committee concurs.

Conclusion and Recommendation

4.50 The Committee does not agree with the Tribunal's proposal that the renewal period be lengthened provided there are competitive renewals and area inquiries. The Committee is supporting modified competitive renewal and area inquiry proposals but neither is a sufficiently good substitute for licence renewals. The Tribunal's modified proposal of competitive renewals is a last resort mechanism, a substitute for the revocation of the licence. Area inquiries should deal with the adequacy and comprehensiveness of the total service in an area and may not necessarily pick up the poor performance of a particular licensee.

4.51 In view of all this the Committee recommends that:

Recommendation 6: The current maximum renewal period of three years for a licence be retained.

Licence Renewals

Area Inquiries

Background

4.52 Section 18A(1) of the Broadcasting Act provides for area inquiries. That section says that in relation to any area the Tribunal may hold an inquiry into the adequacy and comprehensiveness of the services provided by the licensees and into whether these services encourage the use of Australian resources.

4.53 The date from which inquiries under s.18A of the Act can be held is yet to be proclaimed. The Department says it is being opposed by industry and has been the subject of protracted negotiation and consultation.[125] Bond Media states that there is continuing uncertainty over exactly how area inquiries fit

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[124] Transcript of 26 July 1988, p.1797.
[125] Submission No. 4056, p.15.

into the renewal process and also uncertainty over the participation of the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) in such inquiries. These are the reasons why the Act has not been proclaimed.[126]

Consideration of Issues

4.54 The Department states that the appropriate role for area inquiries is being examined in the context of the departmental review of broadcasting regulation. It advances three ways of handling area inquiries, namely:

(a) that they be held prior to renewal inquiries in an area and that the findings of the Tribunal have direct relevance to the renewal inquiries;

(b) that area inquiries replace renewal inquiries; and

(c) that they be held between renewal inquiries and the findings not be of direct relevance to the next renewal inquiries.[127]

4.55 In evidence the Department said that with the range of inquiries possible it is necessary to have a framework based on overall objectives. The basic objective should be to review the performance of the overall system and of the individual licensees within that system. There would be value in moving away from so much concentration on licence renewals.[128]

4.56 There has been a lot of uncertainty over the purpose and outcome of area inquiries. The starting point is to outline the rationale for these inquiries. This will assist in choosing one of the Department's options or another and different option.

4.57 The purpose of area inquiries is derived from one of the objectives of broadcasting policy: to improve quality. What an area inquiry would do initially is to identify minority tastes or gaps which are not catered for because such programs or part thereof do not earn sufficient revenue to make them an economic proposition. The CLC says the Tribunal should make an expert decision about those few occasions on which the public need for a service such as a local news programs will outweigh the question of financial viability in providing that service.[129]

4.58 FARB says that area inquiries seem to be a most illogical way to test the market to find out people's wishes or needs. There are recognised ways of researching a market and this method, undertaken in an independent way, is

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[126] Transcript of 10 February 1988, pp.131, 132.
[127] Submission No. 4056, pp.31, 32.
[128] Transcript of 26 July 1988, pp.1763, 1764.
[129] Transcript of 26 July 1988, pp.1734, 1735.

much more logical than the public face of gatherings which may or may not achieve anything.[130] This argument of market research is relevant for finding a niche in the market. It may not be relevant for ascertaining gaps. Network Ten Australia felt that area inquiries could be useful if they provided well researched and developed findings.[131]

4.59 The next question to be resolved is the definition of the area. Industry sees difficulties in this regard but it is not an insurmountable problem. Audience reach could determine the size of the area or market. The other matter is what type of services should be included in the area. Industry insists that the ABC and SBS be included and the Committee supports this view. Industry says an inquiry should include both radio and television. The CLC wants to add the print media and the Department says all broadcasting-related services should be included - radio, television, cable, Sky Channel.[132] The difficulty with such broad approaches is the question of how all this information is to be managed. An area inquiry should be one defined under s.18A of the Act except that there would be separate inquiries for television and radio. They should not be combined.

4.60 Finally there is the question of the outcomes of an area inquiry. There are several possibilities. If it finds that there are unsatisfied minority tastes the Tribunal can recommend the issue of a new licence - commercial or public. If the Tribunal finds there is a wide range of unsatisfied minority tastes it could recommend the issue of a public broadcasting licence. More realistically, there would be a question of whether gaps should be closed by the ABC, SBS or the licensees. Whatever decision the Tribunal makes one would expect to find carefully articulated reasons as to why one approach is preferable to another. Up to this point a Tribunal report could contain recommendations and would thus need to be reported to the Minister. Area inquiries would not necessarily be related to the renewals process and would not be de facto renewal inquiries.

4.61 Difficulties would arise if the Tribunal, having identified unsatisfied needs, decided that they should be met by the commercial sector. There is no question now that such decisions would feed into the renewals process. The Tribunal's approach is to inform all the licensees in the area of the gaps. If they cannot resolve the problem then and only then would the Tribunal have to impose the obligation on all of them, as it has in the cases of Australian drama and children's programs.[133]

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[130] Transcript of 26 July 1988, p.1700.
[131] Transcript of 25 July 1988, p.1660.
[132] See Transcripts of 25 July 1988, pp.1551, 1657 and 26 July 1988, pp.1698, 1692, 1731, 1764.
[133] Transcript of 26 July 1988, p.1802.

Conclusions and Recommendations

4.62 The Tribunal states that an area inquiry should be used when it is needed;[134] in other words when the Tribunal decides that such an inquiry is necessary. This is a sensible approach to such inquiries. The outcomes of such inquiries can be varied and therefore the Committee does not accept any of the three options put forward by the Department.

4.63 The Committee is also of the view that the Tribunal should have the power to require any person, including the ABC and SBS, to attend the inquiry and give evidence. In view of the foregoing the Committee recommends that:

Recommendation 7: Section 18A(1) of the *Broadcasting Act 1942* be amended to

(a) **specify that in addition to the inquiries and hearings already provided for in the Act there be separate area inquiries for television and radio services provided for in the area, and that such inquiries be held at the discretion of the Tribunal; and**

(b) **require the Australian Broadcasting Corporation and the Special Broadcasting Service to attend and take part in area inquiries.**

Recommendation 8: Section 18A(1) be amended and brought into operation as soon as possible.

Licence Renewals

Network Licensing

Definition of Network

4.64 A network is a group of two or more television or radio stations, either commonly owned or affiliated. Networking is the **broadcasting** by a network, under contractual agreement (affiliated stations) or other agreement or direction (commonly owned stations), of identical programs or other material, at generally identical times.

4.65 This fairly comprehensive definition of networks and networking should answer industry's call 'to get the ground rules right'.[135] It should be clear that, apart from matters related to industry concentration, any concern about networks is really a concern about **networking** of program or other material, and that network by affiliation is solely for the purpose of networking. One can have networks of commonly owned stations **without** networking.

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[134] Transcript of 26 July 1988, p.1801.
[135] Transcript of 25 July 1988, p.1557.

4.66 We would not describe the central production and/or purchase of programs for use by affiliated or commonly owned stations as networking. Networking relates to the transmission or broadcasting of material, not to its production or acquisition.

4.67 Thus the starting point for the examination of the question of network licensing is the extent of networking. The amount of networking in radio is very limited. Armstrong says that nearly all radio stations are programmed separately and independently.[136] Hoyts Media owns radio stations in all the State capitals except Hobart and is one of the largest radio networks in Australia. The company is convinced there is little room for network programming and does not intend networking the stations within the group.[137] The apparent reason for this according to FARB is that radio is essentially a local medium.[138] In these circumstances the Committee proposes to exclude radio from the remainder of its examination of network licensing.

Consideration of Issues

4.68 The proposal for the licensing of networks was made by the CLC which wants the continuation of individual station licences and network licences reviewed and renewed every five years. The Committee took evidence from the Centre on 11 February 1988 after which it made a supplementary submission on network licensing. After taking further evidence the Centre made another submission which included its final position on network licensing.[139]

4.69 The CLC operates under a broad charter to work on legal and policy issues relating to various aspects of communications. It receives financial support from the Law Foundation of New South Wales and the Myer Foundation in Victoria.[140] The Committee appreciates the time and effort the Centre has put into the issue of network licensing.

4.70 The CLC sees the licensing of networks as a significant improvement in the regulation of commercial television. The result 'would be to bring the regulatory structure into line with industry practice which of itself would result in substantial efficiency gains for both the regulator and the regulated'. The second and more important argument the Centre advances is that network licensing would make networks directly and publicly accountable for the quality and diversity of services and this would make it easier for the Tribunal 'to compel improvement(s)'. Finally the Centre says such licensing should allow the Tribunal to monitor systematically and thoroughly network affiliation

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136 Armstrong M, 'Deregulation of Radio', cited earlier.
137 Transcript of 29 March 1988, p.1039. Ownership information from Submission No. 4056, pp.7-9.
138 Submission No. 4097, p.2.
139 Submission No. 3188, pp.57-59 (and Transcript of 11 February 1988, p.365), No. 3500 and No. 4094, pp.8-9.
140 Submission No. 4094.

agreements and program supply agreements. This would protect 'localism' because the Tribunal would now have 'the power to expose unfair or oppressive network practices ...'[141]

4.71 The Department says there is a broad range of options for recognising the importance of networks. These include licensing, other regulation, giving the Tribunal monitoring powers and regulating networks through area inquiries.[142]

4.72 The first argument for network licensing is substantial efficiency gains for the regulator and the regulated. The Centre refers to the 'inane repetition' of renewal hearings where some issues are looked at time and time again. Network licensing would avoid this repetition. The issues would be looked at once instead of several times.[143]

4.73 Even if this is correct the point is that one **does not require network licensing** to correct the deficiency. A change in inquiry procedures would more than suffice.

4.74 But this argument is not correct. The repetition of issues cannot be avoided if the Tribunal is to give the public the opportunity to participate. One cannot envisage the Tribunal not taking oral evidence in say Brisbane on the grounds that similar evidence was taken in Sydney. The Committee's own inquiry procedures where oral evidence was taken in all the State capitals illustrates that public participation results in repetition which sometimes can be considerable.

4.75 The television industry opposes network licensing and questions its purpose. It says that in respect of networks the Tribunal has dealt with common issues at separate hearings in Sydney and Melbourne and then individual renewal hearings for each of the licensees.[144] The Committee concludes that there is no need for networks to be licensed for any improvements in efficiency to be realised.

4.76 Another argument for network licensing is that this would make networks directly accountable for the quality and diversity of the services provided. Once again there is the question of why it is necessary to have network licensing to achieve this goal. Licensees have to give undertakings to provide an adequate and comprehensive service and to encourage the use of Australian resources before a licence is reviewed - s.86(10) and 83(5). If there are any deficiencies in the undertakings the answer is to correct these deficiencies by amending the Act, not by adding adding more regulation.

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[141] Submission No. 4094, p.8.
[142] Submission No. 4056, p.34.
[143] Transcript of 11 February 1988, p.366-371.
[144] Transcript of 25 July 1988, p.1554.

4.77 The other CLC argument for network licensing is that it would enable the Tribunal to monitor systematically and thoroughly network affiliation agreements and program supply agreements. Information on such agreements would enable the Tribunal to protect localism. Yet once again the question has to be asked why it is necessary to have network licensing to protect localism. The provision of undertakings at licence renewal time should suffice to protect localism.

4.78 The Committee does not support the licensing of networks and will recommend accordingly.

4.79 The proposal for the licensing of television networks by the CLC has been prompted by the extent of networking on Australian television. The Centre says that the three networks provide up to anything between 80 per cent to 90 per cent of the programs broadcast.[145] If the concern with such percentages lies in a belief that this does not provide sufficient choice, producing instead what the Tribunal calls 'homogenised viewing - so the sophisticated tastes of Sydney and Melbourne ... are imposed on the rest of Australia',[146] then a more obvious control than network licensing is limiting the number of hours of networking.

4.80 Networking, whether achieved through affiliated or commonly owned stations as is the case in Australia, permits economies of scale because the same program can be shown in a large number of areas. Thus the costs of programs are spread between many stations rather than being borne by a few which would be the case if there were restrictions on the hours of networking. The commercial success of networking depends on whether viewers in different areas have similar or very different tastes.

4.81 By allowing economies of scale, networking contributes to the economic viability of the system which, according to the Committee, is a major objective of broadcasting policy. Economic viability guarantees the success of many other objectives such as the encouragement of Australian content and drama quotas, and so forth.

4.82 In asking for reduced networking hours one is trading-off (accepting less) economic viability for more of something else. This is a decision that cannot be made lightly. The Tribunal says there are probably economic impediments to reducing the number of networking hours. In effect, it says the costs and benefits of this limitation need to be assessed.[147]

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[145] Transcript of 26 July 1988, p.1744.
[146] Transcript of 29 March 1988, p.905.
[147] Transcript of 29 March 1988, p.966.

4.83 A significant practical issue is what would replace network programs in the event that network programs were reduced. There is no bottomless well into which any licensee may dip at will. Program sources are limited and often tied up by networks. The ability to generate local production is also limited by such prosaic factors as the availability of writers, producers, actors and technical crews outside the major production centres. Any proposal to require a larger proportion of programming time from non-network sources must be based on a proper consideration of these issues.

4.84 The Tribunal is the appropriate body to investigate the need for alternative programming to that provided through the network sources, and the practicality of meeting that need. Such an investigation could consider the desirability of 'windows' during the day when licensees would be obliged to broadcast locally produced or selected programs. The Tribunal's investigation should cover both networking by affiliation and networking by common ownership. It should have the power to obtain copies of all program acquisition and supply agreements and this should assist in such an inquiry. Bond Media does not believe there would be any difficulty in getting such information through the licensing process.[148] The Committee is not certain that this is the case. The Tribunal would be assessing the advantages of networking (economies of scale) against the disadvantages - absences of localism and insufficient catering to the tastes of local communities. The Minister should direct the Tribunal to undertake such an inquiry and the Committee will recommend accordingly.

4.85 The Centre also says that if network licensing is not acceptable, the Tribunal be given the power to deal with matters common to a number of stations in one inquiry and to apply those findings across-the-board.[149] This proposal was made in earlier evidence by the Tribunal. It said it can and does deal with network issues but does not have an efficient way of doing so. There are many issues the local licensee cannot deal with - material that comes on relay, advertisements and captioning. A mechanism was needed by which a decision made on a network issue at a particular renewal inquiry was binding on the other parts of the network.[150]

4.86 The industry view is that there is no need for any type of regulation of networks. Network Ten Australia says it has consistently argued for many years that the licensee in each market should be 100 per cent responsible for what that station puts out. At renewal hearings the person in charge of the station cannot claim lack of responsibility for something because that person is

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[148] Transcript of 25 July 1988, p.1603.
[149] Submission No. 4094, p.9.
[150] Transcript of 26 July 1988, pp.1807-1809, and Submission No. 4095 p.2.

responsible. That person can decide what programs to show at what hours. The person in charge has a budget allocation and profit target and meets regularly with other persons who run other stations to discuss matters of mutual interest.[151]

4.87 The Committee does not accept these arguments which indicate there is no need for a mechanism to regulate network issues. First, there are economies of scale in networking and the added commercial advantage of offering national advertisers mass markets. Thus market research and the associated programming need to be and is centralised to obtain these commercial advantages. This centralisation is made clear in the oral evidence of Television Make It Australian.[152] The person who is in charge of a local station would not have the financial resources to undertake this type of work. Second, some issues like captioning for deaf people cannot be examined at local renewal hearings because they are national matters. Local executives also claim that because they get the news on relay they do not have the power to change the time slot. The Tribunal found the industry argument to be completely inconsistent.[153] The Committee holds the identical view.

