

AUSTRALIAN MEDIA LAW UPDATE

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BROADCAST PLANNING

[341] The planning of broadcasting services that use the radiofrequency spectrum² is conducted by the Australian Broadcasting Authority (ABA) as provided for under Pt 3 of the *Broadcasting Services Act 1992* (Cth) (the Act). The ABA undertakes the planning of allocated spectrum for broadcasting services according to the planning criteria established in s 23 of the Act. The planning function aims to effectively map the need for services across Australia, through the determination of priorities³ which apply to frequency allotment plans⁴ and the preparation of licence area plans (LAPs).⁵ These establish the local areas that are a 'catchment' for the broadcasting services that are needed for particular parts of Australia, which tend to remain in place for reasonably established periods. However, LAPs may be varied.⁶ As provided for in s 23, a range of factors can affect a new or established LAP including demographics,⁷ the social and economic characteristics of the area,⁸ and the number of existing services,⁹ among other things.

At a base level, the licence areas that apply to commercial and community broadcasting licences in a LAP have to be identified.¹⁰ The allocated licence area also factors into the relevant licensing for these services,¹¹ as well as ownership and

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² As provided for in the *Radiocommunications Act 1992* (Cth).

³ Section 24.

⁴ Section 25.

⁵ Section 26(1).

⁶ Section 26(2).

⁷ Section 23(a).

⁸ Section 23(b).

⁹ Section 23(c).

¹⁰ Section 29.

¹¹ Part 4 — generally in relation to commercial broadcasting licences, s 84 — community broadcasting services licence allocation.

control arrangements for commercial broadcasting licences.¹² The establishment or variation of a LAP can have a significant impact on the existing owners of licences, as changes can affect the commercial viability of incumbent broadcasters, where a LAP provides for new entrants into a market.

[342] The consequence is that incumbents may seek to have planning decisions of the ABA reviewed. This was the outcome of a LAP for the Gosford area in New South Wales, which had undergone considerable demographic change. The new LAP provided for an additional commercial radio licence, and review was sought by the incumbent broadcaster in the area. As a result, a decision of the Full Federal Court has settled the categorisation of the ABA's planning power in *RG Capital Radio Ltd v Australian Broadcasting Authority*.¹³

RG Capital Radio Ltd is the holder of licences for two commercial radio broadcasting services in the relevant licence area. It sought judicial review of a decision by the ABA to make the additional licence available. If the ABA's determination of LAPs was characterised as administrative, it would be subject to the *Administrative Decisions (Judicial Review) Act 1997* (Cth), and the determination reviewable. If legislative, then such review could not be ordered. The Full Federal Court¹⁴ held that the planning process was legislative and therefore not subject to judicial review.

In reaching this conclusion, the court assessed a range of indicia. As a starting point, it accepted the standard methodology that distinguished legislative decisions as being those of a general, prospective nature, and administrative decisions as being those that apply rules to particular cases.¹⁵ It adopted the observations of Sundberg J in *SAT FM Pty Ltd v Australian Broadcasting Authority*¹⁶ that a LAP established under s 26(1) 'creates new rules of general application to those wishing to provide broadcasting

¹² Part 5 generally.

¹³ [2001] FCA 855.

¹⁴ Wilcox, Branson and Lindgren JJ.

¹⁵ [2001] FCA 855, para 43.

¹⁶ (1997) 75 FCR 604.

services in the licence area, rather than applying such rules in a particular case to a particular broadcaster'.¹⁷

In accepting Sundberg J's observations that the nature of a plan is to determine the number and characteristics of broadcasting services and is thus legislative,¹⁸ the court considered the consequences of the planning process, and the general criteria provided for in s 23:¹⁹

A licence area plan may be prepared for a geographical area in which there are not yet broadcasting services, or it may, as in the present case, be prepared for an area where such services already exist. Preparation of a plan may (as in the present case) or may not have implication for an existing licensee. Either way, the licence area plan lays down general parameters within which takes place the decision-making process (the allocation of licences) for which Part 4 of the BS Act provides.²⁰

The Court also considered a number of other factors associated with the ABA's decision-making process to determine the characterisation of its planning activity. It took the view that no single feature (including those set out above) was individually decisive of the characterisation of the planning process.²¹

