# The 'commercial viability criterion': Wesgo Communications & beyond

**Ken Brimaud examines the development of the ABT's approach to this topical requirement in the Broadcasting Act**

The recent unreported judgment of the full court of the Federal Court in ABT v Wesgo Communications (1989) provides a timely opportunity, particularly given the present happenings in the broadcasting industry, to examine just where the concept of commercial viability stands today and its likely future.

The nexus between good programs and the ability to pay for them has provided from the beginning the basis for the view that licences for new commercial stations should not be granted unless the proposed station would be financially viable. However, it was only in 1977 that amendments to the Broadcasting Act gave this concern legislative expression and the Australian Broadcasting Tribunal (ABT) was required to have "due regard" to the commercial viability of the commercial broadcasting or television stations in the relevant area served or to be served when granting or renewing a licence.

## The U.S. Position

In the U.S case of FCC v Sanders Brothers Radio Station (1949) the US Supreme Court held that although the Federal Commissions Act was neither intended nor designed to protect licensees against competition, such competition is not to be disregarded entirely by the Federal Communications Commission (FCC) because in certain instances it may become so ruinous as to cause not only financial hardship to the competing station, but also an overall degradation of service to the public. In such situations, the court concluded that the effect of competition should be considered by the FCC in implementing its licensing policy.

The FCC in subsequent years adopted a licensing policy premised on the theory that competition could not be adverse to the public interest but in 1958 the Court of Appeals for the District of Columbia Circuit in Carroll Broadcasting Company v FCC definitively established the relevance of economic injury to the public interest and made it incumbent upon the FCC to consider this factor in allocating uses and wave lengths assigned for commercial broadcasting between competing uses and geographical areas to ensure the most efficient use in the public interest. The FCC was to issue a licence when the applicant could show that the grant would serve the public "interest, convenience, or necessity".

## The ABT approach

In the first detailed investigations of "commercial viability" by the ABT in the Coffs Harbour Licence Grant inquiry and in its Albany Commercial Viability inquiry during 1983-84, a definition of commercial viability was decided upon which in successive years remained basically intact. The Tribunal said that the proper interpretation of commercial viability as used in the Broadcasting Act:

*" means the ability of a broadcasting or television station to survive commercially while effectively operating in accordance with the conditions of its licence and providing an adequate and comprehensive service pursuant to the undertaking required to be given under the Act"*

The Tribunal had regard to the FCC, its sister authority in the US, and concluded that there was "a significant similarity in the approach required to be taken by the FCC and the Tribunal". Indeed it expressly stated that in its view it had a "primary duty to act in the public interest".

## The Perth Inquiry

This general approach to the interpretation and application of the commercial viability criterion continued in subsequent years. In the first metropolitan television licence grant inquiry for 20 years (for a third commercial television station to serve Perth) the Tribunal endorsed and more fully expanded upon the principles enunciated and developed in the Coffs Harbour and Albany inquiries.

It adopted the same definition of 'commercial viability', considering that criterion within the context of the public interest and saying that it would not feel constrained from making a decision which could jeopardise the commercial viability of existing stations but would "explore the degree of likelihood and balance that degree against other public interest factors".

The Tribunal in the Perth licence grant inquiry took a very practical approach to the application of the criterion equating its assessment with that made:

*"of plans for other public services, such as roads, airlines, sporting grounds and universities because there is rarely one simple dominating factor. A facility which extends existing services inevitably affects existing services to some extent".*

Such an approach placed the commercial viability criterion no higher than other factors to be considered in the public interest. The Tribunal rejected the use of the expression 'commercial viability' "in a special commercial or trade sense" refusing to equate it simply "with profitability or rate of return on investment, although both those elements are among useful indicators" which it must consider.

The significance of the Tribunal's decision in the Perth inquiry was its consideration of the "commercial viability" criterion in a practical, commonsense and non-legalistic manner within the context of the other statutory criteria and public interest considerations which both the Broadcasting Act and experience require the Tribunal to "have regard to".

This approach was not far removed from the approach in the United States following the decision in the Carroll case.

## The 1985 amendments

The link between viability and service to the community was perhaps more positively reflected in further amendments to the Act in 1985 which introduced the service-based concept of planning and licensing. Section 83(6)(c)(iii) provided that the Tribunal should not refuse to grant the licence unless it appeared to the Tribunal that it was advisable in the public interest to refuse to do so, having regard to the need for the commercial viability of the service provided pursuant to the existing licence.

In considering the grant of a commercial licence, the Tribunal was now no longer obliged to consider the commercial viability of the broadcasting and television stations already serving the proposed area of the licence applicant, but to have regard to "the need for the commercial viability of the service or services provided pursuant to the other licence or other licences" having service areas that overlap the service area.

The first licence grant inquiry conducted by the Tribunal under the 1985 amendments

to the Broadcasting Act was in relation to a grant of a new commercial FM licence in the same area as that served by the applicant's existing AM radio station '2GO Gosford'. In that 1988 inquiry the Tribunal adopted the principles formulated and method of analysis applied in previous licence grant inquiries. In reaching its decision to grant a new commercial FM radio licence to serve the Gosford Wyong area.

