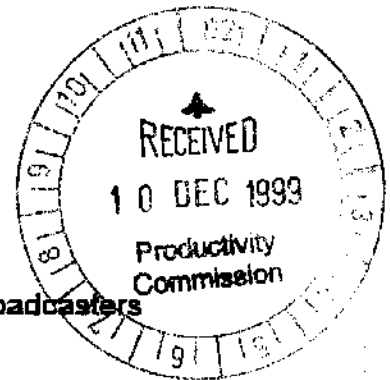


Productivity Commission
10 DEC 1999



FARB Response the Productivity Commission Draft Report on Broadcasting

This response is made by The Federation of Australian Radio Broadcasters Limited.

FARB acknowledges the substantial task imposed on the Commission under this reference and the work undertaken in compiling the draft Report. FARB raises the following issues which it believes are relevant to, and may assist in the formulation of, the Commission's final views.

1.0 INTRODUCTION

Australian broadcasters face increased competition for audience from global alternatives:

- 1.1 As the Commission acknowledges, the communications revolution involves fundamental changes in the way the world accesses information for business, education and leisure purposes and entertainment. The nature of broadcasting and the role of broadcasting within the Australian community is effected by these changes. Other means of delivering entertainment product, in particular, is impacting on the traditional place of broadcast media. Increasingly Australian media is required to compete for audience with unregulated (in the Australian context) international information and entertainment sources.
- 1.2 The issue of audience potential is important in any analysis of the media market. The Australian population is small to support the number of services presently available. Some 18 million people presently are served by one ABC national television service and 4 national radio networks with stand alone metropolitan and regional stations, the SBS, 48 commercial television stations, 3 major subscription television options, 220 commercial radio services, 228 community radio licences and over 100 open narrowcast licences. [at xxvi]
- 1.3 Access to audience is critical for the maintenance of viable commercial mass media. Where audience is fragmented by additional international and local alternatives, there will be an impact on the economic matrix effecting traditional media businesses. The price charged for advertising by commercial radio broadcasters is directly linked to audience participation, including the time spent listening. The participation rate for commercial broadcasting media in recent years has shown a decline in the face of new information and entertainment sources that compete with traditional broadcast options. The impact of new technology on the audience available in Australia to support commercial media must be given due regard by the Commission in formulating its final recommendations. If it is considered that it is in the

public interest to maintain media services which have an Australian perspective and identity, then it will be critical to look at the viability of those services within the context of global communications.

Different broadcast sectors may give rise to different competitive considerations

- 1.4 The Report largely applies the same competitive criteria throughout the broadcasting industry. For the purpose of its enquiry, the Commission appears to make no meaningful distinctions between competition considerations operating within the television and radio industries. FARB believes that "broadcasting markets" in the context of the Commission's terms of reference requires an assessment of competition, efficiency and the interests of consumers in the discrete markets which comprise the broadcasting sectors. Some approaches adopted by the Commission and the recommendations resulting therefrom do not appear to distinguish, in many cases, the difference in circumstances between the relevant broadcast markets. Commercial television generates four to five times the revenue of commercial radio and faces substantially less competition in aggregated licence areas. The analysis of profitability by the Commission [table 2.4 at 30] fails to disclose that of 215 commercial radio licensees, 58 broadcasters were in loss in 1997-98. In regional Australia, approximately 30% of services operated at a loss.

Australia is not one broadcast market

- 1.5 The BSA presently recognises market or sector variations in its planning functions and vis-à-vis broadcasting service regulation (s23; licence conditions; limitations on ownership; content regulation; special provisions for small markets). There is a flexibility within the legislation to apply different considerations to different activities and market conditions. In evaluating whether and to what extent the legislation restricts competition [terms of reference 5(d)], the conclusions appropriately may not be a single response. Similarly, identification of the nature and magnitude of the social and economic problems the legislation seeks to address [terms of reference 5(a)] may reasonably result in different conclusions in different broadcast circumstances. The Commission's approach reflected in the Report tends to treat Australia as one market. This does not recognise the substantial differences effecting for example, the provision of commercial radio services throughout Australia. The financial analysis undertaken by the Commission does not adequately distinguish between the operating conditions that apply in regional Australia and metropolitan markets. The recommendations arrived at, therefore, may not be appropriate across all broadcast sectors or markets.

