

**SYDNEY AND MELBOURNE LICENCE RENEWAL
INQUIRIES: REPORT SUMMARY**

In December 1985 the Australian Broadcasting Tribunal ("the Tribunal") announced its decision to renew the licences of TCN-9, ATN-7, GTV-9 and HSV-7 for a further three years. Subsequently, the Tribunal's report outlining the reasons for its decision was released.

Although the Tribunal considered applications for the renewal of the licences of TEN-10 in Sydney and ATV-10 in Melbourne the results of its inquiries have not yet been announced, awaiting the result of its inquiry into the restructuring of News Corporation Limited. However, inquiries into those two licence renewals were not joined with the restructuring inquiry.

1. Preliminary Matters

A number of preliminary points were considered in relation to the licence renewals. Those dealt with here include the right to participate at inquiries and whether the inquiries for renewal of licences of stations in the same city could be conducted concurrently.

1.2 Joint Hearings

On the latter point the Tribunal said that the inquiries should be conducted separately, although the hearings for each station in the two cities followed each other. This was because different issues arose at the inquiries.

1.3 Participation

In relation to participation the Tribunal followed the principles set out in its report on the licence renewal inquiry into commercial television station TCN-9 (No. 11/82 R(T)). The two relevant matters were the general nature of the person's interest, the subject matter of the proceedings and the relevance of the case which was to be presented in those proceedings. Following the enactment of the Broadcasting and Television Amendment Act 1985, and in particular the amendments to section 22AA by that Act, a person's interest is no longer relevant.

In determining relevance the Tribunal said that the test was whether there was any real and significant connection be-

tween a matter that a person proposed to pursue at a licence renewal hearing and the issues which were to be considered by the Tribunal. The Tribunal said that it was required to make a judgment about the practical likelihood of it being assisted in its consideration of an issue relating to the renewal of a licence by such participation.

The relevant grounds are those set out in ss86(11B) and 83(5)(b) of the Broadcasting Act. ("the Act"). Such issues are:

- (a) The licensee's undertaking to provide an adequate and comprehensive service. Consideration of that matter did not extend to making programming decisions for television stations, but rather consideration of whether -
 - (i) the licensee is properly informed about its market;
 - (ii) whether the licensee was capable of analysing and applying this information;
 - (iii) the soundness of the process by which decisions about programming were made;
 - (iv) how well the service compares with that provided in similar markets;
 - (v) evidence of significant public concern about any areas of programming; and
 - (vi) the way in which resources have been allocated to the acquisition and production of programs, bearing in mind the nature of the market.
- (b) Circumstances which would justify the Tribunal in not renewing a licence for three years.
- (c) Evidence which would lead to a decision by the Tribunal to insert a condition on the licence, for example, to remedy an aspect of programming performance.
- (d) Matters included by the Tribunal in

its previous public report on particular aspects of the licensee's performance, together with observations or recommendations by it intended to bring about improvements in the future.

As far as relevance was concerned, the Tribunal referred to its obligations under s25(1) of the Act to make a thorough investigation, and also to conduct an expeditious and just hearing. It stated that usually a just and expeditious inquiry would require that the submitter be confined to the relevant matters raised in the submission which the Tribunal considers appropriate to investigate at a renewal inquiry.

2. Ascertainment

In relation to ascertainment the Tribunal relied on remarks made in its report into the Adelaide Licence Renewals 1984 (No. 308/84). Ascertainment was defined as a gathering of information about the circumstances of a market, and applying this information when making program judgments. The Tribunal gave greater prominence to the second part of the undertaking pursuant to s83(5)(b) of the Act at the Sydney and Melbourne licence renewals, than it had in Adelaide, in view of the fact that the Sydney and Melbourne stations provide the majority of Australian programs to other licensees.

However, on ascertainment, the Tribunal reiterated that the undertaking to provide an adequate and comprehensive service effectively required licensees, through audience and other research and by other means, to acquire detailed insights into the nature and diversity of the community being served and to go beyond the material presented in the Tribunal's background papers at the inquiry. Such knowledge should then be drawn upon in designing a service.

