

Mr Gault said that ABS had decided not to press for the grant to it of television warrants subject to arrangements for funding.

Mr Gault submitted that if warrants for a third service issued without the imposition of appropriate conditions for Maori broadcasting, the opportunity to develop the structure of broadcasting in New Zealand consistent with bi-cultural interests would be lost. There would be formidable difficulties in re-structuring after a truly competitive commercial system had been established. For those reasons ABS supported the grant to ITV subject to a programme warrant grant to ABS. He said that such an application had been expected for some time and was a logical step. To defer the application for a programme warrant would be time-consuming and wasteful. It would postpone dealing with the issue. He said there were wider interests than those of the other applicants to consider, namely the public interest.

In support Mr Thomas argued that it had not been possible to make the applications earlier; that a programme warrant was a lesser application than an application for a television warrant but was within the framework of the earlier applications; that the change represented an updating of existing ABS evidence; that ever since the Corporation's proposed funding was withdrawn, ABS's uncertain status had been made known and it had avoided seeking an adjournment which would have caused delay; and that the issue went to the public interest which was a primary concern under section 80.

Mr Galbraith for the Film Commission and the Independent Producers and Directors Guild urged that the public interest issues be addressed first as they were fundamental to the grant of any warrants to any applicants.

Counsel for SCTV and UTC, ESTV and TV3 opposed the applications and referred to correspondence with ABS.

This description of the submissions put forward is necessarily brief and does not set out every argument which was put to us.

1. *The Nature of the Application:*

Section 71, Broadcasting Act 1976, provides for two kinds of warrants relating to television. A television warrant authorises the holder to operate a television station and to broadcast programmes from that station.

A television programme warrant authorises the holder to broadcast programmes from a television station. It does not authorise the holder to operate the television station.

Section 71 provides that there can be more than one warrant operating in respect of the same broadcasting station and the warrants would specify the times on specified days of the week during which the holder of the warrant may or shall broadcast programmes.

The essential benefit of a programme warrant is that the owner of the transmission equipment used to broadcast under the programme warrant is not under any liability by reason of being owner of the equipment, in respect of anything published in the course of the broadcast. In other words, responsibility rests with the programme warrant holder. No legal liability for what is broadcast falls on the television warrant holder who owns the station from which the programme is being broadcast in accordance with the programme warrant.

Section 71 (3) provides that where the Tribunal grants a television programme warrant it shall not issue the warrant unless it is satisfied that the applicant has made arrangements with the holder of the television warrant for the joint use of the transmission equipment and such other equipment (if any) of the television station as is necessary to enable the applicant to broadcast the applicant's programmes.

We see the latter provision as indicating that final arrangements regarding the use of the transmission equipment need not be formalised at the time the application for a television programme warrant is made, although the Tribunal would want to have evidence of the arrangements proposed in order to decide whether they would be feasible.

An application for a programme warrant is essentially different from an application for a television warrant. It would normally be accompanied by supporting material relating not only to the programmes to be broadcast but also financial and other evidence relating to matters to be considered under section 80 and the Tribunal's rules and directions that would be given upon the filing of such an application.

The Tribunal considers the application now proposed is so inherently different from the application filed by ABS that it is inappropriate to attempt a procedure to amend applications for television warrants. A new application would have to be filed.

The applicant would then have to file evidence in support specifically directed to the proposition. The Tribunal has heard evidence relating to the desirability of Maori programming in connection with the ABS application for television warrants and in

evidence relating to other applications. But it has not yet passed judgment on that. It would be better to consider a programme warrant application in the context of the Tribunal's conclusions drawn from the lengthy evidence and submissions it has heard.

ABS elected not to call some evidence in support of its application. It did not file an application to amend its application, although this was requested in September 1985. The amendment then contemplated was not to change the nature of the application to that of a programme warrant. The evidence in support was related to a third 'channel' not to providing programmes on contract for television warrant holders or to broadcast via a programme warrant.

ABS claims that the sole reason for failure to complete its case is that the Corporation has withdrawn support, but the Corporation states that that support was predicated on ABS obtaining sufficient outside support, which it had failed to do. If what ABS says about the withdrawal of BCNZ support coming as a surprise is true, it is clear the September 1985 intention was not to apply for an amendment to change the type of application.

2. *The Consequences of Granting the Application:*

The original call was for applications for four television warrants for four regions of New Zealand, i.e., warrants that authorised the holder to operate television stations, and to broadcast programmes from those stations. (Applicants had also to specify provision which would be made for news programmes by an independent news company. The Ministerial direction referred to such a news company operating pursuant to a programme warrant. Thus applications were filed for programme warrants for news companies.)

The Tribunal has not called for applications to be filed for programme warrants to provide Maori programming on any stations established as a result of these hearings.

If the Tribunal now received such an application and intended to proceed to hear it, then time would need to be given for objections and may also need to be given for other persons to make applications for programme warrants. Additional hearings of a proposal quite different from what was originally applied for would be needed for the ABS application.

This would necessitate a period of 3 to 4 months for potential applicants to organise themselves and prepare applications. There would then follow a further period when it would be necessary for evidence in support to be filed and for those who opposed the applications to prepare their evidence. We can envisage about 6 months being added to the present hearings for the purpose of giving to others an opportunity which ABS claims for itself alone on the grounds that it had applied for television warrants and was unable to complete a case for the grant of such warrants. It would delay the decision on the applications for television warrants.

There are also implications for the ITV application. It is clear that the proposal involves ITV in financing ABS production costs and possibly capital facilities (together with Television New Zealand should it be agreed that ABS would supply such programmes for TVNZ stations as well as for the private warrant holders). If the ABS application were to be considered, then it would be necessary to consider amendments to the ITV applications. These would cover financial arrangements, corporate structure and all the consequences that flowed from such changes. The amendments might be challenged as a radical change to the basis of the ITV applications. Further accounting evidence would once more have to be produced and examined.

ITV indicated that it should be able to approach the matter on the basis that as it developed its thinking it should be able to inform the Tribunal and modify its application to absorb new ideas. But this is not a change of emphasis or degree. It is a proposal to introduce new programming and that applications be changed during the period of the hearings to vacate programme time in favour of another applicant which wishes to change its application to a fundamentally different type of warrant.

The Tribunal notes that at an earlier stage ITV indicated a willingness to accept a condition that would require it to make a substantial financial contribution to the cost of production and transmission of Maori programmes on TV2 during peak listening times. It was a significant departure from ITV's original proposals.

That proposal in essence was for the grant of funds from the third service operators to the Corporation to assist it to provide extensive Maori programming at peak hours.

The proposal was criticised by ABS because it failed to give autonomy to Maori programme makers. It was not taken up by the Corporation.

The new proposal is of a different kind. It is for ITV to carry additional Maori programmes, produced by ABS and transmitted in time vacated by ITV for the purpose.

ITV has concluded its case except for some matters of clarification and some rebuttal evidence it has sought to introduce. If the Tribunal were to grant this application it may then have to allow the other applicants who have all closed their cases to re-vamp their applications to the extent that any may wish to do so.