



RBA SUBMISSION TO THE MINISTRY OF CULTURE & HERITAGE
CONSULTATION PAPER “DIGITAL BROADCASTING: REVIEW OF REGULATION &
FUTURE OF CONTENT REGULATION”
9 April 2008

Introduction

The Radio Broadcasters Association thanks the Ministry for Culture & Heritage for the opportunity to respond to these Discussion Papers.

Before replying in detail to the various questions, we make the following general points:

1. That the driving force for any change should be the “public interest” in its broadest sense – current and potential listeners of radio and “radio type” content, and radio broadcasters themselves, including employees, shareholders and important suppliers such as the music industry. We contend that many Government initiatives in recent years have been unbalanced and in favour of minority interests, particularly in allocation of new frequencies. A more balanced approach should be applied as we enter the digital distribution era.
2. That where satisfactory models have evolved over time, these should be left in place. “If it ain’t broke, don’t try and fix it”. Examples of this include the self-regulatory system for advertising standards and the auction system for distribution of commercial radio licences
3. That the Government should take note of the observation in the Cabinet Briefing Paper, Page 5 where it notes that “*most jurisdictions are moving from relatively heavy regulation to a lighter touch approach*”. This is consistent with our view of the future of ‘radio type content’ (RTC) distribution, which we believe will primarily be via broadcasting, the Internet and digital mobile services.
4. That all processes relating to regulation of radio broadcasting, whether undertaken by industry or Government should follow best practice consultation and monitoring standards – widespread participation; balanced analysis (normally through inputs from independent parties); broad dissemination of findings and regular monitoring against agreed and understood performance standards.

Regarding **content** issues, we make the following general points:

1. That market forces will supply most content expectations of the public – how else can we succeed but by supplying what they want to listen to?
In the limited cases of ‘market failure’ (for instance for content such as drama, country music, classical, jazz, world music, ethnic minority language and the like), the Crown may choose to support such content with funding. The RBA argues that such funding should be contestable and accessible to all potential suppliers be they public, commercial, ethnic, community access, whatever. Such funding should be subject to regular scrutiny.
2. That while the RBA is philosophically opposed to public radio, we accept that virtually all democratic governments provide some support for this genre. We thus have no objection to it, provided that it serves needs not covered by other suppliers and is subject to regular scrutiny for performance against the policy goals established by Government. These should be set in consultation with all stakeholders.
3. That all applications of public funds, including success stories such as NZ on Air’s contribution to development of NZ popular music should be subject to regular scrutiny.
4. That control of program standards should be vested primarily in a strengthened self regulatory system.
5. That control over advertising standards continue to be vested in self-regulation in all media.

Regarding **network** issues, we make the following general points:

1. That RBA members will continue to access the vast majority of our audiences via terrestrial analogue broadcasting in even the medium term. There will be progressive shift to new channels, particularly the Internet and digital mobile services, but we see little need for Government to intrude in this process. However, when terrestrial broadcasting moves to digital technology it will be necessary that the Crown act as ‘honest brokers’ ensuring a fair balance in the interests of all stakeholders. At that time, the RBA will argue strongly for priority to be given to incumbent broadcasters of all types, including public radio in view of their historical investment and duplicated costs during the transitional period.
2. That allocation of commercial broadcasting licences continue to be made by auction. Where the Crown hypothesises a need for special purpose non- commercial licences, the rationale should be subject to proper stakeholder consultation, including advice from independent parties.
Should licences be granted under these conditions, their terms should closely reflect the policy objectives and licensees be measured regularly against same and they should be appropriately funded.

There should be no place for commercial licences allocated under non-market/restricted auction processes.

Following are our responses to specific issues raised in “Digital Broadcasting: Review of Regulation (Volume 2)” – note that we have responded only where we see the issue as relevant to radio broadcasting and have a viewpoint.

As a start point, we note the proposition that of the various scenarios hypothesised, that the “diversity” option is seen as desirable, describing the digital broadcasting future as:

“a world with universal geographical penetration by all digital platforms, supported by high levels of digital use and literacy. Digital AV content is accessible on a technology and device neutral basis, with full interoperability across platforms and at an affordable price. All services are content driven, and there is an effective content market, competing on quality and diversity of interest.

