

**Office of
Professor David Flint
Chairman**

12 May 1999

Professor Richard Snape
Commissioner
Productivity Commission
Locked Bag 2
Collins Street East Post Office
Melbourne VIC 8003

[Dear Professor Snape]

Submission to the Broadcasting Inquiry

The Australian Broadcasting Authority (ABA) welcomes the opportunity to contribute to the public inquiry being conducted by the Productivity Commission into the Broadcasting Services Act and related legislation. The ABA has adopted the role of *amicus curiae* and in this regard, the ABA's knowledge and expertise is at the Productivity Commission's disposal.

The ABA's submission provides a backdrop for the rationale of various legislative provisions and a commentary on whether we believe they have been successful in achieving their purpose. In doing this, we have been mindful of the Productivity Commission's remit to conduct the broadcasting inquiry in line with the requirements of the Competition Principles Agreement.

I have accepted to appear at the public hearing in Sydney on Friday 28 May 1999 and I look forward to the opportunity for the public exchange of views. If, following that appearance, the ABA could be of further assistance at other public hearings, we would be happy to attend if you so wish.

Yours sincerely

[David Flint]

Statement by the Australian Broadcasting Authority to the Productivity Commission on the Inquiry into the *Broadcasting Services Act 1992*

Purpose

To provide the Productivity Commission with background information on the intent and operation of legislative provisions in the *Broadcasting Services Act 1992* (BSA).

Background

In preparing this statement, the Australian Broadcasting Authority (ABA) does so in the role of *amicus curiae*. The intention is to provide background information to the Productivity Commission to support it in conducting this inquiry. The ABA's expertise will be at the disposal of the Productivity Commission throughout this inquiry.

The ABA is mindful the Productivity Commission must consider in line with the *Competition Principles Agreement's* requirements that the provisions of the BSA should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the BSA can only be achieved by restricting competition.

The ABA is also mindful the Productivity Commission is directed to, amongst other things:

- report on practical courses of action to improve competition, efficiency and the interests of consumers in broadcasting services;
- focus particular attention on balancing the social, cultural and economic dimensions of the public interest; and
- take into account the technological change in broadcasting services, particularly the phenomenon of convergence.

The ABA's statement addresses the intent of Parliament in relation to specific parts of the BSA. It also provides a commentary on whether, in the ABA's experience in administering the BSA, that intent was met. The statement is divided into 10 parts as follows:

1. The Planning Process;
2. The Division of Responsibilities Between the ABA and the ACA;
3. Transparency and Accountability in Decision-making;
4. Licensing of Services;
5. Ownership and Control;
6. Relationship Between the ABA and FIRB;

7. Relationship Between the ABA and the ACCC;
8. Codes of Practice;
9. Content Regulation; and
10. International Obligations.

Each of these parts is addressed below. In preparing this statement, the ABA does not see its role as having to draw conclusions or make recommendations and consequently, these are not provided.

1. The Planning Process

The review of broadcasting regulation foreshadowed as part of the Government's 1987 micro-economic reform agenda culminated in the proclamation of the BSA on 5 October 1992. The review was prompted by widespread disquiet about the complexity and inefficiency of the previous Act (*Broadcasting Act 1942*), especially in its ability to deal with emerging technologies and services. Consistent with the Government's wider reform objectives, the review set out to:

- develop broadcasting legislation to serve Australia into the next century, and complement the landmark reforms in telecommunications;
- move away from the closely prescriptive approach of the previous Act;
- provide a framework which would accommodate the future and which would promote an industry that could adapt to new commercial and technological realities;
- promote an efficient and competitive broadcasting sector;
- produce regulatory arrangements that were consistent and predictable and which did not unnecessarily impede commercial activity;
- provide opportunities for public consultation in transparent and accountable decision making processes; and
- provide a regulatory framework which was, to the greatest extent possible, consistent with wider commercial law.

The ABA, created by the BSA, took over the licensing, programming and ownership and control functions previously performed by the Australian Broadcasting Tribunal (ABT). It also took over the function of planning the broadcasting spectrum previously carried out by the Federal Minister for Transport and Communications and the Minister's Department.

It was intended that the BSA would reduce the amount of regulation needed to achieve Government objectives and that it would promote economic and administrative

efficiency. To this end, it readily accommodates expansion in the number of services and regulation by exception.

The planning functions of the ABA are set out in Part 3 of the BSA. The BSA requires the ABA to promote the objects at s.3, including the economic and efficient use of the radiofrequency spectrum for broadcasting and to have regard to the matters set out in s.23.

Characteristics of BSA planning include:

- an assumption that the primary use of the spectrum will be broadcasting;
- the existence of mechanisms to set aside spectrum for community and national broadcasting purposes; and
- an emphasis on transparency, wide public consultation and the use of detailed public policy criteria spelled out by Parliament in the BSA.

The planning process has three stages, set out in ss. 24, 25 and 26: establishment of priorities, preparation of a frequency allotment plan, and preparation of licence area plans (LAPs). At each stage of the planning process, the ABA must make provision for wide public consultation [s.27(1)].

The order in which the ABA finalises planning for the different areas of Australia was determined by the *Planning Priorities 1993*, in accordance with s.24 of the BSA. Different areas of Australia were put into priority groups from one to five (priority group one, comprising those areas with the fewest services).

The number of channels to be made available in particular areas of Australia was determined by the *Frequency Allotment Plan 1994*.

A major part of the ABA's analog planning function is the preparation of licence area plans that determine the number and characteristics, including technical parameters, of broadcasting services that are to be available in an area. A copy of a licence area plan is available on request.

In performing its planning functions under Part 3 of the BSA, the ABA is guided by s.23, which states:

In performing functions under this Part, the ABA is to promote the objects of this Act including the economic and efficient use of the radiofrequency spectrum, and is to have regard to:

- (a) demographics; and
- (b) social and economic characteristics within the licence area, within neighbouring licence areas and within Australia generally; and
- (c) the number of existing broadcasting services and the demand for new broadcasting services within the licence area, within neighbouring licence areas and within Australia generally; and

- (d) developments in technology; and
- (e) technical restraints relating to the delivery or reception of broadcasting services; and
- (f) the demand for radiofrequency spectrum for services other than broadcasting services; and
- (g) such other matters as the ABA considers relevant.

As discussed in the ABA's *General Approach to Planning*, the ABA can promote object 3(a) - to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information - by making available a mix of different types of broadcasting services in an area. New licences made available in a LAP are then allocated in the following way:

- commercial radio and TV licences are allocated to the highest bidder at an auction;
- community radio licences are allocated through a merit-based process, taking into account the allocation criteria set out in s.84 of the BSA; and
- open narrowcasting radio and TV services are allocated to the highest bidder at an auction.

The ABA proposed an unprecedented expansion of broadcasting services to fulfil the BSA's promise to free up access to spectrum. Under this, the ABA was to plan the use of the spectrum for the whole continent, a process not undertaken before. This would be done with a relatively small team. After the introduction of the BSA, the ABA estimated that the entire planning process would be completed by June 1996, commencing with remote and regional Australia. It has not been possible to adhere to that schedule as it is now apparent the original estimate was overly ambitious, particularly given the nature of the legislative scheme established for the planning process. The lengthy delay before the first licence area plans were produced, and the further time needed before the planning process is complete in all major city radio markets, have been beyond the ABA's control and have led to periodic pressure for palliative legal amendments.

The passage through Parliament of the *Broadcasting Services Amendment Act 1995*, in December 1995, changed the eligibility rules under s.39 of the BSA. This allowed incumbent radio licensees in licence areas where they are the only licensed broadcaster (solus markets) to request the ABA to allocate to it another commercial radio broadcasting licence for the same licence area before a LAP is finalised for that area. This enabled communities in solus markets to benefit from having an additional service ahead of planning for those areas.

The *Communications Legislation Amendment Act (No. 1) 1997* inserted a new Part 6A into the Act, creating a new category of licence for temporary community services. This in effect gave greater security and time on air to temporary community services using vacant spectrum in areas where licence area plans were not yet complete, or where licence area plans were complete but allocation processes had not commenced or were incomplete.

More recently, analog planning has to some extent been overtaken by the Government's decisions regarding the introduction of digital television in Australia. Preparation of

licence area plans is continuing, assisted by a level of additional funding from the Government. However, the resources of the ABA's Planning Branch have been substantially diverted into the digital television planning task.

