Networking and equalisation in Australian broadcasting

Leo Grey examines the background to aggregation and networking regulation, the recent case brought by regional licensees and amendments to the Broadcasting Act

Networking - history and policy

It is a truism to say that broadcasting is a highly regulated activity. Each licence has been granted to serve a defined area. A licensee has a responsibility to provide "an adequate and comprehensive service" having regard, amongst other things, to the "nature of the community to be served" and "the diversity of interests of that community".

The Act also contains a range of highly complex provisions governing the ownership and control of licences, including basic limitations on multiple ownership, together with share tracing provisions and takeover approval requirements.

In short, the licensing system embodied in the Act has always treated every licensed service as locally focused and independent, and contains elaborate provisions to enhance and safeguard that local focus and independence.

The first and most basic element to recognise about networking is that it involves at very least an agreement between two or more parties concerning the supply of programs making up the content, in whole or part, of a number of licensed services. Any networking agreement will thus have some impact upon the local nature and independence of each service.

The potential for these kinds of agreements to arise and the effect they might have on the assumptions underlying the regulatory system have always been known to politicians and bureaucrats.

References in policy documents to 'networking' can be found as far back as the *Gibson Report* of 1942, which led to the enactment of the *Broadcasting Act*. The *Gibson Report* noted that the Committee had looked at the American system of "chain or network broadcasting", and saw "nothing inherently wrong" but warned that "the main danger to be avoided in such a system is monopoly control".

The Australian Broadcasting Control Board ('the Board'), in its *Second Annual Report* in 1950, noted that it had carried out a "continuous investigation of the operation of networks" and stated that:

"...that on the whole, their activities are beneficial to listeners, in that these combinations of stations permit programs to be produced on a scale which could not be undertaken by any individual organisation. The possibility that networks may exercise too great control over the operations of individual stations is, however, real, and this aspect of the matter requires constant vigilance to secure a proper balance between the interests of the networks and the individual stations."

The advent of TV

When television was introduced in 1956, the Act was extensively amended, including the insertion of section 16(3)(e) to empower the Board to regulate (subject to the Minister's direction) "the establishment and operation of networks" of stations and the making of arrangements for the provision of programs or advertisements. The word "network" was not defined.

In its reports on the inquiries into the grant of the first series of metropolitan commercial licences in 1956/7, the issue of concentration of control through programming agreements arose squarely. In the inquiries into the grant of two licences in each of Brisbane and Adelaide, in particular, the Board was faced with written agreements between the applicants and the two pairs of licensees in Sydney and Melbourne which (in the Board's view) had the potential to deliver control over the programming of Brisbane and Adelaide stations into the hands of Network Committees dominated by the Sydney and Melbourne licensees.

The Board recommended that only one licence be granted in each of Brisbane and Adelaide, and that preference be given to a locally owned and controlled applicant. This recommendation was rejected by the government of the day which insisted on two licences being granted in each city from among the existing applicants. The result of this was that two four-station agreements eventuated, the effect of which was to provide a high degree of commonality of programs across the four cities.

In 1960, there were two legislative developments which should be noted in relation to networking.

The first development was the enactment of a provision (the old section 105A) which was intended to give the Broadcasting Control Board the power to deal with attempts to gain control of stations through the use of power to withhold the supply of programs. The section empowered the Board to direct that a program be made available to a licensee.

The second development was the enactment of more extensive limitations on the ownership and control of licences. Among these provisions was one which specified that various kinds of operational control (including control over the selection and provision of programs) would confer an interest caught by the 'two-station rule' (the general limit on multiple interests in section 92). The operational control provision is still found in section 89H(1)(c) of the Act.

The operation of section 105A became an issue very soon after its enactment, when the Board was faced with the task of recommending the grant of licences in Newcastle and Wollongong. It recommended that the applicants in which the two existing Sydney licensees held shares should not be granted licences. The Sydney licensees then informed the major suppliers of overseas material that they would refuse to deal with the overseas suppliers if they supplied programs to the licensees in Newcastle and Wollongong. In 1962, the Newcastle licensee sought an order under section 105A concerning the supply of overseas programs. This attempt failed because of deficiencies in section 105A itself.

The Minister sought to reinforce the position by imposing conditions, of similar effect to section 105A, upon each commercial television licence. These conditions were held to be invalid by the High Court in *Television Corporation Ltd* v *Commonwealth* (1963).

In 1965, The Parliament repealed both section 105A and section 16(1)(e) but amended the regulation making power of the Act in section 134 to permit control over various facets of networking arrangements (although the word 'networking' was studiously avoided). No regulations dealing with networking were made at that time.

During the 1970s the existence of three groupings of stations, commonly called 'networks', became well established.

Amongst these stations, commonality of programming was high and 'real-time' networking was on the increase. Other agreements covered program supply to and between regional licensees. However, no decisions about the integration of networking into the legislative scheme appear to have been made at the political level.

