Seen to be Done: ABA Chairman Stands Down from Radio Inquiry

When Chairman of the ABA, Professor David Flint appeared on John Law's show on 2UE during a hearing into the Commercial Radio Codes of Practice, the Communications Law Centre requested that he stand aside from the hearings. This is a transcript of Professor Flint's announcement to the hearing that he would stand aside and the CLC's proposed application, presented by Henric Nicholas QC.

THE CHAIRMAN: I propose to begin with an announcement. On Monday, 1 November, in another capacity, I was telephoned by Mr Stuart Bocking of 2UE. He advised me that a former Prime Minister, Mr Bob Hawke, had accused me on air of being a liar and that I had been exposed as a liar and that I had deceived people. Mr Bocking offered me a right of reply. I accepted. I did so, because I believed that the only effective way of assuring the listeners of Radio Station 2UE that Mr Hawke and I had merely a difference of opinion would be through that way. Another media opportunity would not achieve this. Since the allegation was against me and about a somewhat arcane practice within the Commonwealth of Nations which I had researched, I was by far the best person to respond. I should point out that I do not believe that public figures should normally resort to the defamation law. There was no private conversation with Mr Laws, nor did we discuss this hearing, nor was I the recipient of special treatment.

It is, I believe, a universal practice within the media to allow a right of reply when such an allegation is made, particularly from a person of the status of a former Prime Minister. I am not aware that I received anything but normal treatment on air from Mr Laws, nor did I treat him differently from any other presenter.

My appearance was followed by calls that I stand down. Some came from persons who have previously attributed to me statements I have never made and actions I have never committed. The Leader of the Federal Opposition also called for me to stand down. Many of these calls, especially the most vociferous, were, I think, related more to the constitutional debate than to a consideration of this hearing. I cannot however complain that they were made - the old adage applies, "If you don't like the heat, don't go into the kitchen." The reasons why I went into the kitchen are well known.

I have now received notice of the terms of the proposed application which would be made today that I stand down from the hearing. I understand that it is not to be alleged that I am biased; nevertheless, I should point out that I understand that, in making findings, the panel must limit itself to and impartially assess evidence actually adduced in the hearing.

I take section 169 [*Broadcasting Services Act 1992*] to be limited to matters akin to the taking of judicial notice; moreover, in the making of findings which impact deleteriously on the parties or the participants, those findings must be relevant and necessary and the more the impact of those findings on the participants, the greater the level of satisfaction the panel must have as to their veracity.

I understand that the application will be based on the reasonable apprehension of bias tests and for reasons which will become appropriate, I propose to comment on that. This will not involve a subjective analysis as to whether or not I am in fact biased. In this context, the dictum enunciated by Lord Hewart is usually cited; that is, that it is of fundamental importance that justice should not only be done but that it should manifestly and undoubtedly be seen to be done. As I understand it, the principle has been stated by the High Court of Australia in the Livesey case [*Livesey v NSW Bar Association* (1983) 151 CLR 288] to be this:

"A judge", and I take that to mean an officer of a tribunal, "should not sit to hear a case if, in all the circumstances, the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of a question involved in it."

I take it that the slightly different wording of the test in the John Laws v Australian Broadcasting Tribunal case [(1990) 170 CLR 70] does not constitute a reformulation of the test.

The cases of apprehended bias seem to fall, to me, into three broad classes. One is where the judge or the officer has already expressed a view on a relevant matter as in Livesey; the second area seems to involve common membership of an organisation which is relevant to the hearing; the third, ...

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which appears to be more relevant, relates to contact between the judge or the officer and one of the parties or witnesses. This is invariably in private or at least not in the earshot of all of the parties. The conversation is invariably about the case or could be seen to be about the case.

I find it difficult to see how a public conversation on the airwaves in the exercise of a right of reply on a matter having no bearing on the inquiry could lead a reasonable person - that is a fair-minded observer who takes the trouble to obtain the basic facts - to the conclusion that there is a case which constitutes apprehended bias.

I note the cases frequently contain an admonition that the judge or the officer not automatically or lightly disqualify himself whenever requested to do so. My intention then was to hear the application with an open mind and then to decide. However, I am advised that the Communications Law Centre will not accept a decision which does not support their application. If unsatisfied here, they intend to seek redress in the Federal Court, as is their right. This, of course, would lead to delay, particularly if the unsuccessful party then appeals.

It was the unfortunate plight of the predecessor of this Authority, the Broadcasting Tribunal, that its hearings were too frequently interrupted by such actions; indeed, the Broadcasting Services Act was designed to avoid this as far as possible. But it would clearly be wrong of me to rely on a Federal Court hearing for any purpose, even my integrity, other than to argue that there is no case of apprehended bias. In deciding my future participation, I have to have regard to the public interest and the integrity of the hearing and to the interests of those most affected.

While this hearing is not into any alleged breach of the law, it is of special concern to the participants, especially those most affected, for obvious reasons. Even lawyers and journalists do not always understand the heavy strain and the heavy burden that witnesses are put in hearings such as this where there is a very strong media interest.

