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Copyright is ours

Christopher Warren, Federal Secretary of the Australian Journalists Association, discusses copyright issues of concern to journalists

Copyright issues are of growing importance to journalists, artists and photographers both in Australia and around the world. The so-called information revolution has opened up vast new areas for the exploitation of information resources and has dramatically expanded many traditional uses. At the same time the growing concentration of ownership particularly in the print medium has increased the pressure on journalist's work.

This information revolution has called forth from journalist's organisations a copyright resistance. Around the world, journalists ' unions affiliated to the International Federation of Journalists have been seeking to resist the pressures on the rights of authors under the slogan "Copyright is Ours" because, of course, copyright is more than just a legal concept for journalists. It is what we sell to make our living, whether on a freelance basis, or on a continuing basis as an employed journalist .

In Australia, the Australian Journalists Association (AJA) has determined that there are three central issues of copyright exploitation which need to be addressed. The first of these is photocopying, the second is electronic publishing and the third is syndication. It is a truism to say that one of the key objectives of copyright is to link in a fair way the creator of a work with the economic exploitation of his or her creation.

For freelance journalists, the rights are unambiguous and unchallenged. But when the author of a work is an employee, the question that needs to be asked is to what extent the salary paid by the employer is sufficient compensation for the rights over the creation that are assigned to the employer. Our employers claim that once the salary is paid, the employer should have all rights. After all, the argument runs, if the work is made in the bosses' time, it should be the bosses' work.

Journalists, on the other side, say that the work is an expression of its creator and any rights taken over it by the employer should be only for the purposes for which the journalist is employed. Any supplementary or unforeseen exploitation of the work other than that primary exploitation should be for the benefit of the creator not treated as some windfall for the employer.

Around the world, copyright provisions for employed authors vary from country to country although most common law nations place some fetters on exploitation by employers.

In Australia, Section 35(4) of the Copyright Act provides:

"Where a literary, dramatic or artistic work is made by the author in pursuance of the terms of his employment by the proprietor of a newspaper, magazine or similar periodical, the proprietor is the owner of any copyright subsisting in the work by virtue of this Part in so far as the copyright relates to:

(a) publication of the work in any newspaper, magazine or similar periodical;

(b) broadcasting the work; or

(c) reproduction of the work for the purpose of its being so published or broadcast, but not otherwise.

It is in testing the limits this section places on employer exploitation of an employee's copyright that the Association is approaching the three issues of concern.

Photocopying

The ease and superficial cheapness of photocopying over the past decade has seen a dramatic growth in the photocopying of articles from newspapers and magazines. Government departments and large corporations rely extensively on these clipping services to discover what is going on in the media.

As an aside, it should be noted that this spread of information has played a role in potentially reducing free speech by making it easier - and more likely - that defamation action will be taken. Indeed, it was a clipping service that generated the recent defamation by the former New South Wales Minister for Education against a country newspaper in Cavalier -v- Mayes (1989) which resulted in $200,000 award (later overturned on appeal).

Increasingly, both government and corporations are relying on contract clipping services to provide this service. These appear to be immensely profitable. Once published estimate of one service two years ago gave it an annual turnover of $8 million. The AJA's estimate is that the total turnover of the copying industry would be about five times that figure. That's why the AJA together with Copyright Agency Limited have started proceedings in the Federal Court (AJA, CAL & ors -v- Neville Jeffress/Pidler Pty. Ltd) to determine the extent of journalists' copyright under Section 35 (4) of the Act.

It will test how far the copyright relates to:

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- publication of the work in any newspaper, magazine or similar periodicals;
- broadcasting the work; or
- reproduction of the work for the purpose of its being so published or broadcast.

It is hoped the proceedings will also clarify the meaning of the phrase "newspaper, magazines or similar periodical". In relation to fair dealing for the purpose of reporting news - which the monitoring company has raised - the question is:

- what is "fair" in all the circumstances:
- what is meant by "news"?
- what is meant by the phrase "for the purpose of, or associated with, the reporting of news"?

Electrocopying

Most newspaper companies have traditionally kept records of information published in their and other publications in a clipping library. When all this was in paper, the ability to exploit this as a resource was limited and often restricted to staff members for research material. Some, such as The Australian Financial Review, used these paper libraries to provide information services, but the cost of handling the amount of paper involved coupled with problems of access limited this sort of exploitation.

Computer-based publishing resolves both these difficulties and allows publishing companies to provide this service electronically. Stories written by staff journalists on visual display terminals can be stored in an electronic data base, accessed through relevant keywords. Access to this data base can be provided to anyone with a personal computer and modem. Having been copied once, the only limit on further electronic copying is the size and linking of data bases.

A number of companies are now providing this service, such as the Ausinet system available from the Fairfax group.

This additional exploitation of copyright is currently being treated as a bonus by the companies involved. Despite approaches to the employer, no steps have been taken to properly compensate the journalists for the profits this extra - and often unforseen - use provides.

Some of the older types of these data bases, such as the Teletext service provided by the Seven Network, rely on broadcasting. The more common method now, and the one used by Ausinet, is delivery over cables such as telephone lines. Where the information is broadcast it may be argued that Section 35(4) seems to provide that the copyright has been assigned to the employer. But cable transmission is not a right that section transfers to the employer.

These services are by their very nature archival, not periodical. It is the very strong view of the AJA that this means that employed journalists retain their copyright when their material is made available in these sort of services.

Clipping services so far are only an initial attack on journalists' copyright. Electronic copying will be the major challenge of the 90's for copyright owners such as journalists.

"Copyright is more than just a legal concept for journalists. It is what we sell"

A recent report for the International Federation of Reproduction Rights Organisations on electronic copying said it "opens the door to an intensity of use far beyond the level of use made possible by reprographic reproduction". The report adds that "alongside this major point lies the sheer undetectability of electrocopying which increases enormously the risks to copyright owners of abuse of their rights".

Syndication

Syndication of journalists work is not a new phenomenon. It is as old as newspapers in Australia. Since 1803, newspapers (as they still do today) have relied on reprinting material from Britain and elsewhere.

Journalists have long found this sort of syndication unsatisfactory. Whatever the legal position, there is no doubt that it is an abuse of the basic reason for which a journalist is employed.

In its Bulletin 59 "Journalists and Copyright", the Australian Copyright Council indicates its view that in light of industry practice, "the proprietor presumably owns the copyright for the purpose of syndication - including the work in any newspaper or periodical anywhere in the world for any number of times". This is not a view the AJA accepts. Syndication rights must be limited by the contract of employment of the employed journalist. If a journalist is employed by a particular publication, then it is at least arguable that the contract of employment with the particular publication limits the use of copyright material outside that employment relationship.

Being aware of uses of journalists copyright where that copyright has not been paid for is one thing. It is quite another to attempt to develop mechanisms to license use of that copyright in any way that is not excessively bureaucratic or does not restrict the free flow of information.

Collection agency

As the registered trade union for Australia's 12,500 journalists, artists and photographers, the AJA has among its objects to "act as agent and/or licensor for members in all respects in relation to the authorisation of uses of copyright material and the collection and distribution of copyright fees".

This enables the Association to collect copyright fees for its members from copyright users. In line with this, the AJA has recently authorised the Copyright Agency Limited to collect fees due to journalists from copying in educational institutions.

But a major difficulty that the AJA, like all other collection societies, needs to address is the method of distribution of fees gathered.

It is accepted by the samplers that the journalistic work identified by the sample is not statistically sound. All the sample can show is what proportion of the total is from newspaper or magazines. How that proportion is divided among individuals cannot be shown in a statistically valid way by a sample survey.

This has forced the Association together with journalists associations overseas to look at equitable means of collective distribution. This has become the common method in northern European and Scandinavian countries. However, individual property rights in countries in those traditions are generally weaker that they have been held to be in countries in the Anglo-American tradition.

Still, it is difficult to think of a more equitable way of distributing those copyright fees to journalists without an administrative bureaucracy that would absorb all the fees itself without benefiting any of the creators.

Control over copyright is not just an academic exercise for journalists. Creating copyright protected work is what we do and how we earn our living. Unless journalists properly confront the increasing exploitation of their rights, they run the risk of losing those rights altogether. Already media monitoring companies are actively lobbying Parliament to be given a free right to copy journalists' work.

Unless journalists demand their rights, demand control of uses of their work, demand proper payment for its exploitation, those rights will not be maintained.

** This is an updated and adapted version of a speech to the Fourth Copyright Law and Practice Symposium, September, 1989.*

Foreign ownership of broadcasting: will the real limitation please stand up?

Leo Gray examines the background to this topical debate and argues that many of the statements made recently in the press are misleading

The limitation on foreign ownership and control of commercial radio (in s90G) and television (in s.92D) has always been one of the few provisions in the Broadcasting Act 1942 that was guaranteed to make us proud to be Australian. Like kangaroos, meat pies and Holdens.

We could lie in our beds at night secure in the knowledge that our airwaves had been protected by the Parliament from the creeping octopus of foreign multi-national mega-capitalism.

That's how it was and always would be, right? Wrong.

In recent times, the press tells us that consideration has been given to increasing the permissible level of foreign ownership from 20 per cent to 40 per cent, and that some naughty foreigners have been exploiting a "loophole" that allowed them to sneakily acquire up to 50 per cent of a licensee, which the Minister for Transport and Communications, Ralph Willis, described in January as "contrary to the intent of the Act".

What has not really been made clear is that the restrictions on foreign ownership and control have never been as strict as they are popularly presented, and this fact has been well-known to the bureaucracy and to governments of both persuasions.

The best way to understand where we are in policy and drafting terms, is to see where we came from. For the sake of simplicity, I will refer mostly to the limitation as it applies to television, although the principles and comments apply equally to radio.

The 1951 resolutions

The history of the matter starts with the resolutions of each House of Parliament in 1951 that:

"it is undesirable that any person not an Australian should have any substantial measure of ownership or control over any Australian commercial broadcasting station, whether such ownership or control be exercisable directly or indirectly." [emphasis added].

This resolution related to the 1951 acquisition by the UK-owned MPA Productions Pty. Limited of Broadcasting Associates Pty. Limited, a company which was a substantial shareholder in several companies holding licences for commercial radio stations.

Prime Minister Menzies, stated that the motion was:

"... directed to the question of whether people who are not Australians, wherever they may come from, should secure a substantial control over some form of internal propaganda in Australia." [emphasis added]

The companies concerned were willing to give effect to the resolution of the Parliament. After the adjustment in shareholdings, the maximum holding of Broadcasting Associates in any commercial radio station was 44.7%. This was accepted by the government and the Australian Broadcasting Control Board (the Board) as substantial compliance with the resolution of Parliament.

There are three points to note.

First, the concern of the Government was with the potential for foreign control of an organ of propaganda.

Second, the Parliament did not concern itself with any particular percentage of shareholdings or votes but with the concept of a "substantial measure of ownership or control".

Third, a shareholding of less than a majority in any licensee company was accepted by officialdom as "substantial compliance with the resolution of Parliament."

The 1955 television licences report

In its report on the inquiry into the grant of the first four television licences in Sydney and Melbourne, the Board considered what conditions might apply to the licences, and in this context the Board turned its attention to the issue of foreign ownership.

After referring to the 1951 resolutions and extract from the speech of Prime Minister Menzies, set out above, the Board said:

"What was then said of broadcasting [i.e. radio] can be applied with at least equal force to television ... one of its main purposes should be to develop a sound Australian sentiment and the beliefs and standards which will help to make Australia a great country. For this reason, we hold the view that ... the preponderance of the capital invested in commercial television stations should be subscribed by Australians and that the control of those stations should, without any question, be in the hands of Australians ...

"... we consider that it should be a condition of the licence granted for a commercial television station that not less than 80 per cent of the paid-up capital of the licensee company should be held by Australians. If this proposition is adopted, it will be possible for overseas interests to acquire up to 20 per cent of the shares in Australian television companies, but we think that the holding of any individual overseas shareholder should be less than that... we suggest 15 per cent.

"So as to prevent any misunderstanding,... we have proceeded on the basis that in this context:

(a) a company registered in Australia in which the shares are held equally by Australian and overseas shareholders should be deemed to be controlled overseas; and

(b) a company registered in Australia should be deemed to be controlled overseas if it is possible for the company to be controlled indirectly, or in fact, by an overseas company, irrespective of the shareholding."

The following comments can be made.

First, the Board changed the emphasis of the policy from one of preventing foreign control of a means of propaganda, to one aimed at assisting the development a "a sound Australian sentiment and the beliefs and standards which will help to make Australia a great country".

Second, the Board moved away from the notion of control alone, and suggested that television should be an "Australian enterprise", that is, Australian-owned.

Third, despite the strong rhetoric, the Board was remarkably vague about what was meant by an "Australian". The real difficulties lay with corporate shareholders in licensee companies. Assuming that the Board intended that its remarks should apply to any company (not just a licensee), the Board appeared to regard a company as an "overseas shareholder" if it had a 50 per cent foreign shareholding or was "controlled indirectly, or, in fact, by an overseas company, irrespective of the shareholding". In other words, it seems consistent with the Board's expressed views that 100 per cent of a licensee's paid-up capital could be held by Company X, even though Company X was 49 per cent owned by foreign shareholders, provided that the foreign shareholding did not result in Company X being "controlled indirectly, or, in fact, by an overseas company."

The 1956 and 1960 amendments

In 1956, the Board's recommendations were enacted in a new s.53B of the Act, subsequently renumbered as s.92. Section 92 explicitly embraced residency as the test of Australianness for any natural person, but entrenched in legislation the vagueness in the Board's recommendations concerning corporate shareholders.

In 1960, s.92 was amended and renumbered to s92D. The new s.92D(1) was identical to the old s.92(1). There was, however, a significant amendment to the provisions which dealt with the concept of "control". Postmaster-General Davidson explained that it was necessary to specify the percentage of votes which would put a person to be in a position to exercise control of a company, so as to avoid any legal devices aimed at avoiding the ownership and control limits. This was achieved by the new deemed control provision in s.92B, which provided that, for the purposes of Division 3, a person -

"... in a position to exercise control of more than 15 per cent of the total votes that could be cast at a general meeting of a company is deemed to be in a position to exercise control of that company and of any voting rights of that company as a shareholder and of all acts and operations of that company."

The Board remained in doubt about whether "controlled", as used in s.92D, was to be interpreted by reference to the test in s.92B, or general law notions of control of a company.

