

Judicial review of licence grant decisions by the Australian Broadcasting Tribunal

Two recent applications for judicial review of a decision by the Australian Broadcasting Tribunal ("ABT") to grant an additional commercial radio licence have been dismissed by the Federal Court.

The judgement by His Honour Justice Davis is reviewed by Paul Marx of Boyd House & Partners

The proceedings (*Independent F.M. Radio Pty Limited v. Australian Broadcasting Tribunal and Anor NG 1047 of 1988*, delivered 21 April, 1989 and *Rich Rivers Radio Pty Limited v. Australian Broadcasting Tribunal G 1057 of 1988*, delivered 21 April, 1989) were commenced by Independent F.M. Radio Pty Limited ("IFM") and Rich Rivers Radio Pty Limited ("Rich Rivers") following a decision by the ABT in June 1988 to grant to Goulburn Valley Broadcasters Pty Limited ("GVB") a new commercial radio licence to serve the Shepparton area of Victoria. IFM was one of the unsuccessful applicants for the grant of the licence. Rich Rivers was not an applicant but had submitted to the ABT that its interest as the holder of a commercial AM radio licence (2QN) in the Riverina area would be prejudiced by the grant of the proposed licence. The service area of 2QN overlapped the service area of the proposed new licence to the extent that approximately 18% of the persons resident in the Shepparton service area were also situated in the 2QN service area. Rich Rivers submitted to the ABT that the viability of 2QN and that of other services in the area could be prejudiced by the grant of the proposed new commercial FM licence.

In the proceedings commenced by Rich Rivers various grounds of review were put by the applicant to the Federal Court including a failure to comply with the principles of natural justice, that the procedures required to be observed by the ABT pursuant to ss.25(1) and 25B(1)(d) of the Broadcasting Act 1942 (requirements to make a thorough investigation and to give reasons for decisions) were not observed, that the ABT took into account irrelevant considerations and failed to take into account relevant considerations and that there was no evidence or other material which would have justified the decision.

In the judgment His Honour Justice Davis said that he agreed that "the reasons given by the ABT did not really grapple with the question as what is the meaning of the term 'commercial viability' which appears in s.83(6)(c)(iii) of the Broadcasting Act or the question whether station 2QN would be likely to remain commercially viable in that sense after the introduction of the new licence and did not discuss nor delineate the ambit of the matters to be considered in determining 'the public interest' for the purposes of s.83(6)(c)(iii)." However Davies J. noted that the challenge made to the Federal Court was not that the ABT applied the wrong legal test but that it failed to give reasons for its decision. That challenge "was misconceived in that the ABT set out in detail the substance of its reasoning."

The submission by Rich Rivers that there was no evidence upon which the ABT could have concluded that Rich Rivers would remain commercially viable in the event of the grant of a new FM licence in the Shepparton area was rejected by Davies J. who held that on the evidence before it, the ABT "was entitled to conclude the station 2QN would be able to survive as a station and be able to provide an adequate and comprehensive service."

In the course of the proceedings it was submitted on behalf of Rich Rivers that there was no evidence before the ABT that the commercial viability of the Shepparton AM commercial radio station would not be seriously affected by the introduction of the new FM station. The licensee of 3SR has been a party to the ABT's inquiry but withdrew at an early stage. Rejecting that submission Davies J. said that the ABT "was entitled to draw the inference that 3SR did not consider its future jeopardised by the proposed new licence." The lack of submissions by the licensees of other overlapping services, other than 2QN,

also entitled the ABT to conclude they thought their viability was not threatened by the new licence.

As regards the submissions by Rich Rivers that the ABT failed in its duty to make a thorough investigation in that it placed an onus upon Rich Rivers and drew adverse inferences from what it saw as Rich Rivers' failure to provide evidence to it, Davies J. said:

"However, the ABT proceeded by means of an inquiry procedure, in which interested parties participated and in which all parties were given a fair opportunity to make submissions and bring forward material for the ABT's consideration. The ABT was not bound itself to make inquiries of the persons who advertised with 2QN to ascertain what their reaction might be to the establishment of a new FM station at Shepparton. Indeed, the ABT would have prejudiced its impartiality had it done so. In expressing its lack of satisfaction with respect to certain matters which had merely been alleged before it, the ABT was not placing any improper onus of proof upon a party but was exposing its reasons as to why, having regard to the totality of the material before it, it was not satisfied either that the commercial viability of any other licence would be unduly prejudiced or that the public interest would be served by refusing the grant of the licence."

In the proceedings commenced by IFM most of the grounds for review of the ABT's decision to grant the new FM licence to GVB related to financial matters discussed by the ABT in its reasons for decision. In deciding between IFM and GVB for the purposes of s.83(9) of the Broadcasting Act ("the most suitable applicant") the ABT found the crucial marginal factor to be in financial considerations. As stated by Davies J. "... GVB's provision of fewer facilities and of full automation, about which the

ABT had conceded there were doubts, turned the case [before the ABT] in its favour."

The IFM proceedings raised the issue as to the function of the Federal Court in proceedings for judicial review of decisions such as licence grant decisions made by the ABT. Counsel for IFM submitted that the ABT took into account irrelevant matters, namely incorrect findings of fact and failed to take into account relevant matters, namely the correct facts.

