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Reforming Media Law

It is not to expect journalists to comply with the letter of the law if it takes a day's research to find out what the law says — so writes the Chairman of the Australian Law Reform Commission, Mr Justice M. Kirby, in a paper prepared for the Australasian Communications Law Association.

'THE TECHNOLOGY OF THE MEDIA MARCHES ON IN AN ADVANCE PARTY. THE LAW LIMPS ALONG AT THE TAILEND OF THE LINE.'
The Hon. Mr. Justice M. D. Kirby

This paper sketches a few ideas on future directions of media law in Australia. Inevitably, it concentrates on matters which have come before the Australian Law Reform Commission or which may do so at some future time.

First, the background. In June 1981 reports suggested that the circulations of the major metropolitan daily newspapers in Australia had continued to wane. Of the 18 major metropolitan dailies, all but six experienced a drop in circulation compared to 1980. For the first time in the last three audits, the two Sunday newspapers in Sydney lost circulation. Even the Melbourne *Age*, one of the most consistent circulation growths in the newspaper industry in recent years, registered a drop.¹ These developments are not just a local concern. They are reflected in the shifting ownership of major world newspapers such as the London *Times* and, now, the *Observer*.

A lament on the sale of the *Observer* by an American oil company which owned it to a 'disastrous man' named Tiny Rowland, led Michael Davie, editor of the *Age*, to the conclusion:

'The *Observer*' has now been sold like soap by one businessman to another.²

The chief foreign correspondent for the London *Daily Mirror*, John Pilger, told a recent media conference in Melbourne that in his view 'concentration of media ownership in Britain and Australia was a growing problem.'³ This opinion was supported by Ranald Macdonald who suggested that diverse media ownership was the best protection against what he saw as 'an intense campaign' to discredit the media in Australia 'as a prelude to further government restrictions.'⁴ Moreover the threats he perceived came not only from governments but from other institutions — he names

universities, unions and business institutions — which had the desire 'to restrict circulation of values from areas of information that they feel is detrimental to their own personal interests.'⁵

Mr. Macdonald sketched a disturbing scenario:

*It's my very sincere belief that we are witnessing in Australia now a quite concerted and co-ordinated attempt to impose further restrictions on the media and discredit them. Because of mistakes that are made and because of ... overseas cases ... one shouldn't therefore say you can't trust the media.'*⁶

In the last column he wrote before he died recently, Guy Harriott, a former editor of the *Sydney Morning Herald* and a weekly columnist in that journal, hit back at the effort to make the press a 'scapegoat for bungling politicians'

It is a truism of Australian politics that when a political party makes a mess of things and attracts criticism, the press is made the scapegoat. It is not the politicians at fault, but a biased press. ... In a politician's mind the only fair and impartial press is a press which supports his point of view, right or wrong, ... This, when you come to think of it, is a pretty startling proposition in a democracy. It represents, in horrid fact, the politicians' approach to public accountability, irrespective of party. May I suggest to my readers, when they complain about inadequacies of the press, they consider a situation in which the only print record of

— In This Issue —

- Chairman of the Australian Law Reform Commission, Mr Justice M. Kirby, looks at future directions in Media Law in Australia, including Defamation, the Protection of Privacy, the Closure of Courts, Contempt of Court and Journalists' Privilege ...1 CLB — 25
- The law relating to Character Merchandising is outlined by Robyn Durie — Copyright, Registered Designs, Passing-Off, The Trade Practices Act 1974 and Registered Trade Marks ...1 CLB — 28
- Broadcasting inquiries in Canada — a note by Mathew Smith ... CLB — 36

Continued Page 26

ERRATA

The Introductory Paragraph on page 1 CLB 25 should read:

It is not just to expect journalists to comply with the letter of the law if it takes a day's research to find out what the law says — so writes the Chairman of the Australian Law Reform Commission, Mr Justice M. Kirby, in a paper prepared for the Australasian Communications Law Association.

Reforming Media Law — by Mr

From Page 25

*government activities was a government gazette.*⁷

This is one side of the coin. The other is well known to you. Deliberately or by accident people are defamed unjustly. Their privacy is invaded either by actions of investigating journalists, whirring television cameras entering their premises or by a story which, though interesting to the public, unduly invades the individual's private realm. Prejudicial and unfair pretrial publicity occurs. Standards of good tastes are seriously breached. What are we to do about this? Should we simply shrug our shoulders and say that because the harm done is exceptional and legislation may diminish the freedom of responsible journalists, we should look the other way?

No-one under-estimates the importance of good example by experienced journalists conscious of high professional standards. At the 'workface' the influence of sound and reasonable journalists upon younger members of the profession is probably much more important in the long run than laws and guidelines. In practical terms, a rebuke from the editor or one of his assistants is likely to have a far greater impact upon modifying behaviour of the working journalist than the dimly perceived prospect of litigation, whether by private suit or public prosecution. In fact, John Pilger's view was that journalists' self-censorship often went too far in Australia, merely reinforcing official and legal attempts to restrict the press. He attributed this phenomenon to the poor preparation of most journalists for their tasks:

*In my view journalists are badly prepared because their early education gives them ... particular deference — it doesn't given them the scepticism that they need, to be a journalist. ... They feel they have to protect the system rather than stand back from it, be sceptical about it and comment on it.*⁸

It is scarcely surprising that journalists in Australia are accused of self-censorship. The multitude of laws that surround them represent a heavy daily burden they have to bear. If a single word they write or say is published beyond the jurisdiction of one State, they must comply with the laws of the other States of Australia, sometimes differ-

ing in significant respects. In such a world, it is little wonder that there is a strong tendency to caution and self-censorship. There is nothing equivalent in Australia to the ringing assertion of the First Amendment of the United States Constitution which guarantees freedom of the press and free speech in every corner of that country. Our freedoms rest on tradition rather than legal guarantees upheld in the courts when the tests come.

I have said that in practice good example and editorial discipline reinforced by (sometimes excessive) self-censorship remain the best protections against wrongful or unfair media conduct. That was so in the past. It will remain so in the future.

But just as in society a very small number of criminals exists, and cannot be ignored by society, so it is in the media. It is to deal with such cases that something beyond self-discipline is necessary when the procedures of self-regulation are claimed to have broken down.

Press Council

One brave attempt to deal with such cases was the establishment of the Australian Press Council. Under the distinguished chairmanship of Sir Frank Kitto, one of the greatest Australian judges of this century, it deserved better success than it has had. It provided a system of peer review. Its procedures were cheap, speedy and much more accessible to ordinary citizens than expensive, frightening and time-consuming litigation. Procedures of conciliation and education can play a part not only in correcting errors that have occurred but also in setting good standards that will be observed in the future.

