

# Investigation

## procedures

Q  
A

### **What are the ABA's powers in conducting investigations?**

The ABA has a very wide discretion as to the way it obtains information.

The ABA can do it by conducting investigations, by holding hearings, by consulting with persons informally, or otherwise informing itself in any manner it sees fit, including reading the newspaper. But in deciding what form of information gathering the ABA shall use, the Broadcasting Services Act says, the procedure the ABA adopts:

- is to be that which the ABA considers
- (a) will be the quickest and most economical in the circumstances; and
- (b) will also promote the due administration of this Act.

'Being the quickest and most economical' is quite an interesting point, because when we consider major control matters, and we look at whether we investigate by private examination of key witnesses or whether we hold a hearing, the ABA considers two main factors. One is economics, and the other is, what will best promote due administration of this Act?

Other considerations would be:

- is the matter under consideration a matter of public interest, as distinct from a matter of interest to the public?

- how should the ABA deal with confidential information?

Hearings are to be conducted in public. A hearing or part of a hearing may be conducted in private, if:

187 (a) evidence that may be given, or a matter that may arise, during the hearing or the part of the hearing is of a confidential nature.

In that instance, confidentiality allows the ABA to have a private hearing.

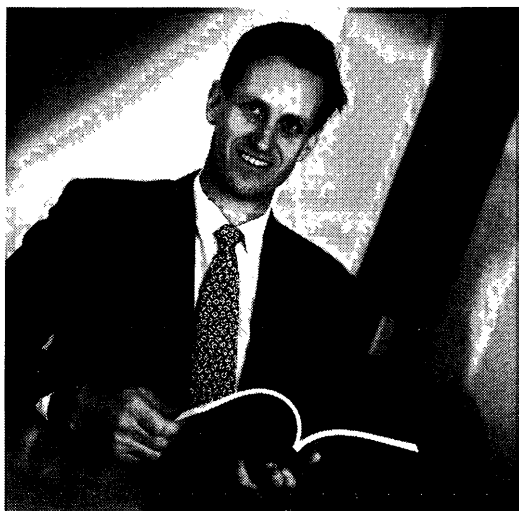
The ABA has conducted two public hearings to date—both of these related to the allocation of community radio broadcasting licences.

### **Why would the ABA choose to conduct an investigation, rather than a hearing?**

Two reasons would be the importance of confidential information, and cost.

Another factor is creating an environment which is most conducive to people being forthcoming as to what really happened. In a private examination, people are advised at the beginning of the examination that it is conducted in private and that therefore the transcript will be confidential, except to the extent that the ABA considers it necessary to report properly on its investigation. I believe that gives people the ability, without fear or favour, to be fairly frank as to what went on. Whereas, in an adversarial situation such as in a public hearing, with possibly the media there as well, people are much more likely to be guarded in their answers to those questions. In examinations, people often start talking about a particular issue, and are often very open about it. It is quite a good means for eliciting what actually happened.

The downside is that it is not anywhere near as accountable to the public, as a public process. What you get to scrutinise at the end of the process is the report.



John Corker  
ABA General Counsel



## Q & A

### ***Ultimately, the reliance is on the judgment of the ABA?***

Yes.

### ***And there is no scrutiny of the ABA's judgment, other than the (section 180) report?***

There is scrutiny, and there are avenues available for review of the ABA's process, but they are only available to those who are adversely affected by a decision that flows from the process.

The processes are still subject to freedom of information review. A person might be able to get access to a wider range of documents than the ABA releases as part of its report of the investigation.

### ***So the in-camera process has some advantages over a hearing, but does not give a different outcome?***

That's right.

### ***The question remains: why doesn't the ABA conduct the investigation as an open process, and consider the public's right to know?***

There are a number of answers to this.

Usually we are dealing with a fair bit of confidential information. In a public hearing there would be quite extensive arguments about when we would have to go into private hearing. In the end, probably quite a lot of it would be heard in private

and we would be going in and out of public session.

It would be a much more adversarial process from the start, because the people we would be investigating would be represented by counsel, who would have a right to put submissions on behalf of their client, and object to questions. They could argue whether or not lines of inquiry were proper and about the relevance and admissibility of documents. They would perhaps even call witnesses themselves. The process would become more costly and more lengthy, but it would be more transparent.

Of the control investigations the ABA has conducted, I would say that even in a hearing process, large parts would have had to be held in private, because of the confidential material.

### ***What questioning is there as to whether information is commercial-in-confidence?***

We do question it. We are dealing with large

companies and we are usually looking at sensitive issues surrounding key decisions made within the company. When looking at control we are looking at how those decisions are made, who is involved making them and what they are.

Now, the reasoning processes that companies use to come to a decision often involve the drawing upon their own ideas as to how the company is running. In making a key decision, a company will always call upon what its business strategy is. Whatever its business strategy is at that time is valuable information for its competitors.

In a nutshell: when you look at the control of a company, you look at the key decisions that it makes and how they are made. In examining that, you will have to look at the reasoning, which is really the business strategy of that company at the moment. The business strategy of that company is valuable information, and therefore is commercial-in-confidence information.

