Second Commercial Television Services In Small Markets

Gillian Saville and Alison Jones discuss the 'one station to a market' restriction imposed by the *Broadcasting Services Act* 1992 in the context of a recent decision by the Administrative Appeals Tribunal.

Introduction

One of the limitations which the Broadcasting Services Act 1992 (the 'BSA') places on the number of commercial television licences which a person may control is the so-called 'one station to a market' rule (section 53(2)). This rule is subject to an exception in favour of incumbent commercial television broadcasting licensees in solus markets, where due to the small size of the licence area there is only one commercial television licensee. Under the former section 73 (now section 38A) incumbent licensees can apply to the Australian broadcasting Authority ('ABA') for an additional licence.

The underlying policy of the former section 73 was to facilitate in appropriate cases the rapid introduction of second television services provided by incumbent licensees in solus markets, thereby giving effect to the object expressed in section 3(a) of the BSA to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information. This section reflected the desire to remove the historical disadvantage of the television viewers in solus markets, which are generally located in isolated and remote communities or centres and who have a limited choice of television services.

The recent decision of Deputy President Gerber of the Administrative Appeals Tribunal in *WIN Television Mildura Pty Ltd, MTN Television Pty Ltd and Territory Television Pty Ltd-v-Australian Broadcasting Authority and Imparja Television Pty Ltd (Party Joined)* (1 July 1996, Part I, unreported) dealt with the issue of whether existing commercial television broadcasting licensees in solus markets should be permitted to operate a second service. It was both the first and the last decision to consider the former Section 73 of the BSA prior to its repeal in January 1996.

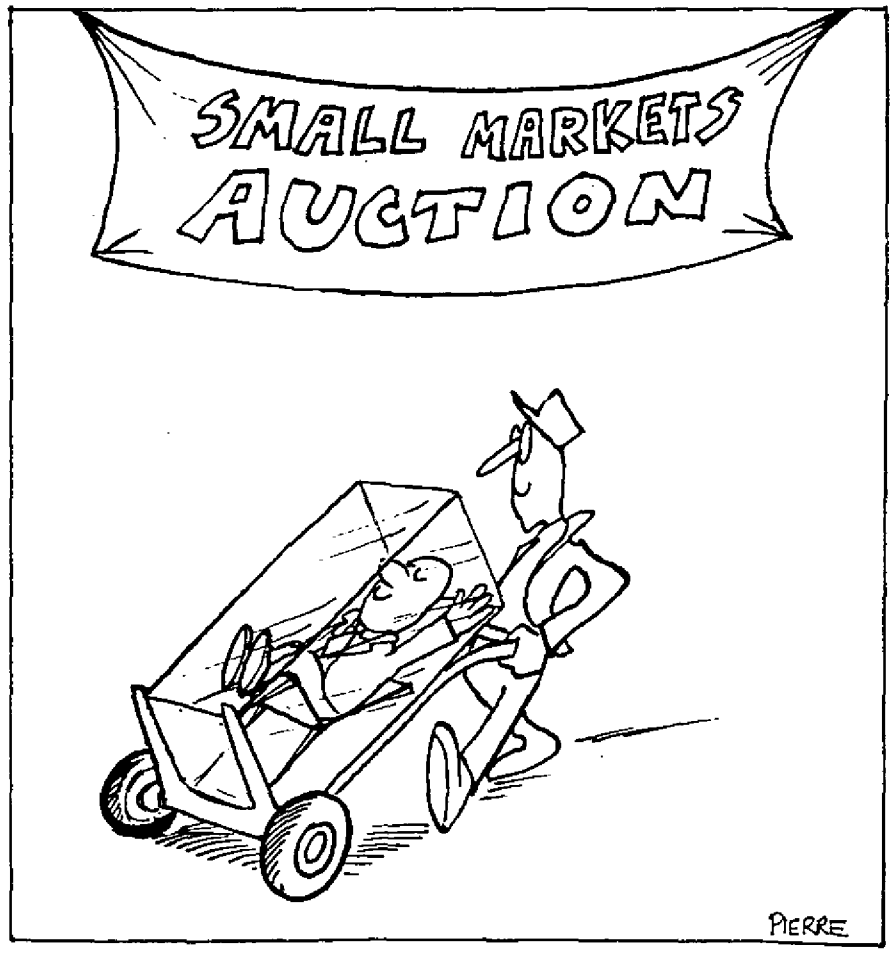
The Former Section 73

The former section 73 dealt with the provision of additional commercial television licences in solus markets, by allowing existing licensees to apply to the ABA for permission to operate a second television broadcasting service.

