Communications B•U•L•L•E•T•I•N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION (CAMLA)

Registered by Australia Post. NBG 4474 EDITED BY GRANTLY BROWN VOL 10 No 2 Winter 1990

Press independence

Max Suich discusses some of the problems facing the independence of the press in Australia

My theme, not surprisingly, is independence and I look at that theme in two areas: prospects for new newspaper publications independent of the current major media groups, and the threat to the independence of the media generally.

I am the editor and publisher of a new monthly newspaper launched in July called THE INDEPENDENT MONTHLY. My partner is John B Fairfax, so you might reasonably ask whether I am independent of a major group. However, the actual operations of the paper and its content are very much my concern and John is a generous and disinterested, but not uninterested, supporter.

Distribution

Much of the glib talk we hear about the opportunities presented by new technology is true. You can set up your own little computer copy processing, typesetting and makeup system for between $5,000 and $30,000. You can do your own typesetting and page makeup if you choose. Alternatively, you can find low and very competitive prices these days from external typesetters and makeup services.

There are therefore few barriers to starting a small suburban newspaper - apart, of course, from the market power of the established suburban groups. You could also establish a small industry newspaper or magazine. But for a paid daily or weekly paper going to a national or Statewide market, distribution is a serious problem. There is only one distribution system independent of the three major newspaper and magazine publishers in the country: NDD, a subsidiary of Eastern Suburbs Newspapers.

NDD will never be a true competitor to the major groups. You can't do daily national distribution unless you have a successful daily paper to underwrite it. This lack of competitive alternatives in distribution is in distinct contrast to the competitiveness in the printing and typesetting industries. Frankly, distribution problems prevent the launch of a major daily or weekly with a national or capital city circulation at the present time unless you have working capital of at least $50 million up your sleeve.

Professor Bob Baxt, head of the Trade Practices Commission, has suggested that the *Queensland Wire v BHP* (1989) case has set a possible precedent for new players looking to solve their distribution problems. By this he means that the High Court's finding under s.46 of the Trade Practices Act in the *Queensland Wire v BHP* case might allow a new publisher to impose on News Limited, The John Fairfax Group or Australian Consolidated Press the obligation to offer a fair commercial price for the distribution of a rival publisher's products.

Distribution, however, is a service not a product and there is more to it than merely taking delivery of a ton of wire. There is plenty of room, obviously, for the majors to provide both quotes and a quality of service which would dissuade a new publisher from using them.

In this Issue –

At this stage it is hard to believe that even with the High Court decision in *Queensland Wire v BHP*, a publisher planning a rival to the dailies or weeklies could, in reality, impose such obligations on one of the major publishers.

For those who are not direct rivals that may not be necessary. For instance, I have negotiated with The John Fairfax Group to distribute my paper, on satisfactory terms.

Legal costs

The other major barrier to independent publishers will be no surprise to you. It is the libel laws. Having been a journalist for 30-odd years and an editor and senior executive for almost 20 of those years, the laws themselves were no surprise to me. The surprise lay in their cost, both financially and intellectually.

The financial cost arises not necessarily from losing any case. There is a significant cost in obtaining advice *prior to publication*. There is an even greater cost in taking advice if a writ should drop and an exponentially greater cost if an experienced Q.C. is engaged for, first, advice, and then the preliminaries to court action.

If the case should go to court it is often subsidised by the plaintiff's corporation, union, or organisation, which means the plaintiff does not bear the cost out of his or her own pocket.

A mischievous try-on by a wealthy plaintiff which is withdrawn or left to languish just before an actual court appearance, could easily cost $35,000: a significant burden to a small newspaper. Of course if it goes to court but is then settled on the basis of each paying their own costs, the bill might be $100,000

continued on p2

or more. Just as expensive to a small newspaper defendant is the time and intellectual energy spent on such actions.

As the Federal Government has clearly learned in its harassing of Brian Toohey and The Eye, an average case accompanied by an unlimited budget, can impose on a small publisher just as great a burden as an excellent case.

For a small publisher the greatest need in the reform of the libel laws is not only liberalisation, but new methods for speedy adjudication which allow the matters to be run as cheaply as possible.

Do we need a royal commission?

This brings me to the second aspect of my theme. There are many critics of the media in Australia today and there are not a few enemies. At their simplest, many want a royal commission into the press. Those who know how the press works find it difficult to think of a good reason why we should have a royal commission - after all, what royal commissioner, judge or QC, or his or her counsel assisting, is going to find out more about the press than the industry already knows.

What conclusions might be drawn by such a legalistic inquiry? And what opportunities for restraining the press might such an inquiry provide to assiduous politicians?

While we in the industry know how the press works and recognise the shortcomings of royal commissions, many outside the media regard the press as a great mystery, a source of great conspiracies - and great power, exercised unchecked.

To these people a royal commission is the answer to finding out how the great conspiracy works. And not a few eminent lawyers who might be appointed as a royal commissioner or counsel assisting, would take the same view.

I suspect that sooner or later the press will get a royal commission in Australia, if only because Britain has had three. In fact if we need an inquiry at all, we need something like The Economist Intelligence Unit inquiry of the 1960's to look at the realities of the economics of the press, as has occurred in Britain.

At different times the Labor Caucus has sought to get the Trade Practices Commission to do such an inquiry. Though uncongenial to some, this would be a far preferable solution to a royal commission. It might properly look at barriers to competition and to the practical economics and restrictions on competition that arise from competitors sharing printing and distribution facilities.

Lawyers and the press

If the press has sectoral enemies then the two most significant are probably politicians and lawyers. Sometimes they are both. I do not have to explain why politicians try to control and manipulate the press, but I should emphasise how important they are in imposing restrictions on the press and how frequently they resort to the libel courts and contempt of court actions to protect their own, as distinct from the nation's interests. Lawyers are a more complex and less clearly defined enemy. I argued at a Press Council seminar last year that there is significant bias within the bench, the bar and the Crown Law offices against the press.

Encounter a libel lawyer at a party after a drink taken and he or she will generally tell you that journalists usually get it wrong (sometimes maliciously wrong), get sued, complain of this unfairness, ill prepare for the case and then blame the lawyers if the case is lost.

'If the press has sectoral enemies then the two most significant are probably politicians and lawyers'

Many judges who hear our cases have either shared that view as practising barristers or acquired it from their colleagues who have worked for or against the press.

The knowledge the legal profession has of journalism is almost entirely based on experience of legal conflict, mainly of experience at the libel bar. Few have encountered the more normal atmosphere of day-to-day publishing.

Thus, disapproval and cynicism about the press - from the bench and the bar - is considerable, not least from those on the bench and at the bar who have practised politics at some time in their career. There is at least a handful of senior lawyers and judges in State and Federal jurisdictions who, I believe, from my personal experience, have strong animus towards individual newspapers or the press as a whole, which arises from their experience in politics, at the bar or both.

This is not the only reason but it is a major reason why I think we will see over the next few years, lawyers in the vanguard of arguments in favour of new privacy, right of reply and official secrets legislation. Draconian official secrets legislation has already been recommended here by former Chief Justice Gibbs of the High Court. It is of course natural for lawyers to seek to introduce these ideas from Britain.

These issues are pressed here, despite our different circumstances, because of the cultural cringe towards English law, because the politicians prefer more restraint on the press, and because it is good for the legal business.

How should the press respond?

The obvious response of the press to these threats is twofold. One is to use its undoubted power to restrain politicians from enacting more and more confining legislation. This can be done at one level by arguing rationally in our opinion columns and presenting opinions to the likes of the Gibbs Committee on the Official Secrets legislation. But this is quite often not enough.

The uniform defamation legislation as it was finally fashioned by the then Attorney-General, Gareth Evans, would never have been demolished by mere rational argument. It took the united, persistent and high level pressure from the media groups to persuade the Attorney-General that the legislation was unacceptable.

The second means of having less restrictions is for the press to live up to its responsibilities. Although it is often proprietors who get the bad press, poor journalism is the fault more of journalists and editors than proprietors. A responsible press is a product of a newspaper's staff rather than the result of directions from above. And in Australia today newspaper and broadcast journalists are more free of intervention from management and proprietors than ever before. This is a fact rarely mentioned by journalists when they make claims for more freedom.

The truth is, though, that the public is out of sympathy with the media's claims for greater freedom. The oligopoly in press and broadcasting, the sleaze that creeps into journalism – not just in tabloid TV – the consistent attacks on the press by politicians and by libel barristers and judges, influence the public to think: "Do we want to give journalists more freedom or more power?" The answer is generally no.

Max Suich is the editor of The Independent Monthly and is a former editor of The Sydney Morning Herald.

(Ed: The Trade Practices Commission is currently reviewing the authorities granted under the Trade Practices Act 1974 for the distribution of newspapers and magazines in Australia based on its 1980 decision *Re John Fairfax & Sons Ltd.* The Commission has released an issues paper to elicit contributions to this review.)

FORUM

Regulation of Pay TV content

To date, the introduction of subscription television, or Pay TV as it is more generally referred to, has been the subject of three inquiries. The first was the 1982 Australian Broadcasting Tribunal's (ABT) 'Cable and Subscription Television Services for Australia'. The Department of Transport and Communications (DOTAC) issued in February 1989 entitled "Future Directions for Pay Television in Australia'. This was followed in November 1989 with the House of Representatives Standing Committee on Transport, Communications and Infrastructure report 'To pay or not to Pay'

All these reports endorsed, explicitly or implicitly, the introduction of Pat TV services although their proposals in relation to regulation of these services, including content regulation varied greatly from the free-to-air broadcasting type regulation proposed by the ABT; through the more moderate proposals of the Saunderson report which recommended only some of the current programming requirements prevailing in the broadcasting arena should be adopted; to the deregulatory publishing industry type mode discussed in the DOTAC report.

A moratorium on the provision of Pay TV services was announced in September 1986. The Governor General may lift this moratorium by proclamation anytime from September 1990.

Tony Branigan of Network TEN

Pay TV in some form is inevitable within the next few years. It is a curious example of a demand which has been created by government reports and intense political interest in what is perceived as a high-profile, costless issue in the notoriously difficult area of broadcasting policy. Public demand has been zero and aspirant Pay TV operators of any real substance have been in short supply. But it has been on the agenda in this ghostly form for so long now that its time has probably come.

It is bound to have some effect on television viewing levels and revenue. Given the state of the industry at the moment, this has to be a major factor in deciding when and how Pay TV is introduced.

Television cannot expect, as of right, to be protected from competition from this or any other quarter. However, the community has a substantial investment in television and the production industry it supports and government has to take this into account in framing policy. At the very least, it must aim to ensure that the introduction of any new service does not lead to a net decline in the entertainment and information services available overall. In a larger economy like the United States that would not be a concern for government – both commercial television and the program production industry over there have the sheer size to be able to cope with the sort of buffeting that would mortally damage their modest counterparts here.

Australian television and quality program production generally are operating at the economic margin. A relatively small decline in revenue may be enough to bring about a drastic fall in Australian television production. The transfer of that revenue to Pay TV will not give it the critical mass - even with its subscription revenues - to pick up this lost production. It took the US Pay TV industry more than a decade - and annual revenues of more than $20 billion - to become a program producer of any significance.

In our view, the best way of guarding against this outcome is to structure Pay TV so that it is a complementary service rather than one that largely duplicates commercial television. The simplest way of doing this is to ensure that Pay TV is a purely subscription medium. If it is even partly advertiser-supported it will inevitably seek to attract the same audience as commercial television.

The only other constraint we would want to see on Pay TV is in relation to the televising of major live events. We do not see any cause to deny Pay TV access to events like the Melbourne Cup or the AFL Grand Final. However, we would oppose to the last any approach that allowed Pay TV exclusive access to events like this. Even on the most optimistic projections, it will be many years - if not decades - before most people are Pay TV subscribers, so access to live coverage of these events would be restricted to a fortunate minority. Most politicians seem to be aware that this will be perceived as an equity issue, and could very easily become a major political liability if not properly handled.

We have not seen any persuasive case for detailed regulation of any other aspect of Pay TV services. They are discretionary services, like commercial videotape rental or book purchase, and it makes no more sense to regulate the content of Pay TV services than it would to tell booksellers or video shops what they must stock or - more importantly - what their customers must rent or buy.

Hoyts Entertainment

Hoyts Entertainment in its submission to the Saunderson Committee outlined its views on what the company saw as the central issues for consideration on implementing Pay TV services in Australia. Those views have not altered. Following is a summary of Hoyts' position on content regulation of pay TV.

Generally, there should be no program content regulation along the lines of existing broadcasting services.

There should be no regulation for minimum Australian content in programming on the grounds that there is no practical or workable means of establishing such regulation, and because the demand for Australian programming represented by Pay TV will outstrip any level of required content.

There should be no barriers to the carriage of advertising on Pay TV. The volume and type of advertising included should be at the discretion of the Pay TV operator who will need to pay careful attention to the attitude of subscribers to frequent and irritating advertising interruptions.

The potential for the siphoning of specific programs from free-to-air to Pay TV should be met by the development of a schedule of events of national importance for which exclusive Pay TV rights could not be granted. Rights holders for such events should be encouraged to negotiate the assignment of both free-to-air and Pay TV rights separately so that consumers of each have access.

In determining prospective Pay TV markets and the allocation of licences/franchises to aspiring Pay TV operators, each market should be considered as a natural monopoly with only one Pay TV service (irrespective of the number of channels) available in each. This is to ensure that the introduction of Pay TV services actually results in the provision

is wide a range and diversity of programg, including comparatively low interest gramming (narrowcast) services, as posle. Allocation of Pay TV on a competitive gle channel basis within systems will re-t in all operators chasing the same maxim interest programming and the same ly of subscribers.

Premium services, involving both preum channels and tiers and pay-per-view, should be able to be marketed by Pay TV operators, subject to subscriber demand.

Decisions by the government, or its agencies, on the ownership structure of Pay TV or the allocation of specific market licences/franchises should take no account of claims that the majority of rights to potential programming are held already by particular commercial interests.

Janette Paramore of the Australian Writers' Guild

The apparent inevitability of the introduction of Pay TV in Australia represents yet another example of technology-driven change in our communitions/media services.

