

Report of the investigation into
the administration of complaints
about broadcasting services by the
Australian Broadcasting Authority

July 1996

Report under section 35A of the *Ombudsman Act 1976*

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FOREWORD

In late 1992 a new legislative framework for managing Australia's broadcasting industry was established. The former Australian Broadcasting Tribunal (ABT) was replaced by the Australian Broadcasting Authority (ABA) under the new *Broadcasting Services Act 1992* predicated on a self regulatory framework.

A number of significant changes were made to how complaints about broadcasting were dealt with. The new Authority was given significantly different enforcement powers and an increased range of penalties that it could apply. However, the main thrust was towards a self regulatory scheme based on industry Codes of Practice over which the ABA had limited powers.

A full analysis of how this new regulatory framework has performed has not been undertaken. However, this report suggests that there were problems in the first two years in the area of current affairs programs and complaints from individuals. New policies and procedures have been introduced by the ABA which should mean that future performance is improved.

The jurisdiction of the Ombudsman relates to the practices and procedures of the ABA and not the commercial broadcasters. This investigation focuses on the ABA's handling of a complaint lodged by an individual, Mr Hughes. Mr Hughes' complaint to the ABA related to inaccurate reports in a current affairs program which affected his reputation and business. Mr Hughes first brought his complaint to the ABA in March 1993.

In February 1994 Mr Hughes complained to the Ombudsman's office about the lengthy delays, and the failure of the ABA to undertake a proper investigation of the matter. After the Ombudsman's intervention the ABA re-opened its investigation. The ABA's eventual finding, in December 1995, about the original broadcast upheld the substance of Mr Hughes' complaints.

The Ombudsman's investigation found, however, that there had been inordinate delays and difficulties in obtaining an adequate response from a broadcaster, and deficiencies in the Authority's complaint handling procedures.

A review of other complaints made to the Ombudsman indicated that there had been a wider problem of delays and poor communication between the ABA and complainants - although there has been significant improvement in recent months.

I have outlined in this report a number of recommendations to ensure that these improvements continue. and I am pleased that these have now been largely accepted

At a broader level the complaint raised matters about the ABA in the context of the self regulatory scheme established by the Broadcasting Services Act 1992.

These broader policy matters are outside the Ombudsman's jurisdiction but necessarily impact on the effectiveness of the ABA's administrative practices and procedures. In this regard, I have noted that a number of other bodies have been considering related issues and have made relevant recommendations. In particular I have considered the NSW Law Reform Commission report on Defamation and the recommended revised Code of Ethics for journalists who are members of the Media and Entertainment Arts Alliance (the MEAA which is the successor to the AJA).

The most significant broad recommendation is that consideration be given to strengthening the system for on air corrections of erroneous material in a timely and appropriate fashion. It is of little use for a complainant to obtain a remedy after many months (or in this case 3 and a half years) if the damage is done in the first week. On air corrections could be required by legislation or achieved by agreement with industry. I note that the Commercial Television Industry Code of Practice is due for review later in 1996. The ABA have argued that on air corrections may not achieve what is being sought.

Because of the problems identified in this complaint this report also raises the following issues:

- the power of the ABA to require a broadcaster to respond to its requests for information
- whether the possibility of litigation was an acceptable reason for not replying to the ABA
- the extent of the ABA's authority over broadcasts that occurred prior to its formation
- the general procedures for handling complaints about individuals.

The arrangements for complaints to the ABA have been progressively implemented since October 1992. The Commercial Television Industry Code of Practice has been in place since September 1993. The ABA has, partly as a result of this investigation, undertaken a thorough review of its complaint handling processes and is (within the parameters of its budget) in the process of introducing revised procedures and

consulting with industry associations and licensees to seek improvements in complaints handling by licensees.

The arrangements for complaints to the ABA have now been in place for approximately 3 years. It is to be hoped that action will be taken quickly on the issues identified through this investigation and that this report will assist in refining procedures to ensure there is an effective complaints process in place for the broadcasting industry.

Philippa Smith
Commonwealth Ombudsman

1. HOW COMPLAINTS ABOUT BROADCASTING ARE CONSIDERED

1.1 The ABA's complaint function

The Australian Broadcasting Authority (ABA) was established on 5 October 1992 as a result of the *Broadcasting Services Act 1992* (BSA) which established a new framework for the regulation of broadcasting in Australia. The ABA was the successor in law to the Australian Broadcasting Tribunal (ABT) and under its transitional legislation it was responsible for continuing some of the roles of its predecessor.

The philosophy of the new Act was based on a self regulatory approach in which Industry Associations were made responsible for developing and administering **codes of practice**. Broadcasters were given the initial role of accepting and responding to complaints from the public in line with those codes. The ABA was empowered to take complaints from people not satisfied by the broadcaster's response and was given various enforcement powers.¹

Parliament included safeguards in the Act to protect community interests, should the broadcasting industry fail to reflect or take account of community concerns. The ABA is empowered to introduce mandatory **program standards** if a code of practice should fail, or where a code of practice is not developed.

Primary responsibility for the resolution of complaints rests with the broadcasters themselves. The BSA lays down a general procedure for complaint handling whereby complainants are required to approach the broadcaster first, who in turn is obliged to respond. However, if a viewer does not receive a response within 60 days, or has received one and found it inadequate, the 'matter' can be referred to the ABA for investigation.

In relation to the commercial and community broadcasting sectors, the ABA must investigate unresolved complaints relating to program content and codes of practice and has a responsibility to inform the complainant of the results of the investigation.

In considering a matter the ABA can inform itself by either consultation, formal investigation, hearings or "in any other appropriate manner". The nature of each of these methods is outlined in section 1.3 below.

¹ The description of the ABA's functions and procedures is summarised from their publication "*Your say: A review of audience concerns about Australia's broadcast media*" ABA, May 1995.

Once the ABA commences a formal investigation or hearing, its powers are wide and include the power to examine witnesses under oath and the power to require the production of documents.

During 1994, the ABA received 3,020 complaints covering all categories of broadcasting service including the ABC and SBS. The bulk of these relate to community standards such as taste, decency, violence, program classification and scheduling. Of the 3,020 complaints received, 99 were unresolved complaints which had previously been taken up with the responsible industry body administering a Code of Practice or were matters which related to licence conditions.

Of these 99 unresolved cases about half related to commercial television and 11 were complaints about news programs and concerned accuracy, fairness and the degree of care exercised in the presentation of material. There were only two cases involving commercial television, where the ABA found a breach of the relevant code. Both involved sexual material which breached the classification criteria.

It is hard to draw conclusions from this pattern given the relatively short time the new arrangements have been in place. On the one hand the relatively low number of unresolved complaints could indicate that complainants are satisfied with the operation of the Codes of Practice system. On the other hand it could also be that the protracted process takes its toll and few people persist with their complaint when the offending broadcast fades from memory.

It is anticipated that the ABA will conduct research to assess the level of community awareness and satisfaction with the Codes. These issues will also be subject to debate when each industry Code is reviewed, commencing with the review in late 1996 of the Commercial Television Industry Code of Practice.

1.2 Codes of practice

The broadcasting industry as a whole is divided into four major sectors which are managed in different ways (the ABC and SBS are known collectively as the national broadcasters):

- commercial organisations
- ABC services

- SBS services
- community organisations

Each service category is required to develop its own Code of Practice and their Codes have been registered with the ABA. There are differences between these Codes. The ABA is responsible for monitoring the implementation of Codes of Practice and has specific duties under those Codes.

Each service category generally develops its own Code of Practice and there are various important differences between these. The ABA is responsible for monitoring the implementation and effectiveness of Codes of Practice.

It does this by:

- monitoring complaints which are made directly to it
- investigating 'unresolved complaints', that is, matters referred to it when the response provided by a broadcaster is considered inadequate by the complainant
- analysing regular quarterly reports from industry groups responsible for each Code about complaints received by broadcasters covered by that Code
- undertaking attitudinal research surveys of community attitudes about the matters covered in Codes as well as the effectiveness of Codes of Practice.

This report focuses on the ABA's handling of a specific complaint by Mr Robert Hughes relating to a current affairs program within the Commercial television service category. This broadcast actually occurred before the BSA and the current Commercial Television Industry Code of Practice were in force.

However the preceding Television Program Standard 24 had several similarities and while there are some unique features to this complaint the delays in this case appear to have some parallels with the handling of other complaints. In this context this report has looked more broadly at the ABA complaints handling process and considers the procedures under the Code of Practice developed by the Federation of Australian Commercial Television (FACTS).

² "Commercial Television Industry Code of Practice" FACTS August 1993

1.3 ABA's Investigative procedure

The ABA's process for receiving and investigating complaints is set out in Figure 1 which is taken from the ABA's May 1995 publication, *"Your say: A review of audience concerns about Australia's broadcast media"*.

The way in which the ABA investigates complaints is described in the same publication in the following terms:

"The ABA is required to investigate alleged breaches of the Act or licence conditions, as well as check primary source complaints referred to it by complainants who consider the response received from the broadcaster inadequate. All such unresolved complaints are investigated, unless it finds a complaint is frivolous, vexatious or not made in good faith.

Investigations into classification and programming matters usually commence with the ABA requesting the broadcaster to provide a tape of the program in question. Upon receipt of the tape, the program is reviewed and an assessment is made as to the program's compliance with the relevant code.

If the program appears to involve a breach of the code, the ABA sets out its concerns to the relevant broadcaster, seeking comments in relation to the program's compliance with the appropriate code of practice provision.

After comments have been received from the broadcaster, a decision is made as to whether a breach is involved. Both the complainant and the broadcaster are informed of the decision. During the investigative process, complainants are kept informed of the progress of the investigation. Some investigations, particularly those relating to accuracy and fairness in news and current affairs programs, often require the ABA to seek comments from both the broadcaster and the complainant on more than one occasion. The ABA has also found it useful to meet with parties to resolve some matters."

FIGURE 1: "HOW TO MAKE A COMPLAINT"

For complaints about program content or compliance with a code of practice write a letter to the broadcasting station, clearly stating your concern, clearly identifying the name of the program and the date and time that it was broadcast.

For commercial television, make your complaint within 30 days of the broadcast.

Stations are allowed 60 days to respond to your complaint.

Some broadcasting sectors have voluntarily undertaken to reduce the turnaround time to respond to complaints. However, the ABA would not usually be able to take any follow-up action until the statutory period of 60 days has passed.

Most complaints are resolved at this point.

If a response is not received within 60 days, or you are not satisfied with the response, you may refer your complaint to the ABA.

To do this, you should write a letter to the ABA explaining the action you have taken and also why you find the station's response unsatisfactory. Where possible, enclose copies of the letters between the station and you.

When the ABA receives your letter, it will open an investigation into your complaint.

The ABA usually requests a taped copy of the program from the station, as well as any further comments the station may wish to make. Stations are given 21 days to respond.

The ABA will keep you informed of the progress of its investigation.

Once the copy of the program has been received and reviewed, the ABA assesses your complaint against the appropriate provision of the relevant code of practice, and prepares a report setting out its findings.

At this point the ABA may sometimes need to seek further information from you or the broadcasting station. Where there is a possibility that publication of a report might adversely affect the interests of a person, the ABA is required to give that person a reasonable period of time (not more than 30 days) to make representations in relation to the matter.

Copies of the report are then forwarded to the complainant and to the broadcasting station concerned.

(Source: ABA "Your Say" May 1995)

There are small differences between these two descriptions but in any event it appears that if a broadcaster uses its full time entitlement and the ABA complete their part of the investigation in a timely fashion it would normally take between 150 and 180 days to complete an investigation (ie up to 6 months).

This might seem an unduly long time to the complainant concerned about the original broadcast who no doubt would like to see a much faster resolution. However six months is still considerably less time than was taken to consider the Hughes case. As will be seen in part 4 neither the ABA nor the broadcaster was able to achieve the timeliness suggested by the ABA document.

1.4 Sanctions available to the ABA

It is worth spelling out in more detail the range of mechanisms available to the ABA in its dealings with broadcasters. The ABA has identified four separate mechanisms it uses to obtain information:

informal monitoring The exchange of ordinary correspondence as an executive function without using any specific statutory power.

consultation Semi formal dealings with broadcasters using the general powers in s 168(1)(a) of the *BSA*, which relate to obtaining information. This section does not include a power to require a broadcaster to provide answers.

investigations Formal investigations may be commenced under Division 2 of Part 13 of the *BSA* (sections 170 to 180). The ABA has broad powers to do a range of things necessary to undertake investigations including a power to examine people under oath and to require disclosure of documents.

hearings Public hearings can be conducted under Division 3 of part 13 of the *BSA* (sections 181 to 199). A hearing has not been used to deal with a complaint on program standards and this power seems mainly aimed at other functions of the ABA.

Prior to October 1992, under the *Broadcasting Act 1942*, the failure of a broadcaster to supervise programs to comply with program standards (as was required by s 99(1A)) was not an offence under that Act. The ABT's powers were limited to non renewal of a licence or a "reprimand or admonishment" under s101.

The *Broadcasting Service (Transitional Provisions and Consequential amendments) Act 1992* unfortunately left the ABA in the position of not having a direct remedy for non compliance with a program standard for a broadcast prior to the ABA's formation in October 1992. This issue is discussed in greater detail in section 3.3.

However, under the *BSA* there are a range of sanctions available to the ABA for broadcasts since September 1992 which fail to meet the requirements of a Code of Practice or a statutory requirement. These include an ability to:

- impose a condition on the licence of the offending broadcaster requiring it to comply with a Code of Practice
- take administrative action, such as the issuing of a notice to ensure compliance with the Act
- impose a program standard that would apply to all broadcasters in an industry sector
- issue notices under s141 to stop continuing breaches of conditions of a licence
- suspend a licence under s143(1) of the *BSA* where a condition of a licence has been breached
- brief the Director of Public Prosecutions to take legal action in relation to 'offences'. The courts may impose substantial fines on any offender.

In the publication *Your Say* the ABA states that any action taken against a broadcaster will depend on the seriousness of the breach. They also refer to the educative benefit that can be achieved through an investigation.

