



COMMERCIAL.TELEVISION AUSTRALIA

**COMMUNITY TELEVISION
LICENCE APPLICATIONS**

**SUBMISSION TO THE
AUSTRALIAN BROADCASTING AUTHORITY**

**SUBMISSION BY
COMMERCIAL TELEVISION AUSTRALIA**

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TABLE OF CONTENTS

Table of Contents.....	2
Introduction	3
Part 1: General Comments	4
1.1 Regulatory policy	4
1.2 Community purposes	4
1.3 Not-for-profit	5
1.4 Sale of air-time and sponsorship	6
1.5 Further regulations	7
Part 2: Comments On Particular Applications.....	8
2.1 CTS, MCTC, and Briz 31 – relationship with RTV	8
2.2 West TV Limited – Perth	12
Conclusion.....	13

INTRODUCTION

Commercial Television Australia (CTVA) welcomes the opportunity to comment on the community television (CTV) licence applications received by the ABA.

CTVA strongly supports genuine community television which encourages community involvement and access, and which provides programming which caters to distinct community groups and contributes to overall Australian television program diversity.

However, as the ABA is aware, CTVA has serious concerns regarding the commercial nature of some services currently being provided under CTV trial arrangements.

Underlying the new regulatory framework for CTV recently introduced into the *Broadcasting Services Act* (the Act) is Parliament's express intention that CTV licences "be regulated in a way which causes them not to operate in the same way as commercial television broadcasting services". The ABA has the crucial responsibility of ensuring the Parliament's intention is achieved.

In CTVA's view, it is essential that in assessing the CTV applications the ABA pays close regard to:

- whether the programming provided by the proposed service (including any air-time proposed to be sold to third parties) caters for distinct community interests not served by other media, including free-to-air and pay television;
- whether the applicant or any entity proposing to acquire more than 2 hours per day of airtime, should be considered to be 'part of a profit making enterprise', by virtue of any significant relationships with third parties.

This submission makes some general comments regarding factors that CTVA believes are important for the ABA to take into account when assessing the CTV applications. The submission then makes some specific comments in relation to particular applications.

PART 1: GENERAL COMMENTS

1.1 REGULATORY POLICY

The new framework for CTV licences has reinforced the community and not-for-profit nature of the community broadcasting sector by making it a condition of community broadcasting licences that the licensee will provide the service “for community purposes” and “will not operate the service for profit or as part of a profit-making enterprise”.¹

The Explanatory Memorandum to the Bill which introduced the amendments stated that these “licence conditions reinforce the distinction between community broadcasting and commercial broadcasting, and ensure that the licensee is focussed on servicing the needs of the relevant community.”²

The need for a clear distinction between community broadcasting and commercial broadcasting is reinforced by Parliament’s express intention that services provided under CTV licences “be regulated in a way which causes them not to operate in the same way as commercial television broadcasting services.”³ This is consistent with the underlying regulatory policy and the existing moratorium on the issue of new commercial broadcasting licences.

1.2 COMMUNITY PURPOSES

The Act does not define “community purposes”. However the Explanatory Memorandum to s15 of the Act (which defines community broadcasting services) explains that the change of name from “public” to “community” (which occurred on commencement of the Act) was “to highlight the emphasis on these types of services being community based, that is, provided to meet the needs of a local community, or of a particular sector of the community.”⁴

In deciding whether to allocate a community broadcasting licence the ABA must have regard to factors, including:

- the extent to which the proposed service would meet the existing and perceived future needs of the community;
- the nature and diversity of the interests of that community; and
- the nature and diversity of other broadcasting services within the licence area.⁵

These factors reflect the underlying regulatory policy that community broadcasting services should cater to distinct community interests not served by national and commercial broadcasting services.

The policy behind community services was emphasised by the Minister when announcing the new framework for CTV licences: “Community television has an important role in

¹ Broadcasting Services Act, Schedule 2, sub-clauses 9(2)(d) and (e).

² Explanatory Memorandum to Amendment Act, Item 10.

³ Broadcasting Services Act, s87A.

⁴ Explanatory Memorandum to Broadcasting Services Act, s15.

⁵ Broadcasting Services Act, s84.

