



**Australian
Broadcasting
Authority**

Investigation Report

File No: 2002/0746/2

Licensee	Cybertvale Pty Ltd
Callsign	6GS Wagin
Service Licence No.	1150458 (issued under s.40 of the <i>Broadcasting Services Act 1992</i>)
Type of Service	Commercial Radio Broadcasting
Relevant Legislation/Codes	Sections 63, 64 and 202 of the <i>Broadcasting Services Act 1992</i>

The Investigation

- On 20 June 2002, the Australian Broadcasting Authority (ABA) commenced an investigation under section 170 of the *Broadcasting Services Act 1992* (the Act) into:
 - the timeliness and correctness of notifications lodged with the ABA on 10 May 2002 by Cybertvale Pty Ltd (Cybertvale), Sherryl Chilcott and Leon Antonio; and
 - the control of the licence since 31 January 2002.
- Cybertvale Pty Ltd, Mrs Betty Antonio, Mrs Sheryl Chilcott and Mr Leon R. Antonio were given an opportunity to make representations to the ABA in relation to the matters raised in this report.

Introduction

Allocation of licence

On 26 November 1998, the Australian Broadcasting Authority issued a commercial radio broadcasting licence SL 1150458 under section 40 of the Act to Great Southern Broadcasters Radio 6GS Pty Ltd. Licences issued under section 40 use non-broadcasting services bands as a means of delivering broadcasting services.

As at 26 November 1998 the identified controllers of licence SL1150458 were Great Southern Broadcasters Radio 6GS Pty Ltd, N.A. Chilcott and P.A. Harding.

Requirement on licensee to notify the ABA of changes in control

- Section 63 of the Act provides:

63 Requirement to notify changes in control

- (1) If a commercial television broadcasting licensee, commercial radio broadcasting licensee or datacasting transmitter licensee becomes aware that:
 - (a) a person who was not in a position to exercise control of the licence has become in a position to exercise control of the licence; or
 - (b) a person who was in a position to control the licence has ceased to be in that position;the licensee must, within 7 days after becoming so aware, notify the ABA in writing of that event.
- (2) The details are to be provided in a form approved in writing by the ABA.

Change of ownership

On 4 March 2002, the ABA received a letter from Sherryl Chilcott, the General Manager/Company Secretary of Cybervale Pty Ltd (Cybervale), stating that Cybervale was 'taking over all future business activities of Great Southern Broadcasters Radio 6GS Pty Ltd' and seeking advice 'of all the relevant forms and procedures that I must adhere to, in the correct maintainance [sic] of this licence in regards to the ABA.'

Compliance issues

On 29 April 2002, the ABA wrote to Cybervale advising it of the notification requirements at sections 62, 63 and 64 of the Act. The ABA advised Cybervale of the apparent breaches of the notification requirements under sections 63 and 64 of the Act and requested that the relevant notification forms (Form ABA2 and Form ABA3) be sent to the ABA by 6 May 2002. This letter also advised Cybervale of its annual reporting obligations under section 62 of the Act.

On 10 May 2002, the ABA received a notification under section 63 of the Act from Sherryl Chilcott, in the form approved in writing by the ABA (Form ABA2). In the form ABA2, Cybervale advised that on 1 February 2002, the 6GS licence SL1150458 was transferred from Great Southern Broadcasters Radio 6GS Pty Ltd to Cybervale, and that it became aware of this on 1 February 2002. The notification advised only that Leon Antonio and Sherryl Chilcott came into a position to exercise control of the licence, and that N.A. Chilcott and P.A. Harding had ceased to be in a position of

control of the licence. Under section 63 of the act, the notification should have been lodged with the ABA by 8 February 2002.

In July 2002, the ABA conducted searches of the companies database maintained by the Australian Securities and Investment Commission (ASIC) to clarify who was in a position to exercise control of the 6GS licence.

The ASIC database stated that Cybervale had a share structure consisting of 100 fully paid ordinary shares of \$1 value each. The shareholders were identified as Robert Blee (5 shares), Betty Jean Antonio (20 shares) and Leon Ross Antonio (75 shares). The database, however, also stated that the three shareholders were not the beneficial holders of the shares.

In its submission in relation to the preliminary investigation report, Cybervale conceded that it had not lodged the notification within the prescribed timeframe.

Finding 1: Cybervale Pty Ltd (Cybervale) has breached s63 of the Act by not lodging a notification with the ABA within 7 days of becoming aware of a change in control of the licence.

