The Broadcasting Act lives on for Regional Radio

John Corker outlines some Broadcasting Act issues which will continue to arise in regional radio licence grants

The *Broadcasting Act* 1942 appears set to be repealed on 1 October 1992, bringing with it the demise of the Australian Broadcasting Tribunal (ABT). Nevertheless, all applications for the grant of commercial and supplementary FM radio licences pending at that time are preserved and must be determined by the new Australian Broadcasting Authority (ABA), apparently in accordance with the existing procedural rules based on the current criteria as set out in the *Broadcasting Act*.

Delay in licence grants

Ever since the Government's regional radio program commenced in 1987, the licence grant process has been characterised by delay, repeated amendments to the relevant legislation and costly inquiries which have provided a fertile ground for legal argument and litigation.

Since February 1987, 29 applications for review of ABT decisions in regional radio licence grant inquiries have been lodged in the Federal Court and 2 applications for special leave to the High Court have been made. Of these, 6 applications have been ultimately successful in having a Tribunal decision set aside (1 reversed on appeal), 8 applications have been dismissed by the Court, 11 applications have been discontinued or withdrawn prior to hearing and 3 applications have dealt with ancillary matters such as costs or extensions of time. Of the 24 service areas where applications have been referred to the ABT for decision since May 1987, 13 now have new licensed operating services, the Tribunal has decided not to grant a new licence in 3 and applications are still pending or litigation is current in 8. Some of the applications for the grant of a supplementary licence were lodged with the Minister as far back as 1983.

A number of reasons have been cited for the tardy and unproductive process, including delays in the planning process, the complexity of the relevant legislation and the number of times it has been amended (seven relevant amending Acts since 1987), lengthy ABT inquiries, the zealous efforts made by incumbent licensees to delay the inquiry processes and the economic downturn generally.

Amending legislation

The *Broadcasting Amendment Act (No. 2)* 1991 was introduced by the then Minister Kim Beazley "to implement reforms which will encourage more expeditious introduction of new FM commercial and supplementary radio services to listeners in regional Australia." Late last year, the Exposure Draft of the *Broadcasting Services Bill 1992* had been released but the Minister was of the view that "urgent remedial measures should not be put off pending that fundamental reform."

The amending Act:

(a) defines the term "commercial viability" and limits the circumstances in which the Tribunal must have regard to commercial viability;
(b) gives a clear preference for the grant of an independent commercial radio licence, when the Tribunal is considering applications for a commercial radio licence and a supplementary radio licence simultaneously and determines that only one licence should be granted;
(c) allows a supplementary radio licence to be sold anytime after two years from commencement of the supplementary service;
(d) substantially reduces the fees payable by new services commencing on the FM band;
(e) allows direct conversion of AM services to FM on payment of a fee.

Whilst some of the amendments may have achieved their purpose, the preference procedure provisions and their applicability to particular inquiries have generated much legal argument.

The term "commercial viability" has generated much debate for as long as it has existed in the *Broadcasting Act 1942* and the new definition has not changed matters. The Federal Court has already had to rule on its new meaning in *WREB Cooperative Limited v Australian Broadcasting Tribunal* and the definition was further amended in June 1992.

Preference for independent licences

In some of the current inquiries, three difficult questions of interpretation have arisen in relation to the preference process provisions described in paragraph (b) above. The first question is whether these provisions require the Tribunal to grant an independent FM licence if there is a suitable applicant for that licence, irrespective of the effect of that licence grant on the commercial viability of an incumbent licensee.

The Tribunal and some parties have agreed that the legislature could not have intended that a consideration of the commercial viability of any overlapping services should be entirely excluded. To make sense of section 82AAA in this way thus requires a departure from the plain and ordinary meaning of the words of the section.

The second and third questions concern whether the preference process provisions apply at all to current inquiries. First it is argued that they are not expressed to apply retrospectively and only apply to applications lodged or referred after the commencement of the section on 4 January 1992. Secondly, it is argued that they only apply to inquiries where the publication of the notice by the Minister inviting applications for the grant of an independent licence post dates the lodgement or referral of the supplementary licence application.

Argument continues about the answers to these questions and it may continue into the Federal Court. At present, applications for commercial and/or supplementary radio licences remain unresolved in the areas of Mackay, Cairns, Lismore, Darwin, Bundaberg, Albury, Sale and Wagga Wagga and the above arguments are potentially relevant to several of these inquiries.

Although some of these problems would have been avoided by better legislative drafting, it seems almost inevitable that when legislation is amended time and time again it becomes fraught with problems. It seems therefore that at least in the granting of commercial radio licences the *Broadcasting Act* 1942 will not be put out of its misery quite as quickly as some had thought. Very recent amendments may well be the subject of litigation that lingers on in the courts in spite of the new regime.

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