- The ABA's planning process included no provision for the disallowance of LAPs by Parliament, unlike other provisions in the Act which provided for disallowable instruments.²² However, this characterisation is a factor only, and able to be outweighed by other considerations.²³ [343]
- Section 35 requires publication in the *Gazette* of a LAP — publicity may be an indication of a decision having a legislative character.²⁴
- Wide public consultation is provided for in s 27 when the ABA engages in the planning process. Unlike the characterisation sought by the applicant — that this

¹⁷ [2001] FCA 855, para 48, quoting Sundberg J at 607.

¹⁸ *Ibid* para 49, referring to Sundberg J at 607–8.

¹⁹ *Ibid* para 50.

²⁰ *Ibid* para 49.

²¹ *Ibid* para 78.

²² *Ibid* para 55.

²³ *Ibid* para 56.

²⁴ *Ibid* para 55, 57–8.

was indicative of a requirement of natural justice, and therefore administrative — the Court considered that this requirement was broadly directed, and was thus indicative of the general rather than the particular.²⁵

- The wide policy considerations that the ABA has to consider in s 23 do not necessarily lead to the planning process being of a legislative character, but in these circumstances, were consistent with it being so.²⁶
- The power to vary the LAP was neutral, and not determinative of the characterisation of the decision-making.²⁷
- There is an absence of Ministerial variation or control of the ABA's formulation of the LAP.²⁸
- The exclusion of planning from the list of decisions of the ABA reviewable by the AAT²⁹ is indicative that LAP decisions are of a legislative character.³⁰
- The binding effect of LAPs, in that other aspects of the Act rest on the determination of the LAP, is further indication that decisions under s 26(1) are of a legislative character. The court held that:

A licence area plan under s 26 ... is a general measure of a kind one might expect to find contained in the statute ... constituting the legislative background against which applications for, and allocations of, licences are enabled to take place.³¹

In reaching its conclusion, the Court noted the most persuasive of the considerations that s 26(1) was of a legislative character:³²

- the LAP is of general application, and not a determination affecting individuals;
- it has long term effects, though it is capable of being varied under s 26(2);
- Pt 3 differs from the operations of Pt 4, which affects individuals and their interests; and

²⁵ Ibid para 59–61.

²⁶ Ibid para 62–6.

²⁷ Ibid para 67–9.

²⁸ Ibid para 70–1.

²⁹ Section 204 (which contains the list).

³⁰ [2001] FCA 855, para 72–6.

³¹ Ibid para 77.

³² Ibid para 79.

- the omission of Pt 3 decisions from s 204 providing for review by the AAT.

Planning for categories of service

In *Nezville Pty Ltd v Australian Broadcasting Authority*,³³ Sundberg J held that the ABA had invalidly determined a licence area plan for Melbourne radio.

As part of its planning activities provided for in the Act,³⁴ the ABA determined a LAP for Melbourne radio services in 2000. As a consequence of the ABA's determination, a change of frequency (1503 kHz) was proposed in respect of a commercial radio licensee, 3AK and a new allocation was to be made in respect of [344] an open narrowcasting service (ONC).³⁵ Two existing ONC broadcasting services conducted in Greek, and operating on a 'drop through' basis (effectively on a short term), were affected by this decision:

- 3XY Radio Hellas, broadcasting at 1422 kHz was, in effect, to be reallocated under s 106 of the *Radiocommunications Act 1992* (Cth) — operated by Nezville Pty Ltd, the first applicant.
- 3BM, broadcasting at 1116 kHz was to be reallocated to 3AK — operated by Harry Stamoulis, the second applicant.

Additionally, Rete Italia, broadcasting at 1593 kHz, in Italian, also operated under an ONC. These are forms of radio that accommodate limited capacity and interest,³⁶ and are allocated as part of a LAP.³⁷ They are effectively granted as a transmitter or apparatus-based licence, pursuant to the *Radiocommunications Act 1992* (Cth).³⁸ A class licence is established for broadcasting regulation under the Act. The ONC licences in question were granted for a limited period, initially in 1994, after which time, the apparatus licences were re-issued from time-to-time until the ABA undertook its planning of the Melbourne, Geelong, and Colac LAPs, commencing in 1998.