The fact remains that the Australian Press Council has suffered from major weaknesses. Only 25% of its membership is from outside the press. The vast majority of complaints are not handled by the future Council but rather by a complaints committee, the overwhelming number of whom are newspaper executives. No opportunity is afforded for the hearing or testing of evidence. Above all, two of the three major Australian publishing interests are not participants in the Council. Recently, in answer to a question in the Administrative Appeals Tribunal, Mr. Rupert Murdoch said that his newspapers were no longer

in the Australian Press Council 'because it had attempted to get too much control over them'.⁹

Even journals which do participate, such as the **Sunday Observer**, when publishing the ruling of the Press Council, do so under such headings as 'Editor Challenges Council Ruling' and carry a signed rebuttal, which is given prominence, rather than the opinion of the Australian Press Council opinion. This happened recently when the Council criticised the **Sunday Observer** for publishing tape recordings of alleged conversations between Prince Charles and Lady Diana Spencer.¹⁰ Far from setting peer standards the Council is merely expressing another opinion. Far from modifying behaviour, the editor stands unrepentant and gives pride of place to his own opinion, not the Council's. No effective sanction can be imposed upon media interests which do not participate in or respect the Council's views. The electronic media have never been involved.

In a recent television and radio supplement to the **Sydney Morning Herald**, Harry Robinson comments on the report of the Senate Standing Committee on Education and the Arts concerning the impact of television on children.¹¹ He criticises the Senate Committee's examination of children's television and its call for more government action and more action from the Broadcasting Tribunal:

*The Senators, I suggest, are falling for the Great Australian Fallacy. It says you will right social wrongs and move closer to heaven if you make enough regulations and have enough controls and guidelines and commissions and petty do-gooding tribunals. The fallacy is responsible for half our troubles. We hardly need more institutionalised do-gooding even for TV, the Jezebel of the century.*¹²

Despite that splendid prose, no alternative is offered by Robinson — simply the suggestion that we ought to try to change our society so that it does not like 'plastic values'. No hint is given of the way this endeavour may be started.

So here we are. Things do go wrong in the media and will continue to do so. Many hurts, unfair reports, undue intrusions, unjust

Continued Page 27

Justice Michael Kirby

From Page 26

pretrial coverage, unfair editorial comments and so on will simply go unredressed. Journalists know, or should know, that ordinary citizens of our country rarely feel able to take on and fight the enormous power of the media whether in court or elsewhere. **Analyses of defamation actions show how very few of them are brought by ordinary citizens: the overwhelming majority of those that get to trial in Australia are brought by politicians and other public figures.** The fact that in the great bulk of cases wrongs go uncorrected imposes, as it seems to me, a special obligation of self-discipline and high standards on journalists. They should be constantly striving to be worthy of the great power they have. Surveys in Australia confirm that the public's perception of power, rightly or wrongly, is that it rests with the media and unions as much as with the constitutional institutions of the country.

Some injustices and wrongs are dealt with by the intervention of experienced thoughtful journalists. This is the way most vocations are taught. A small number are corrected by the Press Council. The Australian Broadcasting Tribunal has some fairly dramatic (if not particularly well graded) sanctions available to it to deal with public complaints. The need for a greater variety of sanctions available to the Australian Broadcasting Tribunal was recently called to notice in the Administrative Review Council's report of that tribunal's procedures.¹³ I have no doubt that a better range of sanctions will become available to Mr. Jones and his colleagues in due course.

That still leaves us with a small number of cases involving resort to courts of law. We have a tradition of 800 years of independent courts, standing as guardians of the individual citizen against the great power of government or private interests. The law will continue to have an impact, if a sometimes spasmodic, unpredictable and unexpected impact, upon journalism in Australia. What we have to hope is that, for the better education of journalists and the clearer appreciation of fair standards, a greater effort is made in this country to secure uniform laws affecting the daily work of journalists.

The former Chief Justice of South Australia, Dr. Bray, himself a participant in a celebrated case affecting journalists' freedom¹⁴ once described diversity as the 'protectress of freedom'. The Federal Constitution of Australia makes for legal diversity and experimentation in a way that would not be possible in a unitary state. It allows the development of novel legal ideas in different parts of this continent. But as the law affects the media, whether electronic or print media, this diversity can sometimes be inconvenient. It can lead to uncertainty as to what the law is. This in turn can contribute to poor standards of journalism, undue timidity by journalists or breaches of the law arising from simple and reasonable ignorance of what the law is. **To adapt a comment made by Lord Devlin in another context, it is not much good expecting journalists, who must frequently act to severe deadlines, to obey the law, if it takes a day's research to find out what the law is.**

Defamation

In Australia, we do not have a particularly distinguished record of uniform laws. Attempts to secure uniform credit laws began in the 1960s. Now, 15 years and three committees later, we are still waiting. I hope our record in the area of media law will be better, for there the interests at stake are even more critical for a free society. The need for simple, up-to-date available and uniform laws is greater than in most other areas of the law that could be mentioned.

Five areas of legal concern of which journalists will surely hear more are Defamation; The protection of privacy; The closure of courts; Contempt of court and Journalists' privilege.

DEFAMATION AND PRIVACY

The Australian Law Reform Commission in 1979 produced a report proposing reform of defamation laws in Australia. Attached to the report was a draft Bill for a uniform Defamation Act. The report proposed new laws and procedures, more apt to deal with defamation complaints. It proposed a single uniform Australian law, codification and simplification of current rules, the introduction of major reforms of procedure (including procedures for the speedier determination of defama-

tion cases) and the provision of new and more effective remedies. Some of these were borrowed from European legal systems including the facility for rights of reply and court-ordered corrections instead of money damages.

By and large, the media and public reaction to the defamation proposals were favourable. Above all, there was a good reception to the proposal to express the law here in a short document, available to journalists, management and citizen alike, more clearly defining the relevant rights and duties in this area so important to freedom.

The more controversial provisions of the report were those which urged the protection of a zone of 'sensitive private facts'. These facts were strictly defined. They were facts relating to health, private behaviour, home life and the personal or family relationships of an individual which, if published, would in all the circumstances be likely to cause distress, annoyance or embarrassment. A number of defences were proposed. Amongst these were consent and proof that the publication was on a topic of 'public interest'. In essence, the Commission's view was that even public figures in Australia were entitled to a private life, unless publication was relevant to their public office or was on a topic of public interest. Generally, the media in Australia respect this rule already. But the fact that most people act properly has never been a reason for failing to provide a law for those few who act in an anti social manner.

