



**Australian
Broadcasting
Authority**

The ABA's General Approach to Analog Planning

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CHAPTER 1

OVERVIEW OF THE PLANNING PROCESS

BROADCASTING SERVICES BANDS

One of the primary functions of the ABA is to plan the availability of the broadcasting services bands (the BSB)¹ which have been referred to it by the Minister. The BSB which have been referred by the Minister to the ABA for planning are:

- (a) 526.5 - 1606.5 kHz (inclusive) The MF-AM radio band
- (b) 45 - 52 MHz (inclusive) VHF television band I (channel 0)
- (c) 56 - 70 MHz (inclusive) VHF television band I (channels 1 and 2)
- (d) 85 - 108 MHz (inclusive) The VHF-FM radio band is 87.5 - 108 MHz. The assignment covers 85 - 108 MHz to cater for existing VHF television band II (channels 3, 4 and 5)
- (e) 137 - 144 MHz (inclusive) VHF television band III (channel 5A)
- (f) 174 - 230 MHz (inclusive) VHF television band III (channels 6, 7, 8, 9, 9A, 10, 11 and 12)
- (g) 520 - 820 MHz (inclusive) UHF television bands IV and V (channels 28-69)

The ABA is required to plan the availability of segments of the BSB on an area basis.

THREE STAGES OF THE PLANNING PROCESS

The planning functions of the ABA are set out in part 3 of the *Broadcasting Services Act 1992* (the Act). The Act requires the ABA to promote the objects of the Act including the economic and efficient use of the radiofrequency spectrum for broadcasting and to have regard to the matters set out in section 23. The planning process has three stages. These are set out in sections 24, 25 and 26 of the Act. At each of the stages of the planning process, the ABA must make provision for wide public consultation [Subsection 27(1)].

Determination of Planning Priorities

The first stage of the planning process in accordance with section 24 of the Act is the determination by the ABA of planning priorities, between particular areas of Australia and between different parts of the BSB, for the preparation of frequency allotment plans (FAP) and licence area plans (LAP). The ABA determined its planning priorities in September 1993. A document entitled "Planning Priorities - 1993", which includes the planning priorities and explanatory notes, is available free of charge from the ABA.

¹ Section 158(b) of the Act.

Preparation of Frequency Allotment Plan

The second stage of the planning process, in accordance with section 25 of the Act, is the preparation of a frequency allotment plan (FAP) which determines the number of channels that are to be available in particular areas of Australia to provide broadcasting services using that part of the radiofrequency spectrum designated as the BSB.

After releasing two exposure drafts of the FAP for public comment in May and December 1993, the ABA determined a FAP for the BSB on 10 August 1994. A document entitled "Frequency Allotment Plan - August 1994", which includes the FAP and explanatory notes, is available free of charge from the ABA.

Preparation of Licence Area Plans

The third stage of the planning process in accordance with section 26 of the Act is the preparation of licence area plans (LAPs), which determine the number and characteristics of broadcasting services that are to be made available within particular areas of Australia. The characteristics of each service include the service's licence area, category, carrier frequencies, transmitter sites and technical conditions, including maximum effective radiated power in each direction from the transmitter site. Potential and current service providers must "read" the LAP together with the Technical Planning Guidelines (TPGs) so that they are fully aware of their technical obligations in establishing services. The ABA was obliged to develop these technical planning guidelines pursuant to section 33 of the Act. The TPGs came into force on 10 August 1995. Paragraphs 109(1) (d) and (e) of the *Radiocommunications Act 1992* apply the technical specifications in the LAP and TPGs as conditions of a transmitter licence issued to commercial and community broadcasting service providers by the Australian Communications Authority (ACA, formerly the Spectrum Management Agency, SMA).

LAPs are prepared on an area by area basis in accordance with the ABA's determination of planning priorities.

Variation of Frequency Allotment Plan

The FAP determined channel capacity based on the ABA's knowledge and public submissions received at the date the FAP was prepared (i.e. 10 August 1994). The FAP's assumptions about demand, nominal transmitter specifications and siting will be re-examined during preparation of the LAPs for particular areas of Australia. This process may necessitate variations to the FAP as a result of the ABA's public consultation process. No permanent allocations of new spectrum for a particular area will be made until LAPs for that area have been prepared. If it is necessary to amend the FAP as a result of the LAP process, then this will be done consistently with the planning priorities. Consultation on any changes to the FAP will take place within the LAP consultation process.

The FAP will also be revised to reflect any additional services planned during the LAP stage (particularly low power channels). If the amended FAP brings about changes to channel capacity for areas outside the area for which the LAP is being prepared, the changes will be subject to public consultation in affected areas.

CHAPTER 2

PLANNING CRITERIA

In performing its planning functions under Part III of the Act, the ABA is guided by section 23 of the Act, which states:

In performing functions under this Part, the ABA is to promote the objects of this Act including the economic and efficient use of the radiofrequency spectrum, and is to have regard to:

- a) demographics; and
- b) social and economic characteristics within the licence area, within neighbouring licence areas and within Australia generally; and
- c) the number of existing broadcasting services and the demand for new broadcasting services within the licence area, within neighbouring licence areas and within Australia generally; and
- d) developments in technology; and
- e) technical restraints relating to the delivery or reception of broadcasting services; and
- f) the demand for radiofrequency spectrum for services other than broadcasting services; and
- g) such other matters as the ABA considers relevant.

All of the matters in paragraphs 23(a) to (g) are relevant to the performance of all three of the ABA's public planning functions.

The words 'have regard to', (used in a different context) received the following interpretation from the High Court in *Re Toohey; Ex parte Meneling Station* per Gibbs J, 44 ALR 63 at 67:

'When the section directs the Commissioner to 'have regard to' the strength or otherwise of the traditional attachment by the claimants to the land claimed... it requires him to take those matters into account and to give weight to them as a fundamental element in making his recommendation: cf *Re R J D Hunt; Ex Parte Sean Investments Pty Ltd (1979) 53 ALJR 552 at 554; ...*'

However, the relative weight given to each of the matters in section 23 is a question of judgement for the ABA. The ABA draws upon various sources of information in considering the above criteria, including the submissions received throughout the planning process; the relevant demographic, social and economic characteristics of the licence area; spectrum availability and technical limitations; and Ministerial directions and notifications.

The ABA has placed different weight on consideration of part of s.23 (b) and (c), depending on the stage of the planning process. For example, the level of existing services Australia-wide, and the social and economic characteristics of markets Australia wide was of greatest weight to the planning process when the ABA was exercising its priority setting power under s.24 of the Act.

When preparing or varying a frequency allotment plan or a licence area plan, existing services in adjacent areas and Australia-wide are relevant because they may constrain the availability of frequencies in the area being planned.

In addition, other markets are also a potential source of benchmarks, or bases for comparison, when assessing the level of services in the market to be planning. The level

of services in adjacent markets may also influence the expectations of viewers or listeners in an area that is to be planned. While there are dangers in treating two markets as similar, the number and type of services operating on other markets can sometimes provide a rough guide as to the likelihood of various planning options in the market to be planned.

The ABA is only able to examine in detail the number of existing services in other areas of Australia as at the time it develops the respective licence area plan. A complete list of broadcasting services throughout Australia, with the exception of open narrowcasting services, is published by the ABA annually. The latest edition, *Radio and Television Broadcasting Stations 1998*, is available from ABA offices as well as the Australian Government Publishing Service Bookshops priced at \$50.

Alternatively, the broadcasting stations information for either television or radio is available on the internet at www.gov.aba.au.

The ABA also believes that consideration of criteria at s.23(d) is general to the planning process and will update its General Approach to Planning regularly to reflect the status of events.

Developments in current radio and television broadcast technology can have an impact in the future planning of broadcasting services. For example, developments in current technology may offer an improvement in the received quality of existing services or may allow for improved spectrum efficiency in planning for conventional radio and television services. The ABA, in consultation with national and international bodies, closely monitors developments in current broadcasting technology and evaluates its likely implications to the Australian broadcasting environment.

The ABA also studies developments in new and emerging broadcast technologies such as Digital Radio Broadcasting (DRB) and Digital Terrestrial Television Broadcasting (DTTB). Advancements in technology have also allowed more programs to be broadcast to the home using satellite and cable technology in addition to terrestrial broadcasting.

Digital Radio Broadcasting.

The Minister for Communications, Information Technology and the Arts, Senator the Hon. Richard Alston announced the formation of a Digital Radio Study Group (the DRSG) at the ABA Conference on 6 May 2003. The DRSG includes representatives from the Australian Broadcasting Authority, Department of Communications, Information Technology and the Arts (DCITA), and the Australian Communications Authority. Under its terms of reference the DRSG must report to the Minister by 28 November 2003 on the options and implications in implementing the various digital radio technologies in Australia.

