# The Australian Broadcasting Tribunal where to from here?

**John Saunderson MP is the Chairman of the House of Representatives Committee on Transport, Communications and Infrastructure. In December 1988 his committee released its report on the role and functions of the ABT. On March 7 John Saunderson spoke at a CAMLA lunch in Sydney about the future of the ABT.**

Since election in 1983 this government has presided over the most dramatic and sweeping changes, resulting in a restructuring of broadcasting not seen since the introduction of television in the 1950's. Amongst these reforms have been changes to

- the level of permissible ownerships from a maximum of two stations to a % of audience reach
- the finalisation of aggregation procedures for rural networks
- the introduction of video and audio entertainment and information services regulation, resulting in the commencement of 'Sky Channel' amongst other new services

These reforms have also resulted in a complete overturning of the old established ownership groups in broadcasting.

The three major networks have all changed ownerships since 1984.

The Nine and Seven Network had been controlled by the same management group since the issuing of the first licences in the 50's.

These reforms have not been without their critics – their criticism primarily centred around the question of the concentration of ownership.

It is certainly true that whilst diversity of ownership has occurred between the different branches of the media family, it is equally true that, within each branch of the media, concentration of ownership has increased.

The Australian Broadcasting Tribunal, the body created to enforce the rules and create the regulation, has been expected to cope with these dynamic events with outdated legislation. The lack of attention by governments to updating legislation has left the Tribunal with 19th century mechanisms to deal with a 21st century industry. This resulted in Deirdre O'Connor's now famous plea for 'teeth for the tiger'.

This now brings me to the role of my committee, not because of our dental expertise, but rather a recently presented report

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'The Role and Functions of the Australian Broadcasting Tribunal'. This report came about because of concerns within the community about the Tribunal's capacity to handle the newly restructured industry, and possible future industry developments, within its current legislative framework.

Our first report is an attempt to address the changes required to cover the existing free-to-air system and our second report will cover the future technologies and issues such as VAEIS.

The terms of reference received for this inquiry required us to examine the role and functions of the ABT in **regulating** the commercial broadcasting sector with particular reference to licence grants and licence renewals; ownership changes; establishment of program and advertising standards and enforcement of these standards.

Taken as a whole, they cover the case for, and need for, regulation.

The case for regulation of television is based on two factors which make broadcasting unique. The first is the impact of television which is received into our lounge rooms and seen by adults and children alike. 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. The second factor is the structure of the industry where television in Australia is dominated by three commercial networks.

It is television's powerful capacity to influence, combined with its ownership by a few, that has produced regimes of regulation and control throughout the western world.

Regulation itself can be separated into program regulation and structural regulation. I will not dwell on the detail and will only list the conclusions reached on program regulation. These were that:

- 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;
- there is also a clear case for the regulatory authority to have the power to improve the quality of television; and
- 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 covers control of entry into the market, prevention of undue concentration and restriction of foreign ownership and prohibition of foreign control of commercial broadcasting.

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

Control of entry into the market is connected with the need for maintaining commercial viability. At present the minister has the primary role and the Tribunal a subsidiary role in determining viability, and thus regulating entry. The traditional argument supporting viability is that of the 'trade-off'.

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Licensees are compelled to provide certain types of programs which result in both additional costs and loss of revenue. The trade-off for such costs and losses is the protection of advertising revenue by restricting entry into the industry.

The second reference the committee received from the Minister was examination of the possibilities for the development of and the appropriate means of regulating new broadcasting-related services. This inquiry was advertised in December 1988 and submissions are now being received.

In respect of structural regulation, the findings of the committee were that:

- the regulation of entry into commercial television markets should continue until the possible effects of Pay TV (Satellite and Cable) have been fully considered;
- the government should keep under constant review the issuing of new licences as a means of providing greater competition and increased variety of programs;
- regulation which prevents undue concentration of ownership and control of commercial broadcasting should be maintained; and
- regulation of foreign ownership and the prohibition of foreign control of commercial broadcasting should also be maintained.

As the trade-off argument suggests, there are interconnections between structural and program regulation. Maintaining commercial viability is a major objective of broadcasting policy which has the capacity to sustain many other objectives, particularly those relating to the encouragement of Australian contents and drama quotas and improvements in quality. It is what a United Kingdom House of Commons Committee 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.

