SOME PRACTICAL EFFECTS OF LEGISLATIVE CHANGES TO THE TRANSPORT ACT

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We are now in the middle of the transitional period from a quantitative to a qualitative transport licensing system resulting from the passing of the Transport Amendment Act (No 2) 1983. This amending Act is possibly the most historic and far reaching piece of transport legislation in the past 50 years.

It is not my function in this paper to attempt to traverse so great a field as all the effects that the amended legislature will have on transport licensing. I shall therefore only endeavour to confine what I have to say to the question of goods service licences commencing with a very brief history of transport licensing.

Transport licensing has been with us for nearly 50 years and commenced in the mid 20's in order to regulate competition between buses and trams and avoid uneconomic duplication of transport services. This was in the form of the Motor Omnibus Traffic Act 1926. Within a few years with the advent of road transport in earnest transport regulation was fast becoming a major concern as heavy trucks were growing in numbers and threatened not only the standard of roads but also public safety. There was also the question of heavy vehicle and passenger vehicle construction and standards of service in public passenger transport which had to be considered. Within a few years the economic regulation of all passenger transport was instigate in terms of the Transport Licensing Act 1931. Shortly after this goods services were added and again within a few years concerned at the protection of the enormous capital investment in Railways, the Government introduced rail protection within a 30 mile limit. By 1936 the legislative structure to encompass land transport licensing was in place and the effect of the subsequent amendment acts has basically been that of refinement without substantial material change. In the 40's Auckland harbour ferries were included and later rental cars. Later still the 30 mile rail restriction was lifted to 150 kilometres. But the principles of transport licensing based on the quantitative system has been the foundation of entry into this licensed industry with the exception of some liberalisation of the rental car industry.

By way of clarification, in simplest terms the quantitative system is in effect the test of proof of demand for the service as one of public interest, whereas the qualitative system is a much less stringent test where the onus rests on the applicar to prove financial ability to operate coupled with management expertise.

New Zealand's geographical and difficult topography with a great inbalance of population distribution adds considerable costs to transportation particularly due to unbalanced loadings and this has undoubtedly been a significant factor in the maintenance of economic restraints up to the present time.

To some extent it may be said that New Zealand has over invested in transport proportional to population and a figure of something like 12,000 million dollars of investment in the licence road industry may be a conservative estimate and highlights the situation.

To put the licensed road transport operation into true perspective, as at December 31, 1982 (the latest statistical available through the Ministry of Transport) there were 25,027 licensed goods service vehicles operating under the licensing system, an estimated 3,000 buses, 2,917 taxis and 10,394 rental vehicles. In all 41,328 vehicles under transport licensing. For this fleet there were something in the order of 13,068 licences in force. The industry employs something like 15% of the total labour force in the country.

With these figures in mind and to the fact that there are over 3,000 appeal decisions on record against decisions of Licensing Authorities, it is not surprising that the field of transport licensing occupies a not insignificant and immensely complex part in the administrative law structure in this country.

Before proceeding to consider the broad outline of the changed legislation with regard to goods services it is important at this juncture to understand the role of the Transport Licensing Authority.

At the present time there are sixteen Transport Licensing Districts presided over by five Transport Licensing Authorities. Four of the Transport Districts are metropolitan districts dealing with public transport alone and one district is unique - I refer to the Auckland Regional Transport Licensing Authority which is a three man tribunal to deal with buses and harbour ferries within the Auckland Region. As from June 1 this year, this Regional Transport Licensing Authority will cease to exist and harbour ferries will have to be handled by a reconstituted Harbour Ferry Licensing Authority.

Apart from dealing with applications for new licences and amendments, temporary licences and so on, the Authorities also review licences and conduct public inquiries into the operation of licences, act as Appeal Authorities in certain areas of taxi operations and have an extended function in a wider sphere in terms of the Transport Licensing Regulations, particularly in the areas of driving hour exemptions and passenger transport operations. In fact the Authority's role is much wider than might be anticipated. I should also mention the Authorities have a statutory requirement to undertake triennial reviews of taxi fleets in all urban areas exceeding 20,000 population (this means 7 or 8 reviews in the greater Auckland area).

