Comments on Draft Report

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I have confined my comments to two of the recommendations in chapter 10 (Section 1 below) and some related matters arising in Chapter 8 (Section 2 below). My original submission was no 143.

1. Draft Recommendation 10.1 and its implications for Recommendation 10.4[1]

First let me applaud the Commission's recommendation that the objectives of the Broadcasting Services Act should be clarified by the addition of a further objective 'to promote the public interest in freedom of expression' which would be drawn from the recent High Court findings of an implied constitutional freedom.

Like the Australian Press Council, I recommended something very similar in my own submission (No 143). My recommendation was based in a criticism of the lack of clarity in the current objectives around the issues of diversity of opinion and fairness and accuracy which, I argued, were issues fundamentally applicable to journalistic content but also fundamentally deriving from a norm of informed citizenship. While the Commission's Report is of course largely driven by the Act's objectives, I suggest below that this recommendation needs some refinement.

(a) the limits of a negative conception of freedom of expression

The Draft Report's rationale for inclusion of the new objective appears to be to provide a

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

further principle to be balanced against those objectives which already require regulation by government in the public interest . It is thus a very 'negative' conception of the freedom - a 'freedom from' government intervention.

This seems a curious step in a chapter which elsewhere recommends ***strengthening*** content regulation by calling on the ABA to 'develop standards dealing with fair and accurate coverage and ethical news gathering and reporting practices' (Draft Recommendation 10.4).

While I also support this draft recommendation (see [**d**]), I suggest that by merely defining the freedom so broadly and negatively, the Commission has left itself open to a charge of self-contradiction. The imposition of a standard for fairness and accuracy could be seen as violating the new objective because it so directly addresses 'content'.

It is perhaps worth remembering that the implied freedom came into being as a result of a legal challenge by commercial television interests to legislation which proposed banning paid political advertisements. The line of reasoning which produced this result is best indicated by this passage from Mason CJ's judgement in ***Australia Capital Television vs the Commonwealth*** (1992):

> A distinction should perhaps be drawn between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted. In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve protection of the competing public interest which is invoked to justify the burden on communication. ***Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information.*** But, even in these cases, it will be necessary to weigh the competing public interests, though ordinarily paramount weight would be given to the public interest in freedom of communication. So, in the area of public affairs and political discussion, restrictions on the relevant kind will ordinarily amount to an unacceptable form of political censorship.

> ***On the other hand, restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible to justification. The regulation of radio and television broadcasting in the public interest generally involves some restrictions on the flow and dissemination of ideas and information. Whether those restrictions are justified calls for a balancing of the public interest in free communication against the competing interest which the restriction is designed to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing interest***. (177 CLR at 143; emphases added)

Judith Lichtenberg has usefully described this distinction within U.S. jurisprudence as that between 'content regulation' and 'structural regulation' (1990, 127). Mason regarded the Commonwealth legislation as falling into the first rather than the second category because it specifically targeted a form of content, 'matters relating to public affairs and political discussion'.

As the Draft Report notes, subsequent judgements have qualified the implied freedom. Crucially, it has since been defined as 'negative in nature' and can more accurately be defined as a freedom of political communication (Chesterman, 1999). Yet, as I argued in my submission, it is the following test from ***Lange vs ABC*** which is perhaps the most crucial formulation of relevance to any regulatory changes affecting journalistic media 'content':

> 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.
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> (145 ALR at 112-113)

This test is also significant because any regulatory changes affecting journalistic media 'content' 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 while structural regulation could probably be easily supported by means of the implied freedom, a more careful case for the 'content regulation' and monitoring proposed in Draft Recommendation 10.4 needs to be made. While such content regulation is consistent with Mason's distinction, the question so begged is 'what is that counterveiling public interest'? In free speech discourse, adequately answering this requires more than the existing objectives of the Act can provide.

(b) The need to articulate a 'positive' freedom in the objectives of the Act.

