

Chapter 2

Television and Radio Regulatory Framework

Legislation

2.1 Two legislative instruments form the basis for the regulation of broadcasting content: the *Broadcasting Services Act 1992* (BSA); and the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act).

2.2 The BSA prescribes a co-regulatory model in which the industry, all broadcasting services (broadcasters) (eg. commercial television broadcasting licensees; commercial radio broadcasting licensees, and subscription service providers) and the government both have defined roles.

2.3 The Classification Act 'supports the National Classification Code, which sets out the overarching principles for classification'¹ of content relating to publications, films and computer games. All films, including those that are shown on television, are required to be classified under this Code. The classification of television and radio programs is not designated under either Act, allowing industry codes of practice or standards to be responsive to prevailing community standards.

2.4 Section 123(3A) of the BSA makes reference to the Classification Act which allows for the creation of guidelines, in requiring that the development of broadcasting industries' codes of practice align with the Office of Film and Literature Classification's film classification system.

Industry

2.5 The co-regulatory nature of the BSA allows the radio and television industry groups representing broadcasters to develop their own codes of practice:

It is the intention of the Parliament that radio and television industry groups...develop, in consultation with the ACMA and taking account of any relevant research conducted by the ACMA, codes of practice that are to be applicable to the broadcasting operations of...sections of the industry.²

2.6 The BSA does not impose a strict requirement for industry groups to develop codes. However, if no code of practice has been registered in a particular section of

1 Australian Communication and Media Authority, *Reality Television Review Volume 1*, Final Report, 30 March 2007, p. 10, http://www.acma.gov.au/webwr/assets/main/lib310007/acma_realitytvreview_finalreport_vol1_30mar07.pdf (accessed 8 April 2008).

2 *Broadcasting Services Act 1992*, s. 123(1).

the broadcasting industry, the Australian Media and Communications Authority (ACMA) must 'determine a standard in relation to the matter'³.

2.7 In the development of codes of practice, broadcasters may address matters of concern to the community, including but not limited to:

- preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry;
- methods of ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority; and
- methods of classifying programs that reflect community standards⁴.

2.8 Specifically, community attitudes to a number of behaviours, including: the portrayal of physical and psychological violence; the portrayal of sexual conduct and nudity; the use of offensive language; the use of drugs, including alcohol and tobacco; and behaviour that incites or perpetrates hatred are to be taken into account.⁵

2.9 The codes of practice operate alongside license conditions that differ according to the category of broadcasting license (eg. commercial television broadcasting licenses or commercial radio broadcasting licences). The intention of this form of regulatory control is that it can be:

...applied across the range of broadcasting services...according to the degree of influence that different types of broadcasting services...are able to exert in shaping community views in Australia.⁶

2.10 Codes of practice are subject to regular review.

Government

2.11 ACMA, the federal statutory authority since July 2005, is responsible for the regulation of radio, television and internet content in Australia and for administering the BSA. Section 123 of the BSA states that ACMA is required to maintain a Register of all relevant industry codes of practice and to keep the Register 'open for public inspection'⁷.

2.12 ACMA may only include a code in the Register when it is satisfied that: the code of practice provides appropriate community safeguards for the matters covered

3 *Broadcasting Services Act 1992*, s. 125(2)

4 *Broadcasting Services Act 1992*, s. 123(2).

5 *Broadcasting Services Act 1992*, s. 123(3).

6 *Broadcasting Services Act 1992*, s. 4.

7 *Broadcasting Services Act 1992*, s. 124(1-2).

by the code; the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and members of the public have been given an adequate opportunity to comment on the code.⁸

2.13 The Special Broadcasting Service (SBS) and the Australian Broadcasting Corporation (ABC), established under the *Special Broadcasting Service Act 1991* and the *Australian Broadcasting Corporation Act 1983* respectively, are Australia's national broadcasters. They are 'self-administering and are not required to obtain...approval of their codes of practice'⁹.

2.14 It is the responsibility of ACMA under the BSA to determine standards that are to be observed by commercial television broadcasting licensees that relate to programs for children and the Australian content of programs.¹⁰

Codes of practice

2.15 The following codes of conduct are relevant to the Committee inquiry:

- Australian Broadcasting Corporation (ABC) Code of Practice, covering its television and radio interests as well as other media;
- Special Broadcasting Service (SBS) Codes of Practice, covering both radio and television interests;
- Commercial Television Industry Code of Practice;
- Commercial Radio Codes of Practice and Guidelines (September 2004)
- Community Broadcasting Code of Practice;
- Community Television Code of Practice;
- Subscription Broadcast Television Code of Practice;
- Subscription Narrowcast Television Codes of Practice¹¹;
- Open Narrowcast Television Codes of Practice;
- Open Narrowcast Radio Codes of Practice; and
- Subscription Narrowcast Radio Code of Practice.

8 *Broadcasting Services Act 1992*, s. 123(4).

