

An address by Wilf Barker to the Media Law Workshop at Ballarat, August 11-12, 1985

From my introduction, you would note that I come before you without the luxury of the free thought that pertains to the professional scholar or the freedom of the social reformer or even the freedom of what the media refers to as 'the new player' looking to find some way into the newest game in town - the media business.

Instead, I come to you with twenty years of my life spent in working for 'the television industry'. A representative of the people who are conceived or misconceived as being synonymous with words like 'monopoly', 'power', 'undue influence'. The big fellow always leaning on the little fellows. And, of course, in furtherance of this Machiavellian image, you have singled me out to address you on the subject of 'Networking and Network Licensing'.

Which brings me then to self-interest. It is said that, in the horserace of life one should always put one's money on self-interest - at least you know you'll get a run for your money in the sense that self-interest is always striving to win. I'll try to remember this in what I have to say, to be objective in the knowledge that final decisions, in the matter of broadcasting policy and, in this context, networking, are important to all broadcasters, program producers, advertisers and the viewing public. I will be cognizant that such final decisions are seldom the product of bias and soap-box oratory, but rather of wide-ranging consensus and political acceptability. As I will indicate later, not always are such final decisions conducive to the key element of the television business - programming.

On the other hand, I speak to you as a practical, experienced, operational broadcaster, and I ask you to consider that theory, idealism and misunderstanding are no substitute for the practical world in which an industry must operate. The television industry, perhaps in particular, spawns instant experts - both in the area of programming and potential social reform. This in itself is a healthy tribute to the importance of this medium. By corollary, it warrants a basis of understanding and knowledge from those who would anticipate new scenarios, perceive a

requirement for reform and, in turn, become the arbiters of change.

The subject of broadcast networking has long been in the public eye. Radio networking was the forerunner of television networking and dominated prime-time radio in Australia in the late 1940's and early 1950's. The Report of the Joint Parliamentary Committee on the Wireless and Broadcasting (1942), said, "... on the whole, the activities of networks of broadcasting stations are beneficial to listeners".

In paragraph 5 of its report, it commented on the possibility of extensive control over the operation of individual stations as being real and requiring constant vigilance. The Board's approach was quoted, "... as not one of bureaucratic interference, but as based upon increasing the benefits which networks are undoubtedly able to confer".

In the DOC Report on the Structure of the Australian Broadcasting System 1976 (the Green Report), little was said about networking other than it being "... one potential area for increasing efficiency in the commercial sector".

#### Defining Networking

In its television context and in the Australian idiom, what then, is 'networking'. Simplistically, it has been described as the distribution of programs between stations. In its 1984 Report on Satellite Program Services ("SPS Report"), the Australian Broadcasting Tribunal ("ABT") noted that it could be used to cover arrangements for any of the following activities:

- (a) Co-operation for promotional purposes, to increase audience and revenue by joint advertising of their stations.
- (b) Co-operation between members of the network for acquisition of local and overseas programs.
- (c) Co-operation between network members for program production or distribution, and
- (d) Ad hoc networks to cover special events.

descriptions of networking practices and attempts to regulate them can be found both in the ABT's SPS Report and also in the 1984 Department of Communications' Localism Report.

The most comprehensive enquiry into networking however, was in the Administrative Appeals Tribunal ("AAT") before Mr Justice Morling In Re: Control Investments Pty. Ltd. and Ors v Australian Broadcasting Tribunal and Ors (39 ALR 281). This enquiry continued through most of 1981. As you will recall, it related to the takeover of ATV-10 by News Limited and NT. One of the central issues was whether television networking was against the public interest. Perhaps the simplest and clearest definition was that given by industry witness, Mr James Macpherson, in this case, when he said:

"I think basically, networking in Australia is a co-operative if you like, of television stations to purchase programs together, to produce programs together and to sell advertising time together."

#### **Networking Arrangements in Australia**

In this context networking is, in any real terms, applied only to the multi-station markets of Sydney, Melbourne, Adelaide and Brisbane, where a co-operative allegiance has developed in the formation of three commercial networks across the four cities - known, of course, as the Seven Network, the Nine Network and the Ten Network. With three commercial outlets in only these four cities, networking in this context applied only to those cities, and not to the 'less than 3' or 'single-station' markets where, generally, competitive pressures govern program sales on a non-aligned basis.