The positive conception of freedom of speech emphasises citizens' ***freedoms to*** the means of communication to voice their own opinions, access the free speech of others and so enjoy the benefits of informed citizenship.

In a comparative study of the ways in which different legal systems resolve the question of broadcasting freedom (up to 1992), Eric Barendt has pointed to the distinctiveness of the 'European' model:

> The different European perspective on the relationship of broadcasting freedom to freedom of speech has been most fully articulated in Germany. ***Rundefunkfreiheit*** is regarded by the Constitutional Court as an instrumental freedom (***dienende Freiheit***), serving the more fundamental freedom of speech in the interests of both broadcasters and

> the public. Broadcasting freedom in other words is to be protected in so far as its exercise promotes the goals of free speech: an informed democracy and the lively discussion of a variety of views. It is not enough to regard the freedom primarily as an immunity from government intervention, as it is treated in the USA. Instead the constitutional guarantee of freedom of expression requires the enactment of legislation to safeguard free speech in the context of broadcasting to ensure, for example, that it is dominated neither by the state nor by any commercial group. ***On this approach programme standards promote, rather than run counter to, broadcasting freedom***. They protect the interests of audiences in a wide range of programmes and give access to minority views. Further, it is less material from this perspective to determine who exercises individual free speech rights than it is to ensure that broadcasting institutions are so composed and regulated that they promote the exercise of free speech. (Barendt, 1993, 33-34; emphasis to sentence added)

The chief instruments of this model have been the structural regulatory institutional form of public broadcasting and 'content' programme standards. (To this could be added the successful British regulation of commercial broadcasting - cf next section). Opinions differ as to whether such a fundamentally 'positive' freedom - freedom to access the means of forming an informed opinion - can be drawn from the Australian High Court judgements (Chesterman, 1999). But it is, I would contend, at least a counterveiling force to the extent that 'informed opinion' - in the sense of forming an opinion before casting a vote - is recognized as such in the 'test' cited above.

In short, Draft Recommendation 10.4 requires a more 'European' justification as an objective of the Act. In forming an opinion 'passively', one requires both 'fairness and accuracy' in news ***and*** exposure to a 'diversity of opinion'. Both of these, as I argued in my submission, are usually mediated within broadcasting by journalistic cultural forms. Indeed, European impartiality codes tend to require that they be so mediated.

(c) My proposed enhancement of 10.1.

After retiring, Sir Anthony Mason intervened during the public debate about the Mansfield

Review of the ABC in 1996 by drawing on the newly found freedom. His text provides flourishes which strike a normative tone highly appropriate to the objectives of a broadcasting act:

> Free speech is of course the essence of modern democratic government and the very spirit of our social life. All the rhetoric about electoral mandates, which of course is legitimate political argument, should not be allowed to obscure the basic proposition that government is undertaken by our political representatives in the interests of the people. This means that good government requires that the people are entitled to the provision by government of relevant information, to informed commentary, to the benefit of continuing discussion and debate on public affairs and to the impact that that discussion and debate (have) on the decision making processes of government. In other words we should aspire to the ideal of a deliberative democracy. Unfortunately that ideal has not always flourished in Australia in recent decades.
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> ...
>
> Good government and vibrant social life call not only for laws that protect and enhance free speech but also for the resources that in a modern world provide for the access to information and informed commentary which I mentioned earlier.
>
> Sir Anthony Mason, September 16, 1996 (Mason, 1996, 4-5)

I have thus drawn a little from his text and, based on the arguments above, suggest that Draft Recommendation 10.1 would be more effective in this form:

> **<u>Draft Recommendation 10.1 (revised)</u>**
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> **A further objective should be added to the objectives in s.3 of the Broadcasting Services Act. It should rank as at least objective (b) and subsume the existing (c) and (g)[2] thus:**

[2] Does not Draft Recommendation 8.1 also render objective (d) obsolete?