While some of these recent changes have ought obvious benefits, many of those re-ed to broadcasting services and policy ve been questionable at best and, for those ncerned with the cultural and social impli-tions of such, disastrous. Disastrous due to e concentration of power and benefits rgely misused) associated with the man-r of their introduction; the failure of our olicy makers to recognise the practical ef-cts of their decisions, and the lost opportu-ties to use the technological developments hich created changes in the broadcasting stem to diversify control of Australia's mass edia culture and create the opportunity for novation and variety in the programming ffered.

Perhaps the introduction of Pay TV will e seized upon as a second chance. Perhaps e creators of the programming upon which s service depends will be provided with ome power in the system, and perhaps the ommunity which it is intended to service vill receive better, rather than simply more, hoice. Choice which contributes positively o Australian mass media culture and to our ense of an Australian heritage and society.

However, there is a sense of uncertainty nd confusion surrounding the processes of ntroduction which belies these possibilities.

True, the recommendations of the Saunlerson Committee are on the public record. However, officers of the Department of Transport and Communications "boffin way" reviewing Pay TV and its introduction, providing advice to the Minister about the most suitable delivery technology, the number of services, the licensing system, suitable regulation and the appropriate regulatory authority, if any.

While the Departmental working party talks to itself and other government agencies within the grey caverns of the bureaucracy, the program makers, public interest groups and the general community remain in ignorance of any terms of reference established by or for the working party, the priorities to which it is working, or what options are receiving serious consideration.

In addition there are powerful vested interests involved in any introduction of Pay TV services to Australia. Those interests range from the controllers of the various technologies which could be utilised to provide the service, to the controllers of program rights and current broadcast and other entertainment services. All these interests are well resourced and have access to government: both parliamentary and bureaucratic.

At the other end of the equation are the program creators and makers, with little power, much to offer and, already suffering from the financial decisions of the owners of existing services, much to lose. In a similar position is the community generally, particularly the growing numbers whose financial situation leads them to rely heavily on free-to-air broadcasting and other home entertainment services for their entertainment.

Will the decision on Pay TV result in a positive outcome with regards to the social and economic impact of its introduction? Will the choice of delivery technology facilitate servicing the widest possible area of the Australian community or, encourage operators to service only areas meeting particular specifications of demographics and population density? Will the number and nature of the services introduced provide a revenue base which supports the production of new programs? Will the licensing system and regulation governing Pay TV ensure diversity, innovation and Australian programming?

If not, Pay TV will make no positive contribution, rather, it will further serve already powerful interests.

The Australian Writers' Guild is painfully aware of its members' incomes dropping by 50 per cent during the current financial year. A direct result of financial decisions made by owners of television networks. We, therefore, can only welcome the introduction of Pay TV if the same requirements for Australian content apply to pay services as currently apply to free-to-air television, and the ownership and control of Pay TV services are regulated to ensure they are securely in Australian hands, not merely subsidiaries of foreign program producers, distributors, or broadcasters, seeking to expand their market.

If Pay TV is introduced without such regulation Australian creators of programs will be ill-served by it. So too will the Australian community, as the introduction of additional services without such regulation will lead, ultimately, to the collapse of the Australian production industry and with it the community's access to its own cultural identity in the mass media.

Jock Given of the Australian Film Commission

The real debate surrounding Pay TV must not be about regulation, it must be about television - broadcasters and program-makers, their programs and their audiences.

Policy on Pay TV must be considered as part of an overall plan for the development of the Australian television system. Such a plan must cover all of the range of television policy questions which currently are being considered by government - charters and funding for the ABC and the SBS, aboriginal broadcasting, broadcasting regulation reform, public television and others.

In the early 1980s, as video began its extraordinary penetration of Australian homes, the Australian Film Commission (AFC) opposed the introduction of Pay TV in Australia. We believed it would only further fragment existing program markets, thus diluting the resources available for programs, and contributing nothing to program diversity.

At the beginning of a new decade, we are all a little wiser. There is considerable evidence that cinema and home video markets are at least partly complementary rather than purely competitive. The AFC now is hopeful that Pay TV might provide some opportunities to improve the diversity of program choice for Australian viewers, to encourage innovation in programming and to diversify media ownership.

However, we must be realistic in our expectations. We will not see a massive number of new quality channels, because of the size of the Australian market. Competition amongst marginal operations may homogenise rather than diversify program choices. Finally, at a time of considerable

nancial pressure for existing television networks, it would be counter-productive to the interests of the film industry and its audiences to recommend a commercial free-for-all which substantially fragments the capacity of existing stations to finance local production.

Initially, a single Pay TV operator delivering multiple channels from one of the second generation Aussat satellites will maximise the chances of real benefits accruing to audiences and program-makers. Concerns about the competitive position of such a monopoly operator will be mitigated by competition with existing free-to-air broadcasters.

A licence to provide the service should be granted for ten years (the life of the second generation Aussat satellite is estimated at fourteen years). The renewal inquiry should encompass a complete review of Pay TV. The Minister should invite applications for such a licence to be made to the ABT. It is hoped that the Tribunal would, by then, be exercising powers under revised legislation which provided a consistent regulatory framework for all point-to-multi-point communications services. The Tribunal should be required to select the most suitable applicant, having regard to revised "quality of service" criteria. Those criteria should exclude commercial viability, which is better considered by the Minister before exercising his or her power to invite applications.

The ABT should have similar powers to make program standards for Pay TV services as are currently available in respect of other licensed services. The more direct relationship between the service provider and the consumer will require a more tolerant and flexible exercise of those powers.

For example, the licensee should be required by the Tribunal to direct a minimum proportion of its total revenue to Australian program expenditure. This would ensure that Pay TV provides some opportunities for local production without prescribing the programming diversity which will be the essence of a successful service. It would be counter-productive to seek to establish program quotas for Pay TV along the lines of those which exist currently for commercial television. Censorship requirements might be eased.

The Pay TV licensee should be permitted to advertise. However, to ensure Pay TV does not simply replicate commercial television, the ABT should monitor the total proportion of revenue derived from advertising with a view to setting specific standards if that proportion rises above 10 per cent.

Broadcast copyright should extend to any new video services capable of reception by a section of the general public.

Broadly, regulation of Pay TV should focus on market structure rather than on detailed programming matters.

Holly Raiche of the Communications Law Centre

Over a year ago, the Communications Law Centre called for major reform to the current legislative framework covering communications (a call echoed in Les Free's article in the Autumn issue of CLB). With the 1 September date for the possible lifting of the "moratorium" on Pay TV approaching, reform to the current regulatory structure is becoming urgent.

In its submission to the Saunderson Committee, the Centre called the current regulatory regime a "complex and contradictory one, causing anomalies in the way different sorts of services can be licensed". The same sorts of service can now be regulated under three different content regulation schemes, provided under three different Acts: regulation under ABT standards for broadcasters licensed under the Broadcasting Act, voluntary guidelines for video-audio entertainment and information services (VAEIS) licensed under the Radiocommunications Act, and no guidelines as yet for value added services (VAS) licensed under the Telecommunications Act.

Control over the content of all broadcasting and broadcasting-related (point-to-multipoint, or PTM) services should be given to the ABT. In that way, all issues of content could be dealt with by the one body with the expertise and established procedures for exercising such control, whatever the technological mode of delivery.

Not all services, however, should attract the same degree of content regulation. The submission, in attempting to draw meaningful, service-based distinctions between the various PTM services, suggested criteria which could help determine the appropriate level and form of regulation for a service, whatever its mode of delivery. Those criteria were:

(a) the availability of the material, for a fee or otherwise, to the general public, or a significant proportion thereof, especially of domestic environments;
(b) the nature of the material, and its cultural significance, such as current affairs or entertainment;
(c) the form in which the material is transmitted (eg. moving pictures, text, data);
(d) access to material (eg. charge for the material, necessity for expensive equipment to access the material); and
(e) whether the material would be received, in the ordinary course of events, in environments where children are present.

Various categories of PTM services could attract different levels of content regulation, based on the nature of the service provided. Each service (whatever the mode of delivery) would be matched against the suggested criteria and categorised, and would then be subject to that category's content requirements. The suggested categories ranged from free-to-air broadcasting, attracting higher levels of content requirements, through categories for entertainment channels, to information services, to videotext or teletext services.

Once current legislation is amended to give the ABT control over the content of PTM services, the government, or the ABT itself, would determine the criteria for delineating the various PTM services into particular categories. Given those guidelines, the ABT could then conduct an inquiry into the sorts of regulation appropriate for particular categories of service.

The result would be more appropriate levels of regulation for all PTM services - less regulation for those services not raising social or cultural concerns, and for those services of cultural and social importance to the community, appropriate regulation, whatever the technological form of delivery. We await the overdue reforms.

Joanna Simpson of the Screen Producers' Association of Australia

Naturally, independent film producers in this country have an interest in the development of new technologies as potential windows for their product.

The Federal government will have to decide what delivery technology or technologies should be in place for transmission of Pay TV and must also establish the most appropriate regulatory delays.

Of the suggested choices – the ABT, Austel or an independent authority – Screen Producers Association of Australia (SPAA) favours the ABT to avoid unnecessary costs of setting up an independent body and the consequent delays. However, the fundamental point distinguishing Pay TV from free-to-air television is that it is a subscriber-based or "narrowcast" service with a resultant range of distinctions.

Pay TV can be seen as competition against network television but it should NOT be considered a similar service. It will not be commercially viable if it seeks to duplicate what is already freely available on our televisions today. Fears about program siphoning from the networks to Pay TV services are at least in the foreseeable future groundless.

A commercially realistic Pay TV service, as history has shown in other markets around the world, will be predominantly fuelled by movies. Accordingly, SPAA supports the concept of levels of Australian content in programming that will assist producers by creating another window beyond theatrical, free-to-air television and home video product releases. Questions as to content should be addressed by way of contractual negotiation and licence conditions. Because Pay TV differs so much from free-to-air television no uniform quota or points system would be applicable.

As with home video in the early days, products are unlikely to be produced especially for Pay TV. In other words, it will not be commercially viable. Only when the service has been established and penetration rates are significant will it be realistic to make programs especially for Pay TV.

To maintain consistency with censorship regulation governing theatrical and home video, product movies intended for screening on Pay TV which have already had a theatrical or home video window should retain that rating if the version is the same.

There are clearly delineated distinctions between free-to-air and Pay or subscriber-based television. Therefore, at all points along the regulatory and programming road, the differences should be constantly borne in mind along with the interests of maintaining reasonable film production levels in this country so as to support our local industry at every step along its way.

Peter McBurney, of BIS Shrapnel, gives a consumer perspective

Much of the debate over recent years concerning Pay TV in Australia gives the appearance of having ignored one crucial set of questions: do Australian consumers in fact want Pay TV services, and are they willing to pay for them?

With the aim of answering these questions, BIS Shrapnel late last year undertook a multi-client market research study of the Australian population, questioning awareness and attitudes to Pay TV services. We contacted 1433 households throughout Australia, and interviewed the residents of each household both individually and as a group.

In brief, the answers to both the questions above was a resounding YES. The study found a considerable level of awareness of the concept of Pay TV (whether satellite or cable delivered): almost two-thirds of Australians were aware of, and positive towards, the concept. No doubt the government's moratorium and the ensuing debate has helped build this awareness.

By far the most common reason people gave us for favouring Pay TV services was dissatisfaction with the program content of the existing broadcast television services.

The principal specific criticisms of the commercial broadcasting networks were:

- insufficient Australian programming;
- too much US programming content;
- a perception of a "cynical disregard" of viewers by broadcasters outside rating periods;
- long, frequent and intrusive advertising breaks;
- too few educational programs;
- low quality children's programs.

Consumers feel that Pay TV will lead to an increase in the range of programs available, and more than half of the respondents gave this as a reason for their favourable response to the concept of Pay TV.

In addition, almost one-half of those interviewed cited a reduction in advertising as the major improvement that can be made to television in Australia. Advertising is clearly another cause of the dissatisfaction consumers express towards broadcast networks, and so a reason for favouring an alternative.

To test this, we presented the respondents with a choice of two options for a Pay TV service:

- no advertisements and full subscription costs; or
- some advertisements and half the normal subscription costs.

Despite the expressed criticism of advertising on broadcast television, Australian consumers were evenly divided in their preferences for these two choices.

As would be expected, high-income households have a significantly stronger preference for the no advertisements option, but all groups showed a preference for less frequent advertising breaks in programs. We also examined preferences for "blocked" periods of advertisements, for example only in between programs.

In addition to these views, there was a clear feeling from some consumers interviewed that the broadcast television industry had exploited self-regulation in the permitted number and length of advertisements at the expense of the viewers.

In conclusion, our survey found that a market exists for Pay TV in Australia, but only if the programming content and advertising format adopted are such as to differentiate the new service from that offered by the existing broadcasting networks. Content and format will be crucial components of the benefit consumers will be provided - and pay for - by satellite or cable-delivered television.

George Frame of Independent Television Newcastle Ltd

Australians over the years have been "blessed" with some of the highest quality local television programming in the world. Programs such as "Flying Doctors", "Neighbours", "Home and Away" etc. are enjoyed by viewers around the world. The stark reality of these programs' sales overseas, however, is that an Australian production costing $300,000 per hour to make may only sell overseas for $2,000 per hour. Petty cash to some overseas operators.

The Australian market must pay for the bulk of program production. As the financially strapped networks prepare budgets for programming, it is obvious that new and expensive quality productions will be limited. That magic mix of high ratings and cost efficient programming is a little like "panning for gold". You have to spend considerable time sifting through the rubbish in the hope of finding "gold".

Without program content regulation on Australian productions (including ABT's program rating points system for drama, sports, quiz shows etc.) the networks may not strive to find that gold, but produce low cost programming to meet content requirements only.

As a fledgling industry Pay TV would initially be devoid of Australian program software other than limited feature films. Current Australian content software would not be attractive. The networks hold the television rights to these programs or, even if those rights are held by independent producers, they may have been shown on free-to-air television previously.