The Tribunal pointed out that in relation to the Sydney and Melbourne licensees they had a dual role in providing a television service for the communities they served and in providing the majority of Australian and overseas programming. This meant that at times they were arguing from two different points of view on ascertainment. It noted that as a major part of the licensees' programming effort was involved in providing programs for their networks this tended to dominate the stations' arguments.

Whilst the Tribunal endorsed the licensee's attitude to providing an adequate and comprehensive service in the manner stated by ATN-7, which was to provide a mainstream commercial television service based on programming which was such that would provide the most satisfactory service for most of the community for most of the time, it also endorsed comments from the Green Report on the requirement that the commercial sector should introduce a measure of innovation and experimentation. This, it said, would assist in achieving a diversity of programming in all three sectors of the broadcasting industry.

The Nine Network at both the TCN-9 and GTV-9 hearings criticised the Tribunal's perceived over emphasis on research studies.

The Tribunal said that it was clear from the wording of the undertaking that whatever methodology was employed a licensee had an obligation to have regard to the nature and diversity of interest of the community it was licensed to serve. The Tribunal considered this required a knowledge of such matters and some relationship between this knowledge and program decision making. Reliance on ratings data did not sufficiently discharge a licensee's ascertainment obligations. It was also open to the Tribunal to examine the licensee's practical interpretation of its ascertainment obligation and to challenge its methods of ascertainment with other evidence which suggested the service being provided was not adequate and comprehensive.

In relation to special interest programming, the Tribunal noted that licensees were required to produce special interest programming to satisfactorily fulfill their undertaking to provide an adequate and comprehensive service. This entailed supporting programs which might not be initially successful in economic terms. As far as special interest programming was concerned, in a multi-station market, it was reasonable that only one licensee met a particular need. However, it was not reasonable to rely solely on the ABC and SBS to meet such needs.

3. Encouragement of Australian Creative Resources

The Tribunal stated that this part of the undertaking gave rise to obligations on licensees beyond showing Australian programs and employing Australians. The

Tribunal endorsed the statement of Actors Equity that the Sydney and Melbourne licensees had a duty to innovate and push back barriers. The Tribunal suggested that this could be done by providing opportunities for new program ideas to be shown to the public, by developing innovative ideas and encouraging production houses to try out new ideas, and by encouraging and training new talent.

The Tribunal recognised the importance of drama on Australian television and stated that licensees must take financial risks to ensure that they met at least the minimum Australian drama content. This remark was specifically addressed to the Nine Network, which had only achieved this only through Tribunal dispensation.

4. News and Current Affairs

At the Sydney licence renewals one major issue was the role of licensees in the training of journalists. Whilst ATN-7 employed 3 cadet journalists, neither TEN-10 or TCN-9 employed any. They told the Tribunal they did not consider that metropolitan television stations were an appropriate place for the training of journalists. The Tribunal followed its comments in its Self Regulation Report, that it saw the employment and training of journalists as part of a station's obligation to provide the public with informed and impartial news and current affairs. It also considered that the training of journalists was one of the many ways in which a station might use, and encourage the use of, Australian creative resources, in fulfilment of part of its undertaking.

5. Classification of Television Programs

There was considerable evidence in relation to classification of television programs by licensees, particularly by TEN-10. The Tribunal noted the importance of this and said that it must be undertaken by people in touch with community standards and with sensitivity to shifts in community values. People undertaking this task would need contact with community organisations.

6. Reliance on Facts' Commercial Acceptances Division

Each of the licensees had continued to rely on the assessment of commercials

by the Federation of Australian Commercial Television Stations ("FACTS") Commercial Acceptance Division ("CAD"). The Australian Consumers Association ("ACA") submitted that if it was established that a licensee had breached the television programming and advertising standards it could not claim as an ameliorating factor that the breaches were due to either reasonable reliance and information supplied by another person or the act or default of another person, in relation to which the licensee took reasonable precautions and exercised due diligence to avoid, within the terms of POS 06.