There is a clear case for the regulation of commercial broadcasting. The need is conceded by all licenses who appeared before the committee, although there were and are differing viewpoints on the extent and nature of that regulation. An associated matter then is the setting of roles and responsibilities of Parliament, government and the Tribunal in regulating commercial broadcasting.

The Tribunal and others have asked for the Broadcasting Act to contain a concise set of policy objectives. These would show legislative intent in the regulatory process.

The committee accepted these proposals and has recommended that the Broadcasting Act specify the objectives of broadcasting policy. But by itself this is insufficient. It is well known that policy objectives are malleable, subject from time to time to different interpretations. My earlier comments on commercial viability illustrate that well. Therefore, the committee also recommended that from time to time the relevant minister make a statement in the Parliament, detailing the ways in which the policy objectives in the Act would be implemented.

We said that the legislation should also give the ABT guidance on its role and functions. The committee's recommendation was that the Broadcasting Act should say that, subject to judicial review by the courts and the institutions of administrative law, the role of the ABT is to protect the public interest by:

- undertaking those functions set down in the Act; and
- having regard to the policy objectives in the Act and policy statements on broadcasting made by the relevant minister pursuant to the Act.

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In short, the Tribunal is the Parliament's regulator of commercial broadcasting, and the recommendation I have just read out makes this abundantly clear. It must surely follow then, that if the words 'accountability' or 'public accountability' are to have relevance or meaning, broadcasters or licensees are accountable to the Tribunal and not to any one else.

The fallacy of broadcasters being accountable to the public gained currency with the Tribunal's 1977 report, Self-Regulation for Broadcasters. This concept of public accountability is a misnomer. Licensees are not directly accountable to the public but to the regulatory authority, the Australian Broadcasting Tribunal, by means of a process of public participation. The power of the Tribunal over licence renewals, for example, demonstrates the accuracy and relevance of the committee's approach to accountability.

Recognition of the reality of licensees being accountable to the Tribunal should reinforce the role of the Tribunal as the protector of the public interest.

Broadcasters are accountable to the Tribunal which in turn is accountable to the Administrative Appeals Tribunal for the quality of some ABT decisions. This is what our report refers to as the second tier of accountability. It is a tier some witnesses, particularly the Australian Broadcasting Tribunal, want removed.

The Administrative Review Council is examining the need for appeals to the AAT from Tribunal decisions. Because of this the committee made no recommendation on this matter.

The Broadcasting Tribunal bases its case for exemption on two special features, the public inquiry process and the expert body argument. The committee report did not concede either argument.

In the broadest sense, appeals to the AAT are a check against the possible misuse of power. It appears to me, and this was not in the report, that administrative law is an application to public sector bureaucracies of Lord Acton's famous dictum: power tends to corrupt and absolute power corrupts absolutely.

It is in this way that the appeals debate should be resolved, by considering the importance of those decisions. The committee endorsed 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 Administrative Appeals Tribunal.

I don't intend to cover all of the areas of recommendation within our report. I will however make comment about one more and that is our recommendations relating to the ABC and SBS coming under the umbrella of the ABT.

It has been argued that these recommendations cover an area outside our reference. I refute that argument. It was clear to us that if our prime aim was to ensure that the ABT could properly administer its responsibilities, it must have control of the whole industry, not simply part of it. It was also clear that, unless the ABC and SBS were required by law to participate in areas of ABT interest, such as standards, the current violence inquiry, possible future area inquires, Australian content regulations, their level of participation would probably be less than satisfactory.

Complaints from some ABC and SBS staff and management show that they have not only missed the reasons behind the recommendations, but also that they do not understand the current standards set by the ABT.

It is my view that the standards would not inhibit in any way the presentation of quality programs.

Before criticising our recommendations, the ABC and SBS should first obtain copies of the standards from the ABT, read them and apply them, rather that simply pointing to examples of 'excessive censorship' by the networks.

Before coming back to our original

discussion topic, I would like to raise one other recommendation: the one regarding the introduction of a 'trustee' system of major share transactions similar to that in use in the United States.

The current inquiry by the ABT into the Bond Corporation presents a scenario which, in my view, makes introduction of the 'trustee' system imperative.

Should the ABT find that Alan Bond is not a fit and proper person to hold a licence, it has two choices: either to require Alan Bond to be removed from a position of influence on the Board of the Bond Corporation; or to order divestiture by the Bond Corporation of the Nine Network. In either instance, a period of grace would almost certainly be provided to allow this to be done. Leaving Alan Bond in a position of influence over the company holding the licence during this period of grace, this would clearly be a ludicrous situation.

