

## CONTINUATION OF THE PERTH SAGA

On 10 February, 1986 Mr Justice Muirhead delivered judgment on what may be the last of the cases arising from the Tribunal's inquiry into the third licence in Perth (at least until the report is prepared), TVW Enterprises Pty. Limited v Australian Broadcasting Tribunal & Ors (No. WAG 5 of 1986).

Towards the end of the inquiry TVW Enterprises Pty. Limited ("TVW") had sought to introduce evidence of its proposals for an "alternative television service, for the Perth television area. This proposal was endorsed by the other incumbent licensee, Swan Television and Radio Broadcasters Ltd. This was placed before the Tribunal in late 1985 and proposed a localised non-profit community television station owned through a government commission or statutory body and drawing upon members of the community to direct and establish operating policies.

In their ruling on 22 January 1986 rejecting the evidence, except for that relating to the preferences of the public and the effect on potential alternative sources of the grant of a commercial licence, the Tribunal made the following points. First, as this proposal had not been mentioned in TVW's original submission about the grant of the third licence it could not be said that there had been reasonable notice of TVW's proposal. Secondly, the Broadcasting and Television Act 1942 ("the Act") required the Tribunal to proceed with thoroughness, justice and expedition. There was some injustice and hardship in requiring the applicants at a late stage to meet what was in essence a substantial addition to the case against the grant of a licence. Justice and expedition would not be served by allowing the evidence to be given. The Tribunal also noted that it was not hearing an application for the grant of a public television station nor had the Minister called for submissions in this regard. There was evidence from the Department of Communications that there were no plans at present to call applications for public television licences.

The Tribunal concluded that it would hear evidence about public attitudes to additional television services and the effects which the grant of a commercial licence might have on alternative television generally, rather than the specific TVW

proposal.

The specific decisions concerning which review was sought were:

- (a) "the Tribunal would not investigate a specific proposal by the applicant for an alternative television service for the Perth metropolitan area ("the alternative television proposal");
- (b) the applicant would not be permitted to adduce evidence as to its alternative television proposal;
- (c) the decision of the Tribunal as to whether or not to investigate the applicant's alternative television proposal was relative to an assessment of justice and expedition;
- (d) that the likelihood or feasibility would not in itself be a reason for refusing to grant a further commercial television licence;
- (e) that the Tribunal is not required by s83(6)(d) to be persuaded that a new commercial television licence is required in preference to all other forms of television service but rather that the grant of such licence would not be in the public interest."

Muirhead J referred to Forster J's decision in TVW Enterprises Limited v Australian Broadcasting Tribunal & Ors (1985) 61 ALR 79, one of the earlier Perth decisions. In that case it had been held that the Tribunal was obliged, in deciding whether or not it should refuse to grant a licence of the kind contemplated in the Minister's notice, to consider the choice of frequency set out in the Minister's notice. TVW relied on this decision to say that the Tribunal should receive and consider evidence referring to the desirability, public need for, and feasibility of establishing a television service of a different nature to that provided by a commercial television station.

Muirhead J disagreed. He did not think that the public interest considerations in s85(6)(d) required, rather than permitted, the Tribunal to admit the material in dispute as a matter of law, on the basis that public interest in an alternative service and the feasibility of



establishing it was or might be relevant to the inquiry. Accordingly, it was not a matter which the Tribunal was bound to investigate within The Queen v The Australian Broadcasting Tribunal & Ors; Ex parte Hardiman & Ors (1980) 144 CLR 13.

Muirhead J replied to TVW's points as follows:

- (a) there was no rigid rule as to what weight ought to be given to the factors of thoroughness, expedition and justice. In this case justice had not been sacrificed to expedition; as Mr Justice Aickin thought may have been in the case of Barrier Reef Broadcasting Limited v Minister for Post and Telecommunications and Anor (1978) 19 ALR 425.
- (b) the Tribunal did not take into account irrelevant considerations.
- (c) it was not correct to say that in assessing the public interest factors under s83(6)(d) of the Act that the Tribunal must submit evidence to enable a comparison to be made between the nature of the television service specified in the the Minister's notice and realistic alternative forms of television that might be prejudiced by the grant of the third commercial television station. Such a broad proposition would tend to turn the inquiry into a section 18 inquiry, without a wide range of other parties who might be interested in being put on notice or being given the opportunity of making submissions; and
- (d) there was no legislative requirement to investigate alternative services when dealing with an inquiry into a Ministerial notice relating to a commercial station.

In conclusion Muirhead J drew attention to the importance of expedition in matters of this kind. It is to be hoped that someone took this into account.

The Perth hearings have now concluded. A report is not expected before June.

Robyn Durie

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#### AFTERMATH OF THE CONNOR REPORT

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On 25 March the Government announced a package of decisions following the report of the Special Broadcasting Service Review Committee ("the Connor Report").

That report was completed in December 1984 and tabled on 25 March 1985.

The major decision is to replace the existing SBS with the Special Broadcasting Corporation ("SBC"), with its own legislation and statutory charter.

This will have the great advantage of giving the SBS flexibility over staffing matters, planning, programming and administrative arrangements. It is hoped that the legislation will be introduced in the 1986 autumn parliamentary session and become operational on 1 July 1987.

Amongst the recommendations from the Connor Report which the Government has adopted are:

- that the ABC and SBS should co-operate, share resources, co-ordinate programming and exchange personnel;
- That a national program packaging unit be set up to provide language programs to public, commercial and other statutory broadcasters;
- that ethnic broadcasting stations be included within the "special interests" public broadcasting classification;
- that the SBS be subject to the same tendering procedures on television production as the ABC;
- that SBS staffing terms and conditions be removed from the Public Service Board control and senior executive positions be widely advertised and open to general competition.

Amongst the recommendations rejected were:

- the holding of a further inquiry to consider the integration of the ABC and the SBS;
- reduction of the membership of the SBS Board;