tion stating gross earnings during that year.

24. The Guidelines may be amended from time to time in accordance with Government policies after a period of consultation.

Australian Broadcasting Tribunal Standards relevant to the provision of VAEIS

Interim Television Program Standards (for video programs):

- General Program Standards (2)
- Program Classifications (3b, 10, 11)
- Not Suitable for Television (9)
- News Programs (15)
- Contests (16)
- Interviews and Telephone Conversations (17)
- Production of Advertisements in Australia (18, 19)

Interim Television Advertising Conditions (for video programs):

- Children and Advertising (5a, 5b)
- Advertising for Cinema films, Video Tapes and Video Discs (6a, 6b)
- Advertising of Products of a Personal or Intimate Nature (8a)
- Policy Statement POS07 on "Advertising Matter Relating to Cigarettes or Cigarette Tobacco"

Radio Program Standards (for audio programs):

- Prohibited Matter (2, 3)
- Encouragement of Australian Artists (4)
- News Programs (5)
- Contests (6)
- Interviews and Talkback Program (7)

Radio Advertising Conditions (for audio programs):

- General (2)
- Australian Advertisements (3)

For the purpose of VAEIS, the term "licensee" should be read as "VAEIS provider"."

THE RADIOCOMMUNICATIONS ACT AND TELEVISION PROGRAMS NOT TRANSMITTED FOR RECEPTION BY THE GENERAL PUBLIC

It is my intention to offer some thoughts in response to the question "How far can the Minister go to control content of programs transmitted pursuant to a licence granted under the Radiocommunications Act?".

The Radiocommunications Act ("the Act") was assented to in December 1983, but only proclaimed to come into effect in August 1985. It replaced the Wireless Telegraphy Act which was first enacted in 1905.

The Act is not ordinarily legislation that one includes in the bundle of law referred to as "media law" - often it is only given a passing reference in the context of technical matters.

Let me remind you of the background to the Act and the matters that that legislation addresses.

The constitutional basis of the legislative power of the Federal Parliament is the power to make laws for the peace, order and good government with respect to "postal, telegraphic, telephonic and other like services" (51(v)). In 1935 the High Court of Australia, when broadcasting was regulated under the Wireless Telegraphy Act, held that the Commonwealth power extended to the control of broadcasting. The Court placing a heavy emphasis on the notion of a "message". That emphasis persists in the definitions to be found in the Act.

This concern about "messages" may be illustrated by the definition of "radiocommunication" - that means:-

> "(a) radio transmission; or
> (b) reception of radio transmission,
>
> for the purpose of the communication of information between persons and persons, persons and things or things and things."

This leads to my favourite definition - s5(1) provides:-

"without prejudice to its effect, apart from this sub-section, this Act also has, by force of this sub-section, the effect it would have if the reference in the definition of "radiocommunication" in sub-section 3(1) for things and things, were a reference to parts of things and the same or other parts of the same things."

You may wonder what that is - it is a definition of radar.

The radio frequency spectrum is used by a multitude of services both space and terrestrial. Many of them are safety services. For example, there are the aeronautical services, the maritime services, the fixed service, land mobiles and even radio astronomy.

The Act has, I suggest, as its object the regulation of the radio frequency spectrum in all its aspects including planning of the use of the spectrum, the regulation of access to the spectrum and the regulation of activities that diminish the usefulness of the spectrum. The Act, when contrasted with the legislation in countries such as the United Kingdom, Canada, New Zealand and the United States is highly innovative, particularly in the area of "interference".

The Act provides the mechanism for the licensing of all radio transmitters other than transmitters licensed under the Broadcasting and Television Act, and for the licensing of receivers falling into a class specified by a regulation. What is licensed under the Broadcasting and Television Act is really only the transmitter radiating a program to the general public. For example, the Radiocommunications (Licensing and General) Regulations defined an outside broadcast television service as a "radiocommunications" service for transmitting programs" to a studio or transmitter for broadcast to the general public". That transmitter is licensed under the Act and not the Broadcasting and Television Act.

It should be noted that the Australian definitions of radiocommunications services accord with the definitions to be found in the Radio Regulations of the International Telecommunications Union.

The International Telecommunications Union is created by a convention which establishes the Union, a specialised agency of the United Nations, and which is responsible for, among other things, the international coordination of the use of the radio frequency spectrum and the international regulation of that spectrum. Australia is a party to the convention and the radio regulations form part of the convention.

The dichotomy between a broadcast service and, for an example, an outside broadcasting transmitter (as defined in the Australian Regulations) is perhaps made clearer in the definition of the broadcasting service found in the Radio Regulations of the ITU - there it is a radiocommunications service in which the transmissions are intended for direct reception by the general public. The only difference between the Australian definition in the Broadcasting and Television Act and the definition of the Radio Regulations is the use of the word "direct".

Mark Armstrong, in his book - Broadcasting Law and Policy in Australia, places considerable emphasis upon the frequency on which the transmission takes place as a test as to whether a transmission is a "broadcast" or not.

Clearly, for international purposes, a program can be transmitted on a non-broadcast frequency. For example, on a frequency in a band allocated to the fixed service, if that transmission is providing a feeder to a transmitter which is "intended for direct reception by the general public". It matters not that the average multi band receiver is as capable of receiving that frequency as it is of receiving the short wave bands allocated to the broadcasting service.

But the Act goes very much further than simply to provide a mechanism for the licensing of transmitters. It establishes a regime that will, with time and by setting of standards, and requiring those standards to be adhered to, provide a regime that will lessen interference. Standards can be set for radio transmitters, radio sensitive devices

(audio amplifiers and even a pacemaker can be a radio sensitive device), receivers (for example, standards for television receivers to increase their immunity from interference), and devices that emit electromagnetic energy (that may include not only a plastic RF welding machine, but also a power line).

