

**AUSTRALIAN MEDIA LAW UPDATE**

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**CLARIFYING OPEN NARROWCASTING**

**Background**

[131] The *Broadcasting Services Act 1992* (Cth) (the Act) introduced a set of broadly structured categorisations of broadcasting services,<sup>2</sup> which were intended to open up the range of broadcasting services available in Australia. These categorisations were established in such a way as to allow for flexibility in the operations of services applicable to the ‘less intrusive and “niche” targeted subscription and open narrowcast services’.<sup>3</sup> As well as flexibility, the structured method was designed to allow for reduced levels of regulatory intervention and oversight for these less pervasive forms of media, as demonstrated by their regulatory need of class, rather than individual, licences.<sup>4</sup>

In a practical sense, the greatest development of open narrowcasting has occurred in the radio sector. The greatest degree of regulation that applies to open narrowcasting has come through the broadcasting planning process, and the granting of transmission capabilities.<sup>5</sup> Other than that, the ability of the ABA to provide for opinions on the categorisation of services<sup>6</sup> has been a device used to provide regulatory certainty in this field, and forms a type of de facto regulatory device.<sup>7</sup> Other than this, the complaints procedure established under the Act<sup>8</sup> has alerted the ABA to the

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<sup>2</sup> Part 2 *Broadcasting Services Act 1992* (Cth) (the Act).

<sup>3</sup> *Broadcasting Services Bill 1992 — Explanatory Memorandum, Clause 12 — Method of regulating particular services.*

<sup>4</sup> Section 12(2).

<sup>5</sup> Australian Broadcasting Authority *Open Narrowcasting Radio Services: Clarifying the Criteria Discussion Paper*, March 2001 (Discussion paper) 2.2–2.3.

<sup>6</sup> Section 21.

<sup>7</sup> Discussion paper, above n 5, 5.5–5.6: of the 154 opinions determined by the ABA, 39 (25 per cent) were held not be open narrowcasters as claimed by the applicants.

<sup>8</sup> Section 147 applies to complaints relating to Act and licence breaches, to be investigated by the ABA as set out in s 149.

operational dilemmas created by the categorisation provisions set out in the Act. A series of [132] complaints made by holders of individual licences, including commercial and community radio broadcasters, has set out a background of definitional uncertainty that has been used by certain open narrowcasters<sup>9</sup> to stretch the integrity of the intended application of the open narrowcasting category.

This is because, as the ABA has pointed out, in terms of coverage or the types of material provided on them, such services are indistinguishable from community and commercial radio broadcasting services.<sup>10</sup> The current method by which categorisation is undertaken does not appear to be able to clearly delineate the intention of the legislature in its desire for providing for niche broadcasting. This most clearly occurs at the boundaries between commercial broadcasting services<sup>11</sup> and open narrowcasting services.<sup>12</sup>

The provisions of s 18(1)(a) establish the category of service, and operate in the alternative. Open narrowcasting services are thus defined as broadcasting services:

- (a) whose reception is limited:
    - (i) by being targeted to special interest groups; or
    - (ii) by being intended only for limited locations, for example, arenas or business premises; or
    - (iii) by being provided during a limited period or to cover a special event; or
    - (iv) because they provide programs of limited appeal; or
- for some other reason.

An open narrowcasting service may therefore function as one of these, and in the process, adopt characteristics of other categories of broadcasting service along the way. There are no excluding factors such as advertising or profit that apply to these

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<sup>9</sup> Two examples are *ABA Investigation Report — Low Power Open Narrowcasting Service Smooth 88FM Byron Bay/Lismore* (1998); *ABA Investigation Report — Low Power Open Narrowcasting Service Best FM Bundaberg*, (1999). Both were found to be providing a commercial broadcasting service as defined in s 14, without a licence, and were consequently in breach of s 133 of the Act.

<sup>10</sup> Discussion Paper, above n 5, 2.3.

<sup>11</sup> Section 14.

<sup>12</sup> Section 18.

categories, for instance, which limit open narrowcasting services, while such elements will distinguish commercial<sup>13</sup> from community broadcasting services.<sup>14</sup> In other words, an open narrowcasting service may display those characteristics of a commercial radio service, such as advertising or profit, though may claim that it operates in one of the limited circumstances provided for in s 18.

