

# Communications

B.U.L.L.E.T.I.N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS  
AND MEDIA LAW ASSOCIATION (CAMLA) A.C.N. 002 651 005

Print Post Approved PP: 234093/00011

EDITED BY ANTHONY MRSNIK

VOL 14 No 1 Winter 1994

## The flawed philosophy of anti-siphoning

Rory Sutton discusses Pay TV, sport and siphoning

**B**y repute this is the era of deregulation. Curious it is, therefore, that the Federal Government has chosen to regulate sporting coverages on Pay TV with anti-siphoning provisions. This means that certain sporting events, deemed to be of national importance, may not be bought exclusively by Pay TV operators unless rejected by free to air stations. Examples are the Melbourne Cup, Cricket Tests in Australia, AFL Grand Finals and so on.

The justification for anti-siphoning rules is social equity. This is a noble sentiment certainly, but conflicts with the essential nature of Subscription Television Services. These services are simply retailing operations, where there is a direct provider to consumer relationship, as with any other retailing enterprise. Pay TV is not the same as the traditional broadcasters. The latter requires a licence to access a limited resource of transmission spectra, and with this privileged membership comes specific obligations to provide a universal service.

The onset of the superhighway technology renders this finite position redundant. The sky now is the limit and even that may be open to question. Anyone with the drive, ambition, money and software has the potential to exploit satellite, cable or dish to dish transmission.

To succeed requires clever marketing and a product for which consumers are prepared to pay.

### access and context

**T**he social equity notion implicit in the anti-siphoning regulations is laudable, but assumes that everyone, wherever they may choose to live, has an inalienable right to equal services. Yet it seems only Pay TV operators and owners of certain sporting

events are to be singled out, while retailers in other fields are free to make commercial decisions. Certainly governments do not dictate to Woolworths where to establish the next supermarket. While it is understandable that politicians would seek to protect access to the Melbourne Cup for all, it does raise a dilemma as to what is in the national interest and is a national sacred cow.

In reality, the Victorian Racing Club is unlikely to want to sell the Melbourne Cup exclusively to a Pay TV enterprise until it is assured of maximum exposure across the country. Thus the VRC is certain to exercise commercial criteria anyhow. It will be an interesting debate should Pay TV offer a much higher rights fee than a free-to-air channel. If by regulation, the VRC is precluded from selling to the highest bidder, perhaps it could ask the government to make up the difference.

Furthermore, the notion that particular sporting events possess a special national cachet is questionable. To single out the AFL Grand Final or the NSW Rugby League Grand Final, neither constitute a national event. Indeed in one context, both events manifest the sporting divide between the States. There is some argument in the case of Test cricket, but it is doubtful Australia v Sri Lanka evokes the same passions as do the Ashes series.

### flawed philosophy

**I**t is difficult to sustain a rigorous argument for anti-siphoning rules based on pure logical criteria. Emotional and political considerations obviously hold sway presently. Aspirants in the Pay TV arena will be prepared to live with these for the moment.

While the anti-siphoning rules are designed to apply for ten years only, it is

probable they will be eroded earlier than that as technology and commercial realities prevail. It is clear the philosophy is flawed. Inevitably political expediency is a more potent force, as politicians seek to espouse social equity, or more aptly to keep the folks contented. The sadness is, that the fare to be offered by Pay TV generally does not promise great riches in programs, unless it be live sport. The riches to be gained by the entrepreneurs by buying and selling sporting rights are immense potentially and will exert great pressure on the current guidelines.

It is likely that the anti-siphoning regulations will implode, falling victim to a good dose of anti-siphoning themselves, as all involved seek to maximise returns. It is probable the Government will give way to political expediency and commercial reality, sooner rather than later.

*Rory Sutton (previous Head ABC TV Sport)*

### INSIDE THIS ISSUE

"But, call me old fashioned, I do not believe that the highest economic return equals the greatest public benefit where broadcasting is concerned."

see "Distinctly New Zealand" by Dr Ruth Harley.

# Electronic newspapers – who owns the copyright?

Anne Davies examines the Copyright Law Review Committee's recent recommendations

In June Australia's newspaper and magazine publishers had a significant win in their campaign to extend control over the copyright in their journalists' work.

The majority of the Copyright Law Review Committee (CLRC) recommended that section 35(4) of the *Copyright Act 1968* be amended to bring journalists into line with all other employees; that is, that all copyright in the works created in the course of their employment would rest with their employer.

This represents a recommended change in the long standing rule that journalists retain the residual copyright in their work. Their employers, the publishers, currently have rights only in relation to the publication in a newspaper, magazine or similar periodical, and broadcasting of those works.

## an industrial impasse?

The publishers may have been hoping that the CLRC Report on Journalists' Copyright (1994) would end the matter but far from being the end of the saga, the Report is only one milestone in this long running issue.

Both the majority of the CLRC and the Government have now told the parties that they regard the issue as an industrial one to be resolved by newspaper and magazine proprietors and the journalists at the bargaining table.

Until the parties strike a deal, it seems unlikely that the Minister for Justice, Duncan Kerr will move to implement the Report.

At stake is who owns the rights to electronic newspapers which will be made possible by the emerging new telecommunications technologies.

## the current position

Unlike other employers, who are the copyright owners of their employees' works, section 35(4) gives the proprietors of newspapers and magazines the copyright in their journalists' works only for the purpose of publishing it in a newspaper or magazine and broadcasting it.

The historical roots of this special rule are a little uncertain but is said to stem back

## CONTENTS

<b>THE FLAWED PHILOSOPHY OF ANTI-SIPHONING</b>	<b>1</b>
Rory Sutton discusses Pay TV, sport and siphoning	
<b>ELECTRONIC NEWSPAPERS – WHO OWNS THE COPYRIGHT?</b>	<b>2</b>
Anne Davies examines the Copyright Law Review Committee's recommendations on ownership of employed journalists' copyright	
<b>THE SEVEN FIGURE OUCH</b>	<b>4</b>
Paul Reidy and Nicholas Pullen review the second <i>Carson</i> defamation trial and the issues for the media – including the use of personal injury verdicts	
<b>NARROWCASTING FOR RADIO</b>	<b>7</b>
Elizabeth Burrows tours the Australian Broadcasting Authority's discussion paper	
<b>DISTINCTLY NEW ZEALAND</b>	<b>8</b>
Dr Ruth Harley, NZ On Air, discusses New Zealand's broadcasting regime	
<b>STRANGE BEDFELLOWS – POLICE AND THE MEDIA</b>	<b>11</b>
David Salter queries the relationship between police and the media	
<b>GEARING UP FOR THE AUTOBAHN</b>	<b>13</b>
The Executive Summary of the Copyright Convergences Group's Report to the Federal Government	
<b>SBS: SHUFFLING THE BROAD AND THE NARROW</b>	<b>14</b>
Malcolm Long, Managing Director SBS Corporation, charts the new course	
<b>THE NEW RIGHTS OF COPYRIGHT</b>	<b>16</b>
Sue Gilchrist outlines the <i>Proposed Moral Rights Legislation for Copyright Creators</i> discussion paper	
<b>AND THE WINNER IS...</b>	<b>18</b>
Catherine McGill discusses the protection of Olympic symbols, Sydney 2000 logos and names	
<b>IN THE PRURIENT INTEREST</b>	<b>19</b>
Max Bonnell reports on the Burswood Casino's unsuccessful attempt to injunct "Real Life"	
<b>RECENT ACT DECISIONS</b>	<b>20</b>
Noel Greenslade provides a round-up	
<b>EVIDENCE FROM TAPPING BEYOND THE PALE OK</b>	<b>22</b>
Grantly Brown examines the latest House of Lords case on telephone tapping and suggests the UK falls short in its international obligations	
<b>INSERT</b>	
<b>COMMUNICATIONS NEWS</b>	
A Looseleaf Supplement to the Communications Law Bulletin (Vol 14 No 1)	

to Charles Dickens, who was angered when a work he had allowed to be serialised, was published as a book without his permission.

Provisions similar to section 35(4) were to be found in the UK Copyright Act 1956 which served as the model for the Australian Act.

Generally, it has been accepted by both journalists and publishers that the effect of this rule is to allow journalists the freedom to publish their work in book form. This right mainly benefits columnists, but sometimes journalists are asked whether they would allow articles they have written to be reproduced in academic texts.

[Assoc. Ed.: Submissions to the CLRC advanced the pattern of media ownership in 1968 as being the reason for inclusion in s.35(4) of the publishers' exclusive right to broadcast their journalists work. In 1968 most private television stations in Australia were owned by newspaper proprietors.]

---

### the Media Monitors case

---

Until 1990, the question of who might own copyright in journalists' works was uncontroversial. In that year, two journalists, on behalf of the Australian Journalists Association (now known as a section of the Media Entertainment and Arts Alliance (MEAA)) won a case against a newspaper clipping service (*De Garis v Neville Jeffress Pidler Pty Ltd*) - the *Media Monitors* case.

In the *Media Monitors* case, the Federal Court established that journalists owned copyright in their work when it was photocopied. The Court ordered that royalties be paid to those journalists.

The publishers were not party to the *Media Monitors* case, and appeared unperturbed by it until the Copyright Agency Limited, representing the reproduction rights of all its members including the journalist members of the MEAA, signed an agreement with the Commonwealth to pay for its use of photocopied works, including news clippings. While the publishers maintain that they, not the journalists, have copyright in material published electronically or diffused via data bases, significant doubt was created as a result of the case.

They began a concerted lobbying campaign to convince the then Attorney General, Mr Michael Duffy, to change the law. The Thatcher Government had repealed the corresponding section in the UK Act at the request of Rupert Murdoch, and the Australian publishers wanted similar changes.

With an election looming, Mr Duffy decided to refer the politically contentious issue to the CLRC.

---

### the majority view

---

The majority of CLRC members who took part in the review - Chairman, Justice Sheppard, Ms Lyndsey Cattermole, Ms Janice Luck, Professor Dennis Pearce and Bob Rodgers - recommended a change in the law which would have the effect of treating journalists in the same way as other employed authors.

The majority argued that difficulties would be encountered with new technology unless section 35(4) was altered.

The publishing business was an integrated one and it would become "increasingly difficult logically to distinguish between primary and secondary uses of journalists' work", the majority said.

"As technology takes hold, there will be increasing uncertainty. This will lead to increasing disputation the result of which will be likely disruption of business and employment and ultimately a most adverse effect on the public interest because of interruptions to the supply of information which is so essential to a modern community," they warned.

The majority also pointed to "numerous practical problems" in establishing the ownership of copyright among authors. By-lines - the basis under which payments are distributed under the photocopying agreements - could lead to unfairness as they did not take account of other employees who might have contributed to the ultimate form of the material, they argued.

Other factors which led the majority to support the proprietors' case was the fact that the proprietors provided expensive equipment to assist the journalists in the creation of their work, and that they took the business risks associated with the enterprise.

The majority rejected the argument put forward by MEAA that giving copyright to the proprietors would result in greater concentration of media ownership by concentrating copyright ownership in fewer hands.

That said, however, they also concluded that it was an industrial issue concerning the conditions of employment, which should be settled at the bargaining table between the parties.

---

### the minority view

---

The minority, - made up of the departmental member, Mr Chris Cresswell, Mr Derek Fielding and Mr Patrick Gallagher, - also noted that it was an industrial issue but proposed amendments which shared the rights between proprietors and journalists. Their

proposal was to amend the Act to give proprietors the right to establish data bases for the purposes of publishing or for archival purposes to provide public access for research. But if material was to be copied or transferred into other data bases, it could only be done with the author's permission.

"The minority has formed the view that the creation of data bases of articles in the newspapers where those data bases are not created by the proprietors in the course of electronic delivery of newspapers is not an activity which can be regarded as part of the publication of news and information. It should be properly regarded as a separate field of activity," they said. "As such the right should remain with the authors of the articles under the existing terms of section 35(4) along with the other residual rights enjoyed by them by virtue of the section."

The minority was more relaxed about the difficulty of identifying authors, pointing out that often this is not a simple matter in copyright law.

It also rejected the argument that failure to amend the Act would lead to more disputes. "Whatever else it did, repeal of the section would weaken the bargaining positions of the journalists for apparently no strong reasons than that their present possession of residual copyright in their articles is an inconvenience to proprietors of apparently profitable businesses," they said.

---

### where to now?

---

The current minister, Mr Kerr, is in no hurry to embroil himself in solving the journalists' copyright dilemma. His clear message to both parties has been to ask them to find a mutually satisfactory solution.

That appears unlikely. The journalists' union is strongly supportive of the minority position; that they should not be made to relinquish their residual copyright. The bottom line for the employers seems to be that they want the certainty the majority's proposed amendments would give them.

The parties met in early July to begin negotiations. On books and anthologies, it seems likely that the parties will agree to the status quo, with journalists retaining the right to exploit their work further in book form.

Photo sales have been the subject of long standing arrangements whereby photographers and proprietors share the proceeds of profits from sales apart from sales through syndication deals, and these seem likely to continue.

On freelancers' copyright, MEAA is pushing to have the issue resolved as part of ongoing negotiations on minimum rates of pay.

But the real crunch points are electronic data bases and photocopying. The MEAA has put a proposal that the proprietors be allowed to exploit information data bases for their own use, including commercial uses, in return for the payment of a continuing copyright allowance, either weekly or annually. However the journalists are seeking a profit sharing arrangement when data bases are licensed to third parties.

