

## THE PERTH SAGA

On 15 May 1984 the Minister of Communications published a notice inviting applications for the grant of a licence for a commercial television station to serve the Perth metropolitan area. The hearing commenced in December 1984 and is continuing. The hearing is not expected to conclude until early next year, and the announcement of the successful applicant will follow some months later. As both remaining applicants intend to operate in the VHF spectrum it could be a further two to three years before the new station commences broadcasting.

There have been two casualties of the saga; Now Television Limited withdrew on the day before the hearing commenced and Perth Television Limited withdrew in August 1985. The remaining applicants are West Coast Telecasters Limited and Western Television Limited. Over the tortuous course of the inquiry there have been a large number of applications to the Federal Court (eleven at the date of writing), which have provided guidance on the powers and duties of the Minister under the Broadcasting and Television Act 1942 ("B&T Act") and the Australian Broadcasting Tribunal's procedures and powers. Some of these points are dealt with below.

### Minister's Obligations to Consult Existing Licensees

Sections 111C(1) and 111C(2) of the Act provide in part, as follows:

"(1) It shall be the responsibility of the Minister -

- (a) to plan the development of broadcasting and television services in Australia;
- (2)(b) In discharging his responsibilities under paragraph (1)(a) the ... Minister shall -

- (i) consult representatives of broadcasting stations and television stations in relation to matters affecting those stations ...".

It was common ground that TVW Enterprises Limited ("TVW") one of the existing Perth licensees, was not consulted by the Minister prior to the issue of his notice

of 15 May, 1984. Mr Justice Toohey held that whilst the Minister was obliged to consult TVW in relation to the development of television services generally, he was not obliged to consult them prior to the issue of the notice. Section 111C(1)(a) was only concerned with planning in its broadest sense. As a matter of construction of the B&T Act there was no indication that failure by the Minister to consult a licensee would avoid an inquiry (No. WAG 11 of 1985). TVW has appealed from this decision.

### 2. Position of Applicants Not Yet Incorporated

At the time its application was lodged Perth Television Limited ("Perth") was not incorporated. The Tribunal found that the application was made by John Pye as Chairman of a group of sponsors who proposed that a licence be granted to Perth when it was incorporated. The Tribunal accepted the application as one made by Mr Pye and gave Perth status as a person directly concerned or interested in the proceedings within s25(3) and s82 of the Act. TVW challenged this decision under the Administrative Decisions (Judicial Review) Act 1977. Mr. Justice Toohey rejected this application (No. WAG 12 of 1985 8 February, 1985) saying that there was nothing in s82 of the B&T Act which confined applications for a licence to corporations. It was only the grant of a licence which was required to be to a corporation (s81(3)). When Perth was incorporated, as it was before the hearing commenced, it was a person directly concerned in the proceedings. The Tribunal then granted Perth an extension of time for it to lodge its application and, although this extension was challenged, Forster J upheld the ruling. (No. WAG 34 of 1985, 26 June, 1985).

### 3. Participation by Parties other than Applicants

There are two existing commercial television licensees in Perth, TVW and Swan Television and Radio Broadcasters Limited ("Swan"). Five sets of proceedings were brought by TVW and Swan relating to the scope of the enquiry and the rights of the existing licensees to cross-examine witnesses, call evidence and make submissions.

Section 25 of the B&T Act provides as follows:

"25(1) The Tribunal shall, without regard to legal forms and solemnities, make a thorough investigation into all matters relevant to an inquiry under this Division, and may give all such directions and do all such things as the Tribunal considers are necessary or expedient for the expeditious and just hearing of the inquiry.

(2) The Tribunal is not bound by legal rules of evidence and may inform itself on any matter in such manner as it thinks fit.

(3) Subject to section 19 the Tribunal shall ensure that every person having an interest in proceedings before the Tribunal at an inquiry is given a reasonable opportunity to present his case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in relation to those documents."

As to "all matters relevant to an inquiry" the ABT had decided that the choice of the vision carrier and its frequency and the commercial viability of the new station were outside the scope of the inquiry. The relevant parts of s83 are as follows:

"83(1) As soon as practicable after the expiration of the period referred to in sub-section 82(4) or 82A(11), as the case requires ... the Tribunal, shall subject to sub-section (2), hold an inquiry into the grant of the licence.

...

(3) The Tribunal shall, at the inquiry or in its consideration of the application, as the case may be, have regard to any submissions, and to any replies or reply, lodged in accordance with section 82 or 82A as the case requires.

...

