

Judicial Review and the Broadcasting and Television Act

The Administrative Decisions (Judicial Review) Act 1977 has since October 1980 provided simplified and more accessible procedures for challenging the lawfulness of exercises of Commonwealth administrative powers.

It makes more apparent the wide assortment of possible grounds for obtaining a Court order against an administrator, and by creating a novel right of a person aggrieved to obtain a full statement of reasons for a decision it dramatically improves his chances of proving the existence of one or more grounds.

The Act has many intricacies and adopts or modifies a complex body of common law. Its full effect cannot adequately be summarised in this Bulletin.¹ What is attempted here is a sketch of the types of decisions and actions taken under the **Broadcasting and Television Act 1942** in respect of which persons aggrieved by them may obtain remedies.

Availability of Remedies

When considering whether the ADJR Act is available in particular circumstances, the search is to find a "decision to which the Act applies", which is defined as a "decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment." (s.3) Identification of such a decision is necessary before a statement of reasons can be compelled (s.13), before a stay of proceedings on the action can be obtained (s.15), and before an application for an order of review can be made under section 5.

Remedies in other circumstances may still be available from the Federal Court, but the Court will require demonstration of a link to a decision to which the Act applies. Thus, other orders of review may be obtained under **section 6** for conduct engaged in for the purpose of making such a decision, and under **section 7** for a failure to make such a decision.

It is also within the jurisdiction of the Court, either inherently or under **section 32 of the Federal Court of Australia Act**, to grant other remedies if the claim for them arises out of the matter the subject of a concurrent application under the

MATTHEW SMITH looks at the wide application of the Administrative Decisions (Judicial Review) Act 1977 to activities in the area of broadcasting and television law.

ADJR Act or if it arises out of an associated matter.² This could allow the Court, for example, to determine the validity of a Commonwealth legislative action or to award damages for torts of breaches of contract for which the Commonwealth was liable.

Actions falling within the general definition of "decision to which the Act applies" are expressly excluded from the ambit of the Act if they are made by the Governor-General or are in the classes of decisions listed in the First Schedule to the Act.

These exclusions have no operation in the context of the B & T Act, except to remove from challenge decisions of the Governor-General appointing or removing from office members of the Australian Broadcasting Tribunal, the Australian Broadcasting Commission or the Special Broadcasting Service, and decisions by him under **section 131** authorising the Minister to assume emergency powers.

Excluded only from the ADJR Act's provision for statements of reasons are the classes of decisions listed in the **Second Schedule**. In the context of the B & T Act, this prevents an aggrieved person requiring reasons for decisions relating to the investigation or prosecution of the criminal offences in the Act, and for decisions connected with personnel management, appointments and industrial matters within the authorities established by the Act. Until October 1981, decisions on promotion or transfer of their employees are also excluded from the obligation to provide reasons on request.

The central concern is, therefore, the ambit of the definition of "decision to which this Act applies". By **section 3(2)**, "decision" includes all the possible actions such as granting, making suspending, revoking or requiring an order, licence, approval, condition, determination etc. It seems to encompass every conceivable type of action which could be disputed.

The usual questions are therefore: does the action have administrative character, and is it made under an enactment (which includes statute, regulation or instrument). These questions are to be answered by analysis of the statutory framework of the particular action under challenge.

It will be apparent that the application of the Act is not determined by reference to the nature of the person or body whose action is under challenge. Any person acting under an enactment is subject to the Act if his actions are seen to have administrative character.

The Act thus looks to the nature or character of the action itself rather than to the person or body performing the action, although the nature of that person may be relevant to this process of characterisation.³

Persons acting under the B & T Act whose actions may be challenged include the A.B.T., the A.B.C., the S.B.S., the Minister, and their delegates. It is suggested below that in some circumstances they may also include licensees acting under the terms of their licences or written undertakings.

Administrative Character

The characterisation of some types of actions as "administrative" is at present uncertain, and will remain so until the concept is fully explored by the Court. However, many types are clearly caught, and in approaching the others it may be expected that the Court will take a wide interpretation.⁴

Clearly within the concept are all decisions made in the course of broadcasting regulation which involve the issue of licences and approvals to specific persons according to statutory criteria or discretions.

The A.B.T.'s exercise of its powers with respect to individual licences and licensees is therefore covered, and do not escape because the Tribunal is 'quasi-judicial' or because it follows court-like procedures.⁵

Continued Page 20

Future Regulation of Television

From Page 18

of existing services. However, the following are some of the important regulatory issues that appear to arise. There are, of course, substantial economic, social and cultural issues as well.

