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Defamation law reform: the search for uniformity

Queensland's Attorney-General, Dean Wells, discusses the parameters for reform of defamation law

Debate has been raging through political and legal circles for many years about unifying the defamation laws in this country, so that freedom of speech is not inhibited by uncertainty and confusion about who can say what, without fear of litigation.

The laws of defamation represent an attempt to balance two important, and to some extent competing principles, each of which is inherently important to a democratic society. Broadly speaking, one is pushed by the press, and the other by the politicians. Freedom of the press (which, according to Thomas Jefferson, "cannot be limited without being lost") is essential to free and open debate in a democracy. It is the point of principle from where the media as a whole argues its position on defamation law reform.

The view traditionally put by the politicians is that freedom of the press to report must be tempered by protection of every individual's right to privacy. So it is we immediately arrive at the most difficult issue in relation to uniformity of the laws - the defence of truth - and the question of the desirability of having a public interest or public benefit qualification to this defence.

Another central question is that of reputation. If the principle intention of defamation laws is to protect the reputation of the citizen, is this best achieved by paying the claimant a large quantum of damages? Or would a correcting statement or broadcast, of equal or similar prominence to the original defamatory statement, do more to effectively rectify the alleged slur.

Is it possible to quantify damage to reputation in monetary terms? Does specific financial disadvantage need to be proved? Who should determine the quantum of damages so it best reflects the actual disadvantage suffered, rather than being based on inflated out-of-court settlements widely publicised in the media? Should there exist a provision for exemplary damages? Should the limitation period be altered? Should criminal defamation remain on the statue books?

Realistic Goals

All these questions were addressed by former Federal Attorney-General Gareth Evans during the last attempt at achieving uniformity. We have studied the Evans experience; this time round, our goals are more realistic, and our methods more workable.

We accept the reality that we will not get every jurisdiction to agree on every point. What we now have is three states in general agreement on some, and only some, of the key substantive issues. We expect this will result in uniformity on key issues between Victoria, New South Wales and Queensland. The discussion paper identifies justification, qualified privilege, correction orders and forum shopping as issues of substantive agreement, even at this early stage.

The result of reforms in these areas will be a more workable law in each of the three states. A degree of uniformity will have been achieved, and the laws will be more effective. Rather than being casinos for the rich, where litigants choose their table, and gamble for huge profits, the laws will be tilted more towards assuaging damaged reputations as expeditiously as possible, and setting damages at more realistic levels.

If the degree of uniformity outlined is attained, we should be able to put an end to forum shopping, and create a degree of certainty across the eastern seaboard which will be welcomed by media proprietors, journalists and the legal profession.

The joint discussion paper on defamation laws released in late August and endorsed by myself and my New South Wales and Victorian counterparts has been designed to stimulate debate within the community and specialist interest groups about alternatives for reform.

In this Issue –

Truth

In Western Australia, South Australia and Victoria, truth alone is a complete defence. In Queensland, Tasmania and the Australian Capital Territory, truth and public benefit must be proved. In New South Wales, the common law has been replaced by a statutory defence, section 15 of the Defamation Act 1974, which requires the defendant to establish:

(i) the imputation complained of is a matter of substantial truth, and

(ii) the imputation either relates to a matter of public interest, or is published under qualified privilege.

The provisions under which justification would become available as a defence are broadly agreed by the three states. To quote from the Queensland position as outlined in the discussion paper:

"Queensland and New South Wales are extremely reluctant to provide for truth alone.

However, in furtherance of the overall objective to attain uniformity, Queensland, like New South Wales, would be receptive to arguments in support of truth alone as a defence provided that appropriate measures are introduced to ensure that individuals are protected from unjustifiable revelations about their private affairs, except where the publication of such matters is genuinely in the public interest."

Retractions or apologies

Some form of retraction, mitigating damages, is considered desirable by all three jurisdictions. To again quote from the Queensland and New South Wales position, as published in the discussion paper:

"New South Wales and Queensland are considering the introduction of a facility for a plaintiff to make early application for an urgent, court ordered correction statement. It is proposed that, if a defendant elects to publish a retraction of the defamatory statement, or apology, or opportunity to put corrective material in terms and form as prescribed by the court, no or highly restricted damages be payable. The defendant would be able to elect not to publish the retraction and continue proceedings, at the risk of increased costs if successful."