I am conscious of the reservations within Australia and outside¹⁵ concerning provision of laws for the protection of privacy in publications. I also realise the Press Council can do valuable work for the defence of privacy in a low-key way which does not involve risks of exacerbating the hurt. But increasingly local and overseas experience suggests that mediation and conciliation are not enough. Where these mechanisms fail the individual should have the right to protect his privacy before the courts. The law will come to defend a zone of privacy, thereby reflecting society's attitudes to this important cultural value.

In Australia, as we move towards a uniform defamation law and drop the element of 'public benefit' and 'public interest' from the defence of justification which has so far in some

Continued Page 33

CHARACTER MERCHANDISING

The area of character merchandising is one in which the law does not yet seem to have caught up with commercial practice. Enormous sums of money are expended in gaining licences to manufacture and sell reproductions of particular characters and to use names, and enormous royalties paid.

Yet, in many cases the only protection is an action of passing-off or under Section 52 of the Trade Practices Act, which is expensive and in which there is no guarantee of success as reputation or deceptive conduct is something which is subjective and, of its nature, hard to prove.

The enormous costs of such litigation discourage many.

1. COPYRIGHT

(a) Subsistence of Copyright

Copyright protection is given in Australia to various works or other subject matter by virtue of the Copyright Act 1968 ("the Act"). Copyright subsists in original works of which the author was a qualified person or which were first published in Australia. The two most relevant forms of works for merchandising rights are artistic and literary works.

Regulation 4 of the Copyright (International Protection) Regulations (SR 1969, No. 6) extends copyright protection to, inter alia, literary and artistic works made by citizens or residents of countries which are members of the Berne or Universal Copyright Conventions and to works first published in those countries.

Section 31 of the Act gives to the owner of the copyright in an artistic and a literary work a number of exclusive rights, which include, for the purposes of merchandising rights, the right to reproduce the work. (Section 31(1)(a)(i) in the case of literary works and Section 31(1)(b)(i) in the case of artistic works).

(b) Dual Protection

There is no "dual protection" for artistic works under the Copyright Act and the Designs Act 1906 in Australia. Section 77 of the Copyright Act provides that:

- (i) if copyright subsists in an artistic work; and
- (ii) a corresponding design is applied industrially by or

with the licence of the owner of the copyright in the work; and

- (iii) the corresponding design has not been registered under the Designs Act; then
- (iv) for a period of fifteen years commencing on the date on which the articles made to the corresponding design were first sold, no copyright protection subsists.

On the expiration of the fifteen-year period it is not an infringement of the copyright in an artistic work to apply the corresponding design of that artistic work to the article which has been industrialised (Section 77(3)). A "corresponding design" is defined to mean a design which when applied to an article reproduces an artistic work (Section 74(1)).

A design is deemed to be applied industrially if it is applied to more than fifty articles (Regulation 17(1) Copyright Regulations (SR 1969 No. 58)).

The apparently harsh result of Section 77 is lessened in two respects. The only artistic works in which copyright is lost through industrialisation are those which are registerable as designs. Regulation 20A of the Designs Regulations (SR 1907 No. 51, as amended by SR 1969 64) makes it clear that works which are primarily literary or artistic in character are not registerable as designs. In addition, copyright protection is only lost in relation to the article

By ROBYN DURIE

to which the corresponding design is applied industrially. Copyright protection still exists in other articles to which a corresponding design of an artistic work has been applied, which have not been reproduced on a mass scale.

Section 17 of the Designs Act 1906 requires that designs for which registration is sought must be new or original and not published in Australia at the date of application for registration.

Section 17A of the Designs Act 1906 to some extent assists applicants who are not familiar with Section 77 of the Copyright Act. That Section provides that:

- (a) where copyright subsists under the Copyright Act in an artistic work, and an application is made for registration of a corresponding design; then
- (b) the design shall not be treated as being other than new or original, or as having been published, by reason only of any use previously made; unless
- (c) that use consisted of the sale or hire of articles to which the design had been applied industrially with the consent of the copyright owner.

Accordingly, a design is not deemed to be published and disqualified from registration merely because, for example, a television show featuring a character reproduced in a design is shown.

(c) Pre-1969 Copyright

Section 77 applies only to works made after May, 1969 when the present Copyright Act came into force.

Section 22 of the previous

Continued Page 29

Character Merchandising — Legal Forms of Protection

From Page 28

Act (Copyright Act 1912) provided that that Act did not apply to designs capable of being registered under the Designs Act, except designs which, although capable of being registered, were not used or intended to be used as models or patterns to be multiplied by any industrial process.

That section was dealt with by the House of Lords in **King Features Syndicate Inc v Kleeman (O & M) Limited** (1941) AC 417. In that case the author of Popeye the Sailor, who had originally been created as a cartoon character published in comic strips, did not have any intention at the time he first drew the character of industrializing the drawings. Subsequently, Popeye dolls, toys, brooches and other articles were made under licence. An action for infringement of copyright was taken against the manufacturer of unlicensed dolls, and the defendant relied on Section 22. It was held that the artistic copyright in the Popeye cartoons had been infringed, and the date on which intention was to be determined was the date of creation of the artistic work. Section 208 of the present Copyright Act gives statutory recognition to the decision in the **King Features** case.

(d) Protection of Merchandising Rights by Copyright Law

Copyright protection is the most simple and efficient means of protection of merchandising rights. There is no necessity for registration and the remedies under the Act are certain. Under Section 116 of the Act the copyright owner is entitled to delivery up of all infringing copies. This prevents the continued sale of such articles and the problem of tracing infringing articles. However, copyright

protection is only relevant in a number of limited cases. These include:—

- (i) pre-1969 works, where there was no intention to industrialize such artistic works at the date of their creation;
- (ii) literary works; and
- (iii) artistic works which are primarily artistic in character.

A recent case has shown the difficulties of protection of names under the copyright law. For a name to be protected by itself, it needs either to be registered as a trade mark, to be a literary work under the Act or to be associated in the minds of the public with a particular person. In **Exxon Corporation & Ors v Exxon Insurance consultants International Limited** (1981) 2 All ER 495, Graham J. held that the word "Exxon" was not the subject matter of copyright. His decision was upheld by the Court of Appeal.

The plaintiffs had argued that as considerable time and labour was expended in arriving at the name "Exxon" it qualified as an original literary work within the U.K. Copyright Act. The Judge found because the word was invented it must, for practical purposes, be considered as original. However, it was not literary.

In the Court of Appeal, Lord Justice Stephenson referred to the judgment of Lord Justice Davey in **Hollinrake v Truswell** (1894) 3 Ch 420, in which he said that:—
"a literary work is intended to afford either information and instruction or pleasure, in the form of literary enjoyment".

The word "Exxon" did not do this. The plaintiffs in the **Exxon** proceedings did succeed on the basis of passing-off. On the basis of the **Exxon** decision, it would seem unwise to rely on copyright as protecting a name for merchandising purposes.