4.88 The Committee finds the industry argument to be incomplete, exaggerated and inaccurate. It agrees with the view that there is a need for a mechanism to deal with network issues so that a decision made at a renewal hearing on a matter that is common to other commonly owned licences would be binding on those licensees.

Conclusions and Recommendations

4.89 The Department has put forward a number of options for recognising the importance of networks. The deficiency of this approach is the absence of criteria which can be applied to select one option rather than another.

4.90 There is no case for the licensing of networks and to do so is to introduce an unnecessary layer of regulation. There is a case for simplifying the manner in which the Tribunal can deal with network issues and for giving the Tribunal adequate power to monitor and if necessary to limit the number of hours of network programming.

4.91 The Committee recommends that:

Recommendation 9: Networks not be licenced.

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[151] Transcript of 25 July 1988, pp.1628-1635.
[152] Transcript of 12 July 1988, pp.1452-1455.
[153] Transcript of 26 July 1988, pp.1807-1815.

Recommendation 10: Pursuant to Section 134 of the *Broadcasting Act 1942*, a regulation be made allowing the Tribunal to apply to all licences under common ownership a decision made at any licence renewal hearing which deals with matters common to all these licences.

Recommendation 11: Pursuant to Section 134 of the *Broadcasting Act 1942*, a regulation be made empowering the Tribunal to require that all licensee agreements, whether with respect to ownership or with respect to provision of programs, which result in networking arrangements be registered with the Tribunal.

Recommendation 12: The Minister refer to the Tribunal for inquiry and report under Section 18(2) of the *Broadcasting Act 1942*, the need to set minimum hours of local programming that licensees must transmit.

5: OWNERSHIP AND CONTROL

The role and functions of the Australian Broadcasting Tribunal in regulating the commercial broadcasting sector with particular reference to -

(2) the role of the ABT in relation to changes of ownership and control of commercial broadcasting licences, including the extent to which such changes should require prior or subsequent approval;

Problems with the Present System

The Present System

5.1 The present system for the regulation of the ownership and control of broadcasting is based on four related but essentially separate kinds of limits, namely:

(a) limits on the holding of 'prescribed interests'[154] in licences (whether those limits are expressed in terms of numbers of licences or in terms of population reach);

(b) limits on the cross-ownership of radio, television and newspapers;

(c) limits on the holding of directorships in media companies; and

(d) limits on foreign ownership and control of broadcasting licensees.

5.2 Associated with the provisions which set out these basic limits is a plethora of provisions which interpret and amplify them, and provide necessary information-gathering and enforcement machinery. In addition, the Act places limits on the free transfer of licences and on the sale of interests which would confer or increase a prescribed interest in a licence.

5.3 The role of the Australian Broadcasting Tribunal in the supervision of changes in ownership and control and enforcement of the ownership and control provisions is a mixture of duties and powers conferred by the Act, with what might be described as convenient administrative practice. The Tribunal's statutory powers and duties include the examination of share transactions and

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[154] See s.89F of the Act. In summary, the section says that a person has a 'prescribed interest' in a licence if the person holding the licence is in a position to exercise control of the licence, or more than a set proportion of the votes in the licensee company, or is the holder of financial or shareholding interests exceeding a set proportion of such interests in the licensee company.

licence transfers, the giving of directions to protect licensees until a transaction is approved, the ordering of divestiture, and the overall collection of information about the ownership and control of Australian broadcasting.

Problems

5.4 The evidence before the Committee shows that most of the powers exercised by the Tribunal are not in dispute. Attention is focussed essentially on only those areas where there was considerable dissatisfaction.

5.5 There are three main complaints about the present system of supervision of changes in the ownership and control of broadcasting licences. These are:

(a) the lack of powers for the Tribunal to deal with significant changes in control;

(b) inflexibility in the Act to allow the Tribunal to protect adequately the public interest between completion of significant transactions and completion of Tribunal inquiries; and

(c) the overall cumbersome and costly burden of administering the ownership and control provisions (especially those requiring supervision of minor share transactions).

5.6 Each of these matters will be examined separately. The final paragraphs of this chapter will bring together the Committee's recommendations which, if implemented, would correct these deficiencies.

The Policy Base

5.7 Any options for restructuring the current system need to be considered against a clear statement of the policy objectives to be achieved by the system.

5.8 A central policy rationale in 1965 for giving the Minister powers to supervise share transactions was to protect the licensing system; that is, to ensure that a person who did not, or would not, succeed in obtaining a licence through the normal licence grant process was not able to achieve the same end by means of an unchecked share transaction. It was also apparent that the then Government saw the Minister's supervision of share transactions as a way of preventing people from gaining control of more than the specified maximum number of prescribed interests. The 1965 amendments required that a person obtain the Minister's approval before becoming a party to, or accepting benefits under, a share (or in the case of television - debenture) transaction which would result in that person acquiring or increasing a prescribed interest in a licence. Nonetheless, no provision was enacted requiring major changes in

management or program supply arrangements to be approved. Neither did the approval requirement extend to transactions covering only the acquisition or increase of votes amounting to a prescribed interest.

5.9 Following the *Green Report of 1976,* the Parliament conferred all the Minister's powers over share transactions on the Tribunal, but the basic system governing approvals remained unchanged until 1981.

5.10 In 1981, the requirement that a party to a share transaction obtain **prior** approval from the Tribunal was removed, and replaced with a requirement that only a simple notice of the impending transaction be given to the Tribunal, with the full application for approval being lodged once the transaction was complete. The second major change in 1981 was that the two simple criteria for approval of share transactions in the previous law were replaced with an exclusive list of factors that the Tribunal was to consider. These criteria did not preserve the 'before' and 'after' public interest comparison implicit in the previous law, and focused instead on the suitability of the purchaser. One effect of the change was that the Tribunal was effectively precluded from giving explicit consideration to changes in the service of the licensee that might result from the share transaction.

5.11 The 1981 amendments were not accompanied or closely followed by any major reassessment of the policy rationale for Tribunal supervision of share transactions. The system remains essentially the same as it was after the 1981 amendments.

5.12 A close analogy can be drawn between the transfer of a licence itself, and a change of the control of the licensee company. There should be no policy difference in the way these transfers are treated under the Act, as there are at present. Transfers and other changes in control of the licence are in turn analogous to the grant of a licence. The Federation of Australian Television Commercial Stations (FACTS), has submitted that 'the criteria for determining the merits of an application for the transfer of a licence should be similar, in most respects, to those which apply to an application for a new licence'. [155] The Committee agrees and believes that the process for supervising changes in control of licences should be brought more into line with licence grants.

5.13 In summary, the Committee considers that the policy touchstone for any system of supervision for changes in ownership and control should be the following:

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[155] Submission No. 3168, p.19.

The Tribunal should be empowered to prevent any change in the ownership or control of a licensee company or the service, if the result of the change on the licensee company or the service would be to nullify the original bases for the granting of that licence to the licensee company.

5.14 This formulation of the policy objective states explicitly that the situation following a change in ownership and control should be viewed as if the licence were now being granted to the licensee, having regard to all the circumstances resulting from the change. But it is also important to say that this does not mean that the Committee believes that every change should result, in effect, in a fresh licence grant. Changes in ownership or control commonly result from private agreements, of varying nature and magnitude, and they cannot simply be equated with a competitive grant process. Rather, the Committee believes that the objective should be an efficient cross-check to ensure that the licensing process is not being undermined.

Powers to Deal with Significant Changes

Introduction

5.15 The first major deficiency of the current ownership and control regime, that it does not allow the Tribunal to deal properly with significant changes in control, can be broken down into two main parts. These are:

(a) scope of control - whether the system should cover every practical or commercial means by which a person may gain or increase control of a licensee or licence; and

(b) prior or post approval - whether changes in ownership and control of commercial broadcasting licences should require prior or post approval by the Tribunal.

The Scope of Control

Background

5.16 This matter was not addressed by most of the submissions received by the Committee, although some (such as SIARS Pty Ltd and Mr L T Grey) regarded it as a problem. The treatment of this issue affects the whole scope of any approvals system and it is appropriate to deal with it first. The question is whether any effective system for supervising changes in ownership or control should include consideration of any means by which control of licences or licensees could be obtained. At present, the Act's approval systems are concerned only with transactions dealing with mathematically quantifiable voting and financial interests, and with changes to memoranda and articles of associ-

ation of licensee companies. Only when the application of the precise tracing provisions gives a person a prescribed interest does that person need to seek approval for any transaction. Even then, the application of the provisions is often obscure and difficult.

5.17 Changes to the memoranda and articles of association of holding companies of licensees do not come within the Tribunal's jurisdiction even though they might be as significant as changes to a licensee. Many other significant changes are also outside the purview of the Tribunal. For example, one way that a person might obtain practical or commercial control of a licensee company is through control of its board of directors.[156] Another way of obtaining effective control of a licence might be through control of its program supply. Neither changes in directorships nor changes in program supply arrangements are subject to Tribunal approval.

5.18 The Committee explored these issues with witnesses at hearings in July this year. In those hearings, FACTS supported an approach which concentrated on changes in control of licensees and conceded that this might then mean that the Tribunal should become involved in changes to boards of directors 'if indeed the composition of a board would affect the control of a licensee'.[157] However, FACTS suggested that this would not require any change to the law; that the Tribunal was notified of directorships and could investigate them. In fact, the position appears to be that the Tribunal is notified only as a matter of courtesy at the time changes occur, and otherwise only in quarterly reports provided to the Tribunal covering a range of shareholding information. Network Ten noted that the information was provided in quarterly reports, and there was a need for the Tribunal to have that information. But it expressed the concern that any greater requirement of reporting about such matters might 'bog the Tribunal down'.[158]

5.19 The Committee believes that any effective system for supervising changes in the control of licences and licensees must take into account control arising from any source. This must be done in a way which is sensitive to the legal and administrative difficulties and burdens, but to ignore the demonstrated potential for control to be exercised by means other than voting and shareholding interests would be absurd.

Options for Change

5.20 A requirement that the Tribunal consider every factual permutation by which a real change in control of a licence or licensee might be effected has the potential to become an administrative nightmare if approached clumsily. For

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[156] See *Re News Corporation Ltd* (1987) 70 ALR 419.
[157] Transcript of 25 July 1988, p.1583.
[158] Transcript of 25 July 1988, p.1639.

that reason the Committee considers that it is essential that any option include the maximum flexibility and discretion for the Tribunal to pick out and deal with only those changes which it regards as important.

5.21 The Committee sees the basic options as:

(a) bring every transaction, agreement, arrangement, understanding, resolution or appointment (or class thereof) which, in the Tribunal's opinion, might be the cause of a real change in control of a licence or licensee, within the scope of the approval system; or

(b) bring every transaction, agreement, arrangement, understanding, resolution or appointment (or class thereof), of a kind specified in the Act, within the scope of the approval system.

5.22 The difference between these two options is that the first would require the Tribunal to make a preliminary judgement about the effect of a particular change, or class of change, before it would come within the approval system. The second option would give Parliament the right to fix the relevant kinds of changes in legislation. The first option has the advantage of flexibility, but the disadvantage in that it is uncertain and may be difficult for the Tribunal to apply on occasion. The second option has the advantage of greater certainty, but deprives the Tribunal of the flexibility to deal with new situations as they arise. On balance, the Committee favours an approach which maximises Tribunal flexibility, even at the risk of leaving it with some difficult judgements, and consequently supports option (a).

Prior or Post Approval

5.23 The evidence put to the Committee can be separated into that which supported prior approval and that which sought changes to the existing manner of prior approval.

5.24 Industry says that the system of approval after the event is sufficient because the Tribunal has a range of protective powers to protect the licensee in the interim period, and has the ultimate power to order divestiture in the event that the change in ownership or control is not approved. FACTS, for example, points out that the Tribunal has not refused any of the 'multitude' of transactions it has considered since 1981, and has not found it necessary to issue any interim directions to prevent changes that would adversely affect the ability of a licensee to comply with its licence conditions or to provide an adequate and comprehensive service.[159] Hoyts Media argues that prior approval is 'unworkable' and would be deleterious to the service because of the effect of

[159] Submission No. 3168, pp.18, 19.

the uncertainty and delay on staff morale etc.[160] Bond Media referred to the former prior approval requirement having the effect of 'erecting a defensive wall around a licensee', rendering it 'virtually immune from hostile takeover'.[161] This problem was also raised by Grey, who expressed the view that small traced interests 'should not be available as a foolproof protection against an on-market takeover'.[162]

5.25 The Communications Law Centre (CLC), and its consultants, SIARS Pty Ltd, says that the pursuit of post-transaction approvals is 'sterile'. It gave the example of radio station 3DB which passed through five different owners in seven months during 1987, with the last of these owners acquiring the station before the Tribunal had finished its report on the first transaction.[163] SIARS argued that the 'silly-but-necessary' system of post-transaction approval was provoked by the 'quite evident overkill of applicable ownership rules'. It says that if the Act confines itself to 'controlling interests', then it is practicable to introduce the same prior approval requirement as applies to licence grants and transfers.[164] This argument appears to be based on the premise that a prior approval system will work once all the 'trivia and incidentals' are removed from the system, but it is not clear to the Committee how this alone will overcome the basic difficulty of running a prior approval system without completely stifling the possibility of on-market changes in control.