It is further proposed that evidence of the defendant's acceptance, or non acceptance of any court ordered correction should not be admissible in court. This position is strongly supported by Victoria.

The success of this option will depend on procedural details yet to be worked out. The idea, however, that early involvement by the courts can assist in bringing the two parties together at an early stage, increasing the chance of an early settlement, is one which is recognised widely as having considerable merit.

Qualified privilege

In New South Wales the Common Law defence of qualified privilege as outlined in Section 22 of the Defamation Act has extended application. It states:

"(1) where in respect of matter published to any person

(a) the recipient has an interest or apparent interest in having information on some subject;

(b) the matter is published to the recipient in the course of giving to him information on that subject; and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances, there is a defence of qualified privilege for that publication.

(2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that person has that interest.

(3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward."

Dean Wells

In Queensland, Section 377 of the Criminal Code provides a lawful excuse for the publication of defamatory material within certain defined categories. These include:

- publication by a person having lawful authority over the plaintiff;
- publication for the purpose of seeking remedy or redress from a person in authority;
- publication for the protection of the interests of either party to the communication;
- publication for the public good;
- publication in answer to enquiries made by persons having an interest in knowing the truth;
- publication for the purpose of giving information to persons having such an interest in knowing the truth as to make the defendant's conduct in making the publication reasonable in the circumstances;
- publication on the invitation or challenge of the plaintiff;
- publication in order to answer or to refute some other defamatory matter published by the plaintiff; and
- publication in the course of, or for the purposes of the discussion of some subject of public interest, the public discussion of which is for the public benefit.

It is up to the plaintiff to defeat the privilege by proving the publication was made with an absence of good faith.

On the Queensland position, in relation to qualified privilege, the discussion paper states:

"any proposal for a uniform statutory provision should not represent a restriction on the existing provisions in the Criminal Code which accord qualified privilege to publication of material in a wide range of circumstances".

New South Wales argues strongly for the retention of a provision of reasonableness as outlined in its Section 22 of the Act and states:

"New South Wales supports the proposal for uniformity in the major statutory defences including qualified privilege. With this aim in mind close liaison with other jurisdictions will be required before final options for change are settled".

Victoria considers there exists the basis for agreement on the nature and form of a defence of qualified privilege.

Forum selection, juries and awards

All three States agree forum shopping should be restricted. Matters to be considered in changing the rules to this effect include principle place of publication, occurrence of the most significant damage, availability of witnesses, and likely expense.

Queensland and New South Wales favour larger juries of up to 12. Victoria sees no problem with smaller juries but states in the discussion paper:

"... this is a procedural matter not affecting the achievement of legislation based on uniform principles of law".

New South Wales and Queensland consider juries should determine liability and the applicability of defences and that judges should decide the quantum of damages. While Victoria believes the task of addressing damages should remain with juries it is willing to allow a judge to give a jury guidelines.

Public figure test

Queensland, New South Wales and Victoria unanimously reject the introduction of a public figure test. The discussion paper notes that Queensland, Victoria and New South Wales:

"... unreservedly believe that the reputation of public figures should not be afforded less protection than other persons in the community. The choice to become a public figure should not mean that the public has an unmitigated right to scrutinise every facet of such person's life".

The acceptance of a public figure test necessarily creates a risk of unfair invasion of the individual's private life. Even though the proposal would only extend to the pro-

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Newspaper distribution and the Trade Practices Commission

Warren Pengilley examines the story so far and raises some concerns about the current inquiry

Over a period of years, commencing 1980, the Trade Practices Commission has granted authorisations on public benefit grounds to a number of distribution arrangements for newspapers and magazines in the various states of Australia. The first authorisation was in New South Wales on 7 February 1980. The same public benefit as found in New South Wales was confirmed in subsequent cases in Victoria in 1982, Tasmania in 1984 and 1985, Queensland in 1985 and Western Australia in 1986. Thus, the fundamental public benefit found in the New South Wales system in 1980 was carried through unquestioned until at least January 1986 when the Western Australian application was determined.

This point is important because statements have been made that the Commission is now concerned at the effect of old authorisations "granted in the 1970s". In fact, none of the authorisations were granted in the 1970s. The first was in 1980 and the principle upon which it was based was consistently confirmed, the latest confirmation being four years ago. Indeed, the South Australian determination in 1988 does not negate this principle - but more of this later.

