

15 February 2002

SUBMISSION

To: The Commerce Select Committee

On: The Television New Zealand Bill

Introduction

1. This submission is from the Screen Producers and Directors Association of New Zealand (SPADA).
2. SPADA is the foremost screen production industry organisation representing film and television producers and directors in New Zealand. We have over 280 company and individual members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand.*
3. This submission has been approved by SPADA's Executive, a board annually elected by its members. SPADA's Chief Executive Jane Wrightson and President Nicole Hoey wish to appear before the Committee. Our contact details are below.

Comment

4. We support the overall intent to require TVNZ to operate more as a public broadcaster. Our submission provides comments and suggestions on three main areas of the Bill:
 - (a) the proposed structure of the TVNZ Group (TVNZG) and
 - (b) the content of the Charter and
 - (c) reporting and accountability

The TVNZG Structure

5. We are concerned that the proposed three-board structure is unusual and cumbersome. We understand the reason for this is to permit TVNZ to operate less commercially and thereby give effect to the Charter yet to permit THL to operate in a fully commercial manner.
6. The preamble to the Bill states categorically that "*the television business and the transmission business operate in different industries*" (p2). With respect this is an ideological position rather than a statement of fact. The two operate in the media and communications industry. Taking this position on a matter of ideology has clearly led to the proposed company structure and we submit that the clumsy structure is designed to fail.

7. SPADA advised the Government that it opposed the original plan to split TVNZ and THL into completely separate companies because of our concern that
 - (a) TVNZ would be facing an uncertain economic future, and that
 - (b) Public funding would always be inadequate and that
 - (c) THL was a possible source of vital third party revenue which would
 - (d) Strengthen the company position of TVNZ overall.
8. Our interest in this derives from our commitment to local content and its importance to provide New Zealanders with New Zealand programme choices. Local content is always a variable cost for a broadcaster and is one of the earliest sacrifices made in lean economic times. The television business, like many businesses in New Zealand at present, is barely profitable. CanWest is slowly turning around after some years of losses and an inadequate ROI.
9. Even before this restructuring, TVNZ faces a hostile and uncertain economic environment. Multinational companies dominate: Murdoch owns the NZ digital and pay TV platform, Packer has recently - and quietly - entered New Zealand through Prime's alliance with Channel 9 and CanWest operates in several countries. The Bill envisages a lone TVNZ retaining its market share in an increasingly competitive environment while increasing its cultural mandate. But the tools to allow TVNZ to compete are being eroded. One of our members has described the situation as comparable to a boxer being sent into the ring with his hands tied behind his back.
10. We do not believe that the proposed structure enhances the prospects of good governance and a good financial position. This structure disempowers TVNZ in its difficult task of effectively implementing Charter while maintaining a strong balance sheet. We urge the Select Committee to consider a cleaner structure where one main board (TVNZ) is charged with Charter performance and overall company management and a subsidiary board (THL) is charged with the financial performance of the transmission and distribution activities.
11. We also wonder why BCL is having a statutorily-enforced name change. If THL is to be a trading name, this will incur seemingly unnecessary rebranding costs.

The TVNZ Charter: s16(2)

12. We support the general provisions of the Charter as laid out in s16(2). We have two concerns and note that it would be enormously helpful, for future reference purposes, if the unusual bullet-points format contained in the Bill was changed into sub-paragraph numbering in the Act.
13. The sixth bullet point - *maintain a balance between programmes of general appeal and programmes of interest to smaller audiences* - is unreasonable if the intention is for an equal balance. The requirement on TVNZ to maintain its commercial performance is directly contradictory to this. This concept may be a classic element of public broadcasting proper - but proper public broadcasters are not reliant on commercial revenue.