5.26 The crucial question according to the Tribunal is the power it has to protect the public interest. By that it presumably means the power it has to ensure that the service provided to the community continues to be of a kind consistent with the licensee's obligations under the Act and the Tribunal's standards. If these powers are adequate in the period between transaction and Tribunal decision, then there is no objection to a system involving approval after the event.[165]

5.27 However, the Tribunal argued that its powers in that interim period were not adequate.[166] The principal relevant power conferred on the Tribunal is s.92M of the Act. The Tribunal said that it had been put to it that s.92M was invalid for Constitutional reasons relating to the separation of judicial and executive powers. Even if it were valid, the Tribunal noted that it required a judgement that there was the threat of something 'adverse' happening to the service. The Tribunal noted that under the current regime it is often presented with a *fait accompli* in terms of changes to operations and programming of a

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[160] Submission No. 1355, p.4.
[161] Transcript of 10 February 1988, p.139.
[162] Submission No. 3064, p.15.
[163] Submission No. 3188, Attachment (consultant's report), pp.65,66.
[164] Submission No. 3188, already cited, p.66.
[165] Submission No. 3153, p.11.
[166] Submission No. 3153, pp. 11-13.

service; these changes would rarely be 'adverse' in the narrow sense of s.92M, but highly relevant to the Tribunal's consideration of the transaction.[167]

5.28 Licensees did not have a strong common view that s.92M was sufficient. FACTS said that the Tribunal had never found it necessary to take action under s.92M, while noting that 'hypothetically' a company could strip a licensee and dispose of it before the Tribunal could take effective action.[168] Network Ten said it could 'certainly perceive the problem' in relation to the interim period, and suggested that the American trusteeship model (described below) might have 'some benefits in perhaps a modified form'.[169]

5.29 The Committee believes that the present system of approvals after the event does not provide the Tribunal with the capacity to supervise changes in ownership and control effectively. The Federation of Australian Radio Broadcasters (FARB) argued that the Tribunal's powers were adequate but the Tribunal itself had become 'formal, passive and reactive'.[170] This may be an exacerbating feature of the current system, but the Committee believes that the heart of the problem lies with the Broadcasting Act. At very least, there are problems with the validity and scope of s.92M that make it of doubtful utility. The fact that the Tribunal was powerless to control any part of the enormous restructuring of radio and television that took place in 1986-87, including the 'pass the parcel' game played with 3DB, suggests that the system is unlikely to give the Tribunal the means to take any interim action to protect a licensee where a real and urgent case for refusing approval of a change in ownership or control arises. The Tribunal itself found that its powers under s.92M did not give it the means to intervene to prevent the possibility of foreign control of The Herald and Weekly Times Ltd in January 1987. Similarly, before it was able to deal with an application for directions under S.92M by the Australian Theatrical and Amusement Employees Association in April 1987, seeking to prevent the dismissal of production staff at HSV-7 after its purchase by the Fairfax Group, the station was again sold.

Options for Change

5.30 The options seem to be the following:

(a) require (or empower the Tribunal to require) that all relevant changes in control be considered by the Tribunal before they take place; or

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[167] Submission No. 3153, pp. 11, 12.
[168] Submission No. 3168, p. 19.
[169] Transcript of 25 July 1988, pp. 1639-40.
[170] Submission No. 4054, p.12.

(b) require (or empower the Tribunal to require) that certain changes in control (or classes of changes) be considered by the Tribunal before they take place; or

(c) do not require that all relevant changes in control be considered by the Tribunal before they take place, but include mechanisms which protect the public interest and the licensee in the interim, and allow any unapproved change to be prevented.

5.31 The Committee does not believe that option (a) is practical in the context of the present detailed ownership and control structure. Although it accepts that the practicality of prior approval increases once concern is focussed on changes in effective control, it is still not convinced that it is necessary to put such a large obstacle in the path of a person wishing to purchase an interest in a licensee in order to provide an effective cross-check against the licensing process.

5.32 Option (b) of allowing the Tribunal to choose which particular changes or classes of changes it might require to be subject to prior approval has some attractions. It attempts to minimise the problems caused by a prior approval requirement, while allowing the Tribunal to block effectively any change which should be properly investigated before proceeding. It was also supported by the Tribunal itself, and by Grey. However, at least in relation to the ordinary run of share transactions, especially those transactions involving shares in more diversified holding companies removed from the licensee, the Committee considers that this option is too unpredictable to be the first choice.

5.33 The Committee is then left with option (c). The key to this option is the effectiveness of the mechanisms designed to protect the public interest in the interim and ensure that any unapproved change is prevented. In the course of evidence, reference made to the approach taken in the United States of America, where a 'trustee' system is in force for tender offers which result in a change in control of a licensee.

5.34 No explicit evidence about the US system was provided by any witness, but the Committee has had regard to a Policy Statement produced by the United States Federal Communications Commission (FCC) in 1986, which explains why the trustee system was adopted and how it operates.[171] The FCC noted that tender offers (or on-market offers) subject to the jurisdiction of the Securities and Exchange Commission were governed by the Williams Act, and that in enacting the Williams Act, 'Congress specifically determined that "takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management"'.[172] However, Congress also recognised that tender offers 'do not always reflect a desire to

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[171] FCC Policy Statement 'In re Tender Offers and Proxy Contests', adopted 30 January 1986.
[172] FCC Policy Statement, already cited, p.23.

improve the management of the company', and therefore embraced a 'policy of neutrality'. In looking at its own procedures, the FCC was also concerned to adopt a process which preserved the policy of neutrality between incumbent management and offeror.[173] It felt that the application of its traditional 'long form procedure', with its prior approval requirement, to a tender offeror would:

> ... unduly favour incumbent management and would conflict with the policies underlying the Williams Act. Indeed, we find that the use of long form procedures would effectively foreclose the availability of tender offers as a means by which to obtain control of communications entities. For these reasons, we conclude that the exclusive use of long form procedures, in the context of tender offers, is inconsistent with the public interest.[174]

5.35 The FCC's solution was to require the simultaneous submission of a full long form application for approval of the transactions resulting from the tender offer, and a short form application seeking a special temporary authority for an independent trustee to collect the tendered stock and exercise any voting rights attached to it. While the long form proceeding is in progress, there is to be no oral communication between the offeror and the trustee, and only certain kinds of written communications.[175] The essence of the process is that the trustee will be completely independent of the offeror. The FCC also emphasised that the trustee was not to have plenary power, but was to be guided by three principles:

1. The trustee has a general obligation to safeguard the assets of the corporation.
2. The trustee should exercise his or her power in a manner which assures the continuity of broadcast operations.
3. The trustee must act in a manner which facilitates the underlying long form transaction.[176]

5.36 The FCC decided that the trustee would be -

> ... presumptively disallowed from undertaking, initiating or supporting any significant departures from existing corporate operations or practices. In addition, unless it is necessary to further one of the three principles herein addressed, the trustee should not discharge key employees, such as news anchors, where such action may effectuate a significant

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[173] FCC Policy Statement, already cited, p.24.
[174] FCC Policy Statement, already cited, p.32.
[175] FCC Policy Statement, already cited, p.53.
[176] FCC Policy Statement, already cited, p.56.

change in the nature of the business.[177] If approval for the long form application is denied, the trustee is to act promptly to obtain alternative buyers for the tendered stock.

5.37 The US trustee system was said by the Department of Transport and Communications to have 'some advantages over the system we have now',[178] and received some qualified support from licensees.[179] It has the distinct advantage that it deals with the issues of 'unscrambling the eggs', and it ensures that irreversible changes will not be made to the management and programming of the service, except when necessary to ensure that the service continues at a reasonable level of quality. In summary, the Committee considers that the 'trustee' system would provide sufficient safeguard for the public interest in the case of share or debenture transactions transferring real control of a licensee, and would mean that the integrity of the licensing process in such cases could be protected without reverting to a system of prior approval for share transactions.

5.38 Clearly, it is not practicable to apply the trustee system to every share and debenture transaction, no matter how small. It is really only necessary where the transaction might give rise to a real change in control. This would be a matter for the Tribunal to determine on assessment of a preliminary notice lodged by the applicant. Neither would it be practicable to apply the trustee system to changes in practical or commercial control of the licensee or its operations which arise independently of share or debenture transactions. In the case of this kind of change, the Committee would favour a version of option (b), that is, to allow the Tribunal selectively to require that certain changes, or classes of changes, should be the subject of approval, whether before or after those changes take place.

The Administrative Burden

Background

5.39 The ownership and control regime places a significant administrative burden on the Tribunal and licensees, mostly due to the requirement that every share transaction leading to an increase in a prescribed interest must be the subject of an application to the Tribunal. The main factor in the administrative burden is the result of the requirement that every share transaction which leads to an increase in a prescribed interest, no matter how small, must be the subject of a notice, followed by an application, to the Tribunal. Each such application must then be the subject of an inquiry. Even though the inquiry process allows for some abbreviation in straightforward cases, the amount of

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[177] FCC Policy Statement, already cited, p.56.
[178] Transcript of 26 July 1988, p.1782.
[179] Transcript of 25 July 1988, p.1640.

paper work generated by the application requirements is considerable, even in cases where there is agreement that the transaction is completely uncontroversial. Even in cases where the transaction may have generated some interest at the Tribunal, it does not seem that, with two exceptions only, any share transaction is ever refused approval.

5.40 The Tribunal itself was critical of the time it was forced to spend dealing with unimportant transactions. It noted that in the 1986-87 financial year, a total of 719 applications were lodged with the Tribunal for approval of transactions under the ownership and control provisions; of these, only 194 were from people who were directly involved in the transactions. [180] The Tribunal added that the processing of these applications diverted its limited resources from more important tasks. FACTS and FARB also supported the simplification of the legislation and the elimination of a range of matters of little consequence and unnecessary administrative burden.[181] Similar views were expressed by Bond Media, the CLC and Hoyts Media.

5.41 There is little doubt that the system requires enormous quantities of paper to be consumed in the consideration of many hundreds of transactions per year which appear to be of little significance because they do not affect the real control of the licence. A simpler system would be more desirable .

Options for change

5.42 The Committee sees the major options for simplification arising from the evidence as these:

(a) require any arrangement or transaction which changes the ownership or control of the licensee to be notified to the Tribunal, with a discretion in the Tribunal to decide whether an inquiry should be held in each case; or

(b) combine (a) with a system of shareholding 'hurdles' at which mandatory inquiries will take place.

5.43 Clearly, option (a) is the more flexible. In most cases, it would require no more of a person than notifying the Tribunal of a change. Of course, the notification would have to be provided before the change took place (as at present), and would have to provide sufficient information for the Tribunal to make a judgment about the extent of the change. In a case where the Tribunal considered that the result was a real change in control of the licensee, it could then require that a full Tribunal inquiry take place (whether before or after the change took place). A system incorporating this kind of increased discretion

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[180] Submission No. 3153, p.12.
[181] Submissions Nos. 3168, p.17 and 4054, p.17

would be consistent with the suggestions made by Bond Media,[182] Hoyts Media[183] and Grey.[184] It would also be possible to combine this option with other changes in approach, such as the trustee system described at paragraph 5.34, or a lifting of the threshold at which a prescribed interest is obtained.

5.44 The 'hurdles' approach involves fixing certain levels of shareholding and voting interests, such that whenever a person acquires interests taking him or her over a 'hurdle', an inquiry would have to held. This approach is suggested in a discussion paper produced by the Department and has reasonable support from the Tribunal and others.[185] Its advantage over the completely discretionary approach is that it relieves the Tribunal of the burden of the initial judgment about the effect of the transaction at certain levels, and provides a safeguard to ensure that major changes do not simply slip through because the Tribunal is too busy to give them proper attention, or fails to appreciate their significance. The 'hurdles' approach could also be combined with the trustee system. For these reasons, the Committee favours option (b).

5.45 The levels at which the hurdles might be fixed is, as the Tribunal says, 'necessarily arbitrary', but should be 'sufficiently wide so that it does not catch insignificant transactions'.[186] It seems to be assumed that the first hurdle must be set at the minimum interest level for acquisition of a prescribed interest, but the Committee does not see any reason why this should be so. It would be possible, for example, to leave the prescribed interest threshold for television shareholdings at 5%, but have the first hurdle fixed at 15%. Overall, the Committee would regard the spacings suggested by FACTS as providing a reasonable scheme, although FACTS raised them as bench marks which would only require compulsory reporting rather then inquiries. As the Committee sees it, these spacings would require applications for approval to be submitted whenever a person's voting or shareholding interests in a licence reached 15%, 30%, 50%, 75% and 100%. In between these mandatory hurdles, reporting would still be required, and the Tribunal would be able to initiate an inquiry if it thought the circumstances warranted doing so.

Other Problems

Tribunal's Capacity to Deal with Changes

5.46 In addition to the three main problem areas outlined above, the hearings before the Committee disclosed two other sources of concern. The first is the capacity of the Tribunal to get and analyse quickly the information needed to

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[182] Submission No. 3169, p.14.
[183] Submission No. 1355, p.7.
[184] Submission No. 3064, p.15.
[185] Submission Nos. 4095, p.6 and 4094, p.2.
[186] Submission No. 4095, p.6.

keep track of the ownership and control laws. This was exemplified in relation to the shareholding of News Corporation Ltd (a foreign person under the Act) in Northern Star Holdings Ltd (the holding company for Network Ten). It came to the Committee's attention that News Corporation had purchased more than the permitted 15% of shares in Northern Star, and had subsequently sold down to below 15%. When the matter was raised with the Tribunal, its Chairperson admitted that the news had taken her 'somewhat by surprise at the time'.[187] She added that it took 11 hours for the Tribunal's computer to produce a model of the Northern Star structure produced to the Committee, and 'if on a daily basis you were going to just keep up with the buying and selling in any particular media organisation, you would have a bureaucratically impossible task'.[188]

5.47 The capacity of the Tribunal to keep up with the volume and complexity of transactions covered by the Broadcasting Act has to be doubted. In that case, there is little point in relying on the Tribunal to be an active policeman enforcing multiple interest, cross-media and foreign ownership matters. Consideration has to be given to strengthening the obligations on licensees to police compliance by their own shareholders, and by other companies further up corporate ladders.

Periods of Grace

5.48 The second area of concern is the application of the so-called 'periods of grace' under the Act: see ss.90C(5B)-(5E), 92(4B)-(4E) and 92JB(6) and (10). In brief, these allow a person to hold excess interests for various periods after the transaction in which they were acquired, or after Tribunal approval of the transaction. It seems to the Committee that this provision should apply only to assist a shareholder in a company, who is put into inadvertent breach of the Act by the company entering into a relevant transaction. This was apparently a problem experienced by institutional investors under the pre-1981 legislation, and led to the introduction of the 'periods of grace'. However, it is clear that some purchasers of interests in licensees are deliberately purchasing excess interests and taking advantage of the 'periods of grace' to maintain those interests for considerable periods. In some cases, the company attempts a restructuring designed to allow the excess interests to be kept indefinitely.

5.49 The 'periods of grace' under the Act are deliberately being used to acquire excess interests, with a view to corporate restructuring and advantageous disposal of the excess (if at all) at a more convenient later date, and possibly to a carefully selected purchaser. The Committee regards this as an abuse of the legislation.

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[187] Transcript of 14 June 1988, p. 1166.
[188] Transcript of 14 June 1988, p. 1167.

The Preferred Package

5.50 Taking all the above into account, the following package should be adopted for the supervision of changes in ownership and control of radio and television licences.