The Control Investment cases

It was left to the Australian Broadcasting Tribunal to conduct an inquiry which looked at the implications of networking for the *Broadcasting Act* in any detail. The Tribunal's first consideration of the implications of networking and control was in its report into the acquisition of half of Ansett Transport Industries by a subsidiary of the Murdoch-controlled News Group: *Re Control Investments* (1980). The News Group already controlled TEN Sydney, and would have gained a half share of ATV Melbourne through the Ansett transaction. In its decision to refuse approval, in September 1980, the Tribunal said:

"... the concentration of media interests by the News Group resulting from the common ownership of Sydney and Melbourne, will have an adverse effect on the freedom of choice of the other members of the network, and is not in the public interest."

That decision was reviewed by Justice Morling, sitting as the Administrative Appeals Tribunal: *Re Control Investments* (1981). In December 1981, Justice Morling set aside the Broadcasting Tribunal decision and approved the transaction. In doing so, he said "networking" is "incapable of precise definition", but embraced arrangements between television stations for, amongst other things, the following activities:

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

Justice Morling in rejecting the Broadcasting Tribunal's decision said:

"It is true that a member of a network who chooses to take network programs will, to that extent, have no need or inclination to buy non-network programs. But that cannot be regarded as affecting its freedom of choice of programs. If it be regarded as a limitation on its freedom of choice, it is brought about by the economic facts of life in the television industry."

Justice Morling also rejected the Tribunal's submission that stronger stations in networks would dominate the weaker station members.

In April 1981, following a general review of the *Broadcasting Act*, the Minister, Mr Sinclair, said that networking arrangements "will not be discouraged, as long as they are consistent with the Government's important objective of fostering and preserving localism and where they are within the ambit of regulations to be made". No regulations were ever made.

It should be noted that nothing in the 1981 Murdoch amendments made any reference to networking as such. But these amendments facilitated a greater centralization of ownership and control by simply restricting the criteria upon which the Tribunal could refuse approval of a share transaction, so as to prevent any repetition of the *Control Investment* decision.

In its 1984 *Satellite Program Services Report*, the Tribunal also pointed out that whatever view it might have of the development of the networks -

"... there is no power vested in the Tribunal by the Act to regulate networks or networking as such and no regulations have been promulgated under section 134. The Tribunal has received no evidence that the arrangements amount to 'control' of member stations or their operators as defined in the Act and the Tribunal is not empowered to act against market power or dominance except to the very limited extent that is governed by the [licensing] criteria. Therefore, in terms of the current provisions of the Act there has been no basis for Tribunal action or criticism."

'Law and policy should create opportunities for stations outside Sydney and Melbourne to have a greater say.'

The Tribunal when on this report to observe:

"To encourage balance between stations in the different areas of Australia, television law and policy should take full account of networks. They do not do so at present. The law and policy should create opportunities for stations outside Sydney and Melbourne to have a greater say. If that balance is not introduced soon through national planning and revision of the Broadcasting and Television Act, television will inevitably become more centred on Sydney and Melbourne, and remain so indefinitely."

No legislative reform of any consequence followed the *Report*. The power to make regulations also remained dormant.

Networking and equalisation

In May 1986, the Government finally embraced the policy of 'equalisation', i.e. the provision (as far as possible) of three competitive commercial services throughout Australia. This arose out of a 1985 Department of Communications report, which (among other things) looked cursorily at options for regulating networks: *Future Directions for Commercial Television.*

The choice of a goal of three competitive commercial services in the equalisation scheme was not accidental. As always the limitation of the numbers of services which can be provided is primarily economic, and a large factor in the economics is guaranteeing a source of programs. In the equalisation scheme, it was understood that the programs would come from the three metropolitan network suppliers, and that licensees which had previously been able to 'cherry-pick' programs from among the three networks would lose that privilege when faced with two competitors.

In his major statement on equalisation on 20 May 1986, the then Minister for Communications, Michael Duffy, dealt shortly with networking but observing that any "restrictive practices .... may well be covered by the *Trade Practices Act 1974*." He did, however, state the government would monitor the "situation".

In 1990, two separate challenges were brought in the Federal Court by a number of regional television licensees to the administrative decisions implementing the equalisation scheme. The challenges relied in part upon an alleged conflict between the market realities of networking under the equalisation scheme, and the ownership and control provisions of the Act (which were designed to promote independence and diversity).

One of these challenges was discontinued but the other was heard by Justice Hill whose judgment was handed down on 2 October 1990: *Victorian Broadcasting Network* v *Minister for Transport & Communications*, (1990) ('the *VBN* case"). This challenge concerned the introduction of the equalisation scheme in Approved Market D ('AM-D'), which basically covered rural Victoria, excluding Mildura.

The licensees argued that the regional operators in AM-D had no choice but to affiliate with one of the three metropolitan networks in order to guarantee program supply. They also argued that the commercial realities of each regional licensees' position vis-a-vis the network controllers, would mean in practice that decisions concerning the licensee's broadcasting operations, and especially program provision and selection, would be dominated by the decisions made by those controlling the network decisions,

irrespective of the nature of any affiliation agreement.