In relation to photocopying the argument is likely to turn on the percentage shares of the rights, as the publishers have asserted that they hold copyright in the published form, while the journalist holds copyright in the work's contents. There is also a dispute about what should happen to payments for rights where the author cannot be identified. The proprietors are

## The seven figure ouch

**Paul Reidy and Nicholas Pullen review the second Carson trial and the issues for the media including the Court's decision on the use of personal injury verdicts**

It's finally over. On 10 July 1994 Nicholas Carson's defamation proceedings against John Fairfax & Sons Limited were settled. In the Court of Appeal, Counsel for Fairfax read the following apology:

*"On April 21 1987 and May 6 1988, The Sydney Morning Herald published articles which a jury has found to convey defamatory imputations about Mr Carson. The imputations were false and very serious. John Fairfax and Sons has not previously apologised to Mr Carson for the serious hurt which the publications caused him. John Fairfax has instructed me to say to this honourable court in Mr Carson's presence that John Fairfax and Sons sincerely apologises to Mr Carson for having published the imputations. John Fairfax and Sons assures the court and Mr Carson that it did not intend to convey the imputations against Mr Carson and wholly withdraws them".*

In a statement released by Carson he said the "jury was correct to award me the verdict that they did on the material before them". However, he acknowledges that "the verdict is vulnerable and could be overturned".

That statement marked the end of a saga which began over seven years ago on 21 April 1987 with the publication of an article in the Sydney Morning Herald by John Slee. It had involved a one week Supreme Court jury trial, an appeal to the Court of Appeal and then the High Court, a re-trial before a jury in the Supreme Court for another two weeks and then another appeal to the Court of Appeal. Added on to

very reluctant to sign up the Copyright Agency Limited, the collecting body which currently administers payments on behalf of the journalists.

The parties are expected to report back to the Minister in September with the outcome of their talks. It will be difficult for them to find common ground, but equally, the Government will be reluctant to intervene. This is not an issue which will be resolved quickly and even if the proprietors convince the Government of the strength of their case, the vagaries of the Senate make passage of amendments uncertain.

*Anne Davies is the Canberra-based communications correspondent for the Sydney Morning Herald. She is a member of the Media Entertainment and Arts Alliance.*

that there were the interlocutory skirmishes - the separate trials on the capacity of the articles to convey the imputations, the arguments about discovery and interrogatories and the admission of evidence. All in all an extraordinary piece of litigation.

Now that it is over, media defendants should sit back and ask a few hard questions: why did Carson get a record combined verdict of \$1,300,000?; and what issues does the Carson case raise about the conduct of future defamation trials?

### the jury's verdict was huge

A combined total of \$1.3 million (\$500,000 for the first, and \$800,000 for the second, action) it was more than double the previous record verdicts given to Carson at his first trial and almost 10 times the record verdict given to former Police Commissioner Kel Glare in Victoria in 1992. It was even more significant given the orders of His Honour Justice Levine that Fairfax pay \$147,098 interest and Carson's costs (on a party/party basis to September 1993 and thereafter on an indemnity basis).

### the articles

On 21 April 1987, the Sydney Morning Herald included on its leader page a commentary by John Slee headed "Dr Rajska a war on many fronts".

As Carson later told the jury he immediately forwarded a letter to the

Herald's Editor in Chief requesting the publication of an apology. The Herald declined to publish that apology but offered to publish a statement correcting two factual errors in the article. Carson did not accept that offer and after further haggling about apologies Carson commenced proceedings in May 1987.

On 6 May 1988, a further comment piece by John Slee appeared on the paper's leader page, headed "The Criminal Phase of Rajska case". This time, without delay, Carson filed further proceedings against the Herald.

### the imputations

The imputations found to be defamatory from the first article were that Carson:-

- (i) wrongfully attempted to intimidate Dr Metcalf by threatening to sue him for defamation over a medical report written by him; and
- (ii) wrongfully brought defamation proceedings in his own name against Mr Arthur Carney, a solicitor for the sole purpose of causing Mr Carney to forthwith cease to act for his client, Mr Rajska.

The imputation before the jury from the second article was that Carson:-

- (i) was wrongfully a party to a conspiracy with Mr Moshe Yerushalmy to obstruct the course of justice by evading service of criminal process.

### the second trial - Carson's case in chief

Carson gave evidence over 3 days. He said he was appalled by the publication of the first article. "It made me very angry and wounded because it was just, it seemed to be so wrong that something that was false could just be published like that". Of the second article he said "I was just absolutely astounded when that was published, it was just such a wild allegation all I could think was this was just a vendetta against me, an attack on me, telling a lie to besmirch me".

In cross-examination by Maurice Neil QC for Fairfax, Carson agreed he was still friends with each of his reputation witnesses. He was still a senior partner at Blake Dawson Waldron and he had been invited onto the Board of the Sydney Dance Company. Carson did not agree with Neil's suggestion that he had resigned from a public company to focus on his legal practice. He said, "I was asked to leave the Board by the main shareholder, the Commonwealth Superannuation Fund because I did not have a big enough commercial profile".

Carson called four witnesses who had testified at his first trial.

Three of those witnesses are lawyers and former presidents of the Law Society of New South Wales: Kim Garling, Rod McGeoch and Brian Thornton. The fourth witness is an investor, Peter Horrobin.

Thornton, McGeoch and Garling each described the conduct imputed of Carson in each article as highly improper. Garling thought the imputations in the first article were so serious he avoided Carson for several months following its publication. Horrobin said the second article was worse than the first and implied that Carson "is a criminal and has engaged in criminal conduct".

Carson also called his partner Hugh Keller. Keller silenced the courtroom as he testified about Carson's reaction to the articles, "This thing's destroying me".

Finally, Carson's Counsel T.E.F. Hughes QC read a transcript of the evidence given at the first trial by former Supreme Court Judge Anthony Larkins. The Judge had died in 1989. He rang Carson on the day of publication and told him "unless he got an assurance of a full retraction or an apology, he would have to sue to protect his name".

## Fairfax's case

**F**airfax called John Slee who had been joined by Carson as a defendant to the second action.

In chief, Slee said he had not intended to convey the imputations found by the jury and that he had not deliberately lied when writing the articles.

In the course of a lengthy, and at times very heated cross-examination by Hughes QC, Slee was asked about each of the imputations. Of the first article he said, "In the express terms of the imputations as you have composed them they are false". They were however, "pretty close to the truth". When questioned about the imputation relating to Mr Carney, Slee said, "I still think its true".

Slee had not apologised to Carson even after the first trial, "I doubt anything would come of it." Slee said, "It was unrealistic" for Hughes QC to suggest rule 10 of the Journalist Code of Conduct obliged him to apologise. Rule 10 says a journalist should do her/his utmost to correct any published or broadcast information found to be harmfully inaccurate.

## Carson in reply

Carson was appalled by much of Slee's testimony. "Here's Mr Slee coming into the witness box and saying he intended to publish those lies and affirming them and repeating them, even though he half grudgingly concedes they are false which he must know they are".

## Carson's record verdict

**T**hree hours after retiring, the jury's verdict was announced.

It is suggested that there were four factors at play, each of which contributed to Carson's huge verdict:

- the non-publication of an apology acceptable to Carson right up to the very end of the second trial;
- the demeanour of John Slee in the witness box and his evidence that the imputations found to have arisen (at least from the first article) were close to the truth;
- the fact that the jury was not given a range of figures on which to base its verdicts; and
- the evidence Carson was able to put before a jury - of Garling the former Law Society President, avoiding him after the publication of the first article, of the Olympics hero McGeoch who has shared a joke at Carson's own expense and of Keller, his partner, the man who had seen the effect on Carson of the libels.

## issues for the media

It is almost impossible to read a jury and as difficult to know with any certainty which way a case should be run. To one jury a defendant in Fairfax's position who says at trial little more than "I'm sorry" may win the day, but to another jury this may be interpreted as hypocritical and self serving. It may result in a huge verdict.

It is suggested however, that a media defendant's exposure to a "huge or freak" verdict typified by Carson's case could be limited (but only in a similar case) by addressing each of the factors at play which we have identified in Carson's case.

## an apology

**T**he High Court's decision in Carson makes it clear that failure to apologise of itself does not aggravate damages. However, as confirmed in a decision of Justice Levine in the course of the second trial, in all the circumstances of



a particular case failure to apologise can aggravate damages.

Apologies are as a consequence still very useful tools for a media defendant. Not only do they serve the very real and practical end of placating an angry plaintiff but they also eliminate one matter that a plaintiff might otherwise point to at a trial.

However, the issue is not always straight-forward. Carson's case is a classic example.

Carson maintained throughout the trial that he never got the apology he wanted. Fairfax originally said an apology was not needed because the imputations did not arise. Subsequently they published an apology to address what they perceived as Carson's concerns. Carson did not accept that apology for two reasons.

Firstly, he thought it was cynical because proceedings had, by then, been filed. Secondly and more importantly he said it was "too little - too late". Too little because it didn't retract all the allegations. Too late because it appeared in December 1987 some eight months after the first article. Fairfax says it did not know proceedings had been filed when it originally offered to publish the apology. They also queried how Carson could complain about the apology not retracting the sting of an imputation when the imputations were only settled later after capacity arguments.

Still, Carson was able to go to the jury at great length in the circumstances of this case about Fairfax's failure to publish the apology he wanted. In doing so, his Counsel reminded the jury that Fairfax had still not published an acceptable apology even though a jury ruled against them in the first trial.

As this case shows it's never easy, but for a media defendant, as long as there are no admissions, it can be helpful to apologise early, prominently and completely.

### **evidence from the journalist**

**C**alling any witness exposes that person to the perils of cross examination. With Hughes QC in full cry those perils may be more significant in a case such as Carson. But there is a further matter which should be borne in mind when that witness is a journalist. Once the journalist is in - he/she is in for all purposes and this includes questioning about his/her sources.

In the course of his cross-examination Slee was asked about sworn answers to interrogatories filed in the proceedings.

Consistent with the "newspaper rule" those interrogatories did not identify Slee's sources who were simply referred to as

Source A, Source B etcetera. Fairfax's counsel objected to a question about Slee's source on the basis of relevance and the High Court's decision in *John Fairfax & Sons Limited v Cojuangco* saying that case reserves a discretion to a trial Judge not to compel disclosure of a journalist's source unless it is necessary to do justice between the parties.

In a judgement given at the conclusion of argument Justice Levine dismissed the objection and directed Slee to answer the question.

His Honour said Slee's sources were relevant because Slee had gone into the witness box to dispel the allegation made by Carson that he was telling a deliberate lie. "It seems quite clear to me that not only has the witness's credit become the subject of examination by Mr Hughes, but also the nature of the witness's belief in the truth of the imputation ... This is clearly relevant to the issue of damages".

In these circumstances disclosure was also necessary to do justice between the parties to test Slee's evidence.

Justice Levine did not accept a further suggestion from Fairfax's counsel that would have allowed Slee to give the evidence in confidence pursuant to Section 80 of the Supreme Court Act. His Honour said, "Considerations of public policy or the policy of the law in relation to the Courts at all times generally being open the public... in my view, transcend even considerations of public policy that might affect confidentiality which, from time to time, the Court is prepared to afford to a journalist in relation to his sources".

In the end, Slee avoided the contempt problems that have faced other journalists by obtaining a release from his sources. In Court the following day he named Reg Blanch and Clarrie Briese.

### **comparable verdicts**

**T**he position of a media defendant is not made any easier by the Court's decision on the use of comparable verdicts, particularly personal injury verdicts.

His Honour declined to direct the jury in relation to awards of general damages in personal injuries cases and also directed counsel not to address the jury on that point.

In his written Judgement handed down after the trial on 13 May 1994 Justice Levine reviewed the High Court's decision in these proceedings.

His Honour placed particular emphasis on the distinction deliberately drawn by the High Court between appellate comparisons of personal injuries verdicts and

comparisons at trial. He said, "It is my view that the decision of the High Court in this litigation provides no authority in relation to the trial judge's function in this area. And; "it is my view that so much of what their Honours constituting the majority said [about a trial judge giving an indication to the jury on personal injuries verdicts] can best be described as obiter....".

As such their Honours comments about use of personal injuries verdicts' at trial were really "suggestions". There were very good reasons for not following such suggestions. For example, Justice Levine asked rhetorically "... will the parties have to reach some agreement beforehand? Or will it be the case that the defendant will ... address the jury on one series of cases the plaintiff on another and the judge on both and/or perhaps his/her own selections?"

His Honour concluded, "I do not see myself as the trial judge in these hearings bound by any authority requiring me to give directions to the jury on personal injury general damages awards; I do not see that there exists a discretion in the matter and nor do I consider that the High Court (in Carson) has done anything more than point to or possibly 'suggest' at best that consideration maybe given to 'an indication'. The decisions I have examined certainly make clear the appellate Court's approach. It is the majority judgment in *Coyne* however, in my respectful opinion, which presently, for the trial judge, articulates the dangers and lack of helpfulness of 'comparison' directions especially, in my view, in the context of the real risk of compromising the clear constitutional role of the jury in this State".

The practical problems raised by Justice Levine are very real. Indeed these problems highlight the main issue. The whole debate on the use of personal injury verdicts is prefaced on the assumption that those verdicts offer some rational guide for a jury's deliberations. This of itself presumes:

- (i) that the general damages component of present personal injury verdicts are fair and equitable;
- (ii) that the impact of legislative caps on damages in workers compensation and motor vehicle accident cases can be effectively isolated in considering these verdicts;
- (iii) that the harm addressed by this component of personal injury verdicts is, if not identical, then substantially the same as the harm suffered by a plaintiff in a defamation action; and
- (iv) that comparisons to personal injury verdicts are of more assistance than comparisons to other damages - say for passing off or wrongful dismissal or better still other defamation cases.

In practical terms the use of comparisons to personal injury verdicts appears to be an expedient way of capping the damages awarded in defamation actions. It may be of benefit in appellate reviews of jury verdicts, but it is, for the reasons identified by Justice Levine of less benefit at a trial. It is doubtful such comparison would be made to personal injury verdicts if they were greatly in excess of defamation verdicts.

It is suggested that the real concern of media defendants, (ie: the size of defamation verdicts), should be addressed directly by the Parliament rather than the Courts by an amendment to the NSW *Defamation Act 1974*. This could outline the range of figures (subject say to CPI fluctuations) to be put to the jury and the procedure a trial judge is to adopt in putting those figures to a jury. Failing this, the Courts need to reconsider the way a trial judge should guide a jury on damages.