The DRSG project plan envisages two phases, with the first phase consisting of two complementary fact gathering exercises. The first exercise, led by the ABA will provide a status report on the various digital radio technologies such as, Eureka 147, IBOC and Digital Radio Mondiale. DCITA is leading the other component of the fact gathering exercise which involves reviewing overseas approaches to implementing digital radio technologies.

The second phase of the project, which will include consultation, will draw on the work undertaken by the ABA and DCITA in the first phase. It will present options and implications for implementing the various digital radio technologies in Australia.

Digital Terrestrial Television Broadcasting

DTTB systems presently being developed may provide higher quality pictures and sound and possibly a flexible multi-channel facility where more than one television service is broadcast per channel.

In response to developments in DTTB the ABA formed a DTTB Specialist Group comprising experts from both private and government sectors to study DTTB options for Australia. This group produced its First Report in June 1995 and published its final report in January 1997.

On 24 March 1998, the Minister for Communications, the Information Economy and the Arts, Senator the Hon Richard Alston, announced that DTTB will commence in the five mainland capital cities on 1 January 2001 and in all other areas of Australia by 1 January 2004.

The Television Broadcasting Services (Digital Conversion) Act 1998 was passed by Parliament in July 1998.

Existing national and commercial free to air broadcasters will be granted additional channels in the broadcasting services bands to transmit in digital mode. Broadcasters will transmit their programs in both analog and digital mode for an eight year simulcasting period. At the end of the simulcasting period, the broadcasters will surrender channels not needed for digital transmissions.

Datacasters will be required to make spectrum available for community television purposes.

Additional commercial television broadcasting licences may be made available for allocation after 31 December 2006.

CHAPTER 3

LEGISLATIVE FRAMEWORK

Section 158 of the Act provides that one of the ABA's primary functions is to plan the availability of segments of the broadcasting services bands on an area basis.

Section 160 of the Act imposes a general obligation on the ABA to perform its functions in a manner consistent with:

- (a) the objects of the Act and the regulatory policy described in section 4 of the Act; and
- (b) any general policies of the Government notified by the Minister under section 28 of the *Commonwealth Authorities and Companies Act 1997*; and
- (c) any directions given by the Minister in accordance with the Act; and
- (d) Australia's obligations under the CER Trade in Services Protocol.

SECTION 160 (a) - OBJECTS OF THE ACT AND THE REGULATORY POLICY

The Objects of the Act

The objects of the Act (contained in section 3 (1)) are:

- (a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information; and
- (aa) to promote the availability to audiences and users throughout Australia of a diverse range of datacasting services; and
- (b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; and
- (ba) to provide a regulatory environment that will facilitate the development of a datacasting industry in Australia that is efficient, competitive and responsive to audience needs; and
- (c) to encourage diversity in control of the more influential broadcasting services; and
- (d) to ensure that Australians have effective control of the more influential broadcasting services; and

- (e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity; and
- (f) to promote the provision of high quality and innovative programming by providers of broadcasting services; and
- (fa) to promote the provision of high quality and innovative content by providers of datacasting services; and
- (g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance; and
- (h) to encourage providers of broadcasting services to respect community standards in the provision of program material; and
- (i) to encourage the provision of means for addressing complaints about broadcasting services; and
- (j) to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them; and
- (ja) to ensure that international broadcasting services are not provided contrary to Australia's national interest; and
- (k) to provide a means for addressing complaints about certain Internet content; and
- (l) to restrict access to certain Internet content that is likely to cause offence to a reasonable adult; and
- (m) to protect children from exposure to Internet content that is unsuitable for children; and
- (n) to ensure the maintenance, and where possible, the development of diversity, including public, community and indigenous broadcasting, in the Australian broadcasting system transition to digital broadcasting.

The relevance of these objects to the variation of the FAP and the preparation of LAPs is discussed below, as part of the examination of section 23 of the Act.

The Regulatory Policy

The regulatory policy is set out in section 4 of the *Broadcasting Services Act 1992*. Subsections 4(1) and (2) relevantly provide:

- (1) The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and Internet services according to the degree of influence that different types of broadcasting services, datacasting services and Internet services are able to exert in shaping community views in Australia.
- (2) The Parliament also intends that broadcasting services and datacasting services in Australia be regulated in a manner that, in the opinion of the ABA:
 - (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and datacasting services; and
 - (b) will readily accommodate technological change; and
 - (c) encourages:
 - (i) the development of broadcasting technologies and datacasting technologies, and their application; and
 - (ii) the provision of services made practicable by those technologies to the Australian community.

Subsection 4(2) is of particular relevance to the planning process. Having regard to the matters in section 23 of the Act, it may be necessary to vary the technical conditions of the licences of existing broadcasters in a manner which imposes costs on them. Examples are:

- clearance of television services from VHF Band II to make room for additional FM radio services;
- relocation of transmitter sites or changes of frequency of existing services to maximise the number of channels available in an area; and
- otherwise changing the technical specifications of existing services to improve the service to the public.

In order not to impose unnecessary financial and administrative burdens on service providers, the ABA has taken account of the cost to broadcasters of any variations to their existing technical specifications as a relevant consideration to be weighed against any benefits that might accrue in terms of the Act's objects and the economic and efficient use of spectrum.

SECTION 160(b) - GENERAL POLICIES OF THE GOVERNMENT NOTIFIED UNDER SECTION 28 OF THE COMMONWEALTH AUTHORITIES AND COMPANIES ACT 1997

No Government policies that relate to its planning function have been specifically referred to the ABA pursuant to section 28 of the *Commonwealth Authorities and Companies Act 1997*.

SECTION 160(c) - DIRECTIONS GIVEN BY THE MINISTER

On 17 March 1994 the then Minister for Communications and the Arts, the Hon Michael Lee MP, notified the ABA to reserve capacity for an Australia wide sixth high power national television channel, for the provision of national broadcasting services or for community broadcasting services.

On 17 March 1994 the then Minister also directed the ABA (under subsection 162 (1) of the Act) to give favourable consideration to the House of Representatives Standing Committee on Transport, Communications and Infrastructure (HORSCOTCI) Report into the future use of the sixth channel. HORSCOTCI gave priority to the sixth channel's use for educational television over community access television in the longer term. It further recommended that:

- A decision on permanent use of the sixth high power television channel should not be made prior to the review of the television broadcasting industry to be conducted by the Minister by 1 July 1997 in accordance with Clause 215 of the Broadcasting Services Act 1992.
- The channel should be made available immediately for community access television using low power transmitters on a continuing trial basis until 1 July 1997.

The ABA has made spectrum available for temporary use by community and educational television groups in several locations. This has been done by the use of the section 34 ("drop through") provisions of the Act.

On 27 May 1997, the Minister for Communications and the Arts, Senator Richard Alston, advised the ABA that he supported an extension of the community television trial for another twelve months from July 1997.

On 24 December 1997, the Minister advised that the Government had decided to allow the community broadcasting sector to continue to utilise the sixth television channel until at least the year 2000.

The ABA extended the community television trial on the sixth channel to 31 December 2001 in all areas in which services were being provided: Sydney, Melbourne, Brisbane, Lismore and Adelaide. Licences in areas in which a service was not on air at the time of renewal, that is Perth, Hobart and Bendigo, were extended. The service in Perth is now on air and the licence has been extended to 31 December 2001; the Hobart licensee no longer wishes to provide a community

service and the ABA decided not to renew the Bendigo group's licence when their status was reviewed just prior to 30 June 1999.

On 31 May 1999, the Minister unreserved the sixth channel spectrum in all areas except where a licence had been issued for trial community television services. This was in recognition of the need to make available as much vacant spectrum as possible to assist in the planning of digital television services.

On 6 December 2001, the ABA extended the community television trial on the sixth channel to 31 December 2002 in Sydney, Melbourne, Perth, Brisbane and Lismore. In Adelaide the ABA extended the community television trial to 30 June 2002 in order that further inquiries be made into the provision of the service by ACE TV. Licences in areas in which a service was not on air at the time of renewal, that is Hobart and Bendigo, were not extended.

On 1 March 2001, the Minister for Communications, Information Technology and the Arts, Senator Richard Alston, issued a direction to the Australian Communications Authority (ACA) and to the ABA, in its capacity as delegate of the ACA. The relevant parts of that direction provide:

4. Direction – renewal of HPON radio licences

The ACA must not refuse to renew an HPON radio licence under section 130 of the Radcom Act on the basis of a general policy that such licences should be issued under a price-based allocation system determined under subsection 106(1) of the Radcom Act.

5. Direction – period of renewal of HPON radio licences

Where the ACA decides to renew an HPON radio licence under section 130 of the Radcom Act, the ACA must, subject to subsection 103(3) of the Radcom Act, specify a period under subsection 103(2) of the Radcom Act that ends at the same time as the period specified by the ABA under the relevant section 34 open narrowcasting determination, or the relevant part of that determination.