The current status of the planning process is that planning for Groups 1, 2 and 3 (with the exception of the Illawarra, SE NSW & ACT) have been completed. Planning is currently being undertaken for Group 4 (metropolitan radio markets). In terms of new services, this will largely complete the first round of licence area plan preparation, as Group 5 consists mainly of television spectrum in markets that already have the maximum three commercial television services permitted before 2006. However, Group 5 also contains a small number of regional radio markets. Thus, notwithstanding the delays since 1992, preparation of licence area plans for all areas of Australia is moving towards conclusion and to date, has resulted in large numbers of additional services and full expansion of available radiofrequency spectrum in areas that have been planned.

A detailed analysis of the delays to analog planning is contained in a report the present Government commissioned from Gilbert and Tobin, Lawyers, in May 1997, to identify options for possible reforms to planning which would facilitate the early introduction of new broadcasting services across Australia. The report identified five options for alternative approaches to the current planning scheme, along with a discussion of the advantages and disadvantages of each option. A copy of the report is available on request.

Throughout the planning process, the ABA has adopted principles of good decision-making and continually reviewed the approach to planning. Initially, the threat of litigation from incumbent commercial broadcasters resulted in careful attention to the form and content of the frequency allotment plan and also to licence area plans and licence area plan decision-making. As a result, while litigation-induced delay was a perennial feature of the pre-1992 licensing system, the ABA's planning process has so far avoided successful legal challenge. More recently, the ABA has been able to accelerate the production of licence area plans considerably, particularly in the less contentious markets of Group 1, 2 and 3. It has achieved this through much quicker internal procedures and development of better computerised planning tools. The aim of this process was to speed up planning, while at the same time retaining the integrity associated with sound decision-making.

The requirement to develop Regulation Impact Statements (RIS), prepared in accordance with the process defined by the Office of Regulation Review, have further reinforced decisions and directions taken to streamline the planning processes. A RIS has a number of functions in relation to natural justice and good decision-making, including the assessment of the impact (costs and benefits) on consumers, business, government and the community.

The question of how scarce the radiofrequency spectrum is in Australia is difficult to answer except on a case-by-case basis. However, in general, the demand for spectrum in metropolitan markets will far exceed the supply whereas the spectrum in remote areas is more abundant and much less in demand. In general, licence area planning is expected to

exhaust the remaining supply of spectrum available for analog AM and FM radio in the more densely settled areas of regional Australia.

The planning of the draft analog radio licence area plan for Sydney, expected to be released in June 1999, will demonstrate that there is limited spectrum available. Similarly, the draft digital television channel plans are also expected to be released in mid 1999, and will demonstrate that there is limited spectrum available to facilitate the introduction of digital television services in metropolitan markets.

This would suggest that licensing arrangements do not have the effect of creating artificial scarcity on spectrum availability.

Digital Television

Commercial and national broadcasters in the five mainland metropolitan markets are required to commence transmissions in digital mode on 1 January 2001. Digital transmissions are to commence in regional markets by 1 January 2004. There will be at least an eight-year simulcast period.

The *Television Broadcasting Services (Digital Conversion) Act 1998* (the Act) requires the ABA to develop conversion schemes, which are legislative schemes for the conversion of commercial and national television broadcasting services from analog to digital mode over time. Part A of the conversion schemes deal with licence areas that are not remote licence areas and Part B deals with remote licence areas.

The ABA determined Part A of the Commercial Television Conversion Scheme in March 1999 and expects to determine Part A of the National Television Conversion Scheme by May 1999.

The Commercial Television Conversion Scheme requires the ABA to determine Digital Channel Plans (DCPs) for each licence area or part of a licence area. Draft DCPs have been prepared and circulated for comment for each of the metropolitan markets and those regional markets where broadcasters also intend to commence digital transmissions on 1 January 2001 or soon after. The ABA expects to finalise DCPs for these markets by mid 1999, thereby allowing broadcasters 18 months to purchase, install and test transmission facilities before the start date. DCPs for all other areas of Australia are expected to be finalised by mid 2000.

After a DCP has been determined for an area, broadcasters will submit an Implementation Plan (or a series of Implementation Plans) for that area. An Implementation Plan is a binding commitment by a broadcaster to provide a television broadcasting service in digital mode from specified sites to cover specified areas by specified dates so as to achieve the same level of coverage as the analog service as soon as is practicable after the simulcast period begins. Implementation Plans submitted by commercial broadcasters are subject to ABA approval, and Implementation Plans submitted by the national broadcasters are subject to the Minister's approval.

The ABA has circulated two drafts of its *Digital Terrestrial Television Broadcasting Planning Handbook* for comment and expects to finalise the Handbook by June 1999. The Handbook provides broadcasters and planners with:

- the general and technical assumptions necessary to meet legislative requirements outlined in the commercial and national conversion schemes; and
- an explanation of the technical planning processes involved in the planning of new digital television services as well as the conversion of existing analog services; for the introduction of digital terrestrial television in Australia.

The ABA has technical expertise in digital planning and spectrum availability issues, which is at the Productivity Commission's disposal. The broader policy issues are more appropriately the domain of DOCITA to deal with.

2. The Division of Responsibilities Between the ABA and the ACA

Content and Carriage Regulation

The current licensing regime for broadcasting distinguishes between the content and the carriage of services. With the exception of broadcasting services bands planning and allocation, the BSA is concerned mostly with content licensing. For example, a person wishing to provide a subscription television broadcasting service may apply to the ABA for the appropriate licence under s.96 of the BSA. This licence authorises the person to provide pay television services of broad appeal. However, the s.96 licence carries no entitlement to any means of conveying the signal. The means of carriage must be secured separately, eg. by acquisition of a transmitter licence or a contractual arrangement with a telecommunications company. Regulation of the carriage of broadcasting services is governed by different legislation, depending on the technical means in question. For example, a service that is provided via radiocommunications will require authorisation under the Radiocommunications Act. Carriage of a service disseminated via telecommunications is regulated by telecommunications legislation.

The BSA creates a special regulatory regime for 'broadcasting services bands' radiofrequency spectrum, which is any spectrum that the Minister has referred to the ABA for planning in accordance with a designation under s.31 of the Radiocommunications Act. This role in spectrum planning inevitably involves the ABA in both content and carriage issues and creates a closely interlocked relationship with the ACA. At present, the VHF and UHF bands used by free-to-air television and the MF (AM) and VHF (FM) bands used by free-to-air radio are broadcasting services bands spectrum. The other licensing regime is for all other (ie. non-broadcasting services bands) broadcasting.

To conclude, the ABA takes the view that it must function as part of an interconnecting network of regulators. This interconnectedness is reflected in cross-appointments: the

Deputy Chairman of the ABA is an Associate Member of the ACA, and correspondingly, the Deputy Chairman of the ACA is an Associate Member of the ABA. The issue of a network of regulators is canvassed in greater detail in a submission the ABA made to the Telecommunications Review in November 1994. A copy of that submission is available on request.

The Interrelationship of ABA and ACA Planning and Licensing Powers

The ACA is the Government's primary spectrum planning agency, with responsibility for preparing a spectrum plan for the entire radiofrequency spectrum (s.30 of the Radiocommunications Act). However, the Minister, after consultation with the ABA and the ACA, may designate parts of the radiofrequency spectrum as broadcasting services bands (s.31 of the Radiocommunications Act). Section 31 designation means the ABA must plan the spectrum in accordance with Part 3 of the BSA.

The ABA has three main spectrum planning powers. These are:

- Its public planning process (ss. 24-26), which results in licence area plans that show the number and characteristics, including technical specifications, of broadcasting services that are to be available in particular areas of Australia with the use of the broadcasting services bands.
- The Ministerial reservation power in s.31: upon receipt of a notification from the Minister under s.31, the ABA is required to reserve spectrum for specified numbers of national or community services.
- The 'drop through' power in s.34, which allows the ABA to make available (or 'drop through') for other uses any spectrum that is not required, or not immediately required, for national, commercial or community broadcasting services. These uses may include other types of broadcasting (eg. open narrowcasting) or return to the ACA for licensing of non-broadcasting services.

