# Broadcasting's five year plan

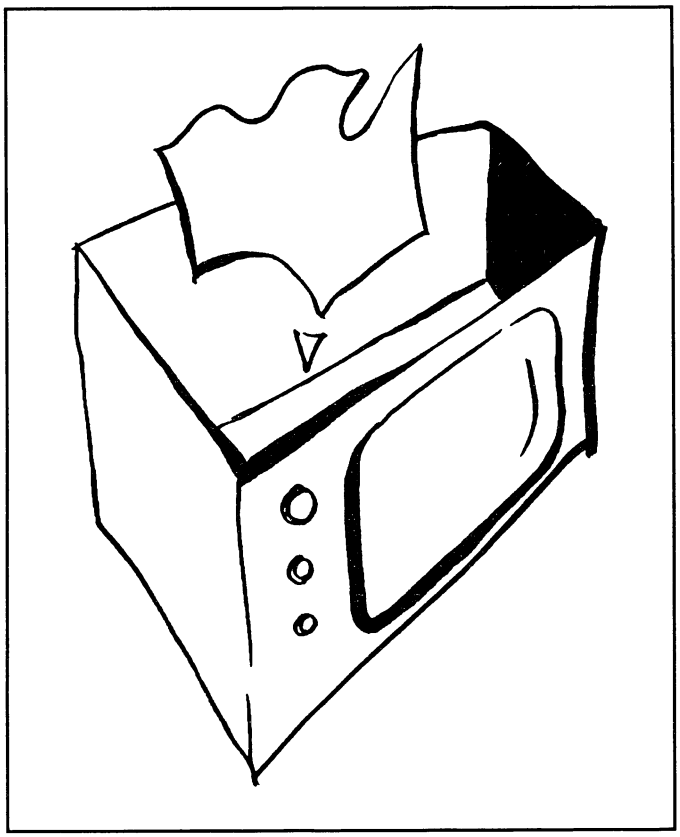
*In October the CLC and Clayton Utz held a conference titled* Five Years of the Broadcasting Services Act: Time for Reform? *Giles Tanner went along.*

On 5 October this year, the Broadcasting Services Act 1992 turned five years old. The departmental review group responsible for the legislation used to refer to their brain child as 'the five year Act'. What better excuse for a fifth birthday conference on the way the legislation has shaped up?

To some of us working at the former Australian Broadcasting Tribunal back in 1992, surviving staff cuts as we negotiated the transition to the new Australian Broadcasting Authority, that nickname had a faintly menacing sound. 'We'll be back for the rest of you later,' it seemed to warn.

For there was no mistaking the deregulatory intentions of the new legislation, nor the underlying determination to abolish not only the ABT but the whole gate keeping mindset it represented. Save for some caveats on commercial television, the new Act liberalised licensing of new broadcasting services beyond recognition and the ABT's routine monitoring and performance evaluation of existing services gave way to 'regulation by exception'. In the area of content regulation, voluntary codes largely replaced mandatory standards, with the regulator retaining power to intervene when self-regulation failed. The control limits were liberalised and confined to the types of service deemed most influential.

The ABA's role was designed to shrink further over time, with some tasks, such as the planning and allocation of services using the broadcasting services bands, meant to be finished as quickly as possible and others coming with statutory sunset clauses. Even the terminology of the old Broadcasting Act 1942 was thrown out – sometimes to effect real change ('fit and proper person' becoming 'suitable licensee'), sometimes apparently for the hell of it (eg. 'grant' becoming 'allocate'). Departmental slang for merit-based licence allocation processes – 'beauty contests' – nicely captures a certain impatience with the whole spectacle of public servants weighing up the public interest before awarding a valuable piece of public property, *gratis*, to the most worthy contender.



Though Parliament equipped the ABA with powers that its predecessor could only have dreamt of, such strong implicit messages could not have been lost on the new agency, for it quickly showed itself reluctant to throw its weight around. Part 13 of the Broadcasting Services Act provides for public hearings, but the ABA has never conducted one. Breaches of the Act can attract mind-boggling fines, but the ABA has not sought to prosecute anybody. The new authority had plenty of teeth, but it was no tiger.

So has the 'five year Act' just gone past its use-by date? Though many features of the Act appear to be working, the conference provided evidence that review is becoming timely, though not always for reasons that were anticipated in 1992.

