

Television Network Ltd.), the agreement entered into proved to be in breach of the Act or the warrant conditions, there were remedies under the Act which could be pursued when an actual broadcast had taken place."

(Decision 7/82 at page 4).

The Tribunal took the view that the question before it was whether or not the Corporation should be permitted advertising programmes on Fridays during the period in question (Decision 7/82 at page 4). The Tribunal granted the application approving the inclusion of advertisements on Fridays between 1100 and 1200 hours from 25 June to 17 December 1982 inclusive, subject to 2 conditions:

1. The advertising programmes in each hour shall not exceed 11 minutes.
2. Each broadcast shall take place only if, during the preceding period of 1 week the applicant has desisted from broadcasting advertising programmes for a period of 1 hour on Network 1 at a time when advertising programmes have normally been broadcast.

The Allegation

On 5 July 1982 the New Zealand Public Service Association Inc. ("the PSA") in a letter to the Secretary of the Corporation complained about various aspects of the *Good Morning* programme and raised the question of whether the arrangement was in breach of section 82 of the Broadcasting Act 1976. The PSA submitted that, by drawing direct advertising revenue from the programme, Northern was participating in the benefit of the Corporation's warrant. If this arrangement amounted to allowing Northern to participate in the benefit of the Corporation's warrant, section 82 (1) would require the Tribunal's consent in writing. This is not a ground for complaint under section 25. The Tribunal therefore treated the formal complaint of September 1982 in this respect as an allegation of breach of warrant. The other matters of complaint were dealt with under the complaints procedure (Decision 31/82).

On 16 December the Tribunal gave a procedural ruling (Decision 27/82). It was decided that a formal notice would be given to the Corporation of the allegation, that the PSA should remain a party and that an order would be made for the production of the contract between the Corporation and Northern. Consideration would be given to an order for confidentiality.

The allegation which the Corporation was required to answer is annexed to this decision.

The Hearing

The contract was produced to the Tribunal. With the deletion only of the percentage of revenue to be retained by Northern in clause 24 it was made available to the PSA on a confidential basis.

The Tribunal had the benefit of detailed submissions from Mr Bartlett for the PSA and Mr Nicholson for the Corporation. Mr Bartlett's first submission related to the meaning of the word "benefit". He drew attention to the wide meaning given in the Shorter Oxford Dictionary of "advantage, profit, good". He submitted that the contract provided for the supply of programme by microwave and by pre-recorded video tapes and that this amounted to participation by Northern in the operation of the Corporation's television station. He argued that this view was supported by the fact that the contract made Northern responsible for the technical standards of the programme. He further submitted that, by becoming bound to transmit the *Good Morning* programme, the Corporation had bargained away the freedom which it would otherwise have enjoyed to broadcast programmes of its own choice.

Mr Nicholson invited the Tribunal to view the arrangement as a normal contract for the supply of programme, that being a function and power specifically granted to the Corporation under sections 22 (c) and 34 (a) Broadcasting Act 1976. He submitted that in acquiring the *Good Morning* programme the Corporation was in fact exercising the choice which Mr Bartlett argued it had bargained away. The consideration in return for the supply of programme was that the supplier could retain a proportion of the advertising revenue. Mr Nicholson argued that not only should the word "benefit" be considered; the phrase in section 82 (1) is "participate in the benefit" and the meaning of "participate" is "to partake, to share in common". It would be an unduly restrictive interpretation, he said, to hold that the Corporation could not contract for the supply of 1 hour's programme per day without being held to have allowed another to have participated in the benefit of its warrant.

In his submission the Corporation had not bargained away its right to choose programmes; it had exercised its choice. The agreement was for a programme in a particular format. The idea was not substantially different from, for example, taking a programme live from an overseas broadcasting organisation.

The Tribunal accepts Mr Nicholson's submission as to the nature of the arrangement. It is satisfied that sections 22 and 34 of the Broadcasting Act 1976 empower the Corporation to acquire the rights to broadcast programmes from outside producers and suppliers. (The significance of those sections is referred to later). The arrangement with Northern was within the scope of these sections. "To purchase or otherwise acquire programmes" includes the power to obtain

broadcasting rights without necessarily obtaining outright ownership of the programmes.