'to promote the public interest in freedom of communication and informed public discussion within our deliberative democracy by:

(i) ensuring diversity in control of those services which provide programmes bearing news and opinion
(ii) ensuring the provision of programmes of news, current affairs and informed commentary which practise ethical journalism of high quality
(iii) ensuring the editorial independence of all programmes bearing news and opinion
(iv) ensuring the fair and accurate coverage (by means of ethical news gathering and reporting practices) of matters of general public interest within all programmes bearing news and opinion
(v) ensuring the editorial independence and diversity over time of informed commentary and personal view programmes'

I have tried to eliminate all references to the negative norm of 'influence' in the above and replace them with positive goals. I believe the detailed refrences are necessary to avoid the confusions relating to 'diversity' which have previously prevailed.

Indeed, if the preconditions in Draft Recommendation 8.4 were met, then the need for conceptualising the goal of diversity of opinion as merely the removal of negative 'influence' should definitely be replaced by the positive objective of informed citizenship.

(d) Re Draft Recommendation 10.4: standards for fairness and accuracy.

As indicated above, this welcome initiative has a strong 'European' heritage. Consistent with the Commission's own admiration of British precedents in public interest regulation (see next section), I would suggest that the ***ITC Programme Codes*** be recommended as the model for such standards.

However, this recommendation is driven almost entirely by complaints resolution. The ITC Standards are part of a broader system of regulation which includes triennial performance reviews of the independent news provider (see Appendix 1) and financial penalties against the licensee for serious proven violations of the code (see Appendix 2). This wider British context is also relevant to some of the discussion in Chapter 8 of the Draft Report to which I shall now turn.

2. Chapter Eight: Lessons from Britain in regulating cross-media ownership?

The discussion of the relationship between the objectives of the Act and the cross-media rules in Chapter Eight of the Draft Report is a major gain. The regular reminders that it is a diversity of ideas (sources of information and opinion) rather than one of markets or owners that is the key issue is a welcome change from the previously prevalent confusions relating to 'diversity'.

Nonetheless the Report also acknowledges the definitional problems which continue concerning the relationship between ownership and, especially, broadcast journalism. In this context and in consideration of the Trade Practices Act option, the Draft Report turns to recent British experience in confronting the definitional problems (of relevant media and the public interest) which result from exploring options for reform of the cross-media rules. This British experience is presented as 'a more flexible approach to cross-media rules that incorporates a media-specific public interest test' (p. 185). The public interest test employed by the ITC and Radio Authority in assessing ownership changes is so singled out as a model which Australian policymakers might emulate.

My problem here is that these British 'definitions' do not translate well unless certain institutional features of the British system are also emulated. Let us consider the Draft Report's chosen example of a British national newspaper's not being prevented from applying to control a broadcasting licence if it has less than 20% of national circulation in the case of the most 'influential' medium, television. The two crucial contextualising points here are

(a) that Britain does not have 'American style' networking. Control of a broadcast licence is much less likely to enable 'influence' via national networking because most television licences are for one of the 13 regional production companies which share Channel 3.

(b) that most television news production is not directly produced by such licensees. A

separate entity, Independent Television News(ITN), provides all national daily news services to the Channel 3 companies, Channel 4 and Channel 5. In turn no shareholder can hold more than 20% of shares in ITN (see Appendix 1 for details).

Thus, even if successful, the most likely scenario would be that the hypothetical national newspaper would not be in a position to exercise 'influence' over news production in the Australian sense.

It is thus innapropriate to extract the 'flexibility' of the British system from this context. Rather, the key lesson of relevance to be learned from the British regulation of broadcasting is thus not its public interest test or its recent 'flexibility'. Rather, as I argued in my submission, it is the ***structural separation of licence-holding from news production***. It is by this structural means, in conjunction with its program standards and performance reviews, that the ITV system solves the 'problems of definition' of the relationship between media and public interest. It also largely solves the problem of the 'tabloidisation' of news which I redefined in my submission as 'Hotellingised news values'.

I would thus further propose that consideration be given to adding the ***outsourcing of news production*** as a disincentive within the range of options open to the ABA in the enforcement of the new standards for broadcast journalism proposed in Draft Recommendation 10.4. Further details can be found in my original submission.