A review of the community television trial, conducted under Schedule 4 to the Act, was table in Parliament in June 2002.

On 5 October 2001, the Minister asked the ABA to continue the analog trial of community television until 31 December 2002. The spectrum was subsequently dropped through by the ABA until 31 December 2002.

On 14 November 2002, the Minister wrote to the ABA advising that legislation was before Parliament to establish a licensing framework for community television under Part 6 of the Act, and requested that the community television trial be extended for a period which would allow sufficient time for the ABA to conduct its permanent allocation process.

In November 2002, the *Broadcasting Services Act 1992* was amended by the *Broadcasting Legislation Amendment Bill (No.2)* to provide more appropriate licensing arrangements for community television services.

On 5 December 2002, the ABA dropped through the spectrum in Sydney, Melbourne, Perth, Brisbane and Lismore for the community television trial purposes for the period 1 January 2003 to 31 December 2003.

SECTION 160(d) - AUSTRALIA'S OBLIGATIONS UNDER THE CER TRADE IN SERVICES PROTOCOL.

Closer Economic Relations Trade in Protocol Agreement: The CER Trade in Services Protocol means the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement (as in force from time to time) (section 6 of the Act). It includes an instrument in force under that Protocol. The Protocol, which the two countries entered in 1988, provides for free trans-Tasman trade in all services, with the exception of a number of services, which were subject to existing government regulations when the Protocol was signed and which are inscribed in the Annex to the Protocol. The basic provisions of the Protocol are national treatment, market access, rights of commercial presence and most favoured nation treatment. The Protocol operates subject to both countries' foreign investment policies. In many cases, inscriptions only exclude certain aspects of a service industry from the operation of the Protocol. For broadcasting and television services Australia currently has inscribed limits on foreign ownership and short-wave and satellite broadcasting.

SECTION 5 - ROLE OF THE ABA

Finally, section 5 of the Act contains a general direction from the Parliament to the ABA on how it is to achieve the objects of the Act in a way that is consistent with the regulatory policy referred to in section 4. Section 5 (1) (b) is of particular relevance to the ABA's planning powers. It provides in part that the Parliament:

confers on the ABA a range of functions and powers that are to be used in a manner that, in the opinion of the ABA, will:

- (i) produce regulatory arrangements that are stable and predictable;....

The structure of Part 3 of the Act and in particular the public planning process described in sections 24 - 27 of the Act are designed among other things to ensure a high degree of predicability in spectrum planning and allocation. In addition to the bare requirements of those sections, the ABA has endeavoured to ensure stable and predictable regulatory arrangements by making all aspects of its reasoning processes transparent through the release of discussion papers and preliminary views.

SECTION 23 - SPECIFIC PLANNING OBLIGATIONS OF THE ABA

Section 23 of the Act imposes specific obligations on the ABA when carrying out its planning functions. First, the ABA is required to perform its functions in a way that promotes the objects of the Act, including the economic and efficient use of the radiofrequency spectrum. The ABA is also required, when performing its functions, to have regard to the range of matters set out in paragraphs (a) - (g) of the section.

The ABA notes that not all of the objects will be promoted by its planning functions; some of the objects will be more directly promoted by other functions of the ABA.

For example, the development of codes of practice and program standards will directly promote objects 3 (1)(h), (j) and to some extent (g). The following discussion of the objects canvasses some of the ways the ABA believes that planning decisions (under sections 25 and 26) might promote the matters in section 23. Whether or not a given planning decision is likely to promote the objects is, of course, a question of fact that will depend on the particular circumstances of the area being planned. The following observations do not constitute an inflexible policy of the ABA towards planning, but describe strategies that might tend to promote the objects of the Act, including the economic and efficient use of spectrum, depending on the particular facts of the situation.

The Explanatory Memorandum to the Broadcasting Services Bill 1992 ('the Explanatory Memorandum') explains the role and uses of the objects in the following way:

The purpose of these objects is to set out clearly the outcomes Parliament wishes to see in the regulation of broadcasting, to assist with the formulation of decisions consistent with the policy enshrined in the Act, and to guide the ongoing administration and enforcement of the Act. It is important to note that the objects are not set out in any order of priority; in other words the relative importance of an object may be determined by the issue being considered at the time - that relative importance could vary from time to time.

It is recognised that there are tensions between the objects. It is intended that the ABA, in the exercise of its regulatory powers, should have regard to the competing objectives, drawing on its ability to assess community views and needs, and to monitor developments in the broadcasting industry. It is expected that the relative importance of each object may vary over time, and vary in relation to different functions and powers of the ABA.

The objects that are of most obvious importance to the ABA's powers in sections 25 and 26 of the Act are those at paragraphs (a) and (b) of section 3.

- (a) *to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information.*

According to the Explanatory Memorandum:

Clause 3(a) relates to the intention that the Act will encourage and facilitate the provision of both 'free to air' broadcasting services as well as subscription and 'niche' broadcasting services to allow a broad range of general and special interests and needs to be met. Diversity in the range of services is encouraged by a more open planning regime that is expected to increase the availability of services, and by a licensing regime which is designed to accelerate the introduction of services and encourage the emergence of the new 'niche' services.

As these observations make clear, the ABA's planning powers have a vital role to play in promoting the object at 3 (1)(a), but it is unrealistic to expect that planning alone will promote the object in all its aspects. In particular, some of the 'diversity' of new services can be expected to come from the proliferation of non-broadcasting services bands services such as satellite and cable subscription television broadcasting and narrowcasting services of all kinds.

CHAPTER 3

When preparing FAPs and LAPs, the ABA may be able to promote this object in several ways.

First, the ABA can seek to ensure areas enjoy a mix of different types of broadcasting service. (The reference in section 26 to the ‘characteristics’ of services includes, in the ABA’s view, the category of each service and whether it is television or radio.) National broadcasters and community broadcasters frequently provide programs that are immediately distinguishable from commercial broadcasting, often serving needs that the commercial sector has not addressed. These sectors also have an important role in providing education.

Open narrowcasting also has a place in promoting diversity, particularly open narrowcasting whose reception is limited either:

- by being targeted to special interest groups; or
- because they provide programs of limited appeal.

These types of ‘niche’ services clearly have a major role in promoting diversity, particularly of information but also of certain types of entertainment, such as entertainment in languages other than English.

Second, as envisaged in the Explanatory Memorandum, the ABA can make additional services available in areas where there is a likelihood this will increase the overall number of broadcasting services being provided. This will create opportunities for service providers to add to the range of services.

It is important to note that the impact of new services on diversity may vary. In the case of commercial radio formats, the outcome of additional services may include lengthy periods of competition between similar formats. Listeners whose interests are met by the new service will perceive some formats, which appear similar to some listeners, as diverse. For example, a sports lover may see an additional sports format as increasing diversity of the sports covered, while listeners not interested in sport will experience no increase in diversity. In any event even if the format is identical, it is not the ABA’s role to ensure that an additional commercial broadcasting service will not simply mimic the format of an existing service in the area, playing the same style of music or even the same songs.

It is not the ABA’s role to regulate formats of commercial services. This is underlined by the price-based nature of the commercial broadcasting allocation process and by the generic condition on commercial licences requiring only that they:

... provide a service that, when considered together with other broadcasting services available in the licence area of the licence (including another service operated by the licensee), contributes to the provision of an adequate and comprehensive range of broadcasting services in that licence area...

Certainly the proliferation of services with similar formats in an area will do little to promote the object at section 3 (1) (a), though it may further other objects of the Act. On the other hand, allocation of additional commercial broadcasting licences may

well result in competing formats and hence greater diversity of choice. As the ABA has little control over the legitimate programming choices of new market entrants, it is truer to say that planning of additional commercial broadcasting services is likely to promote the availability of a diverse range of services in markets, but that in the case of commercial radio broadcasting services, it cannot ensure it.

Thirdly, the ABA can enable improved reception of existing broadcasting services. Inadequate reception currently denies many Australians, particularly those outside of major centres, access to the full diversity of services currently on offer. It can make spectrum available for re-transmission and change licence areas and technical characteristics so as to make it possible for services to reach into areas where they might not otherwise reach.

Fourthly, the ABA can plan smaller (local coverage) services or larger services serving more than one existing market. Smaller services in particular, whether community or commercial broadcasting or open narrowcasting, may tend to promote diversity because they are better suited to different types of programming than wide coverage services. Of course, there will often be circumstances where the object is best served by services with similar coverage areas. A hypothetical example is where an existing wide-coverage commercial television service is showing programs drawn from all three commercial networks. If a second licence were issued serving only the main town, it is likely that the second licensee would acquire the rights to transmit the programs of at least one of the networks. The result may be to deprive viewers in outlying areas of programming from that network. This problem could be avoided by planning the second service as a wide-coverage service. Finally, there may be circumstances where enlarged or aggregated licence areas will promote diversity by increasing the chances that a viable additional service will be offered in the market.

