

**Submission to the Productivity Commission
Inquiry into Broadcasting Legislation**

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Introduction:**Addressing 2.2, The Public Interest and Objectives of Broadcasting Policy.**

The aim of this submission is simply to draw to the Commission's attention the insights of some relevant, mainly sociological, academic scholarship. This scholarship mainly takes the form of critical argument with some empirical support. Its relevance to this Review is that it seeks to aid clarification of some of the key terminology in use in this field. The submission also points to some international policy practice which becomes more relevant once these terminological clarifications are established.

The submission is designed to address Term of Reference 4. However, it does not attempt to address all the issues raised in the discussion paper. It focusses primarily on the implicit but poorly articulated policy goal of an informed citizenry.

Due to illness, this is a late submission. However, this delay has enabled me to take the opportunity of reviewing some previous submissions and the public hearing transcripts material. The submission accordingly makes considerable reference to these.

I thus take it as a given, for example, that PJ Keating's critique of the use of technologically determinist arguments in the public debate surrounding this Inquiry is correct. By technological determinism is meant a form of argument which asserts that mere technological innovation (here, the Internet) might resolve a public interest objective (here, informed citizenship). There is a large sociological literature which supports Keating's critique of such forms of argument (eg Lacroix and Tremblay, 1997).

Accordingly, this submission assumes that free-to-air broadcasting, especially television, will continue to constitute (with newspapers) the chief infrastructure of the public sphere of debate. It is thus more specifically focussed on such issues as those raised (but not resolved) in the ABA's and MEAA's submissions concerning the relationship between modes of broadcast regulation, journalistic practices and informed citizenship.

(i) The problem: diversity and plurality to what end?

The Broadcasting Services Act's objectives are, at best, vague and inadequately articulated. In his submission to this Inquiry and his supporting research Terry Flew rightly points to the ambiguities in the category of 'diversity'. He thus provides a very useful set of correlations between its multiple meanings and possible policy options (Flew, 5).

This submission confines itself to what Flew categorizes as the 'public communication' objectives of 'information' (objective a) and 'diversity in control' (objective c). The Issues Paper manages to derive questions from these which invoke the more plausible objectives of 'plurality of opinion and preventing concentration of political power in the hands of a few' and 'diversity in news, current affairs and political commentary' (p.13).

But even these clarifications and elaborations beg the question of the larger goal(s) of such objectives. Their negative character is their most striking feature. They speak to the longstanding negative norm of Australian broadcasting policy: influence or, more accurately, fear of influence by 'politically minded press owners' (Chalaby, 1997; cf Cunningham, 1997). Nor are the objectives particularly assertive. Even the 'fair and accurate coverage' objective (g) is heavily hedged by the phrase, '... to be responsive to the need for'. Unlike many other nations, Australia has little experience of positive regulatory norms in this area¹. Even Flew's very helpful recommended benchmarks tend to present complaints-handling as the appropriate benchmark for news and current affairs (Flew, 1999, 7). Significantly, the much-cited 1981 Victorian Norris Inquiry into Press Ownership, for example, drew its normative goals directly from the 1977 British Royal Commission into the Press (Norris, 1981, 78).

¹ It should be stressed that the ABA submission's superficially impressive table of codes of practice in News and Current Affairs (ABA, 39) refers not to regulatory *standards* but to the much weaker co-regulatory and self-regulatory *codes*. It must also be said that these codes hardly inspire confidence. Commercial current affairs' regular flouting of the issue of the listed code of 'privacy', for example, has been well documented by *Media Watch*. The codes' other evident feature is the greater number of such commitments made by the public broadcasters.

PJ Keating's contextualisation of his submission to this Inquiry within the overall goal of a democracy of informed citizens is compatible with the goals articulated by such inquiries (Keating, 1997). It thus frames both the 'fair and accurate coverage' and 'plurality of views' objectives of the BSA but, as we shall see, these objectives do not coincide.

For the moment, however, we have a sufficient benchmark in 'informed citizenship' from which to provisionally test the adequacy of the current regulatory regime.

(ii) Australia's lack of informed citizenship and commercial broadcast journalism: some suggestive empirical evidence

The Report of the Civics Expert Group, published in November 1994, provided a good guide to the state of 'informed citizenship' in Australia (Macintyre, 1994). By reversing the usual opinion-attributing format of most opinion polls, the ANOP poll conducted for the Report found little else but extraordinarily high levels of public ignorance of Australian democratic institutions and practices. The finishing touch of this study was the establishment of the chief sources of information for those surveyed. Not only is 'the media' the most generally relied upon source of public information, including 'what it means to be a citizen' (Macintyre, 1994, 159), it is also the case that 'reliance on television for news and information is highest amongst the least well informed population groups' (Macintyre, 1994, 137).

Some similar empirical data has begun to emerge from the survey-based research of my colleague at UNSW Sociology, Professor Michael Pusey. He and his researchers in his Middle Australia Project have found suggestive evidence that the level of influence of talkback radio on opinions on social and political matters is significantly greater for those definable as working class. There is statistical evidence that respondents reporting *high levels of talkback radio influence* also report strong tendencies towards *very conformist social attitudes*.

