

citizens the broadcasts are primarily intended. This means that many concerns about lowering of standards are misplaced. Standards regulation on both sides of the Tasman is likely to remain tough.

Thirdly, there are direct broadcast services or D.B.S. These are broadcasts which are transmitted via satellites with sufficient power to be received on small and inexpensive dishes easily affordable by most households. This type of satellite broadcast originating overseas raises contentious issues on content and standards. However such DBS, although increasingly common in Europe in particular, are still a few years away in New Zealand, at least because there are no satellites with genuine DBS capability operating in our part of the world. The first ones are likely to be the first generation of Aussat satellites, due for launching in 1991 and 1992. It is important to note, however, that DBS broadcasts into New Zealand are unlikely to be fortuitous that is a spill-over into New Zealand from broadcasts intended primarily for another country. This is because of our geographical isolation (unlike neighbouring countries in Europe) which means spot beams have to be focussed specifically on New Zealand to reach DBS field strength.

When it comes to DBS services, recipient countries, including New Zealand, do have legitimate concerns about standards. As part of decisions last August the Minister of Broadcasting was asked to seek inter-governmental agreements on programme standards in relation to the use of satellites for broadcasting equivalent to those to be prescribed in legislation in New Zealand. An assurance has been received from Australia that Aussat facilities will only be contracted for services which meet the regulatory requirements of all recipient countries. This will enable New Zealand to maintain whatever standards we consider appropriate for non-fortuitous broadcasts coming into New Zealand via Aussat; and of course for Australia to do likewise.

Although it has no practical effect presently, Australia has also agreed that New Zealand companies will be able to broadcast into Australia via satellite any service meeting Australia's regulatory requirements. In practice this is essentially limited to what you call VAEIS services, (Video and Audio Entertainment and Information Services). Of course your VAEIS regulations are still being considered along with the possibility of allowing pay TV for domestic subscribers New Zealand will, of course in the context of CER, be seeking to ensure that New Zealand broadcasters are able to provide pay television services into Australia if Australia decides to introduce such services.

Finally, Australia has given an undertaking that it will not use Aussat as an instrument of regulatory policy. That is Aussat will not be directed by the Australian Government (its

owner) to prevent or limit any service provided from New Zealand to Australia.

Some useful progress is being made in the area of trans-Tasman relations for broadcasting services. The CER services protocol is up for review in 1990, and there is a General Review of CER scheduled for 1992. In the meantime a start has been made in evolving a framework within which television broadcasting services can be developed with market opportunities for firms on both sides of the Tasman.

*James R A Stevenson
Assistant Secretary (Communications)
Department of Trade and Industry,
New Zealand*

Naming sources

Mr Justice Hunt on January 6, 1989 set aside orders that Sydney Morning Herald Journalist, Peter Hastings name his sources for an article which was published in The Herald on 13 January, 1985. The next issue of The Bulletin will examine the issues raised by the Hastings case.

FM Licence Grants

What makes a winner?

Paula Pazies is a media/entertainment lawyer with

Blake Dawson Waldron. She represented the

winning applicant in the recent Gold Coast licence grant

and the runner up in the Newcastle licence grant.

In 1986 the Government announced its intention to bring commercial FM services to more than three million people outside metropolitan state markets by 1992. This plan has involved and will continue to involve the Australian Broadcasting Tribunal, in licence grant inquiries around the country-side. To date decisions have been made for Newcastle, the Gold Coast, Geelong, Gosford and Shepparton. Of the five decisions, three are currently on appeal to the Federal Court of Australia. Although the Newcastle decision was appealed successfully, the ABT found in favour of the original winner.

Currently there are a number of licence grant inquiries in train and applications for a number of markets are yet to be called. On the surface, prospective licence applicants have the benefit of five decisions of the ABT to refer to when planning and structuring their applications, to obtain some insight into the ABT's thinking on what makes an FM winner. But is that really the case?

An analysis of the five decisions to date demonstrates that there is no clear formula to be adopted which might guide prospective applicants to a win position. In fact, in all markets the make up of the winner and the grounds for decision have differed. For ex-

ample, in the Geelong licence grant, the overriding determining factor for the ABT was the nature and extent of local involvement in terms of shareholding spread of the applicant company, number of local directors on the Board, the extent of local input into the application, and the encouragement for use and development of local talent and resources.

Applicants with 45% non-local shareholding were immediately disqualified from the race. One month later the ABT found in Gosford for an applicant with 50% non-local shareholding and with a Chairman and Deputy-Chairman living outside the service area having the major responsibility for implementation of the service.

The ABT has a very wide discretion within the scope of the Broadcasting Act 1942 (the "Act") to grant licences, and decisions are made with reference to the scope and intention of the Act, the public interest and the market.

Section 83(6) of the Act lists the considerations the ABT may take into account, to the exclusion of other considerations, when deciding whether or not an applicant qualifies for the grant of a licence. To satisfy the test the ABT must have regard to whether the applicant is fit and proper to hold the licence, has demonstrated

financial, technical and management capability, will provide an adequate and comprehensive service and encourage Australian creative resources in connection with that service, has the capability of complying with the conditions on the licence, and, whether there will be an undue concentration of influence in relation to the new licensee and incumbent licensee(s).

