one-offs and series in the diversity category.

The score is determined by multiplying the Australian Factor by the Quality Factor and the Number of Hours screened.

Quality is subjective

The Quality Factor, according to the ABT, allows commercial stations to opt for fewer hours of high cost mini-series or more lower cost series/serials to satisfy its Australian content requirements. But surely the assessment of quality is subjective; in fact the ABT acknowledges this in its review document.

So how is the Quality Factor measured and who measures it?

Ultimately, it is the viewer who decides what he or she watches and this in turn determines a program's success or failure. While the ABT is offering incentives to high risk drama productions, it is our understanding that no incentives are offered to commercial stations for local sport, news, quiz and game shows. The ABT states these programs are popular and flourish, hence they do not require incentives.

Two comments can be made. Firstly, while in general terms, news and some quiz shows have been, and are good ratings earners, not all news and quiz shows flourish. Secondly, such programs are not necessarily cheap to produce and therefore the stations run the risk of high costs without guaranteed ratings success. High risk is not necessarily confined to drama productions.

Average homes ratings of Australian & Non-Australian Mini-series

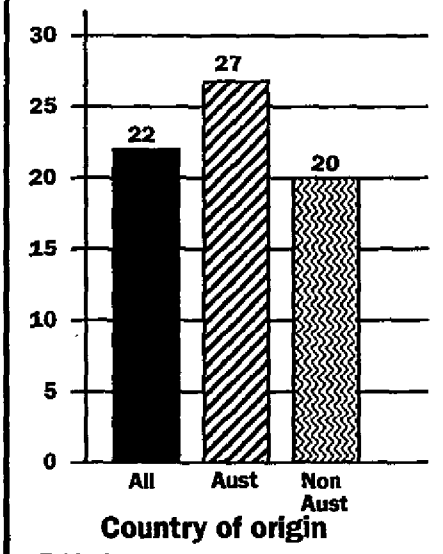

Table 2 Source - AGB: McNair Anderson

There is a delicate balance between the networks' quite proper concern to remain commercially viable, growing audience preference for quality Australian productions, and the ABT's regulatory requirements. Quantity is not necessarily the answer: quality is subjective. In the end success or failure will be clearly spelt out by the viewer.

Broadcasting in hard times

Jack Ford examines the uncertain status of receivers and liquidators under the Broadcasting Act

Each of the past three decades has blessed lawyers in one area of practice or another. The 1960's was a golden era for mining lawyers. The 1970's and 1980's saw the ascendence of takeover lawyers. Broadcasting lawyers have been able to operate in fruitful conjunction with them. The 1990's looks like being the era of the insolvency practitioner. Broadcasting lawyers are likely to be able to team up with insolvency lawyers as cohesively as they have done with the takeover lawyers in the good times, in order to take advantage of new opportunities in the 1990's.

In the good times the rigidities and red tape of the Broadcasting Act (the Act) have had a distorting effect in relation to corporate restructuring in the broadcasting industry. Many of our leading companies have been surprised to learn that effecting their corporate strategies to obtain an interest in some company or other has involved them in the onerous requirements of the Act and the Australian Broadcasting Tribunal (ABT), although the target company might have only a remote and relevantly minor involvement, and no actual involvement, in broadcasting. In these cases the requirements of the Act have proven to be an additional and often nightmarish overlay to the requirements of the Companies and Acquisition of Shares Codes. The unfortunate fact is that most of the major industrial groups which operate in Australia seem to have a prescribed interest in one or more commercial radio or television licenses. If, for example, there is a takeover offer for Carlton United Breweries, Tooths, Bond Brewing, Coopers or South Australian Brewing, the offeror has to pass muster by the ABT. It is tempting to suggest that the ABT should be renamed the Australian Brewing Tribunal.

Virgin territory

The impact of the Act and the ABT on corporate restructurings is a relatively well-trodden path. By contrast, an exploration of the impact of the Act on receivership or insolvency was, at least until last November, virgin territory. I have in mind of course the appointment of receivers to the Qintex Group. Interestingly, the Act provisions, although not apparently drafted with situations of insolvency in mind (doubtless drafted in times when one equated a broadcasting licence with a licence to print money) may determine the way in which some insolvency situations are determined.

I have in mind particularly the Act's requirements regarding people acquiring or increasing prescribed interests in licences, provisions preventing foreign persons from being in a position to exercise the control of licences, provisions requiring ABT approval of certain transactions and provisions preventing transfers of licences and preventing the admission of persons other than the licensee to participate in any of the benefits of the licence or to exercise any of the powers or authorities granted by the licence without ABT consent.

How do these provisions impact on the appointment of receivers, managers and liquidators? That question leads to a number of other questions. Does the Act, on its proper construction, prevent a foreign creditor, for example, appointing a receiver/manager or liquidator? Is the Act intended to prevent the usual operation of the laws which regulate corporate insolvency in Australia? Should it do so? Should a creditor (foreign or otherwise) of a licensee company or a company with an interest in a licensee be in any different situation from a creditor of a company operating in any other industry?

Prescribed interest

Relevantly, the appointment of a receiver or liquidator to a company may occur either upon the application of a company itself or upon the application of a creditor.

