

The new licensing regime

Jack Ford argues that the new licensing scheme is a disaster in the making

As one who has spent much of the past 10 years or so on one side or the other of the licence grant process, it is both bemusing and disturbing that the new bureaucrat-driven, price-based system of allocating commercial radio or television licences and pay TV licences, has, before even a single licence has been granted, been exposed to so much cynicism and ridicule.

The old system

Under the old system, applicants for licences had to pass muster before the Australian Broadcasting Tribunal ("ABT") and anybody else (ie other aspiring applicants, incumbents and, if they wished, the public) who wished to have a say in the licensing process. If nothing else, the system was competitive. Inquiries were hard fought, but results were achieved and licences granted.

There can be no perfect system for handing out new licences in a regulated and limited market. Incumbents will always do whatever they can to preserve their market share, given that they are not charities. In any event, whatever be the faults of the old system, some applicants were granted licences. Some were refused. If one cares to read the ABT licence grant reports, as a general rule, leaving commercial viability aside, applicants to whom the ABT refused to grant a licence had only themselves to blame. In a country where the High Court (in the *Bond* case) has held that holding a licence involves a public trust, such applicants simply failed the threshold tests.

Criticism

The principal criticism levelled at the old process was that it was lawyer-driven, which led to a costly and time consuming inquiry process. The only other criticism made was that licences were handed out for free, but that was corrected a few years ago.

As I have been saying publicly for the past 18 months, when the concept of the new *Broadcasting Services Act* ("BSA") was first floated, for so long as the electronic media industry continues to be regulated, lawyers will play a major role in the industry. The bureaucrats thought they had the perfect answer. First, introduce a system based purely on price. Second, ensure that the regulator, after completion of the planning process, acts principally behind closed door

investigations. That should keep the lawyers muzzled and, presumably, get licences allocated with maximum return to the Commonwealth and minimum delay.

The pay TV licensing debacle has been well chronicled. I will not repeat its sad yet short history. The fact is that the bureaucrats were able to engineer the introduction of a system based solely on price but with no mechanism whatsoever whereby applicants have to demonstrate, even in a preliminary way, that they can pay for what they bid or that they will otherwise be suitable. It gets worse. The Attorney General's Department has reportedly provided advice that, because the legislation speaks only of a price-based system, there is simply no power to extract from applicants at the bid stage details of their financial or management capability (now forbidden expressions from the past although re-enacted, in my view, in a different form in section 41 of the BSA).

What about lawyers?

What about the lawyers? They are all over the new process. The initial notice calling for MDS licence tenders has been found to be invalid and the Australis group remains involved in the Federal Court actions.

What have been the consequences? Firstly, it is trite to repeat that not one new licence has yet been granted. Both the satellite and MDS licence systems have been found to contain serious (and in one case, fatal) flaws. Secondly, this country's reputation is taking a severe buffeting amongst the international electronic media industry. That has been the most unfortunate consequence of all, even if it was inevitable from the outset.

Have any lessons been learnt? The proof of that will be whether or not the legislatively imposed system setting out the parameters for allocating new commercial radio and television licences will be changed. Unless the present parameters are changed, inevitably in my view that system will fall into the same black hole into which pay TV has collapsed.

At the moment the Australian Broadcasting Authority ("ABA") itself has a sword of Damocles hanging over it. It is directed by the BSA to determine a price-based system for the allocation of new commercial television and radio licences. According to information released at the ABA's own planning seminars held last month, new radio licences could be up for grabs late this year or early next year in

some markets. The ABA has not yet determined the allocation system. How will it do so?

Fundamental problems

The problem lies in the fundamental inconsistencies, in my view, amongst the provisions of sections 36 and 37 of the BSA. They are similar to sections 93 and 95 in respect of pay TV. Even if it wished to do so, the ABA, should it decide to follow the advice from the Attorney General's Department referred to above, will be unable to incorporate within its price-based allocated system any other licensing criteria. Accordingly, the system will be unable to contain within it a financial capability test.

In my view, one of two things will happen with respect to the commercial licence allocation process. Either the BSA will remain unamended, the ABA will be forced to determine a system which is the mirror-image (in terms of parameters) of one which has proved to be a debacle, or sections 36 and/or 37 will be amended substantially so as to provide for applicants for public trust type licences to be properly scrutinised before they obtain a licence.

We await with interest the events of the next few months. In the meantime, it appears, ironically, that the new licensing regime will provide lawyers with far more work than under the old system. It remains to be seen whether the new system will lead to more licences being granted than previously.

If recent statements by the ABA are any guide, it appears that nothing has been learnt from the pay TV fiasco. In the 21 May issue of *Media Australia*, ABA member Tim O'Keefe is quoted as saying, in response to the question:

"Will there be deposits? — "There won't be any deposits as such, but the Minister has requested that there will be reserve prices in all cases to ensure that fair prices are paid. Eventually (my emphasis added) the bidder will have to come up with the money. I agree that we must stop what happened with pay TV and we are taking that experience into account".

In other words, there will be absolutely nothing to stop a bidder from lodging 500 bids for a licence in an area, torpedoing for decades the licence grant process. They will not even have to pay \$500 per bid! The first licence won't be granted until well into the next century!

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