Pay TV would gradually develop new program concepts, rather than a straight continuation of current free-to-air styled programs; otherwise subscribers would not perceive difference in Pay TV programming to what they receive now.

continued on p19

Regulation of a sleeper

Oliver Barrett considers the future of mobile communications as a consumer product and as a catalyst for change

Public access cordless telephone systems are aimed at different users and should reach a sector of the market that cellular mobile telephones do not. Users probably will be people for whom it would be more convenient rather than necessary to have mobility. These users will accept far fewer features on such systems providing this is accompanied by lower cost.

Features v costs

What are the advantages and disadvantages for users? There is no easy answer to this because benefits are largely dependant on proposed use. Certainly for the immediate future, cost and proposed use will determine for most users whether they use cellular mobile telephones (CMT) or public access cordless telephones (PCT).

Outgoing calls can be made by PCT users when near a public base station but incoming calls cannot be received. Studies overseas have shown that approximately 80% of calls made using cellular mobile telephones are made by the subscriber. PCT should be available at approximately one third of the capital and operating costs of CMT. A user who is considering or already using a pager could, by combining the two, achieve an effective mobile communication package.

PCT can also operate for both incoming or outgoing calls from a base station which can be at the home or office. The base station to an extent acts as a local "trunking" device where all the "extensions" are handsets. At present there can be six handsets.

Potential

On the negative side there are many who hold the view that this is technology with a limited future. Austel, in its recent report shares this view and calls it a limited window of opportunity. Unlike with CMT, there is only limited mobility available to users while talking and there is as yet nothing more than a memorandum of understanding amongst some European countries as to a common air interface between the various systems and technologies available. There is, of course, no guarantee that the technology chosen by any Australian supplier will be the dominant technology in a few years time.

However, there are reasons to be more positive about the market significance of PCT and its longer term impact, including:

- PCT technology is likely to play a vital role as a catalyst in popularising and developing the whole concept of "mobile communication".
- A mass market for mobile communications is likely to be created amongst those users who pay directly for their service.
- By providing an entry level to mobile communications (when coupled with the tendency to trade up), PCT will eventually boost cellular mobile telephones and the whole "mobile" market.
- A high proportion of users will be likely to use PCTs with pagers or voicemail systems to the benefit of providers of those services.
- PCT does not have many of the notorious failings of the first generation home cordless telephones (poor quality reception, lack of security etc.) and could prove popular with households and small businesses particularly considering the advantages of free use near the base station.
- It is important to note that this PCT technology uses the existing Telecom public switched network (PSTN) to build a new service for users. Its major impact is to provide new access to networks rather than a new network.
- As there is no requirement for cells to overlap (unlike CMTS) capital requirements are reduced.

Can public access telephone systems fill a niche need for a better public telephone service and particularly the need to cater for the mass market for mobile communications? Will this provide the necessary competition to fuel the communications market of the 1990s and to what extent should this be regulated?

Attempts at this stage to assess the worth of a right to provide these services are, at best, of questionable accuracy.

The Regulatory Issues

The Austel report on PCT has been overshadowed by the heated debate over the Austel CMT report. Increasingly, as technology advances, the distinctions between CMT and PCT will become regulatory rather than technical. The regulatory issues are worth further consideration.

Based on the concept that there should be competition, but that competition should be responsible, it is suggested that:

- Austel has got the level of regulation correct for PCT.
- As there is less supplier capital needed per user than with CMT, there is less need to regulate to protect the supplier.
- Entry into the PCT market is easier and there is accordingly less need to regulate to ensure competition.
- PCT by its very nature will use the Telecom PSTN extensively. To a great extent the spectres of community service obligations and the like are dealt with.
- CMT providers (including Telecom) will get a boost from the mass entry of users into the lower end of their market and the level of regulation necessary to protect CMT from PCT is reduced. CMT providers will, if the Austel recommendations are followed, in any event be able to provide PCT services as part of their own licences.

By all means let us regulate to protect in vulnerable areas but only where this is really necessary.

Austel has got the level of regulation correct for this service and we should do all that we can to ensure that we avoid spoiling by over-regulation what could be a mutually beneficial situation for users, suppliers and Telecom.

Perhaps the real question is why has this service not enjoyed a higher profile, particularly since the release of Austel's report on PCT pointed the way to minimal regulation.

Oliver Barrett is a partner in the Melbourne office of Minter Simpson, Solicitors.

Errata

In the Autumn edition of the Communications Law Bulletin (Vol 10. No.1) the following omissions were made:

Ken Taylor was omitted from the list of CAMLA office bearers for 1990.

Michael Hall, author of the article "Official investigations and laying charges: what can be reported", is a lawyer with the Sydney firm of Phillips Fox.

Stephen Menzies, author of the article "Pont Data Australia v ASX", is a partner with the Sydney firm of Allen, Allen and Hemsley, solicitors.

Protection of television formats

Jim Thomson examines the recent Privy Council judgment of Green v Broadcasting Corporation of New Zealand

It is trite law that copyright does not protect an idea itself, but the expression of the idea. In *Plix Products* v *Frank Winstone* (1986), Justice Prichard analysed the process by which a general idea or basic concept (which is not protected) is developed into concrete expression by furnishing it with details of form and shape.

"Each author will draw on his skill, his knowledge of the subject, the results of his own researches, his own imagination in forming his idea of how he will express the basic concept. All these modes of expression have their genesis in the author's mind - these too are "ideas". When these ideas (which are essentially constructive in character) are reduced to concrete form, the forms they take are where the copyright resides."

The difficulty which has often faced the courts is to determine where in the continuum between the formulation of an idea and its expression protection is to be granted.

The Green case

The "idea-expression dichotomy", as it has come to be known, was examined in the context of television show formats in a Privy Council judgment delivered last year.

The Privy Council determined that Hughie Green, the inventor of the talent show "Opportunity Knocks", had no claim to copyright in the format of that show. Accordingly, judgment was given for the Broadcasting Corporation of New Zealand, against which Green had brought an action for breach of copyright.

While the decision creates a precedent of sorts, the result is not surprising. Although organisations have for years been "licensing" formats, there has been little case law on whether a format of a television talent show attracts copyright. Nevertheless, the reactions of some overseas game show producers call for a statement of what the decision may mean to television organisations, both as format devisors, and as potential users of existing formats.

For about twenty years, Green was the author, presenter and compere of a television talent show entitled "Opportunity Knocks" in the united kingdom. South Pacific Television (the predecessor of the Broadcasting Corporation of New Zealand) broadcast in 1975 and 1978 a similar show also entitled "Opportunity Knocks". The elements that South Pacific were held to have copied from Green were the title "Opportunity Knocks"; the phrase "for you (name of competitor) Opportunity Knocks"; "make up your mind time"; the use of "sponsors" who talked about the competitors' backgrounds; and of a "clapometer" which was supposed to measure audience response (but was in fact operated by a technician).

The judgment

The Privy Council found:

"It is stretching the original use of the word "format" a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories. Alternative terms suggested in the course of argument were "structure" or "package".

'the decision should not be seen as giving carte blanche to copy established formats'

"This difficulty in finding an appropriate term to describe the nature of the "work" in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the questions and answers in the quiz show, etc) and identified as an "original dramatic work". The protection which copyright gives creates a monopoly and "there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world: (Tate v Fulbrook [1908]). The subject matter of the copyright claimed for the "dramatic format" of "Opportunity Knocks" is conspicuously lacking in certainty. Moreover, it seems to their Lordships that a dramatic work must have sufficient unity to be capable of performance and that the features claimed as constituting the "format" of a television show, being unrelated to each other except as accessories to be used in presentation of some other dramatic or musical performance, lack that essential characteristic."

The judgment can be reduced to a number of propositions:

1. In order to qualify for copyright protection, an entity must be a "work" of some kind - for example, a literary, dramatic, musical or artistic work.
2. In "Opportunity Knocks" Green had a number of unconnected set phrases and "accessories" which remained constant while the performances which made up each show (the acts of the participants) changed with each presentation.
3. It is not possible to isolate these phrases from the structure of each show and confer on them the status of an "original dramatic work".
4. Further, the phrases in themselves, together with the "accessories" - the clapometer and the use of sponsors - were unrelated to each other and did not have sufficient unity to **themselves** be capable of performance, which quality is essential to the existence of an "original dramatic work."
5. Copyright gives the individual owning it a monopoly, and thus it would be unjust to grant this important status to a work which was uncertain, in the sense that its boundaries were difficult to fix. What precisely constituted Green's "dramatic format" was uncertain, and thus not a copyright work.

The respondent's submission

This conclusion reflects the submission I made as counsel for the Broadcasting Corporation of New Zealand in the New Zealand Court of Appeal, referring to Mr Green's "format":

There is no framework of a serial, there is no setting, theme premise or general story line. There is no treatment of central running characters, nor detail characterisation. There is no treatment of the interplay of characters and the reason for this is that a talent show, by its very nature, is incapable of such treatment. Mr Green's "Opportunity Knocks" was a talent show like so many others. Its uniqueness was that it had as its compere Mr Green, who was identified with the programme, as Mr Green himself concedes.

The content of each programme of "Opportunity Knocks" varied considerably each week with the input of the various singers, comedians and variety artists who appeared on those programs.

A talent show must have characteristics common to every other, by reason of what each show sets out to achieve. This is the displaying before an audience the varied talents and expertise of a number of diverse performers and entertainers, who themselves provide the essence of the show and the rationale for its existence. In other words, the essence of a talent show is the sum of its parts and is not capable of having imposed upon it a format or framework in which its performers will move and be directed."

Implications for television broadcasters

Despite the alarm that greeted the Green decision in the United Kingdom the consequence of the decision are not as dramatic as some commentators have claimed.

First, the Privy Council has not said that copyright in a television format can never exist. It must be remembered that the "format" their Lordships were considering was sketchy, consisting as it did only of a number of catchphrases and accessories. This leaves open the possibility that in a future claim for breach of copyright in a format the decision can be distinguished. A complex and highly specific format, containing detailed outlines of the performance of the presenter, describing the exact nature of the sets, background music, theme tunes and accessories could, it is submitted, if sufficiently elaborate and detailed, be found to be a "dramatic work". For this reason, the decision should not be seen as giving **carte blanche** to copy established formats.

Secondly, the law relating to passing-off must be considered. To establish passing-off, it must be shown that the business of the plaintiff has acquired goodwill or reputation and the actions of the defendant cause potential customers of the plaintiff to confuse the two businesses with consequent likely loss to the plaintiff's business. In the Green case, it was held in the High Court of New Zealand that, as no significant number of New Zealanders was aware of the existence of Green's original "Opportunity Knocks", the show possessed no goodwill in New Zealand. Even if it had, the original show was so dominated by Green as a presenter that nobody seeing the two productions could reasonably think that they were the same.

However, where there is existing goodwill in a particular country in respect of a format, and the copied version does cause confusion in the mind of the viewer, the possibility of a successful action for passing-off exists.

Thirdly, the use of an established format could result in a successful action as being misleading conduct in terms of Trade Practices or Fair Trading legislation. It is possible that a television company could mislead the public into thinking that the show presented was in fact that of some other company with an established reputation.

'His ideas have been appropriated. But that I am afraid is all that has happened'

Fourthly, the action for breach of confidence lies where information of a confidential nature is communicated "in circumstances importing an obligation of confidence", and unauthorised use is made of the information to the detriment of the person originally communicating it. In *Talbot* v *General Television Corporation* (1981), Talbot developed a concept for a series called "To Make A Million". He prepared a written submission setting out the concept to detail and disclosed it to a television company in the course of negotiations. He heard nothing more from the company which, without any further communication with him, broadcast a program identical to his concept. He succeeded in an action for breach of confidential information.

Other considerations

There are other matters to be taken into account in considering format rights. Many formats are bought with associated rights and benefits, such as sets of questions for game shows, opening and closing themes, production assistance and so on. In these cases the use of those rights and accessories is of equal importance as the use of the format and cannot realistically be separated. Further, there is the practical consideration of maintaining friendly relations between television organisations which, at the international level at least, maintain a co-operative association. The copying of a television format, even if not prohibited by law, may result in a disastrous falling out between two erstwhile friendly organisations.

Conclusions

- The *Green* case does not mean that television companies can simply copy formats devised by others.
- Where a television show has a reputation in a particular country (whether or not it has been shown there) an action in passing-off or under the Fair Trading Act or the Trade Practices Act could lie.
- Where a program concept has been communicated in confidential circumstances, that concept cannot be used without risking an action for breach of confidence.
- The circumstances where a television company could safely "copy" another format is where there is no reputation in the relevant country and where the elements of the format are relatively simple. For example, a variation on a simple "dating game" format would, it is submitted, probably not be capable of protection.
- In order, to protect their own formats, as far as this is possible, television companies should reduce to writing every detail of the manner in which the format is to be worked through and presented on screen. The written document should carry an unequivocal heading drawing attention to its confidential nature.
- Despite the caveats set out above, the decision has provided useful guidelines for television companies. It has confirmed that not every so-called "format" has the protection of copyright. This accords with common sense, as every format owes something to similar formats of the same type, and there are only a limited number of ways of producing, for example, a talent show. Where a format idea appeals to a producer, it is suggested that he or she seeks legal advice before parting with a "format fee". The Green judgment has given the television industry the benefit of the application, in the area of television formats, of the principle that copyright protects the expression of ideas. As Justice Somers said in the New Zealand Court of Appeal *"Not surprisingly (Mr Green) feels his ideas have been appropriated. But that I am afraid is all that has happened. Whether taken item by item or as a whole, I am of the opinion that the scripts as they are inferred to be from the description given in evidence, did not themselves do more than express a general idea or concept for a talent quest and hence were not the subject of copyright."*

Jim Thomson is the Office Solicitor with Television New Zealand Limited.

DPP v Newcastle Newspapers and John Fairfax and Sons

A recent amendment to the Crimes Act 1900 in New South Wales has serious implications for journalists reporting sexual assault trials. Richard Coleman reports on the first prosecution under the new section.

The criminal prosecution was brought by the DPP against Newcastle Newspapers Pty Limited and John Fairfax & Sons Limited, publishers of The Newcastle Herald, over the publication in a court report of sexual assault proceedings of the first name of the victim of the sexual assault.