These matters are not defined in the Act and accordingly the ABT considers these with reference to its own policies, practice and interpretation of the individual concepts.

If all applicants pass the 83(6) test then pursuant to section 83(9) of the Act the ABT must make the selection of the most suitable applicant of all the applicants who qualify for the grant of the licence. It is at this stage of the game that the ABT becomes possessed with very wide discretionary powers and may choose between applicants on any aspect of the application.

In *Our Town FM Pty Limited v The Australian Broadcasting Tribunal and Newcastle FM Pty Limited 1 (1988) 77 ALR 577*, (the Newcastle appeal) Mr Justice Wilcox confirmed the discretionary powers of the ABT. He stated that "the Tribunal would be entitled, if it so chose, to take into account all the matters raised by Sec 83(6), selecting as the most suitable applicant that company which impressed most over the whole range of these matters. Alternatively, it could select a particular aspect of the relevant service, for example, the news coverage, local content or target audience which it thought to be particularly important in connection with that licence and judge to be the 'most suitable' that applicant which best dealt with that aspect".

The ABT's decision in Newcastle turned on the criteria of management capability. In that case it stated that with the exception of the management capability criteria, all applicants were generally equal. The ABT referred to management capability in terms of ensuring plans and policies for the proposed new service are implemented. In determining management capability the ABT considered the applicants capability in terms of the stability of both the Board and the company and the professional and personal qualities of individual directors and shareholders. In the case of the winner in Newcastle it was the combination of these factors that impressed the ABT. The runner-up had a stable shareholding and Board with relevant radio, business and administrative experience but in the ABT's view it was not relevant enough. The decision came down to a comparison of the personal qualities of the directors and in particular the Chairman and proposed Managing Director.

On the Gold Coast the ABT found that on a comparative analysis the winner was superior on all counts. In that case the ABT said

that the winning applicant stood out because of high quality in all areas traversed by the Inquiry and because the directors had actually drawn the research, planning, shareholders, community proposals, programming proposals, staffing etc into one integrated strategy. So in this case the ABT compared applicants over the range of matters presented to it. However, as in the Newcastle case, it would appear the qualities of the directors were focused upon. The ABT was impressed by the fact that it was able to know that the plans proposed and promises made would be realised.

"fundamentally a non-local applicant will not be in as strong a position to interpret, appreciate and respond to the needs and interests of the people living in the service area as an applicant with considerable local connections at Board or senior management level"

In Gosford, like Newcastle, the Tribunal found that the winner had superior management capability reflected in the stability and cohesiveness of the Board and the company. It is interesting, however that the company structure of the winning Gosford application was quite different to that of the winning Newcastle application. In Newcastle the company was a private company which was approximately 70% locally owned and with only one of its six directors being a non-resident of the service area. In Gosford, the Company was a public company, 50% owned by an interest not resident in the service area, with Board representation in the form of Chairman and Deputy Chairman living outside the service area. The company also proposed a public float of 40% of the shares to local residents after the grant of licence.

Of particular relevance are the comments made by the ABT in the Newcastle grant in respect of the same group who went on to win the Gosford licence at a later date. In its Newcastle decision the ABT saw a negative aspect of the application being the 40% shareholding earmarked for the public as it was an unknown shareholding and judgement could

not be made about future shareholders.

In Gosford it was not perceived as a problem. As to non-local involvement, the ABT stated in the Newcastle decision that "fundamentally a non-local applicant will not be in as strong a position to interpret, appreciate and respond to the needs and interests of the people living in the service area as an applicant with considerable local connections at Board or senior management level". This attitude was confirmed in the Geelong decision and then abandoned in Gosford.

In Geelong the ABT selected the successful applicant having regard to the nature and extent of the local involvement in its application and also because that applicant's proposal to use and encourage the use of Australian creative resources were considered superior to those of other applicants. The ABT determined that companies that had more than 45% of the shares placed in non-local hands were immediately considered less suitable applicants. Of those contestants left the ABT then tested the applicants on the basis of effective local input including the ability of the local directors to grasp the elements of the application and to implement proposals for the service.

Another interesting aspect of the Geelong decision was the fact that the ABT appeared to be influenced by the fact that the Geelong service area received fortuitous signals from Melbourne FM stations. The ABT stated that as a consequence of this the new FM station would have to compete with those signals and to do so effectively would need a strong professional local base. This situation is not dissimilar to the Gold Coast service area where Brisbane signals are received. However, in that case the ABT placed no particular emphasis on this matter.

In Shepparton, the ABT considered an important factor in selecting the most suitable applicant to be the programming proposals developed in response to the research conducted in the area. It would appear realistic proposals for the development of creative resources was also considered important. In this case actual knowledge and articulation of the understanding of the Australian music industry and the promotion of talent was considered critical. Innovation and adventurous programming was the key. One applicant was criticised for showing a dependence on the metropolitan FM market model and yet this model or similar models were adopted by the Gold Coast and Newcastle licence winners.