Australia, providing programming of a character quite different from that of national, commercial and subscription television.”⁶

Senator Campbell also articulated this policy during the Bill’s Second Reading Speech: “CTV programming is valuable because it caters to distinct and widely diverse community interests not served by network or pay TV. CTV contributes to overall Australian television program diversity.”⁷

This policy is recognised in the Community Broadcasting Code of Practice for TV which requires community broadcasters to be “committed to a not-for-profit business philosophy” by committing to community access principles. One of the principles to which community broadcasters are expected to commit is to “provide a service which caters to interests in the community not generally accommodated by other free-to-air broadcasters.”⁸

CTVA submits that when assessing whether a proposed service is provided for community purposes, the ABA should reject any suggestion that programming of general appeal or programming targeted to viewers of a particular age group is intended to serve a community interest. Such programming clearly overlaps with commercial broadcasting services, which “must provide programs that, when considered in the context of the service being provided, appear to be intended to appeal to the general public”.⁹

CTVA notes that for the purposes of open narrowcasting radio services, the ABA has determined that services targeted to persons of a particular age or range of ages above 10 years old, do not meet the relevant requirements of s18 of the Act. That is, such services are not “targeted to a special interest group” and do not “provide programs of limited appeal”. CTVA submits that the ABA should adopt a consistent approach in relation to the requirement that community broadcasting licensees provide a service for community purposes.

The question of whether a service is provided for community purposes can not be viewed in isolation from issues regarding the sale of air-time and relationships with profit making enterprises. When assessing the extent to which a proposed CTV service meets the needs of the community, the nature of the service, its programming and its accessibility to community groups, must be viewed as a whole. In particular, the ABA must necessarily consider both the community interest represented by the licensee and the extent to which relationships with third parties and programming provided by third parties is consistent with that community interest.

1.3 NOT-FOR-PROFIT

The Act requires that a CTV service must not be operated for profit or as part of a profit-making enterprise. Clearly, assessing whether a potential licensee operates as part of a profit making enterprise requires more than a mere constitutional undertaking that profits will not be distributed. The Explanatory Memorandum provides the following example of being ‘part of a profit-making enterprise’:

“A service would be considered to be ‘part of a profit-making enterprise’ where that service contributes to the generation of income for an organisation other than the service provider, eg a service which broadcasts horse racing direct to betting shops

⁶ Media Release, Senator Richard Alston, [22 October 2002].

⁷ Hansard, Thursday 14 November 2002, p6180.

⁸ Community Broadcasting Code of Practice – TV clause 3 (Access Principles).

⁹ Broadcasting Services Act s14(a)

would be considered to be part of the same profit-making enterprise as those betting shops.”¹⁰

The ABA has previously held that community radio station Sydney Youth Radio Inc (SYRI) was operated as part of a profit-making enterprise, due to SYRI's involvement in the sale of CD's by an external organisation associated with SYRI's management. In making this finding the ABA stated:

“Commercial exploitation of a community broadcasting service is not permitted because of the risk that the service will tend to operate in the interests of the commercial activity rather than the interests of the community that the association has been licensed to serve. This is particularly the case if the association is dependent on the commercial activities for its financial well-being.”¹¹

Whether a business forms part of a profit making enterprise is a complex question which requires the ABA to look behind corporate structures and formal arrangements and undertake a detailed analysis of the nature of relationships between the licensee and third parties, including program suppliers, sponsors, debtors, guarantors and managers. Relevant factors would include:

- the purpose of the relationship;
- the benefits received or likely to be received by the parties arising from the relationship;
- the impact of the relationship on conduct or likely conduct of the licensee (whether or not any formal arrangement exists); and
- any use of surpluses to repay debts to benefactors or to pay third party managers.

CTVA endorses comments made by the ABA in its Investigation Report regarding Channel 31 Sydney, Channel 31 Melbourne and RTV that *“a community broadcasting licence is intended to be used for the benefit of the community, and may not be used for the profit of the licence holder, or for any other person that would seek to exploit the commercial potential of a community broadcasting service.”¹²*

1.4 SALE OF AIR-TIME AND SPONSORSHIP

The Amendment Act introduced new conditions on CTV licensees in relation to sponsorship time and sale of air-time.¹³ These were intended to enhance the financial viability of the sector, whilst still ensuring that it maintains its community and not-for-profit nature.

