THE ADJR ACT: COMMENTS ON ITS WORKINGS IN THE FIELD OF BROADCASTING

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1 INTRODUCTION

I was asked to address the impact of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) in the field of broadcasting. That is not the title of this paper, as I frankly doubt that the availability of review under the ADJR Act has made that much difference in this area.

This is not to say, of course, that there have not been important challenges to administrative decisions in this field, with significant consequences, both for those of us working in the area and for administrative law in general. I remain to be convinced, however, that similar challenges would not have occurred, or that there would have been that many less applications for review, if parties to proceedings before the Australian Broadcasting Tribunal ("ABT") had been left to their remedies under the general law.

This may seem a bit heretical. Broadcasting is after all often cited as one of the culprit areas of abuse of ADJR Act review, and hence as one of the justifications for amending the Act and limiting the opportunities for review, particularly in the interlocutory stages of proceedings.

These allegations of abuse are, I suspect, why broadcasting has been included in this collection of papers. I shall shortly discuss these allegations, and examine the most famous and oft-cited example: the inquiry into the grant of a third commercial television licence for Perth. First, though, I would like to make some preliminary points about the context in which broadcasting decisions are made at first instance, and about the applicants for judicial review of these decisions.

2 SOME CONTEXT FOR CONSIDERING JUDICIAL REVIEW OF BROADCASTING DECISIONS

It is generally acknowledged that the ABT operates in a most difficult arena, under legislation which is, to put it politely, sometimes more of a hindrance than a help. As the Administrative Review Council ("ARC") has noted:

> The legislation and procedures under which the ABT operates, and the tasks which the ABT is called upon to perform, are complex in the extreme, and there are considerable financial interests involved. Within the framework of the Broadcasting Act, the ABT is expected to make decisions in the public interest which also have a major impact on competing private interests. Its decision making function operates in an area which has been highly regulated. The more one regulates, the more one creates the opportunity for review.[1]

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1 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977 - Stage One*, Report No 26, para 14 (1986).

The ARC went on to say that it accepted that "while the ABT continues to play a role as important and sensitive as it now does under the existing legislation, there will continue to be challenges to the ABT's decisions on both procedural and substantive matters".[2] A corollary of this is that in those times when the ABT is exercising its regulatory powers in the more complex and/or controversial inquiries, there are likely to be significantly more applications for judicial review.

It is worth noting the applicants for review of ABT decisions. Applications for judicial review in broadcasting, whether under the general law or the ADJR Act, are almost invariably, if not invariably, made by incumbent licensees (who must, under the Broadcasting Act 1942 (Cth), be companies); companies related to a licensee company; directors of such companies; advertising companies; unsuccessful applicants for licences; or high profile individual broadcasters at risk of a s 119 direction, prohibiting or restricting their participation in live broadcasts (and hence jeopardising their livelihoods).

Such parties are comparatively well-informed as to their rights, and are well-resourced with access to expert legal advice. For players or would-be players in the competitive market of commercial broadcasting, legal assistance is likely to be regarded as part of the cost of obtaining a licence, and of keeping it through ownership and control changes and licence renewals.

In some instances, and in particular in ABT inquiries into the grant of a new licence in a service area perceived to be potentially lucrative in advertising revenue, there is a very strong incentive to keep a new or a particular player out. Broadcasting is unusual in that there cannot be many areas where the amount of cash flow that some licensees generate weekly can make long legal battles not only possible but commercially worthwhile.

Given these factors, creative applications for judicial review will always occur in some ABT inquiries. Applications for judicial review were made under the general law before the commencement of the ADJR Act. If the ADJR Act were not there, or access was limited in some way, applications would still be made but would likely be extended with more legal argument. What the ADJR Act does is to provide a simpler, quicker and generally less expensive form of review. This is of particular benefit in the area of broadcasting where ABT inquiries can themselves be long, complex and costly.

The ADJR Act may have been a success in providing a simpler and cheaper review mechanism, but a corollary of that aim was to make access to review more equitable. Given the profile of applicants mentioned above, one might be forgiven for thinking that this aim has not been achieved.