The 1965 amendments

In 1965, Part IV Division 3 was again repealed and a new Division 3 enacted. It had been possible to circumvent the 1960 amendments by restricting, through the articles of association, a shareholder's voting rights to 15 per cent, irrespective of the size of the shareholding held. The 1965 amendments introduced into the Act, the concept of a "prescribed interest" in a licence, along with associated provisions for tracing and identifying control.

Whatever else the 1965 amendments did, they did not clarify the confusion about the scope of s.92D. In 1967, the Attorney-General's Department advised the Board that it was:

"... doubtful whether regard can be had to the provisions of section 92B in determining for the purposes of section 92D whether a company is controlled by a person, but the relationship between the two sections is obscure and consideration should be given to an amendment of the Act to clarify the matter."

The advice added:

"... if section 92B does not apply in relation to section 92D, the references in the latter section to 'control' would have to be construed as meaning control of more than 50 per cent of the voting rights."

Justice Morling in Re Control Investments and the ABT (1982) also expressed the opinion that, under the pre-1981 law, s.92B did not apply to s.92D.

The 1981 amendments and after

The 1981 amendments changed the test from a "residency" test into a "citizenship" test. Ironically, it was widely believed that this was done to benefit Rupert Murdoch, who remained (at that time) an Australian citizen, although he still called America home. In September 1985, when he took US citizenship, he fell a foul of the very same provision that had enabled him to keep control of Network Ten over the previous years.

"The policy and effect of the legislation...is really very little different to that put in place back in the fifties"

But the 1981 amendments also appeared to try and legitimise the administrative practice which had been adopted for many years. Senator Chris Puplick raised the problem in the Senate debate on the 1981 Bill:

"In those sections [ss. 90G and 92D] 'controlled' could mean the 15 per cent shares and/or votes test currently applied under section 92B or it could mean the 50 percent vote test used under common law. The first interpretation ... would allow non-residents to own directly 84 per cent of the shares in a licensee provided no individual non-resident or company which non-residents were in a position to control, and they are the words of section 92B, held more than 15 per cent of the shares. The second interpretation ... would allow, for example, 100 per cent of the shares in the licensee to be held by a company in which 80 per cent or more of the shares were held by non-residents, provided the non-residents held less than 50 per cent of the voting rights in that company. It has to be acknowledged that the existence of those varying interpretations has led to some confusion. In recent years one would suspect that the Tribunal has inclined to the 50 per cent rule ... The redrafted sections apply the current interpretation and strengthen it. Apart from whatever consequences may flow from the alteration of the word 'resident' to 'citizen' it is not true to suggest that the proposed new sections allow a larger proportion of the shares in the licensee to be held by persons who are not citizens than was allowed for non-residents previously.

The solution adopted by the Government was to apply both the 15 per cent and 50 per cent tests in a way that was more readily understandable, even though it appeared on its face to be a radical departure from what had gone before.

Section 92D(1) applied the 15 per cent tracing test by using the formula of words contained in s.92B of the Act (now renumbered as s.89K), but with the addition of the words "directly or indirectly". Thus the section now prohibited a "foreign person" from holding in a licensee any of those classes of interests outlined in s.92B(1), even if those interests were deemed to be held by virtue of tracing under s.92B through a chain of companies.

Until 1986, no consideration was given to the possibility that s.92D(1) might also include de facto control of a licensee, i.e. control arising not from any shareholding or voting interest, but from control over the appointment of directors or any other means of controlling the affairs of the licensee company. That matter was considered by the Full Federal Court in Re News Corporation Ltd (1987). That case arose from the Tribunal inquiry into the reorganisation of the News Group holdings in Network Ten following Rupert Murdoch's assumption of American citizenship. In the course of the inquiry, the Tribunal referred a number of questions of law to the Federal Court under s.22B of the Act, including whether s.92B exhaustively defined the meaning of "in a position to exercise control, directly or indirectly, of a company" as used in s.92D.

The Court found that s.92B was not exhaustive. The court said:

"I consider that the term "in a position to exercise control of a company" in s.92D(1) should be taken to mean the power to direct or restrain what the company may do on any substantial issue. The situations referred to in s.92B(1) will be included within the expression "control of a company", but do not exclusively define its limits. The application of such a definition may give rise to difficult questions of fact in future cases, but that is to be preferred to an illogical interpretation of s.92B(1) which would stultify the purpose of the Act."

The Court also held that control of the board of directors of a company also fell within the expression "in a position to exercise control of a company", and that a power to veto action by the board was a power to control it. Chief Justice Bowen thought the position was no different where the putative controller appointed one less than half the directors of the company, but had the power to appoint another director at any time and thereby exercise a veto power.

As always, the real problem in s.92D is

not when a natural person is a "foreign person" - that is determined simply by reference to the person's status under the Australian Citizenship Act 1949 (Cth). The problem is still the position of corporation shareholders. After 1981, the status of a corporation is determined by reference to sub-section (4). That sub-section brings in the 50 per cent voting power test which had been applied in fact by the Board and the Tribunal, but also adds to it the classes of interest of the kind set out in s.92B. In this respect, Senator Puplick's reference to strengthening the pre-1981 position is actually correct.

Section 92B (and the present s.89K) applied to s.92D(4), but not to ss.92D(2), (5) or (6): see s.92B(89K)(1). Thus a company that is exactly 50 per cent foreign-owned will be a "foreign person" (and thus limited to an interest in a licensee of no more than 15 per cent of votes or paid up share capital) if one or more of the foreign shareholders holds a shareholding or voting interest exceeding 15 per cent of the relevant interests in that company. With any other spread of shareholdings, such a company is able to hold 100 per cent of the interests in a licensee.

Because the real issue is when a corporate shareholder is deemed to be a foreign person, the 80:20 ratio of Australian to foreign shareholdings in the licensee itself remains (as it has really always been) a complete red herring.

It is easy to see how a fairly unsophisticated and inexpensive structure could be set up - involving a small number of foreign companies and a single Australian citizen - which could exploit this relationship between the 15 per cent and 50 per cent measures, and the fact that the proportional tracing method set out in s.89N also does not apply to either s.89K or s.92D. Without going into detail, it is possible to lift the total direct and indirect foreign equity to a level as close to 100 per cent as the parties feel they can go without creating a situation where a finding of de facto control of the licensee (under the News Corporation test) by one of the foreign shareholders becomes inevitable.

But whatever may be the shortcomings of the 1981 amendments, one thing is clear: the policy and effect of the legislation as it now exists is really very little different to that put in place back in the fifties. If anything, s.92D since 1981 is more restrictive in its reach than the legislation which preceded it (putting aside the residency/citizenship issue). What this means is that the current debate about whether total foreign ownership should be "kept" at 20 per cent or "lifted" to 40 per cent or some higher figure, is at best proceeding in a direction tangential to the real world, and is at worst as misdirected and muddled as most other debates about broadcasting policy.

Leo Grey is a Sydney Barrister

The great book debate

The "Great Book Debate" of 1989 revolved around those provisions in the Copyright Act 1968, prohibiting the parallel importation of literary works. Section 37 prohibits the importation of a book by a person, without the permission of the copyright owner, for the purpose of selling, or offering for sale, or distributing for sale that book. Similarly, s.38 prohibits persons, without the permission of the copyright owner of a book, from selling, hiring or offering for sale, that book.

After inquiries by the Copyright Law Reform Committee, the Prices Surveillance Authority and much public debate, the Attorney-General announced that the Copyright Act was to be amended so that copyright owners would lose control over imports for all non-pirated copies of books published after the amendment of the Act.

The A-G's scheme would exempt from this general provision all books published in Australia either first or within 30 days of first publication overseas in any signatory nation to the Berne Copyright Convention.

The scheme also provides that where stocks of a book become exhausted and are not replenished within 90 days, that book may be imported by any person without penalty until such time as the copyright owner can again meet booksellers' orders.

The scheme's requirements to meet demand will not be satisfied by the mere supply of a hardback edition where a paperback edition is available overseas.

Finally, booksellers will be able to import any book the subject of documented order from a customer wanting the book for non-commercial purposes.
Ed

Laurie Muller, president of the Australian Book Publishers Association

The Fairfax Media

In October 1988 the Sydney Morning Herald and The Age ran a prominent series of articles, by Robert Haupt, alleging British publisher monopolisation of the Australian book industry using territorial copyright as the means. These articles were followed up by others including editorials.

The front, feature and editorial page prominence of the initial and subsequent articles on this subject was certainly without precedent in any average of the Australian book industry. The articles and editorials did not strive for any balance on what is a complex issue. The initial articles pre-empted the Copyright Law Review Committee (CLRC) Report and created an extremely hostile climate for its reception The Fairfax media maintained its hostility to the book publishing industry throughout the whole period using the Sydney Morning Herald, Age and Financial Review to maintain their crusade for far reaching copyright reform.

While a significant amount of the coverage was insightful and valuable, the overall effect was so far out of balance and of such a crusading nature that it presented a distorted picture to a confused and angry public and a troubled industry. To most people it was their only source of knowledge on what was a complex multi-faceted debate, the interested public was poorly served by the media generally.

Overall the media involvement in the controversy fell well short of any reasonable standard of balance and created a climate where it was very difficult to maintain any sense of perspective.

CLRC Report

Six years in the making, the CLRC Report was a model of thoroughness and respect for copyright. It introduced the radical concept that territorial copyright be subject to a performance test based upon a notion of reasonable time. The book industry reacted with some caution and set about attempting to find workable industry definitions of reasonable time and associated details.

To the surprise of the book industry, the Australian Booksellers Association (ABA) and the Australian Book Publishers Association (ABPA) managed to agree on an extensive range of crucial definitions. Both Associations advised the A-G of the agreement and generally welcomed the reform of the industry as recommended by the CLRC.

The PSA

Amid a blaze of well orchestrated media publicity the Prices Surveilance Authority (PSA) conducted two days of public hearings and several months of independent research into Australian book prices and the effect of parallel importation restrictions contained in the Copyright Act.

In a further blaze of well orchestrated publicity they announced in their interim report in September 1989 that there was a conspiracy of British publishers and Australian authors, which caused book prices to be 30 per cent higher than they should be and recommended the complete removal of the territorial copyright provisions of the Act. The PSA recommended that alone of the English speaking nations of the world, Australia should become an open market.

Publishers and authors responded with genuine alarm. The Australian Society of Authors, the Australia Council, the Australian Copyright Council, the ABPA and a large group of prominent Australian authors advised the Government of their strong objections to the extreme position adopted by the PSA.

The debate spilled over, angrily, into the media and for the first time the many other aspects of the controversy were aired. The PSA was publicly criticised for the economic narrowness of its approach and the dubious validity of its economic theory. It was further criticised for the lack of thoroughness in its report, for significant errors in its international price comparisons and most importantly for its inability to comprehend Australia's obligations under the Berne Convention. Australian authors and many publishers and public figures criticised it for its cultural shortsightedness.

The main supporters of the Report apart from the PSA itself, were the Fairfax media, a group of breakaway booksellers and a handfull of politicians.

The A-G

The person responsible for making a decision, on what had now become a seemingly impossible scenario was the soon to retire, Lionel Bowen.

He proved to be above the media-driven controversy and a politician with a fundamental respect for the law and for Australian cultural expression.

After several weeks of deliberation and discussion with various representative groups he ultimately made a profound decision.

In effect the Bowen decision:

- upholds the principle of territorial copyright;
- upholds Australia's Berne Convention obligations;
- protects Australian authors and Australian originated publishing specifically; and
- applies a radical new condition on the importation of foreign books that makes their copyright protection dependent on performance.

In making such a decision, Lionel Bowen has repudiated the and its economic rationalism and embraced the philosophy and findings of the CLRC.

The big winner out of all this has been Australian authors and Australian indigenous publishing. They have been shown to be of political importance. It will be a brave, or reckless, politician who argues otherwise.

Gail Cork, Executive Officer of the Australian Society of Authors

Territorial copyright is a poorly understood concept. Those who depend on it for their livelihood faced no easy task when called upon to defend it against the much more tangible prospect of cheaper imported books. In recommending the abolition of territorial copyright, the PSA did not try to deny that authors would suffer as a result; it merely dismissed this unfortunate side-effect as a less important consideration than cheap books.

By way of compensation for authors' loss of income in a de-regulated market, the PSA suggested increased government subsidies and/or a ten year exemption from de-regulation for Australian authors. Not surprisingly, authors found neither suggestion acceptable. Like their colleagues throughout the English-speaking world, they consider the divisibility of copyright into territories to be an integral and necessary part of copyright law.

The need for territorial copyright

Copyright laws are designed to protect the owners of intellectual property. Territorial copyright is that aspect of copyright law which enables authors to maximise the commercial potential of their work. It gives them the opportunity of negotiating an exclusive licence for the Australian market, another for the US market, a third for the UK and so on. Each new licence means another advance for the author, commensurate with anticipated sales in that market.

Take away the exclusivity of the Australian licence and the Australian publisher's incentive to take on new Australian titles is severely eroded. What publisher would bother to spend thousands of dollars promoting a new title, knowing that a UK or US publisher had only to tack a few thousand copies onto their print run (enjoying economies of scale impossible in Australia), export them to Australia and enjoy a free ride on the demand created at the Australian publisher's expense?

Without territorial copyright protection, it would simply not be worthwhile for an Australian publisher to publish a new Australian title, unless it insisted on world rights, thus cutting out the possibility of competition from other editions. This also means cutting out the possibility of further advances for the author from publishers overseas. And, since few Australian publishers are in a position to properly exploit overseas markets, it also means the author's work has virtually no chance of breaking into other markets.

The invidious position of authors

Unfortunately 'cultural destructiveness' is a difficult thing to quantify. In the long and sometimes nasty public debate which accompanied publication of the PSA Report, authors found themselves in an invidious position. Confronted with a looming threat to Australian literature in general and their livelihood in particular, they had no choice but to oppose the report. On the other hand, they had no wish to perpetuate a system which made it easy for British publishers to manipulate the Australian book trade.

The A-G's compromise

In its submission to the A-G, the ASA listed six probable consequences of abolishing territorial copyright protection. It would:

- drive our most successful authors overseas;
- severely undermine the royalty income of those who remained;
- vastly increase the need for government subsidies;
- damage the professional pride of Australian writers, by denying their moral right to control what they create;
- destroy small independent publishing houses; and
- concentrate publishing in the hands of multi-national companies, sending profits from Australian book sales offshore, instead of using them here to finance further indigenous publishing.