The test to be applied by the ABA in deciding whether to exercise its discretion to give permission to the existing licensee to operate a second commercial television service in the licence area is found in section 73(2). Section 73(2) provides that.. 'if the ABA is satisfied that it is unlikely that another person would be interested in, and likely to be in a position to, operate another commercial television broadcasting service in the licence area ...', it may give the licensee permission to operate a second service for up to five years.

Price-Based Allocation System - Sections 36 and 38

A price-based system for the allocation of commercial television broadcasting licences was determined by the ABA pursuant to section 36 of the BSA. It is set out in the *Commercial Broadcasting Licence Allocation Determination No.1 of 1995*. Where the ABA is going to allocate a commercial television broadcasting licence under the price-based allocation system, section 38 requires the ABA to advertise for applications for that licence.



It is an 'over the counter' approach to allocating licences. Allocation under the scheme is not subject to the constraints of any specified licensing criteria directed to the capabilities of the licence applicant, other than a limited 'suitability' test. Applicants are required to pay a $10,000 application fee which is usually refundable if unsuccessful. If there is more than one eligible application, the licence is to be allocated to the highest bidder in an auction-style allocation exercise. If there is only one eligible applicant, then the licence will be allocated to that applicant.

The only real restrictions on this 'over the counter' approach to licence allocation under section 38 are that a licence is not to be allocated to an applicant if:

1. it is not an Australian company with a share capital (section 37(1)(a)); and

2. if the ABA has decided that section 41(2) of the Act applies to the company. Section 41(2) will apply if the ABA is satisfied that allowing the applicant company to provide broadcasting services would lead to a significant risk of an offence against the Act or regulations or a breach of licence conditions.

The applicant must also complete all of the relevant forms and acknowledge having read the *Determination*. Significantly, and in contrast with the section 73 process, the ABA is not required to be satisfied about the applicant's likelihood of being in a position to operate the service.

The New Section 38A

The *Broadcasting Services Amendment* Act 1995 (the 'Amendment Act'), which commenced operation on 5 January 1996, made a number of amendments to the BSA. Relevantly, it repealed the former section 73 and largely reinstated it in the BSA in a new section, 38A.

Other than by changing the nature of the instrument from a 'permit' to a 'license', the new regime under section 38A is in many respects the same as the regime under the former section 73. However an important difference between the former section 73 and the new section 38A is the introduction of sub-sections 38A(5) and (6), which provide in a case where a section 38 process is being pursued in parallel with a section 38A application, the former will prevail by effectively freezing the section 38A process.

The Explanatory Memorandum to the *Broadcasting Services Amendment Bill 1994*, (which was subsequently passed as the *Broadcasting Services Amendment Act 1995*) states that 'the purpose of section 38A was to remove legal uncertainty about the operation of the existing provisions in section 73', and 'to provide a clear mechanism for the grant of an additional licence in a commercial television solus market'. In doing so, Federal Parliament has attempted to clarify the relationship between the section 38A application process and the section 38 price-based 'auction style' process of licence allocation.

Applications under the Former Section 73

MTN Television Pty Limited ('MTN'), WIN Television Mildura Pty Ltd('WIN') and Territory Television Pty Limited ('Territory Television'), are solus commercial television licensees in the Griffith/Murrumbidgee Irrigation Area, Mildura/Sunraysia and Darwin licence areas respectively.

Once the ABA identifies a licence as being available in a licence area plan (LAP), the licence can be allocated. The ABA released LAPs which identified a second commercial television broadcasting service as being available in each of the Griffith, Mildura and Darwin licence areas. Each licensee then applied to the ABA for permission to operate a second commercial television broadcasting service in its respective solus market, in accordance with the former Section 73 of the Act (as the Amendment Act had not yet commenced operation).

After seeking expressions of interest from persons interested in providing the second service and considering submissions from the applicants and interested persons, the ABA applied the test in section 73(2) and decided to refuse permission to each of the three licensees to operate a second service. Each of the unsuccessful licensees applied for a review of the ABA's decision by the Administrative Appeals Tribunal (the 'AAT'). As each of the applications involved the consideration of many similar legal and factual issues, the AAT decided to hear all three applications together.

Removal of Rights of Review

As a preliminary point, the ABA submitted that the effect of the changes made by the Amendment Act was to remove the existing rights of the licensees to have the ABA's decisions reviewed by the AAT in accordance with the former section 73. The general rule is that a statute is not intended to take away any existing rights. The AAT found that the transitional provisions of the Amendment Act did not disclose a clear contrary intention to displace the ordinary presumption of continuing rights. Accordingly, the AAT held that the three applicants' rights of review before the AAT were preserved, and the AAT had jurisdiction to determine those applications (decision of Deputy President McMahon, 16 February 1996, unreported).