- (b) *to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs.*

According to the Explanatory Memorandum:

Of particular relevance to this object are the flexibility of the planning and licensing schemes...

As the broadcasting services bands remain by far the most important means for delivering free-to-air broadcasting services, and as there is potential for these bands to carry additional services, the ABA's planning process is at present fundamental to the further development of the broadcasting industry in Australia. As a part of the 'regulatory environment', the ABA's FAPs and LAPs should promote development of an industry that is 'efficient, competitive and responsive to audience needs'.

Examination of the Act suggests that introduction of competition is intended to play a key role in promoting this object. For example, the licensing scheme of the Act is designed to encourage exploitation of alternative means of delivery to the broadcasting services bands. This observation is supported by the regulatory policy in section 4(2) of the Act. Some types of broadcasting require no ABA authorisation at all and access to licences for more influential services (commercial broadcasting and

subscription television broadcasting) is subject only to a few simple tests, except in the special case of broadcasting services bands spectrum.

The move to a more open and competitive regulatory regime is also supported by changes to the conditions attached to commercial broadcasting services, both television and radio. The condition that services merely 'contribute' to the provision of an adequate and comprehensive range of broadcasting services in their market will enable bolder experimentation with formats, continue existing industry trends towards networking and also permit the commercial survival of services with a smaller share of the market than may previously have been possible.

The development of an efficient and responsive broadcasting industry will occur primarily as a result of industry growth. The radio industry should be expected to grow at least at the same rate as the economy generally. As revenues grow in real terms additional competitive entrants to the industry will contribute to industry development.

The ABA believes that permitting new services to make use of the broadcasting services bands and, in particular, planning the availability of additional commercial broadcasting services, is likely, depending on the particular facts of the market, to promote the object at 3 (1)(b) of the Act.

This approach is supported by the Explanatory Memorandum, which states in its general comments on Part 3 of the Act:

It is... intended that barriers to entry to the broadcasting service industry be minimised, and that competition in the provision of such services be facilitated through the quicker introduction of extra services.

Three other objects are potentially relevant to the preparation of licence area plans and frequency allotment plans.

- (c) *to encourage diversity in control of the more influential broadcasting services.*

According to the Explanatory Memorandum:

Diversity in control is to be promoted by allowing a greater number of services (subject, in relation to commercial television, to a review to be completed by 1 July 1997 - refer to clauses 28 and 215) under the planning and licensing regimes, supported by the O & C (ie. Ownership and control) limits in Part 5 relating to commercial broadcasting...

Planning of additional services could promote this object by enabling independently-owned (competing) new service providers to enter the market. Often this outcome will be furthered by the ownership and control limits, which will restrict the right of incumbent commercial radio and commercial television service providers to own or control the new services.

Introduction of additional services to markets will not always promote this object. For example, if an additional commercial television service is shown as available in a licence area plan, an existing commercial television service provider, if it is the only

service of that type in the market, may be entitled to apply to the ABA to provide a second service under section 38A. Similarly, an existing commercial radio service provider may be entitled to acquire a second licence, either under section 39 or via the price-based allocation system.

(f) to promote the provision of high quality and innovative programming by providers of broadcasting services.

The Explanatory Memorandum relevantly states:

Clause 3(f) is based on the expectation that the emergence of ‘niche’ broadcasting services and the development of a more competitive environment should result in high quality and innovative programming if broadcasting service providers, particularly of subscription services, are to attract and retain audience interest.

However, the ABA has received a submission suggesting that additional services may not always promote the criterion in 3 (1)(f)². In essence, the submission argued that if additional commercial television services were introduced to the ‘solus’ (ie a single licence) commercial television market in question:

- there would be no significant addition to the overall quality or innovation of programming, as the existing service was already able to ‘cherry-pick’ the best of the three networks’ programs;
- additional television services would actually detract by constraining the ability of the existing service provider to continue to produce locally relevant and innovative programming; and
- additional television services would have a similar constraining effect on the ability of radio services to produce locally relevant and innovative programming.

While additional services may not always promote the object at section 3 (1)(f), in the ABA’s view, the effect of introducing additional commercial services is more likely to be positive than negative when measured against this object. What is an innovative program is often a matter of judgement for the viewer or listener and ‘cherry picking’ may focus on the popularity of programs rather than how innovative they are.

The ABA is of the view that additional services may well permit additional high quality and innovative programming to be broadcast, whether in the form of innovative new ideas for local services or top quality programming ‘networked’ from other parts of the country.

(g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance.

² The submission is contained in a letter dated 31 January 1994 from Blake Dawson Waldron on behalf of NTD 8 Darwin, in response to the ABA’s request for submissions on licence area planning for Darwin.

Planning decisions are liable to affect coverage of matters of local significance in several ways.

In general, planning of additional services might be expected to promote appropriate coverage of matters of local significance, where there is some prospect those additional services might be taken up. For example, planning may enable new service providers to address needs not adequately catered for by existing licensees. Also, greater competition in markets may encourage service providers to provide more appropriate coverage of matters of local significance.

However, in planning of highest priority areas a number of submissions on behalf of existing broadcasters have argued that the introduction of competition to small markets will diminish the ability of existing broadcasters to produce programs locally³. This may hinder appropriate coverage of matters of local significance, if the new services do not redress the deficiency by covering matters of local significance themselves.

If the ABA believes that planning of additional services may not promote the object at section 3 (1) (g) of the Act, it will take those concerns into account in its decision and, where appropriate, weigh the possible costs in terms of local coverage against any benefits in terms of the other objects of the Act.

In making its planning decisions, the ABA will also take into account the contributions made by national and community services to coverage of events of local significance in many areas.

... including the economic and efficient use of the radiofrequency spectrum

In performing its planning functions, the ABA must promote the objects of the Act including the economic and efficient use of the radiofrequency spectrum.

The word ‘economic’ in this context suggests ‘economical’, in the sense of ‘avoiding waste or extravagance; thrifty’ (Macquarie Dictionary). ‘Efficient’ can mean ‘productive of effects; operative’ (Shorter Oxford English Dictionary). The idea of promoting the economic and efficient use of the radiofrequency spectrum suggests that spectrum should not be planned in a wasteful way, that it should as far as possible be put to productive use, but that conversely, it should not be planned for a particular use if it is not really needed for that use.

Examples of how the ABA might promote the economic and efficient use of the radiofrequency spectrum include:

1. all planning measures are designed to maximise spectrum productivity; and

³ See for example the submission dated January 1994 and supporting appendices from commercial television operator RTS 5A Riverland in response to the ABA’s request for submissions on licence area planning for the Riverland area of South Australia.

2. not planning broadcasting services in excess of the number required. For example, by planning for very long term demand in one area, the ABA may limit its ability to meet more immediate demand in another. Similarly, it may be wasteful of spectrum - and unlikely to further the objects of the Act - to make more services available of a type than are ever likely to be used.

Section 23 also lists a number of matters that the ABA 'is to have regard to' when performing its functions under Part 3 of the Act.

Finally, the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*, requires the ABA to take into account the licence areas referred to in subsection 8(1) of that Act in preparing a licence area plan under s.26 of the *Broadcasting Services Act 1992*.

Subsection 8(1) states as follows:

Subject to any action taken under the new Act and to section 15, a licence to which subsection 5(1) applies has as its licence area the area that was the service area of the former licence under the Broadcasting Act immediately before the commencement of this Act.

CHAPTER 4

GENERAL APPROACH OF THE ABA TO THE PLANNING OF BROADCASTING SERVICES

As discussed in the ‘Legislative Framework’, the ABA can promote the object at 3(a) of the Act (‘to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information’) by making available a mix of different types of broadcasting services in an area.

In respect of television services, the ABA’s FAP generally indicates that six channels are available for television services in all locations. The Minister has notified the ABA that two channels are to be reserved for national television services - ABC and SBS. The Minister has also notified the ABA to reserve the remaining sixth channel for the provision of a national or community broadcasting service. With respect to capacity for commercial television services, section 28 of the *Broadcasting Services Act* states that no more than three commercial television broadcasting services are currently permitted in licence areas. In a limited number of circumstances, overlaps between licence areas of commercial broadcasting services have necessitated additional channels for commercial television services (also affiliated with one of the three networks but showing different local programs) being made available. In these situations, a spare channel for the Minister’s additional national or community broadcasting service may not exist.

In weighing up the merits of different categories of radio broadcasting services, the ABA considers community and commercial radio services to be mutually exclusive options in relation to frequency allocation, as a community radio broadcasting licence must be operated by a non-profit organisation. That is, any profits cannot be distributed amongst individuals. In general, community organisations cannot afford to purchase commercial radio broadcasting licences, particularly in markets where investor interest results in high prices being paid. (Whereas commercial broadcasting licences are allocated through a price-based process, community broadcasting licences are allocated via a merit-based process.)

