Directions as to Confidentiality in the ABT's Perth Enquiry

The Australian Broadcasting Tribunal ("the ABT") in its enquiry for the grant of a third commercial television licence in Perth has recently published extensive directions in relation to the production of documents and the confidentiality attached to such documents. The applicants had not agreed to the confidentiality provisions which applied in the Coffs Harbour case and left it to the Tribunal to make the appropriate orders that in respect of their financial records, the existing licensees were not in a comparable position to inventors or purchasers of trade secrets who had long been protected by the Courts from the destruction or diminution in value which would result from public disclosure of such trade secrets through public hearings. The main interests for which protection was sought were the television licences themselves. The almost inevitable fruit of those licences was considerable revenue. The licences were not private property, but a grant made virtually gratis on behalf of the Commonwealth. Until such time as a third licence was granted the two existing licensees were protected from competition by the Act. A major result of the decision made in the enquiry would be whether or not the two existing licensees will be exposed to competition.

One of the major issues in the enquiry is the argument by the two existing television licensees in Perth, STW and TVW, that the grant of a third licence would damage their own commercial viability. Under the Broadcasting the Television Act 1942 ("the Act") the Tribunal may refuse to grant a licence if it would affect the commercial viability of existing licensees (s83(6)(c)(ii)).

In considering its directions the Tribunal referred to s19(1) of the Act which provides that proceedings of the Tribunal should be held in public, although that section does go on to permit the Tribunal to take evidence in confidence. It pointed to its dilemma in cases like this where it was possible that if all claims for confidentiality were upheld and a licence were not granted, the basis of the decision not to grant a licence and the necessary time taken in hearing the matters, would be withheld from the public. Accordingly the Tribunal said that it would not be appropriate to shield documents from public view or from disclosure to other parties merely because the party producing the documents had some generalised concern about the concept of having their documents disclosed.

The ABT referred to two other factors. The first was that the existing licensees had voluntarily exercised their right to enter into the enquiry and to argue on financial and other grounds against the grant of a third licence. Accordingly, they could not then reasonably insist on protecting the basic evidence in their "commercial viability" case from other parties in the enquiry or from the public.

It was the Tribunal's view that financial operations operating under a licence were not entitled to such high protection from scrutiny as financial operations of a business created from private assets and opportunities in a market fully open to competition.

The Tribunal decided that the only available balancing of interests arising under the relevant sections of the Act (s21(2), s21AB(1)(i), s25(1), s25AB(d),-(e), s17, s25(3) in relation to the Tribunal's powers; s25(3), s80A — Natural justice and s25(2) - informality and expedition) would be to allow what might be called "limited disclosure" of some documents produced. The Tribunal attempted to confine this area to that which was truly necessary to protect information which really should remain secret and stated that it would attempt to conduct parts of the hearing which deal with the documents the subject of limited disclosure in public as far as it was possible to do so without actually disclosing the confidential material.

Attached to the directions were schedules setting out the classes of persons to whom material might be disclosed. There were two main classes of people who would have the benefit of limited disclosure and they were the legal representatives, to whom the widest field was practicable, and people advising those people, who were not themselves lawyers but who could advise the lawyers. Those people did not include employees of the existing licensees or of the TEN Network, which had intervened in the proceedings. All those to whom limited disclosure was granted were required to give an undertaking.

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DEFAMATION (Cont'd from PAGE 14)

system acknowledged that public debate in the U.S. is much more scrupulous of personal reputation, and careful with the facts, than it is in more anxious jurisdictions like the U.K. and Australia.

Why, in the country of Patrick White and Thomas Keneally and David Williamson and Stephen Sewell do we put up with the State looking over our writers' shoulders?

Why does the recall and pulping of Ross Fitzgerald's "History of Queensland from 1915 to the Present" because of a complaint by the Chief Justice, Sir William Campbell, not provoke protests from academic believers in free scholarship?

Why do those great believers in individual creativity, the city architects, passively accept what Kevin Rice, president of the NSW chapter of the Royal Australian Institute of Architects, calls a debate on architectural standards 'stifled' by the laws of libel?

Why does one of the country's finest playrights, Alex Buzo, have to shell out to David Hill, head of the State Rail Authority, because Hill chose to identify himself as one of the less attractive characters in "Mackassar Reef"?

The assumptions running through our system of State regulated speech were well illustrated when the National Times published the story that Robert Askin when he was Premier of New South Wales had received $100,000 a year in payments from organised crime figures.

There was a storm of abuse of the National Times, the reporter, David Hickie, and the then editor, David Marr. It was 'despicable', said the then leader of the NSW Liberal Party, Bruce McDonald. It was in 'appalling bad taste' said the National Party's expert in family morality, Ian Sinclair. Neville Wran said it was 'tasteless in the extreme.' Askin's widow, Molly, wept on ABC radio as she asked why Marr and Hickie 'had to be such utter curs to wait until he died.'

The grieving widow did not have the consolation of the huge damages which no doubt would have been hers if the story had been published when Askin was alive. But she did have some consolation. When Askin died he left an estate of $1.8 million. When she died, Molly left $3.4 million. From a Premier's Salary.

The question which no politician asked while heaping abuse on the National Times was the one James Fairfax, chairman of the Fairfax Board, asked when he read the story: 'Why was this not published when Askin was Premier?'

I think the answer to this and the other fundamental questions about out libel system is another question: why do we not trust ourselves?

Robert Pullan

In its directions, the Tribunal also commented on the question of relevance. It decided not to require production of a number of documents which the parties had requested because they were not sufficiently relevant.

The ABT noted that the enquiry was not a judicial enquiry but an administrative one. It differed from a Court dealing with a dispute in that:-

(a) a Court had the benefit of issues being confined by pleadings, within a framework of established and well defined categories of forms of action, as well as a large volume of case law precedent;
(b) the legal rules of evidence have the effect of excluding from the proceedings of Courts a large amount of material which would otherwise arguably be relevant. Pursuant to s25(2) of the Act the Tribunal is not bound by the rules of evidence;
(c) the restraints of time and money which exert a natural break on prolixity in most proceedings of courts do not necessarily operate in proceedings before the ABT. In this regard the ABT noted that television markets of a size comparable to Perth were sometimes valued in the commercial world at over $50 million. With such economic interests involved, it was only natural that some delay might be preferred.

Accordingly, the issues which had some relevance to the enquiry were very broad. The ABT considered that it was required by the Act to make practical judgments about the likelihood, as a matter of practical reality, of its being helped to make a decision about the licence by evidence which as to profitability logical relevance was not sufficient. Accordingly, detailed internal financial information about advertising revenue would be required. For the same reasons a meticulous comparison with other metropolitan markets such as Brisbane and Adelaide was not relevant.

The enquiry is still proceeding.

Robyn Durie