14. This paragraph was not included in the original draft Charter which was the only version subject to public consultation. We query whether such a provision is necessary at all, given the careful detailing throughout the Charter of various audiences and genres which must be addressed, and the threat this provision might pose to small, niche channels in providing unhelpful competition.
15. The requirement is unnecessarily onerous and we urge that it is deleted entirely.
16. If the Committee does not agree that this provision should be deleted, then we urge that the provision be reworded so that an equal balance is not automatically expected.
17. The ninth bullet point - *support and promote the talents and creative resources of New Zealanders and of the New Zealand film and television industry* - is a welcome recognition of the role the industry has in supporting and contributing to the operation of TVNZ. It is a longstanding worry of the independent production industry that healthy competition between in-house programme makers and independent programme makers is not always adequately fostered.
18. It is only a little over ten years ago that the independent production industry was not formally permitted to submit programme ideas at all. The health of independent relationships with TVNZ is too often reliant on the personal support of a small number of people as opposed to being a natural part of the structure.
19. Disturbingly, there is no recognition of the independent industry at all in the Bill. It is often a natural instinct for companies to protect their own operating divisions first and rarely for the right reasons. With the financial outlook uncertain, it is entirely feasible that TVNZ could direct significant levels of production to be produced and/or post-produced in-house (and thus maximise use of Crown assets). This could well send several private facilities houses, as well as production houses, out of business and damage the very industry infrastructure which other arms of government are trying to grow (see, for example, the Prime Minister's papers *Growing An Innovative New Zealand*).
20. The competition provided by the independent industry for both programme ideas and technological facilities also provides an excellent benchmark for TVNZ's own pricing and services.
21. For this paragraph to be meaningful and effect real change, we strongly urge that it must be reworded to read *support and promote the talents and creative resources of New Zealanders and the independent New Zealand film and television industry*.

Directors' Responsibilities: s19

22. While the heading refers to the subsidiary boards, the text requires that "every director" must ensure that the subsidiary acts in accordance with its SOI. It is not best practice to require this of individual directors but to require that a board takes collective responsibility for decision making.

23. We submit that this clause be reworded to “..... the board of each TVNZG subsidiary must ensure that the subsidiary acts in a manner consistent with its current statement of intent”.

Reporting: s26

24. S26(b) (sic) specifies that TVNZ’s statement of intent must include *performance measures for measuring performance against its Charter*. This is a critical requirement and will be one of TVNZ’s many new challenges. As the foundation document for TVNZ, the Charter is critical and we believe that maximum transparency should apply.
25. We propose that, for the avoidance of doubt, this paragraph be strengthened to read *quantitative and qualitative performance measures for measuring performance against every element of its Charter*.

Independence: s31(1)(a)

26. We are unclear as to the reasons for and meaning of this paragraph: *The shareholding Ministers may, by written notice to the TVNZG board –*
(a) direct the board to include in, or omit from, its statement of intent any provision or provisions of a kind referred to in section 26;
27. We request that the Select Committee examines this wording carefully. We are assuming that the matters specified in s26 **must** be included and the omissions and inclusions are intended for **other matters**. If there is any prospect that this section could mean the omission of any elements now specified in s26, we would object strongly and we request that the Select Committee satisfy itself that there can be no subsequent legal challenge here.
28. So, what matters referred to **of a kind** specified in s26 could be omitted or included? And why would they be omitted or included? We cannot see the public interest intent here and request that this clause is expressed so the intent is clearer.

Ministerial Directives - Dividend Policy: s31(1)(b)

29. This section allows the shareholding Ministers to: *determine the amount of dividend payable by TVNZG to the Crown in respect of any financial year or years*
30. The ability of the shareholding Ministers to set the dividend is also a vexed issue. We accept that, in principle, it is the right of a controlling shareholder to set dividend policy. But the years of stripping TVNZ of potential capital and programme investment funds to further non-broadcasting Government objectives have left us cynical about this process.
31. While we understand that s31(3) requires the Ministers to “*have regard to the objectives and functions of TVNZG and consult with the board*”, clearly the Ministers of Finance and Broadcasting have the last say about the money to be extracted from the company. We expect that the Minister of Finance, a position invariably senior to the Minister of Broadcasting, will generally hold sway.