Open narrowcasting radio services are a different case, for two reasons. First, an open narrowcasting provider can bid for a commercial licence, as commercial radio licences are allocated through a price-based allocation process. Second, the frequency that was to be made available for commercial or community radio broadcasting can be made available for open narrowcasting (under the provisions of section 34), if it is not taken up during the ABA’s allocation process. So making a frequency available for commercial or community broadcasting purposes does not necessarily preclude an open narrowcasting service provider from ultimately obtaining a licence to use that spectrum. Those licences made available in licence area plans specifically for open narrowcasting services are allocated via a price-based process.

In accordance with s30 of the *Broadcasting Services Act 1992*, for the purposes of s38A, s39, the ownership and control provisions of the Act and the population reach rules, the ABA has determined population figures for licence areas (including in overlap areas) for commercial broadcasting services. Copies of the determination are available from the ABA upon request.

CHAPTER 4 (1)

COMMERCIAL BROADCASTING

As indicated in the ‘Legislative Framework’, the ABA believes that planning additional commercial radio broadcasting services is likely, in certain circumstances, to promote several of the Act’s objects, including the economic and efficient use of spectrum. The Legislative Framework contains a detailed discussion of how various planning outcomes may promote the objects of the Act. The basis for planning additional commercial television services has been referred to in previous chapters.

In forming a view on the likelihood a decision will promote the objects, including the economic and efficient use of spectrum, the ABA will consider and reach views about the likely effect of its decision, having regard to the local circumstances of the market, the likely impact of other planning decisions in the LAP and other relevant matters under section 23(a)-(g).

Assuming technical capacity can be found to increase the number of services, the ABA believes there are three key areas of concern that are relevant to any decision about whether to increase the number of commercial broadcasting services available in an area.

First, the ABA is concerned that planning additional commercial services in a market may not represent ‘economic and efficient use of the radiofrequency spectrum’, nor would it serve to promote the objects of the Act, unless there were some likelihood that the number of commercial service(s) of that type would increase as a result.

Second, in order to promote the objects at section 3(a), 3(b) and (c) of the Act, the ABA would prefer that any additional commercial service in a market be a wide coverage service, rather than a low powered service addressing only a fraction of the population served by the existing licensee(s). The ABA’s preference for wide coverage services reduces the opportunity for entrepreneurs to only provide a service to the more commercially lucrative areas within a licence area at the expense of the quality of services enjoyed in other parts of the licence area.

For this reason, the ABA will generally plan any additional commercial services to match the coverage of any existing commercial services of that type in an area.

Third, the ABA is concerned that the loss of present levels of local programming on the existing service(s) may result in less appropriate coverage of matters of local significance, particularly if the new service(s) would be unable to redress the deficiency by covering matters of local significance itself. (The object at para 3(g) of the Act relates.)

The ABA accepts that the objects of the Act may pull in different directions, requiring it to choose which object to give the most weight to, depending on the local circumstances of the market. (For a more comprehensive discussion of the relevant law, please refer to the Legislative Framework.)

The ABA will in general have regard to:

- the likelihood that making an additional commercial service available for allocation in an area will increase the number of services of that type serving the area;
- whether or not any additional services would offer wide coverage comparable to existing services; and
- the likely impact of any increase in the number of services on the coverage of matters of local significance.

Consideration of these issues will necessarily involve a consideration of a number of the section 3 objects and the matters listed in section 23. It also requires potential service providers to address the following:

- (a) Whether or not, and in what way, providing an additional commercial radio broadcasting service in the market would represent an economic and efficient use of the radio frequency spectrum;
- (b) Whether or not any additional commercial radio service you propose to provide would offer signal coverage comparable to existing services;
- (c) The likely impact of any increase in the number of services on the overall level of programming in the area covering matters of local significance;
- (d) Information and supporting evidence about your capability to provide a commercial radio service;
- (e) Whether sufficient capital is currently or potentially available to you to commence and continue to provide an additional commercial radio service in accordance with the technical specifications similar to those of the existing commercial radio service(s); and
- (f) Whether your interest is conditional in any way.

Licence Areas

The service area of commercial services operating before commencement of the *Broadcasting Services Act* in October 1992 continued as licence areas by virtue of section 8 of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*.

In determining service areas, factors taken into account by the Minister, under the *Broadcasting Act 1942*, included the following: social and economic links between the major urban centres in the area; governmental functions and responsibilities; topography; signal coverage and possible effects on the commercial balance between the station and other stations claiming to serve the community or communities in the area.

The ABA assumes that the licence areas of existing commercial and community broadcasting services using the broadcasting services bands represent accepted media markets and the ABA will not vary them without good reason, other than to update them where boundaries are based on outdated Census descriptions. The ABA further assumes that additional broadcasting services within those markets, using the broadcasting services bands, should have the same licence area as existing services unless there are good reasons to the contrary.⁴

⁴ Source: *ABA Record of Assumptions*

CHAPTER 4 (2)

COMMUNITY BROADCASTING

In forming an opinion on community radio broadcasting services, the ABA determines whether it is likely to promote the objects of the Act at paragraphs 3(a), (f) and (g), including the economic and efficient use of the radiofrequency spectrum. The Legislative Framework contains a detailed discussion of how various planning outcomes may promote the objects of the Act.

In forming its opinion, the ABA considers views about the likely effects of its view, having regard to the local circumstances of a particular market, the likely impact of other planning views in a licence area plan and other relevant matters under section 23(a)-(g).

Additional community services in a market

Sections 23(a) and (b) of the Act require the ABA to have regard to demographics and social and economic characteristics within a licence area. Section 23(g) requires the ABA to have regard to such other matters as it considers relevant. The ABA believes the funding requirements of existing community services, and its own knowledge of the sources of funding and support available to community broadcasting services, are relevant considerations when considering the scope for introducing additional community services.

Under the *Broadcasting Act 1942*, a special interest public radio service was defined as a service clearly focused on a particular interest or need, or group of common interests or needs (eg educational, ethnic, Aboriginal, Radio for the Print Handicapped (RPH)). Special interest public radio (using an 'S' class licence) was clearly distinguished from public radio for community purposes, which used a 'C' class licence.

The Department of Communications publication *Public Radio: Planning Guidelines, August 1985*, identified the former 'C' class public licences as serving a wide community of interest typically relying on multiple sources of revenue, notably listener subscriptions, donations, fund raising activities and sale of sponsorship announcements. They may also receive assistance from other sources, such as government funding administered by the Community Broadcasting Foundation (CBF).

While additional community services allocated for wide community purposes would tend to compete for a limited pool of sponsorship, subscribers and government assistance, special interest community services (including former 'S' class public licences) frequently tap into different sources of revenue altogether. The impact on an existing community licensee serving a wide community of interest may well be limited to a reduction of any part of its subscriber base representing the special community interest for which a new licence has been allocated.

Forms of assistance may include direct support from other institutions catering to that special interest. Some special interest community services, notably RPH, are also likely to receive the bulk of their programming from elsewhere.

Thus, additional community licences serving special interest groups may complement rather than compete with existing community services. Indeed, there may be scope for co-operation between the licensees. This complementarity will be important if small communities are to sustain special interest as well as general purpose community broadcasting services, thereby increasing the diversity of available services.

Aboriginal and Torres Strait Islander people and the print-handicapped are two groups that are often poorly catered for in the mainstream media. Both were identified by the then Minister, Senator the Hon Bob Collins, in his letter of 1 October 1992, as examples of particular interest groups whose needs the ABA should consider.

Community Licence Areas

The ABA assumes that when planning for community broadcasting services, it is appropriate to consider the population size and other demographic, social and economic characteristics of particular interest groups that may require a dedicated community service as well as the overall demographic, social and economic characteristics of the market.

In determining a new community service licence area, or granting an extension to an existing community radio broadcasting service licence area, the ABA will have regard to:

1. Whether a community radio broadcasting service exists in the proposed licence area, and whether it serves a 'special interest' or geographic ('broad-based') community-of-interest.
2. Whether there is spectrum available to provide coverage of the geographic area requested.
3. Whether a community-of-interest exists, over what geographic area, and whether that community-of-interest is currently being served. Indicators of community-of-interest include:
 - social and economic links between major urban centres (eg shopping, sporting employment, banking, or other cultural links);
 - governmental functions and responsibilities (eg local government, Aboriginal and Torres Strait Islander Commission, council boundaries);
 - topography;
 - existing media markets; and
 - whether people identify with a notion of community for the purposes of access to services, eg people with a disability such as a sight impairment.
4. In cases where an extension of a community radio service licence area is sought, whether the applicant group exists that could serve the area, and whether that would better promote the objects of the Act.
5. In cases where an existing community radio broadcaster seeks to extend its licence area and there is no locally-based aspirant group, whether the applicant can

demonstrate that it has actively sought to foster the development of an independent locally-based community radio service eg via advertisements of other regular promotional activities in the community.

