AN OUTLINE OF THE NEW PUBLIC INQUIRY PROCEDURES OF THE AUSTRALIAN BROADCASTING TRIBUNAL

Introduction

The law which governs the major powers of the Australian Broadcasting Tribunal ("the Tribunal") has gone through major changes in the last five years. Some of these changes relate to the criteria by which the Tribunal exercises its powers. Others relate to the procedures which are applicable in the various processes. It is this latter area which has undergone major recent surgery, comprising amendments of the Broadcasting Act 1942 ("the Act") and the promulgation of a new set of inquiry regulations.

To put the changes in a proper perspective, it is necessary to look back to the beginnings of the Tribunal's public inquiry processes. Apart from the Self-Regulation Inquiry of 1977, the Tribunal's first major forays into the public inquiry field were in the licence renewal inquiries for the Adelaide and Sydney commercial television stations in late 1978 and early 1979. These inquiries were regarded as unsatisfactory by almost everyone who took part. The applicable procedure was ill-defined in the Act and the Tribunal members lacked the kind of experience or legal background that would have enabled theme to fashion new rules quickly from scratch. Blame for the confusion which arose in Adelaide and Sydney is commonly levelled at the Tribunal, which was unable to achieve a generally acceptable balance between the competing interests at inquiries, and the licensees, who sought protection in folds of silk and detailed legal argument. However, a large measure of the responsibility lay with those who were responsible for the drafting of legislation which failed to provide a proper framework for the holding of public inquiries.

The problems with the Act were recognised by the Federal Government soon enough, and the whole question of the Tribunal's inquiry procedures was referred to the Administrative Review Council ("ARC") for consideration and report. The ARC reported in early 1981, with a series of recommendations intended to improve the effectiveness of the Tribunal's inquiry processes and provide for greater control over the procedures by the Tribunal. The proposed procedures were based on one uniform inquiry process applicable wherever the Tribunal proposed to exercise a substantive power. The whole process was a detailed mix of statute, regulations and administrative arrangement, with (at the risk of over-simplifying matters), three main features:

- greater reliance on documentation;
- elimination of technical rules about who could participate; and
- confining of oral hearings to issues best dealt with at such hearings.

The Government endorsed these recommendations in 1984, and the new inquiry system was implemented in part by the Tribunal's own practices, and in greater part by the Broadcasting and Television Amendment Act 1985. However, the real framework for the inquiries is embodied in the new Australian Broadcasting Tribunal (Inquiries) Regulations (1986), which appeared in the Commonwealth Gazette of 22 May, 1986.

The Role of the Tribunal

To understand how the inquiry procedures are intended to operate, it is important to understand what kind of body the Tribunal is. Above all, the Tribunal is an administrative agency, not a court. It can exercise a number of substantive powers on application (such as grant and renewal of licences, determination of program standards and approval of share transactions), and (in many cases) it can itself decide to commence an inquiry.

The inquiry process is the means by which the Tribunal informs itself before it exercises a power. An inquiry is not a trial, nor is it a kind of boxing match with the Tribunal acting as referee. The important point is that the inquiry is held for the Tribunal's benefit, and the Tribunal should control the manner in which it informs itself, provided that it properly discharges the duties placed on it by the Act. The two main duties that the Tribunal must fulfill are the following:

- to make a thorough investigation into all matters relevant to an inquiry; and
- to be both expeditious and just,

including the duty to comply with the rules of natural justice.

The courts have recognised that thorough and just investigations are not necessarily expeditious, and there has been some recent judicial head-scratching over where the line is to be drawn in respect to the obligation to investigate (see TVW Enterprises Ltd v ABT (No 2) (1985) 61 ALR 79, per Forster J; TVW Enterprises Ltd v ABT (No 3), 7 February 1986, per Muirhead J).

The object of the new procedures is to give the Tribunal the means to make better use of inquiries than was previously the case. However, the new legislation also requires the Tribunal to hold inquiries in many cases where they were not previously required. The inquiry as a useful tool has become the inquiry as a mandatory obligation. Of course, the "new" inquiry is a different beast to the "old" inquiry. Nevertheless, the question most commonly asked remains: will the new inquiry process speed up inquiries and reduce costs, or will it simply bog the Tribunal down in a morass of technical procedures, or bury it under a mountain of paperwork?