The ACA submitted that the licensees reliance on the CAD was not reasonable and they had not taken reasonable precautions and exercised due diligence.

FACTS had applied to the Trade Practices Commission for authorisation of the procedures of its CAD and the Trade Practices Commission had issued a draft determination and summary of reasons on 11 May, 1984. During the time prior to this draft determination the CAD had operated under an interim authorisation from the Trade Practices Commission. Following receipt of the draft determination FACTS withdrew its application and the interim authorisation lapsed. FACTS had then advised its members that the submission of advertisements to the CAD was no longer mandatory. However, each of the stations unilaterally decided to only televise commercials which had been submitted to, and approved by, the CAD.

The ACA had required the Tribunal to impose undertakings on the licensees that they would set up independent comprehensive checking systems to ensure compliance of advertisements with the Television Program Standards, in addition to requiring policy statements in relation to sexism, advertising of non-nutritional food, etc.

The Tribunal found that there were very few cases of CAD approved advertisements which breached the requirements of the Program Standards or the general law. Therefore, it considered it reasonable for licensees to continue to rely on the assessments of the CAD. It also said that it was appropriate to take this reliance into account when considering the weight to be attached to any breach by an advertisement that had been classified by the CAD.

The Tribunal said that it was not appropriate for it to pass judgment on the merits of the Trade Practices application. The Tribunal said that it was impor-

tant that licensees ensured that the CAD was sensitive to the concerns and attitudes of the community and in this regard suggested that it would assist licensees and the CAD if licensees met regularly on an organised basis with community and consumer groups. It also suggested that the complaints procedure of the station should be widely publicised. Only GTV-9 had done this prior to the hearing.

7. The Nine Network and Drama Content

The licences of both TCN-9 and GTV-9 were renewed for the full period of 3 years. However, the Tribunal recorded its dissatisfaction with their performance and stated that it would continue to monitor such performance. If it was found to be unsatisfactory the Tribunal said that it would use its powers pursuant to s85(1) of the Act to impose conditions on the licence relating to Australian drama. It characterised the Nine Network's drama strategies as unsound and said that whilst such strategies might save money they did not secure the production of successful peak time drama programs and fulfilment of the quota. The Tribunal said that a licensee must take sufficient financial risks to ensure that it met at least its minimum drama content.

The Nine Network had suggested that there should be greater flexibility to enable resources to be used in the development of other types of programming. However, the Tribunal noted the reliance of the Nine Network on television drama (largely imported) as a type of programming, and consequently expected the Network to commit greater resources to the production of Australian drama and the encouragement of the local drama industry. It stated that the major reason for the Network's current difficulties in the serial drama area appeared to be reliance on the success of a single serial, rather than adopting the safer strategy of developing more than one serial. In addition, it said that the Network would seem to have a lesser commitment to the encouragement of necessary creative talent and the type of creative environment required to produce successful indigenous drama. The Network seemed to be out of touch with conditions now required by creative talent, such as writers, in order to produce their best and most commercially viable work. In particular, it referred to evidence from the Australian Writers Guild to this effect.

Julie James Bailey dissented from the decision made by the majority of the Tribunal to renew the licences for TCN-9 and GTV-9 for a full term. Her reasons for that decision were given in relation to the TCN-9 renewal.

In particular, she found that these stations had failed to comply with their undertaking to encourage the use of Australian creative resources. She said that TCN-9 did not appear to recognise the importance of Australian drama as a means by which Australian lifestyle and values could be represented on television. Nor did it appear to give a great deal of commitment to developing people and ideas in order to improve the content of its programs. She said that it was important in the public interest that the stations took a much more responsible role in developing the skills and creative talent necessary for the production of Australian television programs and, in particular, drama.