6. In cases where an existing community radio broadcaster seeks to extend its licence area, and endeavours to foster an independent locally-based aspirant group have proven to be unsuccessful, whether members of the community that the aspirant or licensed community radio broadcaster aims to serve will be able to actively participate in the operation and programming of the licensee in providing the service. Where the geographic distance may seem to prohibit active participation, and the aspirant or licensed community radio broadcaster can demonstrate that initiatives to foster the establishment of locally-based community radio broadcasting service have proven to be unsuccessful, applicants will be required to outline the strategies they would adopt to overcome such problems.
7. In the case of an existing community radio broadcasting licensee seeking to extend its licence area, whether it is serving communities of 200 or more within its existing licence area. (In the preparation of licence area plans, the ABA assumes when planning the technical characteristics of services that communities with a population of 200 people or more are entitled to expect a service from a broadcaster that is licensed to provide one).⁵
8. What plans the aspirant or existing broadcaster has to meet maximum technical operating conditions in the near future, including the applicant's financial capacity to provide the service.
9. The feasibility that the community to be served can provide and sustain a community broadcasting service.
10. Whether a retransmission of a service outside of its licence area under section 212 of the Act would better promote the objects of the Act.
11. Such other matters as the ABA considers relevant.

It is important to note that the ABA places the onus on the submitter/organisation making the request to demonstrate both that a community-of-interest exists, and the mechanisms for ensuring that the community it intends to serve will be able to participate in the operation and programming of the service.

Temporary Community Radio Broadcasting Licences

Following amendments to the Broadcasting Services Act the ABA may now allocate temporary community broadcasting licences.⁶ The amendments came into effect on 4 August 1997.

Temporary community broadcasting licences (TCBL's) can be allocated to eligible applicants for periods of up to 12 months.

⁵ ABA Record of Assumptions, licence area planning.

⁶ The Broadcasting Services Act was amended on 27 June 1997 by the passage of the *Communications Legislation Amendment Act (No 1) 1997*.

Transmissions by a licensee may be continuous or broadcasting air-time may be shared with other licensees, depending on the availability of frequencies in an area. If no frequency is available, no licence can be allocated.

The ABA may only allocate a temporary community broadcasting licence if it first decides, in accordance with the provisions of section 34 of the Act, that spectrum can be made available to temporary community broadcasting licensees in a specified area for a specified time.

TCBL's cannot be renewed, but a licensee can make application for a new licence before the expiration of a current licence. The term and conditions of a new licence may be different to those of an earlier one.

In deciding whether it will allocate a TCBL the ABA is not permitted (by law) to have regard to:

- the extent that the proposed service would meet community needs;
- the nature and diversity of the interests of the community;
- the nature and diversity of other broadcasting services in the same licence area; and
- the capacity of the applicant to provide the service.

However, the ABA may have regard to:

- the undesirability of one person being in a position to exercise control of more than one community broadcasting licence that is a broadcasting services bands licence in the same licence area; and
- the undesirability of the Commonwealth, a State or Territory political party being in a position to exercise control of a TCBL.

Before allocating a TCBL the ABA must:

- designate a particular area as the licence area of the licence;
- determine the timing conditions of the licence; and
- determine a period of up to 12 months as the licence period.

Who May Apply For A TCBL?

The ABA can only accept applications from companies that:

- are formed in Australia or in an external Territory; and
- represent a community interest.

The Act defines a 'company' as including an incorporated association. The ABA considers that an applicant which is an incorporated association or a company limited by guarantee will be eligible to apply for a licence. Other types of company (including certain co-operatives and companies limited by shares), whilst not precluded from

applying, are considered by the ABA to be inappropriate vehicles to hold a community broadcasting licence.

It is important for those interested in operating a TCBL to appreciate that the granting of a TCBL does not confer automatic entitlement to a permanent community broadcasting licence. In areas where the available licences are contested at allocation, the ABA has already made a decision about the number of community licences to be available, and there may be insufficient capacity available for all who wish to hold a permanent licence.

When Will Permanent Community Broadcasting Licences Be Made Available?

The ABA can offer a permanent community broadcasting licence for allocation only when it has made such a licence available in a LAP. For details of how the ABA allocates permanent licences, see the Fact sheet *Allocation of community broadcasting licences (Broadcasting Services Bands)*.

CHAPTER 4 (3)**OPEN NARROWCASTING**

As discussed in the Legislative Framework, the ABA takes the view that planning for open narrowcasting services has an important role in promoting the object at section 3(a) of the Act. For example, such open narrowcasting formats as foreign language, racing information and tourist or traveller information services have a unique contribution to make to the range of broadcasting services in areas. For this reason, the ABA is concerned to accommodate open narrowcasting services during the public planning process at the same time it considers the need for other types of services.

As there are differences in both the planning and subsequent allocation processes between open narrowcasting services and conventional commercial and community radio services, the ABA has given consideration in the course of the planning process to what is the appropriate way to cater for open narrowcasting requirements disclosed during the public planning process.

On 5 December 1994, the ABA obtained legal advice from counsel, J J Spigelman QC, on options for planning open narrowcasting services during the public planning process. The advice indicates that the ABA would be entitled to show an open narrowcasting service as being available in a licence area plan, but that there are some indications in the Act that this may not be the case. (This advice is available as part of the ABA's Record of Advice under Subsection 27.)

During preparation of LAPs, the ABA has further considered the advice from counsel regarding open narrowcasting services and has decided to cater, as far as possible, for long-term open narrowcasting demand within LAPs. Short-term open narrowcasting services in particular areas will continue to be planned outside of the preparation of the licence area plans (section 26). It should be noted that the ABA retains the power to make spectrum available for open narrowcasting or other purposes outside licence area plans, by use of section 34 of the Act.

CHAPTER 4 (4)

NATIONAL BROADCASTING

In performing its functions under sections 26 and 31 of the Act, the ABA is to promote the objects of the Act, including the economic and efficient use of spectrum.

As discussed in the Legislative Framework, the ABA can promote the object at 3(a) of the Act ('to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information') by making available a mix of different types of broadcasting service in an area. In forming its Preliminary Views presented in discussion papers accompanying draft LAPs, the ABA firstly has regard to the Minister's notification for reservation of capacity for national broadcasters under section 31 of the *Broadcasting Services Act*.

The importance of this is that the ABA is required to reserve spectrum capacity in the broadcasting services bands for the number of national broadcasting services specified in the notice. The choice of frequencies and technical characteristics for each service is a matter for the ABA.

CHAPTER 5

RECORD OF ADVICE AND ASSUMPTIONS

Section 27 also requires the ABA to keep a record of, and make available for public inspection, all advice received by the ABA, and all assumptions made by the ABA, in performing its functions under sections 24, 25 and 26 (Subsection 27(2)).

The purpose of the record to be kept under Subsection 27(2) is to facilitate the ‘wide public consultation’ referred to in sub-section (1). This is confirmed in the Explanatory Memorandum which notes with respect to sub-section (2):

‘This is one of the many provisions in this Act which are intended to make the ABA accountable in the exercise of its powers and performance of its functions.’

The combined effect of ‘advice’ and ‘assumption’ is to encompass a broad range of sources of information available to the ABA for the purpose of performing its functions under the planning provisions. The overriding purpose of section 27 is to facilitate public understanding of and participation in the planning process.

RECORD OF ADVICE

The ABA has not treated the word ‘advice’ as limited to formal or professional opinion, although it includes such. The Macquarie Dictionary defines ‘advice’ among other things as:

‘a communication, especially from a distance, containing information’

The Australian Concise Oxford Dictionary expresses this meaning without the reference to distance, as:

‘information given, news’

The ABA’s record of advice is available for viewing upon request.

RECORD OF ASSUMPTIONS

An assumption in the context of subsection 27(2) bears the meaning set out in the Macquarie Dictionary:

‘something taken for granted; a supposition’

The fact that the ABA is permitted to make such assumptions in performing its planning functions is confirmed in section 169 of the *Broadcasting Services Act 1992*, which provides:

‘In making a decision on any matter, the ABA is not limited to a consideration of material made available through an investigation or hearing conducted in relation to the matter, but may take into account such other matters as it considers relevant, including the knowledge and experience of the members.’

The following excerpts are from legal advice prepared by JJ Spigelman QC and NJ Williams of counsel on 7 November 1994 and included in the record of advice.

‘The word “assumption” obviously does not extend so far as to encompass the whole of the “knowledge and experience” of the members of the Authority. What Subsection 27(2) does is to impose an obligation to formally record the matters which the Authority either takes for granted or supposes to be true, on the basis of the Authority’s collective “knowledge and experience”.

