The Broadcasting and Television Amendment Bill

The commercial television industry has generally welcomed the change to service based licences and has supported the Government's desire to bring broadcasting legislation up to date so that it more adequately relates to the technological developments which have or are about to take place.

While acknowledging these important developments - the biggest single change to our broadcasting law since the introduction of television - it must be said that there is still plenty of scope for improvement. Our broadcasting legislation remains clumsy and convoluted to put it mildly and while the task of re-writing the Act is formidable it should, indeed must eventually be undertaken.

Tonight I want to concentrate on two aspects of the Bill - the shift to regulations to deal with Tribunal inquiry procedues and the introduction of area inquiries. I will also briefly address an aspect of the amendments foreshadowed for the August session of Parliament.

Regulations:

The Department has indicated that the regulations to be introduced for uniform inquiry procedures will follow the recommendations of the Administrative Review Council which were previously adopted by the Government.

While the Department has undertaken to consult with the industry and others on the thrust of these regulations, it will not be until their precise wording can be studied that we can fully comprehend the new procedures to be adopted. Certainly we have had the opportunity to study the Administrative Review Council's recommendations but these provide us with only the broad outlines, many questions remain unanswered.

I believe it is in the interest of the Tribunal, the Government, the industry and the general public to clear the air as quickly as possible. Certainly we in the industry are entitled to know the details of these matters which so directly impact upon us.

Area Inquiries:

It is in the matter of area inquiries that the industry has its main reservations. Our apprehension is, I believe, understandable because we have been kept very much in the dark about their real purpose and the Tribunal's intentions.

The concept of area inquiries was first raised in the Green Report, that Report suggested that renewal hearings should be held on an area basis, that all licences in a given area should expire simultaneously and that a single hearing should consider the performance of all radio or television stations in that area. It is important to remember that the Green Report envisaged that the policies and performance of the Australian Broadcasting Commission would be subject to public inquiries conducted by the Australian Broadcasting Tribunal and further that only if a prima facie case was established for denying renewal should a licensee be required to defend his performance during the preceding period at an individual hearing. There is little resemblance between those recommendations and the situation as it appears to apply today

The concept of providing a general forum for members of the public to put their views about broadcasting generally rather than about licensee's performances specifically was mooted by the Gyngell Tribunal. It envisaged that there would be a clear separation in time between the area inquiries or "town meetings" and licence renewal proceedings. The Gyngell Tribunal concept envisaged an informal process whereby members of the public could bring before the Tribunal and broadcasters matters of a general nature which would not be relevant in the context of considertion of an individual station's licence renewal. The industry had little difficulty with this concept providing the area inquiries were well distanced from any licence renewal within the area.

Later, under the chairmanship of David Jones, the Tribunal conducted a series of town meetings which were well attended by the industry. These were informal in nature and while the Tribunal had a loose agenda of matters to be covered, members of the public were encouraged to canvass any issues of interest to them. A few of these meetings attracted wide public interest, most very little.

They appeared however to be heading in the right direction in that members of the public were able to get off their chests matters troubling them and it was significant that many of the questions related not to broadcasting practices but to the procedures of the Tribunal itself.

Following the Administrative Review Council's study of Tribunal procedures, particularly those relating to licence renewals, the Council made a series of recommendations. The majority of its members recommended that the Tribunal be empowered to make a decision on a licence renewal without a public hearing where no relevant opposing submission or application had been received or where no substantive issues of controversy or public concern had arisen. Mr Justice Kirby, in a dissenting view, recommended that in every case of an application for grant or renewal of a licence there should be a hearing in public.

A compromise was struck and a two tiered structure of public inquiries proposed. It envisaged that renewal inquiries would be subject to uniform inquiry procedures while area inquiries were to be introduced to consider the adequacy and comprehensiveness of broadcasting services provided in the different areas of the country. It was envisaged that these inquiries would not be subject to the uniform inquiry procedure but that they would be conducted in public. This recommendation was adopted by the Government.

Our difficulty is that as yet we are unclear about the nature and purpose of area inquiries. What are their objectives? How are they to be conducted? What criteria will be established for assessing the adequacy and comprehensiveness of the various services available and what will flow from them? How will the legitimate interests of licensees be protected from unfounded accusations?

Certainly we have an overall guide to the purpose of area inquiries in the new s18(A) of the Act. However, I remind you that the criteria formerly contained in s83(5) of the Act has been removed as a consequence of the amendments. No longer will it be necessary for the Tribunal to take into account "the nature of the community to be served in pursuance of the licence": "the diversity of the interests of that community". Now, in accordance with the provisions of 18(A), the inquiry will be held into the adequacy and comprehensiveness of the broadcasting services provided by licensees to the community in the area having regard to the nature of any broadcasting service provided in that area by the Corporation or the Service, and to such other matters as the Tribunal considers relevant.