5.51 The Committee recommends that:

Recommendation 13:

(a) a person shall provide the Australian Broadcasting Tribunal with specified details of -

(i) any proposed transaction in respect of shareholding, voting or financial interests, where a result of the transaction will be that the person acquires an interest which (together with any other such interests held by the person) exceeds the minimum prescribed interest threshold for the affected licence(s).

(ii) any other proposed transaction, agreement, arrangement, understanding, resolution or appointment (or class thereof) which might be the cause of a real change in control of the operations or selection or provision of programs of a licensee.

(b) a person shall lodge an application seeking the approval of the Australian Broadcasting Tribunal for any transaction, agreement, arrangement, understanding, resolution or appointment (or class thereof) referred to in (a) above, where -

(i) in the case of a transaction in respect of shareholding, voting or financial interests - the transaction causes the interests held by the person in a licence to reach or cross, for the first time, one or more of the following levels: 15%, 30%, 50%, 75% and 100% of the relevant class of interests (excluding deemed interests) in the licence.

(ii) in any other case - the Tribunal serves a notice on the person requiring the person to lodge an application within a certain period of time (say 28 days), on the basis that, in the Tribunal's preliminary view, the proposed action would be likely to cause a significant change in control of the operations or selection or provision of programs of a licensee.

(c) there shall be no prohibition on completion of any transaction, arrangement, understanding etc., before the Tribunal gives its decision on the application, but the Tribunal shall have the power to issue an order staying the operation of any such act for which an application for approval has been or is to be lodged;

(d) pending the completion of an inquiry by the Tribunal into the application for approval of a share or debenture transaction, any shares or debentures acquired by the applicant shall be vested in the Tribunal or another suitable trustee and held on trust for the applicant; strict rules along the lines of the US model should govern contact between the applicant and the trustee, and the duties of the trustee in the interim period;

(e) in the case of a share or debenture transaction -

(i) if the Tribunal approves it - the shares or debentures held on trust shall be forthwith transferred to the applicant.

(ii) if the Tribunal does not approve it - the shares or debentures shall be retained on trust until such time as another person to whom the trustee proposes to sell the shares or debentures has submitted an application and received the approval of the Tribunal.

(f) in the event that the Tribunal refuses to approve any action for which an application was lodged, the Tribunal may, if it sees fit, issue directions to the applicant and any other relevant person for the purpose of ensuring compliance with the Tribunal's decision.

5.52 In conjunction with the above, the Committee further recommends that:

Recommendation 14:

(a) consideration should be given to strengthening the obligations on licensees to police compliance with the ownership and control provisions by their own shareholders, and by other companies further up the corporate ladder; and

(b) the 'periods of grace' under the Act for the disposal of excess interests should be amended to ensure that they cannot be used deliberately to acquire excess interests.

6: PROGRAM AND ADVERTISING STANDARDS

The role and functions of the Australian Broadcasting Tribunal in regulating the commercial broadcasting sector, with particular reference to -

(3) the role of the ABT in establishing and enforcing program and advertising standards;

Background

Standards and their Purposes

6.1 The Broadcasting Act gives the ABT a range of powers. In particular, s.16 sets out the functions of the ABT and gives it the power to determine standards for programs. Children's programs are specifically dealt with in s.16(5) to (7). Other significant powers in the Act relating to program and advertising standards include prohibition of broadcasting advertisements for cigarettes or cigarette tobacco (s.100(5A)), or medicines (s.100(6)); supervision of programs by licensees to comply with program standards (s.99(1A); and the prohibition of broadcasting blasphemous, indecent or obscene material (s.118).

6.2 There are other provisions in the Act which relate to the application or enforcement of standards, for example, reprimands and admonishments over non-compliance with standards (s.101). These provisions will be discussed in more detail in Chapter 7 which deals with standards, sanctions and their enforcement.

6.3 These powers apply to all commercial licensees other than the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). The ABC is required to 'take account' of the Tribunal's standards, but there is no such requirement for the SBS. *Australian Broadcasting Corporation Act 1983*, s.6(2)(a)(ii).

6.4 The purpose of the standards promulgated by the ABT is 'to provide a statement of the rules, other than those in the Act, for the transmission of programs'[189] The ABT provided short descriptions of its procedures to the Committee.

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[189] Introduction to Interim Television Program Standards, ABT, p.11.

Community Concern

6.5 An unprecedented number of submissions were received in response to the notification of this inquiry. The majority of the submissions were one or two page letters from persons all around Australia requesting that the powers of the Tribunal to establish and enforce program standards be either retained or increased. This concern may have been stimulated by a statement from the then Minister for Transport and Communications, Senator the Hon Gareth Evans, QC, that '... may be the time has come when Australian governments do not need to resort to regulatory intervention to achieve minimum criteria of quality ... on television'.[190]

6.6 The Committee took a considerable amount of evidence around Australia which related to this term of reference and to term of reference 4 which deals with sanctions. Few of the submissions received dealt with radio.

6.7 Many of the submissions drew attention to what was seen as the deterioration of the standard of television programs. The Christian Television Association of WA referred to the 'creeping deterioration of standards' in 'violence, sexuality and things like that'. The Catholic Church in Adelaide expressed concern about the difficulties young families had in the standards which were adopted from the media, especially TV.[191]

6.8 While the Communications Law Centre suggested 'there is a lot of room for the interpretation of those standards which apply particularly to the aspect of sex and morality and violence', the Church of Christ in Victoria wanted 'community standards broadly reflected in what is shown on TV'. The Catholic Communications Centre (NSW) made a distinction between what comes into the family home and what is seen in a public theatre. Television is a family medium and this fact should govern the content of what was shown to homes where programs could be watched by anyone of any age. Different standards applied to theatres where people had made a conscious decision to go, and paid money, to see specific programs.[192]

6.9 A great deal of evidence was taken from the television industry about standards and their implementation. When the Committee inspected TCN 9's facilities in Sydney, we took particular interest in that station's internal censorship procedures. The Program Classification Officer from TCN 9 gave evidence about the classification of all overseas film and videotape material and material produced outside the station. His responsibilities extended to advising others in

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[190] Address to the Australian Broadcasting Tribunal Conference *The Price of Being Australian*, Conference Report, ABT, 1988, p.10.
[191] Transcripts of 1 March 1988, p. 676 and 7 June 1988, p.1088.
[192] Transcripts of: 11 February 1988, p. 384; 12 July 1988, p.1431; and 10 February 1988, p.195.

the station who have to classify material, including news and current affairs. Evidence was also taken from the other networks about their comparable procedures.[193]

6.10 The Chairperson of the ABT drew attention to the 'fairly militant army of private watchdogs ... on those taste and morals issues'. She also expressed the view that 'the television networks by and large take a fairly conservative attitude' to what is shown on television.[194]

6.11 While the Tribunal believes that the existing standards have had a 'salutary effect on the commercial television stations'[195] , submissions from many individuals and groups make it clear this confidence is not universal.

The Need for Standards

Approach

6.12 While the Act empowers the Tribunal to determine program standards this term of reference and the Ministerial comment prompt an examination of the need for such powers. This significant question is best approached by asking whether, for example, there should be programs on TV specifically for children, how this can be achieved and what is the role of regulation. The principles derived from considering this particular topic can then be applied to such issues as the times certain programs should be shown, Australian content, violence and advertising on TV. Some of these issues will be considered in more detail later in this chapter. The chapter will conclude by considering whether the ABC and SBS should be covered by the ABT's standards.

Children's TV Programs

6.13 Television has an enormous capacity to inform, to educate, to entertain and to influence. It therefore should provide a diverse range of programs for various groups in the community. Children are a substantial and important minority in the community and licensees have an obligation to serve such groups.[196]

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[193] Transcripts of: 29 March 1988, pp. 1021-1034; 3 March 1988, pp.797-801; and 25 July 1988, p.1684.
[194] Transcript of 29 March 1988, pp.975, 941.
[195] Transcript of 29 March 1988, p.945.
[196] See paragraph 1.4. Australian Broadcasting Tribunal,*Annual Report 1983-84*, Appendix M, p.193.

6.14 In order to develop children socially and intellectually, there is a need for age-specific and comprehensive programs geared to their special cognitive abilities and experiences. In addition, they have an entitlement to choices in the programs they watch and to choice and diversity of ideas and information. The Committee is satisfied there is a need for special programs for children.

6.15 The evidence makes it clear that, left to itself, licensees would not provide the quality programs that some sections of the community believe they should show for children.[197] It therefore follows that there has to be regulation than self-regulation in order to provide high quality programs for children.

6.16 The Minister could establish and enforce standards by regulation under the Act, or there could be set up, by means of the Act, a body with appropriate powers under the Act. In terms of accountability to Parliament, discussed at paragraphs 3.71 and 3.73, the Tribunal is such a body. It is presently conducting an inquiry into children's TV programs and we believe this public process is a suitable way to devise standards

6.17 The Business Regulation Review Unit argued that reservation of time slots for programs for any community group distorts commercial use of the spectrum, reduces advertising revenue, increases advertising prices, imposes costs on licensees and, by reserving time slots for one group in the community, denies others viewing choice.[198] Some of these arguments may be correct in that regulation prevents the optimal commercial use of viewing time. Nevertheless, they have to be weighed against non-commercial or social objectives which legislation has always imposed on licensees.

Australian Content

6.18 Considerable evidence has been taken on the need to increase the amount of Australian content on commercial television, including the need to increase quotas for Australian drama. The Committee is aware of the extensive inquiry being undertaken by the Tribunal into regulation dealing with Australian content. It will therefore make only some general comments on this matter.

6.19 One of the objectives of broadcasting policy is to encourage Australian content. The questions to be considered then are what role should the Tribunal have in respect of this objective.

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[197] See the Transcripts of 10 February 1988, pp276, 285 and 11 February 1988, p.363. Submission Nos: 152, p.3; 4056, paragraphs 7.2.3, p.47; 4072B, p.1. See also 'How Australia Sees Itself: The Role of Commercial Television', by Appleton, G in *The Price of Being Australian*, already cited, pp.233-234.

[198] Submission No. 3, pp.26-27, 31. Transcript of 22 February 1988, pp.509-510.

6.20 The starting point for analysis of the Tribunal's role is the question of whether television should perform a significant cultural and social role by reflecting Australian views and perspectives and stimulating a sense of Australian culture and identity.[199] There has been considerable research on this subject. It supports the concept of national identity. Because television in particular is such a powerful medium, the Committee has no hesitation in endorsing the point of view that propagation of a sense of national identity requires television to have a predominantly Australian look and to show Australian programs including drama.

6.21 The next question is whether the commercial television industry, if left to itself, would produce the quality and quantity of Australian content that is necessary for national identity.

6.22 There are differing viewpoints on whether drama quotas or consumer preference have been the driving force behind the increase in Australian content and Australian drama on commercial television. Industry says the quota does not drive it to produce Australian drama; consumer preference does.[200] Others claim the opposite: that were it not for the quota there would be far less Australian drama shown on commercial television. Both points of view are assertions. The Committee expects the Tribunal's report on regulation of Australian content to address this issue.

6.23 Whether or not increases in Australian content have been quota driven, the inescapable fact is that the costs of local programs are much greater than the costs of imports. For example, local drama series cost between $125,000 to $240,000 an hour whereas the imported series costs $12,500.[201] FACTS says that because of the use of marginal pricing, high quality US programs are 'thus nearly always cheaper for Australian stations than Australian produced programs'.[202] It is presumed that this differential will continue despite Government assistance provided under s.10BA of the Income Tax Act and the arrangements which have replaced it.

6.24 The Committee doubts whether deregulation of Australian content rules will produce the quality and quantity of Australian content, including drama, for television.

6.25 Given the need for television to have Australian content including drama, and also given the need for regulation, the next question is who should do the regulating. The choices are between the Minister or the regulatory authority.

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[199] Submission No. 4086, p.28.
[200] Transcript of 10 February 1988, pp.136, 137.
[201] Submission No. 3188, p.38.
[202] Submission No. 3168, p.11.

6.26 The Minister can set the levels of Australian content and Australian drama after seeking advice on this matter. However, the Committee believes that the Tribunal, because of its data base, its knowledge of commercial viability and its general knowledge of the industry, is in a better position than the Minister to set the limits.

Violence on Television

Background

6.27 The Committee has said that one of the objectives of broadcasting policy should be the protection of the public, particularly children, from offensive material on TV.[203]

6.28 The ABT's Interim Television Program Standards are a statement of the rules to be observed by licensees in the transmission of programs. Television Program Standards (TPS) lay out guidelines for the classification of programs and the times in which certain programs may be shown. TPS 10 prescribes the criteria for various program classifications.[204]

6.29 Thus, during general viewing time, physical or psychological violence may not be presented in a way which would cause alarm or distress to children. Explicit depictions, unduly bloody or horrific depictions are classified as unsuitable for television. TPS 5 states that, subject to standards governing children's programs, news and current affairs programs may be transmitted during general viewing periods only if care is exercised in the material which is shown.[205]

6.30 During the inquiry, the television industry provided copies of the guidelines it has issued concerning violent material in programs shown in general viewing times. In evidence details were given of the various networks' guidelines and procedures. The Committee recognises the commitment displayed by the industry in this area.[206]

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[203] See paragraph 3.19.
[204] Program Standards, already cited, p.11 and pp.16-17.
[205] Program Standards, already cited, pp.16, 13. See also Transcript of 29 March 1988, p.942.
[206] Censorship - Transcripts of 3 March 1988, pp.797-801 (Network Ten) and 29 March 1988, pp.1024-1032 (Bond Media). Guidelines - Transcripts of: 10 February 1988, p.161 (Bond Media); 25 July 1988, p.1654 (Network Ten), p.1684 Australian Television Network); and 13 September 1988, pp.1861-1862 (TAS TV). See also paragraph 6.09.

News and Current Affairs

6.31 The ABT said that presentation of news and current affairs during general viewing time was probably the only area of Tribunal concern. The Tribunal also observed that subjective judgment was required in selecting what might be shown at 6 p.m. and what might be appropriate at 9 p.m. on a given night.[207]

6.32 The Baptist Union of Tasmania stated that much of the prime time violence was during news programs. Concern was also expressed about promotions for news broadcasts very soon after 5 p.m., although it was also said, by one licensee, that some of the complaints about such promotions were somewhat overstated.[208]

6.33 The National Viewers and Listeners Association (NVLA) drew attention to violent items carried in 6 p.m. news programs and suggested that the 'good news' should be shown at 6 p.m. and the 'bad news' at 9 p.m. This raised the question of censorship, the manipulation of news and the distortion of reality. The CLC believed different standards should apply to news shown at 6 p.m. and at 10.30 p.m. but was concerned about the imposition of the moral standards of a minority group on all viewers. Archdeacon Chambers did not support two different news programs but suggested the more detailed portrayal of some items should be left to a later hour than general viewing time.[209]

6.34 The Committee's attention was drawn to the different ways two incidents in the USA, the on-camera suicide of a government official and the shooting at the end of a small time robbery in the mid-west, were handled on various news programs. These incidents demonstrate the need for judgment about the content of such programs. The Australian Broadcasting Corporation began a review of its standards as a result of a belief that some of its coverage of these and other incidents had lingered over aspects of these stories. The Free Speech Committee said that most broadcasters are pretty responsible about violence on TV. The views of the South Australian Institute of Teachers (SAIT) were that news programs are one of the best indicators of the ability of TV stations to trivialize issues and their inability to inform.[210]

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207 Transcript of 29 March 1988, pp.941, 942-943. See also Transcript of 11 February 1988, p.455.