Let me hasten to point out that various other networking arrangements do exist. All regional stations are members of the Regional Television Association of Australia Limited ("RTA") collective buying group. Many separately-owned regionals join together for co-operative benefit, such as in Great Eastland. Most programming and much of their sales are common to all.

Notwithstanding the 4-city network operation and the usual nature of such an operation's distribution arrangements, from time to time the colloquial word 'networking' has been applied to special cases of co-operation between major sta-

tions and regional outlets. An example of this is the special distribution arrangements for the Olympic Games in 1984. In such a case, a 'network' for Australia-wide distribution joined together in the production, promotion, live presentation to air, sales and marketing of the telecast of the Games for reasons associated with the significance and scale of the event.

A more limited form of networking, with real-time programming, occurs on programs such as 60 Minutes, The Ray Martin Show and Good Morning Australia which are relayed live across much of Australia. In some cases there is national sponsorship of these programs, but in each case each station telecasting the program inserts its own commercials.

Let's pause for a moment to look at the relationships involved in networking as it currently exists in Australia. In the four markets of Sydney, Melbourne, Adelaide and Brisbane, each separate licensee has a similar level of demand for television product and is bound by the same rules as to adequate and comprehensive services, localism, Australian programming, etc., in respect to the licence which has been issued to him. Using Mr Macpherson's definition, 'networking' has evolved as the appropriate arrangement to make in the optimisation of program opportunity and bottom line profitability. Networking being a voluntary co-operative for the common good.

In the words of Julius Sumner-Miller - "why is this so?"

#### **Justification for Networking**

Australian audiences are about the most sophisticated in the world, but we do operate from a relatively small population base. Thus, the per capita cost of the various types of Australian-made programs is very high in any international comparative sense, as well as in real cost terms. Also, for the same reason the markets with three commercial television outlets are intensely competitive, both in their quest for ratings and for sales dollars. The United States, with a population base of some 250 million people, has only three commercial networks plus a lame-duck Public Broadcast network and additional independents in major cities. Other countries have significantly less.

Australian television is proud that these driving forces have prompted the immediate reaction by 'networks' so neces-

sary in producing high-quality and high-interest television schedules - programs that have given commercial television in this country viewing levels high by international standards. This reaction is demonstrated by the high level of top-class Australian drama available to viewers.

Another aspect: you would be aware that networks have had available to them, and have leased full-time, link or bearer facilities to allow simultaneous program delivery throughout the four (or five) network cities. Despite this capability and the cost savings that would result, there are significant degrees of difference in the program schedules of each of the cities. Competition and commercial pressures have maintained these differences. A Ten Network example is the program It's a Knockout which is shown on Sunday in Melbourne and Brisbane and on Wednesday in Sydney. I will refer to this again later when I speak about satellite technology - my point at this stage being that the satellite age offers no programming advantages to the existing networks. In fact, comparative costs are very much in favour of the status quo.

**Networking: Comparing Decisions and views from the AAT, ABT and FDU**

In the previously referred to AAT proceedings, Mr Justice Morling held,

"... commercial television networks are inevitable and advantageous to stations. They are particularly advantageous to smaller stations and are in the public interest."

In its SPS Report, the ABT was somewhat lengthier in its deliberations on the subject:

"Networks and networking are the heart and arteries of the commercial television system. Networking offers great advantages to the community and this industry as a whole. The extension via satellite of a commercial television service comparable to that available in the State capitals to the whole of Australia will increase the importance of networks and networking in the system. Networking is a natural result of economic forces in the television broadcasting industry where there are high costs attached to the acquisition of program-

ming material and where the cost of distribution of that material to stations throughout the country is relatively low. The phenomenon of networking is economically rational and beneficial in so far as it allows high quality television programming, both Australian and overseas, to be made available for transmission throughout the country. Indeed, it is difficult to conceive how the television industry would operate in Australia without a high degree of centralised program acquisition and distribution. Therefore, the Tribunal supports continuation, strengthening and expansion of networks and networking; but this must occur within a balanced commercial television system."