Davies J. agreed that the ABT had made some errors of fact and that "its decision was to that extent made on wrong facts and to that extent was unfair to IFM." The ABT reached wrong conclusions as to debt to equity ratio and the use made by the ABT of IFM's proposals concerning overdraft and leasing facilities. His Honour stated that these were unsatisfactory aspects of a finding by the ABT that GVB's estimates of revenue were preferable to those of IFM. The ABT's statement that IFM's revenue projections were at the top of the range "was not a fair description of them", the ABT did not explain why a lowering of proposed advertising rates would have a serious effect on its revenue projections and the ABT did not give adequate support for certain of its findings as to the consequence of advertising rate attrition.

Davies J. found that the ABT had made some findings of fact that, in his view, were wrong on the material before the ABT and to that extent took into account facts that were wrong and failed to take into account facts that ought to have been found on the material before the ABT. That, however, was held not to be sufficient to found a conclusion that irrelevant considerations were taken into account or that relevant considerations were ignored. His Honour said:

"It is necessary to find that the errors were of such a nature that no reasonable decision-maker could have made them or that there was no evidence before the ABT to justify the findings or that the findings were in some like vein an improper exercise of the decision-making power."

In conclusion Davies J. stated:

"On the whole, I find myself in the same position as was Pincus J. in *Western Television Limited v. Australian Broadcasting Tribunal*, cited above, where His Honour at p.429 expressed the view that a finding was not 'in the least convincing' and the 'I do not think any court would have made a finding adverse to the applicant on the basis of such tenuous material as is mentioned in the report' but that the Tribunal's finding nevertheless did not involve an error of one of the varieties mentioned in s.5 of the *Adjr Act* in the end it amounts to a judgment as to whether the approach taken by the ABT with respect to the several matters I have discussed in these reasons was an approach that no rea-

sonable decision-maker would have taken."

The decision in *Independent F.M. Radio Pty Limited v. Australian Broadcasting Tribunal and Anor* gives little comfort to unsuccessful applicants aggrieved by ABT decisions to grant new licences. The legislature has not thought it appropriate to confer on such persons a right to apply to the Administrative Appeals Tribunal for review. Should such a right of appeal arise under s.119A of the *Broadcasting Act* the Administrative Appeals Tribunal would be constituted by a presidential member alone.

*Paul Marx
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24 April, 1989*

ACLA/MLA merger

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committees rather than a freshly-elected new one, we missed the opportunity to take in some new blood. I frankly encouraged existing committee members who would not be able to make an active contribution during the coming year to make way for new blood. For that purpose, a number of distinguished committee members who had served well in the past resigned or did not stand for re-election this time around. Thanks to them all. The vacancies allowed us to get our vast committee membership down to 30 members, including the vital infusion of new members from diverse backgrounds.

Our events and publications require less explanation, because they have been visible to all. A number of promised events did not get off the ground due to lack of volunteers, but all those which were held were well attended and successful. There were luncheons addressed by Henry Geller, the US communications lawyer and John Dowd, Attorney-General of NSW who spoke about defamation. There was also the evening OTC/IIC/CAMLA function addressed by Veronica Ahearn, a US telecommunications lawyer, and Peter Leonard of Sly & Weigall. The dinner following the AGM addressed by Gleeson CJ was a resounding success.

Communications Law Bulletin

The most manifest advance in 1988 was the upgrade of the *Communications Law Bulletin*. The current very successful approach was reached through effort, planning and experiment. Many were involved, but particular tribute must be paid to Michael Berry, the editor. Despite his commitments as a TV producer, Michael has done an outstanding job. Most of his work, like Cleo's, is unpaid. The *Bulletin* is dependent on the submission of articles by members and oth-

ers. Don't be shy. Send your articles to the editor, or phone him to ask if he would be interested. There is always a shortage of articles about defamation, contempt and other basic areas of law relating to the content of communications. If you are working in that area, you should consider sharing your ideas through the *Bulletin*.

I have mentioned only a few names among the many committee members and others who built up the organisation in the last year. The expression *unius principle* does not apply to the many others not mentioned. Suffice it to say that the combined effort of all has produced a well-organised, united association with the promise of more activities in the coming year. Members based in Melbourne have expressed enthusiasm for holding some functions there, which is likely to happen. It is likely that Melbourne will be a centre of the new telecommunications law, in addition to traditional areas, as the Government has announced that Austel will be located there.

In conclusion, I would like to emphasise that ours is an independent and voluntary association. We do not provide the smooth, professional level of service which you would find in an industry association with a paid staff and an office. This fact is at its most obvious in the organisation of functions, when some people deal with Cleo Sabadine and other helpers as if they were the reservations staff at the Waldorf Astoria. What we do provide is something unique, inimitable, and priceless: an independent forum, in print and at functions, where people can come together from all the diverse avenues of communications law to share ideas and enjoy themselves. We will provide more of it in 1989.

This is the written version of Mark Armstrong's shorter oral address given at the meeting. Mark Armstrong is the Law Foundation Visiting Professor of Communications Law and Chairman of the Broadcasting Council.

Contributions
from members in the form of
letters, feature articles,
extracts, case notes etc. are
appreciated.

Editorial submissions
should
be posted to:
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