208 Transcripts of: 13 September 1988, p.1884; 10 February 1988, p.264; and 3 March 1988, pp.807-808.

209 Transcripts of 1 March 1988, pp.586-590, 600 and 29 March 1988, p.1008. See pp.1062-1064 for the Free Speech Committee's position on censorship and the distortion of reality. Transcripts of 11 February 1988, p.386 and 12 July 1988, p.1402.

210 See, for example, the Transcripts of: 11 February 1988, pp.385-387; 3 March 1988, pp.802-804; and 29 March 1988, p.1009. For the ABT's comments on the issue, see the Transcript of 29 March 1988, pp.942-945. Transcripts of: 10 February 1988, p.112; 29 March, p.1063; and 7 June 1988, p.1126.

Cartoons

6.35 In her written submissions and in evidence Mrs J Blyth, a private citizen, drew attention to the impact of violent programs, particularly cartoons, on children and to the link between exposure to violent entertainment and later more violent behaviour. Blyth also mentioned the reinforcement of the culture of violence by violent entertainment.[211]

6.36 In other evidence, mention was made of the lack of variety in cartoon programs and it was pointed out that cartoons need not be the only way of providing humorous entertainment on TV. SAIT said there was evidence that children are able to distinguish between reality and fiction where cartoons are concerned. Psychological evidence suggests children can evaluate whether or not a program is violent, but not whether that violence has a negative effect on them.[212]

6.37 Blyth referred to 'programs which have been designed to sell whole ranges of anti-social war toys'. She said the toys are manufactured first and the programs, barely disguised commercials for the toys, built around them. Her objection was to the nature of the stories, which are based on violence, and to the programs themselves which are effectively commercials. In reply to questions on this subject Network Ten Australia said 'that in Australia there is almost no evidence of a link between the marketing of cartoons and the marketing of products'[213]

Anti-Social Behaviour/Violence Links

6.38 Blyth provided the Committee with details of some of the research into the links between violent children's programs and anti-social behaviour. The Free Speech Committee, on the other hand, referred to a study which it said showed there was no relationship between televised violence and aggression.[214]

6.39 The Committee was made aware of a submission, from the Research Branch of the ABT, to the Joint Select Committee on Video Material which stated there has been a great deal of research on the effects of televised violence. The greatest part, concerned with children and adolescents, has demonstrated a link between violent viewing and aggressive behaviour. The majority of the studies quoted recognise that violence on television is only one of many factors contributing to aggressive behaviour.[215]

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[211] Submission Nos. 3448 and 4102 and Transcript of 1 March 1988, pp.711, 729-733.
[212] Transcripts of: 10 February 1988, pp.241, 248; 7 June 1988, pp.1140-1141; and 1 March 1988, p.731.
[213] Submission No. 3448, Transcripts of: 1 March 1988, pp.712, 715; and 3 March 1988, pp.815-817.
[214] Submission No. 3448, Appendix; Transcripts of: 1 March 1988, pp.711-713; 29 March 1988, p.1071.
[215] Submission, January 1985, pp.5-11.

6.40 There is a general concern in the community about the amount of gratuitous violence in the range of programs on television. The NVLA and the Festival of Light drew attention to the desensitizing effect of constant exposure to violence. Industry representatives acknowledged they had to be responsive to community standards but it appears stations do not receive as many complaints about program standards and violence as might be expected. Tasmanian Television Ltd said that although there was no evidence of an increase in complaints about violence, viewers were more aware of it in programs.[216]

6.41 The ABT has recently been directed to undertake an inquiry into violence on television and the Government has also commissioned a more general study into violence in Australian society.[217] The latter inquiry in particular can only been seen as a result of community concern about such incidents as the shootings in Queen Street in Melbourne early in 1988. It would be quite absurd if any resulting revisions to standards governing violence on TV were applied to commercial stations but not to the ABC or SBS.

Advertising Standards

Background

6.42 Advertisements are seen as irritating and as detracting from the quality of programs, particularly on television. Without advertisements there would be no commercial television[218] because they are virtually its only revenue base. There are specific complaints about such things as advertisements during or close to children's viewing, advertisements for alcohol and the mixture of cigarette advertising and sport.

6.43 Advertising standards need to be regulated in order to provide a balance between the wish of the viewers to have as few interruptions to programs as possible and the need of the licensees to provide the money to pay for programs, run stations and make a profit. Regulating the number of breaks for advertising in each broadcasting hour, as well as the number of advertisements per break, has been seen as the most effective way of balancing these two interest.

6.44 Prior to September 1987 the Tribunal's rules governed the length, number and placement of advertisements, program promotions and other

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[216] See for example Transcripts of 1 March 1988, pp.666, 676; 12 July 1988, p.1474B and 13 September 1988, pp.1862-1864, 1895-1897.

[217] Media Statement by the former Minister, Senator the Hon Gareth Evans, QC, 22 August 1988.

[218] Transcript of 25 July 1988, p.1648. See also *Advertising Time on Television*, ABT, AGPS, 1987, p.7.

non-program material shown by licensees. These Television Advertising Conditions (TACs) were made under the provisions of the Act.[219]

6.45 In September 1987, the ABT relaxed advertising time standards for a two year trial period during which licensees would be given opportunities to provide a better mix of advertisements and programs and carry out research into viewers' preferences in this matter. At the end of this trial the Tribunal hopes to be able to make informed decisions about what rules, if any, are needed to govern interruptions to TV programs.[220]

6.46 The Tribunal believed that the less regulated, more competitive regime should be rated a failure if, among other things, there was an overall increase in the number or rate of interruptions to programs or if stations persisted with different advertising practices despite audience objections.[221]

6.47 As the Department pointed out in its submission, there is already considerable self-regulation of advertising in broadcasting. In January 1986, the Tribunal removed many of the standards governing advertising on radio. The Tribunal removed the time limit altogether for competitive radio markets and retained it only for solus radio markets.[222]

Complaints about Advertising

6.48 In 1986-87 complaints about advertisements on TV accounted for a significant proportion of total complaints referred by the Tribunal to licensees. Most complaints related to the content of advertisements, but others dealt with placement of and the time limits for advertisements. The Tribunal stated that the perceived loudness of advertisements and frequent repetition of the same advertisement ranked next after interruptions to programs as irritants to viewers. In nearly all surveys the public has shown it wants minimum intrusion by advertisements into programs. The Tribunal also drew attention to the lack of regular quantitative and qualitative research on viewers' reactions and interests, and to the deficiencies of the rating system as the main measure of audience satisfaction.[223]

6.49 In material presented to this inquiry, concern was expressed about the potentially destructive effects of advertising. The Australian Association of National Advertisers, however, stated that advertisers are very receptive to community standards for their own commercial interests.[224]

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219 *Advertising Time on Televison*, already cited, p.1.
220 *Advertising Time on Television*, already cited, p.vii.
221 *Advertising Time on Television*, already cited, p.viii.
222 Armstrong M, 'Deregulation of Radio', cited earlier, p.49.
223 Australian Broadcasting Tribunal, *Annual Report 1986-87*, AGPS, Canberra, 1987, p.236-239. *Advertising Time on Television*, already cited, pp.3, 9, 14-16, 64-77.
224 See, for example, Submission No. 4005, Submission No. 4081, p.18.

6.50 Network Ten Australia said that advertisements during feature movies, mini-series and live sport accounted for most of the complaints received. That network also said there were always complaints about advertising but that the level had always been very low.[225]

6.51 Since the trial period began, Network Ten believed quality of presentation of sport on the other networks had improved. At the end of the trial, the network suggested, there will have been very little complaint from the public.

The Committee's Views

6.52 While noting these views and the comment of the Australian Television Network, that the trial did not represent great change because it was more a matter of presentation of advertisements in programs, the Committee believes the ABT should retain responsibility for standards of advertising on TV. At the end of the trial period, the Tribunal should carry out its intention, set out in its 1987 review, of deciding whether there is a need to introduce a new rule about interruptions to TV programs.[226]

6.53 We consider the measures proposed by the ABT to assess the results of the trial, research by licensees and the Tribunal about the needs of viewers and interruption patterns, are an appropriate way of resolving problems between the industry and viewers. As the trial is not yet over, the Committee will not make any further comment on this issue.

Conclusions on standards

6.54 The Committee finds that:

(a) **it is clear the Australian community believes that TV programs should reflect and maintain community standards;**

(b) **the Tribunal is the appropriate body to determine how these standards are reflected in TV programs through the processes of the Tribunal, including public inquiries;**

(c) **there is public concern about what are perceived as declining standards, relating particularly to the quantity of violence in TV programs, how violence is portrayed on television and the possible link between such programs and violence in the community;**

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[225] Transcript of 25 July 1988, pp.1645, 1644, 1648, 1649.
Transcript

[226] Transcript of 25 July 1988, pp.1683-1684; *Advertising Time on Television*, already cited, p.viii.

(d) **there is a heavy obligation on the Australian Broadcasting Tribunal to lay down program standards which properly reflect community views. This obligation extends to ensuring these standards are observed;**

(e) **likewise, appointments to the Australian Broadcasting Tribunal are important and there is a heavy obligation on the Government to appoint members to the Tribunal who understand the community's high expections of them and who are capable of reflecting the community's standards. The Government should therefore engage in a consultative process before appointments to the Tribunal are made; and**

(f) **regulation of Australian content including the determination of quotas for Australian drama should continue, and should continue to be determined by the Australian Broadcasting Tribunal.**

Regulation of ABC and SBS by the Tribunal

Background

6.55 The provisions of the Act and the ABT's various standards only apply to commercial licensees. Section (6)(2)(a)(ii) of the *Australian Broadcasting Corporation Act 1983* says that the Corporation shall 'take account of ... the standards from time to time approved by the Australian Broadcasting Tribunal in respect of broadcasting and television services'. In respect of the SBS, the Act makes no mention of standards.

6.56 Under s.11 of its Act, the ABC has established Advisory Councils at national, State and territorial levels which 'furnish advice on ... broadcasting programs and television programs'. The Corporation believes such bodies continuously provide information on the sorts of material which might give offence or where community attitudes might have changed. Corporation staff are also required to be familiar with the Tribunal's standards and to have sound reasons when they depart from them.[227]

6.57 During this inquiry, the Committee put and heard arguments for and against the ABC and SBS being required to observe the Tribunal's standards. The arguments in favour of applying the ABT's standards concentrated on the inconsistency of the situation where only the commercial broadcasters are obliged to adhere to the ABT's standards.[228] The opposing argument is that the national broadcasters have a special function and should not be subject to standards. These arguments are **not mutually exclusive.** In other words, it is

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[227] Transcript of 10 February 1988, p.112, 'Current Editorial and Program Practices in ABC Radio and Television', ABC, November 1987, paragraph 7.4.2, p.22.

[228] Transcript of 10 February 1988, pp.111, 113, 115.

possible for the ABC and SBS to be required to comply with standards the Tribunal may set, and also for the Tribunal to take account of the different responsibilities of the national broadcasters.

Consideration of Issues

6.58 A number of witnesses expressed concern at the exclusion of the ABC and SBS from the Tribunal's standards, including the NVLA, Network Ten Australia and the Festival of Light.[229]

6.59 In addition, a number of the shorter, one or two page submissions from the general public recommended making the ABC and SBS subject to the ABT's standards. One in particular wanted to see the ABT's standards for news and current affairs programs applied to the Corporation and SBS.[230]

6.60 The ABC's Charter obliges the Corporation to take account of the different services provided by the commercial and public broadcasters. The Corporation also said that, with the exception of children's TV, it observes the ABT's classifications. Departures from these were stated to be infrequent and made only after senior staff were involved. The CLC said that because the ABC is in a different environment to licensees it had to be responsible for its own standards.[231]

6.61 The question of whether or not the ABC and SBS should be subject to the Tribunal's standards should be examined in the context of the objectives of broadcasting policy. Paragraph 3.19 referred to what the Committee saw as a desirable objective: to protect the public and particularly children from offensive material by the setting of appropriate standards.

6.62 At paragraphs 3.39 to 3.47, the case is set out for program regulation of commercial broadcasting. Since the matters covered by the objective proposed in paragraph 3.19 are sufficiently important to warrant regulation, as a general principle they should apply to all sectors of broadcasting.

6.63 Reference has been made to the community's concern about violence, to announcements concerning studies into violence in the Australian community and into violence on TV specifically. The Committee endorses the need for a review of program standards covering violence on TV welcomes these inquiries as appropriate means to this end. The ABC and SBS should be subject to any revised standards which result from the Tribunal inquiry.

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[229] Transcripts of: 1 March 1988, p.632; 3 March 1988, p.814; and 29 March 1988, p.991.
[230] See, for example, Submission Nos. 901, 1239, 1320 and 1853; Submission No. 5.
[231] *Australian Broadcasting Corporation Act 1983*, s.6(2)(a)(i); Submission No. 3154, pp.2-3. Transcript of 11 February 1988, p.359.

6.64 The CLC points out as the Act is presently framed there are no sanctions the Tribunal can impose on either the ABC or the SBS. The Centre added that the ABC's Act would make it difficult for the Tribunal to exercise its powers.[232]

6.65 It is clear there is a community expectation that program standards will be applied universally. The ABT needs comparable powers over the ABC and SBS as it presently has over licensees. The Broadcasting Act should be amended to give the Tribunal the power to ensure all broadcasters adhere to its program standards. The ABC's Act would need amendment to make the Corporation subject to these standards. The ABC and SBS would then be covered by the provisions of s.99(1A) of the Broadcasting Act, concerning compliance with program standards, and subject to the ABT's power to reprimand and admonish under s.101.

6.66 While the Committee accepts the suggestion put forward by FACTS, that where a standard warrants universal application it should apply equally to licensees and to the ABC and SBS, there remains the issue of the responsibilities of the national broadcasters.[233]

6.67 The ABC's Charter stresses the provision of innovative and comprehensive services. The ABC is required to balance broadcasting and television programs of wide appeal with more specialised programs. The ABC stated that, in some circumstances, it would broadcast programs which demanded a greater degree of audience involvement. Such programs might also challenge some community sensitivities.[234]

6.68 These views are consistent with two of the responsibilities of national broadcasters: to make quality programs which involve the audience and have an impact beyond the moment of screening; and provision for the sizable constituencies of special interests.[235]

6.69 There is a specific role for the national broadcasters, but the Committee does not believe that this role would be hampered by a requirement to adhere to program standards which have been determined by the ABT's procedures including public inquiries.

