CHAPTER 3

ISSUES

Overview of the Bill

3.1 In general the main criticism of the Bill centres on the vagueness of some terms used in the Bill, the broad powers conferred on the Minister for Foreign Affairs and an overall lack of transparency and accountability in procedures set down in some of the provisions.

3.2 Before dealing with the specific provisions of the Bill, the Committee took note of the comments made by witnesses regarding the overall direction of the proposed legislation. Mr Mike Edmiston, Director, Christian Voice (Australia) Ltd, expressed concern about 'the blanket powers' conferred on the Minister for Foreign Affairs under the Bill which in his view were 'tantamount to unaccountability'. He submitted 'The absence of openness and accountability in themselves, is against the national interest in that they leave such powers open to abuse; political, personal or otherwise'.[1] Supporting this view, Professor Rodney Tiffen submitted that 'transparency and proper procedure must be paramount, and parliament should always be wary of allowing the introduction of new executive powers, which one day may be used for an undesirable purpose not currently foreseen'.[2]

3.3 Ms Brigette Godwin from Seven Network Ltd, stated that 'if there is to be some kind of regime governing our activities, we need some kind of certainty, firstly, in the way that we operate and, secondly, that decisions cannot be made in an arbitrary and immediate fashion'.[3] Clearly, a number of witnesses appearing before the Committee were unhappy about fundamental issues concerned with transparency and accountability.

National interest

3.4 One of the main weaknesses in the Bill is the undefined use of the term 'national interest'. The Bill's stated primary object is to ensure that international broadcasting services are not provided contrary to Australia's national interest. Indeed, according to DFAT, the role for the Minister for Foreign Affairs under the Bill is essentially to safeguard Australia's national interest.[4] Yet the meaning of national interest is not defined.

3.5 The need to convey in the legislation a clear and consistent understanding of this term is important because major decisions taken by the Minister for Foreign Affairs under this legislation are based on his or her interpretation of this term. The Bill stipulates that if the ABA is satisfied that an applicant for an international broadcasting services licence is not an unsuitable applicant, the ABA must refer the application to the Minister for Foreign Affairs to decide whether the proposed service would be contrary to the national interest.

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1 Christian Voice (Australia) Ltd, Submission no. 1, p. 1.

2 Associate Professor RodneyTiffen, Submission no. 6, p. 2.

3 Ms Brigette Godwin, Committee Hansard, p. 16.

4 Department of Foreign Affairs, Submission no. 5, p. 3.

3.6 The Bill in sub-section 121FL(8) states that 'in determining whether an international broadcasting service is contrary to Australia's national interest, the Minister for Foreign Affairs must have regard to the effect of the service on Australia's international relations. Clearly, as pointed out by Mr Buettel, General Manager, Legal and Parliamentary, Department of Communications, Information Technology and the Arts, a key starting point is what is going to be the effect on Australia's international relations.[5]

3.7 The Bill also confers on the Minister for Foreign Affairs an on-going power to act to protect the national interest in relation to international broadcasting services after a licence has been issued. The Minister has the authority to direct the ABA to issue formal warnings, or to suspend or cancel an international broadcasting licence if the Minister is of the opinion that the service is contrary to the national interest.

3.8 According to the Department of Foreign Affairs and Trade (DFAT), this test of national interest is a negative one, that is, it is not whether a particular service is likely to be in the national interest, but whether it is likely to be contrary to the national interest. The Bill does not at any stage specify or even indicate what would be contrary to the national interest—this is a matter for the Minister to determine. DFAT insists that it is not possible to define precisely what sorts of broadcasts would be, or would be likely to be contrary to the national interest.[6]

3.9 The Seven Network Ltd emphasised the central role that this notion of national interest has in deciding whether to grant or refuse a license and in determinations of whether a licence should be suspended or cancelled. It also drew attention to the difficulties in defining the term:

> The term 'national interest' is inherently difficult to interpret and calls for a highly subjective assessment. What one person may deem to be in the national interest may be considered by another to be against it, depending on the factors which each takes into account and the weight accorded to them. For example, an action may be considered to be against the national interest in the short term, but in the national interest in the long term.

3.10 Further, that the meaning of national interest assumes significance in light of the political environment in the region, and may change from day to day depending on the issues of the moment and the presiding powers in other countries.[7] The Seven Network Ltd was seeking a set of clear and objective criteria that would provide a code of practice that would allow a broadcaster to ascertain at all times 'whether it was operating within the scope of its licence'.[8]

3.11 Mr Graeme Carroll, Manager, Public Affairs, Federation of Australian Radio Broadcasters Ltd, told the Committee that it would be helpful to have the term national

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5 Mr Buettel, Department of Communications, Information Technology and the Arts, Committee Hansard, p. 36.