Such a publication is prohibited by section 578A(2) which states:

"A person shall not publish any matter which identifies the complainant in prescribed sexual offence proceedings or any matter which is likely to lead to the identification of the complainant."

This section was added to the Crimes Act in 1987. This amendment had the entirely praiseworthy purpose, as revealed in the Minister's second reading speech, of making the court processes less traumatic for child and adult victim-witnesses and of encouraging women and children to report crimes against them and to seek the assistance of police and court processes in protecting themselves from threats of future violence.

The section provides for fines and six-months' imprisonment for individuals who are convicted under it and substantial fines for corporations.

Matter likely to lead to identification

The particular problem for news organisations interested in reporting court proceedings involving sexual assault is the width of the prohibition. The section prohibits not only the publication of any matter which identifies the complainant, but also the publication of "any matter which is likely to lead to the identification of the complainant".

It is this second limb of the section that poses the greater danger for court reporters and news organisations. Even though the court report might leave out the name of the complainant, sufficient details of the sexual assault might nevertheless be published which would allow readers, viewers or listeners of the report with special knowledge to work out the identity of the complainant, thus leaving the reporter and news organisation in apparent breach of the section.

The Newcastle Herald prosecution proceeded on the basis that the offence was one of absolute liability. That is, the publishers were criminally liable irrespective of whether they had acted with neither criminal intent nor fault.

The prosecution was heard by Acting Justice Lusher in March 1990 in the Criminal Division of the Supreme Court. Both defendants pleaded guilty.

In the offending court report the complainant was referred to as the "boy" or "son" throughout with the exception of one mention of his first name in a reference to the evidence given by his mother.

In the judgment, Justice Lusher made this observation:

"Subjectively I must confess that at the outset of the hearing and being aware of the charge and on first looking quickly over the article, I was puzzled and not conscious of any identification and it was only on closer examination that the form of the identification became apparent".

Justice Lusher thought that the offence occurred under the second, broader limb of the subsection referred to above. That is, the offence occurred because the publication was likely to lead to the identification of the complainant rather than actually identifying the complainant.

Vigilance is not enough

The evidence presented by counsel for Newcastle Newspaper concentrated on the newspaper's good record as a publisher since 1876, its awareness of the prohibition against publishing the names of sexual assault victims, its training and supervision of reporters and the system of checks and double checks that has been established on the paper to prevent accidental publications of the sort in question.

Justice Lusher looked at the purpose of the legislation and said:

"Obviously total prevention of identification is impossible. The charge itself, the committal and the trial were reported and local and other awareness and discussion and curiosity are themselves instances and sources of public identification. Nevertheless the policy behind the legislation assumes ... that the impact on the victim of publication can be enormous and is to be avoided. There is also the question of deterrent."

He made the following assessment of Newcastle Newspapers' culpability:

"I accept the explanations offered and find that the first defendant's (Newcastle Newspaper's) efforts so far as selection and quality of personnel, training and supervision and efforts to inculcate proper standards of awareness of the need to comply with the legislation are substantial and impressive. Indeed accepting all the facts put before me by the defendant as I do, there is no question but that this matter aside, everyone concerned knew and was aware of the restriction and implemented it.

Likewise the system employed I find satisfactory and probably exceeds accepted standards and practice. It is easy to say it should have been picked up but experience, particularly of those who practise in these Courts, is that virtually no system is absolute proof against ever present fallibility and the capacity for unpremeditated human error. In short, I find that the degree of such criminal culpability in the first defendant as the section envisages is slight."

In light of these observations, he imposed a penalty of $1500 on Newcastle Newspapers Pty Limited and a penalty of $750 on John Fairfax & Sons Limited.

The experience of The Newcastle Herald in this matter emphasises the extreme - and perhaps even infallible - vigilance required by court reporters covering sexual assault trials not to publish anything that would either identify the complainant or be likely to lead to the identification of the complainant.

Richard Coleman is a solicitor in the Sydney office of Mallesons, Stephen Jaques.

Privacy Problems of the Nineties

Kevin O'Connor examines the background to legal recognition of privacy rights and considers the impact such rights may have on the media

The debate on the need for greater privacy protection in Australia has been a long one. One question that has been debated for more than fifty years here is whether Australian laws should recognise a broad-brush right to sue for infringement of privacy. Such a development would have significant implications for the media.

Victoria Park Racing Club case

The most influential examination of that question occurred in the High Court in 1936 in the case of *Victoria Park Racing Club -v- Taylor* where the media defendant argued successfully against recognition of a right to privacy.

The case related to an attempt by an Adelaide race club to prevent a radio station broadcasting the races from a stand erected outside the perimeter of the race course. As the race club could not rely on the law of trespass to prevent this intrusion into what it saw as the commercial value of its spectacle (the races), it had to find a new head of claim and lighted upon the argument that it had an interest in protecting the privacy of the spectacle which it was conducting. It would appear however, that the battleground of protection of commercial interests wasn't the ideal context in which to seek to develop a view about the law and privacy.

The defamation/privacy nexus

The media, as seekers and purveyors of truth, are legally affected in some States by privacy concerns. Some States of Australia vary from the strict common law rule that a statement to be defamatory must be shown to be untrue. In New South Wales, for instance, a defendant may fail to succeed, even though published statements made are true, because they relate to a matter of "public interest".

In 1979 the Australian Law Reform Commission (ALRC) said that the "public benefit" element of the law in the so called "code" jurisdictions was "vague and unpredictable in its application, ultimately depending on the judgment of a jury, or a judge sitting without a jury".

While the Commission saw it as desirable to eliminate the "public benefits" qualification from any uniform Australian law on defamation, it considered that the "public benefit" limitation did provide a limited form of protection of privacy in relation to media publications.

A new tort

This conclusion led the Commission to propose that alongside a uniform defamation law (which had truth alone as the key defence and shifted the focus to correction remedies away from damages), a new tort should be created of unfair publication of private facts.

In its examples, the Commission referred to activities which have become regular sources of criticism of the media in the 1990's. These examples included: unnecessary identification of a rape victim who lived in a small town; publication of the name and address details of a witness to a brutal killing; filming of individuals without consent; and surreptitious photography of a mother of quadruplets who had refused to consent to be photographed.

'A new tort should be created of unfair publication of private acts.'

The ALRC's proposal on unfair publication of private facts sought to give protection only to the publication of sensitive private facts relating to home life, private behaviour, health, personal and family relationships and in addition the appropriation for political or commercial purposes of the name, identity, reputation or likeness of an individual.

A publication would breach the unfair publications restriction if it was published "in circumstances in which the publication [was] likely to cause distress, annoyance or embarrassment to an individual in the position of the [individual the subject of the publication]".

The key defences to such an action proposed by the Commission were consent, that the matter published was a matter of public record open to public inspection, that the publication was authorised by law, that there existed absolute privilege, that there existed qualified privilege or that the publication in question was a protected publication.

Recent developments

A uniform law of defamation, which was dropped from the agenda of the Standing Committee of the Attorneys General in 1985, has now been put back on the agenda. We have also seen during the 11 years since the ALRC made the proposal to which I have referred, increasing demands in comparable jurisdictions for better controls on press activity as it affects privacy.

As of June 1989 I understand that there were 16 private member's bills before the United Kingdom Parliament proposing that a right to privacy in respect of unfair publication be developed. Indicating a degree of governmental interest in the proposition, the Thatcher government supported referral of one of these bills to a Parliamentary Committee. As I understand it, the process of considering that bill continues.

Interestingly, in December 1989 the UK Press Council issued a report prepared by the eminent lawyer, long identified with civil liberties causes, Professor Louis Blom-Cooper which contained many recommendations for reform of press practice including a proposal for protection of privacy.

While the excesses of the tabloid press in the UK make even our noted Sydney tabloids look quite restrained, I expect there will be increasing attention given to the need for privacy laws affecting the press here in Australia as well. It will be interesting to see what direction these will take.

This is the edited text of an address Kevin O'Connor, the Australian Privacy Commissioner, gave to a recent Communications and Media Law luncheon.

The ATUG Submission to the Government's Telecommunications Carrier Review

Diana Sharpe and Miro Mijatovic comment on the Australian Telecommunications Users Group submission to the review on the relationship between the government carriers

In December, 1989, the then Minister for Transport and Communications, Mr Willis, announced a review into "the present ownership arrangements and structural relationships between Telecom, OTC and AUSSAT in the conduct of their respective reserved services". Mr Beazley (the new Minister) and the government have evinced an intention to push through major reforms to the communications industry as part of a program of accelerated industry restructuring. Accordingly, the results of the review are eagerly awaited by those in the telecommunications industry as possibly heralding a new era in the industry.

The major questions facing the Minister are first, the future of AUSSAT (the satellite operator) and second, whether Telecom and OTC (the international telephone operator) should be exposed to full competition.

A report has been prepared by the Australian Telecommunications Users Group (ATUG) and submitted to the Minister on behalf of Australian users and suppliers of telecommunications services. In its report this influential body makes a number of recommendations in key areas, all of which will be of interest to all those involved in the industry.

The current state of play

The operation of the Telecommunications Act 1989 ("the Act") currently grants Telecom, OTC and AUSSAT ("the Carriers") certain exclusive rights in relation to the supply of networks and the provision of telecommunications services.

Broadly, the carriers have three monopolies. Telecom has a monopoly in the provision of public switched voice services, public switched data, public switched text and video, public switched integrated services digital networks (ISDN), leased circuits and mobile phones; OTC has a monopoly in the provision of overseas telecommunications services: and AUSSAT has a monopoly in the provision of Australian satellite telecommunications facilities.

In the service sector of the industry certain services are reserved to the carriers, namely a service is reserved if it is one which, in the words of the Act is "for primary communications carriage between two or more cadastrally separated places or persons". (The word "cadastrally" means across property boundaries.) Any other telecommunications service is a value added service and is open to competition.

To distinguish between reserved and value added services requires a characterisation of whether a telecommunications service is a service for primary communications carriage. It is so if it carries out only those functions necessary to arrange, operate and manage connectivity across the telecommunications network or, in other words, carry communications across the network. "Connectivity" is therefore the pivotal issue. Since "connectivity" remains as yet undefined, the boundary line between reserved services and value added services remains unclear. This is one of the major problems in the administration of the Act in its current form.

AUSTEL, which was established to administer and regulate the telecommunications industry, has as one of its functions, the regulation and administration of this boundary line. The administrative complexity and expense in administering this flawed and blurred distinction satisfactorily would, however, take up much of AUSTEL's time and reserves both of which might be more productively spent in other areas.

A different boundary is defined under current legislation in relation to the supply of telecommunications equipment. The boundary between the monopoly network reserved to Telecom on the one hand, and the competitive supply and installation of customer cabling and customer premises equipment on the other is either the first telephone socket in smaller premises, or (for larger commercial premises) the building's main distribution frame. Supply, installation and maintenance of the premises, wiring/cabling and attachment points beyond these respective network boundaries are open to all service providers with appropriate qualifications.

The provision of value added services and private network services is subject to class licensing systems. These licences cover all currently approved services.

Pro-competitive safeguards

Since the carriers are allowed to compete in the provision of value added services and private network services, the Act has a number of provisions to guard against any abuse by the carriers of their monopoly position. The Act provides that the carriers may not unreasonably refuse to connect value added services in private network services provided by private suppliers and that the carriers shall not discriminate in charges levied or in any other manner against people supplying or using the value added services and private network services.

These safeguards are called non-structural safeguards and are opposed by competitors to the carriers who advocate the operation of "structural safeguards". The provision of structural safeguards would mean that carrier affiliated competitive services and equipment would have to be provided through a structurally separate entity (subsidiary). This separate entity would have separate accounting and personnel and would operate in competition with non-carriers conducting business in the same area.

The current situation can be criticised as being insufficiently liberal, and its reliance on a boundary line between reserved services and competitive services is difficult to administer and increasingly blurred by further technological developments. It operates therefore merely as a stage in the process of Australian telecommunications liberalisation rather than the conclusion of that process. The industry is now entering the next phase of its development and it is in this context that the ATUG Report should be considered.

ATUG's position

The ATUG Report takes a broad look at Australian telecommunications from the perspective of economic efficiency and makes a number of recommendations. It points to a number of currently existing inef-

ficiencies which it suggests are fostered by the current regulatory scheme. The Report goes on to propose that the existing inefficiencies might be cured by fostering competitive forces and by adopting accepted economic reasoning that competition increases efficiency - an efficiency which is of course in the interests of all Australians.

The ATUG Report makes several major recommendations. The first of these proposes the removal of barriers to entry in the provision of all domestic and international networks and services, and involves amendment of the Act to remove restrictions on the establishment, maintenance, operation and resale of telecommunications facilities and networks and the provision of all services. However, until open competition is implemented, Telecom and OTC should continue to be restricted to their present lines of business to ensure the private sector can effectively compete with government business enterprises.

Secondly, pro-competitive safeguards should be introduced, requiring all carriers to provide non-discriminatory interconnection of their networks.

Thirdly, AUSSAT should retain its current line of business restrictions until it is privatised (which should occur as soon as possible). When AUSSAT is privatised, it should be able to compete openly in all telecommunications markets. If necessary, the government should refinance AUSSAT to prepare it for sale if it has a negative market value. Further, Telecom should be removed as a shareholder and board member of AUSSAT and should not be allowed to bid for AUSSAT when privatisation is effected.

Its fourth recommendation is that Telecom should retain the current line of business restrictions to provide only domestic telecommunication networks and services for a period of five years or until it is privatised. During this period, Telecom should be separated structurally into three arms length companies - one to provide network facilities (local and trunk), one to provide services (local, trunk, STD and enhanced (value added)) and a third to provide and operate CMTS (MobileNet).

OTC should retain the current line of business restriction to provide only international and maritime telecommunications networks and services for a period of five years or until privatised.

In addition, OTC and Telecom should not be merged since this would further delay open competition and would prejudge the combination of international and local business operations as the most efficient in the open market.

The Report also recommends that price caps be removed, since competition would constrain monopoly pricing by the carriers.