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232 Transcript of 11 February 1988, p.360.
233 Submission No. 3168, p.22.
234 *Australian Broadcasting Corporation Act 1983*, s.6(1)(a) and s.6(2)(a)(iii). Submission No. 3154, p.3.
235 'The Role of Australia's National Broadcasters' in *Review of National Broadcasting Policy*, Department of Transport and Communications, February 1988, p.6.

Recommendations

6.70 In view of the foregoing, the Committee recommends that:

Recommendation 15: The *Broadcasting Act 1942* be amended -

(a) **to make the Australian Broadcasting Corporation and the Special Broadcasting Service subject to all of the Australian Broadcasting Tribunal's powers to regulate program standards; and**

(b) **to require the Tribunal, when enforcing such standards, to take account of the special responsibilities of the national broadcasters.**

Recommendation 16: Section 6(2)(a)(ii) of the *Australian Broadcasting Corporation Act 1983* be repealed.

Other Matters

VAEIS and Standards

6.71 In its submission Bond Media says there is a danger that inappropriate regulation could stifle development of new services. The example cited is of Video and Audio Entertainment and Information Services (Sky Channel). It implies that if Sky Channel was under the Broadcasting Act rather than the Radiocommunications Act, it is unlikely the service would have survived.[236]

6.72 This inquiry is not the place to deal adequately with this matter which is an issue for the inquiry into broadcasting-related services (see paragraph 3.4). Suffice it to say, however, that to the extent such services are similar to those of broadcasting, the standards that apply to broadcasting in respect of violence, children's programs, etc. should also apply to such services.

Exemptions from Standards

6.73 Under s.16(1)(d) of the Act, the Tribunal is given the power to determine standards to be observed by commercial licensees. 'Standards' are rules of general application, as was made clear in the *Herald-Sun* case.[237]

6.74 Any exemption from a standard must itself be an exercise of the power to make that standard. There is considerable doubt about whether the power to make standards under the Act also allows for specific exemptions for particular

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[236] Submission No. 3169, pp.7-8.
[237] *Herald-Sun TV Ltd v Australian Broadcasting Tribunal* (1985) 59 ALR 525 at 527.

purposes or licensees. A problem usually arises with children's program standards when significant cultural or sporting events cannot be shown without contravening those standards.

6.75 The Tribunal should have the flexibility to consider whether or not an event warrants an exemption from program standards. This is not to say that in every case an exemption should be given. If an exemption is given from a particular standard, the ABT should also be empowered to order the making up of the program(s) so exempted.

6.76 Accordingly, the Committee recommends:

> **Recommendation 17: The *Broadcasting Act 1942* should be amended to allow the Australian Broadcasting Tribunal to exempt licensees from adhering to particular standards in order to broadcast other, significant events. Any such exemptions should involve making up the program(s) so exempted.**

7: ENFORCING STANDARDS AND SANCTIONS

The role and functions of the Australian Broadcasting Tribunal in regulating the commercial broadcasting sector with particular reference to -

(3) the role of the ABT in ... enforcing program and advertising standards; and

(4) appropriate sanctions for breaches by licensees of provisions of the Broadcasting Act, including undertakings given pursuant to the Act as to 'adequate and comprehensive services' and use of Australian resources.

Enforcing Standards

Provisions in the Act: Directions, Offences and Fines

7.1 The role of the Tribunal in the establishment of program and advertising standards has been dealt with in Chapter 6 as part of term of reference (3). However, it is appropriate that the enforcement of standards, the other part of term reference (3), is considered together with the consideration of sanctions for breaches by licensees of provisions of the *Broadcasting Act 1942* (the Act). The reason for this is that the two matters overlap in that breaches of standards may also attract licensing sanctions as to 'adequate and comprehensive services'.

7.2 Licensees are required to comply with program standards under s.99(1A) of the Act. Generally speaking, the Tribunal can enforce standards in two different ways. The first is to issue directions under those sections of the Act directly related to the enforcement of program standards; the second method is via the licensing provisions of the Act.

7.3 Enforcement of program standards under the first method is accomplished by directions on compliance, reprimands and admonishments and prohibition/restrictions on live broadcasts.

7.4 Failure to comply with a direction would be an offence under s.132 of the Act. This would be brought to the attention of the Minister who could initiate a prosecution which, if successful, may result in the imposition of fines.

Provisions in the Act: Licensing Sanctions

7.5 The second way of enforcing standards is by means of the licensing provisions. A breach of a standard is a breach of a licence condition and may be subject to licensing sanctions.

7.6 Licensing sanctions include non-renewal of a licence, renewal of a licence for a shorter period, revocation or suspension of a licence and the imposition of conditions on a licence.

7.7 Non-renewal of a licence is an option which has never been exercised and is regarded as a reserve power. Renewal of a licence for a shorter period of time has been used on 20 occasions since 1978[238] for reasons related to management capability, non-compliance with the Act, standards or directions, adequacy and comprehensiveness of services and fitness and propriety issues.

7.8 Revocation or suspension of a licence is an option with limited practical application. Only one licence has ever been revoked, 2CT Campbelltown in 1981 for reasons of non-viability.[239]

Enforcing Standards: Lack of an Adequate Monitoring Process

7.9 The discussion in succeeding paragraphs covers the two general ways available to the Tribunal for enforcing standards; directions with fines and licensing sanctions, which are matters which do not attract fines.

7.10 In considering the appropriateness and effectiveness of sanctions it is necessary to consider what it is that sanctions are intended to achieve. Perhaps the starting point is the objectives of broadcasting policy and the Act. The enforcement of standards should be related to the objectives of broadcasting policy. These were described at paragraphs 3.18 and 3.19. They include the objectives of protecting the public from offensive material, the encouragement of Australian content, localism and improvements in quality.

7.11 Given these objectives and, as argued by the Committee earlier, that these objectives are best achieved by regulation, and that the Tribunal should be the regulatory body, **there should be clear and clearly understood linkages between standards, methods of checking whether the standards are being observed and, if they are not, methods for enforcing compliance.**

7.12 The National Viewers and Listeners Association (NVLA) complained that it has to provide incontrovertible evidence of breaches to the Tribunal if they are to be investigated. The NVLA posed the question as to who is supposed to do the monitoring: 'It is their standards, we are prepared to try to assist them

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[238] Submission No. 3153, p.56.
[239] Submission No. 4056, p.55.

as to what we see as breaches, but I do feel that it is a reciprocal process. They ought to be doing something about investigating the sorts of things that we bring up to them'.[240]

7.13 The NVLA's point was that the Tribunal was either too slow in responding to complaints, by which time the offending material was no longer being broadcast, or that the tapes provided by the NVLA were incomplete, and as no complete tape of broadcasts are retained by television stations it is impossible to corroborate the NVLA's evidence. It is true that logs of programming and individual programs are available but a complete tape of each days broadcast is generally not available.

7.14 The Federation of Parent's and Citizen's Association of NSW made a similar point with regard to advertising. They claimed that both they and the Australian Consumers Association had conducted exercises of timing advertisements and found alleged breaches of regulations. They went on to say '(t)here always seems to be a log which proves that our stopwatches were wrong ... (i)f you are regulating yourself there is no watchdog'.[241]

7.15 The evidence suggests a sense of frustration among interested groups that standards are not being policed effectively by the Tribunal. The NVLA was concerned that the Tribunal ought to be equipped to examine concerns raised by the public.[242] This point was expanded upon by that association which stated that evidence of breaches had to be comprehensive if the Tribunal was to act and that it is not always possible for interest groups to collect such evidence.[243]

7.16 This sense of frustration was also evident when the Australian Council on Smoking and Health stated that rather than continue to attempt to enforce alcohol and smoking advertising standards, they would prefer any reference to alcohol or cigarettes banned by amending the Act.[244]

7.17 The Tribunal draws on past experience to argue against a detailed monitoring process. The question of checking deficiencies in service elicited the following response from the Tribunal: 'a really substantial monitoring process to drag this out of the woodwork is going to be even more expensive than a licence renewal. In fact, that is the reason why it was abandoned in the first place'.[245]

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[240] Transcript of 1 March 1988, p.602.
[241] Transcript of 10 February 1988, p.237.
[242] Transcript of 1 March 1988, p.609.
[243] Transcript of 1 March 1988, p.601.
[244] Transcript of 1 March 1988, p.544, 555.
[245] Transcript of 26 July 1988, p.1813.

7.18 This argument has an inconsistency in that, on the matter of the trial self-regulation of advertising, the Tribunal is monitoring the performance of broadcasters very strictly to ensure that the criteria set by the Tribunal are being complied with.[246]

7.19 The establishment and policing of standards is a major responsibility of the Tribunal and is an issue of concern to the public. There is a missing link in the Tribunal's operations in this area. As mentioned earlier broadcasting policy has a number of objectives and sanctions are one means of ensuring compliance with those objectives. It is difficult to see how a compliance mechanism can operate effectively if there is no formal monitoring process which will detect breaches and bring them to the attention of the Tribunal.

7.20 The Tribunal depends upon public interest groups and individuals to draw matters of concern to the attention of the Tribunal. While this public participation is important, it is unsatisfactory as the sole means of monitoring for compliance.

7.21 When consideration is given to the fact that the Tribunal places great store in the public accountability of licensees and has also emphasised the ability of individuals to initiate inquiries by the Tribunal into matters of genuine concern, then it is reasonable that the public should expect prompt action with regard to complaints and that critical attention be paid to matters of concern such as standards.

7.22 The question of standards is of considerable concern to the public. The Tribunal should be monitoring programming to ensure that standards are being maintained. The Committee acknowledges that a comprehensive system would be costly, but if public confidence is to be maintained a system of monitoring has to be introduced.

7.23 In order to minimise cost, a continual system of spot checking would appear to be appropriate. This would be augmented by representations made to the Tribunal by individuals and interested groups. Difficulties experienced in the past with gathering complete evidence of breaches could be overcome by requiring television stations to maintain a complete tape record of each days transmission for a period of six weeks. Such records are already maintained by radio stations for political subjects and current affairs programs under s.117A of the Act.

7.24 It is necessary for the Tribunal to institute a system of monitoring primarily as a compliance check against the Tribunal's standards and licence conditions, and also as a means of overcoming public concern at a lack of

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[246] Transcript of 29 March 1988, p.958.

action by the Tribunal in maintaining standards on television in particular. An appropriate recommendation on spot monitoring will be made at the end of this chapter.

7.25 In order to assist the Tribunal to respond more effectively to representations from the public and help facilitate a monitoring program, complete records of transmissions should be maintained by all broadcasters for a set period. The Committee will make a recommendation about the retention of tapes of broadcasts at the end of this chapter.

7.26 The retention of tapes will allow the Tribunal to operate a monitoring process in two ways: firstly, alleged breaches or complaints can be thoroughly examined; and secondly, a system of random spot checking could be established by the Tribunal.

Enforcing Standards: Adequacy of Enforement Mechanisms

7.27 The Committee's proposals should give the Tribunal a more effective means of ascertaining whether licensees are complying with program and other standards the Tribunal has promulgated. This raises the next question, namely, whether the existing mechanisms for enforcing compliance are adequate.

7.28 There is a lot of confusion in the community over the adequacy or otherwise of enforcement mechanisms. The Committee also found it difficult to gain a clear understanding of enforcement mechanisms and their application. In other words, despite the continual emphasis on public accountability there has been very little effort to inform to the public as to how the system works.

7.29 The Federation of Australian Commercial Television Stations (FACTS) believes that subjectivity makes it difficult to evaluate performance critically and say that a particular decision was right or wrong.[247] This in turn makes the process of determining appropriate penalties for breaches imprecise.

7.30 The current procedures under s.99(2) of the Act enable the Tribunal to issue a direction where the existence of a serious breach is established. Failure by a licensee to heed such a direction would be an offence under the Act and would enable legal proceedings to be commenced.

7.31 Sanctions are considered when licence conditions have been breached by a licensee. FACTS contends that the important point regarding breaches is that the licensee is informed of the Tribunal's concern and is aware that the breach may be examined in an inquiry or at a future licence renewal hearing. The licensee can then take remedial action and the rest of the process is immaterial unless the licensee continues with the breach.[248]

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[247] Transcript of 3 March 1988, p.860.
[248] Transcript of 3 March 1988, p.866.

7.32 Bond Media stated that the fact that sanctions are used rarely is not because they are ineffective, but because there has been no need to use them.[249] This view is supported by FACTS which stated that 'there is no evidence of any commercial licensee since 1977, when the Tribunal's processes where introduced, deliberately, flagrantly flouting the standards'.[250]

7.33 The Tribunal faces some difficulty in determining program standards in that standards must be consistent with provisions of the Act and that standards could not require classification by the Tribunal prior to broadcasting, except as allowed by the Act. A further restriction, which could affect the usefulness of these powers, is that any test to be applied to a program has to be found in the standard itself. These restrictions resulted from the High Court's decision in the Herald-Sun case: *Herald Sun TV Ltd v Australian Broadcasting Tribunal* (1984) 55 ALR 53. 'In judgment delivered for the Court, Gibbs C J said (at 527):

> *a standard ... must fix the quality or nature of the program in such a way that both the licensee required to observe the standard and the court or other body called upon to decide whether it has done so can determine whether the program answers the criteria set by the standard. That is not to say that the test should be entirely objective, for it may involve questions of taste, but it does mean that the standard is to be found in the Determination itself. The power to fix a standard which is to be generally applied is quite different from a power to decide ad hoc, from case to case, whether a particular program may be televised. A power of the latter kind is not a power to fix standards'.*[251]

7.34 Proposals for increased sanctions were usually not specific with regard to the means of increasing sanctions. There was a perception of a need to force television licensees in particular to adhere more strictly to standards; and that this could be best achieved by ensuring that the Tribunal had the necessary powers. Both the NVLA and the Christian Television Association (CTA) called for the imposition of substantial financial penalties for breaches of standards. The CTA also advocated broadcasting bans.[252]

7.35 The question of whether substantial financial penalties would be effective is disputed by the ABT. In evidence the Tribunal expressed the view that fines were generally of little use and that their use should be limited to matters central to the legislation.[253] The Chairperson, said that fines may only lead to

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[249] Submission No. 3169, p.19.
[250] Transcript of 3 March 1988, p.854.
[251] Grey L, Orr R and Hitchens L, *Communication Law and Policy in Australia*, Butterworths, 1987, pp.1507-1508.
[252] Transcript of 1 March 1988, pp.609, 686.
[253] Transcript of 29 March 1988, p.911.

less funds being available for the improvement of services.[254] The Tribunal's view was that there are more effective means of achieving improvements in the quality of service delivery.