Basis upon which prior agreements were authorised

The systems of distribution are different in the various states. The New South Wales system is here discussed as the authorisation precedent. In essence, this system involves the joint appointment by publishers of territorial newsagents which all publishers then agree to supply. The publishers also agree not to supply any other territorial newsagent. The territorial newsagent may appoint sub-agents and is required to appoint a sufficient number of sub-agents to enable his or her territory to be adequately serviced. The Newsagency Council (consisting of various publishers and the Newsagents Association) may appoint sub-agents in the event that the newsagent does not comply with his or her obligations in this regard.

The territorial newsagent undertakes home delivery of newspapers and magazines at a maximum price prescribed by the publishers. The newsagent also undertakes to maintain an adequate display and range of publications. In practice, this means that newsagents stock a considerable number or publications which are regarded by many newsagents as uneconomic. A number of these publications without the system simply would not be stocked at retail level at all. These obligations are, in effect, the "quid pro quo" for the grant or the territorial monopoly.

There are some misunderstandings about the system and it is fair to say that even a number of newsagents do not understand it completely. The publishers agree only not to supply another "look alike" newsagency in the territory. There is nothing in the present agreement which prohibits the publishers from supplying other outlets such as supermarkets or cafes. Further, retail outlets at airports and railways are not covered by the arrangement. As stated, the territorial newsagent has the right to appoint sub-agents in his or her territory and the obligation to do so to ensure that his or her territory is adequately serviced.

The agreement is frequently characterised as a newsagents' agreement. It is not. It is a publishers' agreement. Should any publisher believe that the agreement is not in its best interest and in the interest of most efficient distribution of magazines and newspapers produced by it, then such publisher can, subject to some formalities, leave the arrangement and set up alternative distribution channels.

Why the prior agreements have been authorised

The arrangements have been authorised on the basis that they deliver the following public benefits:

1. The system ensures a wide range of newspapers and magazines stocked at a very low cost and distributed through a prompt and efficient home delivery service.
2. The system of obligatory home deliveries ensures widespread home distribution of newspapers and magazines. Only more limited home deliveries would continue in the absence of these restrictions.
3. The fixing of delivery fees for home deliveries is important because this prevents home delivery obligations being avoided by excessive delivery charges being imposed.
4. The restriction that there be only one specialist accredited newsagent in each territory provides a secure financial base in return for which the newsagent ensures provision to all within its territories of prompt low cost home delivery service.
5. The specialist newsagency system provided by the arrangement is more likely to ensure convenient availability to the public of a wider range of publications than would otherwise be the case - particularly in outlying areas or other low population areas.

What is the Trade Practices Commission now doing?

The Trade Practices Commission changed its attitude somewhat to newspaper and magazine distribution when it evaluated the South Australian system. A final determination was made in relation to South Australia in November 1988. The South Australian determination did not illegalise territorial delivery monopolies. However, agents holding the territorial home delivery monopoly in South Australia hold a delivery monopoly only. Retail selling agents are appointed by publishers as a matter of individual publisher decision.

The Commission regards its South Australian decision as being important enough for it to re-assess the principles upon which its prior authorisations were based. It should be said, however, that the Commission was considering in South Australia a position which had historically developed there. Of the 198 delivery agents in South Australia at the time, 148 did not in fact also operate at the retail level though there was nothing to prevent their doing so if they wished.

One of the concerns of newsagents is that an historically different system operating in South Australia may be thought to set the "trend" nationally whereas the historic development of distribution systems in each State is quite different. Further, although the Commission regards the South Australian decision as some sort of trend setter, the reality is that, because of historical differ-

ences, South Australia was prepared to make certain concessions in order to obtain an authorisation in that State. Presumably, such concessions would not have been made in other States if they had been sought by the Commission when their authorisation applications were considered by it. This is because of the historically different distribution systems which have evolved in other states which are quite different to those in South Australia.

The Commission's "study"

The present inquiry by the Commission is stated to be a "study". The public stance of the Commission is that this study has nothing to do with the prior authorisations.

This writer has argued elsewhere (see Bond Law Review, June 1990) that the Trade Practices Commission does not have legal power to conduct its study. The Commission, not surprisingly, vigorously asserts to the contrary. Short of legal proceedings, this issue will not be resolved.

