COMMUNICATIONS LAW BULLETIN
The Official Publication of the Australasian Communications Law Association (ACLA)
ISSN 0705-9043 EDITED BY JOHN MANCY LLB Vol. 1 No. 3 October 1981

Future Regulation of Television

It is a daunting task to attempt to discuss the Future Regulation of Television, particularly in the longer term, because, among other things, it involves making judgements and assumptions about the future of television itself, which is futurologist's delight or nightmare depending on your point of view.

How quickly developments occur is, perhaps, well illustrated by the following comments made by the well known futurologist, Alvin Toffler, in 1975:

"What we call television is no more than a primitive pre-runner of video systems that could turn out to be the electronic spine of tomorrow's society. TV today is essentially an entertainment medium and, as such, peripheral to our lives. Tomorrow we might well base much of our economy and our political system on what we still anachronistically call "the tube"...

Right now television, in every country, is a tool used by "them" to influence "us". The "them" may be advertisers selling a product, politicians pushing a party line, or celebrities offering their views. But the messages flow only in one direction. Now imagine a system in which each of us becomes not merely a passive viewer, but also a sender — a system that permits each of us to communicate privately with others. Imagine, in short, a video equivalent of the lowly telephone".

This may have been regarded in 1975 as fantasy, Alice in Wonderland, but of course we are all aware that at least some of it has already come true in other parts of the world and is being discussed as a likely future reality in this country. Such developments have substantial regulatory implications — how should the new technologies be regulated in the public interest and what impact should their introduction have on the regulation of traditional services.

An extract from an address by Mr **DAVID JONES**, Chairman of the Australian Broadcasting Tribunal, to a FACTS seminar on The Future of Australian Commercial Television, on 21 September, 1981.

In order to discuss future regulation it is necessary to examine the principles upon which past and current regulation have been said to be based. Different sources reveal common themes.

In 1956 the former Post Master General, Mr. Davidson, said to Parliament:

"The conduct of a commercial television service is not to be considered as merely running a business for the sake of profit. Television stations are in a position to exercise a constant and cumulative effect on public taste and standards of conduct, and, because of the influence they can bring to bear on the community, the business interests of licensees must at all times be subordinated to the overriding principle that the possession of a licence is...a public trust for the benefit of all members of our society."

In April 1978 this theme was developed further by another Minister, Mr. A.A. Staley, when he said to Parliament, some 22 years later:

"In short, broadcasting is so powerful a social and communications instrument, so valuable a national resource, so crucial to the public interest, that no government can afford to ignore it. The problem for government of course, is the extent to which the system can, or should, be regulated. Where does sensible planning and policy implementation finish, and totalitarian control start? A basic premise accepted by most governments in free societies is that the electro-magnetic frequencies — or airwaves — used by broadcasting and in most forms of communications, are public property. That premise leads logically to an assumption that government must accept the role, and attendant responsibilities, of custodian of those airwaves for, and in, the public interest".

In November 1979, this underlying theme of public interest was stressed by the High Court in the **2HD case** when it said:

"From the elaborate provisions made by the Act in relation to the grant, renewal, revocation and suspension of licences, the limitation on the ownership of shares, the

Continued Page 18

In This Issue

Registered for postage as a publication, Category B. Printed by Beaver Press, 29 Alberta Street, Sydney 2000. Inquiries and contributions to: The Editor, Australasian Communications Law Bulletin, 1/167 Phillip Street, Sydney. 2000 (DX 423).

Future Regulation of Television

From Page 17

determination of program standards and the extensive role which it gives to the Tribunal in connection with these matters, we infer that it is the purpose of the Act to ensure that commercial broadcasting is conducted in the interests of the public."

Most recently, Mr. Justice McGregor (sitting as the AAT), when discussing the regulatory policy inherent in the Broadcasting and Television Act said:

"The holding of a radio or television licence is in its nature monopolistic, at least in a given area. There is potential for great profit and for the exercise of significant influence over manners, customs, education, political opinion and even morals of viewers."

