

THE AUSTRALIAN BROADCASTING COMMISSION: A CRITICAL ANALYSIS

BY DANIEL BAUM*

The Canadian Federal government has permitted a creature of its own making the Canadian-Radio-Television Commission (CRTC) to become regarded as the "Parliament" for broadcasting. The Commission has consolidated its position in the eyes of the public by using the annual licence renewal proceedings (a process to which the Australian Broadcasting Commission is not subject) to impose conditions on the licence of the Canadian Broadcasting Corporation (CBC) (subject to a CBC appeal to Government). At the 1974 hearing the Committee on Television, a public interest group of television producers and academics, and Mr Neville, the former Executive Assistant to the Secretary of State, petitioned the CRTC to propose a policy of severing the technical side of broadcasting from that of programming in the operations of the CBC. The witnesses argued that the CBC was emphasizing technical services and physical plant (hardware) to the detriment of programme production (software) and that the severance of these functions would allow those producing programmes to concentrate on this task with less hindrance and limitation.

The following article is an excerpt from an independently prepared report to the Canadian Department of Communications submitted in 1974 in which Professor Baum examines the benefits and detriments of the proposal. In other sections of the Report which are not reproduced here, Professor Baum advances further reasons for his belief that a severance of hardware from software is not implicitly beneficial. He cites the ABC experience as evidence against the proposition that severance of hardware from software improves programming.

After examining the Canadian, Australian and British broadcasting systems Professor Baum concludes with the suggestion that an overall communication policy is necessary. He opines that the Australian experience is especially valuable to Canada and supports the Australian Priority Review Staff's recommendation that communication policy should be a governmental function.

Allowing for the differences between Canada and Australia the following excerpt is valuable in providing an understanding of the role and organisation of the ABC.

*B.A., LLB (Cincinnati) LL.M., J.S.D. (New York). Visiting Professor, University of Cincinnati. I wish to thank Mark Armstrong for the opportunity to discuss the problems of Australian broadcasting regulations and for allowing me to read a draft chapter of his Master's thesis about constitutional power over broadcasting.

The former P.M.G. Department has been separated into two statutory authorities under the Postal Services Act 1975 (Aust.) and the Telecommunications Act 1975 (Aust.). The new authorities are the Australian Postal Commission and the Australian Telecommunications Commission.

There is always a certain danger in drawing upon the experience of other jurisdictions to resolve a domestic problem. This applies as well to the nations of the Commonwealth. In their common heritage, their relationship to Great Britain, and their continued sharing of experience the nations of the Commonwealth can derive useful information. There is, however, a limit beyond which it would be dangerous to cross in an acceptance of even Commonwealth experience: Canada must understand the problems that are individual to it as a nation. Canada *is* a confederation in a real sense. In neither law nor fact is all-power, including that of communications placed in the hands of the Federal government. Power over the subject of communications will be shared between governments. And that sharing will likely be the result of political compromise. The thrust of that political compromise will likely result in greater diversity. In part this will come because of a constitutionally recognized English and French culture. In part, diversity will result merely from the differing needs of a relatively small population of twenty-one million that spans a continent in an area greater than that of the United States. In the context of that diversity Canada, if it is to maintain itself as a nation, must guard against cultural absorption by its powerful neighbour of the south with a population of two hundred million. Yet, how is this to be done? While the Canadian population is spread across a continent, most live in urban areas bordering the United States. Without any added electronic aids United States signals can be picked off the air by most Canadian television and radio sets. Other than by establishing interfering signals there is no effective way to stop reception in border areas. Finally, the new technology is not removed from the present. It is with us now. Through cable, for example, a range of options are opened that go far beyond over-the-air reception. For Canada the choice is not whether cable should be developed. Cable is well-entrenched in the communications system. It was well-entrenched *before* the CRTC *attempted* regulation. There is a common characteristic to the special forces that operate on Canada: it is the pressure of diversity that tends to fragment any single broadcasting policy. It is useful to keep this characteristic in mind as we view the systems of Australia and the United Kingdom.

Land, people, the nature of broadcasting regulation, and industry structure are the subjects in Australia where there are *points of similarity* with Canada. Because of these points of similarity Australia was selected as a nation whose broadcasting system should be described and commented upon. In doing this however, to give focus to our study we will relate our description and comments to community programming. We do

this to give perspective to decision-making and the role (or absence of it) of the Australian Broadcasting Commission (ABC), the equivalent of the CBC.

Australia, like Canada, has a land mass greater than the United States. Yet, its population is centred in urban areas generally clustered on a thin sliver of coastline. More than eighty per cent of the 13.2 million Australians live in the nation's capital cities. Nearly half of all Australians live either in Sydney (with a population of 2.8 million) or Melbourne (with a population of 2.5 million). Still, there remain thousands of Australians in the outback (the country). They, too, are in need of communications. But, the cost of bringing broadcasting to them is not inexpensive.

For much of its history Australia, aside from its aboriginal citizens, was a homogeneous society. There were no meaningful ethnic communities. From World War II to the present, immigration patterns have brought a major change in the nature of Australia's population profile. In 1974 nearly one in three of the nation's inhabitants were first generation Australians. Ethnic groups abound. When the Cyprus crisis of 1974 arose there were demonstrations in Australia on the part of both the Cypriot and Turkish communities. Both made "demands" on the Australian government. The protests of both communities were featured on the national news. In the ongoing Arab-Israeli crisis a candidate for Federal office told the Australian Jewish community that their votes were "neutralized". The reason? Today there are as many Arabs as Jews in Australia. Indeed, the government is even "considering" a request to allow an office of the Palestine Liberation Organization to open. Finally – and this is no small matter – Australia's native people, the Aborigines, are finding a voice and also making "demands".

From the new mix of Australians comes new communications needs. In Canada these needs are *beginning* to be recognized. While Toronto may have French language radio and television, it also is developing the same capacity for what really is the second language of the city, Italian. Programming for minorities, just beginning to surface in Australia, will be examined. Our information, obtained over a period of more than four months, comes from interviews at the highest levels within the Australian Broadcasting Board, the Australian Broadcasting Commission, and community broadcasting groups. In addition, confidential memoranda and files were made available from the Postmaster-General's Department, the Department of the Media, and the Prime Minister's Priority Review Staff. Where it is possible and appropriate citation will be made to relevant documents and interviews.

As there are some points of similarity between the land and the people of Australia and Canada so too there are points of similarity between the two nations in the way broadcasting is regulated and in the nature of the industry. Australia has a governmental system which is a curious blending of the Canadian and United States' systems. In terms of our interest, it suffices that Australia is a federation with heads of power allocated between the States and the Commonwealth government. And, like the British North America Act, 1867 30+31 Vict. c.33, the Australian Constitution which came into effect on 1 January 1901 contains no mention of radio. Section 51 (v.) of the Australian Constitution does provide that the Federal "Parliament shall, subject to

this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to . . . postal, telegraphic, telephonic, *and other like services*".

By 1932 the Canadian *Radio Reference* case¹ had been decided by the Privy Council. The primary question posed in that case related to Federal jurisdiction "to regulate and control radio communication . . . including the right to determine the character, use and location of the apparatus employed."² At issue was the capacity of the Federal government to ensure compliance with the 1927 International Radio-Telegraph Convention. To resolve the reference the Court had to interpret the meaning of section 92(10)(a) of the British North America Act which gives to the Federal government control over "the lines of . . . telegraphs, and any other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

Viscount Dunedin delivered the judgement of the Privy Council. He found that the word "telegraph" encompassed radio communication. He refused a narrow definition, opting instead for that then given in the Oxford English Dictionary, namely, "an apparatus for transmitting messages to a distance, usually by signs of some kind".³ In support of his decision *The Corporation of the City of Toronto v Bell Telephone Company of Canada*⁴ was cited. That case did more than broaden the definition of "telegraph". It viewed the operation of a federally chartered company as an integrated undertaking. There would be no escape from federal jurisdiction on grounds that some of the incidents of operation were solely *intra-provincial*, if there was an overall *inter-provincial* effect.