"The ABA also has an obligation to assist broadcasters to be responsive to the concerns of the community. In this regard the ABA may use the investigative process and its report on an investigation to provide its interpretation of the provisions of a code of practice so as to inform the industry of community expectations in regard to programming matters. The outcome of such a process is that both the broadcaster and the industry sector are provided with a 'bench mark' of acceptable program material."

2. THE HUGHES COMPLAINTS

2.1 The complaints by Mr Hughes to the ABA

Mr Hughes lodged his complaint about the *Real Life* program with the ABA by a letter dated 12 March 1993. He subsequently raised two other similar complaints about other media reports.

The Real Life complaint

It concerned a report broadcast by the Seven Network as part of the *Real Life* program which went to air on 26 May 1992. This report dealt in part with the alleged fire risk of a backpackers hostel operated by Mr Hughes on the Gold Coast.

It is important to note that the establishment of the ABA occurred between the time of the broadcast and the lodging of the complaint. In fact Mr Hughes states that he only became aware of the existence of the ABA in early 1993.

Mr Hughes' complaint was that the *Real Life* program was neither accurate nor fair and that the substantial errors it contained victimised Mr Hughes and misrepresented the backpacker industry.

Mr Hughes set out 12 separate points regarding the program including evidence of why he thought there were inaccuracies or unfairness in the presentation of the program. He also attached a number of clippings and receipts related to fire protection work which, he argued, demonstrated his points.

The history of the handling of Mr Hughes' complaint is set out in Figure 2. A total of 144 weeks elapsed between the lodging of the complaint and the finalisation of the ABA's report on its re-opened investigation.

This period is analysed in detail in section 6.2. It can be divided up into three key elements – a lengthy period at the outset awaiting a reply from the Seven Network, a period when the investigation was inactive and a period when the re-opened investigation was undertaken and a report written.

The ABA completed its investigation in mid November 1995. After obtaining comments from the respective parties the final report was released on 12 December 1995.

The *Hinch* program complaint

The *Real Life* report included a significant section which repeated earlier allegations made as part of the Derryn *Hinch* program on the same Network three years earlier. These allegations concerned fire risks at a backpacker hostel in Highgate Hill, Brisbane, run by Mr Hughes which was next to another building which had burnt down.

During the course of this fire, a fireman died but the residents of the hostel were safely evacuated, the hostel only suffered minor damage and the hostel staff assisted in the fire fighting effort. The Brisbane City Council have also confirmed Mr Hughes' argument that any fire safety defects that existed at the time of the fire were the responsibility of the landlord.

Mr Hughes had not raised the earlier *Hinch* program in his original complaint to the ABA although he did so in later correspondence. The ABA elected not to investigate the *Hinch* allegations separately but, to the extent that the same assertions were repeated by *Real Life*, the ABA addressed the substance of them, ie that Mr Hughes had a "record" of running unsafe hostels.

The *Courier Mail* complaint

The potential for such repeated reports to become accepted "fact" was illustrated when the Brisbane *Courier Mail* printed a report on 30 January 1995 headed "Clamp on backpackers hostels" which included the statement that a fire at a Highgate Hill hostel had led to the death of a fireman. Mr Hughes further complained about this report which was, however, outside the jurisdiction of both the ABA and the Commonwealth Ombudsman. The *Courier Mail* printed a correction to this statement one week later confirming that the fire occurred at the neighbouring property.

Figure 2

SUMMARY OF EVENTS IN ABA INVESTIGATION OF HUGHES COMPLAINT

DATE	KEY DEVELOPMENT	Elapsed weeks
28 September 1989	First item on Mr Hughes on the <i>Hinch</i> program	
26 May 1992	Item broadcast on the <i>Real Life</i> program	
5 October 1992	ABA replaces the ABT	
12 March 1993	Mr Hughes lodges complaint with ABA	
26 August 1993	ABA commences its investigation by writing to the Seven Network	24
11 April 1994	Seven Network send reply to ABA declining comment	33
14 July 1994	ABA advises Mr Hughes that after consideration they will not investigate	14
5 June 1995	After intervention by the Ombudsman's office the ABA decides to re-open its investigation	46
17 August 1995	Letter apparently sent to Seven Network but not received	10
15 November 1995	In absence of reply from Seven Network the ABA proceeds to send a "proposed decision" to the Seven Network and asks for comment within 7 days	13
28 November 1995	Reply received from Seven Network	2
	Comment on Assessment section sought from Mr Hughes	
12 December 1995	ABA releases final report	2

Total period 144 weeks

2.2 The complaint by Mr Hughes to the Commonwealth Ombudsman

On the 4 February 1994, Mr Hughes complained to the Commonwealth Ombudsman about the ABA's investigations (which at that stage had been running for 47 weeks). Mr Hughes' complaints to the Ombudsman about the ABA have been summarised under the following headings:

- his concern that there had never been a proper investigation of his complaint to the ABA (concerning the way in which his business was featured on the program *Real Life*)
- the lengthy delays and other difficulties in correspondence with the ABA
- his desire to achieve a fresh investigation of his complaint to the ABA.

The sequence of events in the lodging of this complaint and its investigation by the Commonwealth Ombudsman are set out in Figure 3 and span a total of 104 weeks. A further 14 weeks have since elapsed with the making of comments, redrafting and resubmission of a draft report to the ABA to finalise the matter.

The complaint was originally considered by the Ombudsman's Brisbane office but after December 1994 was referred to the Melbourne office which has national responsibility for ABA matters.

The complaint handling practices of the ABA came under close scrutiny after it took some 41 weeks to secure an answer to the Ombudsman's first letter on this matter to the ABA. This delay occurred despite repeated contacts with the ABA and a reply was only obtained on the day of a deadline set for the use of the Ombudsman's formal powers to obtain all documents.

As a consequence of this delay, contact arrangements between the ABA and the Commonwealth Ombudsman were upgraded to directly involve the General Manager, Policy and Programs. Since that time communication has improved but unfortunately progress with this complaint has still been slow.

There followed an exchange of correspondence and meetings between the ABA and staff of the Ombudsman's office to clarify the issues and discuss the legal arguments. This culminated in the ABA's decision in June 1995 to re-open its own investigation of the Hughes matter following consideration of an earlier letter from the Ombudsman.

FIGURE 3 SUMMARY OF EVENTS IN OMBUDSMAN'S INVESTIGATION OF COMPLAINTS ABOUT THE ABA

DATE	KEY DEVELOPMENTS	Elapsed weeks
4 February 1994	Mr Hughes complains to Ombudsman about delays by ABA.	
16 February 1994	Ombudsman writes to ABA seeking comments.	2
2 December 1994	ABA replies to Ombudsman after numerous requests. Handling of Complaint transferred to Ombudsman's Melbourne office	41
24 February 1995	Meeting between Ombudsman's staff and ABA which led to differences on the legal issues being identified. A strategy to develop the investigation was agreed.	12
20 March 1995	Ombudsman writes to ABA setting out an alternative analysis and recommending the ABA re-examine case.	4
21 April 1995	ABA provides Ombudsman with copy of legal opinion from Australian Government Solicitor.	5
19 May 1995	Ombudsman restates earlier views in the light of the AGS legal opinion.	4
25 August 1995	Second meeting between Ombudsman's staff and ABA. Report given on progress of re-opened investigation.	
13 September 1995	ABA responds on legal issues raised by Ombudsman letters. Steps taken during this period to speed up investigation	14
30 November 1995	Ombudsman uses her powers under section 9 to obtain ABA files to enable completion of this report.	11
15 January 1996	Draft report under section 15 provided to ABA for comment by 29th February 1996.	9

Total period 104 weeks

There was a further exchange of correspondence whilst the re-opened investigation was undertaken by the ABA and this report was drafted. To enable all documents to be carefully checked, the Ombudsman used her formal powers in early December 1995 to obtain the ABA's files in this matter. The draft report was sent to the ABA on 15 January and comments received as requested on 29 February. As a result of these comments additional material was included in the report and a number of amendments made. A further four weeks for comments were provided prior to the completion of this report in April 1996.

2.3 The "own motion" investigation

The issues raised by the Hughes' complaint resulted in the Ombudsman drawing on her powers to investigate matters on her own motion to consider whether the Hughes matter was a "once off" or whether more systemic issues were evident. Section 6 of this report considers the ABA's overall practices and procedures for complaint handling.

3. THE HUGHES INVESTIGATION

3.1 Did the broadcast meet the relevant program standards ?

Mr Hughes was an operator of a backpackers' hostel in Brisbane which was the subject of the original segment on the *Real Life* program of 26 May 1992. In the segment various allegations were made regarding the fire safety of premises managed by Mr Hughes and other comments on the fitness of these places to be used by backpackers and the fitness of Mr Hughes to manage them. A transcript of this segment is attached as Appendix 1.

Mr Hughes complained to the ABA that various of the claims made in the story were demonstrably false, misleading or otherwise in breach of program standards. For example he claimed that the fire which featured prominently in the story, from which people had allegedly narrowly escaped, actually occurred on the next door property and that he and his staff assisted in extinguishing it.

The relevant program standard which applied to licensees at the time the program went to air was "Television Program Standard 24" (TPS 24). This had been adopted by the Australian Broadcasting Tribunal under section 16 (1) (d) of the *Broadcasting Act 1942*, as it was then in force. Section 5 of TPS 24 includes the following five criteria:

In the preparation and presentation of current affairs programs, a licensee must ensure that:

- a) factual material is presented accurately and that reasonable efforts are made to correct substantial errors of fact at the earliest possible opportunity;*
- b) viewpoints are not misrepresented and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts;*
- c) respect is given to each person's legitimate right to protection from unjustifiable use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy;*
- d) viewpoints are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts; and*

e) respect is given to each person's legitimate right to protection from unjustifiable use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy.

A detailed assessment of the program has now been carried out by the ABA and is attached as Appendix 2 to this report. This sets out in detail the claims made during the telecast and the extent to which the segment met TPS 24 is analysed.

Essentially the ABA assessment is that the program was in breach in four respects:

- the statement that, "Fire services describe ... your last hostel in Brisbane was a fire trap" was a substantial error of fact in terms of TPS 24 (5) (a) and Channel Seven had not made a reasonable effort to correct this substantial error of fact.
- Channel Seven gave Mr Hughes no respect for his legitimate right to protection from unjustifiable use of material which was obtained without his consent. Channel Seven's conduct of the interview involved an unwarranted and intrusive invasion of Mr Hughes' privacy. Breach of TPS 24 (5) (e).
- The comment that Mr Hughes has "a record" is a substantial error of fact and Channel Seven did not make a reasonable effort to correct this substantial error of fact. Breach of TPS 24 (5) (a).
- The program contained material (the comment that Mr Hughes had a record) which was presented in a misleading manner. Breach of TPS 24 (5) (d).

The ABA report (see Appendix 2) includes in its conclusions the following comments:

"9.3 It would appear that Channel Seven's only attempt to interview Mr Hughes was by way of chasing after him on his own property. Mr Hughes complained about this practice by Channel Seven at the time both to the reporter and in writing to the Producer of Real Life, Alan Craig."

"9.4 As a whole the report unfairly presents Mr Hughes as an irresponsible person who is recklessly indifferent to the safety of guests at his backpacker hostels. It is the ABA's view that the use of this material was, in the circumstances, both unfair and unjustifiable"

"9.6 By selective editing, use of footage without Mr Hughes's consent and the presentation of inaccurate material this segment of the Real Life program has demonstrated a careless disregard for both the standards set out in TPS 24 and perhaps more importantly, the effect that such a program may have on Mr Hughes himself"

It is important to note that these findings are specifically about Brisbane TV Limited (BTQ 7) which was the originator of the program segment. At the time this company was a fully owned subsidiary of the Seven Network Ltd. The ownership of the company and the name of the holding company have since changed but the network is essentially the same licensee. It is understood the original program was broadcast nationally by the Seven Network and affiliates but unfortunately this cannot be confirmed as the logging tapes were no longer available by the time Mr Hughes made his complaint.

3.2 The delays in consideration of Mr Hughes' complaint to the ABA

For simplicity, consideration of the cause of delays has been broken into the six main periods between the broadcast in May 1992 and the release of the ABA's finding to Mr Hughes in November 1995. From the time that Mr Hughes actually lodged his complaint there was a period spanning a total of 144 weeks until the matter was finalised.

(a) Mr Hughes delay in lodging complaint (41 weeks.)

The first issue is that Mr Hughes did not complain to the ABA for some 9 1/2 months after the program went to air. It has been suggested that this made the investigation more difficult as it appeared an old matter of little urgency to various parties. It was also during this period that the ABA replaced the ABT as the relevant body.

Neither the ABT or the ABA set any deadline for the submission of such complaints. In fact, there is a requirement that a complainant must first raise the complaint with the broadcaster who is given up to 60 days to respond. Therefore it is not unusual that the complaint had taken some time to be made.

However, from the ABA's point of view it is understandable that it is helpful to receive the complaint reasonably close to the events concerned. One consideration is that station logging tapes of programs are only kept for a few months - although in this case this was not a problem as a video of the program was provided by the complainant.

There is also a suggestion that the full economic impact of the negative publicity from the *Real Life* program may have taken some time to be felt by Mr Hughes. He went from being the operator of a successful backpackers' venue to not being able to find a position in the industry. Therefore the fact that he turned to the ABA after 9 months might be understandable.

Lastly, Mr Hughes only became aware of the existence of the ABA in early 1993 and turned to it as a way of finding remedy to his problem when he found himself unable to afford to commence legal action for defamation against the licensee.

Clearly it is desirable for complainants to raise their concerns as early as possible - particularly if corrective action is to be taken. Under the current arrangements this must first be with the broadcaster. It should, however be open to a complainant to raise a complaint at any reasonable stage and to make a case to the ABA. Therefore, the delay in this case by the complainant is not relevant to considerations of the later progress of how the complaint was handled.

However, with respect to the reference made to the 1989 *Hinch* program as part of the complaint, it is also reasonable for the ABA to have the option to decline to deal with old or stale matters. Mr Hughes did not complain to the Tribunal about the *Hinch* program and it would have been impracticable to try to commence an investigation when the matter was raised some 4 years later.

(b). The ABA's delay in commencing investigations (24 weeks)

The ABA did not start its investigations by writing to the Seven Network concerning the complaint until 26 August 1993 - some 24 weeks after receiving Mr Hughes' written complaint. The reason given is that Mr Hughes had rung the ABA on a number of occasions and the ABA believed he would be providing further information to elaborate on his complaint.