The problematic nature of open narrowcasting radio and its operations is now being considered by the ABA in order to clarify the determining criteria. This was first announced by the ABA on 27 April 2000.<sup>15</sup> Nearly a year later, on 5 March 2001,<sup>16</sup> the ABA released its Discussion Paper calling for submissions on the way it can clarify the criteria.

The ABA will be exercising its powers set out in s 19 of the Act to attempt to provide a more stable regulatory environment for the operation of open narrowcasting. Section 19 is a generic provision that may be used in respect of any of the categories of broadcasting service, and can be used to either [133] determine additional criteria to those set out in ss 14–18A,<sup>17</sup> or to clarify this criteria,<sup>18</sup> for the purposes of distinguishing between categories of broadcasting services. Different criteria or clarifications may be made for either radio or television services.<sup>19</sup> The ABA does this by notice in the Gazette,<sup>20</sup> and such determinations and clarifications are disallowable instruments for the purposes of s.46A of the *Acts Interpretation Act 1901* (Cth).<sup>21</sup> The

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<sup>13</sup> For example, s 14 (c ) and (d).

<sup>14</sup> For example, s 15 (b) and Community Broadcasting licence conditions: cl 9(1)(b), and 9(3)–(6); although these categorisations can be flexible as well, for instance as it applies to the definition of ‘community purposes’, which has been interpreted in its broadest sense: *3AW Southern Cross Radio v Inner North East Community Radio Incorporated* (1994) 16 ATPR 41-313.

<sup>15</sup> Australian Broadcasting Authority, *ABA to bring greater clarity to open narrowcasting radio licence category* (NR 28/2000, 27 April 2000).

<sup>16</sup> Australian Broadcasting Authority, *ABA seeks to clarify criteria for narrowcasting services* (NR 10/2001, 5 March 2001).

<sup>17</sup> Section 19(1)(a).

<sup>18</sup> Section 19(1)(b).

<sup>19</sup> Section 19(2).

<sup>20</sup> Section 19(1).

<sup>21</sup> Section 20.

way the ABA is to determine the criteria or clarification is provided for in s.22, which also functions in relation to s 21 opinions.

## **The discussion paper**

### ***Part 1 — background***

The discussion paper canvases the role and function of open narrowcasting radio services as it has emerged in Australia, and sets out the type of formats that has characterised the service, which includes racing radio, radio in languages other than English, low power tourist information services, and some niche music formats.<sup>22</sup> The paper then sets out the method of regulation that applies to this type of broadcasting service.<sup>23</sup> It deals with the scope of the regulatory uncertainty that exists because of the broadly defined categorisations,<sup>24</sup> and the role of the ABA to clarify this uncertainty.<sup>25</sup> It notes that the s.21 opinion had been its sole regulatory mechanism,<sup>26</sup> rather than the provision of broadly developed criteria. In this way, it has also acknowledged the private nature of these opinions, and their limited scope to provide more general guidance.<sup>27</sup>

### *The scope of this inquiry*

The discussion paper notes that this clarification activity is occurring in the context of the expansion of open narrowcasting into metropolitan areas, as well as the availability of more powerful transmitter licences. The auctions for these have been postponed until the s 19 process has been completed, and it is in this context that the relationship between open narrowcasting and other broadcasting services is considered, *so that there may need to be clarifications made in respect of those other services* as set out in Pt 2 of the Act.<sup>28</sup> It notes, however, that issues of ownership and control of open narrowcasting falls outside the scope of the task at hand.<sup>29</sup>

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<sup>22</sup> Discussion Paper, above n 5, 2.1.

<sup>23</sup> Ibid 2.2–2.5.

<sup>24</sup> Ibid 3.1–3.5.

<sup>25</sup> Ibid 4.1, 6.1–6.3.

<sup>26</sup> Ibid 5.1–5.6.

<sup>27</sup> Ibid 5.5, 5.7.

<sup>28</sup> Ibid 7.1–7.7, 7.10.

<sup>29</sup> Ibid 7.8–7.9.

***Part 2 — issues for consideration***

The discussion paper deals with the difference in regulatory approach between those criteria in s 18(1)(a) that relate to a physically defined location and those that operate on a more ‘subjective’ level. In assessing the different criteria, and the [134] methods by which clarification may be sought, the ABA has drawn on its body of s 21 opinions to illustrate those services that have fallen into the criteria.