Also, the ABT took into account whether or not the winning applicant had any major shareholders with existing media interests. The ABT felt that it would be better not to have any such alliance.

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work. At the same time, the consumer protection requirements which safeguard minimum standards will be retained. Public service radio broadcasting will continue under the aegis of the BBC. BBC radio services will continue to be funded from the licence fee for some years to come. But BBC radio services will be subject to a much stronger stimulus of competition. The Government's proposals will create the conditions for an expansion of radio which should benefit broadcasters, advertisers and listeners alike. In the meantime the Government, as a step towards the new radio arrangements, has endorsed proposals by the IBA for a limited number of additional stations operating under present legislation.

The UHF network

The UHF transmission networks run by the BBC and the IBA give a highly effective service to the public. They reach 99.4 per cent of the households in the UK, providing them with a reliable, high quality signal. This is a considerable engineering achievement, and it is highly regarded internationally. As broadcasting enters a more competitive phase, the Government intends to see that high technical standards are maintained, while moving the UHF transmission system progressively into the private sector, and separating transmission (ie service delivery) from service provision.

The Government considers that the best arrangement in due course would be a regionally based, privatised transmission system designed to promote competition, while containing certain common carrier obligations. The route towards this objective is complicated at present by the way in which the IBA's system is entwined with that of the BBC, and by the fact that the BBC's transmission responsibilities are rooted in its Charter which lasts until the end of 1996. The Government proposes to discuss with the BBC, the IBA and others how the objective of moving towards a privatised transmission system might best be taken forward. It will also be considering how, given its inherent monopolistic characteristics arising in part from topography, any necessary regulatory oversight should be arranged.

Until such a system is in place the BBC will continue to have responsibility for transmitting its television and radio services. The Government hopes that the BBC will, during this transitional period, test the market for the operation of its own transmission system by commercial contractors on a regional basis. This would be consistent with the steps which the BBC has already taken to test the market for a range of support services, as part of its general policy of devoting as great proportion as possible of its resources to programmes. This would be a useful step in

itself, and would also prepare the way for privatisation in due course. The advent of new services - such as the new national commercial radio services - will open up new commercial transmission opportunities. The Government also envisages that the BBC might, in the transitional period while it retains a transmission role, be able to arrange for its contractors to offer a transmission service to new entrants.

Under the existing arrangements the IBA owns and operates the uplink for its DBS contractors. The Government believes that DBS licensees should in future be responsible for the uplink themselves along with the rest of their transmission system (ie the satellite). The IBA is presently constructing the uplink for British Satellite Broadcasting and will operate it while the law remains as it is. The Government will discuss the transitional arrangements with the parties concerned.

Independent productions

Traditionally, broadcasters in the UK have themselves made the television programmes they have not acquired from abroad. Channel 4 broke this mould. The results have exceeded all expectations. Independent producers constitute an important source of originality and talent which must be exploited, and have brought new pressures for efficiency and flexibility in production procedures.

The Government has already set the BBC and the ITV companies the target of commissioning 25 per cent of original material from independent producers as quickly as possible. Both the BBC and the ITV companies are committed to achieving this target by the end of 1992, subject to satisfaction on cost and quality. Good progress has already been made. A framework for the business arrangements for commissioning programmes has been agreed.

The Government has welcomed these developments, and the willingness of the BBC, IBA and ITV companies to embrace change. Under the arrangements proposed in Chapter VI, the Government envisages that independent producers will continue to play a greater part in programme making in the UK. So far as the position after 1992 is concerned, the Government's proposals for the independent television sector in any event envisage that no licensee should be required by the ITC to maintain any in-house production capacity as a condition of obtaining a licence.

Anyone interested in acquiring an unabridged copy of UK Broadcasting in the '90s should contact the BBC, 80 William St, Sydney. Tel: (02) 358 6411.

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Again, this position can be contrasted to the situation in Newcastle, Gosford and Geelong where all winners had a major media interest as a shareholder and the ABT found it to be an advantage to have input and support of this type.

Another interesting aspect of the Sheparton decision is that the ABT assessed the personal qualities of the directors and their ability to implement the proposals proposed after determining the most suitable applicant on the basis of the best programming. This is quite a different approach to all other decisions.

In conclusion it is obvious that the Tribunal makes its decisions on a case by case basis. If prospective licence applicants are looking for precedents on which to base their applications then they can take little comfort from past decisions of The Australian Broadcasting Tribunal.

The ABC Bill

Several items in the Broadcasting Legislation Amendment Bill, which whizzed through Parliament in December should have had much more public discussion.

Foremost of concern is the new Limited Licence which is not, as many people think, connected with aborigines in remote areas but concerned with the broadcasting of events like an Olympic Games or a Bicentennial.

The ABC will have no control over the awarding of licences and permits as this will be done by the ABT with fees paid to the government. Vet Clauses 7, 34 and 43 of the Bill provide that the Corporation may make broadcasting facilities and staff available to a limited licence holder for them to transmit programmes to the general public pursuant

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Contributions

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**The Editor
Communications Law Bulletin
4 Tullip Street,
Chatswood. 2067**