The Tribunal also informed the applicants that it would reject the argument that shareholding interests of BIL in Hauraki are protected—

1. In the case of CCR by the consent of the Tribunal given to Hauraki or
2. In the case of Radio I by the savings provisions of regulation 12 (S.R. 1981/295) as far as regulation 20 (2) and (3) are concerned.

The Tribunal added:

"Brierley Investments Ltd. has informally applied for consent to have prescribed interests in Hauraki, Windy, Hawke's Bay FM and Radio I under regulation 20 (3). However, as the position disclosed is a serious one and the Tribunal's interpretation of the law may have application to other shareholdings it will be necessary for Brierley Investments Ltd. to file applications in respect of all consents which might be required under regulations 20 and 21 by 31 January 1986."

(That date was later extended to enable this decision to be considered).

Attention was also drawn to the amendment of regulation 21 made by S.R. 1985/197. The parties had been dealing with the previous regulation 21 which it was agreed was ambiguous, but the abiguity had been removed by the amendment made in August 1985.

The parties were informed of the Tribunal's minute by telephone.

The Tribunal is concerned that the effect of the BIL and Hauraki shareholdings in Radio I could produce a combined competitive position that would be detrimental to other individual stations in Auckland. But that was not its prime concern. It was concerned that the diversity of programming and news and current affairs should be maintained. It was less important from the regulatory point of view that separate spotter planes should be used for traffic or other matters on which there had been previous disagreement within the Radio I board.

It was therefore concerned that the undertakings should be given in respect of these matters, and the consent be based on those undertakings.

The Tribunal was also concerned that if Hauraki's application did not succeed or, if it were withdrawn, that the Tribunal's consent would permit the continuation by one company of prescribed interests in two AM stations. However the undertaking given deals with that position.

Finally the Tribunal was concerned at the attitude of BIL to the acquisition of shareholding interests in radio stations.

BIL had acquired further shareholding in CCR after giving an undertaking to the Tribunal that it would not acquire any further shareholding during the currency of the inquiry the Tribunal was conducting at the request of the Minister. We can understand the concern that BIL expressed that the inquiry had taken longer than expected but the company was well aware of the Tribunal's willingness to consider such an application to increase shareholdings as it had done so in another case. In fact at the time the undertaking was given the chairman had made it clear that the reason the undertaking was required was so that time could be taken over the inquiry and the position should not be prejudiced by further purchases. Whereas if notice were given and the purchases were considered undesirable, the Minister would be free to promote some regulatory hold on the situation.

Mr Timmins had no difficulty earlier in approaching the Tribunal when his client wished to purchase some shares. BIL appears to have increased its direct shareholding in CCR from nearly 6 percent to 15.5 percent and made no such application.

Such an attitude puts in peril the warrants of stations in which it has a prescribed interest. It also displays an attitude towards compliance that leaves the Tribunal with few grounds for confidence in the responsibility of those directors who have a duty to see that no breaches of warrant are committed.

The Tribunal does not accept the legal argument by Mr Laing that BIL did not have more than two prescribed interests in stations before increasing its shareholding in Radio I. Leaving aside the Radio Avon situation, it is clear that it has a prescribed interest in Hawke's Bay Radio Ltd. through Hawke's Bay Newspapers Ltd. and New Zealand News Ltd.

It also clearly has a prescribed interest in Hauraki.

Hauraki had consent to take a shareholding of 30 percent in CCR some years before BIL had a prescribed interest in Hauraki. It is specious to suggest that that consent applied to every person or company who is or becomes a shareholder of Hauraki. The consent was given to Hauraki and thus BIL on the acquisition of 52.6 percent shareholding in Hauraki was not for that reason deemed to have consent to have a prescribed interest in CCR.

In any event the consent given under the former regulations was to enable Hauraki to have a prescribed interest in a *second* warrant. It was not a consent to have one more than the regulations may from time to time permit a station to have as of right.