As these statements illustrate Government regulation of television has been based on such principles as the scarcity of the resource, the influence that it can exert, the use of a public property and the overall need for the medium to be used responsibly in the public interest.

The greatest challenge for the regulator (whether it be government or statutory agency such as the Tribunal) in the future is to be able to adjust and mould the regulation of television to meet the changes in the technology and in the attitudes and aspirations of the Australian society that will inevitably occur.

As these changes take place inevitably the public interest will alter and the regulation of television to ensure that the public interest continues to be served will have to be adjusted accordingly. The regulator cannot work in a vacuum or cocoon or in blinkers. He must react and adjust constantly to what is happening in the real world around him otherwise, inevitably, his regulation will inhibit, rather than protect and serve the public interest. I regard this as one of the great challenges to the regulator (whether it be government or agency) in the field of communications; to be able to continually assess the best method of achieving the public interest in an atmosphere of continuing and sometimes dramatic technological, social and cultural change.

This I think was well summed up in the following comment by Ian Sinclair, the Minister for Communications, when he said to the AANA in March of this year:

"The balance between the level of necessary regulation and elimination of unnecessary regulation is one of the great challenges of the 80's."

As a regulator I would, respectfully, endorse, that comment. It is a real challenge that confronts us in the Regulation of Television and one which we must constantly remind ourselves of. Mr. Mark Fowler, the recently appointed Chairman of the FCC, had this to say when addressing the Oregon Association of Broadcasters in June:

"A primary goal of the Commission in the months to come will be to strip away the layers of Rules, Policies, and Programs that now encrust the basic "Public Interest" concept. The new age of alternative communications media cable television, low power television, MDS, STV, Video Discs and cassettes and perhaps DBS — clearly make some of these rules and policies as anachronistic as the vacuum radio tube. But our scrutiny of the broadcasting rules will not begin and end with those rendered obsolete by new technologies. Many rules have simply lost what usefulness they may have had because of the changes in American society that the passage of time has wrought. But many others, quite frankly, were ill-advised to begin with. Top to bottom, we will take a look at each regulation imposed on broadcasters and ask, frankly, candidly, what would happen to the world if this regulation were eliminated? Does the regulation perform a function best undertaken by the regulators or by the industry? Do consumers really get enough back from this requirement to outweigh its costs on business and on the public."

Although there are many substantial differences between the American and the Australian systems and experience I believe the principles he enunciated have application here. There is a need to keep regulation up to date, effective and responsive to the true public interest. It was a policy that the Tribunal pursued recently in its complete overhaul of the Broadcasting Program and Advertising Standards. In a statement accompanying the release of the new Standards I summed up the policy of the Tribunal in this way:

"Radio, particularly with the development of public broadcasting and FM broadcasting both National and commercial, has become a more specialised and competitive medium. This trend is likely to continue as more services are introduced....Increased competition means less regulation is necessary to maintain the public interest. The Broadcasting Standards have not kept pace with these changes in the market and the community. Consequently many of the provisions have become irrelevant and no longer necessary to ensure that broadcasters act in the public interest. The new Standards are designed to regulate those areas that the Tribunal feels clearly require positive statutory regulation. The new standards are intended to provide broadcasters with the flexibility to exercise their own judgment in determining the best way to serve their community's needs and interests in a manner that reflects the realities of today's broadcasting market".

Although the issues are different and more complex the Tribunal is pursuing a similar policy in its review of the Television Standards. Many of them are also irrelevant and no longer necessary to protect the public interest. What the tribunal is addressing are the real issues such as violence, criteria for classification of programs, children's programs, advertising of particular products, which may require positive statutory regulation. Otherwise the content of programs will be left to the judgment of licensees acting within their overall statutory obligations. I believe, as with radio, that in principle, increased television services in the future should mean that less regulation is necessary to maintain the public interest.

The Tribunal certainly intends to keep all Standards under review in the future to ensure as far as possible that they are relevant to the current broadcasting market place and community attitudes, aspirations and values.