Ms James Bailey also said that there should be further investigation into management capability at the station, and particularly that of Mr K.F.B. Packer, the Chairman of TCN-9 and GTV-9. She considered that Mr Packer ought to have been required to give evidence at the hearing. She also questioned the fitness and propriety of the licensee, for example, the perceived lack of candour of the Nine Network in placing emphasis on its live variety programs "New Faces" and the "Mike Walsh Show", both of which were cancelled following the hearing.

8. Public Interest Advocacy Centre Submission

The Public Interest Advocacy Centre ("PIAC") had lodged a submission at the TCN-9 inquiry relating to the fitness and propriety of Mr K.F.B. Packer. The submission raised matters arising from the Costigan Royal Commission. During a preliminary hearing the Tribunal decided that, apart from a film tax minimisation scheme, it should not make any further investigation of the matters raised by PIAC.

The film tax minimisation scheme was one which Mr Packer had admitted two of his companies were parties to. The effect of it was that for a total outlay of \$68,000 the two companies concerned had claimed deductions over two years totalling \$1.8 million. The claims for deductions had failed, as the particular film did not earn any income, as required by Division 10BA of the Income Tax Assessment

Act, in the relevant years. However, it was pointed out that neither TCN-9 or any other part of the Consolidated Press Group had invested in this scheme.

The Tribunal found that it was appropriate for it to investigate this scheme, although it did not necessarily involve criminal conduct. Trustworthiness of a person in Mr Packer's position was relevant to fitness and propriety. It was also tied in with the undertaking given by licensees in relation to the use of Australian creative resources. It found that there was no evidence that either Mr Packer or his two companies had not been honest with the Commissioner for Taxation in relation to the film tax minimisation scheme and that there was no connection between the scheme and the provision of Australian programs by the licensees.

However, the Tribunal sounded a warning for the future. It said that it would take into account on the issue of fitness and propriety participation by licensees, or persons possessing significant interests in licensees, in artificial schemes which attempted to avoid the obligations and limitations imposed by the Act. In the context of the News Limited restructuring inquiry this appeared to sound an ominous note. In relation to the film tax minimisation scheme Mr Packer had relied on professional advice. The Tribunal said that this would not be a sufficient excuse in relation to matters regulated by the Act.

9. Max Gillies

Evidence had been led that TCN-9 had cancelled an appearance by the comedian Max Gillies on the Mike Walsh Show because of contemplated defamation proceedings by Mr Packer, and TCN-9, against Mr Gillies and the Australian Broadcasting Corporation arising out of an episode of the Gillies Report. The evidence was that the decision to cancel this appearance was made on legal, and not artistic and programming, grounds. The Tribunal said that whilst the private interest of a licensee, its directors or management, were recognised as entering into programming decisions from time to time this should be done objectively, balancing the private interests of those persons with the public interest in the provision of an adequate and comprehensive service.

10. Conclusion

Whilst the Tribunal in this report covered a very full range of issues, it would appear to have decided that caution was appropriate and that warnings were sufficient. On the two issues of ascertainment and drama content the Nine Network seemed to have disregarded the Tribunal's requirements. In the absence of an independent party prepared to invest substantial sums to show (possibly) that its stations were not providing any adequate and comprehensive service there appears to be no reason why this attitude should not continue.

Robyn Durie

NEWS

NEW COMMUNICATION SERVICES

The Government has foreshadowed the transmission of new communication services as part of existing radio and television signals. These services are to be known as Ancillary Communication Services and are expected to be provided by existing broadcasters, independent operators and entrepreneurs. The first may commence operation later this year.

It is anticipated the services will include commercial and public radio, educational tutorials, data/information distribution and background music. They will be transmitted either to simple receivers or attachments to existing television or FM radio receivers.

At present most television or FM radio signals can be used to transmit both broadcasting and non-broadcasting material. New technology now permits more efficient use of this capacity by providing additional channels at a modest cost and with potential benefits.