The strength of plural, effective broadcasting and telecommunications markets in the ‘diversity’ scenario supports a strong presence for local content that meets the needs of diverse social and cultural groups. News and information sources are diverse, accurate, balanced and relevant. There is widespread participation in democratic digital forums. This scenario assumes Analogue Switch-Off has occurred and there is significant and sustainable economic growth in the digital AV sector. This scenario...represents major digital advance, high levels of competition and investment, as well as accessible, diverse content (including interoperable devices, effective pricing etc) and high levels of media literacy”.

Q3.1 – Should NZ maintain the status quo in all respects? If so, why? If not, what are the priority areas for change?

With the proliferation of outlets providing access to content, an explosion in content has followed, much of it unregulated and some potentially injurious to the interests of the public. There is thus, in our view a need for adjustment to the process of control over content.

Q3.2 – If some change is necessary, should this generally be at the level of (a) updating existing arrangements, (b) restructuring the regime in line with market developments, or (c) reforming the regime? Please give reasons for your views.

We recommend Option (a). We submit that Government needs to foster the development of self-regulatory mechanisms to protect the public interest. Technologies are moving so quickly that it is unrealistic for the New Zealand, or for that matter any other Government to create structures to, in particular, control content. As the Advertising Standards Authority has shown many times in advertising markets, it is able to move with speed to adjust to new challenges. For instance, the ASA has already been adjudicating on complaints about internet advertising for some three years. Acknowledging that control through technology is virtually impossible at this time, the ASA achieves compliance with its rulings through the co-operation of ISPs and their advertising clients. The

process “connects” with Government through regular meetings between the ASA and relevant Crown agencies such as the Ministry for Culture & Heritage, Ministry of Health, Commerce Commission, Ministry of Consumer Affairs and others. All at no cost to the taxpayer!

Q4.1 – Should NZ consider one of the three options for revised institutional arrangements (reflecting different levels of change along the regulatory spectrum)? If so, which one, and why?

As would be gathered from our response to 3.1, the RBA does not support creation of either a single or converged regulator. The “default” setting should, in our view, be self-regulation for each of the key content provider segments – television broadcast, radio broadcast, internet and mobile telephony. Each should operate its own self-regulatory system with the BSA providing policy advice to Government, support for Code development, quality assurance and in cases of total failure of self-regulation, adjudication over complaints.

Q4.5 - How could the relationship between a single regulator and the Commerce Commission best be defined and managed? For example, should the regulator have primacy and then ‘refer’ issues to the Commerce Commission? Would the two be required to work together on all competition matters? Or, would they each be free to investigate potential issues / breaches as they saw fit?

Q4.6 - Some overlap of responsibilities does exist in other countries, such as the US and the UK. Should such overlap be contemplated if a single regulator were established? If so, how might it be made workable?

We see no need to change the current environment. The Commerce Commission has statutory responsibilities across all sectors including the media to prevent anti-competitive behaviour. We can see no justification for a special case in the media context. If some future Government wish to introduce rules about media ownership, these would be better dealt with as a stand-alone issue, rather than re-jigging the overall operations of the Commerce Commission.

Q4.7- Which of the options for dealing with market definitions should be considered in New Zealand? Please give reasons for your views.

We support Approach A, acknowledging that “radio like” content needs to be subject to the same standards as broadcast radio, subject only to the degree of access limitation (i.e. formats which are protected from open access by e.g. password or credit card access need not be subject to the same level of restriction as publicly accessible content).

Q4.8 - Should changes to media ownership (including cross-platform or foreign investment) rules be considered to ensure plurality of news/key genre provision?

We challenge the notion that media ownership rules will necessarily provide “plurality” of news/key genre provision. Good “content provision” in its broadest sense is driven by listener/viewer needs – not some pre-conception of what is “good” for the public by regulators.

The RBA believes that the current “open market” environment for ownership within and across media has provided New Zealand audiences with a quality of broadcasting far better than might be expected for such a small country. Much of this is due to investment from outside New Zealand, and has resulted in substantial employment and general wealth creation that would have been unlikely had there been restrictions on ownership.

Q5.2 - Which of the above options for change do you consider would best ensure diversity and visibility of local content in a digital age? Please give reasons for your views.

Q5.3 - Do funding bodies require any mechanisms (e.g. incentive-based or obligation-based) not currently available to them to promote diversity, maximum visibility and accessibility of funded programmes?

Q5.4 - To what extent would the blurring of boundaries between different segments of the audio-visual sector justify changes to the current structure of funding bodies (e.g. to avoid the risk of gaps or duplication)? If a converged funding body were established, what might its role be?