As they were designed towards other primary foci, neither of these studies sufficiently

distinguishes between different media or between commercial and public broadcasting. It does seem reasonable to assume that the Civics Expert Group's results regarding television would primarily refer to the more popular commercial news programmes. Talkback radio, as the current John Laws scandal makes evident, does not even attempt to observe journalistic norms concerning the cultivation of informed citizenship (cf section [iv])².

It is plausible to propose then, that there is an inverse relation between informed opinion amongst the Australian citizenry and the Australian commercial media's incapacity, especially in the form of television news, to realize the goal of informed citizenship.

Professor Graeme Turner's 1996 comparative study of ABC and Channel Nine news and current affairs output in Brisbane provides evidence for this proposition's emphasis on commercial broadcast journalism. Turner's criteria of 'comprehensiveness', 'impartiality' and 'balance' were compatible with those employed by the 1996 Mansfield Inquiry into the ABC. His conclusions were dramatic:

Overall, the results establish that the ABC provides the most comprehensive service for radio news and current affairs, the most independent service for radio and television news and current affairs, and the most impartial and balanced service across all programming surveyed. In some cases the differentials were so dramatic as to indicate that, without the presence of the ABC, there would be no provision of a socially responsible, comprehensive news and current affairs service to the Australian community. (Turner, 1996, 129)

Consistent with Turner's conclusion, Mansfield commented on the curious imbalance existent in Australian broadcasting policy which effectively requires this public

² Cf Professor Graeme Turner's similar reasons for excluding talkback entirely from his study (discussed next); Transcripts, Brisbane 20/5/99, pp 58-59. Note also that the prescient (!) discussion of John Laws between Mr Simson and Terry Flew could not capture this informing/non-informing distinction because it remained trapped within the negative concept of 'influence'; Transcripts, Brisbane, 20/5/99, p 55.

broadcaster, unlike parallel organizations in the UK and Canada, to carry the ‘unrealistic and unfair burden’ of bearing such a bulk of ‘public interest’ responsibilities (Mansfield, 1997, 20-21).

Indeed, Mansfield’s recommendation that the ABC outsource drama production rested on his view that ‘the ABC’s reputation for innovative and challenging drama has now been matched by the independent sector’ (Mansfield, 1997, 36). The likelihood that a similar qualitative claim could be made by the commercial networks’ in-house journalistic producers, especially in current affairs, is presently comical. Indeed, Mansfield acknowledges as much (1997, 21-23).

In short, if the goal of informed citizenship is to be taken as a ‘universal’ one, ie as one which includes all Australian citizens (and not just those who make use of the ABC), then more effective means need to be found to improve the quality of the commercial provision of news and current affairs.

The ABA’s statement to this Inquiry of the co-regulatory obligations of commercial broadcasters in the area of news and current affairs does seem rather empty in this context (ABA, 1999)³. This issue will be discussed further in the next section.

³ Cf fn 1.

(iii) The ABA's Statement to this Inquiry: some qualifications and corrections regarding possible modes of content regulation of broadcast journalism.

The ABA's statement to this Inquiry directly addresses the central dilemma in the cross-media rules, ie (consistent with Flew's distinctions) that diversity of ownership does not guarantee diversity of opinion:

The rules regulate for diversity of ownership as a proxy for diversity of views. A diversity of ownership does not ensure a diversity of views; it merely provides an opportunity for diversity of views. A reduction in the number of owners will also result in the reduction in the number of organizational 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 organizational culture.

It would be difficult for the Government to regulate directly for diversity of views without compromising the principles of independent and uncensored news media. (ABA, 16)

This is a matter which is often difficult to articulate with appropriate precision. The ABA here correctly argues in the first paragraph, as I do, that the cross-media rules are *a necessary but not sufficient* means of guaranteeing diversity of opinion. We need to go further than this, however. For *diversity of opinion is itself a necessary but not sufficient means of ensuring informed citizenship*. I will discuss this in the next section.

But having acknowledged that diversity of ownership is an insufficient precondition of diversity of opinion, the ABA statement also asserts that 'pro-active' regulation for such goals '...would be difficult ... without compromising the principles of independent and uncensored news media'. In the immediately following passage the ABA statement further implies that comparable nations such as Britain have tried and failed to implement such content regulation. *If this is the ABA's intended implication, it is a surprisingly parochial and seriously misinformed one*. The implicit appeal to

freedom of speech is a furphy⁴. As the currently unfolding John Laws talkback scandal has since forced the ABA Chair to publicly concede, there are cases where its co-regulatory codes might be usefully replaced by compulsory *standards* in the case of ‘journalistic’ content.

This has long been the British (and, to some extent, European) regulatory norm ie that compulsory codes of practice - in the Australian sense of ‘standard’ - apply to broadcast journalism. These are usually referred to as ‘impartiality codes’ but also make specific reference to accuracy (cf ITC 1997)⁵. The British regulator of commercial television (the latter being generically known as ITV), the Independent Television Commission (ITC), has considerably greater powers of monitoring and even pre-approval of schedules than those ever enjoyed by its Australian counterparts. However, it has never been demonstrated that this degree of content regulation amounts to censorship in any form. Rather, *it is due in part to such regulatory means that British commercial television journalism enjoys the reputation of being on par with the BBC*. As we saw, it was this qualitative correlation that Turner and Mansfield found to be absent here.

