

# AM/FM Conversion

Paul Marx examines the story so far

In the May 1989 edition of the Communication Law Bulletin, I assessed the progress of the procedures for converting commercial radio services in Australia's capital cities from the AM to the FM frequency bands. Some twelve months later it is useful to make a further assessment of those procedures.

The following is a simple chronology of events so far:

**April 1989:** The then Minister for Transport and Communications, the Hon. Ralph Willis published a notice in the Commonwealth of Australia Gazette (No. S139, 18 April 1989) pursuant to section 89DAB of the Broadcasting Act 1942 ("the Act") inviting licensees who held AM commercial radio licences in mainland State capital cities to lodge applications with the Tender Board for conversion of their licences to FM. Tenders were called for two new FM services in each of Sydney, Melbourne, Adelaide and Perth. Tenders were called for one FM service in Brisbane because of the availability at that time of FM frequencies for conversion. Tenders for the conversion of licences were close on 19 July 1989. By 18 April 1989 of the 27 AM commercial licensees in Adelaide eligible to apply for conversion of their licences, 24 had expressed interest in tendering.

**August 1989:** The Minister published a notice in the Gazette on 2 August 1989 pursuant to section 89DAJ of the Act notifying the result of the July tender. That notice stated that six commercial AM radio licensees had been successful in their bids, namely 3KZ, Melbourne (\$31,568,999); 3AK, Melbourne (\$22,700,000); 4BK, Brisbane (\$17,139,012.96); 5KA, Adelaide (\$5,525,003); 6PM, Perth (\$16,382,000); and 6GL, Perth (\$12,001,010.80). Only one tender in Adelaide met the reserve determined by the Minister under s.89DAG of the Act and tenders were reopened. The Minister previously had extended the closing date for tenders for the two FM frequencies in Sydney to 11 October 1989 to accommodate an extension of television transmissions on Channel 4, Wollongong.

**September 1989:** Wesgo Communications Pty. Limited ("Wesgo") commenced proceedings against the Minister and officers of his Department in the Federal Court of Australia. That application sought orders of review and prohibition in respect of, amongst other things, the Minister's decision pursuant to section 89DAB of the Act to publish the notice on 18 April 1989 inviting tenders for conversion to FM. It was claimed

that the decision involved an error of law in that the Minister's notice did not, as it was obliged to do under section 89DAB(2)(b) of the Act, set out an outline, in the case of Wesgo, of the new technical conditions proposed for the frequencies to be allocated pursuant to the Notice. Those proceedings (which are listed for further directions on 14 September 1990) resulted in the closing date for tenders in Sydney being extended to 29 December 1989.

**November 1989:** The Minister announced that the licensee of 5DN was the successful tenderer for the second FM frequency in Adelaide with a bid of \$6 million (Media Release 102/89, 8 November 1989).

**December 1989:** The closing date for tenders in Sydney was extended to 28 February 1990. Discussions continued between successful tenderers in Melbourne, Brisbane, Adelaide and Perth concerning the meeting of the necessary preconditions for conversion.

**January 1990:** 3KZ Melbourne converted to FM and adopted the call sign 3KKZ. 5KA, Adelaide converted to FM and adopted the call sign 5KKA.

**February 1990:** The closing date for tenders in Sydney was extended to 30 May 1990. The Minister amended his section 289DAB Notice of 18 April 1989 by publishing a draft Statement of Technical Conditions applicable only to those licensees in Sydney who satisfy the conditions stipulated in section 4(16)(b) of the Act (i.e. 2WS). 4BK, Brisbane converted to FM and adopted the call sign 4BBB.

**March 1990:** The licensees of each of 3AK (Melbourne), 6PM (Perth) and 6GL (Perth) defaulted within the meaning of s.89DAM of the Act. In Melbourne the licensee of 3TT, being the next highest bidder on the tender list (\$11.5 million), became eligible for conversion. 3TT expects to convert to FM in late June 1990. In Perth, no other licensees met the reserve determined by the Minister under section 89DAG of the Act, necessitating a further tender process.

**May 1990:** The closing date for tenders in Sydney was extended to 19 October 1990.

In July 1989 when announcing the six commercial AM radio services which had been successful in their bids to be offered a frequency on the FM band, the then Minister announced that the total amount bid by the licensees of those services was \$105 million. Mr. Willis stated that the amount of the bids "reinforces the Government's view that the FM radio spectrum is indeed a valuable public resource". As a consequence

of those licensees who subsequently have defaulted in respect of offers of conversion to FM, the government will receive significantly less than \$105 million. In summary, the current position is as follows:

**Sydney:** No tenders have been lodged.

Changed economic conditions are likely to result in bids well below the \$31.5 million paid by the licensee of 3KZ, Melbourne. No additional converted commercial FM services can be expected before early 1991.

