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High Court finds in ABA's favour over Gosford radio licence

The ABA welcomed the High Court's decision on 20 November 2001 to dismiss with costs the special leave application filed by RG Capital Pty Limited (RG Capital).

RG Capital applied to the Federal Court of Australia on 3 October 2000, seeking judicial review of the ABA's decision to plan one new commercial radio broadcasting service in the Gosford licence area. A preliminary legal question, concerning whether a licence area plan (LAP) is a decision of a legislative or administrative character, was referred to the Full Court of the Federal Court of Australia for determination. On 6 July 2001, the Full Court found in favour of the ABA. On 3 August 2001, RG Capital filed an application for special leave to appeal to the Court from the decision of the Full Court of the Federal Court.

The successful outcome before the High Court means that the ABA is now able to proceed with auctioning the new commercial radio licence in Gosford.

Background

RG Capital Radio Pty Limited applied to the Federal Court of Australia on 3 October 2000 for an order to review the Gosford LAP made by the ABA under section 26 of the *Broadcasting Services Act* (the Act). In particular, the applicant sought review of the decision in the LAP to make available an additional commercial radio broadcasting licence in Gosford.

A preliminary question of law was referred to the Full Court. Resolution of the preliminary question would determine whether the LAP was a legislative or administrative decision. The outcome would determine whether judicial review of the Gosford LAP would proceed, since the applicant undertook to withdraw the application if they were unsuccessful on the preliminary legal point.

The question of law before the Full Federal Court (Wilcox, Branson and Lindgren JJ) was:

Is the decision of the respondent to determine the licence area plan made 31 August 2000 for the Gosford licence area a decision of an administrative character within the meaning of the Administrative Decisions (Judicial Review) Act 1977 (Cth)?

Decisions which are of an administrative character are reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Decisions of a legislative character are reviewable under the Judiciary Act 1903 (Cth). The grounds for review are considered broader under the Administrative Decisions (Judicial Review) Act 1977 (Cth) than the Judiciary Act.

On 6 July 2001 the Full Federal Court handed down its decision, finding that a LAP was not a decision of an administrative character [*RG Capital Pty Ltd v ABA* (unreported)]. The Full Federal Court stated in its reasoning that there is no simple rule for determining whether a decision is of an administrative or a legislative character. It stated that not one consideration discussed in the decided cases or raised by counsel is decisive of the issue but rather all considerations must be taken into account.

In deciding that a LAP was a decision of a legislative and not an administrative character, the Full Court found that the

considerations most persuasive were:

1. The LAP is of a general application as distinct from being a determination which affects only particular individuals or is made with particular individuals in contemplation;

2. Notwithstanding the power of variation give by ss26(2) a LAP is expected to have a moderately long term application and to lay down parameters within which decisions affecting individuals will be taken;

3. There is a clear distinction between the planning concerns of Part 3 of the Act and the Part 4 provisions regarding allocation of licences which more directly affect the interest of individuals; and

4. Section 204 of the Act provides for review by the AAT of a wide range of decisions which the ABA makes under the Act, including decisions under Part 4 and subsequent Parts of the BSA but omits review of the preparation of a LAP under ss26(1).