The *Radio* case is the jurisdictional basis for Federal regulation. Even today it has continued force as applied to cable.⁵ Yet, questions remain to be answered — at least in terms of final judicial interpretation of broadcasting power as between the Federal and Provincial governments.

It might well be that the *Radio* case . . . was concerned only with the technical aspects of broadcasting (i.e. 'radio communication' and the use of Hertzian waves), and that the programming, informational, educational, and cultural aspects of broadcasting are still open to regulation by either level of government as long as federal technical requirements are fulfilled.⁶

It must be emphasized that even in 1974 final judicial determinations have not been made as to the relative jurisdictions of the Federal and Provincial governments. This

1. *In re Regulation and Control of Radio Communication* [1932] A.C. 304.

2. *Id.*, 310.

3. *Id.*, 315-316.

4. [1905] A.C. 52.

5. *Re Public Utilities Commission and Victoria Cablevision Ltd et al.* (1965) 51 D.L.R. 2nd 716; *R. v. City of New Westminster; Ex parte Canadian Wirevision Ltd* (1965) 55 D.L.R. 2nd 613; B. Laskin, *Canadian Constitutional Law* (3rd ed., 1966) 588.

6. J. Lyon and R. Atkey (eds), *Canadian Constitutional Law in a Modern Perspective* (1970) 986.

fact plays an important part in inducing both levels of government to move toward a *political resolution* and not to seek redress in the courts.

The Canadian situation does *not* exist in Australia. All broadcasting power *is* in the hands of the Federal government. This is a major difference in a comparison of the two nations. Yet, it is worth noting that the difference did not come about because of the clear wording of the Australian Constitution, for it, like the British North America Act was not written at a time when radio was invented. Moreover, in concept and even in word both enactments have significant points of similarity. Indeed, the Canadian *Radio* case was relied upon by the Australian High Court in its *first* major decision relating to Federal jurisdiction.⁷ There the Wireless Telegraphy Act 1905-1919 (Aust.) required that a person have a listener's license as a condition to the receipt of broadcast signals. In challenging the Act the plaintiff made the argument that receipt of a broadcast message was not "telephony" within the meaning of section 51(v.) of the Constitution. It was held that such a broadcast message was not only "telephonic", but also "telegraphic". Latham C.J. added:

It appears to me to be impossible to attach any definite meaning to section 51(v.) short of that which gives full and complete power to Parliament to provide or to abstain from providing the services mentioned, to provide them upon such conditions of licenses and payment as it thinks proper, or to permit other people to provide them, subject or not subject to conditions, or to prohibit the provisions of such facilities altogether.⁸

Moreover, the phrase in section 51(v.) "other like services" was subject to an interpretation that went beyond Hertzian waves, or electricity. The Court seemed to assign to the Federal government power to regulate *communications systems*.⁹

The decision of the High Court was not narrow. It could not be interpreted as giving the Federal Government control capacity over the broadcasting mechanism only. This view was reinforced in two other rulings of the High Court: the first was a challenge to the national broadcasting system, the ABC.¹⁰ That challenge was to the right of the government to use its power for the purpose of programming (the power: expropriation of land to build ABC facilities). In this regard, it should be noted that the ABC is engaged in more than national broadcasting. For example, it operates a rather large publishing house and funds concerts. In unambiguous language Kitto J. stated that it was for the Federal government to determine

the choice of the persons who may make use of such a [broadcasting] service either to send or to receive communications, to the conditions upon which persons may so use it, and to every aspect of the use and advantage that may have from it. No narrower view would be consistent with the broad understanding, upon which *Brislan's* case [the landmark decision] insists, of the grant of power in section 51(v).¹¹

7. *R. v. Brislan; Ex parte Williams* (1935) 54 C.L.R. 262.

8. *Id.*, 277.

9. *Id.*, 280, 282 *per* Rich and Evatt JJ.

10. *Jones v. Commonwealth (No 2)* (1965) 112 C.L.R. 206.

11. *Id.*, 226.

The High Court, with only one dissent, was of the view that the Constitution conferred power over programming as well as broadcasting. The ABC squarely put the problem to the Court. Unlike the CBC, the ABC does *not* control its own transmission facilities. National service transmission, as a matter of statute, is done by the Australian Post Office. The ABC is purely a programming organization in that respect. The Court had the opportunity to draw a line of distinction between programming and broadcasting. It chose not to do so.¹²

The second ruling came in 1966 reinforcing the earlier broadcasting decisions.¹³ By that time it was clear that the Federal government had control over the means (the hardware) and even *the* product itself (the software) of broadcasting. The 1966 ruling permitted the Federal government to set standards for the control of broadcasting. In this instance the Federal government attempted to control concentration of communications ownership (that is, press and broadcasting interlocks). What if there is only a tangential relationship to broadcasting in such control provisions? Could the law be struck down as not being relevant to the constitutionally valid purpose? Again, Kitto J. stated:

How far they should go was a question of degree for the Parliament to decide, and the fact that the Parliament has chosen to go to great lengths — even the fact, if it be so, that for many persons difficulties are created which are out of all proportion to the advantage gained — affords no ground of constitutional attack.¹⁴

For nearly forty years the Federal government has had confirmed its power to regulate broadcasting. The rationale for that grant of power to some extent was founded on the Canadian *Radio* case. Yet, unlike the Federal government of Canada that of Australia was never really subject to State pressure (even political pressure) to share jurisdiction over broadcasting. The Australian Federal government was left free to regulate.

From forty years of regulation has come a system strikingly similar to that of Canada. In the context of diffusion in decision-making Australia has found itself with a mixed system. And it is one that meets many of the criteria suggested by The Committee on Television and Mr Neville:

1. There is a national broadcasting service, the Australian Broadcasting Commission.¹⁵
2. The *transmission facilities* for the ABC are constituted and maintained (for a

12. *Id.*, 227.

13. *Herald and Weekly Times Ltd v. Commonwealth* (1966) 115 C.L.R. 418.

14. *Id.*, 437; Menzies J. stated (*id.*, 442): "In making laws Parliament can, as it were, enter the board room of an entrepreneur engaged upon an enterprise subject to control by Parliament and can be as long-headed as he is in selecting the means which it will employ to achieve an end that is within its legislative power."

15. Broadcasting and Television Act 1942-1973 (Aust.) This is the central legislation covering broadcasting. Part II of the Act deals with the Australian Broadcasting Control Board; Part III, the National Broadcasting Service (i.e., radio) and the National Television Service; and Part IV, the commercial stations.

fee) by the Post Office. Thus, except for the operation of studio equipment, the ABC is largely a programming, or software organization.¹⁶

3. No advertising revenue is permitted to the ABC.¹⁷ All funding, except for revenues derived from concert and publication sponsorship, is done by the Australian Parliament.
4. The ABC is told by the Post Office (band allocation) and the Australian Broadcasting Control Board (ABCB) what channels, frequencies and power will be used for the National Broadcasting Service. But the ABC is not, as such, licensed by the ABCB.¹⁸
5. The ABC sees itself much as a Crown corporation, operating under a broad mandate which states that it shall provide adequate and comprehensive programmes and shall take in the interests of the community all such measures as, in the opinion of the Commission, are conducive to the full development of suitable broadcasting and television programmes.¹⁹ Few constraints are imposed on the ABC by *statute*. The ABC is required to broadcast daily news and current affairs information both within Australia and throughout the world;²⁰ to employ sufficient staff for its news and information gathering duties;²¹ to use as far as possible Australian talent;²² and to broadcast the proceedings of the Federal Parliament.²³
6. Alongside, and supposedly complementary to the National Broadcasting Service, are the commercial stations licensed by the ABCB. Licenses are awarded following a declaration of band availability by the Post Office. The

16. *Id.*, ss 73-76. The gist of these sections is that the Postmaster-General shall, except insofar as he otherwise determines, provide and operate for the purposes of the broadcasting programmes of the Commission, transmitting stations and technical equipment required for programme purposes – for instance, to provide and operate technical equipment in studios, to connect studios to the local transmitting station, for the reception of overseas transmissions and at programme pick-up points. With respect to the transmission of television programmes the Postmaster-General has an identical obligation to provide and operate transmitting stations and technical equipment to connect a studio to the local transmitting station. Other technical equipment for transmission of television programmes is to be provided and operated by the Commission, though it may arrange for the Postmaster-General to provide and operate these services, in any case, the Postmaster-General may stipulate that his approval be obtained on these matters. In most cases the Postmaster-General, except insofar as he otherwise determines, is instructed to provide these services to the Commission without charge. The Commission is required to indemnify the Postmaster-General against any actions or claims in respect of any acts done by the Postmaster-General in the interests of the Commission.