- The use of new television channels for the provision of RSTV also has the potential for the development of other additional non-subscription services. What should be the programming mix between subscription and free-to-air television (if any)?
- To enable RSTV channels to be used for various purposes it would probably be necessary to vary existing licensing provisions which do not allow frequency sharing. How could this be done to achieve the most effective utilisation of possible available television time?
- To what extent should time sharing be permitted on allocated RSTV channels by such bodies as religious, ethnic, local community and sporting organisations.
- To what extent should existing standards and regulations apply to programming provided on RSTV and cable channels; e.g. censorship, Australian content etc.
- Should, and if so what type and

amount, of advertising or commercial sponsorship be permitted on RSTV or cable channels.

- Should there be any restrictions on RSTV or cable networking. To what extent should such networking be subject to regulation relating to ownership and agreements.
- Policy concerning RSTV and cable ownership and control may be consistent with existing provisions of the Broadcasting and Television Act or with new principles, which are more or less restrictive. For example:
 - To what extent should existing licensees be eligible to hold RSTV and/or cable licences for services either within their current coverage area or in other areas.
 - Should there be any differentiation in the participation allowed to existing licensees on a geographic or some other basis.
 - To what extent should other associated media interests (e.g. cinema owners/operators) or new entrants to the media industry be eligible to hold RSTV and/or cable licences.
 - To what extent should limitations be placed on overseas ownership and control on RSTV and cable services.
 - Should the licensing processes for

RSTV and cable be the same as, or similar to, those applying under the Broadcasting and Television Act or should a new system be developed which is more appropriate to each of them.

- In the event of a cable franchise being offered for an area served by an existing RSTV service should:
 - (a) The RSTV licensee be eligible to apply for that service,
 - (b) the RSTV licensee have some special consideration e.g. the cable system must carry the RSTV service if the RSTV licensee so desires.
- Should there be some "must carry" obligation on a cable operator with respect to other services provided in the area served by his franchise. Should there be any, and if so what, restriction on the number of imported distant signals that may be carried by a cable operator.
- What copyright liability should apply to a cable operator for local signals and distant signals carried on his system.

These are only some of the regulatory type issues that the Tribunal sees arising in this inquiry. With a view to obtaining as much assistance as possible from the forthcoming hearings the Tribunal will shortly release a detailed background paper which will detail significant issues which the Tribunal considers are raised by the Terms of Reference.

Judicial Review and the B & T Act

From Page 19

Similarly, the Minister's regulatory powers, for example to make technical specifications for particular licences and to certify technicians, are covered.

It may be argued that some decisions are so political or 'policy' in nature as to cease to be 'administrative'. Examples of these are the Minister's powers to direct an inquiry (B & T Act s.18(2)), to prohibit or direct a broadcast (ss.99(3) and 104), and to plan the development of services (s.111C(1)(a)). However, it is suggested that exercises of these powers would be reviewable under the ADJR Act,⁶ although because of the unlimited nature of the discretions involved the possible grounds of challenge may be very circumscribed.

Based on more established

classifications the Court has held that the word 'administrative' excludes acts which answer the description of legislative or judicial acts.⁷

This places the making of regulations and statutory amendments beyond the scope of the Act, but also raises some uncertainty in relation to powers to establish general criteria binding groups of people, for example the A.B.T.'s powers over program standards (B & T Act ss.99(1), 100(4), and 100(5)). Prima facie, exercises of these powers are legislative even if they directly affect the interests of identifiable people, but it is possible that the Court may draw a qualitative distinction between law-making under the scrutiny of Parliament and administrative legislation.

Even if these decisions are outside the ADJR Act, an administrator's general policies and standards lack-

ing the status of 'laws' are open to review under the Act when applied in individual decisions, and indeed the inflexible application of them is a ground for intervention (ADJR Act s.5(2)(f)).

Also within the ADJR Act are procedural actions taken under the B & T Act in the course of substantive regulation. Many examples of procedural decisions potentially open to challenge appear, particularly in the steps taken by the A.B.T. in the conduct of its inquiries and the processing of applications to it. However, at times these actions may only be regarded as conduct in the course of making an ultimate or operative decision, and therefore only reviewable under section 6 and not open to a demand for reasons.⁸

When a decision made under the B & T Act does not serve distinctively governmental functions of the

Judicial Review and the B & T Act

From Page 20

regulation of broadcasting but instead parallels or is part of activity conducted generally in the community, there may be hesitancy in categorising the decision as administrative for the purposes of the ADJR Act.