6 Department of Foreign and Trade, Committee Hansard, pp. 39-40.

7 Seven Network Ltd, submission no. 9, p. 6.

8 Seven Network Ltd, Submission no. 9, p.7.

interest defined, unless it is defined in other legislation.[9] Professor Tiffen went further and argued that the Bill should not 'invoke the nebulous phrase, national interest, as the basis for governing the operation of international broadcasters'. Furthermore, it should not assign powers on this basis for ministerial intervention in a way which is not governed by proper procedures and safeguards.[10]

3.12 Professor David Flint, Chairman, Australian Broadcasting Authority, noted that the provisions of the Bill leave matters in relation to Australia's national interest and questions concerning international relations to the government of the day to determine. In his opinion this arrangement accorded with Australia's tradition in the handling of international relations. He stated 'I think the common law sensibly leaves the conduct of international relations to the executive government of the day, and I think we would have to be guided, in accordance with this Bill, by the opinion that the Minister for Foreign Affairs of the day took in relation to that.'

3.13 The Committee agrees that decisions concerning Australia's foreign relations and the national interest rightly belong to the government of the day. Its concern is not with this matter but rather with the uncertainty generated by the use of the term, national interest.

3.14 An understanding of this term is central to the Minister for Foreign Affairs' decision to refuse or to suspend or revoke a licence yet this term, used throughout the Bill, is not defined and no indication is given in the Bill as what would constitute actions contrary to the national interest. A number of witnesses observed that within the community there is, in general, a very broad appreciation of the term national interest. When speaking about this notion of national interest, Mr Sivak, Strategic Development Director, Merlin Communications International, told the Committee that in the United Kingdom there is a 'general understanding that it is only material which is really outside the bounds of what would be acceptable broadcasting within the UK'.[11] He told the Committee that the guidelines in the United Kingdom are not formal but they are consistent. 'We have a very good idea of what is likely to be acceptable and what is not.'[12]

3.15 Mr Buettel relied on the words of Justice Sankey in 1926, to explain the difficulty in pinning down the meaning of the term national interest. Justice Sankey stated:

> …considering what is in the national interest, various questions at once emerge…we do not think it would be desirable, even if it were possible to lay down an exhaustive definition of what is in the national interest. …the fact that opinion, grounded on experience, has moved one way does not preclude the possibility of its moving on fresh experience, in the other. Nor does it bind succeeding generations when conditions have changed. After all, the question whether a particular thing is in the national interest is a question of the time, and it is a question of fact.

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9 Mr Graeme Carroll, Manager, Public Affairs, Federation of Australian Radio Broadcasters Ltd, Committee Hansard, p. 25.

10 Associate Professor Rodney Tiffen, Submission no. 6, p. 1.

11 Mr Markham Sivak, Merlin Communications International, Committee Hansard, p. 3.

12 Mr Markham Sivak, Merlin Communications International, Committee Hansard, p. 5.

Mr Buettel submitted that in the circumstances, 'it is probably not sensible to try and give an exhaustive definition of "the national interest"'.[13]

3.16 DFAT acknowledged the difficulty in defining what would be contrary to the national interest. Nonetheless it was prepared to indicate the lines along which a broadcast might harm the international interest in relation to international relations and thus gave some idea about its understanding of national interest:

> It is not possible to define precisely what sorts of broadcasts would be, or would be likely to be, contrary to the national interest. However, some broadcasting services may be more likely to be contrary to the national interest than others. For example, hostile broadcasts promoting communal violence or terrorism in a foreign State, or inciting or encouraging armed hostilities or the violent overthrow of an established government, would likely be viewed as contrary to Australia's national interest. Likewise broadcasts which demean persons or groups on the basis of ethnicity, nationality, race, gender, sexual preference, religion, or mental or physical disability would likely be unacceptable.[14]

3.17 Mr Ian Wilcock, First Assistant Secretary, Public Diplomacy Division, DFAT, explained that the department tried to provide an indicative list of the kinds of issues it would expect to be considered in any analysis of the national interest. In his opinion, the list was comprehensive but 'it cannot be totally comprehensive'. Put simply, 'the actual definition of the national interest…is probably beyond us'.[15]

3.18 Mr Jonathan Brown, Director, Parliamentary Liaison Section, DFAT, stressed the point that it would only be in exceptional circumstances that would engage the national interest. He stated that 'it is not a question under the bill as to whether a particular service is in the national interest or whether it serves the national interest. It is whether it is contrary to the national interest. So it is a permissive regime subject only to those extreme circumstances'.