I refer to the provisions of the Broadcasting and Television Act (B&T Act) where limitations of ownership and control are extended to control of stations through control of programming. It is contrary to existing law for any station to 'control' the programming of others in a distribution chain. I emphasise the voluntary nature of existing network arrangements and their flexibility. I emphasise the extensive evidence provided to, and accepted by, Mr Justice Morling in this regard. The sworn evidence of operators from metropolitan areas and smaller regional markets alike confirmed the advantage of the system as currently operating. There was no suggestion of any need for voluntary or legislative controls from the many stations involved - large or small.

Read in full, the comments of Mr Justice Morling at 39 ALR 321 are significant and interesting. Referring to the smaller stations 'owned and controlled by companies of great financial substance', he said, "... they would not be slow to voice their objections to current networking arrangements if they felt they operated to the disadvantage of their stations".

Australian networking has not changed since the time of Mr Justice Morling's deliberations. Thus for the present. The future though, is said to raise new issues.

The Minister for Communications in a notice dated February 18, 1985, instructed the Department of Communications to prepare a report subsequently entitled Future Directions for Commercial Television ("FDU Report") and issued on June 30, 1985.

As its primary task, the FDU Report

dealt with the available options for the qualification of television services across Australia within a relatively short timeframe, i.e., it created options and consequential elements involved in converting Australia's regional markets from their current single-station operation to 3-station operations - services equivalent to those currently existing in the major capital cities. It highlighted the future availability of the Australian domestic satellite with its potential for Australia-wide networking in a new context of real time relay to stations who would instantly re-transmit these programs to viewers in their own service area.

#### **Analysing the FDU's Suggested Options for Regulation of Program Distribution Arrangements**

Chapter 4 of the FDU Report deals specifically with 'Program Distribution Arrangements'. The section concludes by looking at four broad options for the control of networking in this new hypothetical, but potentially real, system of operation.

In its build-up to the need for such control, the FDU Report quotes further from the ABT's SPS Report (and the next two quotations are most germane to my conclusions):

"... the satellite distribution of television programs and advertising, and the establishment of additional stations in regional areas of Australia, will substantially extend the power and influence of the metropolitan networks, and particularly the Sydney and Melbourne stations, in the commercial television system. This development will be facilitated by the network sale of national advertising to be integrated with program feeds emanating from Sydney and Melbourne distributed to commercial television stations throughout the country." (SPS Report)

The FDU Report continues:

"... the ABT expressed its support for an extension of networking. However, it is believed that without corrective action it would extend the power and influence of metropolitan stations at the expense of other parts of the commercial television system. As economic ascendancy with-

in the metropolitan networks lies with the licensees of Sydney and Melbourne stations, it is believed this could worsen the current imbalance in influence within the system." (FDU Report)

This FDU conclusion is undoubtedly a non-sequitur to the ABT statement on which it is based and yet it is the framework for FDU philosophy on the subject. The ABT noted a developmental probability in that comment. The FDU Report then introduced the conclusion suggesting corrective action. The point is crucial in its becoming the basis of FDU suggestions of a need for change.

On the one hand, the ABT has never thoroughly investigated the subject of networking in Australia, either at the SPS Enquiry or in other enquiries in which it has been involved. Despite claims to the contrary, the transcript of such enquiries is testimony to this.

On the other hand, the evidence given at Mr Justice Morling's AAT Hearings was extensive in the extreme. In the context of Sydney and Melbourne joint ownership, Mr Justice Morling found public interest advantaged in the present networking system. From its smaller data base, the ABT expresses concern at the influence of this same Sydney/Melbourne ownership. The FDU don't seem to be aware of the ABT Enquiry and interpret the ABT statement as pointing to a need for 'correction action'.

To go a step further, the AAT was looking at a four-market network system - Sydney, Melbourne, Adelaide and Brisbane. On the other hand, the ABT comment is made in reference to the future world of additional station outlets beyond those presently involved in 'networking'. In this environment, the influence of Sydney and Melbourne stations is automatically reduced, not strengthened, as Sydney and Melbourne will then as a result have a smaller slice of the much larger cake.

I say this on the basis of evidence that network planning decisions are taken at broad-based network meetings and that future representation will be expanded, not reduced. Network cost apportionment amongst members will significantly reduce Melbourne/Sydney influence, not the reverse. I maintain that the ABT is incorrect in its view and that it is based on opinion, not evidence or broadcast practice.