A good example of the ITC’s role in hegemonising ‘public service values’ in commercial television journalism is provided in Appendix (b). This ITC press release relates to the highly controversial issue of rescheduling the 30-year old ‘News At Ten’ late last year. The relationship between scheduling of news by commercial channels and ratings has already arisen as an issue at this Inquiry. Accordingly, the widely canvassed danger in the British case was that rescheduling the main news might be the precursor to subordinating the quality of the news to the capturing of an early evening audience. The ITC had the power to refuse the application to reschedule the program (as it did in 1993) but instead approved and imposed conditions such as:

‘- there will be no diminution in the funding, or in the range and quality of national and international news...

⁴ Cf section vii of this submission.

⁵ These codes can also be found at the ITC website along with an excellent account of the Commission’s functions: www.itc.org.uk

- the ITC expects ITV's commitment to public service values to be undiminished and for the more diverse range of programmes proposed from 9-11pm to be delivered.' (Appendix [b])

Such conditions will be directly monitored by the ITC. The ITC thus provides a fine model of how direct content regulation can assure the maintenance of public interest objectives.

Recommendation 1: that any future body which administers the public interest objectives of the BSA should be invested with day-to-day approval and monitoring powers comparable to those of Britain's Independent Television Commission. These should include positive standards of journalistic practice modelled on the ITC's impartiality codes.

However, there are also structural regulatory options that we might derive from the British case. It is thus worth examining such 'lessons from Britain' but first it is useful to explore further some specific features of broadcast journalism.

(iv) Broadcast Journalism, Commercial Pressures and 'Hotelling's Effect'

The two chief deleterious determinants of the quality of commercially produced broadcast journalism discussed so far in the Commission's deliberations would appear to be the 'downmarket' convergent standardization produced by Hotelling's effect⁶ and the contamination of journalistic norms by cross-promotional activities of licensee organizations⁷.

The brief discussions of Hotelling's effect in the hearings and submission appear not to have drawn on this 'media-specific' definition provided in the recently influential text by Collins and Murrone, **New Media, New Policies**:

⁶ Cf the discussion with Terry Flew, Transcripts, Brisbane, 20/5/99, pp 47-48.

⁷ Discussion with MEAA, Transcripts, Melbourne, 10/6/99, p.52.

... many doubt that competitive media markets, even those with more than one firm supplying relevant products and services, do deliver diverse, quality media products. They characteristically point to broadcast television in the USA where there is significant convergence of programming content. ... Economic theory names this phenomenon 'Hotelling's effect'.

Hotelling's effect applies under special circumstances, namely where there is non-price competition (eg between advertising funded television channels). Economically rational competitors will then crowd in the middle of the spectrum of consumer tastes rather than provide a diverse range of products. Assuming consumer tastes can be arranged in a continuum, it can be argued that two firms that did not compete on price would do best by positioning their products 'where the demand is', in the middle of the continuum. New entrants would face the same incentives, resulting in an undue tendency for competitors to imitate each other. *Advertising funded, profit maximizing television is a case in point.*

(Collins and Murrone, 1996, 62-63; emphases added)

To this definition could also be added the tendency to presume that the easiest means of estimating 'where the demand is' in consumer taste is by eliminating the possibility that 'quality' programming has any chance of broad popularity and thus constitutes a higher 'economically rational' risk.

Ironically, however, Hotelling's effect also brings into question whether the goal of a 'diversity of news' has any meaning in a broadcast programming sense. While a diversity of news *sources* overall is a worthy goal, there has been a tendency to confuse 'diversity of news' with 'diversity of opinion'. This is because the category of 'diversity of opinion' (usually attributed to J.S. Mill) historically predated the consolidation of the journalistic cultural forms which 'mediate' opinion. Such mediations include the now familiar distinction made between opinion and 'facts' (news) (Smith, 1978a & 1978b). Further, journalists operating within different 'media' in turn render opinion and news within different cultural forms. This distinctiveness is a particularly strong tendency in television journalism. The following table summarizes these distinctions.

	<i>ethical goals (in print and TV)</i>	print cultural forms	televisual cultural forms
news	- 'objectivity' 'neutrality' 'accuracy' - 'balance' '4th estate'/ watchdog investigation	- news pages - features	- news bulletins - investigative current affairs
opinion	-diversity of opinion - 'balance' '4th estate'/ watchdog investigation	- editorials - letters to ed. op-ed: - 'expert' opinion pieces -columnists	nil -current affairs interviews and investigative stories

A Typology of (Professional) Journalistic Cultural Forms⁸

Three sets of 'values' are in conflict here. The first set consists of those ethical goals listed above associated with 'news'. These need not conflict with the 'marketing values' which would follow from Hotelling's effect. If the consistent application of these values were all that generated news, all news programmes would look largely identical because they sought the same 'truth'. There is no consistent economic incentive to actually fabricate false stories⁹. However, a third set of values (not listed above), *news values*, becomes crucial here. These are the *criteria of newsworthiness* by which stories are selected to be reported at all and then hierarchized within the news programme. They have long been recognized by sociologists (eg Schudson,

⁸ Radio has been excluded because of the relative decline in journalistic forms – especially news – within Australian commercial radio. Talkback clearly could be placed within this model except that, as the John Laws affair makes only too evident, that cultural form appears to have few, if any, journalistic professional norms. (However the ITC/IBA impartiality codes could well be of use here now.)