Even if this had been the case, which is disputed, the ABA did not exercise good judgement by delaying so long in starting its inquiries. The ABA procedure states that when a complaint is received an investigation should be commenced and additional comments sought from the broadcaster. At the least the ABA should have written and sought preliminary views from the Seven Network to ensure a timely consideration of the problem.

The ABA have now indicated that an investigation will be commenced on all complaints when received rather than relying on informal communications.

(c) The Seven Network's delay in replying (33 weeks)

The third and most significant period is between the ABA's request of 26 August 1993 and the Seven Network's reply dated the 11 April 1994. During this period of 33 weeks the Seven Network refused to respond despite the following requests:

- a phone request in late November 1993

- a letter dated 22 December requesting "urgent attention"
- two meetings with the Seven Network between December 1993 and March 1994 at which the issue was raised by the ABA
- a request by fax of 24 February 1994
- a letter from the ABA General Manager dated 22 March 1994.

There can be no doubt that this period of time is excessive and that the cause of the delay lay with the Seven Network.

The delay is even more remarkable when considered in the light of the rather brief response finally received on 11 April 1994 from the Broadcast Policy Director for the Seven Network which indicated that the Executive Producer of the show had been of the view (apparently since May 1992) that :

- A Court represents the appropriate forum for resolution of the matter
- It would be inappropriate in view of Mr Hughes extant threat of litigation for the Seven Network to enter into correspondence at this time with Mr Hughes **or the ABA** concerning the matter.

The letter went on to state that the Executive Producer "did indicate however, that he would enter into such correspondence if Mr Hughes were to withdraw his threat of litigation and provide the Seven Network with an appropriate release". The Broadcast Policy Director concluded that he agreed with these views.

The only evidence held by the Ombudsman regarding potential legal action is a letter on Mr Hughes' behalf from Collas Moro, Solicitors of Surfers Paradise, written on 25 May 1992, the day *before* the *Real Life* broadcast.

As the Seven Network is not a public authority within the jurisdiction of the Commonwealth Ombudsman it is not appropriate to form an opinion on its actions. It is clear, however, that the timeliness and effectiveness of the ABA's investigation was affected by the delays by the Seven Network in answering correspondence.

The contacts listed above show that after leaving three months for the Seven Network to respond to its original request the ABA did make a number of efforts to raise the matter and obtain a response although it did not attempt to use its formal powers.

However, it is far from satisfactory that a further 7 months were allowed to elapse before conclusive action was taken to secure a response. The need for the ABA to use its powers to obtain timely replies from broadcasters and to set appropriate performance standards will be discussed below.

(d) The ABA's consideration of the reply (14 weeks)

A further 14 weeks elapsed between the reply from the Seven Network to the date of the ABA's response to Mr Hughes. The ABA was clearly not prepared for the direction of the Seven Network response which did not enter into any consideration of the content of Mr Hughes complaint.

It was at this point that the ABA decided it needed legal advice about:

- the ability of the ABA to require a detailed answer and
- the ability to consider the complaint at all given the change in the regulatory framework which had occurred since the original screening of the program.

This request was made by an undated memo from the manager, Codes and Conditions Section. A reply was sent on 24 May from the ABA's in house solicitor. The nature of this advice is discussed in Part 4 below.

It is sufficient to say that, after receiving the legal advice, the ABA's officers believed that the ABA lacked power to consider the complaint because they formed the view that the Seven Network at the time the program went to air was not a licensee within the meaning of the *BSA*.

After a further 6 week period this view was conveyed to Mr Hughes. This time appears to have been consumed with the legal opinion being considered at different levels within the Authority.

(e) Ombudsman investigation and re-opening of ABA inquiries

By this stage Mr Hughes had already complained to the Commonwealth Ombudsman. However, due to the delays by the ABA in responding to the Ombudsman's letters in 1994 and the exchange of correspondence during 1995, it was to be a further 46 weeks before the ABA made its decision to re-open its investigation into this matter. In fact, as the investigation had not even started, it is more correct to say that they started their investigation in June 1995.

(f) *ABA investigation of complaint (23 weeks)*

The investigation took a further 23 weeks to complete. This was due to the need to obtain further legal advice from the Australian Government Solicitor and continuing difficulties with communications with Channel 7.

A fresh letter was sent by the ABA to Channel 7 on 17 August 1995 but was apparently not received. Normally 21 days would be provided for a reply but none was received and apparently no inquiries were made with the Network to see whether they had received the letter. Finally, the ABA decided to produce a draft report on the matter and sought the Network's response in a formal way on 15 November 1995.

It was only at this stage that the ABA received a response from the Network who sought a copy of the 17 August 1995 letter and advised that they were making efforts to locate people and files associated with the now defunct *Real Life* program.

However, once the ABA had produced its draft assessment of the *Real Life* segment, events moved quickly. Channel 7 provided its comments on the draft within 10 days and Mr Hughes provided his response to the ABA after a further 2 weeks, enabling the ABA to finalise their report on 12 December 1995.

This highlights the value of having clearly specified processes followed in a formal manner with appropriate deadlines enforced. Had this approach been adopted when the complaint was first received, the matter might have been dealt with by mid 1994 (when *Real Life* was still going to air). It would also have been desirable for Mr Hughes to have lodged his complaint closer to the time of the broadcast (rather than 9 months later).

3.3 Delays in responding to the Ombudsman's office

The fact that there were similar problems in obtaining responses to correspondence from the Ombudsman's office indicates that there may have been a more systemic problem in the ABA, including the adequacy of resourcing and the management priority for complaints handling.

The ABA has rejected this view. It argues that complaints handling has always had a high management priority and that additional resources have been given to the function over the past two years in the face of a reduction in resources to the ABA generally over that period due to service wide constraints. This is examined further in section 6.1.

The ABA acknowledges that it has, in the past six months, extensively reviewed the handling of these matters and is in the process of finalising and implementing reviewed procedures. This will be subject to further discussion in the light of the recommendations in this report.

4. DISCUSSION OF OTHER ISSUES

4.1 Power to require a reply from a broadcaster

The problem encountered in obtaining a reply from the Seven Network arose largely because of the reliance on informal methods of investigation.

Once an investigation is commenced under the *BSA* the powers of the ABA to obtain information from a licensee are quite clear. Under section 173 (b), for the purposes of an investigation under Division 2, the ABA may require any person to produce documents or to answer questions or to provide documents or other information to the ABA relevant to the subject matter. This would permit not only inquiries of the licensee but of any other party about matters of fact relevant to the complaint (for example reporters, interviewees, researchers, producers etc).

Section 202 makes it an offence not to produce documents without reasonable excuse unless to do so would tend to incriminate the person. Specifically, subsection 202(2) provides that:

A person required to answer a question, to give evidence or to produce documents under this Part must not, without reasonable excuse:

- (a) *when required to take an oath to make an affirmation, refuse or fail to take the oath or make the affirmation; or*
- (b) *refuse or fail to answer a question that the person is required to answer; or*
- (c) *refuse or fail to produce a document that the person is required to produce.*

Penalty: Imprisonment for one year.

The ABA therefore, has the necessary powers available to it. It is noted, however, that the *FACTS* Code sets time limits for replies to the public but not to the ABA. Including timeliness within the *FACTS* Code could be more acceptable to the industry without the ABA needing to rely on the formal powers in the Act on routine matters or on every occasion that a reply is overdue.

Conclusion

In my opinion, in the light of experience in the Hughes' case:

The ABA should, where necessary, use its statutory powers to enforce timeliness

The ABA should seek an amendment to the FACTS Code to set maximum periods for a reply to the ABA

The ABA have responded that these difficulties arose from the difficulties experienced in getting responses from the Seven Network. These problems were taken up directly with the CEO of the Network, as result of which the internal procedures of the network were improved and a senior executive appointed to coordinate responses to the ABA and ensure these were timely and comprehensive.

The ABA has stated that it has no reluctance to use its statutory powers where it is necessary to do so but believes its dealings with the Seven Network demonstrate a constructive, consultative approach can also produce results.

I accept this observation but repeat the point that underpinning the consultation there needs to be clear rules which are applied when problems arise which make this necessary.

4.2 Can the possibility of litigation be used to justify non-reply?

The initial position adopted by the Seven Network was that they would enter discussions about the complaint only if Mr Hughes entered into a release from future litigation on the matter. The possibility of civil litigation was argued to override the statutory requirements and provide a reason for not corresponding with the ABA.

In my opinion, it is not likely that the possibility of civil action by a third party (ie: the complainant) against the Network would constitute "reasonable excuse" as contemplated by s202(2) of the BSA for not providing requested documents. This was also the view taken in the ABA's internal legal advice dated 24 May 1994.

Once the ABA has taken up a complaint it is acting on its own behalf and, in my view, is not limited by further dealings between the complainant and the Network. For example, a complainant could reach a settlement with the Network but this would not prevent the ABA continuing to exercise its statutory powers.

Concern has been raised that a broadcaster may be subject to “double jeopardy” but there seems to be a clear distinction between the ABA’s statutory powers and any civil proceedings that an aggrieved person may mount.

Section 202(3) provides that it is a "reasonable excuse" for the purposes of the above section if the production of documents would tend to incriminate the person. I agree with the ABA’s internal advice that the potential arguments concerning self incrimination in this case are not convincing. In any event this question was not tested because the formal investigation powers were not used.

An additional point is that even if the Seven Network had replied to the ABA and produced documents, those documents would not necessarily have been available to the complainant. There is potential for the gist of information to become known through the finding of the ABA but this is unlikely to be at a level of detail useful to the complainant in a civil suit. Therefore, the ABA’s deliberations are not really an alternative to discovery procedures and stand separate to any civil proceedings.

The ABA argues that it did not accept the civil litigation argument and simply decided not to use its formal investigative powers for other reasons. However, the matter should be put beyond doubt as this issue would create a major gap in the self regulatory scheme if the argument was accepted.

Conclusion

In my opinion, the possibility of civil litigation should not be accepted as a reason for a broadcaster to decline to respond to an investigation by the ABA.

The ABA have agreed with this view

4.3 Did the ABA have jurisdiction over earlier broadcasts?

The ABA’s original view on jurisdiction was based on the May 1994 internal advice that a breach of TPS 24 under the *Broadcasting Act 1942* could not be viewed as a breach of the *Broadcasting Services Act 1992* (the *BSA*).

This was argued because the relevant licence held by the Seven Network in May 1992 was not a licence allocated by the ABA and hence the ABA would be unable to apply any remedies.

(For the purpose of this discussion it is assumed that there is one relevant licence although in practice as the program is understood to have gone to air nationally, many may have been involved).

This interpretation differs from the seeming intent of section 5(1) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* ("the Transitional Act") which provides that all former radio and television licenses "continue in force" as if such licenses had been allocated to the holder under Part 4 of the *BSA*.

The effect of this section is to include licenses issued **before** the *BSA* in the definition of "license" in the *BSA*. This suggests that breaches of a license (which are required before any remedy can be enforced by the ABA under Part 10) were intended to include breaches of licenses in force on 5 October 1992.

This alternative interpretation is supported by the second reading speech for the Transitional Act which stated:

Clauses 5 to 9 deem current broadcasting services which will be subject to the regulatory regime of the *Broadcasting Services Bill* to be licensed under that Bill... This approach gives the Australian Broadcasting Authority the same degree of control over those licenses as it will have over licenses actually granted by it.

Weekly Senate Hansard No.8, 4 June 1992, page 3604

Unfortunately, the apparent Parliamentary intention was not fully achieved. Because the *BSA* also made major changes to the offences and available remedies, the ABA were left in the position that, although they could make a finding about a breach of a licence, they could not impose any penalties or other remedies under the new Act for what had been a breach of the old Act.

The ABA has now determined that the broadcast in question breached TPS 24. (see Appendix 1). Under the old Act, it was the responsibility of the licensee to supervise the broadcasting of programs to ensure that program standards were complied with (subsection 99(1A) of the *Broadcasting Act 1942*). A licensee's failure to comply with program standards empowered the ABT to issue a reprimand or admonishment to the licensee, and to direct the offending licensee to publish the reprimand/admonishment. An equivalent power was not provided in the new Act although the FACTS Code does have a clause on corrections.

Moreover, whilst TPS 24, was a *program standard*, it was not a *licence condition* under the old Act. It was not an **offence** under the old Act to breach a program standard.

The introduction of the 1992 Act meant that a breach of a program standard became a breach of a licence condition and hence an offence. However, there was no penalty for a breach of a Code of Practice although the ABA can issue a notice to make compliance with a Code of practice a condition of the licence.

A breach of a licence condition is potentially an offence punishable on conviction by a penalty of up to \$200,000 (Schedule 2 subclause 7(1); section 139). Presumably, this substantial increase in penalties available reflects a view by Parliament that an admonishment or reprimand was an insufficient or inappropriate penalty for breaching relevant program standards.

TPS 24 had effect as a program standard under the 1992 Act and remained in force until it was replaced by the FACTS Code in September 1993.

As already noted, the transitional provisions allow the ABA to treat a breach of a licence condition under the 1942 Act as a breach of a licence condition under the 1992 Act. However, because TPS 24 only became a licence condition after the passage of the new Act, the ABA had no powers under the 1992 Act to impose a penalty for an earlier breach of TPS 24 - such as occurred in this case.

Not only was the old remedy of admonishment/reprimand not available under the 1992 Act but also the Transitional Act did not provide for the continuation of the power to admonish/reprimand where a program standard had been breached in the period when the old Act applied.

I accept that it is not appropriate for legislation to retrospectively declare activities to be a breach of a licence condition. However, the program in question was a breach of a program standard at the time it was broadcast and the same program standard remained in force with a higher penalty. The fact that the transitional provisions did not retain any appropriate remedies for an earlier breach of a program standard which did not constitute a breach of licence condition has meant that the ABA have limited scope to act on their finding that TPS24 was breached in the *Real Life* broadcast concerning Mr Hughes.

Conclusions

In my opinion the silence of the Transitional Act on the question of remedies meant that there was no continuing power for the ABA to issue a reprimand or admonishment using the powers under s 101 of the 1942 Act. Further the lack of reference to any retrospective application appears to exclude something which was not an offence under the 1942 Act being considered to be an offence under s139 of the 1992 Act.