The A-G's decision to retain territorial copyright protection for books first published in Australia represents a compromise for all interested groups, but far from being simply the line of least resistance, it heralds some

bold reforms which offer something to everyone. For the poor beleaguered book buyer, it means no more untenable delays for overseas titles, as well as the potential for a downward trend in the price of those titles. For authors whose books are first published in Australia, it preserves territorial copytight protection. For Australian publishers, it creates incentive to buy Australian rights to overseas titles. For manufacturers, it will probably mean more books produced in Australia. For booksellers, it overcomes the frustration of unavailability of overseas titles. Those who value books on the basis of their price tag alone will still be able to shop from remainder bins and 'books-by-the-kilo' discount stores.

David Gaunt is a Sydney bookseller and convenor of the Australia Booksellers' Association Standing Committee on Copyright

There has long been concern about the price and availability of books in Australia. There is a perception that Australia is a captive book market where consumers are fleeced by greedy British publishers who publish in Australia when and if they feel like it, at prices outrageous in comparison with Britain, the U.S. or Canada. The British are not the only villains but the feeling that the existing system is a colonial relic, which should be treated as such, is a powerful one.

That feeling is exacerbated by another perception - books as "sacred objects", as totems of knowledge, creative power and instinct. Bad enough that the public should be overcharged and restricted in its access to goods: worse still when the commodity is as precious as books. Tempers, therefore are high; the greed of big business, the power of multinationals, the sanctity of Australian writing, the right to control one's own destiny - all have been invoked in the debate which has raged since the government intervened and established the CLRC and PSA inquiries. Self-interest has, predictably, muddied the waters of the arguments.

The Need for Change

In the first place, the system as it stands doesn't work; too many books are overpriced, unavailable or delayed in publication. It has produced complacency amongst publishers, distributors and booksellers and has not served the public well. At the same time it should be emphasised that most bestsellers and popular titles are competitively priced when one looks at UK and US prices. It is in specialist areas such as academic and technical books where outrageous discrepancies are to be found.

The response for a bookshop like ours [Gleebooks, Sydney] has been simple - break the law, import the cheaper American editions of British "copyright" titles, obtain paperbacks as soon as they're published in either country and ignore copyright where its unfair effect on the reading public is manifest.

The proposals

In September, 1988, the CLRC report was produced. A cautious, well-reasoned document, it delivered on "availability", but was administratively a minefield for booksellers. They were only mildly enthusiastic; the publishers even less so.

In September 1989 the interim report of the PSA proposed total deregulation!

Responses were predictable. Suddenly the CLRC report looked very attractive to the publishers. Some booksellers, confusing risk-taking in a more competitive market with grave danger to their livelihood took a conservative position. One very large chain, clearly to be advantaged by its enhanced buying power in a totally deregulated market, emerged quite unexpectedly as the "reader's friend".

Authors, agitated by the threat of the abandonment of territorial copyright under the PSA report recommendations have struck back; some passionately and persuasively, others as their own worst advocates. The public, confused by the legal arguments over copyright, micro-economic issues, and various positions of self-interest, still wants its cheaper books.

Has the government found a solution? I believe it has; a proposal which enshrines territorial copyright so that authors are protected and our flourishing local publishing industry continues to be just that; and a virtual open market for all books published overseas unless stringent demands on price and availability are met.

What will the public get? Some books will be cheaper - only time will tell how many and how much. All titles of any significance will be available earlier, much earlier.

This is an edited version of an article which first appeared in the January copy of Editions

The Prices Surveillance Authority comments

The PSA welcomes the reforms to the Copyright Act announced by the A-G in December. They constitute a more radical regime than would have been likely in the absence of the PSA inquiry and recommendations. In particular overseas books will become available in Australia much earlier than in the past. The effect upon prices is more fixed, with some prices falling, a few possibly rising, and others being unaffected. Paperbacks should also become available earlier with associated favourable price effects. However, the complexity of the proposed regime raises some legal and administrative problems. These problems in turn together with current issues on the GATT agenda raise questions about the longer term durability of the system.

Legal problems

A number of definitional problems will have to be sorted out before the effects of the reforms become clear. Whether the legislation can deal with all these problems or whether they will result in litigation has yet to be seen. Most crucial is the definition of "to publish". The Copyright Act currently defines publication as the making available of sufficient copies to satisfy the reasonable requirements of the public, but what exactly does this mean? The reasonable requirements of the public depend on the demand for individual titles. It is possible that some publishers will try to thwart the intention of the legislation by importing a few token copies within the thirty days required to achieve protection. They would then have ninety days to replenish supplies.

A second set of problems arise under the "revolving door" provisions for titles which become unavailable for 90 days or more. From when does the 90 day period commence? If it is the time when publishers cease to have stocks of the title available in Australia, how will that date become known? If it is the time when they are first unable to fulfil an order within 90 days, how will other booksellers know this date? Furthermore, titles may in fact be unavailable for much longer than 90 days. A bookseller must wait and see if the publisher can supply within 90 days and only if they fail can the books be imported directly. It may then be a further 90 days or more before the books are delivered. When supply is re-established, what is the status of copies which were ordered by booksellers during the 'off period'? If they have

not yet arrived in the country, do they become illegal imports under section 37 of the Act; or it they are in the bookseller's shop, are they being illegally distributed under section 38 of the Act?

Administration

The current importation provisions and the restrictive trade practices which they support stifle the entrepreneurial flair of booksellers in effectively meeting the needs of consumers. While the proposed amendments provide them with greater freedom in this respect, the associated costs are not inconsiderable. For the small retailer, the costs are likely to be great. Only a few large retailers will find this exercise clearly worthwhile. The provisions for individual orders, despite the acceptance of non-written orders, will still consume considerable administrative resources. An open market for books would avoid these costs and would also encourage the establishing of wholesalers/importers with the attendant benefits arising from a rationalisation of orders. The proposed regime will result in multiple small orders and the cost of this inefficiency will be reflected in prices.

Availability and pricing

If the proposals are implemented in the way the Cabinet decision intends, they will bring considerable benefits in terms of the availability of new titles. No longer will Australian consumers have to wait months or years before they are able to buy the latest novel or scientific text. The proposals will also improve the availability of backlist titles via the 90 day 'revolving door' provisions. However, in both cases the benefits will be less than could have been expected under the open market proposed by the PSA; entrepreneurial booksellers will be thwarted by the time provisions and the administrative costs of the system . Furthermore, the backlist provisions will only become effective after a considerable lag, since they apparently will not apply retrospectively to titles published before the legislation is enacted.

The potential effects of the reforms on prices are considerably less certain that the effects on availability. The crucial issue here will be what proportion of new titles are published in Australia within 30 days of their publication overseas. Publishers have a strong incentive to meet this timetable where the title is likely to make a considerable contribution to their revenue and profits. Even where individual titles are not major revenue earners, collective Australian sales may well be. If a large proportion of books do meet the 30 day requirement, the effect on prices will be negligible. Under these circumstances, the importation provisions will continue to support price discrimination by publishers, who will face little competition from substitute titles which have failed to meet the requirement and can be freely imported at cheaper prices.

There may even be a negative effect on prices where the 30 day requirement is met by air freighting copies out to Australia. In a competitive market, we would expect the costs of air freight to be largely absorbed by the supplier, as currently happens with overseas library suppliers; but with the market power provided to suppliers by the importation provisions, they may be able to pass these costs on to consumers. The effect on prices will also be muted compared to an open market situation because there is unlikely to be much if any development of book wholesaling, with its attendant benefits for cost efficiencies.

One of the greatest benefits in terms of both prices and availability is likely to be in the area of specialist titles with a relatively narrow market in Australia. If publishers do not find it worth their while to meet the thirty day requirement, they will be freely available for importation. Under existing arrangements, these titles often take a considerable time to reach Australian consumers and they may pay up to four or five times the price paid by overseas consumers. However, some of these texts have a relatively long life; existing titles will continue to be protected by the importation provisions and their prices are only likely to fall when a new competitive text becomes freely available.

The G.A.T.T agenda

Trade related aspects of intellectual property rights (TRIPS) are currently on the agenda of the GATT. Developed countries want to improve the protection against pirating in developing countries; while some developing countries want to balance this with improving their access to the markets of developed countries through parallel imports. This combination would secure the benefits of competition in the supply of intellectual products while providing protection against the legitimate concerns of producers regarding piracy. Australian government statements on the TRIPS negotiations are consistent with support for such a regime. In this context, the current reforms would become redundant.

Robert Haupt, champion of book copyright reform, is a senior journalist with Fairfax

The debate over the proposed changes to Sections 37 and 38 of the Copyright Act is a debate over which books booksellers may import. Since no-one is suggesting pirate editions should be allowed into Australia, it is a debate between those who wish Australian booksellers to be free to import legitimate editions from anywhere they like and those who wish to restrict them to the editions an international publishing house says they may import. Under current law, individuals and libraries may import from whoever and wherever they wish.

The important thing in this debate now is not the fight but what is being fought over. The ground has shifted against the big British (increasingly British-American) publishing houses, and I believe it will shift further.

CLRC Report

When the CLRC brought down its findings in September 1988, the representatives of the British publishers were astounded. The committee said that books ought to be free to be imported directly by booksellers under either of two conditions: when they would not be available in Australia within a reasonable time; OR if a bookseller held a written order for them from a customer. The publishers' representatives said that "OR" could only be a misprint for "AND".

By the time the Hawke cabinet had the Copyright Act changes before it last December, the publishers had not only recovered from their shock at the CLRC recommendations, they were enthusiastically endorsing them.

PSA Report

What had changed? The Hawke government had shown eagerness for change under its agenda of "micro-economic reform"; Lionel Bowen was eager to reform the Act; the PSA, itself eager to get some runs on the board, had held a public inquiry into book prices.

When the PSA reported, its findings made the CLRC look conservative. Moreover, it gave those booksellers who had been campaigning for far-reaching reform a friend at court, for the PSA recommended not a modification of the closed marked for imported books, but its abolition.

At this point, the Australian authors entered the fray, some worried that their high-priced editions for the Australian market would be undercut by cheaper imports, oth-

ers by a more general belief in the inviolability of copyright. Their campaign, through such high-profile writers as Thomas Kenneally and Peter Carey, carried weight with some Hawke ministers.

Cabinet's decision

In the CLRC and the PSA proposals, cabinet might be said to have been given a choice between a lawyer's approach and an economist's. The first enshrined property rights, the second market forces. In the cabinet, too, where Mr. Bowen took a lawyer's approach, other ministers are understood to have argued for the economist's.

Cabinet's decision reflects the lawyer's view, with a dash of free-market economics for a certain range of books. The lawyer's wish to preserve property rights is shown in the way previously-published (or "black-list") titles are dealt with: if they can be made available in Australia within 90 days by the closed-market system, they may not be imported direct.

The glimmer of open-market applies to titles published after the Act is changed. They are subject to a 30-day rule - short enough to loosen the British publisher's grip over most American titles, without costing Australian authors their territorial copyright.

So what will happen? I believe that just as the unworkability of Australia's partly-open market is becoming apparent, two international changes will force a re-think. The first is the creation, after European economic integration in 1992, of the biggest open market for English language books in the world, one which will include the U.K. The second is new technology for storing, transmitting and printing words.

CAMLA Office Bearers For 1990

Elected At A.G.M.

President:	Mark Armstrong
Vice-president:	Julia Madden
Vice-president:	Stephen Menzies
Secretary:	Adrian Deamer
Treasurer:	Des Foster

Committee:

Ian Angus	Peter Leonard
Thomas Arthur	Malcolm Long
Trevor Barr	Mark Lynch
Ken Brimaud	Tracy Meredith
Martin Cooper	J.A. Morgan
Shayne Daley	Camilla Mowbray
Graham Dethridge	T. O'Connor
Gareth Evans	Russell Patrick
Dominique Fisher	Richard Phillips
Kate Harrison	Jonquil Ritter
Grant Hattam	Joanna Simpson
Peter Hohnen	Bruce Slane
Yvette Lamont	Doug Spence

F.O.I.: The promise & the reality

Peter Bayne, of the Australian National University, examines the scope for exploitation of the various F.O.I. acts by journalists and others

The notion that citizens have a right to obtain information in documentary form in the possession of the government stands legal and administrative traditions on their heads. This explains in good part the reason for the long and difficult gestation period of the Freedom of Information Act 1982 (Cth) in the face of opposition of the senior levels of the public service. But the Commonwealth Act was followed soon by the more generous Victorian Freedom of Information Act 1982 and, more recently, the Freedom of Information Act 1989 (NSW). The Queensland Electoral and Administrative Review Commission may well recommend an Act, and one was promised in the Governor's recent speech to the South Australian Parliament. In the past, the Tasmanian MP Bob Brown has introduced Bills to provide for FOI.

There is a great deal of similarity between the three existing Acts (or four if the ACT Act, which is almost identical to the Commonwealth is included). There are some vital differences, which where relevant will be noted below. Otherwise fine detail will be omitted, and the references which follow are, unless otherwise indicated, to the Commonwealth Act.

The promise

The Acts begin boldly enough, providing at s.11 that "every person has a legally enforceable right to obtain access" to documents of Ministers, Departments and agencies (notice that it is only information in documents which may be obtained). The right does not however extend to an "exempt document", and this of course is where the argument with government usually starts. Nevertheless, the manner in which the politicians, from all sides, justified the introduction of the legislation gave rise to an expectation that the right would be seen generously.

Take for example what was said in the Parliament of New South Wales by Mr. Wal Murray in June of 1988:

"This bill is one of the most important to come before this House because it will enshrine and protect the three basic principles of democratic government, namely, openness, accountability and responsibility. It has become commonplace to remark upon the degree of apathy and cynicism which the typical citizen feels about the democratic process. This feeling of powerlessness stems from the fact electors know that many of the decisions which vitally affect their lives are made by, or on advice from, anonymous public officials, and are frequently based on information which is not available to the public. The government is committed to remedying this situation."

At the forefront then is the democratic rationale for the Acts - that they will enable any member of the public - including the merely curious - to find out what its government has done, and furthermore to participate in what is proposes to do. "Government" is moreover seen as both the Ministry and the public service. There is also a privacy rationale for the Acts, but it was not prominent in the parliamentary debates.

