The Freedom of Information Act, the ABT and ABT 12 Forms

Actors' Equity Association of Australia and Australian Consumer's Association v Australian Broadcasting Tribunal (No. 2) and The Federation of Australian Commercial Television Stations

Administrative Appeals Tribunal, No. N83/483, 29 March, 1985.

In this decision the ADMINISTRATIVE APPEALS TRIBUNAL ("the AAT") refused to review a decision of the AUSTRALIAN BROADCASTING TRIBUNAL ("the ABT") refusing access by Actors' Equity to certain documents under the Freedom of Information Act 1982 ("the FOI Act"). Subsequent to the commencement of the proceedings the Australian Consumers Association was added as a party in support of Actors' Equity in its application and the Federation of Australian Commercial Television Stations in support of the ABT. The application was heard on the basis that the information sought was the information contained in form ABT 12 lodged by commercial television stations with the ABT in accordance with provisions of s106A(3)(b) of the Broadcasting and Television Act ("the B&T Act"). In fact, Actors' Equity had sought audited balance sheets and profit and loss accounts, the costs of production of Australian programs, the revenue earned by the resale of those programs, information obtained by the Tribunal in the performance of its functions. Equity said that it required such information for its submission to the ABT's enquiry in Australian content on commercial television.

Section 106A(3) of the B&T Act provided for access to information in the possession of the Tribunal on request, but this had been refused, as had access under the FOI Act.

The first question referred to in the decision was whether information contained in form ABT 12 was information supplied gratuitously to the Tribunal and not in pursuance of its statutory function, or whether or not it was supplied pursuant to the provisions of s106, which required the licensees to make available financial accounts to the Tribunal.

In looking at ABT 12 the AAT said that it had all the essential character of a profit and loss statement in an approved form. Accordingly, it did fall within s106.

The Tribunal had denied access to information under s43 of the FOI Act, the exemption relating to documents the exposure of which would disclose information relating to a person in respect of its business or its professional affairs. FACTS also argued that the documents in question were exempt within ss38 and 45 of the FOI Act. The ABT subsequently accepted the s38 argument, but not that relating to section 45. Section 38 provides an exemption where there is an enactment applying to specific information of the kind contained in the documents prohibiting persons referred to the enactment from exposing information of that kind. Section 45 related to breaches of confidence.

The AAT said that s38 did not found a claim for exemption of the documents in question and so proceeded to hear evidence in relation to the other claims for exemption.

The AAT characterised the questions which were to be answered under s43(1)(c)(i) as:-

(i) Would disclosure affect the licensees adversely in respect of their affairs?
(ii) Alternatively, could disclosure reasonably be expected to affect the licensees adversely in respect of such affairs?
(iii) If yes to 1 and 2 above, would such effect be unreasonable.

There was evidence of a number of impact factors, including competition for advertising revenue, competition with persons doing business with television stations such as film distributors, competition with other licensees seeking to buy or sell telecast rights and competition with people seeking to hire production facilities owned by the various licensees. These were not matters which would affect the work of the licensee, but rather the conduct of its day to day business. An adverse affect arising from them would ultimately be reflected in the overall profitability of a licensee being lower than otherwise. These were the factors which the AAT took into account. It did not feel that it was necessary to consider factors such as the value of shares in companies owning television licences, the vulnerability of such companies to

takeovers, or the value of those companies of television licences.

They found that the cumulative effect of information that could be gained from the ABT 12's, if disclosed and placed with other information would be considerable and could be made available to other licensees or other organisations who were either directly competing with licensees or who were otherwise involved in the fields of business in question. They also considered that there be a considerable value in making year by year comparisons. The information from the ABT 12's together with other information would enable competitors to determine accurately specific cost structures department by department, which would provide valuable information as to efficiency or otherwise and would be indicative of excessive monetary expenditure by licensees.

In interpreting s43 the AAT said that it was necessary to weigh the competing principles of public and private interest. Such interpretation had the support of Deputy president A.N. Hall in Chandra and the Department of Immigration and Ethnic Affairs (1984) ADMN 92-027.

In summary, the Tribunal said that the information gained by disclosure of ABT 12's would be likely to advantage a licensee in selling advertising time and other activities to the detriment of its competitors. Those competitors would include not only other licensees, but also other components of the media industry seeking funds available for advertising, such as magazines and radio. Other broadcasters competing for advertising revenue would be able to obtain a better picture for selling strategies adopted by one particular licensee. They also accepted that the dangers to a licensee would exist where licensees were in a market as buyers of rights to telecast local and overseas productions. The same considerations applied in respect of the part of the licensees' business which concerned the hire of production facilities.