Notwithstanding assertions from the Trade Practices Commission that its study has nothing to do with prior authorisations, most newsagents have a clear perception to the contrary. Indeed, the Commission has done its best to state one thing and give the impression of another. While the Commission, from time to time, seems to assert that its study is a piece of pure research, it equally points out that it wishes to reform the industry. It further states that it will not hesitate to use its power to review or revoke prior authorisations "should it prove necessary". The Commission clearly wishes to obtain some sort of acceptable consensus through its study but it is obvious that, in the ultimate, the study is sanction driven. To try to separate the study from the market reality against which it is based is commercially unrealistic. The Commission, by its own statements, hardly encourages newsagents to make such a separation.

The Commission has a power to review prior authorisation if it appears to the Commission that there has been a material change of circumstances since the grant of the original authorisation. The Commission has not stated any material change of circumstances but its statements that it wishes to reform the industry can be consistent only with the view that it has the belief that there are changed circumstances and that, in the ultimate, it will seek to review prior authorisations.

What has happened?

The Commission has now produced an issues paper. In the view of the Australian Newsagents Federation, this issues paper poses considerable difficulties. There are a number of assertions in it and, indeed, some of the so-called "issues" have clearly been couched in terms of prima facie conclusions.

Given this, the Australian Newsagents Federation sought access to all submissions lodged so that it could evaluate them and answer them on their merits. As many of the issues raised by the Trade Practices Commission involve factual evaluations, this was thought not unreasonable and, as the Newsagents Federation said, the complaints and submissions should be available to it as a matter of basic fairness if nothing else. The Commission has refused to make submissions available and has stated that it will defend Freedom of Information Act proceedings in relation to them.

The Commission believes it appropriate to divulge some information orally in negotiations but intends to disclose only such information as it thinks to be appropriate. Not surprisingly, the Newsagents Federation believes that this approach must be a matter which makes the Commission study necessarily incomplete because it is based on assertions which must remain untested.

The Present Position

The present position appears to be that various states will make their own submissions on the "Issues Paper". There are, of course, other possibilities such as political representations or legal action in relation either to the Commission's power to conduct its study or in relation to the Commission's denial of "natural justice" by declining to make submissions made to it available for comment.

Not surprisingly, there are also negotiations going on with the publishers. The view of the publishers appears to be that they wish to retain the benefits of the present system but they seek to change the system in various ways. There would appear to be no doubt that the Commission's inquiry is a matter which has attraction to the publishers as a vehicle to effect changes in the present system.

TPC rulings - an inhibition to change

One of the major inhibitions to change to date and for the future is the ruling of the Trade Practices Tribunal (the appellate body from the Commission on public benefit authorisation issues) that even the minutest of changes (even if an improvement on the present system) brings with it the possibility of a total re-argument of all public benefit issues. Further, if a subsequent authorisation application is not granted, this is, of itself, grounds for revocation of an already granted authorisation. Parties thus have no incentive to seek authorisation for even beneficial changes as they do not want to incur the problems and expense of re-proving what was previously accepted nor to take the risk of having present protection removed in the event of an adverse decision in a subsequent case.

TPC rulings - an inhibition to change

Though the Tribunal states (and the Commission would undoubtedly agree) that arrangements should be updated from time to time, the Tribunal's ruling operates to preserve the status quo rather than encourage that change which is preached. If for no other reason than costs, the present system operates to discourage, rather than encourage, the updating and improvement of prior authorised arrangements. The ruling of the Trade Practices Tribunal that any amendments to authorised arrangements put all issues back into the pot for re-argument, even though public benefit had been previously established, resulted in proposals to update the newspaper distribution system in NSW and the ACT being withdrawn in 1986.

The Prognosis

The present system has some inadequacies which all acknowledge. If the present system is radically changed, however, the results must be uncertain. It seems that home delivery service must decrease and its costs increase - if not overall, then in a number of identifiable areas. From statistics as to variety of publications in retail outlets, it seems undoubted that Australia has a wider range of publications available in retail outlets than in all other comparable countries. The present arrangements clearly deliver the public benefits upon which their authorisations are based. Whether a restructured system will achieve the same benefits, if the Commission forces any such radical restructuring, is at best problematic.