Finally, competitors should be allowed the same rights of way as the carriers.

The Report alleges that Telecom's requirement to provide community service obligations (CSOs) has often been used as an excuse for wasteful ventures. It notes that Telecom has used CSOs as a justification for cross-subsidisation and in this way a justification for retaining its monopoly rights. The Report also notes the minor cost of CSOs to Telecom and proposes that in the medium term AUSTEL undertake further analysis of CSOs. It concludes however that in the short term no arrangements need to be made regarding CSOs.

Conclusion

In summary, the Report recommends that the present monopoly boundaries established under the Act for the benefit of the carriers should be eliminated to permit open competition. However, until open competition is fully implemented and accepted, Telecom and OTC should continue to be restricted to their present lines of business. AUSTEL appears implicitly to support one of the ATUG Report's recommendations. In the Sydney Morning Herald of 9 April 1990 it was reported that AUSTEL is recommending to the Minister that three mobile telephone operators should operate in Australia by the end of the year. One of these operators would include Telecom's existing MobileNet. The operators would be required to pay an annual fee of between 5 and 10% of their yearly revenue for a 20 - year licence. AUSTEL notes that MobileNet would have to be properly separated from Telecom with a separate accounting system and would have to operate as an arm's length company, a proposal which is in line with the recommendations of the ATUG Report.

While the eventual outcome of the Ministerial Review is as yet unknown, it is encouraging for the industry to note that the government's intention appears to be to accelerate micro-economic reform in this area, and that AUSTEL favours competition, at least in the Mobile Phone segment. Given this, the ATUG Report appears to have played a significant role in the Review and its recommendations will probably prove to be influential. It may be that the future path of the Australian telecommunications industry is that recommended by the ATUG Report.

Diana Sharpe is a consultant with the Sydney office of Sly and Weigall, Miro Mijatovic is a lawyer with that firm.

The Friedrich case

Grant Hattam and Craig Richards report on a series of cases in which John Friedrich sought to suppress publication of evidence arising in liquidation hearings into the NSC

John Friedrich was only apprehended after one of the most publicised man hunts in Australia's recent history. The face of the former Chief Executive Officer of the National Safety Counsel ("NSC") was constantly in the press as the search for Friedrich, for details of his alleged mysterious past and for the truth about the NSC's missing $244 million was pursued. Much of what was missing was apparently public money and, as a result, significant public interest existed in its whereabouts. When Friedrich was ordered to attend before the Master of the Supreme Court to be publically examined by the Liquidator of the NSC pursuant to section 541 of the Companies Code, it was inevitable that issues would arise concerning the likely impact that publicity of this examination would have upon Friedrich's subsequent trial. He had been charged with one count of obtaining financial advantage by deception and 91 counts of obtaining property by deception.

On 9 November 1989 Counsel for Friedrich sought suppression orders to have the Examination Court closed, and publication of any report of the examination banned. The application required consideration of a number of competing policies. Not only was it necessary for the Court to balance the familiar competing rights of freedom of speech exercised through the dissemination of information by the press and the individual's right to a fair trial, but the community's interest in the honest conduct

f companies, particularly those which con-ol public funds, also needed to be ap-raised.

After 17 court hearings involving four pplications for suppression orders, appeals nd stays of publication pending appeal, riedrich's evidence finally came into the ublic domain on 14 December 1989. In the nd, Friedrich had been successful in his pplication for a suppression order only nce, in his initial application made to the laster of the Supreme Court of Victoria. he Master's decision was reversed by both n appeal to the Supreme Court before a ingle judge and a further appeal to the Full ourt of the Supreme Court.

Supreme Court hearing

Sitting alone to hear the appeal from the Master's decision to grant one of the orders equested by Friedrich, Justice Cummins of he Supreme Court recognised that the real uestion in issue was whether any future ury before whom John Friedrich appeared vould be tainted or prejudiced by the dis-emination of information revealed in the iquidator's examination.

Justice Cummins believed that it was a relevant factor that under the legislation (section 541(12) of the Companies Code) a person being examined annot refuse to answer questions put to him n the ground that it might tend to incrimi-ate him even though such answers would ot be admissible in future criminal pro-eedings. He believed, however, that as the rial was at least six and probably twelve nonths away and that jurors are presumed ntelligent, robust, and drawn from a com-ulsory education system and are also sub-ect to the directions of the trial judge, a ontemporary jury would not be adversely ffected or prejudiced by publication of the iquidation proceedings. This conclusion was eached despite intensive interest in and grand scale publication concerning the facts surrounding the NSC and John Friedrich.

Full Court hearing

The Full Court heard two appeals. The first was from the decision of Justice Cummins; the second from the Master by leave of the Supreme Court. Both of these concerned the Master's refusal to grant an order preventing publication of other witnesses' evidence relating to Friedrich.

The Full Court spent considerable time examining the purpose of section 541(4) which states that examinations can be held in private if special circumstances exist. The court concluded that the purpose of this piece of legislation is to ensure that the public is informed of the affairs of a company which has gone into liquidation, to provide the opportunity for further information in relation to the company to come to light and to deter company officers from behaving fraudulently.

The Full Court assessed that publicity plays an important role in fulfilling these purposes. It did not consider that publication of the facts and circumstances coming to light in the liquidation proceedings was analogous to contempt. In contempt proceedings publishers choose to make a comment on a court hearing, but publicity is not just to be expected of liquidation proceedings, it is actually desired by the legislature. An order for non-publication of information revealed in these examinations would only be granted in the most exceptional circumstances. For example, where the answers to questions raised may directly establish guilt or give pre-trial discovery. This was not the case here.

Risk of interference

The Full Court considered that the main issue before it was whether there was a real or substantial risk that publication of the section 541 hearing would cause an interference with the administration of justice. This, it believed, should be balanced with the policy behind the operation of the legislation - that fair and accurate reports of examinations are in the public interest. On balance, the court did not find in the Friedrich case a real or substantial risk that publication would affect the administration of justice.

The court considered the fact that the trial was at least six and almost twelve months away and that if any element of prejudice borne of the Liquidator's examination continued to exist at the time of the criminal trial, the trial could be further adjourned. It also stated that a jury's intelligence should not be underestimated and that if fairly and accurately reported, the chances of a juror remembering the questions and answers from the examination which related to guilt were remote. The court concluded that the risk of the jury's view of the evidence presented at trial being overwhelmed by the press dealing with the Liquidator's examination must be slight. The Full Court rejected Friedrich's counsel's submissions that a general order should be granted for the reason that some unfair and inaccurate reports of the examination had in fact already occurred. The court stated that if a genuine complaint in this regard existed, the remedy was to take out an injunction against the particular publisher on the basis of proved contempt and the likelihood of repetition.

Liquidator's examination

The judicial decisions in Friedrich's case are strong statements to the effect that the public dissemination of fair and accurate reports of court proceedings will not be impeded simply because of the notoriety of an accused person. Both the Supreme Court and the Full Court of the Supreme Court showed high regard for the jury's intelligence and ability to concentrate on issues at trial. It should be remembered however that these findings were made in the context of the Courts' consideration of the purpose of a Liquidator's examination under section 541, and that publication of material revealed in such examinations was found to be an important factor in the satisfactory operation of the legislation.

The fact that at an examination an examinee may be required to answer incriminating questions means that even though answers to these questions may not be used against him at a criminal trial they can nonetheless be published. On the Court's findings, however, it could be argued (and strenuously as was argued by Friedrich's counsel) that a potential juror could be prejudiced by becoming aware of matters that could not legally be brought to his or her attention at trial.

The case is therefore important. If the court was not prepared to grant a blanket suppression order in these circumstances then this must be seen as a significant boost to the right of the press to fairly and accurately report court proceedings.

It should be noted however that the court did leave it open for the Master actually hearing the Liquidator's examination to suppress any particular question or answer that the Master thought might be prejudicial. This suppression would be subject, of course, to the right of either the press or the examinee to appeal from the Master's decision. Importantly also, the case demonstrates that the judges of the Supreme Court were not prepared to anticipate the content of Friedrich's evidence; and were not prepared to grant a blanket suppression order over any evidence arising in the Liquidator's examination without first knowing what evidence would be.

A final interesting point on the case is its demonstration of how the appeal process can in itself work as a suppression tool. It is not suggested that Friedrich's application and appeals were to achieve this end. Clearly, however - even though the court was not prepared to grant Friedrich's suppression application - the appeals following on from this application worked, in effect, to suppress the publication of evidence concerning John Friedrich. As was strenuously argued by counsel for The Sydney Morning Herald and The Sun newspapers during the proceedings, it appears that Mr Friedrich had achieved by appeal that which no court would grant.

Grant Hattam is a partner in the Melbourne office of Corrs; Craig Richards is a solicitor with that firm.

The overhaul of the Broadcasting Act

Kim Beazley, Minister for Transport and Communications, comments on the review of the Broadcasting Act in delivering the second reading speech on the Broadcasting Amendment Bill 1990.

The government remains fully committed to the wider reform of [the Broadcasting] Act, and work is proceeding well on the main reform package. I expect to announce the results of this later this year ... We are addressing seven key areas and the scope of the Review remains as outlined by my predecessor on 1 November last year.

First, future broadcasting legislation must serve the explicit policy aim that there be no more regulation of industry than is necessary to support stated objectives. The current legislation casts a very wide and complex regulatory net. In seeking to address all aspects of broadcasting it can also extend regulation to non-broadcasting communications services, and indeed to other commercial activities. Future legislation will need to be more closely targeted.

Secondly, we are examining the regulatory needs and implications of new electronic communications services and service delivery methods. Where new services are different from broadcasting, they should not be subjected to regulation aimed at broadcasting. We need a regime that encourages initiative and service development and facilitates the innovative use and development of technology. But, of course, where any particular service amounts to mainstream broadcasting, then we must ensure that it is regulated as such, regardless of whether it is ultimately delivered from radio transmitters, from satellites or by cable.

Thirdly, we are examining the need for reform in the broadcasting planning processes. We intend to provide a more transparent process that also provides for proper commercial and public accountability. We need a framework within which technology, and especially the radio frequency spectrum, is allocated and used efficiently and equitably. We need to avoid unnecessary second-guessing of commercial decisions or commercial outcomes.

Fourthly, we are continuing to examine options for further reform in the area of ownership and control regulation.

Fifthly, we are examining reform to the processes of licence allocation, review and renewal in order to enhance efficiency and to streamline processing. We will, of course, retain arrangements for public accountability on the part of broadcasting licensees within this framework.

Sixthly, we are examining possible changes to the process for setting the program standards which broadcasters are required to observe. Whatever new arrangements are adopted, the government will maintain support for Australian content, quality children's programming and observance of community standards.

The final area involves the future of the Australian Broadcasting Tribunal as the regulatory authority in this area. Its role, function, powers and structure may require amendment to reflect changes decided on in the overall regulatory regime. It is not, however, intended to abolish the Tribunal. It is important that that body has the appropriate powers, resources and status to do its job efficiently and effectively.

'We need a regime that encourages initiative and service development and facilitates the innovative use and development of technology.'

In developing options against this agenda, the government's position remains that broadcasting is more than just another industry. Its cultural role means that it has special characteristics which will continue to require government intervention to ensure that undue concentrations of ownership or control do not arise in commercial broadcasting; to ensure that commercial programming control remains firmly in Australian hands; and to ensure community responsibility on the part of broadcasters through appropriate program standards. The government's concern does not relate only to ensuring the efficient, equitable and responsible use of radiofrequency spectrum. Increasingly our efforts are directed to the product or service being delivered to homes or businesses, whatever the method of transmission and delivery - be it terrestrial radiocommunication, satellite or cable.

These concerns present special challenges to government in our efforts to develop a more appropriate, contemporary regulatory regime.

The first challenge is to ensure that the public interest safeguards are provided with rigour, but in a manner which recognises that, while it has these special requirements, commercial broadcasting is also a business where its participants compete at some considerable risk for commercial returns. It is therefore important that only minimum regulation needed to meet those objectives is imposed, so as not to unnecessarily inhibit normal commercial development.

The second challenge is to ensure that essential regulation of mainstream broadcasting is not unnecessarily applied to new and emerging electronic services. Differences in the nature of services provided by broadcasting, telecommunications and publishing have narrowed significantly through their use of common technology and through the development of new and complementary services. Inappropriate regulatory restriction on some electronic entertainment and information services, on educational services and potentially on Pay TV, would be likely to significantly constrain their development. This is turn could deny Australian homes and businesses timely access to the technologies and to the entertainment and information services that they have the potential to provide. However, when these services converge to the point where they become de facto mainstream broadcasting, broadcasting regulatory provisions should of course apply.

The third challenge is to recognise that, in addition to its special regulatory regime, the broadcasting industry is subject to a wide range of general business regulation. It is therefore important that interaction between the two regimes avoids conflicts and provides, as far as possible, a stable and consistent environment in which the industry can operate efficiently.

Brave new works?

Richard Horsley argues that the new performers' protection legislation has shed light on authors' copyright

The Copyright Amendment Act 1989 introduced a new Part XIA into the Copyright Act 1968, providing for "Performers' Protection". This Part protects performers from "unauthorised use" of their performances - that is, sound or video recording, or broadcasting of their performances without their authority.

The amendments avoided giving performers any rights in the nature of copyright, or indeed any property rights at all. This was a specific recommendation of the Copyright Law Review Committee, whose Report on Performers' Protection (May 1987) was the inspiration for the amendments.

However, some of the provisions of Part XIA may, incidentally to their purpose, have very great influence on basic concepts of copyright law - those of a "work" and of the "first author" of a work - in areas where the law has been unclear, or untested, or both. This flows from the fact that these amendments contain the first references in copyright law to "improvised works".

Improvised works

The references come in the definition of "performance", in section 248A, which provides:

(a) a performance (including an improvisation) of a dramatic work, or part of such a work, including a performance given with the use of puppets;

(b) a performance (including an improvisation) of a musical work or part of such a work;

(c) the reading, recitation or delivery of a literary work, or part of such a work, or the recitation or delivery of an improvised literary work.

What is a "work"?