³³ [2001] FCA 29.

³⁴ Part 3.

³⁵ As defined in s 18.

³⁶ Section 18.

³⁷ Section 26.

³⁸ Part 3.3–3.4 of the *Radiocommunications Act 1992* (Cth).

When the draft LAP for Melbourne was released in 1999, no reference was made to any reallocation for 3AK, and the existing frequencies for ONC were proposed to be maintained. Prior to this, in 1997, the ABA had been approached by 3AK in respect of problems with its allocated frequency, 1503 kHz. It reiterated this twice in submissions in 2000 following the release of the draft LAP, and sought the reallocation of 1116kHz. The ABA issued a technical document³⁹ in respect of the request, in May 2000, and when the LAP was released in June 2000, 3AK was reallocated as requested. Additionally, a community broadcasting service was to be available through 1503 kHz.

The applicants sought review of the ABA's decision in a number of respects, and Sundberg J held the following grounds to be unsuccessful, in addition to a range of other matters not expressly argued.⁴⁰

- The planning function under s 26 is not related to content-based⁴¹ or licence allocation issues,⁴² and does not deal with the merits of current broadcasters existing services.⁴³ Instead it had to consider the plan in relation to the interests in and demand for ONC.⁴⁴
- Procedural fairness was not denied in respect of the second applicant, as the possibility that 3AK may have been given to 3AK had been flagged in 1999,⁴⁵ and that he had access to the technical document.⁴⁶
- 1116kHz and 1422 kHz 'availability' — the ABA's decision in this respect was related to future unallocated licences, as 'drop-through' licences would expire.⁴⁷
- Existing spectrum use on these frequencies⁴⁸ and the need for ethnic services⁴⁹ were matters dealt with under other heads.

³⁹ 'Draft Revised Technical Specifications for Commercial Radio Station 3AK Melbourne, Vic', 1 May 2000.

⁴⁰ [2001] FCA 29, para 50–60.

⁴¹ Ibid para 27–8.

⁴² Ibid para 22–4.

⁴³ Ibid para 25.

⁴⁴ Ibid para 26.

⁴⁵ Ibid para 29–30.

⁴⁶ Ibid para 31.

⁴⁷ Ibid para 43.

- The documentation asserted that the ABA would allocate the ONC on a price-based allocation system [345] within the power of the Australian Communications Authority who could delegate this to the ABA — this assumption was wrong as it assumed it had been the ABA who made the determination.⁵⁰
- Section 27 requires wide public consultation in relation to the allocation of a LAP. Four grounds were sought for review. Three were unsuccessful — that the second applicant had been given one week only in which to respond,⁵¹ that issues for consideration by the ABA were not clearly put,⁵² and that it failed to consider matters to do with content as submitted.⁵³

The fourth matter raised in relation to s 27 was a successful ground for review. This concerned the unstated and limited effect of public consultation concerning the change of 3AK's frequency. The wide public consultation that existed at the early stage of the process diminished by the end, in respect of a matter that significantly altered one aspect of the LAP. While 21 entities who made submissions were invited to comment, others who made earlier submissions were not. Sundberg J took the view that: 'the effect of the changes was to reduce the number of ONC services from three to two ... while provision may have been made for wide public consultation in relation to the bulk of the plan, the LAP as a whole was not the subject of such consultation'.⁵⁴ Sundberg J held that 'Having regard to the language of s 27 and the subject matter and objects of the BS Act, it was in my view the intention of the legislature that an act done in breach of s 27 should be invalid.'⁵⁵ The LAP in respect of this aspect was thus invalidly determined.

⁴⁸ Ibid para 44.

⁴⁹ Ibid para 45.

⁵⁰ Ibid para 49.

⁵¹ Ibid para 34.

⁵² Ibid para 35.

⁵³ Ibid para 36.

⁵⁴ Ibid para 37.

⁵⁵ Ibid para 39.

The LAP for Melbourne radio was thus declared invalid in relation to the commercial radio broadcasting service on 1116 kHz and the community broadcasting service was to be available through 1503 kHz.