---

### the plaintiff's case

---

A media defendant can not do much about this - all they can do is limit the

evidence before the jury by objections as to admissibility and hope that their own case does not add any fuel to the fire.

In many ways Carson's record verdicts reflect the type of evidence he had been able to obtain about reaction to the articles from friends and colleagues. In the end, this perhaps more than anything else explains these verdicts, and it is in this area that a media defendant is most exposed - with no knowledge of the type of evidence a plaintiff will call in support of her/his case until that evidence, in the form of her/his testimony, is heard echoing through the Court.

That being so, the decision of a media defendant to go to trial will always be a gamble - it will always be a toss of the coin, to see just what the next jury does.

*Nicholas Pullen is a Melbourne Partner with Holding Redlich and acted for former Police Commissioner Kel Glare. Paul Reidy is a Sydney Associate with Holding Redlich and instructed Counsel on behalf of Nicholas Carson in his second trial whilst he was at Blake Dawson Waldron.*

*the Act*, similar to that to be found in the Explanatory Memorandum to the Broadcasting Services Bill.

For example, the *Paper* gives as examples of limited locations, "hospitals, doctors' surgeries, shopping centres, schools, pubs and clubs...". Section 17 includes as examples "arenas or business premises", and the Explanatory Memorandum also suggests domestic dwellings in a limited area.

---

### opinions on service categories

---

**T**he *Paper* aims to assist the application by potential service providers for opinions on service categories under section 21.

Applications for opinions which have been determined by the ABA and which relate to services which have commenced operation can be inspected by arrangement with the Allocations and Renewals Section of the ABA. The ABA also publishes opinions as to service categories in the Commonwealth Gazette, but the opinions contain conclusions rather than reasoning, and the details are limited.

The ABA concluded, in one opinion published in the Gazette this year, that a proposed service fell within the category of open narrowcasting because it was targeted at a special interest group, it provided programs of limited appeal, and its comprehensibility was limited to persons speaking Italian.

The Department of the Parliamentary Reporting Staff's application in relation to a proposed service of unedited coverage of Parliament and parliamentary committees was held by the ABA to be a subscription narrowcasting service - the service would be of limited appeal and was only to be available on the payment of subscription fees. Another Government service, targeted at people with a need for or interest in particular educational and training programs, which was encrypted and required the obtaining of special equipment was held to be within the open narrowcasting category. The requirement that the audience obtain decoding equipment did not prevent it from being an open narrowcast service, but was a factor in the determination that the service was a narrowcast service, because the requirement limited the accessibility of the service.

The extent of the information provided by the ABA reached a particularly low point with the opinion in relation to Montamar Pty Ltd trading as Perpetual Motion Pictures. The ABA stated that the matters considered in reaching the opinion that the service fell within the open narrowcast service category included that "the service will be limited because it provides programs of limited appeal."

---

# narrowcasting for radio

---

## Elizabeth Burrows tours the Australian Broadcasting Authority's discussion paper

---

**R**ecently, the Australian Broadcasting Authority issued a Discussion Paper (*the Discussion Paper or Paper*) dealing with narrowcasting for radio in order to assist potential radio narrowcasters in their understanding of the category definitions.

The *Broadcasting Services Act 1992 (the Act)* provides for the regulation of subscription and open narrowcasting licences under sections 17 and 18. There is considerable uncertainty surrounding the criteria to be used in deciding whether a service is a narrowcast service. This uncertainty is compounded by inadequacies in the opinions provided by the ABA on service categories.

---

### what are narrowcasting services?

---

**S**ervices may be narrowcasting services if their reception is limited by audience, location, duration, or appeal of programming, or because of some other reason.

In addition, subscription narrowcasting services must only be available on payment of subscription fees, and subscription fees must be the predominant source of revenue.

Because narrowcasting services are part of the class licence regime, and the provider need only comply with the conditions determined by the ABA and Schedule 2 Part 7 of *the Act* rather than applying for a licence, it is particularly important that the boundaries within which narrowcasting services must operate be clearly defined. The *Discussion Paper* offers little assistance in this regard.

---

### categories of service

---

**T**he *Discussion Paper* gives examples of the factors which establish service categories. The *Paper* states, not very helpfully, that the criteria in section 22 of *the Act* "are a good guide for an aspirant broadcaster in deciding whether or not a proposal would fall within the class licence regime." However the *Discussion Paper* gives little guidance beyond an interpretation of the relevant provisions of

---

## need for information on service categories

---

**S**ervice providers cannot obtain enough information about service categories. This is unacceptable because an opinion effectively licences the service, if it does not change substantially, for five years. Once the ABA provides an opinion, no Government agency is able to take action against the service provider on the basis that the service falls into a different category. Better information about the categories of narrowcasting is needed not only for the purposes of prospective narrowcasters, but also for the purposes of commercial broadcasters who may be targeting the same region or audience and who have no input into the process of the ABA's determination.

The ABA points out in the *Discussion Paper* that it is not bound to follow its own precedents in relation to opinions and can determine additional criteria or clarify the existing criteria for determining the category of services under s.19 of *the Act* (it has not yet done so). Service providers are warned not to treat opinions as precedents. This diminishes considerably the commercial certainty which the provision of opinions is intended to create. The assistance provided by the opinions is also limited by the lack of detail. Although commercial confidentiality needs to be protected, it seems reasonable to expect more details about the nature of the service, given that the ABA cannot publish the opinion until the service to which it relates has commenced operation.

---

## ownership and control

---

The *Paper* does not discuss issues of ownership and control of subscription and open narrowcast radio services.

---

# Distinctly New Zealand

---

## Dr Ruth Harley discusses New Zealand's broadcasting regime

---

Up until the major deregulatory changes to the broadcasting regime in New Zealand in the late '80s, broadcasting, like a great many other facets of life in New Zealand, was characterised by a heavy measure of State control.

State broadcasting, and that's the only kind there was for decades, grew up under the influence of the Reithian concept of public broadcasting - broadcasting as an influence on our society directed to particular ends - educational, political, social

and cultural. Because licences are not allocated to narrowcasters there is no ABA control over candidates for them. There are no restrictions under *the Act* on their ownership or control. This means that owners of commercial broadcasting licences are not prohibited by *the Act* from operating narrowcast services.

It was stated in the Explanatory Memorandum that concentration in ownership and control of narrowcast services was to be regulated by the provisions of the *Trade Practices Act 1974*. However, it would be difficult for the TPC to monitor any such concentration because of the lack of individual licensing which might assist to identify providers. While those services using the radio spectrum must at least obtain transmitter licences under the *Radiocommunications Act*, as the *Paper* points out a narrowcasting service may be delivered by cable, optical fibre, satellite, or other means as well as by broadcasting services bands or other radio spectrum.

---

## conclusions

---

**T**he *Discussion Paper* leaves many questions about narrowcasting services unanswered, as have the published opinions. The *Paper* does not discuss issues of ownership and control, and adds little to the information already available under *the Act* and the Explanatory Memorandum as to which services will be considered to be narrowcast services. This is particularly unacceptable given that the ABA itself considers that the provisions of section 21 are intended to give certainty to service providers.

*Elizabeth Burrows.*

*Solicitor, Blake Dawson Waldron.*

factors which created the climate for the changes of the late '80s. Telecommunications and broadcasting were just a part of the picture.

---

## key factors for change

---

**F**irstly, in the drive for a more internationally competitive economy, all regulated industries came under intensive scrutiny. Secondly, regulatory (public sector) reform focused on those industries in which Government trading enterprises operated. Government dominated the broadcasting industry. By mid 1987 the Government had adopted a new framework for Government enterprises.

They were to be placed on a more commercial, competitive footing with managers held accountable for performance. There was to be a competitive neutrality with the private sector, ie Government-owned enterprises were not to have any disadvantage or advantages vis a vis private broadcasters. Policy advice and regulatory responsibilities were to be separated from commercial activities. And, the delivery of social objectives was to be separated and transparently contracted and not mixed with commercial objectives.

Thirdly, there was dissatisfaction with the degree of choice in broadcasting services. Broadcasting was dominated by the state broadcaster, Broadcasting Corporation of New Zealand (BCNZ) and its predecessors. Frustration had built up with the restrictions on entry for the private sector into radio and television broadcasting.

Fourthly, the broadcasting warrant system administered under a quasi-judicial tribunal system was seen as cumbersome, time consuming and not able to keep pace with technological change. The BCNZ itself faced a range of restrictions on its commercial operations and wanted flexibility. Television especially would increasingly have to operate in a global environment in which international partnerships needed to be formed.

Fifthly, demands for greater diversity of programming, including programming reflecting our own society, were not being fully satisfied. Yet the public broadcasting fee was controlled by the BCNZ and it had conflicting objectives. Relevant social objectives were also obscured by Reithian doctrines that were out of touch with the modern consumer service environment.

---

## legislative reform

---

The new legislation of 1988/89 sought to eliminate those problems. It provided a fundamentally revised framework for broadcasting, including:

- the introduction of various measures to promote competition in the broadcasting industry - notably the removal of all statutory restrictions on entry into broadcasting and the introduction of tradeable property rights in radio spectrum;
- the replacement of the BCNZ by two new state-owned companies - Television New Zealand Limited (TVNZ) and Radio New Zealand Limited (Radio NZ). These companies were to operate along ordinary commercial lines but they were still required to promote NZ identity and culture;
- cross media ownership restrictions were removed and foreign ownership restrictions reduced and finally abolished;
- "public service" broadcasting objectives were redefined into more concrete targeted objectives to be facilitated by a transparent subsidy scheme funded by the broadcasting fee and administered by an independent statutory agency. The new Broadcasting Commission/NZ On Air was to assess competitive bids for funding and programming within the specified categories of social objectives, notably the advancement of New Zealand culture and identity including Maori programming and minority programming; and
- an independent statutory body, the Broadcasting Standards Authority (BSA), was established to maintain certain defined broadcasting standards.

---

## public service objectives

---

At the time the proposals for the reforms were being worked through, the Government considered two options for achieving public service objectives, either subsidies or regulation.

The subsidy approach was adopted for various reasons. It provides for competitive neutrality thereby enabling greater competition between broadcasters. Costs and benefits are readily identifiable (ie transparent). It allows clear targeting of assistance to particular social groups. It provides flexibility in mechanisms for delivery of public service programmes. It keeps costs of funding down as it is a top-up system (few programmes are completely non-commercial).

Three main categories of concern were identified within a wholly commercial environment - sufficient local content to reflect and develop NZ culture and identity, (it was rightly assumed that commercial broadcasting, supported by advertising would provide certain types of NZ programming without subsidy); access to signals for small and remote communities; and sufficient coverage of minority interests. Support for archiving was added during the progress of the new legislation through Parliament.

---

## NZ On Air

---

The result was the Broadcasting Commission, NZ On Air, whose functions are:

- to reflect and develop New Zealand identity and culture by promoting programmes about New Zealand and New Zealand interests, and, promoting Maori language and culture;
- to maintain, and if the NZ On Air believes it to be cost-effective, extend radio and television coverage to communities that would not otherwise receive a commercially viable signal;
- to ensure that a range of broadcasts is available to provide for the interests of women, children, persons with disabilities, and minorities (including ethnic minorities) in the community; and
- to encourage the establishment and operation of archives.

---

## results of reform

---

There has been a range of good news results of NZ On Air.

*fee collection statistics* - Our gross revenues have increased by 10% from \$82 million in 1989/90 to over \$90 million in 1993/94. The number of fee paying households is up by 18% to 1 million or 87.2% of liable households.

Our collection costs have fallen from 14.5% of gross revenues to 9.8%. This is despite a 19.1% increase in the CPI and a \$1.3 million advertising and promotion campaign designed to brand fee-funded services and inform fee payers of their obligation to pay and tell them where their money is spent. Our administration costs are around \$1.5 million compared with a reported \$10 million by the BCNZ.

*local content levels on television* - NZ On Air will fund or partially fund around 1200 hours of television this year. These hours contribute to a general increase in

local content across the three free-to-air channels.

Total hours of NZ content are up from 2112 hours in 1988 to 4866 in 1993 - more than double but still only 23% of total broadcast hours. Volume of local content will always be a problem in a small economy like ours. Primetime hours of local content increased by 160% since 1988 from 686 hours to 1789 hours in 1993. Drama, comedy, documentary and children's programmes have increased most significantly, largely as a result of NZ On Air's role.

*increased productivity* - In television production and the cost of running National Radio and Concert FM and in the costs of providing television signals into remote areas, significant cost reductions have been achieved with increased levels of service to fee payers with the monies freed up.

*improved services for fee payers* - Since its inception NZ On Air has concentrated on initiating new services for poorly serviced fee payers such as people with impaired hearing, arts audiences, children, people in remote areas and Maori.

A sampling of new services includes:

- 20 Maori radio stations, a Maori Radio news service and linking systems;
- 2 Pacific Island Radio stations in Auckland and Wellington;
- 7 Access Radio stations in different centres;
- 3 grant schemes designed to promote New Zealand music on radio and television plus dedicated New Zealand music programmes, both pop and rock, on 17 commercial radio stations throughout the country;
- an increase in teletext subtitling for people with impaired hearing from 10 hours per week to over 40. This was after extensive consultation with deaf communities and now includes regular feedback from them;
- the first 5 day per week soap; and
- National Radio (a news and information service) and concert FM (a fine music service) into several new centres.

---

## problems encountered

---

Jockeying for position: The 1989 broadcasting reforms, accompanied by significant argee-bargee, introduced radical change into New Zealand. We have had protracted negotiations with the key vested interests, Radio NZ and TVNZ, about NZ On Air's role. The very branding of NZ On Air caused a lot of grief at TVNZ, which still surfaces periodically.