17. *Id.*, s. 65(1.).

18. *Id.*, ss 59(1.), 16(3.)(a)-(c), 4, and 81.

19. *Id.*, s. 59(1.).

20. *Id.*, s. 66(1.).

21. *Id.*, s. 66(2.).

22. *Id.*, s. 114(1.).

23. *41st Annual Report, Australian Broadcasting Commission (1972-73)*, Parly Pap. No. 192, 38: "In accordance with the provisions of the Parliamentary Proceedings Broadcasting Act, the A.B.C. broadcasts from Federal Parliament at the direction of the Joint Committee on the Broadcasting of Parliamentary Proceedings. When Parliament is in session, approximately 25 hours per week is given over to Parliamentary broadcasts, which are carried by [ABC] Radio 1 stations in all States. The Budget Speech and the Address-in-Reply by the Federal Opposition were also broadcast on [ABC] Radio 3 regional stations. The A.B.C. usually broadcasts from the House of Representatives on Tuesdays and Thursdays and from the Senate on Wednesdays. Between 1 July, 1972 and 30 June, 1973, Federal Parliament sat on 69 days, and A.B.C. *radio* transmitted 613 hours of Parliamentary broadcasts." (*Italics added*)

Minister for the Media issues the licenses for periods of up to five years on recommendation of the ABCB.²⁴ The standard under which the ABCB is to exercise its power is similar to that mandated the ABC: '... [E]nsure that adequate and comprehensive programmes are provided by commercial broadcasting stations and commercial television stations to serve the best interests of the general public.'²⁵

The government has established a mixed broadcasting system consisting of two elements; the National Broadcasting Service and the commercial stations. On both has been imposed the same duty, that is, providing a diverse programme format. While the words used to define the duty are the same, they have been interpreted differently both by government and the broadcasters themselves. In August 1973 the Australian Senate Committee on Education, Science and the Arts set forth these requirements for the National Broadcasting Service (the ABC):

It must provide a national network for material of national interest. At the same time it must provide a local alternative to local commercial and other public stations which we believe will develop in the future... It (the ABC) must provide competition for commercial channels. It must have an element of doing what the commercials do, but trying all the time to do it better.²⁶

The commercial stations patently operate on a different basis. Their concern is share of market, for that alone determines advertising revenue. Neither the Broadcasting and Television Act 1942-1969 (Aust.) nor ABCB regulations or guidelines substantially detract from the overall purpose. It is true that the Act does require Australian content and that the ABCB does endeavour to require certain kinds of programming and prohibit other types that offend against community "well being or morality, or [are] otherwise undesirable in the public interest."²⁷ Indeed, a point system has been established that commercial licensees must meet.²⁸ But there can be no doubt that it is a point system that operates in the context of station profitability. The commercial stations have shown a willingness to resist ABCB effort to *limit* programming that attracts a market. To illustrate, the ABCB attempted to set aside

24. Broadcasting and Television Act 1942-1973 (Aust.) ss 83(1.), 84(a).

25. *Id.*, s. 16(1.)(c).

26. Second Progress Report on *All Aspects of Television and Broadcasting, including Australian Content of Television Programmes*, August 1973, Parly Pap. No. 108, 10.

27. Australian Broadcasting Control Board, *Television Programme Standards* (1970), 7, item 6(a) (IV,V).

28. Though it is unrelated to this study the so-called "point system" is of obvious interest to Canada. It was introduced not by statute but, in reality, by Ministerial directive; *25th Annual Report, Australian Broadcasting Control Board* (1973) 110. The main features of the new system are:

- (i) The existing requirement for six hours of first-release Australian drama each twenty-eight day statistical period between six p.m. and ten p.m., has been retained.
- (ii) The existing requirement for four hours of school-age children's programming each twenty-eight day statistical period has been retained, but to qualify towards the quota such programmes must be televised during the period from four p.m. to 7.30 p.m.
- (iii) The existing requirement for fifty per cent Australian content of overall transmission time between six p.m. and ten p.m., including credit loadings, has been dropped.
- (iv) In each twenty-eight day statistical period, stations must arrange their programmes in such a way as to achieve a number of points (based on the given point scale for various types of programmes) equal to the total transmission time for the period. Extra points are available

Sunday mornings as a non-commercial time, as a time for religious, musical, or educational programming. *All* of the commercial stations, through their trade association, challenged the power in law of the ABCB to do this – with the result that the Board withdrew its “order”.²⁹

To judge the adequacy of the Australian broadcasting system is no easy matter. The statutory standards are not overly precise. While we will soon refer back to government policy there may be some value in offering the statements of self-evaluation by both the commercial stations and the National Broadcasting Service. The ABC denigrated audience measure as a means for determining either audience satisfaction or compliance with statutory mandate. It argued strongly that publication of the “top 10” television programmes is “not in the best interests of the industry or of the Australian audience.”³⁰ In the ABC’s view

it is not the size of audience that measures a programme’s success but rather how the size of the audience compares with the target aimed for; and targets vary. For example, it would be unreasonable to expect a production of ‘The Pirates of Penzance’ to have as large an audience as a comedy programme or a quiz show. But programmes with relatively small audiences can often be more successful in reaching the target set for them than others with much larger audiences. The publication of lists of the so-called ‘top 10’ programmes gives unreasonable prominence to audience size. An appearance in the ‘top 10’ may be due to the type of programme offered as an alternative, or to the fact that the programme followed another with a large audience, resulting in what is called the ‘halo effect’.³¹

Still, the ABC wanted it known that audience size may be important. Its argument was largely defensive:

[A] broadcasting organization should not be thought to have failed if it presents programmes which have more limited appeal in terms of mass audience but which bring pleasure and stimulus to, or raise the level of experience of, the discerning listener or viewer.³²

for stations in multi-station areas, for first-release peak-time drama and for school-age children’s programmes televised in excess of the quotas in (i) and (ii) above.

- (v) The existing arrangement whereby compliance with requirements is calculated on the basis of programmes transmitted between six a.m. and midnight each day, will be retained.
- (vi) Also retained is the existing provision that current affairs, documentary and variety programmes commencing no later than 9.30 p.m. and continuing beyond ten p.m. be regarded as peak-time programmes until 10.30 p.m.
- (vii) There will be no change in the method of calculating a station’s overall performance for the year. The ABCB will continue to disregard the results for the worst twenty-eight day period in the year to allow for the effects of the annual holiday lay-off in production.
- (viii) The provision for the ABCB to vary the requirements in particular circumstances has been retained.

As was the case with the existing system, in the new system the ABCB’s calculations will be based on information supplied by stations.

29. *Id.*, 42; see also *23rd Annual Report, Australian Broadcasting Control Board* (1971) 40-42.

30. *Op. cit.*, note 23, at 166.

31. *Op. cit.*, note 29, at 8-9.

32. *Id.*, 9.

The ABC pointed with special emphasis to its school programming. It, after all, is a primary producer of educational programming for the Australian school system.³³ While more will be said of this, we nevertheless note here that about eighty per cent of Australian schools with television receiving equipment "make some use of ABC school broadcasts."³⁴ Can it be said, in such a context, that the ABC has failed to reach its audience?

