COMMUNICATIONS LAW BULLETIN

The Official Publication of the Australian Communications Law Association (ACLA)

ISSN 0272-1301

Vol.5 No.3 October 1985

ACLA SEMINAR PAPERS

Amendments Relating to RCTS Licences

The amending Act introduces a new regime defined as "Remote Licences" by a proposed new s81(4A) in the Act. Did the draftsman understand the irony of this abbreviation? Such licences may only be issued to a corporation or consortium of corporations formed within the Commonwealth.

Interestingly, s81(6) is amended to apply that sub-section to remote licences. The effect of this is that where a remote licence is held by a consortium of companies the shareholdings must be equal.

No explanation for this is given in the Minister's second reading speech or the explanatory memorandum with the Bill and this may reflect the fact that there probably is none. In its First Report on RCTS at p448 the Tribunal says it "is concerned about the possible implications of (this amendment) and recommends that ... consideration be given to the removal of remote licences from the ambit of s81(6)(a) of the Act."

Of course, the effect of the provision will be to make participation by small regional operators in RCTS consortia difficult, if not impossible. It is to be hoped that the Tribunal's recommendation will be accepted.

The Amending Act proposes remote television licences and remote radio licences within the structure of remote licences.

A remote licensee will be empowered to serve a designated service area with a defined service. How this will be done technically will be specified in the technical operating conditions (TOC's) attached as conditions of the licence. Of course, the satellite up and down links will

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have to be included in the TOC's. These TOC's incidentally will be included in a new concept called a licence warrant (s89D).

The Bill also addresses the special problem created by the fact that most RCTS signals will be received by individual household TVRO's (Television Receiver Only) or community owned and operated TVRO's and retransmission facilities. It introduces the concept of a retransmission or rebroadcast licence by amendment to the definition in s4 and by making provision for the grant of these licences (by amendment to s81).

A retransmission licence will permit a broadcasting service or services, by use of a telegraph line, to be retransmitted (s80(1)(d) and the technical conditions attaching to specify the design, siting, installation, maintenance or operation of the telegraph lines and other equipment or facilities to be used for or in connection with the transmission of programs pursuant to the licence.

A rebroadcasting licence (which confusingly covers both radio broadcasting and television) permits retransmission in accordance with the specifications attached to the licence, by means of a radio communications transmitter.

Thus apparently the Government has established a whole new licence regime to deal with the problem of the remote community. However, as is so often the case, the Act puts the technical means in place but does not begin to grapple with the much larger problem of what use is to be made of the technology.

If simple retransmission of a single signal was the only purpose perhaps the problem would be insignificant. However, the Act now contains the brave new world of s99A - local programming. Here the Tribunal is enjoined to permit the broadcast of "different programs from different ... transmitters" subject to such conditions (if any) as it determines. Yet again the Tribunal is left with the hard issues.

In the W.A. RCTS inquiry and subsequently at the RCTS general inquiry the breadth and range of these issues began to be explored:-

(a) Can a community decide to block out some incoming programming and, if so, on what basis?

(b) How will such decisions be made by the community? e.g. if the aboriginal section of a community wish programming to cease during a ceremonial occasion or if the local parents group want a program blacked out because of excessive sex or violence how will the interests of the rest of the community be balanced?

(c) If majority rule is to apply, will the mid-day movies and soaps overrule the special purpose and often narrow cost educational programming promised for RCTS?

(d) If locally produced programming is introduced who will be responsible for its content in terms of the program standards and defamation, privacy, trade practices and self-regulatory law and requirements?

(e) If ad hoc local insertion or straight out switching off is occurring how will the principal RCTS licensee be able to guarantee an audience to his advertiser, without whom there will be no service?

In its First RCTS Report the Tribunal isolates two alternatives to deal with these issues:-

1. Permits could be granted by the Tribunal to community organisations and those organisations could then be solely responsible for the content of the programs broadcast; or

2. The licensee is responsible for all programs broadcast and no separate permits are required.

There is not time tonight to consider the pros and cons of these proposals. Suffice it to say that the Tribunal appears to favour the big brother approach of the remote licensee being responsible but protected by statutory amendments requiring the Tribunal in considering the impact of breaches of standards at retransmission points to have regard for "the capacity of a licensee in all the circumstances of the breach to prevent the occurrence of such breach".

Briefly, so far as ownership and control of remote licences is concerned s92V has been introduced. This sub-section effectively empowers the Tribunal to suspend the effect of s92(1) and s90C which you will recall prescribe maximum numbers of licence interests which may be held.

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The circumstances in which the Tribunal may do this are set out in s92V(2) and (3) and leave a very wide discretion to the Tribunal.

Ironically, special mention is made of control by foreign persons and yet the first remote licence has been handed to a Canadian citizen.

Further, paragraph (4) of s92V constitutes new definitions of "control" and "interest". Since the present definition of "control" in s90(1) and of "shareholding interest" in s90(2) have been left intact we now have the curious position of the same term being differently defined in different parts of the Act.

Quite transparently this is undesirable and leaves those considering and advising upon the Act in the potentially confusing position of having to constantly define which definition they are referring to. Errors will occur.

The s92V definition of "interest" is breathtaking in its width and I would suggest, perhaps meaningless because of that. The definition depends upon three terms which are defined in the Act - i.e. "shareholding interest" which is defined by the Amendment Act 1985, ."a voting interest" and "financial interest" by the Amending Act 1984. However, these expressions are inclusive but exclusive. Presumably even wider interests are envisaged - perhaps being politically or economically powerful in the licence area?

The grant of remote licences is to be controlled by a new provision, s83(da), which is substantially in the form of the normal grant criteria, but it does require particular attention to be given to the continuing viability of overlapped service areas. A particular person may be refused a licence on this basis, even though another person might be considered by the Tribunal to be suitable to be licensed for that remote licence.

This has significance for remote licence consortia. If available this might well have been a significant factor in Western Australia. Yet again the structure is put in place after the horse has bolted.

The remote licence provisions do little more than establish a structure which the Tribunal is left to flesh out. Perhaps this is consistent with current trends in broadcasting law and policy. One cannot help but wonder in light of the confusion reigning across the whole field of broadcasting at the moment, whether this is a proper exercise of the function of government and truly in the interests of the people of Australia.

Martin Cooper

RECENT CASES

Federal Court Judgement on the Third Perth T.V. Licence

Foster J of the Federal Court in July issued a judgement dealing with ten appeals from decisions of the Australian Broadcasting Tribunal ("ABT") arising out of the hearings of the applications for the third commercial television licence in Perth.

In his judgment, Foster J made it clear that the two existing Perth licensees, STW-9 and TVW-7, had the right to:-

1. Participate fully as interested parties to the enquiries; and

2. Attack and attempt to demolish the individual cases of the applicants.

His Honour also made it clear that the viability of the applicants was a relevant issue for consideration, and that the choice of frequencies and the suitability of each on technical and public interest grounds should be considered by the ABT.

In His judgement, Foster J criticised the ABT for "sacrificing justice to expediency" in its handling of the inquiry. He said:-

> "The inquiry is the only public forum, indeed the only forum of any sort in which public interest in these matters may be advanced by anyone other than those officials advising on the matter and in which the matter of choice of frequency may be debated."

On the question of commercial viability, it would appear that the ABT has to find a middle ground when assessing the applications. The applicant must have sufficient financial technical and management capabilities to stay in business, but not be extremely successful and thus have a drastic impact on the existing licensees. If His Honour's decision stands it could be the wealthiest licensees, who have the most money to withstand competition, who will be able to attempt to dem-

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