## The digital dilemma

On the 'anticipated' side of the ledger, the advent of digital broadcasting now looms as one of the strongest forces, at least in the minds of some at the conference, for early change. Both digital television (DTTB) and digital radio share the property that multiple, discrete streams of audio or audiovisual entertainment (let's call them 'services') can be transmitted simultaneously on a single radiocommunications channel. The key is multiplexing, a process by which multiple streams of digital programs are sorted into a single stream of data for transmission. Digital receivers are able to reconstitute this signal into discrete services, a process requiring so much

processing power there will be a perceptible time lag between transmission and audience reception. (Those time beeps on the radio may have to be transmitted a split-second ahead of the hour.)

While the Broadcasting Services Act is in many respects 'technology neutral', crucial parts, including the ABA's planning and allocation powers and the control limits, were simply not designed to cope with multiservice channels. Gareth Grainger, the incoming deputy chairman of the ABA, called for a 'fundamental reappraisal' of the Act in light of digital technology.

Digital television also provided some of the most entertaining exchanges of the conference, as opinions differed over the ABA's recent recommendation to the Minister that additional channels should be given to existing free-to-air broadcasters for simulcasting and ultimate conversion of analog services to digital. Arguably, the issue hinges on the long-term prospects for high definition television (HDTV), as the emerging digital technology can be used either to transmit a single picture of greatly enhanced quality (HDTV) or from three to six services of conventional quality.

If the additional capacity were ultimately used for converting existing services to HDTV quality, giving extra spectrum to existing free to air services might be compared to the move in the 1970s from black and white to colour. (While colour television did not require additional spectrum, DTTB will be able to use the previously-useless 'taboo channels' that separate existing VHF and UHF services.) But if high definition television proves to be a mirage, it is harder to find a convincing reason to hand a subset of existing broadcasters additional spectrum if it is just to provide multichannel services.

The ABA's recommendation has a precedent. The US has already decided to follow a migration model and offer spectrum to existing free to air services. In the US, concerns have been raised that incumbents may now find plenty of technical and commercial reasons for delaying high definition simulcasting, meanwhile augmenting their free-to-air services with additional services of conventional quality, or even pay television.

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The only technologist at the conference, SBS's David Soothill, had no doubt that high definition television was the way of the future, though other speakers (BSA author Chris North among them) warned that if the Broadcasting Services Act has taught us anything, it is the unreliability of technological forecasts.

## Blue Sky, and all that

There was much discussion at the conference of the *Project Blue Sky v ABA* case, the current attempt before the High Court to secure for New Zealand-made programs equal status to local programs under the Australian content standard for commercial television broadcasting. Whatever that means.

This development was not anticipated because there was no doubt in 1992, either in the Department or in the ABA, that the program standards were to be subordinate to foreign treaties such as Australia's CER ties with New Zealand.

Indeed, CER looked like being small beer compared with the then-ongoing GATT negotiations. This intention is expressed in s.160(d) of the Act, which provides that the ABA is to perform its functions in a manner consistent with (among other things) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country. What the authors of s.160 did not foresee was the willingness of lawyers to read down these words in light of other parts of the Act, such as section 122(2), which provides simply that standards must relate to 'the Australian content of programs'. Not to mention the object of the Act at s3(e): 'to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity'.

It is rather extraordinary that the Act's authors were content to draft sections such as s.122 or objects such as 3(e) while at the same time, elsewhere in the legislation, seeking to ensure that any Australian content standards were subordinated to deals other parts of government might conclude on trade. The ABA – and the High Court – are still grappling with what Parliament can have intended by such a juxtaposition.

ABA Deputy Chairman Gareth Grainger had this to say: 'Depending on the outcome of the Project Blue Sky case, I believe Parliament will have to consider whether it wants to have cultural protection rules or not. If it wants a body such as the ABA to develop, administer and enforce such rules then it needs to make the ground rules clear – what international obligations are to curtail the scope of such rules?'

Simon Lake's summary of recent Government pronouncements on this subject suggested it is not entirely clear which path it would choose.

Project Blue Sky incidentally gives us another example of how the plain English of the Broadcasting Services Act, so refreshing after the Broadcasting Act 1942, can conceal ambiguity

and confusion, and how this can lead to outcomes startlingly different from the authors' presumed policy intentions.