It is well known that "literary", in the phrase "literary work" as used in copyright law, has a wider meaning than in other contexts. Only a lawyer would recognise a bus ticket, a football pools coupon and a standard classified death notice as literary works. In fact, the range of things which qualify can seem so wide that one doubts whether there are any principles of exclusion.

Well, there are, of course. But they are not onerous. The thing must be original; but only in the very limited sense that the work as an expression must originate from the author. There is no requirement that the ideas be original.

However, where the content or ideas - as opposed to their expression - are taken from some other identifiable source, there will usually also be a second requirement - the exercise of labour and skill by the author.

The third major requirement is that of substantiality. The lack of this frequently denies protection to such things as brand names (Exxon, for example), titles, slogans and advertisements.

A final requirement - more often given effect than formal recognition - is that the work be in writing. Thus Justice Petersen in the case of University of London v University Tutorial Press (1916) stated:

"In my view the words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high".

'We are facing a brave new world where even the most trivial of utterances might be copyright literary works from the moment they are emitted'

However, such explicit statements are rare, probably because it has been difficult, until recently, to have any meaningful copyright disputes about literary works which have not been written down. The result has been that learned authors have debated among themselves the question of whether a lecture which has been tape recorded but has not been written down is, or is not, a literary work.

Well, that question is now resolved. From the Performers' Protection amendments, it is clear that a "literary work" can be improvised. If that is so, then the label "literary" does not refer to how the work is created; and the "work" need not be in writing - or, indeed, in any material form at all.

That problem being solved, another, of wider import, arises. If "literary" works are not bounded by the requirement for writing, what range of spoken utterances might qualify for the appellation? As hinted above, only the most trifling level of originality is required of copyright works; the exercise of labour and skill is only occasionally required; and, as to substantiality, although the word "Exxon" was not substantial enough to qualify, the trial judge made it clear that he was not ruling that a single word could never qualify as a "literary work" within the meaning of the Act. "Supercalifragilistickespeea-ladojus" springs to mind as a candidate.

Thus we are facing a brave new world where even the most trivial of utterances might be copyright literary works from the moment they are emitted. And after all, why not? Playwrights like Pinter are applauded the more boring and banal and - well - normal their dialogue becomes. Large tracts of a novel like Jack Kerouac's Vision of Cody appear to be taken verbatim from tape recordings of conversations between the author and Neal Cassady. Samuel Johnson's estate should have sued for a large slice of profits from Boswell's Life of Johnson, so much of it being made up of gobbets of Johnsonian conversation recorded nearly contemporaneously by the assiduous Boswell. In similar circumstances in America, the estate of Ernest Hemingway did sue! And lost.

Who is the author?

To turn again to the academics' bugbear, a lecture which has not been written down. Suppose a person delivers a lecture extempore; and suppose a person other than the lecturer or someone acting on behalf of the lecturer records his or her words by rapid writing. In these circumstances a literary work has clearly been created; but is the author of the work the person who framed the words or the person who first fixed them in to material form?

The case law on the question is unclear. The question may appear to have been resolved in favour of the person who put the work into material form in 1900, in the case of *Walter* v *Lane*, which involved the copyright in reports of the speeches of Lord Rosebery. The reports had been made by shorthand reporters employed by The Times. In the days before speechwriters, Lord Rosebery had delivered his speeches impromptu. Probably because of this, an en-

terprising publisher thought the public would be interested in a book of them, and set out to publish one, gleaning his material by lifting The Times' reports. When The Times' proprietors sued for breach of copyright, the book publisher claimed that there had been no such breach, as the reporters were not the authors of the speeches or their reports and therefore did not own any copyright in them. The House of Lords held that the reporters did own the copyright in their reports, as being created by their considerable skill in taking down rapid speech.

However, this decision dealt only with the copyright in the reports, not in the speeches themselves. The question next memorably arose in the case of *Cummins* v *Bond* (1927), in which it was common ground between the plaintiff and the defendant that the originator of the words in question was a spirit moving in another astral plane. The plaintiff was the medium to whom the spirit had communicated the works, and the defendant an associate of the plaintiff who had ordered and punctuated the works as transcribed by the plaintiff. The defendant claimed to be one of the authors of the works so produced and, as such, a part-owner of the copyright. He failed on this count. In the alternative the defendant claimed that neither of them owned the copyright as the true author of the works was another person. The judge declined to entertain this submission also:

"[I]t would almost seem as though the individual who has been dead and buried for some 1900 odd years and the plaintiff ought to be regarded as the joint authors and owners of the copyright, but inasmuch as I do not feel myself competent to make any declaration in his favour, and recognising as I do that I have no jurisdiction in the sphere in which he moves, I think I ought to confine myself when inquiring who is the author to individuals who were alive when the work first came into existence and to conditions which the legislature in 1911 may reasonably by presumed to have contemplated. So doing it seems to me that the authorship rests with the [plaintiff], to whose gift of extremely rapid writing coupled with a peculiar ability to reproduce in archaic English matter communicated to her in some unknown tongue we owe the production of these documents. ... I can only look upon the matter as a terrestrial one, and I propose to deal with it on that footing. In my opinion the plaintiff has made out her case, and the copyright rests with her."

The argument in favour of the author being the person who fixes the work in material form gains some support from subsection 22(1) of the Copyright Act:

"A reference in this Act to the time when, or the period during which, a literary, dramatic or musical work was made shall be read as a reference to the time when, or the period during which, as the case may be, the work was first reduced to writing or to some other material form."

This can be taken to indicate that the work simply does not exist until it has been reduced to writing or some other material form. However, its meaning may be more restricted. The Act refers in various places, for various purposes, to the time when a work was made. (Examples may be found in section 32). This subsection says what those references mean, and thereby defines the time when a work was made for the purposes of those sections. But nothing compels us to use the same test to determine when a work was made for any other purposes.

In 1977 a British government committee noted that the uncertainty in this area was unacceptable, and recommended that the law be amended to make it clear that in the above circumstances the lecturer, and not the shorthand writer or the sound recordist, would own the copyright in the work. This suggestion (which unfortunately did not address the ownership of works communicated by spirits) was not taken up by the UK government, nor has the problem been explicitly addressed in Australia.

Conclusion

However, the argument has now been all but decisively pushed in the direction of the author being the originator of the words, not the person who fixes them in material form - the lecturer, not the sound recordist; for from the recognition that improvised works exist it follows that works exist before they are fixed in material form. In that case the author must be the person who framed the words - or the music, or dramatic incidents.

It is to be hoped that these amendments have settled this question, however unintentionally. The purpose of copyright law is to encourage the creation of works, which will benefit society, by giving their authors an incentive to create. The incentive is the monopoly in their own productions which the Act gives to authors. The significant work in the creation of a speech, or a musical or dramatic work, which has been improvised and recorded, is surely with the artist or talker who generated the sounds and actions, not with the person who slavishly recorded them. Granted, some work goes into making the recording, especially if it is a recording of quality; but the recording engineer, or whoever has performed that function, has a copyright in this recording which is separate to the copyright in the work which he or she has embodied in the recording. There is no reason why he or she should be given the copyright in the work he or she has captured as well.

For these reasons, improvising artists have double cause for welcoming the Performers' Protection amendments to the Copyright Act. Incidentally to protecting their performances, the amendments are also securing their copyright in their improvised works.

Richard Horsely is a solicitor with the Sydney firm Cutler, Hughes and Harris.

BRIAN WHITE
1933 - 1990

During the three years Brian White was President of the Federation of Australian Radio Broadcasters, there developed a little comic set piece, repeated each year at the industry's convention. Brian was of small stature, and each time he took the rostrum, with only his head visible, someone would call out "Stand up!" and Brian would always grin and say "I am standing up".

A slight thing, and perhaps altogether trivial to an outsider. You had to be there to feel the warmth and the camaraderie of the occasion. There was an essentially human quality about "Whitey" which was reflected in all his friendships and associations.

Someone said at his funeral that he was a stylish man, and so he was. But he was also without pretension. Whatever the circumstances, he was just himself. This is what came through in his programs and in his personal relationships. Listeners felt they knew this man who could conduct a hard news interview one minute and in the next, reveal some personal, whimsical side of his character. So it was with his friends and business associates. He was generous, compassionate and public-spirited.

Brian White was a pioneer of that school of radio journalism which substituted matter for manner and in so doing lifted the medium above the trivial and the transitory. He was a journalist's journalist.

I knew him and worked with him in various capacities for nearly 30 years. Listening a few days before his death I was moved to reflect how splendidly my friend had matured over that time.

By all criteria that matter, he was a very big man.

- Des Foster -

The use and abuse of FOI legislation by journalists

Jack Waterford explains how best to exploit this investigative tool

Journalists have a strange love-hate relationship with Freedom of Information ("FOI"). Every journalist I know is, of course, heartily in favour it. Few journalists I know - apart from a v I have strong-armed - have actually ever ed it. Asked why not, they give a variety of asons some of which have a strong basis truth: "FOI takes too long", "the exemp-ns are so wide you will hardly ever get ything anyway", "it's too complicated".

Whether the basis of these reasons is in ith or not, journalists essentially do not ow what is possible or what can be hieved under the Freedom of Information ts, and there are only a few people with tual street experience with whom they can nsult.

While journalists may be in favour of the inciple of FOI - or have a baggage of be-fs about its usefulness in an ideal body litic - they have little interest in FOI or its ocess as such. They are interested in the tual information itself and in particular at which is usable or, in their own terms, ewsworthy".

News v advertising

Exactly what "newsworthy" means is a uch vexed question and depends in great rt on a journalist's interests and perhaps his or her ideology. A conservative defini-n is the old news editor's dictum: "Son, g bites man is not news, man bites dog is". is, according to the celebrated American vestigative journalist, Izzy Stone, some-ing that someone doesn't want you to write out - everything else is advertising.

By such a definition very little of what e reads in an ordinary, even a good, news-per is anything else but advertising. The fices of a typical metropolitan newspaper ceive daily millions of words in press atements, reports and results of commis-ons of enquiry among other things and its thors hope that the newspaper will use all it tomorrow. Little of this material tells the hole truth. Rather it skips and elides mate-al that its writers do not want the public to now and is actually misleading to journal-ts about the facts in some cases.

Unfortunately, a great deal of the more teresting and newsworthy material sent in newspaper offices ultimately reappears in relatively undigested form when the jour-alist involved simply asks no further ques-tions and rehashes the material he or she has received.

It should be hoped that beneath each journalist's breast is a would-be investigative reporter. I am however also realistic - if not about what beats behind journalists' breasts, then about the practical demands of newspapers.

'Good journalism is no more lazily rewriting extracts from material obtained under FOI than it is lazily rewriting press hand-outs'

Often there is no glaring scandal behind the stories we publish and as someone with some responsibility for getting out a newspaper within a tight budget, I would be unwilling to dedicate thousands of hours of journalistic time or thousands of the publishers' dollars to writing the definitive piece about public holiday arrangements, council rates or government health policy. My job, working for a newspaper rather than a magazine, is to get information of interest and importance to people as quickly as possible.

In short, one major reason why relatively few journalists make use of FOI is that their work is focused on the day-to-day. Even when there are no problems of FOI access, it is rare indeed to get an FOI delivery the same day; indeed to get information inside a month is to be lucky.

FOI uses

FOI is like all other raw journalistic material - the press statements, the telephone calls, the leaks and so-on. By providing the documentary path of how something came to be, use of the FOI facility can often identify, in a way which has not previously been clear, some of the interests which were taken into account and/or some of the problems which were perceived in different possible solutions to a problem.

FOI is not, however, the only way of achieving this result. There have always been other ways in which journalists can gain access to information, and they make as much use of these as ever. Firstly, there is publicly available information - particularly in cases in which government or the administration is, in effect, arbitrating between competing interests. Politicians and the public relations machineries of those with axes to grind also release a welter of material, and through use of the telephone book and the government directory it is not hard to find out which public servant is dealing with an issue at any particular time.

While FOI and similar legislation have persuaded public servants that merely talking to the reptiles of the press is not a breach of the Crimes Act, it was never hard to ring a public servant and say "I am thinking of writing a piece about this issue. Can you point me to any material which is available? What's the situation as you see it now?" - and so on.

Neither has the use of the leak abated because of FOI. In my experience the leaker is not the public servant who quite properly, if cautiously, briefs a journalist who has asked for confirmation; it is the Minister or politician or someone with an obvious interest in the outcome.

In addition, journalists have a not unnatural tendency to want to beat up something which they think is being held secret and rather less of a tendency to scrutinise that which is on the record. Any skilled senior public servant will know that if he puts out into the Parliament House press boxes 85 copies of the report of a public service task force it may well never appear in a newspaper. Slip the same report into a brown paper envelope to one journalist, saying out of the side of your mouth "you didn't get this from me, remember" and it is likely that it will be the front page headline, no matter how innocuous. Journalists have the same tendency to believe that a story found through use of FOI is more newsworthy than one which has been sitting there all along had only a journalist concerned done the legwork.

Good journalism is no more lazily rewriting extracts from material obtained under FOI than it is lazily rewriting press hand-outs. FOI is a good thing if it is used as an adjunct to good hard work, but it is rarely of much use if it is used as a work substitute.

Another pernicious problem is a tendency of some journalists to think that the

"real story" hidden in the paperwork is the catalogue of corruption, incompetence and the exercise of power for wrong reasons. I would not deny that such things can occur, and when they do, FOI is one of the processes that helps expose it. But the observation should be made that in my long experience with public servants I have found nearly all I know to be decent, honourable people with a keen sense of public interest doing the best job they can.

How to use FOI

A good use of FOI is to master the routine of decision-making. As often as not though, this can be done by looking up a government directory and simply asking someone obviously concerned or by otherwise working out a department's scheme of administration and the types of powers exercised and by whom.

The result of such preliminary enquiry is a focused FOI request which is likely to be processed faster. Moreover, where something has obviously been irregular in the decision-making process, a knowledge of how the system ought to have worked can provide often critical footprints for working out what went wrong and who really was to blame.

The second point I would make is that a process may well have been perfectly regular but a public servant may quite properly, from her or his own perspective, be less than keen on disclosing it to journalists. The mere fact that it is argued that some material is exempt from FOI is not of itself proof-positive that there is some secret scandal being concealed.