In both cases, one such question is whether the receiver (or liquidator) obtains a prescribed interest in or is placed in a position to exercise control of the licence or licences. In the latter case, an additional question is whether the person who directed or procured the appointment of the receiver or liquidator also obtains a prescribed interest in or is placed in a position to exercise control of the licence or licences. The primary duty of a liquidator is to get in all assets, sell them and distribute the proceeds to all creditors (irrespective of whether all creditors or only one or more of them procured his appointment). The duty of a receiver may, depending on the terms of his appointment, parallel that of the liquidator.

Alternatively, the receiver may be au-

thorised to carry on the business of the company as a going concern for a period. In either case, the liquidator or receiver (as the case may be) will generally, if not invariably, have power to sell the assets of the company and to vote shares held by the company.

My view is that in neither case does the liquidator or receiver obtain a prescribed or controlling interest in the licences held by the subject company or its subsidiaries. That is because receivers and liquidators are agents of the company to the property to which they are appointed. They are not agents of creditors who procure their appointment. They acquire neither a shareholding nor voting interest as defined under the Act. The consequence of that from a broadcasting point of view is that receivers and liquidators can largely proceed about their business without fear of ABT scrutiny or interference. They are obliged to seek neither prior nor subsequent ABT approval of their appointment.

An alternative view

There is a school of thought which, however, considers that if a lender who happened to be a foreign bank procured the appointment of a receiver or liquidator to a licensee company (or even a holding company) that would put the foreign lender in a position to exercise control of licensee companies and hence the licences. Now if that argument is right then the appointment of the receiver or liquidator in those circumstances would amount to an immediate serious breach of the licence conditions, obliging the ABT to act forthwith.

The ABT itself has yet to opine in the matter. Having regard, however, to the parlous state of the industry and the precarious position of some of its players, it will not be long in my view before the ABT is asked to give a definitive statement on the matter.

If the school of thought I have just described is accurate, there would inevitably be panic amongst lenders if the matter came to a head and a disaster in terms of the willingness of foreign lenders to continue to do business with the Australian Broadcasting industry.

It would surely be better for a receiver or liquidator appointed by a creditor (foreign or otherwise) to conduct business as usual (in the case of a media company in receivership or liquidation) than effectively to have the station (or network) shut down as a result of a meaningless technical breach of the Broadcasting Act.

Jack Ford is a partner in the Sydney office of Blake Dawson Waldron, Solicitors

President's address

to the AGM of Communications and Media Law Association

It is a pleasure to be able to give a totally positive report on the year's activities. At last year's annual general meeting we were in the throes of the merger between ACLA and the MLA. That large and complex manoeuvre has now been successfully completed. The new, merged, organisation has continued to grow throughout the year with a number of new members admitted at every committee meeting throughout the year. For example, 28 new members were admitted at the last committee meeting.

Last year, we all applauded Michael Berry for the work he had done in upgrading the Communications Law Bulletin. In the middle of the year, Michael resigned as editor and was replaced by Grantly Brown. Happily, we are able to thank Michael for all the work he did for us, as well as continuing our association with him. That is because he continues to arrange publication of the CLB despite the success and expansion of his media production company.

Working from the sound base which Michael provided, Grantly Brown has expanded and improved the CLB still further. The increase in membership is largely attributable to the work he has done in obtaining articles for the CLB, expanding its areas of coverage, and promoting it. For most members, the CLB is the identity of the organisation. That has been a very exacting and time-consuming task. The CLB reflects our interests, and provides a reference-point for every-thing else which happens.

It would be invidious to attempt to thank the office bearers and committee members who have raised CAMLA's level of activities through the year to a record level. The expressio unius principle could imply a lack of thanks to some of the large number who have made a contribution. The committee members have donated large amounts of time and skill to organising a number of functions, planning and supporting the basic fabric of the organisation.

The one person who should be expressly mentioned is Cleo Sabadine, who has made a personal contribution to all matters relating to the membership and records, as well as to the organising of virtually every function we have held. Cleo has done this with rare dedication, on terms extremely favourable to CAMLA.

There is every reason to believe that CAMLA will continue to grow and to stimulate interest in media and communications law issues. The sheer momentum we have now established makes that easier. And there is more need than ever before for the relaxed, independent forum which we provide for people and ideas to reach over the professional and institutional hurdles.

We have held a number of luncheons during the year, including those addressed by Wilcox J (defamation reform), Michael Chesterman (contempt reform) Ros Kelly (telecommunications), Dennis Pearce and Peter Banki (moral rights), Robin Davey, Judi Stack and John Evans (AUSTEL).

We have not yet matched the successes which both MLC and CAMLA achieved in earlier days in the organisation of seminars about current issues. The most manageable format is a short evening seminar; but in a voluntary organisation their success depends on having a few members prepared to undertake the organisation themselves. Hopefully, we shall be able to do something about this during 1990.

An objective which seems easy to meet is an increase in CAMLA activity outside Sydney. With a number of committee members now in Melbourne, there is every prospect of more Melbourne activities.

Mark Armstrong
15 February 1990.