As from November 1, 1983 Transport Licensing Authorities were given wider powers to equip them for the change to the qualitative system. Up until that time the Authorities had the powers and privileges of a District Court Judge at all public hearings but there was a grey area as to their immunities in law when dealing with matters "on the papers". A study of the Official Information Act 1982 led to some uncertainties as to the true legal position of a Licensing Authority and in this context it seemed to fall under a heading of a tribunal with judicial powers. Now in terms of Section 103 of the Amendment Act, this matter has been resolved. Licensing Authorities now have full judicial powers and immunities for dealing with any matters which they are required by law to attend to during the course of exercise of their duties.

At the present time there are five Transport Licensing Authorities, but as I understand Government thinking, the proposal is to consolidate in view of the reduction of public hearings as a consequence of the change to the qualitative system. With this background therefore I now come to the introduction of qualitative licensing which is to operate from June 1, 1984.

In terms of the Amendment Act the Authorities now have power collectively to set practice procedures. In reality it will not be possible to formulate any practice procedures until the revamped Transport Licensing Regulations are promulgated and in this regard I do not expect these Regulations will be sighted before May of this year. Furthermore I believe the Authorities will want some practical experience of handling applications under the new system before they could contemplate any code of procedures. As time proceeds I am sure a set of practice directions will be published and will be of assistance for dealing with future applications. In late May the Authorities propose to hold a conference on this very subject.

In preparation for June 1, some softening up has been accomplished by the lifting of a number of restrictions subsequent to November 1, 1983. In this regard all area and commodity restrictions have been removed although this does not apply to licences subject to rail exemption. Last year at a conference of Licensing Authorities it was decided to act consistently with regard to the interpretation of Section 6 of the Amendment Act in that new general goods service licences would be issued, where evidence supported the application, in standard terms. Thus a general goods service licence is now issued showing the area as New Zealand and commodity as general goods with the respective number of vehicle authorities granted. The repeal of Section 26 of the Transport Licensing Regulations 1963 has removed the requirement to insert a business domicile.

It can be seen then that those matters requiring so much hearing time by Licensing Authorities have been eliminated overnight.

Looking specifically at the rail situation, the introduction of a three year graded permit system for the right to carry goods where rail protection applies has also eliminated the necessity in many instances for applications being lodged for rail exemption. Coupled with this the aggressive marketing policy of the New Zealand Railways Corporation which has been clearly revealed may also diminish any real need for many further major fights with regard to rail exemption applications. It is clear that most carriers are now prepared to apply and pay for a permit which is borne at the client's expense rather than embark upon expensive legal argument before a Licensing Authority.

The media has frequently referred to the changes in transport licensing as simply de-regulation suggesting that the licensing system is to be abolished. I believe that this is very misleading and confusing to the public as well as to many transport operators. Section 108 of the Amendment Act provides for a penalty of $10,000 for anyone upon conviction who carries out a Passenger Service, Taxi Service, Rental Service, Goods Service or Harbour Ferry Service without the appropriate licence. I suggest this is far from de-regulation.

Recently I read in a major daily newspaper that as from June 1 a passenger transport operator would be able to amend his timetable without any recourse to the Transport Licensing Authority. This of course is simply not true. In fact the Amendment Act provides for very tight control over route passenger operations with even more stringent requirements for public hearings than at present applies.

As from June 1 this year entry into the licence transport industry, with the exception of taxis, will be on a qualitative basis. Broadly as I have stated entry will be based on management expertise coupled with satisfactory financial ability to operate in conjunction with safety factors. All arbitary economic restraints are thus removed and so entry into the industry will be considerably easier.