⁹ Although *Media Watch* has found this tendency in such matters as enhancement of visual effects in commercial television news and actual story fabrication in commercial current affairs.

1996) but often are only reluctantly conceded to exist by commercial practitioners of broadcast journalism. As Professor Turner argued at the hearings, the tendency here is for commercial television news to hierarchicize particular kinds of stories - especially crime-based - deemed more attractive to reach 'where the demand is' over others¹⁰. But this demand is much less 'the public demand to know' than the networks' pursuit of an audience for subsequent programmes in the evening schedule.

Perhaps what is unique in this case is that Hotelling's effect thus chiefly manifests as a distortion of news values from the ideal 'public service' ones which address audiences as informable citizens into those which address audiences as audiences awaiting entertainment. When we speak of 'diversity of news' in a programming sense we are thus referring to a diversity of news values. It is possible to generate a diversity of news values where each set meets such professional norms as the objective reportage of facts and the ideal of informed citizenship. The ABC and SBS provide two distinctly diverse alternatives nightly. Locale-based news services might provide another, and so on.

However, more than any others, it is the directly competing prime-time commercial services which produce a remarkable sameness to the point of triplication¹¹. This sameness is the sameness of 'Hotellingised news values' rather than a tangible commodity like the ice creams in the classic illustration Hotelling's effect in the ice cream sellers on a beach. Accordingly, there would appear to be little evidence that a fourth commercial news service in each city would change this situation. The Fox network in the USA appears to have had no such effect on the news values of NBC, CBS and ABC. Rather, those in the US seeking to be primarily addressed as informable citizens still need to turn to the PBS system.

In broad terms, the same argument can be applied to current affairs. What could be

¹⁰ Transcripts, Brisbane, 205/99, pp 59-60.

¹¹ Some informal evidence for this claim: over the last ten years I have routinely required my students to conduct an (effectively annual) comparative story listing of all television news services on one night. While some minimal disparity occurs between the commercial networks in story positioning, the 'pool' of stories is almost identical.

added in that case is the fact that the cost of ‘serious’ investigative journalism is a further disincentive for commercial broadcast journalism. Only Nine’s *Sunday* program could be said to practise it.

Let us now turn to the structural features of the British regulatory system which attempt to redress these tendencies.

(v) The British ‘Duopoly’ Model and its Implications for Structural Regulation of Broadcast Journalism

The British system of regulation of commercial media, especially television, remains seriously misunderstood in Australia. There is a misperception that the Australian ‘dual system’ of public and commercial system is somehow unique or was later emulated elsewhere (eg Armstrong et al, 1995, 161) ie that we have ‘the best of both worlds’ because we have integrated the ‘British’ BBC model with the ‘American’ commercial model.

Professor Flint’s comments in the public hearings, for example, reproduce this misconception by projecting an account from the early history of Australian and British radio which neglects the subsequent history of the regulation of British *commercial* broadcasting, especially television.¹² It is the latter that is of most relevance to this Inquiry.

Similarly, Tom Burton of the MEAA asserted at one point in the hearings the following:

Mr Burton: It would be fantastic if this commission came up with a better way of looking at this whole public interest issue of concentration diversity. Worldwide people have been struggling with this core concept, which is right in front of me here, the one we’re discussing. To date, particularly in the Anglo-Saxon world, they’ve all fallen back to exactly the same position that Australia has got. Paul Keating likes to suggest he invented the cross-media rules.

¹² Transcripts, Sydney, 28/5/99, p.5.

Well, they exist in the US, they exist in the UK, they're broadly similar in all those markets, because eventually public policy-makers have just found it very difficult to find a different way of dealing with it.¹³

While it is true that cross-media rules are an international phenomenon, the British case is one which has developed far more sophisticated means of addressing 'this core concept' than indicated by Burton. Indeed the British system aims to address the more precise formulation of 'this core concept' found in the MEAA submission in a discussion which tends to restrict itself to newspapers:

The challenge of editorial democracy is how to separate the power of a proprietor from the editorial process, that is the preparation of news and comment for publication, broadcast and other form of distribution. (MEAA, 10)

The narrowly 'Australian' presumption shared by both Flint and Burton is that in such discussions 'proprietor' (of the news producing organization) must necessarily coincide with 'licensee' (the owner of the 'channel'). British commercial television was regulated so that licensee companies were separated from the ownership of a shared channel. Moreover, the journalistic programme company, Independent Television News (ITN), has enjoyed a near monopoly of provision to British free-to-air commercial television (even until the present). The other broadcasting companies held regional advertising monopolies and shared the first commercial channel (see below). Hotelling's effect was thus largely eliminated. *Commercial broadcast journalism was thus structurally encouraged to compete qualitatively with the BBC news.*

