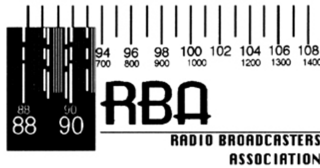

<u>RBA RESPONSE TO "BROADCASTING AND NEW DIGITAL MEDIA: FUTURE OF CONTENT REGULATION"</u>
9 April 2008

Introduction

The Radio Broadcasters Association thanks the Ministry for Culture & Heritage to participate in this consultative process. Before answering questions in detail, we make the following general observations:

- That in the second half of the 20th century, western democracies, including New Zealand have seen a significant shift from state intervention and control in many aspects of peoples lives, including broadcasting, to a more liberal environment wherein the "default setting" is that citizens will make their own minds about, for instance, what when and where they consume media.

- This is well demonstrated in New Zealand by the contrast between the Broadcasting Act (1989) and the Bill of Rights. The Broadcasting Act assumes that citizens need to be protected against e.g. unbalanced journalism, offensive content, unfair treatment by the media etc. It ignores both the sense of responsibility exhibited by the media generally and the ability of the public to opt out of anything they find offensive, unbalanced etc. In short, the Broadcasting Act treats citizens as children who need to be protected. Conversely, the Bill of Rights takes the view that a healthy democratic society depends on extensive freedom of speech, despite the fact that it will occasionally be offensive to some citizens. Only in rare cases where there is likely to be harm to the public good should there be intervention and then only in a way proportionate to the potential harm. The Bill of Rights can thus be seen as treating citizens as adults taking responsibility for their own actions.

The RBA strongly holds the view that the "responsible adult" should be the default setting for any regulation of media content.

We further observe that at the time of promulgation of the Broadcasting Act, broadcast media choice in New Zealand was quite limited. Although the assumption could be challenged, it was widely held that the listening or viewing public sat back and "took what was coming". Put another way, it could be seen very much as a "supply" model.

Since that time, there has been vast increase in the range and type of media available, not only in broadcasting. Viewers, listeners and readers are now very much in "opt in" or "opt out" mode. We are therefore of the view, that

intervention by Government is now necessary only where there is evidence, or a strong likelihood of harm to the public good.

Responses in detail to questions raised for the Consultation Paper follow (where a question number is missed, we have no view on that particular issue).

Q 1:
What concerns are appropriate to be addressed through content regulation?

We believe that the only issues that should be addressed by content regulation are those which are harming or are considered likely to harm the public interest. For instance, hate speech of a degree that it is likely to encourage unlawful actions; encouragement and/or instruction as to how to commit crimes; encouragement to, and instruction on how to commit acts of terrorism etc.

Q 2:
Should a single regulatory regime apply to all broadcasting-like content no matter how it is distributed?

No. Underlying principles, such as those noted above should apply to all suppliers of "broadcasting-like content". However, there are legitimate grounds for different standards for different media, particularly taking into account audience profile and control of access. For instance, audio visual content with unrestricted access by young children requires a different standard of control from when the same content is broadcast in an environment accessible only to adults on an "opt in" basis.

This principle has already been established, in particular by the differences between the free-to-air television code and that for Pay TV. In the radio environment, it is recognised by the willingness of the BSA to take into account the format and typical audience of a particular radio stations, and the extent to which a listener would be reasonably aware of this.

Q 3:
Should the same general regime apply, but with a less strict or detailed code for content received on the demand of individuals than for content broadcast conventionally?

See Question 2.

Q 4:
Publicly-owned broadcasters have special mandates to set standards of quality (such as the Charters of TVNZ and Radio New Zealand or the legislation of Maori Television).

Should their content be regulated differently from the content of private-sector broadcasters or the same?

As publicly owned media, organisations such as TVNZ, Radio New Zealand and Maori Television must always be subject to the requirements of elected representatives.

However, this should not be done in such a way as to confer a tax-payer funded advantage over commercial media.

Q 5:
Should broadcasting-like content provided to audiences from overseas be subject to New Zealand's regime for content regulation?

Yes. While acknowledging that control of (in particular) internet sourced content is difficult to apply, we contend that the same principle of "prevention of harm" should apply to all content providers.

We acknowledge the difficulties of this but this requirement is about to be imposed by amendments to the Copyright Act (wherein, an ISP once advised of breaches being carried by one of its content providers, is required to remove such content or risk a substantial fine). We can see no reason why the same sanction could not be applied against material in breach of the internet self-regulatory code.

Q 6:
If you answered yes, what form should regulation take, and who should regulate such content?

The default setting should be self-regulation. Technology is changing so quickly that the inevitably lengthy process of Government regulation is unlikely ever to be able to "keep up". Conversely, a self regulatory code developed perhaps in consultation with a re-purposed BSA, and in consultation with all stakeholders, particularly the public, will always be able to move more quickly in maintenance of appropriate standards.