However, from the research we conduct into the efficiency of our advertising

campaign, it has undoubtedly paid dividends with the public. Not only has it in our view assisted us to increase our collection rate, it has also made the public - over 92% of them - aware of who we are and what we do. Around 75% of them support or at least are not unhappy with our performance. Not bad for what is essentially a tax collection operation.

*conflict and confrontation:* The productivity increases have also been hard won and continue to be hard fought. We are currently engaged in meaningful discussion with TVNZ about what exactly constitutes "non-commercial coverage" and how much it should cost. At last count the parties were over \$10 million apart in their calculations!

*Maori Radio development:* This has been a difficult but rewarding exercise. However, a parallel body, Te Mangai Paho, has now been set up and as from 1 January 1995 will allocate the portion of the Fee Income currently allocated for specialist Maori broadcasting purposes together with funds from Government Vote. Personally I hope they are more successful than we were with ensuring that Maori radio contributes fully to the revival of the Maori language. Theirs will be the responsibility of funding specialist Maori language and cultural programming on radio and TV.

It will then remain for NZ On Air to fulfil its function to "promote Maori language and culture" through programming targeted at mainstream audiences on radio and TV.

*perception of the fee as value for money:* There is always a level of complaint about the existence of the Broadcasting Fee. For example, those who do not receive TV3 may take the view that they should pay less, those who claim to use their TV sets for videos or viewing pay service only, call for exemption; those who dislike types of programming or levels of advertising also complain.

Whilst there is bound always to be a measure of dissatisfaction with any regime, there is a prospect that these types of grievances could eventually destabilise the regime. If we solve the TV3 coverage problem (which we are currently seeking to do), then the questions of additional regional services for remote areas will surely arise. The numbers of people with pay services will certainly increase although research to date suggests that the free-to-air networks are likely to be the mainstay for at least a decade. Of more concern, perhaps, is what many people perceive to be a debasing of the free-to-air services and a corresponding decrease in what some vociferous sectors regard as the stuff of a quality broadcasting service such

as in depth news and current affairs, sustained documentary programmes, and high production value drama. There is also a lot of dissatisfaction expressed with the levels of advertising.

---

### issue for the future

---

**T**he result of the debate over these issues is frequent discussion of the Government's stated policy to consider selling Channel 2 and make TV One a semi-commercial public broadcaster - whatever that might be. There are endless rumours and discussions on this with no conclusion as yet. However, I do not believe these rumblings will go away.

As long as public funding is involved, we in the industry cannot avoid engaging with the public in the discussion of the role and nature of publicly funded broadcasting.

The old arguments for public broadcasting are under serious threat from new technologies and new and increasingly dominant ideologies on the conduct of human affairs. The technologies offer more, the ideologies idolize the consumer. Both developments challenge the core theories of public broadcasting: that broadcasting utilizes a scarce natural resource which must be regulated in the public interest, and that the audience consists of citizens eager to engage with the quality entertainment and information with which you wish to ply them. Neither of these is any longer plausible so the argument for public broadcasting has to be elsewhere.

In New Zealand the reforms translated public broadcasting, almost by sleight of hand into three specific concepts - New Zealand culture and identity including Maori, remote coverage, and minority access. These concepts were underpinned by the belief that deregulation would bring a range of new broadcasters into the picture whose existence would, by definition, provide choice for the consumer; choice, in the terms of the prevailing market ideology, being of its very nature a public good.

However although deregulation has certainly brought us a greater number of broadcasters - we now have 3 free-to-air national broadcasters, 5 free-to-air local broadcasters, 2-3 cable trials and 4 subscription channels with several more in the pipeline - it is debatable whether it has brought the public much in the way of real choice. In any case, only around 2-3% of the population so far is exercising that choice. And for the rest of us, consumers of the free-to-air services, our choices reduce by the

day as all three channels look more and more alike even to the extent of 3 news bulletins head to head at 10.30 at night.

A number of commentators have observed that programme material in New Zealand is heading steadily downmarket with a disproportionate emphasis on criminals, victims and freakish events encapsulated into sensationalised fragments.

I have already observed that choice on the free-to-air schedules is diminishing. Last year the TV One schedule allowed for a weekly one hour arts programme in late prime time or just at the edge of prime time. This year because of the move to the late news it does not. Last year the TV One schedule allowed for a half hour observational documentary series using one person Hi-8 crews. This year it does not for the same reason.

In New Zealand we have constructed a very efficient commercial broadcasting structure. But, call me old fashioned, I do not believe that the highest economic return equals the greatest public benefit where broadcasting is concerned.

In New Zealand we have NZ On Air as a public good mechanism to leaven the otherwise purely market driven structure. It has to date proved very effective but I believe there are signs which give rise to concerns for the future.

---

### conclusions

---

**I** do believe the public wants choice and I know for sure that the various publics are clear that expenditure of public monies must be targeted at worthy objectives, although of course, the exact nature of those objectives would be vigorously debated. But in a situation where choice in free-to-air television is reducing and the ethics and quality of a lot of television programming is coming under fire and the levels of non-programme material are perceived to be reaching even greater heights, I think there is likely to be increasing levels of political disquiet.

Just as the violence debate has at least produced a response from the broadcasters, there may well eventually be sufficient public concern about the direction in which free-to-air television in New Zealand is currently heading to motivate politicians to reassess the current structures. On the other hand, it may be that, again as in the case of television violence, the broadcasters themselves perceive the problem and self-correct. Watch this space!

*This is an edited version of an address given by Dr Ruth Harley, NZ On Air, to Communications & Media Law Association.*

# strange bedfellows - police & the media

David Salter queries the relationship between police and the media

**P**onder for a moment the contradictions embedded in the following scenes played out in our media over the recent period:

- After the committal hearing, the solicitor for the man charged with the "Backpacker Murders" called an all-in press conference on the steps of the court house to appeal against "trial by media" and to complain that the excessive attentions of press, television and radio might have already made it impossible for his client to get a fair trial.
- A nightly ABC current affairs programme was given access to police video recordings of their interview of the accused in a particularly brutal bashing death of a homosexual man. The most gruesome portions of that interview - including admissions - were transmitted in prime time as part of a story on the defence of provocation.
- When police in Newcastle, NSW, needed to shake down the local "escort agency" business last May, they raided five inner-city establishments and charged just about every prostitute in town. The next day, the local newspaper dutifully printed the full name, age, occupation and address of each sex worker - straight off the charge sheets. What news value that recital had is doubtful, but the public disclosure of such information might be quite useful to anyone running a protection racket.
- On a routine basis, major metropolitan commercial radio stations now carry "live" and recorded "police reports" of serious crimes - items prepared, written and presented by police media liaison or public relations staff. Because of dwindling production budgets, these reports are rarely checked or supplemented by journalists or the newsreader.

Clearly, those traditional bedfellows - the press and the police - would seem to be in a far more subtle and dangerously dependent relationship than the simple "we're all in this together" mateship of previous generations.

## the common cause

**U**ntil quite recently, the social backgrounds and character types of policemen and police reporters were virtually interchangeable.

Their shared culture was founded in the digger/footy/lifesaving ethos of big, tough blokes who could all drink like fish and use their fists. They delighted in a common bravado. The two groups accepted quite openly that to a large extent their chances for fame and promotion were intertwined. It was a small, closed community and the detectives and the journos made sure to look after each other's interests. Favours owed were always repaid. Two examples:

In early 1956, when the NSW Vice Squad had a particular interest in the exact movements of Sir Eugene Goossens as he prepared to return to Australia (with a suitcase full of "indecent articles"), it was *The Sun* which arranged for the Conductor to be tailed in Europe. On the strength of this information, a senior *Sun* police reporter was able to give Goossens' precise arrival details to the investigating detective who then had plenty of time to arrange for the customs search which destroyed Sir

Eugene's career.

On the morning of New Year's Day, 1963, the bodies of Gilbert Bogle and Margaret Chandler were found in Lane Cove River Park. It was the beginning of one of the most sensational (and still unsolved) crime stories of the modern era. At that same moment, the ace crime reporter for the *Sydney Daily Mirror* was enjoying a few free rounds of beer at an inner-city hotel. The reception officer at CIB headquarters patiently rang each of the *Mirror* man's known watering holes until he finally found him and sent the grateful reporter racing to the scene.

## women and television

**T**hat old "mates" world of police and reporters has gone forever. It was dismantled by two overpowering influences: women and television.



As "the bloody sheilas" slowly became tolerated on police rounds, they found it difficult to pick up an off-the-record briefing from a Detective Inspector simply by standing beside him in the local hotel. Women forced the exchange of information between police and journalists onto a more open, formal - and potentially much fairer - basis.

But the impact of television has been even greater. The police roundsman of a generation ago wouldn't believe he'd done a decent job until he filed 750 - 1,000 words on a story. Print therefore required a solid working relationship with the police not just for their precious tip-offs, but to assemble enough reliable information, colour, interviews and background detail to support a substantial article.

In its punishing time-frame of only 90-120 seconds per story, television can only use: two or three sentences of narration over brief views of the crime scene; a 30-word "standup" from the reporter; another 20-words of interview from (take your pick - an eyewitness/victim/policeman/relative); and a closing sentence or two of narration. That's the formula.

Radio is even less demanding - no more than 80 words of straight summary, phoned in from the location (or, more often, the media office at police HQ).

---

### **informed or duped**

---

**A**t the same time, fierce competitive pressures of contemporary print, radio and television (and their technical sophistication) give the ethical issues of the police/media relationship particular currency.

These days the media would have virtually *nothing* to report on crime without the active involvement - and often encouragement - of police. Therein lies the central dilemma: to what extent are the journalists who cover crime being manipulated - even duped - by the police who feed them their stories?

The process can be observed at the most basic operational level. 24-hours-per day, every News Editor and Chief of Staff in the country keeps one ear tuned to a battery of special radios, all designed to monitor the full range of police frequencies. Such blatant eavesdropping is questionable, but the police never complain (after all, the tow-truck drivers are all listening in too).

The radios supply the starting point for almost every police story. From a bus smash to a multiple murder, the radio will provide the first vital details - most importantly the location to which the film crew, photographer or reporter should be despatched.

Sometimes the media manage to arrive *before* the police, and for a few chaotic moments there is no legal authority at a crime or disaster scene. In the inevitable climate of scoop frenzy, despicable things can - and often do - happen. But whatever happens, it is police radio traffic which sets the base line of crime reporting - and that traffic can always be controlled.

---

### **the information (super) shopfront**

---

**A**t the next level - beyond what journalists like to call "fire engine chasing" - is the less clear-cut world of police "media liaison". Trained and carefully briefed teams of PR personnel in police uniforms provide the information shopfront for the vast corporate structures now entrusted with law enforcement in Australia.

And, like all PR teams, their job is to peddle the most self-serving and optimistic version of events: to convince the public - through the media - that their police *are* doing a great job.

Once again, with the media so reliant on the police for information and access, it hasn't been difficult for these media liaison groups to shape and control the way crime stories and police work are represented.

---

### **police conduit?**

---

**P**erhaps the most extreme recent example of this manipulation was *Australia's Most Wanted*, a flashy offering from a commercial network, made with the generous involvement and support of the police. It purported to be a "service" programme with the lofty ambition of helping police apprehend offenders at large.

In truth, it was a cynical vehicle for gruesome and sensational dramatised "re-creations" of crimes - voyeurism dressed up as public service. Yet the police were delighted to co-operate because the producers always depicted them as a concerned, caring and dedicated team of crime-stoppers.

Fortunately, the programme succumbed to that fatal combination of falling ratings and high production costs. (Presumably the legion of clean-cut constables who were made to sit about in the background every week pretending to take phone calls were all returned to more useful work).

At another (some might say higher) level, two *Four Corners* programmes during the past 12 months were entirely devoted to police affairs. Both were reported by Chris Masters, both depended on high levels of

police "co-operation", and both ended up presenting the majority of police in a good light.

During the Summer of 1993/4, Masters was allowed an impressive level of freedom to report from the inside on the vast and intensive "Backpacker Murder" investigation. It was a solid and level-headed account, yet the lasting impression it gave was more of a PR exercise for the police than an example of investigative journalism.

At times it was difficult to shake off the suspicion that the ABC had only been permitted such open access because the police were under enormous public pressure to produce an arrest. Through the programme, the police seemed to be saying: "Look, we're doing our best!".

Last year, *Four Corners* ventured into far more contentious territory when it transmitted an extended survey of corruption in NSW, offering an insight not only into police corruption, but also police attempts to trace and eradicate that corruption.

Context is important here. Police corruption is a high-profile *political* issue in NSW. Police Ministers resign on a more-or-less regular basis. Police Commissioners are often in open warfare with those Ministers (and usually win). The battles are fought in the media, and by mobilising their well-resourced PR machinery, the elite officers of the force have become expert at the sophisticated techniques of media manipulation.

The trick is to put distance between the current leadership and the sins of your immediate predecessors. As part of this need to point the accusing finger backwards, the *Four Corners* special on corruption was invaluable to the NSW police leadership. Behind every sequence showing the dedicated corruption-busters hard at work on their computers was a persistent sub-text: *they* were the bad boys, not us.

It's the kind of atmospheric support a Police Commissioner finds invaluable when giving evidence to ICAC or being quizzed by the next pesky Parliamentary committee.

---

### **the basic game is still the same**

---

**B**ut, in essence, how different is today's subtle media management from those side-of-the-mouth leaks from detective to crime reporter in the darkest corner of a waterfront public bar?

Not much. The basic game is still the same - and still just as dangerous.

*David Salter, Executive Producer, ABC TV "Media Watch"*

# **gearing up for the autobahn**

**The Copyright Convergence Group reports to the Federal Government**

**T**he CCG's report "Highways to Change - Copyright in the New Communications Environment" ("the Report") has been presented to the Minister for Justice, Duncan Kerr MP. Extracted below is the Executive Summary of the Report, setting out the Group's recommendations for legislative amendment.

(Ed: the CCG's Terms of Reference were reproduced in Communications Law Bulletin Vol 13 No 4; Paragraph references in the Executive Summary are to the body of the Report).