3.19 He stated further:

> …under the Bill, there is a provision for formal warnings to be issued to broadcasters. I am sure it will be well known at the time that such warnings have been issued or, in a more serious case, that a service has been suspended. It is likely that both the circumstances and the reasons for the government's intervention will be known at that time in the unlikely event that it happens.[16]

3.20 The Committee agrees that Australian action taken against the international broadcast of highly offensive material likely to damage Australia's international reputation

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13 Mr Buettel, Department of Communications, Information Technology and the Arts, Committee Hansard, p. 37

14 Department of Foreign Affairs, Submission no. 5, para. 9. Mr Ramsay, Managing Director, Bramex Pty Ltd a consultant representing HCJB, in commenting on the principles put forward in para 9 by DFAT stated they are 'in fact the types of principles which could be perhaps included in the legislation or put out in guidelines or whatever to be a test against the decisions of the Minister for Foreign Affairs., Committee Hansard, p. 20.

15 Mr Ian Wilcock, DFAT, Committee Hansard, p. 40.

16 Mr Jonathan Brown, DFAT, Committee Hansard, p. 44.

and standing or to harm its political, diplomatic, security or commercial relations with other countries, would most probably be known and understood by the broadcasting industry. Broadcasters would appreciate that any decision taken in the national interest would hinge on these fundamental questions of Australia's international status and its relationships with other countries.

3.21 The difficulty of defining 'national interest' and enshrining a definition in legislation is that the national interest is never static; it is forever changing as circumstances change. In the case of this Bill, national interest is referred to in terms of Australia's international relations. International relations may change significantly and quickly as witnessed in relation to East Timor in 1999.

3.22 The Committee appreciates the desire of international broadcasters for certainty in terms of what can and cannot be broadcast. It, too, would prefer more certainty. However, the only certainty in international relations is uncertainty.

3.23 Nevertheless, the Committee believes that most international broadcasters would understand in general terms what type of material, if broadcast to the region, would be contrary to Australia's national interest. It would only be at the margins that broadcasters might have some doubt as to whether certain material should be broadcast. Reputable broadcasters would either not broadcast such material or seek advice from Australian broadcasting or diplomatic authorities before doing so. Mr Sivak of Merlin Communications International Ltd told the Committee that Merlin sought advice from national authorities about questionable services. It should also not be forgotten that broadcasters would have guidance from the guidelines to be written by the ABA.

Guidelines to be formulated by the ABA

3.24 Section 121FP requires the ABA to formulate written guidelines relating to international broadcasting services. These guidelines may deal with matters other than Australia's national interest.

3.25 As part of the application process for an international broadcasting licence, the ABA must, when referring an application to the Minister for Foreign Affairs, provide the Minister with a report on whether the proposed international broadcasting service complies with the international broadcasting guidelines. The Bill stipulates that the Minister, in determining whether a proposed international broadcasting service is or is likely to be contrary to Australia's national interest, may have regard to the ABA's report. The Minister may also direct the ABA to prepare a report about whether a specified international broadcasting service complies with the guidelines and provide that report to the Minister.[17] Other than allowing for the guidelines to deal with matters other than Australia's national interest, the Bill and the Explanatory Memorandum fall silent on the details of these guidelines.

3.26 Numerous witnesses commented on the uncertainty generated by the lack of guidelines. Seven Network Ltd argued that 'Broadcasters require a clear set of objective guidelines, which they are able to apply in order to easily determine whether they are complying with the relevant laws at any given time.'[18] It pointed out further that while it

17 Sections 121FB(1)(d) and (3); 121FD; 121FL(9); 121FM

18 Seven Network Ltd, submission no. 9, p. 6.

appears that the Bill intends the guidelines to be primarily concerned with national interest, section 121FB(2) specifically provides that they may deal with other matters. Put simply by the Seven Network Ltd, 'there is therefore no limit on the scope of such guidelines.'[19] Moreover, there is the possibility that the guidelines will change from time to time.

3.27 In supporting this view, Mr Graeme Carroll from the Federation of Australian Radio Broadcasters Ltd, stated plainly that his organisation would like to see 'some guidelines so that we are well aware of the parameters within which we have to work. Those guidelines could be put together in cooperation with the ABA, and we would be happy to do that.'[20]

3.28 During the course of the inquiry more information became available on the nature and content of the proposed guidelines.

