Examining the procedures for granting FM radio licences

In the last issue of the Bulletin, Paul Paizies examined the ABT's inquiries into the granting of new FM radio licences in Newcastle and on the Gold Coast.

Now that the first four major inquiries have been completed, Martin Cooper analyses the procedures used by the ABT for awarding FM radio licences and asks, how appropriate they are for future inquiries.

Broadly speaking, the Australian Broadcasting Tribunal has adopted a documentary-based system for licence enquires accompanied by a brief oral presentation without cross examination of witnesses.

The documentary procedure is highly formalised, subject to a very strict timetable and involves massive amounts of paper since all parties must be circulated with all documents.

In brief outline the procedure is as follows:

1. Each party is given approximately eight (8) weeks to prepare and file a detailed application accompanied by a large number of schedules which set out matters such as market research details, engineering details, corporate structure details, programming details and so on.
2. Each party is given an opportunity to ask questions of the other parties.
3. Each party is required to file supporting documents which will be used in presenting the application to the Tribunal, particularly including market research and engineering work.
4. Parties are given an opportunity to reply to the questions asked of them by the party.
5. Each party is required to submit a Statement of Facts and issues upon which they propose to rely in presenting their case to the Tribunal.
6. Each party is required to submit a list of witnesses and a Statement of Evidence to be given by them to the Tribunal.

The total documentary preparation has in recent enquiries required up to one thousand (1000) pages of material from each applicant and thus, where as many as nine (9) parties to an enquiry exist the volume of paper can be imagined.

The presentation of each party's case was preceded by an arbitrary determination of an order of presentation by which the parties present their case "in chief" by assembling the board of directors of the company (and other persons if deemed desirable) for presentation of the partys case and "examination" by the Tribunal.

Subsequently, the parties present a final address to the Tribunal in reverse order to the presentation of the cases "in chief".

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Generally speaking, the parties have intended to use the case "in chief" to speak to their written application and to emphasis their strengths and weaknesses. The final submission has been used to summarise and to criticise the cases put by other parties. Final addresses have normally been confined to one hour or less.

From a practitioners point of view, the procedure as presently laid down is impossibly complex and inefficient.

The shear volume of paperwork makes a proper analysis and assessment of all applications almost impossible. Since the Tribunal has not clearly indicated which areas the applications it regards as most significant, the parties have felt it necessary to respond to almost every detail so that, for example, a great deal of time has been expended on examining corporate structures, carrying out company searches, examining company minutes and records to attempt to discover the examples of the failures to comply with the strict requirements of the Company's Code. Such activity would seem to be pointless except, perhaps, to establish a disregard for procedural niceties indicating a general unfitness to hold the broadcasting licence.

Equally, minute analysis of each applicant's market research has been necessary in order to attempt to establish which research is more accurate. Since so much of research is qualitative in its processes, such an exercise would seem to be of limited value. Obviously, if the market research has not been carried out by a professional organisation or contains a fundamental flaw such matter might be relevant but minute analysis of research techniques and so on would appear to be an entirely fruitless exercise.

The interview system is also very inefficient. It places great emphasis upon presentational skills and the "showmanship" of individual directors but would seem to have little or no relevance to the vital issue of which board of directors is able to cohere together and act with financial and community responsibility in the organisation of a radio station and its programming.

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Because of the interview technique it is notable that a number of applicants have attempted to insert media personalities and "celebrities" on their board line-ups in an attempt to impress with their presentation.

The content has often suffered.

The highly ambivalent attitude of the Tribunal to the use of lawyers and to the scope of their activities in the enquiry process has not only lead to much uncertainty but has multiplied the wasteful work which has had to be undertaken by applicants.

Some applicants have used lawyers to actually present material to the Tribunal whereas others have kept their lawyers very much in the background. Some lawyers have approached the application process as a highly forensic exercise in which every "i" must be dotted, "t" crossed and ambiguity exercised. Again this has lead to great complexity. For example, in the Geelong applications, one party sent out questions to other applicants which in some cases ran to over thirty (30) pages and read very like interrogatories in a commercial litigation matter. They invited replies of equally forensic complexity.