The contract shows that the Corporation gave away none of its responsibilities as a warrant holder. The programme was to be within an agreed format, normal technical standards were to be maintained, the Corporation had the right to order changes in the programmes, the supplier was under a duty to have stand-by material available in case of faults, the normal complaints procedure was to apply and Northern was prohibited from assigning the benefit of the contract without the Corporation's consent. Even a substantial transfer of shareholding in Northern without the Corporation's consent would be expressly in breach of the contract.

Mr Bartlett's second submission was that the sharing of advertising revenue was a participation by Northern in the benefit of the warrant. He argued that section 73 made it clear that the right to advertise arose from a condition of the warrant. The sharing of such revenue constituted participation in the warrant. Mr Nicholson on the other hand submitted that the division of the advertising revenue was nothing more or less than a method of paying Northern for the programme which it supplied.

Mr Nicholson invited the Tribunal to find that, construing the contract as a whole, it was essentially one for the supply of a programme to be paid for by the division of advertising revenue, as the simplest and most convenient method of payment. He submitted that in construing the words as used in section 82 (1) they should be given no wider application than is consistent with the statutory intention of prohibiting the establishment or operation of a broadcasting station by an unauthorised person: Section 82 was intended to stop people getting around the need for specific authorisation by trafficking, partnership or "straw man" devices. The interpret the provision "permit any person to participate in the benefit of his warrant" as prohibiting the production and supply of programmes for a warrant holder would be to impose a restriction not intended by the legislature.

Mr Nicholson was unable to say at what stage a contract for the supply of programmes on this basis would drift into the realm of "trafficking, partnership or straw man devices." Nor is the Tribunal able to lay down a clear boundary line. For the purpose of determining the question before it, the Tribunal holds that on these facts, the obtaining of 1 hour's programme per day in the manner provided for in the contract between the Corporation and Northern did not constitute participation by Northern in the benefit of the Corporation's warrant. The stage at which section 82 (1) would apply is a question of degree which the Tribunal will refrain from attempting to define in this decision. Although the Corporation was to receive only a small percentage of the revenue this was not particularly significant, having regard to the time of day the programme was to be broadcast.

Having decided that the Corporation was not in breach of section 82 (1) it is not necessary to go on to consider Mr Nicholson's alternative defence, namely that the Corporation is not subject to that section. However the Tribunal considers it is desirable to express a view on this submission, in the interests of clarifying the matter.

Mr Nicholson drew our attention to sections 22 (e) and 34 (a) and also to section 17 which lists the general functions and powers of the Corporation. He submitted that, in the overall scheme of the Act, the Corporation was given a special status, with an entire part of the Act dedicated to its general functions, powers, and obligations. He said it was at least arguable that these powers and functions should be read as particular powers and functions and should therefore override the general provisions of the Act. In support of this he cited the maxim that generalities do not derogate from particular provisions.

The Tribunal does not accept that the Corporation's empowering provisions exempt it from the provisions of section 82. That section was adopted without substantial change from section 27 Broadcasting Authority Act 1968. That Act established for the first time a regulatory body independent of the (then) New Zealand Broadcasting Corporation.

Section 70 was adopted from section 16 of the 1968 Act and provides:

"(1) Before a person (including the Corporation) is granted a licence under the Post Office Act 1959 to establish and operate a broadcasting station (not being a short-wave station or a relay station) he shall obtain a warrant under this part of this Act.

(2) Subject to this Act, no person shall establish or operate a broadcasting station otherwise than in conformity with the terms and conditions of a warrant or authorisation issued by the Tribunal under this Act and for the time being in force."

Thus it is clear that the Corporation, like any other broadcasting organisation, is to operate only within the terms of its warrant or authorisation.

Further, as Mr Bartlett pointed out, section 83 (5) of the 1976 Act clearly contemplates that the Corporation could be penalised for being in breach of the terms of its warrants.