2. DESIGNS

The next area of protection which is dealt with, the Designs Act 1906, is again confined to situations where actual copying takes place. Other remedies such as the tort of passing-off or an action under sections in Part V of the Trade Practices Act are wider in that if it can be established that someone is engaged in the business of licensing, even though they may not have made particular goods, or in fact, have licensed someone else to make those goods, consumers may still be misled and the article may be held out as being made under licence from that person.

A design is registerable under the Designs Act 1906 if it consists of a new or original design which has not been published in Australia (Section 17(1)).

The term of design registration at present is fifteen years, although recent amendments provide for a sixteen year term.

Designs are registered in various classes which are set out in the Schedule to the Designs Regulations (SR 1097 No. 51). When the amendments come into force, it will not be necessary to obtain registrations in each class.

The owner of a registered design must use it in the manufacture of goods in Australia, or else a compulsory licence for its manufacture may be granted (Section 28). A person who applies a design or fraudulent or obvious imitation of it, to an article, or who imports or sells an infringing article, infringes the copyright in a design. One advantage of design registration is that registered designs are kept on a public register (at the Patents, Trade Marks & Designs Office) and so a person may have some certainty as to whether by using a design, he is infringing the rights of another person. One practical problem is, however, that design registrations take approximately two years to be granted and it is not possible to search applications for registered designs, thus losing considerable certainty in a world where fashions in the field of merchandising change rapidly.

Continued Page 30

Character Merchandising — Legal Forms of Protection

From Page 29

3. PASSING-OFF

Most cases concerned with merchandising rights have arisen under the tort of passing-off. The most recent Australian case on character merchandising is the decision of His Honour Mr Justice Helsham in **Children's Television Workshop Inc & Ors v Woolworths Limited & Anor** (1981) 1 NSWLR 273. Unfortunately, in his judgment in that case Helsham CJ. in Equity refers only to one other merchandising case, the previous Australian case of **Henderson v Radio Corporation** (1969) RPC 218.

The classic definition of "passing-off" is set out in *Kerley's Law of Trade Marks*. Paraphrased, the definition is as follows. It is an actionable wrong for person 2 to represent, in the course of business, that his goods or his business are those of person 1. It makes no difference whether the representation is by means of a direct statement or by using the same kind. Representations must be in such a manner as is calculated to cause goods to be taken by ordinary purchasers as the goods of person 1. Generally speaking, a false representation which is calculated to injure another in his trade or business is regarded as passing-off.

In the field of merchandising this definition of passing-off needs to be taken one step further. In many instances defendant is not someone who actually makes goods, but instead is someone who licenses others to make them. Generally, that person is the owner of the reputation in a character, the person with whom the character is associated. For example in the **Woolworths** case, the first two plaintiffs were, respectively, the maker of the programme "SESAME STREET" and the U.S. owner of copyright in the "MUPPET" characters featured in that show. Neither actually made any goods. For this reason it was necessary to show that their business was that of licensing.

Passing-off is a tort. Proceedings to restrain people from committing the tort or for damages must

be brought in state Supreme Courts. The other legal remedies dealt with in this paper are given by Commonwealth statutes. Whilst state Supreme Courts have jurisdiction at first instance in copyright, design and trade mark actions, an appeal lies to the Federal Court. The Federal Court has first instance jurisdiction in trade practices cases.

Before turning to the decision in the **Children's Television Workshop** case, I propose to go through the previous authorities.

(a) Australian Decisions

There are two relevant Australian decisions prior to the **Children's Television Workshop** case; the first is the judgment of the High Court in **Radio Corporation Pty Limited v Disney** 57 CLR 448. That case was the first Australian recognition of merchandising rights.

The other more relevant authority is that of **Henderson v Radio Corporation Pty Limited** (1969) RPC 218. **Henderson's** case was concerned with two well known professional ballroom dancers, whose photographs were reproduced on an album cover of dance music without their consent. The New South Wales Full Court restrained the distribution of this record. They did not think it relevant that the plaintiffs were in a different field of activity from the defendant, a record producer. The Court found that the **Hendersons** were amongst the best known dancers of their type and that the use of the photographs implied that they had approved and recommended the record.

Chief Justice Evatt and Mr Justice Myers in their joint judgment said:—

"The remedy in passing-off is necessarily only available where parties are engaged in business, using that expression in its widest sense to include professions and call-

ings. If they are, there does not seem to be any reason why it should also be necessary that there be an area, actual or potential, where two activities conflict."

(b) U.K. Decisions

In **Henderson's** case the Full Court had before it the decision of Wynn-Parry J. found that the plaintiff, a broadcaster, was not engaged in the business of producing puffed wheat, and had no field of activity in common with the defendants who did market puffed wheat. Accordingly, the defendants by using the broadcaster's name "Uncle Mac" had not invaded any proprietary right of the plaintiff.

Three more recent English decisions have considered character merchandising. Those decisions are **Lyngstad v Anabas Products** (1977) FSR 62, **Wombles Limited v Wombles Skips Limited** (1957) FSR 485, and **Travener Rutledge Limited v Trexapalm Limited** (1975) FSR 479. Merchandising rights were not protected in those cases as the parties were not in the same field of activity as the defendant. The Court of Appeal in **Annabel's (Berkley Square) Limited v G. Schock** (1972) RPC 38 also considered the relevance of common fields of activity. **Annabel's** case was concerned with whether the plaintiff, the operator of the well known London nightclub, was entitled to prevent an escort agency operating as "Annabel's Escort Agency". The Court of Appeal upheld the grant of an interlocutory injunction. Lord Justice Russell said:

"In this question of confusion of course, as a matter of common sense, one of the most important considerations is whether there is any kind of association, or could be in the minds of the public any kind of association, between the fields of activities of the plaintiff and the fields of activities of the defendant

Continued Page 31

Character Merchandising — Legal Forms of Protection

From Page 30

— as it is sometimes put: is there an overlap in the fields of activity? But of course, when one gets down to brass tacks, this is simply a question which is involved in the ultimate decision whether there is likely to be confusion”.

This decision is consistent with that of the New South Wales Full Court in **Henderson** and is probably the law in New South Wales at the present time.

The **Wombles**' decision was concerned with the mythical WOMBLES characters who picked up garbage on Wimbledon Green. The plaintiff was the owner of the copyright in drawings of these characters and had licensed them to various companies. The defendant was using the name “Wombles” on its rubbish skips. Walton J. found that there was no common field of activity and, accordingly, refused an injunction.