## **recommendation 1: a new right of transmission to the public**

A technology neutral, broad based right to authorise transmissions to the public should be introduced into the *Copyright Act 1968* ("the Act") (Paragraph 1.3).

The new transmission right should:

- cover the transmission of copyright material in intangible form to the public by any means or combination of means which is capable of being made perceivable or used by a receiving device;
- encompass the existing right to broadcast and replace and extend the right to transmit to subscribers to a diffusion service;
- remain separate from the existing public performance right;
- be given to all copyright owners, including owners of copyright in sound recordings and broadcasts.

## **recommendation 2: the right to broadcast**

The right to broadcast should be retained in *the Act* as part of the new transmission right. The definition of broadcast for this purpose should include all transmissions made by providers of broadcasting services under the *Broadcasting Services Act 1992*, or as part of a national broadcasting service of the ABC or SBS, but exclude other transmissions to the public such as on-demand services, interactive services and computer networking of material. The definition of broadcasting should be linked to the definition of broadcast services in the *Broadcasting Services Act 1992* and should be a specifically defined use of copyright material which falls within the scope of the right to transmit to the public. (Paragraph 1.3.2)

## **recommendation 3: the public**

A definition of "the public" should not be introduced into *the Act* and that term should remain subject to judicial interpretation. (Paragraph 1.3.3)

However, a new provision should be inserted in *the Act* to the effect that transmissions of copyright material by electronic or similar means which are made for a commercial purpose should be deemed to be transmissions to the public. (Paragraph 1.3.3)

## **recommendation 4: the diffusion right**

In view of recommendation 1 to introduce a right of transmission to the public, references to transmission to subscribers to a diffusion service should be deleted from *the Act*. In particular, section 26 should be repealed. (Paragraph 1.3.4)

## **recommendation 5: subsistence of copyright in broadcasts and other transmissions**

- (i) Reference to specific broadcasters and legislation in section 91 should be removed from *the Act*. The section should be amended to provide that copyright subsists in all broadcasts which are lawfully made from a place in Australia, and which are capable of being lawfully received by members of the public. (Paragraph 2.3)
- (ii) Section 99 of *the Act* should be amended to remove the reference to specific broadcasters and statutes and to provide that the owner of copyright in the broadcast is the person who makes the broadcast. Section 22(5) of *the Act*, which deals with who is the maker of the broadcast should be amended to provide that the maker of a broadcast is the person who is responsible for the content of the broadcast and also makes the arrangements necessary for its transmission. (Paragraph 2.3)
- (iii) Copyright protection should not be extended to transmissions other than broadcasts in the extended sense proposed in recommendation 2. (Paragraph 2.3)

## **recommendation 6: transmissions originating from Australia**

- (i) Where a transmission originates from Australia and is intended for reception by the public outside Australia, the maker of the transmission should be required to obtain the licence of the copyright owner in Australia to do so. (Paragraph 3.3)
- (ii) Broadcasts intended for reception by the public outside Australia but originating in Australia should be the subject of copyright protection in Australia. (Paragraph 3.3)

## **recommendation 7: transmissions intended for reception in Australia**

- (i) The CCG accepts the principle that where a transmission originates outside Australia but is intended for reception by the public in Australia the maker of the transmission should be required to obtain the licence of the owner of copyright in Australia. Given the international complexities of the issue, the CCG considers that the appropriate means of implementing such a right requires further examination. (Paragraph 3.3)
- (ii) The CCG recommends that broadcasts originating from countries outside Australia and which are intended for reception in Australia, should be the subject of copyright protection in Australia. (Paragraph 3.3)

## **recommendation 8: satellite broadcasts (section 22(6))**

- (i) The maker of a satellite broadcast (and therefore the owner of any copyright in the broadcast) should be the person responsible for the content of the service, as is the case for other broadcasts. Section 22(5) of *the Act* specifies who is the maker of a broadcast. The section should be amended as set out in recommendations 5(ii) above, and reference to the maker of a satellite broadcast should be removed from section 22(6). (Paragraph 3.5)
- (ii) Section 22(6) of *the Act* should be reworded to provide that the place from which a satellite broadcast is made is the place from which the signals carrying the broadcast are transmitted to the satellite. (Paragraph 3.5)

---

**recommendation 9:  
transmissions originating from  
a satellite**

---

A new section should be inserted in *the Act* which provides that transmissions originating from a satellite which are directly and lawfully receivable by the public in Australia and intended for reception by that public should be deemed to be made from Australia and therefore protected as broadcasts in which copyright subsists. (Paragraph 3.7)

---

**recommendation 10:  
retransmission of broadcasts**

---

Section 199(4) of *the Act* should be replaced with a section which allows for retransmission by any means of a broadcast (in the extended sense suggested in recommendation 2) only in the following circumstances:

- (i) where the retransmission takes place within the intended reception area of the primary broadcast; and
- (ii) where the retransmission is simultaneous with the primary broadcast; and
- (iii) where the content of the primary broadcast is not altered in any way in the retransmission; and
- (iv) the retransmission is for the purpose of enabling reception of the primary broadcast in areas where the signal quality of that broadcast is inadequate.

Consequent amendments will be required to section 199(5), (6) and (7) of *the Act*. (Paragraph 4.2) The CCG has also recommended complementary amendments to section 212 of the *Broadcasting Services Act 1992*. (See recommendation 16).

---

**recommendation 11:  
rebroadcast of broadcasts  
(section 25(3))**

---

Retransmissions of broadcasts should be dealt with in a technology neutral manner. All retransmissions should be dealt with in a single section as set out in recommendation 10 and section 25(3) of *the Act* should be repealed.

---

**recommendation 12:  
unauthorised reception of  
transmissions**

---

Two new offences concerning unauthorised reception of transmissions should be enacted:

- fraudulent reception of transmissions;
- making, importing, selling, or letting

for hire unauthorised decoding devices.

The CCG notes that these offences may possibly be more appropriately included in Commonwealth Crimes legislation than *the Act*. (Paragraph 5.2)

A civil right of action against a person who makes, imports, sells or lets for hire unauthorised decoding devices should be introduced. (Paragraph 5.2) The civil right of action should:

- (i) vest in the person who charged a fee for the intercepted transmission, or for whose benefit such fees were collected, or the maker of any encrypted transmission;
- (ii) lie against any person who makes, imports, sells or lets for hire the unauthorised devices, and against any person who publishes information calculated to enable or assist any persons to receive services to which they are not entitled.

The same rights and remedies should be available against such persons as would lie against copyright infringers. (Paragraph 5.2)

---

**recommendation 13: incidental  
cable services where persons  
reside or sleep**

---

Section 26(3) of *the Act*, which permits the cable diffusion of copyright material in premises where persons reside or sleep, is inequitable in view of the commercial reasons for such exploitation. The provision should be repealed. (Paragraph 6.1)

---

# SBS: shuffling the broad and the narrow

---

Malcolm Long, Managing Director SBS Corporation,  
charts the new course

---

**A** great deal is being said about the rapid changes that are occurring in the communications business in Australia. Nowhere is change likely to be more rapid or more far-reaching than in broadcasting. It will put enormous pressure on existing broadcasters to devise strategies so they can survive and, indeed, prosper in the new audio-visual environment.

Change will come in a rush because Australian broadcasting has been protected from developments that have occurred almost everywhere else in the world in a rather more gradual way. There has been no

---

**recommendation 14:  
ephemeral copying**

---

The ephemeral copying provisions in *the Act* should operate for the benefit of all broadcasters, but at present, and pending further review, should not be extended to all transmissions to the public.

---

**recommendation 15: statutory  
licence for the use of sound  
recordings in broadcasts**

---

- (i) The scope of the statutory licence for the use of sound recordings by broadcasters in section 109 of *the Act* should apply only to broadcasts which are not offered in return for valuable consideration from the recipient of the broadcast.
- (ii) Further consideration should be given to whether the statutory licence for free-to-air broadcasters should continue to operate, and that this should take place as part of the wide ranging review of *the Act* which has been proposed by the Minister for Justice.

---

**recommendation 16: section  
212 of the Broadcasting  
Services Act 1992**

---

The operation of section 212 of the *Broadcasting Services Act 1992* should be narrowed to make it consistent with the circumstances in which retransmission is permitted as set out in recommendation 10. Section 212 should be amended to make it subject to the provisions of *the Act*. Retransmission outside the licence area of the primary broadcast should not be permitted without the permission of the copyright owner.

significant change in the shape of Australian television for more than 30 years, except for the creation of SBS.

There are a number of reasons for this. Firstly, the traditional broadcasting system in Australia with its mixed economy of healthy public and private operators has served the audience well, with a fairly high degree of program innovation and diversity. As a result, there has been nervousness among regulators about admitting new players to the scene: the current balance of broadcasting forces might be destabilised, current commercial viabilities could be threatened. Hence, new services like Pay TV were put on the back burner.

Secondly, Australia, because of its geographical position tucked away outside the footprints of most of the world's communications satellites was naturally protected from the growing impact elsewhere of satellite delivered trans-national broadcasting.

All this is about to change.

---

### the context of change

---

**T**he growing sophistication and fragmentation of broadcast audiences, together with the developing complexity of the cultural mix in our society, means existing Australian broadcasting outlets will increasingly be unable to satisfy the myriad of needs, tastes and lifestyles that characterise our more and more demanding viewers and listeners. In addition, the arrival over the next eighteen months of a range of foreign satellites with footprints covering Australian homes will dictate that either the Australian broadcasting system develops new services or viewers will be tempted to tool up to watch direct-to-home services provided by operators off-shore.

SBS is Australia's youngest broadcaster with a specific, focussed charter to serve the special needs of the nation's different cultural communities - to reflect our growing multiculturalism to all Australians; and, thereby, to add diversity to the broadcasting system. I believe SBS has not only been a very valuable component of the existing broadcasting scene but that it is also well placed to respond effectively to the changes that are almost upon us.

There are three crucial areas of concern for any broadcaster managing change: audiences; the people who acquire and make our programs; and technology.

---

### managing for audiences

---

**A**ustralian broadcasting audiences are restless. In television they are watching an increasing number of hours each week, now (on average) more than 22 hours per person. But at the same time, surveys show that the overall satisfaction level of audiences is low. Last year, a national survey by AMR: Quantum found that the television industry was one of the worst performers in the customer satisfaction stakes, ranking with banks and used car dealers. Australians also hire almost five million videos a week, presumably because they can't get what they want on over the air TV.

The increasing demands of audiences will force Australian broadcasters to follow the logic that has governed broadcasting developments internationally - a move away from broad or mixed services towards

narrower, streamed services targeted on a particular aspect or niche in audience interests and tastes. Audiences are demanding more programs, with more quality, more consistently delivered to them according to their tastes, interests and viewing moods.

Now SBS, already something of a niche or special interest broadcaster, has already benefited from these trends. The cumulative audience for SBS TV in the nine major cities has grown by an average of 30% each year over the past ten years and the reach of the channel is now three times what it was in 1984.

But we need to respond further to audience changes, and to that end we have been undertaking a fundamental review of our schedule. In the evenings we are streaming our programs more to assist the audience to access that station. For example, late last year we began to broadcast movies at 9.30 - every evening, seven days a week. We are doing the same with documentary programs every weeknight. The audience response has been encouraging, reflecting our view that audiences want more consistency of output from day to day.

---

### targeted & specialised services

---

**B**ut audiences are also keen for more targeted and specialised services. SBS is responding to this need in two ways. First we have developed our services on our free-to-air network.

In radio, over the years we have expanded the number of languages in which we broadcast. We now present regular services in more than sixty languages, responding to new audiences as Australia's multiculturalism develops.

A year ago SBS TV broadcast for about eight hours each day. We now broadcast more than eighteen hours of programs. In the mornings we broadcast a set of niche services which is unique. Our developing *Worldwatch* program presents major daily news bulletins from some of the most respected broadcasting organisations in the world, in Italian, Greek, Cantonese, Mandarin, French, German and Russian. A Polish news round-up is broadcast weekly and an Arabic service is currently being planned.

Each weekday afternoon, SBS TV now broadcasts a range of educational programs in association with 12 Australian universities. The Professional and Graduate Education Consortium makes teaching programs in each university's own production centre aimed at practical skills enhancement using simple to-camera

instruction.

These program initiatives are examples of how SBS is responding, on its existing services, to the new audience environment. However, in television there is obviously a limit to the degree to which emerging audience needs can be met on our existing networks.

---

### future delivery

---

**F**or this reason, SBS TV is keen to enter the Pay TV arena. Our plans include: the provision of non-English language television services to Australia's leading non-English language cultural communities through the SBS subsidiary company, Multilingual Subscriber Television Ltd; the extension of our education programming to Pay TV, providing a range of skills development services; and, the supply of programs and program services to the Pay TV industry in developing niche program formats and offering comprehensive sub-titling and re-versioning services.

In radio we have recently seen the extension of SBS Radio to capital cities beyond Sydney and Melbourne, broadcasting in more than fifty languages to cultural communities in those Cities. Mid-year a second SBS Radio frequency will open, on the FM Band in Sydney and Melbourne, so that SBS Radio can serve its audiences there with more programming, and more consistently.

This initiative will also be followed by the introduction of some English language international news and analysis programs on SBS Radio so that existing listeners and we hope a healthy, new audience of English only speakers can hear on SBS Radio the kind of quality, world news reporting that SBS TV has presented so effectively for many years.

In both radio and television, SBS is also an active participant in the planning for digital over-the-air services.

---

### managing people

---

**N**ew service developments at SBS are only possible because of the quality and energy of our people - in the in-house staff and external contributors who acquire, and make our programs and those who support them. In order to enhance our performance in the face of our many-sided charter, SBS has been developing our corporate culture in a number of ways.

We have been working for some months on a new positioning statement which will define as clearly and as simply as possible the essence of SBS's role in the audience environment we now face. This statement

will both feed into our internal corporate planning processes and will also form the basis of a major publicity and promotional campaign which will occur mid-year.