9 Arts Law Centre of Australia Online, *Classification and Censorship*, <http://www.artslaw.com.au/LegalInformation/ClassificationCensorship/default.asp> (accessed 6 April 2008).

10 *Broadcasting Services Act 1992*, s. 122(1-2).

11 Narrowcasting services are broadcasting services whose reception is limited by being targeted to special interest groups; or by being intended only for limited locations, for example, arenas or business premises; or by being provided during a limited period or to cover a special event; or because they provide programs of limited appeal; or for some other reason. *Broadcasting Services Act 1992*, ss 17-18.

2.16 At the time of the inquiry, no code of practice for the datacasting industry had been approved by ACMA.

ACMA's role in industry codes

2.17 Commercial television codes of practice, the principal concern of this inquiry, are subject to review every three years. The review process involves ACMA and the broadcasters and requires extensive opportunity for public comment. Drafts of revised codes are developed by the broadcasters and their industry body in consultation with ACMA

2.18 Once an agreed draft of the revised code is developed it is released for public comment. To ensure that the public has a reasonable opportunity to make comment advertisements are placed in all major national and regional daily newspapers seeking submissions and respondents are given four to six weeks to provide a submission. The draft code may be amended in light of issues raised in submissions. This process is managed by Free TV Australia.

2.19 The draft is then provided to ACMA together with the submissions received, and ACMA may review the draft and seek further amendments to it. Once a final version of the draft is agreed it is registered by ACMA and becomes the industry code for the next three-year period.

2.20 The Committee believes that it would be a useful addition to this process if the submissions received were published either on ACMA's or Free TV Australia's website and if, in addition, ACMA released a response to the major critical comments.

Co-regulation

2.21 As noted above, the current system of control of content in broadcasting is one of 'co-regulation' in which the broadcasting service providers, working within a framework of general guidelines, develop and implement their own codes of practice and, in the first instance, deal with complaints relating to breaches of the code. The co-regulatory aspect of the system involves ACMA, as the regulator, being involved in the development, registration and enforcement of the codes.

2.22 A number of inquiries into ACMA's predecessor, the Australian Broadcasting Authority (ABA), were critical of the system as it then operated. The Productivity Commission report into Broadcasting in 2000¹² and a Senate Select Committee¹³ in the same year were critical of the system as it then operated.

12 Productivity Commission, *Broadcasting*, Report No. 11(2000), p. 453.

13 Senate Select Committee on Information Technologies, *In the Public Interest* (2000), paragraph 6.1.

2.23 Some contributors to this inquiry have also chosen to reflect on the nature of the system and the performance of responsibilities held by broadcasters, industry bodies and ACMA:

Broadcast licences are extremely valuable economic privileges granted by society. With such privileges, come social obligations to act with respect for community values and the needs of people. Social responsibility is a necessary reciprocal response to such a licence. Broadcasters have in practice failed to demonstrate such good faith commitments or willingness to exercise social responsibility.¹⁴

2.24 Professor Lesley Hitchens notes that:

... there have been ongoing concerns about the effectiveness of the broadcasting co-regulatory scheme. Reporting on its inquiry into broadcasting, the Productivity Commission was critical of the limited monitoring role undertaken by the then regulator, the Australian Broadcasting Authority (ABA), and commented that the system was closer to one of self-regulation than co-regulation.¹⁵

2.25 Professor Hitchens went on to comment that:

If the system is to have credibility and be effective ... there needs to be a comprehensive investigation into the design and operation of the current co-regulatory arrangements.¹⁶

2.26 A common criticism in submissions to this Committee has been that ACMA does not take effective action against broadcasters found to be in breach of the codes of practice. Breaches of the codes with regard to content rarely result in anything more than the imposition of an unenforceable undertaking.

2.27 The Committee notes the concerns expressed by submitters about the co-regulatory system and the role of ACMA and agrees that the co-regulatory system would benefit from ACMA taking a stronger role in promoting and defending the public interest in the area of broadcast regulation. However, ACMA is a relatively new organisation thus the Committee is reluctant to be critical of it at this stage.

2.28 The Committee notes that ACMA has a very broad range of responsibilities including:

Allocating spectrum and numbers, licensing, monitoring compliance, investigating complaints, setting technical and content standards, registering industry codes of practice, participating in delegations on international standards setting and spectrum management, and undertaking

14 Australian Family Association, *Submission 85*, p. 4.

15 Professor Lesley Hitchens, *Submission 56*, pp 1-2.

16 *Ibid.*, p.2

quality research on key media and communications developments at home and abroad,¹⁷

And, that these '... responsibilities continue to broaden and diversify'.

2.29 It may be that regulation relating to broadcasting codes and program content would be better managed in a smaller, more focussed organisation.

Recommendation 1

2.30 The Committee recommends that, no later than the end of 2010, the government considers a review of ACMA, with a focus on ACMA's role in the broadcasting co-regulatory system, to determine if ACMA is effectively working with relevant industry bodies to maintain a fair balance in Australia's broadcast media.