This situation should be brought to the attention of Parliament to consider in the drafting of future Transitional provisions where it is intended that a new Authority continues to enforce a prior regulatory scheme.

4.4 Is the ABA required to investigate?

A further issue is whether the ABA is required to formally investigate a complaint which has been properly made under section 147 (offences and breach of licence conditions) or s148 (Codes of Practice). Section 149 of the BSA reads:

1) Subject to subsection (2) the ABA must investigate the complaint

(2) The ABA need not investigate the complaint if it is satisfied that:

a) the complaint is frivolous or vexatious or not made in good faith; or

b) in the case of a complaint referred to in section 147 the complaint does not relate to:

i) an offence under this Act or the regulations

ii) a breach of a condition of a licence

The first sub-section requires the ABA to investigate a valid complaint by using the word "must" which is only overridden by the qualifications in sub-section 2. To be valid a Code complaint must be made within 30 days in writing and sufficiently specific to identify the matter.

The principle reason for the ABA not pursuing the matter after it received the reply from the Seven Network in April 1994 was that it formed the view that Mr Hughes' complaint was one they could decline to investigate under s 149 (2) (b) - ie because the transmission took place before the BSA commenced, it did not involve an offence under the Act or a breach of a condition of a licence.

It should be noted that the ABA had not yet formed this view when it commenced correspondence with the Seven Network. The letter dated 26 August 1993 from the ABA to the Seven Network made no reference to any formal complaint process and simply stated "comments on the matters raised by the complainant would be appreciated".

The intent of the legislation is to give the ABA a wide discretion to determine the most effective means of investigating a matter whilst promoting the objects of the BSA in the quickest and most economical manner.

Thus it is open to the ABA to choose whatever simple and effective procedures they like and presumably to enter into arrangements with licensees to enable the quick and effective consideration of complaints. However, it seems to me that the words of section 149 are quite specific that the ABA "must investigate".

In her reply to Mr Hughes of 14 July 1994, the then Manager of the Codes and Conditions section, stated

"the ABA has made no assessment of whether, on the information and evidence before it, it is likely that the standard has been breached. This is because, whilst the ABA is obliged to investigate your complaint, it has discretion as to how far it takes such an investigation and what powers it uses in investigating the matter.

The ABA has taken the position that there is no regulatory purpose to be served in investigating the matter."

Conclusion

In my opinion, decisions not to investigate the Hughes complaint was unsatisfactory. In my view, the ABA has a discretion how it investigates a matter but it does not have a discretion not to investigate at all something which could be a breach of a licence condition or an unresolved Code complaint (unless it falls under the heading of being frivolous, vexatious or not made in good faith).

Subject to any contrary legal opinion, the ABA should generally investigate valid unresolved Code complaints made in good faith or matters which could involve a breach of a licence condition or an offence under the BSA.

In subsequent correspondence with the Ombudsman the ABA has indicated that it only partially accepts these two recommendations. In the Hughes case, whilst the Authority accepts it might have dealt with the matter earlier than it did, it argues there were a number of complicating factors and a legal opinion on which it acted. Initially the ABA decided not to investigate because the timing of the *Real Life* program and the deficiencies in the Transitional legislation meant there could **not** be a breach of a licence condition.

The general point remains, however, that the ABA is required to investigate matters (at least to the point of determining whether there could be a breach). The ABA has indicated it intends to investigate all breaches of licences and unresolved Code complaints in future.

5. CONCLUSIONS ABOUT ABA'S INVESTIGATION OF MR HUGHES' COMPLAINT

This case has raised administrative and regulatory issues that deserve careful consideration by the ABA and other responsible parties.

It is accepted that the ABA acted within the legislation that it was established under and that these events occurred during the formative period for the new Authority. Contributory factors were that Mr Hughes only lodged his complaint some 9 months after the broadcast and the station procedures that now exist under the FACTS code were not in place.

However, the way the complaints function was administered was defective and resulted in unreasonable delays in the consideration of important matters in the case of Mr Hughes.

The ABA's eventual finding about the original broadcast upheld the substance of Mr Hughes' complaints which he had persisted with for 3 years.

There are important lessons to be learnt from this case and I set out below my conclusions on the main issues along with recommendations for change which involve the ABA. In the next section I have summarised the issues that deserve consideration by other bodies.

Responsibility for delays

Considering the full range of reasons for the delayed consideration of this complaint I am drawn to conclude that there were a number of contributing factors which were the responsibility of the complainant, the ABA and the Seven Network but that it was the Network which was the most significant contributor.

However, the ABA took inordinately long to complete its part of consideration of the complaint. Each step of the process took some weeks. Although it is understood that Mr Hughes was constantly ringing various officers of the ABA, the progress of his matter was slow by any measure. The ABA frequently failed to respond in a timely fashion, including in its correspondence with the Ombudsman.

Earlier *Hinch* broadcast

I consider it was open to the ABA to not investigate that part of the complaint relating to the 1989 *Hinch* broadcast. However, it did have some relevance as background to the central complaint concerning *Real Life*.

Process used by the ABA

The ABA took a number of steps to try to elicit a response from the Network but should have used its formal powers under Division 2 of Part 13 of the BSA much earlier to extract a timely response.

There is a need to clarify the procedures used by the ABA to investigate complaints to ensure that the various requirements under its Act are being met. The ABA has considerable discretion to choose the means of investigation but has limited grounds on which it may decline to investigate.

In my opinion, the Hughes case, the other case studies and the pattern outlined in Tables 4 and 5 indicate there have been significant internal problems with the timely acknowledgment and reply to complaints in the past. The ABA should ensure that the correct systems are in place with performance criteria to ensure that correspondence is sent in a timely fashion, correctly addressed and commitments to fax documents are fulfilled.

In my view the ABA should consider:

- as a matter of policy treating all written complaints concerning the treatment of individuals in current affairs as formal investigations. (It is understood that the ABA has now changed its administrative procedures to achieve this in practice).
- that investigation of written complaints should start promptly when they are received.
- reviewing the wording used in its letters to licensees to clarify the expectations about the due date for a response.
- establishing standing arrangements with each licensee for the consideration of complaints including contact points at senior level.
- introduce, through the Codes of Practice or by other means a requirement that any licensee must respond to the ABA within 30 days of being requested to do so in relation to a complaint. Where a licensee fails to meet this performance target it should be made a licence condition.
- that case management reviews are used to ensure that complex or difficult cases are not unnecessarily protracted.

- the ABA should provide an apology to Mr Hughes for the unreasonable delays in considering his complaint.
- that close attention be paid to future correspondence with the Ombudsman's office to ensure replies are provided in a timely fashion. (New arrangements have been agreed to between the ABA and the Ombudsman to achieve this outcome).

6. OTHER COMPLAINTS ABOUT ABA COMPLAINT HANDLING

6.1 Pattern of complaints to the Ombudsman

In considering whether the concerns raised in the Hughes case were common to other complainants we analysed the previous complaints made to the Commonwealth Ombudsman about the ABA. Excluding Mr Hughes, there have been 19 complaints from 17 complainants in the two years from January 1994 to December 1995. Of these, four were complaints about reception and re-transmission of television on which, for various reasons the Ombudsman exercised her discretion not to further investigate. The remaining 15 complaints (from 13 people) are set out in Table 4.

The fact that a person complains to the Ombudsman does not mean that there is necessarily a valid ground for complaint. Often the Ombudsman exercises her discretion not to investigate further or the matter is outside the jurisdiction or the matter does not in all the circumstances warrant investigation. In all but two of these ABA cases there was a partially favourable outcome when the Ombudsman's involvement facilitated consideration or resulted in the complainant being given a copy of missing correspondence.

Timeliness was an issue at the core of many of the complaints received. In six cases the ABA had apparently made a decision but the letter of advice had not been received by the complainant. In each of these cases, after enquiries by the Ombudsman a copy of the missing reply was able to be found and was then provided to the complainant. The cause of the high frequency of lost mail is not clear but the evidence suggests there was some administrative defect within the ABA.

A number of the complaints were related to the establishment period of the ABA and, therefore, teething problems may have contributed to the length of the time taken for them to be considered. The average time taken by the ABA has declined but the pattern of lost mail has continued throughout the period being considered.

The impact of any improved handling of complaints by the ABA after mid 1995 may not yet be evident since there has probably been insufficient time for them to turn up as complaints to the Ombudsman about delay.

The ABA has stated that these 15 complaints represent 0.5% of complaints of all types received during this period and that in 6 of the cases it had taken all necessary action. The ABA also believes the cause of the lost mail should not be ascribed to it.

TABLE 4: SUMMARY OF COMPLAINTS ABOUT THE ABA

File No.	Subject	Date complaint made to ABA	Complaint about ABA made to Ombudsman	Complaint outcome received by complainant	Time taken by ABA	Comments
95/13153 VIC	Failure to respond to correspondence.	9 March 1995 7 June 1995	11 Sept 1995	16 Oct 1995	31 weeks 19 weeks	Letters mislaid. Replied promptly when copies supplied.
95/7029 VIC	Failure to reply to complaint and failure to provide documents under FOI.	3 Jan 1995	12 May 1995	10 June 1995	8 weeks (+ 15 weeks)	Decision made by ABA on FOI aspect on 25/2/95 but letter went astray.
95/6790 WA	Slow response to investigate complaint.	28 Oct 1994	19 May 1995	13 June 1995	14 weeks (+ 15 weeks)	Complaint finalised by ABA on 30/1/95 but letter went astray.
95/7998 SA	Failure to respond to correspondence	(a) 2 Dec 1994 (b) 25 Oct 1994	1 June 1995 1 June 1995	29 June 1995 29 June 1995	30 weeks 36 weeks	Four earlier complaints from same person. Two were answered on 20/2/95 but no action on others despite promise.
94/12189 NSW	Delays in reply to correspondence. False statements that a reply had been posted.	24 May 1994	6 Sept 1994	8 Sept 1994	24 weeks (+ 16 weeks)	Complaint finalised by ABA on 18/7/94 but letter went astray.
94/10497 WA	Inadequate time for comment on Aust. Content review	n.a.	30 Aug 1994	2 Sept 1994		Invitation for comment received 5 weeks after public advertisement . Extension of 4 weeks for comment granted.

* Figures in brackets show delay in complainant receiving advice after ABA completed investigation

TABLE 4 CONTINUED: SUMMARY OF COMPLAINTS ABOUT THE ABA

File No.	Subject	Date Complaint made to ABA	Complaint about ABA made to Ombudsman	Complaint outcome received by complainant	Time taken by ABA	Comments
94/8299 SA	Failure to respond to complaints.	4 letters dated in May 1994	7 July 1994	19 Sept 1994	7 to 10 weeks (+ 9 weeks)	Reply dated 15/7/94 but letter went astray.
94/7861 QLD	Delay in grant of licence amendment.	21 Jan 1994	23 June 1994	4 July 1994	14 weeks (+ 10 weeks)	Amendment approved on 27/4/94 but letter went astray.
94/9329 TAS	Late and inadequate response despite 5 letters being sent.	n.a.	29 June 1994	12 July 1994	n.a.	Further explanation provided but complainant still felt issues had not been addressed.
94/4276 NSW	Delay in reply.	2 Dec 1993	30 March 1994	n.a.	29 weeks (+ 8 weeks)	Complaint finalised by ABA on 27/1/94 but letter went astray.
94/3594 SA	Delay in decision on radio frequency and failure to reply to correspondence.	20 Sept 1993	28 March 1994	28 April 1994	31 weeks	Promptly dealt with following intervention by Ombudsman. No acknowledgments.
94/3675 NSW	Delay in reply to correspondence	May 1993 followed up in Jan 1994	1 March 1994	n.a.	36 weeks	Complainant asked for more information. Complaint lapsed.
94/3527 NSW	Delay in investigation	4 May 1993	23 March 1994	22 April 1994	51 weeks	Investigation commenced but not finalised.

6.2 Case Study 1

During May 1994, Mr A lodged complaints with the ABA against each of the main networks in South Australia about alleged contraventions of the *Broadcasting Services Act*, the *SA Electoral Act* and the FACTS Code of Practice. His complaints dealt with alleged bias in the coverage of the Shooters Party during a State election campaign.

Mr A was concerned his complaints would not be dealt with and twice sought a written acknowledgment of their receipt without success. On 7 July, 9 weeks after his first letter, he complained to the Commonwealth Ombudsman about the lack of an acknowledgment.

After 3 contacts with the ABA the Ombudsman's office was advised that an acknowledgment had been sent on 6 June 1994 and that a substantive reply was in preparation. The alleged letter of 6 June was never received by the complainant and despite promises a copy was not provided to the Ombudsman's office.

A further 7 weeks later, on 22 August 1994 Mr A again complained to the Ombudsman's office that no correspondence or acknowledgment had been received. Contact was made with the ABA who advised that a letter had been completed and sent on the 18 July. Arrangements were made for a further copy to be sent that day by certified post and a copy was to be faxed to the Ombudsman's office.

After a further three contacts with the ABA the Ombudsman received a faxed copy of a letter dated 15 July on the 8 September and this was subsequently received by the complainant on the 19 September.

The substance of the ABA's reply was that election advertisements do not fall within its jurisdiction except to the extent that they may involve a breach of a law and that balance in editorial policies is not a matter the ABA normally concerns itself with.

Preliminary Conclusion

In my opinion, this case and those outlined in Table 4 indicate there have been internal problems with the timely acknowledgment and reply to complaints in the past. The ABA should ensure that the correct systems are in place with performance criteria to ensure that correspondence is sent in a timely fashion, correctly addressed and commitments to fax documents are fulfilled.

The ABA has accepted there have been some internal deficiencies in terms of process and allocation of resources. Steps have been taken by it to address these with revised procedures, allocation of resources and management reporting systems which are having the effect of improving the performance of the ABA in dealing with investigations and responding to complaints.

6.3 Case Study 2

Mrs B is the secretary of a community group concerned about broadcasting standards. On 23 August 1994 she wrote to the ABA concerning a television news broadcast at 5pm in which a graphic sequence was shown in which a circus elephant attacked and crushed a keeper and another man who came to his aid. Another station was mentioned favourably by the complainant for covering the same story without the graphic footage.