3.29 The Department of Communications acknowledged that the guidelines may deal with matters other than Australia's national interest including accuracy, fairness and balance in relation to news and current affairs, consistency with Australia's programs standards and the advertising of products such as alcohol, tobacco and medicines.[21]

3.30 The ABA told the Committee that it had not yet prepared guidelines but Professor Flint imagined that those principles annexed to their submission would be matters which would assist the ABA in developing guidelines.[22] These guidelines, 'Principles for transborder satellite television broadcasting in the Asia-Pacific region', were tabled by the ABA at the Asia-Pacific Regulatory Roundtable in Singapore in September 1999 and have been endorsed by the Australian Government (see Appendix 3). The Committee noted that the Australian Government is the only regional government to have endorsed these principles. The ABA submission outlined its understanding of the process involved in developing the guidelines:

> A provision in the bill also requires the ABA to formulate written guidelines relating to international broadcasting services. Once again, at this stage, it is envisaged the transborder satellite television broadcasting principles, developed by Asia-Pacific broadcast regulators, including the ABA, would provide the basis for the formulation of the written guidelines. These guidelines would then be applied in a similar way that codes of practice are applied when investigating complaints to assess whether licensees have breached relevant codes.[23]

3.31 In providing some background on and some insight into its proposed guidelines, the ABA explained that it had been involved with other regulators in the region in developing certain principles, which were thought to be appropriate for transborder transmissions. Professor Flint explained that the regional forum in drafting these guidelines tried to balance freedom with responsibility. Being a responsible citizen meant that, particularly in relation to news and current affairs, such programs should be accurate, fair and balanced and respect the privacy of individuals. At the same time there should 'be a concern not to broadcast material

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19 Seven Network Ltd, submission no. 9, p. 7.

20 Mr Carroll, Federation of Australian Radio Broadcasters Ltd., Committee Hansard, p. 25.

21 Department of Communications, Information technology and the Arts, submission no. 4, p.2.

22 Profesor Flint, ABA, Committee Hansard, p. 8.

23 Australian Broadcasting Authority, submission no. 3, p. 2.

deliberately from one country into another which might upset the internal cohesion of that country and the cultural and other matters which were particularly sensitive in that country.' Professor Flint noted that they were more concerned as a group with 'matters which could be inflammatory, not matters which would be part of the democratic process but matters which could inflame, for example, tensions, say, on the subcontinent between different communities'. He added that their challenge is to 'balance freedom with responsibility and responsibility involving a care and concern for matters of cultural sensitivity'.[24]

3.32 Professor Flint conceded that there had not been as yet any consultations with the Department of Foreign Affairs and Trade on the drafting of a set of guidelines. He felt that it would be premature to have drafted a set of guidelines but pointed to the work that had been done in formulating principles for the region. DFAT were expecting to be consulted by the ABA as they draw up the guidelines. DFAT's understanding is that the Asia-Pacific Regulatory Roundtable principles would be used as a basis in formulating the guidelines.[25]

3.33 The Department of Communications did not regard it as unreasonable for the Parliament to see those guidelines in draft form before it votes on the Bill.[26] The Committee believes that the guidelines should be on the public record before legislation is considered in the Parliament.

3.34 The provisions of the Bill requiring the formulation of international broadcasting guidelines were also criticised because there was no provision for broadcasters to contribute to the drafting of the guidelines.[27] Mr Buettel expected that the ABA would, in their first draft, work from the Asia-Pacific principles but he also expected that the ABA would consult potential players in the development of guidelines. He observed that such players may raise other issues that would then be incorporated in the final set of guidelines. [28]

3.35 Professor Flint suggested that when the guidelines are drafted the industry and the public would be consulted. He stated that this was normal practice and he expected that this practice would be followed.

3.36 Ms Godwin stated that Seven Network Ltd would prefer a scheme similar to the one that operates for Australian commercial broadcasters—that is a code of practice rather than one where guidelines are imposed on the industry. She stressed 'we strongly object to the idea that we would have guidelines imposed upon us as opposed to the way that regulation operates currently for all other forms of broadcasting'. Ms Godwin suggested that the guidelines should be formulated by the industry and the industry should consult rather than be consulted about the guidelines which are being imposed.[29]

3.37 Mr Wilcock from DFAT suggested that if there were agreed guidelines on what is suitable for international broadcasting, there would not be 'many occasions on which a

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24 Professor Flint, ABA, Committee Hansard, pp. 7–8.