Dr Pengilley is a Partner in the Sydney office of Sly & Weigall, Solicitors, and a former Commissioner of the Trade Practices Commission. He acted for the Newsagents Association of South Australia in relation to the authorisation by the Trade Practices Commission of the newspaper distribution system in that state. He is presently retained by the Australian Newsagents Federation and the Newsagents Association of New South Wales and the ACT in relation to their dealings with the Trade Practices Commission on which subject, at the request of The Communications Law Bulletin he has written this article.

FORUM: FOREIGN OWNERSHIP OF MEDIA

The Press: Paul Chadwick of the Communications Law Centre

During the Hawke-Keating years, foreign investment has surged through the Australian economy at an unprecedented level. Between June 1987 and December 1989 more than $50 billion of direct foreign investment arrived compared with $9.8 billion in 1985-86.

The arguments about the size or direction (mostly into real estate) of this inflow will not be debated here. The commentators tell us that Australia's pool of domestic savings is too small to support development projects, acquire equipment and buy the imported goods to sustain the living standards we expect. To finance it all, we can either borrow or allow foreigners to invest directly.

Assuming this context, should the newspaper industry be treated like the broadcast media, in which foreigners are to be limited to a 20 percent stake under changes steered through Cabinet last May?

The Minister for Transport and Communications, Kim Beazley, has said that "the government believes it is vital that Australia's radio and television stations are owned and controlled by Australians because they are major outlets for political debate and exploration of cultural identity".

The question whether similar considerations apply to newspapers arises under the Foreign Takeovers Act, which gives the Treasurer discretion to reject a proposed acquisition deemed contrary to the national interest. Paul Keating's record has been inconsistent.

The American citizen, Rupert Murdoch, was not prevented from acquiring most of the Australian press through his takeover of Herald and Weekly Times Limited early in 1987. But in December that year, Mr Keating ruled out Murdoch's attempted purchase of the bulk of the Australian Associated Press wire service. Murdoch was, however, allowed to acquire AAP's share of Reuter and half of Australian Newsprint Mills. The New Zealand group Fletcher Challenge bought the other half.

In April 1988, Keating and Hawke indicated that they would block a bid by Maxwell for the Melbourne Age. In June 1988, Keating also prevented the acquisition of 49.9 per cent of the Perth Daily News by a Malaysian company, MUI Australia.

Maxwell is persisting in his efforts to establish his Mirror Group in Australia. He is seeking approval for the acquisition of 49 per cent of West Australian Newspapers (WAN), a subsidiary of the Bond-controlled Bell Group. Maxwell already has secured 15 per cent of Bell.

Despite Keating's indication in June that approval would be withheld, Maxwell, supported by Bell, is formally seeking approval from the Foreign Investment Review Board (FIRB), which advises the Treasurer. The lobbying on the issue has included circulation of a Bell Group White Paper, "Foreign Investment in Australia: A Case for Consistency", which emphasises the double standard: Maxwell impeded while "a single, foreign-controlled group (Murdoch's New Corporation) owns 65 per cent (in circulation terms) of the metropolitan print media".

The FIRB application appears to be an attempt to flush out what Malcolm Maiden in the Financial Review describes as "Paul Keating's informal advice to the print media that the television foreign ownership limit of 20 per cent also applies to print".

At the time Cabinet set the new limit for broadcasting, a similar 20 per cent limit on foreign holdings in newspapers was suggested. It was attributed to ALP sources, but at present there do not appear to be serious moves in Caucus for such a scheme. The political obstacles to requiring News Corporation to divest are formidable. But if Murdoch were grandfathered, the concentration of ownership in the industry would be further cemented.

The most common argument against foreign control of newspapers assumes that owning newspapers brings with it the power to influence public opinion. A prospective owner's disavowal of any such intention (as Bell and Maxwell assert in the WAN proposal) is less important than the recognition of the potential.

The objection to foreigners also rests on assumptions about their primary loyalty. The former Liberal Prime Minister, Malcolm Fraser, has asked: "Is a US owner of Australia's media going to be interested in advancing Australia's arguments or is he going to be interested in advancing the interest of the US, to whom he owes his primary loyalty, to whom he is legally committed?"

Maxwell made a novel contribution to the debate in an interview with the Financial Review published last 20 July:

Q. "You are reported to have described newspapers as megaphones, is that correct?"

A. "Newspapers in a small country like England certainly are megaphones. In Australia it doesn't bear any relation."

Q. "So in Australia you don't believe that newspapers fulfil the same function?"

A. "They probably do, but I, as a foreigner, can't acquire newspapers in Australia and use them as a megaphone to tell Australians what to do. That must be left to the natives to tell them, not to foreigners. I don't interfere editorially anywhere except where I vote."