Requirement on person who obtains control to notify the ABA

- Section 64 of the Act provides:

64 Person who obtains control of a licence must notify the ABA

- (1) If a person who was not in a position to exercise control of a commercial television broadcasting licence, a commercial radio broadcasting licence or a datacasting transmitter licence becomes aware that that person is in a position to exercise control of the licence, the person must, within 7 days after becoming so aware, notify the ABA in writing of that position.
- (2) The details are to be provided in a form approved in writing by the ABA.

On 10 May 2002, the ABA received a notification under section 64 of the Act from Sherryl Chilcott, in the form approved in writing by the ABA (Form ABA3).

The notification advised that on 1 February 2002, Sherryl Chilcott and Leon Antonio had moved into a position to exercise control of the 6GS licence by virtue of the transfer of that licence to Cybervale. The notification also advised that the persons became aware on 1 February 2002 of the event that led to their being in a position to exercise control of the 6GS licence.

The notification was certified as being true and correct and signed by Ms Chilcott. It appears that in certifying and signing the notification, Ms Chilcott was also acting as an authorised agent on behalf of Leon Antonio.

Schedule 1 to the Act sets out the ways in which a person may be in a position to exercise control of a licence. These include the holding of company interests in excess of 15%, or by virtue of being in a position to exercise control of the selection or provision of a significant proportion of the programs broadcast by the licensee, or a significant proportion of the operations of the licensee in providing the service.

In order to clarify who was in a position to exercise control of the 6GS licence, the ABA conducted searches of the companies database maintained by the Australian Securities and Investment Commission (ASIC).

In July 2002, the ASIC database stated that Cybervale had a share structure consisting of 100 fully paid ordinary shares of \$1 value each. The shareholders were identified as Robert Blee (5 shares), Betty Jean Antonio (20 shares) and Leon Ross Antonio (75 shares). This information was notified to ASIC on the annual return lodged 31 January 2002. The database, however, also stated that the three shareholders were not the beneficial holders of the shares. No s.64 notification has been received from Betty Jean Antonio.

Betty Jean Antonio, Sherryl Chilcott and Leon Ross Antonio were provided with an opportunity to provide representations in regard to the preliminary investigation report, however no submission was received from them.

Finding 2: Betty Jean Antonio, on becoming a controller of Cybervale, has breached s64 of the Act by not lodging a notification with the ABA.

Finding 3: Sherryl Chilcott and Leon Ross Antonio, as controllers of Cybervale, have breached s64 of the Act by not lodging a notification with the ABA within seven days of becoming aware that they were in a position to exercise control of the licence.

Control of the Licence since January 31, 2002

On 19 July 2002, the ABA issued a Notice to Cybervale pursuant to section 173 of the Act, requiring the provision of documents to the ABA by no later than 5.00 pm on 7 August 2002.

The documents to be provided were:

1. All documents within your possession, custody or control specifying any or all of the following information:
 - each person who has a company interest, including a shareholding interest, a voting interest, a dividend interest or a winding-up interest in Cybervale Pty Ltd, ACN 096 782 400 (Cybervale) as at the date of this notice;
 - each person who has had such an interest at any time since 31 January 2002; and
 - the nature, extent and duration of the company interests in Cybervale of each person referred to above.
2. All documents within your possession, custody or control, whether in the form of statutory declarations or otherwise, stating whether shares in Cybervale are held beneficially by any holder of the shares and, if not, who has beneficial interests in the shares.

The letter from the ABA accompanying the Notice advised Cybervale of the condition of the 6GS licence that the articles of association of the licensee will at all times contain provisions requiring shareholders to provide the company with a statutory declaration stating who has the beneficial interests in the shares.

At 7.47 pm (WA time) on 7 August 2002, Cybervale faxed a letter in response to the Notice. This was received by the ABA after the 5.00 pm deadline. The documents requested by the ABA in the Notice were not included in Cybervale's response.

In the faxed letter, Cybervale advised that Leon Antonio is the 'beneficial owner of all shares in Cybervale', that no one else has ever been a beneficial owner of shares in Cybervale' and that 'the information contained on the ASIC database now states this.'

Cybervale also advised that the corrections to the ASIC database were made on 6 August 2002. Cybervale advised that it was not able to provide any supporting documentation to evidence this advice as none had been received from ASIC.

A search by the ABA of the ASIC database indicated that on 6 August 2002, a notification was lodged of a change of registered office of Cybervale. The ABA could find no evidence of any documentation lodged by Cybervale with ASIC concerning a change to the beneficial ownership of shares in the company. ASIC advised the ABA that even if Cybervale had advised it of such a change, it would not be reflected in its database until the next annual return (due by 31 January 2003), was received.

On 29 August 2002, the ABA advised Cybervale that its response of 7 August did not comply with the terms of the Notice and that this may be a breach of section 202 of the Act. Despite Cybervale's failure to comply with the Notice, it was again requested to provide the documents, this time by 5.00 pm on 2 September 2002.