25 DFAT, Committee Hansard, p. 39.

26 Department of Communications, Information Technology and the Arts, Committee Hansard, p. 34.

27 Seven Network Ltd, submission no. 9, p. 7.

28 Mr Buettel, Department of Communications, Information Technology and the Arts, Committee Hansard, p. 28.

29 Ms Godwin, Seven Network Ltd, Committee Hansard, p. 16.

formal process of consultation and discussion is necessary'. He argued that all parties to the business will understand what is acceptable to the region and referred to the regulatory roundtable guidelines, which in his words 'gives you some sense of what is acceptable to regional broadcasters, including us'.[30]

3.38 Mr Wilcock further stated 'the proposal in the Bill is that there be international guidelines and that someone who wishes to broadcast from Australia be required to comply with those guidelines, so it will be quite transparent.' The main difficulty for people in the broadcasting industry as demonstrated through representatives appearing before the Committee is that the Bill, the Explanatory Memorandum and the responsible departments have done little to inform the public about the requirements that a licensee will have to meet to obtain and retain an international broadcasting licence.

3.39 Clearly the situation with the guidelines is confusing. The Committee believes that the proposed guidelines need to provide a clear and precise framework of reference for those applying for or holding an international broadcasting services licence. Licensees need to feel confident that the guidelines will not change without warning, or without any public discussion or consultation. To ensure that the guidelines provide greater transparency and accountability, the Committee believes that they should be a disallowable instrument, thus making them subject to parliamentary scrutiny and approval.

Recommendation

The Committee **recommends** that the Bill be amended in the following terms:

Division 6—Miscellaneous, Section121FP International broadcasting guidelines

Insert after line 6

(3) The International broadcasting guidelines are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Statement of reasons

3.40 The Bill provides that the Minister need not limit him or herself to the guidelines in determining whether a proposed international broadcasting service is likely to be contrary to Australia's national interest.[31] The Committee, however, realises that this provision allows the Minister the necessary discretion to deal with matters unforeseen or not anticipated in the guidelines and the vicissitudes of international relations. It also places a greater onus on the Minister to be accountable for his or her decisions.

3.41 The Bill amends the ADJR Act by exempting the Minister for Foreign Affairs from giving reasons for his or her decisions in relation to the licensing of international broadcasting services.

3.42 Under the ADJR Act, a person who is aggrieved by a decision made in relation to matters such as the issuing, suspending, revoking or refusing to issue a licence, authority or

30 DFAT, Committee Hansard, p. 17.

31 See 121FD(4) and 1221FL(9).

other instrument is entitled to an explanation.[32] The aggrieved person may request the decision maker to furnish a statement in writing setting out the facts on which those findings were based and giving reasons for the decision. The person who made the decision is required under the Act to prepare a statement and furnish it, as soon as practicable, to the person who made the request.[33] The Minister for Foreign Affairs, under the proposed amendments that deal with international broadcasting services, is under no such obligation to provide a statement of reasons. The Explanatory Memorandum observes that the nature of these decisions is such that exposure of the reasons for the decisions could itself be contrary to Australia's national interest.[34]

3.43 The proposed amendment to the ADJR Act would not prevent an appeal under the ADJR Act against a decision by the Minister for Foreign Affairs but would make it difficult for an appellant to appeal against the Minister's decision other than on procedural grounds. If the Minister declined to make a statement of reasons, it would be hard to see how the Minister's decision could be judged on its merits.

3.44 A number of witnesses raised serious concerns that this amendment to the ADJR Act means that licensees and potential licensees are denied the most fundamental right to information necessary to seek redress for any adverse decision taken by the Minister under this Bill. The Minister is not held accountable for his or her decision and the aggrieved person is left in ignorance regarding the grounds for the decision. This exemption from having to provide a statement of reasons includes decisions to issue a formal warning, suspend or cancel a licence as well to reject an application for a licence.

3.45 Section 121FL enables the Minister for Foreign Affairs to direct the ABA to issue a formal warning to a licensee or to suspend or cancel a license if the Minister decides that the service is contrary to Australia's national interest. In the case of a suspension, the Bill does not provide for any notification to be given to the licensee or the reasons for such proposed action to be made known. In addition, there is no provision for the licensee to make representations to the Minister in response to a warning or of the intention to suspend a licence before such sanctions are imposed.