Even Professor Withers' direct comments about econometric studies of the reduction of Hotelling's effect in broadcasting failed to mention the glaringly concrete example of the British regulatory system!¹⁴ Given this underprovision of such information to this Inquiry, some further background is thus warranted. Briefly, the BBC's monopoly in television ended in 1955 with the establishment of the 'second channel', the

¹³ Transcripts, Melbourne, 10/6/99, p.65.

commercial ITV. The watershed decision in regulation, however, is usually attributed to the Pilkington Inquiry of 1960-1962 which rejected calls for a second commercial channel and instead established BBC-2. Its rationale included an explicit rejection of the risks of Hotelling's effect (cf Jones, 1994). ITV subsequently became known as 'Channel 3'¹⁵.

The resulting system was referred to as 'the duopoly'. It has long held the reputation as the 'least worst broadcasting system in the world'. The major reasons for the duopoly's successful design (and some subsequent history) have recently been neatly summarized (but at some length) by Peter Humphreys:

In order to provide further protection for the public-service nature of the duopoly, the financial bases of the ITV/ILR and BBC were kept strictly separate. The BBC continued to be funded from their licence fee while the commercial ITV companies financed their operations and made their profits from limited spot-advertising, which was carefully regulated by the IBA¹⁶ to conform to strict codes of conduct. Although there certainly was competition for audiences (the ratings battle), the deliberate avoidance of structures of direct competition for the same source of revenue between the BBC and the ITV sector limited the incentives for broadcasters to subordinate standards of public service to commercial demands. The same principle was also operative, albeit in a different guise, within the ITV sector itself. *Direct commercial competition between the ITV companies, and the corresponding negative effect that this would have had on programming standards, was precluded by the fact that each ITV company held a franchise giving it a regional monopoly* (until the 1980s there was no competition from cable or satellite). When the system was expanded by the addition of the 'minorities channel' Channel 4 in 1982, care was taken to prevent this development from entailing commercial competition. To this end, ownership of Channel 4 was conferred wholly upon the IBA. Moreover, Channel 4 was financed not by competitive advertising but by an annual subscription set by the IBA and paid by the ITV companies, who sold the advertising for the channel. Moreover the ITV companies also sold their own advertising on Channel 4 and retained the profits therefrom. As a result of these carefully crafted

¹⁴ Transcripts, Melbourne 7/6/99, p. 30.

¹⁵ The famous Channel Four was added in 1982 and Channel 5 in 1997.

¹⁶ Independent Broadcasting Authority. From 1991 its functions were divided between the ITC and The Radio Authority.

structures, the duopoly functioned in a uniquely symbiotic fashion; its various channels competed to produce quality programmes as well as simply for audiences. *As much as was possible in any system, standards were protected from open market competition; the duopoly was most decidedly not a 'free' market. The British case demonstrated how public-service regulation and in particular protection from commercial competition - the absence of competition for the same source of revenue - were more important than public monopoly ownership of the broadcasting services.* (Humphreys, 1996, 129-130; emphases added)

To this extremely sophisticated system of cross-subsidization must be added a very high level of programme monitoring by the (highly staffed) regulatory body consistent with the content regulations already described. Where the regional monopoly system had to be reconciled with high population concentration - i.e. London - temporal monopolies were added. Thus the broadcasting week in the London market was divided between two companies, one of which was the appropriately named London Weekend Television. While this system has recently come under considerable de-regulatory strain which may well prove intolerable (Sparks, 1995), in 1995 the duopoly still enjoyed the support of 92% of audience viewing-time despite ten years of competition from satellite television (Curran, 1996, 108).

Beyond some semi-informed discussion of 'the channel four model', Australian interest in this regulatory system has been limited. An early advocate was Julie James Bailey (cf Bailey 1983) who recognized that the key feature of the British system was the abolition of direct convergent competition. As part of her case to improve the quality of Australian television drama production in her submission to the 1976 Green Inquiry, she proposed applying the 'Channel 3' model of temporal monopolies here by providing each existing 'channel' within one temporal 'third' of the broadcasting week on a shared channel.

No attempt appears to have been made, however, to derive any lessons for Australian broadcast journalism. This is curious as the British system *structurally embedded* an equivalent of the former convention of 'quarantining' of broadcast journalism from commercial ratings norms in US broadcast networks (as described to this Inquiry by

Professor Graeme Turner¹⁷).

(vi) Chief Recommendation (Recommendation 2): A Case for Progressively ‘Outsourcing’ Free-to-air Commercial Television Journalism

It should be stressed that the lessons emerging from the British case do not require a duopoly be established. Rather, this case provides an example of how to release the commercial news services from the reduction in quality that would seem to necessarily follow from their use as vehicles of ratings pursuit within direct convergent competition.

Nor need it follow by implication that the ITN model of near monopoly provision should be emulated.