Any service using the broadcasting services bands must have appropriate authorisation from the ACA. The ACA has three main ways of licensing radiocommunications services. The way these apply in the broadcasting services bands is described below:

- Spectrum licences under Part 3.2 of the Radiocommunications Act. These are not permitted using the broadcasting services bands.
- Transmitter licences under Part 3.3 of the Radiocommunications Act. Commercial and community broadcasting services automatically obtain transmitter licences under s.102 of the Radiocommunications Act. Other broadcasting services using the broadcasting services bands require a licence under s.100. Section 100 licences may only be issued for the broadcasting services bands if spectrum has been made available under s.34 of the BSA or, in the special case of transmitters for national broadcasting services, reserved under s.31 of the BSA. The Digital Conversion Act

makes special provision for transmitters required in connection with digital conversion of television.

- Class licences under Part 3.4 of the Radiocommunications Act. Class licences are used for a range of low-interference devices currently sharing the broadcasting services bands and do not require any form of ABA permission.

ABA/ACA Coordination in Relation to Broadcasting Services Bands Planning and Allocation

As the legal exposition is intended to show, the ABA and the ACA must closely coordinate their decision-making processes if the broadcasting services bands are to be administered efficiently. Key areas of cooperation are outlined below.

- Consultation on planning decisions: as planning decisions within the broadcasting services bands may affect services using other radiofrequency spectrum and *vice versa*, both agencies have agreed to consult one another on relevant spectrum planning. In practice, the ACA's wish to resume particular parts of the broadcasting services bands for other purposes (consistent with its overarching spectrum planning power) has been a major topic of consultation.
- Cooperation on Radiocommunications Act transmitter licensing decisions: the ACA has delegated some of its transmitter licensing powers to the ABA and the two agencies have agreed to principles determining which agency should be responsible for licensing which classes or groups of transmitters within the broadcasting services bands. As the ACA cannot delegate its power to hold price-based allocations of transmitter licences, a practice has grown up by which the ACA approves price-based allocation procedures developed by the ABA for certain transmitters and the ABA conducts the auctions.
- Cooperation to ensure parts of the broadcasting services bands not required for broadcasting are made available to the ACA where appropriate, using the power in s.34.
- Cooperation with the ABA when the ACA is developing mandatory technical standards that affect the broadcasting services bands.
- Investigation of interference and transmitter licence compliance issues: although the ABA plans the broadcasting services bands, the ACA has the role of enforcing transmitter licence conditions. It also has a network of regional offices to perform this role. In relation to the broadcasting services bands, this requires extensive coordination with the ABA. Public complaints may come to either body – the ABA and the ACA are committed to providing the public with a 'one-stop shop' while working behind the scenes to ensure issues are resolved by the appropriate body. It is the ACA's role to investigate the cause of interference. Interference may result either

from a planning error (ie. which the ABA is responsible for fixing) or from another cause (generally, the responsibility of the licensee to fix – with the ACA responsible for ensuring compliance).

- Cooperation when settling international standards for radiocommunications.
- Consultation with the ABA when the ACA is making or varying a class licence authorising operation of transmitters in the broadcasting services bands.
- Administrative cooperation: the two agencies have a Memorandum of Understanding governing many of the above issues. The MOU commits the agencies to exchange information and also to meet at Authority level to resolve disputes. Of greater day-to-day importance, the ABA has access to the ACA's IT business support system, Radcom, and its staff are required to use Radcom when administering the Radiocommunications Act. The ABA's spectrum planning tools have been designed as a module of the Radcom system and were developed in close cooperation between the two agencies.

Legislation is currently before Parliament that would address one source of inflexibility in the current relationship between the ABA and the ACA. The *Radiocommunications Legislation Amendment Bill 1999* will, if passed, amend s.31 of the Radiocommunications Act to allow the ABA and the ACA to agree in writing that transmitter licences may be issued in specified circumstances in relation to the broadcasting services bands or to parts of the broadcasting services bands.

With the exception of transmitter licences for national, commercial and community broadcasting licences, the current law only permits the issue of a transmitter licence when the spectrum has been dropped through under s.34 of the BSA. Problems include:

- s.34 does not enable the ABA to make available spectrum that has already been made available for a broadcasting service – notwithstanding that the proposed use may be technically compatible with the television signal; and
- s.34 often necessitates large numbers of discrete administrative decisions by the ABA.

3. Transparency and Accountability in Decision-making

The ABA's decision-making processes, in keeping with a co-regulatory approach, is transparent to the extent decisions are made in consultation with all interested parties eg. in the planning process, and the codes development or review process (see 8. Codes of Practice). The ABA, industry groups and the community all have a role in these processes. The benefits of a co-regulatory regime are evident in the low number of appeals against ABA decisions, which also reflects a less litigious environment than that previously administered by the ABT.

For example, in 1991/1992, the final year of the ABT, 11 court judgments were delivered in matters where the ABT was a party, and at the end of July 1992, the ABT was party to six current legal proceedings. Three matters were carried forward to the ABA in October 1992, but by the end of that financial year, the ABA was not a party to any litigation. There has been a marked decrease in the number of decisions that have been legally challenged since the advent of the ABA in October 1992.

To date, the ABA has been involved in only two major pieces of litigation in the Federal Court. There have been other minor cases. The first major case was the challenge by CanWest Global Communications Corp. against the ABA's decision that they were in a position to exercise control of the TEN Network in breach of the foreign control restrictions of the BSA. This matter went to the Full Court of the Federal Court of Australia where the ABA's decision was upheld.

The second major case was the challenge by a group of New Zealand film producers against the validity of the ABA's Australian content standard for commercial television. This matter went to the High Court of Australia where the ABA's decision was set aside (see 10. International Obligations).

Only one matter has been heard by the AAT. This involved commercial television licensees in Darwin, Mildura and Griffith seeking review an ABA decision to refuse to grant them permission to operate a second service in their respective markets. A decision that the ABA was required to make within 45 days of receiving applications was re-made by the AAT after seven days of hearings. A vast amount of new evidence was put before the AAT that had not been before the ABA. The AAT came down with the same decision as the ABA for Darwin and Mildura, but decided to grant permission to the licensee in Griffith to provide a second television service. Involvement in these proceedings was very costly for the ABA.

The list of reviewable decisions by the AAT has been significantly expanded by the introduction of the *Digital Conversion Act 1998* and the Conversion Schemes made pursuant to that Act. The decisions that are reviewable to the AAT have been determined in accordance with the guidelines of the Administrative Review Council.

This potential reviewability of ABA decisions has promoted a culture of good administrative decision-making in the ABA. This involves consistency, accountability, transparency and effective decision-making.

Details of the administration and compliance costs of particular reviews can be established from archived files.

4. Licensing of Services

The tables at Attachment 1 provide an overview of the planning and allocation of licences from 5 October 1992 to 1 May 1999 on broadcasting services bands as well as the allocation of licences on non broadcasting services bands, including fees and charges

where these are applicable. However, they do not show details such as network affiliations, areas of amalgamation into consolidated groups, and gross earnings and licence fees payable. These details may be better gleaned from licence fee and broadcasting financial figures. Broadcasting financial results up to 1997/1998 are available on disk and copies will be made available if required.

The rationale for licence fees appear to have been a tax for use of a scarce public resource and for the benefit of operating in closed markets created by legislative restrictions. Given the difficulties in predicting the financial performance of the industry, there seemed to be a view at the time that prices achieved at price-based allocations would not represent fair value for use of the spectrum and hence some mechanism such as licence fees should continue to be used to achieve some measure of return to Government. Consequently, licence fees represent a turnover tax and bear no relation to the economic value for use of the spectrum.

5. Ownership and Control

The ownership and control rules in the BSA regulate concentration within broadcasting sectors, ownership across different media, and foreign ownership. The provisions are based on the concept of 'control', which defines the financial activities that are regulated.

'Control' is broadly defined in a legislative essay in the BSA to include control through trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights. A person is considered to be in control of a licensee or company if they have control over: a selection of a significant proportion of programming; a significant proportion of the operations of a company; a power of veto over actions by a board of directors; the ability to appoint at least half the board of directors; or the ability to direct or restrain substantial actions. A person who has company interests exceeding 15% is also considered to be in a position to exercise control of the company. Company interests are defined broadly to include shareholding, voting, dividend and winding-up interests.

The concentration restrictions preclude:

- control of commercial television licences with combined licence area populations in excess of 75% of the Australian population;
- control of more than one commercial television broadcasting licence in the same licence area; and
- control of more than two commercial radio broadcasting licences in the same licence area.

There are parallel limitations on directorships for commercial television and radio broadcasting licences. A person must not be a director of one or more companies, or a director of one or more companies and in control of another company, that between them:

- control commercial television licences covering more than 75% of the population;
- control more than one commercial television licence in the same area;
- control more than two commercial radio licences in the same area.