In 1989, Wesgo Communications appealing the 2GO decision succeeded in its submission to the Federal Court that the Tribunal erred by considering not the commercial viability of the service provided by Wesgo, but the commercial viability of Wesgo itself, irrespective of the service it was providing pursuant to the 2GO licence (Wesgo Communications v ABT). Because the Tribunal had extensively referred to earlier decisions all made under earlier legalisation, made frequent references to commercial viability in the context of a broadcasting station's viability and failed to specifically use the expression 'commercial viability of the service' Justice Sheppard, although recognising that the Tribunal was aware of and may have considered the new legislation, concluded that the Tribunal had erred in its application of s. 83(6) (c) (iii). He appeared to have taken the view that the 1985 amendments to the Act substituting the expression 'service' for 'station' signified a substantive change.

## The ABT vindicated

The matter went on appeal to the Full Court of the Federal Court which held that the 1985 amendment to s. 83(6) (c) (iii):

*"was not designed to effect any relevant substantive change to the law; rather it was a consequential amendment designed to adjust the terms of the Broadcasting Act consequent upon the change of the basis of licensing from single 'stations' (which referred to physical structures) to 'service areas', that is to say, in relation to a licence, the area to be served pursuant to the licence".*

The Full Court took the view that when the Parliament directed the attention of the Tribunal to the need for the commercial viability of the service or services provided pursuant to other licences "it was dealing with a practical question which turned upon the financial feasibility of the operations conducted by the relevant licensee with the respect to the relevant service". Although the 'service' comprises the programs that are broadcast, these do not stand apart from the general conduct of the operations of the licensee pursuant to the licence. The Full Court said that:

*"It is too limited a reading of the expression of sub-s 83(6) 'the commercial viability of the service ..... provided pursuant to the other licence', to treat it as referring merely to the program material provided to the listening public in the service area"*

Rather, what is involved is a "a practical test designed to enable the Tribunal to look at the provision of the relevant service by a particular licensee, and to consider if it is commercially viable or not in the sense of financially sustainable".

The Full Court therefore endorsed what a long line of Tribunal decisions in licence grant inquiries, particularly in the Perth inquiry, had said about the practical nature of the task the Tribunal had to perform when applying the 'commercial viability' criterion in the particular instance: that is, that one practically has to look at the total picture - the operations being conducted by the licensee pursuant to, and in accordance with, its licence, as well as the particular market environment in which it does so.

In 1988 ss. 83 and 86 were repealed but new sections substituted which included commercial viability as a criterion for grant of licences (except limited licences), for a renewal of licences and for their variation, revocation or the imposition of new licence conditions.

## The criterion under threat

In the United States the Carroll doctrine has come under attack as being contrary to the First Amendment to the U.S Constitution guaranteeing freedom of speech and of the press. The cost in time and money to both parties and to the government of requiring consideration of the Carroll issue against what many consider the relatively remote possibility of actual harm to the public interest has been another source of criticism. Indeed, in May 1987 the FCC undertook an inquiry to consider abolishing the Carroll doctrine.

Interestingly, the same reservations about the concept of commercial viability have recently emerged in Australia. The July 1989 *Discussion Paper* by the Broadcasting Review Group of the Department of Transport and Communications (DOTAC) concluded that there was a case for re-examining the role of viability in the planning and licensing process. Striking a similar note to the FCC's *Inquiry Notice*, the Review Group identified a number of "special problems" associated with the 'commercial viability' criterion. For instance, it was the concept of commercial viability as forming "a barrier to entry allowing incumbent licensees to carry on business under its protection".

The Review Group also saw a "conflict of aims" between the general objectives of the government to remove unnecessary regulation, promote free markets, provide greater competition and increase variety of programmes with the protectionism inherent in the concept. It referred to the "complexity of licensing inquiries, the cost to participants in the inquiry, the amount of related litigation and the delays in delivery of new services to the public".

The Federal Government has not stood still. Stage II of the National Metropolitan Radio Plan in which there will be allocated by tender up to two new commercial FM radio licences in each capital city, envisaged that the Tribunal, although involved in awarding these new license, "will not have regard to viability of the proposed service or the effect on the viability of existing services".

The Federation of Australia Radio Broadcasters has taken a strong stand against the reform, referring to the development as "the most significant and far reaching reversal of broadcast planning policy in the history of Australian Broadcasting".

The recent upheavals in the industry caused largely by the financial problems experienced by the major television networks (or their owners) have exposed the inadequacy of present broadcasting legislation. Comments by the Deputy Secretary of DOTAC, Mr Mike Hutchinson, advocating a reversal of certain fundamental tenets which have governed broadcasting law in Australia, and the Minister's mixed response, suggest that serious reconsideration of the basic policy doctrines of Australian broadcasting is taking place beneath the surface.

The commercial viability criterion is obviously one of the many policies being currently assessed in the light of the new types of services and the changing environment of the broadcasting industry.

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the 1989 Telecommunications Act.

I note that the Minister must also see the low cost of the CSO's as an embarrassment and we welcome his announcement yesterday that the government is bringing forward its plans to look at the structural arrangements between the three carriers.

This review must extend to a full inquiry into whether or not there is any future justification for the continued Telecom monopoly over any or all of the reserved services. Austel is the appropriate body to conduct that inquiry.

Communications is a sunrise high tech industry. Australia needs private enterprise entrepreneurial energy to ensure that we are internationally competitive in this industry that is so vital to our economic health.

*This is an edited version of an address Judy Stack gave to a CAMLA Luncheon on 7 December 1989.*