The Minister has expressed the hope that the introduction of area inquiries ultimately will reduce the number of inquiries, particularly renewal inquiries, presently necessary but both the Minister and the Tribunal see area inquiries as having a direct relationship with licence renewals. I think it inevitable therefore that matters relating to the performance of individual licensees and to the ABC and SBS will be introduced at area inquiries. Comparisons will be made, perceptions of inadequacies about the performances of individual licensees, the ABC and SBS will be submitted.

One must therefore ask a series of questions. Will the area inquiries be informal and non legalistic in line with the ARC's proposals? Will they cast participants in adversary roles? If so, how will an individual licensee, the ABC or SBS be defended? How does the Tribunal propose to test allegations? Will proceedings be privileged?

It may be that the Tribunal will say that prior to taking any such allegations into account at licence renewal it will vett the evidence. In the meantime of course the accusations will have been made in public. Licensees, the ABC and the SBS will not have the opportunity to cross examine and the unsubstantiated allegations will be widely canvassed in the media. I ask, is this fair and reasonable?

If on the other hand contrary to the ARC recommendations, area inquiries are to be conducted on a more formal and legalistic basis, it is difficult to imagine what real benefits will flow.

Finally, and perhaps most importantly, just what is expected to be achieved as a result of an area inquiry?

Let me speculate that the Tribunal detects a deficiency in the adequacy or comprehensiveness of services in that it finds that there is a section of the community which has not been adequately served by a particulr form of programming. For instance I read with interest last Friday that drastic cuts to educational programs on ABC radio and television are expected to be announced by the Federal Government. It is not beyond the scope of one's imagination to consider that the lack of such services may be raised at an area inquiry. Who will be regarded by the Tribunal as being deficient in such cir-

cumstances? Will it be the ABC, perhaps the SBS? Will it be licensees in general or specific licensees and would the Tribunal propose to determine how such deficiencies could be overcome?

The Tribunal can hardly direct the ABC or the SBS to provide a particular service and even if it were to suggest they should in a subsequent report to the Minister, what then?

Alternatively, will the Tribunal place conditions upon individual commercial licensees to provide particular programming to overcome a perceived difficulty. Again, will it nominate a particular licensee to fulfill the apparent need or will it require parallel programming to be provided by all licensees rather than single out an individual one.

In these days where the discussions of "carts" are topical it appears that both the Government and the Tribunal have definitely put the cart before the horse.

Thankfully the provisions relating to area inquiries are to be separately proclaimed. FACTS believes most strongly that they should not be proclaimed until such time as the procedures, and especially aims and objectives have been thoroughly thought through and the multitude of questions which currently exist are satisfactorily answered.

August Amendments:

I now direct my attention to the desire of the Minister to amend the Act during the Budget Session to overcome perceived difficulties which flowed primarily from the Saatchi and Saatchi decision.

Initially I should make it clear that FACTS supports the Australian production industry and therefore supports the principles which were enunciated in the "standard" quashed by the Courts. The old "Standard" was however fraught with administrative difficulties. Both the Tribunal and licensees had to rely on information provided by others as to the amount of overseas footage used and whether Australian crews had been used in overses shoots. I put it to you that even if an Australian crew worked side by side with an overseas crew it would be extremely difficult for either the Tribunal or licensees to know with the certainty required by the Act whether the footage shot by the Australian crew was that used in the finished product or whether, in whole or in part, it ended up on a cutting room floor.

The restrictions on use of imported material in commercials or the requirements that Australian crews be used in overseas shoots are improperly placed in broadcasting law or broadcasting Standards. Unless it is the broadcaster who imports the material or who sends a "ghost crew" overseas, why should the broadcaster, and only the broadcaster be held responsible for abiding by rules which restrict or prohibit such action.

It is difficult to envisage the Broadcasting Act providing the Tribunal with punitive powers over agencies, production houses, or advertisers but surely it is these organisations who are importing the material, who are manufacturing the goods. It is they therefore that should be regulated, and if they breach the regulations, punished - not the user of the finished product, the broadcaster.

I submit therefore that it is unlikely that any changes to the Broadcasting and Television Act will provide any solution to this problem and that some more appropriate form of legislation should be considered. One does not, for instance, control the importation of motor vehicles or motor vehicle parts through the Motor Traffic Act. It would hardly be reasonable for a licensed driver of a motor vehicle to have his licence restricted and be forced to drive on "P" plates because a vehicle manufactured had used in excess of the prescribed number of imported parts in assembling the vehicle.

David Morgan

VICTORIAN JUDGEMENTS BULLETIN

The Victorian Judgments Bulletin is a fortnightly reporting service of the Judgments of the Supreme Court of Victoria. It is a sister publication to the NSW Judgments Bulletin, and reports all appeal cases of the Victorian Supreme Court.

NSW Judgments Bulletin covers all similar NSW decisions. In addition, both publications cover a large number of single judgments.

For enquiries contact: Legal Bulletin Service, PO Box 2, EASTWOOD 2122