The objections summarised so far ne-

glect the multinational character of the media organisations likely to be interested in a slice of Australia's press. Policy must be framed in light of what Bell Group calls "the imperatives of global publishing".

If we accept, for argument's sake, that a Murdoch, Maxwell or the French Hersant is a "world citizen", untroubled by the simple conflicts of loyalties which Fraser foresaw, do we clear this way for foreign control in the press? On the contrary, it is in the respect that the strongest arguments against it arise. The first is practical: the multinational is tempted to treat any local operation as a mere source of venture capital or subsidies for exercise elsewhere. The obligations of the Australian operation to provide high quality news and opinion to its readers remain, but the advocacy of Australian managers and journalists, when viewed in a company's global context, may count for little and get even less.

The second and more important consideration is what might be termed Australia's "media sovereignty". It is vital to preserve local control of, and accountability for, the news and opinion which provide the basis of Australians' view of themselves, the world around them and their place in it.

As Australia increasingly attempts to engage that world, local control of the media becomes still more important. The deregulation of the financial system, of which the increased inflow of foreign capital is one spectacular feature, has made the economy more vulnerable. The need to adapt is obvious, but that imperative must be explained by Australians to Australians to be achieved.

Culturally, the fact that we speak English increases our vulnerability. Unlike other nations in comparable circumstances, we cannot retreat into a unique language to cultivate our unique culture.

Just as Beazley's rationale for the 20 percent limit in broadcasting implies a wish to avoid Australian stations becoming merely extra outlets for drama made in Los Angeles for American audiences (to a greater extent than at present), so it is justifiable to prevent newspapers becoming passive carriers of articles researched and written in, say, London, for British readers (to a greater extent than they already are such carriers).

It must be acknowledged that the two major objections to foreign control of newspapers - directed coverage and diminution of sovereignty - can equally result from Australian ownership. But pressure may be more effectively applied to Australian controllers. As the Perth entrepreneur, Kerry Stokes, owner of the Canberra Times, said during discussion of foreign ownership of TV, Australian owners are that much more accountable.

Against objections must be balanced the costs of excluding foreign capital and expertise. It is plain, for instance, that Fairfax will require a substantial injection of capital if its papers are to avoid the journalistic anaemia which financial weakness can cause. Why prevent, say, the Washington Post, Le Mode, the British Independent or the US chain Knight-Rider from reviving what is our only substantial competitor to News Corporation?

'Australian owners are that much more accountable'

Short of picking and choosing among "acceptable foreigners", the unsatisfactory basis for policy we now have, is there a way to diminish the potential dangers without excluding the benefits? One option is to impose new limits on newspaper ownership and control by any person or corporation, Australian or foreign. If no owner were allowed more than, say, one metropolitan daily (with appropriate limits for other types of papers), greater levels of foreign investment in any one paper may be of less concern. Nobody's megaphone would be too loud.

It is worth noting that the primary objection to News Corporation's current grip on Australia's press is not Murdoch's foreigness, but the concentration of power and barriers to entry posed by News Corporation's position.

In current circumstances, Australia's best refuge is in diversity.

Telecommunications: Peter Waters of Gilbert & Tobin

Foreign ownership was one of the main issues around which a compromise is struck by the ALP factions over telecommunications policy. The other key issue was the competition between Telecom and new carriers in the basic networks. The two issues were closely interwoven.

Before turning to the political arguments over foreign ownership, lets consider the commonsense arguments for foreign ownership, since the two are unlikely to coincide. There are two simple reasons for participation of a foreign telecommunications company in the new Australian telephone company: cash and know-how.

The establishment of a second network, even if not duplicating the local loop, will be enormously expensive. The second carrier would have to build that network from scratch, whichever of the two smaller government carriers formed its nucleus. It is generally accepted that customers dislike satellite carriage of voice communications and, accordingly, a second carrier established around Aussat would need to build a terrestrial network. OTC also does not possess its own domestic network: Telecom capacity is used to carry OTC traffic to OTC's exit points.