At this stage it is necessary to break down the different types of licensed applications for transport licences into four distinct categories for further consideration of the practical effects that will emerge in the changed legislative amendments.

These are:

1. Goods Service, Rental Service, Passenger Service Licence applications where the applications for passengers do not fall under the heading of a scheduled timetable route service.
2. Goods Service Licence requiring rail exemption.

3. Passenger Services for scheduled services and taxis. With regard to taxis the changed legislation has no practical effect on this industry (with some exceptions) and the quantitative requirements still stand.

Common to all these categories with the exception of taxis is the abolition of the right to transfer licences. All new entrants into the industry will be required to undergo the 'qualitative test' for a new licence. Once a licence has been obtained it is understood there will be no limit on the number of vehicle authorities and applications will, to a greater extent, be considered on the papers alone. In regard to vehicle authorities to be issued I understand these will be allied with the registration number of the actual vehicles in use and will be of considerable benefit for enforcement procedures. The mechanics for all this are still to emerge.

Looking specifically at applications for a general goods licence the most fundamental change is the removal of the compulsion of the Licensing Authority to hold public sittings except under certain circumstances. The substantive majority of all applications will be dealt with on the papers.
Further unless the Authority receives a submission from the Secretary for Transport the Licensing Authority is unlikely to hold any public hearing over an application unless he is clearly of the opinion that the papers indicate something is amiss and that he should decline the application in which case a hearing is to take place. However for all practical purposes unless a submission from the Ministry is received an application is likely to be granted on the papers. In one sweeping change then, two thirds of all the public hearings presently held by Licensing Authorities will cease to be necessary.

It is important to stress at this point that as a judicial officer a Licensing Authority employs no staff. Consequently any investigation has to be undertaken by the Ministry of Transport's specialist staff. It seems therefore highly unlikely that an Authority would find it necessary to decline an application in the absence of any submission from the Ministry after the application had been scrutinised in accordance with Section 116 (3) of the Amendment Act.

For the past few months my policy has been to deal with as many applications for transfers and amendments of goods and passenger licences (except taxis) by way of Section 140 of the present Act that is, by public notice advising that the application will be granted unless objections are received. This policy has enabled a speedy solution to my usual backlog of applications pending public hearings and, perhaps more importantly, has commenced a dual process of dealing with applications by determining as many applications as are possible on the papers with recourse to public hearings where information is woefully lacking.

The present application form is unsatisfactory in this regard, but the Ministry staff have gained much experience in assembling the pertinent missing facts which I consider necessary for the success of an application. In other words the transitional period is being put to maximum benefit as far as I am concerned.

For determination on the papers a much more complex application form will need to be devised by the Ministry of Transport. Section 116 of the Amendment Act 1983 lays down the requirements in this regard. I do not believe the Ministry is likely to embark upon a form so complex as that which applies in Great Britain. Nevertheless an application has to be made out in triplicate accompanied by a written statement setting out the type of transport licence sought and also showing the equity of the applicant in the proposed service, the details of capital requirements and the details of any arrangements under which monies are borrowed as well as details of all land, buildings, vehicles etc. The application is to include any submission which the applicant wishes to make, documents and testimonials which will assist the Authority in considering the application and a written statement identifying the persons to be involved for the running of the transport business. If the applicant is a body corporate indication of the persons responsible for running the organisation are to be included and in the event of the application being for a goods service, an indication of whether or not the application will have any effect on the rail restriction. The application is to be accompanied by a statutory declaration and following receipt of this application and being satisfied that the application is properly made the Secretary for Transport will forward all the papers on to the Licensing Authority so that the Authority may come to a proper decision. It will be possible for an application to be granted in a relatively short space of time if the papers are in order.