The cross-media ownership regulations restrict a person being in a position to exercise control of more than one of: a commercial television licence, a commercial radio licence or a newspaper in the same licence area. Parallel limitations on cross-directorships also apply. A person must not be a director of one or more companies, or a director of one company and in a position to exercise control of another company, that between them control more than one of: a commercial television licence, a commercial radio licence and an associated newspaper, in the same licence area.

The foreign ownership and control rules restrict:

- a foreign person being in a position to exercise control of a commercial television licence;
- two or more foreign persons having company interests in a commercial television licensee that exceed 20%;
- more than 20% of the directors of each commercial television licensee being foreign persons;.
- a foreign person having company interests of more than 20% in a subscription television licence; and
- a foreign person having company interests in a subscription television licence that, when added to the company interests in that licence held by other foreign persons, exceed 35%.

A summary of the licensing and ownership and control requirements for different media is at Attachment 2.

The BSA also requires each commercial television and commercial radio broadcasting licensee to keep the ABA advised of persons who are in a position to exercise control of the licence and interests in associated newspapers.

The BSA provides some flexibility with provisions for the ABA to approve temporary breaches of the ownership and control rules for specified periods.

Rationale for the Rules

The ownership and control rules are designed to address the influence broadcasting material has in the political system, cultural life and in the operation of markets. The primary objectives of the BSA relating to the ownership and control rules are:

- to encourage diversity in the control of the more influential broadcasting services; and
- to ensure that Australians have effective control of the more influential broadcasting services.

The concentration and cross-media rules relate to the first of these objectives and the foreign ownership rules to the second.

- ***Diversity in Control of the More Influential Broadcasting Services***

Statements by various governments and parliamentary committees on media ownership indicate that the underlying rationale for diversity of control is to promote a diversity of views in the media.

Concerns about the 'undesirable consequences' of broadcasting concentration resulted in multiple ownership limits for radio in 1935.¹ Subsequent parliamentary committees considered the influence of broadcasting and that 'excessive concentration ... could be a threat to democracy'.² The views presented in the media have been perceived to have a significant influence on public opinion. Ensuring a diversity of views has thus been seen as important to the effective workings of democracy.

On the introduction of the BSA in 1992, the then Minister stated that broadcasting 'is integral to developing an Australian identity and cultural diversity ... [it] is vital to the operation of a democratic society'.³

¹ House of Representatives *Hansard* 3 December 1935 pp.2364-5 quoted in Department of Communications *Ownership and Control of Commercial Television: Future Policy Directions* Canberra 1986 p.42

² *Report of the Joint Committee on Wireless Broadcasting* (Gibson Report) AGPS, Canberra 1942 p.8 and *Parliamentary Standing Committee on Broadcasting* (Second Report), AGPS, Canberra 1943 pp.9-11 quoted in Dept of Communications (1986)

³ Second Reading Speech *Broadcasting Services Bill 1992* in *Hansard* 4 June 1992 p.3599

Restrictions on cross-media ownership were introduced because ‘it can limit public access to diversity of opinion, information, news and commentary ... [it] can inhibit competition, produce monopolies, and affect employment opportunities’.⁴

These statements indicated that in addition to the primary objective of promoting diversity of views, additional objectives include: encouraging competition, cultural diversity, and increasing employment opportunities.

The rules regulate for diversity of ownership as a proxy for diversity of views. A diversity of ownership does not ensure diversity of views; it merely provides an opportunity for diversity of views. A reduction in the number of owners will also result in a reduction in the number of different organisational cultures and a likely reduction in the range of views and the depth of treatment of those views. A range of variables impact on the diversity of views in the media, including the views and interests of individual journalists and their editors, a commercial imperative to increase readership or audience, and the management practices and organisation culture.

It would be difficult for Government to regulate directly for diversity of views without compromising the principles of independent and uncensored news media. For example, work which commenced in the UK in 1994 to balance a continuing need for media ownership rules and competition regulation resulted in a proposal based on the concept of “share of voice”. While this concept was considered have the advantage of flexibility and technology neutrality, there remained issues concerning the future shape of media markets and the impact of convergence. As a result, interim changes were introduced in the UK. Amongst other things, the amendments proposed at the time included a provision to empower the relevant regulator to disallow control where it was considered not to be in the public interest.

Accordingly, the rules operate at the level of ownership. Each owner, and the organisation culture they establish, is likely to influence the range of views presented in their media service. The concentration and cross-media rules aim for diversity of owners both within individual markets and across different media sectors.

- ***Effective Australian Control of Broadcasting Services***

Restrictions on foreign ownership of broadcasting have a long history.

⁴ Second Reading Speech *Broadcasting (Ownership and Control) Act 1987*

The initial rationale was ‘it is undesirable that a ... [foreign person] ... should have any substantial measure of ownership or control over any Australian commercial broadcasting station’.⁵ This related to concern about foreign political influence and national security. In the debate on that resolution, Prime Minister Menzies said that the question was whether to allow ‘... the most intimate form of propaganda known to modern science ...’ to be in the hands of ‘... people who do not belong to this country ...’.⁶

More recent arguments for foreign ownership and control limits refer to the concern about cultural dominance by foreign interests and the need to safeguard and support Australian cultural industries.

There is also an argument that Australian ownership will tend to facilitate a significant level of Australian expertise in broadcasting. This view assumes that Australian owners are more likely to employ Australian staff. This, in turn, is said to contribute to:

- **employment opportunities for Australians;**
- **more scope for representation of Australian views;**
- **a local creative infrastructure; and therefore**
- **scope for an industry base capable of exporting Australian productions.**

In relation to foreign ownership, the rules have largely prevented foreign control of commercial television services and required foreign investors in subscription television to enter into consortium arrangements with Australian companies. By way of contrast, two of the major radio networks are now foreign owned.

Effectiveness of the Rules in Meeting their Rationale

In assessing the effectiveness of the rules, it is necessary to consider that the different elements of the existing rules were introduced at different times. A timeline setting out the development of the rules can be provided if required.

The BSA brought in several major changes in the ownership and control rules:

- increased the audience reach limit for television from 60% to 75%;
- relaxed the concentration rules for radio;
- removed foreign ownership restrictions for radio; and

⁵ House of Representatives *Hansard*, 28 November 1951 p.2924 quoted in Department of Communications *Ownership and Control of Commercial Television: Future Policy Directions* Canberra 1986 p.50

⁶ *ibid*

- introduced an increased role for actual ‘control’ tests.

Since 1992, there has been significant rationalisation and restructuring in the radio industry. There has been a significant consolidation of stations and formation of larger networks and an increase in networking, greater use of centralised newsrooms and shared facilities, and increased use of common financial and management systems. Syndicated news services now account for a majority of news services in regional stations. Foreign-owned groups also account for a significant proportion of the market. The diversity of news services on commercial radio stations has reduced as a result of changes other than ownership structure. In June 1991, there were 149 commercial radio licences with 76 owners. By July 1996, these increased to 206 licences with only 74 owners. Of the current 244 radio licensees, 142 are now controlled by 8 networks.

For free-to-air television, there has been some change in control of the major television networks, but little structural change with a similar number of players in the market. Since the introduction of subscription television with the commencement of the BSA, there has been a major rationalisation of the industry with a number of smaller players being replaced by two major operators, Foxtel associated with News Ltd and PBL, and Optus Vision.

There are some technical issues concerning the application of the foreign ownership rules, but the ABA is addressing these in a different forum. The ABA will provide details if these are required.

The actual control tests in the legislative essay in Schedule 1 of the BSA were introduced to provide more flexibility to the ownership and control rules. This approach arose, in part, as a response to the previous Act, which set out a series of ‘prescribed interests’. The previous Act was amended numerous times to address the various devices which were developed to get around the rules. The actual control tests in the BSA are an attempt to move beyond narrow legalistic tests. While the control tests provide some flexibility, it may well be difficult to find evidence of actual control.

As the rules may create uncertainty for investors, s.74 was introduced to allow the ABA to give binding opinions on control. This provision has not been widely used by industry, perhaps because interested parties may have considered their best legal option would be to act and then see whether the ABA would investigate.