*Physical limitations*

The criterion set out in s 18(1)(a)(ii) deals with physical limitations<sup>30</sup> in the sense of limited locations and populations. As well, the scope of transmission capabilities<sup>31</sup> can ascribe limited locations.<sup>32</sup> Having said this, the content of a narrowcasting service may be a retransmitted commercial service, which will not fall outside the scope of open narrowcasting, if serving a very limited area or population. The issue of ‘networking’ of content through distinct means is being considered within the context of this criterion.<sup>33</sup> The discussion paper canvasses options relating to defining how such physical limitations will operate in practice.<sup>34</sup>

*Subjective factors*

The content-oriented, subjective factors of certain types of open narrowcasting services have been linked by the ABA in the discussion paper. These focus on s 18(1)(i) relating to those services targeted to special interest groups, and s 18(1)(iv) relating to those services providing programs of limited appeal. The discussion paper notes, in effect, the problematic nature of these defining these types of service, in terms of stability and regulatory certainty, particularly because of the shifting boundaries of demographic and interest groups that may be constituted under these criteria; the exception that applies, though, is the stable and predictable non-English language category.<sup>35</sup>

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<sup>30</sup> Ibid 9.1–9.6; s 22 (a)–(b).

<sup>31</sup> Ibid 9.8–9.9; s 22(c).

<sup>32</sup> Ibid 9.11–9.25.

<sup>33</sup> Ibid 9.26–9.27.

<sup>34</sup> Ibid 9.28.

<sup>35</sup> Ibid 10.1–10.6.

The ABA has sought particular clarification of these factors as set out in s 22 of the Act. These relate to the nature of the audience to which those services are targeted,<sup>36</sup> the nature of the programs being provided by those services, including the level of interest in the subject matter of those programs,<sup>37</sup> whether those programs are directed at a specialist audience,<sup>38</sup> the social and cultural impact of those programs,<sup>39</sup> and such other matters as the ABA thinks fit.<sup>40</sup> The ABA is thus seeking views on a broad range of types of programs and appeal, including whether s 18(1)(i) groups have to be formal or loosely connected, or whether they may provide business information, as a type of program of limited appeal, among others.<sup>41</sup>

The ABA is suggesting some additional factors that may assist with clarifying the meanings of both provisions. In relation to s 18(1)(i), it is proposing the inclusion of definitional provisions of 'targeted' and 'special interest group', which will ensure that there has to be some clear factor that distinguishes these groups from others.<sup>42</sup> It has suggested that:

*Targeted* means directly serving the interest of a special interest group ...

[135] *Special interest group* means a particular readily identifiable group whose members choose to belong to it and who are organised for the predominant purpose of participating in or furthering a special interest.<sup>43</sup>

In relation to s 18(1)(iv), it has proposed a schedule of 'programs of limited appeal' based on s 21 opinions. These would be subject to revision.<sup>44</sup>

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<sup>36</sup> Section 22(e)

<sup>37</sup> Section 22(f)(i)

<sup>38</sup> Section 22(f)(ii)

<sup>39</sup> Section 22(f)(iii)

<sup>40</sup> Section 22(g)

<sup>41</sup> Discussion Paper, above n 5, 10.10–10.15.

<sup>42</sup> *Ibid* 10.15, 10.17–10.20.

<sup>43</sup> *Ibid* 10.16.

<sup>44</sup> *Ibid* 10.21–10.23.

### *Racing radio*

The ABA has set out the history and policy behind the emergence of ‘racing radio’,<sup>45</sup> as a category of program of limited appeal, within the definition of open narrowcasting service. It has noted the expansion of this component into more generalised TAB and sports betting,<sup>46</sup> and the generalised success of this sector in accessing transmitter licences.<sup>47</sup> It is clearly suggesting that it is a sector of broadcasting service on its own,<sup>48</sup> and is thus open for legislative intervention to create a new category of service, an issue not open to it to consider under its powers in s 19.<sup>49</sup> However, it can consider reporting to the Minister in relation to this issue under s 158(n) of the Act.<sup>50</sup>

### **Conclusion**

Submissions and comments based on the Discussion paper closed on 27 April 2001. It will be interesting to see what approach the ABA adopts in relation to the categorisations proposed, and the method by which it will conform with its obligations under the Act.