In March this year, SBS moved out from under the purview of the *Public Service Act* in the matter of staffing and employees' terms and conditions. We now stand on our own in this regard. This is a very significant move but I believe an absolutely necessary one if the corporation is to develop, with its staff, a working culture which effectively responds to the unique position SBS plays in the fast moving and demanding broadcasting environment.

---

### advertising, sponsorship and the commercial environment

---

**T**he uniqueness of SBS is reflected in its advertising and sponsorship activities. These activities have had an impact on our culture and that of some of our colleagues in the industry. For the first time in the Australian television industry SBS is a TV broadcaster which carries commercials while deliberately setting out to service different audiences at different times in its output. This niche approach sits uneasily in the traditional culture of commercial television advertising.

For all of its life before SBS, Australian commercial television has been primarily the outlet for retail-style advertising to mass audiences. Targeted advertising was done in other media. Advertising was also skewed to the anglo audience. SBS Marketing has been working to change this culture among our advertising colleagues with growing success. More than 150 manufacturers and service providers have now seen benefits in taking advertising and sponsorship with SBS, and our marketing seminars on the good business sense of taking account of the multi-ethnic character of our community have been influential.

Like so many other public sector enterprises, we are also learning within SBS how to live in a corporate culture that must combine public service with a commercial ethos. This has been difficult, indeed painful, for some. However, success stories are now beginning to emerge. For example, our SBS Linguistic Services Unit is increasingly revealing itself as a highly motivated group which can achieve its charter driven sub-titling tasks while also developing an impressive range of new activities in the marketplace.

As a small, flexible broadcaster it is also important that SBS be able to draw effectively on a range of non-staff producers and facilities houses to support its broadcasting. We must be able to capture for TV more of the considerable talent that exists in the Australian independent production sector. To this end a special unit

called SBS Independent has been established to develop out-of-house product. More interaction between in-house activity and providers from outside will be an important development at SBS which will need to be carefully nurtured.

The move by the bulk of SBS in-house staff to new purpose built headquarters in the suburb of Artarmon in Sydney has also had a significant impact on the culture of the organisation. Here for the first time SBS Radio and Television are under the same roof in a building designed to encourage and support interaction between different groups.

---

### managing technology

---

**T**he management of plant and technology is crucial in planning for survival in the tumultuous years ahead for broadcasters. I draw on my current role at SBS and experience at the ABC.

The impact of new plant and technology on staff can have a significantly bad effect on organisational culture. As such, at least as much planning needs to go into the preparation and training of staff headed for new plant and equipment as goes into the construction and installation of the facilities themselves. Careful human resources planning, using your best managers, will be repaid handsomely on the fateful day when your services are due to originate in a new way from a new place.

On the other hand, I am constantly impressed by the potential of new plant and facilities to support cultural changes within an organisation, especially in the area of work practices. It is extraordinary how many often ineffective or outdated work practices relate to labels on work spaces or to particular pieces of technology. In the ABC Ultimo Centre, for example, there are no spaces labelled "control room" in the transmission suites. Nor are there pieces of equipment that are clearly either "presentation" or "control" consoles. The touch screen digital consoles installed in the building are able to be configured in either,

or both, modes. This approach gave considerable freedom to management and staff to plan new ways of making radio.

New technology often depends on the development of a kind of critical mass of penetration into the community. I understand marketing experts say that a penetration of about 5% in the general population in necessary before a new technology has a real chance of feeding off itself and "taking off". Certainly there can be pockets of resistance to new technology that are difficult to budge. Generation-based technological phobia has previously hindered people from switching from the AM to the FM band.

Contemporary broadcast managers have to transcend the temptation to "leave the technology to the engineers". I do not think it is possible to be an effective, audience-responsive manager of broadcast services these days without maintaining some level of knowledge of what is happening technically, especially with transmission technologies. Engineering expertise will, of course, always be crucial in broadcasting organisations, but provision of services to audiences - the customers - is so intimately related these days to what is possible technically, that the once fashionable general management attitude of gross technical ignorance is not credible.

---

### conclusion

---

**A**s we, at SBS, confront the issue of managing responding to change in audience needs; as we develop the cultures within our organisation; and, as we cope with the developments in technology we are strengthened by our belief that our role as the national, multi-cultural broadcaster is an important one which will endure as we enter an exciting new era in Australian broadcasting.

*This is an edited transcript of an address entitled "New Services & Cultures - Organisations, Strategies & Tactics" delivered at ATUG '94.*

---

# the new rights of copyright

---

## Sue Gilchrist outlines the proposed moral rights legislation

### discussion paper

---

**I**n June 1994, the Federal Government published a Discussion Paper on "Proposed Moral Rights Legislation for Copyright Creators", setting out the options for significant amendments to the *Copyright Act 1968 (Cth)* to achieve

recognition and enforcement of moral rights of creators of literary, artistic and other works.

The Discussion Paper was prepared by officers in the Attorney-General's Department in consultation with officers in

the Department of Communications and the Arts and is one in a series of recent initiatives by the Federal Government aimed at amending the *Copyright Act*, both to enhance (and clarify) the copyright rights of creators and users of works, and to satisfy Australia's obligations under international conventions.

Other recent initiatives include the establishment of the Copyright Convergence Group in January 1994 (see Communications Law Bulletin Vol 13 No 4) and the various reviews by the Copyright Law Review Committee including its Report on Computer Software (Jun 1993) and its Report on Journalists' Copyright (1994) (see this issue).

---

### moral rights defined

---

**T**he recognition of the moral rights of an author of a work generally involves the recognition of two fundamental rights of an author: the right of attribution and the right of integrity.

The *right of attribution* is described in the Discussion Paper as the right to:

- be made known to the public as the creator of the work;
- prevent others from claiming authorship of the work;
- prevent others from wrongfully attributing to an author works that are not hers/his; and
- prevent others from wrongfully attributing to an author works that are unauthorised altered versions of her/his work.

The *right of integrity* is described in the Discussion Paper as the right to "object to:

- distortions and mutilations; or
- other modifications; or
- other derogatory action,

in relation to an author's work that prejudicially affect the author's honour or reputation.

As recognised by the Report, new technology such as the ability to digitally manipulate works (such as photographs and films) increases the scope and likelihood of alteration of works well beyond the contemplation of the original artist.

---

### Berne Convention

---

**O**ne of the major factors which will determine the nature of any legislative recognition of moral rights is Article 6 bis of the Berne Convention for the Protection of Literary and Artistic Works, to which Australia is bound.

The Discussion Paper succinctly summarises the obligations under article 6 bis as follows:

- moral rights must be independent of the economic rights;
- the two rights to be protected are those of attribution and integrity;
- the right of attribution may be limited to the positive aspect of attribution;
- the right to prevent distortions or mutilations is subject to a condition of prejudice to the author's honour or reputation; and
- the rights should be protected for the life of the author and, following this, at least one of the rights should be protected until the end of the economic rights, namely, 50 years later.

However, the Berne Convention provides no guidance on a number of issues of significant practical importance both to creators of copyright works and users of copyright works, in particular, the ability to deal in copyright works in which moral rights exist, for example, by assignment, licence or waiver.

---

### current position

---

**T**he Discussion Paper sets out a useful review of the current protection under Australian law of moral rights - such which exists on an adhoc and limited basis. An author must rely on limited provisions in the *Copyright Act* or in special circumstances may be able to rely on contractual rights, defamation, passing off or section 52 of the *Trade Practices Act 1974 (Cth)* or its equivalents in the State and Territory Fair Trading Acts.

The Paper also briefly reviews recent developments in moral rights legislation in the UK, US and Canada.

The Discussion Paper considers in detail the Copyright Law Review Committee's 1988 Report on moral rights. The majority of the members of the CLRC recommended against the introduction of moral rights legislation at that time.

From the Discussion Paper's consideration of the many other reviews and submissions to the Government on moral rights, it is clear that there has been a ground swell of interest in, and support for, legislative recognition of moral rights in Australia.

---

### proposed amendments

---

**T**he Report proposes that the Copyright Act be amended to recognise the rights of attribution and integrity, for the following types of creators:

- author of a literary or dramatic work;

- author of an artistic work;
- composer of a musical work; and
- the director or producer (or both) of a cinematograph film.

The right of attribution would include the right to be identified whenever the work is reproduced (or otherwise published, broadcast etc); and the right to be identified in respect of any adaptation of the work.

The right of integrity would consist of the right to prevent the work being the subject of "derogatory treatment" - defined to mean "any material distortion, mutilation or alteration to a work or an adaptation of the work that is unreasonable and is prejudicial to the honour or reputation of the author".

---

### qualifications

---

**T**he Report proposes that the attribution right should exist only when it is "reasonable in all the circumstances." Similarly, the right of integrity will only be protected where the treatment of the work is derogatory (as defined above).

One example given by the Report of where it would be reasonable to recognise the right of attribution is where an author's work is included in a database which can be accessed by individual users at a computer terminal and printer. An example given of where attribution would be unreasonable is where a part of a film is reused in an incidental way in another film. However, the right of the creator in that case may be protected by copyright.

A useful example given of a derogatory use of an artistic work is the use of the work in association with a product or service that would offend against the known views of the artist.

Although the Report sets out a number of factors to be taken into account and gives examples in an attempt to illustrate the application of the "reasonableness" and "derogatory" tests, these tests will clearly be difficult to apply. This will result in uncertainty as to the existence of the moral rights and as to their scope (particularly in the short term before judicial consideration).

Recognition that industry practice and all the circumstances of creation of the work should be considered does not greatly assist in achieving certainty and predictability.

Of particular practical significance is that the Report contemplates that works created during the course of employment may be subject to moral rights of the

employee. This could be the case even though the copyright vests in the employer.

### practical implications

*Dealing* - Under the reforms proposed by the Report, moral rights: cannot be assigned; and may be waived by instrument in writing signed by the author.

*Infringement* proceedings may be taken by the author only (or her/his legal representative upon the author's death or mental illness).

A person who deals in a work the subject of moral rights (for example a publisher) may infringe those rights by use of the work where she/he has actual or constructive knowledge that the person from whom she/he received the work has infringed the creator's moral rights (for example, by modifying the work).

Remedies for infringement would comprise the full range of remedies including damages, injunctions and declaratory relief. Infringement proceedings would be heard by the Federal Court or State Supreme Courts (rather than the Copyright Tribunal).

### comment

The introduction of the proposed moral rights scheme will have significant implications not only for creators of copyright works but for those who commercially deal in copyright works, from publishers and broadcasters to gallery owners and multi-media producers.

Although moral rights by their very nature are not economic rights, their recognition will have a significant effect upon the ability of both the artist and others to utilise the economic potential of their works. It is in the interests of both creators and users of works that the existence and scope of moral rights can be determined with some degree of certainty.

All those in the business of creating and dealing in copyright works should closely consider the Report's proposed legislative scheme. The Government's review will certainly benefit from input from creators and industry participants and groups on the likely practical and economic implications of the proposed scheme.

All interested parties should forward submissions and comments to the Attorney-General's Department (Telephone (06) 250 6325, Facsimile (06) 250 5929).

Sue Gilchrist, Freehill Hollingdale & Page (Sydney)

# And the winner is...

Catherine McGill discusses the protection of Olympic symbols, Sydney 2000 logos and names

The announcement on 23 September 1993 by Juan Antonio Samaranch that Sydney would hold the Year 2000 Olympic Games saw a flurry of activity by entrepreneurs to register trade marks, company and business names in an endeavour to cash in on the goodwill attaching to the Olympic symbols, Sydney 2000 logos and names.

The Sydney Organising Committee for the Olympic Games (SOCOG), the Australian Olympic Committee Incorporated (AOC) and the International Olympic Committee (IOC) have moved quickly to protect their intellectual property rights and have given a strong indication that persons hoping to exploit goodwill attaching to those rights do so at their own risk.

This article examines the substantial rights which exist under statute and

common law for the protection of Olympic related intellectual property and notes some recent proposals to extend protection.

### Olympic Insignia Protection Act 1987

The *Olympic Insignia Protection Act (Cth) 1987* enables the AOC, or the Australian Olympic Federation (AOF) as it was then known, to control the use within Australia of the Olympic Symbol (the five inter-locking rings), the terms "Olympic" and "Olympiad", the Olympic motto "Citius, Altius, Fortius" and other nominated Olympic designs including the koala-styled mascot and various other designs.

The AOC has been permitted by the IOC to exercise the above rights in Australia and the IOC has allowed the Olympic



symbol to be licensed provided that it is compensated by way of royalty payments.

The Act's purpose is to assist the collection of funds to finance Australian participation in the Olympic Games through the licensing by the AOC of certain designs including the Olympic Symbol. In order to clarify the issue of ownership of copyright in the Olympic Symbol the Act vests ownership of copyright in the Symbol in the AOC. The Act also provides that the AOC is the owner of certain protected designs which were registered for a period of 12 years under the Act as registered Olympic designs. The design protection provided by the Act is similar to that provided under the Designs Act 1906 and enables the AOC (or its licensees) to take legal action to prevent the unlicensed use of the designs or to prohibit the importation of articles bearing the designs.

### **Olympic Insignia Protection Amendment Act 1994**

**T**he *Olympic Insignia Protection Amendment Act 1994* widens the protection afforded to Olympic related designs and words. The amendments provide a mechanism for the protection of the Olympic Torch and Flame Designs for a limited time around each Olympic Games by way of the protected designs provisions of the *Olympic Insignia Protection Act*. Registration of trade marks that contain or consist of the English version of the Olympic motto "Faster, Higher, Stronger" are prohibited in the same manner as those that contain or consist of the motto "Citius, Altius, Fortius".