The inclusion of a range of interests, including dividend and winding-up interests in the definition of “company interests”, indicates that the BSA aims to count a broad range of equity and debt mechanisms in calculating a person’s interest in a company. There have been several uses by industry of convertible debentures which fall outside the definition of ‘company interests’ (eg. the TEN Network case). A bill was prepared which would have expanded the definition of ‘company interests’ to cover convertible debentures and similar devices, but the bill lapsed before Parliament was prorogued in 1996.

Compliance with the Rules

Since the introduction of the BSA in 1992, the ABA has conducted a number of investigations into control. A summary of major investigations will be provided if needed.

The ABA has found one major breach of the foreign ownership and control rules, and that finding was upheld by Hill J. following an appeal to the Federal Court. A subsequent appeal to the Full Court of the Federal Court was dismissed, but that breach has since been rectified. The ABA has noted one other minor breach of the cross-media rules.

The ABA has approved temporary breaches of ownership and control rules under s.67 of the BSA for 33 transactions. In 10 transactions, the ABA granted an extension of time to remedy the breach. In all but 2 of these cases, the breaches were remedied within the required time. In the 2 cases, the ABA issued a notice under s.70 requiring the parties concerned to remedy the breaches within one month.

Overall there has been a reasonably high level of compliance with the rules. Monitoring the control provisions is resource intensive and time consuming for both the ABA and the industry parties under investigation. There are also compliance costs for industry. Under the BSA, pecuniary penalties may be imposed on persons who fail to comply with the control provisions. Also, the ABA charges a fee of \$2,500 for an opinion on control under s.74 of the BSA.

6. Relationship Between the ABA and FIRB

Under the Foreign Acquisitions and Takeovers Act (FATA), the Treasurer can prohibit an acquisition of shares in a corporation which would have the effect of conferring foreign control over the corporation, where that result would be contrary to the national interest.

Proposals by foreign persons to invest in radio, television, subscription broadcasting and newspapers can or must be examined under FATA. A foreign person who proposes to control a commercial radio broadcaster may be permitted to do so under the BSA, but still be subject to regulatory obligations under FATA.

The definitions of 'foreign person' and 'control' vary between the BSA and FATA. The BSA definition of 'foreign person' is based on citizenship, while the FATA definition is based on residency. FATA provides that a 15% shareholding interest confers control, unless the Treasurer is satisfied to the contrary. Under the BSA, control may be actual or deemed.

The Foreign Investments Review Board (FIRB) administers FATA. When a foreign person proposes to acquire a controlling interest in an Australian company, they must submit an application to FIRB. FIRB sends all applications relating to foreign interest in the media that might involve a breach of the BSA to the ABA for comment. The ABA

assesses the applications in relation to the foreign ownership restrictions under the BSA and advises FIRB on whether or not the proposed acquisitions would likely result in a breach. FIRB then considers the ABA's assessment in deciding whether or not to approve the acquisitions.

7. Relationship Between the ABA and the ACCC

Both the ABA and the Australian Competition and Consumer Commission (ACCC) are involved in regulating the structure of media markets. The ABA's role in administering the ownership and control provisions is derived from specific policy objectives with respect to content, public interest considerations that would otherwise not be taken into account under the Trade Practices Act (TPA) administered by the ACCC.

The BSA contains a number of references to the TPA. A primary reference is in s.97 of the BSA, which requires the ABA to seek a report from the ACCC. This report comments on whether allocation of a satellite or non-satellite subscription television broadcasting licence would, in the normal application of the TPA, constitute a breach of s.50 of the TPA, and if so, whether it would be authorised 'in the public interest' pursuant to s.88 of that Act.

Section 97 is referred to in s.96 (allocation of other (non-satellite) subscription television broadcasting licences) and in s.93 (allocation of (satellite) subscription television broadcasting licences) of the BSA. These sections provide the ACCC with the power to prevent the allocation of a licence on competition grounds.

Since the commencement of the BSA, the ACCC has not prevented the allocation of a s.93 or a s.96 licence on competition grounds. Consequently, as at 1 May 1999, the ABA had issued 3 s.93 and 1,676 s.96 licences.

Another primary reference is in s.116B of the BSA that makes clear that the TPA generally applies to conduct of subscription television broadcasting licences.

A third primary reference is in s.130 of the BSA that makes clear that program standards are not to be used for anti-competitive purposes, in the manner that the phrase is used in the TPA.

A fourth primary reference is in s.77 of the BSA that makes clear that the provisions of Part V (ownership and control of commercial broadcasting licences) override the TPA whenever there is an inconsistency with the BSA.

Despite this, the TPA was held to apply to the transfer of a licence in general for the purposes of the ownership and control limits set out in Part V. In the case of *AUSTEREO v TPC (1993) 115 ALR 14*, the Full Bench of the Federal Court held that s.54 of the BSA did not confer any right to a person to hold two licences in a licence area and that the TPA applied to the transfer of commercial radio broadcasting licences. This decision established that Part V of the BSA did not provide an exhaustive scheme for the

regulation of the concentration of ownership and control within the broadcasting industry, and that the provisions of the BSA did not exclude the operation of s.45 or s.50 of the TPA.

The ACCC has thus involved itself in a number of media transactions, particularly in the pay TV industry (where, since 1997 only foreign ownership restrictions have applied under the BSA) to establish whether a breach of a provision of Part IV of the TPA may have occurred. This has sometimes involved liaison between the ABA and the ACCC.

The ABA and the ACCC have maintained close liaison over the application of their respective Acts to mergers and acquisitions in the media. The ABA and the ACCC liaise in a more formal manner over s.96A of the BSA, which requires the ABA to monitor cross-media ownership of licences allocated under s.96.

Pursuant to s.96A of the BSA, the ABA, in consultation with the ACCC, must monitor the cross-media ownership of the more influential media and non-satellite subscription television broadcasting licences in the context of the objects of that Act, and in particular, in the context of object 3(c) which is to encourage diversity in control of the more influential broadcasting services.

The ABA has consulted with the ACCC pursuant to this provision on at least two occasions since 1992. The ABA has had no reason to be concerned that the objects of the BSA are being undermined and has thus not made any report to the Minister on such a matter.

Audience reach provisions limit the emergence of national commercial television operators. The TPA does not proscribe foreign ownership or control, but such restrictions in the BSA limit the extent of horizontal and vertical relationships by foreign firms. While the BSA provisions are based on the number of licences and apply in relation to predetermined licence areas, the TPA provisions are generally based on the anti-competitive effects in a market. The application of the two sets of provisions will not always lead to the same result.

The formal relationship is reflected in the interconnecting network of regulators where the Chairman of the ABA is an Associate Member of the ACCC and the Senior Counsel for, and member of the ACCC has been an Associate Member of the ABA.

8. Codes of Practice

The role of the ABA in a co-regulatory scheme was intended to be less interventionist than had been the case under the previous Act. The focus was to be more on having a supervisory capacity in relation to devising codes, and in respect of operations under them (see, for example, the terms of s.5 of the BSA).

The co-regulatory regime was established to further a number of the objects set out in s.3 of the BSA. A major element, and a significant change from the previous scheme, was

the introduction of codes of practice developed by industry groups, in consultation with the community and the ABA, as the primary means of regulation of the subject matter in most areas of programming. Culturally significant areas of Australian content and children's programming, in relation to television programming only, were reserved for regulation by the ABA by way of its power to make standards (see 9. Content Regulation).

From the Explanatory Memorandum, in relation to s.123 of the BSA:

A rationale underpinning the codes of practice provisions is that inappropriate regulation can bring with it significant economic costs through efficiency and productivity losses. There can also be social costs as formal regulation can deprive industry of the opportunity to devise a flexible and responsive approach meeting the demands of the community.

It was Parliament's intention, as set out in s.123 of the BSA, that representative groups for each section of the broadcasting industry would develop codes of practice for that section of the industry. Since the BSA commenced in 1992, industry groups have developed codes of practice for all sections of the industry, and there has been a revision of the code developed for commercial television. A review of the code for commercial radio is under way. Industry groups have shown themselves to be willing to respond to community input regarding code provisions.

Making industry largely responsible for regulation was intended to ensure that industry manages the costs of the co-regulatory scheme. As far as the ABA is aware, industry has not identified problems with compliance costs.

Section 4 of the BSA sets out Parliament's intention regarding the co-regulatory scheme. The intent acknowledges that the several types of broadcasting services have differing impacts on the community in terms of their ability to influence, and that levels of regulatory control should differ accordingly. Parliament's intent further acknowledges the likelihood of technological development and the desirability of encouraging such advances. There is also a policy statement that the regulatory regime should aim for an appropriate balance between public interest considerations and imposing financial and administrative burdens on licensees. It was intended that broadcasting services would accept more responsibility for administering their respective codes of practice, particularly in relation to responding to and resolving complaints.