The answer to this question will come only with experience, but a run-through of the process may help to crystallise some thoughts on the matter. The following explanation is not intended to be a definitive legal explanation, but rather a readable guide to the detailed provisions.

Initiation of Inquiries

One of the new features of the inquiry process is that inquiries can be initiated by members of the public or the industry, as well as by the Tribunal and the Minister. If a person applies to the Tribunal for it to exercise a "substantive power", then the Tribunal must hold an inquiry into the requested exercise of the power: s17A-17C. In these cases, the basic requirement is that an application must comply with the regulations. This is not necessarily as onerous as it may sound. In summary, the regulations say that an application shall:

(a) be in accordance with the appropriate "approved form" (although the Tribunal can allow someone to make an application in a different form, subject to any conditions that the Tribunal may determine);

(b) indicate the relevant power of the Tribunal;

(c) outline the grounds for the application, and any other information that is required by the approved form;

(d) be signed or have the company seal properly affixed; and

(e) be lodged with the Tribunal, together with copies of other documents relied on by the applicant.

There is an additional (and controversial) requirement for applications from unincorporated associations. These applications must state the objects of the association (if any) and the name of each member of the association (if 20 or fewer members) or the name of each officer of the association (if more than 20 members).

All these requirements are subject to the qualification that strict compliance is not necessary.

The Tribunal can reject an application if it does not comply substantially with the requirements of the regulations, if it does not contain sufficient information on which to base an inquiry, or if it is scandalous, vexatious, frivolous or an abuse of the Tribunal's procedures. If it refuses an application, the Tribunal must give the applicant concise reasons for so doing.

The Inquiry File

When an application is accepted, the Tribunal must open an inquiry file. This marks the commencement of the inquiry. Similarly, if the Tribunal decides to hold an inquiry on its own initiative, it must open an inquiry file. The inquiry file is the master record of what takes place in the inquiry.

The Tribunal is under a duty to place all documents relevant to the inquiry on the inquiry file. This is a continuing duty throughout an inquiry. There are four classes of documents which do not need to be placed on the inquiry file:

(a) documents which are covered by a confidentiality direction;

(b) submissions which do not comply with the regulations, or are irrelevant, scandalous, vexatious, frivolous or an abuse of the Tribunal's procedures;

(c) staff legal advice or opinions, excluding staff opinions about the interpretation of the Act or the regulations; and

(d) published documents available to the public - the Tribunal need only put on the file a short notice outlining the matters in such documents which are to be taken into account, and specifying where such documents are available to the public.

The inquiry file must be made available for public inspection at the Tribunal's central office (in Sydney) and at other places determined by the Tribunal. In the case of licence grant or renewal inquiries, the Tribunal has to try and ensure that the inquiry file is available at a place within the (proposed) service area of the licence.

Notices to Licensees and Applicants

Once an inquiry is commenced, the Tribunal must notify any affected licensee that is not already a party to the inquiry (see below). If the inquiry affects more than one licensee (such as where it concerns the possible determination of program standards) and the relevant licensees are members of one of the three main industry associations (i.e. FACTS, FARB, or PBAA), the Tribunal can instead notify the relevant association.

The obligation to notify applies also in relation to submissions lodged in the inquiry. The Tribunal must notify affected licensees (or their industry association) of the relevant submissions lodged and, as far as practicable, ensure that the notified licensees receive copies of those submissions (unless the Tribunal has refused to take the submissions into account because they are, for example, frivolous or an abuse of Tribunal procedures). Usually, this will be by a direction that persons lodging submissions should also serve a copy on the licensees.

If an inquiry follows after an application from a person, that person is also entitled to be notified of relevant submissions lodged, and, as far as practicable, to receive copies of those submissions.

Decision Without Advertisement

In some cases, it will be possible for the Tribunal to make a decision simply on the basis of an application and such other information the Tribunal has in its possession about the relevant issues. This can only be done if the Tribunal is satisfied that it has made a "thorough investigation" into all the relevant matters in such cases, so that in practice the use of this option will be limited to fairly minor and straight-forward applications. The regulations specifically say that decisions of this kind cannot be made in the case of licence grants, or renewals for licences other than re-broadcasting or re-transmission licences.

Where the Tribunal makes a decision in such cases (either granting or refusing the application under investigation), it must notify the applicant and affected licensees, and publish a notice which gives particulars of its decision, and state where and when the inquiry file can be inspected.