In view of the Tribunal's current inquiry into Cable and Subscription (RSTV) Services it will be understood that I cannot provide concluded views about the regulation of those services if they are introduced and the consequent impact on the regulation

Continued Page 20

Judicial Review and the Broadcasting and Television Act

The Administrative Decisions (Judicial Review) Act 1977 has since October 1980 provided simplified and more accessible procedures for challenging the lawfulness of exercises of Commonwealth administrative powers.

MATTHEW SMITH looks at the wide application of the Administrative Decisions (Judicial Review) Act 1977 to activities in the area of broadcasting and television law.

It makes more apparent the wide assortment of possible grounds for obtaining a Court order against an administrator, and by creating a novel right of a person aggrieved to obtain a full statement of reasons for a decision it dramatically improves his chances of proving the existence of one or more grounds.

The Act has many intricacies and adopts or modifies a complex body of common law. Its full effect cannot adequately be summarised in this Bulletin.[1] What is attempted here is a sketch of the types of decisions and actions taken under the **Broadcasting and Television Act 1942** in respect of which persons aggrieved by them may obtain remedies.

Availability of Remedies

When considering whether the ADJR Act is available in particular circumstances, the search is to find a "decision to which the Act applies", which is defined as a "decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment." **(s.3)** Indentification of such a decision is necessary before a statement of reasons can be compelled **(s.13)**, before a stay of proceedings on the action can be obtained **(s.15)**, and before an application for an order of review can be made under section 5.

Remedies in other circumstances may still be available from the Federal Court, but the Court will require demonstration of a link to a decision to which the Act applies. Thus, other orders of review may be obtained under **section 6** for conduct engaged in for the purpose of making such a decision, and under **section 7** for a failure to make such a decision.

It is also within the jurisdiction of the Court, either inherently or under **section 32** of the **Federal Court of Australia Act**, to grant other remedies if the claim for them arises out of the matter the subject of a concurrent application under the ADJR Act or if it arises out of an associated matter.[2] This could allow the Court, for example, to determine the validity of a Commonwealth legislative action or to award damages for torts of breaches of contract for which the Commonwealth was liable.

Actions falling within the general definition of "decision to which the Act applies" are expressly excluded from the ambit of the Act if they are made by the Governor-General or are in the classes of decisions listed in the First Schedule to the Act.

These exclusions have no operation in the context of the B & T Act, except to remove from challenge decisions of the Governor-General appointing or removing from office members of the Australian Broadcasting Tribunal, the Australian Broadcasting Commission or the Special Broadcasting Service, and decisions by him under **section 131** authorising the Minister to assume emergency powers.

Excluded only from the ADJR Act's provision for statements of reasons are the classes of decisions listed in the **Second Schedule.** In the context of the B & T Act, this prevents an aggrieved person requiring reasons for decisions relating to the investigation or prosecution of the criminal offences in the Act, and for decisions connected with personnel management, appointments and industrial matters within the authorities established by the Act. Until October 1981, decisions on promotion or transfer of their employees are also excluded from the obligation to provide reasons on request.

The central concern is, therefore, the ambit of the definition of "decision to which this Act applies". By **section 3(2),** "decision" includes all the possible actions such as granting, making suspending, revoking or requiring an order, licence, approval, condition, determination etc. It seems to encompass every conceivable type of action which could be disputed.

The usual questions are therefore: does the action have administrative character, and is it made under an enactment (which includes statute, regulation or instrument). These questions are to be answered by analysis of the statutory framework of the particular action under challenge.

It will be apparent that the application of the Act is not determined by reference to the nature of the person or body whose action is under challenge. Any person acting under an enactment is subject to the Act if his actions are seen to have administrative character.

The Act thus looks to the nature or character of the action itself rather than to the person or body performing the action, although the nature of that person may be relevant to this process of characterisation.[3]

Persons acting under the B & T Act whose actions may be challenged include the A.B.T., the A.B.C.,the S.B.S., the Minister, and their delegates. It is suggested below that in some circumstances they may also include licensees acting under the terms of their licences or written undertakings.