The ultimate criticism of the present procedure must lie in the fact that the generally anticipatory nature of the entire process makes it impossible to engage in any real analysis of applications. If the available audience is known only in the most general outline, if the size of the revenue in the market can only be guessed at, if the influence of overlapping stations and other media can only be guessed at and if the decision of the other station or stations in the market to go FM or not is not known at the time of the application, one wonders how any Tribunal can possibly carry out a realistic and fact based comparison of applications.

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The present system is patently not working and is grossly inefficient. It has been estimated that each applicant in the Gold Coast spent in total executive time and direct costs more than $300 000.00 in preparing their applications. This means, if combined with the Tribunal's costs in conducting the enquiry, a total cost exceeding $4 000 000.00. Would this money have not been better spent in establishing the station?

If it is accepted that the process does not provide the Tribunal with any real answers as to which applicant is the most suitable to operate the station (except to perhaps eliminate the totally incompetent or the financially insecure), is there not a better system?

It is suggested that the following reforms could be easily implemented and would have a substantial impact upon the cost of Applications whilst providing the Tribunal with a clearer picture of potential applicants:

1. Before applications for grant are called, a "viability" hearing should be conducted at which the encumbent licensee or licensees will be entitled to argue the issue of their commercial liability in the context of the grant of the new licence. Potential applicants should be entitled to appear at this preliminary hearing and to ask questions of the encumbents.
2. An application fee of $25 000.00 per applicant should be charged;
3. These monies would be used to provide a single comprehensive market research and engineering analysis which would be made available to all applicants and which the Tribunal would use as the basis for all factual findings about engineering and audience matters.
4. The Tribunal would assume that all applicants are capable of providing the technical facilities necessary for an appropriate station and examination of issues such as studio size and numbers would be eliminated. Of course, each applicant would be required to give appropriate undertakings in relation to technical matters.
5. The Tribunal would lay down an appropriate corporate structure which applicants are invited to accept. If they wish to use some other structure then this must be specifically justified.
6. The Tribunal would lay down minimum capital requirements for all applicants for each particular station.
7. The Tribunal would lay down a series of criteria which it will use to assess applicants including the desirable level of local anticipation, the minimum amount of local programming, the minimum percentage of Australia content and similar matters.
8. Applications would be very simple in format and would primarily consist of a series of undertakings to comply with the outlined procedures and structures accompanied by schedules in which an applicant's choice to vary from the basic structural guidelines could be set out.
9. Each applicant would have a **private interview** with the Tribunal in which the Tribunal would be free to ask for further explanation of any aspect of an applicant's application or proposed management. At this time the Tribunal could ask for specific undertakings in relation to programming matters.
10. Each party would be given an opportunity to present in writing a final submission in support of its application.

This procedure should reduce if not eliminate the competitive nature of applications. Criticism of other applicants should be discouraged. In certain circumstances the Tribunal might even suggest the amalgamation of two or more applicants which, if the parties agree, would ensure the grant of the licence.

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In the private interview process, the Tribunal could "negotiate" with applicants to ensure matters the Tribunal considered were important were included in applications although, of course, applicants would be free not to accept "suggestions" from the Tribunal.

Much greater emphasis should be placed upon the first licence renewal of each successful applicant to ensure that all undertakings given have been complied with unless the Tribunal has been notified and approved the variation from those undertakings. It is the sanction of loss of licence for failure to comply with undertakings which will be the most important part of this reformed licence grant system.

It is suggested that the reforms proposed above comply with the requirements of the Broadcasting Act and yet provide an efficient, cheap and fair licence grant system.

The administrative structures of the Tribunal will not be stressed to breaking point, citizens will obtain additional radio services much more quickly and efficiently and the encumbent will be treated more fairly.

New Telecommunications Bill

from p4

(5) Clause 52 and the definition of "reserved services" has an expanded operation by the "declaration of policy" contained in Clause 36. By stating an intention to Parliament referable to particular services, but without any attempt to define those services (eg "leased circuit services"), continuing argument will arise as to the proper interpretation of Clause 52. The scope of that argument is evident by the various submissions received by the Department concerning an appropriate definition of those terms. It is wrong to include those terms in the legislation, having regard to their acknowledged ambiguity.