The offending footage was not kept by the station but it allegedly showed an elephant in a circus full of children knocking down his keeper, stamping on him repeatedly, dragging him across the ring, attacking a second man who came to his aid before returning to the inert body of the first man and stepping on it again. The sound track was described as comprising the screams of the onlookers and children "which drowned out the man's cries".

In reply to the complaint, the ABA referred her to the television station in accordance with the Code procedure Mrs B subsequently made her complaint to the station. It replied 19 days later without referring to the FACTS code, saying "We welcome constructive criticism.....and I can assure you your complaint has been circulated amongst senior staff."

Mrs B then again complained to the ABA on 28 October 1994 - 67 days after the original broadcast - stating that the broadcast was in breach of the Code of Practice. The complaint specifically referred to the "public interest" criterion applying to distressing material. The relevant section of the Code states:

2.7 Material which may distress or offend viewers

Licensees may broadcast a news or current affairs program containing visual material which in the licensee's reasonable opinion is likely to seriously distress or offend a substantial number of viewers **only if there are identifiable public interest reasons** for broadcasting the material and if adequate prior warning is given to viewers

The complaint was acknowledged by the ABA one month later on 30 November 1994 but the complainant heard no more.

A further 6 months later she complained to the Commonwealth Ombudsman on 26 May 1995 about the lack of progress by the ABA in considering her complaint and the absence of a reference to it in *Your Say* (which had statistics for all 1994 complaints). In the following fortnight the Ombudsman's office contacted the ABA on seven occasions seeking information, received three apologies and two assurances that "documents" had already been faxed to the Ombudsman.

Finally the Ombudsman's office sent a written demand on 12 June 1995 for the documents previously promised. The next day a copy of a letter addressed to Mrs B and dated 30 January 1995 was faxed by the ABA to the Ombudsman. This letter was said to have been sent on the day it was dated but was apparently not received by the recipient.

This letter gave the ABA's general response to the complaint but did not address the public interest criterion. It also revealed that no tape remained of the broadcast in question. Although Mrs B had complained directly to the ABA on the day after the broadcast and to the station within the appropriate Code period, neither had kept a tape of the event. Her second letter (67 days after the broadcast) was outside the statutory period for retention of tapes - although only 7 days beyond the statutory minimum for making a complaint direct to the ABA.

Finally the ABA letter noted that the original broadcast had been preceded by a "warning to viewers" (as required under Code clause 2.25) and that although the offending broadcast had not been seen, similar footage from other broadcasts indicated that no further action was required.

On the 13 June 1995 this letter was provided by the Ombudsman to Mrs B who emphatically denied that anyone in her group had previously received it. She subsequently wrote re-stating her complaint as being that:

- the broadcaster had failed to provide the mandatory advice under the Code about how to further complain when it originally responded
- the public interest criterion had not been met
- the presence of a warning did not remove the public interest criterion but was additional to it
- the ABA was not complying with the complaints procedures under its Act
- the ABA was not upholding the Objective 3(j) of its Act to protect children from exposure to program material that might be harmful.

The Ombudsman undertook research into the policy framework and decided to take up the first two matters. The complainant and the ABA were advised the Ombudsman's office would not take up further the other issues on the question of the tape retention period. A fax was sent to the ABA on 29 August 1995 seeking comments on these matters.

Over the next six weeks there were four further contacts with various ABA staff. It emerged that during a change of staff the file had been lost and then relocated but there was no record of the fax from the Ombudsman's office. A further copy was sent which resulted in the ABA writing to the broadcaster on 12 October 1995 - some 59 weeks after the original broadcast (and the original complaint to the ABA). This letter only dealt with the first of the matters raised - namely the inadequacies of the station's reply to Mrs B's direct complaint. The broadcaster promptly replied apologising for the earlier letter which had been written by a person no longer working at the station. The letter went on to say:

"Coincidentally some months ago the company tightened the existing complaints procedures.... Particular care is taken of complaints related to matters covered by the Code of Practice.... A standard paragraph is included advising complainants that he or she may refer a matter to the ABA if not satisfied with our response."

The ABA and Ombudsman accepted this reply and it is understood the broadcaster apologised directly to the complainant about the omission of the Code advice.

Although the ABA did not take up the issue of the "identifiable public interest" with the broadcaster, there was an exchange of correspondence with the Ombudsman about the meaning of these words. It was agreed that the term "identifiable" suggested the section was intended to ensure that the claim of public interest was reasonable and could be identified subsequent to the broadcast. It was not intended that the broadcaster had to publicly identify the reason prior to the broadcast or in any warning to viewers.

In this case, however, the ABA did not seek the broadcaster's reasons for believing there was an identifiable public interest. As there was no tape of the program the ABA concluded that the prior "threshold" test of whether the item was "likely to seriously distress or offend a substantial number of viewers" could not be determined. Hence the ABA decided there was no need to proceed to determine whether the broadcaster had "identifiable public interest" reasons for proceeding with the broadcast in the time slot that it did.

The wording of section 2.7 of the FACTS Code makes it clear that the "public interest" and "public warning" provisions only apply to material which was "likely to seriously distress or offend a substantial number of viewers". This expression has 4 key words which can only be assessed subjectively. The ABA has the skills and authority to make such judgements in assessing broadcast material and can decide on the facts whether or not the threshold test is met. However, I am concerned that the absence of a tape should result in a finding that the threshold test had not been met when the subject matter is something which reasonably could be described as having potential to meet the threshold test.

The ABA has argued that the complainant contributed to the problem in this case by "waiting nearly 30 days" after the station's reply before lodging the formal complaint. I do not view this as an excessive delay and was less than the time taken by the ABA to acknowledge this second complaint.

Conclusions

In my opinion, having received the second complaint, the ABA should have investigated it – and taken action in early November 1994 to ensure a copy of the item in question was retained for future analysis.

Despite the absence of a tape, the general nature of the material had potential to meet the threshold test and there were thus grounds for the ABA to seek a statement of reasons from the station for why the broadcaster thought the item complied with the Code's public interest criterion. The broadcaster could have put its case including any argument it might have wanted to raise on the threshold test.

At the end of the day there may be a public interest in broadcasts about the dangers of circus animals but whether this justifies showing a death in full detail at a particular hour is a matter for the ABA to judge on the facts. In my opinion it is unsatisfactory for the matter not to have been investigated for want of a tape of the broadcast.

The ABA have not accepted this part of the report arguing it is too hard to come to any view without knowing exactly what went to air. They also have challenged the Ombudsman's office right to pursue this matter after earlier declining to investigate further. I accept that it is an unsatisfactory situation and apart from highlighting the issue of the importance of tapes it is not possible to pursue the matter further than we have. However it is a significant and well documented case of the type of delays and mishandling of correspondence that has been present in the past concerning complaints to the ABA.

6.4 Timeliness in other ABA investigations

To examine whether the pattern in complaints to the Ombudsman was unrepresentative of the general timeliness in considering ABA complaints, further information was sought from the Authority.

Between January 1994 and December 1995 the ABA received 34 formal complaints about alleged breaches by commercial television licensees of the accuracy of fairness provisions of the FACTS Code (Clause 4.3.1). Table 5 provides a summary of the timeliness of these investigations which involved 14 separate programs (one of which attracted 21 separate complaints).

This Table indicates that the total time taken to complete the investigation into these complaints ranged between 8 weeks and 42 weeks. In 8 of 14 cases (58%) the complaint was promptly taken up with the broadcaster. Unfortunately in the other six cases the delay was 3 weeks or greater. The maximum delay in contacting the broadcaster was 15 weeks and the average 3.2 weeks.

Given the 60 day limit on retention of logging tapes and the time which must elapse before a person is entitled to make a formal complaint, this is a significant issue. The ABA has already made a recommendation to Government that logging tapes be held for 90 days and this will go some way to fix the problem. Prompt communication by the ABA to broadcasters is a further desirable step.

In the majority of cases the replies to the ABA from broadcasters have been prompt. The cause of delays in the other cases has not been a subject of investigation. In some cases extensions have been requested and granted. This highlights the desirability of setting clear time frames and enforcing them to ensure timely consideration of a complaint.

The ABA also provided statistics from its complaints computer database on the other types of investigations that it had completed in the same period and which involved either a Code of practice or a program standard. A computer generated search indicated that:

- the average time taken to complete investigations was 21.8 weeks (approximately 5 months);
- 80% of investigations are completed within an average of 15.5 weeks (less than 4 months).

These two statistics incorporate all sectors of the industry which the ABA regulates.

The ABA has highlighted its experience that investigations into the questions of accuracy and fairness of news and current affairs broadcasts are the most complex category of complaints. Often such investigations require the ABA to assess the factual evidence in terms of the accuracy or inaccuracy of statements made in the broadcast. The determination of such issues may require further clarification from the complainant, the gathering of the evidence from a third party, the consideration of documents and possibly even expert opinion on the issue, the subject of the broadcast.

This fact-finding often necessitates the ABA going to the broadcaster more than once, seeking and considering legal advice and seeking the views of senior staff on the strategy of investigation. Often these matters involve the consideration of multiple issues raised during an hour's programming so that the ABA is obliged to examine evidence in respect of a whole range of alleged "inaccuracies" in a single program and more than one aspect of "unfair" reporting within the one program.

The ABA is also concerned that where the complainant is the person about whom the broadcast is made they may also be seeking legal relief through defamation proceedings or are seeking to use the ABA's complaint procedures as a substitute for seeking legal damages. This issue has also been raised by broadcasters and is discussed below in section 5.2.

Conclusions

It is accepted that the nature of investigation of complaints about lack of accuracy or fairness means that they will on average take longer than complaints about other matters. However, in my opinion there are opportunities to improve the current procedures, particularly with respect to timeliness.

To achieve this the ABA should give consideration to:

- **establishing realistic performance standards to ensure that complaints are handled in a timely fashion.**
- **giving more attention to minimising the initial delays in raising the complaint with the broadcaster which remain the most significant avoidable delay.**

During the course of this Inquiry the ABA undertook an extensive review of their complaints handling procedures and after the above recommendation had been

made were able to provide a 26 page documents setting out the detailed policies and procedures now in place. The Ombudsman is confident that if these procedures are followed there should not be a recurrence of past problems.

The Ombudsman has also supported the ABA's 1995 recommendation to Government that the Broadcasting Services Act 1992 be amended to increase the time for retention of tapes to 90 days.

Further discussions with the ABA also produced a suggestion that consultation occur with broadcasters to ensure that tapes are held for a longer period when they have been subject to a Code complaint until the time for the complainant to take it to the ABA as an unresolved complaint has expired. The ABA are also ensuring that its procedures include making contact at the earliest stage to indicate where there may be a situation in which the ABA want access to the tape of a disputed broadcast.

TABLE 5: SUMMARY OF ABA FORMAL COMPLAINTS ABOUT ACCURACY AND FAIRNESS IN COMMERCIAL TV NEWS AND CURRENT AFFAIRS

January 1994 to December 1995

File No	Subject	Date Complaint Received	Date ABA wrote to Broadcaster	Date of Broadcaster's reply	Date Complaint finalised
94/0065	Inaccurate News Report	13/12/94	28/1/94 (6 weeks)	9/2/94	15/4/94
94/0942	Inaccurate misleading coverage	25/10/94	3/11/94 (1 weeks)	27/2/95	1/8/95
94/1013	Bias	2/12/94	14/12/94 (2 weeks)	6/1/95 Request extension 17/1/95	27/9/95
95/0029	Inaccurate Reporting	12/1/95	12/1/95 (nil)	30/1/95 (3 weeks)	5/6/95 (20 weeks)
95/0284	Inaccurate reporting	28/3/95	29/3/95 Further info requested 2/8/95 (nil)	Extensions 21/4/95 1/5/95, 7/9/95	22/1/95
95/0369	Inaccurate and unfair	28/4/95	14/8/95 (15 weeks)	4/10/95 (7 weeks)	
95/0464	Inaccurate news report	1/6/95	1/6/95 (nil)	7/6/95 (1 week)	22/3/96 (42 weeks)
95/0794	Inaccurate and unfair report	21/7/95	14/8/95 (3 weeks)	24/8/95 18/1/96* (2 + 20 weeks)	26/3/96

TABLE 5: Continued

File No	Subject	Date Complaint Received	Date ABA wrote to Broadcaster	Date of Broadcaster's reply	Date Complaint finalised
95/0997	Inaccurate report creation of public panic	20/6/95	27/9/95	19/10/95 (3 weeks)	21/3/96
95/0917	Misleading use of footage (first of 21 complaints about this broadcast)	3/8/95	7/8/95 9/10/95 (1 week)	8/9/95 9/1/96	17/1/96
95/1142	Inaccurate & unfair story	17/11/95	7/1/96 (7 weeks)	26/2/96	
95/1180	Unfair presentation	8/11/95	7/12/95 (4 weeks)	14/12/95 (2 weeks)	11/1/96
95/1187	Inaccurate & unfair story	27/11/95	7/12/95 (1.5 weeks)	9/12/95	
95/1194	Press Viewpoint re: Anti-gun Lobby	5/12/95	12/12/95 (1 week)	29/1/96 (7 weeks)	29/3/96 (16 weeks)

* Initial reply declined detail comment for legal reasons; detailed reply provided when these had been resolved.

7. GENERAL ISSUES ABOUT BROADCASTING COMPLAINTS

7.1 ABA's consideration of individual complaints

Investigation of the particular complaint raised the general question of how complaints from individuals concerning matters involving themselves in broadcasts should be dealt with. A number of points have been made above regarding the processes that might be employed to ensure timely and effective resolution of complaints.

At a broader level there is a problem with the consideration of such matters in the context of the self regulatory scheme established by the *Broadcasting Services Act*.

If the ABA has limited flexibility about the remedies and penalties it can apply, it will encounter significant difficulties with complaints like those of Mr Hughes in the future. For example the principle of proportionality would suggest that revocation of a licence would be an inappropriate remedy for a particular breach of a program standard. On the other hand if individual breaches were able to go without investigation it might give a signal that such breaches are acceptable.

The problem for complainants is that the only remedy they have is to take civil action for defamation or similar proceedings. This is expensive and inflexible and is only likely to be successful in the case of quite gross misstatements of fact. I consider that a licensee should not be able to rely on the inability of the person subject to adverse treatment to take such action to enable it to breach program standards with impunity.