## The Net

On-line services provide an even larger unanticipated ground for review of the Broadcasting Services Act. The conference heard how the ABA has staked a strong claim to a content regulation role in relation to this medium and the Government is currently considering changes to the Act to formalise this role.

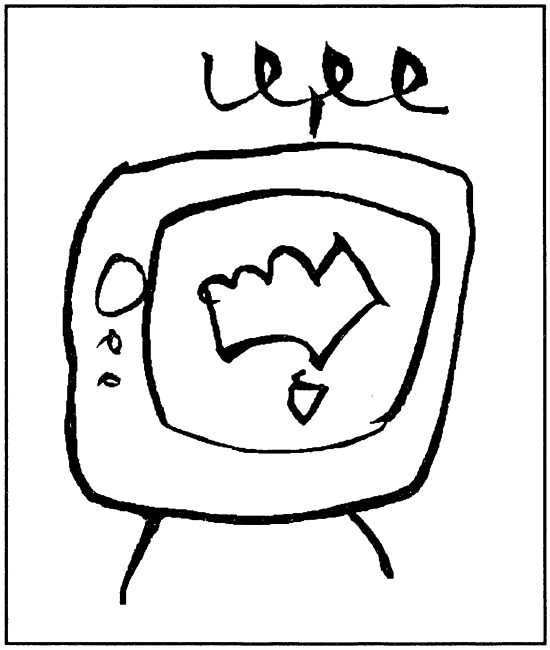
While the Act's authors clearly foresaw that technological convergence would have an impact on broadcasting, what they attempted to do in 1992 was to confine the regulatory scheme for broadcasting services to 'traditional' point-to-multipoint audio and audiovisual entertainment and information services. This is made clear in the definition of 'broadcasting service' in section 6, which excludes services that provide no more than data or text (with or without associated still images) or services that are made available on demand on a point to point basis.

While this distinction may have been clear in 1992, it is arguably somewhat ambiguous in its application to on-line services today, with most clearly excluded but some, such as 'real time' radio services, possibly caught within the broadcasting definition.

If the on-line amendments proceed, it will represent the extension of broadcasting-style regulatory concern for the content of services into the realm of point-to-point communications. It remains to be seen how the Government goes about it.

## Controlling interests

The discussions of the control rules threw up some interesting analysis, also some reasons for a review, such as the foreign investors who find themselves seeking approval under three different Acts of Parliament, and the way foreign tracing rules may operate to hamper Australian fund managers seeking to invest in local media. In light of these concerns, it may have been interesting to hear more about why the government recently abandoned its review of the cross media rules, evidently deciding it was not worth the controversy, or how the government might proceed in future.



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As Gareth Grainger observed, we saw an interesting shift during the media debate on the present rules – the government's review proposal was initially greeted by a general press consensus in favour of reform. Only as rumours of the possible outcomes of the review began to circulate did we see a change in the flavour of the press debate. I would add that the emphasis of the debate seemed to shift progressively from the ABA's perceived shortcomings to the influence of a particular media owner; also that the views of a number of backbench politicians began to assert themselves. Whether or not there is fear of media concentration in the general community, there does appear to be widespread fear of media concentration within Parliament itself, spread across politicians of all parties.

The digital debate is only the latest example of why it is important for Parliament to be able to review and adjust media control limits in light of changing market and technological realities. As News Limited's Helen O'Neil commented, it sometimes seems easer to get 'smut' issues onto the amendment agenda than investment-sensitive ones. She asked about the possible timing of any reforms, and the question was not really answered during the day.

There may be a lesson in the 1992 legislation itself. The Broadcasting Services Act successfully introduced major reforms of the previous control rules. These were almost certainly more palatable for being presented as part of a more comprehensive review of broadcasting regulation. As the conference demonstrated, technological and market developments continue to provide grounds for review of broadcasting regulatory structures.

Meanwhile, the recent appointment of a large new ABA board and the absence of any further major reforms to broadcasting law in the Government's first term agenda both suggest, Blue Sky permitting, that the five year Act may survive somewhat longer in more or less its present form than its authors might have preferred.

***Giles Tanner is general manager of policy and programs of the ABA. The views expressed here are those of Mr Tanner, and do not necessarily reflect ABA policy.***