However, there seems little inherent reason for the Australian presumption that commercial broadcast journalism should necessarily be organized as ‘in-house’ production. This, more than anything else, contributes to the impression that licensee ‘moguls’ do have ‘influence’. Professor Turner’s reference to the ‘untrammelled access media owners enjoy when they wish to put their case to the public’ (Turner, 1999) – and, it could be added, often on their ‘own’ current affairs programmes - is relevant here.

More importantly ‘in house’ journalistic programme production leaves such programmes more directly vulnerable to Hotelling’s effect and other competitive distortion of news values. It increases the likelihood of their being treated, in Alan Bond’s famous phrase, as ‘just another business’.

During the hearings an interesting model was put forward by Professor Snape and Mr Simson for a ‘transferable quota’ for children’s television content. Professor Withers (for the ABC) commented in response that a direct subsidy policy might be more

¹⁷ Transcripts, Brisbane, 20/5/99, p.62.

effective¹⁸. Such a process was initiated for drama in the ALP government's 1994 *Creative Nation* cultural policy statement in the Australian Commercial Television Production Fund. Portions of licence fees provided the revenue. I argued in my submission to the DOCA review that this should be extended to current affairs.

The transferable quota scenario put to the ABC in the hearings could also be seen as a means of addressing the problem I raised above concerning Mansfield's observation about the overburdening of the ABC with public interest responsibilities. However, as I argued, the more appropriate means of meeting the policy objective of informed citizenship is to share the public interest responsibilities more equally across the sectors. Indeed Mansfield notes that some of his recommended procedures for journalistic production and complaints-handling should apply 'in any media organization' (1997, 28).

In the case of the 'public communication' goal of informed citizenship and television news (and possibly current affairs), the appropriate initiative I suggest is that ***commercial television licensees be encouraged to outsource their news production to independent production companies***. In this scenario - which bears some resemblance to the transferable quota option - commercial licensees' obligation to broadcast such programmes would be maintained. While this outsourcing would necessarily require regulation, this structure would be a means of increasing the number of 'players' in the sense of programme producers and so could be seen as structural regulation for increased competition. It would also clearly demarcate the sector subject to this necessary regulation.

Such a separation of journalistic programme production ownership from commercial television network ownership would thus be the most pertinent ***structural*** lesson to derive from the British experience. The ***outsourcing of news and current affairs production from commercial television*** to (completely) independently owned programme providers would be the most transparent means of achieving this. Qualitative ***content*** regulation could be introduced to inform the selection of those

¹⁸ Transcripts, Melbourne 7/6/99, pp 31-33.

programme providers. The imposition upon commercial licensees of ITC-modelled impartiality and privacy programme *standards* would be an appropriate first step. The Australian Broadcasting Authority is the appropriate regulatory authority to undertake this role but would need professional journalistic advice as this would amount to its obtaining a new remit. A more modest strategy may be to encourage those licensees that failed to meet the new standards to contract out all or part of their journalistic production to quality providers. This would leave some commercial networks with in-house journalism.

Such developments would not only be consistent with ‘flexibility’ of regulation of ‘broadcast services’ and ‘disaggregation’ of monoliths, but would have obvious potential advantages for public broadcasters. The ABC and SBS could become quality providers of journalism to the commercial networks which chose to outsource. However, other companies which met the criteria could, of course, also produce such programmes. Equally, complete contracting out may have attractions for commercial licensees as the trade-off would be the complete removal of most current ambiguities attaching to cross-media ownership rules. Commercial licensees who ‘contracted out’ would cease to attract most personalised charges of ‘bias’ and ‘bad character’ as these would be directed at the journalistic production company (provided its independence was genuine).

I suggest that this strategy would at least diminish Hotelling’s effect upon commercial television journalism.

It may seem untimely to advocate the imposition of such changes on commercial free-to-air television during a new, digital, wave of channel expansion. However, one aim of this submission has been to de-emphasise such technical innovations in favour of the more significant social relations of journalistic production. While not unrelated to the former, it is the latter which require greater attention in the formulation of policies which might enhance informed citizenship. The forms of regulation which have worked successfully elsewhere have not been inherently ‘technology specific’ or ‘technology neutral’ per se but rather appropriately-fashioned interventions in production relations

and their economic underpinnings. These entail some means of quarantining editorial and journalistic production.

(vii) The Relevance of the Implied Constitutional Freedom of Political Communication to this Inquiry¹⁹

The submission from the Australian Press Council concludes thus:

8.1 While recognising that it is not within the scope of the Commission's inquiry, the Council observes that rather than relying on the CMR, the Parliament could best give effect to its concern about protecting the role of the press by specially guaranteeing the freedom of speech, and of the press. This would ensure that these freedoms could be protected from interference. It is believed the federal Parliament would have the power to legislate in this way under the external affairs power, as Australia has already entered into international treaty commitments promising to provide such guarantees. Subsequently, a referendum could be put proposing that these freedoms be entrenched in the Constitution.

8.2 Accordingly the Council believes that government policy on the media should be based on these objectives:

- the maintenance and enhancement of freedom of the press and of the media; and
- the promotion of plurality of media outlets, diversity of content and media ownership and competition between them in the media market.