(5) An applicant for a licence shall, at the inquiry into the grant of the licence or, if the Tribunal,

in accordance with sub-section (2) considers the application without holding an inquiry, before the consideration by the Tribunal, give an undertaking in writing to the Tribunal that he will, if the licence is granted to him -

- (a) comply with the conditions of the licence;
- (b) if the licence is a licence referred to in paragraph (a), (b), (g), (h), (k), (ka) or (L) of the definition of "licence" in sub-section 80 (1) -

(i) provide an adequate and comprehensive service in pursuance of the licence, having regard to -

- (A) the nature of the community to be served in pursuance of the licence;
- (B) the diversity of the interests of that community; and
- (C) the nature of the other broadcasting and television services (if any) of which satisfactory reception is being obtained by that community; and

(ii) encourage the provision of programs wholly or substantially produced in Australia and use, and encourage the use of, Australian creative resources in and in connection with the provision of programs.

(6) The Tribunal shall not refuse to grant a licence to a person unless it has held an inquiry into the grant of the licence and -

- (a) the person has failed to give an undertaking in accordance with sub-section (5);
- (b) the Tribunal is satisfied that the grant of the licence would be contrary to a provision of this Act;
- (c) it appears to the Tribunal, having regard only to the following matters or circumstances, that

it is advisable in the public interest to refuse to grant the licence to the person:

(i) is not satisfied that the person -

(A) is a fit and proper person to hold the licence;

(B) has the financial, technical and management capabilities necessary effectively to operate the relevant broadcasting station or television station, as the case may be; and

(C) is otherwise capable of complying with the conditions of the licence;

...

(9) Where there are 2 or more applicants for a licence, each of whom is a person to whom, but for the sub-section, the Tribunal would be required to grant the licence, the Tribunal shall grant the licence to the most suitable applicant."

The choice of frequency for a vision carrier was a matter for the Minister to determine (s84(1)). However, the notice calling for applications gave a choice between UHF and VHF frequencies, which choice would raise questions as to the technical capability of the applicant concerned. The ABT had the alternative of refusing to grant a licence for technical reasons within s83(6)(d). In addition, the ABT was required to act in the public interest - In re Australian Broadcasting Tribunal; ex parte 2HD Pty. Limited (1979) 27 ALR 321. Accordingly, Forster J in proceeding No.'s WAG35, WAG37, WAG41, WAG42, WAG43 of 1985, in his judgment delivered on 19 June 1985, found that the criteria in s83(6)(c) must include the public interest.

He found that the commercial viability of the applicant's station was a relevant issue as:

(a) financial capability effectively to operate the relevant television station in s83(6)(c)(1)(B) must include the commercial viability of the station.

(b) It is not in the public interest that a new television station should fail financially, especially as applications were called on the basis that it was thought necessary in the public interest to have a third commercial television station in Perth.

(c) In considering the grant of the third licence the ABT was required to consider the commercial viability of the existing licensees (s83(6)(c)(3)).

Section 22 of the B&T Act provides as follows:

"In proceedings before the Tribunal at an inquiry under this Division, a person who is directly concerned in the proceedings, and, with the approval of the Tribunal, any other person having an interest in the proceedings may be represented by a barrister, solicitor or agent, who may, subject to any directions of the Tribunal given under sub-section 25(1) examine witnesses and address the Tribunal on behalf of that person."

Forster J recognized the commercial interest of existing licensees in the outcome of the inquiry generally and the opposing of the grant of a licence to anyone. Section 83(6)(d) requires the Tribunal to consider whether or not a licence should be granted. The existing licensees were the only persons represented with an interest to oppose the grant of any licence on technical or public interest grounds. Relying on passages of the decision of Aickin J in Barrier Reef Broadcasting Pty. Limited v Minister for Posts and Telecommunications (1978) 19 ALR 418 it was found that the existing licensees had a legitimate right to attack and attempt to demolish the individual cases of the applicants, as well as dealing with matters of general public interest. The ABT in the exercise of its statutory duty to make a thorough investigation had to permit that case to be put. The existing licensees' case was as wide as the inquiry, other than the s83(9) point, subject to the laws of relevance and proximity. As a result of this ruling a number of witnesses, particularly technical witnesses, were required to be called for cross-examination by the existing licensees.

#### 4. Duty of the ABT to Observe the Rules of Natural Justice

After hearing argument on the rights of the existing licensees to participate in the inquiry the ABT sent a telex to the applicants, the existing licensees and some of the special interest parties calling for further submissions. TVW requested that the written submissions of the parties should be exchanged and the submissions argued in an open hearing. This was not done. TVW argued that this involved breaches of s19, s25 and s80A of the B&T Act. Section 19(1) requires that proceedings of the Tribunal be public, s19(3) requires that the contents of the documents lodged with the Tribunal should be made available to the public and to all persons having an interest in the proceedings and s23(3) requires the ABT to ensure that interested persons have a reasonable opportunity to inspect documents to which the ABT proposes to have regard in reaching a decision in the proceedings and to make submissions in relation to such documents.