The Act has provision for radio frequency planning, providing for the publication, public comment and adoption of frequency plans.

Throughout the Act there is a continuing reference to the minimisation of interference.

The Act uses a series of definitions that require close examination. Many of the definitions interlock with other definitions. ""Radiocommunications" utilises a definition that depends in turn on the definition of "radiotransmission". "Transmitter" is defined, again in terms of "radiocommunications" and a transmitter (which includes the power line) is different from a "radiocommunications transmitter" which is really what one would ordinarily refer to as a transmitter.

In short I suggest that the purpose of the Act is to regulate the use of the spectrum, to regulate access to the spectrum, and to regulate the things that can effect the spectrum. I suggest that the identification of the purpose of the legislation is of critical importance.

Section 25 of the Radiocommunications Act provides that a licence to operate and possess a radiocommunications transmitter is subject to certain conditions. Section 25(1)(d) provides that amongst those conditions is a "condition that the holder of the licence shall not operate, or permit the operation of, the transmitter in such a manner as would be likely to cause reasonable persons, justifiably in all the circumstances, to be seriously alarmed or affronted, or for the purpose of harrassing a person". A somewhat lower standard than the standard imposed by the Australian Broadcasting Tribunal under the Broadcasting and Television Act.

Reference should also be made to s25(1)(j) which imposes on a licence "such conditions (if any) as are prescribed". An examination of the Radiocommunications (Licensing and General) Regulations seems to show that conditions have only been prescribed for citizen band radio stations and amateur stations. Reference should also be made to s25(1)(k) which imposes on a licence "such other conditions (if any) as are specified in the licence".

These last two provisions should be read in conjunction with s25(8) which provides that nothing in paragraphs (1)(a) to (h) shall be taken by implication to limit the generality of the condition that may be prescribed for the purposes of paragraph (1)(j) or specified under paragraph (1)(k). However, all that says is that nothing in those paragraphs shall be taken by implication to limit conditions - conditions may be limited for other reasons.

Section 86 of the Act provides that the decision of the Minister under s25 is a reviewable decision under the Administrative Appeals Tribunal Act. Equally the possible impact of the Administrative Decisions (Judicial Review) Act should not be overlooked.

Against this background one returns to the original question - "how far can the Minister go to control content of program transmitted pursuant to a licence granted under the Radiocommunications Act?". I take the question to refer to content in the sense that content is regulated by the Australian Broadcasting Tribunal under the Broadcasting and Television Act, in terms of program content, Australian content, advertising content and the like.

It is a general principle of administrative law that an authority cannot exercise the power granted for a particular purpose for a different purpose.

This principle can be illustrated by a decision of the House of Lords in 1964 - Chertsey Urban District Council v Mixnams Properties Limited (1965) AC 735. There the owner of a caravan site applied for a licence under the Caravan Sites and Control of Development Act 1960 for a site licence. A licence was issued but the licence imposed numerous conditions which the licensee objected to as being ultra vires. It was asserted that the local authority were entitled only to impose

conditions limited to matters of town planning and public health. The House of Lords held that there was nothing in the Act suggesting any intention to authorise local authorities to go beyond laying down conditions relating to the use of the sites and it was not permissible to regulate the user of the licensee's legal power of letting or licensing caravan spaces.

It is clear that that administrative principle applies to a Minister exercising a statutory discretion as much as it applies to authorities generally - re Toohey (Aboriginal Land Commissioner) ex parte Northern Land Council (1981) 56 ALJR 165.

It may be therefore, if my characterisation of the purpose of the Radiocommunications Act is accurate, that it could be argued that the Minister's power to impose conditions dealing with content in much more than the very broad way imposed by s25(1)(d) of the Radiocommunications Act is exercising a power for a purpose beyond which that power was granted. The Broadcasting and Television Act is legislation that clearly grants that sort of power. The question is - does the Radiocommunications Act?

One suspects that behind all of this lies a question of policy that no one is terribly anxious to grapple with.

Michael J. Owen

This was a paper delivered at the ACLA Seminar on 13 August, 1986 on New Video Entertainment Services. Other papers delivered at this Seminar were published in the Vol. 6 No. 3 (October 1986) issue of the Communications Law Bulletin.

NEW TRIBUNAL VICE-CHAIRMAN

Mr Bill Armstrong, the former managing director of Radio 3EON-FM in Melbourne, has been appointed as the new Vice-Chairman of the Australian Broadcasting Tribunal. Mr Armstrong took up his position on 1 December, 1986.

A.C.L.A. - NEWS

At the Annual General Meeting of ACLA on 30 October, 1986 the following office bearers were elected:

Stephen Menzies	- Chairman
Michael Law	- Vice-Chairman
Victoria Rubensohn	- Secretary
Stephen Menzies	- Treasurer (on a temporary basis)

Executive Members:

Richard Ackland
Mark Armstrong
Adrian Deamer
Noric Dilanchian
Robyn Durie
Dominque Fisher
Michael Frankel
Leo Gray
Kate Harrison
Catriona Hughes
Paul Marx
Judi Stack
Janet Strickland
Catharine Weigall

MULTIPOINT DISTRIBUTION SYSTEMS

Expressions of interest from entrepreneurs wanting to distribute video, audio or information material through multipoint distribution systems ("MDS") have been sought by the Government. Such systems use microwave transmitters to distribute video material or data to receivers at specified locations. The systems operate on different frequencies to television services and cannot be received without special equipment. They can stand alone, or operate as part of a hybrid delivery system combined with either satellite or Telecom cable or both. The fee for the transmitter sites in high density radio locations is $9,000 per annum, and elsewhere $2,130 per annum. Licences will be granted under the Radiocommunications Act.