If the ABT had the power to require the transfer of shares to a trust arrangement this situation could be avoided.

Our first report we believe, provides the framework to allow the ABT to deal with its existing responsibilities in a more effective and efficient way. It provides the ABT with more options to deal with issues but also ensures that individuals are provided with the necessary protective mechanisms in the event of excessive ABT decisions as they arise.

The next report, will I hope address the issue of tying all of the new technologies under the same umbrella of the ABT and provide the necessary protective mechanism if required to ensure that existing program quality or choice is not effected by new concepts such as PAY TV if and when they are introduced. Just as importantly we would hope that whatever new options are introduced, it is done in a way which ensures a further diversity of ownership and a continued separation of ownership between the arms of the media.

This will we hope ensure that we not only have a top quality broadcasting industry in Australia but one which provides a wide range of diverse views and options.

*Note: The Chairman of the Australian Broadcasting Tribunal, Deidre O'Connor was also a guest speaker at the CAMLA lunch. She acknowledged the recommendations of the Saunderson Committee report and expressed appreciation for the positive way it highlighted the ABT's limited powers and inadequate resources for regulating the broadcasting industry.*

# The ACLA/MLA merger completed

**The President's address to the annual general meeting**

We have not provided much information during the year about how our association was functioning, or where our plans had reached. That is because most of the year was consumed in strenuous but successful, efforts to build up the organisation. Throughout the year, the merger of the Media Law Association and Australian Communications Law Association has been executory and inchoate. Our animation has been slightly suspended. A report on progress would have said that great things would be happening at the time known in the US computer industry as 'real soon now'.

Happily, the Annual General Meeting marked the end of the 'real soon now' stage. It is time to tell of the work which went into building the new framework of the association.

The history of the decisions to merge the MLA and ACLA is well known. At the AGM, both former organisations disappeared into the Communications and Media Law Association, the renamed company limited by guarantee which was formerly the corporate base of the MLA. It was a considerable achievement to bring the results of the negotiations of 1987 and earlier, in which our two vice-presidents Alec Shand and Stephen Menzies represented the two sides, to fruition. Hugh Keller kindly prepared the final documentation to bring the changes into effect.

Some of the greatest challenges in the last year went beyond the legal framework to the human framework of understanding, contact, enthusiasm and cooperation. This was not like the merger of the two businesses with offices, staff and resources. It was the merger of two non-profit organisations both depending largely on voluntary work. By unfortunate coincidence, both organisations had run out of part-time administrative support just around the time the merger started to happen. The Australian Chamber Orchestra had the good fortune to hire Roz Gonczi who had provided outstanding administrative support to ACLA. The MLA was in a similar condition.

## Vital continuity

Some vital continuity was provided by our treasurer Des Foster, who maintained the financial life of our organisation whilst it was on the operating table undergoing merger surgery. There were a lot of demands on his time and complications, including different membership fees and payment dates for the two previous associations, different banks, accounts and authorities, different membership records, and varying cost structures and circulations of the Communications Law Bulletin.

Into the administrative void stepped Cleo Sabadine, a person of great experience in communications who had recently retired from running the secretariat of the Broadcasting Tribunal. From a standing start, and working from home without basic office resources, Cleo built up what is now a very reliable administrative base for the Association. Members should be aware that a lot of the work she does for us is voluntary.

The last character in this dramatis personae of people who created order from chaos is the honorary secretary, Victoria Rubensohn. Victoria has brought a superhuman level of energy and inspiration to every activity and function of the Association: and she has done this despite the travels and travails of her demanding job.

Looking at the association as a whole, nobody could have anticipated the number or the height of the administrative hurdles we had to jump. On the other hand, the main problems which people did foresee before the merger did not happen. Perhaps the lesson is that a foreseen problem is unlikely to cause trouble: and vice versa. Some had doubted whether the two existing committees of ACLA and MLA would work happily together. In reality, there was no issue on which people split along ACLA/MLA lines, formally or informally. There was unbounded goodwill, no faction, and no unbalance of one side or the other. It was a single, harmonious committee from day one.

## Making way for new blood

Another legitimate fear was that the transitional arrangement under the merger documents, whereby large existing committees combined into one would produce unweildy meetings. In fact, we sometimes had the opposite problem of barely a quorum present. Because we were two merged existing

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