7.36 The Committee considers that the concept of re-introducing fines for breaches of standards is impractical and, given the nature of the debate surrounding standards, it would be unfair to impose statutory financial penalties for perceived breaches.

7.37 With regard to licensing sanctions, the perception that there is little enforcement of standards is partially due to the fact that there appears to be little action taken against licensees for alleged breaches. The usual form of action is a short term renewal under s.87(2) or the imposition of conditions under s.85, 86(12) both of which are seen as less than effective responses by many interest groups. For example the attitude of the Catholic Communications Centre is typical: 'there is no ultimate sanction and control for the Broadcasting Tribunal to exercise. Its only sanction is to do the impossible, to take someone's licence, which it cannot do'.[255]

7.38 The short-term renewal of a licence is the most commonly used sanction and is often perceived by the public as being inadequate. Tribunal's Chairperson expressed a contrary view: 'I know people are very sceptical about it but there is no doubt that the shortened renewal and other ways of dealing with it usually leads to the investing of money'.[256] This statement was made in discussion related to the means of improving the quality of programming and local content.

7.39 The power to impose conditions on a licences can be used to address specific issues but there are legal problems related to the exercise of this power. These problems resulted from an AAT case: *New Broadcasting Ltd v Australian Broadcasting Tribunal,* where Davies J 'effectively read down the power to impose licence conditions by restricting its exercise to situations where the criteria had been met so that the Tribunal would have the power not to renew the licence'.[257]

7.40 This power is potentially very effective. Consideration should be given to reviewing the situation and if necessary, amending the legislation to clarify the Tribunal's power to impose conditions on licences.

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[254] Transcript of 29 March 1988, p.915.
[255] Transcript of 10 February 1988, p.205.
[256] Transcript of 26 July 1988, p.1819.
[257] Submission No. 3188, p.57.

Conclusions and Recommendations

7.41 The Committee accepts the ABT's role in enforcing standards and policing breaches of provisions of the Broadcasting Act. There is strong public support for this position.

7.42 Some sections of the public seem to believe that, as little action appears to be taken against broadcasters for alleged breaches, then the Act is deficient in sanction powers. This is not the view of the Committee.

7.43 The fact that the full range of licence sanctions has not been used or that prosecutions have not been initiated does not necessarily mean that the Tribunal's powers and regulations are deficient. It can be argued that they have not been required because the broadcast regulatory system is working satisfactorily.

7.44 The Committee is inclined towards the latter point of view. It finds that **current sanction powers available to the Tribunal are appropriate and adequate, but that a monitoring system is required to ensure compliance with standards.** A compliance mechanism cannot be expected to operate effectively without a formal monitoring process.

7.45 The Committee recommends that:

> **Recommendation 8: The Tribunal institute a system of monitoring television and radio broadcasts based on random spot checking to detect breaches of program standards and licence conditions.**
>
> **Recommendation 9: In the case of television and radio broadcasts, a complete record of each day's transmission be retained by the Corporation or licensee, as the case may be, for a period of six weeks from the date of transmission, and these records be made available to the Tribunal on request.**

7.46 The use of licensing sanctions is limited by the fact that it it is not a practical proposition under normal circumstances to revoke or not renew a licence. The Committee's recommendations on competitive renewals addresses this problem and provides a further step should problems persist following the use of the short-term renewal of a licence.

7.47 The question of sanctions is complicated, as many of the responses that can be taken by the Tribunal are inter-related, there is rarely a simple response to any given situation. It is important that the public understand the Tribunal's operational criteria if confidence in the system is to be maintained or restored and if the more extreme points of view regarding broadcasting are to be satisfactorily dealt with.

7.48 The Committee believes that there is a lack of understanding and some misconceptions among the general public regarding the purpose of sanctions and the enforcement processes. In short, the public does not properly understand how the system works. Both commercial licensees and the Tribunal share responsibility for this situation.

7.49 Industry has not made sufficient effort to explain to the public how the industry functions and the mechanisms employed to ensure that broadcasting is conducted responsibly. Relevant industry associations should develop an information system by which the public could be informed and educated with regard to the industry's operations. The Tribunal should develop and institute a similar process.

7.50 The Committee recommends that:

> **Recommendation 20: Both industry and the Australian Broadcasting Tribunal develop and undertake a public education campaign with the objective of improving the understanding of the operation of the broadcasting system and responsibilities of both licensees and the Tribunal.**

Competitive Licence Renewal

The Proposal

7.51 The competitive licence renewal proposal has been made by the Tribunal. Its submission said that one of the aims of a regulated licensing system is the provision of the highest possible quality of programming to the public. Although sanctions have a role to play there are other more positive mechanisms for the improvement of the quality of services, mechanisms which would 'enable a deficient service to be replaced with one which would better serve the interests of the community in the area'. In evidence the mechanism was identified as 'competitive renewals'.[258]

7.52 In evidence the Tribunal explained that competitive renewals would act as a competitive spur which would by inference improve the quality of programming. It said that licensees would have to come up with offers and if that happened one would see a very substantial increase in the creative thinking of the existing licensees to convince the Tribunal that they were better than any other applicant who might come in wanting to take the licence away from them'.[259]

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[258] Submission No. 3153, pp.16, 19 and Transcript of 14 June 1988, p.1223.
[259] Transcript of 14 June 1988, p.1224.

7.53 At a later hearing the Tribunal clarified and in doing so modified its proposal. As interpreted by the Committee there are now four stages to the modified proposal:

- first, a deficient service identified by way of a normal licence renewal hearing resulting in a short-term renewal;
- second, the continued existence of the deficiency at the expiry of the short-term renewal;
- third, the invitation of applications for that licence; and
- fourth, the awarding of the licence to the incumbent or the challenger. The Tribunal saw this as a valuable additional power to be used wherever necessary.[260]

7.54 This proposal appears to be derived from the USA. Under what are termed 'comparative renewals', the Federal Communications Commission (FCC) is given the power to replace the incumbent licensee if the FCC considers the challenger would better serve the public interest. The underlying intention is the competitive spur which would encourage licensees to achieve and maintain high quality programming.[261]

7.55 The competitive renewal proposal has been challenged vigorously by industry. FACTS says that the proposal is vague, impractical and unworkable.[262] The Federation of Australian Radio Broadcasters says the proposal had not been given sufficient consideration and that FARB is 'strenuously opposed to a process which would force incumbents into a kind of auction process against would-be broadcasters ...'[263]

Consideration of Issues

7.56 Some of the industry objections relate to the earlier proposal by the Tribunal; others to the later proposal. The Committee proposes to treat all the objections as applying to all the proposals.

7.57 A number of arguments have been advanced by industry against competitive renewal. The first relates to the difficulties of choosing between incumbent and challenger. FARB refers to arguments by the FCC in 1977 justifying 'renewal expectancy', one of these being that there is no guarantee that a challenger's paper proposals will match the incumbent's proven performance.[264] The Committee believes that the Tribunal is quite capable of compar-

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260 Transcript of 26 July 1988, pp.1818, 1819.
261 Submission No. 4054, p.25.
262 Submission No. 4097, p.1. FACTS was referring to the modified proposal - see paragraph 3.
263 Submission No. 4093, pp.1, 2. The comment on insufficient consideration referred to the modified proposal.
264 Submission No. 4054, pp.26, 27.

ing promise with performance, particularly if promises are made by challengers with a proven track record in other markets and the performance is that of a licensee with a deficient service.

7.58 The second argument advanced by industry is that competitive renewal would deter investment. FACTS says competition in the television industry is intense and this necessitates substantial long term investment (both capital and operational infrastructure costs) and long term planning. According to FACTS this 'is a major reason why the notion of competitive licence renewals makes no sense in the Australian context'.[265]

7.59 The television industry has said frequently that competition is intense, that it is judged critically every minute of the day and if it does not pass these critical assessments then Australian viewers simply will not watch commercial television.[266] If this happens there will be a sharp decline in advertising revenue, the lifeblood of commercial television. It is inconceivable that the industry, because of the existence of or the potential for competitive renewal, will reduce investment, risk losing its market, and thereby put at risk all the capital invested up to that time.

7.60 The third argument is that competitive renewal would lead to huge amounts of litigation and thus be a big bonanza for lawyers.[267] FARB adds that it would be a wonderful breeding ground for blackmailers.[268] This latter view is supported by information provided by FARB. In the USA companies challenge the licensees of stations with the apparent goal of winning the licence or, more often, receiving a hefty financial settlement for withdrawing the challenge.[269] The blackmail view is repeated in information on the American situation provided by the Tribunal. However, the willingness to settle is said to be a function not only of the difficulty of challengers winning because of 'renewal expectancy', but also because of a major shift in Congressional and FCC policy regarding such payoffs.[270]

7.61 Overseas experience should be used with caution because the law, the conventions, the way things are done and even business ethics could all be different. Nevertheless, FARB implies the Committee should take note of this experience and when this is done the bonanza for lawyers and blackmail arguments appear to be exaggerated. The proportionate number of cases designated for 'comparative renewal' hearings in the USA is very small - less than one-third of a per cent.[271] If one applies this percentage to Australia there

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[265] Submission No. 3168, p.15.
[266] Transcript of 15 June 1988, pp.1313, 1314.
[267] Transcript of 25 July 1988, p.1598.
[268] Transcript of 26 July 1988, p.1703.
[269] Radio Business Report, 25 April 1988, p.2.
[270] *Broadcasting*, 24 August 1987, 'Comparative Renewal. The biggest gamble on the air?', p.30.
[271] *Broadcasting*, 24 August 1987, already cited. Between 1982 and 1987 there were 40 cases out of 12,500 radio and television stations.

would be a total of just over one case every six years; and even less when one allows for the restricted nature of competitive renewal under the Tribunal's modified proposal.[272]

7.62 The Tribunal counters the litigation argument by expressing the hope that there would be no appeals to the Administrative Appeals Tribunal (AAT).[273] This raises the question of whether the cure (competitive renewal plus abolition of appeals to the AAT) is worse than the disease (the occasional difficulty in rectifying a deficient service). This matter has been discussed in chapter 3.

7.63 The final industry argument is probably the strongest. FACTS asks for the evidence to support the competitive renewal proposal.[274] FARB refutes any suggestion that the Tribunal lacks power to deal with licensees that breach the Act or any other of their legal obligations under the Act. After listing what it calls 'the armoury of powers at the Tribunal's disposal', FARB says it is 'not aware of a single case where a licensee has failed to respond once the Tribunal has invoked one or other of the ... powers', i.e. those FARB listed. It says that the reduced renewal period has been particularly effective in this context. FARB gives examples of three radio licences which received short-term renewals. The next time round these licences were renewed for the full period.[275] The conclusion drawn was that deficiencies were rectified by the licensees.[276] However, the Tribunal referred to a case under review where the service provided is technically inferior and presumably where the best option is a competitive renewal.[277]

Conclusions and Recommendation

7.64 The need for and the scope of competitive licence renewal should be examined against the objectives of broadcasting policy. One of these objectives is to improve the quality of the service provided and the Tribunal sees its regulatory role as that of ensuring that the public receives the highest quality of programming. Although the Committee shares these sentiments it notes that the policy objective can be achieved in different ways. For example, the objective of improving quality can be met by increasing the number of licences in a particular market, by increasing or varying the contributions of national or public broadcasters, or by area inquiries.

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[272] 0.32 per cent of 190 licenses (50 television, 140 radio - see Submission No. 4056, p.3) equals 0.608 over three years (the licence period).
[273] Transcript of 14 June 1988, p.1225.
[274] Transcript of 25 July 1988, p.1571.
[275] Submission No. 4054, pp.20-22.
[276] Transcript of 26 July 1988, p.1704.
[277] Transcript of 26 July 1988, p.1821.

7.65 Given these alternatives and given in particular Committee endorsement of the concept of area inquiries the full-blooded concept of competitive renewal is unnecessary. Some aspects of this earlier proposal may also be unworkable. Mr L T Grey says it may be impractical to talk about competitive renewal for one station which is an intrinsic part of a network.[278]

7.66 The industry arguments which question the need for competitive renewal, given the track record of the industry, are convincing. But what the Tribunal is asking for and what the Committee supports is something different: **a tidier and more effective way of dealing with licence revocations than what is currently in the Act.** FARB says there are provisions in the Act for the licence to be revoked and for the Minister to call for applications for a fresh licence.[279] FACTS says that the Tribunal can set an advance date for revocation, thereby giving sufficient time for an applicant to be selected before the advance date.[280] In this way there would be continuity of the service.

7.67 But this is **de facto** competitive renewal. The logical extension of the industry argument is to amend the Act to provide that where the Tribunal has revoked a licence or has set an advance date for revocation the Minister **shall,** within say 14 days of being notified by the Tribunal, invite applications for a fresh licence. This change would give the process an iron-clad certainty.

7.68 This alternative to competitive renewal adds another administrative step which is unnecessary. The Committee believes competitive renewal to be the better alternative and recommends that:

> **Recommendation 21: The *Broadcasting Act 1942* be amended to provide that where the Australian Broadcasting Tribunal grants a licensee a short-term renewal and where at the end of that period the Tribunal determines that the licensee has not corrected the deficiency that led to the short-term renewal, the Tribunal can invite applications for that licence and select one of those applicants.**

JOHN SAUNDERSON, MP
Chairman

24 November 1988

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[278] Transcript of 11 February 1988, p.323.
[279] Submission No. 4093, p.2.
[280] Submission No. 4097, p.1.

APPENDIX 1

CONDUCT OF THE INQUIRY, EVIDENCE AND WITNESSES

Conduct of the Inquiry

The House of Representatives Standing Committee on Transport, Communications and Infrastructure was appointed under Sessional Order 28B on 24 September 1987. The Committee is empowered to inquire into and report on any matters referred to it by either the House or a Minister.

2. On 17 November 1987 the Chairman wrote to the Minister for Transport and Communications seeking a reference on regulation in the Australian radio and television industry, including new services and technology. The Minister replied the next day giving the Committee terms of reference for two inquiries, one into the role and functions of the Australian Broadcasting Tribunal and the other into new broadcasting-related services. He said it would be helpful if the first inquiry (into the ABT) was completed by the end of March 1988.

3. The inquiry was advertised in the national newspapers on 25 and 26 November 1987. The advertisements contained the Committee's terms of reference, called for submissions by 15 January 1988 and said the Committee would commence taking evidence in early February.

4. In November and December 1987, as part of a familiarisation exercise, the Committee held informal briefings with strategic groups in the broadcasting industry - the Tribunal, the Department of Transport and Communications, FACTS, FARB, the Australian Theatrical and Amusement Employees Association and the Public Interest Centre.

5. By the beginning of February 1988 the Committee had received an unprecedented number of submissions - over 4,000 from all over Australia. Many of these were one or two page letter submissions from private citizens concentrating on one issue, namely, the retention of the Tribunal's powers to establish and enforce program standards. Although a large number of these submissions were the product of an organised and misconceived campaign of protest, they nevertheless represent a serious concern of the Australian community.