A loyal public servant, anxious to protect the Minister, or indeed the Minister himself or herself may attempt to conceal information concerning options canvassed during the decision-making-process so as not to provide the opposition with ammunition drawn from draft justifications of possible alternative decisions.

The media here is sometimes a little immature in this respect. If a document shows that an administrator gave a minister options then, no matter which the minister adopted, there is in this country a tendency to say that he or she ignored other material or was in conflict with his or her department and to give it a significance that it does not deserve.

This immaturity is aggravated by the scandal-seeking tendency. If a relatively full disclosure by a public servant or administrator reveals no obvious points of attack, research is most often promptly halted and attention is then focused on some other project. All too often, journalists drop the ball precisely when they have a good story because they have defined the story only in terms of a fairly naive outcome which did not come about.

A successful or semi-successful FOI request ought to provide the springboard for follow-up telephone calls to the individuals whose names appear on the files seeking fresh information and sometimes the benefit of decision-makers' frank hindsight and perception of events.

Dealing with public servants

When FOI first came in I acquired some reputation for, firstly, making a lot of requests and, secondly, for being willing to litigate them if I did not get disclosure. That reputation as a litigant probably helps me now. In any event I rarely put in a formal FOI request but rather just say to people "look, this is material I could get under FOI if I put in a formal request. Why not save yourself the paperwork and me the time and the energy and just fork it over?" and, surprisingly, they often do.

In advising journalists how to use FOI, I reiterate that FOI is only part of the process of getting information on a story. Informed questions should be directed to the actors in any decision when requesting information on what material is available. A journalist should ask whether there is anything he or she ought read as background to the question being tackled. This can often provide a journalist with the information sought long before the drawn out and excessive bureaucratic process of putting in an FOI request.

Requests for documents should be focused and the advice of the public servant helping to identify the most useful documents available should be sought. A public servant who has helped a journalist frame a request for information is both more likely to comply with that request and to later remember, innocently, another source of relevant information capable of being disclosed.

Once a request is made, I recommend that the journalist making the request not sit around waiting a month or so wondering what is happening. Ring the relevant department and, if the public servants suggest any problem, parry them immediately.

Having assessed the possible uses of and the procedures in FOI, now the more bitter words. The exemption areas of FOI are too wide. The impediments to access, not least in its cost if it is demanded, are substantial. It is sometimes necessary to fight, and to fight hard, without being sure of what you will get in the end. More than ever FOI is not the complete answer to a maiden's prayer. But it is neither completely toothless, nor completely useless.

Jack Waterford is the Deputy Editor of the Canberra Times.

from on p6

The networks have had about 30 years to perfect their Australian programming. Also to be considered is the significant budgeting which would be required to meet the current free-to-air level of Australian content for Pay TV.

In Pay TV's infancy, progress will be conditional on expenditure on suitable overseas software and early development of reasonable quality Australian programming for Pay TV.

There will be a demand by subscribers to receive some Australian content other than news, sport and music channels, which would have basic Australian content by their very content nature. Research underway may allow a further understanding of what levels of Australian content the public wish to view. Initially subscribers will be attracted by the choice available on Pay TV, but continued overseas material alone, with little Australian content, would increase the "churn" factor (the cancellation of service followed by reconnection at a later date) over a period of time.

In devising an appropriate regulatory regime, the Government will have to bear in mind the differences between free-to-air and Pay TV. The body to have regulatory oversight of Pay TV must be able to regulate with a clear understanding that "free-to-air" broadcasting is just that, while Pay TV is based on viewer choice.

A full "broadcast model" (as set down by the Australian Broadcasting Tribunal) would not allow Pay TV to develop fully in this country. There is a view that regulation of Pay TV should match a slightly deregulated free-to-air sector, however, it appears there will still be excessive regulation in that market on some major points, at a time when world trends are to introduce controlled deregulation. But let's not throw the "baby out with the bath water" – there are some proven legislative provisions that can be profitably adopted for Pay TV from the broadcast model.

Whatever regulatory body is to govern the regulation of Pay TV that body must recognise the specialised service that exists between the program provider and the viewer. There is a concern that rigid Broadcasting Act style legislation covering Pay TV would not allow in the resultant program mix, as was noted in the Sanderson Report, an "appropriate level of freedom for viewers to choose".

If that "appropriate level of freedom" is not realised because the legislation is too rigid then Pay TV operators would be forced into a full broadcast model type service. That is, these operators would be forced to schedule similar programs to those offered by the networks, which would not satisfy viewer choice and would defeat the purpose of choice and diversity in programming which should be the object of Pay TV.

AM/FM Conversion

Paul Marx examines the story so far

In the May 1989 edition of the Communication Law Bulletin, I assessed the progress of the procedures for converting commercial radio services in stralia's capital cities from the AM to the frequency bands. Some twelve months er it is useful to make a further assessnt of those procedures.

The following is a simple chronology of events so far:

ril 1989: The then Minister for Transt and Communications, the Hon. Ralph illis published a notice in the Commonalth of Australia Gazette (No. S139, 18 ril 1989) pursuant to section 89DAB of Broadcasting Act 1942 ("the Act") invitlicensees who held AM commercial raices in mainland State capital cities lodge applications with the Tender Board conversion of their licences to FM. Tenrs were called for two new FM services in ch of Sydney, Melbourne, Adelaide and rth. Tenders were called for one FM sere in Brisbane because of the availability at at time of FM frequencies for conversion. nders for the conversion of licences were close on 19 July 1989. By 18 April 1989 of e 27 AM commercial licensees Australiade eligible to apply for conversion of their ences, 24 had expressed interest in tenring.

ugust 1989: The Minister published a tice in the Gazette on 2 August 1989 purant to section 89DAJ of the Act notifying e result of the July tender. That notice ated that six commercial AM radio licenss had been successful in their bids, namely KZ, Melbourne ($31,568,999); 3AK, elbourne ($22,700,000); 4BK, Brisne ($17,139,012.96); 5KA, Adelaide 5,525,003); 6PM, Perth ($16,382,000); and GL, Perth ($12,001,010.80). Only one ter in Adelaide met the reserve determined the Minister under s.89DAG of the Act d tenders were reopened. The Minister reviously had extended the closing date for nders for the two FM frequencies in Syd-ey to 11 October 1989 to accommodate an xtension of television transmissions on hannel 4, Wollongong.

eptember 1989: Wesgo Communicaons Pty. Limited ("Wesgo") commenced roceedings against the Minister and offic-rs of his Department in the Federal Court f Australia. That application sought orders f review and prohibition in respect of, mongst other things, the Minister's decision pursuant to section 89DAB of the Act to ublish the notice on 18 April 1989 inviting enders for conversion to FM. It was claimed that the decision involved an error of law in that the Minister's notice did not, as it was obliged to do under section 89DAB(2)(b) of the Act, set out an outline, in the case of Wesgo, of the new technical conditions proposed for the frequencies to be allocated pursuant to the Notice. Those proceedings (which are listed for further directions on 14 September 1990) resulted in the closing date for tenders in Sydney being extended to 29 December 1989.

November 1989: The Minister announced that the licensee of 5DN was the successful tenderer for the second FM frequency in Adelaide with a bid of $6 million (Media Release 102/89, 8 November 1989).

December 1989: The closing date for tenders in Sydney was extended to 28 February 1990. Discussions continued between successful tenderers in Melbourne, Brisbane, Adelaide and Perth concerning the meeting of the necessary preconditions for conversion.

January 1990: 3KZ Melbourne converted to FM and adopted the call sign 3KKZ. 5KA, Adelaide converted to FM and adopted the call sign 5KKA.

February 1990: The closing date for tenders in Sydney was extended to 30 May 1990. The Minister amended his section 289DAB Notice of 18 April 1989 by publishing a draft Statement of Technical Conditions applicable only to those licensees in Sydney who satisfy the conditions stipulated in section 4(16)(b) of the Act (i.e. 2WS). 4BK, Brisbane converted to FM and adopted the call sign 4BBB.

March 1990: The licensees of each of 3AK (Melbourne), 6PM (Perth) and 6GL (Perth) defaulted within the meaning of s.89DAM of the Act. In Melbourne the licensee of 3TT, being the next highest bidder on the tender list ($11.5 million), became eligible for conversion. 3TT expects to convert to FM in late June 1990. In Perth, no other licensees met the reserve determined by the Minister under section 89DAG of the Act, necessitating a further tender process.

May 1990: The closing date for tenders in Sydney was extended to 19 October 1990.

In July 1989 when announcing the six commercial AM radio services which had been successful in their bids to be offered a frequency on the FM band, the then Minister announced that the total amount bid by the licensees of those services was $105 million. Mr. Willis stated that the amount of the bids "reinforces the Government's view that the FM radio spectrum is indeed a valuable public resource". As a consequence of those licensees who subsequently have defaulted in respect of offers of conversion to FM, the government will receive significantly less than $105 million. In summary, the current position is as follows:

Sydney: No tenders have been lodged. Changed economic conditions are likely to result in bids well below the $31.5 million paid by the licensee of 3KZ, Melbourne. No additional converted commercial FM services can be expected before early 1991.

Brisbane: One converted FM service is operating, resulting in the payment to the Commonwealth of $17.1 million.

Melbourne: One converted FM service is operating. Another is expected to commence in late June. Fees payable to the Commonwealth will total approximately $43 million.

Adelaide: One converted FM service is operating. The licensee of 5DN is apparently still to meet the preconditions for conversion. Fees paid to date to the government amount to $5.5 million.

Perth: No AM services have converted to FM. Further tenders are awaited.

To date the government has received $54.1 million of the $105 million expected by Mr. Willis. In the event of conversion of both 3TT and 5DN later this year, that amount will increase to $71.6 million, of which approximately 43.3% has been paid by Industrial Printing and Publicity Company Limited, the licensee of 3KKZ, Melbourne.

The $36.3 million lost by the government from AM licensees who have defaulted is a consequence of the provisions of the Act relating to FM conversion. Mindful of the provisions of the constitution (section 55), the Parliamentary draftsman has ensured that Division 1A of Part IIIB of the Act (Conversion of AM Commercial Radio Licences To FM As Part Of The National Radio Plan) is silent as to the payment by a licensee of the amount of its tender bid. Section 6C(1) of the Radio Licence Fees Act 1964 ("the Licence Fees Act") provides that the fee payable in respect of conversion from AM to FM pursuant to an application made under section 89DAE of the Act is payable "upon the conversion". Section 4(1) of the Act defines "convert to FM" in relation to an AM commercial radio licence as meaning to "vary the technical conditions of the licence warrant in respect of the licence under subsection 89D(6) so as to authorise very high frequency transmission." Hence, if a licensee who is offered conversion defaults (within the meaning of section 89DAM(1) of the Act), the defaulting licensee is not required to pay the conversion fee specified in the Licence Fees Act. A defaulting licensee merely forfeits any deposit paid by it in relation to the conversion application (section 89DAO(5) of the Act). The amount of the deposit specified in the notice published by

he Minister on 18 April 1989 inviting applications for conversion was only $10,000.00.

It is interesting to note that, notwithstanding the provisions of section 26C(1) of the Licence Fees Act, the Minister's section 89DAB notice of 18 April 1989 stated, that the "tender bid amount is payable within 14 days of the date on which the Minister signs the licence warrant changing the technical conditions of the licence to FM operation". In his notice published on 14 February 1990, by which the Minister informed interested persons that the original Invitation to Tender with respect to Sydney tenders was amended, it was stated that the provisions in the section 89AB Notice concerning payment of the tender bid amount were amended to read "The tender bid amount is payable on conversion of the licence warrant to FM, in accordance with the Radio Licence Fees Act 1964".

As regards those licensees who have defaulted after being offered conversion by the Minister, it is open to them to submit a further tender bid in due course in circumstances where no other licensee is eligible for conversion (e.g. in Perth where no other applicants met the reserve specified by the Minister). One presumes that most, if not all, of such defaulting licensees will submit fresh conversion applications. The amounts of some of their bids for conversion may well be adjusted downwards, having regard to commercial realities.

It is apparent that the process of AM/FM conversion as part of the National Metropolitan Radio Plan has not progressed as quickly or efficiently as the architects of that plan envisaged. According to a statement in August 1988 by the then Minister for Transport and Communications, Senator Gareth Evans Q.C., AM/FM conversion as part of Stage 1 of the Plan should have been completed by 1989 (except in Brisbane where the availability of FM frequencies would see the second FM conversion in 1992).

Advocates of reforms to the current licensing provisions contained in the Act, who propose the introduction of a tender system for the granting of new commercial radio licences (rather than the selection of the most suitable applicant by the Australian Broadcasting Tribunal) frequently cite the efficiency of such a reformed licensing system as being one of its main attributes. To the extent that the experience to date with AM/FM conversion is any indication, such a claim must be questioned.

Paul Marx is a partner in the Sydney firm of solicitors, Boyd House & Partners

Les Heil argues that the government's metropolitan radio conversion scheme needs overhauling

Since the introduction of commercial FM radio services in Australia about 10 years ago the new FM services have attracted increasingly larger audiences and their advertising revenues have increased largely at the expense of many long-established AM services.

In Melbourne the 1987-1988 ratings figures show that FOX-FM, Melbourne's then most popular station, and MMM, FOX's nearest competitor, captured 40 percent of all advertising revenue.

In the same period Australia's 29 Metropolitan AM stations could only manage a total profit of $200,000, while the seven commercial FM stations recorded a $27 million profit.

FM's popularity

Its not hard to understand how these profits have been achieved by the FM stations when one has regard to their audience share. Since 1987 the FM audience in Sydney has risen from 23.1 percent to an estimated 27.7 percent of the available radio audience for 1990-91, Melbourne's FM audience will increase from 26.5 percent to 41.4; Brisbane from 28.5 percent to 39.7; and Adelaide from 29 percent to 45.5 percent. Perth is the single metropolitan capital where FM audience is expected to fall marginally from 28.4 percent to 28.3 percent.

