

Litigation summary

A snapshot of current litigations involving the ABA

CanWest and others v ABA

Federal Court Proceedings No. NG322 of 1997; NG 384 of 1997; VG 183 of 1997; VG 185 of 1997

In April 1997 the ABA found CanWest Global Communications Corporation to be in breach of the *Broadcasting Services Act 1992*.

CanWest has filed an application in the Federal Court for review of the ABA decisions, under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The contested decisions of the ABA are:

- to give CanWest two section 70 notices directing CanWest to take action so that it is no longer in breach of sections 57(1) and 57(3) of the *Broadcasting Services Act*;
- that the ABA was satisfied that CanWest was in breach of sections 57(1)

and 57(3); and

- to publish a report on its investigation.

CanWest has also challenged these decisions in the High Court. This claim was put forward under paragraph 75(iii) of the Constitution and sought to quash and set aside the ABA decisions and make declarations that the ABA's findings about CanWest were invalid. These proceedings have been remitted by the consent of the parties to the Federal Court.

Donholken Pty Ltd and Selli Pty Ltd, two other parties to the transactions which were the subject of the ABA's investigation, have also sought judicial review of

the ABA's decisions under the ADJR Act.

On 28 May 1997 the Court constituted by His Honour Mr Justice Hill made orders that all of the above proceedings be expedited and that any motions in any of those proceedings be made returnable on 13 June 1997 before His Honour. The ABA filed its points of defence on 4 June 1997.

On 16 June, Justice Hill ordered discovery against the ABA. The matters (together with proceedings brought by CanWest, Selli and Donholken against the Treasurer of the Commonwealth of Australia concerning separate but related decisions) are listed for hearing for eight days from 14 July.

Project Blue Sky v ABA — the Australian Content Standard

High Court Proceedings No. S219 of 1996

The Australian Content Standard, determined by the ABA under section 122 of the *Broadcasting Services Act*, came into force on 1 January 1996. As part of this standard, the ABA defined 'Australian program' as a program produced under the creative control of Australians who ensure an Australian perspective. For the purposes of the standard, this definition does not include programming produced by New Zealanders.

Project Blue Sky Inc. and five New Zealand production companies challenged the validity of the standard, asserting that the ABA had not complied with the Australia New Zealand Closer Economic Relations Agreement (CER) in determining the standard. CER requires Australia to provide national treatment to New Zealand persons and services.

On 2 August 1996, Justice Davies of the Federal Court ruled that it was open to the ABA to determine a standard

which is consistent with the Protocol to the CER Agreement. The ABA's appeal to the Full Federal Court from the decision of Justice Davies was successful. However, Project Blue Sky sought leave to appeal the decision.

On 11 April 1997, the High Court granted Project Blue Sky leave to appeal from the judgment of the Full Federal Court. It is expected that the High Court will hear this appeal later this year.

SAT FM Pty Ltd v ABA

Federal Court Proceedings No. VG684 of 1996

SAT FM Pty Ltd has challenged the ABA decision to make no additional commercial FM radio broadcasting services available for allocation in the Kalgoorlie region of Western Australia. In October 1996, the ABA released its licence area plan for Kalgoorlie radio in *Esperance Kalgoorlie and Merredin Radio*

Licence Area Plans.

SAT FM Pty Ltd filed an application for an order of review under the AD(JR) Act in the Federal Court on 11 November 1996. The application seeks review of the ABA decision of 8 October 1996 that no additional commercial FM radio broadcasting services are to be made available in the Kalgoorlie li-

cence area.

The ABA filed a notice of objection to competency asserting that the decision is of a legislative character not an administrative character and therefore is not a decision to which the AD(JR) Act applies. The jurisdictional argument is set down for hearing in Melbourne on 3 July 1997.

Golden West Network v ABA

Federal Court Proceedings No. NG367 of 1997

Golden West Network Pty Ltd (GWN) has challenged the ABA's decision to plan a second commercial television broadcasting licence for the remote and regional Western Australian licence area. The ABA made this decision on 23 February 1997, pursuant to section 26 of the Broadcasting Services Act. The decision is contained in the ABA's licence area plan: *Remote and Regional Western Australia. Television Decisions,*

released in February 1997.

GWN is the incumbent licensee of four commercial television licences in regional and remote Western Australia. The combined licence areas of these services are proposed as the licence area for the planned second commercial television service. GWN's application for an order of review of the ABA's decision argues that GWN's ability to provide an adequate and comprehensive service

will be adversely affected if an additional commercial television service is licensed to operate in the licence area.

The ABA provided reasons for its decision to GWN on 17 April 1997. GWN filed its application for an order of review in the Federal Court of Australia on 15 May 1997. The first directions hearing was held on 27 June 1997. The next directions hearing is listed for the 15 August 1997.

Foxtel Cable Television Pty Ltd v Nine Network Australia Pty Ltd and the ABA — Sport anti-siphoning case

High Court Proceedings No. 535 of 1997

The Nine network ('Nine') complained to the ABA on 30 January 1997 about an ABA decision which was notified to Nine in a letter dated 16 January 1997. The ABA had found that Foxtel's acquisition of live rights to the Australian cricket tour of South Africa did not breach the licence condition imposed by Clause 10(1)(e) of Schedule 2 of the *Broadcasting Services Act 1992*.

The ABA reconsidered this decision afresh on 11 February 1997 and came to the same view.

Nine sought a review of the ABA's decision in the Federal Court and Foxtel joined as a party to the litigation. The matter was heard before Justice Lockhart on Friday 21 February 1997. Justice Lockhart's judgment was handed down on 25 February 1997.

The Court decided the ABA had erred in law and on 26 February 1997 ordered the ABA's decision be set aside and remitted to the ABA to decide the matter again according to law.

On 28 February 1997, Foxtel filed a notice of appeal against Justice

Lockhart's decision and was granted leave to seek a date for the appeal hearing as soon as possible. The Full Federal Court hearing was held in Perth on 17 March 1997. On 26 March 1997 the appeal was dismissed. Foxtel have made an application for special leave to appeal to the High Court of Australia from the judgment of the Full Federal Court. This issue of special leave has not yet been determined by the High Court.

The ABA is entering a submitting appearance in these proceedings. 