Advertising the Inquiry

Where the Tribunal commences an inquiry on its own initiative, or determines that an application cannot be dealt with quickly, the Tribunal must, within 28 days of opening the inquiry file, advertise the fact that an inquiry has commenced. The advertisement must in every case appear in the Commonwealth Gazette and the Tribunal's own newsletter, ABTEE. Where the inquiry concerns the grant, renewal, suspension, or revocation of a licence, or the determination of program standards, or any other matter that the Tribunal thinks is of significant public interest, the advertisement must also appear in at least one newspaper. If the inquiry concerns a particular area or place, the newspapers chosen should include one which circulates in that area or place. The advertisement must specify:

(a) the relevant particulars of any application;

(b) the issues to be considered in the inquiry;

(c) the places and times for inspection of the inquiry file; and

(d) the closing date for lodgment of submissions.

The closing date for submissions must be at least 42 days after the date of the Commonwealth Gazette in which the adver-

tisement appears. However, the Tribunal has the power to extend this period to allow a late submission to be accepted.

Submissions

The regulations lay down some basic requirements for submissions. The essential requirement is that they be in the form of a "document". This includes audiotape, videotape, computer disc, and on paper. In the case of documents which are not on paper, the Tribunal can impose conditions, e.g. that any videotape must be in Beta format, or any computer disc must be in particular format. Submissions on tape or disk etc must also be accompanied by a statement (whether on a sticky label or separately) which identifies the submitter and the inquiry to which the submission relates, and outlines the content of the document. A submission has to be signed or otherwise executed.

Submissions must indicate the nature of the decision, recommendation or direction (if any) that the submitter wants the Tribunal to make in the inquiry. A submission must also outline any matters relied on in support of it, although where a submitter wishes to rely on a published document, it is only necessary to name the document, outline what part of it is relied upon, and specify a place where it is available to the public.

Submissions from unincorporated associations must contain the same kind of information about membership as do applications (see above under heading "Initiation of Inquiries").

The Tribunal can reject a submission if it does not comply with the requirements of the regulations, or if it is irrelevant, scandalous, vexatious, frivolous or an abuse of the Tribunal's procedures.

Parties to the Inquiry

Once all the submissions are in, the Tribunal will usually be able to determine the final list of parties to the inquiry. The Act no longer contains the notion of an "interest" as a qualification to be a party. Instead, the parties to an inquiry are:

(a) the applicant (if any);

(b) any person who has lodged a submission which has been accepted by the Tribunal; and

(c) any other person that the Tribunal directs should be a party in the public interest, because of special circumstances.

Parties to inquiries do not have unlimited rights of participation. Subject to normal principles of natural justice, the Tribunal can direct that the participation of any party be limited to, for example, specific matters raised in that party's submission.

The Documentary Phase

Eventually, the Tribunal will have before it a series of inquiry documents which will usually include an application, one or more submissions, and supporting documents.

At this stage, several things can be done:

(a) the Tribunal could move directly to a decision if it were satisfied it had all the information it needed before it;

(b) the Tribunal could require any party to lodge additional documents, and reply to any other documents lodged;

(c) the Tribunal could restate the issues to be considered and readvertise;

(d) the Tribunal could join the inquiry to another inquiry;

(e) the Tribunal could suspend the inquiry until a future date set by the Tribunal.

All of these steps could be taken in various orders, and perhaps more than once. The object is to get as much of the relevant information in documentary form as possible.

Conferences and Hearings

During the documentary process, or at the end of it, the Tribunal may decide that the documentation alone will not give it the information it needs to reach a decision. In that case, it can hold a conference or a hearing. Conferences and hearings can be held at any time to examine various aspects of the inquiry.

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mailings has been very good, with answers from just under a third. While some said "thank you, I'll read the material", there were assurances from members from all three parties that they support the introduction of performers' rights.

"This is good support to build on, though there are still many MPs who must be convinced of the importance of the issue," said the Chairperson of the Performers Guild. "We must keep the momentum going and make sure that every MP is familiar with our arguments by the time the copyright legislation is discussed in the House of Commons."

"This is a critical issue for performers and we are on the verge of winning the protection we have sought for years." said Lyn Jackson. "I urge all our performer members to stay involved."