The role of journalists

The introduction of the Commonwealth Act was supported by journalists, and some, such as Jack Waterford in Canberra and Paul Chadwick in Melbourne were early users of this Act (and in Chadwick's case, of the Victorian Act). For reasons which will be apparent from what is said below, enthusiasm for the Commonwealth Act has waned, but the Victorian Act remains a valuable asset to the 'investigative' reporter. The opposition parties at both the Commonwealth and Victorian levels have lately begun to use the legislation to some effect. A point which journalists might note is that it is safer for the whistleblower to let it be known that a document exists than to actually leak it.

Rather than illustrate use by journalists, this brief comment will outline the major kinds of exemptions in the Acts, and in particular those which may be invoked where the documents concern the development of policy on some matter. In this way, the reader can form her or his own view as to just what difficulties the public interest requester will face.

Exemptions

While the politicians proclaimed the democratic aims of the Acts, the fine detail of the drafting of the exemptions reveals that the interests of government and those with whom they deal are well protected. The inter-

ests of government are reflected in exemptions for documents which, if disclosed:

- would reveal Cabinet and Executive Council decisions and deliberations (classes which are widely defined but which do not pick up any document submitted to these bodies);
- might damage Commonwealth/State, Commonwealth/Foreign government (or State/State) relations, or reveal information communicated in confidence between them;
- might prejudice national security, defence or international relations;
- might prejudice law enforcement; or
- in the case of a 'deliberative process' document, would be contrary to the public interest. This category potentially picks up all manner of advices and policy proposals, whether intra-agency, inter-agency, or agency/outside.

The interests of those with whom the government deals are protected by exemptions for documents which, if disclosed:

- would be an unreasonable disclosure of someone's personal affairs;
- would reveal trade secrets, other valuable commercial information, would lead to a reduction in the supply of information to government, or would unreasonably affect someone's business affairs; or
- would breach a confidence.

The exemptions are so broad that some system of external review of agency decisions to refuse access was imperative. The Commonwealth and Victorian Acts provide for AAT review; in NSW it is currently the District Court. Under the Commonwealth and NSW Acts, the review body must uphold any exemption claim it finds satisfied. But in this circumstance in Victoria, the AAT may, on public interest grounds, nevertheless grant disclosure. This vital difference makes the Victorian Act much more attractive.

In many cases, where say a journalist or an MP seeks documents, the exemption for the 'deliberative process' documents will be sought, and argument will then concern what matters are relevant to both disclosure and non-disclosure in the public interest. In the early case, Harris v Australian Broadcasting Corporation (1983) Justice Beaumont stated that

"in evaluating where the public interest lies in the present case it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other ...".

The reality

The Commonwealth AAT has, however, generally weighted the scales towards non-disclosure. Agencies have come to rely on the five factors specified in Re Howard and The Treasurer of the C/W of Aust. (1985) (in which Mr. John Howard, then Leader of the Opposition, sought documents about ACTU/government budget negotiations). These factors suggest that it is not in the public interest to disclose high level communications on sensitive issues, or concerned with the development of policy. An agency may argue that disclosure of the documents in issue is contrary to the public interest by reason that those called upon to produce similar documents in the future would, if disclosure occurred, be inhibited from being candid and frank. An agency may also argue that disclosure could cause confusion and unnecessary debate in circles outside the agency, or that the document does not fairly disclose the reasons for a subsequent decision. Some AAT members will also give weight as favouring non-disclosure to the extent of confidentiality which surrounds the document, and further find that policy development at the senior levels of the bureaucracy is necessarily conducted in confidence.

"Great weight is given to agency claims of damage, and inter-governmental communications are readily accepted to have been confidential."

There is however another line of AAT cases which take a much more limited view of the weight to be given to the factors just mentioned. Some seem to reject the possibility that public servants, (and particularly senior ones), would not be candid or frank. Some give little or no weight to the extent of confidentiality. The Senate Standing Committee on Legal and Constitutional Affairs which reported on the operation of the Act disapproved of the argument for non-disclosure to the effect that the public might be confused and thus speculate unprofitably about the information; but some AAT panels nevertheless continue to uphold the argument.

The AAT has taken a generous view of inter-governmental relations exemptions. Great weight is given to agency claims of damage, and inter-governmental communications are readily accepted to have been confidential. It is most unlikely that a claim will be rejected where the foreign or State government objects to disclosure. Whether or not a conclusive certificate has been issued seems to make little difference.

Conclusive certificates

Under all the Acts, the problem for applicants is compounded by the fact that some kinds of claim of exemption can be supported by a conclusive certificate. The Victorian Act protects only cabinet documents and in any event is largely ineffective; this is another matter which makes that Act attractive to users. But in the Commonwealth and in NSW, the effect of a conclusive certificate is that while an appeal from a decision not to disclose the document may be heard by the AAT (or District Court), it may determine only whether there were "reasonable grounds" for the certificate, and ultimately the Minister has a discretion whether or not to revoke the certificate. In any event, the Commonwealth AAT has virtually yielded up any meaningful review of the conclusive certificates.

But there is a critical difference between the Commonwealth and NSW Acts. In the Commonwealth, a conclusive certificate can protect documents concerning Commonwealth/State relations, and the deliberative process documents. From the point of view of a journalist, these exemptions are often the barriers to access. But under the NSW Act, these exemptions cannot be fortified by a conclusive certificate.

A final matter of significance is the matter of charges. In 1986 the Commonwealth Act was amended such that if it is so minded an agency can, even in relation to a request for a small number of easily accessible policy documents, run up a bill for several hundred dollars. The NSW charges regime follows the Commonwealth scheme. Again, the Victorian Act is more user friendly in that it sets a low upper limit to charges.

Enough has been said to show just what barriers face the journalist requester in the Commonwealth and in NSW. But FOI is in its infancy and for reasons which may seem hard to grasp still seems a popular measure of reform. In time, the Acts may be administered by agencies, and interpreted by review bodies and the courts in a way which will fulfil the promise of a better informed public.

The economics of aggregation

Cas O'Connor, Media Analyst with Bain Securities, examines the economic pitfalls of the Government's policy on aggregation

The woes of the metropolitan television industry have been well publicised. A bigger bloodbath is now beginning to trickle. One which, unlike that currently lapping around the metropolitan operators' ankles, has neither significant controversy nor foreseeable drainage. The controversy will come, but the bath will continue to fill. This is regional television under aggregation.

Aggregation is the chosen route of the Federal government's Equalisation Policy which strove to introduce additional commercial television services to regional areas in order to bring the total number of services up to the three enjoyed in metropolitan areas. The current policy has forged four "approved markets" down the eastern seaboard, each of around 1 million viewers. Within each approved market, the number of operators will provide three services (amalgamating if necessary) each taking a "feeder" from the metropolitan networks

However, the current aggregation policy is far more onerous than its alternative, multichannel service (MCS). Most of the regional operators have formed a lobby group which is urging the Government to overthrow its aggregation policy in favour of MCS in which the incumbent operator in each area would be licensed to broadcast a second channel for 10 years. The second channel would eventually be sold to a new competitor. As a political sweetener, the licensees propose to fund the introduction of SBS programming into their area. They say SBS would be introduced by December 1990, and that they would give SBS 10 years to repay the funds.

Government television policy has traditionally been based on five major broadcasting objectives:

- maximise diversity of choice;
- maintain viability of the broadcasting system;
- encourage Australian production and employment;
- foster localism; and
- discourage concentration of media ownership and control of stations.

Each objective would seem to be better served by an MCS/supplementary licence scheme than by aggregation.

Maximise diversity of choice

Regional operators currently broadcast about 70 per centof metropolitan network first release programming. Hence, only two operators are needed in each area to increase this to 100%. Three operators would simply give viewers a greater choice of repeats.

Further, with each service largely carrying network transmission, regional viewers could actually see their favourite programs appear at the same time on conflicting channels courtesy of network counter-programming strategy. This would leave the viewer with less watchable population programming than under the current scheme.

Competition in regional areas is not best serviced by three "affiliate" service providers. Two operators who could cherry-pick from the three networks would provide better programs and stronger financial viability.

Maintain viability

Regional operators have traditionally enjoyed high levels of profitability because of their solus positions and the ability to play-off the three networks against each other in program negotiations. With aggregation the regionals will lose their negotiating positions forcing program expenditure, currently at around 40 per cent of the total expenditure, up towards the 60 per cent paid by the metropolitan operators. Revenues are unlikely to compensate: regional stations have a high reliance on local advertising (27 per cent total revenue as against 8 per cent for metropolitan stations) which will not expand simply because of a tripling of services.

Projecting these two factors forward, one can foresee substantial losses faced by the sector. At least one operator in each market will incur sustained losses. Most probably, it will be the station which is affiliated with the third rating network, which is why Ten's affiliates are among the loudest protestors. Further, each operator must raise between $12 - 20m for the privilege of being less profitable in order to purchase the necessary transmission equipment.

It is the viability issue which should be most closely scrutinised, particularly in light of the current position of the metropolitan networks and the flow-on effects that has had the ability of the regionals to raise either equity or debt financing.

Under MCS, the capital costs would not be as great (as each operator would only transmit into its own area), program negotiations would continue and full viability would be a possibility.

Content

Australian productions will be produced for as long as the stations can afford it. Such programs consistently rate better than foreign programs and thus draw more revenue. They are, however, expensive so the focus is affordability. The ABT's local content guidelines are a safety net under the wrong tightrope: the viability of any industry must be insured before conditions can be imposed on its operation. Aggregation's serious financial drain throws this prerequisite of viability into doubt.

Localism of content too, unfortunately, is an ABT requirement that licensee's must meet. The southern NSW experience is that one station's local news has been cut from the full 30 minute bulletin to a 5 minute adjunct to the network news. Community programs have been similarly cut. Again, MCS by its stronger financial advantage had lessened cut throat competition would help maintain localism.

Aggregation concentration of ownership

Back in 1985, the looming spectre of aggregation saw the regional operators form affiliations in order to forge stronger relationships with their inevitable metropolitan network partners. A flurry of merger and acquisition activity followed. Of the original 13 individual regional operators along the Eastern seaboard of Australia eight now remain. Under MCS the sunset clauses would have forced the second/supplementary service to be eventually transferred to a new operator, virtually ensuring the dilution of media ownership in the longer term.

Further, there is a damaging spillover to other media. To illustrate, we have the benefit of experience in one area. In southern NSW, some 30 second ad spots on breakfast television are currently selling at $20. This does not merely shatter the financial viability of regional television, it also damages the other local media operators, particularly in radio where spots are more than the $20 being asked by the television stations.

Add this to a separate government policy which will see the introduction of further radio licences to regional areas and we could see the radio industry as the next casualty in the growing media bloodbath.

Official investigations and laying charges: what can be reported

Michael Hall examines the nebulous authorities in this important area

Journalists and lawyers alike frequently have difficulty determining what can be said concerning investigations, by the police and other official bodies, or charges arising from them.

It is certainly defamatory to say of someone that they are being investigated for or have been charged with an offence. Even the accusation, however unfounded, conveys some suspicion of improper conduct.

The more authoritative the body allegedly investigating, the more sting the accusation will carry. The most clearly defamatory is also the most common - the suggestion that someone is being investigated by the police.

Unfortunately for reporters, it seems clear that such statements do indeed carry further implied statements capable of being considered defamatory, and in practice more will be required than mere poof that the investigation was proceeding. These further imputations are considered below.

The imputation of guilt

The strongest imputation that can arise from the statement that a person is being investigated, is that the person is guilty of the crime. To justify such an imputation the defendant will be required to prove the person's guilt. This can be a formidable task.

Fortunately for reporters, it is assumed that the ordinary reasonable reader will bear in mind that a person is innocent until proved guilty. In Lewis v Daily Telegraph (1964), a decision of the English House of Lords which has been cited with approval by Australian courts, it was held that the headline "Fraud Squad probes firm", and an associated report, were incapable of conveying the imputation that the plaintiff (the chairman of the firm) was guilty of fraud as readers would bring to the article their usual sense of fairness and realise that investigation did not equal guilt. Thus the bare statement that a person has been investigated will not carry the imputation that s/he is guilty.

The same is true of the simple statement that a person has been arrested and charged with a criminal offence. In Mirror Newspapers Limited v Harrison (1982), a case in the Australian High Court, it was held that a report that the plaintiff had been arrested in connection with an assault could not give rise to the imputation that he was guilty or probably guilty of that offence.

While it now seems clearly established that the statement that a person is being investigated or has been charged cannot alone give rise to the imputation of guilt, that imputation can certainly be carried if additional matter in the report supports it. The courts have allowed reasonable latitude to reporters in this department. In the Harrison case, for example, the article stated that the arrest followed investigations by detectives who had "worked around the clock to fulfil a directive from the Deputy Premier ... that the culprits be found". Even this was not capable of displacing the presumption of innocence.

Third party opinions

The principal category of cases in which the imputation of guilt is conveyed, and of which writers must be wary, is what are known as the "repetition" cases, in which the report repeats someone else's accusation that the plaintif is guilty of the offence. There is a difficult dividing line to be drawn because one would normally interpret the laying of a criminal charge as an allegation by the police that the person was guilty, and a report of that charge as being a repetition of that allegation. As Harrison's case shows, however, the courts do not treat it in that way. Nonetheless, in Wake v John Fairfax & Sons (1973) the New South Wales Court of Appeal held that a report of an accusation made by a race steward against a bookmaker was capable of conveying the imputation that the accusation was true. Similarly in Parker v John Fairfax (1980) a report that the plaintiff had been alleged in equity proceedings to have solicited a bribe was capable of conveying the imputation that he had indeed solicited that bribe.

Clearly, it will always be difficult to draw such lines. Nonetheless, the following broad practical guidelines seem to operate:

1. A report that a person is being investigated or has been arrested and charged by the police is not, without more, capable of conveying the imputation that he or she is guilty of the offence being investigated or charged.
2. The reporting of an express allegation by a third party that a person is guilty of an offence is capable of conveying the imputation of guilt.

The imputation of reasonable suspicion

Plaintiffs who are unable to assert that the report of their investigation or charge conveys the imputation that they are guilty, can nonetheless make the task of pleading a defence of justification difficult by claiming that the report conveys the imputation that they were suspected on reasonable grounds of being guilty of the offence. In Jackson v John Fairfax & Sons Limited (1981), Justice Hunt of the New South Wales Supreme Court said:

"To state that a man has been charged with a criminal offence suggests, in my view, at the least that he has so conducted his affairs as to give the police (or the Corporate Affairs Commission) reasonable and probable cause (or, perhaps, merely good grounds) so to charge him".