The ABA was given new powers to impose conditions on CTV licensees relating to sale of access to air-time and dealing with matters such as community access to air-time, governance and the provision of annual reports. In exercising these powers, the ABA is expected to have regard to the Parliament's intention that community services not operate in the same way as commercial television broadcasting services.¹⁴

CTVA notes and endorses the concerns expressed by the ABA that making new revenue models work *“can have unpredictable outcomes. For example, community control of CTV*

¹⁰ Explanatory Memorandum to Broadcasting Services Act, s15.

¹¹ ABA Investigation Report, May 2001, 'A report of the investigation by the Australian Broadcasting Authority into Sydney Youth Radio Inc and Sydney Gay and Lesbian Broadcasters Inc' p16.

¹² ABA Investigation Report regarding Channel 31 Sydney, Channel 31 Melbourne and RTV, March 2003, p27.

¹³ Explanatory Memorandum to Amendment Act, s87A.

¹⁴ Explanatory Memorandum to Amendment Act, Item 8.

*operations can be weakened, leading to perception of capture by commercial entities. The regulator must be able to respond flexibly to ensure that the spectrum is used for community purposes.”*¹⁵ This concern was echoed during the second reading debate in the House of Representatives.¹⁶

CTVA submits that, in order to ensure that a potential licensee will meet the community and not-for-profit requirements and to guard against capture by commercial entities, the ABA will need to undertake a detailed analysis of relationships between the licensee and third parties. In relation to sale of air time, the ABA is also required to assess whether a third party which supplies more than 2 hours of programming to a licensee operates as part of a profit making enterprise. This involves all the same considerations set out under paragraph 1.3 above.

CTVA submits that other relevant factors for the ABA to consider include:

- the applicant’s funding sources, including revenue from sponsorship and sale of air-time. Over-reliance on a limited number of funding sources increases the likelihood that the potential licensee will be captured by the commercial interest represented by the source (even if not evident from formal arrangements);
- responsibility for the sale of advertising and sponsorship. Capture by commercial interests is more likely where an applicant grants third parties, such as program suppliers, the right to sell sponsorship; and
- the existence of appropriate sponsorship policies as required by the Community Broadcasting Code of Practice for TV, to ensure that the licensee retains editorial control and independence in all programming, and does not enter into any sponsorship arrangement which is likely to affect the independence and integrity of the service.

1.5 FURTHER REGULATIONS

CTV licensees are currently regulated under the Open Narrowcasting Code of Practice. However, CTVA understands that following the issue of licences an industry specific Code for CTV licensees will be developed.

In addition, the ABA has the power to impose additional licence conditions on all CTV licensees including, but not limited to, conditions relating to the sale of access to airtime.

In assessing the relative merits of CTV applications it is essential that the ABA is mindful of any proposed additional restrictions or conditions to be imposed on CTV licensees (whether to be provided in the Industry Code or in the form of additional licence conditions). In particular, the impact of any proposed additional restriction or condition on the financial viability of the proposed licensee must be taken into account.

¹⁵ ABA Submission to Department of Communications, Information Technology & the Arts on its Proposal for Community Broadcasting Amendments, August 2002, p5.

¹⁶ Hansard, Thursday 13 November 2002, Mr Hatton (Member for Blaxland), pp1880–1.

PART 2: COMMENTS ON PARTICULAR APPLICATIONS

Many of the applications for CTV licences propose services with a clear focus on community based programming which caters to distinct community groups and which contributes to overall Australian television program diversity. CTVA supports such applications.

However, a number of applications propose services seeking to provide substantial amounts of programming which is of general appeal, which does not cater to any distinct community group and which covers the same program genres broadcast on free-to-air and pay television. Such services would not achieve Parliament's intention that community broadcasting services cater to distinct community interests not served by free-to-air and pay TV broadcasting services.

CTVA has particular concerns in relation to the services proposed by Community Television Sydney Limited (CTS) (existing Sydney licensee), Melbourne Community Television Consortium Limited (MCTC) (existing Melbourne licensee) and Briz 31 Limited.

These concerns relate to the nature and scope of the relationships between the licensee, Renaissance Television Australia Limited (RTV), Lifestyle Media International Limited (Lifestyle) and its parent company, Primelife Corporation Limited (Primelife). CTVA submits that the ABA needs to conduct a detailed and thorough investigation of these relationships in order to assess whether the proposed services will be provided for community purposes and whether the services will be operated as part of a profit making enterprise.