Administrative Character

The characterisation of some types of actions as "administrative" is at present uncertain, and will remain so until the concept is fully explored by the Court. However, many types are clearly caught, and in approaching the others it may be expected that the Court will take a wide interpretation.[4]

Clearly within the concept are all decisions made in the course of broadcasting regulation which involve the issue of licences and approvals to specific persons according to statutory criteria or discretions.

The A.B.T.'s exercise of its powers with respect to individual licences and licensees is therefore covered, and do not escape because the Tribunal is 'quasi-judicial' or because it follows court-like procedures.[5]

Continued Page 20

Future Regulation of Television

From Page 18

of existing services. However, the following are some of the important regulatory issues that appear to arise. There are, of course, substantial economic, social and cultural issues as well.

- The use of new television channels for the provision of RSTV also has the potential for the development of other additional non-subscription services. What should be the programming mix between subscription and free-to-air television (if any)?
- To enable RSTV channels to be used for various purposes it would probably be necessary to vary existing licensing provisions which do not allow frequency sharing. How could this be done to achieve the most effective utilisation of possible available television time?
- To what extent should time sharing be permitted on allocated RSTV channels by such bodies as religious, ethnic, local community and sporting organisations.
- To what extent should existing standards and regulations apply to programming provided on RSTV and cable channels; e.g. censorship, Australian content etc.
- Should, and if so what type and amount, of advertising or commercial sponsorship be permitted on RSTV or cable channels.
- Should there be any restrictions on RSTV or cable networking. To what extent should such networking be subject to regulation relating to ownership and agreements.
- Policy concerning RSTV and cable ownership and control may be consistent with existing provisions of the Broadcasting and Television Act or with new principles, which are more or less restrictive. For example:
- To what extent should existing licensees be eligible to hold RSTV and/or cable licences for services either within their current coverage area or in other areas.
- Should there be any differentiation in the participation allowed to existing licensees on a geographic or some other basis.
- To what extent should other associated media interests (e.g. cinema owners/operators) or new entrants to the media industry be eligible to hold RSTV and/or cable licences.
- To what extent should limitations be placed on overseas ownership and control on RSTV and cable services.
- Should the licensing processes for RSTV and cable be the same as, or similar to, those applying under the Broadcasting and Television Act or should a new system be developed which is more appropriate to each of them.
- In the event of a cable franchise being offered for an area served by an existing RSTV service should:
  (a) The RSTV licensee be eligible to apply for that service,
  (b) the RSTV licensee have some special consideration e.g. the cable system must carry the RSTV service if the RSTV licensee so desires.
- Should there be some "must carry" obligation on a cable operator with respect to other services provided in the area served by his franchise. Should there be any, and if so what, restriction on the number of imported distant signals that may be carried by a cable operator.
- What copyright liability should apply to a cable operator for local signals and distant signals carried on his system.

These are only some of the regulatory type issues that the Tribunal sees arising in this inquiry. With a view to obtaining as much assistance as possible from the forthcoming hearings the Tribunal will shortly release a detailed background paper which will detail significant issues which the Tribunal considers are raised by the Terms of Reference.

Judicial Review and the B & T Act

From Page 19

Similarly, the Minister's regulatory powers, for example to make technical specifications for particular licences and to certify technicians, are covered.

It may be argued that some decisions are so political or 'policy' in nature as to cease to be 'administrative'. Examples of these are the Minister's powers to direct an inquiry **(B & T Act s.18(2))**, to prohibit or direct a broadcast **(ss.99(3))** and **104)**, and to plan the development of services **(s.111C(1)(a))**. However, it is suggested that exercises of these powers would be reviewable under the ADJR Act,[6] although because of the unlimited nature of the discretions involved the possible grounds of challenge may be very circumscribed.