Why are the categories of applicants generally confined to those mentioned above? Why is it that applications for judicial review, even under the ADJR Act, are not made by, if not ordinary members of the public, at least the consumer, community and special interest groups, or the unions, which commonly participate in ABT inquiries? As a lawyer who often represents these less financially endowed organisations, I can say with some assurance that this apparent passivity should not be taken as evidence of their universal satisfaction with the conduct and conclusion of all ABT inquiries. The reason for these parties not availing themselves of review provisions is the cost - the

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2 *Id.*

ADJR Act may provide cheaper review, but it is far from cheap. Initiation of, or intervention in, a review application also opens the party to the possibility of a costs order against it. Non-commercial parties to ABT inquiries, even the bigger groups, simply cannot, as a rule, afford that risk.

One could conclude that, given the categories of parties who apply for judicial review and the interests involved, the number of applications for review of broadcasting decisions under the ADJR Act is not high. Attached as Appendix 1 to this paper are some tables recording the numbers of review applications of broadcasting decisions in each calendar year since 1981. Table C shows the total number of review applications in each year in broadcasting, and then lists the areas which had the same or more applications in that year. It shows too, I think, that apart from a few consistently high scorers like immigration, use of the ADJR in many areas (including broadcasting) waxes and wanes, but is not strikingly high.

It may be that there has been some increase in the number of review applications since the ADJR Act came into effect, but I doubt that it has been great. In any event, as the ARC has commented: "since the ADJR Act was designed to make judicial review more accessible, it can scarcely be maintained that it is being abused merely because there has been an increase in the number of judicial review cases".[3]

3 THE PERTH INQUIRY[4]

As mentioned above, the most commonly cited example of alleged abuse of the ADJR Act review in broadcasting concerns the Federal Court challenges to the ABT's grant of a third commercial television licence for Perth. Complaints about these challenges started during the inquiry[5] and have been repeated frequently ever since, attaining an almost legendary status.

By way of background, some brief facts about the inquiry follow. The ABT commenced its public inquiry into the grant of a third commercial television licence for Perth in late 1984. There were originally four grant applicants, however, by the inquiry's conclusion, only two remained, one having withdrawn (because of the cost of the proceedings) and another having merged with one of the remaining applicants.

The hearing commenced in February 1985, ran for a total of 117 days, and concluded in March 1986. The majority of the hearing days were consumed by material relating to frequency allocation and the cases of the incumbent stations.[6] The frustration of the parties can be understood from the fact that

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3 *Supra* n 1, para 7.

4 Perth Licence Grant Inquiry (No 310/84) G(T), 1986 1 BR 403.

5 The Tribunal itself cited use of ADJR Act review as a "significant cause of delay and expense" in its inquiry into the grant of a third commercial television licence for Perth (ABT, *Annual Report 1986-87*, x-xi). See also comments by Mr Macphee, MP, "...the two existing licence holders are setting out to take every point of objection they can, to go on every appeal that they possibly can go on and deliberately to delay the granting of a licence by the Broadcasting Tribunal until at least after the America's Cup has been telecast...": H Reps Deb 1985, Vol H145, 3115 (19 Nov 1985), quoted in ARC Discussion Paper, *Some Aspects of the Operation of the Administrative Decisions (Judicial Review) Act 1977*, (1986) 5-6.

6 ABT, *Annual Report 1986-87*, x-xi.

after 54 sitting days, the ABT had only recently begun to hear the substantive application of the first applicant.[7]

The frustration of the ABT members and staff can be understood from the fact that the inquiry involved three of the ABT's seven members almost full-time throughout the 1985-86 year.[8]

There were several factors contributing to the length of this inquiry. As the ABT has acknowledged, the legislation and the procedures governing the conduct of ABT inquiries at that time were in part to blame.[9] (The current uniform inquiry procedure, with its detailed mandatory procedural steps, did not come into effect until May 1986.)

Another cause was the number of applications for judicial review lodged during the course of the inquiry. By its conclusion, there had been a total of 15 applications for judicial review. The two incumbent licensees in the service area, TVW Enterprises Ltd ("TVW"), a licensee of TVW-7 and Swan Television and Radio Broadcasters Ltd ("Swan"), a licensee of STW-9 had both participated extensively in the ABT inquiry and were responsible between them for all the review applications to the Federal Court.