32. There is no requirement for the dividend to be reinvested in broadcasting. This provision highlights yet another contradiction in this structure, in that TVNZG is expected to implement the Charter, remain financially sound through healthy commercial revenue and still provide a significant share of any profits back to Government for other purposes.
33. New Zealand has the only public broadcaster in the world that pays the Government, rather than vice versa. It is also the only public broadcaster in the world which relies on advertising revenue. Crown funding will always be difficult to secure and the advertising market will always be volatile. What will happen to TVNZ's Charter targets if advertising revenue slumps mid-year? Will TVNZ endeavour to complete targets nevertheless and fail in its financial obligations, or reduce targets and fail in its Charter obligations?
34. We argue that the current requirements are highly undesirable. In light of its new cultural responsibilities, it will rarely be reasonable to require TVNZ to pay a dividend to the Crown (which does not abrogate the requirement for sound fiscal management).
35. We submit that TVNZ should be protected from the unnecessary, highly political 'money-go-round', where TVNZ has a dividend extracted then needs to bid for additional Crown funding. We submit that s31(3) is amended to read: *Before giving any notice under subsection (1), the shareholding Ministers must give special weight to the objectives and functions of TVNZG set out in section 16, consult with the board of TVNZG and may issue a notice only if all qualitative and quantitative Charter performance measures have been met or exceeded.*
36. In the undesirable event that this is not agreed to, a second approach would be the introduction of a new s31(4): *Upon receipt of the dividend payable, the Ministers will immediately allocate additional funding of the same amount as the TVNZG dividend to NZ On Air for allocation to contestable television programme funding.*
37. This is a sensible solution to some of the funding issues. TVNZG can still argue for retention of funds for its own purposes to its shareholding Ministers. Once that matter is settled, moneys earned from television can quite fairly be reapplied to television.
38. Either way, the ability for any government to strip TVNZG of investment funds must be minimised. As we cannot emphasise enough, TVNZG's ability to maintain a healthy financial position is already compromised without this additional threat.

Ministerial Directives - subsidiaries: s32

39. The paragraph allows the Ministers to direct TVNZ and THL to amend their SOI's and to pay a dividend to TVNZG. It is most unusual for shareholders to be given this influence over subsidiary companies (and again highlights the weaknesses of the three-board structure outlined earlier). We strongly argue that this is improper and contravenes good governance.

40. We submit that this entire paragraph must be removed. The Ministers' influence should be with the TVNZG and with the appointment of directors to the boards. After that, subsidiaries should be solely accountable to the TVNZG. This provision is a further mechanism allowing political interference and asset stripping, and reflects badly on the cumbersome three-board structure commented on above.

Schedule 1

41. We note the inconsistency of "TVNZ Ltd" not being included in amendments to the Official Information Act schedule (where it already exists) but being included in the Ombudsmen Act schedule amendments (where it also already exists). For the avoidance of doubt, we suggest the Select Committee check that TVNZ Ltd is categorically included in the Official Information Act schedule. We assume that it is.

Summary of SPADA Recommendations:

42. That the Select Committee recommends a new, clean **company structure** where one main board (TVNZ) is charged with Charter performance and overall company management and a subsidiary board (THL) is charged with the financial performance of the transmission and distribution activities.
43. That the sixth bullet point of the Charter at s16(2) - *maintain a balance between programmes of general appeal and programmes of interest to smaller audiences* – be **deleted**.
44. That the ninth bullet point of the Charter at s16(2) be **amended** to read *support and promote the talents and creative resources of New Zealanders and the independent New Zealand film and television industry*. (emphasis ours)
45. That s19 be **amended** to “*In addition to the duties under the Companies Act 1993, the board of each TVNZG subsidiary must ensure that the subsidiary acts in a manner consistent with its current statement of intent*”. (emphasis ours)
46. That s26(b)(ii) be **amended** to “*quantitative and qualitative performance measures for measuring performance against every element of its Charter*”. (emphasis ours)
47. That the meaning of s31(1)(a) (general Ministerial directives) be **clarified**.
48. That s31(3) provisions (dividend payment) be **amended** to: *Before giving any notice under subsection (1), the shareholding Ministers must give special weight to the objectives and functions of TVNZG set out in section 16, consult with the board of TVNZG and may issue a notice only if all qualitative and quantitative Charter performance measures have been met or exceeded*.
49. That s32 (giving the power for Ministerial directives to be issued to TVNZG subsidiaries) be **deleted**.
50. That the Select Committee **ensures** that the TVNZ Ltd is included in the Official Information Act schedule

Thank you for the opportunity to comment.

Yours sincerely

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