The hearing is ready to proceed; in fact, there are only a few more days for the taking of evidence. This courtroom is available. The witnesses and solicitors and the ABA staff are ready. A Federal Court action, one not brought by any of the affected participants, would be an unnecessary distraction and could destabilise the inquiry; worse, the imposition of weeks or probably months of delay on the affected participants would, in my view, constitute a cruel and unusual punishment which they do not merit. Therefore, although I cannot see how in the light of the authorities a case of apprehended bias can be made out, I propose to deem myself unable to continue as envisaged in section 193 of the Broadcasting Services Act. I stress that in doing so, I do not believe that I am biased nor that the circumstances justify a finding of apprehended bias. I do so to preserve the integrity of the hearing and that the participants not be subjected to unconscionable delays by unnecessary litigation. ...

(Short adjournment)

THE CHAIRMAN: Mr Nicholas?

MR NICHOLAS: May I seek the panel's leave to appear for the Communications Law Centre in this hearing, and to indicate to the panel the orders that we propose to seek, had it become necessary for the panel to determine the application which was foreshadowed at the end of last week.

With respect, we think it appropriate that the panel should have on record what the nature of my client's application was and in a summary way have it recorded what the basis of that application was. Unless I am asked to do so, I do not propose to descend into the detail of the facts or the principles of law which are applicable to them. But it seemed to us, with respect, that there should be recorded the matters to which I referred. Now, may I do that?

THE CHAIRMAN: Leave is granted.

MR NICHOLAS: Thank you, Mr Chairman. The application that we sought to make was firstly an order that the Chairman, Dr Flint, be disqualified from and immediately cease participation in this inquiry, being the hearing into the conduct of 2UE, Mr Laws and Mr Jones.

Secondly, we sought an order that the panel conducting the hearing be reconstituted by the appointment of a member of the ABA to sit with Mr Gordon-Smith to continue the inquiry. Alternatively, an order that the ABA not proceed with the inquiry whilst Dr Flint was a member of the panel conducting the hearing into the conduct of 2UE, Mr Laws and Mr Jones.

Now, in a summary way the basis for the application which we sought to make may be stated this way, and it arises from the recent conduct of the Chairman in several respects. Firstly, the participation in the Laws program broadcast on about 11am, Monday, 1 November 1999. That exercise involved the provision by Mr Laws to the Chairman of a direct personal benefit of immeasurable but substan-

tial value of a kind not usually or generally available to others. The Chairman took this benefit.

This benefit had several extraordinary features. Firstly, it was a means of speedy reply to the savage and defamatory personal attack by Mr Hawke, and a means whereby the Chairman might vindicate his reputation; secondly, it was a means of broadcasting statements to advance a cause of which the Chairman was a prominent advocate; thirdly, it was a means of promoting the Chairman's book, *The Cane Toad Republic.*

Secondly, participation in the Radio 2BL program on 2 November 1999, and the statements made in it, and published statements in the press on numerous occasions thereafter. Thirdly, numerous public statements by the Chairman by way of explanation and exculpation which demonstrated that he had in fact prejudged and has provided the basis for the apprehension that he might have prejudged the question whether he should immediately cease participation in the inquiry with the consequence, it would have been submitted, that he would not be seen by the parties or the public to bring an impartial and unprejudiced mind to the resolution of the very question which was to be raised by this application.

And by way of conclusion, members of the panel, it would have been submitted, perhaps what might seem to be obvious to the bystander, that an important aspect of this inquiry is of course the existence and effect of influence.

Ultimately, after taking the panel to the facts, had we needed to do so, it would have been submitted that the objective facts, when applied to the circumstances of this case, provide a reasonable basis for apprehension that the Chairman would not bring an independent and impartial mind to the determination of the questions before the panel clear of the taint or suspicion of influence or favour; and thus we submit that the irregularity was of a fundamental kind which [required] the immediate cessation of [his] participation in this hearing as a member of the panel, otherwise the ultimate determination of the questions and findings made are likely to be flawed, and whatever the outcome of the hearing might have been neither the parties nor the public may have had confidence in it.

In a summary way, members of the panel, that is the basis of our application before we propose to take the panel to the background, the context, the circumstances and, what I choose to call, the immediate objective facts. Those are the matters for the moment that we wish to have recorded. <

High Definition Recommendations for the Broadcasting Industry

The CLC organised a seminar to discuss the recommendations contained in the Productivity Commission's Broadcasting Inquiry: The Draft Report. The seminar was organised by Clayton Utz 4 November 1999.

The Communications Law Centre's Sydney seminar on the Productivity Commission's Draft Report into Broadcasting provided many participants with their first opportunity to assess this report. The keynote speaker was Professor Richard Snape from the Productivity Commission, who provided an overview of the Inquiry, the main issues, and the Commission's preliminary findings. He described the main issues facing the Commission as: maximising the benefits from digital technology; maximising effective use of broadcast spectrum; ensuring media diversity; developing content policies which balanced social, cultural and economic objectives; and assessing standards and complaints procedures.

The most distinctive feature of the Productivity Commission's approach, according to Professor Snape, has been not so much its economic methodology for analysing costs and benefits of regulation, but its rejection of a 'quid pro quo' approach to policy, where one section of the industry is given something in exchange for something else, whether it be spectrum access, the right to multi-channel, content quotas or program standards. He emphasised that such a policy approach, where competing interest groups are given 'enough to make them happy', was not, in the

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