Of those 15 applications, there were ten made solely under the ADJR Act; two under the general law solely; three under both the ADJR Act and the general law; two appeals to the Full Federal Court (both dismissed); and one special leave to appeal application (refused). Ten of the review applications were taken in one week.[10]

As other commentators have noted, consideration of these applications for review does not, on the face of it, reveal frivolous claims. John Griffiths has commented:

> While it is tempting to draw adverse inferences from the large number of applications made in respect of the Tribunal's inquiry, it is significant that almost one-third were successful in exposing some illegality in the Tribunal's actions and all the unsuccessful applications raised genuine issues of law.[11]

Indeed the ABT itself said at the time that the first 12 applications "covered a broad range of procedural matters of considerable importance".[12]

It would be naive to suggest that the incumbent licensees, who between them initiated all these actions, were motivated by a desire to see the Tribunal's powers and procedures clarified and improved by the normative effect of administrative review. Obviously large sums of money were at stake. Both licensees were very substantial and wealthy corporations in their own right, as well as being subsidiaries of other large companies. As commercial television operations, they had access to a large and continuing cash flow, which might

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7 Staff Addendum (5 September 85) to ABT Submission to ARC, Attachment B to ARC Discussion Paper, *Some Aspects of the Operation of the Administrative Decisions (Judicial Review) Act 1977* (1986) para 2.2.

8 ABT, *Annual Report 1985-86*, paras 109-111.

9 *Supra* n 7, para 2-3.

10 A list of the matters, detailing the grounds of challenge, the decision and a summary of the reasons for the decision in each application, is given as Appendix H to the ABT's decision in the Perth Licence Grant Inquiry (No 310/84) G(T), (1986) 1 BR 403, 451 ff.

11 J Griffiths, "The Price of Administrative Justice" (1989) 58 Canberra Bulletin of Public Administration 34, 35.

12 ABT, *Annual Report 1984-85*, para 103.

diminish if any additional commercial television service were introduced into the Perth area. No doubt the fact that the America's Cup was on in Perth at the time contributed to their competitive zeal.

While there seems some basis for the view that the Perth inquiry gave rise to some review applications which may have been pursued primarily for reasons of tactics rather than legal merit, this does not in my view warrant the conclusion, which has frequently been reached, that the Perth inquiry is an example of the shortcomings of the existing ADJR Act and the need for reform to protect against its abuse or potential abuse.[13] If the ADJR Act procedures had not been so readily available, it is possible, even likely, that TVW and Swan would have turned to other judicial review proceedings in the High Court or Federal Court,[14] perhaps prolonging the Tribunal hearing even further.

4 BENEFITS OF THE ADJR ACT REVIEW IN BROADCASTING

I have already mentioned that if there is going to be judicial review, it is clearly desirable for all concerned that it be by the simplest, most expeditious and cheapest form possible. The ADJR Act has been a benefit to the area of broadcasting in providing a comparatively simple and inexpensive form of judicial review.

Whatever has motivated applicants for review, the result has been some interesting law - such as the High Court's decision in *Bond*[15] - and some useful clarifications of the Tribunal's obligations and discretions in conducting inquiries.

This has been of benefit to the Tribunal, to participants and prospective participants in ABT inquiries, and, in the sense that the Tribunal's operations are more efficient, to the public, in whose interest the ABT is charged with regulating commercial broadcasting. On the negative side it can be said that this is an expensive form of legal training for the Tribunal. Certainly better drafted legislation would have helped and would have been cheaper.

I do think though that the Tribunal has benefited from this "training". Whatever else it may be, the *Bond* decision was a confirmation of the appropriateness of the multi-staged way in which the Tribunal had conducted that inquiry. Similarly, having "got it wrong" badly in the first Ron Casey and John Laws inquiries examining alleged breaches of program standards, the second ABT inquiry[16] into the Casey broadcasts went smoothly and well in a difficult context.

I am reminded of the following quotation from an article on administrative law by Taggart:

> Remember Jeremy Bentham's description of the common law method which is apt in this instance: 'When your dog does anything you want to break him of, you wait till he does it, and then you beat him for it. This is the way you make laws for your dog: and this is the way judges make law for you and me'. This

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13 *Eg* the Attorney-General's Second Reading Speech of the Administrative Decisions (Judicial Review) Amendment Bill 1986, H Reps Deb 1986, Vol H151, 2560-2561 (22 October 1986). See also J Griffiths, *supra* n 11, 35 .

14 Griffiths, *id.*

15 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

16 (1989) 3 BR 351.

'dog law' emphasises the Court's control over administration; to stand over it and beat it on particular occasions of the Court's choosing.[17]

I suspect that this is the way the ABT feels sometimes. As someone who sometimes participates in attempts to beat the ABT dog, I can only plead that it does seem in the long run to make it work better.