7.2 FACTS Code of practice

The FACTS Code covers the matters prescribed in section 123 of the *Broadcasting Services Act 1992* and each licensee has made a commitment to comply with it.

The ABA has formal powers under s44 of the *BSA* to impose a condition on a licensee requiring it to comply with the relevant Code. Furthermore a licensee who does not comply with a notice to comply with a condition of licence can be guilty of an offence under s 142 attracting a fine of up to \$2 million.

Under s 125 the ABA can also determine a standard in relation to a matter if it is satisfied that there is convincing evidence that the Code is not operating to provide appropriate community safeguards.

Section 4 of the FACTS Code deals with news and current affairs programs and generally requires that news is presented fairly and in accordance with community standards. The relevant sections in regard to this complaint are as follows:

- 4.3.1 *licensees must present factual material accurately and represent viewpoints fairly having regard to the circumstances at the time of preparing and broadcasting the program,*
- 4.3.8 *licensees must make reasonable efforts to correct significant errors of fact at the earliest opportunity.*

Clause 7.8 of the FACTS Code places a time limit of 10 working days on licensees to respond to a complainant (provided they have complained within 30 days of the original broadcast). If this time is insufficient, under clause 7.9 the licensees can write to advise that it requires a further 20 days to respond.

These responses are required to include advice to the complainant of their right to raise the matter with the ABA if dissatisfied with the response. However, if there is no response the complainant must wait for 60 days to expire before the BSA gives them the right to complain directly to the ABA. This is an anomalous situation which in effect increases the time before a person can have a matter considered and which acts against timely correction of unfair material.

Conclusion

Complainants should be able to lodge a complaint with the ABA if they have not received a reply or a notification of an extension from the broadcaster within a reasonable time (bearing in mind that broadcasters are allowed 10 working days under the Code to reply).

I have also concluded in section 4.1 above, that the ABA should seek amendment of the FACTS Code to set time limits for broadcasters to respond to matters raised by the ABA.

The ABA has highlighted that different Codes set different response times up to the statutory maximum of 60 days. It takes the view that 60 days is the outer limit and would take a pattern of failure to respond to complaints in significantly less time than this as an indication that there was a problem. If this was sector wide it would need to be addressed in a review of the Code or through imposition of a standard by the ABA.

The point remains that television is a very immediate medium and complaints need to be dealt with whilst they are still fresh. If corrective action is necessary this must follow promptly if it is to be effective.

The ABA have also stated that anyone can complain to the ABA at any time and the complaint will be noted. Although it only **investigates** licence breaches and unresolved code complaints it undertakes to respond by phone or in writing to all other complaints. However the underlying philosophy of self regulation is that broadcasters must take responsibility for their own actions and Codes and hence complainants should always be directed towards the broadcaster who should respond.

7.3 MEAA Code of practice

Under the former Australian Journalists Association Code of Ethics, journalists have committed themselves to ethical and professional standards. This Code goes back to 1944 with a major revision in 1984. It is administered by the AJA judiciary committee. The two sections relevant to this complaint are:

- "1. They (journalists) shall report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant, available facts or by distorting by wrong or improper emphasis*
- 10. They shall do their utmost to correct any published or broadcast information found to be harmfully inaccurate."*

The AJA's successor, the Media, Entertainment and Arts Alliance, has produced a recommended revised Code of Ethics which is currently open for public discussion. This carries similar sentiments to the old Code and widens its scope whilst considerably simplifying the language. The points in paragraph 10 above are re-expressed as follows:

- " 2 Make efforts to give the subject of a damaging report an opportunity to comment - preferably in that same report*
- 3 Urge the fair correction of errors."*

The AJA Code (which applied at the time of Mr Hughes' complaint) clearly places some obligation on the journalists concerned to correct errors of reporting such as occurred in Mr Hughes' case. Although the ABA had no role in enforcement of the AJA code, it is arguable that it might have referred Mr Hughes to the AJA which provided an alternative dispute resolution process.

7.4 The NSW Law Reform Commission's Report on Defamation

The recent report by the NSW Law Reform Commission on defamation considered a number of relevant issues to the problem underlying this investigation. Amongst its recommendations were the following broad points.

- In general, falsity should be an essential ingredient of defamation actions, with the plaintiff bearing the onus of proof.
- The introduction of a new remedy, the 'declaration of falsity', as an alternative to damages. The plaintiff must seek the declaration within four weeks of publication and establish that the imputation is false, defamatory and capable of being proved true or false. The court can order the defendant to publish the declaratory judgment so as to reach substantially the same audience as the original publication. Successful plaintiffs will be awarded costs.
- Publication of a correction should be a defence to a claim for non-economic loss. The plaintiff must seek the correction in writing. The correction must be published in the same place and manner or calculated to reach substantially the same audience as the original publication and it must be made promptly - within seven days of the request or in the next edition.
- The government should give urgent consideration to the development of privacy laws and their interaction with the law of defamation.

I believe these are sound principles which would assist in bridging the gap between costly Court actions for defamation and obtaining a prompt and effective remedy for complaints about current affairs programs which impact on individuals.

7.5 On air corrections

In this light it is worth considering the beneficial role that "on air corrections" could have for dealing with the problem at the heart of this investigation. The most immediate and relevant remedy for an aggrieved individual is to have corrected the matter they believe to have been wrong and unfair. An alternative to civil litigation and the current protracted complaints process under the Broadcasting Services Act, would be for a complainant to have a right to seek a correction of errors from a broadcaster and if rejected to ask the ABA to adjudicate the complaint.

It is noticeable that some programs have already adopted use of "on air corrections" - although whether this is only under threat of legal action cannot be determined. However, newspapers do so quite regularly by printing "We were wrong" paragraphs in a box on a similar page to the original error.

The objections from the broadcasting industry are that on air corrections sit out of context and the viewer may not recall or be interested in the program several days or weeks before. It is argued that a retraction or apology makes "poor television" with the host being humbled and has low entertainment value. Moreover a retraction may not be effective if body language and material broadcast before and after reverse the meaning of a forced apology.

These are relevant points but they are not of such force that they remove any purpose from introducing "on air corrections". Arguments to counter these would include:

- current affairs and lifestyle programs are a small proportion of the total programming on television and to the extent that they include material on ordinary people there is a particular responsibility to be accurate and fair.
- the time devoted to making retractions should not be great if journalistic standards are generally met and program quality control processes are adequate
- not all viewers may recall the original program but those who do could radically change their view if presented with additional facts or a correction
- the existence of on air corrections will enhance the respect given to television journalism and belief in the honesty of the programs
- controversy makes for good television. Whilst broadcasters may not like to air controversy involving themselves one suspects the public will be interested.

8. GENERAL CONCLUSIONS ABOUT THE ABA'S COMPLAINT HANDLING PROCEDURES

The concept underpinning the legislative framework for handling complaints about broadcasting is in line with current thinking about best practice. There is a two tiered approach, not unlike that used by the Ombudsman, whereby a complainant is first asked to raise their complaint directly with the broadcaster and then, only if it is unresolved, he or she has access to an independent external complaints body with powers to investigate and if necessary make a determination on the matter.

An Australian standard for complaint handling has been produced by the Society of Consumer Affairs Professionals and Standards Australia (AS 4629 1995). This endorses the general approach of a two tiered system for complaint handling based on initial internal reviews and an ability to take complaints to an external independent agent or regulator.

This approach is similar to that adopted in the broadcasting industry but there are several problems which need to be addressed by those responsible for the self regulation regime:

- the broadcasters need a clearer obligation to respond to complainants in a timely fashion
- the complainants must wait 60 days before they can raise their complaint with the ABA as the external complaints body
- the damage done by an error in a broadcast program is done very quickly (and can be frequently repeated if it becomes "news")
- the powers of the ABA to require an answer from a broadcaster are limited to matters dealt with formally under Part 13 of Division 2 of the BSA.

In my opinion the ABA and other interested parties need to develop practices and procedures to investigate and ensure adequate redress in situations where individuals have been wrongly reported or represented on news and current affair.

Conclusions

In my opinion the following steps should be considered by the responsible bodies to avoid the problems highlighted by this report:

1. The ABA should consider introducing, through the review of the FACTS Code in late 1996 or by other means a requirement that licensees shall provide timely on air corrections for errors in news and current affairs programs where:

- a) a complaint has been made and the licensee concedes that there has been an error or unfairness in the broadcast
 - b) the Chairman of FACTS or the ABA determine there has been a breach of the Code.
2. That the statutory requirement for 60 days to elapse before a person may complain to the ABA should be reviewed with a view to having it replaced by:
- a) an open right to complain to the ABA at any reasonable time. (This could for example be within 90 days of the broadcast or within 60 days of receiving a reply from a broadcaster to a complaint under the Code)
 - b) a discretion for the ABA not to investigate if the person has not complained to the licensee.

This would mirror the processes used by the Ombudsman and would give greater flexibility to enable complaints to be considered in a timely fashion. Under the Code the licensees would have up to 30 working days (about 42 calendar days) to respond but most would be dealt with within 10 working days.

3. Consideration be given in drafting future Transitional legislation to ensure an Authority has the remedies as well as the powers available to it to enforce the previous regulatory regime (if that is Parliament's intention).
4. The ABA should give consideration to:
- establishing realistic performance standards to ensure that complaints are handled in a timely fashion.
 - giving more attention to minimising the initial delays in raising the complaint with the broadcaster which remain the most significant avoidable delay.
 - extending to at least 90 days the period during which logging tapes should be retained.

**REPORT ON COMPLAINT BY MR ROBERT HUGHES
ABOUT *REAL LIFE*, 26 MAY 1992**

1. THE COMPLAINT

1.1 Mr Hughes lodged a written complaint with the Australian Broadcasting Authority ("ABA") on 12 March 1993. Mr Hughes alleged that a broadcast by BTQ Brisbane (Channel Seven) during its *Real Life* current affairs program broadcast on 26 May 1992 had been inaccurate and unfair and as such was a breach of Television Program Standard ("TPS") 24.

1.2 Mr Hughes claimed that

There were substantial errors in the program's claims which clearly victimises myself and is not representative of the true situation of Surfers Paradise hostels or the industry in general.

1.3 In his original complaint and in subsequent correspondence, Mr Hughes provided detailed comments on what he felt were the inaccuracies and unfair material in the *Real Life* report of 26 May 1992.

1.4 As discussed below, Channel Seven declined to comment on the substance of Mr Hughes complaint, despite having several opportunities to do so, until 28 November 1995.

2. THE PROGRAM

2.1 The segment of the *Real Life* program in question dealt in general with fire hazards in backpackers hostels and with Mr Hughes' backpacking establishments in particular. It was broadcast by BTQ Brisbane on the evening of 26 May 1992.

2.2 Mr Hughes has operated a number of backpacking hostels: including the Walkabout Hostel in Highgate Hill, Brisbane; The Terminus Hotel, South Brisbane, and; Backpackers United, Surfers Paradise.

2.3 The segment began with an impromptu, "on-the-run" interview with Mr Hughes at the Backpackers United hostel on 25 May 1992. At the time of this interview, Mr Hughes objected to the reporter's approach and asked her to leave his property on several occasions. Further extracts from this interview were placed between comments by spokespeople for the Youth Hostel Association and Gold Coast Council, as well as file footage of an interview with Mr Hughes and footage of fires at backpackers' hostels in Kings Cross and Highgate Hill, next door to the Walkabout Hostel operated by Mr Hughes. Occasionally, footage is shown of hostels in the Gold Coast area. This footage is accompanied by voice-overs from the reporter.

3. LEGAL FRAMEWORK & THE STANDARD AGAINST WHICH *REAL LIFE* PROGRAM ASSESSED BY THE ABA

- 3.1 As noted above, the segment of the *Real Life* program that caused concern to Mr Hughes was broadcast by BTQ Brisbane on 26 May 1992. *Real Life* was a program broadcast across "the Seven Network". BTQ Brisbane TV Ltd was the licensee for BTQ Brisbane at the time of the broadcast, and BTQ Brisbane TV Ltd was a part of The Seven Network Ltd. For simplicity, the broadcaster is referred to in this report as Channel Seven.
- 3.2 Television Program Standard 24 (TPS 24) was the relevant standard at the time of the broadcast in May 1992. TPS 24 provides as follows:
5. In the preparation and presentation of current affairs programs, a licensee must ensure that:
- (a) factual material is presented accurately and that reasonable efforts are made to correct substantial errors of fact at the earliest possible opportunity;
 - (b) the reporting of factual material is clearly distinguishable from commentary and analysis;
 - (c) reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance, either within the same programs or in similar programs, while the issue has immediate relevance to the community;
 - (d) viewpoints are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts;
 - (e) respect is given to each person's legitimate right to protection from unjustifiable use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy.
- 3.3 An important question which arose in this case was whether the relevant legislation operated so that a failure on the part of a broadcaster to comply with TPS 24 in broadcasting a program before the commencement of the BSA could have given rise to an offence or penalty under the BSA. The BSA commenced on 5 October 1992.
- 3.4 TPS 24 had effect as a standard under the BSA until 17 May 1993, at which time the Federation of Australian Commercial Television Stations Industry Code of Practice was registered.

3.5 Nevertheless, at the time the program in question was broadcast (26 May 1992), neither the BSA nor its transitional provisions had commenced. As the BSA and its transitional provisions do not have retrospective operation, Channel Seven could not have breached a condition of a licence under the BSA in broadcasting the program.

3.6 However, s.147 of the *Broadcasting Services Act* 1992 ("the BSA") provides that:

If a person believes that another person who is providing a broadcasting service has:

- (a) committed an offence against this Act or the regulations; or
- (b) breached a condition of a licence or a class licence;

the person may make a complaint to the ABA about the matter.

3.7 Therefore, under s.147 of the BSA, a person may thus make a complaint to the ABA concerning an alleged breach of a licence condition. Except where the ABA considers that the complaint is vexatious, or not related to breach of a condition or an offence under the BSA, the ABA must investigate the complaint pursuant to s.149 of the BSA.