Q5.5 - What would be the implications of the changes you support for the amount of funding required? How could a significant commitment to private investment in local and other content of public value also be encouraged?

The RBA believes that the marketplace and in particular close attention to the needs of listeners and viewers will provide the best route to diversity. However, we also believe that there is a small risk of a “tyranny of the majority”. Special minority content needs identified through thorough public consultation and research are a justifiable use of Crown funding, as long as the process for granting such funding is transparent and contestable. We support the current NZ On Air model, which in the television sector provides support for content which may not be viable in open market financial terms with appropriate share of both risk and reward. In the music environment, support for NZ music has had an important impact on achievement of current broadcast levels of around 20% local content. If the Crown’s ultimate goal is to give audiences access to minority content, the funding process should also be platform neutral.

Q5.6 - Which of the options for supporting and promoting public service broadcasting in a digital age do you support, and why?

Q5.7 - Would a greater focus on the role of public broadcasters be a more effective means of ensuring the continued accessibility of public service content than spreading resources and content across numerous providers? If so, how might this be achieved?

Q5.8 - If an independent body were commissioned, what mechanisms might be needed to measure and monitor the quality and diversity of public service broadcasting in the digital age?

Q5.9 - As viewing patterns change with the proliferation of platforms, and access is often conditional (pay per view or subscription), what expectations should there be for the delivery of publicly-funded content through pay platforms?

The RBA’s view is that in a properly functioning “marketplace” for audiences, virtually all needs will be so met with minor intervention by the Crown on a contestable basis for minority content. We’re also realistic enough to note that virtually every democratic country has public service broadcasting in both

television and radio. Our view is that the public broadcasting sector should be restricted only to core services that need on-going support such as news, long format current affairs, drama, minority culture content and the like. We are however also of the view that public broadcasting in NZ extends well beyond what we would consider to be “core”. For instance, should taxpayers be supporting classical music or sport when private broadcasters do the same or more and should be able to compete for contestable funding. A specific example that we observe is that of Concert FM where we believe that its funding should be exposed to contestability with the non-public broadcasting sector on a regular basis – say every five years. Conversely we can see the case for core funding for a service such as National Radio from say 6am to midnight, subject to regular public scrutiny through the Select Committee process as at present.

Q5.10 - Which of the above options for dealing with advertising issues in a digital age do you support? Please give reasons for your views.

The RBA is strongly in favour of self-regulation by industry. The ASA already applies a “level playing field” policy across all media, including the internet and telephony, but makes appropriate allowances for e.g. control of access, listener/viewer profiles, time of day etc. It moves faster and less expensively than the BSA (although, of course, there is no charge at all to the taxpayer for the ASA service) and quickly modifies its Codes and other procedures according to the needs of the moment.

In areas where there is potential harm to the public interest, close and regular consultation is undertaken with appropriate bodies such as the Ministry of Health, the Commerce Commission, Securities Commission, Ministry of Consumer Affairs etc.

Despite the natural inclination of Governments to want to “control”, we submit that the public interest is very well served by best practice self-regulation as per the Madelin Report of the European Union. The ASA performs very well against all of the Madelin criteria with the exception of independent monitoring and audit, a minor shortcoming which is in the process of being corrected.

Q7.1 - Which of the options for ensuring fair access for service providers to digital platforms do you support? Please give reasons for your views.

Q7.2 - If an open access regime was introduced to ensure fair access for service providers to digital platforms, what would be its scope? What sort of criteria should apply?

Q7.3 - If “must-carry” provisions were introduced, to which platforms would the obligations to carry services apply (e.g. all pay, cable, satellite, IPTV)? What services should qualify for must-carry status (e.g. public service broadcasters, regional channels)?

Q7.4 - Should “must pay” obligations be introduced, either in addition to, or instead of, “must-carry”? If so, how might this work? Which services would it apply to? Would the Canadian version of “must pay” be appropriate to New Zealand?

Q7.5 - If a “must list” requirement for electronic programme guides were introduced, should this be in addition to or as an alternative to “must-carry”?

How would such a requirement work in a multi-platform and multi-channel environment?

At this time, the issue of broadcaster access to various portals or platforms is of little relevance to radio. However this will not always necessarily be so. We believe that the principles should be that if the Government wishes to provide an open access portal, it should provide this service. Where “property rights” are already conferred on private operators, it is a breach of natural justice to retrospectively require such operators to carry mandated material.