Q 7:
a) Should there continue to be a state agency available in New Zealand to operate a system of content regulation? Or;

b) Should broadcasters be able to regulate themselves, within the requirements of legislation?

Yes, but functioning in a different way from the BSA at present. We see the proper role of the BSA top be as a policy adviser, educator, "encourager" of Codes development and even quality assurance adviser of the self regulatory process. At present, while only around 10% of complaints not upheld by

broadcaster internal complaints committees go on to the BSA, we believe it is a fundamental flaw of natural justice for appellants to be able to go to the BSA simply because they are unhappy with the self regulatory decision. We propose that appeals to the BSA be allowed only under “quasi legal” grounds (as happens at the ASA) – for instance that the self regulatory decision was manifestly against the weight of the evidence; or that evidence provided to the Complaints Board has been misinterpreted to the extent it has affected the decision; or the proper procedures have not been followed; or that it is in the interests of natural justice that the matter be reheard.

Q 8:
a) Are the current arrangements for monitoring public broadcasting and the broadcasting environment adequate?

In our experience, the roles undertaken by the BSA, Ministry for Culture & Heritage and the radio spectrum management division of the Ministry of Economic Development are adequate. It could be argued that better coordination between the three in provision of policy advice to Ministers might be desirable, but we see no need for creation of a monolithic central body such as Ofcom in the U.K. We are advised by our colleagues at The Radio Centre in London that while Ofcom in total has a very broad role, the differences between major content provider sectors, particularly television, radio and telecommunications are such that the different divisions operate very much in “silos”.

Q 9 :
If you believe that there are gaps in the current arrangements, would such an agency play a useful role?

We oppose the establishment of an independent “watch dog”. Again taking the example of Ofcom in the U.K, its very substantial powers coupled with independence of action creates a risk of breaches of ‘natural’ justice. For instance, their complaints board, managed internally, provides no right of appeal.

We believe that the very short links between broadcasters and democratically elected representatives in New Zealand should be maintained. We invite the Ministry for Culture & Heritage to note that not only is this preferred by organisations such as ourselves, but is regularly used by our critics and competitors.

Q 14:
Are a single set of broad concepts as a basis for content regulation more, or less, important in an era of increased choice in content and in the ways of receiving it?

As noted earlier, we support the idea of a serious of broad principles applying to all providers of "broadcasting like content", differentiated by the characteristics of the medium and control over access to it.

Q 15:

a) Should the concepts currently guiding the standards applying to broadcasting continue to apply to broadcasting?

No. We believe that the ability of the public at large to understand and analyse media content and to avoid access to content they find distasteful or disagreeable has far outstripped the ethos of the Broadcasting Act. We argue for an extensive and intensive process of consultation with the public to build a content control environment appropriate to the 21st century, with appropriate emphasis on 'at risk' groups such as children.

Q 16:

Do you have a preference between these two possible approaches?

The RBA clearly prefers the second alternative. Given the proliferation of media choice, and an "opt in" environment, we see attempts to establish a single standard of, for instance, "good taste and decency" as impractical. We prefer the default setting of the Bill of Rights, conferring extensive rights to impart and receive information constrained only where there is demonstrable harm to the public interest.

Q 17:

Does this principle, as currently expressed in the Act, remain important in an era of an increasing variety of outlets for information?

Again, using the standards of the Bill of Rights, we can see no particular need for "balance" to be mandated by legislation. In the first instance, journalistic ethics support the notion of coverage of a range of viewpoints. Second, where a particular medium indulges in biased reporting or analysis, this generally becomes quickly known with viewers or listeners choosing to opt in or out according to their preferences. Using radio as but one example, in the course of a day in talk radio, it is possible to listen to a range of views from both left and right of centre, without detracting from the merits of a programme. No-one expects a Labour (for instance) politician to provide a balanced prospective on the world including that of National, ACT, Greens etc. Why should the media be any different, particularly when Government can impose standards of balance on public broadcasters.

Q 19:

To what extent is the achievement of accuracy dependent on the availability of a balance of views:

a) within a broadcast programme, or other audio-visual content?

We contend that accuracy and “balance of views” (does this actually mean a “range of views”? or “a range of views covering all aspects of an issue”?) are two separate issues. It is possible on a single issue for there to be highly accurate information, but subject to very biased analysis. Conversely, a range of views is no guarantee of accuracy. The two issues should not be linked.

Conclusion

The Radio Broadcasters Association holds the view that there is a need for dissolution of the Broadcasting Act and replacement by an environment which recognises firstly that consumers of media in the 21st century generally opt in to what they want to view or hear; that the trigger for control over content should be demonstrable or likely harm to the public interest; and that self-regulation will, if managed to best practice standards, protect the public good at least as well as the current BSA-led environment, at no cost to the taxpayer.

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