With some reason the ABC has been defensive in its role as the National Broadcasting Service. Indeed, it was so defensive that in 1973 it felt compelled to have its own Audience Research Department conduct a survey to determine whether the public continued their support of the ABC itself.³⁵ The answers given from a respondent universe of nearly 1,500 people in the cities of Sydney and Melbourne indicated substantial support for the National Broadcasting Service. But in this regard, it should be noted that only 72.2 per cent favoured public funds being used to subsidize the ABC.³⁶ Nearly twenty-five per cent of blue-collar or unemployed persons rejected the government subsidy of the ABC.³⁷ The document has been used by the ABC as a defense for both the Commission as it is constituted and its programming.

For the commercial stations the ABC is in many respects a boon. It provides them with an opportunity for comparison in terms of viewing audience. Through the trade association of the commercial stations, the Federation of Australian Commercial Television Stations, they have pointed to the *startling* differences between the ABC and the commercial stations in share of audience market and, at the same time, have attempted to keep the ABC non-competitive. That is, the commercial stations have strongly argued that it is the national service which is to cater to *minority interests* therefore, the ABC audience rating should be low. At the same time, the commercial stations ask for comparison, for if their ratings are very high then — so their argument runs — they must be doing a good job. This argument is all the stronger — so their plea goes — when one bears in mind that the ABC is funded by government (\$73 million in 1970-71) yet the commercial stations must pay their own way through advertising.³⁸

33. *Ibid.*

34. *Ibid.*

35. Audience Research ABC, *Public Opinion of the ABC: Results of a Survey Conducted in Both Sydney and Melbourne in April and May 1973* (July 1973).

36. *Id.*, 1.

37. *Id.*, 2. [67.7% of these respondents were in favour of government subsidy of the ABC. *Editor's note*]

38. Indeed, this attitude seems to be endorsed by the Broadcasting Control Board. In its research publication of 1970, *Attitudes to Television 1968-1969*, the Board stated: "Sources of finance are different for each service, the ABC operating on an Annual Parliamentary appropriation, and commercial stations depending mainly on income from sale of time for advertisements. There are also some differences in the nature of programmes in each service, the Commission having regard to its statutory obligation to 'take in the interests of the community all such measures as ... are conducive to the full development of suitable ... television programmes,' and the commercial licensees placing emphasis on programmes which are likely to attract and hold majority audiences ... Each service is concerned with the size of its audience, but a substantial continuing audience is an economic necessity in the commercial service."

There is a rationale to the goal of maximum audience participation. That is, the commercial stations can and do argue that their profit motive (high audience participation and greater advertising revenue) is directly related to the public interest:

Television is a *mass media* and each station utilises a scarce public frequency. The object of transmitting a programme through the atmosphere is hopefully, that it will be seen by a reasonable section of the community. Otherwise, it is a misuse of the frequency. There are over 3 million television households in Australia and each one of them, throughout waking hours on all 365 days of the year, the turning on to a particular channel or programme, or turning off the set, is a conscious act of decision. It is a simple matter for the set to be left dark or to switch to another channel, but the pervasive influence of the medium is shown in audience studies. They consistently establish that the set in some 96 per cent of all homes is turned on to commercial television during each week, which reflects credit on programme planners.³⁹

The commercial stations succeed, according to their spokesman, because they respond to the viewer's first desire in terms of television, the desire "to be entertained" by the medium. During prime time, from six p.m. to ten p.m. in Australia's capital cities, the ABC's percentage of viewers ranges from 7.4 per cent to 18.3 per cent. For regional areas the ABC range is from 13.5 per cent to 31.6 per cent.⁴⁰ (The difference between the cities, where eighty-seven per cent of Australia's population lives, and the regional areas is that in the latter the ABC is apt to be the only television broadcaster.)

**Six p.m. to Ten p.m.:
NUMBER OF HOMES WITH TELEVISION SETS
TURNED ON EACH NIGHT⁴¹**

CAPITAL CITIES

Hour	To Commercials	Percentage All Sets	To ABC	Percentage All Sets
6 – 7 p.m.	1,116,700	53.8	154,500	7.4
7 – 8 p.m.	1,157,700	55.8	397,400	18.3
8 – 9 p.m.	1,163,100	56.0	264,200	12.7
9 – 10 p.m.	981,300	47.3	184,900	8.9

REGIONAL AREAS COVERED BY SURVEY

Hour	To Commercials	Percentage All Sets	To ABC	Percentage All Sets
6 – 7 p.m.	388,700	48.6	177,800	22.2
7 – 8 p.m.	399,800	50.0	252,900	31.6
8 – 9 p.m.	443,900	54.3	157,500	19.7
9 – 10 p.m.	371,000	46.6	107,900	13.5

39. Testimony of Arthur S. Cowan, General Manager, Federation of Australian Commercial Television Stations, before the Australian Senate Standing Committee on Education, Science and the Arts, 18 July 1972, Official Hansard Report, 323. (Italics added)

40. *Id.*, 327.

41. *Ibid.*

At no point in the prime-time hours does the ABC capture most of the viewing audience. In the cities the ABC never reaches beyond 18.3 per cent of the viewers. In confidential market surveys, which the Australian Broadcasting Control Board allowed me to see, the ABC city share of viewers for 1974 was about *eleven per cent*. During the peak viewing hours of seven p.m. to nine p.m. the commercial stations have little public affairs or news programming. (Using Sydney as an example, on weekdays of the three commercial channels only one presents thirty minutes of public affairs programming in the seven p.m. to nine p.m. period. This comes at seven p.m.) The ABC, however, largely presents a public affairs, informational, and news format during that time period.

To carry out its mission the ABC maintained a staff of 6,376 at 30 June 1973. Of these, 2,451 worked in programmes including public affairs. Half of this total were stationed at the ABC's head offices in New South Wales and the Australian Capital Territory. Four hundred and sixty were employed in the news department. The combination of management and technical services involved full-time nearly half of all ABC personnel (technical services: 1,659; management group and management services: 1,165).⁴² As the number of ABC employees has increased over the years, so too have the Parliamentary appropriations. In 1972-73 Parliament provided the ABC with a budget of \$74.4 million, compared to \$66.6 million in 1971-72.⁴³

ABC personnel and funds are used to maintain, operate and prepare programmes for both television and radio. In this regard, special mention must be made of the Australian Report of the *Royal Commission on Television* (1954). Until the advent of television the Postmaster-General provided *all* technical services associated with the transmission of ABC programmes. With television, however, the ABC argued that

the relationship of technical operation to the television programme is so close and intimate that all studio technical services involved in the production of the television programmes should be under control of the programme *authority*. It would be understood that the Postmaster-General's Department would continue to erect, maintain and operate all transmitters and assume responsibility for the transmission from the point of output from the studios.⁴⁴

The Royal Commission – *without in-depth study* – accepted the recommendation of the ABC:

It is evident that television demands a much closer degree of collaboration between technical and programme services than does broadcasting and that certain categories of operating personnel are required to perform functions that are partly technical and partly programme in character. We are not in a position to determine whether the extension to the field of television of the present arrangements with respect to broadcasting (under which the whole of the technical services is provided by the Postmaster-General's Department) would fail to provide the degree of collaboration which is required, but it is evident that the Australian Broadcasting Commission holds considerable doubts in this

42. *Op.cit.*, note 23, at 67.

43. *Id.*, 56.

44. *Report*, p.68. (Italics added)

matter, at least so far as relates to operations in the studios. The problem which arises in this connection has, so far as we know, no counter-part in overseas countries. In both Great Britain and Canada, where national television services are in operation, technical and programme functions are the responsibility of the one authority, and the *only objection* that was suggested to the adoption of a similar course in Australia was that the Australian Broadcasting Commission would be required to recruit technical staff – a task which may be difficult but not insuperable. *We have not been in a position to make a detailed examination of this particular matter* but, in the light of the information available to us, we are inclined to the view that the operation of all technical services directly associated with the production of programmes in the studios, should be included in the responsibilities of the Australian Broadcasting Commission.⁴⁵

Thus, today more than a quarter of all ABC personnel are classified as technical. As we shall soon see, there is reason for stressing the technical role performed by the ABC.

