

EXPLANATORY STATEMENT

STATUTORY RULES NO.100 OF 1986

Issued by the Authority of the Minister for Communications

Sub-section 134(1) of the Broadcasting Act 1942 (the Act) provides in part that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Broadcasting Act 1942 provides for commercial and public broadcasting services and establishes the Australian Broadcasting Tribunal (the Tribunal) as an independent body with licensing and supervisory powers in relation to those services. Section 17A of the Act lists the most significant powers of the Tribunal, which are classed as substantive powers. These reflect a broad range of powers including for example the power to grant licences, to determine standards for programs, to approve transactions relating to the ownership or control of licences, to reprimand licensees and to issue directions to licensees.

Section 17B provides that a person may apply to the Tribunal requesting the Tribunal to exercise a substantive power and that such an application shall be made in accordance with the regulations. Under section 17C the Tribunal can also consider the exercise of a substantive power of its own motion.

Sub-section 17C(1) requires that an inquiry be held prior to the exercise of a substantive power. Sub-section 17C(5) provides that an inquiry shall be conducted in accordance with Division 3 of Part II of the Act and the regulations.

Sub-section 17C(6) provides the regulations may make provision for and in relation to the deferral suspension or termination of inquiries, the holding of joint inquiries, the holding of separate inquiries into different aspects of the exercise of a power and the holding of inquiries into certain aspects only of the exercise of a power.

Under section 126(1) a person may apply for a permit to allow test transmissions from a broadcasting transmitter. Such application is to be in accordance with the regulations.

The Australian Broadcasting Tribunal (Inquiries) Regulations provide, in conjunction with the Act, for procedures to be followed in the conduct of inquiries into the proposed exercise of substantive powers and for the form of applications under sub-sections 17B(1) and 126(1).

In its 1981 report to the Attorney-General entitled "Australian Broadcasting Tribunal Procedures", the Administrative Review Council (ARC) recommended a series of amendments to the Act, new regulations and desirable administrative practices which would establish a flexible set of procedures to be followed in inquiries conducted by the Tribunal. The ARC noted a need to clarify the rights of members of the public to participate in the inquiry process and difficulties which the Tribunal had faced in attempts to develop a workable procedure. The ARC recommendations were reflected in amendments to the Act made as part of the Broadcasting and Television Amendment Act 1985 which commenced operation on 1 January 1986. The proposed regulations are also based on the ARC recommendations and complement the provisions of the Act as amended.

The regulations allow the Tribunal flexibility to adopt a range of procedures to pursue an inquiry, including documentary processes, conferences and hearings. The regulations also deal with publication of notices which will facilitate public participation in inquiries.

The regulations leave significant discretion to the Tribunal in the conduct of inquiries. In exercising these discretions however, the Tribunal will be bound by general legal obligations of natural justice and by the express provisions of the Act. An alleged breach of the Tribunal's legal obligations would be subject to judicial review and the Administrative Decisions (Judicial Review) Act 1977 has already proved an effective avenue for scrutiny of the Tribunal's proceedings.

Examples of provisions which will bind the Tribunal when exercising powers under the proposed regulations are as follows:

- section 19 - proceedings are to be in public except in certain circumstances.
- section 22 - parties have a right to legal representation, but if not represented they should not be disadvantaged.
- section 22AA - a wide range of persons may become parties to an inquiry.
- section 25 - in an inquiry the Tribunal must make thorough investigation of all relevant matters, and shall proceed justly and expeditiously. Every party must be given a reasonable opportunity to present a case.

No provision is made in the regulations at this stage for review on the merits by the Administrative Appeals Tribunal. The Administrative Review Council proposes to consider the desirability of such a review of the Tribunal's procedural decisions as part of a reconsideration of rights of review of the Tribunal's decisions under the Broadcasting Act. The ARC review is likely to commence during 1986.

The Attorney-Generals Department, the Tribunal and representatives of the broadcasting industry were closely consulted during preparation of the regulations.

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Details of the regulations are set out in the attachment.

Authority: Section 134 of the Broadcasting Act 1942

ATTACHMENT

Details of the regulations are as follows:

Regulation 1 provides for citation.

Regulation 2 deals with interpretation.

Regulation 3 lists the powers of the Tribunal which, under the Regulations, may be exercised during an inquiry.

Sub-regulation 3(3) provides that the list of powers is not exhaustive.

Sub-regulation 3(4) reflects section 25 of the Act in that it requires the Tribunal to perform its statutory functions in relation to inquiries justly and expeditiously.

Regulation 4 provides for the form of applications under section 17C and section 126.

Sub-regulation 4(1) provides for standard forms for applications, for execution of applications and for lodgement of supporting information.

Sub-regulation 4(2) requires that an application by an unincorporated association set out additional information relating to the objects of the association and its membership.