Q7.6 - Which of the options for ensuring minimum agreed technical standards do you support? Please give reasons for your views.

Q7.7 - Would the interests of audiences and industry be best served by industry-wide adoption of agreed technical standards?

Q7.8 - Is government encouragement sufficient to ensure industry-wide agreement is reached in New Zealand? If not, what other measures might be warranted?

If there is one area that does need Government participation, it is in the establishment of technical standards. Proliferation of digital platform standards is in the interests neither of listeners or content providers. Given the number of stakeholders involved, many with vested interests, we see the need for an “honest broker” role for Government to facilitate decisions that satisfy the greatest number of stakeholders. We also believe that there is a great risk in NZ being an innovator or early adopter in this area and that it is better to learn from the experience and at the cost of larger economies as has been the situation with digital radio.

Q7.9 - What principles and priorities do you consider should guide the development of a post-analogue switch-off spectrum allocation framework?

Q7.10 - If any new regulatory measures (such as an open access regime) were introduced, would the option of licensing broadcasters, multiplex and/or other platform operators be an appropriate means of monitoring compliance?

We believe that the underlying principles adopted for analogue switch off for television would be generally appropriate for radio i.e. that when penetration of digital receivers reaches a mutually agreed level (probably +70%) a final switch off date should be announced and promoted to the public to accelerate final conversion.

Regarding the operation of digital radio multiplexes (assuming, that is, that a DAB-type platform were adopted) we are implacably opposed to establishment of independent multiplex control or ownership. In our view, since Government asserts ownership over broadcasting spectrum, it should be in the “front line” of allocation policy. The most advanced digital radio market in the world, the U.K, has been virtually brought to its economic knees by unnecessary and undesirable capture of revenue by multiplex operators. We argue strongly against the replication of such an unsatisfactory environment in New Zealand.

Q7.11 - Which of the options to encourage investment in digital content and infrastructure, and to ensure the digital broadcasting industries are yielding an

optimal economic return to New Zealand, do you support? Please give reasons for your views.

Q7.12 - If government intervenes to encourage investment in infrastructure, how can it ensure that it does not make de facto technology choices that preclude innovation in other areas?

Q7.13 - If a “build” obligation were placed on media platforms to ensure a minimum roll-out, how could such a requirement best be designed (e.g. the provision of incentives to encourage cooperation)? To which networks should it apply?

Q7.14 - If a media-funded pool was established to ensure broad geographic service availability of networks, who should be levied, and how should such a fund be administered?

Regarding migration of radio broadcasting to a digital platform, we believe this is relatively less complicated than the challenges faced by broadcast television, internet and telephony. Evidence from overseas introduction of digital radio suggests that it should be viewed, at least in the short to medium term, as simply a “technology migration” not dissimilar from the migration in the 1990s from AM to FM (Note: still not complete). The experience of the British radio sector, particularly the commercial sector, of the conversion to DAB is instructive – rapid expansion in choice in stations and multiplex changes have largely destroyed the economic viability of commercial broadcasting; despite major efforts by all stakeholders to encourage conversion after some 7+ years, with many tens of millions of dollars of expenditure, only some 22% of homes have DAB receivers; worse, with the arrival of the next generation technology, DAB+, these sets are now obsolete as is much of the broadcasting infrastructure with new entrants (such as potentially Australia) launching on the DAB+ platform; thus U.K broadcasters will be faced not just with simulcasting but with “trimulcasting” at considerable infrastructure cost. It can thus be seen that new business opportunities, particularly for internet and mobile telephony, simply do not exist for radio – in fact, for at least incumbents broadcasters, they will face fragmentation of audiences and significant increase in operating costs. The only potential players to be advantaged will be those on new platforms such as mobile telephony and the internet.

In Summary

The RBA’s position on the key issues raised is as follows:

- The current model for regulation of broadcasting, despite some fragmentation actually works well – so why initiate change that will inevitably be expensive and complex in the short term.
- The market will provide almost all listener needs – any unmet needs identified after public consultation should be serviced through Crown funding (and not advertising) in a contestable environment.
- Content regulation should be via strengthened self-regulation, with the BSA repurposed as a policy, research and code development service, adjudicating on complaints only as a last resort.

- There is a legitimate role for Government in ensuring that radio's migration to digital is undertaken in a way that meets the needs of broadcasters and listeners alike.

John McElhinney
CHAIRMAN

David Innes
EXECUTIVE DIRECTOR