Potential Conflict between the Review and the Auction Process

After the ABA refused permission to both MTN and WIN, and after Territory Television had applied for permission but before the ABA had made its decision, the ABA proceeded to invite applications for commercial television licences in Griffith, Mildura and Darwin under the price-based allocation system. Having instituted the procedure of calling for applicants under the 'auction' system, the ABA was under a legally enforceable obligation to allocate the licence to an 'auction' applicant, subject to a discretion which the ABA has under the *Determination* to withdraw the licence from allocation should it become aware that for any reason the licence cannot be allocated.

The AAT's review of the ABA's decision to refuse section 73 permission to the three existing operators was unlikely to have been finalised and decided prior to the completion of the ABA's allocation process unless the allocation process was delayed. This may have led to an anomalous situation if the AAT decided that the existing licensees should be permitted to operate a second service and the ABA had already allocated the second licence to another person. Ultimately, this problem never eventuated because the ABA extended the deadline for applications under the price-based scheme until after the AAT's decision.

The AAT's Decision

The thrust of each applicant's case was that, for various reasons, the ABA should not have been satisfied on the material before it that there was/is another person likely to be in a position to provide another commercial television broadcasting service in its respective licence area.

Of particular interest were the ABA's submissions in relation to ascertaining whether there is 'another person' interested in providing the second service. The ABA submitted that in making a decision in relation to a section 73 application the ABA did not have to have anyone particular in mind. The ABA argued that the real issue is whether someone makes an application if and when a section 38 advertisement process is formally commenced, triggering the public auction, and that it should be entitled to say that the commercial facts are such that someone else would apply if a section 38 advertisement is placed. The only way to actually discover what is likely to happen for the purposes of section 73(2) is to permit a public auction to occur under section 36. If no one applies, or if the person proves unable to operate the service, then the incumbent can renew its application under section 73. These submissions were rejected by the AAT in the context of the BSA prior to the January 1996 amendments.

The AAT considered the test in section 73(2) and its task at the time of writing its decision is to ask: 'is there some other person who is interested in and likely to be in a position to operate another commercial television broadcasting service in the licence area?' This involves determining whether there is a credible, recent expression of interest by another person in providing another service in the licence area and applying the same criteria that the ABA applied, which includes:

1. whether the person has access to the necessary capital to establish the service;
2. whether the person has, or could obtain in a timely fashion, managerial and technical expertise to establish the service;
3. whether the person is likely to be able to obtain timely access to a transmitter and transmitter site;
4. whether the proposal is for a service that meets the technical specifications set down in the LAP;
5. the person's estimate of operating costs and revenue of the service for the first five years;
6. when the person would be in a position to commence providing the service; and
7. if there has been a price-based allocation exercise, the results of the exercise.

The AAT was satisfied that Prime Television Limited in Griffith and Mildura and Imparja Television Pty Ltd in Mildura and Darwin technically and financially satisfied both limbs of section 73(2).

The AAT also considered the interpretation of section 73(2) in the context of the objects of the BSA. The evidence of all three existing operators was that if an independent operator were to be allowed to provide the second service, neither the existing operator nor the independent operator would be able to continue to provide the current level of matters of local significance to the community, including a dedicated local news service.

The AAT found that the ABA had adopted the view that it was not obliged to pay due regard to the likelihood of local programming being provided by 'another person' when considering the capacity of that person to provide another service, and apparently treated objects 3(a) and (b) of the BSA as being of greater importance than the remaining objects. The AAT considered that section 73(2), like any other section of the BSA, is subordinate to its stated purpose as set out in its objects. The problem is to balance two seemingly opposing objects - on the one hand the BSA seeks to encourage diversity in control of the more influential broadcasting services (object 3(c)), and on the other, to encourage an appropriate coverage of matters of local significance (object 3(g)). The AAT was of the view that this conflict could be resolved 'when it is borne in mind that we are dealing with small markets, where the provision of local material, albeit provided by a monopoly operator, is of greater significance than diversity in control, if that can only be achieved at the expense of local coverage' (at page 25). It was not for the ABA to 'cherry pick' through the various objects of an Act of Parliament, totally ignoring some while holding itself bound by others, by emphasising object 3(c) to the detriment of object 3(g) (see per Black CJ in *Tickner v Bropho* (1993) 114 ALR 409, at 418). The AAT considered that unique situations may require giving different weights to different objects, and did not read object 3(c) as though it provided that diversity in control must be achieved at any price.