At the present time, with the public hearing requirement, there is a substantial time elapse necessary between the filing of an application and the holding of a public hearing. Under the new system it would be possible for an urgent application to be dealt with instantly subject to the availability of the Authority. In practice the Authorities will still be required to undertake circuit work in conjunction with passenger and taxi applications as well as public inquiries so that it is likely there will always be some delay in the application being considered. Furthermore there is the right of the Secretary for Transport to make a submission within 14 days of an application being received and forwarded to the Authority as to whether the application should be declined or otherwise and a further 7 days for the applicant to comment on the Ministry's submission. In this case where a public hearing is to be held there could be a further month's delay before a hearing can be arranged. As no goods service or passenger service licences can be transferred all applications taking over an existing business must be dealt with as a new application.

The matters which have to receive the Authorities' attention are difficult areas to adjudicate upon particularly when dealing with the papers alone. To a very large extent the format of the application form to be designed and produced by the Ministry of Transport will be critical for ease and speed in considering each application a factor which I cannot over stress.

Section 123(2) of the Amendment Act lays down the framework that an Authority must have regard to in reaching a satisfactory conclusion that the proposed service is likely to be carried on in a 'safe and reliable manner'.

Significantly most of the matters requiring an Authority's consideration under this new section were in fact matters to be considered under the old requirements. Section 123(2)(a) covers the type and nature of the proposed service and the vehicles to be used as well as arrangements for survey maintenance and repair : Subsection (B) covers experience, competence and repute in other words if the applicant is a fit and proper person to operate a transport business : Subsection (C) covers financial matters. Specifically the new Section 123(3) requires details of the person or persons who control a body corporate - this is an entirely new criterion.

However under the old system the primary requirement was to ascertain the need for the proposed goods service and the necessity of proving this requirement as being in the public interest and the needs of the district.

In my experience the substantial time of any public hearing in the past to consider a new general goods service licence was devoted to hearing evidence and argument on the quantitative test and if an applicant established the evidence of need then he usually succeeded in the financial tests on the basis that if the work was genuinely there, then so was the income to ensure the operation was a viable success.

Not so, of course under the new system, so that in considering the applicant's financial ability to carry on the proposed service in a safe and reliable manner, without any requirement to show evidence of work, particular attention will have to be given to the financial data filed with the application to indicate that satisfactory equity and working capital is available to carry out the service proposed.
For example, a number of owner driver type of applications can only be held to be financially viable due to minimum guarantees of work. Without a guarantee many of these operators do not have sufficient capital to borrow funds to purchase expensive rigs. This is particularly relevant to young operators entering the transport industry who obviously have insufficient working time to accumulate capital.

In such cases in future more emphasis will probably have to be placed on such things like work references and bankers references to support an applicant's personal financial standing.

However, being completely practical, following close scrutiny by trained Ministry of Transport personnel of all applications, the Authorities themselves, with no further information than contained on the application form are unlikely to form any other conclusion than those of the examiners. Where something is obviously lacking I feel confident that the Ministry will highlight the concern by a submission to the Authority. There will be occasions where the Authority is unsatisfied on some item and requests additional information from the applicant.

I expect the Ministry will only lay a formal submission to the Authority where there is a history of criminal or traffic convictions, offences against rail or road user charges, or other offences against the Transport Licensing Regulations. These areas are within the natural resources of the Ministry to evaluate and I have some doubt as to whether for the purpose of a transport licence other misdemeanours of administrative law would be canvassed. There may be questions of financial ability which demand further proof and some hearings may rest solely on this factor.

If the Licensing Authority forms a provisional view on studying the papers that the application should be declined or feels he should hear either the applicant or the Secretary for Transport, a formal hearing is to be arranged.

The mechanics for arranging the hearing where they become necessary remain similar to the old law with the exception that a notice in the gazette is a pre-requisite. The format however of the hearing is vastly different in that the parties entitled to be heard are the applicant and the Secretary for Transport only. Whilst the hearing is 'public' the procedure is very much simplified in that the applicant knows the other party in advance. I am aware that the legal profession have always found hearings before Transport Licensing Authorities difficult in that they are never too sure until the hearing who will oppose their client's application.