Jane Craig

The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), is a Canadian union of performers, writers and broadcast journalists affiliated to the Canada Labour Congress (CLC), the International Federation of Actors (FIA) and the International Affiliation of Writers' Guilds (IAWG).

The above article appeared in ACTRA's quarterly publication ACTRASCOPE. Jane Craig, the author of the above article is its Editor.

Correspondence should be addressed to:

Jane Craig, Editor
ACTRASCOPE
2239 Yonge Street
Toronto, Ontario
M4S 2B5

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Conferences are a useful and informal means of discussing and clarifying matters which do not require the formal taking of evidence or detailed legal argument. The Tribunal might, for example, conduct conferences with submitters to clarify points raised in their submissions. In other cases, where there is a collateral dispute between parties to an inquiry, a conference may be one means of resolving it. A conference can be conducted by any member of the Tribunal, usually but not necessarily a member of the inquiry Division.

Hearings will usually be a bit more formal than conferences, although it is likely that the Tribunal will be looking to shed as much of the "judicial" appearance of current hearings as it can. The Act itself says that the Tribunal shall not have regard to "legal forms and solemnities". The most important point about hearings is that they will be confined to matters which are best dealt with in oral hearings. A hearing will not roam over all the issues to be decided in the inquiry.

The Tribunal may restrict participation of parties to conferences and hearings, as it directs. Of course, this power is subject to implicit natural justice limitations.

The regulations specifically provide that proceedings (other than confidential sessions) at a conference or hearing may be recorded in any manner that does not, in the Tribunal's view, disrupt the proper conduct of the proceedings.

Conclusion of Inquiry

Following a conference or hearing, the Tribunal may decide that it needs additional documentation. It may then hold another conference or hearing as it sees fit. At some stage it will be satisfied that it has made a thorough investigation into the relevant issues and is sufficiently well-informed to proceed to a decision. A decision, when made, has to be followed by the familiar report on the inquiry.

Transitional Arrangements

The procedure outlined above will apply initially to any inquiry which does not fall within s98 of the Broadcasting and Television Amendment Act 1985. In numerical terms, that will be a fairly

small number of inquiries, the most important of which will be:

(a) inquiries into the determination of program standards; and

(b) inquiries into licence grants.

All other licensing inquiries (involving "old system" licences) will continue under the old procedures until such time as regulations are made under s98(2) of the Broadcasting and Television Amendment Act 1985. That sub-section allows regulations to apply the new inquiry process to inquiries involving old system licences. These transitional regulations are currently being drafted, and should appear in the Commonwealth Gazette a few weeks after the main body of inquiry regulations. It is expected that the new procedures will not apply to any inquiry which involves an old system licence, and has already commenced.

Leo Grey

IMPERSONATION AND WRONGFUL USE OF NAME AND LIKENESS

Media law in Australia is surprisingly lacking in substantive law on the issue of the wrongful use of a person's likeness or name for commercial gain.

There is, of course, some substantive law in relation to the protection of privacy in a non-commercial context (e.g. Argyll v Argyll [1967] Chancery CH. 302).

This article is restricted to the commercial context although, of course, many of the principles discussed would apply equally to non-commercial invasion of privacy.

Impersonation

It would seem that, so long as it is clear that an impersonation is occurring, there is no rule of law which would prevent an advertiser utilising a public figure in an impersonation occurring in an advertisement, whether authorised or not.

The usual restrictions upon any published material would apply, namely that the usage is not defamatory of the person being impersonated (or any other person or corporation) and that the material is not obscene, blasphemous, an incitement to riot and so on.

The Broadcasting Tribunal has on more than one occasion, and most recently in relation to the use of former President Richard Nixon's impersonation in commercials, intervened to prevent commercials containing impersonations to occur. However, impersonations of Humphrey Bogart, Margaret Thatcher and the Queen have all recently been utilised in commercials without apparent intervention by the Tribunal.

So far as broadcasting regulation is concerned, the following Broadcasting Standards may be relevant - paragraphs 38(a), 38(g), 38(i), 40(a) and 40(b). None of these Standards, however, are directly in point and would only circumscribe the manner in which the impersonation was performed rather than prevent the impersonation per se.

In the United States the commercial exploitation of a person's likeness has now been effectively prevented by developments in tort law. A leading case occurred in California in 1984 and involved the singer, Frank Sinatra, who objected to a lifesize photograph of himself being used