3.8 Furthermore, s.148 of the BSA provides that if:

- (a) a person has made a **complaint to a provider of broadcasting services** on a matter relating to:
 - (i) **program content**; or
 - (ii) compliance with a code of practice that applies to those services and that is included in the Register of codes of practice; and
- (b) if there is a relevant code of practice relating to the handling of complaints of that kind - the complaint was made in accordance with that code of practice; and
- (c) either:
 - (i) the person has not received a response within 60 days after making the complaint; or
 - (ii) the person has received a response within that period but considers that response to be inadequate;

the person may make a complaint to the ABA about the matter.

3.9 There is no definition of "complaint" in the BSA. As such, there is no statutory requirement that a complaint relating to program content be about a program broadcast after 5 October 1992 (i.e. the date the BSA came into effect).

- 3.10 As "complaint" is not defined in the BSA, the ABA is able to investigate a complaint even though the alleged breach of the program standard occurred before the BSA took effect; however, the penalties for a breach (Part 10, BSA) are only available where there is a breach of a condition of a licence, and TPS 24 was not a condition of Channel Seven's licence prior to October 1992.
- 3.11 However, it is significant that a breach of TPS 24 cannot be the basis of action taken under Part 10 of the BSA. As such, there is no remedy that the ABA can provide as a result of a finding that TPS 24 was breached.
- 3.12 A potential legal consequence, in terms of the legislation administered by the ABA, which could flow from a negative finding against Channel Seven in this matter is that the licensee could ultimately be found to be an unsuitable licensee, under s.41 of the BSA.
- 3.13 It is a licence condition that a licensee remain suitable [BSA, Schedule 2 clause 7(2)(b)] and the ABA must refuse to renew a licence if the ABA determines that a licensee is no longer suitable: [s.47(2) of the BSA]. The relevance of this to the present case is that:
- (i) The business record of the Seven Network includes its record of compliance with standards under the *Broadcasting Act 1942* regime, including compliance with TPS 24, and;
 - (ii) The business record of a company is a matter which the ABA must take into account in determining whether there is a **significant risk** of a breach of conditions of the licence occurring within the terms of s.41(2) of the BSA: see also s.41(3).

However, in this case it cannot be said that a breach of TPS 24 (especially as it is not a program standard under the BSA), as a matter of fact, would indicate a "significant risk" of a breach of licence conditions.

4. THE INVESTIGATION OF MR HUGHES' COMPLAINT BY THE ABA

- 4.1 After receiving more information from Mr Hughes regarding his complaint, the ABA wrote to the Broadcasting Policy Director of Channel Seven, Mr Sean O'Halloran, on 26 August 1993 requesting comments on the matters raised in Mr Hughes' complaint.
- 4.2 Channel Seven did not reply to the ABA's request for comments on this matter until 11 April 1994. During this 34 week period, Channel Seven neglected to respond despite the following requests:
- a telephone request by the ABA in late November 1993;

- a letter from the ABA dated 22 December 1993 requesting "urgent attention";
 - two meetings with the Seven Network between December 1993 and March 1994 at which the issue of this outstanding complaint was raised by the ABA;
 - a fax, dated 24 February 1994, requesting comments; and
 - a letter from the ABA's General Manager, Policy and Programs Division, Mr Gareth Grainger to Mr O'Halloran dated 22 March 1994.
- 4.3 In the circumstances, Channel Seven's delay in responding was both excessive and unreasonable.
- 4.4 It is even more so when considered in light of the rather brief response provided by Mr O'Halloran in April 1994. Mr O'Halloran indicated that the Producer of *Real Life* (Mr Gerald Stone) had been of the view (apparently since May 1992) that Mr Hughes complaint is essentially one of defamation and, as such, in Channel Seven's opinion:
- * a court represents the appropriate forum for resolution of the matter; and
 - * it would be inappropriate in view of Mr Hughes' threat of litigation for Seven Network to enter into correspondence at this time with Mr Hughes or the ABA concerning the matter.
- 4.5 In its 11 April 1994 response, the Seven Network suggested that it would enter into correspondence if Mr Hughes were to withdraw his threat of litigation and provide the Channel Seven with an appropriate release. Mr O'Halloran stated that he agreed with Mr Stone's views on this matter.
- 4.6 It is the view of the ABA that the possibility of civil action by a third party against a broadcaster does not constitute a reasonable excuse for not providing the ABA with information it has requested. Once the ABA has taken up a complaint, as it had in this matter, the ABA is acting on its own behalf and is not limited by further dealings between the complainant and the broadcaster. For example, a complainant could reach a settlement with the broadcaster, but this would not prevent the ABA continuing to exercise its statutory duties.
- 4.7 Even if Channel Seven had replied to the ABA and produced documents, those documents would not have been available to the complainant as a matter of course. The opportunity for Mr Hughes to obtain information through the ABA's processes in support of a potential civil suit is very limited.
- 4.8 In July 1994, the ABA took the position that there was no regulatory purpose to be served in investigating Mr Hughes complaint any further because no remedial action was possible. Mr Hughes was advised of this position on 14 July 1994.

- 4.9 Nevertheless, after receiving independent legal advice from Counsel and the Commonwealth Ombudsman on the matter, the ABA decided in June 1995 to "re-open" its investigation into Mr Hughes' complaint.
- 4.10 On 17 August 1995, the ABA wrote to Channel Seven requesting their comment on Mr Hughes' complaint. The ABA provided Channel Seven with copies of all the relevant correspondence and a dub of the *Real Life* program in question. Channel Seven were asked to provide comments to the ABA by 8 September 1995. Channel Seven did not provide comments to the ABA following this request (see paragraph 4.12 below).
- 4.11 On 15 November 1995, the ABA forwarded a copy of its report on this complaint to Mr David Davies, Network Seven's Business Director, for comments, pursuant to s.180 of the BSA.
- 4.12 Mr Davies faxed a letter to the ABA on 15 November 1995, noting that he had not received the ABA's letter of 17 August 1995. On 17 November 1995, a copy of this letter was forwarded to Mr Davies, along with a copy of Mr Hughes original complaint, a tape of the *Real Life* program in question and related background material.
- 4.13 On 28 November 1995, Mr Davies faxed to the ABA Channel Seven's comments on Mr Hughes' complaint. These comments were directed at the actual assessment of the *Real Life* program and have been considered by the ABA in its assessment set out below.
- 4.14 After considering Channel Seven's comments and amending the report as appropriate, a copy of the ABA's assessment was sent to Mr Hughes on 30 November 1995 for comment. Mr Hughes provided his comments on the assessment on 6 December 1995.

5. ASSESSMENT OF THE *REAL LIFE* PROGRAM OF 26 MAY 1992

5.1 As noted above, TPS 24 provides as follows:

5. In the preparation and presentation of current affairs programs, a licensee must ensure that:
 - (a) factual material is presented accurately and that reasonable efforts are made to correct substantial errors of fact at the earliest possible opportunity;
 - (b) the reporting of factual material is clearly distinguishable from commentary and analysis;
 - (c) reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of

public importance, either within the same programs or in similar programs, while the issue has immediate relevance to the community;

- (d) viewpoints are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts;
- (e) respect is given to each person's legitimate right to protection from unjustifiable use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy.

5.2 In assessing this matter the ABA has considered the tape of the relevant segment of the *Real Life* program of 26 May 1992, a transcript of this segment and the comments and material provided by Mr Hughes. As noted above, despite having an adequate opportunity to do so, Channel Seven has chosen not to provide the ABA with any substantive comments on Mr Hughes' complaint.

5.3 It is the ABA's assessment of the story on backpackers' hostels presented in the *Real Life* program of 26 May 1992, that Channel Seven has breached TPS 24 on a number of occasions. The ABA's assessment of each of these breaches is set out below in the order in which they occur in the program.

6. **Comment by reporter (Jane Hanson) to Mr Hughes that "Fire services describe ... your last hostel in Brisbane was a fire trap. Mr Hughes are these the same?"**

6.1 Mr Hughes has provided evidence to the ABA that his last hostel in Brisbane was the Terminus Hotel, South Brisbane. He notes that he was there from 16 October 1989 until January 1990, and that the Terminus Hotel fully complied with the relevant fire safety requirements.

6.2 In their letter of 28 November 1995, Channel Seven note that soon after the statement by the reporter (Jane Hanson) to Mr Hughes that "Fire services describe ... your last hostel in Brisbane was a fire trap. Mr Hughes are these the same?", the reporter backgrounds the fire safety in backpacker hostel issue by reference to the deaths of backpackers in Kings Cross in 1989, emphasising that one of the problems in that fire was the lack of an exit, and that the backgrounder notes the similar problems in Highgate Hill, Brisbane, where Hughes' Walkabout Hostel was next to a hostel that burned down. Channel Seven note that their file footage indicates that Fire Brigade officers expressed their concern about the safety of the Walkabout Hostel, particularly in relation to exits.

6.3 Mr Hughes notes in his letter to the ABA of 12 March 1993 that not one of the people staying at the Walkabout Hostel were injured in the 26 September 1989 fire at Highgate Hill. He attributes this to the prompt actions of the Walkabout Hostel's staff to evacuate guests, shut the windows

and use the fire extinguishers. At the time of the fire, Mr Hughes notes that the Walkabout Hostel's fire escape was being rebuilt following Brisbane City Council's approval of the plans on 26 June 1989, three months before the fire next door.

- 6.4 Channel Seven assert that these sequences (set out in paragraph 6.2 above) are the reason and explanation for the reporter's initial comment to Mr Hughes. They note that the on-camera statements and concern of fire service officers with regard to the lack of adequate fire exits from the Walkabout Hostel are entirely consistent with the viewer "shorthand" that the building was a "fire trap" (i.e.) that people could be trapped in the fire through inadequate paths of exit.
- 6.5 Channel Seven feels that the proposition put by the reporter is not a substantial error of fact as, in light of the 1989 file tape from the Highgate Hill fire, Mr Hughes does have a record of running buildings that have been described by firemen as having inadequate means of exit in case of fire.
- 6.6 The comment by the reporter is presented as if it were an established fact, yet the only evidence presented to support this is a comment by a fire service officer about the likelihood of escape from the Walkabout Hostel in the event of a fire. The actual words of the relevant fire service officer were

[If there was a fire] the people living in these accommodation corridors that run off the centre of this front lobby would have no chance of escaping through this one remaining door.

That officer did not describe the Walkabout Hostel as a "fire trap".

- 6.7 The above comments by the fire service officer were edited into the Real Life program so that they were shown approximately two minutes after the initial comment by the reporter. In that two minutes, a number of other elements to the story were introduced and the dramatic pictures of the Kings Cross and Highgate Hill fires were shown. The connection between the reporter's initial comments and the later comments of the fire service officer and the reporter would probably not have been connected by the reasonable viewer.
- 6.8 No evidence was presented in the *Real Life* report or subsequently by Channel Seven to support the allegation that the Walkabout Hostel operated by Mr Hughes was described by fire services as a "fire trap". It would be true to say that the fire services appeared concerned by the boarding up of the doorway and the potential risk that this exposed guests to, but the reporter failed to mention the reason that the doorway was boarded up despite this information being on the public record at Brisbane Council.

- 6.9 This is a “substantial error of fact” in terms of TPS 24(5)(a) because it implies that Mr Hughes has a record of running “fire traps”. There is no evidence that Channel Seven has made a reasonable effort to correct this “substantial error of fact”, despite receiving contrary information from Mr Hughes and this information being available on the public record.

6.10 Assessment

Breach of TPS 24 (5)(a). The comment by reporter (Jane Hanson) to Mr Hughes that “Fire services describe ... your last hostel in Brisbane was a fire trap” was a substantial error of fact and Channel Seven has not made a reasonable effort to correct this substantial error of fact.

7. The scene of the first “interview” with Mr Hughes

- 7.1 The scene of this “interview” was that the reporter (Jane Hanson) was chasing after Mr Hughes across his yard. Mr Hughes asked the reporter and the camera crew to “go away” twice. This segment of the story involved the following exchange between Mr Hughes and the reporter:

Reporter: Fire services describe ... your last hostel in Brisbane was a fire trap. Mr Hughes are these the same?

Hughes: Go away !

Reporter: Are these any better ?

Hughes: Go away !

Reporter: Does someone have to die before you do the right thing around here ?

Hughes: Nobody’s dying, get your facts right.

- 7.2 This exchange was followed by the reporter’s voice over: “If you believe Robert Hughes, he’s a struggling businessman ... just another victim of the recession”.
- 7.3 The above footage was taken by Channel Seven on 25 May 1992. It was edited into the *Real Life* segment and screened by Channel Seven the following night (26 May 1992).
- 7.4 In their letter of 28 November 1995, Channel Seven rely on Mr Hughes’ later comments to the reporter to justify the fact of the continuation of the interview after his request for the reporter and crew to leave. That is, Channel Seven feels that Mr Hughes’ later comments to the reporter, after he requested them to leave, are an implicit withdrawal of his earlier request for them to leave.
- 7.5 If a person is being filmed or interviewed and they clearly ask for the filming or interviewing to cease, as Mr Hughes did, it is reasonable to conclude that any consent that may have existed had been explicitly

withdrawn. It is the ABA's view that to continue filming and asking questions after this is potentially an unwarranted and intrusive invasion of privacy.

- 7.6 The tone throughout the interview with Mr Hughes is confrontational. It is clear that Mr Hughes was unhappy with the reporter and crew staying on his property. The footage that was gained by Channel Seven was of a person who was being confronted in his own home by a reporter and camera crew who he had requested to leave. During the interview Mr Hughes asked the reporter to "make an appointment" and soon after to "have some manners".
- 7.7 Mr Hughes solicitors (Collas Moro) sent the producer of the *Real Life* segment a facsimile on 25 May 1992 stating that

Mr Hughes requested the camera crew and reporter to leave the premises on three occasions. The requests were ignored and the camera crew and reporter walked around and filmed on the property in violation of his rights as a Lessee. This gross behaviour resulted in the police being called by Mr Hughes.

Mr Hughes is concerned about what is to be shown on television in the *Real Life* program as false and sensational statements were made to him by the reporter and a member of the film crew. Reference to a fire at a previous place managed by him was made by the reporter and this is untrue. ...

[Mr Hughes] is attempting to satisfy all the requirements of the Council and any questions should be directed to the Council.