Whilst no decision was made by a court in relation to the ABT's action Mr Justice Forster in his decision on 19 June pointed out the ABT's impropriety in calling for further submissions without calling on the parties to serve copies on the other parties and making an opportunity for further oral submissions. Its action was found to be a clear breach of its duty to act fairly and observe the rules of natural justice pursuant to s80A. The ABT was admonished.

#### 5. Production of Documents

Amongst the documents the existing licensees were directed to produce were advertising and other financial material, including program costs. Objections were taken to serving copies of the documents ordered to be produced to the representatives of the special interest groups (the Australian Writers Guild, the Australian Journalists Association, the Musicians Union and Public Television (W.A) Inc.) and to certain experts advising the applicants. The latter objection was on the basis that such persons were potential competitors of the existing licensees.

Each of the Tribunal, Forster J and the Full Federal Court (comprising Sweeney, Toohey and Wilcox JJ) rejected an application of the "need to know" argument in relation to the production of docu-

ments. The inquiry was public and prima facie the information on which the ABT reached its decision was to be public unless there were considerations of confidentiality. The situation was the reverse of the "need to know" basis - all information should be public unless a case could be made out restricting its publication. As far as confidential documents were concerned those with access to these had to give an undertaking as to confidentiality.

Both Forster J and the Full Court accepted that it was relevant to the production of documents by the existing licensees that they had chosen to enter the inquiry and to argue the issue of commercial viability. Had they not done so they may not have been obliged to produce documents. As far as financial documents were concerned the position of the existing licensees was contrasted to that of businesses created from private assets and in a competitive environment. Television licences were granted by the government and licensees were "trustees" of them and accountable for the way in which they conducted their television stations.

Only Swan appealed to the Full Court on this point (No. WAG 59 of 1985, 1 August 1985).

The Full Court dismissed the appeal. It referred to the 2HD case where it was stated that:

"From the elaborate provisions made by the Act in relation to the grant, renewal, revocation and suspension of licence, the limitation on the ownership of shares, the determination of program standards and the extensive role which it gives to the Tribunal in connection with these matters, we infer that it is the purpose of the Act to ensure that commercial broadcasting is conducted in the interest of the public".

In relation to the "experts" who were potential competitors, both Forster J and the Full Court considered that the Tribunal had fairly balanced the interests of the parties.

#### The Perth Saga Continues

On 11 October, 1985 the Full Federal Court dismissed an appeal by TVW from the decision of Mr Justice Toohey that the Minister's failure to consult with the two existing Perth licensees did not result in

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the notice seeking applications for the third commercial television licence for the Perth Metropolitan Television area, and the subsequent enquiry, being invalid and void.

The Full Federal Court dismissed the appeal, and a cross-appeal relating to the Minister's duty to consult with existing licensees in relation to the development of television services in Australia by the introduction of a third licence in Perth.

All three members of the Court held that on its proper construction, the B&T Act did not make consultation under s11C(1) a pre-condition of the validity of the notice and the enquiry. The majority, composed of Beaumont and Sheppard JJ, considered that s11C(1)(a) imposed a statutory obligation on the Minister to formulate a policy in the area of the evolution, growth or expansion of television services in Australia. Such obligation was independent of the Minister's other statutory functions, such as his obligation to issue a notice pursuant to s82(1). In performing his duty the Minister had to consult with the existing licensees. However, their Honours made it clear that his failure to consult did not result in invalidity.

Mr Justice Sweeney considered that when deciding whether or not to publish a notice under s82(1) of the B&T Act, the Minister was discharging his responsibility to plan the development of television services in Australia. It was only in arriving at a decision to publish the notice that the Minister had to consult with existing licensees, not in deciding to publishing it.

It is understood that TVW is seeking special leave to appeal to the High Court against this decision.

Robyn Durie

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The following casenote concerning the Victorian Freedom of Information Act has been reprinted with the kind permission of the publisher of the Victorian Judgments Bulletin.

Ryder v Booth; Swinburne Ltd. v Booth; State Superannuation Board of Victoria v O'Connor (unreported Victorian Court of Appeal) Young CJ; Gray, King, JJ, June 26, 1985.

These appeals were heard together. The common issue was whether personal medical reports which each respondent had sought could properly be withheld by the State Superannuation Board because they came under the heading of "exempt" documents under s35(1) of the Act.

In each case, the Full Court dismissed appeals from County Court orders granting access to the reports.

Section s35 states:

"A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister, and -

- (a) the information would be exempt matter if it were generated by an agency or a Minister; or
- (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Section 30(1) states:

"Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -

- (a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has