The AAT rejected the ABA's conclusion that Prime was 'in a position to operate another commercial television broadcasting service in the area' within the meaning of the BSA, on the basis that it was satisfied that Prime was unwilling to provide the Griffith viewing audience with an adequate and appropriate coverage of matters of local significance. This was regarded by the AAT as an essential pre-condition that an applicant for another licence must fulfil before being eligible to compete in a small licence area. The service which Prime proposed to provide was clearly in breach of object 3(g) of the BSA. For the same reasons in Griffith, Prime was found not to be a person likely to be able to operate another service in Mildura.

However, in both Mildura and Darwin, the AAT was satisfied that Imparja was 'another person' likely to be in a position to operate another commercial television broadcasting service which complies in all respects both with the LAP and the objects of BSA.

Accordingly, the AAT set aside the ABA's decision in Griffith and affirmed the ABA's decisions in both Darwin and Mildura

As a result of the AAT's decision, the ABA proceeded with the section 38 licence allocation process in relation to the Darwin and Mildura licences. The commercial television licence previously advertised as available in the Griffith licence area was withdrawn from the price-based allocation process and was allocated to the incumbent licensee in accordance with section 38A of the BSA.

Conclusion

The amendments to the BSA which came into effect in January 1996 meant that this AAT decision was both the first and the last under the former section 73 of the BSA. However, the submissions made by the ABA during the hearing of these review proceedings may provide some guidance about how the ABA will handle future applications under the new

section 38A by incumbent solus commercial television operators for the allocation of an additional licence in their licence area. In order to identify whether there is another person who would be interested in operating another licence in that licence area, the ABA may commence the price-based allocation process under sections 36 and 38 and trigger a public auction. This would effectively freeze the incumbent's application until after the 'auction' process has been exhausted (section 38A(5)). If this 'auction' process leads to the allocation of the second licence, the incumbent's application will be taken to have been withdrawn (section 38A(6)).

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Application for Review of a Determination of the Australian Competition and Consumer Commission revoking Authorisation No. A3005

Annabel Archer provides a Case Note on the Australian Competition Tribunal's decision to revoke authorisation for the Media Council of Australia's Accreditation System.

Background

In 1978 the Accreditation System of the Media Council of Australia ('**MCA**') was granted authorisation by the Trade Practices Commission ('**TPC**'). In order to grant an authorisation, the TPC must be satisfied that in the circumstances, the conduct sought to be authorised would be likely to result in a benefit to the public that outweighed the detriment to the public from the authorised anti-competitive behaviour.

The MCA's System continued in substantially the same form as was authorised in 1978, until 12 January 1995, when the Australian Competition and Consumer Commission ('**ACCC**') (formerly the TPC) issued a notice to the MCA pursuant to section 91(4)(a) of the *Trade Practices Act 1974 (C'th)* ('**TPA**') stating that it considered that:

(a) there had been a material change of circumstances since the authorisation of the System in 1978; and

(b) inviting submissions as to whether the authorisation should be revoked in accordance with section 91(4) or upheld on analysis of the public benefit and anti-competitive detriment flowing from the authorised conduct.

The MCA System and its operation

The System originally began as an informal industry arrangement, implemented by the MCA from 1968. Its underlying purpose was to provide accreditation to advertising agents as businesses of such financial standing and trustworthiness that they should be entitled to receive unlimited credit from the members of the MCA. These members consisted of most media organisations in Australia, as well as almost all the private proprietors of mass media in Australia, either as constituent or affiliated bodies. As constituent or affiliated members of the MCA, media proprietors were therefore bound by the MCA's objects and rules, including the rules governing the application, implementation and enforcement of the System.

There were discretionary criteria for accreditation however the primary criterion was that the applicant advertising agency demonstrate that it was capable of conducting a viable business and that it was therefore appropriate for the media to extend it unlimited credit when it placed advertisements, rather than requiring it to pay for the advertising space at the time an advertisement was booked, that is rather than requiring 'cash with copy'.

In return for the System's endorsement of an agency as a business worthy of receiving unlimited credit, an accredited agency agreed to assume responsibility for the content of the advertisements it placed with any MCA member media proprietors.

The System also provided a mechanism whereby the media paid commission to accredited advertising agents, in relation to the value of the advertising space bought by that agent, in return for:

(a) the agent's acceptance of the del credere risk for the amount of advertising placed and for any liability arising out of the contents of the advertisements;

(b) acceptance by the agent of responsibility for compliance with the relevant advertising codes and standards; and

(c) the agent's agreement to pay for the advertising on certain payment terms specified by the System.

MCA members were prohibited from paying commission to unaccredited agencies, or to agencies other than those responsible for lodging and taking responsibility for the relevant copy, and an accredited agent could not accept a higher rate of commission than the maximum rate prescribed.