There are differences between the regulatory codes developed for the different types of services. These reflect, in part, their different levels of influence on the community. As industry groups have developed codes, they have borne in mind the role of their members in their respective broadcasting sectors. They have also made efforts to balance their members' interests and those of the public. The processes of codes development and review involve public submissions and consultation with the ABA and these, together with licensees' consideration of complaints, ensure that licensees are well informed of community concerns about broadcasting. Under the codes, licensees have taken on the

responsibility of administration of the codes' requirements, particularly in relation to responding to complaints, and also in relation to compliance with any licence conditions.

The ABA must include a code of practice in its Register of Codes of Practice if it is satisfied that code provides appropriate community safeguards for the matters covered by it; it is endorsed by a majority of the service providers of that industry sector; and members of the public have had adequate opportunity to comment on that code. The matters set out in the BSA are among those considered by the ABA in making its determination on a code of practice presented to it for inclusion in the Register.

The requirement of having endorsement from a majority of the service providers of the relevant industry sector, while not problematic for 'mainstream' broadcasters, has the potential to cause some difficulties in industry sectors where it is difficult to find out how many services operate within the class. This is true of narrowcasting services (for which there is no individual licensing scheme); some narrowcasters may not even be aware they are providing a 'broadcasting service' as defined in the BSA). The problem has been dealt with in the proposed online regulatory scheme by removing the requirement for majority support.

The national broadcasters (ABC and SBS) are required, under their respective Acts, to develop their own codes of practice and notify them to the ABA. The ABA has no formal role in the development of these codes.

As codes must take account of any relevant research conducted by the ABA, the ABA must make available research results to assist those devising codes. It was Parliament's intention that the ABA's research on community standards as to program content would underpin the codes of practice and feed into the code development or review process.

The ABA's research is provided to, and discussed with, industry groups. In particular, relevant parts of research results, which may propose ways of addressing specific issues in codes provisions, are drawn to the attention of the appropriate sections of the broadcasting industry. Research also provides a reality test against which community concerns reflected in complaints received may be verified.

The BSA also requires that, in developing codes, community attitudes towards a number of particular issues be taken into account. These include:

- the portrayal of violence;
- the portrayal of sex and nudity;
- the use of offensive language;
- the portrayal of the use of drugs, including alcohol and tobacco; and
- the portrayal of matter likely to incite or perpetuate hatred against, or vilify any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, age, religion, or physical or mental disability.

In the course of the codes development or review process, the ABA has negotiated with industry groups with a view to the inclusion of provisions to address particular issues, for example, suicide. The ABA takes this advocacy role to ensure the codes contain safeguards that the community expects to be in place.

Consumer advice and warnings for offensive material have been introduced, and are now more prescriptive and used more widely. Community concerns on various matters have led to restrictions in particular areas, such as depictions of violence on television (new “AV” category); so-called ‘phone sex’ advertisements; program promotions; and depictions of suicide. There are proposals for new rules for radio, in relation to the broadcast of sexually oriented material, and requiring a proportion of programming to be devoted to new Australian music.

It was expected that industry groups would appreciate that it was in their interest to ensure that an appropriate balance was struck between the public interest in the maintenance of standards of taste and decency and their desire to provide competitive services. This expectation appears to have been well founded, as is evidenced by the new matters included in the revised FACTS code.

Section 123(2) of the BSA sets out a number of matters to which codes may relate and these include:

- preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry;
- ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority;
- promoting accuracy and fairness in news and current affairs programs; and
- providing methods for handling complaints.

All codes that are on the ABA’s Register deal with all these matters, although in slightly different ways, as appropriate, for the type of broadcasting service concerned.

Parliament expected that the prior work of the ABT in relation to “accuracy and fairness” issues would provide the groundwork for those parts of the codes of practice that related to news and current affairs. These matters are explicitly referred to in the BSA as possible code provisions, and all codes cover them.

Formal complaints handling procedures are now in place under the codes of practice. The majority of complaints are dealt with by licensees, as the codes provide for unresolved complaints only to be taken to the ABA. In the 1997/1998 financial year, for example, the ABA commenced 94 investigations, across all broadcasting sectors, into unresolved complaints about matters covered by a code of practice. In an overlapping 12-month period, commercial television stations received 831 written complaints. Commercial radio stations received 1,145 complaints in the 1998 calendar year.

The ABA has a range of sanctions available to it if it finds a breach of a code of practice, if it has convincing evidence that a code of practice is not operating to provide appropriate community safeguards, or if no code of practice has been registered. These sanctions include the imposition of a condition upon a licence and the imposition of a standard across a sector of the industry. The ABA may also issue a notice requiring compliance with a condition or standard. Breaches of licence conditions and standards, or non-compliance with a notice requiring compliance may result in prosecution. The ABA may also decide to suspend or cancel the licence in question.

If the ABA finds that either the ABC or SBS has breached its code of practice it may, if it is satisfied that the complaint was justified and that action should be taken, recommend to the national broadcaster that action should be taken to comply with the relevant code. This may include the broadcast of an apology or retraction. If the national broadcaster does not take the recommended action, the ABA may give the Minister a written report of the matter, which must then be tabled before both Houses of Parliament.

To date, codes of practice for the following have been registered or notified:

- Commercial Television Industry Code of Practice;
- Commercial Radio Code of Practice;
- Community Broadcasting Code of Practice;
- Subscription Television Broadcasting Code of Practice;
- Subscription Television Narrowcasting Code of Practice;
- Subscription Radio Narrowcasting Code of Practice;
- Open Narrowcasting Television Code of Practice;
- Open Narrowcasting Radio Code of Practice;
- ABC Code of Practice; and
- SBS Code of Practice.

Copies of the codes can be provided if required. Tables comparing key provisions of the television codes are at Attachment 3, although they do not include reference to the new subscription television codes of practice. In addition, the tables were prepared before finalisation of the revised commercial television code and therefore may not reflect its terms precisely. An updated version can be provided if this is considered useful.

9. Content Regulation

Program Standards

Section 122 of the BSA requires the ABA to determine standards relating to the Australian content of programs and to programs for children. All commercial television broadcasting licensees must comply with ABA standards.

The Explanatory Memorandum to the *Broadcasting Services Bill 1992* set out the underlying policy intent for program content regulation. The Explanatory Memorandum states that:

Areas such as Australian content [and] children's programs...are matters of community concern which could conflict with a service provider's responsibility to its shareholders to maximise profits. This Part [of the Act] aims to balance the costs and benefits of the community's regulatory need with the profit-based nature of a commercial service provider.

The ABA must not determine a standard which:

- requires that programs, or a sample of a program, be approved by the ABA prior to broadcast (s.129(1));⁷
- is inconsistent with the Act (s.122(4));
- is inconsistent with the objects and regulatory policy of the Act (s.160(a)); or
- is inconsistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australian and a foreign country (s.160(d)).

In *Herald-Sun TV Pty Ltd v ABT (1985) 156 CLR 1*, the High Court held that a standard must be easily ascertainable. It must fix the quality and nature of the program by reference to general criteria in such a way that both the licensee and the court, or other body called upon to decide whether the standard has been observed, can determine whether or not the program answers the criteria set by the standard. The test need not be entirely objective, but may involve questions of taste. The test must be found in the determination itself and should not be subject to the discretion of the ABA.

Australian Content Standard

The Explanatory Memorandum states that a standard relating to the Australian content of programs should encourage the broadcast of programs which:

- reflect the multicultural nature of Australia's population;
- promote Australians' cultural identity;
- facilitate the development of the local production industry; and
- include a requirement for Australian programming for children.

The objects of the BSA specify the outcomes Parliament intended from the regulation of broadcasting. The objects relevant to Australian content are:

- to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity (s.3(e)); and
- to promote the provision of high quality and innovative programming by providers of broadcasting services (s.3(f)).

⁷ However, the ABA is able to determine a standard, which requires programs to be approved before broadcast in relation to programs for children (section 129(2)).

The current *Broadcasting Services (Australian Content) Standard 1999* came into force on 1 March 1999 and it does three main things. The standard:

- defines eligible Australian programs;
- sets minimum amounts of Australian programs which must be broadcast by commercial television licensees; and
- is consistent with Australian international obligations and defines programs that are eligible to reduce a licensee's Australian content obligations (see 10. International Obligations).