- 7.8 According to Mr Hughes, Channel Seven have made no attempt to arrange a more co-operative interview with him. Channel Seven have provided no evidence to contradict Mr Hughes on this matter.
- 7.9 It is the ABA's view that, in the circumstances, Mr Hughes had a legitimate right to have the opportunity to be interviewed at a time and place that he consents to.
- 7.10 The prompt editing of the 25 May 1992 footage into the 26 May 1992 program would suggest that Channel Seven did not feel there was a need to obtain further footage. Channel Seven argue in their letter of 28 November 1995 that the interview with Mr Hughes on 25 May 1992 was both adequate and consensual. However, the footage *Real Life* obtained through the interview with Mr Hughes on 25 May 1992 was dramatic and confrontational. Given that Mr Hughes suggested that the reporter "make an appointment", it is improper for Channel Seven to use the footage it did when a less intrusive and more appropriate forum for an interview appeared to be available. *Real Life* chose to use the prejudicial material gained from

this interview despite Mr Hughes offer of a more consensual interview and the letter received by the producer of *Real Life* from Mr Hughes' solicitors.

- 7.11 Channel Seven's haste to use the footage gained from the confrontational interview with Mr Hughes on 25 May 1992, their denial of a more co-operative interview for Mr Hughes and their apparent disregard of the warning letter from Mr Hughes' solicitors are important factors in the ABA's assessment of this matter. The use of the confrontational footage was unjustifiable and was used without Mr Hughes consent.

7.12 Assessment

Breach of TPS 24 (5)(e). Channel Seven gave Mr Hughes no respect for his legitimate right to protection from unjustifiable use of material which was obtained without his consent. Channel Seven's conduct of the interview involved an unwarranted and intrusive invasion of Mr Hughes' privacy.

8. Following the confrontation (noted in paragraph 7.1 above) between the reporter and Mr Hughes, Mr Hughes suggests the reporter "make an appointment". The reporter ignores this suggestion and Mr Hughes says that "the media of this country have a very bad record". This followed by a voice over by the reporter "Robert Hughes has a record too, but the Gold Coast Council says that record is not enough for it to act."

- 8.1 In their letter of 28 November 1995, Channel Seven submit that, at the time of the *Real Life* broadcast, Mr Hughes did have a record of managing/operating backpacker hostels which gave fire and/or local council authorities serious concern in relation to the fire safety of such premises. Further, Channel Seven argue that this point is one of the themes of the story and is drawn out from the first question put by Jane Hanson to Mr Hughes and backgrounded and supported by file footage of the Highgate Hill fire affecting the Robert Hughes-operated hostel. Channel Seven feel that, in this context, reference to a "record" does not automatically mean a criminal conviction and clearly means "history" or "experience".

- 8.2 In the *Real Life* program, the voice-over comment that Mr Hughes had "a record" was followed by a short extract from an interview with the Gold Coast's Mayor, Mr Lex Bell. Mr Bell states that

Gold Coast City Council would really have to deal with these properties on their own merits. We could not with propriety ascribe unfair motives because the man had a history in some other location.

- 8.3 In their letter of 28 November 1995, Channel Seven assert that the above comment from Mayor Lex Bell itself provides support for the fact that Mr

Hughes, in the eyes of the Council having responsibility for hostels on the Gold Coast, had a record or history of problems with similar buildings in another location.

- 8.4 It is the view of the ABA that voice-overs are a powerful mechanism for reporters to provide important background material without contradiction. As such, voice-overs add authority to statements of fact. When used injudiciously, they can also make the opinions or comments of reporters appear to be statements of fact. In this case, it was implied that Mr Hughes had a "record" of being responsible for hostels which did not meet with the required fire safety standards, or even that he may have been successfully prosecuted under the laws governing these matters.
- 8.5 There is a strong implication from the comment that someone has "a record" that they have been formally convicted of an offence of some kind. This is particularly so when the comment that someone has "a record" is made by way of a voice-over. Saying someone has "a record" carries much greater odium than saying a person has a "history" or "experience". Mayor Lex Bell clearly distinguished between these words when he stated that

We could not with propriety ascribe unfair motives because the man had a history in some other location. (*emphasis added*)

- 8.6 The voice-over comment by the reporter that "Robert Hughes has a record too, but the Gold Coast Council says that record is not enough for it to act" would therefore mislead lead the ordinary and reasonable viewer into thinking that Mr Hughes may have such a record.
- 8.7 Channel Seven presents it as a fact that Mr Hughes has "a record", yet no evidence was presented in the *Real Life* program or subsequently by Channel Seven to support the allegation that Mr Hughes had a formal record of committing any offences.
- 8.8 From the information presented in the *Real Life* program and subsequently by Channel Seven, it is misleading to state as a fact that "Robert Hughes has a record too, but the Gold Coast Council says that record is not enough for it to act". It is misleading because (i) Mayor Lex Bell does not say that Mr Hughes has a record, (ii) Channel Seven provides no other factual material in the *Real Life* program story to support their assertion that Mr Hughes has "a record", and (iii) Mr Hughes has never been convicted of any offences in relation to operating hostels, nor was he held responsible in any way by the Fire Services for the 1989 fire at Highgate Hill.

8.9 Assessment

Breach of TPS 24 (5)(a). The comment that Mr Hughes has "a record" is a substantial error of fact and Channel Seven did not make a reasonable effort to correct this substantial error of fact.

Breach of TPS 24 (5)(d). The program contained material (the comment that Mr Hughes had "a record") which was presented in a misleading manner.

9. CONCLUSION

9.1 The objective of TPS 24 was

to ensure that current affairs programs were presented on television:

- (a) with accuracy and fairness; and
- (b) in a way which allowed informed public debate on substantial issues affecting the community.

9.2 Mr Hughes has provided material to the ABA that shows that a number of the factual assertions made in the *Real Life* program are inaccurate and misleading.

9.3 It would appear that Channel Seven's only attempt to interview Mr Hughes was by way of chasing after him on his own property. Mr Hughes complained about this practice by Channel Seven at the time both to the reporter and in writing to the Producer of *Real Life*, Mr Alan Craig. Mr Hughes is concerned that the footage from these "interviews" was used in a way that was unfair to him.

9.4 As a whole, the report unfairly presents Mr Hughes as an irresponsible person, who is recklessly indifferent to the safety of the guests at his backpacker hostels. It is the ABA's view that the use of this material was, in the circumstances, both unfair and unjustifiable

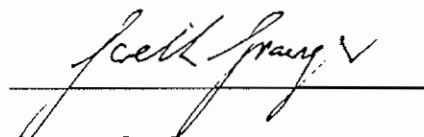
9.5 At the time the *Real Life* program was broadcast, the safety standards of backpacker hostels was a matter of public concern. The use of footage by Channel Seven of the fires in backpacker hostels in Kings Cross and Highgate Hill highlighted that the issue of safety in backpacker hostels was a substantial issue affecting the community.

- 9.6 By selective editing, use of footage obtained without Mr Hughes' consent and the presentation of inaccurate material, this segment of the *Real Life* program has demonstrated a careless disregard for both the standards set out in TPS 24 and, perhaps more importantly, the effect that such a program may have on Mr Hughes himself.
- 9.7 The ABA does not propose to make finding with respect to each and every allegation made by Mr Hughes. The ABA is satisfied that, on the evidence before it, the story on backpackers' hostels presented in the *Real Life* program of 26 May 1992 by Channel Seven breached TPS 24.

10. FINDING

10.1 On the facts which were presented to the ABA, and on the results of the investigation conducted by the ABA as contained in this report, the ABA is of the view that BTQ Brisbane Pty Ltd failed to comply with TPS 24 in that the *Real Life* program which is the subject of this investigation:

- * contained substantial errors of fact which the broadcaster did not make reasonable efforts to correct:
- * gave Mr Hughes no respect for his legitimate right to protection from unjustifiable use of material which was obtained without his consent. The conduct of the interview involved an unwarranted and intrusive invasion of Mr Hughes' privacy, and:
- * contained material which was presented in a misleading manner.



Gareth Grainger
General Manager, Policy and Programs Division

12 December 1995

TRANSCRIPT REAL LIFE PROGRAM SEGMENT
ON BACKPACKER HOSTELS

Tuesday, 26 May 1992

AUDIO	VIDEO
<p>Stan Grant (intro to camera) "Young, footloose and fancy free. Backpacking their way around Australia, on a fraction of what it costs the ordinary tourists. That's the ideal picture, but the truth for young travellers can be very different, if they find their way into the <u>wrong sort</u> of hostel.</p> <p>As Jane Hanson tells us, roughing it can sometimes mean risking your life."</p>	<p>Studio</p>
<p>Jane Hanson (JH) "Fire services describe.."</p>	<p>Outside Backpacker International</p>
<p>Robert Hughes (RH) "Leave now!"</p>	
<p>JH "..Your last hostel in Brisbane was a fire trap. Mr Hughes are these the same?"</p>	
<p>RH "Go away!"</p>	
<p>JH "Are these any better?"</p>	
<p>RH "Go away!"</p>	
<p>JH "Does somebody have to die before you do the right thing around here?"</p>	
<p>RH "Nobody's dying, get your facts right."</p>	
<p>JH - voice over - "If you believe Robert Hughes, he's just another victim of the recession."</p>	<p>Cut aways</p>
<p>RH "There's a shortage of funds, or don't you people read the T.V."</p>	<p>Two shots outside hostel</p>

AUDIO	VIDEO
JH "Yes, but.."	
RH "Read the papers and watch the T.V."	
JH "...you don't have to threaten peoples' lives."	
RH "I'm not threatening anybodies' lives, so don't put words into my mouth."	
JH - voice over - "Hughes runs a backpackers hostel from five buildings marked for redevelopment on this site. They are old, they are rundown, and many believe they are unsafe."	Shots of Backpackers United Hostel
JH "Mr Hughes, I'm sure we can talk about this."	Inside shot Mr Hughes leaving
RH "You have a very bad record."	
JH "I have a bad record?"	
RH "Year"	
Joanne Pitt (JP) "I inspected the premises late last year and even from my first entry into the place, it is sub-standard accommodation."	Interview at another office
JH - voice over - "Joanne Pitt inspected the properties when Hughes sought the approval of the Youth Hostel Association."	
JP "There are issues such as umm.. fire exits, that would be number one."	
"Because it seems to be an old building, I certainly did not see evidence of fire extinguishers or reels etc. whilst going through."	
JH - voice over - "In 1989 the issue of safety in backpackers hostels hit the headlines when six innocent young travellers lost their lives in a Kings Cross fire. The Down Under hostel had just one exit and no fire safety equipment."	Shots of Kings Cross fire Shots of Highgate Hill fire

AUDIO	VIDEO
<p>Shortly after, history nearly repeated itself. This fire in Brisbane's Highgate Hill came perilously close to igniting the Walkabout Hostel next door."</p>	
<p>Keith Drummond (KD) "Look at the fire, it came into this building here so we had, we had the potential here for a disaster."</p>	<p>Internal shots at Highgate Hill (1989)</p>
<p>JH "The hostel had no fire escapes, in fact they'd long been boarded up. There were no extinguishers, and only one exit on the ground floor. Fire Chief Officer Keith Drummond was not impressed."</p>	
<p>KD "The people living in these accommodation corridors that run off the centre of this front lobby would have no chance of escaping through this one remaining door."</p>	
<p>JH - voice over - "And who was running this hostel back in 1989? You guessed it, Robert Hughes."</p>	
<p>JH "You've been operating a hostel firemen have called a death trap without a licence for the last month."</p>	<p>Interview outside Highgate Hill Hostel (1989) Title "File Vision 1989"</p>
<p>RH "Ahh! (indistinct) No, that's not true."</p>	
<p>JH - voice over - "Hughes had inadequate fire safety standards. He had been requested time and time again to fit the necessary exits without response."</p>	
<p>RH "Rome wasn't built in a day."</p>	
<p>JH "Since then, Hughes has moved on."</p>	
<p>JH (To camera) "Surfers Paradise, it's the country's number one tourist destination. But not everybody can afford the luxury hotels sold in the travel brochures. It's a pit stop for the thousands of backpackers prepared to bunk down just about anywhere. But little do they know, they can be putting their lives at risk in the process."</p>	<p>Pan shot of Surfers Paradise main street</p>

AUDIO	VIDEO
RH "Things have to be built, I'm sorry. I can't wave a magic wand."	Outside Backpackers United Hostel
JH "For the past six months Robert Hughes, Backpackers United has gained the attention of the local council."	
Mayor Lex Bell (LB) "We're very worried uhh, that if the fire standards are not maintained uhh, then peoples' lives could be at risk."	
JH "According to mayor Lex Bell, council inspections of the properties revealed no less than 270 defects. In September last year, Hughes was ordered to fix them, since then his efforts have been described as purely token. He has now been given his last thirty days reprieve."	Reporter chasing Mr Hughes outside Backpackers United
JH "There are 270 defects in these places you haven't bothered to fix up."	
RH "There's how many defects in that building?"	
JH "You had six months, <u>six months</u> to do it. Haven't you!"	
RH "Get off my property, I'm having you charged."	
JP "It is serious because it concerns young peoples' lives and most of the people using these facilities are young people and I think that young people sometimes have to be protected from themselves."	
JH "Can you show me a fire extinguisher?"	Underneath stairway at Backpackers United
RH "Yes. Yes."	
JH "I'd love to see one. Can we go up and have a look?"	

AUDIO	VIDEO
RH "As I said to you, make an appointment..."	
JH "Can we go up and have a look at your fire safety?"	
RH "...have some manners, which the media of this country have a very bad record. Doesn't it, really?"	
JH "Robert Hughes has a record too, but the Gold Coast City Council says that record is not enough for it to act."	
LB "Gold Coast City Council would really have to deal with these properties on their own merits. We could not with property uhh, its ascribe unfair motives because the man had a past history in some other location."	Interview in Council office
JH "You've been in the place, if there was a fire what would happen?"	
JP "To be honest, I don't know how people would get out in the case of a fire, or where to go. Umm.. I known certainly myself, I would not like to be there, if there was a fire."	
Stan Grant (to camera) Jane Hanson reporting "The moral there is cheap doesn't have to mean unsafe. Backpacking is a huge slice of the Australian tourist industry, one bad fire could mean more harm than anyone dreamed."	