3.46 In the case of cancellation, the Bill does provide for the ABA to give written notice of the intention to cancel the licence and allows the licensee 'a reasonable opportunity' to a send a submission to the ABA, which is forwarded to the Minister. But without a statement of reasons for the proposed cancellation, it is difficult for the licensee to address the concerns of the Minister. In responding to this difficulty, Mr Wilcock pointed out that 'it would be perfectly obvious what the issue was. What we are talking about is a last resort use of ministerial power in rather exceptional circumstances'. In addition there is no provision requiring the Minister to consider such a submission and the vague term 'reasonable opportunity' provides little indication as to what would constitute 'reasonable'.[35]

3.47 DFAT noted that the Minister may choose to give reasons, but he is not obliged to. This means that in certain cases he might believe the matter is too sensitive to give reasons:

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32 Section 2(c), *Administrative Decisions (Judicial Review) Act 1977.*

33 Section 13(1) and (2), *Administrative Decisions (Judicial Review) Act 1977.*

34 *Explanatory Memorandum*, p. 5.

35 See Seven Network Ltd, submission no. 9, p. 10.

that the exposure of the reasons for the decision could itself be contrary to Australia's national interest. A number of witnesses were not convinced by this argument. Mr Ramsay, from the Federation of Australian Radio Broadcasters Ltd, found it difficult to accept that it is not in the national interest to say why the granting of a licence would not be in the national interest.[36]

3.48 HCJB respected the right of, and the need for, Parliament to enact laws enabling the Government to manage international relations in Australia's interest and agreed that reasonable controls within Australia are necessary to achieve that purpose. Even so, it rejected as extreme and untenable the proposition that 'it is not in the national interest to say why granting of this licence is not in the national interest'.[37]

3.49 Seven Network Ltd argued that exempting the Minister from the obligation to disclose the reasons for a decision, creates a highly uncertain environment for international broadcasting licensees. The licensee has no part in the decision making process, is afforded no opportunity to justify, defend or clarify its position. It is denied the right to be made aware of the reasons for any decision by the Minister for Foreign Affairs, to respond to any such reasons or to have its response considered. Seven Network Ltd stated 'it is impossible for a broadcaster to make an assessment at any given time of whether it is operating within the regulatory framework or outside of it'.[38]

3.50 Under the provisions of this legislation, an applicant for an international broadcasting service licence or a holder of such a licence subject to an adverse decision by the Minister may be denied the basic right to know the reasons for such a decision. According to a number of witnesses this right to be provided with a statement of reasons should be the right of any person operating a business from Australia. Ms Godwin from Seven Network Ltd told the Committee that her organisation was 'looking for a process by which we have an opportunity to make submissions and be heard before decisions which affect our operations are made, just in the same way as any business would be able to do in relation to domestic operations and, in particular, broadcasters are able to do under the Broadcasting Services Act.'[39]

3.51 In order to achieve this process, it is necessary to have clear, objective and definable measures of compliance. Essentially, according to the Seven Network Ltd, 'the procedural aspects of both the licence grant process and the administration of sanctions are seriously deficient in failing to afford the applicant or licensee the ordinary requirements of natural justice'.[40] The Network concluded that 'Clearly, this is an arbitrary and unsatisfactory manner in which to manage a punishment system'.[41]

3.52 It should be borne in mind that the Minister for Foreign Affairs is seldom likely to refuse a licence and is even less likely to order the suspension or revocation of one. Only

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36 The Federation of Australian Radio Broadcasters Ltd, Submission no. 2.

37 Heralding Christ Jesus Blessings (HJCB), Submission no. 8, pp. 3–4.

38 Seven Network Ltd, Submission no. 9, p. 7.

39 Ms Bridgette Godwin, Seven Network Ltd, Committee Hansard, p. 16.

40 Seven Network Ltd, Submission no. 9, p. 10.

41 Seven Network Ltd, Submission no. 9, p. 10.

extreme material is likely to be considered as contrary to the national interest and most international broadcasters would eschew such material as a matter of course. In cases where the Minister does intervene in the national interest, the reasons for such intervention would usually be obvious. Although the Committee expects the Minister to provide a statement of reasons in most cases, it accepts that in certain sensitive cases it might not be appropriate for the Minister to provide a formal statement of reasons subject to judicial scrutiny.

3.53 Where the Minister has such a discretionary power, the Committee believes that he or she should be accountable to the Parliament for the exercise of that power. In cases where the Minister chooses not to provide a statement of reasons, the Committee believes that he or she should report to Parliament on the case and give the Parliament reasons for the decision in terms appropriate to the sensitivities of the case. If the Parliament were not satisfied with the Minister's report, there would be processes available to the Parliament in such circumstances.