The current standard has two main quota mechanisms: an overall transmission quota and sub-quotas for specific types of programs. The transmission quota sets an annual minimum level of 55 % Australian programming between 6am and midnight. There are specific annual quotas for minimum amounts of first release Australian programs in the categories of drama, documentaries and children's programs. Each year, commercial television station must broadcast:

- first release Australian adult drama (between 80 and 258 hours depending on the type of drama ie. serial, series, miniseries, telemovie);
- 15 hours of first release Australian documentaries (20 hours from 2000);
- 130 hours of first release Australian C classified children's programs (including 32 hours of Australian children's drama); and
- 130 hours of first release Australian P classified preschool programs.

Copies of the standard and explanatory notes are available at the ABA's website: www.aba.gov.au

In the main, the standard appears to be operating well. There have only been a few instances when commercial television licensees have not met their content obligations. For example, the six Seven Network stations failed to meet the requirements of the Australian Content Standard and the Children's Television Standards by not broadcasting the required amount of Australian children's drama. They had a shortfall of 30 minutes in their broadcast of first release Australian children's drama on two occasions in 1997.

Children's Television Standards

The objects of the BSA relevant to television programs for children are:

- to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity (s.3(e));
- to promote the provision of high quality and innovative programming by providers of broadcasting services (s.3(f)); and
- to ensure that the providers of broadcasting services place a high priority on the protection of children from exposure to material which may be harmful to them (s.3(j)).

The underlying policy intent for children's television regulation set out in the Explanatory Memorandum to the *Broadcasting Services Bill 1992* states that standards relating to programs for children are intended:

to cover the times at which children's programs should be broadcast; and
how programs televised during children's viewing time should be classified.

The standards relating to programs for children required by s.122 of the BSA are referred to as the Children's Television Standards (CTS). The objective of the CTS is that:

Children should have access to a variety of quality television programs made specifically for them, including Australian drama and non-drama programs.

The CTS continue concepts dating from 1 July 1979, eg. C (children's) classification and C program times. They reflect extensive community and industry consultation.

A summary of relevant aspects of the CTS is provided below. However, copies of the CTS and explanatory documents are available at the ABA's website: www.aba.gov.au

The CTS provide for:

- the broadcast of specific annual amounts of children's (C) and preschool (P) programs, including Australian children's drama programs. This includes:
 - 130 hours of first release Australian C programming
 - 32 hours of C drama programs
 - 130 hours of P classified programs
- the application of a 'quality' test for C or P classification which means that a program must be:
 - specifically made for children
 - entertaining
 - well produced
 - able to enhance a child's understanding and experience
 - be appropriate for Australian children
- rules about the amount and type of advertising directed to children:
 - in P programs there are no advertisements allowed
 - in C programs, 5 minutes of advertising can be shown in a 30-minute program
 - advertisements should be clearly presented, not mislead children or put pressure on them to ask their parents or other people to buy a product or service
- a commitment to preventing images or events that may frighten children from being broadcast during C and P periods, including images that:
 - may frighten or distress children
 - demean people on the basis of race, gender, religion, disabilities etc
 - show unsafe use of a product or situations which may encourage children to engage in dangerous activities

The assessment procedure for classification is based on initial ABA staff assessment with referral to specialist consultants (producers, child development experts etc) on a case-by-case basis. An ABA delegate makes the final decision. As stated in the ABA's Service Charter, program classification decisions are made within 60 days of the date of receipt of an application.

10. International Obligations

Pursuant to s.160(d) of the BSA, the ABA is required to carry out its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country. A number of key international obligations is discussed below.

The Effect of ITU Radio Regulations on Australian Broadcasting

The ITU Radio Regulations are made pursuant to the International Telecommunications Convention and Protocols thereto and thus have to be observed by the ABA.

They impose obligations in relation to rational use of the radiofrequency spectrum (Article 33) and operating stations in a manner so as to not cause harmful interference (Article 35).

There are also ITU regional agreements to which Australia is a party which require member countries to adopt certain characteristics for their services operating in the MF-AM band.

General Agreement on Trade in Services

The ABA has contributed to public consideration of international trade negotiation issues that relate to Australian content regulation. The ABA's 1998 submission to the Joint Standing Committee on Treaties on the Multilateral Agreement on Investment (MAI) is available on request. The ABA is also preparing a submission to the Department of Foreign Affairs and Trade on next year's scheduled World Trade Organisation GATS negotiations.

The Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials (the Florence Agreement)

The matters covered by the Parts of this treaty which the Australian Government declared it would not be bound pursuant to paragraph 16(a) of that treaty (and in particular, the items listed in Annexes C.1) are items used in the course of production of films and television programs. However, they reflect only a very small part of the total cost of

production of a program. The ABA is not aware of what import tariffs, if any, apply to the importation of any of these items.

Closer Economic Relations Trade Agreement

Section 160(d) of the BSA requires the ABA to fulfil its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country

On 28 April 1998, the High Court of Australia found that the previous Australian Content Standard was unlawfully made because it was inconsistent with Australia's obligations under the Trade in Services Protocol (the Protocol) to the Australia New Zealand Closer Economic Relations Trade Agreement (CER).

Section 122 of the BSA requires the ABA to determine a standard relating to the Australian content of programs. The High Court ruled that s.160 is the dominant provision that directs how the ABA's functions must be exercised, including the determination of the standard under s.122.

The ABA reviewed the standard to remedy the inconsistency and to make it comply with the BSA. The objective of the review was to develop a standard relating to the Australian content of programs that would meet Australia's international treaty obligations concerning New Zealand and, as far as possible, promote the role of television in developing and reflecting a sense of Australian identity, character and cultural diversity. The review also provided an opportunity to clarify some elements of the existing standard.

In developing the new standard, the ABA consulted widely with industry and government representatives from Australia and New Zealand.

The *Broadcasting Services (Australian Content) Standard 1999* allows quota obligations under the standard to be fulfilled by the extent to which New Zealand programs, Australia/New Zealand programs and Australian official co-productions are broadcast by a commercial television licensee.

The difficulty between consistency with the CER and promotion of the role of broadcasting in developing and reflecting a sense of Australian identity, character and cultural diversity illustrates the impact that trade agreements can have on the cultural and public interest objectives for broadcasting.

The Government has recently indicated that it intends to pursue an amendment to the BSA which restricts the operation of s.160(d) to the CER protocol with New Zealand and no other international agreements.⁸ In the life of the ABA, no other international

⁸ See 'Australian content on Australian television', Media Release, Senator the Hon. Richard Alston, Minister for Communications, Information Technology and the Arts, 19 March 1999

agreements (other than the ITU agreements referred to elsewhere) have been considered by the ABA to have any direct relevance to the carrying out of its functions.

Attachment 1

**Planning and Allocation of Licences on Broadcasting Services Bands
Radio - AM/FM, Television - UHF/VHF
[5 October 1992 to 1 May 1999]**

Category of service	Relevant section of BSA*	No. of new licences planned	No. of licences operatng	No. of licences not on air	No. of licences ceased operatng	Duration of licence	PBA or Merit Allocat.	Applic. Fee	Applic. Package	B'cast Licence	Licence Fee	Transmitter Licence	Apparat. Fee
National broadcasting • Radio • TV	N/A, as the ABA plans for national b'casters' use of t'mitters and not for the number of such services												→
Commercial broadcasting • Radio • TV	s.36 s.39 s.36 s.38A	21 53 3 1	5 47 3 1	13 6 Nil Nil	Nil Nil Nil, but some amalg.	5 yrs 5 yrs 5 yrs 5 yrs	PBA PBA PBA PBA	\$1,000 Nil \$10,000 Nil	\$50 Nil \$50 Nil	Yes, ABA Yes, ABA	Yes, ABA Yes, ABA	Yes, ABA/ACA Yes, ABA/ACA	Yes, \$20/yr to max of 5 yrs Yes, ? Yes, ?

* Under the previous Act, 167 commercial radio and 44 commercial television broadcasting licences were allocated. Of these, 152 radio and all 44 television licences were in operation when the BSA came into effect in October 1992. Similarly, 128 community radio licences were allocated under the previous Act, and of these, 109 were in operation in October 1992. No community television licences were allocated under the previous Act.