However, from a recent case it appears that decisions pursuant to the powers and responsibilities given by the B & T Act to the A.B.T., the A.B.C. and the S.B.S. with respect to their employers are subject to the ADJR Act,⁹ and currently a significant part of Federal Court litigation under the Act involves government employees challenging actions of their employers or their appeal tribunals.

It would seem by analogy that the internal management and decision-making processes of these authorities are also subject to the Act.

There are indications also that the Court will consider decisions of the A.B.C. and S.B.S. on programming, contractual dealings and other activities in the community to be under the Act, on the basis that they are incidents in an administrative process followed by those authorities in carrying out the objects of the relevant parts of the B & T Act.¹⁰

Under an Enactment

The requirement that a decision to which the ADJR Act applies must be made under an enactment, emphasises the need in each circumstance to identify a particular provision of a statute, regulation or instrument by reference to which the action is taken.

The necessary degree or type of reference required by the words "made under" needs clarification. They arguably may mean: "regulated by" or "in accordance with", or on the other extreme: "by a person entrusted by the Act with some public function",¹¹ and it has been suggested that they mean: "in pursuance of" or "under the authority of".¹²

Clearly beyond the ADJR Act are

activities conducted solely under administrative arrangement. Many informal activities occur in the administration of broadcasting regulation and these cannot be directly challenged, nor can the formal activities of consultation and regulation which take place outside the B & T Act, a possible example of which is the procedures for censorship and classification of local programs involving the Film Censorship Board and on appeal the A.B.T.¹³

However, the net is cast wider than the terms of the B & T Act, since the ADJR Act also applies to decisions made under "instruments" made under the B & T Act.

If "instrument" means any formal legal document in writing,¹⁴ then the ADJR Act's remedies are available against administrative action taken under the A.B.T. program standards, under orders of the A.B.T. under section 17 or of the Minister under section 111D, under licence conditions, and under the newly required written undertakings of licensees.¹⁶ Contemplating the last of these, it may be possible that a licensee's decisions on providing an "adequate and comprehensive service" are under the ADJR Act on the basis that they (like the A.B.C.'s decisions under section 59) have administrative character and are made under the undertaking. Similarly, licensee decisions on political broadcasts under section 116(3) may be subject to demands for statements of reasons, and open to review by the Federal Court if a legal defect can be found.

New Tactics

Enough has been said to show that, despite considerable ambiguities of definition, the ADJR Act has very wide application to all activities in the area of broadcasting and television law. Persons affected by those activities are likely to have rights to demand statements of reasons and, if they can show errors of law such as defects of procedure, motivation or reasoning, have rights to apply to the Federal Court. Of course these rights are hedged with many technicalities and limitations, particularly very brief limitation

periods, but they deserve to be examined whenever disputes arise. With the other new administrative law remedies of Ombudsman, Administrative Appeals Tribunal and references of questions of law,¹⁵ tactics are available to people decisively to test action governed by the Broadcasting and Television Act.

Footnotes:

1. General introductions are to be found in D.C. Pearce: "The Australian Administrative Law Service"; J. Griffiths in (1978) 9 Fed L Rev 42; and L.J. Curtis in (1979) 53 ALJ 530.
2. See Philip Moris Incorporated v Adam P Brown Male Fashions Pty Ltd (1981) 33 ALR 465.
3. See Hamblin v Duffy and Others (1981) 34 ALR 333 at 339.
4. See Evans v Friemann (Fox J, 26 June 1981).
5. Hamblin v Duffy (supra) at p.339; Evans v Friemann.
6. But c.f. Barton v R (1980) 32 ALR 449 at 458.
7. Hamblin v Duffy (supra) at p.338; Evans v Friemann.
8. See Riordan v Connor and Others (1981) 34 ALR 322; and Evans v Friemann (supra).
9. Hamblin v Duffy (supra).
10. See Evans v Friemann (supra).
11. c.f. Polgardy v A.G.C. (1981) 34 ALR 39.
12. Evans v Friemann (supra).
13. See A.B.T. Annual Report 1979-80 at p.67.
14. As in Osborn's Concise Law Dictionary.
15. Broadcasting and Television Act s.22B inserted by 1981 Amendment Act.
16. Broadcasting and Television Act ss.83(5), 86(10) and 89A(1A) inserted by 1981 Amendment Act.