More spectrum does not necessarily mean diversity of ownership or opinion

- 1.6 The Commission endorses the desirability, as a key broadcasting objective, of diversity of information and opinion [at 194]. The Report proceeds on the premise that freeing up of spectrum will enable more services to be provided and that, ipso facto, these new opportunities will result in a broadcast media which is diversified in ownership and programming [xxix at para 4]. The validity or otherwise of this position is relevant to a number of the recommendations arrived at by the Commission.
- 1.7 Broadcast media requires a substantial capital expenditure to acquire and operate (whether by way of a priced based allocation or by transfer). Major broadcast media often are operated by multinational corporations who have access to significant funds. The greatest barrier to new interests participating in mass media in Australia is the high cost of acquisition. This is unlikely to change.
- 1.8 The availability of additional spectrum cannot be presumed to necessarily result in the entry of new interests in mainstream broadcast media seeking to diversify. The participants are likely to be established media entities. FARB does not oppose or endorse this in the context of the Commission's recommendations. It merely seeks to make the point that the concept of an increase in the availability of spectrum on the one hand and diversity of media ownership and opinion on the other hand, are not necessary corollaries.

Social and cultural considerations are not only linked to program content

- 1.9 While the social and cultural objectives of the BSA have been considered by the Commission, it appears to have regarded such criteria as relevant only to the issue of program content. Consideration of the value of program content cannot take place in isolation because service viability (as distinct from profitability) has a direct impact on program content. FARB does not take issue with the Commission's view that:

"Australia's broadcast policy should:

*.....
promote the community's social and cultural objectives in
broadcast programming [at xxvii]*

Such objectives cannot be achieved consistently with a policy that advocates, in all cases, the making available of broadcast services, having regard only to spectrum capacity. Service viability and content are inextricably linked concepts.

- 1.10 Notwithstanding the new technology alternatives to mainstream broadcast services (which may have the "sound" and "feel" of some

elements of traditional radio broadcasting) the uptake in many regions of Australia is likely to be gradual and commercial radio will continue to be the most significant form of day to day audio media for the majority of Australians in the foreseeable future. In these circumstances, any variation of the regulatory scheme must be framed in a way that does not put at risk the public interest in the preservation of such services. Were the Commission to look closely at the economics of many of the smaller regions, it would see that operating a commercial radio service is a marginal business. Some markets have only limited potential and therefore attraction, for investors. Those communities would not be well served by changes which encourage a high turnover of broadcasting investment.

2.0 Response to the major recommendations

Separate Spectrum and Broadcast Licences

- 2.1 The commercial radio industry does not agree with the Commission's recommendation that licences to use spectrum should be separated from licences to provide broadcasting services [4.2 at 65], for the following reasons.
- 2.2 The benefits identified by the Commission do not appear to relate to commercial radio. The Commission argues that broadcasters have been allocated more spectrum than they would otherwise have taken if required to purchase it. In the case of the commercial radio industry, no data is provided for reaching this conclusion. Spectrum in the case of radio has been determined having regard to the need to provide an adequate service, accordingly to the nature of the licence, and the topography, within the licence area. There is no value to the commercial radio broadcaster in having more spectrum than required to meet reasonable service delivery within the licence area because it simply adds to the cost of establishing and maintaining transmission facilities. To the extent the Commission's report justifies its recommendation on the basis it will prevent "spectrum hogging", that justification does not apply in the context of commercial radio.
- 2.3 Creating separate spectrum and broadcast licences will not "drive digital conversion" and encourage a more expeditious conversion from analogue to digital in the commercial radio industry. The speed of conversion to digital broadcasting will be governed substantially by the take up rate of receiving sets in the community and particularly, in regional areas. Digital conversion in rural Australia will also be governed by the broadcaster's ability to fund the costs of new transmission technology.
- 2.4 It is unlikely that commercial radio services outside the metropolitan areas will be delivered by means other than the broadcasting services bands at any time in the near future. Therefore facilitating technological

convergence will not be a high priority in these areas. FARB agrees that where licensees do not use the spectrum in delivering their services, there appears to be limited grounds for imposing licence fees. This could be achieved by an amendment to the appropriate legislation however.

- 2.5 Concerns about the efficiency of, or values applied to, the spectrum planning process do not support or justify the separation of spectrum and broadcast licences. It would still be open to the planning authority to take matters such as interference and quality of signal reception into account when determining a spectrum allocation (and indeed, highly desirable). There is no evidence of any "quid pro quo" in the commercial radio planning process because of program content. Box 4.3 at page 87 relates to the planning of free to air television services. This argument appears directed solely toward the planning of television services. Similarly, the Commission's arguments in respect of the development of digital multiplexers is justification relevant at first hand to free to air television services. The development of, and access to, digital multiplexers will not be advanced by the Commission's recommendation. The sharing of, or access to, transmitting facilities presently occurs by commercial arrangements between television and radio broadcasters and as between radio interests.