5 SOME OTHER MATTERS RELEVANT TO THE WORKINGS OF THE ADJR ACT IN BROADCASTING

A Statements of Reasons

One of the principal elements of the ADJR Act was the enactment of an obligation on decision makers to give to a person adversely affected by an administrative decision the reasons for that decision and a statement of findings on material questions of fact, including the evidence or other material on which those findings were based.[18]

I suspect that this was one of the main features that caused shock waves through other administrative decision makers, but the ABT was already required to give reasoned decisions[19] and therefore the ADJR Act has had little impact in this regard.

Applications to the ABT for statements of reasons under the ADJR Act are made, but they are few: 1981 (0); 1982 (1 - complied with in full); 1983 (0); 1984 (2 - complied with in full); 1985 (6 - complied with in full); 1986 (6 - 4 complied with in full, 1 withdrawn, 1 refused on the basis that a statement had already been given); 1987 (0); 1988 (0).[20] It is reasonable to assume that the low figures indicate a fair degree of satisfaction with ABT reports of decisions, at least as statements of reasons for the decisions.

B Consumer Dissatisfaction

There is significant dissatisfaction in both the ABT itself and among parties who appear before it with the existing mechanisms of review of ABT decisions.

It has been said before that a higher use, and possibly abuse, of ADJR proceedings is likely to occur in areas where there is little or no provision for merits review.[21] After all, as the Kerr Committee noted back in 1971, the aggrieved person is usually seeking merits review.[22]

This may well be the case in broadcasting where access to AAT review of decisions is limited in a number of ways. First, the types of decisions of the ABT amenable to appeal are restricted. Section 119A(1) of the Broadcasting Act 1942 (Cth) lists the decisions of the ABT which may be appealed to the AAT. In summary, they are decisions by the ABT about a licence condition; a

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17 M Taggart, "*Osmond* in the High Court" in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) 68, quoting from 5 *The Works of Jeremy Bentham* (1923 reprint) 235.

18 Second Reading Speech on the Administrative Decisions (Judicial Review) Bill 1977 by the Hon R J Ellicott QC, Attorney-General, H Reps Deb 1977, Vol H105, 1394-1396 (28 April 1977).

19 Broadcasting Act 1942 (Cth), s 25B.

20 ARC Annual Reports for the relevant years.

21 ARC, *supra* n 1, para 7.

22 *Report of the Commonwealth Administrative Review Committee* PP No 144 of 1971, para 363.

refusal to renew a licence or renew it on a short-term; suspension or revocation of a licence; refusal to approve a licence transfer or change in potential control of a licensee; or a restriction on a broadcaster or program maker under s 119.

More to the point, a range of decisions concerning the exercise of significant powers of the ABT are not covered by AAT review, for example, a decision on the initial grant of a licence, and findings of alleged breaches of the programs standards.

Review of ABT decisions is limited in another way peculiar to this jurisdiction, that is, in regard to who may apply for review. The standard AAT provision, which provides that any person or organisation whose interests are affected by a relevant decision may appeal against it,[23] is specifically excluded by s 119A(2) of the Broadcasting Act 1942 (Cth) which generally restricts the right of appeal against a licensing decision to the licensee itself. There are a few exceptions to this exclusion, the most significant of which are decisions relating to changes in the potential control of the licensee - where only the applicant may appeal; and a prohibition or restriction made under s 119 - where the program maker or broadcaster concerned may appeal.[24]

The question of the adequacy of the existing means of review of ABT decisions was considered by the ARC in 1982 in its second report to the Attorney-General on the Broadcasting and Television Act 1942.[25]

The ARC's conclusions on the need and appropriate occasions for, and appropriate form of, merits review led it to recommend that the rights of appeal to the AAT from decisions of the ABT be extended to include all substantive decisions of the ABT (with the prior leave of the AAT President as a safeguard against misuse) and a number of decisions of the ABT or the Minister as well as those procedural decisions which determine whether or not to hold a public inquiry, or to reach a final decision in an inquiry without holding a public hearing. The ARC also recommended that the restrictions on those who could appeal be removed by the abolition of s 119(2) and (3). These recommendations have not been implemented.

The limitations on the availability of merits review cause some "consumer" dissatisfaction among parties participating in ABT inquiries. Dissatisfied parties tend to turn to the remaining forms of review and, finding them lacking for their purpose, complain further. Such criticism is sometimes specifically aimed at the ADJR Act although this is, in my opinion, inappropriate. The

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23 Administrative Appeals Tribunal Act 1975 (Cth), s 27(1).