The FDU Report specifically develops this thrust of the ABT and its scenario goes something like this. If we are going

to have a satellite which can provide immediacy of program delivery from a central source to all stations, and if we are going to have additional outlets or equality of services in regional areas, then there is a high level of probability that many stations in any network will become slave stations from a central source, with programming decisions tending to be made at the central source and programs being transmitted simultaneously. Since the central source is likely to be Sydney, then we will create an undue influence by the Sydney/Melbourne stations on all Australian broadcast television schedules. Therefore, we should look at the issues of regulation of program distribution arrangements between stations.

I don't argue with the potential operational aspects, only the conclusions.

The FDU Report then identifies four broad options for such regulation.

**Option 1:** is the de-regulation option of a complete 'hands off' approach by Government, and is suggested as involving changes to the B&T Act to facilitate such de-regulation.

Over the years the television industry has always been unanimously agreed on two basic freedoms for each licensee. The first, the right to accept or reject any program or group of programs at its sole discretion. The second, the right to accept or reject advertising to go to air on his station and to decide for himself the rates at which any advertising should be sold. The television industry has constantly said that it will enshrine these two tenets of operation in its own self-regulation codes, or Government can regulate or legislate accordingly.

In its de-regulation option the FDU Report has confirmed and added to these two tenets the concept of a receiving licensee being free to select his most desirable method of distribution, i.e., direct by satellite, terrestrial bearer, tape, film, etc., along with the appointment of an independent arbitrator in the event of dispute.

Current legislation provides for the onus of responsibility of adherence to ABT program and advertising standards resting separately with each transmitting licensee. The industry has long maintained the impracticality of this, where the transmitting licensee receives direct-to-air programs from another station. In such instances, he must receive his program on trust and without the opportunity of his

own pre-censorship. In the evolving world of broadcast change and expanded networking, though not mentioned in the FDU Report, this aspect must be changed to place censorship onus on the originating licensee.

I must say that, given almost 30 years of complaint-free networking, I support the concept of solving new problems when they occur. I believe in a basic de-regulatory approach with self-regulatory commitment to the freedom of operation of individual licensees.

**Option 2:** provides for a "Code of Prescribed Practice". Under this option the B&T Act would be amended to incorporate specific protections for licensees. A list of do's and don'ts given the force of an Act of Parliament.

I would perceive the legality involved as being unnecessary and destructive of flexibility in the continuously changing relationships of licensee, program distributor, program producer, advertiser and Government.

**Option 3:** under this option the ABT would be empowered to establish basic requirements for agreements between originating stations and network affiliates. Such agreements would not involve licensing as such, but rather a listing of the many matters to be included in any contractual relationship and a filing of such agreements with the ABT.

The FDU Report sets out eleven matters for possible control covering everything from exclusive affiliation through advertising rates, national vs. local sales and rights of program pre-emption.

It should be mentioned that this option is referred to as the "US model". However, the US environment has changed and now there is an almost heady tendency towards complete de-regulation and allowing market forces to establish operating procedures in the light of operational imperatives and social responsibility.

To me, again, it is a case of solving problems before they occur in the knowledge that they might never occur. Sort of, defining a problem that does not exist and then finding the hypothetical solution for the hypothetical problem. Current agreements between stations are a matter of industry practice and good faith in continuing inter-dependence - they are generally not committed to writing. Nor

o they apply inflexibly.

ption 4: is that referred to in the title of this discussion - "Licensing of Distribution Networks".

First, a line is drawn between the responsibility of an existing licensee as an exhibitor of television product and the separate function of program distributor.

Currently, each of the networks, as a licensee or group of licensees, commissions or purchases programs. To fulfil its programming needs, it then both exhibits the program on its licensed station(s) and sells the program to other stations who might voluntarily decide they wish to purchase rights for their particular area. Hopefully, distribution achieves sufficient revenue to cover the financial outlay. The entrepreneurial risk is with the network or commissioning group.