**Brisbane:** One converted FM service is operating, resulting in the payment to the Commonwealth of \$17.1 million.

**Melbourne:** One converted FM service is operating. Another is expected to commence in late June. Fees payable to the Commonwealth will total approximately \$43 million.

**Adelaide:** One converted FM service is operating. The licensee of 5DN is apparently still to meet the preconditions for conversion. Fees paid to date to the government amount to \$5.5 million.

**Perth:** No AM services have converted to FM. Further tenders are awaited.

**T**o date the government has received \$54.1 million of the \$105 million expected by Mr. Willis. In the event of conversion of both 3TT and 5DN later this year, that amount will increase to \$71.6 million, of which approximately 43.3% has been paid by Industrial Printing and Publicity Company Limited, the licensee of 3KKZ, Melbourne.

The \$36.3 million lost by the government from AM licensees who have defaulted is a consequence of the provisions of the Act relating to FM conversion. Mindful of the provisions of the constitution (section 55), the Parliamentary draftsman has ensured that Division 1A of Part IIIB of the Act (Conversion of AM Commercial Radio Licences To FM As Part Of The National Radio Plan) is silent as to the payment by a licensee of the amount of its tender bid. Section 6C(1) of the Radio Licence Fees Act 1964 ("the Licence Fees Act") provides that the fee payable in respect of conversion from AM to FM pursuant to an application made under section 89DAE of the Act is payable "upon the conversion". Section 4(1) of the Act defines "convert to FM" in relation to an AM commercial radio licence as meaning to "vary the technical conditions of the licence warrant in respect of the licence under subsection 89D(6) so as to authorise very high frequency transmission." Hence, if a licensee who is offered conversion defaults (within the meaning of section 89DAM(1) of the Act), the defaulting licensee is not required to pay the conversion fee specified in the Licence Fees Act. A defaulting licensee merely forfeits any deposit paid by it in relation to the conversion application (section 89DAO(5) of the Act). The amount of the deposit specified in the notice published by

he Minister on 18 April 1989 inviting applications for conversion was only \$10,000.00.

It is interesting to note that, notwithstanding the provisions of section 26C(1) of the Licence Fees Act, the Minister's section 89DAB notice of 18 April 1989 stated, that the "tender bid amount is payable within 14 days of the date on which the Minister signs the licence warrant changing the technical conditions of the licence to FM operation". In his notice published on 14 February 1990, by which the Minister informed interested persons that the original Invitation to Tender with respect to Sydney tenders was amended, it was stated that the provisions in the section 89AB Notice concerning payment of the tender bid amount were amended to read "The tender bid amount is payable on conversion of the licence warrant to FM, in accordance with the Radio Licence Fees Act 1964".

**A**s regards those licensees who have defaulted after being offered conversion by the Minister, it is open to them to submit a further tender bid in due course in circumstances where no other licensee is eligible for conversion (e.g. in Perth where no other applicants met the reserve specified by the Minister). One presumes that most, if not all, of such defaulting licensees will submit fresh conversion appli-

cations. The amounts of some of their bids for conversion may well be adjusted downwards, having regard to commercial realities.

It is apparent that the process of AM/FM conversion as part of the National Metropolitan Radio Plan has not progressed as quickly or efficiently as the architects of that plan envisaged. According to a statement in August 1988 by the then Minister for Transport and Communications, Senator Gareth Evans Q.C., AM/FM conversion as part of Stage 1 of the Plan should have been completed by 1989 (except in Brisbane where the availability of FM frequencies would see the second FM conversion in 1992).

Advocates of reforms to the current licensing provisions contained in the Act, who propose the introduction of a tender system for the granting of new commercial radio licences (rather than the selection of the most suitable applicant by the Australian Broadcasting Tribunal) frequently cite the efficiency of such a reformed licensing system as being one of its main attributes. To the extent that the experience to date with AM/FM conversion is any indication, such a claim must be questioned.

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### Les Heil argues that the government's metropolitan radio conversion scheme needs overhauling

**S**ince the introduction of commercial FM radio services in Australia about 10 years ago the new FM services have attracted increasingly larger audiences and their advertising revenues have increased largely at the expense of many long-established AM services.