Few, if any, Australian companies have a spare $5 billion to pump into establishing a fibre optic network. With Australia's growing notoriety amongst world bankers, few international financial institutions may be willing to lend the money. OTC's financial modellers claim it has enough cash, but this seems doubtful given the damage Telecom will do to OTC's international business if the duopoly was extended into international services, which would have been Telecom's consolation prize if the Megacom proposal (involving an amalgamation of OTC and Telecom) had been rejected.

Technology will, of course, be crucial to the success of any new Australian cellular or second telephone company. The technology, and the services delivered utilising that technology, will have to be at least as good as Telecom's, and will probably need to be superior if the new entrant is to gain public acceptance and to dislodge a sufficient number of Telecom's subscribers to survive. Sprint's dedication to building a complete fibre optic network in the US was an important promotional tool which distinguished it from "Ma Bell's" old-time copper network. This technical edge has helped sustain US Sprint through the other start-up difficulties it experienced, which initially put many customers off-side.

It is probably fair to say that there is no Australian company which has the technological capacity to take on a public mobile telephone licence on its own, let alone a comprehensive carrier licence. Most of the switching and other telecommunications skills reside with Telecom precisely because of its long-held monopoly, although there are a handful of private companies which have telecommunications experience in niche markets, such as AAP Information Services and Link Telecommunications. Even OTC would not possess all the skills needed to operate a full alternative carrier service, because Telecom is responsible for carrying and switching the domestic component of OTC's traffic.

The foreign telecommunications companies (telcos) are the sole repositories of the skills and expertise needed to develop Australia's new mobile networks and/or second carrier. Without the involvement of foreign telcos, the chances of setting up a sophisti-

ited and competitive network within a reasonable time frame are greatly reduced.

The new Australian telco also will need to be savvy and knowledgeable if it is to detect hidden cross-subsidies or anti-competitive practices in the interconnection offered by Telecom with its network. The bitter lessons learned by companies like Mercury, MCI or Sprint will be invaluable. A U.S. Regional Bell Operating Company ("RBOC") may also be valuable on the theory of (to use a convenient expression without impugning their's or Telecom's past history!) "setting a thief to catch a thief". The RBOCs occupy Telecom's position at the local loop level, and the competitive US carriers have to negotiate access and interconnect agreements with them.

The Beazley proposal required a higher level of foreign ownership than Keating's proposal, because more cash is needed. In addition to the $5 billion for the second carrier network and $600 million for the cellular network, there is $600 million of Aussat debt. Treasurer Keating has labelled Aussat as "space junk", although Aussat is probably not as useless to a new entrant as some would have us believe. Nonetheless, requiring the second carrier to acquire Aussat is really a disguised licence fee.

In the early discussion of the Megacom proposal, it was suggested that the new carrier might be 100 per cent foreign owned. However, Beazley recognised that high foreign ownership was the kiss of death for his proposal so far as the ALP left went, and he contrived a solution which met the cash and political dictates. His Cabinet submission proposed initial foreign ownership of 70 per cent, which would be sold down within 3 or 4 years to 30 or 35 percent, no doubt at a handsome profit to the foreign telco.

The Keating proposal was affectionately known as the "mixed bag of lollies", because it had something for everyone, including on foreign ownership. Building a second carrier around OTC had the singular advantage of access to OTC's international revenues: a licence to print money. Telecom was to be kept out of international traffic for 3-5 years, giving the new carrier a guaranteed income stream to fund its domestic network. Aussat's staggering debt could then begins to look bearable. In addition, OTC probably has a better knowledge of Telecom's network, vital for negotiating interconnection agreements, and possibly a better all-round management and technical team than Aussat. As a result, the dependence on foreign telcos would be less on several counts. The Keating proposed a level of foreign ownership of only around 25-30 per cent.

As Beazley and Keating slogged it out in Cabinet, it became clear that the Left and Centre Left were not particularly enamoured

Kim Beasley

of either proposal. The two factions weren't happy about chunks of the national telecommunications infrastructure passing into private hands, let alone foreign hands.

Keating stole a march on Beazley in the first week of September by repackaging his proposal to deal with this concern. He proposed that there would only be competition in the services currently reserved to the monopoly carriers, and not in networks over which services were provided, which would remain Telecom's, and therefore publicly owned. Telecom would resell network capacity to the competitive service provider. Keating was vague on exactly what resale meant, probably deliberately so, but it appears he intended that the competitive service provider could perform its own switching.