This increase in FM popularity (and profitability) is not primarily due to an increase in the total radio audience attracted by the new services. The radio sector's audience while large has not increased dramatically. Revenue too is generally static, with recent and estimated future growth, at best, equalling inflation. The growth in FM's audience and revenue has been achieved principally at the expense of the existing commercial AM licencees.

These recent figures bear ample testimony to trends which have been increasingly evident over the last 10 years. Not surprisingly, as listeners deserted established AM stations in droves, AM operators pressed the government for the right to convert to FM frequencies - there being ample capacity in the FM band (had it been properly managed) to accommodate most, if not all, existing AM operators.

Existing FM licensees attributed their success to better programming and management of their new services. The AM licensees argued that a significant increase in the popularity of commercial FM radio was attributable to superior technical quality of FM transmission. Having managed a radio station through the transition from AM to FM frequencies, I can categorically state that the difference in quality of sound is significant. During our four-week change over trials, we were able to listen to the same programs on AM or FM simply by flicking a switch. The difference was like chalk and cheese.

I have maintained, with other AM licensees, that FM radio represented a technological advance similar to the appearance of colour technology in the television industry and, accordingly, existing AM licensees should have been permitted to convert to FM as a matter of right, as a matter of equity, and for the public benefit.

The conversion scheme

The government instead took a different view and in August 1988, Gareth Evans, the then Minister for Transport and Communications, unveiled the government's plan for the development of metropolitan radio services. The plan was stated to have addressed various issues including:

- *the strongly pursued claim of many existing AM licences to convert to FM on commercial, and in some cases, technical grounds*
- *the need to guarantee a secure and technically effective future for the Radio for the Print Handicapped service*
- *the need to find a delivery mechanism for Parliamentary broadcasts which does not hopelessly disrupt ABC programming, but is not prohibitively expensive to establish*
- *the need to not only minimise government financial outlays to secure these various objectives, but to ensure an appropriate financial return to the community from a scarce public resource.*

Because of the shortage of FM frequencies in capital cities, a shortage greatly exacerbated by governments of both persuasions in first allocating part of the FM band to television and then squandering many of the remaining frequencies on services of minimal public appeal, it became necessary to amend the relevant legislation to provide a mechanism to allocate the reduced number of FM frequencies.

An amendment to the Licence Fees Act 1964 created an obligation on the part of the relevant licensees to pay a fee upon conversion from AM to FM. That fee is determined according to the formula B-V (where B is the amount of the bid made by the successful licensee and V is the value of the licensee's existing transmission facilities).

The bidding system was provided for by the amendments to sections 89ADA to 89ADP of the Broadcasting Act 1942. Put

iefly, the system involves existing AM lic-
sees lodging a sealed bid with the Depart-
ent of Transport and Communication's
nder Board following a call for bids made
the Minister in the Commonwealth Ga-
tte. The amount of the bid must be a single
ure and must exceed both the value of
ensee's AM transmission facilities to be
nded over to the government (for Parlia-
entary broadcasts or Radio for the Print
andicapped) and a reserve figure deter-
ined by the Minister and kept secret from
e bidders. Bidders are also required to pay
deposit.

Commercial radio ravaged

So how has the plan worked? In our case KZFM (formerly 3KZ) topped the bidding for Melbourne. We bid $31.5 million, $8.8 million more an the next highest bidder 3AK. 3AK has ow withdrawn its bid, thereby relinquish-g its right to conversion to 3TT which bid 1.5 million - $20 million less than KZFM!

We converted to FM on 1 January 1990 d in the first ratings survey of 1990 picked 3.2 percent more of the radio audience - a total of 14.6 percent of the radio audi-nce or 0.3 of a percentage point more than OX FM which had topped the previous 11 tings surveys. With 41.4 percent of elbourne's radio listening audience, FM ations now draw 63 percent of all advertis-g revenue.

Similar results have been achieved else-here with Adelaide's KZFM (formerly 5KA) creasing its ratings from 14.9 to 16.5 per-ent (it paid $5.5 million), while Brisbane's BK, now B105, has jumped 2.5 percentage oints (it paid $17.4 million). And it should e noted that the conversion of 4BK to B105 ccurred during the latter part of the first urvey in Brisbane for 1990: therefore fur-ner gains for B105 can be anticipated.

It is significant that KZFM did not alter s format and there was relatively little vari-tion in our competitor's formats. Our climb n ratings is a clear vindication of what I and thers have maintained for some time: that he popularity of FM stations has little to do ith programming and management and verything to do with technology. It needs to e understood, of course, that programming eeds to be right. Good programming will ave far greater appeal on FM - inferior pro-ramming will not benefit from technology lone. The commercial radio industry is be-ng ravaged by the government for the right o use improved technology when the only lternative, in the face of the growing mar-ket dominance of FM stations, was to even-ually go broke.

The government's iniquitous bidding ystem is forcing the commercial radio sec-or to assume a large financial burden at a time of high interest rates and at a time when the economy is contracting. The results of this system of allocation has been to substantially undermine stability in the industry. Bond Radio has had to forgo its right to convert to the FM band in Perth (where it offered $16.3 million) and in Melbourne (where it offered $22.7 million). Austereo has also relinquished its right to convert to FM in Perth (for which it had bid $12 million).

Conclusion

There are a number of alternative approaches the government could have adopted. A mini-hearing by the Australian Broadcasting Tribunal was one possibility. Even a ballot would have been preferable to the approach adopted.

There is some indication that the government, which has hitherto ignored the pleas of the industry to move with the times and embrace the new technology sensibly, is beginning to realise its error and express doubt about its auctioning system. There is also some suggestion of a more liberal spectrum allocation: that is, with less space required between stations leading to increased room on both the AM and FM frequencies to accommodate an increase of 20-40 percent in the number of stations on each band.

It is interesting to note that the remaining AM stations contend future conversions should be on the basis of a reasonable, fixed fee relevant to the size of the market. KZFM supports this approach. If the government accepts this proposition it will have a strong moral obligation to refund the difference between the reasonable fee for what stations, such as KZFM, had to pay for the right to convert, and this new licence fee. Only in this way could the government maintain equity and establish the "level playing field" which all political parties claim to believe in.

Les J Heil, AM, is manager of the Melbourne FM station KZFM

Police and the media

Relations between police and the media recently came under some scrutiny at the Blackburn inquiry. Evan Whitton examines aspects of this relationship.

Chester (The Smiling Funnelweb) Porter QC, counsel assisting Justice Jack Lee at the Blackburn inquiry, offered some characteristically trenchant views about the performance of former Sun police roundsman, Steve Brien, director of the NSW Police Media Unit, in events leading up to and following the arrest of Harry (The Hat) Blackburn.

What excited Porter was that before Blackburn, a former Superintendent, was arrested on multiple rape charges, Brien took the media into a lockup for a briefing on the pending event and after the arrest, but before Blackburn appeared in Court, laid on a photo opportunity of the accused for television and press cameras.

Contempt

All involved, including the media, were thus at risk of contempt charges for possible prejudice of the case. In the event, there was no case; further police investigations indicated that Blackburn was innocent; the charges were withdrawn.

There was evidence before the inquiry that the photo opportunity was not uncommon. The unit presumably took the view that it was merely assisting the media in its reporting tasks; the media presumably took the view that it was assisting the police in their inquiries. Sooner or later, it may be thought, both sides were bound to come undone on a matter of possible contempt.

While not denying that such practices may tend to put the liberty of the subject at risk, we may perhaps suggest that contempt law is a little out of date.

First, the Australian Law Reform Commission pointed out in 1987:

"The origins of the common law concept of contempt lie in the medieval notion that the monarch was divinely appointed and accountable only to God and therefore any resistance or affront to the authority of the monarch should attract not only eternal damnation but immediate retaliation ...

"It was only a short step from this to say that any resistance or affront to the authority of ... a court established under royal authority, should also be considered a contempt of royal authority."

And second, as Adrian Deamer has properly noted, allegations of contempt by prejudice may amount to contempt by way of influencing jurors: but there is evidence indicating that they are perfectly capable of understanding

e trial judge's exhortation to put out of their inds anything other than the evidence be-e them.

Another aspect of the police/media rela-onship was addressed by the Hon Gerald tzgerald QC in his 1989 report on corrup-on in Queensland.

Fitzgerald stated:

"The [Queensland] Police media unit storically has served two purposes, one essen-il and the other inappropriate."

He said that useful and legitimate func-ons included attending disaster areas to eal with media queries without impeding olice, daily bulletins on the road toll, miss-g persons, and the like.

Fitzgerald also said that another "impor-nt and legitimate" activity in a reformed olice force would be "to ensure the commu-ity is accurately appraised of Police Depart-ent initiatives and reforms and their im-act, so that public credibility may progres-ively be re-established through demon-trated performance, integrity and ethical onduct of police officers and the Depart-ent."

Brien may, however, sadly reflect that his was precisely what got everyone into rouble in the Blackburn matter: the investi-ation and arrest of a former Superintendent y regional detectives was seen as a triumph or dismantling the CIB, and as a clear signal hat, under a reform administration, police would no longer look the other way at allega-ons against other officers.

Fitzgerald said that an inappropriate function of the media unit was that it "also served a purpose to deflect and combat criticism of the force, respective of whether or not that criticism was well based". Evidence before him sug-ested "that on at least one occasion senior olice used the media relations staff to 'leak' alse information to a journalist".

Gatekeeping

That may be, but one imagines that indi-idual police or groups of police offer a more erious problem than police media units. Fitzgerald noted that:

"The media is able to be used by ... police fficers ... who wish to put out propaganda to dvance their own interests and harm their nemies.

"A hunger for 'leaks' and 'scoops' ... and ome journalists' relationships with the sources ho provide them with information can make t difficult for the media to maintain its inde-endence and a critical stance ...

"Information [is] invariably 'leaked' to elected journalists who are able to delude themselves that they are not being used ... should these journalists ever 'bite the hand that feeds them', the flow of information would resumably dry up, or be diverted to a rival media outlet or colleague."

This touches on the "gatekeeper" effect that has proved crucial to keeping a corrupt system in place. Historically, seriously corrupt Sydney detectives, such as the late Inspector Ray Kelly, were at pains to cultivate what we may trust were no worse than naive journalists strategically placed at the sharp end of crime reporting.

At Fitzgerald notes, "both the journalist and the source have a mutual interest: both want a headline". Kelly got plenty of those; to the world at large, he was the greatest detective since the late S. Holmes.

'A hunger for "leaks" and scoops ... can make it difficult for the media to maintain its independence and critical stance.'

However, whatever little "scoops" detectives such as Kelly might supply on the latest shocking murder or rape, they were hardly likely to provide information on corruption, or indeed much on organised crime: the Kelly cartel was part of it. Reporters thus inadvertently acted as gatekeepers barring the way to disclosure of corrupt systems.

Breaking the nexus

A Sydney Telegraph reporter, Robert Godier Bottom, first broke the nexus between journalism and corrupt detectives in NSW in the late 1960's. He cultivated, and was cultivated by, honest detectives. His sources were thus in a position to disclose information on corruption and organised crime, and from 1971 his disclosures (in his own name or via other reporters) led to a number of inquiries that slowly laid the groundwork for cleansing the police force from 1983, and the trade of authority as a whole from 1988.

To our shame, Bottom's counterpart in Melbourne was not a reporter at all, but a medical practitioner, the late Dr Bertram Wainer. He sought an inquiry into the Homicide Squad's abortion-extortion racket in 1969. The Attorney-General, Sir Arthur Rylah, who may have had particular reason to be nice to the Homicide chaps, showed no inclination to accommodate Wainer.

The Melbourne Herald's chief crime reporter, the late Geoff Clancy, is understood to have been privy to details of the extortion system, including when it was first set up, and the name of the officer who invented it. He thus probably knew more about the corrupt system than Wainer, and was in a position materially to assist the push for an inquiry.

It is of course fundamental to journalism that democracy cannot exist when elements of the trade of authority are corrupt. Clancy may have imagined he was awkwardly placed: that if he burned sources such as the late homicide detectives Jack Matthews and Jack Ford, no one would give him any information.

The assumption was false. As Bottom was to show, there are honest police who can supply data on matters more important to society than murder and rape. In any event the ethic in Clancy's situation, if he did not want to embarrass himself, is to supply the information to a general reporter who can then make a guerilla raid on the corrupt activity.

Clancy took neither course. He sent a message to the present writer, who had a connection with Wainer, confidently asserting that no such inquiry would ever get off the ground. One cannot say that Clancy took the further step of acting as an active, rather than a passive, blocking agent to disclosures of corruption. It is true that Wainer was effectively "ratbagged" in organisations with which Clancy was associated, but it must be said that Wainer brought much of it on himself in his concern to keep the issue on boil.

The Clancy episode perhaps makes Fitzgerald's point: "... if the journalist is so undiscriminating that the perspective taken serves the purposes of the source, then true independence is lost, and with it the right to the special privileges and considerations which are usually claimed by the media because of its claimed independence and 'watchdog' role".

In the end Wainer, former Colonel in the Australian Army, outmanoeuvred Rylah, the police, and any other forces of resistance, and a Board of Inquiry was set up. In what was perhaps not their finest hour, the Board, Bill Kaye QC and his counsel assisting, John Winnecke, gave dear old Bert a birching for what they saw as a heinous offence of "grandstanding", but three police went to prison.

And a second inquiry Wainer initiated, by Barry Beach QC into police malpractice in 1975, eventually led to reform of the force under Commissioner Sinclair Imrie (Mick) Miller from 1977, six years earlier than NSW, and 12 years earlier than Queensland.

Evan Whitton is a senior journalist with The Sydney Morning Herald.

Associate Editors

Richard Coleman, Kerrie Henderson, Page Henty, Stephen Peach, Yasna Palaysa, Bruce Slane, Peter Waters

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

Contributions

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:

Grantly Brown
Editor
Communications Law Bulletin
c/ Gilbert & Tobin Lawyers
GPO Box 3810
SYDNEY NSW 2001

New Zealand contributions and comments should be forwarded to:

Bruce Slane
Assistant Editor
Communications Law Bulletin
c/ Cairns Slane
Barristers & Solicitors
PO Box 6849
Auckland 1

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 .....