24 Applications for review have been rejected by the AAT on the basis of this provision, *eg* in *Re P G Laird and Australian Broadcasting Tribunal* (AAT, 10 May 1979, unreported decision of Davies J), the AAT refused to hear an application for review of a decision of the ABT which approved the transfer of shares in a company holding a television licence granted under the Broadcasting and Television Act as it was then called, because the appellant was not the person seeking control, as required under s 119A(2) of that Act. While the Broadcasting Act narrowly limits the right of appeal, it does not so limit the right to contest the appeal once it is on foot, for there is no exclusion of s 30(1A) of the AAT Act which provides that once one of those persons entitled to has appealed, "any other person...whose interests are affected" may become a party to the appeal. This occurred in *Re Control Investments (No 1)* (1981) 3 ALD 74.

25 Administrative Review Council, *Review of Decisions under the Broadcasting and Television Act 1942* Report No 16, (1982).

parties' frustration is understandable, however, as examination of some cases shows.

One example concerned the unsuccessful applicant in the Perth inquiry, Western Television Ltd ("Western Television"), which applied for an order of review under the ADJR Act in respect of the ABT's decision to grant the third commercial licence to West Coast, a decision which it regarded as flawed.[26] Because it was a grant inquiry, Western Television had no access to review on the merits.

The Tribunal had found both applicants to be eligible for the grant of the licence, but, in deciding which of the two applicants was the "most suitable" (the next step required by the Act) the Tribunal had, Western Television alleged, made a number of errors of law. One alleged error of law concerned the entitlement of the Tribunal to take the shareholding stability of the applicants into account in assessing their relative suitability. Without going into the complex details of the case, suffice to say, in summary, that the Tribunal had taken its perception of the shareholding stability of the applicants into account in assessing relative suitability. This, the Court held it was entitled, although not obliged, to do.

In doing so, however, the Tribunal had attempted to assess the general susceptibility to takeover of the applicants' proposed structures. Pincus J commented that, in his respectful opinion, this involved "little more than speculation" on the Tribunal's part. He went on to say that:

> I do not find the Tribunal's reasoning on the stability point in the least convincing, and I do not think any court would have made a finding adverse to the applicant on the basis of such tenuous material as is mentioned in the Report. Further, if a court had so found, that would perhaps have been reversed on appeal; but this is not an appeal, and therein lies the applicant's difficulty. I do not think the Tribunal's findings on the stability question involved an error of one of the varieties mentioned in s 5 of the Judicial Review Act.[27]

In another more recent application for review of an ABT decision in a licence grant inquiry,[28] Davies J commented that he found himself in the same position as Pincus J in the passage quoted above. Justice Davies agreed with the arguments put to him by counsel for one of the applicants that the Tribunal had made some errors of fact and that its decision was to that extent made on wrong facts and to that extent was unfair to his client. The judge went on to list a number of deficiencies in the Tribunal's decision, and said:

> So I come to the point that the ABT made some findings of fact that, in my view, were wrong, on the material before the ABT, and to that extent took into account facts that were wrong and failed to take into account facts that ought to have been found on the material before the decision-maker. But to say that is

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26 *Western Television Ltd v Australian Broadcasting Tribunal* (1987) 69 ALR 465.

27 *Ibid* 480.

28 The case, *Independent FM Radio Pty Ltd v Australian Broadcasting Tribunal* (1989) 17 ALD 529, concerned the ABT's decision in June 1988 to grant to Goulburn Valley Broadcasters Pty Limited ("GVB") the new commercial radio licence serving the Shepparton area of Victoria. IFM was one of the unsuccessful applicants for the grant. The ABT had found that both IFM and GVB were suitable, the question was which was the "most suitable applicant" (Broadcasting Act 1942 (Cth), s 83(9)). The ABT found that this assessment in this instance turned on financial considerations, particularly revenue projections.