Sub-regulations 4(3) and 4(4) allow for some departures from the requirements for applications

Regulation 5 empowers the Tribunal to refuse to receive an application which does not substantially comply with requirements of the regulations, doesn't contain any relevant information or which is scandalous vexatious frivolous or an abuse of the Tribunal's procedures. The decision must be explained to the applicant.

Regulation 6 provides for the establishment, maintenance and public inspection of an inquiry file. The file is to contain all relevant documentation as described in sub-regulations 6(1)(2) and (4).

Sub-regulation 6(6) provides an exception in relation to published documents, but provides for a notice to be filed which explains the relevance of the document and where it is available.

Sub-regulations 6(8) and 6(9) provide for the file to be made available for public inspection.

Regulation 7 provides for special notices to be sent to the applicant and any licensed broadcasters (licensees) who would be directly affected by the exercise of the substantive power under consideration. (Under regulation 9, a public notice of the commencement of an inquiry will normally also be given.) The Tribunal is also required to ensure that as far as practicable,

affected licensees and applicants receive copies of all submissions lodged in the inquiry.

Regulation 7 is not intended to be an exhaustive statement of the Tribunal's obligations in this regard. In some cases it may be appropriate to provide special notice of an inquiry and copies of submissions to other persons or organisations as well. It is understood that the Tribunal's general obligations to carry out a thorough and just inquiry would require that it consider doing so.

Sub-regulation 7(3) provides that where several licensees are involved who are members of the same representative organisation, the Tribunal may arrange for the giving of notice or provision of copies to the representative organisation rather than to each individual licensee.

Regulation 8 provides for early termination of inquiries where there is clearly no issue requiring investigation through the exercise of the inquiry powers. Any such decision must be explained to the applicant and any affected licensee and a public notice of the decision must be published.

The power under regulation 8 cannot be exercised in relation to the grant or renewal of a licence other than renewal of a rebroadcasting or retransmission licence.

Regulation 9 provides for publication of a notice of commencement of an inquiry. The notice will set out particulars of the application (if the inquiry is prompted by an application); specify the issues to be considered; give information about the availability of the inquiry file; and invite submissions from members of the public. Regulation 18 will deal with the method of publication.

Sub-regulation 9(2) requires that the notice be published within 28 days of commencement of the inquiry except in the case of inquiries dealing with the initial grant of licences, in which case the notice is to be published within 28 days of the close of applications for the grant of the licence.

Regulation 10 provides for the form of submission to be lodged. Submissions are to be in writing unless another form is approved, indicate the action sought, outline matters relied upon and be accompanied by any documents relied upon.

Under sub-regulation 10(2) a submission on behalf of an unincorporated association must be accompanied by certain information about the objects and membership of the association.

Sub-regulation 10(4) provides that where a submission is not in writing, it is to be accompanied by a statement in writing setting out basic information about the submission. The intention is that the statement be placed on the inquiry file so that the file gives a comprehensive picture of proceedings.

Sub-regulation 10(5) gives the Tribunal a discretion not to take into account submissions which do not comply with the regulations; do not contain relevant matter or are scandalous vexatious frivolous or an abuse of procedures.

Regulation 11 provides a means to avoid the need to produce to the Tribunal (with an application or submission) copies of documents which are already public documents. A person who intends to rely on a public document may lodge, instead of a copy, a notice indicating the matters in the document which are relied on and specifies where the document is publicly available.

Regulation 12 provides a mechanism for introducing new issues to be considered in an inquiry where it comes to notice that the issues as identified in the public notice under regulation 9 are inadequate. Where the new issues are substantially different, the parties are to be notified, notice of the new issues is to be published and further submissions invited.

Regulation 13 empowers the Tribunal to hold a conference of some or all parties before a member of the Tribunal to expedite resolution of matters through discussion. It is not intended that major aspects of the inquiry be dealt with in conferences and sub-regulation 13(2) gives an indication of the appropriate sort of subjects for conferences.

Regulation 14 provides for the holding, where appropriate, of hearings before the Tribunal at which evidence may be taken and arguments presented.

Regulation 15 provides for the recording of proceedings by parties or members of the public.

Regulation 16 provides for termination of an inquiry where the Tribunal concludes that further investigations are not necessary for the performance of its function.

Regulation 17 allows the Tribunal to delegate the exercise of specified incidental powers to a member of the Tribunal. The central powers relating to conduct of an inquiry remain with the Tribunal (that is, the full Tribunal or a Division constituted under section 15C of the Act).

Regulation 18 provides the mechanism for publication of the notices referred to in regulations 8, 9 and 12. Publication will be in the Gazette; in the Tribunal bulletin; in the case of matters of significant public interest in a newspaper circulating in the area concerned; and by such other means as the Tribunal determines.