Furthermore BIL acquired a shareholding interest in CCR when it acquired shares in New Zealand News Ltd. The shareholding of New Zealand News Ltd. in CCR has been less than 15 percent and no *prescribed interest* in CCR could have been imputed to that company and through it to BIL. But a *shareholding interest* in regulation 19 (4) (b) imputed also to BIL.

The acquisition of shares by BIL directly (an increased shareholding of about 10 percent bringing the holding to 15.5 percent), when added to the other shareholding interests through New Zealand News, clearly created another prescribed interest even before the 15.5 percent level was reached.

The Hauraki shareholding in Radio I has until now been exempt under regualtion 12 of the Broadcasting Regulations 1977, Amendment No. 5 (S.R. 1981/295).

That regulation made it clear that Hauraki, which was entitled to exercise or control the exercise of voting power exceeding 15 but not exceeding 25 percent of the total voting powers, would be deemed (while it continued to exercise or control that voting power or to have that shareholding interest), not to have a prescribed interest in any warrant held by the company. (Hauraki wished to increase the number of warrants in which it had a prescribed interest by the acquisition of further shares in Radio I, but it is permitted to increase the number of prescribed interests only if it does so in accordance with regulation 20.)

BIL argued that it was entitled to the benefit of regulation 12 (2) as a shareholder with a shareholding interest as defined by regulation 19 of the principal regulations (as that regulation stood immediately before the commencement of the 1981 regulations).

We have no evidence that BIL held its shares in Hauraki immediately before the October 1981 amendment and therefore cannot find that the saving provision would apply.

In any event BIL clearly requires a consent because it has increased its prescribed interests since 1981 by the acquisition of prescribed interests in Hawke's Bay Radio Ltd. and Capital City Radio Ltd. and possibly in Radio Avon Ltd. It has therefore lost any protection it might have had under regulation 12.

We find that regulation 12 (2) merely protects the shareholdings as they stood in October 1981 insofar as shareholdings in Hauraki are concerned and for so long as the person who is deemed not to have the prescribed interest does not increase the number of warrants in which he has a prescribed interest.

On the face of it therefore BIL need significant consents and yet had failed to apply for any of them, even at the stage of making the present application to the Tribunal for the consent under regulation 20 (4).

This raises considerable doubt about the bona fides of the company insofar as regulatory controls are concerned. BIL applied for an obvious consent but, until the question was raised by the Tribunal, made no effort to apply for the consequential consents which, without any doubt at all would arise upon the increase in shareholding in Radio I which brought about the application to the Tribunal.

The Tribunal considered refusing the application made under regulation 20 (4) on the grounds that it would have resulted in a breach of regulation 20 (2).

However it was considered that in the interests of radio broadcasting in Auckland it was more appropriate to require BIL and Hauraki to make application for such consents as may be necessary. If they are not granted then it will be for BIL to decide which prescribed interests to discard.

The applicant's attention is also drawn to the provision relating to beneficial interest under regulation 19. The company is at present claiming that it has less than a 15 percent shareholding in Radio Avon Ltd. and yet has an agreement to acquire further shares from Mr Stewart. The Tribunal may find that beneficial interest would give BIL a prescribed interest in Radio Avon Ltd. and any consequential prescribed interests that may be derived from Radio Avon's shareholding in other warrant holders.

In respect of Radio I, we do find that, under regulation 18 (c) (ii), BIL would have a prescribed interest in Radio I Ltd. because it will be entitled to exercise control of the management of the private broadcasting station in respect of which the warrant is in force.

It could well be argued (but it was not raised before us) under the same regulation that BIL had a prescribed interest in CCR when it controlled Hauraki and New Zealand News which together owned 44.6 percent (30 percent and 14.6 percent) of CCR shareholder voting powers together with its direct shareholding (6 percent increased later to 15.5 percent) now totalling 60.3 percent.