(Australian Press Council, 1999)

I would contest the assumption that this issue is not within the scope of this Inquiry. It was also regrettable that the Press Council pursued the same apologetic tone within the hearings²⁰. Indeed, even the existing implied freedom of political communication is itself quite relevant.

The constitutional issue is of relevance to this Inquiry because freedom of speech provides a major normative basis for many regulatory regimes in broadcasting (Barendt, 1993). I argued in section (i) that the BSA fails to articulate its 'public communication' goals with sufficient clarity. It seems reasonable that the Commission

¹⁹ This section has benefited from my continuing consultations with Professor Michael Chesterman of the UNSW Law Faculty.

²⁰ Transcripts, Melbourne, June 9, pp17-19.

recommend that this unclarity be rectified. Freedom of speech literature and jurisprudence would be a valuable aid to the necessary review process. It is thus not insignificant that at 8.2 in the above extract the Press Council apparently derives its recommended objectives from the free speech ideal. This is a significant improvement on the ambiguities of ‘diversity’.

Further, free speech jurisprudence tends to see the issue of the public interest and broadcast regulation in terms remarkably similar to the articulated need for ‘balancing’ of competing ideals identified by the Commission for this Inquiry. Free speech theorists employ a famous distinction between ‘negative’ *freedoms from* such things as censorship and ‘positive’ *freedoms to* such things as informed citizenship. In *Lange v ABC* (1997) the full Court reiterated Brennan J’s view in *Cunliffe v Commonwealth* (1994) that ‘the implication is negative in nature’ in that it does not ‘confer personal rights on individuals’ (145 ALR at 107). However, the full Court also concluded that the ‘text and structure’ of the constitution nonetheless does presume the positive ideal of informed citizenship and so its relevant sections ‘necessarily protect that freedom of communication’ (145 ALR at 106).

Moreover, in *Lange* the full Court also explicitly laid out ‘the test for determining whether a law infringes the constitutional implication’. This passage is worthy of citation at length:

When a law of a State or federal parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by s 7, s 24, s 64 or s 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively ‘the system of

government prescribed by the Constitution’). If the first question is answered “yes” and second is answered “no”, the law is invalid. In *ACTV*, for example, a majority of this court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.

(145 ALR at 112-113)

This test is also significant because any regulatory changes affecting journalistic media ‘content’ - such as those made in this submission - may well be subjected to legal challenge by licensees which would appeal to the implied freedom. Such challenges (on my understanding) would ultimately be subject to this test.

Thus, as a specific elaboration of Terry Flew’s Principal Recommendation 3 regarding ‘mechanisms for dialogue’ (Flew, 1999, 1), I would further recommend the following:

Recommendation 3:

That the Productivity Commission should advise the Government on how the ‘public communication’ objectives of the BSA could be clarified, aided by expert advice, with specific reference to the ‘negative’ and ‘positive’ aspects of the implied constitutional freedom of political communication.

Appendix (a) Report for Dr Paul Jones from the Middle Australia Project

Preliminary Data on Various Influences on Political and Social Opinion Formation

Background Information

The following research has been conducted as part of the Middle Australia Project, led by Professor Michael Pusey (University of New South Wales). The project has involved surveying 400 adult Australians in 5 capital cities with both an interview and a self-administered questionnaire. The interviewees resided in Commonwealth Census districts with household incomes in the middle 80% of the distribution of incomes. The first stage of this research was conducted in 1996-1997, and the second stage will be completed by the end of 1999. The research aims to establish how middle Australians are adapting, coping, and interpreting the influence of economic change on their lives. This project is ARC funded.

Key findings

1. Respondents indicated on a 5 point scale the level of influence of various media and social institutions on their opinions about political and social matters. Mean levels of influence were calculated for each type of media/social institution. Results were then analysed according to respondent class self-identification, occupational class, and a scale that measures perceptions of individual control over political and economic institutions and systems.

A consistent pattern emerged from this analysis. The mean level of influence of spouse/partner *significantly decreases* for individuals employed in non-managerial/non-professional services or manual work. The mean level of influence of talkback radio *significantly increases* for the same group. There is some statistical evidence for higher than average influence among those working in occupations broadly defined as “working class”.

2. Attitudes measuring social role conformity were then compared with the level of influence of talkback radio. There is statistical evidence that respondents reporting *high levels of talkback radio influence* also report strong tendencies towards *very conformist social attitudes* (questions used available on request). This trend is apparent across the political spectrum, with statistically significant results among ALP voters.

3. Further data and analysis is available on request, including a sociological profile of those influenced by talk-back radio and television. The primary suggestion of this research is that talkback radio may have some influence in promoting very conformist social attitudes (on unemployed, women, social security) among service/working class Australians. Further evidence is required to reinforce this suggestion.