Each of the licensees proposes to sell 8 hours of air-time to RTV. As such, the ABA also needs to thoroughly investigate the relationships between RTV, Lifestyle and Primelife to be satisfied that RTV does not operate as part of a profit making enterprise.

2.1 CTS, MCTC, AND BRIZ 31 – RELATIONSHIP WITH RTV

The CTS, MCTC and Briz 31 applications do not provide the detailed information necessary for CTVA or the ABA to assess the nature of the relationships between the applicants and RTV, or the nature of the relationships between RTV, Lifestyle and Primelife. As stated above, this will require the ABA to conduct a detailed and thorough analysis of the relationships looking behind the corporate structures and formal documents.

However, the ABA made a number of significant findings regarding the relationship between CTS, MCTC and RTV in its recent Investigation Report which give some indication of Lifestyle's degree of influence.¹⁷ In particular:

- Lifestyle, a fully owned subsidiary of Primelife) has long-term "sponsorship agreements" with CTS and MCTC, renewable until 2017 (CTS) and 2016 (MCTC). At that time Renaissance Television (RTV) was a registered business name of Lifestyle.
- Under the agreements, CTS and MCTC agree to broadcast programming supplied by RTV between 8.00am and 4.00pm each weekday for the duration of the agreements, in consideration for the payment of a yearly fee by Lifestyle. CTS also receives a share of RTV's Sydney-based sponsorship revenue.

¹⁷ ABA Investigation Report regarding Channel 31 Sydney, Channel 31 Melbourne and RTV, March 2003. At that time, Renaissance Television was a business trading name of Lifestyle. The CTS, MCTC, and Briz 31 applications state that RTV has now been incorporated as a not-for-profit company limited by guarantee and that arrangements are being put in place under which RTV will assume the obligations of Lifestyle under the sponsorship agreements.

- CTS and MCTC are required to seek the consent of Lifestyle for the engagement of certain technical staff for the purpose of fulfilling the station's obligations under the agreement (such consent not to be unreasonably withheld).
- Lifestyle may broadcast sponsorship of its own or of a third party during RTV programming.
- CTS and MCTC must enter into agreements with Broadcast Australia to improve their reception. CTS and MCTC were required to get Primelife's consent to the terms of those agreements. Those agreements are in place and are secured by a guarantee from Lifestyle and Primelife, respectively.
- At the time of the report, CTS and Lifestyle had an informal arrangement under which Lifestyle pays the yearly fee for the lease of the broadcasting transmitter from Broadcast Australia. This was claimed to be a temporary arrangement until CTS found other finance. It is not clear whether it is still in existence.
- RTV programming for broadcast on CTS is delivered direct to Broadcast Australia under an agreement between Lifestyle and Broadcast Australia.

Although CTS and MCTC retain discretion not to broadcast programming that is inconsistent with their obligations as licensees, at least in relation to CTS, the RTV programming (including sponsorship announcements) is not reviewed by CTS prior to broadcast. The ABA Investigation Report found that in relation to RTV programming, CTS operates for the most part, only as a re-transmission facility.

CTVA's review of the Agreement between MCTC and Lifestyle attached to MCTC's licence application, also reveals that:

- Lifestyle pays a "Transmission Agreement Contribution Amount" of \$15,000 per month (increasing each year) to satisfy MCTC's obligations to Broadcast Australia;
- Lifestyle allows 2 minutes per hour of broadcast time for use by MCTC for broadcast of its promotional and community announcement material, provided that any such material does not, in the reasonable opinion of Lifestyle, detract from or be inappropriate to the content of the Lifestyle programming. MCTC must first make this material available to Lifestyle.
- MCTC can request an interest free advance of \$100,000 to be applied to infrastructure costs relating to improving MCTC's transmitter.
- In consideration of MCTC engaging technical staff for the purpose of fulfilling the station's obligations under the agreement, Lifestyle agreed to pay to MCTC a Staff Reimbursement Amount.
- MCTC must also provide Lifestyle with three 30 second time slots between 6.30–11.00pm for broadcast of Lifestyle's promotional material and material which promotes Lifestyle programming.
- Primelife guarantees Lifestyle's performance of the Agreement with MCTC.