This view was considered by the New South Wales Court of Appeal in Sergi v Australian Broadcasting Commission (1983), where Justice Glass appears to confirm that to avoid giving rise to such an imputation it is necessary, by the language in which the report is couched, to disclaim any intention to suggest that the charge is laid on reasonable grounds. He said that "distinctions of exquisite delicacy will have to be made depending on small differences in the language employed," and suggested that a report would have to be "cautiously articulated" to succeed in disassociating the publisher from the suggestion that the police suspicion was reasonably based. A reporter faces obvious difficulties in reporting the fact of an investigation or arrest without giving rise to this suspicion. One can see that to report "the police have arrested and charged Mr. Brown [ed: no relation], but we believe that they have no reasonable grounds for doing so" would be likely to avoid defaming Mr. Brown, but it may defame the police officers concerned.

It is important therefore to always bear in mind when deciding what can be safely reported the question: what would I be required to prove, to establish a defence of justification?

Michael Hall is a solicitor with the Sydney

"Private networks – common interest" – Telecommunications regulation under review

Peter Leonard examines AUSTEL's first major review of telecommunications regulation

AUSTEL's report "Private Networks: Common Interest - A Review of "the Present Arrangements for Allowing Joint Use of Private Networks" is an interesting amalgam of legal and economic reasoning and is AUSTEL 's first major foray into the dark and mysterious world of Telecom pricing policy. As economics underlie AUSTEL's conclusions, it is necessary to first consider pricing issues before examining AUSTEL's conclusions.

The economic imperatives

Private networks may be broadly defined as telecommunications facilities for internal communications within individual or groups of companies and organisations. As the Telecommunications Act 1989 reserves to the public carriers (Telecom, OTC and AUSSAT) the exclusive right to lease communications channels crossing property boundaries (other than limited exceptions such as links provided solely by means of radiocommunications) such companies and organisations usually use carrier provided links for point-to-point voice, data and video communication. These links generally bypass the expensive centralised switching equipment of the telephone exchanges used by the carriers for public traffic and are therefore offered at a cheap rate by carrier.

Cost saving is only one of a number of reasons that companies and organisations establish private networks. However, the potential cost savings to users represent revenue lost to the carrier in provision of public network services. Accordingly, previous Telecom regulatory policy, and the provisions of the Telecommunications Act 1989 and the current AUSTEL private networks class licence, artificially limited the classes of person entitled to establish and operate private networks, using the so called " common interest" criteria. In broad terms, the current criteria limit the use of private networks to persons having a common business or other interest, where their primary business or other interest is not the operation of a telecommunications network or service, and where the operation of the telecommunications network of service is ancillary to their primary business or other interest.

The significance of any loss of revenue by Telecom through so-called "bypass" is a matter of considerable debate. The conventional wisdom has been that diversion of traffic from the public network to private networks has the potential to jeopardise Telecom's ability to fund its statutory community service obligations to provide universal telephone service and further network development. This view led to the inclusion as Section 72 (a) of the Telecommunications Act 1989 of "the private network licencing principle" that " private networks are not to be supplied in a way that would permit a person (other than a carrier) to sell, or otherwise dispose of, capacity of private networks to third parties". Of course, differences in gross revenue earnt from public and private services only tell part of the story: of greater significance is the difference (if any) in the rate of return from provision of public and private network services.

Tariff imbalance - differences in the relationship of prices to costs for various public and private network services - will be the prime determinant of the impact on Telecom profitability resulting from a particular common interest policy. In short, restrictions on the use of private networks (imposed through common interest policy) can only be justified on economic grounds to the extent that the pricing for leased private network capacity does not properly reflect the cost of provision of that capacity as against the pricing for the public network. The restrictions placed upon the person who can use private networks should therefore been seen as a transitional step pending establishment of rational cost based pricing for leased capacity. AUSTEL ' s conclusions are based upon a legal premise - that it could not permit "resale" of leased capacity because of the restriction in Section 72 (a) of the Act - and the results of AUSTEL economic analysis. AUSTEL concluded that Telecom's rate of return on narrowband leased circuits (such as tie-lines, frequently used for joining PABX's, and costing around $12,000 per annum) is at least comparable to that which it secures from its public trunk service. By contrast, wideband capacity (such as Telecom Megalinks, used for high volume traffic such as bank data transfer, and costing $205,000 per annum) costs considerably less than the equivalent public trunk services. AUSTEL therefore concludes that:

> "in the case of wideband private networks, the magnitude of both the economic incentive for bypass and the potential monetary loss to Telecom may be significant. To safeguard against substantial bypass in this way, AUSTEL has recommended conditions on capacity sharing".

In short, AUSTEL determined that until Telecom rebalanced tarrifs, restrictions on capacity sharing should remain. AUSTEL's report also makes it clear that it would welcome a reference from the Minister to consider whether resale should continue to be prohibited by the Act.

Proposed new common interest criteria

AUSTEL recommends the substitution of three mutually exclusive categories of common interest in lieu of the current criteria. "Category A" would be "persons who need to communicate with each other and interchange traffic on a regular basis but whose sharing of capacity is incidental only to that interchange", provided that the primary use of the service is the interchange of traffic, and the use of the service for an individual parties own communications is secondary and not its principal feature.

This recommendation finally disposes of the previous Telecom policy that users of a private network could not use that network for individual communications purposes (i.e. branch office to branch office of the same company) as distinct from interchange between users (branch office of A to branch office of B, and so on). Aside from that change, category A essentially embraces the current arrangements, although assisting interpretation by more precise framing of the criteria. It is convenient to next deal with AUSTEL's category C : Commonwealth, State and Territory government agencies may jointly establish a private network jointly, "except where there is a demonstrable unfair commercial advantage to an agency resulting from its automatic inclusion in the Government category". Two clear exceptions would be the State banks and insurance companies. There is no reason why governments should occupy a special position - except that AUSTEL was seeking to remove "current inconsistencies and uncertainty" created by inexplicable differences in

Telecom regulatory decisions in relation to the various government networks. The government agencies category and the " unfair commercial advantage" exception to the category may not be important in practice, as government agencies are perhaps uniquely placed to fully exploit AUSTEL's "capacity sharing" category B.

Capacity sharing is joint leasing of carrier capacity for carriage of communications other than interchange traffic : A to A, B to B, and so on. Capacity sharing will be subject to a number of proposed conditions. Firstly, each person whose traffic is carried on the private network service, together with the person directly connected to the service, must be jointly and severally liable for all charges payable to the carrier. Secondly, a person sharing capacity on the service must not enter into joint insurance or other joint risk avoidance measures that would have the effect of negating the person's joint and several liability. Thirdly, a person sharing capacity on the service must be connected to the service by a fixed link (that is, not via the public network). Fourthly, except where persons sharing the service are co-tenants in a building, exchange lines connected to the service must not be shared.

The joint and several liability requirement is no doubt primarily intended to discourage larger scale bypass of the public network by smaller entities jointly leasinguide band capacity: the cost of a Megalink ($205,000 p.a.) may well make the risk of liability unattractive to the average business man. The requirement is, of course, entirely artificial and devised solely as a means to deter growth of capacity sharing arrangements. The scheme can be criticized for working to the advantage of larger users and corporate groups but providing no real benefit to small and medium sized businesses.

AUSTEL' s report is refreshingly devoid of the obfuscation which has characterised private networks policy to date. The proposals are, on the whole, a balanced and constructive new initiative in Australian telecommunications regulation. Its recommendations may be seen as a holding operation pending further Telecom tariff rebalancing and a more complete examination of whether full resale of leased capacity should be permitted. It is unfortunate that AUSTEL did not choose to substantiate its conclusion that unrestricted capacity sharing (and resale) of wideband private network services would lead to a significant monetary loss to Telecom. No doubt telecommunications economists will now seek to demolish this conclusion as the pressure for unrestricted resale continues to mount.

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The politics of pay

George Frame, General Manager of Independent Television Newcastle, argues that the Saunderson Report should have endorsed satellite delivery

Having attended several pay TV Hearings, given evidence and presented seven submissions on behalf of our company, it has become evident to me that the issue of what benefits pay TV could bring Australia has been eclipsed by the politics being played in the arena. But, as in all electronic media in this country, politics are the axle which governs motion and direction according to the amount of friction applied, rather than being the spokes that should support the medium and its direction. Pay TV has been affected for over a decade by lack of movement due to various frictions of internal and external forces.

On November 30 1988 the House of Representatives Committee Report To Pay or Not to Pay (known as the Saunderson Report after its Chairman, John Saunderson) made one small adventurous turn, by favouring the introduction of pay TV. Of course the Report is just that, a Report. The Minister can accept or reject all or part of the Committee's recommendations. But once again, this will be determined by the hand of politics.

Australia lags

The Saunderson Report made 16 major recommendations on pay TV in Australia, however there were may other issues raised in the Saunderson Report and space will allow, at this stage, only one major issue to be put under the microscope.

Australia already lags behind much of the world in pay TV services and is the largest English speaking country not provided with this service. The Committee Report could be better titled "Pay TV in Australia, A Lost Continent."

Australia was foremost in the introduction of radio in the 20's and followed closely the international trend by introducing television in the mid 50's.

However pay TV is only now gaining any motion after a decade of debate. In fact if the Federation of Australian Commercial Television Stations submissions are adopted, the turn of the next century would be too early to introduce Pay TV.

Why are we out of step with the rest of the world? Is our current television industry that fragile? Corporately the television industry has been on a self destruct track, however, the core of the industry (high corporate flyers aside) is very strong and capable of making solid profits. An evaluation of industry balance sheets prior to 1988 testifies to this.

Pay TV, if it has any effect on current free-to-air operators, would take 5 to 6 years to make any appreciable penetration of the Australian television viewing market.

The lack of a decision to introduce pay TV has afforded the existing free-to-air television industry one of the greatest shields to competition ever enjoyed in this country. Other Australian industries would welcome the kind of protection that this pseudo import tariff awarded the broadcast industry represents.

The Saunderson Report proposed a cable/MDS delivery system for pay TV in Australia.

Cable (or fibre optics) can carry up to 40 channels, while multipoint distribution system (MDS), a microwave delivery system, can provide up to six channels in selected areas for "localised" services. MDS is a line-of-sight technology with 30 to 50 kilometres transmission coverage.

Satellite vs cable

Aussat's national direct broadcast service (DBS) was not only not recommended, but completely dismissed as a pay TV service. One only has to look at a map of Australia to realise the immensity of the technological task in providing a service to potential viewers on a national basis in the next 10 years.

Only satellite DBS can provide an immediate service when the scheduled Series B satellites are launched and commissioned in early 1992 with MDS providing re-transmission of the national six channels with localised programs inserted into local windows of the national service. The Saunderson Report recommends 40 national local franchises (e.g. for instance four franchises for Sydney).

Cable will commence to have penetration in major metropolitan markets by 1994/95 and eventually over the years cable will have the greater penetration, but only a DBS pay TV service can provide initially a co-ordinated national service associated with cable and MDS.

The moratorium on pay TV ends in September of this year and following the Federal election will rise again as a decision for the government of the day.

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Pont Data Australia v. Asx

Stephen Menzies reports on this recent Trade Practices case which has wide-ranging implications for electronic information providers

On 9th February Justice Wilcox delivered a judgment in proceedings commenced by Pont Data against the Australian Stock Exchange and ASX Operations Pty Limited, a wholly owned subsidiary of the Exchange ("ASX").

Background

Stock exchanges throughout Australia are operated as subsidiaries of Australian Stock Exchange Ltd. As a result of operating the exchanges, information concerning trading and the bid and offer prices at which brokers will buy and sell securities is collected. That information represents a valuable commodity, which is distributed to broking houses, banks and other financial institutions by various data vendors, such as Reuters, AAP Information Services, Telerate and Pont Data. This case concerned an application by Pont Data for orders in respect of a contract for the supply of a data feed to Pont Data by the ASX. That data feed ("C signal") is the kind most ordinarily supplied by data vendors to their customers. The ASX had alleged that Pont Data was in breach of its distribution agreement, particularly in respect of an understanding that all of Pont Data's customers should sign a "tri-partite agreement" (between ASX, Pont Data and the customer).

Judgment

Justice Wilcox found that the ASX had breached the provisions of ss45, 46 and 49 of the Trade Practices Act ("the Act"), justifying the court to make declarations that various contractual terms were void. However, because such declarations or injunctions which the court may grant would require careful drafting in the light of further submissions by counsel, no final orders have yet been made at time of writing.

In relation to the balance of the contractual terms (being those elements of the supply contract which were not as such void for contravention of the Act), Pont Data sought an order declaring the contracts void except in so far as they provide for the supply to Pont Data of the ASX signal, with a further order requiring the ASX to refund to Pont Data all moneys paid pursuant to the Agreements other than $10.00. The question of fees arose because Pont Data contended that the ASX had failed to establish that the provision of the ASX C signal occasioned any cost at all, so that the imposition of any fee, particularly the $45,000 "storage fee" would involve monopoly pricing and an abuse of market power.

The Act only affects the validity of that portion of a contract which contravenes the Act (in so far as that provision is severable from the balance of the contract). Because the tainted terms of the contract were so connected with all other terms that their deletion would materially change the contract, Justice Wilcox thought it more appropriate that the court exercise its power to make an order varying the contract, so as to keep the contract on foot on reasonable terms but without provisios which transgress the Act. The most difficult matter, on which the court sought further submissions from the parties, concerned the nature and amount of the fees payable under the varied contract. Justice Wilcox thought that it would not be unfair to compel the ASX to supply the C signal at a price which reflected "the costs of supplying that signal together with a margin of profit similar to that charged by competitive suppliers in the data industry". Accordingly, he allowed the ASX the opportunity to submit further material to the court within one month of the date of judgment, demonstrating the cost of supplying the C signal.

Breach of Section 45

Section 45 of the Act prohibits a corporation from making a contract, arrangement or understanding if it contains an "exclusionary provision" or has the purpose, or would have or would likely to have the effect, of "substantially lessening competition".

Justice Wilcox found on the facts (as discussed below in relation to s.46) that the ASX had the purpose of preventing the entry of persons into market for data supply or deterring or preventing a person engaging in competition in that market and accordingly the contractual provisions had the effect of substantially lessening completion in both the stock exchanges market and in the information market.

In discussing s45, arguments arose concerning whether the data feed was in fact the supply of "goods" or "services". Justice Wilcox concluded that the data feed, being electrical impulses, constituted "goods" for the purposes of the Act. This conclusion was important, in respect of the application of s49 of the Act, as discussed below.