Recommendation

The Committee recommends that, if the Minister for Foreign Affairs decides to refuse, suspend or revoke an international broadcasting licence, and chooses not to make a formal statement of reasons for his or her decision, the Minister report to the Parliament on the case and give the Parliament reasons for his or her decision in terms appropriate to the sensitivities of the case.

Transmission providers

3.54 In providing a regulatory framework for international broadcasting from Australia, the Bill focuses on individual international broadcasters, broadcasting their material through their transmitters or through space leased from other transmitters. It does not, however, provide specifically for the needs of transmission providers that package material from a range of international broadcasters, and then broadcast that material through transmitters which they manage.

3.55 Merlin Communications International Ltd, a transmission provider, raised concerns about certain provisions in the Bill, which it considered might compromise the commercial viability of operating the Cox Peninsula transmitters.

3.56 Under the current provisions of the Bill, once the Bill is enacted, any person who wishes to conduct an international broadcasting service from Australia, unless exempted under the Bill, has to obtain an international broadcasting licence from the ABA. Under clause 121FB (1), an applicant for such a licence must be 'a company that is formed in Australia or in an external territory'.

3.57 Merlin Communications International Ltd submitted that the requirement for each international broadcaster to be incorporated in Australian is one which would act as a deterrent to international broadcasters from broadcasting from Australia. It argued that the transmission provider should be able to hold multiple broadcasting licences and to act for international broadcasters with Australian broadcasting authorities, removing the need for broadcasters to establish corporate entities in Australia.

3.58 Mr Markham Sivac, Merlin's Strategic Development Director, told the Committee:

> From our perspective, the problem is that, if you were to acquire a broadcaster to establish an Australian presence in order to gain the licence to operate – for us to transmit this service from Australia – that could be quite a disproportionate cost and effort, given what could be only an hour or an hour or two a day of transmission time. A lot of the way shortwave works is that, in order to endure the reception of a signal in, say, China, for some parts of the day you will transmit that service from a different location from where you transmitted a couple of hours before. That reflects that the ionosphere changes, the propagation part of the signal changes, and, therefore, you will move it around.
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> There are a number of choices where you could choose this as an alternative point. People are not going to choose a point which will require a very onerous establishment of an organisation if they have another alternative. Therefore, from our commercial perspective, the requirement to make people establish companies could really turn away customers.

3.59 Mr Savic also said:

> Sites such as Cox Peninsula require quite extensive use of those facilities. They are very expensive to maintain. The danger with the current legislation is that it is likely to lead to only one or two organisations being in a position to utilise the facilities. Our experience is that – and the US is quite a good example - those tend to be charitable organisations, which tend to not have long-term stability, to turn over the facilities quite quickly and to not maintain them as well. Were the facilities able to be supplemented by other commercial use, that would increase investment in those facilities, and Cox Peninsula is a very useful site which could take a lot more investment. It would also prepare it quite well for the future.

3.60 The Committee understands the Government's desire for each holder of an international broadcasting licence to establish a corporate entity in Australia as that would facilitate legal action being taken against the broadcaster should such action ever be necessary. On the other hand, the Committee understands the point made by Merlin that, commercially, it would be a disincentive for broadcasters, especially those proposing to broadcast short transmissions each day or week, to go to the trouble of setting up and servicing a corporate entity in Australia.

3.61 The Committee understands that a broadcaster could buy a shelf company to comply with the legislation and use a solicitor's office in Australia as the registered office of the company. The costs involved in establishing this arrangement would not be expensive. However, having to establish even this minimal presence might be enough to dissuade international broadcasters from using Australian transmission facilities if alternative facilities, without these proposed administrative constraints, are available.

3.62 Under the Merlin proposal, each international broadcaster would still have to obtain an international broadcasting licence. The transmission provider would hold those licences and would be responsible for them. If the ABA were to order the suspension or revocation of a licence, that order would be served on the transmission provider, who would then comply with the order by not transmitting material covered by the order. If the ABA issued a warning to the transmission provider as a result of offensive material being broadcast by an international broadcasting licensee, it would be the responsibility of the transmission provider to pass on the warning to the licensee and to take whatever other steps it considered necessary to ensure that the broadcaster did not offend again.

3.63 The transmission provider would have to establish a corporate entity in Australia, however minimal that might be, but the international broadcasters, whose material would be broadcast as part of a package put together by the transmission provider, would not have to establish an Australian corporate entity, unless also broadcasting separately from the provider's package.