## **THE ANTI-SIPHONING LIST — ABA INVESTIGATION**

The ABA is undertaking an investigation into the ‘events’ to be included in the ‘anti-siphoning list’,<sup>51</sup> at the direction of the Minister for Communications, Information Technology and the Arts.<sup>52</sup>

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<sup>45</sup> Ibid 11.1–11.12, 11.21–11.25.

<sup>46</sup> Ibid 11.13–11.20.

<sup>47</sup> Ibid 11.29.

<sup>48</sup> Ibid 11.26–11.27.

<sup>49</sup> Ibid 11.28.

<sup>50</sup> Ibid 11.30–11.31.

<sup>51</sup> Australian Broadcasting Authority, *ABA investigation — review of anti-siphoning list* (NR 7/2001, 15 February 2001); Australian Broadcasting Authority, *Investigation — review of anti-siphoning list: Issues Paper* (February 2001). The ABA is to report to the Minister by 30 June 2001.

<sup>52</sup> Minister for Communications, Information Technology and the Arts, *Australian Broadcasting Authority (Investigation), Direction (No 2 of 2000)* (22 December 2000).

### **What is the list for?**

The anti-siphoning list was created in 1994,<sup>53</sup> at the time of the establishment of [136] subscription television broadcasting services<sup>54</sup> (or 'pay TV') in Australia. Free-to-air services — the commercial television licensees and the national broadcasters, the ABC and SBS — are given the opportunity to acquire the right to broadcast nationally important sporting events 'live', though there is no compulsion that they do so.

The aim of the list and associated rules was to ensure that nationally important sporting events would remain available 'live' on free-to-air television. The idea was that the list and rules would prevent the 'siphoning' of these attractive events to the less accessible pay TV.<sup>55</sup> The list of sporting events includes the Melbourne Cup, Australian Rules, National Rugby League, international Rugby Union, international cricket, some soccer, Grand Slam Tennis and some other matches, international netball, some national basketball, major golf tournaments, and some motor sports.<sup>56</sup> The operation of the current list expires in 2004, with the exception of World Cup soccer, which expires in 2006.

### **The hoarding of siphoned events**

While the intention of the rules was to protect the interests of the Australian public, they also appeared to 'protect' incumbent broadcasters, who could 'hoard' events,<sup>57</sup> thus denying access to 'listed' events which never made available to the public.<sup>58</sup> 'Anti-hoarding' rules, designed to prevent this happening, and made applicable to commercial television broadcasting services and relevant program suppliers were inserted into the *Broadcasting Services Act 1992* (Cth) (the Act) in 1999.<sup>59</sup> The rules were established to ensure that the anti-siphoning rules operate in the public interest.

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<sup>53</sup> Broadcasting Services (Events) Notice No 1 of 1994. The list has since been modified.

<sup>54</sup> As created through Part 7 of the *Broadcasting Services Act 1992* (Cth).

<sup>55</sup> W Lee and B Moylan, 'Hosepipes and Footballs: how sports coverage went down the Gurgler' (1997) 2 *Media & Arts Law Review* 93, 93–4, describes the rationale behind the establishment of the anti-siphoning rules.

<sup>56</sup> Broadcasting Services (Events) Notice No 1 of 1994. As well, some specified cricket tests and 'one-dayers' as well as the Rugby Sevens have been delisted.

<sup>57</sup> Lee and Moylan, above n 55, 94–102.

<sup>58</sup> *Foxtel Cable Television Pty Ltd v Nine Network Australia Pty Ltd* (1997) 143 ALR 516.

<sup>59</sup> Part 10A.

It should be noted that the ABA recently investigated, again by way of Ministerial direction,<sup>60</sup> the types of events that may be listed under those rules.<sup>61</sup>

### **The legislative formulation for the creation of the list**

The anti-siphoning rules are found in s 115 of the Act. The Minister can list<sup>62</sup> events the televising of which the Minister thinks should be available free to the general public. The provisions also allow for delisting such events.<sup>63</sup> Statutory examples of these are provided for in s 115(2).

The subscription television broadcasting licence conditions<sup>64</sup> set out in Pt 6 of Sch 2 of the Act give effect to the anti-siphoning list. Clause 10(1)(e) provides that a licensee will not acquire the right to televise an event specified in a notice under s 115(1), *unless* a national broadcaster or a commercial television broadcaster *has the right to televise the event*. In relation to the latter, the right relates to coverage [137] of a total of more than 50 per cent of the Australian population.<sup>65</sup> The acquisition of rights has to be real, and not delayed, or as a package of highlight programs.<sup>66</sup> The effect is that there should not be a de facto siphoning of listed events by only permitting a limited scope of ‘televising’ on free-to-air television.