In 1973 the National Broadcasting Service operated six metropolitan TV stations, two in the Northern Territory and forty-five categorized as regional. It provided *three* radio networks. Radio One and Two each with a total of seven stations were urban based. Radio Three is a combination of the other two networks and is broadcast to the country areas. (Radio Three has a total of sixty-three stations.)⁴⁶

The air-waves of Australia are not crowded by a large number of broadcasters. In 1973 there were only forty-eight commercial television stations, and 118 radio stations. No State capital has more than three TV and six radio stations.⁴⁷ On the whole, most of the stations – and certainly the capital city outlets – make a profit. In 1971-72 a total of forty-one of forty-eight TV stations had a combined net-before-tax profit of \$17.4 million and revenue of \$102.02 million. During the same period ninety-nine radio stations had a combined net-before-tax profit of \$11.7 million and revenue of \$45.8 million.⁴⁸

This summary of industry structure and income is provided in the context of programming service. Australia does have broadcasting policy. It is quite similar to that of Canada. The government has been more concerned with the development of hardware than with the production of programmes. This is not to deny Australian content rules. But, it should be noted that these rules were designed more to provide employment opportunities than to protect and enhance a culture.⁴⁹ Moreover, the Australian content rules must be seen as largely quantitative rather than qualitative. On the whole, they are not directed to *what* is produced but to how much of Australian content is produced. Two examples of Australian “hits” which – at least in my view – say very little about Australian society are “The Box” and “Number 96”.

45. *Id.*, 68-69. (Italics added)

46. *Op. cit.*, note 23, at 67.

47. *Op. cit.*, note 28, at 83.

48. *Id.*, 10-11.

49. The Board itself seems to link employment with Australian Content. Thus, for example, advertising of American products may be performed by Australians thus satisfying content requirements – but the script may exactly reflect what was prepared in the United States.

Both may be categorized as "adult" soap-operas. Indeed, both programmes opened, and attracted large audiences, with scenes of frontal nudity — much to the chagrin of the Australian Broadcasting Control Board.

Public affairs programming discussing issues of relevance to the Australian community in a forthright manner is not a dominant characteristic in the programming of commercial stations which define their role largely in terms of entertainment⁵⁰ or in the programming of the National Broadcasting Service. Senator J. R. McClelland, a key member of the Senate Standing Committee on Education, Science and the Arts which has jurisdiction over broadcasting, spoke directly to the quality of Australian broadcasting programmes in 1974. He summarized his view during rather lengthy hearings conducted by the Senate Committee concerning broadcasting:

Over the years the ABC has looked good only by comparison with the commercials. It has become a top-heavy bureaucracy, too timid to play a real role in innovative, experimental programming, inhospitable to diversity or idiosyncrasy in its own creative staff, nervous towards the controversial . . . Among the programmes which we are either not getting at all or are not getting in sufficient quantity or quality and which would become possible with the advent of an additional national channel are, in the words of a witness before the Senate Committee 'art and literature, music and drama; science technology and medicine; wildlife and conservation; psychology, sociology and education; politics, law and economics; Australian folklore and history; games and recreation; alternative cultures; consumer affairs and business; philosophy; theist and non-theist religions; local affairs.' The list is not conclusive but it suggests the immense possibilities which would open up if another non-commercial channel became available.⁵¹

The bill of particulars concerning the quality of Australian programming, particularly as it relates to the ABC, is not my evaluation alone. Rather it represents the considered judgment of nearly every governmental study. Indeed, the ABC itself commissioned a study by McKinsey and Company, Inc., completed in November 1973 but *unpublished*, that pinpoints some of the difficulties within the Commission.⁵² The McKinsey study focuses upon *management*. Among the central study recommendations are:

- that the Commission be freed of unnecessary administrative work;
- that the organization be built around two new end-product groups — television and radio; and
- that greater emphasis be given to the evaluation of output rather than the monitoring of input and process.

The study tends to emphasize the need for greater management flexibility. In confidential interviews with a former senior ABC management member the following characterization was offered: of more than a thousand "management" personnel about

50. *Supra* note 39.

51. Senator James McClelland, "The Role of Federal Government in Australia's Media", *Issue*, April 1974, Vol. 4, No. 12, 2 at p. 15.

52. McKinsey and Company, Inc., *The Use of ABC Resources* (November 1973) Australian Broadcasting Commission.

a hundred constituted the senior ABC management team. Of senior management *none* has any direct programming function. None is, as such, involved directly in production. All “have lost touch” with the “realities” of programming. The function of senior management seems to be the imposition of controls, often without any real programming purpose. The problem with management is not that it is technically oriented. The problem is its removal from the creative arm of the ABC.

There are pressures that operate on the ABC management to inhibit a more vigorous type of programming. But these pressures do not include management conflict because of a technical orientation. Nor are they related to personnel conflict with the Post Office in the operation of ABC transmission facilities. In 1972 J. A. O’Shannassy, Assistant Director-General (Radio), Postmaster-General’s Department, testified before the Senate Standing Committee on Education, Science and the Arts:

Senator McManus — In regard to the Australian Broadcasting Commission, there is the point that you as an organization are fully responsible to your Minister. The Australian Broadcasting Commission has reminded Parliamentarians on a number of occasions that it is a semi-independent body which claims the right to be completely independent on some questions. Have you ever had any problems with the ABC because of the difference in the authority under which they work and the authority under which you work?

Mr. O’Shannassy — Taking account that the only field of mutual interest between the Post Office and the ABC is in the technical area, where, as I understand it, this philosophy of theirs does not intrude, we have struck no difficulty. In other words, dealing engineer to engineer, or dealing from senior management of the Post Office side to senior management on the Commission’s, talking about the provision of technical equipment or technical facilities, this difficulty has not arisen.⁵³

Political pressures, however, do serve to inhibit ABC management. They can operate to dampen the vigour of ABC programming. Moreover, these pressures are built into the legislation itself. It is true that the Broadcasting and Television Act 1942-1974 (Aust.) appears to afford the ABC a large measure of independence. It is given to the Commission to ensure adequate and comprehensive broadcasting.⁵⁴ Further, the Act specifically empowers the ABC to judge the manner and nature of controversial and political broadcasting.⁵⁵ The same Act, however, allows the Minister (now the Minister for the Media) to force the broadcast of any matter which he feels is in the “national interest”.⁵⁶ *Without reference to any standard*, including “national interest”, the Minister may order the deletion of any broadcasting matter.⁵⁷ These powers relate exclusively to the ABC. The only statutory check on ministerial censorship or propaganda is the Act’s requirement that the ministerial order be laid before Parliament within seven sitting days of its issuance.⁵⁸

53. Testimony of Mr. O’Shannassy, 19 May 1972, *op. cit.* note 39, at 179.

54. Broadcasting and Television Act 1942-1973 (Aust.) s. 59(1.).

55. *Id.*, s. 116(1.).

56. *Id.*, s. 64.

57. *Id.*, s. 77.

58. *Id.*, s. 78(A).

The ministerial powers stated *have been used*. In March 1963 the Government, citing its censorship power under the Act, prohibited the ABC showing a filmed interview with M. Bidault, a former Premier of France. M. Bidault was critical of French policy in Algiers. The Australian government did not want to be part of an act "offensive to a friendly nation".

Control of Commission finances, and approval of only annual budgets constitute a far more formidable type of government control over the ABC. The Commission is required to prepare budget estimates that used to go to the Postmaster-General (since 1972, to the Minister for the Media). The Postmaster-General then hands the estimates to the Treasury for analysis, preparatory to being presented to Cabinet.⁵⁹ It is up to government, the ABC concedes, to indicate what funds can be appropriated to the ABC as a whole. If the Government attempted to limit public affairs programming funds the ABC would feel free to switch money from another account to public affairs to make up the difference.⁶⁰

On occasion, however, the government has not used its budget power with restraint. In May 1970 the Postmaster-General directed the Treasury to cut the ABC budget for 1970-71 by \$500,000. Half of this was to come from the television current affairs budget. According to press reports, the Postmaster-General was acting on authority of the Prime Minister who, in turn, was concerned about complaints of a "left-wing" ABC bias. At a formal level — before the public and, for example, before the Senate Committee, the ABC resisted the intrusion. Within the ABC itself, however, the current affairs and news departments were even more closely monitored by senior management. The tension of 1970 was heightened in the intense political campaign associated with the 1972 Federal election. "The lid was put on the public affairs and news people," said one former senior ABC manager. "Daily directives came out. Interviews with certain people were absolutely forbidden."