There are matters of such common knowledge that persons involved in the public consultation process would be expected to be aware of them. Accordingly the purpose of the maintenance of a record for public inspection would not be served by requiring such matters to be recorded.

The ABA should keep a record of any supposition it makes that may have a practical impact on the exercise of the planning powers unless the supposition is so obvious that one could assume that any participant in the public consultation process should be aware that the assumption would be made.’

CHAPTER 5(2)**RECORD OF ASSUMPTIONS****SUBSECTION 27(2) OF THE *BROADCASTING SERVICES ACT 1992* -
RECORD OF ALL ASSUMPTIONS MADE BY THE ABA IN
PERFORMING ITS FUNCTIONS UNDER SECTIONS 25(2) AND 26.****1. POLICY ASSUMPTIONS - PREPARATION OF LAP AND VARIATION OF
THE FAP**

The following were unchallenged policy assumptions made by the ABA at the commencement of the planning process. Where appropriate, notes updating or explaining the assumptions have been added.

1. Universal Access

Communities with a population of 200 people or more are entitled to expect a service from a broadcaster that is licensed to provide one (see paragraph 3.1.1 of volume 6 the ABA document ‘Current State of Radio and Television Planning’⁷ [‘the ‘Current State Document’]).

Note: This assumption is relevant only when planning the technical characteristics of services. The ABA will ensure as far as possible that the technical characteristics of the service would enable the service provider to provide a service to communities within the licence area with a population of 200 or more.

It will not always be appropriate or even possible to plan to this criterion, particularly in areas where there is a scarcity of suitable broadcasting services bands (BSB) spectrum.

2. Fortuitous Reception

Reception of distant signals from a radio or television station in another licence area is regarded as fortuitous and will not be protected when planning decisions are made (see paragraph 3.1.2 of volume 6 the ‘Current State document’).

3. Channel Capacity

Six wide coverage free-to-air television channels had been planned throughout Australia before the commencement of the Broadcasting Services Act. That plan is set out in a 1986 publication entitled ‘Equalisation of Regional Commercial Television; Draft Indicative Plan’ (‘the Draft Indicative Plan’) (Parts 1 and 2 are contained in the first volume and Part 3 is contained in a second volume).

⁷ *Current State of Radio and Television Planning, Vol. 6*, Australian Broadcasting Authority, 1992, Planning Division, ABA, Canberra.

In 1993, all metropolitan areas except Hobart and Darwin received services on 5 of the 6 allotted channels - programs from the Australian Broadcasting Corporation, three commercial networks and the Special Broadcasting Service were transmitted.

In the overlap areas of the Central Coast (NSW) and the Gold Coast (QLD) 8 translator channels were provided at each site to accommodate operators in each market in addition to the national services. In May 1992, the Department of Transport and Communications published a document entitled '*Australian Television Channel Allotment Plan*'. That document listed proposed television channels for most communities in Australia. In some cases the Department had not found that a sixth channel was available or depended on the release of spectrum before the full complement of six could be achieved (see paragraph 3.1.4 of volume 6 of the ABA document '*Current State of Radio and Television Planning*'⁸ [the '*Current State Document*']).

In the Current State document (1992), the ABA assumed that the scope for introducing additional radio services in the AM band was very limited, unless the AM band was re-planned.

In the case of VHF-FM radio, the ABA in the Current State document set a 'planning target' of 16 wide coverage services in metropolitan areas and 8 wide-coverage services in regional areas where possible, noting that this planned capacity may not be available until after clearance of television services from VHF Band II. (The ABA's assumptions on Band II clearance are discussed below, at item 9). In the initial FAP, prepared in August 1994, the ABA further developed its 'broad targets' for the number of channels in particular areas of Australia in the light of demographic and social and economic characteristics of areas. The four 'very broad' categories were:

- a) 'metropolitan areas' including Sydney, Melbourne, Brisbane, Adelaide, Perth. In these areas the ABA has aimed for a target of 16 high power channels;
- b) 'main cities' such as Canberra, Hobart, Darwin, Gold Coast, Newcastle, Wollongong. In these areas the ABA has aimed for a target of 12 high power channels;
- c) 'regional centres' such as Cairns, Ballarat, Bendigo, Port Pirie, Bunbury, Alice Springs. In these areas the ABA has aimed for a target of 8 channels; and
- d) 'remote areas' including remote communities in Northern Territory, Western Australia, South Australia and Queensland. In these areas the ABA has aimed for a target of 8 channels.

According to the FAP, the target figures

... endeavour to maximise total FM spectrum availability in all areas where need has arisen or is likely to arise, in a way that would accommodate large differences in the number of existing FM services between areas throughout Australia. They also give some scope to the ABA to address any demand during the LAP process, whether in metropolitan areas or other major cities, regional centres or in remote

⁸ *Current State of Radio and Television Planning, Vol. 6*, Australian Broadcasting Authority, 1992, Planning Division, ABA, Canberra. 4

areas. If met, the target figures would ensure channels are allotted such that demand for additional spectrum can be addressed in all areas. Note, however, that in some areas the 'targets' cannot be reached. An example of why this might occur is the presence of television services on part of the VHF-FM band in an area or in an adjacent area. The targets are no more than a tool for apportioning between areas the spectrum capacity that is available - they are not in themselves a reason for proceeding with Band II clearance in areas where FM channel supply falls short of the target.

The initial FAP, and its underlying assumptions, will be reviewed on an area basis in light of the matters in section 23 during preparation of the relevant licence area plans.

4. Sixth Television Channel

The sixth channel in 1993 was the last high power, free-to-air channel available in many parts of Australia where other channels are taken up with the ABC, SBS and the three commercial services.

In 1992, the House of Representatives Standing Committee on Transport, Communications and Infrastructure (HORSCOTCI) Inquiry into Possible Uses of the Sixth High Powered Television Channel recommended that, rather than prevent use of the spectrum, the sixth channel be made available for community television on a trial basis.

As there was no provision for temporary community television licences in the BSA at that time, the Australian Broadcasting Authority made the sixth channel available to community groups on an area by area basis under the open narrowcasting category of service. The apparatus licences were issued to community groups on a temporary basis with a special condition attached that the services be provided for community and educational non-profit purposes. Temporary licences were issued to community broadcasting groups in Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart, Lismore and Perth pending a Ministerial review of the television broadcasting industry to be conducted by 1 July 1997 (see paragraph 3.1.5 of Volume 6 of the 'Current State document').

On 27 May 1997, the Minister advised that he supported an extension of the community television trial for a further 12 months to July 1998.

On 24 December 1997, the Minister advised that the Government had decided to allow the community broadcasting sector to continue to utilise the sixth television channel until at least the year 2000. The Minister further advised in July 1998 that the sector could continue to occupy the sixth channel until the introduction of digital transmission on 1 January 2001.

The ABA extended the community television trial on the sixth channel to 31 December 2001 in all areas in which services were being provided: Sydney, Melbourne, Brisbane, Lismore and Adelaide. Licences in areas in which a service was not on air at the time of renewal, that is Perth, Hobart and Bendigo, were extended to 30 June 1999. The service in Perth is now on air and the licence has been extended to 31 December 2001; the Hobart licensee no longer wishes to provide a community service and the ABA decided not to renew the Bendigo group's licence when their status was reviewed just prior to 30 June 1999.

On 31 May 1999, the Minister unreserved the sixth channel spectrum in all areas except where a licence had been issued for trial community television services. This was in recognition of the need to make available as much vacant spectrum as possible to assist in the planning of digital television services.

On 5 October 2001, the Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston, asked the ABA to continue the analog trial of community television until 31 December 2002.

On 6 December 2001, the ABA extended the community television trial on the sixth channel to 31 December 2002 in Sydney, Melbourne, Perth, Brisbane and Lismore. In Adelaide the ABA extended the community television trial to 30 June 2002 in order that further inquiries be made into the provision of the service by ACE TV. Licences in areas in which a service was not on air at the time of renewal, that is Hobart and Bendigo, were not extended.

A review of the community television trial, conducted under Schedule 4 to the Act, was table in Parliament in June 2002.

On 14 November 2002, the Minister wrote to the ABA advising that legislation was before Parliament to establish a licensing framework for community television under Part 6 of the Act, and requested that the community television trial be extended for a period which would allow sufficient time for the ABA to conduct its permanent allocation process.

In November 2002, the *Broadcasting Services Act 1992* was amended by the *Broadcasting Legislation Amendment Bill (No.2)* to provide more appropriate licensing arrangements for community television services.

On 5 December 2002, the ABA dropped through the spectrum in Sydney, Melbourne, Perth, Brisbane and Lismore for the community television trial purposes for the period 1 January 2003 to 31 December 2003.

5. **New Television Services**

New Television Services will be on UHF channels in line with developments in other developed countries (see paragraph 3.1.6 of Volume 6 of the 'Current State document').