Category of service	Relevant section of BSA	No. of new licences planned	No. of licences operatng	No. of licences not on air	No. of licences ceased operatng	Duration of licence	PBA or Merit Allocat.	Applic. Fee	Applic. Package	B'cast Licence	Licence Fee	Transmitter Licence	Apparat. Fee
Community broadcasting	Part 6A: TCBLs– s.34 drophru	TCBLs not planned				1 yr max.	Upon applic.	Nil	Nil	Yes, ABA	No	Yes, ABA/ACA	Yes, ?
• Radio	Part 6	102	20++	12	1	5 yrs	Merit	Nil	Nil	Yes, ABA	No	Yes, ABA/ACA	Yes, ?
• TV	Part 6	Nil	Nil++	Nil	Nil	5 yrs	Merit	Nil	Nil		No		Yes, ?
Open narrowcast	s.117 class licence s.106 of Radcom Act (s.34 drophru)												
• Radio		208	Don't know	Don't know	Don't know	5 yrs	PBA	\$500	\$40	No	No	Yes, ABA/ACA	Yes. AM \$13.54/yr FM \$95.45/yr
• TV		2	Don't know	Don't know	Don't know	5 yrs	PBA	\$900	\$40	No	No	Yes, ABA/ACA	Yes, ?
	CTV trial		5	3	Nil	Till 31 Dec. 2000	Merit	Nil	Nil	No	No	Yes, ABA/ACA	Yes, ?
Subscription broadcasting	N/A, no pay services												
• Radio+													
• TV													
Subscription narrowcast	N/A, no pay services												
• Radio+													
• TV													

+ There are subscription radio services using broadcasting services band spectrum, but the ABA does not have any information on them.

++ This does not take into account the 80 BRACS radio and 80 BRACS television services under the previous Act that were carried over to the BSA as community broadcasting services.

**Allocation of Licences on Non Broadcasting Services Bands
Offband AM/FM, Cable, Satellite, Internet
[5 October 1992 to 1 May 1999]**

Category of service	Relevant section of BSA	No. of licences made available	No. of licences operatng	No. of licences not on air	No. of licences ceased operatng	Duration of licence	PBA or Merit Allocat.	Applic. Fee	Applic. Package	B'cast Licence	Licence Fee	Transmitter Licence	Appara. Fee
National broadcasting • Radio • TV	N/A	—————→											
Commercial broadcasting • Radio • TV	s.40	6 Nil	Nil Nil	6 Nil	Nil Nil	5 yrs 5 yrs	Upon applic.	\$2,400 \$2,400	Nil Nil	Yes, ABA	Yes, ABA	Yes, ACA, Telstra, Optus, Pan- Amsat, Internet	Yes, ?
Community broadcasting • Radio • TV	s.82	Nil Nil	Nil Nil	Nil Nil	Nil Nil	5 yrs 5 yrs	Upon applic.	Not yet deter- mined	Nil Nil	Yes, ABA	No No	Yes, ACA, Telstra, Optus, Pan- Amsat, Internet	Yes, ?

Category of service	Relevant section of BSA	No. of licences made available	No. of licences operatng	No. of licences not on air	No. of licences ceased operatng	Duration of licence	PBA or Merit Allocat.	Applic. Fee	Applic. Package	B'cast Licence	Licence Fee	Transmitter Licence	Appara. Fee
Open narrowcast • Radio • TV	s.117 class licence	Unlimited Unlimited	Don't know	Don't know	Don't know	N/A N/A	N/A N/A	N/A N/A	N/A N/A	No No	No No	Yes, ACA, Telstra, Optus, Pan-Amsat, Internet	Yes, ?
Subscription broadcasting • Radio • TV	s.117 class licence s.93 s.96	Unlimited 3 1,676	Don't know ? Don't know	Don't know ? Don't know	Don't know ? Don't know	N/A N/A	N/A PBA Upon applic.	N/A ? \$1,600	N/A ? Nil	No Yes Yes, ABA	No No No	Yes, ACA etc. Yes Yes, ACA, Telstra, Optus, Pan-Amsat, Internet	Yes, ? Yes, ? Yes, ?
Subscription narrowcast • Radio • TV	s.117 class licence	Unlimited Unlimited	Don't know	Don't know	Don't know	Don't know	N/A N/A	N/A N/A	N/A N/A	No No	No No	Yes, ACA, Telstra, Optus, Pan-Amsat, Internet	Yes, ?

Summary of licensing and ownership and control requirements for different media

The BSA identifies six generic categories of broadcasting services: national broadcasting, commercial broadcasting, community broadcasting, subscription broadcasting, subscription narrowcasting, and open narrowcasting. These categories are not tied to technological means of delivery; they focus on the nature of the service provided (see Fig. 1 below).

Licence categories are defined on the basis of whether services are targeted at mass audiences or are of more limited appeal, and whether they are distributed free or require a fee or subscription. Commercial television services which are provided free-to-air and aimed at a general audience are deemed to have a high level of influence. Accordingly, they are licensed individually and have to comply with heavier regulatory requirements. By contrast, a subscription radio narrowcasting service, such as a fee-based business information service, is deemed to have limited power to influence and can operate under a class licence with minimum regulatory conditions.

Fig. 1 Licensing and ownership and control requirements for different media

	Individual licences issued	Limit on no. of licences issued	Foreign ownership limitations	Additional foreign control limitations	Cross-media ownership limitations	Other ownership limitations	Mandatory Standards	Licence Fees
Commercial TV (Free-to-air)	Yes	Yes* Limit of 3 per market until 2008	Yes 15% single 20% total	Yes (FATA)	Yes Radio 15% Press 15%	Yes 75% popn. and only one per licence area	Australian Content Std. Australian Content in Advertising Std. Children's Television Stds.	Yes
Commercial radio (Free-to-air)	Yes	No*	No	No	Yes TV 15% Press 15%	Two per licence area		Yes
Subscription TV broadcasting	Yes For each service	No	Yes 20% single 35% total	No	No	No**		
Open narrowcast TV (Free-to-air)	No	No*	No	No	No	No		
Open narrowcast and subscription broadcast radio	No	No*	No	No	No	No		
Satellite, cable, MDS narrowcast pay TV	No	No	No	No	No	No		

* The ABA is undertaking a planning process which will report on the availability and use of AM/FM/UHF/VHF capacity. The Broadcasting Services Act sets out the criteria the ABA is to take into account when making planning decisions.

** The ACCC must report to the ABA on competition issues before the ABA allocates a subscription television broadcasting licence.

A Comparison of Key Provisions in Television Codes of Practice

Table 1 Classification

	Application of the OFLC system	OFLC classified material may be modified	Time zones	Display of symbols	Consumer advice for M and MA programs/films	Warnings before certain programs	Programs may be broadcast outside classification zone, if clear indication given
Commercial	√	√	√	√	√	√	√
ABC	√	√	√	√	√	√	√
SBS	√		√	√	√		√
Open Narrowcasting	√		√ M and MA only	√	√		

Table 2 News and Current Affairs

	Accurate	Fair	Impartial	Balanced	Avoid public panic	Re-enactments identified	Simulate (mislead alarm)	Distinguish fact from comment	Regard to composition of audience
Commercial	√	√	√ news only		√		√	√	√
ABC	√		√	√		√			√
SBS	√	√		√					√
Open Narrowcasting	√	√					√	√	√ applies to all programming

	Distressing material to be flagged	Privacy	Sensitivity	Avoid negative portrayal	Corrections	Non-disclosure of journalists' sources	Reference to MEAA code	Reporting of suicide
Commercial	√	√	√	√	√			√
ABC		√	√	√	√	√		√
SBS	√	√	√				√	
Open Narrowcasting								

Table 3 Complaints Handling

	Written complaints only	Complainant does not need to specify code	Provision of on-air information	Advising phone complainants of the formal process
Commercial	√	√	√	√
ABC	√	√		√
SBS	√	√		
Open Narrowcasting	√		√	√

	Complaint period	Timeframe for station's response	Reference to the ABA	Other adjudicating bodies	Reporting of complaints data	Potential/actual legal proceedings
Commercial	√ 30 days from the date of broadcast	√ within 30 working days ie. 6 weeks	√	√	√ quarterly reports	
ABC		√ 6 weeks for the ICRP, otherwise 60 days		√ Indep. Complaints Review Panel for allegations of bias, lack of balance		√
SBS		√ 60 days, however, there is an undertaking to respond within 6 wks				
Open Narrowcasting		√ 60 days	√		√ to ABA on request	