This licensing option suggests the issue of a separate and special licence to a distribution network by the ABT, with such a licence being for a specific period and subject to public enquiry and certain regulatory requirements. Potentially new ownership and control rules and various other rules would be incorporated in such a distribution licence which would be quite separate to those of the existing exhibition licensee. In practice, there may be or may not be any impediment to an existing television licensee holding a separate distribution licence. It is suggested that there could be variants to the concept and that distribution licences might be zonal, state, regional or national. Such distribution licensees might be consortia of existing broadcasters and thus the distribution licensee could operate from a Board of Directors where the regional member(s) had equal voting with their larger metropolitan cousins. All in all, presuming to achieve the effective watering down of the Sydney/Melbourne influence in program selection - since this is the presumed ill to be corrected.

## conclusions

On the basis of practicality (apart from philosophy), I am diametrically opposed to the Distribution Licence option. When someone is planning to introduce new levels of controls, I believe the first test should be a clear response to the question of whether the new control is necessary. I suggest the answer to this is a positive 'no'.

Leaving aside the philosophy of unnecessary regulation, practical elements present great difficulty. Given the inevitability and desirability of separate networks, what, then, is the practical effect of creating a distributor licence separate to the existing licence of the exhibitor?

In the case where the two are the same - in other words, the distributor is the same entity as the exhibitor - then there is simply and obviously no point in separate licensing and a few moment's thought should settle this point. Certainly, other options can shore-up any misgivings.

The real aspect then, is that the distributor in a licensing context is suggested as a different entity to the exhibitor. Thus the reason for separate ownership and control elements, thus the underlying reasons for licensing of that entity.

The first presumption then is that, being a separate entity, this entity could be either a broader group of licensees and/or new players and/or a combination of both. It would seem that a pre-requisite to such change is that the mere fact of licensing distribution will introduce new players and that this will be in the public interest.

The presumption then, is that it is no longer the Sydney/Melbourne network licensees who act almost exclusively as the entrepreneur in financing program purchases and production. If a licensee has only the concern of his exhibition function, then the entrepreneurial role passes to the distributor - the licensed distributor.

With these presumptions in place, the practical problems:

1. The perceived problem of control of Australia's programming simply passes to a third party and that seems to me like a change for changes sake.
2. If the new licensed distributor is broadly based with, as has been suggested by the ABT, "licensees other than Sydney/Melbourne having a greater input", then we end up with committee decisions in matters of television programming. It is my experience with a single television station, let alone within a network, that shared decisions simply don't work and tend towards mediocrity, lack of risk-taking and negative elements which are, each

of them, the antithesis of valuable program production. Television program production is a very specialised, creative area and requires the entrepreneurial spirit of putting one's reputation on the line and backing one's judgment.

It is trite to repeat the idiom that "A camel is a horse designed by a committee". Broad-based input is fine; it is important and to be encouraged. Decision making must be clear-cut and singular. The buck must stop - somewhere. The ABT would give the licence to a committee.

3. The competitive nature of television in Australia's largest cities is a matter of record and the high level of television viewing is tribute to its programming quality. The exhibitor (i.e. the existing licensee in Sydney or in Melbourne) is intimately involved in the professionalism of fighting for every rating point in this competitive environment. At first-hand, he perceives the needs of his audiences and his success depends upon his capacity to meet those needs. When the distributor is separated from the exhibitor, then we introduce a party removed either in fact and/or in function from the exhibitor's marketplace. The licensed distributor calls the shots, decides programming and the valuable nexus between distributor and audience is severed. The product that is offered to our audiences will be reduced in audience appeal and, not only will our industry suffer, but so will the general public.

The only alternative to this is that the exhibitor - not having any control over national distribution - will then move further into local programming as opposed to national programming for his particular market. When this happens to any significant extent in the major cities, then consequent corner-store mentality will have adverse repercussions across Australia for program producers, advertisers and viewers alike.

4. There are those who suggest that a greater number of players would move into the void and become licensed distributors. Quality television product requires major financial investment.

Amortisation of this investment through distribution is essential. Despite local, national and international interests involved in television production in this country, no-one has yet risked the economic viability of spec building of television product - production of programs without a complete underwriting of costs. Only the Sydney/Melbourne stations and their network partners, have had, as exhibitors, the financial base for this operation. With a population base of something over 15 million and a need for costly quality product, it is impossible for the situation to change to one of freelancing entrepreneurs in the foreseeable future. The thought of a licence as a prerequisite would further retard the process.

