SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2004

31 March 2004

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MEMBERS OF THE COMMITTEE

Senator T Crossin (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator D Johnston
Senator J McLucas
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 2004

The Committee presents its Fifth Report of 2004 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Broadcasting Services Amendment (Media Ownership) Bill 2002 [No. 2]

Broadcasting Services Amendment (Media Ownership) Bill 2002 [No. 2]

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2003*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 24 March 2004. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 15 of 2003

[Introduced into the House of Representatives on 5 November 2003. Portfolio: Communications, Information Technology and the Arts]

The bill proposes to amend the *Broadcasting Services Act 1992* to repeal provisions that restrict foreign ownership of commercial television and subscription television interests, and to allow the Australian Broadcasting Authority to:

- grant cross-media exemption certificates on application, provided certain editorial separation requirements and conditions are met;
- investigate complaints in relation to breaches of certain licence conditions; and
- require regional broadcasters to meet certain local news and information content standards.

The bill is the same as the bill previously passed by the House of Representatives in 2002 but also incorporates those amendments made by the Senate and agreed to by the House of Representatives in June 2003.

Retrospective application
Proposed new section 43A

Proposed new section 43A of the *Broadcasting Services Act 1992*, to be inserted by item 1AA of Schedule 2, provides for a new licence condition for the renewal of regional aggregated commercial television broadcasting licences. The applicable date for the imposition of this new condition on defined licence areas in regional New South Wales, Victoria and Queensland is specified as 1 August 2003. The application of the changes proposed by the new section would therefore apply retrospectively from that date.

As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the Explanatory Memorandum does not indicate the reason for this retrospective application. The Committee therefore **seeks the Minister's advice** as to why the date of 1 August 2003 was chosen for this purpose and whether any person would be adversely affected by this retrospectivity.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

I note the Committee has sought advice concerning proposed new section 43A of the *Broadcasting Services Act 1992* (BSA), to be inserted by item 1AA of Schedule 2 to the Bill, and proposed new section 43B of the BSA, to be inserted by item 1AB of Schedule 2 to the Bill.

Proposed new sections 43A and 43B of the Bill amend the BSA to require the Australian Broadcasting Authority (ABA) to ensure that, at all times on and after given dates, there is in force under section 43, for each regional aggregated and Tasmanian (new section 43A) and metropolitan (new section 43B) commercial television broadcasting licence, a licence condition that has the effect of requiring each licensee to broadcast to each local area, during set periods, at least a minimum level of material of local significance.

I note that the Committee considers the application of the changes proposed by new section 43A for the regional aggregated markets of Northern NSW, Southern NSW, Regional Victoria, Eastern Victoria, Western Victoria and Regional Queensland would apply retrospectively from the chosen date of 1 August 2003.

Following an extensive investigation and public consultation process, including consultation on a draft licence condition by regional broadcasters, the ABA proceeded to impose an additional licence condition on each of the 13 commercial licensees in the four regional aggregated television markets, effective 6 July 2003. The provisions for this particular licence condition in the Bill were intended to mirror this ABA inquiry and therefore the date of 1 August 2003 was chosen.

I am advised that because the ABA has thus completed the process of imposing a licence condition of the kind specified by proposed new section 43A of the BSA, there is no potential for retrospective operation of this provision.

The Committee may wish to note that the Government is considering amending the equivalent provisions in s. 43A relating to Tasmania, and those in s. 43B for metropolitan markets. The current requirement for an equivalent licence condition by 1 July 2004 for these markets may not provide the ABA with sufficient time to conduct the necessary investigations given the delays experienced in progressing the Bill through Parliament. If the Government decides to move such an amendment I will advise the Committee accordingly.

The Committee thanks the Minister for this response. The Committee notes, however, that it would have been useful if this explanation had been included in the Explanatory Memorandum to this bill.

Parliamentary scrutiny
Proposed new sections 43A and 43B

Both proposed new section 43A of the *Broadcasting Services Act 1992*, to be inserted by item 1AA of Schedule 2, and proposed new section 43B of that Act, to be inserted by item 1AB of Schedule 2, would permit the Australian Broadcasting Authority to impose conditions on the renewal of various commercial television broadcasting licences relating to the broadcasting of minimum levels of material of local content. The effect of the imposition of those conditions appears to be very similar to the Broadcasting Authority legislating for such minimum levels of local content, in that the conditions would lay down general principles to be observed by licensees in the conduct of their business.

However, since those general principles are contained in conditions to the renewal of a licence, and not in a public document, they are not subject to Parliamentary scrutiny. The Committee **seeks the Minister's advice** on whether the exercise by the Broadcasting Authority of its power to determine these conditions ought to be subject to Parliamentary scrutiny.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

You have also sought my advice as to whether or not the exercise by the ABA of its power to determine licence conditions in relation to sections 43A and 43B should be subject to parliamentary scrutiny, as they appear to be very similar to the ABA legislating for minimum levels of local content.

