Australian music on radio

Late last year a challenge was mounted against the ABT's new program standard for Australian music on Radio. Here Charles Alexander of Minter Ellison reviews that challenge.

This decision of the Federal Court of Australia (Mr Justice Davies) was handed down on 16 September 1988 and concerned Ballarat Broadcasters Pty Ltd & Ors v Australian Broadcasting Tribunal & Ors.

This judgement arose out of an application for judicial review of a decision of the Australian Broadcasting Tribunal ("Tribunal") under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJRA"),

The Decision of the Tribunal outlined the new Program Standard the Australian Music on Radio to commence on 1 July 1988 and went on to state:

"Although incentives will not be offered for the broadcasting of new recordings, new independent material and station-originated music which the Tribunal wishes to encourage, it proposes at Licence renewal to request stations to supply evidence that they have used a significant amount of this material. If stations cannot demonstrate use of this material conditions may then be placed on a licence in order to encourage the use of (such material) depending on the relevance of this material to the station's format".

> *"not a decision capable of review but simply an informal advice"*

The applicant radio stations claimed that they were uncertain of the effect of this paragraph - whether there was an obligation to broadcast new independent material, new recordings and station originated music; whether failure to broadcast such material would prejudice the renewal of their licences or whether renewal would be subject to some special condition. The meaning of the words "significant amount" also required clarification. The applicants submitted that the decision was so uncertain as to be an improper exercise of power and relied on Sections 5(1) (e) and 6 (2) (h) and 6(1) (e) and (2) (h) of the ADJRA.

Counsel for the Australian Record Industry Association and the Phonographic Performance Company of Australia (which had intervened) filed an objection to competency on the ground that the paragraph was not a "decision" capable of review but simply an informal advice with respect of obligations already imposed on the licensees under Sections 83(5) and 114(1) of the Broadcasting Act 1942 ("the Act") under which licensees were obliged to provide an adequate and comprehensive service and use the services of Australians in the production and presentation of radio programmes.

Davies J in rejecting this argument, considered that the paragraph was not expressed as mere advice but rather in terms of the imposition of an obligation.

His Honour considered a number of alternative possibilities in determining whether the decision could be supported.

He found the subject paragraph did not amount to a standard as the matter dealt with in the paragraph was deliberately excluded from the standard; neither did it express a condition to which all licences were subject and it was not expressed as an order having force of law in that it did not order any person to do or refrain from doing any act, breach of which would be an offence under Section 132 of the Act.

Finally he rejected the Tribunal's contention that it constituted a direction made pursuant to Section 17. His Honour held that in order to constitute a direction it must direct all or specified licensees to do or refrain from doing an act, and to make it clear that the recipient of the direction must comply with it or be guilty of an offence as provided in Section 132 of the Act.

> *"Such an exercise of power is an improper exercise of power"*

In considering the question of uncertainty Davies J held that the uncertainty lay "not in the meaning of the words used in the paragraph but the impossibility of determining what precise power it was that the Tribunal considered itself to be exercising and what effect it intended the paragraph to have."

Because the Tribunal did not specify, and as it was impossible to determine what power it exercised, the result of the exercise of the power was uncertain. Such an exercise of power is an improper exercise of power.

Davies J therefore made an order declaring that the paragraph did not constitute a valid standard, condition, order or direction. He also made it clear that he considered the paragraph in question to have no effect as it added nothing to the consideration of whether a licensee had complied with its obligations under the Act His Honour added by way of obiter dictum, that, should a licensee not be in breach of its undertakings or the obligation, it may be an arbitrary and invalid exercise of power to impose upon the particular licensee a special condition or obligation with respect to new recordings, new independent material and station-originated music in the absence of a standard with respect to such material.

This remains a question for final determination on another day, as does the question of whether the Tribunal has the power to make such a standard.