References

Barendt,E. (1993) **Broadcasting Law: a comparative perspective.** Oxford: Clarendon Press.

Chesterman,M. (1999) 'The High Court's Concept of Freedom of Communication'. (unpub ms.)

Lichtenberg,J. (1990) 'Foundations and Limits of Freedom of the Press'. In J. Lichtenberg ed. **Democracy and the Mass Media**. Cambridge: Cambridge U.P.

Mason,A. 1996. ‘The Free Speech Debate in Australia’. In Communications Law Centre, **Free Speech in Australia: conference papers**. Sydney: CLC/Spectrum.

Appendix 1: ITC document describing independent news provision to 'channel 3'

No. 18 **CHANNEL 3 NEWS PROVISION**

Error! Reference source not found. (accessed November 30, 1999)

Broadcasting Acts 1990 and 1996

Section 31 of the *Broadcasting Act 1990* (as amended by sections 74 and 75 of the 1996 Act to take effect from 1/1/98) on the provision of news requires Channel 3 licensees and Channel 5 to broadcast high quality national and international news at intervals and in particular, except for national Channel 3 licensees, at peak viewing time. It should be presented live and broadcast simultaneously by all regional Channel 3 licensees, and must be provided by a single appointed news provider. From 1998, the appointed news provider must be selected collectively by the regional channel 3 licensees from amongst those news providers nominated by the ITC.

Section 32 (as amended by section 76 of the 1996 Act) requires the ITC to nominate one or more news providers for regional Channel 3 for a period of 10 years. The ITC is given powers (from 1/1/98) to review the qualification of all nominated news providers when the appointment of the appointed news provider is due to expire, to be renewed or terminated and may, on specific grounds, terminate a nomination. In October 1996, the ITC held a consultation on guidance for the method of applying for nomination as a provider of national and international news for regional Channel 3 licensees.

Section 32(9) (as amended by section 76(3) of the *Broadcasting Act 1996*) on ownership of a news provider limits any single shareholding to a maximum of 20%.

Section 32(12) (as amended by section 76(4) of the *Broadcasting Act 1996*, effective from 1/1/98) requires the ITC to ensure that a nominated news provider is or, if appointed, would be effectively equipped and adequately financed.

ITC Powers/Rules

Nomination. In January 1991 ITN was nominated by the ITC to be a news provider for a 10 year period from 1 January 1993. When it announced its intention to nominate ITN, the ITC stated that ITN's performance as a nominated provider would be reviewed around the end of 1995. Following the review, the Commission concluded that ITN had provided 'a well resourced, authoritative and attractive' news service in its first three years. The Commission concluded that ITN had supplied a high quality service dealing with national and international matters, and that it remains effectively equipped and adequately financed to provide such a service, meeting the Act's requirements for high quality.

Ownership. In May 1995 the Government announced its intention to maintain the 20% maximum single shareholding in ITN. The ITC expected those licensees not in conformity to sell down to this limit by 31 December 1995. Carlton and Granada (with 36% each) achieved this by creating two deadlocked companies to hold shares in ITN in excess of those allowed by the 1990 Act. Although not in breach of the Act, the ITC believed such a structure was contrary to the spirit of the Act.

In April 1996 DMGT (Daily Mail General Trust) acquired 20% of ITN from Granada and Carlton, and in July 1996 the final excess of 12% held by the two companies was sold to United News and Media. United already had a 5% share in ITN.

Currently ITN shareholders are Carlton Communications, Granada Group, DMGT (20% each), Reuters (18%), United News & Media (20%) and Scottish (2%).

Finance. ITN's news service to regional Channel 3 services is provided under contract negotiated between the nominated news provider and the licensees. The ITC published an indicative figure in the Invitation to Apply for a regional Channel 3 licence that the cost in 1993 would be in the region of £55m-£60m (at 1991 prices).