In addition to these provisions, cl 10(1B) expands the definition of commercial broadcasting service in relation to cl 10(1)(e), so that *program suppliers*<sup>67</sup> are taken to have the right to televise also. For these provisions, this means a person who has an agreement to supply the licensee with program material to be televised on its

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<sup>60</sup> Minister for Communications, Information Technology and the Arts, *Australian Broadcasting Authority (Investigation), Direction (No 1 of 2000)* (29 February 2000) in relation to s 146C.

<sup>61</sup> Australian Broadcasting Authority, *ABA to examine the use of rights to live sporting events on free-to-air television* (NR 36/2000, 9 June 2000); Australian Broadcasting Authority, *Investigation into the implementation of the anti-hoarding rules: Issues Paper* (June 2000). The ABA reported to the Minister on 31 August 2000.

<sup>62</sup> Section 115(1), (1A).

<sup>63</sup> Section 115(1B), (2).

<sup>64</sup> Section 99(1) and (5).

<sup>65</sup> Clause 10(1A) refers to the ABA’s specification under the applicable licence area.

<sup>66</sup> *Foxtel Cable Television Pty Ltd v Nine Network Australia Pty Ltd* (1997) 143 ALR 516.

<sup>67</sup> Cf the designation of ‘program supplier’ in Part 10A relating to ‘anti-hoarding’.

commercial service (whether or not the material includes matter showing the event)<sup>68</sup> and supplies the licensee with a substantial proportion of all the program material, whether it is supplied under this agreement.<sup>69</sup>

This definition of program supplier is problematic in its effect and in its relationship with the new Pt 10A of the Act. There is a trend toward both horizontal and vertical relationships between commercial television licensees and program supply. As well, there is a developing connection between interests in pay TV and commercial television licensees, and the connected interests these may have in sporting organisations. The recent developments in which rights acquired in relation to the AFL by both commercial and subscription television broadcasters are a case in point. The soccer, an example included by the ABA in its issues paper released as part of this current investigation, suggests the inter-connection emerging between pay TV and free-to-air broadcasters.<sup>70</sup>

A consequence of this development, in the light of the ambit of the investigation to be carried out by the ABA, in relation to the otherwise innocuous notion of which events should be listed in the future is perhaps less straightforward than it seems on first blush.

### **The investigation**

The investigation is seeking to establish what events should be retained on the list.<sup>71</sup> Included in the Ministerial Direction (the Direction) is the requirement that the ABA is 'in conducting the investigation to have regard to the policy that an event<sup>72</sup> should only be included in the Notice if the event has been consistently broadcast by free-to-air television broadcasters in the past five years'.<sup>73</sup> However, the extent to which certain types of events have not been broadcast or have been delisted<sup>74</sup> during that

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<sup>68</sup> Clause 10(1B)(a).

<sup>69</sup> Clause 10(1B)(b).

<sup>70</sup> *Investigation — review of anti-siphoning list: Issues Paper*, 14.

<sup>71</sup> *Direction (No. 2 of 2000)*, above, para (a).

<sup>72</sup> This includes 'events of a specified kind or a series of events.

<sup>73</sup> Paragraph (b).

<sup>74</sup> Section 115 (2).

time may not be as clear cut as the direction has stated, in view of the developing relationship between pay TV and free-to-air broadcasters. The differences between live, delayed, and packaged highlights programs also muddy the waters in relation to this aspect of the Direction.

These more problematic matters are raised in the ABA's issues paper.<sup>75</sup> Among other things, it is seeking to clarify the meaning of 'consistently broadcast', as well as matters concerning the events themselves. It will be interesting to see exactly how the ABA's investigation will be treat this curiously worded direction, in terms of the effectiveness of any list ultimately created. However, what cannot be considered in the framework of this investigation is the actual effectiveness of the rules as they exist as part of the developing connections between broadcast sectors. These may require a reconsideration of the scope of the anti-siphoning rules themselves.

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<sup>75</sup> *Investigation — review of anti-siphoning list: Issues Paper*, 5.