Section 46

Section 46 of the Act provides that a corporation that has a substantial power in a market shall not take advantage of that power for the purpose of:

"(a) eliminating or substantially damaging a competitor of the corporation .... in that or in any other market;
(b) preventing the entry of a person in that or any other market; or
(c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

The evidence in the case allowed Justice Wilcox to find:

1. The ASX had a substantial degree of power in two markets: the stock exchanges market (being the provision of stock market services in a manner permitted by the Securities Industry Code) and the information market (being the provision of information regarding sales made on various securities exchanges); Justice Wilcox did not think that the division of the information market into sub-markets by reference to wholesale and retail supply of information made any difference to the question as to whether or not the ASX had a substantial degree of power in the information market.
2. It was the purpose of the ASX to prevent anyone else entering the stock exchange market, on the basis of background planning documents of a Committee of four persons from the ASX (known as 'G4') and certain conduct being:
   - the ASX insistence on a tri-partite agreement,
   - the drastic limitations on data use contained in the agreement; and
   - the prohibitions in the contract on use of the information in "establishing, maintaining or providing a stock market" for trading in securities.
3. A purpose of the ASX was to prevent the entry of Pont Data and others into the information market, by preventing the materials supplied by ASX being wholesaled. Although the ASX was, on the evidence, motivated by self-interest (being an effective cross subsidy of its own JECNET services), rather than malice towards its competitors, that did

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Defamation for authors

Sally Walker of the University of Melbourne argues defamation law has strayed from its objective of protecting individuals from wrongful attacks on their reputations

It is said that the object of the law of defamation is to protect the individual's reputation: a person whose reputation has been wrongfully attached may bring a civil action to clear his or her name. This suggests that, when you are concerned that something you have written may be defamatory, you can apply a simple test - am I wrongfully attacking a person's reputation? Regrettably, the law is not so simple.

The three major characteristics of Australia's defamation laws indicate that defamation law has lost its way; the law is not directed simply at protecting the individual's reputation from wrongful attacks. The importance of these characteristics can be demonstrated in two areas of relevance to authors: fictional works and defamation of the dead.

Characteristics of Australia's defamation law

The first characteristic is that a writer's motive is irrelevant when determining whether his or her material satisfies the definition of "defamatory".

The test of what is defamatory differs from jurisdiction to jurisdiction, but this characteristic is common to the definitions in all Australian jurisdictions. Although Justice Hunt of the New South Wales Supreme Court has argued that it is relevant to consider how the ordinary reader would have understood, from what was published, what the publisher intended to convey, in Anderson v Mirror Newspapers Ltd (No 1) (1986) he conceded that his approach is not in conformity with authority. It follows that, although a writer's improper motive may assume importance in relation to damages and some defences, an **honest** motive is of no relevance to whether the material is defamatory.

Secondly, defamation is a tort of "strict liability".

This means that, for the purpose of determining whether material is defamatory, the writer's knowledge is irrelevant. Subject to little used New South Wales and Tasmanian legislation regarding the making of an "offer of amends", an author may be liable for publishing defamatory material even though he or she did not know, and could not reasonably have been expected to know, the facts and circumstances which made the material defamatory. Authors may be liable for defaming people whose existence was unknown to them.

Finally, a defamation action is unlikely to result in members of the public knowing whether an attack on the plaintiff's reputation was warranted".

There are various reasons, some practical and others arising from the elements of the action, why defamation cases have little to do with discovering and publicising the truth:

- The mere fact that a statement is false does not necessarily mean that it is defamatory.
- To take advantage of the defence of "justification" or "truth", the defendant publisher or writer bears the burden of establishing the truth of the defamatory material. Indeed, it is even more difficult than this simple statement implies: the defendant must prove the truth of the "imputations" arising out of the publication of the material. An "imputation" is an accusation conveyed by the material. For example, if I said that a person has AIDS this may convey a number of imputations, including that the person is promiscuous and homosexual. To rely on truth as a defence, I would have to prove the truth of these imputations. It is not enough that my statement is literally true; the imputations must be true.
- The defendant, who has the burden of proving truth, may face practical problems: a witness may have changed his or her mind about giving evidence; there may be a desire to protect a writer's sources. Furthermore, the law of evidence limits what evidence may be admitted in court proceedings for the purpose of proving "truth".
- In the case of defamatory comments, inferences or opinion, it is not enough that the defendant truly held the opinion; a comment is "true" only if it is accurate, in the sense of being implicit in the facts which are stated and proved to be true.
- The truth of an allegation may not be investigated because some defence, other than justification, protects the publisher.
- Owing to the fact that it takes months, sometimes years, for an action to reach the courts, a person cannot hope to restore her or his name until long after an allegation has been made. Indeed, only a small proportion of actions reach trial. Even then, there is no guarantee of publicity. In defamation cases, Australian courts have no power to order a defendant to publish a correction. A wrongly impugned reputation cannot be restored, and the public cannot know the truth, if the proceedings receive no publicity.

Defamation and truth

To the lay person, defamation and truth, or lack of truth, are intertwined: most people would be able to tell you that "truth is a defence" to a defamation action. This involves an obvious fallacy in that in the case of material published in some jurisdictions - New South Wales, Queensland, Tasmania and the Australian Capital Territory - to take advantage of the defence of justification, a publisher must show that the imputation is not only true, but also that it was published for the "public benefit" or, in New South Wales, that it relates to a matter of "public interest". Furthermore, because of the third characteristic of Australia's defamation laws, a defamation action is unlikely to discover "the truth". At the end of the day one is not likely to know whether a person's reputation has been "wrongfully" attacked.

Like many others, I believe that defamation law is in need of reform. In my view it is in the area of "truth" that reforms should be made: to ensure that the law is directed to its objective of protecting the individual's reputation from wrongful attacks, defamation law must ensure that the truth is discovered and publicised.

Practical application

The application of the characteristics of Australia's defamation laws can be illustrated by the Morosi case. At about 7.15 am on 1 August 1975 Ormsby Wilkins made a broadcast over radio station 2GB. He had this to say about Junie Morosi:

"now that she's to have a baby there will be a spate of dirty jokes about her, and a variety of speculations as to who is the father because everyone knows that Junie Morosi is an immoral adventurer ... adventuress ... who has slept with a variety of notable politicians, and most recently has been sleeping with Jim Cairns. In fact, of course, nobody knows any such thing. There is indeed not even the faintest suggestion that she has ever had any such relationship with any of the men she has known ... there is no stain of any kind on her character."

Morosi instituted defamation proceedings against the broadcaster. The New South Wales Court of Appeal dismissed an appeal against a jury's award of $10,000 in Morosi's favour.

This case illustrates the first characteristic of the law: what the broadcaster intended his words to convey was irrelevant; his motive was irrelevant. It also illustrates the operation of the third characteristic. To take advantage of the defence of justification, the defendant would have to establish the truth of the defamatory imputations. So far as the "speculations" and "rumours" referred to in the broadcast were concerned, the defendant would have to prove the truth of the defamatory imputations arising from the speculations and rumours; it would not be sufficient to show that there had in fact been speculation or that the rumours were in fact circulating.

Fictional works

To succeed in a defamation action the plaintiff must prove that the material complained of was published "of and concerning" the plaintiff. The law is concerned with whether the material would lead persons acquainted with the plaintiff to believe that he or she was the person referred to. It follows that a work of fiction may defame a person if it could reasonably be understood to refer to that person.

In one case, a newspaper published what was intended to be an amusing article about a person described as "Artemus Jones". Unknown to the author and the editor there was a person of that name. Jones' friends gave evidence that they believed the article referred to him. The House of Lords held that the trial judge had correctly directed the jury that they must apply a two stage test. Firstly they must determine whether sensible and reasonable people reading the article would think it referred to an imaginary person or to a real person; if people supposed it to refer to a real person, the second question for the jury was whether people who knew the plaintiff would understand that he was the person referred to in the article.

Similar principles are applied where material describes fictitious events. A magazine published a story dealing with fictitious incidents involving the hijacking of an aeroplane. The aeroplane was, however, described as one belonging to that airline and its insignia. The airline commenced proceedings. It was held that it should be left to the jury to determine whether a reasonable reader would conclude from the story that there were dangers inherent in travelling in the plaintiff's aeroplanes.

These cases illustrate the second characteristic of Australia's defamation laws: the writers' knowledge regarding the existence of Artemus Jones and the airline was irrelevant. Furthermore, the writers' intentions were in accordance with the first characteristic, irrelevant.

Defamation of the dead

In Australia there is no liability for defaming a person who is dead. Thus, this provides another illustration of the third characteristic of the law.

A statement regarding a dead person may, however, form the basis of an action by a living person. For example, if you were to say that a dead person was illegitimate, the person's living parents might bring an action alleging that this defamed them. An imputation concerned the family, whether living or dead, of a living person may defame that living person. It is not sufficient that a deceased person's reputation has been injured. An imputation about a deceased person is defamatory only if the conditions for defamation are fulfilled in relation to a living person.

Some law reform bodies have suggested that there should be a limited right of action in respect of defamatory imputations regarding a deceased person, even if the imputation does not defame a living person. If the law is to find the truth, that is, to determine whether an attack on a person's reputation is "wrongful", regardless of whether the person happens to be alive or dead, these proposals should be implemented.

Conclusion

Most people judge the "wrongness" of a statement made by one person about another by reference to its veracity; they would probably also have regard to the mental state of the "wrongdoer" including his or her motive and state of knowledge. Australia's defamation laws pay insufficient regard to motive, knowledge and truth. In formulating proposals to amend the law, regard should be had to what the law aims to achieve.

** This article is based on a paper delivered at a Seminar conducted by The Australian Society of Authors in Melbourne on 3 February 1990.*

Pont Data Australia v. Asx

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not matter in that the relevant conduct was to deter or prevent competitive conduct.

Section 49

Section 49 prohibits a Corporation from engaging in price discrimination in relation to the supply of goods. Pont Data contended that, by the terms of the agreements it was obliged to sign with subscribers , the ASX discriminated between purchasers of " goods of like grade and quality" in relation to price. As Justice Wilcox found that the data feed constituted " goods" , he was satisfied that the ASX did discriminate, as between its subscribers in relation to the price charged for the C signal , because :

- the monthly fees varied according to the number of terminals which took the information;
- the fee varied as between subscribers for the same number of terminals, as to how many customers those subscribers had;
- the fees varied by reference to dynamic supply and non-dynamic supply of data to end-users; and
- the fees varied in relation to subscribers who pay for the right to store information and those who did not.

Justice Wilcox found that the differences were of a kind to which the various exempting provisions of s.49 had no application and that the breach of s.49 was therefore established

Clarification of issues

The judgment of Justice Wilcox will affect the business of data supply in Australia in a number of respects, aside from its impact on distribution of data by the ASX.

It was unnecessary for Justice Wilcox to determine whether copyright subsisted in either a data stream or its format, because of the admissions made by the ASX that legal advice had indicated the ASX did not own copyright in the data itself. However, the judgment seems to proceed on the basis that copyright in the data or format was not a relevant issue, because the exemption from the Act for conditions imposed in a copyright licence was not considered.

By finding that the data stream constituted "goods" for the purposes of the Act, Justice Wilcox was able to apply s.49 to the conduct of the ASX. However, the same conclusion may affect other conduct of data supply, including arrangements for resale price maintenance. Previously, a data or information service had been regarded as a "service" for the purposes of the Act.

The need for a communications act

Les Free, of Consolidates Press Holdings, argues that with technological convergence the time is ripe for a comprehensive Communications Act

The raising of issues by The Department of Transport and Communications' Broadcasting Review Group's "Review of Broadcasting: Discussion Paper" of July last year (the Review) was certainly timely, if not long overdue.

The Review, by restricting itself to a discussion about the Broadcasting Act, failed to resolve the issue of the impact and implications of technological convergence of telecommunications, broadcasting, computers, print media, etc Legislation needs to be devised to provide for:

(a) the current evolutionary developments, which are already providing television delivery methods other than broadcasting;
(b) the inevitable revolutionary changes for industry arrangements when the broadband integrated services digital network (B-ISDN) is introduced. This maybe as little as 10 years hence;
(c) an anticipated industry restructuring of ownership and management arrangements due to financial criteria which require a shift from "free" television service provision to "user pays". For example, NBC President, Robert Wright, says that in new media mix, television "can't make it" on advertising support alone (Broadcasting May 1989).

B-ISDN

The impact of the introduction of B-ISDN is expected to be dramatic, and traumatic, for many participants in the television industry because the technical quality of television will be dictated by the choice of the digital coding algorithm at the supply end, and will be delivered to the consumer virtually unimpaired. This controlled performance capability is arguably a pre-requisite for the successful introduction of high definition television (HDTV). It is doubtful whether existing broadcast transmissions, even with forseeable upgrading, can successfully match this technical quality imperative for HDTV.

The B-ISDN will provide for the carriage of mass media, narrowcasting (as opposed to broadcasting), retrieval services, teleconferencing and even one-to-one television program exchange. Potentially, it will allow a consumer access to television program from anywhere around the world. It will provide an abundance of channels. Regulation must be seen in terms of an unlimited supply of television program within an international context. It is only a matter of time before a television program will be able to be accessed by a consumer in Australia directly from an international supplier eg. Lethal Weapon 5 replayed from Los Angeles, in a manner similar to that which now applies to domestic 0055 telephone services for sound. How should this be regulated?

The B-ISDN offers the most straightforward and efficient method of conditional access, (i.e. the means by which access to programs is limited to certain consumers) which is expected to be a fundamental component of any future restructuring of the television industry.

It is clear, therefore, that a vital need exists for a comprehensive Communications Act, framed so that technological, financial, administrative, and policy imperatives might be easily accommodated as they occur.

Proposed Act

A revised Communications Act could and should cover all media involved in conveying messages or information to consumers or between consumers. It should encompass content, whether it is described as information, entertainment, education, leisure viewing, background music, advertising material, etc., and carriage in terms of radiocommunications, telecommunications and transport. If exceptions were to be made to the operation of the Act, such as the distribution of videos, the print media, etc., these might simply be omitted from the legislation. It should be noted that, depending on the scope of the Act, the co-operation of the States may be required to overcome Constitutional restraints on the Commonwealth's powers to legislate in such areas as video distribution.