> not sufficient to found a conclusion that irrelevant considerations were taken into account or that relevant considerations were ignored. It is necessary to find that the errors were of such a nature that no reasonable decision-maker could have made them or that there was no evidence before the ABT to justify the findings or that the findings were in some like vein an improper exercise of the decision-making power.
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> On the whole, I find myself in the same position as was Pincus J in *Western Television Ltd v Australian Broadcasting Tribunal* ... where his Honour at 429 expressed the view that a finding was not 'in the least convincing' and that 'I do not think any court would have made a finding adverse to the applicant on the basis of such tenuous material as is mentioned in the report' but that the Tribunal's finding nevertheless did not involve an error of one of the varieties mentioned in s 5 of the ADJR Act ... any matters in the reasoning process that may be errors were not reviewable errors.[29]

Counsel for the applicant had argued that the ABT took into account irrelevant matters, that is, the Tribunal's incorrect findings of fact, and failed to take into account relevant matters, that is the correct facts. As Davies J noted, the case contained a very real question as to what is the function of the Court in judicial review proceedings under the ADJR Act,[30] but, unfortunately for the applicant in the review proceedings, the law is clear that "correct or incorrect facts are not to be equated with relevant/irrelevant facts".[31]

As solicitor Paul Marx has commented in an article on this and another decision arising from applications for ADJR review of the ABT's Shepparton decision, "the decision ... gives little comfort to unsuccessful applicants aggrieved by ABT decisions to grant new licences".[32]

The two cases referred to above are examples of what is, in some areas - such as licence grant inquiries - a strong feeling of consumer dissatisfaction with the review procedures available for broadcasting decisions. As mentioned above, this is not a fault, in my opinion, of the ADJR Act, which was not intended or designed to provide the type of review which may have assisted these applicants.

These instances are still, however, relevant to use of the ADJR Act. Cases where the Tribunal has "got it wrong" and has been seen to go uncorrected, do not engender confidence in users, or would-be users, of review mechanisms. It is of course a feature of ADJR Act, and judicial review generally, that where one is successful one is back to where one started, that is, in front of the original decision maker. One hears of instances these days where aggrieved parties in broadcasting proceedings, faced with this result, are electing not to avail themselves of ADJR Act review.

C Court's Discretion to Grant Relief

Western Television also indicates that in the area of broadcasting decisions a party who elects not to pursue a point, but to keep, in effect, a legal challenge

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29 *Ibid* 533-534.

30 *Ibid* 530.

31 *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4, 13 *per* Forster J, as quoted in *Independent FM Radio supra* n 28, 531.

32 P Marx, "Judicial Review of licence grant decisions by the Australian Broadcasting Tribunal" (1989) Vol 9 No 2 *Communications Law Bulletin* 12, 13. As Marx goes on to note, the plight of these aggrieved persons is exacerbated by the fact that they do not have a right to apply to the AAT for review.

"in reserve", may be declined relief later on. One of Western Television's grounds of challenge concerned the Tribunal's alleged disregard of the convictions for taxation offences of Mr Brian Treasure, formerly Chairman of West Coast, and subsequently a full-time consultant for the company.

Justice Pincus found that the Tribunal, in failing to treat Mr Treasure's convictions as telling against the suitability of the second respondent, fell into a legal error. The Court went on, though, to exercise its discretion to decline to grant relief, taking into account the "unparalleled length and cost" of this Tribunal inquiry and, most particularly, the fact that the point had been abandoned by counsel for the present applicant.

Justice Pincus commented that the potential importance of the criminal convictions of Mr Treasure must have been evident to the present applicant - "as must have been the waste of time and money which could ensue if the Tribunal were led into legal error. The present applicant preferred to take its chances of success before the Tribunal on the basis that Treasure's convictions were not to be used in its favour, having failed before the Tribunal, it should not, I think, be allowed to take advantage of the error for which it was partly responsible".[33]

Justice Pincus said:

> Whatever the reason, it is undesirable that a party, particularly one legally represented, should be allowed to keep a point like this "in reserve". It would tend to bring the administration of justice, and in particular the functions of the court under the Judicial Review Act, into merited disrepute if parties were encouraged to take such a course.[34]

His Honour made it clear that every abandonment of a point before an administrative tribunal does not make it proper for the reviewing court to exercise its discretion to decline to grant relief under the ADJR Act with respect to that point. The decision does, however, make such a possibility a real consideration for parties aggrieved by ABT decisions in interlocutory stages of proceedings. I may be being excessively charitable, but it may be that this is one factor which motivates parties to take points at interlocutory stages. I would add that in the interests of minimising the wasting of resources, it is desirable that they do so, as such review applications can, if successful, mean that the whole inquiry may have to be conducted again in accordance with law.

6 SUMMARY

In summary, I do not think there is as much abuse of the ADJR Act review procedures in broadcasting as seems to be popularly thought.