Based on more established classifications the Court has held that the word 'administrative' excludes acts which answer the description of legislative or judicial acts.[7]

This places the making of regulations and statutory amendments beyond the scope of the Act, but also raises some uncertainty in relation to powers to establish general criteria binding groups of people, for example the A.B.T.'s powers over program standards **(B & T Act ss.99(1), 100(4), and 100(5))**. Prima facie, exercises of these powers are legislative even if they directly affect the interests of identifiable people, but it is possible that the Court may draw a qualitative distinction between law-making under the scrutiny of Parliament and administrative legislation.

Even if these decisions are outside the ADJR Act, an administrator's general policies and standards lacking the status of 'laws' are open to review under the Act when applied in individual decisions, and indeed the inflexible application of them is a ground for intervention **(ADJR Act s.5(2)(f))**.

Also within the ADJR Act are procedural actions taken under the B & T Act in the course of substantive regulation. Many examples of procedural decisions potentially open to challenge appear, particularly in the steps taken by the A.B.T. in the conduct of its inquiries and the processing of applications to it. However, at times these actions may only be regarded as conduct in the course of making an ultimate or operative decision, and therefore only reviewable under **section 6** and not open to a demand for reasons.[8]

When a decision made under the B & T Act does not serve distinctively governmental functions of the

Continued Page 22

Continuing questions directed to Mr David Jones when he addressed an Australasian Communications Law Association (ACLA) luncheon in Sydney on 24 April, 1981 (previous see (1981) 1 CLB — 5, 14, 15 & 16.

Richard Nixon ... beyond self-regulation?

Q. Mr. David Shannon: Mr. Jones I wonder if I could ask you a question about self regulation. I think there are many signs that the Tribunal is becoming more involved in the self regulation of advertising both at the stage of formulation of rules and in arbitrating as to the effect of those rules, and a recent decision of the Tribunal in relation to a Richard Nixon look alike commercial as a particular case in point. My question is simply how can it really be self regulation when the Tribunal is involved in that way as an independent governmental body?

A. Well I think there are two points to be made. First of all there is at the moment statutory regulation of advertising on the electronic medium. In other words the Act requires that advertising be broadcast in accordance with standards determined by the Tribunal; there are standards, so in the sense there is an ultimate regulatory responsibility on the Tribunal to not only determine standards but to oversee that they are complied with. Now that the system has been blended with a form of self regulation in that the television industry has set up its own operation to deal with advertisements to assist their members in assuring that advertisements do comply with the standards and any other self regulatory codes that may operate in the area and as far as the Tribunal is concerned we have welcomed and supported this initiative and the excellent work that is being done by the C.A.D. However, I think it is an example of where many self regulatory experiences reach a stage that they can go no further and that there has to be some ultimate statutory body or responsibility where the self regulatory process can't cope with the problem. The one that you're talking about is a situation where the body operated by the industry was taking a certain view, other people involved were taking a contrary view. Ultimately, the Tribunal had to make a decision as to whether that piece of advertising was in accordance with the Act and the Standards, and the Tribunal accepted that responsibility and took the decision. But by and large matters relating to advertising in television, for example, are sorted out under the self regulatory process that operates.

Ownership

Q. Lady Duckmanton: Mr. Jones I was wondering if you could comment on your claim that cable will open up diversity in ownership and control and therefore the need for regulation may diminish. I was wondering whether you believe diversity can only be contained in regulation and whether it is desirable that the same

Continued Page 23

Cable Inquiry Submissions

Herewith some late submissions to the Australian Broadcasting Tribunal's Inquiry into Cable and Subscription Television Services and Related Matters (previous submissions (1981) 1 CLB — 5, 6 & 8):

172 : SUPERIOR INSTALLERS, INC COUNTRY: U.S.A.; 173 : OFFICE OF ROAD SAFETY—DEPARTMENT OF TRANSPORT; 174 : TELECASTERS NORTH QUEENSLAND LTD; 175 : AMATIL LTD; 176 : BRISBANE TV LTD; 177 : DR R LORRIMER; 178 : MR S DE BELLE; 179 : YOUNG PEOPLES FORUM OF THE YOUTH AFFAIRS COUNCIL OF VICTORIA; 180 : TELEVISION BROADCASTERS LTD; 181 : DAVID SYME & CO LTD; 182 : SENATOR JOHN SIDDONS; 183 : SOVEREIGN RECORDS; 184 : TELEVISION NEW ENGLAND LTD; 185 : TRAFFIC AUTHORITY OF NSW; 186 : HARRY DOUGLAS PTY LTD/DATEC PTY LTD; 187 : WESTERN REGION COUNCIL FOR SOCIAL DEVELOPMENT AND OTHERS;