Adequate return on spectrum

- 2.6 The Commission proceeds on the premise that dual pricing arrangements of a price based allocation system and the payment of annual licence fees linked to revenue do not provide an adequate return to the community for the commercial use of scarce spectrum [at 72]. FARB does not accept that position. It is hard to envisage a better indication of the value of spectrum than the auction process which has applied to the allocation of commercial radio and narrowcasting licences in recent years. FARB accepts that if, however, as appears contemplated by the Commission, availability of spectrum will be the sole criteria for making available broadcast services, regulatory restrictions on competition (previously seen along with the "scarce resource" argument as justification for the licence fee regime) largely may no longer apply. In these circumstances, arguments for the continuation of licence fees or licence fees at current levels, may be diminished.
- 2.7 Any proposal which threatens a commercial licensee's security of spectrum tenure would appear counterproductive to the public interest and the licensee's interests. A secondary market in spectrum, as contemplated by the Commission, may be illusory in relation to the commercial radio market in that the value of the broadcast service without spectrum tenure would be significantly reduced and the value of spectrum without the broadcasting service with which it is identified may be similarly effected, particularly in circumstances where spectrum

is not in short supply. In the case of commercial radio services, designated spectrum often has been strongly identified with the service. In the context of the commercial radio industry, the Commission's proposal may devalue both components.

- 2.8 The conversion of licence fees to spectrum access fees [recommendation 4.3] would be difficult in relation to pre-existing services. The value of spectrum necessarily must be addressed at a particular point in time. In the case of existing licensees, the value of spectrum has been incorporated into the price paid on allocation, conversion and in the context of licence fees. Those matters would need to be taken into account in any assessment of the value of spectrum access today. If the value of spectrum is assessed annually, further distinctions would need to be made to ensure that the particular qualities and success of the service is not factored into the spectrum fee. This would be analagous to selling a house and the vendor retaining the right to adjust the price each year, having regard to market variations and improvements made by the purchaser.

Planning Criteria

- 2.9 The Commission recommends that planning criteria for the broadcasting services bands, currently found in s23 of the BSA, should, for commercial broadcasting, be restricted to those relevant to the technical planning of the spectrum [recommendation 4.4]. The Commission finds that the non technical planning criteria at s23(a),(b) and (c) complicate what should be a technical planning function. It is not clear, however, that s23 was intended by the Parliament to fulfil no more than a technical function. The Explanatory Memorandum to the BSA stated the following (in relation to part 3, planning of broadcasting services).

"By the operation of this part, particularly the planning criteria set out in clause 23, together with ministerial guidance to the ABA on broadcasting priorities, it is intended that the broadcasting service planning process become more open and accountable to its users. It is also intended that barriers to entry to the broadcasting service industry be minimised and that competition of the provision of such services be facilitated through the quicker introduction of extra services".

Specifically, in relation to clause 23, the EM provides that "it is at the planning stage that judgements will be made about the number and types of services to be available in market areas. There will no longer be provision at the licence allocation stage for reconsideration of whether or not there should be another service of a particular category in a licence area – such issues will be settled during the planning stage".

2.10 The criteria highlighted by the Commission at s23 could be described as applying public interest considerations. The principle underlying draft recommendation 4.4 appears to be that if there is a technical capacity, a broadcasting services bands licence should be available for allocation. FARB assumes the Commission believes that the market forces would determine ultimately the number of players that can be sustained. S 23 has operated to allow, amongst other things, a differentiation in markets within Australia. In particular, it allows a distinction to be made as between television and radio and as between metropolitan, regional and country licence areas. These distinctions are important distinctions in the commercial radio market. The factors bearing upon the availability of radio services and the nature of those services in, say, Mt. Isa are very different from those present in Newcastle or Adelaide. The analysis undertaken by the Commission in the context of its terms of reference treats the legislation as having the same impact on all broadcasting sectors and markets. This fails to recognise the flexibilities within the legislation and ignores regional distinctions surrounding the provision of commercial radio services throughout Australia.

2.11 There has been significant debate in recent years highlighting the effect that economic rationalist principles have had on the communities and economies of regional Australia. Commercial radio broadcasters have a long history of association with the communities they serve, particularly in regional Australia. The availability and regulation of commercial radio services has, therefore, a significant public interest aspect. Economic goals must be balanced against the public interest in guaranteeing that certain types of services are made available within the Australian community. The more global communications become, the more the economies of scale of Australian services will be effected. If there is a continuing public interest in ensuring the continuity of locally produced and delivered mass communication services such as commercial radio, then the need to have regard to the viability of those services is heightened. Whereas ten years ago the debate about localism centred on whether a radio program emanated from Sydney or Wagga, the debate now is whether important public needs in Australia may appropriately be met by a radio program emanating from London or New York.

Ownership & Control

2.12 The Commission recommends lifting the restrictions on foreign ownership of broadcast media. This has no impact on commercial radio where foreign ownership has been unrestricted, subject to FIRB approval, since 1992. A number of international media interests now control commercial radio services in Australia.