Yet, the greatest force inhibiting ABC diversity, is not related to political pressure or budgetary restraint. It is the assignment of channels and stations *given* the ABC. *If you will, the greatest inhibiting force for the ABC springs directly from the separation of programming from broadcasting.* In this we do not refer to the operation of transmission facilities by the Post Office. Rather, we refer to the lack of any ABC role in determining broadcast band, channel allocation, transmission power, or location of transmission facilities. There is rather diffusion of power, with final authority — not necessarily related to any broadcasting or communications objectives — vested in the Minister for the Media (before 1972 the Postmaster-General). The Control Board is responsible for the allocation of frequencies to the ABC. An unpublished, but widely "leaked" report of the Priorities Review Staff of the Prime Minister's Office, *Report on Radio* of August 1974 stated:

59. Testimony of Sir Robert B. Madgwick, Chairman of the ABC, 7 June 1972, *op. cit.*, note 39, at 289.

60. *Id.*, 291.

It has been put to us by representatives of the ABC that while there is a form of consultation between the ABCB, the APO [Post Office] and the ABC, decisions on *geographic* extensions of the National Service have been made without reference to the ABC. This may have been acceptable under the policies applied in the past where the prime criteria were the numbers of people or square miles covered by the broadcast transmission, technical considerations and the costs of transmission facilities. But if the Government now wishes to apply different policies to radio and to give as much stress to the nature and content of programmes as to population coverage etc., *it would seem appropriate to involve the ABC in all stages of planning the extension of the National Service.*⁶¹

An effect of not consulting the ABC as programmer in the extension of the National Service has been to debilitate the ABC. The reason: The technical planning resulted in the establishment of a small number of very high-power stations with broad areas of coverage.⁶² It is in this setting that the ABC bears the burden of its statutory mandate requiring "adequate and comprehensive" broadcasting. What is it to do with three national channels, two for the cities and one for the country? How does one create a useful "mix"? The Priorities Review Staff Report stated:

The ABC (we would think at most levels) has an acute consciousness of remoteness from the community because (1) it must provide a programme for each station to meet a diversity of sectional commitments and hence the station is seldom able to develop an 'identity' of programme style; and (2) it has no roots in the community at a local level, and hence stations do not have a local identity.⁶³

By its very structure the ABC is locked into a programme format. The Commission loses flexibility. The Commission's General Manager admitted as much in a lengthy interview. The ABC with a transmitter built to beam over thousands of miles simply is not able to respond to local needs. Yet, the ABC points to its role in educational programming. It has an education department; it does "consult" with State education committees; programmes are designed that meet specific curriculum needs; and the States are providing their schools with reception and recording equipment to pick up ABC programming (which amounts to only five per cent of the total ABC budget).

To the Priorities Review Staff this hardly does the job. Speaking only of educational radio the Staff Report declared:

Educational radio should not be confined to formal instruction such as that exemplified by the programmes for schools transmitted by the ABC or by the lecture-style courses to which one of the experimental University radio stations devotes its programme time.

Groups interested in educational radio have expressed a variety of attitudes. Some want radio to serve formal or structured educational purposes. Some want it for continuing education at all levels. Some want it for mixed-purpose programmes including entertainment and recreation. At the same time many of

61. Priorities Review Staff *Report on Radio* (August 1974) 55. (Italics added)

62. *Id.*, 9.

63. *Id.*, 12.

these groups with a general interest in community radio propose that their broadcasts should include informative and educational programmes.

Distinguishing a class of stations as "educational" may therefore be inappropriate although there is an obvious place for stations which, by their constitution and with regard to the community they serve, are primarily or almost wholly "educational" in their programming policy.

The time available to us has not been sufficient for a study of the role of radio in education. Such a study needs to be made by the various groups concerned with educational policy. This includes as well as the Australian State Governments, the community — which in some instances is already directly involved in educational policy. To assist in this, information on the potential of radio and of other media should be made available to tertiary institutions, public bodies, schools, teachers, pupils, school boards and parents and citizens groups.

Educational stations should in our view be broadly based. They should be available for continuing education at all community levels. Trade union education, language instruction for migrant and other groups and programming for housewives, for example, should be regarded as forming part of the style of programming to which these stations might aspire. They should also be available for possible use in conjunction with open-style University programming, regular course work in tertiary institutions, the development of other external course work and re-inforcement in teacher education; education, however, should be envisaged as covering cultural enrichment and recreation, through general programming including music appreciation relating to all types of music. They may also be expected to provide forums for discussions on public issues.

Such stations may be viewed also as providing a means of training in the technical aspects of the use of radio and for a variety of other purposes. They could be expected to encourage the development of drama, opera and musical programmes for example, and forms of experimental use of radio. This need not only be in conjunction with existing formal courses.

They should be encouraged to develop a programming policy which is of sufficiently broad interest to give them an identity of their own. Thus, for example, they might also be expected to provide forms of ethnic programming which serve a dual purpose. They may appeal to ethnic groups but at the same time provide programme material which enables students of foreign languages, for example, to listen to regular programming in languages they are presently studying.

We have not sought to distinguish radio for schools from radio for other educational purposes. But distinctions exist now and school broadcasts are provided through the ABC according to a formally-structured timetable. This would be appropriate for schools working on rigid timetables to a uniform syllabus. But schools are departing from these rigidities and uniformities and the role of broadcasts for schools should be re-examined with regard to the need for production at the national level as against the regional or local levels; the need for programmes at particular times and the possible alternatives of taped material or other media; and the opportunities for participation by teachers and pupils.

The funding of educational stations should be on the same basis as community stations. Where a university or institute of higher learning desires to operate a radio station it should commit funds from its general budget, and thereby forgo

other activities for which the expenditure on the radio station could have been used. Jointfunding of an educational station by a combination of educational bodies and community organisations should be possible and is, indeed, desirable to ensure access and community participation in programme policy.⁶⁴

A technically imposed structure has done more than affect the quality of ABC programming. It has affected the entire structure of communications in Australia. It has frozen broadcasting into two kinds, commercial and the National Service, with the commercial sector under-regulated by the Control Board. For the creative talent in broadcasting there is limited mobility except outside Australia. An ABC current affairs producer cannot easily shift to the commercial sector, for there are few stations and those that exist have limited current affairs programming. (The same example could be used as applied to serious drama.)

In this industry structure the commercial stations are freed from any real competition. They are given an unchallenged access to the air with profits more or less assured. They are not required to meet community needs, to provide diversity. One community group of considerable size without political affiliation sought to buy radio time on commercial stations in one of Australia's capital cities. The group did *not* want to advertise; rather it wanted to present programmes which it thought would be of social and cultural interest. Without exception each of the city's six radio stations rejected the offer to buy time. (Yet, it should be noted that there is no prohibition as to ownership of broadcasting stations by political parties. And, in fact, the nation's Labor Party does own such stations.) The replies given by each of the stations were made available to the Royal Commission on FM Broadcasting. They are set forth as follows:

Station A 'Naturally, I fully appreciate the value of a special programme of news, comments and music but unfortunately at this time we do not have a suitable time channel. It has been our policy for a long period of time not to allocate time to individual groups in the belief that it is much better to allow all to be heard in our normal public affairs programming where they may appear in a climate of topicality.'

Station B 'We regret we are unable to help you in this matter. Our recent change of programme format does not accommodate the use of segment or specialised programme material.'

Station C 'Whilst we are most sympathetic to your requirement we wish to advise that for the past 2½ years we have not presented sponsored programmes. All sponsored time on this station is allocated to limited spot advertising which is in keeping with contemporary programming.'