That will nearly always be the case in control investigations whether they be cross-media, 75 per cent audience reach or two stations to a market. What we are looking at is whether a prohibited person is in a position to exercise control. So where you look is: what are the key decisions being made at the time and how are they being made?

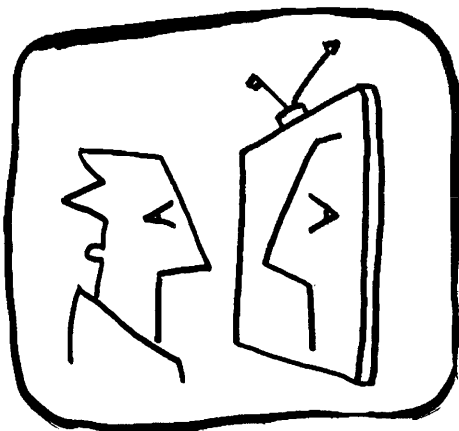
Those issues create the inherent difficulties in conducting the matter as a public hearing.

### ***Are there secrecy provisions?***

No, but during one of our investigations, we were issued with a subpoena by a court to produce a transcript of evidence given in private.

The ABA argued that the transcript should not be released because to do so would prejudice the course of its investigation. The argument was based on public interest immunity grounds, and the court accepted that argument. So there is some agreement about the sensitivity of the material the ABA receives during an investigation. Therefore, the ABA reserves the right to keep the proceedings of an investigation confidential, so as not to prejudice the further course of an investigation. This is the second reason why they are conducted in private.

When the ABA investigates a company, it may be following leads, or for example, trying to find out what happened at a key meeting. It may have two witnesses' accounts of what happened at that meeting, and may wish to talk to a third person. Now in a public hearing, that third person will be forewarned of the line of questioning. We direct people at the end of their evidence, not to talk about their evidence,



### **Section 180**

If publication of matter in a report or part of a report would or would be likely to adversely affect the interests of a person, the ABA must not publish the report or part of the report until it has given the person a reasonable period, not exceeding 30 days, to make representations, either orally or in writing, in relation to the matter.

except with their legal adviser, until the report of the investigation has been made public, or until they are otherwise advised.

**Why do these investigations take so long to report? The recent Fairfax investigation started in May and the period under investigation finished in August.**

The final evidence was gathered on 27 October.

Once all the evidence was in, and considered, the ABA prepared a draft report within five weeks, which is not long to prepare a report that is around two hundred pages and covers complex issues. We then gave affected parties the opportunity to examine the report (as required under section 180 of the Broadcasting Services Act), and they had three weeks. They sought a two week extension of time. The ABA granted them about one week and their comments came in 'right on Christmas. The ABA then sought external legal advice on their comments, and received this at the end of January. Over the next month, the ABA considered the comments and revised the report, and released it on 8 March. I would say it was not a long time.

The answer is that this inquiry hasn't taken too long at all, once you understand the nature of the process.

**How would you answer the complaint: Why did the ABA take such a long time when everyone knows Kerry Packer is in control?**

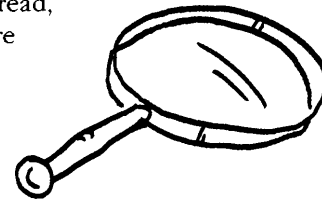
The answer is—we don't know 'Kerry Packer is in control'. You can surmise and have suspicions, but the ABA must make a decision on the evidence, not on surmise or suspicion.

**What other investigation procedures does the ABA have access to?**

The Act says because of the complexity of the matters under consideration, it is not possible to provide rules which would give a definitive answer in all cases, therefore the ABA is given additional powers of investigation in order to

reach a conclusion. It is a difficult issue of judgment as to whether or not a person is in a position to exercise control. That's a starting point. You need to use investigative tools that are pretty thorough.

One of the other tools we use is issuing a notice that requires a person to produce relevant documents. We usually do that before examining that person on oath. That also adds to the length of time investigations can take—we can have a large number of documents produced on notice, which must be read, analysed and considered before (and after) we examine the witnesses.



**When is it appropriate to have hearings?**

There are certain times when it is.

1. If there is a conflict of evidence and a need to test a witness' credibility. This has not happened so far—evidence from various witnesses, as to what happened on any particular occasion, has been quite consistent. A public hearing is conducted in a more formal environment, in which you are actually saying to the witnesses, 'look, I don't believe you'. If someone is not telling the truth, and they are a critical witness, then you would go to a hearing—that is the only way to deal with it.

2. If there is a genuine wide-based public interest, and there would not be an adverse effect on the company. The ABA's public hearings so far have related to community radio broadcasting licence allocations: there is wide-based public interest in the community. It's ideal for a public hearing—there is no confidential material.

Investigations into codes and conditions matters are conducted in private, but at the end of the investigation, the ABA releases a report. Part of the reason for conducting these in private is based on cost.

**Is an investigation similar to a judicial process?**

The entire process is quasi-judicial in nature. The judicial process is an adversarial process, which hears from two sides. That happens towards the end of the process. An investigation follows an inquisitorial process. Initially it is more a matter of inquiring into something, in the same way the police do. When the information is obtained the ABA reaches a preliminary view and then complies with the principles of natural justice, by issuing a draft report and allowing the affected parties to comment on it. 