In Melbourne the 1987-1988 ratings figures show that FOX-FM, Melbourne's then most popular station, and MMM, FOX's nearest competitor, captured 40 percent of all advertising revenue.

In the same period Australia's 29 Metropolitan AM stations could only manage a total profit of \$200,000, while the seven commercial FM stations recorded a \$27 million profit.

#### FM's popularity

It's not hard to understand how these profits have been achieved by the FM stations when one has regard to their audience share. Since 1987 the FM audience in Sydney has risen from 23.1 percent to an estimated 27.7 percent of the available radio audience for 1990-91, Melbourne's FM audience will increase from 26.5 percent to 41.4; Brisbane from 28.5 percent to 39.7; and Adelaide from 29 percent to 45.5 percent.

Perth is the single metropolitan capital where FM audience is expected to fall marginally from 28.4 percent to 28.3 percent.

This increase in FM popularity (and profitability) is not primarily due to an increase in the total radio audience attracted by the new services. The radio sector's audience while large has not increased dramatically. Revenue too is generally static, with recent and estimated future growth, at best, equalling inflation. The growth in FM's audience and revenue has been achieved principally at the expense of the existing commercial AM licences.

**T**hese recent figures bear ample testimony to trends which have been increasingly evident over the last 10 years. Not surprisingly, as listeners deserted established AM stations in droves, AM operators pressed the government for the right to convert to FM frequencies - there being ample capacity in the FM band (had it been properly managed) to accommodate most, if not all, existing AM operators.

Existing FM licensees attributed their success to better programming and management of their new services. The AM licensees argued that a significant increase in the popularity of commercial FM radio was

attributable to superior technical quality of FM transmission. Having managed a radio station through the transition from AM to FM frequencies, I can categorically state that the difference in quality of sound is significant. During our four-week change over trials, we were able to listen to the same programs on AM or FM simply by flicking a switch. The difference was like chalk and cheese.

I have maintained, with other AM licensees, that FM radio represented a technological advance similar to the appearance of colour technology in the television industry and, accordingly, existing AM licensees should have been permitted to convert to FM as a matter of right, as a matter of equity, and for the public benefit.

#### The conversion scheme

The government instead took a different view and in August 1988, Gareth Evans, the then Minister for Transport and Communications, unveiled the government's plan for the development of metropolitan radio services. The plan was stated to have addressed various issues including:

- the strongly pursued claim of many existing AM licences to convert to FM on commercial, and in some cases, technical grounds
- the need to guarantee a secure and technically effective future for the Radio for the Print Handicapped service
- the need to find a delivery mechanism for Parliamentary broadcasts which does not hopelessly disrupt ABC programming, but is not prohibitively expensive to establish
- the need to not only minimise government financial outlays to secure these various objectives, but to ensure an appropriate financial return to the community from a scarce public resource.

Because of the shortage of FM frequencies in capital cities, a shortage greatly exacerbated by governments of both persuasions in first allocating part of the FM band to television and then squandering many of the remaining frequencies on services of minimal public appeal, it became necessary to amend the relevant legislation to provide a mechanism to allocate the reduced number of FM frequencies.

An amendment to the Licence Fees Act 1964 created an obligation on the part of the relevant licensees to pay a fee upon conversion from AM to FM. That fee is determined according to the formula B-V (where B is the amount of the bid made by the successful licensee and V is the value of the licensee's existing transmission facilities).

The bidding system was provided for by the amendments to sections 89ADA to 89ADP of the Broadcasting Act 1942. Put

chiefly, the system involves existing AM licences lodging a sealed bid with the Department of Transport and Communication's Tender Board following a call for bids made by the Minister in the Commonwealth Gazette. The amount of the bid must be a single figure and must exceed both the value of licensee's AM transmission facilities to be handed over to the government (for Parliamentary broadcasts or Radio for the Print handicapped) and a reserve figure determined by the Minister and kept secret from the bidders. Bidders are also required to pay deposit.

### Commercial radio ravaged

**S**o how has the plan worked? In our case KZFM (formerly 3KZ) topped the bidding for Melbourne. We bid \$31.5 million, \$8.8 million more than the next highest bidder 3AK. 3AK has now withdrawn its bid, thereby relinquishing its right to conversion to 3TT which bid \$11.5 million - \$20 million less than KZFM!

We converted to FM on 1 January 1990 and in the first ratings survey of 1990 picked up 3.2 percent more of the radio audience - a total of 14.6 percent of the radio audience or 0.3 of a percentage point more than OX FM which had topped the previous 11 ratings surveys. With 41.4 percent of Melbourne's radio listening audience, FM stations now draw 63 percent of all advertising revenue.