Station D 'For many years we have not accepted sessions along the lines envisaged, whether these are sponsored or otherwise. This is related entirely to program format based on our need to maintain a consistency of appeal to our entire public audience. For the same reason we have discouraged foreign language and ethnic music programmes and do not compete in such areas as current affairs discussions and general talk back.'

Station E 'At the present time no program channel availabilities exist for the type

64. *Id.*, Annex G.

of feature suggested. I might add that in recent times similar requests have been denied for the same reason.'

Station F 'Such a program, in our opinion, results in a definite tune-out for those who are not interested. You can appreciate, I am sure, that all stations are constantly reviewing program material. All station formats are also under constant review and the consensus of opinion, within the radio industry, is that fragmentation of format to appeal to specific groups has the over-all effect of dividing the community rather than uniting it. In our over-all program policy we are trying to present a program which is balanced and which appeals to the broad spectrum of public interest at all times and to all people regardless of race or creed. Segmented programming divides this objective.'⁶⁵

The Broadcasting Control Board has significant power over the commercial stations. But what the internal management study said of the ABC might just as well have been said of the Control Board:

[There are] *tendencies to control transactions, not results*. Every truly effective control process is basically one of measuring resources consumed against some end achieved. However, in the ABC, because of the difficulties in goal-setting and planning, control processes have developed almost exclusively on the cost or input side of the equation. Without definite objectives, but with the need for control perceived, there is a tendency to adopt surrogate measures. It is not long before the surrogates become ends in themselves. Management finds itself controlling detailed transactions but not overall results. When this happens, the management begins to realise that there are still shortcomings in overall control and is tempted to add more controls of transactions. . .⁶⁶

The Control Board does indeed regulate, but in a manner and as to subjects that have only a tangential effect on the quality of commercial programming. This may in part spring from ministerial interference with the licensing process. Memories are still fresh within the Control Board of the 1958 Ministerial directive reversing a major Board licensing recommendation.⁶⁷ The Board was anxious to diffuse concentration of TV ownership. It accordingly recommended the rejection of all licensee applications for the Brisbane-Adelaide area and asked for new applications.⁶⁸ The Government rejected that recommendation and required the Board to make new findings based on the existing applicants. Since that time the Board has had the appearance of less independence and, indeed, of a rather close relationship with the supervising minister.

The nature of Board regulation has a twofold effect: (1) It tends to solidify the entrenched position of those who are members of the broadcasting "club". (2) It tends to induce a common level of bland programming. Illustrations will be given as to both points. Consider firstly Board action inducing a common level of bland programming.

65. *Id.*, 21-22.

66. McKinsey and Company Inc., *The Use of ABC Resources* (November 1973) Australian Broadcasting Commission, C-4-5.

67. The order of reversal is mentioned in Australian Broadcasting Control Board, *Supplementary Report and Recommendations to the Postmaster-General on Applications for Commercial Television Licenses for the Brisbane and Adelaide Areas* (1958) 3.

68. The initial recommendations of the Board are contained in its original report under the same title at p.31.

The Control Board, like the CRTC has promulgated "guides" to broadcasters in the form of a statement of general programme standards. Under the Board's Broadcasting Programme Standards it is stated:

8. In the application of the provisions of the preceding paragraphs certain aspects of programmes require particular care:
 - (a) No programme should contain matter which, if imitated, could be harmful to the well-being of individuals or of the community; this includes such sequences as those which —
 - ...
 - (iv) deride or otherwise discredit the law and its enforcement, or significant social institutions.

That quoted is a primary standard. It is one that the National Broadcasting Service, the ABC, accedes to in principle. It is a standard that tends to dampen criticism and to heighten broadcasting as entertainment media *exclusively*. It allows broadcasters to take the easier path: Find programmes that pleasure viewers. Don't risk challenging or irritating them. Of this proviso the Prime Minister's Priority Review Staff Report stated:

Whatever that may have meant to those who drafted it and whatever it may be thought to mean by those who now administer it, one must regard such a restraint upon the right of the individual to criticise vested interests, including government, as most unwise and potentially dangerous.⁶⁹

Where the Control Board has acted to require the kind of programming that is not profitable to the commercial stations, it has met with singular failure. As mentioned earlier, on Sunday mornings the Control Board attempted to limit television licensees between the hours of six a.m. and noon to programmes of a religious nature; instructional education; charitable appeals; and news.⁷⁰ On advice of counsel the commercial stations simply refused the Board's instruction, arguing a lack of statutory authority.⁷¹ The Board retreated and the commercial stations continued to telecast replays of sporting events.⁷² On the question of children's programmes the Board established an advisory committee which met with the industry. Its goal was to increase the number and quality of children's programmes. The Committee's first report sounded a hopeful note; it was striving for voluntary cooperation.⁷³ Its final report was one of despair: The industry could not be expected to co-operate. The Board should affirmatively regulate by requiring a given number of hours of children's programmes. For its part the Board-recognizing the commercial nature of its licensees — held them to only *one hour* a week of children's programmes. The spokesman for

69. *Op. cit.*, note 61, at 46-47.

70. Australian Broadcasting Control Board, *Television Programme Standards* (1970) 22, item 35; see also *supra* note 29.

71. *Op. cit.* note 39, at 315-316.

72. That retreat has continued.

73. See the first report the Board published as a separate document, *Production Guidelines for Children's Television Programmes*, a Report by the Children's Television Advisory Committee (1973).

the commercial stations testified before the Senate Committee that that time was more than enough; children want to be entertained, not educated.⁷⁴

So much for programming regulation. Now to the Board's technical standards which tend to solidify entrenched positions. The Board's technical standards are quite high. They extend to studio equipment *all of which* must be subject to Board approval. A result of this is that the Board can inhibit programming and the entry of new licensees (particularly those with limited capital funds) by its power to control the quality of equipment. Of this the Priority Review Staff Report stated:

We find much in the Technical Standards that is unnecessary, and some that has little meaning. Standards are necessary to ensure that signals transmitted do not interfere with other stations' transmissions. But the Technical Standards go far beyond that, prescribing types of equipment, how studios should be built and numbers of personnel that must be present . . . Not only is the result an ineffective approach to control, but, in this case, an unnecessary and potentially undesirably close association between the control authority and the organisations under its control. If Commercial Broadcasting is based on any value it is that the 'market' will sort out the better stations. We imagine the market could determine technical standards: a station claiming to broadcast good music would presumably broadcast it in a way that would enable it to be received as good music.⁷⁵

As significant as the Board's ordering of technical standards has been the Board's participation together with the Post Office in giving direction to the new technology. Without a detailed presentation it suffices to note that the owners of radio broadcast licenses are the owners of the television broadcast licenses and that the method of regulating radio was imposed on television.⁷⁶ Moreover, while it surely has its good points, the fact remains that the new technology of cable and FM have yet to be developed in Australia.

It is in respect to FM that the roles of the ABC, the Control Board and the commercial stations are being challenged. Elected in 1972 the Labor Party, after about seventeen years out of power, determined to create "pluralism" in broadcasting and FM was to be the mechanism to achieve that end. In a period of less than two years

74. The final report was *not* published as a separate document. It was mentioned in the Board's 25th Annual Report, *supra* note 28 *op. cit.*, 106-107. The Board stated in part: "Although protection of the interests of young people is of paramount consideration during the early evening period, the Board is conscious of the fact that television as a whole is a medium of entertainment, information and education which reaches a great number of persons of all ages in the privacy of their homes." Having said that, the Board then impliedly rejected the strong recommendations of its own committee whose final report is contained in Appendix L to the Board's Annual Report. See also, testimony of Mr. Cowan, *op. cit.*, note 39, at 341: "No matter how worthy a programme designed by adults for children may be in the eyes of adults, there can be no certainty that children will share their views. Whatever may be the intrinsic value of the subject matter from the evaluation of adults, it is the child viewer who must be entertained enough to watch. There is ample evidence that he will *not* watch if he considers the subject matter as an extension of the school rooms." (Italics added)

75. *Op. cit.*, note 61, at 47.