In **Lyngstad v Anabas Products Pty Limited**, the pop group “ABBA” failed to restrain the sale of products bearing the name “ABBA”. Oliver J. in his decision specifically found that there was no proof that the plaintiffs were in the business of the licensing of their name or image or of marketing articles using them and that that finding was fatal to any claim. The **Henderson** case did not go this far. It merely showed that the plaintiffs could follow other well known identities and license their likeness. In **Travener Rutledge**, the plaintiff and defendant both sold confectionery under the name “KOJAK”. The defendant was licensed by the producers of the television show. Walton J. again found that there was no common field of activity and that it was not sufficient to show that the public would think that the plaintiffs were licensed by the

owners of the television series. He said —

“It appears to me that, therefore, one would have to have three things proved, first, that a reference to ‘Kojakpops’ inevitably carried the man in the street back to the person, whoever he was and of course he might not know his identity, who was the owner of the television series; secondly, that the owners of all licensing rights automatically included provision for quality control in their agreement and, thirdly, that they all automatically saw that those were carried out. It seems to me, in my judgment, that unless and until those matters are all satisfied it cannot be said that there is any relevant overlap in any of the activities of the plaintiff and Universal City Studios” (at page 486

(c) **The Woolworths Case**

In the **Woolworths** case, the criteria set out in **Travener Rutledge** were met. The judge found that the first and second plaintiffs exercised scrupulous care over the production of “SESAME STREET” characters for sale and there was strict quality control over all goods licensed. The reputation which Helsham C.J. found in that case was threefold:—

- (i) the three characters which had been reproduced had acquired a reputation;
- (ii) the first respondent was associated in the minds of the public with the television programme; and
- (iii) the public associated the producer of the television programme with the merchandising of toys which were intended to be representations of the characters in the programme.

Helsham J's final relevant finding was that members of the

Australian public associated the business of commercial exploitation by merchandising with whoever had the right to permit it by licensing or by arranging for the manufacture of toys or other products representing the fictional characters. He found that there was confusion, because the defendant's toys picked up the essential characteristics of the plaintiffs' characters.

On the question of common field of activity, the Judge did not say whether that point was relevant, (which in the light of his reliance on **Henderson's** case it was not) but in any event found that there was a common field of activity. The defendants imported and sold toys and the plaintiff arranged for the manufacture and sale of toys in the market place.

The defendants lodged an appeal from the decision, but later withdrew that appeal. They raised two arguments in the appeal which are important. The first was that there was no evidence that the public were aware of any quality control by the first plaintiff; the second was that the false representation that the goods were licensed by the plaintiffs was irrelevant to the purchase by the public. These two arguments are ones which will have to be considered in future cases.

4. TRADE PRACTICES ACT

Section 52 of the Trade Practices Act provides that a corporation shall not engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 53 prohibits various false representations including representations that goods or services are of a particular standard or quality, or that they have a particular history (s53(1) (a) and (aa); that goods or services have sponsorship or approval they do not have (s53(1) (c); and that corporations have a sponsorship, approval or affiliation they do not have (s53(1) (d).

Sections 55 and 55A are also relevant as prohibiting misleading conduct in relation to goods or services.

Continued Page 32

(1981) 1 CLB — 31

Character Merchandising — Legal Forms of Protection

From Page 31

Following the decision of the High Court in **Phillip Morris Inc v Adam P. Brown Male Fashions Pty Limited** and **U.S. Surgical Corp. v Hospital Products International Pty Limited** 33 ALR 465, provided a passing-off action arises on the same sub-stratum of facts as an action under any of Sections 52, 53, 55 or 55A, proceedings may be brought in the Federal Court joining both actions under the Trade Practices Act and passing-off actions.

The selling of reproductions of well known characters, or goods using the names of such characters, without the licence of the person entitled to grant that licence, is misleading or deceptive conduct as it may lead people to a mistaken belief that the seller has the authorisation of the owner of the right to sell those goods. It could also constitute false representations —

- (a) that the goods were of a particular standard or quality or they had a particular history; or
- (b) that goods or services had a sponsorship which they did not have.

Within Sections 55 and 55A, such conduct may mislead the public as to the nature of goods or services.

The first merchandising case which has arisen in the Federal Court is that of **Nostac Enterprises v New Concept Imports Services Pty Limited & Ors** (1981) ATPR 43-135. It was concerned with two companies who had been granted licences for different "Mr Men" products. Ellicot J. found:

"... the use of the 'Mr Men' words and characters represent to the public including parents and children that there is some likely association between the product and those responsible for the 'Mr Men' books and T.V. series. It is unnecessary, of course, to show that the public actually know who in fact are responsible" (at 43, 137-43, 139).

One problem with trade mark registration in the context of mer-

chandising is that they are expensive. Applications have to be lodged in all classes for which goods or services are licensed or intended to be. Character merchandising is a very fashion oriented business and trade mark registrations take at least two years from the date of application.

5. TRADE MARKS

The Trade Marks Act 1955 provides that a person who claims to be the proprietor of a trade mark may make application for the registration of that mark in respect of goods or services provided the mark meets certain specifications (Section 40). A trade mark must be:

- (a) the name of a person represented in a special or particular manner;
- (b) signature of the applicant;
- (c) an invented word;
- (d) a word not having direct reference to the character or quality of the goods or services and not being a geographical name or surname; or
- (e) any other distinctive mark (Section 24).

A "trade mark" is defined as "a mark used or proposed to be used in relation to goods or services for the purpose of indicating . . . a connection in the course of trade between the goods or services and a person who has the right, either as proprietor or registered user, to use the mark . . ." (Section 6(1)).

The overriding test for trade mark applications is that the mark must be distinctive of the goods or services of the proprietor. The Trade Marks Register consists of some 42 classes for goods and services. The Register is divided into four parts:

- Part A is for distinctive marks, e.g. "ESSO";
- Part B is for marks which are capable of

becoming distinctive although they are not at the time of application, e.g. SOFLENS;

- Part C is for certification marks, which indicate origin and certify that goods or services have reached a particular standard, e.g. the Wool Mark; and
- Part D is for defensive marks.

Those who wish to grant merchandising licences require for adequate protection a registration in each class in which they intend to grant licences. Licensees should also be registered users of the trade marks. There are extreme examples of companies who register in every class. However, this is rarely possible. Before he registers a trade mark the Registrar of Trade Marks must be satisfied that the applicant intends to use the mark (Section 44(1) and Section 23(1)) or to licence other to use it (Section 45(1)(b)). If this intention does not exist at the time of registration then the mark can be expunged (Sections 22 and 23). Accordingly, entrepreneurs cannot register marks they might want to use at some time in the future, depending on the success of a television programme — Rawhide TM (1962) RPC 131 and Pussy Galore TM (1967) RPC 265.