Similar results have been achieved elsewhere with Adelaide's KZFM (formerly 5KA) increasing its ratings from 14.9 to 16.5 percent (it paid \$5.5 million), while Brisbane's BK, now B105, has jumped 2.5 percentage points (it paid \$17.4 million). And it should be noted that the conversion of 4BK to B105 occurred during the latter part of the first survey in Brisbane for 1990; therefore further gains for B105 can be anticipated.

It is significant that KZFM did not alter its format and there was relatively little variation in our competitor's formats. Our climb in ratings is a clear vindication of what I and others have maintained for some time: that the popularity of FM stations has little to do with programming and management and everything to do with technology. It needs to be understood, of course, that programming needs to be right. Good programming will have far greater appeal on FM - inferior programming will not benefit from technology alone. The commercial radio industry is being ravaged by the government for the right to use improved technology when the only alternative, in the face of the growing market dominance of FM stations, was to eventually go broke.

The government's iniquitous bidding system is forcing the commercial radio sector to assume a large financial burden at a

time of high interest rates and at a time when the economy is contracting. The results of this system of allocation has been to substantially undermine stability in the industry. Bond Radio has had to forgo its right to convert to the FM band in Perth (where it offered \$16.3 million) and in Melbourne (where it offered \$22.7 million). Austereo has also relinquished its right to convert to FM in Perth (for which it had bid \$12 million).

### Conclusion

There are a number of alternative approaches the government could have adopted. A mini-hearing by the Australian Broadcasting Tribunal was one possibility. Even a ballot would have been preferable to the approach adopted.

There is some indication that the government, which has hitherto ignored the pleas of the industry to move with the times and embrace the new technology sensibly,

is beginning to realise its error and express doubt about its auctioning system. There is also some suggestion of a more liberal spectrum allocation: that is, with less space required between stations leading to increased room on both the AM and FM frequencies to accommodate an increase of 20-40 percent in the number of stations on each band.

It is interesting to note that the remaining AM stations contend future conversions should be on the basis of a reasonable, fixed fee relevant to the size of the market. KZFM supports this approach. If the government accepts this proposition it will have a strong moral obligation to refund the difference between the reasonable fee for what stations, such as KZFM, had to pay for the right to convert, and this new licence fee. Only in this way could the government maintain equity and establish the "level playing field" which all political parties claim to believe in.

*Les J Heil, AM, is manager of the Melbourne FM station KZFM*

## Police and the media

**Relations between police and the media recently came under some scrutiny at the Blackburn inquiry. Evan Whitton examines aspects of this relationship.**

**C**hester (The Smiling Funnelweb) Porter QC, counsel assisting Justice Jack Lee at the Blackburn inquiry, offered some characteristically trenchant views about the performance of former Sun police roundsman, Steve Brien, director of the NSW Police Media Unit, in events leading up to and following the arrest of Harry (The Hat) Blackburn.

What excited Porter was that before Blackburn, a former Superintendent, was arrested on multiple rape charges, Brien took the media into a lockup for a briefing on the pending event and after the arrest, but before Blackburn appeared in Court, laid on a photo opportunity of the accused for television and press cameras.

### Contempt

All involved, including the media, were thus at risk of contempt charges for possible prejudice of the case. In the event, there was no case; further police investigations indicated that Blackburn was innocent; the charges were withdrawn.

There was evidence before the inquiry that the photo opportunity was not uncommon. The unit presumably took the view that it was merely assisting the media in its re-

porting tasks; the media presumably took the view that it was assisting the police in their inquiries. Sooner or later, it may be thought, both sides were bound to come undone on a matter of possible contempt.

While not denying that such practices may tend to put the liberty of the subject at risk, we may perhaps suggest that contempt law is a little out of date.

First, the Australian Law Reform Commission pointed out in 1987:

*"The origins of the common law concept of contempt lie in the medieval notion that the monarch was divinely appointed and accountable only to God and therefore any resistance or affront to the authority of the monarch should attract not only eternal damnation but immediate retaliation ...*

*"It was only a short step from this to say that any resistance or affront to the authority of ... a court established under royal authority, should also be considered a contempt of royal authority."*

**A**nd second, as Adrian Deamer has properly noted, allegations of contempt by prejudice may amount to contempt by way of influencing jurors: but there is evidence indicating that they are perfectly capable of understanding