6. The distribution of submissions by State is as follows:

State/Territory	No of submissions
New South Wales	518
Victoria	945
Queensland	855
South Australia	379
Western Australia	1069
Tasmania	232
ACT/NT	64
TOTAL	4062

7. On 9 February 1988, prior to the first public hearing in Sydney, the Committee appointed a sub-committee comprising Mr Saunderson (Chairman), the Hon N A Brown and Mr Gorman to take evidence on the inquiry. Mr Downer (Deputy Chairman) replaced Mr Saunderson for the hearings in Adelaide and Hobart.

8. At both the first Sydney hearing (9 February) and the Perth hearing (1 March) the Chairman spent some time correcting misconceptions about this inquiry. Briefly he said it was inaccurate to say that the timing of the inquiry was an attempt to reduce the powers of the Tribunal and that no individual or organisation that requested an extension of time to make a submission was refused. Submissions were accepted up to the period of report preparation.

9. Because of the late receipt of a key submission, that of the Department received on 11 March 1988, that is, some 20 days before the Minister wanted the Committee to complete its inquiry, the Chairman wrote to the Minister and informed him that it would not be possible for the Committee to report before the 1988 Budget sittings of the Parliament.

10. Oral evidence was taken in all the State capitals and Canberra. Because of the community interest in the inquiry and the Committee's wish to make its inquiry both public and participatory, circular letters were sent to those that made submissions in each State informing these persons of the date, time and venue of the public hearing in that State. Time was set aside to hear persons 'from the floor' - i.e. those who attended the hearing, wished to speak, but had not been invited formally to give evidence.

11. In addition, the sub-committee held a public meeting in Perth and inspected the Channel 9 facilities in Willoughby and the Tribunal's facilities in North Sydney.

12. The sub-committee deliberated privately on several occasions and decided to take further oral evidence in Sydney from strategic groups in the broadcasting industry on 25 and 26 July on specific issues. These groups and others were sent copies of the major submissions and transcripts.

Evidence

13. The evidence consists mostly of written submissions made to the Committee and oral evidence taken by the Committee at public hearings. The written submissions have been authorised for publication and have been indexed in a register which is available for inspection at the committee secretariat, Parliament House, Canberra. The submissions will be bound in several volumes and the volumes sent to the National Library and the Parliamentary Library. A set of the bound volumes will be retained in the committee secretariat.

14. The major or substantial submissions including those of persons/organisations who appeared before the sub-committee at public hearings are as follows:

[A] Consumer Protection Groups

Submission No.(s)	Person/Organisation
91	The Australian Children's Television Foundation
745	Australian Council on Smoking and Health
1	Australian Federation of Consumer
3506	Organisations Inc.
2618	National Viewers and Listeners Association (WA)
3091	South Australian Institute of Teachers
3133	Communications Policy Committee, National Party of Australia - Queensland
3151	Children's Program Committee, Australian Broadcasting Tribunal

Submission No.(s)	Person/Organisation
3155	South Australian Council for Children's Films and Television Inc.
4072	Federation of Parents and Citizens'
4072B	Associations of NSW

[B] General Interest Groups

1.Religious Groups

152	Catholic Communications Centre, Archdiocese of Sydney
155	Christian Media Association ACT
1648	St. Stephen's Vicarage, Richmond, Vic
2171 2173	Baptist Churches of Tasmania
2507	Christian Television Association of SA Inc.
2578	Archdiocese of the Catholic Church of Perth
3213	The Australian Federation of Festival of Light
3459	The Christian Television Association of WA
3460	The Australian Churches Media Association
3903	Catholic Church Office of South Australia
4092	Victorian Council of Churches Social Questions Commission

Submission No.(s)	Person/Organisation
	2.Other Groups
3188 3500 4094	Communications Law Centre
3203	Screen Production Association of Australia
3215	Public Broadcasting Association of Australia
3233 4082	Free Speech Committee
3240	Film and Television Institute (WA) Inc.
3499 3519	Printing and Kindred Industries Union
3656 4074	Australian Writers' Guild
4086	Television Make It Australian
	[C] Industry Groups
746	Media One Pty Ltd
1355	Hoyt's Media Limited
3164 4054 4093 4101	Federation of Australian Radio Broadcasters
4098 4099 5000	Australian Television Network Ltd.
3168 4097	Federation of Australian Commercial Television Stations

3169	Bond Media Limited
3210	Grundy Organisation Pty Ltd
4081	Australian Association of National Advertisers

[D] Government Department, Agencies

3	Business Regulation Review Unit
3154	Australian Broadcasting Corporation
3181	Department of the Arts, Sport, the Environment, Tourism and Territories
3214	Australian Film Commission
4049 4056 4090 4091 4096	Department of Transport and Communications
4087	Administrative Review Council
4089	AUSSAT
3153 4095	Australian Broadcasting Tribunal

[E] Private Citizens

3064	Mr L T Grey
3448 4102	Mrs J Blyth
4103	Mr H Petrusma, MLC

15. Oral evidence was taken at 15 public hearings held in all the State capitals and Canberra, as follows:

Sydney	-	9-11 February, 3 and 29 March and 25 and 26 July
Melbourne	-	12 July
Brisbane	-	13 July
Adelaide	-	7 June
Perth	-	1 March
Hobart	-	13 September
Canberra	-	2 February, 14 and 15 June

16. Copies of the proof transcripts of proceedings were sent to witnesses. The corrected proofs will be bound and sets sent to the National Library and the Parliamentary Library. One set will be retained in the committee secretariat.

Witnesses

The following witness appeared before the sub-committee and were examined:

Organisation/Witnesses	**Date(s) of Appearance**
[A] Consumer Protection Groups	
Australian Federation of Consumer Organisations	
Mr R M G Brown Director	11.2.88
Federation of Parents and Citizens' Association of New South Wales	
Mrs E McGill Member State Executive	10.2.88

Organisation/Witnesses	Date(s) of Appearance
Ms L Frow Research Officer	10.2.88
Parents and Friends Federation of Western Australia	
Mr I R Ker Councillor (Treasurer)	1.3.88
Australian Council on Smoking and Health	
Dr K W Faulkner Chairman	1.3.88
Dr K Jamrozik National Heart Foundation Delegate	1.3.88
Ms R Shean Consultant Cancer Foundation of Western Australia	1.3.88
National Viewers and Listeners Association (WA)	
Mr R Studham President	1.3.88
Mrs B Van Luyn Secretary	1.3.88
Australian Children's Television Foundation	
Dr P M Edgar Director	12.7.88

Organisation/Witnesses	Date(s) of Appearance
National Party of Australia, Queensland Branch	
Mr E C Powne Chairman Communications Policy Committee	13.7.88
Mrs C Bauman Member Communications Policy Committee	13.7.88
South Australian Council for Children's Films and Television	
Mrs B E Biggins President	7.6.88
Mr C G Cupit Vice-President	7.6.88
Ms F Coleman Research Officer	7.6.88
South Australian Institute of Teachers	
Mr D Jolliffe Executive Member	7.6.88

[B] General Interest Groups

1. Religious Groups

Australian Federation of Festival of Light	
Reverend Fred Nile, MLC Honorary National Co-ordinator	29.3.88

Organisation/Witnesses	Date(s) of Appearance
Mrs E Nile, MLC President Women for the Family	29.3.88
Australian Churches Media Association	
Reverend W Hartley Chairman	1.3.88
Catholic Communications Centre New South Wales	
Father K Burton	10.2.88
Catholic Church Office, South Australia	
L A Faulkner His Grace, The Archbishop of Adelaide	7.6.88
Mr C P Linkson Chairman Catholic News Board	7.6.88
Christian Television Association Western Australia	
Miss P Ryan Chairperson	1.3.88
Father P Cunningham Treasurer	1.3.88
Christian Television Association South Australia Inc	
Mr J H Pryzibilla Former Chairman	7.6.88

Organisation/Witnesses	Date(s) of Appearance
Christian Media Association of the Australian Capital Territory	
Reverend N W Adcock Chairman	14.6.88
Conference of Churches of Christ in Victoria and Tasmania	
Mr F L Van Laar Convenor Social Questions Committee	12.7.88
Mr D Looke Member Social Questions Committee	12.7.88
Baptist Union of Tasmania	
Reverend R A Beeston Superintendent	13.9.88
Mr J E Ryall Vice-President	13.9.88
St Stephen's Vicarage	
Archdeacon D H Chambers	12.7.88
Uniting Church in Australia, Synod of Western Australia	
Reverend J Ramsbottom Convenor of Media Committee	1.3.88
Women's Christian Temperance Union	
Mrs S Mitchell State President New South Wales	11.2.88

Organisation/Witnesses	Date(s) of Appearance
Mrs N Adams State President Western Australia	1.3.88
Mrs G E May Field Officer and Honary Life Vice-President South Australia	7.6.88
Mrs I Birch National Treasurer	12.7.88

2. Other Groups

Communications Law Centre

Dr K Harrison Co-ordinator	11.2.88 26.7.88
Mr R B Phillips Solicitor	26.7.88
Ms C Spurgeon Research Officer	26.7.88

Actors Equity

Ms A Britton Assistant Federal Secretary	11.2.88

Australian Journalists Association

Ms A Giles Assistant Federal Secretary	11.2.88

Organisation/Witnesses	Date(s) of Appearance
Australian Writers Guild	
Mr D Williamson President	11.2.88
Mr G Atherden Chairman	11.2.88
Ms A Wales Executive Officer	11.2.88
Printing and Kindred Industries Union	
Mr B Barker Assistant Federal Secretary	3.3.88
Free Speech Committee	
Mr A Katsigiannis Secretary	29.3.88
Mr R Crofts Secretary	29.3.88
Mr G Morris Executive Member	29.3.88
Film and Television Institute (WA) Inc.	
Mr R Garton Smith Chairman Television Committee	1.3.88
Mr P Morris Consultant	1.3.88
Television Make It Australian	
Mr K Dalton Treasurer	12.7.88
Mr P Edgeworth Committee Member	12.7.88

Organisation/Witnesses	Date(s) of Appearance
Mr C Livingstone Committee Member	12.7.88
Ms V C Molloy Committee Member	12.7.88
Ms A Britton Member	12.7.88
[C] Industry Groups	
Bond Media Limited	
Mr A Branigan Director of Broadcasting Policy	12.2.88 29.3.88 25.7.88
Mr D Leckie General Manager TCN 9, Sydney	10.2.88
Mr G W Rice Managing Director GTV 9, Melbourne	10.2.88
Mr R D Lyle Program Classification Officer	29.3.88
Federation of Australian Commercial Television Stations	
Mr L A Mauger Chairman	25.7.88
Mr D Morgan Federal Director and Chief Executive	9.2.88 3.3.88 25.7.88
Australian Association of National Advertisers	
Ms K Henley Executive Director	10.2.88

Organisation/Witnesses	Date(s) of Appearance
Federation of Australian Radio Broadcasters	
Mr G W Rutherford President	11.2.88 26.7.88
Mrs J Cameron Immediate Past President	11.2.88 26.7.88
Mr D L Foster Federal Director	11.2.88 26.7.88
Network Ten Australia	
Mr I G Gow Group Managing Director	3.3.88 25.7.88
Mr G Dunstan Network Business Manager	3.3.88 25.7.88
Mr S J McKew General Manager Corporate Planning and Development	3.3.88 25.7.88
Hoyts Media Ltd	
Mr G D Wheatley Managing Director	29.3.88
Mr J H Martin Group General Manager	29.3.88
Australian Television Network	
Mr C Skase Chairman Qintex Ltd	15.6.88
Mr R B Campbell Chief Executive Media and Entertainment Qintex Ltd	15.6.88

Organisation/Witnesses	Date(s) of Appearance
Mr G Kelly Solicitor to Quintex Ltd	15.6.88
Mr K V Campbell General Manager ATN 7, Perth	25.7.88
Mr A Tyson Managing Director ATN 7, Sydney	25.7.88
Mr S P O'Halloran Network Legal and Business Affairs	25.7.88
Mr A R King Broadcast Development Manager ATN	25.7.88
Media One Pty Ltd	
Mr K Tietze Director	13.7.88
Tasmanian Television Ltd	
Mr E D G Rouse General Manager	13.9.88
Mr P S Wallbank Director of Programs	13.9.88

[D] Government Departments, Agencies

Aussat Pty Ltd	
Mr W G Gosewinckel Managing Director	9.2.88

Organisation/Witnesses	Date(s) of Appearance
Mr R C Johnson General Manager	9.2.88
Mr M McDonnell Business Analyst	9.2.88
Australian Broadcasting Tribunal	
Miss D O'Connor Chairman	29.3.88 14.6.88 26.7.88
Mr M K Minehan Principal Executive Officer Legislation Section	29.3.88 14.6.88 26.7.88
Mrs H Clark Head Children's and Education Programs Committee	10.2.88
Ms C Petre Chairperson Children's Program Committee	10.2.88
Ms A Wilson Vice-Chairperson Children's Program Committee	10.2.88
Mrs B E Biggins Member Children's Program Committee	
Australian Broadcasting Corporation	10.2.88
Mr G Reynolds Director of Television	10.2.88
Ms H Mills Director Corporate Policy and Planning	10.2.88

Organisation/Witnesses	Date(s) of Appearance
Australian Film Commission	
Mr K L Williams Chief Executive	3.3.88
Ms K Hughes Policy Adviser	3.3.88
Business Regulation Review Unit	
Dr A Moran Director	22.2.88
Department of Arts, Sport, the Environment, Tourism and Territories	
Mr L Neilson Assistant Secretary Film Branch Film and Cultural Heritage Division	14.6.88
Department of Transport and Communications	
Mr R N Smith First Assistant Secretary Broadcasting Policy Division	14.6.88 26.7.88
Mr V H Jones First Assistant Secretary Communications Operations Division	14.6.88
Mr J A Duncan Acting Assistant Secretary Broadcasting Analysis Branch Broadcasting Policy Division	14.6.88
Mr C J Knowles Assistant Secretary Communications Operations Division	26.7.88

Organisation/Witnesses	Date(s) of Appearance
[E] Private Citizens	
Mr L T Grey	11.2.88
Mrs M Smith	11.2.88
Mr R Coady	11.2.88
Hon I M McPhee, MP	22.2.88
Mrs J Blyth	1.3.88
Mr G P O'Connor	1.3.88
Mr R R Crocker	7.6.88
Mr P J Coburn	12.7.88
Mr R W Ward	12.7.88
Mrs A Tan	13.7.88
Mrs G Taylor	13.7.88
Mrs M Campbell	13.7.88
Mrs H White	13.7.88
Mrs M R Butler	13.9.88
Mrs C E & Miss R A Howard	3.9.88