A trade mark is something used to indicate a connection in the course of trade between the proprietor of the mark and his goods or services. Copying an article is not necessarily indicating such a connection. Section 62 of the Trade Marks Act makes it clear that a registered trade mark is only infringed by a person who uses a mark which is substantially identical with or deceptively similar to the trade mark in the course of trade in relation to goods or services in respect of which the trade mark is registered. Obviously, a person who makes infringing "R2D2" dolls is not using that mark in relation to goods. He is merely using a representation. If copyright or design protection is available they would provide the appropriate legal remedies, failing that, passing-off.

Reforming Media Law

From Page 27

States helped to defend privacy, I believe we will seek to define as overseas countries recently have¹⁶, an alternative approach which respects the right to privacy and provides redress where it is invaded.

I am confident that before too long we will see the uniform defamation law in this country. Mr. Medcalf, the Attorney-General for Western Australia, said in March 1981 that he expected a single defamation law to be finalised 'within the next six to twelve months'. The Standing Committee of Attorneys-General on 10 April 1981 affirmed its agreement to work towards a uniform defamation law saying that whilst it might not be possible to achieve uniformity immediately 'it should be possible to reach early agreement on a number of issues'. For the interests of good journalism and the setting of standards without the need of expensive legal advice let alone litigation, the first necessity is that there should be clear rules.

Closed Courts

Closure of courts has been one means of preventing journalists reporting cases involving female first offenders, divorce litigants and children and young persons.

In a recent custody battle in the Supreme Court of New South Wales, the decision of Mr. Justice Helsham to close the court was criticised in the press.¹⁷ Legislation providing for the closure of courts in the case of female first offenders has now been repealed.¹⁸ The Family Law Act is also to be changed to permit an open court except in proceedings concerning children and a relaxation of restrictions on publication of cases, provided that the names of parties will not be disclosed. Interestingly, the International Press Institute's list of threats to press freedom in Australia asserted that more than 40% of the threats 'emanated from the judiciary'.¹⁹

Contempt of Court

The law of contempt limits public reporting of material pending a trial, civil or criminal, where the public disclosure in advance of the trial would be bound to affect the fairness of the trial.

Although the scope of the inhibitions of the law of contempt are often exaggerated in the mind of the public and on the part of the press²⁰ the fact remains that the media in Australia and Britain are under more restraints than are their colleagues in the United States and many European countries. Following the criticism of English law in the European Court of Human Rights, the British Government introduced a Contempt of Court Bill in December 1980. Again, the reform measure coincided with events which almost appeared designed to show the inadequacies of the reforms. A legal officer of the National Council for Civil Liberties was charged with and convicted of contempt for showing a reporter documents even though these had previously been read out in open court.

Then, the widespread coverage of the Yorkshire Ripper case seemed to prove the need for some law of contempt. The *Times* newspaper analysed the balance to be struck between the respective rights of the public to have information and other competing rights which would restrict access to that information, by an appeal to an even higher principle:

Much of the information contained in the contemptuous articles was interesting to the public. But it was not in the public interest to publish it. There are some circumstances in which a newspaper might justifiably believe that the benefits to society of publishing articles which would or might be in contempt of court outweigh the public interest in the defendants' being entitled to a fair trial. The thalidomide case was perhaps an example. But no such issues arise in the Sutcliffe case. Public curiosity cannot be an excuse for harming an individual's right to have the presumption of innocence applied

to him and to his right to a fair trial . . . What the coverage of the past three days have demonstrated is that it does not matter to many organs of the media what the law of contempt says. They will break it anyway if the case is spectacular enough and engenders sufficient curiosity on the part of their viewers or readers. Yet it is precisely in that sort of case — where a heinous crime is alleged — that the defendant most requires protection of the law. These decisions are not unconsidered. Newspaper editors are not children; newspapers have lawyers; who can doubt that many newspapers and television producers had carefully weighed up the possibility of prosecution and decided to go ahead with a known contempt?²¹

I believe there are few in Australia who would prefer the virtually unrestricted prejudicial trial and pretrial publicity which occurs in the United States to the more restrained course we have adopted, partly as a result of our law of contempt. It must be acknowledged that the price of a fair trial for an individual accused may sometimes involve frustration of the public's desire for information. Determining where the inhibitions start and cease and what rules should govern them is a sensitive matter in which vital attributes of freedom compete. The efforts to define more closely the law of contempt and to modify the British law of contempt which was criticised by the European Court of Human Rights has not yet attracted a counterpart movement in the law in this country. However the calls for reform become more insistent. The *Canberra Times* recently put its point of view:

The crime is undefined. One judge hears the case immediately, and sentences immediately. The accused has little or no right to be heard or to be represented. The punishment is unlimited imprisonment. It sounds like an 'emergency' law proclaimed by some fledgling dictatorship. In fact it is the English, now Australian, law of contempt. No-one seriously questions that a judge

Continued Page 34

Reforming Media Law

From Page 33

should have power to deal with disorder and disruption in court . . . The main problem with the lack of clarity in the law of contempt is in the area of sub-judice . . . The lack of clarity leads the media to err on the side of caution and not to publish it: thus public discussion is muted.²²

In a more practical vein perhaps, the Melbourne *Age* pointed out that the opening of an inquest into two recent murders in Victoria had, on its legal advice, prevented publication of material that could be helpful to the police:

Newspapers in publishing sketches and other information can be helpful to the police in solving murders . . . The effect of the adjournments [of the inquests] is that both inquests are now 'sub-judice'. As a result by publishing material that could prejudice the coroner's hearings when they reopen, this newspaper could find itself in contempt of the court. Indeed, our legal advice suggests that if the Chief Commissioner of Police, Mr. Miller, asks for our assistance, by publishing a police sketch or other police details to help track down the offenders, we shall have to refuse or risk being in contempt of the Coroner's Court. The penalty for contempt is limitless. Not long ago this newspaper and its editor were fined a total of \$80,000 on a contempt matter in the Supreme Court. It would be stupid to expect this newspaper to pay such a price to help the police to catch murderers.²³

I make no comment on the legal advice nor on the distinct note of discontent with the earlier fine. The fact remains that the law of contempt in Australia is in need of re-examination. Governments, looking at the calumny that has been heaped upon Lord Hailsham's attempt at reform in Britain, may retreat from the effort. The Yorkshire Ripper case and other notable abuses of pretrial publicity do not make the path of the reformer any easier.²⁴ But things have changed. Our law of contempt is quite out of line with that existing in the United States and much more restrictive than that in

most parts of Europe. Shortly, it will be out of line with the reformed British law. A popular demand for information and the utility to which information can be put in assisting the administration of justice are seen more clearly today than they were in the past. Without pandering to an impartial adjudication, I believe we could see significant reform of the law of contempt. But how it will come and whether it will come on a uniform basis is not at all plain to me at this vantage point.