**Mean Level of Influence of Various Media and Social Institutions on Opinions
on Social and Political Matters**

Overall (% of respondents reporting strong/quite strong influence)

Newspapers (36)
 Experts (34)
 Educational Institutions (27)
 Spouse/partner (25)
 Television (21)
 Political leaders (20)
 Close friends (19)
 Talkback radio (15)
 Business leaders (13)
 Other relatives (11)
 Workmates (9)
 Religious Leaders (6)
 Community Leaders (5) \

By occupational class (% of respondents reporting strong/quite strong influence)

Middle/managerial (n = 173)

Working/Service class (n = 135)

Newspapers (39)
 Experts (38)
Spouse/partner (28)
 Educational Institutions (27)
 Political leaders (21)
 Television (19)
 Close friends (17)
 Business leaders (13)
 Workmates (11)
 Other relatives (11)
Talkback radio (11)
 Community Leaders (7)
 Religious Leaders (6)
 Neighbours (1)

Newspapers (33)
 Experts (30)
 Educational Institutions (28)
 Television (23)
 Close friends (22)
Talkback radio (21)
Spouse/partner (21)
 Political leaders (18)
 Business leaders (13)
 Other relatives (11)
 Workmates (6)
 Religious Leaders (6)
 Community Leaders (2)
 Neighbours (2)

Bold = significant differences in mean score on 5 point scale of influence by occupational class.

Prepared by S. Wilson (statistics by T. Fattore) for Professor M. Pusey

Appendix (b): ITC Press Release 105/98, 19 November 1998²¹

ITC GIVES QUALIFIED APPROVAL TO NEW WEEKDAY SCHEDULE on ITV

The Independent Television Commission has approved proposals put forward by ITV for its weekday evening schedule, including a 30 minute early evening news service at 6.30pm, and a further 20 minute service at 11pm. The Commission will review the changes after 12 months.

The ITC has stipulated that approval will be granted on the following conditions:

there will be no diminution in the funding, or in the range and quality of national and international news

ITV will schedule a regular headline service in the nearest break to 10pm on weekday evenings

the ITC expects ITV's commitment to public service values to be undiminished and for the more diverse range of programmes proposed from 9-11pm to be delivered.

ITV will schedule an agreed quantity of thirty-minute slots for high quality regional programmes in or just outside peak time on weekdays throughout the year.

ITC Chairman, Sir Robin Biggam, said: "This was a complex issue which raised significant concerns for the Commission and generated a strong public debate. News at Ten has been a cornerstone of the ITV schedule for more than 30 years and exemplifies the best in news coverage on British television. Viewers express a strong attachment to it, stronger than their propensity to view it regularly.

"But the ITC recognises the competitive challenges ITV face. If the new flexibility which the network will now have is able to arrest its audience decline without damaging its public service commitments, it should have the chance to prove it. The ITC considers it important to ensure that the ITV schedule as a whole delivers a range of diverse, high quality services, and that it should not stand in the way of changes that have the potential to enhance that diversity.

"After considering the available evidence, including the results of a public consultation and specially commissioned research, the ITC believes that ITV should have the opportunity to put their proposals for change to the test."

The ITC will conduct a first review of the effect of the schedule changes after 12 months, to allow for a full assessment of the impact of the new scheduling pattern on viewers. In the event that the ITC judges that any of the conditions outlined above are not being met, ITV will be required to come forward with remedial proposals.

Each ITV company must accept the ITC's conditions, so that formal variations to their

²¹ Downloaded from ITC website.

licences can be agreed. The conditions reflect commitments obtained from ITV as its proposals have been considered. No changes to the existing 5.40pm or 10pm news can go ahead until the licences have been revised.

Diversity

In coming to its decision, the ITC particularly took account of its effect on diversity in the ITV schedule and the likely appeal to viewers of the totality of ITV's proposals. ITV have regularly been criticised by the ITC for their failure to offer as diverse a schedule as envisaged in Channel 3 licences. The proposals made by ITV offer a wide range of choice of programming between the watershed at 21.00 and 23.00; in particular, they open up opportunities for more adult comedy, for documentaries and current affairs programmes as well as long form drama and film. It is clear from audience research that such programming has a strong appeal. The ITC will ensure that ITV deliver the proposed enhancements to diversity.

Quality of News Programmes

The ITC also considered the effect of these proposals on the provision for high quality national and international news. The ITC has been given assurances that the range and quality of the main ITV bulletins will not be affected by changes in their timing. Content will be monitored qualitatively and quantitatively. If there is evidence of marked deterioration in the audiences for news, the ITC will require ITV to take remedial action.

Regionality

The ITC has been especially concerned at the impact of these proposals on regional programming, a core component of the ITV schedule. In agreeing to these changes, the ITC asked ITV to ensure that about a dozen half-hour slots are available each week for regional programming in or just outside peak on weekdays, as well as a peak time regional slot at the weekend. New licence conditions will, for the first time, make this a requirement. This should preserve the accessibility of regional programming. Availability of regional slots in mid-evening will help compensate for the slightly earlier scheduling of some regional magazine programmes on weekday evenings.

Details of the public consultation and research which formed a significant part of the ITC's considerations are attached.

Note to Editors:

There were 1807 responses to the ITC's consultation on proposals put forward by ITV. Copies of responses are available in the ITC library.

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