Clearly complex relationships exist between the licensee, RTV, Lifestyle and Primelife, and between each of these entities. No doubt, they are even more complex now that RTV has

been incorporated as a not-for-profit company limited by guarantee and will assume the obligations of Lifestyle under the current arrangements.¹⁸

It will be crucial in assessing the current applications that the ABA conduct a thorough investigation and analysis to understand the purposes and objectives of each of these entities, the benefits received or likely to be received as a result of the relationship, the nature of informal understandings and the impact or likely impact of the relationship on the conduct of the parties.

Only such an analysis will enable realistic assessment of the following issues.

2.1.1 Whether the proposed services will be provided for community purposes?

As stated under paragraph 1.2 above, when assessing the extent to which a proposed CTV service meets the needs of the community, the ABA must necessarily consider both the community interest represented by the licensee and the extent to which relationships with third parties and programming provided by third parties is consistent with that community interest.

RTV's website states that RTV dedicates programming catering to the needs of the 50-plus age group. CTVA does not accept that the 50-plus age group is a *"distinct community interest, not served by commercial or pay TV"*¹⁹ or that the RTV programming being broadcast on CTV is *"of a character quite different from that of national, commercial and subscription television."*²⁰ In fact, the programming is a broadly targeted entertainment service of general appeal, and clearly overlaps with commercial broadcasting services.

A review of the programming schedules attached to the CTS, MCTC and Briz 31 licence applications illustrates that programs of general appeal constitute the major part of all programming. At least 40 hours of programming per week comprises a range of classic movies, drama, comedies, lifestyle and sports programs. In addition to the 40 hours supplied by RTV, each of the applicants propose to broadcast a number of additional programs of general appeal. For example, the program schedule attached to CTS' application includes a number of programs which it describes as "of general appeal, including Gig Live, STAT, Movie Show, Channel 31 Magazine, Chaos TV, Series of Everything and Cooking Cleverly with Beverley."²¹

Further, CTVA submits that the ABA's findings regarding the relationship between CTS, MCTC and RTV, indicate that the services are being used to serve commercial rather than community interests. It is clear that the current arrangements with CTS and MCTC offer the following benefits:

to CTS and MCTC –

- financial security in the form of ongoing yearly fees and, in the case of CTS, a share of RTV's Sydney-based sponsorship revenue and, at least on a temporary basis, payment of the lease fee for a broadcasting transmitter; and

¹⁸ Letters from RTV to MCTC and CTS attached to the MCTC and CTS applications state that arrangements are presently being effected under which RTV will assume the operation previously undertaken by the RTV division of Lifestyle Media.

¹⁹ Hansard, Thursday 14 November 2002, p6180.

²⁰ Media Release, Senator Richard Alston, [22 October 2002].

²¹ CTS license application, answer to Q33.

- vastly improved audience reach and the associated potential for sponsorship growth (the relevant transmission agreements with Broadcast Australia being guaranteed by Lifestyle and Primelife, respectively);

to Primelife –

- guaranteed air-time (in the form of programming and sponsorship) to promote its products and services to a large potential audience (hence the guarantee of obligations under relevant transmission agreements); and
- associated income generation.

When assessing whether the proposed services will be provided for community purposes, the ABA should consider an applicant's funding sources. CTVA submits that over-reliance on a limited number of funding sources (primarily air-time sales to Primelife) increases the likelihood that the potential licensee will be captured by the commercial interest represented by the source (even if not evident from formal arrangements).

2.1.2 Whether the proposed service will be operated as part of a profit-making enterprise?

Again, this is a question of fact requiring a detailed analysis of the relationships between the applicants, RTV, Lifestyle and Primelife. However, it is clear from the simple analysis above that the arrangements between CTS and MCTC have the potential to generate significant income for Primelife. CTVA submits that it would be reasonable to draw a conclusion that it is the intention of Primelife to derive revenue from publicity for its organisation and its products and services promoted throughout the RTV programming and that the arrangements exist to further this intention.

It is also clear that CTS, MCTC and Briz TV will receive a large proportion of their revenue directly or indirectly from sale of air-time to RTV and, at least in the case of CTS, a share of RTV's Sydney-based sponsorship revenue. As noted above, CTS and MCTC also receive other financial benefits, in the way of guarantees, payment of broadcast transmitter lease fees and reimbursement of some staff costs. CTS's application states that 80% of its financial outlays are guaranteed by Broadcast Australia, ntl Australia, and Lifestyle.