ITC licence conditions. Applicants for regional Channel 3 licences were required to propose at least three daily national and international news programmes on weekdays. It was specified that these must be at least 20 minutes at lunchtime, 15 minutes in the early evening, and 30 minutes in peak-time (ie. 6pm - 10.30pm). The total amount of news required is incorporated in each licence. The news must be of high quality and be shown simultaneously in all areas. Proposals made by the winning applicants were incorporated as conditions in their licences.

News at Ten. Following press comment in June 1993 on the possibility that the regional Channel 3 licensees were considering a change in the timing of *News at Ten*, the ITC Chairman wrote to the licensees stressing that unless the ITC's approval was obtained, the present timing must be maintained if they were to remain in compliance with their licence conditions. A majority of the licensees had committed, as part of the core proposals, to schedule the peak-time evening news programme at 10 pm. The National Heritage Committee convened a special meeting and published a report on the *News at Ten* issued in July 1993 urging the ITV Council to reject the proposal to reschedule *News at Ten*. In September 1998, ITV formally applied to the ITC for changes to licences regarding the weekday evening schedule, moving their main news bulletin to 6.30pm, with an additional bulletin at 11pm, replacing the existing 5.40pm news and *News At Ten*. Following a public consultation and research, the Commission approved ITV's proposals, subject to conditions designed to preserve the quality of news programmes, regional services and a range and diversity in the schedule. The Commission also required a regular news headline service to be broadcast at, or as near to as possible, 10pm. The changes will be reviewed by the ITC after 12 months' service.

Performance Review.

Channel 3 News – in its 1997 performance review, the ITC said that ITN continued to provide high quality news coverage of foreign and domestic stories, and 'rose impressively to the task' of handling of the General Election and the death of the Princess of Wales. The early evening news gave greater prominence to crime, show business and royal stories, and required a more balanced agenda.

Channel 4 News, which is supplied by ITN, sustained its high quality throughout 1997. It provided a news service distinctive in style from other channels, although innovation had not been marked in recent years.

Channel 5 News. Channel 5's news is also supplied by ITN. In the first nine months of service, Channel 5's news was praised for its freshness and vitality. It was described as having 'a bright and energetic feel ... unmistakably distinguished ... from other terrestrial channels... one of the new channel's undoubted successes".

Further References

ITC Publications

* ITC Library bibliographies: *News programmes; Censorship and the media*
Shadow ITC news release (60/90) on the *News provider for Channel 3* (2 November 1990)
Text of letter from ITC Chairman on scheduling the news. News release (31/93)
Instrument for nomination of news provider (January 1991)
Guidance note on application for nomination as news provider in respect of news provided on regional Channel 3 licences on or after 1 January 1998. (October 1996.)
Submission to the Department of National Heritage on *Media ownership.* News release (16/94)
2 March 1994
ITN Shareholding deadline extended. News release 74/94.
ITC statement on Government's media ownership proposals. News release 41/95.
Media ownership: ITC response to the Government's proposals. August 1995
ITC statement on ITN shareholdings by Carlton and Granada. News release 95/95.
ITC consults on proposal to move News At Ten. News release 79/98 & consultation leaflet.
ITC announces decision on moving News At Ten. News release 105/98.

External Publications

House of Commons: Culture, Media and Sport Committee. *Ninth report. The Future of News at Ten.*
(Session 1997-98; HC 1110) London: Stationery Office, 1998

December 1998

Appendix 2: ITC Press Release 118/98 18 December 1998

118/98 18 December 1998

ITC IMPOSES £2M FINANCIAL PENALTY
FOR
"THE CONNECTION"

Members of the ITC have imposed a financial penalty of £2 million on Central Independent Television plc (Central) for grave breaches of the Programme Code in the documentary **The Connection**, made by Carlton UK Productions and broadcast by Central on the ITV Network on 15 October 1996. Central, which has admitted the breaches, has also been directed to broadcast an apology on the ITV network, the terms of which must be agreed by the Commission. The ITC has made it clear to the Board of Carlton Communications plc, the parent company of Central, that the Commission had seriously considered whether Central's licence should be shortened and that they would have no hesitation in applying that sanction were Code breaches of a similarly serious nature to be identified concerning any other programme.