In so far as abuse occurred in the Perth inquiry, I think that it could, and probably would, have happened just as much under the general law, given the resources of, and the incentives for, the applicants in that case. And Perth was an exceptional inquiry, in unusual circumstances.

Delay and challenges on that scale have not occurred since. This may be for a number of reasons but at some point we may have to acknowledge that the

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33 (1987) 69 ALR 465, 475.

34 *Ibid* 474. Refusal of relief by the Court on such grounds is not, of course, as Pincus J noted in this case (at ALR 474-475), confined to the exercise of its discretion under the ADJR Act; and has been exercised on similar grounds, *eg*, in cases of refusal of certiorari.

Tribunal may have got better at administering its inquiries under the Broadcasting Act 1942 (Cth), assisted by the uniform inquiry procedure introduced in 1986.

Other factors, such as deficiencies in the legislation governing broadcasting, and the limited access to merits review, could reasonably be thought to have something to do with any undue number of legal challenges by way of the ADJR Act. Perhaps the legislators should direct their attention there.

Finally, a plea to those concerned to stop using broadcasting cases as a justification for tinkering with the ADJR Act. The Act seems, in my opinion, to do what it was set up to do quite well.

APPENDIX A

TABLE A: Applications to the Federal Court for an Order of Review - Australian Broadcasting Tribunal*

Calendar Year Finalised	Pending at Commence-ment of period	Total Applic-ations Received	Granted	Refused	Withdrawn	Pending at end of Period
1982	0	2	0	0	0	2
1983	0	4	1	2	0	3
1984	1	7	3	4	0	7
1985	1	13	4	8	1	13
1986	1	7	1	2	0	3

* From Administrative Review Council Annual Reports for the relevant years.

Breakdowns for particular departments/authorities were not given in the ARC's 1980 and 1981 Annual Reports, but the total numbers of applications for review lodged in those years were 4 and 69 respectively.

• 11 applications which were heard concurrently have been counted as 1 application (ARC *Annual Report 1984-85*, Appendix 6, Table 5.)

TABLE B: Applications to the Federal Court under the ADJR Act for Review of Decisions under the *Broadcasting Act 1942* from 1/1/87 to 30/12/88**

Year	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	Total
1987	6	1	1	1	2	0	0	0	11
1988	16	3	2	1	0	0	0	0	22

** From ARC *Annual Report 1987-88*, Appendix 1, Table 4; and ARC *Annual Report 1988-89*, Appendix 5, Table 4.

The breakdown of results of applications is not recorded in the 1987 and 1988 Reports.

TABLE C: Other Departments or Authorities with Same or Bigger Total Number of Applications for Review as Broadcasting.*

Year	Broadcasting Total	Other Areas and Totals
1982	2	Aviation (2); Commissioner for Cth Employees Compensation (3); Education (2); Foreign Affairs (2); Health (12); Dept Immigration & Ethnic Affairs (30); Industry & Commerce (10); Public Service Board (19); Veterans Affairs (4).
1983	4	Attorney-General's (17); Australian Federal Police (10)**; Australian Tax Office (27)**; Australian Telecommunications Commission (10); Aviation (42); Commission for Cth Employees' Compensation (4); Health (5); Dept Immigration & Ethnic Affairs (31); Industry & Commerce (9); Public Service Board (14); Repatriation Commission (4); Trade Practices Commission (7).
1984	7	Attorney-General's (24); Australian Tax Office (48); Health (16); Dept Immigration & Ethnic Affairs (45); Industry, Technology & Commerce (35); Repatriation Commission (9).
1985	13***	Attorney-General's (24); Australian Tax Office (38); Dept Immigration & Ethnic Affairs (80); Industry, Technology & Commerce (41).
1986	7	Australian Tax Office (56); Australian Telecommunications Commission (8); Aviation (11); Community Services (9); Dept Immigration & Ethnic Affairs (106); Industry, Technology & Commerce (20); Magistrates (7).
1987	11	Customs (26); Income Tax Asst (30); Migration (94); Public Service (11).
1988	22	Customs (24); Income Tax Asst (46); Migration (97).

* From ARC Annual Reports

** "Figures supplied by the responsible Department contain error. The Department concerned was unable to clarify the matter" (ARC *Annual Report 1983-84*, Appendix 5, Table 4).

*** 11 applications which were heard concurrently have been counted as one application.