It was argued that certain things would follow from those facts. First, it was submitted that the network controller would be in a position to exercise control of each affiliated licence under section 89H(l)(c). Moreover, in the light of the Full Federal Court decision in *Re News Corporation Ltd* (1987), it would be open to make a finding that the operational control of a licensee provided through the affiliation agreements also meant that the network controller would be in a position to exercise control of each licensee company.

However, paragraph 89H(2)(b) had to be considered, in that it says that section 89H(l)(c) does not apply to program supply agreements. It was submitted to Justice Hill, however, that this provision had no relevant operation in relation to a general affiliation agreement designed to operate in a practical setting to enhance overall network profitability.

If this argument were correct, it was then argued that one result would be that the controlling entities of each of the three networks would acquire a prescribed interest in each affiliated licence: see section 89F(2)(b). They would then find themselves in breach of section 92 of the Act, which establishes the basic limit on the ownership and control of commercial television through the 60 per cent audience-reach limit.

If all of that were correct, not only would the network controllers be liable to prosecution, but the affected regional licensees would also be at risk of losing their licences. This result, ran the argument, could have been or should have been foreseen by the Minister at the time he made his decision.

The point of the argument was that an administrative act which would, on the balance of probability, produce this result was not authorised by the Act, or was manifestly unreasonable.

The *VBN case* was complicated by the fact that the licensees were attempting to bring an action under the *Administrative Decisions (Judicial Review) Act 1977* three years after the administrative decisions made by the Minister in respect of AM-D. This required, of course, an extension of time to be granted by the Court. Justice Hill dismissed the application for an extension of time, after hearing what amounted to the substantive argument on the main issues. Part of his reasons for so doing related to the merits of the above argument concerning network control:

"In making the decisions the Minister is not, in my view, required to assume that licensees would pursue a course that would involve them in committing breaches of the law. That would be a perverse assumption. The Minister is entitled to proceed upon the basis that licensees would obey the law and that they would enter into arrangements which would not constitute a breach of the law. The evidence before me does not satisfy me ...that the only course open to licensees once the Indicative Plan was published was to enter into arrangements in breach of the law."

On the question of alternative arrangements, Justice Hill suggested in the course of argument that another option open to each of the three competing licensees in AM-D was (in effect) to 'cherry-pick' from each of the three networks. There was no evidence before the court as to the feasibility of that or any option for program supply which might be an alternative to network affiliation.

Legislative amendment

In any event, the issue may soon be academic. Section 12 of the *Broadcasting Amendment Act (No.2) 1990* inserted a new section 89EA. This saw the word 'networking' appear in the Act for the first time since 1965. The section defines "networking agreement" as "a written agreement lodged with the Tribunal that provides for the supply of programs to a competing licensee". The definition of "competing licensee" would cover any licensee in a multi-station metropolitan market, and any licensee in one of the approved markets moving towards aggregation under the equalisation scheme.

'a network controller may impose a networking agreement upon an affiliate'

Section 89EA(2) is an extraordinary provision. What it does is provide a total exemption from the prescribed interest provisions for any kind of control that arises from the terms of the networking agreement itself relating to program supply, or as an indirect commercial consequence of it. It is not necessary that any agreement be approved by the Tribunal, nor is it subject to any power in the Tribunal to declare that the agreement should not have the protection of section 89EA.

In other words, a network controller may impose a networking agreement upon an affiliate that removes program control completely from the licensee to the network, and by simply lodging it with the Tribunal thereby achieve immunity from the ownership and control provisions.

All the complex rules about limitations on ownership through shareholding and voting interests are worth very little if it is possible to achieve de facto control of a licence in every major market in the country by the simple expedient of a networking agreement.

The scope of this provision is even more surprising given section 15 of the Act inserts a new section 89JA which is intended to entrench in legislation the expanded view on de facto control of licensee companies taken by the Full Federal Court in *Re News Corporation*. It makes it clear that a person who is, amongst other things, in a position "to exercise, either directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs" of a company is taken to be in a position to exercise control of that company, and of all its acts and operations. Of course, a person who is in a position to exercise control of a licensee company also has a prescribed interest in the licence: sections 89F(2)(b), 89H(l)(b).

It is difficult to imagine a more "substantial issue affecting the management or affairs" of a licensee company than the program content of the service. But what the legislation giveth in proposed section 89JA, it taketh away in spades in section 89EA.

Conclusions

The absence from the Act of any coherent approach to the legislative recognition of networking is the result of 30 years of failure to bite the bullet. Governments have neither embraced networking openly and structured the Act around it (without necessarily increasing the level of regulation), nor have they attempted to identify and prohibit networking practices that ran contrary to the long accepted policies of localism and autonomy for licensees. They have simply let networking arrangements develop in whatever way the marketplace dictated.

It goes without saying that the failure to deal with the matter coherently has political origins. It may be that Governments have recognised that any attempt to legislate for networking could be portrayed as anti-localism and pro-monopoly, and any attempt to legislate against it would be bitterly opposed by the large operators, and could be portrayed as commercially unrealistic, and over regulatory.

Whatever the reason, in the new broadcasting era, it is important that a coherent policy about networking be adopted and woven into the governing legislation in way that is consistent with general ownership and control policy.

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