Note: In areas where the issue of planning additional services on VHF is raised in public submissions, the ABA will re-examine this assumption on a case-by-case basis in the light of the matters in section 23.

6. **Translators**

The equipment used to broadcast a service is called a transmitter. Re-transmission facilities, often called translators, are generally low powered transmitters whose purpose is to extend the coverage of the licensed service by providing a satisfactory signal to areas which receive a deficient signal from the parent transmitter. Translators are allocated a different frequency from the main transmitter and therefore use a different part of the spectrum. The ABA has assumed that all new television translators would be on channels in the UHF band (see paragraph 3.1.7 of Volume 6 the 'Current State document').

Note: In areas where the issue of planning television translators on VHF is raised in public submissions, the ABA will re-examine this assumption on a case-by-case basis in the light of the matters in section 23.

7. **Equalisation in Australia**

By 1993, the 1986 Draft Indicative Plan had been given effect in four markets, one each in Queensland and Victoria and two in New South Wales. Three commercial services had been planned and implemented for each of these markets. The ABA noted that, in Tasmania, plans were being developed to extend the services of the two existing regional operators throughout the State, commencing in 1994. Finally, the ABA noted that equalisation had not been planned in other parts of Australia.

8. **Remote Commercial Television Services (RCTS)**

There are three remote markets that have television services distributed by satellite delivery systems either direct to homestead receiving systems or via re-transmission television facilities to serve remote communities. The ABA expressed the view that the six channel plan ought to extend to these remote community services.

Note: By operation of section 5(1) of the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 former remote television licences under the *Broadcasting Act 1942* continued in operation as commercial television broadcasting licences under the *Broadcasting Services Act 1992*.

The ABA's view about the application of the six channel plan to remote community services will be reviewed during preparation of the relevant licence area plans.

9. **Band II Clearance**

The ABA originally assumed that the Band II clearance program would continue until all affected television stations have been cleared to alternative channels, preferably VHF. It noted that previous Ministers had given undertakings that the timing of residual clearances would be assessed on the basis of the need for FM channel capacity or earlier at the request of the licensee. The ABA also stated that channel 5A, whilst not technically a Band II channel, was required for space research services and was being cleared as part of the clearance of Band II.

Following submissions received during preparation of the initial frequency allotment plan, the ABA changed its views on these matters. The ABA decided it would examine the need for clearance in the preparation of licence area plans under section 26 of the Act in the light of the objects of the Broadcasting Services Act, the regulatory policy in section 4 of that Act and the matters in s.23. If there is no demand for FM radio services the ABA decided it will not necessarily clear services that use Band II.

II. FURTHER ABA ASSUMPTIONS - PREPARATION OF THE LAP AND VARIATION OF THE FAP

During the process of preparing licence area plans and variation of the frequency allotment plan in particular areas, the ABA has regard to the following further assumptions:

1. The ABA assumes the demand for additional broadcasting services can be inferred from demographic, social or economic indicators within a market or from comparison with other markets with similar demographic, social or economic characteristics, even where it receives no relevant submissions during the public consultation phase of planning, or where the evidence of submissions conflicts with the demographic, social or economic evidence.
2. The ABA assumes that when planning for community broadcasting services, it is appropriate to consider the population size and other demographic, social and economic characteristics of particular interest groups that may require a dedicated community service as well as the overall demographic, social and economic characteristics of the market.
3. The ABA assumes that the licence areas of existing broadcasting services bands commercial and community broadcasting services represent accepted media markets and the ABA will not vary them without good reason, other than to update them where boundaries are based on outdated Census collection districts. The ABA further assumes that additional broadcasting services bands broadcasting services within those markets should have the same licence area as existing services unless there are good reasons to the contrary.
4. The ABA assumes that aspirant broadcasters have a role to play both in identifying and in creating popular demand for additional services, thereby promoting the objects of the Act. Accordingly, the ABA will have regard to expressions of interest by aspirant broadcasters when assessing demand for new services, even where it receives no relevant submissions from potential viewers or listeners during the public consultation phase of planning, or where the evidence of submissions conflicts with the evidence of demand from aspirant broadcasters.
5. The ABA assumes audiences in solus commercial television markets would generally prefer to receive the same number of commercial television broadcasting services as are received in the major city markets of Australia.
6. The ABA assumes audiences want television services to cover issues of local significance and to reflect something of the local character of the area in which they live.
7. The ABA assumes that an area of relative isolation will to some extent have different needs, particularly for news and information, to those of television audiences in the major television markets of Australia.
8. The ABA assumes Aboriginal and Torres Strait Islander people, the print-handicapped, non-English speakers and people from a non-English speaking background are groups within society that are often poorly catered for in the mainstream media and would generally support the introduction of services catering to their needs or controlled by members of the group.

9. The ABA assumes that new technologies such as digital radio broadcasting ('DRB') and digital terrestrial television broadcasting ('DTTB') have the potential to alter the planning environment considerably by allowing capacity for more or enhanced broadcasting services using the same amount of spectrum. The ABA assumes that all radio LAPs will be finalised before DRB transmissions can start.
10. The ABA assumes AM and FM services would still remain the most important media for radio services for a number of years, as it would take an extended period of time for DRB receivers to reach comparable penetration rates and for DRB transmission facilities to provide a comprehensive coverage throughout the country.
11. The Minister announced that DTTB will commence in the five mainland capital cities on 1 January 2001 and in all other areas of Australia by 1 January 2004. The Television Broadcasting Services (Digital Conversion) Act 1998 was passed by Parliament in July 1998. Under this Act the ABA cannot issue any new commercial television licences before 31 December 2006. The ABA therefore assumes preparation of television LAPs can be completed Australia-wide before any new commercial television licences can be issued in Australia (other than section 38A and section 38B licences).
12. The ABA assumes that VHF television channels 4 and 5 and the part of VHF channel 3 used by VHF FM radio in Australia (ie. the spectrum between 87.5 - 108 MHz) are or are likely in future to be required for FM radio broadcasting services in all markets.
13. The ABA assumes that VHF channel 5A will be required for non-broadcasting services in all markets.
14. The ABA assumes that the part of VHF channel 3 not used by VHF FM radio in Australia (85 - 87.5 MHz) will be required for non-broadcasting services in all markets.
15. The ABA assumes that parts of the VHF television band, 202-208 MHz between channels 9 and 10, and 222-230 MHz above channel 11, previously used for aeronautical navigation services throughout Australia, became available for broadcasting services on 1 March 1996.
16. The ABA assumes that the remaining parts of the broadcasting services bands spectrum assigned to it are potentially useful for a range of non-broadcasting services in the category of fixed and land mobile communications. However, the ABA assumes that the objects of the Broadcasting Services Act, including the economic and efficient use of the radiofrequency spectrum, are best served by giving first priority to broadcasting uses of this spectrum.
17. The ABA assumes that locally-based community broadcasters serving the needs of communities, or communities of interest, within the licence area of the service, are best placed to meet the condition at clause 9(1)(c) of Schedule 2 of the Broadcasting Services Act:

The licensee will encourage members of the community that it serves to participate in:

- (i) the operations of the licensee in providing the service; and*
- (ii) the selection and provision of programs under the service.*

III. TECHNICAL ASSUMPTIONS - PREPARATION OF LAP AND VARIATION OF THE FAP

1. Basis of Technical Assumptions

The planning of radio and television services in Australia has been carried out based upon technical planning assumptions detailed in the following documents :

- *Technical Planning Guidelines, Australian Broadcasting Authority, August 1995*

Note : The *Technical Planning Guidelines* (TPG) replace the mandatory technical requirements in the *Technical Planning Parameters and Methods for Terrestrial Broadcasting* and the former emission standard publications by the Department of Transport and Communications.

- *The Interim Australian Broadcasting Planning Handbook (ABA, 1995) (formerly, Technical Planning Parameters and Methods for Terrestrial Broadcasting, Department of Transport and Communications, 1992).*
- *The Australian Radiofrequency Spectrum Plan, Spectrum Management Agency, January 1997.*
- *Emission Standard for the Australian Amplitude Modulation Sound Broadcasting Service, contained in the Technical Planning Guidelines (TPGs);*
- *Emission Standard for the Australian Frequency Modulation Sound Broadcasting Service, contained in the Technical Planning Guidelines (TPGs);*
- *Emission Standard for the Australian Terrestrial Television Service, contained in the Technical Planning Guidelines (TPGs);*

2. Specific Technical Assumptions Relating to Particular Areas

Where the preparation of licence area plans in accordance with section 26 of the *Broadcasting Services Act 1992* (the Act) results in the variation of the frequency allotment plan, under section 25(2) of the Act, it is the opinion of the ABA that specific technical assumptions are appropriate to particular areas. Note that technical assumptions relating to a particular area are included with the LAP discussion paper for the area.