2.13 The Commission also recommends that cross-media rules be lifted once certain pre-conditions are met. FARB does not oppose the lifting

- of cross-media rules provided certain matters are adequately addressed. For example, the formulation of the proposed "public interest" test and its application in practice would be all-important to the impact of the lifting of such restrictions. The requirement that all mergers and acquisitions (or all above a certain size) be subject to prior application and approval and a public consultation process is likely to be unworkable, however. Such a course would have significant implications for the speed, cost and confidentiality of commercial transactions. It does not reflect commercial realities and may significantly impede investment in Australian media. While major acquisitions appropriately are, and should remain, the subject of prior approval, it is unrealistic to suggest that regulatory scrutiny should involve public consultation.
- 2.14 To the extent that the proposal suggests a market by market approach, the recommendation has merit. It must be recognised that commercial radio in Australia does not have the same economic power as other media interests, in particular newspapers and television. If cross-media rules are abandoned, it can be expected that radio stations logically will be the target of television and press interests. Ultimately, there are many synergies for cross ownership of these entities. Prior to cross media rules, there was, of course, a significant press/radio common ownership and many regional radio operations had their genesis in newspaper interests.
- 2.15 It is likely that initially at least television and press acquirers will treat commonly owned radio outlets as a "value added" product which enables them to extend their main media advertising promotions. The concept of radio as an independent and vibrant industry where the participants focus on radio as a specialised medium, would probably be diminished. Events of recent times have highlighted the importance and influence of the commercial radio medium in public dissemination of news and current affairs. Common ownership of competing cross media in one market must inevitably place some pressure on operatives to be less diverse in the opinions they express.

Codes of Practice & Compliance

- 2.16 FARB supports recommendation 10.1 that the objects in section 3 of the BSA should be expanded to include the further objective "to promote the public interest and freedom of expression".
- 2.17 The Commission's recommendation substituting a requirement of "general support" from within the relevant section of the industry rather than the present requirement of a "majority of broadcasters" appears founded on difficulties which arise in some industry sectors where it is difficult to identify the number of service providers. Even were the ABA to develop guidelines on how this would be assessed, the concept of

- "general support" is too vague and uncertain. If there are difficulties in identifying the number of service providers as, perhaps, with narrowcasting services, it would appear more appropriate for the ABA to work with such broadcasters and the industry association to establish how "the majority" can be identified. As the Commission notes, industry acceptance is important in a co-regulatory framework. Therefore, it is important that support for the codes should be clearly determined within the relevant broadcast sector. There is no evidence that the concept of the majority is causing any difficulty within most media sectors.
- 2.18 The Commission recommends that the ABA develop guidelines on "an adequate opportunity to comment" to support the community consultation process on a proposed code of practice. In particular the guidelines should provide for:
- on air broadcasts at peak or other appropriate audience times inviting comment;
 - public hearings;
 - minimum periods for consultation.
- 2.19 The FARB codes were registered on 26 October 1997 after a public consultation process lasting approximately 8 weeks. The consultation process was advertised on air. This process followed extensive consultation with the ABA in the formulation of the draft codes. The community consultation process in respect of the FARB codes encompasses in substance the Commission's recommendations, other than the new concept of public hearing. The imputation in the Commission's draft recommendation is that public hearing should be mandatory. In FARB's view, it would be inappropriate that the ABA's hands be tied in this fashion. The holding of a public hearing would not necessarily be the most effective way of assessing public interest in all cases. If that course is determined appropriate, the ABA presently has the power to convene a public hearing. Maintaining the ABA's discretion in this regard is a more appropriate course.
- 2.20 The Commission makes certain recommendations as to contents of codes and the ABA's role (10.3). In FARB's case most of those recommendations presently apply. The FARB codes provide for at least weekly announcements about the existence and effect of the Codes, broadcast at different times and in different programs. A listener may make a telephone complaint to a licensee but will be asked to confirm the complaint in writing if it is not resolved by the telephone call. This is so there can be no doubt about the nature of the listener's complaint. A summary of complaints and action taken by the licensee is provided to the ABA. FARB supports the recommendation that licensees found to be in breach of a relevant code of practice by the ABA be required to broadcast an on air announcement of the ABA's finding.

2.21 FARB does not agree that the ABA should develop standards dealing with fair and accurate coverage of ethical news gathering and reporting practices [at recommendation 10.4]. The recommendation may be appropriate if there is a deliberate policy shift on the part of the government away from self-regulation. Presently, the issue of accuracy and fairness in news and current affairs forms part of the self-regulatory process. These issues are addressed in the FARB Codes of Practice. Current Code of Practice 2 (registered in 1993) will remain in force pending the completion of the ABA's current investigation into certain commercial arrangements of some talk back presenters. FARB has already indicated to the ABA in the context of the investigation that it proposes to make further amendments to Code of Practice 2 to address what it identifies as a gap in the current formulation, having regard to evidence presented to the ABA. To impose standards in addition to the self-regulatory codes would be unnecessary duplication, adding to administrative costs of the ABA and broadcasters.

FARB

7 December, 1999