Journalists' Sources

A similar tension can be seen in the claim by journalists to a privilege against revealing in court the sources of confidential information upon which they have based news or other stories.

In the United States, even in the face of constitutional guarantee in the First Amendment, the Supreme Court has held that the countervailing importance of the administration of justice in the courts displaces the interest of the press in protecting its confidential sources.²⁵ In Australia a similar rule has been adopted.²⁶ In Britain, a recent decision of the House of Lords refused to confer on a television journalist a privilege against disclosing to the British Steel Corporation the 'mole' who had 'leaked' highly confidential internal documents.²⁷ A similar conclusion was reached by the Law Reform Commission of Western Australia, which recommended against granting to journalists a privilege in absolute terms.²⁸ This recommendation was recently criticised by Professor Sawyer who described it as having been based on hunches that were 'excessively bald'.²⁹ He urged:

There is a great deal to be said for a rule that in civil defamation actions refusal to name sources should be permissible on terms that a defendant cannot rely on any ground of qualified privilege, but in such cases plaintiffs should not be allowed to demand disclosure of sources if the sole purpose is to obtain aggravated damages. In the case of criminal trials before a judge and jury, the judge sitting alone in chambers should be empowered to uphold the claim of privilege if the journalist satisfies

him that the evidence of the informant will not be admissible in the trial; otherwise he should require the naming of the informant.³⁰

The issue of journalists' privilege is now under consideration by the Australian Law Reform Commission in connection with its inquiry into the reform of evidence law.

Police informers and lawyers' clients have a privilege in respect of their confidential communications. In some States of Australia, communications with a doctor or priest are privileged. The extension of privilege to other groups, including journalists, poses a risk that justice may be truly blindfolded.

Should courts resolving the disputes of society be forced to do so on inadequate and incomplete data, where some relevant material is withdrawn out of respect for confidences which are said to be even more important than the due administration of justice? It is still too early for me to prognosticate how this debate will go. Extending a privilege to journalists will add urgency to the claims for privilege by all doctors, priests, accountants, bankers and others.

It seems appropriate to give legal protection to confidences which advance the greater public good. But I doubt that we will see a privilege in the absolute term called for by some journalists. Not even the United States, with its cherished constitutional protection for the press, has gone so far.

CONCLUSIONS:

Journalists of today must perform their difficult vocation in a time of rapidly changing media ownership, dynamic technological advances which affect the media and changes in social attitudes which, sooner or later, impact the law.

That there is need to reform media law in Australia is scarcely open to debate. Federation, so convenient and appropriate in many other areas, is a source of confusion and uncertainty when it comes to media law. Because a great many newspapers, magazines, radio and television broadcasts proceed across State borders nowadays, there is a

Continued Page 35

Reforming Media Law

From Page 34

need to bring a greater harmony into the law affecting the media from one jurisdiction of Australia to another. This is not just a case of uniformity for the sake of neatness. This is yet another case of technology presenting a problem for law reform which was simply not conceived at the time the Australian Constitution was designed.

I repeat that it is not just to expect journalists to comply with the letter of the law if it takes a day's research to find out what the law says. Journalists must often work to very severe deadlines and in situations of great emotion and significant public importance. Confusion and uncertainty about the law governing them must affect standards and produce timidity and unevenness. It must diminish their capacity to serve the public well.

In one area of operations, there is hope. It arises, I believe, from the report of the Australian Law Reform Commission proposing a new defamation law, which also includes new and more appropriate procedures of redress and certain limited protections against invasions of personal privacy.

I have always believed that the availability of a single uniform defamation law, with modern procedures and a clearer statement of rights and duties, would be the best possible contribution to an improvement of journalistic standards. It will provide the means by which cadet journalists could learn the legal boundaries within which they must operate. I confess at once that I should not want to be a journalist today, trying to keep in my head eight different systems of defamation law. Of course few, if any, do. Most 'muddle along', occasionally guided by highly talented but expensive lawyers and sometimes stung into concentration upon the law by the receipt of a Supreme Court summons.

Where such an important freedom is at stake, the law ought to do better. The report of the Law Reform Commission on defamation and privacy points the way.

I believe we will see legal protections for privacy. I am sure we will

see greater readiness in open courts, presently closed, but on condition that litigants in the Family Court and Childrens Court are not identified by journalists' reports. There is an urgent need to reform the law of contempt to bring it into closer line with the law as it obtains in other developed Western communities, but without removing altogether the inhibitions against trial by the media. Finally, we must come to grips with the difficult issue of journalists' claims for the secrecy of confidential sources. This too is a matter under consideration by the Law Reform Commission.

Clive Robertson, a Sydney breakfast announcer for the ABC, with a large following of devotees, recently announced:

Journalists are not godlike. There is no evidence that God was ever a journalist.

All the same, journalists are the 'ministering angels' of a free society. Some fall from grace. Some get lost in the clouds. Most get on with the business of bringing news, views, opinions and entertainment to an information-hungry nation. There are few vocations with greater power and responsibility. And that is precisely why the law, stating society's ultimate standards, has things to say to journalists. But the question remains. Need those statements be so Delphic and obscure?

The effort for the next 20 years should be modernisation, clarification and unification of media law. The technology of the media marches on in an advance party. The law limps along at the tailend of the line.

FOOTNOTES

1. *Australian Financial Review*, 4 June 1981, 12 ('Dailies are still feeling the pinch'). 2. M. Davie, 'Lament for a Newspapers', *The Age*, July 1981. 3. *The Age* 1 June 1981, 5. 4. *ibid.* 5. *id.* 6. *id.* 7. G. Harriott, 'On the Other Hand', cited in *Focus*, June 1981, 11. 8. *The Age*, 1 June 1981, 5. 9. As reported, *Sydney Morning Herald*, 14 July 1981. 10. *Sunday Observer*, 5 July 1981, 9. 11. Australia, Senate Standing Committee on Education and the Arts, 'Children and Television Revisited — A Review of the Report of the Impact of Television on the Development and

