Broadcasting Inquiries: Canadian Experience

By MATTHEW SMITH

Excitement about what are appropriate inquiry procedures for the Australian Broadcasting Tribunal has lately been muted by headier topics, but the quest for a workable system of public and industry participation has not been abandoned.

In February 1981, the Administrative Review Council recommended the introduction of uniform and detailed inquiry procedures, and its report was made public in April. The report and comments upon it are apparently now under consideration by the government.

In this context it is interesting to review a lengthy study paper prepared by Mr. C.C. Johnston for the Law Reform Commission of Canada on administrative procedure in the Canadian Radio—Television and Telecommunication Commission. The study was written in 1979 but was published only recently, and reached Australia after the ARC has concluded its study of the ABT.

The Canadian Law Reform Commission has a role in reforming administrative law and practice similar to that of the ARC, but has approached the task in a very different way. With a larger budget and longer time—tables, it has delayed forming recommendations until the completion of a series of research studies on particular administrative agencies and general topics of public administration. The result has been an expanding literature of great interest. As well as the present study, it includes a paper by Mr. D. Fox entitled "Public Participation in the Administrative Process", which usefully examines the techniques for converting the slogan of "participation" into some reality.

The CRTC, like the ABT, has been in the forefront of trends to greater openness and public involvement in government. For both, the development of inquiry procedures has been seen as a corollary of the transfer of full powers to regulate broadcasting to persons independent of politics. Their regulatory powers and roles are largely equivalent, although the CRTC also regulates the Canadian Broadcasting Corporation, cable television systems and federally regulated telecommunications services.

In 1979 the ABT, with vague philosophies of "accountability" and no rules of procedure, commenced a new administration insisting upon public hearings before it would make decisions of any significance. It discovered problems whose solutions are only now being found. Similar problems were encountered by the CRTC, which responded with procedures of greater detail and sophistication than those to date developed by the ABT.

Mr. Johnston's study examines these and recommends further improvements. The study provides support for the thrust of the ARC's recommendations for improving ABT procedures.

This can be illustrated by reference to the problems of when to follow inquiry procedures, and how to control oral hearings.

The benefit of an inquiry system of regulation is that it guarantees that the regulator will not make a decision until he has heard and considered the concerns of all people who will be affected. This especially assists members of the public and community interest groups who are apt to be ignored by bureaucratic regulators, but it also protects the commercial interests of the industry involved.

One difficulty in running such a system is that locating the people who wish to be heard and examining what they wish to say can be time—consuming and expensive. At times the process will also seem unrewarding, since only some of the hundreds of different decisions to be made by the broadcasting regulator will attract the involvement of people other than the applicant, or will give rise to issues deserving thorough scrutiny in a public hearing. Unless this is recognised by the appropriate procedures, the regulator will adopt routines for dealing with applications which either effectively prevent people obtaining a full and fair hearing, or so dominate the regulator's attention with undigested trivia and formality that he is unable to react properly to important issues.

Both these dangers surfaced in the early days of the ABT, partly as a result of the load of unprepared renewal hearings undertaken in the name of accountability.

In Canada, the CRTC's resources seem to be greater, but it also was able to approach its work—load more sensibly by developing a procedure allowing variable responses to applications for decisions. Thus it exercises a discretion not to call inquiries, sometimes after first testing public reaction, and also has a system of dividing its hearing lists into "appearing" and "non—appearing" items. Mr. Johnston's study encourages these procedures, and suggests improvements by requiring more preliminary documentation from applicants and intervenors and by the active assessment of this material by the CRTC. He proposes that the CRTC should then spell out the issues which has caused it to call a public hearing. This approach has ben endorsed for Australia by the ARC, with further recommendations that the discretionary gateways by which the ABT could dispose of matters without a hearing should be tightly structured, thus guaranteeing rights of participation.

Turning to oral hearings, it would seem that Canada has not had an experience equivalent to the ABT's early series of capital city television licence renewal hearings.

The CRTC recognised the need for procedures to prevent hearings becoming either unco—ordinated babel or inaffective vehicles for participation. It has limited the right of members of the public to appear only by requiring notice of proposed intervention: the solution to the problem of standing also endorsed by the ARC. As a result of history, the CRTC has had the beneficial experience of operating two styles of hearing: in broadcasting matters with informality and limited cross—examination; and in telecommunications matters with more thorough preliminary procedures and adversarial hearings. Mr. Johnston's study suggests that there are advantages in being able to vary the formality of procedures. At times a broadcasting matter will require testing by court—like procedure preceded by exchanges of written evidence and analysis of issues, but at other times these procedures will be unnecessary and unwise. What is needed is ample procedural rules allowing formalities to be introduced when appropriate, and regulators able to direct each inquiry down the procedural path suited to its circumstances.