76. *Royal Commission on Television* (1954) 103.

there were four government reports, including that of a Royal Commission on FM. All accepted the proposition that "pluralism" meant community programming. The final question was one of control. The ABC asked to be the instrument for local programming; it, after all, is the National Broadcasting Service and it is non-commercial. The Broadcasting Control Board expressed concern about licensing and standards and responsibility. The Minister for the Media urged community programming but with the *hardware* to be controlled by his office. The Post Office wanted to be sure that the communications band was not impinged upon. All of the reports made were either technical or reflected a vested interest.⁷⁷ There was only one exception. That is the report of the Priority Review Staff (PRS).

The PRS consists of senior civil servants and informed non-civil servants. It is responsible to the Cabinet (or more particularly to the Prime Minister). It owes no allegiance as such as any department, to the ABC, or to the commercial stations. Its Report offers a clear alternative to those filed before. It is a statement of rationale and

77. Australia is many years behind the rest of the world in introducing FM Broadcasting. This is due in part, to the recommendations of the Huxley Committee, which placed television stations in the Very High Frequency (VHF) waveband, and to other differences between Australian and International Standard frequency allocations. On that basis the then Government accepted the recommendation of the Australian Broadcasting Control Board (ABCB), in June 1972, that FM transmissions should be introduced in the Ultra High Frequency (UHF) waveband. In August 1973 the Senate Standing Committee on Education, Science and the Arts, which had been concerned with broadcasting over many years, presented a report which was critical of the recommendations of the ABCB and of the decisions of the previous Government.

As a result of this criticism and of other stimuli, the Labor Government decided to hold an independent inquiry into FM Broadcasting. In November 1973 Sir Francis McLean and Professor Cyril Renwick were appointed as Commissioners to inquire into the introduction of FM. The Commission's terms of reference were not confined to technical and economic aspects but touched on the social issues inherent in the introduction of a new broadcasting medium and referred specifically to the Australian Government's desire to "encourage pluralism of involvement in the media".

The Minister for the Media announced on 20 February 1974 that, by altering policy on the area of coverage of AM Stations, it had been found possible to provide for a doubling of the number of AM licences throughout Australia. (This will take some time and will involve expenditure on new aerial systems for existing stations). See *Independent Inquiry into Frequency Modulation Broadcasting Report* (March 1974).

On 8 March 1974 the McLean Commission reported to the Government recommending that FM broadcasting should be introduced in the VHF waveband, which is the International Standard. This recommendation was based on the transfer of certain television and other transmissions from the VHF waveband. The report of the Commission dealt mainly with technical and economic matters and touched only briefly on social considerations — even though a great deal of the evidence was concerned with social issues unconnected with the choice of waveband.

The Australian Government endorsed the recommendations of the McLean Commission in principle. Specifically, the Government approved the establishment of FM Broadcasting in the WHF waveband; allocated funds for the clearance of television and other transmissions from that waveband; and called for a plan of development of FM Broadcasting. The Government directed that the planning take full account of the Australian Government's policies, particularly for the media and for urban and regional development.

[On 1 February 1975, 2MBS-FM Australia's first FM station officially commenced broadcasting. *Editor's note*].

it is goal oriented. It set a new dimension of broadcasting policy, namely, community programming.

The social objectives affecting the development of broadcasting in Australia are undergoing change. The community is only now beginning to realise the potential of radio as a means of communication for community development. They could well lead to the objective of providing *programmes* (not simply broadcasts) to people in accordance with their needs. The technical plan then would tend towards a multiplicity of small stations each covering a restricted geographic area, say 2 to 10 kilometres across, and providing programs of special interest and relevance to the community living in its area. Medium coverage stations, covering groups of communities, and broad coverage stations covering entire cities, could also be provided. The result would be structures of stations, varying from place to place around Australia, providing for general and sectional needs. The planning of the size, power, coverage, frequency, and other technical characteristics of those structures of stations would be fundamentally different from the planning of the least-cost solution aimed at reaching the maximum number of people. The higher costs of these structures of stations would have to be weighed against the higher social benefits. Simple criteria like the number of persons covered are inappropriate.

Any new technical plan must have a capacity to adjust to change. The first steps in the introduction of new radio services, particularly FM, should be strictly confined to those which will not later impede the choice of social objectives and technical options.⁷⁸

To achieve the stated goals required a flexible response: the ABC should be given another *national channel* for *national* programming. But a new layer of broadcast stations, the Community Service, should be developed. In this regard, neither the ABC nor the Control Board nor the Minister for the Media nor the Post Office should have a controlling role. *Control over all relevant elements* of community broadcasting, including the hardware, must be in the hands of the community being served. This view reflects the single most argued point by the community station representatives: They do *not* want a Federally owned "telephone" service that they can tap into. They want to buy and operate their own equipment. Senior representatives of the Music Society of New South Wales made this point in interviews. No government agency might want to censor music. Still, the representatives said, "it is a matter of principle. Ownership of equipment can mean control of programmes. We don't want any form of government control."

To help community groups achieve control the Federal government will provide funding. But, it is stressed in the Report, that funding will come from a *variety of agencies* not one of which may have any association with the licensing body. Again, the key is to maintain control in the community group. The licensing body will largely be an *assistant* to such groups. It will help, for example, organize different groups so that they might share a channel — should there be scarcity.

The entire thrust of the PRS report is access. The licensing body will be a new unit; it will not be the Control Board. Government regulation will not be in the form of

78. *Op. cit.*, note 61, at 10.

inhibition. Rather, the Report urges the Federal government to address itself to the law of slander and defamation as applied to broadcasting. Instead of the laws of several States which sometimes conflict, why not have a more *open uniform law* that will encourage community discussion? Such is the kind of *affirmative* regulation urged by the Report.

Most important, however, is the *co-ordination* and *formulation* on an *ongoing* basis of communications policy. The PRS argues strongly that this role is *not* one to be performed by an agency as such. Rather, it is a role of government. The Report also urges that the role *not* be given to a minister with sectional responsibilities. The policy functions should be performed by a committee of ministers:⁷⁹

Radio is a potentially powerful force for social change. Policies for control and licensing of radio should therefore be harmonised with the Australian Government's policies in other fields of social development including Human Rights. We suggest that consideration could be given to explicit recognition of this need for harmonisation of policies by placing ministerial responsibility for the ABCB (or its successor) with a Minister having central, non-sectional, responsibilities – namely the Prime Minister, the Deputy Prime Minister or the Special Minister of State (but not the last if he acquires responsibility for telecommunications). To ensure that the full range of policies is taken into account a Ministerial Committee comprising one of those Ministers just mentioned as chairman, the Minister for Social Security, the Minister for Urban and Regional Development, the Minister for the Media, and the Postmaster-General (or the Minister responsible for telecommunications) could be established to deal with policy for radio and, ultimately, for all non-print media. Other Ministers could be co-opted as required, e.g. Attorney-General, Education, Labor and Immigration.

(There is, however, a footnote to be added at this point. The PRS is *not* the Prime Minister, nor the Cabinet. It is merely a staff of non-elected persons. The Prime Minister apparently made this point on 23 September, 1974, according to *The Australian*: "The Prime Minister was critical of the PRS report. He said it had exceeded its brief and stressed that it was his task to determine the specific responsibilities of ministers."⁸⁰ However, it should also be added, that the *Cabinet* apparently refused to allow the Minister for the Media jurisdiction over community licensing. *Cabinet* decided that the two FM community music stations would be licensed under the Wireless Telegraphy Act 1905-1973 (Aust.) through the Postmaster-General. The stations would be placed on that portion of the band before used for communications only. The power of the PMG over these stations is to be quite limited.)

79. *Id.*, 56.

80. *The Australian*, 24 September 1974, at p.3, "In yesterday's Cabinet meeting, the Prime Minister, Mr. Whitlam, came down heavily on the side of the Media Minister, Senator D. McClelland, in refusing to allow any discussion on the vital question of who should have responsibility for developing FM broadcasting in Australia."