NEW MEDIA: LAW & POLICY

The long-held view that the media had a unique role in a free society and was not to be controlled like other industries is now under challenge, MARK ARMSTRONG told seminar attenders at the University of N.S.W. on 22 August,

The challengers are:

- Politicians seeking a partisan advantage;
- Bureaucrats seeking to impose uniformity; and
- Lawyers seeking to resolve policy and planning issues by the methods which the courts use.

Armstrong told the seminar "NEW MEDIA: LAW AND POLICY" that legal controls on media content should be reduced to the extent that "narrowcasting" replaces broadcasting — and to the extent that there is greater diversity of media controllers.

The law should no longer be used by government as a barrier to block media developments. Governments have a responsibility to plan and allocate natural resources. But they should not be allowed to fetter the range of considerations which make up the public interest in freedom of speech, Armstrong and co-author Terry Buddin argue in their seminar paper: The Role of Government and Freedom of Speech.

The twelve papers delivered at the seminar will be available next month. To obtain these send a cheque for $17.00 in favour of Law School, U.N.S.W.) to Ms. J. Trethewey, Faculty of Law, University of N.S.W., P.O. Box 1 Kensington. 2033.

For details of the authors and topics of the other papers see (1981) 1 CLB — 8, 11.

The seminar organised by the Australasian Communications Law Association (ACLA) and the Faculty of Law, University of N.S.W. was attended by more than 200. It concluded with an informal dinner at which the speaker was Mr Rod Muir.

Judicial Review and the B & T Act

From Page 20

regulation of broadcasting but instead parallels or is part of activity conducted generally in the community, there may be hesitancy in categorising the decision as administrative for the purposes of the ADJR Act.

However, from a recent case it appears that decisions pursuant to the powers and responsibilities given by the B & T Act to the A.B.T., the A.B.C. and the S.B.S. with respect to their employers are subject to the ADJR Act,[9] and currently a significant part of Federal Court litigation under the Act involves government employees challenging actions of their employees or their appeal tribunals.

It would seem by analogy that the internal management and decision-making processes of these authorities are also subject to the Act.

There are indications also that the Court will consider decisions of the A.B.C. and S.B.S. on programming, contractual dealings and other activities in the community to be under the Act, on the basis that they are incidents in an administrative process followed by those authorities in carrying out the objects of the relevant parts of the B & T Act.[10]

Under an Enactment

The requirement that a decision to which the ADJR Act applies must be made under an enactment, emphasises the need in each circumstance to identify a particular provision of a statute, regulation or instrument by reference to which the action is taken.

The necessary degree or type of reference required by the words "made under" needs clarification. They arguably may mean: "regulated by" or "in accordance with", or on the other extreme: "by a person entrusted by the Act with some public function",[11] and it has been suggested that they mean: "in pursuance of" or "under the authority of".[12]

Clearly beyond the ADJR Act are activities conducted solely under administrative arrangement. Many informal activities occur in the administration of broadcasting regulation and these cannot be directly challenged, nor can the formal activities of consultation and regulation which take place outside the B & T Act, a possible example of which is the procedures for censorship and classification of local programs involving the Film Censorship Board and on appeal the A.B.T.[13]

However, the net is cast wider than the terms of the B & T Act, since the ADJR Act also applies to decisions made under "instruments" made under the B & T Act.