Learning Behaviour of Children'. 1981. 12. H. Robinson, 'Concern Over Children's T.V. and all that Junk', in *See, Hear!*, *Sydney Morning Herald*, 13 July 1981, 1. 13. Administrative Review Council, *Report on the Procedures of the Australian Broadcasting Tribunal*, 1981. 14. See e.g. 'Former Chief Justice Reviews Famous Libel Case', on *Focus*, June 1981, 10. 15. Lord O.R. McGregor, 'Conflicts of Rights: The Right to Privacy and the Rights of a Free Press', Paper for the IPI Conference, Nairobi, 1981, mimeo. 16. A note on the new Israeli legislation is contained in *New York Times*, 25 February 1981. For a recent report on Swedish proposals, see *Statens offentliga utredningar, Justitiedepartementet, Privatlivets fred*, 1980 (English Summary). 17. *The Australian*, 22 December 1980, 6. 18. See First Offenders (Women) (Repeal) Ordinance 1980 (ACT) which repealed the First Offenders (Women) Repeal Act 1976 (NSW), which repealed the First Offenders (Women) Act 1918 (NSW). 19. *The Australian*, 22 December 1980, 6. 20. Mr. Justice David Hunt, 'Why No First Amendment? The Role of the Press in Relation to Justice' (1980) 54 *Australian Law Journal* 459, 461-2. 21. *The Times*, 7 January 1981. 22. *Canberra Times*, 15 June 1981, 2 ('Contempt of Court'). 23. *The Age*, 9 July 1981, 13 ('Murders and contempt'). 24. See the *Times*, 16 May 1981 ('An Unproven Case for Contempt'; G. Robertson, 'The Contempt Bill and Press Freedom' in the *Listener*, 5 February 1981, Vol. 105, No. 2698, 162 ('It is easy to exaggerate the horrors of trial by newspaper'). 25. *Branzburg v. Hayes; in Re Pappas; United States v. Caldwell*, 408 US 665, 690 (1972), Cf. in *Re Farber*, 99 S.Ct. 598 (1978). 26. *McGuinness v. Attorney-General (Vic.)*, (1940) 63 CLR 73; *Re Buchanan* (1965) 65 SR (NSW) 9; Hunt, 462. 27. *British Steel Corporation v. Granada Television Limited* (1980) 3 WLR 774. See now Contempt of Court Bill 1980 (GB) as amended. Reported, the *Times*, 20 May 1981, 2, which proposes a privilege for journalists. 28. Project No. 53, Perth, 1980. 29. (1980) 4 *Criminal Law Journal* 324. 30. *ibid.*, 323-4.

Broadcasting Inquiries: Canadian Experience

By MATTHEW SMITH

Excitement about what are appropriate inquiry procedures for the Australian Broadcasting Tribunal has lately been muted by headier topics, but the quest for a workable system of public and industry participation has not been abandoned.

In February 1981, the Administrative Review Council recommended the introduction of uniform and detailed inquiry procedures, and its report was made public in April. The report and comments upon it are apparently now under consideration by the government.

In this context it is interesting to review a lengthy study paper prepared by Mr. C.C. Johnston for the Law Reform Commission of Canada on administrative procedure in the Canadian Radio—Television and Telecommunication Commission. The study was written in 1979 but was published only recently, and reached Australia after the ARC has concluded its study of the ABT.

The Canadian Law Reform Commission has a role in reforming administrative law and practice similar to that of the ARC, but has approached the task in a very different way. With a larger budget and longer time—tables, it has delayed forming recommendations until the completion of a series of research studies on particular administrative agencies and general topics of public administration. The result has been an expanding literature of great interest. As well as the present study, it includes a paper by Mr. D. Fox entitled "Public Participation in the Administrative Process", which usefully examines the techniques for converting the slogan of "participation" into some reality.

The CRTC, like the ABT, has been in the forefront of trends to greater openness and public involvement in government. For both, the development of inquiry procedures has been seen as a corollary of the transfer of full powers to regulate broadcasting to persons independent of politics. Their regulatory powers and roles are largely equivalent, although the CRTC also regulates the Canadian Broadcasting Corporation, cable television systems and federally regulated telecommunications services.

In 1979 the ABT, with vague philosophies of "accountability" and

no rules of procedure, commenced a new administration insisting upon public hearings before it would make decisions of any significance. It discovered problems whose solutions are only now being found. Similar problems were encountered by the CRTC, which responded with procedures of greater detail and sophistication than those to date developed by the ABT.

Mr. Johnston's study examines these and recommends further improvements. The study provides support for the thrust of the ARC's recommendations for improving ABT procedures.

This can be illustrated by reference to the problems of when to follow inquiry procedures, and how to control oral hearings.

The benefit of an inquiry system of regulation is that it guarantees that the regulator will not make a decision until he has heard and considered the concerns of all people who will be affected. This especially assists members of the public and community interest groups who are apt to be ignored by bureaucratic regulators, but it also protects the commercial interests of the industry involved.

One difficulty in running such a system is that locating the people who wish to be heard and examining what they wish to say can be time—consuming and expensive. At times the process will also seem unrewarding, since only some of the hundreds of different decisions to be made by the broadcasting regulator will attract the involvement of people other than the applicant, or will give rise to issues deserving thorough scrutiny in a public hearing. Unless this is recognised by the appropriate procedures, the regulator will adopt routines for dealing with applications which either effectively prevent people obtaining a full and fair hearing, or so dominate the regulator's attention with undigested trivia and formality that he is unable to react properly to important issues.

Both these dangers surfaced in the early days of the ABT, partly as a result of the load of unprepared renewal hearings undertaken in the name of accountability.

In Canada, the CRTC's resources seem to be greater, but it also was able to approach its work—load

more sensibly by developing a procedure allowing variable responses to applications for decisions. Thus it exercises a discretion not to call inquiries, sometimes after first testing public reaction, and also has a system of dividing its hearing lists into "appearing" and "non—appearing" items. Mr. Johnston's study encourages these procedures, and suggests improvements by requiring more preliminary documentation from applicants and intervenors and by the active assessment of this material by the CRTC. He proposes that the CRTC should then spell out the issues which has caused it to call a public hearing. This approach has been endorsed for Australia by the ARC, with further recommendations that the discretionary gateways by which the ABT could dispose of matters without a hearing should be tightly structured, thus guaranteeing rights of participation.

Turning to oral hearings, it would seem that Canada has not had an experience equivalent to the ABT's early series of capital city television licence renewal hearings.

The CRTC recognised the need for procedures to prevent hearings becoming either unco—ordinated babel or ineffective vehicles for participation. It has limited the right of members of the public to appear only by requiring notice of proposed intervention: the solution to the problem of standing also endorsed by the ARC. As a result of history, the CRTC has had the beneficial experience of operating two styles of hearing: in broadcasting matters with informality and limited cross—examination; and in telecommunications matters with more thorough preliminary procedures and adversarial hearings. Mr. Johnston's study suggests that there are advantages in being able to vary the formality of procedures. At times a broadcasting matter will require testing by court—like procedure preceded by exchanges of written evidence and analysis of issues, but at other times these procedures will be unnecessary and unwise. What is needed is ample procedural rules allowing formalities to be introduced when appropriate, and regulators able to direct each inquiry down the procedural path suited to its circumstances.