In particular, a new Communications Act should encompass:

- postal services;
- print media;
- television services for leisure viewing and entertainment;
- other visual services;
- sound broadcasting (colloquially known as radio in Australia); and
- information services.

This article presents only an outline of a proposed Communications Act and primarily uses television to illustrate the concept. The arguments in the Review for a modular Act are sufficiently convincing that this proposal adopts the concept. The best way of visualising the proposed new Act might be the three dimensional framework shown in the figure. The figure is shown to have x,y,z axes. The figure should be seen only as a visual presentation for explanatory purposes. The x-y plane is split into two parts.

Part A lists general regulatory regimes including: planning; ownership and control; authorisation and licensing; content; carriage; and community service obligations.

The legislative provisions in Part A modules should set out general government policy and overall objectives.

The Part B provisions list specific regulatory regimes including: Broadcasting Act; conditional access radiocommunications - such as those services currently regulated under the government's Video-Audio Information and Entertainment Services (VAIES) regime; videos; and (a suggested) Guided Media Act.

Part B modules or Acts will draw on Part A modules or their subsets to various degrees. Also, Part B modules should set out specific government policy, and any special, objectives.

A Broadcasting Act might be included as a Part B module based on the concept that television programs are freely available to all members of the public and delivered by means of radiocommunications.

In recognition of the claims concerning the scarcity of spectrum, and the percieved persuasive power of television, a severe regulatory regime is at present in place involving a number of special conditions including unique content standards, community service obligations, sanctions and performance reviews. These specific items need to be retained as part of the Broadcasting Act Module.

In Australia, at this time, the television programs, percieved to be 'services with common characteristics' similar to those delivered by a broadcasting service, are available or potentially available to consumers by delivery methods other than broadcasting. These possibilities include VAIES and videos, which are considered below.

Conditional access of television program

service provision to consumers by means of radiocommunciation transmissions which might use television broadcast channel allocations are believed to require a regulatory regime different from that set out in the Broadcasting Act. Therefore, it is proposed that a specific Part B module be created to specify the terms and conditions for the conditional access of radiocommunication services carrying television programs for leisure viewing and entertainment, currently governed by the regime VAIES.

If video sale and hire is to be included in the legislation, a statement to the effect that the delivery of videos is totally unregulated, except for Part A conditions.

It is envisaged that a separate Part B module will be required for regulation of the television services provided to consumers over guided (wired) media. It is anticipated that a regulatory regime very different from that of existing Acts will be required.

The x-z plane shows the component parts or subsets of the Part A modules.

For example, the content module might be seen to include: television programs, television program services, sound services and financial data services.

The content module might also be subject to Federal laws in respect of violence, pornography, etc., whereas more stringent content rules might uniquely apply within the Broadcasting Act.

A further example shows that the carriage module might consist of: a radiocommunications Act, a telecommunications Act, and physical transport.

It is envisaged that the integration of the several different Acts into an integrated Communications Act will enable anomalies to be eliminated, and lead to simplification of the regulations applicable to individual modules or Acts.

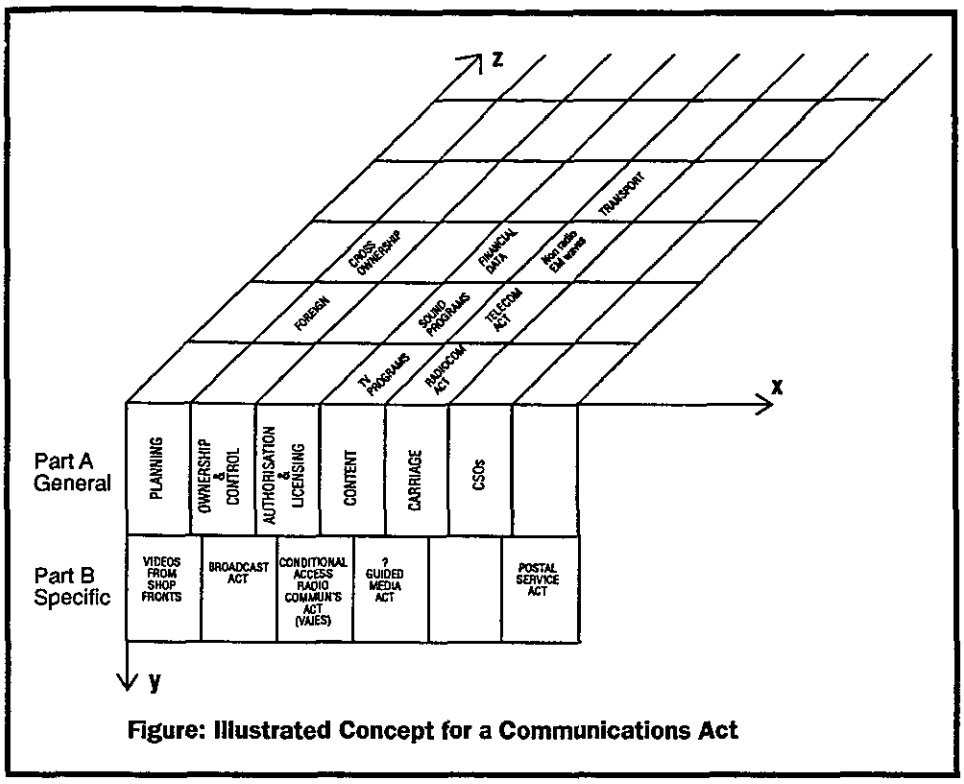

Figure: Illustrated Concept for a Communications Act

"The Law of Journalism in Australia"

Bruce Donald, Manager of Legal & Administrative Services, ABC, reviews this useful new text wriiten by Sally Walker

The worst aspect of the common law system based on a mix of judge-made and statutory law mix has always been that discovering the law on any subject is something of a lottery. The passionate hopes of Jeremy Bentham for the gathering and codification of English based legal systems, readily intelligible to ordinary people as well as to professional lawyers, remains a twinkle in his embalmed eye which was wheeled out annually at the University College, London.

It is, however, a cause for great celebration that his intellectual tradition remains alive and well in the major academic treatises that collect and organise the law. Sally Walker has established her position in that tradition. This treatise is encyclopaedic yet precise, scholarly yet practical. It is a work which, while principally of use for lawyers, ought to have a place in every news room in Australia as well as in all colleges of communications and media. (I have already ensured that all of the ABC legal team have a copy next to their bedside telephone for those late night advising sessions where precise law is needed.) In short, Sally Walker has performed a significant public and private service in researching and assembling this book.

Sensibly, the author has been concerned to expound the current state of the law without dwelling too much on the great debates concerning the law of journalism. For example, while naturally referring to the debate over the state of the defamation law in Australia and its weakness in the field of public figures and issues, she concentrates on the law as it is.

Reporting the Courts

The book begins with the Courts. For me it is a depressing aspect of public curiosity and journalistic obsession that so much attention is focused on the matters and people who pass before the courts; it stands beside ambulance chasing as the cause for the descent of electronic media into tabloid status. Walker covers the field in admirable detail from the fundamentals of the **sub-judice** rules through the range of often conflicting rules in the various jurisdictions on suppression and restriction of publication. At times she lets some of the judges off too lightly: notably the South Australians in the field of suppression orders. The law has changed dramatically in that State in response to the gross overuse of suppression orders so the book is already out of date in this respect. However, Walker should really have noted that the law in that State had permitted the suppression of the identity of the head of the Drug Squad right through his trial and up to the point of him ultimately pleading guilty on over eighty charges of drug dealing.

Walker appropriately points out the uneven enforcement of the sub-judice rules. In the ABC for example we take a reasonably strict approach stressing our journalists that

the right of fair trial is a fundamental right in a democratic society. Regrettably, this rather lofty position is hard to defend when our competitors get away with outrageous breaches regularly seen on our screens; the most notable being the publication by Channel 7 of the interviews with Paul Mason, the pick-axe murderer, as he was being flown by police to the scene of the crime. The failure of the New South Wales Attorney General to prosecute over this makes it virtually impossible to convince journalists that the law of contempt is worth upholding.

There are some points of detail in the sections of the book concerning court reporting which I believe could be improved in a subsequent edition. When dealing with information obtained from the police, mention could have been made of the growing resort to Police/Media Liason Units which are unfortunately not as careful as they should be with the laws of contempt. The Blackburn case in NSW is a perfect illustration of how excessive concern with media management and desire to release information can result in a perversion of the criminal justice system. When considering pre-judgement it should have been made clear that accused persons are entitled to protest their own innocence without being in contempt. In the section on juror's deliberations there ought to have been mention of the Western Australian law prohibiting publishing of photographs of jurors which is only noted elsewhere. In relation to suppression, the important provision in Tasmania that there is a prohibition of reports of bail proceedings could have been emphasised.

The work proceeds then to examine reporting Parliament, elections and security matters. While inevitably a shorter section than others in the book, there are some issues that perhaps may have been better dealt with. Comment could have been made on the need for balance in reporting of Parliament to ensure a fair and accurate report; for instance, ensuring that a subsequent denial of a matter stated under Parliamentary privilege is also included in any report. Also, in my view the section on reporting Parliamentary proceedings ought to have given more specific prominence to the Federal Parliamentary Privileges Act 1987. In relation to security matters there could have been some policy analysis of the D-notice issue although it is such a minor area of current media practice that the author can be forgiven for passing over it.

Defamation

The book then turns to the difficult, confusing and troubling area of defamation law, carefully and adequately summarising the complexity of our eight jurisdictions in this area. Given that now most publications occur in a national market, it is absurd that we do not have one defamation law.

The analysis is comprehensive and again my criticisms go to points of detail. The author correctly asserts that reasonable people are mindful of the principle of an accused being innocent until proven guilty as the basis for the rule that reporting that a person has been charged does not give rise to defamatory imputation of guilt. However, the author goes on at a later point, in the context of proving truth as a defence, to state that it is usual practice not to name or otherwise identify a person who has been charged with an offence until the person has appeared in court. There is a contradiction here. It is certainly not ABC practice to stop journalists naming people who have been charged until they reach court.

In relation to the defences to defamation, I would take issue with placing the comment defence under the heading "Fair Comment". While later in the section the author points out that the word "fair" is misleading, surely the fact that it is so should have induced her to delete it from the heading. The importance of the comment defence is that in a free society, people are entitled to express their honestly held opinions, even if they are unreasonable and unfair when objectively judged. We in the ABC continue to see the comment defence as alive and kicking. Inevitably the great controversy in the area of defamation defences surrounds the call for a broad qualified privilege defence. Journalists yearn to have a "public interest" defence along the lines of the US Sullivan v NY Times defence; some point to the recent Morgan case in NSW under s.22 of the NSW Act as opening up a broader scope for qualified privilege in this State and to the decision of the Federal Court in Comalco as showing that it may not be altogether dead in the common law word for practical purposes. However, these cases are of very limited use in ordinary media reporting and this remains the principal point at which reform should take place.

As to remedies for defamation, the major problem remains that damages are at large and that there are no sensible criteria available for juries in selecting them. This produces both in Australia and in the UK quite silly results which are thankfully often remedied by appeals; for instance, as in Australia in the Comalco case and in the UK in the recent Yorkshire Ripper's spouse case. As this is one area where reform may well be possible, some further policy analysis perhaps might be considered by the author for a subsequent edition.

Broadcasting standards

In relation to obscene, blasphemous and racist material the author has collected the relevant law. Of course this is fundamentally unused and outdated law except in the area of racism; here the States are looking again at the area with NSW having recently enacted its law and in WA the draft law having been produced. I feel the author should have cross referred para. 4.14.13 (which is curiously entitled 'Sedition') to the Australian Broadcasting Tribunal standards in this area which, while not creating criminal offences, nevertheless give rise to an obligation on commercial broadcasters (and one accepted as relevant to the ABC as well) to avoid gratuitous racial vilification. While for myself I am not sure these laws really work, the do need to be taken into account by journalists.

Moving to the area of broadcasting regulation, the author sensibly again declines to deal in detail with the whole commercial licensing system because this book is really about the content of the work of journalists. On the other hand the sections dealing with the Australian Press Council are of particular value as indeed are the careful analysis of ABT program standards.

Part Six of the book deals with gathering of the news, and in this area, apart from dealing with the normal rules of trespass and listening devices the author chooses to make reference to the freedom of information laws. As a practical matter the author does perhaps not draw sufficient attention to the absurd cost of these laws and how that can often effectively frustrate their use by journalists working on small budgets and short deadlines.

In writing this book Walker has obviously had the benefit of the pioneering work of one of the most notable Australian academic lawyers, Professor Geoffrey Sawer, whose work A Guide to the Law for Journalists now in its third edition provides a fundamental reference point in this area. Nevertheless, the merit of Walker's new work is that it expands the material considered and, while following in many respects the organisation of Sawer's book, Walker has taken a significant scholarly step. The book should form an essential part of the library of every person involved in media and communications law. Practising lawyers and hard working journalists should take the opportunity to let Sally Walker know that they appreciate what she has given them. From an author's point of view, it is only regrettable that the fees many lawyers will be able to charge for giving advice directly from this book are not returned by way of some royalty to the learned author! But that has always been the lot of the dedicated academic writer of professional treatises in this country.

"The Law of Journalism" (1989) is published by the Law Book Company Ltd.

Standards vs. ratings

AGB.McNair Anderson Director of Media Research, Bill Faulkner, looks at the ABT' s new programming standards in the context of television programming over the last 10 years

Currently the three commercial television stations in each of Australia ' s mainland capital cities collectively account for just under 90% of all viewing.

Much of the success of the commercial sector over the period under review is primarily due to the development of high-quality local productions including series, mini-series and movies, and the fact that the Australian public has increasingly reacted in a positive manner to quality local productions as against overseas imports.

For example, of the top 25 television programs screened in Sydney in the past decade, 16 were produced in Australia (see Table 1) . These included the mini-series, A Town Like Alice, The Dismissal, Return to Eden and the Thorn Birds; the Australian movie Picnic at Hanging Rock; series such as A Country Practice and specials incuding The Hoges Report and The Logies.

Locally produced mini-series have been particularly strong ratings performers since the late 1970s with all first-run titles averaging a rating of 27 compared with foreign mini-series which average a 20 rating (see Table 2).

A comparison between the October/ November survey period in 1979 and 1989 for Sydney also confirms the continued popularity of Australian television content.

Of the top 20 programs, six were produced overseas in 1979 compared with only four in 1989.