Section 43 of the BSA provides that the ABA may impose additional licence conditions on commercial television and radio broadcasting licences. The ABA is required to give the licensee notice of its intention, give the licensee a reasonable opportunity to make representations in relation to the proposed action, and publish the proposed changes in the Gazette.

The licence conditions imposed by the ABA under new sections 43A and 43B will be imposed on a case-by-case basis. For each relevant licence, there must be a condition imposed. Since the result of the new sections will be conditions of specific application, the only parties that may be aggrieved as a result of the ABA's action under the new sections are the specific licensees holding the licences to which the conditions are to apply.

Each licensee that is affected by an additional condition imposed on its licence as a result of new sections 43A and 43B may apply to the Administrative Appeals Tribunal (AAT) for review of the decision to impose the condition. The ability of the ABA to determine minimum levels of material of local significance for each licence is therefore not unfettered; it is subject to merits review of the specific requirements imposed by the condition (provided there is always a condition in force).

I am therefore advised that in a case such as this, where an instrument made by the ABA will affect only a particular person, it would not normally be the case that the instrument would be made subject to Parliamentary disallowance, particularly where review of the decision on its merits is available (as it is here).

I hope this advice addresses the concerns of the Committee.

The Committee thanks the Minister for this response.

Trish Crossin
Chair

MINISTER FOR COMMUNICATIONS
INFORMATION TECHNOLOGY AND THE ARTS
THE HON DARYL WILLIAMS AM QC MP

24 MAR 2004

Senator Trish Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Senator for the Northern Territory
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

I am writing to you in response to the comments of the Senate Standing Committee for the Scrutiny of Bills, contained in the Scrutiny of Bills Alert Digest No. 15 of 2003, as they relate to the Broadcasting Services Amendment (Media Ownership) Bill 2002 [No. 2] (the Bill).

I note the Committee has sought advice concerning proposed new section 43A of the *Broadcasting Services Act 1992* (BSA), to be inserted by item 1AA of Schedule 2 to the Bill, and proposed new section 43B of the BSA, to be inserted by item 1AB of Schedule 2 to the Bill.

Proposed new sections 43A and 43B of the Bill amend the BSA to require the Australian Broadcasting Authority (ABA) to ensure that, at all times on and after given dates, there is in force under section 43, for each regional aggregated and Tasmanian (new section 43A) and metropolitan (new section 43B) commercial television broadcasting licence, a licence condition that has the effect of requiring each licensee to broadcast to each local area, during set periods, at least a minimum level of material of local significance.

I note that the Committee considers the application of the changes proposed by new section 43A for the regional aggregated markets of Northern NSW, Southern NSW, Regional Victoria, Eastern Victoria, Western Victoria and Regional Queensland would apply retrospectively from the chosen date of 1 August 2003.

Following an extensive investigation and public consultation process, including consultation on a draft licence condition by regional broadcasters, the ABA proceeded to impose an additional licence condition on each of the 13 commercial licensees in the four regional aggregated television markets, effective 6 July 2003. The provisions for this particular licence condition in the Bill were intended to mirror this ABA inquiry and therefore the date of 1 August 2003 was chosen.

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I am advised that because the ABA has thus completed the process of imposing a licence condition of the kind specified by proposed new section 43A of the BSA, there is no potential for retrospective operation of this provision.

The Committee may wish to note that the Government is considering amending the equivalent provisions in s. 43A relating to Tasmania, and those in s. 43B for metropolitan markets. The current requirement for an equivalent licence condition by 1 July 2004 for these markets may not provide the ABA with sufficient time to conduct the necessary investigations given the delays experienced in progressing the Bill through Parliament. If the Government decides to move such an amendment I will advise the Committee accordingly.

You have also sought my advice as to whether or not the exercise by the ABA of its power to determine licence conditions in relation to sections 43A and 43B should be subject to parliamentary scrutiny, as they appear to be very similar to the ABA legislating for minimum levels of local content.

Section 43 of the BSA provides that the ABA may impose additional licence conditions on commercial television and radio broadcasting licences. The ABA is required to give the licensee notice of its intention, give the licensee a reasonable opportunity to make representations in relation to the proposed action, and publish the proposed changes in the Gazette.

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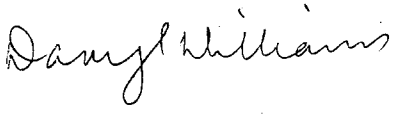
Each licensee that is affected by an additional condition imposed on its licence as a result of new sections 43A and 43B may apply to the Administrative Appeals Tribunal (AAT) for review of the decision to impose the condition. The ability of the ABA to determine minimum levels of material of local significance for each licence is therefore not unfettered; it is subject to merits review of the specific requirements imposed by the condition (provided there is always a condition in force).

I am therefore advised that in a case such as this, where an instrument made by the ABA will affect only a particular person, it would not normally be the case that the instrument would be made subject to Parliamentary disallowance, particularly where review of the decision on its merits is available (as it is here).

I hope this advice addresses the concerns of the Committee.

Yours sincerely



DARYL WILLIAMS