If "instrument" means any formal legal document in writing,[14] then the ADJR Act's remedies are available against administrative action taken under the A.B.T. program standards, under orders of the A.B.T. under **section 17** or of the Minister under **section 111D**, under licence conditions, and under the newly required written undertakings of licensees.[16] Contemplating the last of these, it may be possible that a licensee's decisions on providing an "adequate and comprehensive service" are under the ADJR Act on the basis that they (like the A.B.C.'s decisions under **section 59**) have administrative character and are made under the undertaking. Similarly, licensee decisions on political broadcasts under **section 116(3)** may be subject to demands for statements of reasons, and open to review by the Federal Court if a legal defect can be found.

New Tactics

Enough has been said to show that, despite considerable ambiguities of defination, the ADJR Act has very wide application to all activities in the area of broadcasting and television law. Persons affected by those activities are likely to have rights to demand statements of reasons and, if they can show errors of law such as defects of procedure, motivation or reasoning, have rights to apply to the Federal Court. Of course these rights are hedged with many technicalities and limitations, particularly very brief limitation periods, but they deserve to be examined whenever disputes arise. With the other new administrative law remedies of Ombudsman, Administrative Appeals Tribunal and references of questions of law,[15] tactics are available to people decisively to test action governed by the Broadcasting and Television Act.

Footnotes:

1. General introductions are to be found in D.C. Pearce: "The Australian Admininstrative Law Service"; J. Griffiths in (1978) 9 Fed L Rev 42; and L.J. Curtis in (1979) 53 ALJ 530.
2. See Philip Moris Incorported v Adam P Brown Male Fashions Pty Ltd (1981) 33 ALR 465.
3. See Hamblin v Duffy and Others (1981) 34 ALR 333 at 339.
4. See Evans v Friemann (Fox J, 26 June 1981).
5. Hamblin v Duffy (supra) at p.339; Evans v Friemann.
6. But c.f. Barton v R (1980) 32 ALR 449 at 458.
7. Hamblin v Duffy (supra) at p.338; Evans v Friemann.
8. See Riordan v Connor and Others (1981) 34 ALR 322; and Evans v Friemann (supra).
9. Hamblin v Duffy (supra).
10. See Evans v Friemann (supra).
11. c.f. Polgardy v A.G.C. (1981) 34 ALR 39.
12. Evans v Friemann (supra).
13. See A.B.T. Annual Report 1979-80 at p.67.
14. As in Osborn's Concise Law Dictionary.
15. Broadcasting and Television Act s.22B inserted by 1981 Amendment Act.
16. Broadcasting and Television Act ss.83(5), 86(10) and 89A(1A) inserted by 1981 Amendment Act.

New Media . . . . Old Owners?

From Page 21

media outlets, which control the media at the moment, whould also control cable?

A. I can't comment on that in the sense that these are matters the Tribunal has to consider in the cable inquiry; questions of cross-ownership, things of that nature. But the experience in the United States seems to be that cable is a new medium which offers the opportunity for many more services because of cable being able to carry out so many more servces. So rather than just having three or four television services coming into an area the introduction of a cable system may mean another ten or fifteen through that particular cable system and that offers the opportunity for a wider spread of program content particularly perhaps in the nature of minority type programming which can add more diversity to what is currently offering.

Q. Lady Duckmanton: I think if I may just ask another question. There's no guarantee though that the same groups won't own all those ten outlets in there unless we do it by regulation?

A. Well what you're saying is you may not achieve diversity by leaving it entirely up to the market place because the market place may result in the same people owning the new medium. That is obviously a possibility and something we have to address as to whether there needs to be some statutory injection; foreign ownership is another example — whether you need some statutory requirement to achieve a certain type of ownership which is felt to be in the public interest and we have to address that issue, it's an important issue as to what extent, if cable is to be introduced, there ought to be regulation in the areas of ownership and control with a view to encouraging diversity within the system.

Interest Groups

Q. Mr. Masterman: I would like to hark back to Max Keogh's questions about the Broadcasting Tribunal's attitude to the representation of other interests before it. I don't think lawyers, such as yourself, should hide behind the law. I also think it is undeniable that the Broadcasting Tribunal as distinct from Mr. Justice Davies and Mr. Justice Morling, has shown a hostile attitude, a defensive attitude to applications by interested groups on both sides of the spectrum that is from public interest groups, so called, and from (the) industry who appear before it. Why do you think that members from a psychological point of view, have been so defensive in their attitude to getting assistance in their inquiries from members of interest groups from both sides of the spectrum?