Sydney - Top 25 programmes 1980 to 1989

		Channel	Year	Rating
1	Special: Olympic Games (Opening)	10	84	56
2	Special: Royal Charity Concert	9	80	53
3	M.A.S.H. – Goodbye, Farewell, Amen	10	83	50
4	Mini Series: A Town Like Alice	7	81	49
5	Movie: Star Wars	10	82	48
6	Movie: Raiders of the Lost Ark	10	85	47
7	Sale of the Century	9	81	46
8	A Country Practice	7	83	45
8	Movie: Grease	7	83	45
10	Movie: The Spy Who Loved Me	10	83	44
10	Special: Opening of Sydney Entertainment Centre	9	83	44
10	Movie: Every Which Way But Loose	10	83	44
10	Mini series: Jack the Ripper	7	89	44
15	Special: The Hoges Report	9	81	43
15	Special: Logie Awards	9	82	43
15	Beryond 2000 Special: Climate in Crisis	7	89	43
18	Willesee Special: Quentin	7	82	42
18	Mini series: The Dismissal	10	83	42
18	Movie: 10	10	83	42
18	Mini series: Return to Eden	10	83	42
18	Mini series: The Torn Birds	10	83	42
18	A Country Practice	7	85	45
18	Special: Royal Wedding – Andrew & Fergie	7	86	42
25	Movie: Picnic at Hanging Rock	7	80	41
25	Sale of the Century	9	80	41
25	Special: Royal Wedding – Charles & Di	9	81	41

Table 1 **Source: AGB McNair Anderson**

The ABT position

After a long period of sometimes controversial consultation, the Australian Broadcasting Tribunal (ABT) overhauled its Program Standards for Australian Content (Program Standard14) on Commercial Television, with the first stages coming into effect this year.

The ABT states that it is seeking a solid Australian content on commercial television, that it wants to reduce regulation of commercial television, encourage rather than restrict production activity, provide maximum flexibility for licensees and take a commercially realistic approach to broadcasting development.

It states that the way to achieve these standards is to establish a transmission quota for television stations which would require a minimum 35 per cent of program hours telecast between 6am and midnight, to be Australian. This percentage is an increase of 5 per cent each year from the date of implementation until the total reaches 50 per cent.

Similar types of quotas have been met by commercial television licensees in the past, commencing with a 40 per cent requirement in 1960 which was increased to 50 per cent in 1965. This preceded the introduction of a points system in 1973.

Analysis of recent Australian programing by commercial networks has shown that, on average, the commercial stations have been meeting the ABT's previous targets, although this has varied somewhat from network to network.

Financial Viability

While historical ratings figures show that Australians generally prefer Australian programs, it equally seems clear that there is an inhibiting factor - that factor is production costs.

There has been, and are, many locally and successsfully exported Australian productions such as Neighbours. Conversely, there has also been a large number of expensive failures, including Richmond Hill, Willing and Abel, Prime Time and Page One.

Commercial television stations have ploughed millions of dollars into writing, scripting and producing such shows only to withdraw them from telecast, sometimes only after a few weeks, due to poor ratings performance.

In these cases, it becomes a question of commercial viability. Without local public support manifested in significant ratings, a program, despite its local genesis, will not attract sufficient levels of advertising revenue to justify its existence. The reality is that proper levels of advertising revenue and reasonable return on the investment is the lifeblood of the commercial television sector. his, in turn, poses a conflict between financial viability and quality and quantity of Australian programs. Should local commercial stations risk huge sums and possible ratings failures simply because they have to cater for

one-offs and series in the diversity category.

The score is determined by multiplying the Australian Factor by the Quality Factor and the Number of Hours screened.

Quality is subjective

The Quality Factor, according to the ABT, allows commercial stations to opt for fewer hours of high cost mini-series or more lower cost series/serials to satisfy its Australian content requirements. But surely the assessment of quality is subjective; in fact the ABT acknowledges this in its review document.

So how is the Quality Factor measured and who measures it?

Ultimately, it is the viewer who decides what he or she watches and this in turn determines a program's success or failure. While the ABT is offering incentives to high risk drama productions, it is our understanding that no incentives are offered to commercial stations for local sport, news, quiz and game shows. The ABT states these programs are popular and flourish, hence they do not require incentives.

Two comments can be made. Firstly, while in general terms, news and some quiz shows have been, and are good ratings earners, not all news and quiz shows flourish. Secondly, such programs are not necessarily cheap to produce and therefore the stations run the risk of high costs without guaranteed ratings success. High risk is not necessarily confined to drama productions.

Average homes ratings of Australian & Non-Australian Mini-series

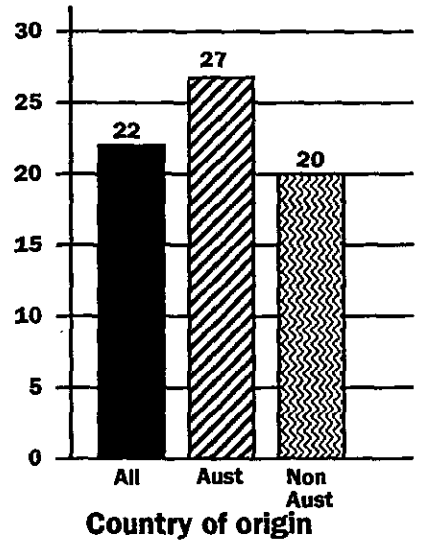

Table 2 Source - AGB: McNair Anderson

There is a delicate balance between the networks' quite proper concern to remain commercially viable, growing audience preference for quality Australian productions, and the ABT's regulatory requirements. Quantity is not necessarily the answer: quality is subjective. In the end success or failure will be clearly spelt out by the viewer.

Broadcasting in hard times

Jack Ford examines the uncertain status of receivers and liquidators under the Broadcasting Act

Each of the past three decades has blessed lawyers in one area of practice or another. The 1960's was a golden era for mining lawyers. The 1970's and 1980's saw the ascendence of takeover lawyers. Broadcasting lawyers have been able to operate in fruitful conjunction with them. The 1990's looks like being the era of the insolvency practitioner. Broadcasting lawyers are likely to be able to team up with insolvency lawyers as cohesively as they have done with the takeover lawyers in the good times, in order to take advantage of new opportunities in the 1990's.

In the good times the rigidities and red tape of the Broadcasting Act (the Act) have had a distorting effect in relation to corporate restructuring in the broadcasting industry. Many of our leading companies have been surprised to learn that effecting their corporate strategies to obtain an interest in some company or other has involved them in the onerous requirements of the Act and the Australian Broadcasting Tribunal (ABT), although the target company might have only a remote and relevantly minor involvement, and no actual involvement, in broadcasting. In these cases the requirements of the Act have proven to be an additional and often nightmarish overlay to the requirements of the Companies and Acquisition of Shares Codes. The unfortunate fact is that most of the major industrial groups which operate in Australia seem to have a prescribed interest in one or more commercial radio or television licenses. If, for example, there is a takeover offer for Carlton United Breweries, Tooths, Bond Brewing, Coopers or South Australian Brewing, the offeror has to pass muster by the ABT. It is tempting to suggest that the ABT should be renamed the Australian Brewing Tribunal.

Virgin territory

The impact of the Act and the ABT on corporate restructurings is a relatively well-trodden path. By contrast, an exploration of the impact of the Act on receivership or insolvency was, at least until last November, virgin territory. I have in mind of course the appointment of receivers to the Qintex Group. Interestingly, the Act provisions, although not apparently drafted with situations of insolvency in mind (doubtless drafted in times when one equated a broadcasting licence with a licence to print money) may determine the way in which some insolvency situations are determined.

I have in mind particularly the Act's requirements regarding people acquiring or increasing prescribed interests in licences, provisions preventing foreign persons from being in a position to exercise the control of licences, provisions requiring ABT approval of certain transactions and provisions preventing transfers of licences and preventing the admission of persons other than the licensee to participate in any of the benefits of the licence or to exercise any of the powers or authorities granted by the licence without ABT consent.

How do these provisions impact on the appointment of receivers, managers and liquidators? That question leads to a number of other questions. Does the Act, on its proper construction, prevent a foreign creditor, for example, appointing a receiver/manager or liquidator? Is the Act intended to prevent the usual operation of the laws which regulate corporate insolvency in Australia? Should it do so? Should a creditor (foreign or otherwise) of a licensee company or a company with an interest in a licensee be in any different situation from a creditor of a company operating in any other industry?

Prescribed interest

Relevantly, the appointment of a receiver or liquidator to a company may occur either upon the application of a company itself or upon the application of a creditor.

In both cases, one such question is whether the receiver (or liquidator) obtains a prescribed interest in or is placed in a position to exercise control of the licence or licences. In the latter case, an additional question is whether the person who directed or procured the appointment of the receiver or liquidator also obtains a prescribed interest in or is placed in a position to exercise control of the licence or licences. The primary duty of a liquidator is to get in all assets, sell them and distribute the proceeds to all creditors (irrespective of whether all creditors or only one or more of them procured his appointment). The duty of a receiver may, depending on the terms of his appointment, parallel that of the liquidator.

Alternatively, the receiver may be au-

thorised to carry on the business of the company as a going concern for a period. In either case, the liquidator or receiver (as the case may be) will generally, if not invariably, have power to sell the assets of the company and to vote shares held by the company.

My view is that in neither case does the liquidator or receiver obtain a prescribed or controlling interest in the licences held by the subject company or its subsidiaries. That is because receivers and liquidators are agents of the company to the property to which they are appointed. They are not agents of creditors who procure their appointment. They acquire neither a shareholding nor voting interest as defined under the Act. The consequence of that from a broadcasting point of view is that receivers and liquidators can largely proceed about their business without fear of ABT scrutiny or interference. They are obliged to seek neither prior nor subsequent ABT approval of their appointment.

An alternative view

There is a school of thought which, however, considers that if a lender who happened to be a foreign bank procured the appointment of a receiver or liquidator to a licensee company (or even a holding company) that would put the foreign lender in a position to exercise control of licensee companies and hence the licences. Now if that argument is right then the appointment of the receiver or liquidator in those circumstances would amount to an immediate serious breach of the licence conditions, obliging the ABT to act forthwith.

The ABT itself has yet to opine in the matter. Having regard, however, to the parlous state of the industry and the precarious position of some of its players, it will not be long in my view before the ABT is asked to give a definitive statement on the matter.

If the school of thought I have just described is accurate, there would inevitably be panic amongst lenders if the matter came to a head and a disaster in terms of the willingness of foreign lenders to continue to do business with the Australian Broadcasting industry.

It would surely be better for a receiver or liquidator appointed by a creditor (foreign or otherwise) to conduct business as usual (in the case of a media company in receivership or liquidation) than effectively to have the station (or network) shut down as a result of a meaningless technical breach of the Broadcasting Act.

Jack Ford is a partner in the Sydney office of Blake Dawson Waldron, Solicitors

President's address

to the AGM of Communications and Media Law Association

It is a pleasure to be able to give a totally positive report on the year's activities. At last year's annual general meeting we were in the throes of the merger between ACLA and the MLA. That large and complex manoeuvre has now been successfully completed. The new, merged, organisation has continued to grow throughout the year with a number of new members admitted at every committee meeting throughout the year. For example, 28 new members were admitted at the last committee meeting.

Last year, we all applauded Michael Berry for the work he had done in upgrading the Communications Law Bulletin. In the middle of the year, Michael resigned as editor and was replaced by Grantly Brown. Happily, we are able to thank Michael for all the work he did for us, as well as continuing our association with him. That is because he continues to arrange publication of the CLB despite the success and expansion of his media production company.

Working from the sound base which Michael provided, Grantly Brown has expanded and improved the CLB still further. The increase in membership is largely attributable to the work he has done in obtaining articles for the CLB, expanding its areas of coverage, and promoting it. For most members, the CLB is the identity of the organisation. That has been a very exacting and time-consuming task. The CLB reflects our interests, and provides a reference-point for every-thing else which happens.

It would be invidious to attempt to thank the office bearers and committee members who have raised CAMLA's level of activities through the year to a record level. The expressio unius principle could imply a lack of thanks to some of the large number who have made a contribution. The committee members have donated large amounts of time and skill to organising a number of functions, planning and supporting the basic fabric of the organisation.

The one person who should be expressly mentioned is Cleo Sabadine, who has made a personal contribution to all matters relating to the membership and records, as well as to the organising of virtually every function we have held. Cleo has done this with rare dedication, on terms extremely favourable to CAMLA.

There is every reason to believe that CAMLA will continue to grow and to stimulate interest in media and communications law issues. The sheer momentum we have now established makes that easier. And there is more need than ever before for the relaxed, independent forum which we provide for people and ideas to reach over the professional and institutional hurdles.

We have held a number of luncheons during the year, including those addressed by Wilcox J (defamation reform), Michael Chesterman (contempt reform) Ros Kelly (telecommunications), Dennis Pearce and Peter Banki (moral rights), Robin Davey, Judi Stack and John Evans (AUSTEL).

We have not yet matched the successes which both MLC and CAMLA achieved in earlier days in the organisation of seminars about current issues. The most manageable format is a short evening seminar; but in a voluntary organisation their success depends on having a few members prepared to undertake the organisation themselves. Hopefully, we shall be able to do something about this during 1990.

An objective which seems easy to meet is an increase in CAMLA activity outside Sydney. With a number of committee members now in Melbourne, there is every prospect of more Melbourne activities.

Mark Armstrong
15 February 1990.

The politics of pay

from p14

It will be interesting to see whether Australia has the opportunity to have one of the best pay TV services in the world or is left with a "second best" system due to the lack of utilisation of all available technologies.

Let's hope that more than ever before, economic viability will play a vital part in the correct political decisions being made. A DBS/MDS cable system would be seen as being the best decision for the delivery of pay TV in Australia.

(Ed: Darling Downs Television and Northern Rivers Television are currently seeking injunctions before the Federal Court to prevent the Minister from proceeding with aggregation, the ABT from renewing the Seven Network's licence and Quintex, Prime Television and Riverina and North East Victoria Television from proceeding with their affiliation).

Contributions

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

Contributions and comments should be forwarded to:

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Communications and Media Law Association

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

Issues of interest to CAMLA members include:

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

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

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

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

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

To: **The Secretary, CAMLA, Box K541, Haymarket. NSW 2000**

Name .....

Address .....

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

Principal areas of interest .....

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

- Ordinary membership $40.00
- Corporate membership $70.00
- Student membership $20.00
- Subscription without membership $40.00 (Library subscribers may obtain extra copies for $5.00 each).

Signature .....