If the application is for rail exemption a hearing is a mandatory requirement and in this case as well a representative of the Secretary for Transport, the New Zealand Railways Corporation is also automatically a cited party.

Where hearings take place the Ministry of Transport's role will undergo a change as, being a cited party with right of appeal, the Ministry's previous position as an amicus at transport licensing hearings is automatically altered.

This should not really effect the relationship which the Licensing Authorities presently enjoy with the Ministry's staff as it has long been the policy of the Authorities to observe strict procedures to ensure complete impartiality with the Ministry's staff who appear at public sittings. I believe it will be necessary for those exercising the delegated authority of the Secretary of Transport to ensure a degree of consistency when making a formal submission to the Licensing Authority which may set in train the holding of a public hearing.

One matter which is probably worth mentioning at this juncture is the importance in my opinion of submitting a copy of the Certificate of Incorporation where the applicant seeks a licence in the name of a private company. This is a routine procedure for the legal profession but is likely to be overlooked by a private individual filing his own application.

Before moving on to briefly discuss the often vexed question of temporary licences, I believe that where professional advice is sought in regard to the filing of an application for a goods service licence, or any other type of transport licence, the application is likely to be completed in sufficient depth and detail to permit a smooth passage for consideration and consequently a relatively quick decision may be possible. Obviously the form to be designed will have to be quite complex to cover all the matters set out for statutory consideration. A poorly designed layout will just create additional work for Ministry of Transport staff.

The law relating to the granting of temporary licences has been considerably extended by Section 117 of the Amendment Act. The most dramatic alteration being that once granted, a temporary licence is valid for no longer than 28 days and cannot be renewed in similar terms within a 28 day period after the lapse of the initial grant. This will mean an end to operators running on continually renewed temporary licences and may create some problems in the passenger transport and taxi industry.

As no goods service licences will be transferrable a new licence application will be necessary for what was previously dealt with by transfer. The importance then of furnishing full details with each new application becomes apparent when considering that if the application is defective and leads to the necessity of holding a hearing there is no way in which the transport business can be legally continued whilst these procedures are followed.

The Railways Corporation are also to be consulted, if the temporary licence involves rail exemption, but the Act lays no other consultative procedure other than considering any submission from the Secretary for Transport. I imagine the Ministry will liaise with such organisations as the Road Transport Assn and others.

There is considerable case law on the question of the granting of temporary licences as being a judicial act by a Licensing Authority and I anticipate this is an area which for consistency's sake needs to be incorporated into published practice procedures of Licensing Authorities in due course.

In view of the statutory restriction of the term of any temporary licence it would seem prudent when seeking a transport licence for the new prospective licensee to file the papers and obtain his licence before any sale is finalised. This is really similar to the sale of property when vacant possession is not usually obtainable until the completion of all the legal formalities.

Interestingly my office handled 6322 applications for temporary licences in 1982 and 4965 in 1983. The marked reduction resulted from a fall off in applications just prior to November 1 last year. Presently the applications appear to hover around 200 a month having fallen from 500 to 600 per month and now mainly relate to additional vehicle authorities, goods which are unsuitable for rail transportation and transfers and amendments pending hearing. From June 1 I anticipate a further reduction in requests for temporary licences in view of the changed emphasis now required by statute. However I am extremely reluctant to even consider a temporary licence application where a matter is likely to be contested at a public sitting, and leaving aside the public passenger section of the transport industry and exemptions from rail, I do not foresee too many temporary licences being issued for general goods operations.

To conclude I have not endeavoured to cover the subject of public inquiries and reviews as these areas of transport licensing law fall outside the somewhat narrow parameters of this paper. Nor has it been possible to explore the effects of the legislative change in passenger transport which might well be the subject of a paper itself. It can be seen though that the role of the Transport Licensing Authority also undergoes a radical change to accommodate the new legislation.