(CONT'D FROM PAGE 30) Amendments Relating to RCTS Licences...

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-

(CONT'D PAGE 41)

(CONT'D FROM PAGE 32) Area Inquiries & Local Origination...

the book at licensees.

We therefore propose that, first, area inquiries be held as nearly as possible midway between licence renewals, and, secondly, that the term of a renewal be increased to four or five years. The Tribunal could be expected normally to grant licences initially for five years, unless for special reasons that was too long, when two-and-a-half years would not be unreasonably short.

Local Origination of Programmes:

The new provisions in s99A of the revised B&T Act allow for local origination of programmes on subsidiary transmitters. They are probably traceable to concerns expressed some years ago by Aboriginal communities that the sudden arrival of metropolitan-style television, when many of them had not even been used to radio services, would be extremely disruptive of traditional culture and mores. The first reaction was increased pressure for Aboriginal radio services; some progress has been made, including the establishing of CAAMA in Alice Springs as a capable Aboriginal broadcaster and production house.

With provision proposed (and now made) for local origination of programmes, commercial broadcasters especially began to observe the possible problems. FACTS was concerned at the commercial implications of interruption of delivery of advertisements. FARB raised a possibility that limited 'local origination' could expand until effectively a new station had come into being, without the operation of any of the normal processes of ministerial planning and Tribunal licensing.

The PBAA supports the provision for local origination, but acknowledges that there is some reality in these problems for the commercial sectors. The concern of FARB about the bypassing of normal procedures is one requiring thought; the argument (if we understand FARB correctly) is not that the development ought not to occur, but that it should occur subject to properly determined processes.

Because its stations are not normally competitive with each other in the way commercial stations are, the public sector is inherently more easily able to accommodate concepts such as local origination without strain. For this reason, the PBAA asked that provision be made (and it has been) to proclaim the introduction of local origination separately for each type of licence, allowing the process to begin on public stations even if there are still unsolved problems for other sectors.

An idea canvassed by FARB would allow local origination with minimal restriction and regulation in remote areas, but not on translators in currently-served rural or regional areas (or, anyway, not without considerably more 'process'). At least one public radio service - that to Bathurst, currently being extended to Orange with a translator, with an understanding that a local Orange community station may in the future supersede the translator - makes FARB's proposal of interest to the public sector too.

It can be said that public broadcasters firmly support local origination; further, the idea should not be confined in its implementation to remote areas. For some time the merits of channel sharing have been argued by the PBAA, to lukewarm or cold reactions from other sectors. We maintain our view that, with suitable arrangements, diversity of choice and comprehensiveness can be well served in some circumstances by less rigid separation than has been customary of the various kinds of service - in both radio and television.

Michael Law

Federal Court Judgement...

(CONT'D FROM PAGE 40)

olish the individual cases of applicants. Those with less financial capability will be disadvantaged.

His Honour's conclusion was that the ABT, in its reasons issued on 3 April, 185, denied natural justice to the encumbant licensees. If this decision stands it will substantially reduce the ABT's discretion in the conduct of inquiries.

ACLA APOLOGY

Apologies are extended for the recall of Volume 5 No. 2. Unfortunately an error appeared in this edition.