### **Copyright Act, Trade Practices Act and Passing Off**

**C**urrently, an action for infringement of copyright can be taken by SOCOG or AOC in relation to reproductions of the Sydney 2000 Bid Flash Logo. Sections 52 and 53 of the *Trade Practices Act 1974* and corresponding State Fair Trading legislation may also be used to prevent use of the Flash Logo, "Sydney 2000" and associated words where such conduct is misleading or deceptive or falsely represents that a business or its goods or services has some association with or approval from SOCOG or AOC.

In addition, the common law tort of passing off may be used by SOCOG or AOC in order to stop traders passing off their goods and/or their businesses as in some way being sponsored or approved by or otherwise connected with the Olympics.

### **Trade Mark Protection**

**T**rade mark applications in each of the 42 classes of the International Classification System have been lodged by SOCOG to protect the Flash Logo and the composite Bid logo containing the Flash logo, the words "Sydney 2000" and the slogan "Share the Spirit". Upon registration SOCOG will acquire proprietary rights under the *Trade Marks Act 1955* to use these names and logos and will be entitled to take proceedings for infringement.

### **Business and Company Names**

**O**n 27 April this year, the Premier of NSW announced that the use of business names associated with the Sydney Olympics or the Paralympics will be restricted by Federal, State and Territory Governments. In NSW, under new Ministerial directions and guidelines to be issued under the *Business Names Act 1962*, words and phrases such as "Olympic", "Olympian", "Paralympic", "Olympiad", "Share the Spirit", "Gold", "Summer Games" and "Millennium Games" will be unacceptable for registration without the consent of the Minister for Consumer Affairs. It is proposed that the changes will remain in force until the end of the Sydney 2000 Games. The Premier has indicated that similar regulations will be introduced by all governments to protect the sponsorship revenue for the Games and in an endeavour to prevent harm to Australia's reputation.

It has been reported that the NSW Department for Consumer Affairs has deferred or frozen approximately 240 applications to register business names using terms such as "Olympic", "Sydney 2000" and "Games City" and that the applications are now likely to be refused. It is likely that if the applications are not refused the use of them will be challenged by SOCOG on other grounds such as possible breaches of sections 52 and 53 of the *Trade Practices Act* as referred to above.

Further, recent amendments to the Corporations Law Regulations require Ministerial permission for the reservation or registration of company names that suggest a link with the Sydney Olympics or the Paralympics. Names containing the words "Olympic", "Paralympic" and their derivatives suggesting a connection with the Sydney Games will not be permitted to be registered unless the applicant has obtained a certificate from SOCOG to the effect that there is an official connection between the company and the Games.

The NSW State Government is also considering enacting further legislation to protect Olympic related intellectual property.

*Catherine McGill is a solicitor with Blake Dawson Waldron.*

# In the prurient interest

## **Max Bonnell reports on the Burswood Casino's attempt to injunct "Real Life"**

**T**he proprietors of Burswood Casino in Perth have failed to obtain an injunction to prevent Channel Seven's current (Ed. "public") affairs flagship *Real Life* from televising video footage of its patrons taken by the casino's own security cameras.

Although the cameras were installed for security purposes, it came to *Real Life's* attention that some members of the casino's staff had used the cameras for an unauthorised voyeuristic purpose. The footage that *Real Life* obtained and broadcast focussed upon the cleavage and underwear of several female patrons.

### **issues**

**T**he injunction was sought in the Federal Court on the grounds that the proposed broadcast would amount to a breach of privacy and that the videotape had been obtained by Seven without the consent of the casino proprietors. [Ed.: other grounds argued - copyright, breach of confidence and "public interest"]

French J said that the primary issue was whether the casino patrons had an interest in the material being broadcast, and concluded that the patrons' interests did not require that an injunction be granted. No written judgment had been delivered at the time of writing. The videotape was broadcast by *Real Life* in the first week of July.

The application contained echoes of the *Whiskisoda* case heard in Melbourne last year, in which the Victorian Supreme Court refused to grant an injunction restraining *Real Life* from broadcasting footage taped by a hidden camera in a striptease show (see Communications Law Bulletin Vol. 13 No. 4). Together, the two cases emphasise the difficulty of obtaining an injunction preventing a broadcast on the ground that the footage may have been filmed or obtained without the consent of the subjects.

It is clear that, even in those circumstances, courts will require something more before an injunction will be

granted - in particular, convincing evidence that damages would not be an adequate remedy for the applicant if the broadcast were to proceed (the Casino's argument that the broadcast would deter potential patrons from visiting the casino was insufficiently strong). Nor is the fact that privacy may be threatened by the proposed broadcast a sufficient ground for the granting of an injunction unless, perhaps, the broadcast would breach a recognised duty of confidentiality owed by the broadcaster.

---

### public interest

---

**A**lso reminiscent of *Whiskisoda* was Seven's insistence that its proposed broadcast of the footage was in the public interest. According to at least one newspaper report of the hearing, French J accepted Seven's argument, saying that the broadcast was in the public interest because it would inform people of the improper use made of security cameras. Obviously, Justice French's written judgment will be eagerly awaited.

The definition of the term "in the public interest" is elusive. It does not mean merely "of interest to the public", but undoubtedly carries a connotation, however vague, that the public is entitled to read or see and will benefit from reading or seeing, the matters to be published or broadcast. Seven maintained that the public was entitled to know that the casino's security system had been abused and that it was in the public interest that this be exposed.

Maybe so. But, of course, it would have been possible to convey that information without beaming cleavages into the country's living rooms. Evidence was given

that the footage obtained by *Real Life* was between four and eight years old. No doubt the footage was titillating to some, and may have had a certain historical fascination for students of voyeurism. It is difficult to see how its being broadcast would have benefited anyone else or added anything of value to the store of human knowledge. Seven's argument drew an inadequate distinction between a message which might be in the public interest and a medium - the casino footage - that arguably was not.

In similar cases, such as *Whiskisoda*, the issue of "public interest" has often been treated as irrelevant (except in defamation cases) in which a publisher who faces an injunction application will often need to show that it will be able to rely upon a defence containing an element of public interest.

---

### comment

---

**I**t is hoped that the judgment of French J will not encourage broadcasters to continue to argue that material with essentially prurient appeal should be broadcast in the public interest. *Real Life's* invocation of the public interest amounts to an argument that in order to show a piece that informs the public that someone has acted in a way that is degrading to women, it's necessary to show pictures of cleavage.

It might be less contorted, and more honest, simply to say that without the pictures, there's no entertainment. But that could imply that the only difference between *Real Life's* broadcast and the conduct of the casino camera operator is the difference between self-righteous indignation and a smirk.

*Max Bonnell is a solicitor at Allen Allen & Hemsley.*

After entering Mr Nimmo's front garden Mr Wilkinson said to Mr Nimmo: "We've been trying to find out why you refuse to do what the Family Court says"; and "Why did you transfer all your assets across to your wife?".

Magistrate Ward found that Mr Wilkinson was directed to leave the property on no less than nine occasions and yet did not leave the property after any of those directions. Mr Wilkinson's explanation as paraphrased by Magistrate Ward was that he felt he could convince Mr Nimmo to change his mind and speak to him, and that he believed interviewing Mr Nimmo was in the public interest. Magistrate Ward, apparently unimpressed by the public interest argument, commented:

"Another excuse is the hoary old perennial: it's in the public interest. It may well be in the interest of the TV station's ratings, to cater for the morons of this world who enjoy the spectacle of the discomfort of those branded by the TV executives as wrongdoers, and in the privacy of their own home to boot! It cannot be in the public interest that such gutter journalism be the means by which alleged wrongdoers are brought to justice. We might as well scrap the courts, repeal the laws and leave it to the television stations to control the country.

The plain fact is that the defendant had no right to be where he was. He knew he was committing a civil trespass at least. Once he was told to leave, and declined to do so he committed a criminal trespass. He had no excuse for remaining - no reasonable excuse, that is".

There may be some people in the media who will be less than satisfied with this decision and will argue that it is against the public interest. However, from the point of view of the writer it is difficult to see a logical basis for excepting journalists from the consequences of laws relating to trespass.

---

### defamation - Evans v Fairfax appeal

---

**I**n August 1993 the Federal Court heard an appeal by the plaintiff in the matter of *Graham Charles Evans v John Fairfax & Sons Limited and Allan Ramsey and John Alexander*.

The appeal was from the decision of Justice Higgins of the ACT Supreme Court delivered on 12 February 1993 (discussed in Vol. 13 No. 3 of the CLB). In the Supreme Court the plaintiff had argued his case on the basis that the defamatory imputations alleged to have been conveyed by an article titled "Cosy in the Corridors of Power" appearing in the *Sydney Morning Herald* on 14 April 1990 were conveyed from the

---

## Recent ACT decisions

---

### Noel Greenslade provides a round-up

---

---

#### criminal trespass - it's in the public interest!

---

**P**eter Wilkinson, an investigative reporter for the programme *A Current Affair*, was convicted by Magistrate Ward on a charge of contravening section 11(2)(c) of the *Public Order (Protection of Persons and Property) Act 1971 (Cth)*.

The relevant provision of the Act reads "A person who being in or on premises in a Territory, refuses or neglects, without reasonable excuse, to leave those premises on being directed to do so by the occupier

or by a person acting with the authority of occupier; is guilty of an offence." Commonwealth premises are expressly excluded from the operation of this section.

On 3 October 1992 Mr Wilkinson confronted Mr Stephen Nimmo in the front garden of his property and attempted to interview him as part of *A Current Affair's* program on alleged maintenance dodgers entitled "Deadbeat Dads". Two weeks previously Mr Nimmo's solicitors had written to Mr Wilkinson's employer and that letter in part read: "We are instructed that Mr Nimmo does not wish to be interviewed by you ... we wish to make it clear that Mr Nimmo does not wish to speak to you".

natural and ordinary meaning of the words used and chose not to rely on true innuendo meanings.

The plaintiff who had been Principal Private Secretary to Prime Minister Hawke following the 1983 Election, and later Secretary of the Department of Primary Industry and Energy alleged that the article conveyed imputations that:

- the plaintiff's career advancement in the Commonwealth Public Service was only the result of the patronage from the Prime Minister;
- the plaintiff, in his capacity as Secretary of the Department of Primary Industry and Energy, lacked the confidence of his Minister, Mr John Kerin;
- the plaintiff was a person whose successful career in the public service was due more to his enjoyment of a nasty system of patronage than to anything else;
- the plaintiff was prepared to advance his career through cronyism rather than on the merits of the performance of his duties.

In his reasons for decision of 12 February 1993 Justice Higgins found that none of the imputations pleaded arose from the article in its natural and ordinary meaning as they were not imputations that would have been conveyed to the ordinary reasonable reader. However, Justice Higgins found that defamatory imputations may have been conveyed to public servants, and that the article had lessened the plaintiff's reputation amongst his colleagues.

His Honour held that had any of the pleaded defamatory imputations been made out he would have awarded \$25,000 for hurt to feelings, \$30,000 for damage to reputation within the Public Service, and \$15,000 for aggravated damages. Justice Higgins ordered that there should be no order as to costs because of the defendant's failure to respond reasonably to the plaintiff's letter of demand and complaint by not publishing a timely correction.

The plaintiff appealed from the decision and by reasons for judgment dated 27 May

1994 the Federal Court constituted by Neaves, Miles and French JJ dismissed the appeal but overturned the order of Higgins J that there should be no order as to the costs of the proceedings in the Supreme Court, and ordered the plaintiff to pay the defendants' costs of the Supreme Court proceedings and the Federal Court appeal.

The Court discussed the need, when deciding whether an imputation arises from the matter complained of in its natural and ordinary meaning, to approach the question from the stand point of the ordinary reader and cited with approval statements of Mason J in *Mirror Newspapers Limited v Harrison* that:

"A distinction needs to be drawn between the reader's understanding of what the newspaper is saying and judgments or conclusions which he may reach as a result of his own beliefs and prejudices. It is one thing to say that a statement is capable of bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience of human affairs in order to reach that result. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff. The defamatory quality of the published material is to be determined by the first, not by the second, proposition. Its importance for present purposes is that it focuses attention on what is conveyed by the published material in the mind of the ordinary reasonable reader."

Their Honours commented that: "Although the ordinary reader is not suspicious of mind by nature, nor avid for scandal, the language of the publication as a whole may excite suspicion in the mind of that reader. Where that is so, the reader is the more likely to read between the lines and take the matter complained of to convey a meaning which causes the reader to think less of the plaintiff."

Further, the Court approved a statement from Mason J in *Mirror Newspapers Ltd v Harrison* to the effect that where a person publishes words that are imprecise, ambiguous, loose, or unusual and there is room for a wide variation of reasonable opinion on what the words mean, then they cannot complain if they are reasonably understood as having said something that they did not mean.

Their Honours found that the title of the article brought to it a degree of imprecision, ambiguity or looseness of the kind to which Mason J was referring and found that:

- "The ordinary reasonable reader was invited to draw the conclusion the Prime

Minister did not treat merit as the sole criterion for the bestowal of praise,;

- The reader is invited to conclude that an element in the selection (of ex-members of the Prime Minister's Staff to senior public service positions) was the influence of the Prime Minister or of the successive holders, identified in the article, of the office of the Secretary to the Department of the Prime Minister and Cabinet.;
- The article would convey to the ordinary reasonable reader that the relevant procedures had been manipulated in an undesirable, even in an improper though unidentified, manner so as to ensure that the careers of officers who had served on the Prime Minister's personal staff were advanced.;
- The appellant was identified in the article as one of the group who had been beneficiaries of the system, and that he was said to have benefited on three occasions by his appointment to senior public service positions;
- That the statement in the article that the appellant and Mr Kerin did not 'get on' implied that there were personal differences between them which led to difficulties and stresses within their relationship, but that blame for this situation was not attributed to one man or another and that no reasonable reader was likely to think less of the appellant in this regard.

