

THE AUSTRALIAN BROADCASTING TRIBUNAL AND THE FREEDOM OF INFORMATION ACT 1982

BY ROBYN DURIE

The Australian Broadcasting Tribunal ("ABT") recently received a request for information pursuant to the Freedom of Information Act 1982, and Section 106A of the Broadcasting and Television Act 1942 ("B & T Act").

The request basically was for information on the cost of purchasing or producing Australian programs by Australian commercial television stations and the revenue earned by their re-sale.

The request was made by Actors' Equity for use in replying to the Tribunal's discussion paper on Australian content requirements for commercial television.

Separate decisions were made under each Act.

The Chairman alone, as the principal officer of the ABT, pursuant to Section 23 of the Freedom of Information Act, gave a decision under the Freedom of Information Act on 30th May.

The Tribunal, comprised of the Chairman and Messrs. K.A. Archer and J. Wilkinson, gave a decision pursuant to Section 106A of the B & T Act on 27th May.

1. Freedom of Information Act

The only relevant documents for the purpose of the Act were those which had come into the Tribunal's possession after 1st December, 1982.

The particular document identified by the Tribunal as being relevant to the request made by Actors' Equity, apart from published accounts, was ABT form no. ABT-12.

The Chairman had previously formed the view that Section 27 of the Act applied, that is, those who had supplied the documents to the Tribunal might reasonably wish to argue that such documents were exempt under Section 43.

Submissions were made to the Tribunal following notification.

The Chairman made it clear that access must be sought to a particular document or documents, but in this case, that had been done. He held that Form ABT-12 was exempt under Section 43 (a)(c), but not Section 43 (1)(a).

Section 43 (1)(a) provides that a document is exempt if it would disclose trade secrets. Presumably, this was intended

to apply to information which is protected by an action for breach of confidence. The relevant part of paragraph (c) was that which provides that a document is exempt if ... "the disclosure ... could reasonably be expected to, and reasonably affect that person adversely in respect of his lawful business or professional affairs, or that organisation, or undertaking, in respect of its lawful business, commercial or financial affairs ..."

He said that similar considerations would apply in deciding whether the release of a document would constitute prejudice within the terms of Section 106A (5) of the B & T Act.

Accordingly, he found that the disclosure of documents not already published would disclose information which fell within Section 43 and thus such documents were exempt.

2. Decision under Section 106A (3)(b)

Section 106A of the B & T Act provides that the Tribunal shall assemble information relating to broadcasting and television in Australia.

Such information shall be that information either supplied pursuant to Section 106, required under 106A (2), or otherwise required by the Tribunal.

This information may be made available on request, unless its supply "would be prejudicial to the interests of any person" [Section 106A (5)].

Most of the submissions lodged did not oppose the release of audited balance sheets and profit and loss accounts which were published documents.

In relation to Section 106A,

the Tribunal noted that a principal use of the information assembled by it was as a departmental and public resource, in addition to permitting it make informed decisions and to access licence fees.

In relation to sub-section 5, it was noted that Section 19 provided that as the basis of its considerations, the Tribunal should have regard to the principle that it is desirable that, inter alia, contents of documents lodged with the Tribunal should be made available to the public. This principle is not repeated in Section 106A.

The Tribunal defined the phrase — "prejudicial to the interest of any person" as meaning the causing of detriment or damage to a person, whether personally or in his business affairs, by action in which his rights have been disregarded. This prejudice must occur as a result of the manner of the release of the information or the state of affairs surrounding it. It noted that there was no provision for weighing the prejudice to one person against the benefit to another by reason of the release of information.

The Tribunal rejected the submissions that form ABT-12 had been provided voluntarily and pursuant to an agreement that it was confidential. The Tribunal regarded that document as one provided pursuant to Section 106 (1)(c)(i), which relates to the provision of accounts. It held this, notwithstanding the fact that ABT-12 contains other information.

The Tribunal went on to say that it had consistently taken the view that information supplied under Section 106 (1)(c)(i) should be treated as confidential.

tial, unless it was otherwise publicly available.

In relation to Equity's request, the Tribunal said that it must be assumed that once the information requested was supplied, it would potentially be available to others, including competitors. It was said that it could be argued that no case had been made out on the balance of probabilities that the release of documents would be prejudicial to licensees; merely that life would be made more complicated or risky.

However, the Tribunal rejected that argument, and said that the release of the information would be prejudicial as:-

- (a) it could be used to the advantage of competitors and to the disadvantage of persons supplying the information;

- (b) provision of information would be of advantage to other media with whom television competes for advertising;

- (c) the availability of information would be of advantage to people with whom licensees are obliged to negotiate, and to the detriment of licensees, for example, production companies and unions; and

- (d) the information in ABT-12 is open to misinterpretation by people not familiar with the intricate details of the financial management of television stations.

Accordingly the Tribunal held, under Section 106A (3)(ii) that only published information would be available.

The Tribunal indicated its willingness to consult with

Equity regarding the nature and form of financial performance information which it regularly issued, on an industry or market basis.

3. Conclusion

This decision, brings some certainty into the interpretation of the Freedom of Information Act as far as the Broadcasting Tribunal is concerned, by equating the two "access to information" sections.

However, the Tribunal's comments as to the strength of the arguments raised by the licensees of commercial television stations raises some doubt as to how such cases should be put.

It is hard to imagine that such licensees would not have raised those issues.

BOOKS IN BRIEF

MEDIA LAW IN AUSTRALIA — a manual

By Mark Armstrong, Michael Blakeney and Ray Watterson
(Oxford University Press)

Essentially aimed at non-lawyers* and covers all you would expect from the title — defamation, copyright, contempt, radio & television, advertising — plus such topical extras as leaked government documents, electronic interception & recording and protecting business reputation.

The chapter on sub judice publication is worth reading alone for the paragraph, "The scope of potential contempt is sometimes exaggerated in the minds of media practitioners, to become broad or absolute to an extent which the law does not require" (echoing the CLB editor's experience through two decades of 'when in doubt, leave out' journalism!). Seeking to push the law of prejudicial contempt to its limits seems a worthier aim (see p.103). This same chapter might serve as a valuable adjunct to formal journalistic training (the electronic media need not feel neglected, "... film of an accused person entering or leaving the court building is fairly commonplace." When does this amount to contempt? (p.112).

*Legal practitioners may benefit from the extensive references collated at the back as handy guides to the leading & latest case law on the various subjects.

AUSTRALIAN TRADE MARK LAW and PRACTICE

By D.R. Shanahan (Law Book Co. Ltd.)

Practising patent attorney's guide through the law of trade marks in Australia (at February, 1982). Also brings into focus the relevant consumer protection (misleading or deceptive marks to be considered in assessing what is "contrary to law" — section 28 Trade Marks Act 1955) and restrictive trade practices' (assignment & licensing of trade marks) provisions of the Trade Practices Act.

For the non-expert in this field, the lists of contrasted trade names and trade marks, held to either infringe or not infringe, is a useful guide to Australian and New Zealand decisions.

PRICE DISCRIMINATION LAW — regulating market behaviour

By Michael Blakeney (Legal Books)

Although generally not concerned with communications law, this copiously footnoted treatise on section 49 of the Trade Practices Act highlights a problem zone for advertisers — cooperative advertising deals (supplier and purchaser combining to advertise supplier's product in conjunction with the promotion of specific retailers) may amount to price discrimination (p.97).