Overall, they considered that what was fundamental was the likely ability of the competitor, once given the ABT 12 information, in conjunction with all other available information, to tip the scales of knowledge in relation to the opponent's costs in his share of the market. It seemed to the AAT almost axiomatic that the effects which were outlined would be unreasonable.

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RECENT CASES

Copyright Tribunal Sets Photocopying Rate

On 20 March, 1985 the President of the Copyright Tribunal, Mr Justice Sheppard gave his judgment in the case of Copyright Agency Limited v. The Department of Education of New South Wales & Ors.

This was the test case in relating to the assessment of the royalty payable to the owners of copyright in works under s53B of Copyright Act 1968 ("the Act"). The statutory licence in s35B provides for multiple copying of reasonable portions of works and articles in periodicals for the teaching purposes of educational institutions. As far as is material, the section provides as follows:-

> "(1) Subject to this section, the copyright in an article contained in a periodical publication is not infringed by the making of copies of the whole or a part of that article, by or on behalf of the body administering an educational institution for the teaching purposes of that or other educational institution.
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> (2) Subject to this section, the copyright in a work (other than an article in a periodical publication) is not infringed by the making of copies of the whole or a part of that work, by or on behalf of the body administering an educational institution, for the teaching purposes of that or another educational institution.
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> (3) Without limiting the generality of sub-section (1) or (2), a copy of the whole or a part of a work shall be taken to have been made for the teaching purposes of an educational institution if:-
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> (a) it is made in connection with a particular course of instruction provided by that institution; or
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> (b) it is made for the purpose of inclusion in the collection of a library of that institution.
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> (4) Sub-section (1) does not apply in relation to copies of, or of parts of, 2 or more articles contained in

quarie University, the University of Sydney, The N.S.W. Institute of Technology, The South Australian College of Advanced Education and the New South Wales Department of Technical and Further Education. By agreement between the parties fifteen (15) applications were made pursuant to s53B and s149A of the Act, reflecting a range of copying instances. Section 149A is the section relating to the machinery for the holding of enquiries under s53B. At the request of the parties the Tribunal reached a single rate, although the President noted that s53B contemplated an equitable rate being fixed for each incidence of copying. The applicant argued that there was a most common fee charged by authors and publishers for permissions to copy, which was evidenced by an actuarial study produced in evidence. This was between 4 and 5 cents per copy page. It also argued that collection costs should be included in the rates.

The respondents argued that the appropriate rate was the royalty authors commonly received on the sale of their works in the form of books. They said that the applicant's most common fee approach ignored the large number of free permissions granted by authors and publishers. They pointed out that most copying was transient and was not retained by schools or pupils for long periods of time. They also said that fixing too high a rate would lessen the amount of copying and thus lower general standards of teaching.

Sheppard J set a rate of 2 cents per page for each page copied pursuant to s53B. He said that the rate should be set by analogy to the measure of damages for infringment of copyright. In doing so he referred to two earlier cases before the Copyright Tribunal, The Report of the Enquiry by the Copyright Tribunal into the Royalty Payment in respect of Records Generally (published 24 September, 1979) and WEA Records case it was said that the amount of damages from infringment of copyright otherwise the person taking a licence would pay more for acting lawfully than unlawfully. Sheppard J also referred to the judgment of the House of Lords in General Tyre and Rubber Co. v. Firestone Tyre and Rubber Co. Limited (1976) RPC 197.

In particular, he referred to the judgement of Lord Wilberforce who dealt with a case where there was no normal rate of profit or established licence royalties. In such cases he said that it was for the plaintiff to adduce evidence which would guide the Court. Such evidence might consist of practices in the relevant trade or an analagous trade, of expert opinion expressed in public or other factors on which the judge could decide the measure of loss. However, the ultimate process was one of judicial estimation. He said that the case fell within Lord Wilberforce's category of judicial estimation of the available indications. He noted that the factors which he had taken into account were, collection costs, the fact that copying would be discouraged if the rate were too high, the transient nature of the copies made, royalties authors received on the sales of their works and the value of commissions given since s53B was inserted into the Act.

He noted that he had specifically excluded the following factors; the facts of overseas comparison, the fact that some authors wrote for other than commercial reasons, comparison with conversion damages under s116 of the Act and the inability of authors to insist on attribution when their works were copied by educational institutions.

Robyn Durie

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In reply to the argument put by Equity that the disclosure would lead to the common advantage of all licensees the AAT answered that the effect of acceptance would be to reduce all to the lowest common denominator. The essence of the character of the television industry was competition and in the AAT's view it was not the intended function of the FOI Act to change the character of a field of commerce by intrusion into it of the principles of disclosure which the Act laid down in relation to supply to the community of the information held by the government.

Robyn Durie