However, their Honours also found:

- That whilst the article did convey the imputation that the appellant did not get on with his Minister the ordinary and reasonable reader "...would not take the further step of inferring that the stress in the relationship, the failure to 'get on', was due to the Minister lacking confidence in the appellant's ability to perform the duties of the office or in the appellant's integrity.;" and
  - That whilst "There is little difficulty in seeing that the reader would have read the article to mean that the appellant had achieved success in his Public Service career and that patronage had occurred with respect to appointments at a senior level within the Public Service during the time of his career. There is not much difficulty in seeing further that the article meant to the reader that this element of patronage had been 'enjoyed' by the appellant, to the extent that he was the recipient of its benefits", and that the imputation that the system of patronage was "nasty" was made out.
- However, the ultimate question relating to this imputation was whether the reader would take the article to mean

## IN THE NEXT ISSUE

Multimedia – what's all  
the racket

that the enjoyment of this type of patronage had contributed more than anything else to the appellant's success in his public service career.

The court held "...it is a considerable leap from an acknowledgment that the appellant served in the Prime Minister's Department and was well known to the Prime Minister to a conclusion that the appellant's success in his career was not justified by his experience and capacity. His service in the Prime Minister's Department would, in the expectation of the ordinary reader of this article, be as likely to give him positive and legitimate qualities for advancement as to make him the object of unjustified favours. His association with the Prime Minister would be seen as no less likely to lead to the Prime Minister recognising the appellant's capacity than it would be to entice the Prime Minister or others under his influence to arrange unmerited promotion of the appellant."

Accordingly none of the imputations pleaded were found to be made out.

The Court then considered the order of Higgins J that there should be no order as to costs because of the failure of the respondents to reply to a letter written on the appellant's behalf demanding an apology, and Justice Higgin's view that the statement in the publication that the appellant Mr Kerin "did not get on" was a lie and that it was necessary for the appellant to commence litigation in order to "nail the lie".

Their Honours held: "It is difficult to see why the possibility that a defendant might have taken a course which would have

avoided the litigation (the offering of an apology) should necessarily deprive the defendant of costs where the defendant is successful following a hearing on the merits as in the present case."

And further with words of encouragement to potential plaintiffs: "Since the decision in the Supreme Court, this Court has handed down its judgment in *Humphries v TWT Limited* (unreported, 3 December 1993). According to the judgment of the Court a correction of an error contained in a defamatory publication, or an apology, or a combination of both, does not vindicate the plaintiff's reputation in the same way or to the same extent as a judgment of a court in favour of a plaintiff. Hence a plaintiff does not have to rest content with a published apology, and an apology does not stand in the way of an award of substantial damages for injury to reputation or injury to feelings. The principle so stated runs contrary to the hypothesis presented in the present case that an apology may have avoided litigation." (*Ed.: of Carson*)

The Court held that Justice Higgins' decision not to award costs against the plaintiff was based on erroneous grounds and that no reason had been demonstrated why the ordinary rule of practice should not be applied and costs follow the event. Accordingly, the appellant was ordered to pay the costs of both the Supreme Court proceedings and the costs of the Federal Court Appeal.

*Noel Greenslade is a solicitor with Minter Ellison Morris Fletcher in Canberra.*

## Evidence from tapping beyond the pale OK

**Grantly Brown examines the latest House of Lords case on telephone tapping and suggests the UK falls short of its international obligations**

**W**hen can telecommunication signals in the UK be said to be transmitted on a "public telecommunication system"? If a signal is not being transmitted on a "public telecommunication system" can it be intercepted by police authorities? What use can be made by the authorities of those intercepted communications in subsequent criminal proceedings? These were just a few of the questions resolved in the House of Lords case of *R v Effik* ("*Effik*") in July 1994.

The legality of telephone tapping has become something of a fetish within the English legal system. Apart from numerous cases on the subject - including one before

the European Court of Human Rights (*Malone v UK* (1984)) - telephone tapping has been the subject of at least 5 governmental inquiries. Unfortunately, as we shall see, this latest case is unlikely to have brought an end to this inability of the English legal system and Government to come to grips with the UK's international human rights obligations in this area.

### the facts

**P**ut shortly, the facts are that two persons were convicted for conspiracy to supply heroin and cocaine. In the course of their investigations, the police recorded a

number of telephone conversations made by one of them, Effik, on a Greemarc cordless telephone. The telephone consisted of a base unit connected to a telephone socket in a house and a wireless transmitter/receiver handset which could be used as a mobile phone within a limited range of the base unit.

When the handset was used by Effik, police observers, in an adjoining dwelling, were able to intercept the transmissions between the handset and base station with a radiocommunications receiver and record the conversations.

The House of Lords found evidence led at the trial of these conversations "was a material contributory factor in the appellants' convictions."

The substance of the appellant's case was that the *UK Interception of Communications Act 1985* ("*the Act*") rendered evidence of the telephone conversations inadmissible.

Section 1 of the Act makes it an offence to intentionally intercept "a communication in the course of its transmission by ... means of a public telecommunications system" unless the Secretary of State has issued a warrant under section 2. Section 2 provides for the issue of a warrant where necessary for various purposes including the "preventing or detecting of serious crime". No warrant was obtained by the police in this case.

### issues

**I**n the earlier House of Lords case of *R v Preston and Ors* (1993) it was held that sections 2, 6 (which provides for the minimum possible disclosure of recorded conversations) and 9 (which prohibits the leading of evidence in a trial that "tends to suggest" an offence under s.1 has been committed or that a warrant under s. 2 has been issued) permitted use of telephone taps to prevent crime but did not permit use of taps for the prosecution of crime. Accordingly, material which was intercepted in the manner contemplated by the Act was inadmissible in criminal proceedings.

The crucial question in *Effik* was whether the Act applied to the tapping of these telephone conversations and this turned on whether the transmissions were by means of a "public telecommunications system". Section 10 of the Act provides that this expression has the same meaning as in the Telecommunications Act of 1984 ("*the Telecom Act*").

Section 4(1) of the *Telecom Act* describes a "telecommunications system" as a system "for the conveyance ... of - [amongst other things] speech." Section 4(2) provides that an "apparatus connected to but not comprised in a telecommunications system shall be regarded as a telecommunication system ..."

Subsection 4(4) provides that "a telecommunication system is connected to another telecommunication system ... if it is being used ... in conveying", amongst other

things, speech "which is to be or has been conveyed by means of that other system."

Under section 9(1) the Secretary of State may designate a system as a "public telecommunication system". British Telecom's system, which connected to the house from which the calls were made via a junction box in the building, was so designated under a 1984 Order.

Accordingly, the Greemarc phone used by Effik was a telecommunication system connected to but not comprised in British Telecom's public telecommunication system.

The appellants argued that it was impossible to separate the transmission from the point of origin through the public system to the transmitter on the base unit of the cordless phone. That is, that the process of emitting signals was so indivisible and continuous that without the (prior or subsequent) transmission to and from British Telecom's system those signals would not have been capable of reception.

---

### ruling

---

**T**he Court, however, rejected the notion that "by means of a public telecommunication system" meant "through the intermediate agency of" such a system. Instead, the Court took the view (which it conceded was "a rather artificial concept") that a transmission could be notionally split into "separate temporal sections" so that the expression "by the means of" looks to the point in time at which the interception takes place. Accordingly, where signals which have already passed (or are yet to pass) through a "public telecommunication system" are intercepted, those signals are not relevantly being transmitted "by means of" that public system.

In reaching this conclusion, the Court followed a similar conclusion reached in an unreported decision of the English Court of Appeal in March 1994 (*R v Ahmed*). Also considered significant was the fact that as it is possible to intercept communications at various stages of their transmission, including entry and physical interference with apparatus (ie "bugging") and, as the scope of the warrant the Secretary for State could issue could not be held to extend to authorising such activity, *the Act* must only be focusing on tapping of public systems.

The Court's opinion was reinforced by the view it took of the "limited purposes of the Act". These were:

- to protect the integrity of public, as opposed to private, systems;
- to provide for limited exceptions to that protection; and
- to ensure that material acquired by this tapping is not used other than for the legitimate purpose of the tapping (here, the prevention of crime).

Accordingly, the legislation was not designed to prevent eavesdropping or intrusion on the privacy of individuals or to provide for any general authorisation for tapping in private premises. The Court went on:

"And there is logic in this. The individual who connects his own private apparatus to the public system has means to protect that apparatus from interference. What he cannot protect himself from is interference with the public system without which his private apparatus is useless. Hence the necessity for statutory protection of that system."

Accordingly, the telephone taps were not covered by *the Act* and the evidence obtained was admissible.

---

### European Convention on Human Rights

---

**C**uriously, it does not appear to have been argued by the appellants that the Court should have paid regard to the UK's international obligations under the European Convention on Human Rights (1950) (*"the Convention"*) in determining which of the two contending interpretations to accept of s.1 of *the Act*.

Article 8 of *the Convention* provides that:-

- "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law" in pursuit of certain limited and specified objectives.

Article 8 had been held by the European Court of Human Rights to extend to interception of telecommunications in the 1978 *Klass* case.

That the UK's laws on tapping should be interpreted in a way consistent with the UK's obligations under *the Convention* had been raised in the UK case of *Malone v Metropolitan Police Commissioner (No.2)* in 1979 long before the passage of *the Act*. In that case the Court comprehensibly rejected the notion that police phone tapping was illegal under English common law. The Court also declined to pay any regard to *the Convention* because it was not "law" in the UK and the relevant legislation authorising the tapping had not been passed to give effect to the UK's obligations under *the Convention*. Sir Robert Megarry VC did state in that case though that:

"I ... find it impossible to see how English law could be said to satisfy the requirements of the Convention ... unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes ...

"... telephone tapping is a subject which cries out for legislation ..."

In 1980 the Home Secretary indicated in the House of Commons that the Government saw no need to introduce legislation following the 1979 *Malone* decision and Megarry VC's suggestion was to go unheeded until after *Malone* appealed to the European Court of Human Rights in 1984.

In that case the Court held that the phrase in "accordance with the law" in paragraph (2) of Article 8 of *the Convention* required "a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 ... [and that in relation to tapping] the law must indicate the scope of any such discretion conferred on competent authorities and the manner of its exercise with sufficient clarity ... to give the individual adequate protection against arbitrary interference ...". As the English law did not meet these requirements the Court unanimously found a breach of Article 8 had occurred.

Following this case and (yet another) White Paper on the *Interception of Communications in the United Kingdom* (1985), which heralded "a comprehensive framework for interception" to bring the UK's laws into line with *the Convention*, the Government finally introduced the *Interception of Communications Bill* into Parliament. The Home Secretary stated in his Second Reading speech that the Bill "fully meets our obligations under the European Convention on Human Rights."

It should be noted that section 5(b) of the *Wireless Telegraphy Act 1949* does supplement the provisions of the Act somewhat by providing that a warrant must be obtained by the authorities before using a radiocommunication apparatus "to obtain information as to the contents, sender or addressee of any message (whether sent by means of wireless telegraph or not)." But this legislation contains none of the detailed restrictions laid down in *the Act* on the tapping of "public telecommunication systems" or as required under *the Convention* generally. It is not clear whether police obtained a warrant under this legislation for use of the receiver in the *Effik* case.

---

### tapping OK

---

**U**nfortunately then for the people of the UK their rights under *the Convention* are not comprehensively protected by legislation. Public authorities have now been given the green light to intercept communications on private networks, cordless telephones (including cordless PABX's) and to "bug" telephones and use any material obtained in criminal proceedings without satisfying *the Convention* restrictions. These are very large exceptions to the scope of protection guaranteed by *the Convention*.

It seems therefore that further challenge to the European Court of Human Rights is likely and that additional legislation will be required.

*Grantly Brown is a Legal Consultant on communications law with the Hong Kong Government. The views expressed in this article are his own.*

## Associate Editors

**John Corker, Julie Eisenberg,  
Jane English, John Mackay  
Catherine McDonnell,  
Chris Woodforde,  
Editorial Assistant:  
Lynette Purser**

The Communications and Media Law Association is an independent organisation which acts as a forum for debate and welcomes the widest range of views. Such views as are expressed in the Communications Law Bulletin and at functions are the personal views of their authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

## Contributions & Comments

From the members and non-members of the Association in the form of features, articles, extracts, case notes etc. are appreciated. Members are also welcome to make suggestions on the content and format of the Bulletin.

*Contributions and comments should be forwarded to:*

**ANTHONY MRSNIK  
Editor  
Communications Law  
Bulletin  
C/- ABC Legal & Copyright  
Department  
ABC Ultimo Centre  
700 Harris Street  
ULTIMO NSW 2007**

## Contributions & Comments

New Zealand contributions and comments should be forwarded to:

**BRUCE SLANE  
Assistant Editor  
Communications Law  
Bulletin  
C/- P.O. Box 466  
Auckland 1  
New Zealand**

## Communications and Media Law Association

The Communications and Media Law Association was formed in 1976 and brings together a wide range of people interested in law and policy relating to communications and the media. The Association includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CAMLA members include:

- defamation
- contempt
- broadcasting
- privacy
- copyright
- censorship
- advertising
- film law
- telecommunications
- freedom of information

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys General, judges and members of government bodies such as the Australian Broadcasting Tribunal, Telecom, the Film Censorship Board, the Australian Film Commission and overseas experts.

CAMLA also publishes a regular journal covering communications law and policy issues – the Communications Law Bulletin.

The Association is also a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join the Communications and Media Law Association, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

To: **The Secretary, CAMLA, Box 545, Glebe, NSW 2037**  
Phone/Fax: **660 1645**

Name:.....

Address:.....

Telephone ..... Fax:..... DX: .....

Principal areas of interest:.....

I hereby apply for the category of membership ticked below, which includes a Communications Law Bulletin subscription, and enclose a cheque in favour of CAMLA for the annual fee indicated:

- Ordinary membership \$85.00
- Corporate membership \$350.00 (list names of individuals maximum of 5).
- Student membership \$25.00
- Subscription without membership \$85.00 (library subscribers may obtain extra copies for \$10.00 each).

Signature .....