3.64 In section 121FF of the Bill, licensees are required to keep records of programs broadcast. If a transmission holder were to package program material and broadcast it on behalf of international broadcasters, it, too, should be required to keep records in accordance with section 121FF. The transmission holder would be the first point of contact by the ABA should the Minister for Foreign Affairs have concerns about a broadcast made by the transmission holder.

3.65 The Merlin proposal does not weaken the control elements of the Bill. Individual international broadcasting licences would still be issued and the issue of those licences would still be subject to all the vetting provisions contained in the Bill. If a transmission provider, which packaged broadcasting material, were to be given the contract to operate the Cox Peninsula transmitter, Australian authorities would only have to deal with the provider and not all the individual broadcasters on an operational basis. The ABA agreed that this would make it easier for the Authority.

3.66 The Merlin proposal would require a number of amendments to the Bill. However, according to Mr Sivak, the Bill as it stands would act as a disincentive, on commercial grounds, to both transmission providers and international broadcasters seeking transmission facilities in the region. Cox Peninsula is expensive to maintain, acknowledged by the Government as a reason for tendering the lease of the facility. Significant broadcasting time would be required to make the facility a viable commercial proposition. Merlin's proposal appears to add to the commercial attractiveness of the facility, which would enhance its long-term viability.

3.67 The Committee is not in a position to test fully Merlin's assertions about the effects of the Bill, as it stands, on the commercial viability of Cox Peninsula. However, whatever those effects might actually be, Merlin's suggestions would not weaken the Bill and would, indeed, make it easier and more attractive for international broadcasters to broadcast from Australia. It would also bring the Bill more in line with other international broadcasting regulatory systems to which Merlin referred. In addition, apart from the issuing of international broadcasting licences, the ABA would only have to deal, on an operational basis, with the transmission provider at Cox Peninsula instead of all the international broadcasters using that facility to broadcast their material.

Recommendation

The Committee **recommends** that the Government give the Merlin proposal serious consideration with a view to amending the Bill to give effect to it.

3.68 The Merlin proposal would not in any way change the arrangements for individual broadcasters, such as HCJB Australia, which is proposing to operate an international broadcasting service in Western Australia, using its own transmitters.

Internet

3.69 This Bill is designed to provide a regulatory framework for external broadcasting from Australia to prevent offensive material being broadcast, which might affect adversely Australia's relations with other countries. The Committee wishes to draw attention to the availability of other media, not similarly regulated, which might be used as an alternative medium to distribute offensive material. In particular, material might be loaded on the Internet in Australia that might be highly offensive to regional countries, resulting in Australia being blamed for being the origin of such material and not trying to prevent its distribution.

3.70 The adequate control of the Internet and other emerging communications technologies is a vexed problem that is being addressed in many countries. There is no easy solution to it. The Committee is not intending that the Bill be widened to take account of the Internet but just wishes to draw attention to a potential problem, as it might provide an avenue for purveyors of offensive material to try to circumvent this legislation.

Other matters

3.71 In deciding to refer the Bill to this Committee, the Selection of Bills Committee wanted the Committee to consider concerns raised by the Opposition, which centred on the powers conferred through the Bill on the Minister for Foreign Affairs. Witnesses who made submissions to the Committee commented on this matter but a few also took the opportunity to raise other matters they believed needed further consideration. The Committee draws attention to one such matter—the timeframe allowed for processing an application for an international broadcasting licence.

Timing for decisions

3.72 HCJB was concerned about the time allowed for the decision regarding the national interest. Under sub-section 121FD(5), the Minister 'must make reasonable efforts' to direct or inform the ABA 'within 60 days of the referral' of his or her decision regarding an application for a licence. HCJB submitted that it was unreasonable for an applicant to:

- wait an unspecified time for the ABA to examine an application and refer it to the Minister for Foreign Affairs;
- wait for up to 60 days and an unspecified subsequent period for the Minister for Foreign Affairs to make an unreviewable decision; and

- wait for up to 90 days for the Australian Communications Authority to issue the accompanying radio communications licence.[42]

3.73 The Seven Network Ltd, in also raising this matter, argued that the Bill provides nothing more than 'the most tentative timetable for the determination of the licensing process'. It asserted:

> Potentially, an applicant for a licence may never be able to bring a licence application process to a close. The Bill should provide for an absolute cut-off time for the determination of licence processes.[43]

3.74 The Committee believes that the time periods should not be left open-ended and that specific periods should be inserted in the Bill.

David Brownhill
Chairman

42 HCJB Australia, Submission no. 8, p. 4.

43 Seven Network Ltd, Submission no. 9, p. 9.