The ABA did not receive a response to this request. A telephone voicemail message was received on 5 September 2002 from a person identifying himself as 'Norm', stating that Ms Chilcott was in hospital and would not be able to respond to the letter until 12 September 2002 at the earliest. No correspondence has been received by the ABA in relation to this letter.

In its submission in relation to this issue, Cybervale conceded that it had not produced documents as required.

Finding 4: Cybervale has failed to produce documents required in a notice dated 19 July 2002, issued by the ABA under s173 of the Act, and has committed an offence under s202 of the Act.

The ABA conducted a further search of the ASIC database in February 2003. According to Cybervale's 2002 annual return to ASIC, Leon Antonio holds all 100 shares in Cybervale. It is stated however, that Leon Antonio is not the beneficial owner of the shares. Under the Act, the beneficial owner of the shares holds a company interest, and may be in a position to control the licence.

Without the documents requested in the Notice, the ABA is not in a position to determine the controllers of the 6GS licence with any certainty. As a result, the ABA is unable to determine which person, if any, is in breach of the requirement at section 64 of the Act. Further, the ABA is unable to determine whether Cybervale has fully complied with its obligation to notify under section 63.

In its submission in relation to this issue, Cybervale claimed that Leon Antonio is the beneficial owner of all shares in Cybervale Pty Ltd. However, as no documentation was provided to support the claim, and the annual return lodged by Cybervale with ASIC in January 2003, indicates that Mr Antonio is the only shareholder and is not the beneficial owner of the shares, staff consider that the information available to the ABA was not conclusive one way or the other.

Finding 5: Given the lack of conclusive evidence before it, the ABA is unable to make a finding in the matter regarding the identity of the beneficial owners of shareholding interests exceeding 15%. It notes however that there may be a person or persons unknown, who may be the beneficial owner(s) of shareholding interests exceeding 15% in Cybervale Pty Ltd, who have breached s64 of the Act by not lodging with the ABA a notification of being in a position to exercise control of the licence.

Ownership and Control Annual Notification under section 62 of the Act.

Cybervale did not provide a section 62 annual notification form ABA5 to the ABA by September 2002. This failure was brought to the attention of the P&CR Committee at its meeting of 21 November 2002.

A letter was sent to Cybervale on 24 February 2003, reminding it of its obligations under section 62 of the Act and requesting that the enclosed form ABA 5 be completed and returned to the ABA by 10 March 2003. The ABA received a section 62 Annual Notification form ABA5 on 24 March 2003. This form identifies Leon Ross Antonio as the only person in a position to exercise control of the licence as at 30 June 2002.

In its submission in relation to the preliminary investigation report, Cybervale conceded that it had not lodged the notification within the prescribed timeframe, and that insufficient attention had been given to complying with the requirements of the Australian Broadcasting Authority (sic). An undertaking was provided to comply in future.

Finding 6: Cybervale has breached s62 of the Act by not lodging a notification for the financial year ending June 2002 with the ABA by 30 September 2002.

Decision

The Australian Broadcasting Authority, at its meeting of 31 July 2003, has determined for the above reasons, that:

Finding 1: Cybervale Pty Ltd (Cybervale) has breached s63 of the Act by not lodging a notification with the ABA within 7 days of becoming aware of a change in control of the licence.

Finding 2: Betty Jean Antonio, on becoming a controller of Cybervale, has breached s64 of the Act by not lodging a notification with the ABA.

Finding 3: Sherryl Chilcott and Leon Ross Antonio, as controllers of Cybervale, have breached s64 of the Act by not lodging a notification with the ABA within seven days of becoming aware that they were in a position to exercise control of the licence.

Finding 4: Cybervale has failed to produce documents required in a notice dated 19 July 2002, issued by the ABA under s173 of the Act, and has committed an offence under s202 of the Act.

Finding 5: Given the lack of conclusive evidence before it, the ABA is unable to make a finding in the matter regarding the identity of the beneficial owners of shareholding interests exceeding 15%. It notes however that there may be a person or persons unknown, who may be the beneficial owner(s) of shareholding interests exceeding 15% in Cybervale Pty Ltd, who have breached s64 of the Act by not lodging with the ABA a notification of being in a position to exercise control of the licence.

Finding 6: Cybervale has breached s62 of the Act by not lodging a notification for the financial year ending June 2002 with the ABA by 30 September 2002.

The common seal of the
Australian Broadcasting Authority
was affixed to this document in
the presence of:

Signature of Member

Ms LYN MADDOCK

Name (please print)

Dated this SEVENTH day of AUGUST 2003.

Signature of Member/General Manager

Mr MICHAEL GORDON-SMITH

Name (please print)