

Decision No. 13/87

Before the Broadcasting Tribunal

IN the matter of Broadcasting Act 1976, and in the matter of applications for television warrants:

Chairman: B. H. Slane.

Members: Ann E. Wilson and Robert Boyd-Bell.

Co-opted Members: G. J. Schmitt and W. Kerekere.

REASONS FOR RULING

Dated the 22nd day of April 1987

AOTEAROA BROADCASTING SYSTEM INC. ("ABS") applied to the Tribunal to amend its television warrant applications to an application for a programme warrant to accommodate an arrangement to be entered into with Independent Television (ITV) Ltd. ("ITV") for ABS to supply and broadcast programmes on ITV's third television service if ITV companies should be granted the television warrants for which they had applied.

On 14 August 1986 in Decision No. 11/86 the Tribunal declined the application to amend.

On 31 October 1986 counsel for ABS, by memorandum of counsel dated 28 October 1986, sought leave to adduce evidence, a draft of which was annexed. The draft evidence was submitted as calculating "the almost complete cost of a programme warrant and its production, including the separate provision of much of the equipment, premises and staff from the 'ground up'."

Counsel also sought further written evidence from the BCNZ as to what it proposed for autonomous Maori television.

There was difficulty in arranging a suitable time for one of the counsel for ABS to be heard on the application. Counsel for ABS decided to make no further submissions in support and the Tribunal heard other counsel on 12 November 1986. When the transcript had been conveyed to counsel for ABS a reply was filed in writing on 21 November.

There had been no indication between 14 August and 31 October of the intention of ABS to apply for leave to file further evidence.

In the intervening period the Corporation's motion for review in the High Court had been dealt with on appeal by the Court of Appeal. At the direction of the Court of Appeal the Tribunal heard the parties on the question of whether or not any further evidence should be heard from the BCNZ. That application was granted on conditions.

In support of the application to amend Mr Gault said that ABS had been unable, because of the expressed intention of the BCNZ to withdraw support, to call evidence relating to the financing of its proposals. ABS would therefore stay with its interim decision not to call further evidence on financial or commercial matters. In 1985 ABS had applied for leave to amend its evidence and the Tribunal had required a schedule of the amendments to be filed. That was never pursued as it was later said to have been overtaken by events.

Mr Gault referred to the Tribunal's ruling of 14 August declining ABS's application. The Tribunal had indicated that one possibility was that it could impose conditions requiring arrangements to be made by a successful applicant for autonomous Maori broadcasting through a programme warrant holder or some other arrangement if this were thought to be appropriate. He also referred to the Tribunal's statement that:

"Since submissions can be made on the desirability of Maori programming conditions it is actually premature to be considering now an amendment application for a programme warrant before the Tribunal's position on Maori broadcasting and programmes has been established."

Mr Gault submitted that the Tribunal's position could be established only upon evidence. The extent of any conditions imposed and the ability of each of the applicants to meet the conditions within the terms of its own application could be established only if the Tribunal had the necessary evidence to enable it to come to a determination on those matters. He submitted that the financial commitment on the part of a warrant holder in accepting Maori programming conditions would extend beyond mere substitution for the costings already provided by applicants for local content. It would be impossible for the Tribunal to impose such costs through conditions without canvassing the costs with applicants in order to assess their ability to meet them. Leave was therefore sought to adduce evidence.

It was submitted that each applicant would be able to accommodate a large proportion of the expenditure within presently proposed structure and budgets. It would be for applicants to identify the additional or incremental costs to them of complying with such

a condition and to satisfy the Tribunal they could meet them. The draft evidence produced by ABS consisted of detailed financial estimates both of income and expenditure, particulars of equipment requirements, some staffing information and a commentary on the estimates as well as a description of the programme material on which they were based.

Opposing the application Mr Baragwanath said the evidence did not relate directly to the proposed service contained in the respective applications, rather to some other service which, it was claimed, would be desirable in the public interest. He submitted that the Tribunal could approach the issue in general terms and, if that were the Tribunal's view, it should impose relevant conditions when it issued a warrant to a successful applicant and it would then be appropriate to get into the fine details.

Mr Baragwanath said that if the Tribunal accepted the course proposed by ABS then it would have to require all the other applicants to consider the consequences to them, to respond in detail and to file further evidence. The Tribunal had already refused Mr Thomas leave to do that. The Tribunal should reject the evidence in its present form but if it wished to take a general broader approach it should require ABS to recast its evidence.

Mr Thomas supported the application but said he was somewhat embarrassed in doing so as it would involve the Tribunal in reversing its earlier decision excluding evidence which ITV had sought to produce on the way it would accommodate a condition which would allow a substantial measure of Maori programming. He agreed with Mr Baragwanath that there was more involved than the admission of the evidence which ABS sought now to adduce. Counsel for the applicant had suggested the extent of any conditions to be imposed and the ability of each of the applicants to meet the conditions in terms of its application could be established only if the Tribunal had the evidence necessary to enable it to come to a determination. The financial commitment on the part of the warrant holder in accepting conditions would extend beyond mere substitution for the costings already provided by applicants for local content. It would be impossible for the Tribunal to impose such costs through conditions without canvassing the costs with the applicants in order to assess their ability to meet them. It would be for applicants to identify additional or incremental costs to them. It would be necessary for the Tribunal to reverse its earlier decision. Mr Thomas argued that the Tribunal's ability to impose a condition relates to and turns on the evidence that is being sought to be adduced not by ABS but by the other applicants as a consequence.

The Tribunal was therefore being asked to consider a move which would require other applicants to produce further evidence.

Mr Miles referred to the significance of the expenditure involved which would amount to a fifth of the total planned expenditure of Southern Cross.

He submitted that the Tribunal would not have jurisdiction to impose a condition which had such a significant and massive effect.

He said it required a very detailed assessment of whether the costings were accurate or not. That would significantly lengthen the hearing. Mr Miles said the position was different from that of the Corporation on which the Court of Appeal's decision had been based, because of its very special status under the Act. ABS was just another applicant.

Mr MacRae submitted that there was a considerable difference going to jurisdiction between a condition which sought to enforce an agreement between an autonomous broadcaster and a warrant holder or a prospective warrant holder, and a condition which sought to impose on an unwilling prospective warrant holder the full terms of an arrangement by which autonomous broadcasting would be undertaken.

Mr Impey suggested that the end result of the consideration would be a combination of additional costs and very substantial changes in revenue so that the status of the applicants would be quite dramatically different. There would have to be comment on ABS's costs. His client's preliminary assessment was that they were substantially under-budgeted.

There would also be an impact on revenue. These were substantially matters that had been canvassed previously by the Tribunal in its ruling of 14 August.

In response, by memorandum, Mr Gault said that the actual cost to an applicant was the very subject on which ABS sought to have other applicants give evidence. He said there must be evidence to form a basis for the Tribunal to impose an appropriate condition. It was this evidence which was offered.

He conceded it may be open to the Tribunal to impose conditions without there being an adequate evidential base but if there were insufficient evidence any decision may be rendered futile if the successful party could not meet the costs. He said that evidence was not being produced to urge the adoption of a particular programme production schedule or to deal with the condition in a particular way.