In a statement on the issues raised by **The Connection**, Sir Robin Biggam, ITC Chairman said: "The facts revealed even in the investigation instituted by Carlton demonstrate that **The Connection** was not only comprehensively in breach of the ITC Programme Code, but involved a wholesale breach of trust between programme-makers and viewers. The programme set out with ambitious claims to demonstrate the existence of a major new route for drug-running into the UK. But much of what was offered as evidence used to substantiate this was fake. In relation to this major section of the programme, little was as it seemed.

"The size of the financial penalty imposed by the ITC reflects the scale of the programme's ambition and the consequent degree of deception of viewers. The Board of Carlton Communications plc should be in no doubt that such an unprecedented breach of compliance must not be allowed to recur.

"The ITC has been given assurances by Carlton that new procedures and personnel are in place to prevent a repetition of such breaches of the Code. The Commission note these. However, Carlton needs to consider further its mechanisms and culture, in so far as they relate to the commissioning and production of documentary and current affairs programming."

Commenting on the wider implications of this case Sir Robin continued:

"This case demonstrates all too clearly that care is needed where filming, remote from management supervision, is involved. The same applies where key personnel in a production have little or no prior TV experience. The broadcasting industry has been subject to a process of casualisation, with many fewer people employed on staff, and more on a freelance basis. There are lessons here for all broadcasters, who must ensure that the mistakes revealed in the implementation of our Code are not repeated.

"This particular incident must not discourage broadcasters from the objective of providing high quality documentary programmes on international topics. Such current affairs programming is not only fundamental to public service broadcasting, but is a specific legislative requirement in relation to Channels 3, 4 and 5."

The ITC also considered *The Guardian's* allegations that publicity for a previous Central documentary had made false claims as to the exclusivity of an interview with President Castro of Cuba. No such claims were made in the programme or in on-screen trailers. As the ITC Programme Code refers only to broadcast material, no breach can have taken place. The ITC has no locus to intervene.

Notes for Editors:

1. Carlton's response admitted breaches of the Code in ten of the eleven areas cited by the ITC which are listed below. These related either to Code section 3.1, on respect for the truth, or to Code section 3.7, which refers to reconstructions in factual programmes and the requirement to label them on screen, or to both sections.

2. The eleven main areas of potential breaches of the ITC Programme Code, were:

   (i) the evidence for a new heroin route to the UK does not exist;

   (ii) the programme-makers did not risk their lives in the manner claimed;

   (iii) the raid on a cartel leader's house was a reconstruction;

   (iv) this cartel leader was not the person interviewed in the programme, and the 'secret location' for the interview was the producer's hotel bedroom;

   (v) the person interviewed was in fact a retired bank cashier with low-level drugs connections;

   (vi) the drug-runners shown were acting the parts, and the 'heroin' shown was sweets;

(vii) the drug-smuggling mission was not arranged by the cartel; the producer paid for the 'mule's' airline ticket;

(viii) the 'mule' was seen apparently boarding a plane in Colombia with a destination of London, but in fact never left Colombia;

(ix) the second half of the flight sequence was in fact filmed six months later and, contrary to claims, no drugs were being carried;

(x) the mule did not get through customs and immigration at Heathrow, but was detained and sent home;

(xi) the programme was unfair to a man in Manchester, whose home was shown being raided for drugs.

3. The ITC found that the Code had been breached under ten of the eleven headings above. The exception is item (iii), where the ITC accepts the Carlton panel's conclusions that the raid was not reconstructed.

4. The only previous financial penalty imposed on a terrestrial licensee was £500,000, which was imposed on Granada in 1994, following a series of Code breaches for undue prominence in **This Morning**.

5. The proceeds of the financial penalty are paid to the Exchequer.