Might I comment that existing licensees don't adopt this dual distribution/exhibition role by choice. Over the years they would have welcomed and have encouraged program-makers to offer quality finished programs from which they could program their stations. They would pay dearly for someone else to carry the risk. Categorically, it simply isn't on and no commercial entrepreneur is interested. The very isolated exception would only prove the point.

In a business where one episode of a series program costs say, \$150,000, the most that can be hoped for is a single hour documentary worth a fraction of this cost. And, of course, it is a commercial nonsense to suggest the step of the networks supporting a middleman licensee if the networks on the Sydney/Melbourne licences retain the same risk, the same involvement, but simply pay a higher price without direct access to the product distribution marketplace.

And on the subject of networks and licensing and separating exhibitor and distribution functions, what of the ABC? In reality, the ABC is the only national network in Australia, responsible for what, by any commercial network standards, is a large budget. Its distribution functions and its exhibitor functions in each and every part of Australia are controlled by its Managing Director through a Board of Directors. This Board is essentially resident in Sydney and the ABC has its

staff functions headquartered in Sydney. If the ABC were, like its commercial colleagues, responsible for its operation to the ABT, then a question - would the Tribunal have similar concerns? Would the ABT be the triggering point for change in its system of operation also? The Distribution/Exhibitor mix are inherent in the ABC. Is it pertinent that the Dix Report into the ABC did not single-out this issue in its consideration of ABC affairs? Certainly, the analogy is worthy of consideration.

I believe it appropriate that consideration of the future direction of broadcasting take place at a time of technological change. However, changes in the system, without good reason, clearly don't make sense.

A satisfactory, yet unregulated, system of distribution has been operating in the four 'network' cities of Sydney, Melbourne, Adelaide and Brisbane for almost 30 years. Multiple television services will progressively be introduced in regional Australia. We should respond only to the real problems that will occur and not regulate against imaginary ones. We should ensure that we don't start with a solution and then look for a problem.

Most importantly, and finally, television is all about programming. Television is all about what we see on the screen. Television is not about regulation, bureaucracy, legislation and politics. When programming is threatened by bureaucracy, legislation and politics, then the medium itself is at risk. In the continuing public debates to which television is prone, we must remember that program producers, distributors and even the would be 'new players' will not thank us for getting our priorities wrong. Of all the dangers to our television future, given currently determined policies and the status quo, I consider the potential of distribution licensing singularity prejudicial to programming excellence, investment in local production and effective broadcast practice.

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## THE ABT'S WEST AUSTRALIAN REMOTE AREA LICENCE REPORT

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The Australian Broadcasting Tribunal ("ABT") has released its report in relation to the West Australian remote area licence.

As previously announced the successful applicant was Regional Television Western Australia Pty Limited ("RTWA"). At the date of that application the applicant was a wholly owned subsidiary of Golden West Network Limited ("GWN"). The term of the grant of the licence will be the maximum period the Act permits, five years.

The ABT took the opportunity in its report to make general comments about remote area licences and the procedures to be followed in inquiries for the grant of remote area licences.

These comments are summarised and discussed below.

### 1. General Recommendations of the Tribunal

The ABT expressed its concern at the possible implications of s29(e) of the Broadcasting and Television Amendment Act 1985, which required equality of shareholding in a consortium holding a remote licence. It recommended that before that Act came into force on 1 January, 1986 consideration be given to the removal of remote area or "RCTS" licences from the ambit of s81(6)(a) of the Broadcasting and Television Act 1942 ("B&T Act").

The Tribunal also recommended that the Administrative Review Council examine the possibility of a review of the Minister of Communication's power to determine both the technical conditions attached to a licence (or soon to be in a licence warrant) and service areas, in the context of its re-examination of the review of administrative and Tribunal decisions under the B&T Act.

It also recommended that the initial grant of an RCTS licence be for a maximum period of seven years, in view of the financial characteristics of the service.

Again, as in its SPS report, the ABT stressed that the existing ownership and control provisions in the B&T Act had serious deficiencies; they did not address concentration which arose from cross ownership or control of different media. It also recommended that educational broadcasts of an RCTS licensee be accessible by