A. Hardly surprising that Mr. Masterman and Mr. Keogh have a similar point of view. Speaking personally Mr. Masterman, I suppose one has to be subjective about this, I don't believe that I have adopted a defensive attitude to this position or to this matter. Certainly I have been involved in a number of inquiries where we have rejected applications on the other hand I have been involved in a lot of inquiries where we have granted them. And I must say I have endeavoured to take a pretty broad approach to allow people in where I felt that there presence as a party, as distinct from their presence as a witness, was going to be of assistance to the Tribunal. And some assitance I think is gleaned from the High Court's judgment in the matter that it dealt with in terms of the same type of case being repeated in proceedings. The Tribunal does have a statutory obligation not only to carry out a thorough investigation but also to do it with expedition and we have to weight that up as well as weighing up the need for the investigation. And the way I have seen it has come back very much to the question of assitance by that particular person as a party as distinct from trying to hide behind the statute. I don't think I can say much more than that.

Q. Mr. Masterman: And you don't apologise for the Tribunal's attitude as compared with Mr. Justice Davies' attitude, in not adopting the attitude you've just described.

A. Well I think Mr. Justice Davies delivered a very comprehensive and valuable judgment on the matter in the AAT. He is dealing with a different statute to ours although there are obviously a lot of similarities. The circumstances of particular inquiries or proceedings vary and as we endeavoured to point out in a decision we gave recently on party status in the Fairfax inquiry, it is very much a matter of looking at what the proceedings are about in determining whether you can say someone has got an interest in the proceedings, and that is what we will endeavour to do. Now if you see us adopting a more restrictive and defensive attitude than Mr. Justice Davies well so be it.

Self Regulation

Q. Ms. Julie James Bailey: I wonder whether I could pursue the issue of self regulation. I have always found it useful to define 'regulation' into two areas. One which is economic and therefore the regulation affects quite dramatically the economic base of a broadcasting company namely, the amount of advertising, Australian content, and programs which, almost by definition are expensive, such as drama and children's programs. And the other area of regulation which is more along the lines which you addressed yourself to today which is in relation to the mores of society, violence etc.

The self regulation report of the Tribunal of course indicated that they accepted that the economic base regulations were ones which were acceptable. You today, however, have suggested that it's more the qualitative ones the social ones in which both the law and lawyers could be more involved, which I found interesting because it seems to me that this is an area for the sociologists rather than the lawyers. I would like you to comment on the role perhaps that those two disciplines might be taking.

A. Certainly, I gave those as examples that came to mind I didn't mean to convey the impression that they were the only areas. The role of sociologists and psychologists is very important in regulation particularly in those matters you just mentioned because you need to be as well informed as you can about what is the effect of violence as a result of television, what is the effect of advertising

Continued Page 24

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Self Regulation

From Page 23

on children before you make regulations dealing with those matters. I think the way I saw the role of the lawyer was not so much being an expert in that respect or providing assistance in that respect, but in being *able to deal with the issue, once the* issue was determined, such as violecne and being able to assist the client to deal with that issue. Now that may be by saying we can overcome this by having some of self regulation as distinct from statutory regulation. But of course you need to be able to show how that can be done and it's in that sense, i.e. in the sense of communicationg that particular person's *position, be it a television company* or whether it be an industry body or a public interest group. It's in terms of being able to show what the person's position is that the lawyer can play an important role for his client. That's the point I was trying to make rather than actually being the expert like the sociologist or the psychologist dealing with the hub of the problem in the same way with economic matters you *may be relying on financiers* and accountants etc. to determine what the economic impact is of certain regulation. But again your lawyer can use that information to develop a *certain* point of view, to develop a certain proposal that can be put forward; that's the way I see it.