CTVA calculates that, at a minimum, MCTC receives \$540,000 per year under the Sponsorship Agreement with Lifestyle (increasing after the initial term).²² This is a significant proportion of MCTC's estimated total revenue of \$854,000.²³

We note that statements in some of the applications indicate a keen focus on maximising audiences. For example, MCTC's application states that OzTAM ratings are purchased in "purchase partnership" with RTV. In response to Q37 requesting details of any research or community consultation to be carried out to gather information about the needs of the community to be served, MCTC identifies that it is "firmly focussed on the OzTAM audience survey system". Again, in response to Q48 concerning what procedures the applicant has in place to develop new, quality and diverse programming, MCTC's response focuses on identifying demographic gaps in their OzTAM ratings and then developing programs to draw

²² Sponsorship Agreement between MCTC and Lifestyle: aggregate amount of payments under clauses 3.5 (Transmission Services Agreement Contribution Amount), 5.1 (Fees) and 7.7.1 (Staff Reimbursement Amount).

²³ MCTC licence application, answer to Q55. Revenue estimates for year 1, 2 and 3 are \$854,009, \$981,000 and \$1,090,000 respectively. Copies of the sponsorship agreements with CTS and Briz TV were not made available, however it appears from the applications that sale of air time under those agreements makes up a significant proportion of total revenue for these licensees.

those people to its service. Such statements indicate a commercial focus. CTVA does not believe that the focus of a community service should be broadcasting program content to maximise audiences. Such a focus suggests that programming which will maximise revenue from sponsorship and sale of air time, is taking precedence to programming aimed at fulfilling community interests and needs.

2.1.3 Whether RTV operates as part of a profit making enterprise?

Again, the ABA will need to investigate the nature of the relationships between RTV, Lifestyle and Primelife. Clearly, it is important to understand the terms on which RTV acquires programming, the terms on which RTV sells sponsorship time, whether RTV sells sponsorship time to parties other than Primelife, the sources of RTV's revenue, whether third party guarantees are in place, the terms of any access to third party facilities, third party interests of key management etc.

In relation to sponsorship, MCTC has granted Lifestyle the rights to control sponsorship during the Lifestyle programming block. Even the 2 minutes of air-time reserved to MCTC for broadcast of its promotional and community announcement material, must not detract from or be inappropriate to the content of the Lifestyle programming.

CTVA submits that the ABA should investigate policies and practices in place in relation to sponsorship, to assess whether they meet the safeguards set out in the Community Broadcasting Code of Practice for TV.

2.2 WEST TV LIMITED – PERTH

This application states that West TV is proposing to make a community program supply arrangement with RTV under which it will accept 4 hours of programming per weekday. Such programming will serve the interests of the ageing population in the Perth metropolitan area. The application states that the economical benefit of the arrangement (\$120,000) has been budgeted into West TV's business plan and financials for the first year of operation.

The terms of any agreement with RTV will need to be obtained.

CONCLUSION

CTVA strongly supports genuine community television which encourages community involvement and access, and which provides programming which caters to distinct community groups and contributes to overall Australian television program diversity. A number of the applications propose services which appear to meet this criteria.

CTVA does not support allocation of CTV licences to applicants proposing services seeking to provide substantial amounts of programming which is of general appeal, which does not cater to any distinct community group and which covers the same program genres broadcast on free-to-air and pay television. Nor does CTVA support the allocation of a licence where there is doubt about whether the service will be provided for community or commercial purposes, or where arrangements exist which indicate that the service may be used by others for commercial gain.

In relation to CTS, MCTC and Briz 31, it is CTVA's view that:

- the majority of programming proposed to be offered by these applicants are programs of general appeal; and
- there is a significant risk that any legitimate community purpose served by the proposed services will be captured by commercial interests, given the reliance on funding from Lifestyle; and
- the applications fail to demonstrate that CTS, MCTC and Briz 31 and/or RTV, Lifestyle and Primelife are not part of a profit making enterprise.

In CTVA's opinion, CTS, MCTC and Briz 31 should not be granted CTV licences based on their current applications. Similar issues will need to be considered in relation to any arrangements entered into between RTV and with West TV Limited.