Excluding the new telco from network competition immediately cuts the capital needs, and hence the next Keating sweetener to the Left. He proposed that the OTC-Aussat entity would be privatised, but would be Australian owned. This seemed to do the job, and Bob Hogg and other Centre Left members were saying they could see sense in Keating's proposals.

After a promising start, the modified Keating proposal was dead in the water when the unions threatened political and industrial havoc if OTC was sold. Megacom staggered over the finishing line in Cabinet, although many Ministers remained deeply unhappy.

As is now history, the Special National ALP Conference voted for the Megacom proposal. As the price for its support, the Centre Left extracted amendments which require that the new carrier include a 'strong Australian participant in the ownership consortium, guaranteeing or leading to majority Australian ownership'. This resolution is probably flexible enough to accommodate the Beasley 'selldown' proposal to allow initial majority foreign ownership. However, the potential bidders should have got a loud and clear message that in any beauty contest for the licence maximising Australian participation in the bidding consortium will be an important plus.

The national interest probably, and nationalistic politics certainly, require that there be some upper limit on the level of foreign participation. However, the foreign telcos are not about to exchange their technology, expertise and the cash we need from them for a role as a minor player in the brave new world of Australian telecommunications.

Music industry: Phil Tripp of Aural Sect Records

In a recent submission I made to the Prices Surveillance Authority (PSA) regarding record prices, the quote that the media took to heart quickest, and out of context to a great degree, was one where I compared multi-national record companies to "oil sheiks" and their trade organisation, OPEC, to the Australian Record Industry Association (ARIA). In the sensational coverage of this volatile issue of possible cartelisation of major record companies, the media went for the sensational and the best sounding bite rather than reporting what is a complex debate with many points of view.

The point I was driving at was that in ARIA's past actions against small distributors, it tended to use lawyers like sledgehammers to cut off sources of supply to petty infringers of the copyright laws. It was stressed that this sort of action was really in the past and that, in light of the changes within the industry and more rational approaches to rectifying disputes, cooler heads had prevailed. The age of knee-jerk reactionaries in the complex and constantly dynamic industry is over.

We have moved from the Dark Ages of the music industry, where the major powers established feudal fiefdoms and never worked with their neighbours to a more co-operative industry where the once iconoclastic and dogmatic independent record companies are now utilising multinationals as their distributors and, in many cases, financiers. And the majors are seeing the benefit of having small, hungry and A&R (artists and repertoire) driven companies do their talent scouting and artist development. This is a worldwide trend which will be beneficial to the industry.

The book "Rockonomics", by Mark Eliot, describes how the music industry overseas

has evolved from its early days under the control of communications conglomerates to its most recent days under the control of even more monolithic communications giants. It not only traces the contributions of the record producers but contrasts this essential talent development against the dealmakers that have controlled the industry.

In our country, many of the ills experienced by the media conglomerates in print, radio and television are being experienced by record companies vying for the disposable income of listeners. It is unfair to state broadly that they are cartels but certainly one can draw parallels.

Everyone is trying to introduce new A & R into a market which is resistant to change. The market generally would rather stick with tired and proven acts such as the Beatles, Rolling Stones, Dianna Ross and their clones than putting out new material that may fail to catch on. Band managers are the catalysts who nurture new acts through independent record distribution and pressing to the point where the major record companies are prepared to marshall their massive distribution and marketing systems behind such acts so as to get the tastemakers - print media and radio - to induce interest in them so that both the specialist record stores and mainstream record outlets (Brashs, Virgin, HMV megastores) stock and push their product.

Artists' first harvest of songs is usually unripe and immature but they have to be nurtured to produce better material every year. The object of the exercise is to create a desire in the public to buy this material as soon as it is released. Some would argue that the large companies find it in their interest to make the material as uniform and controllable as possible resulting in blandness.

The small local independent labels pride themselves on imaginative and fresh acts, the majors rely on portion control, market research, delivery systems and demographic targetted marketing and immense advertising and promotion campaigns. The majors also react quickly to each others' successful formulas and quickly introduce similar material.

The realities of the record industry are that multi-nationals satisfy a need. It's very easy to blame the woes of an industry on its most powerful players, but realistically, they are the ones that move the industry most rapidly through periods of change. True, they do have the power and opportunity to corrupt but the checks and balances that exist to rectify situations contrary to public interest in the end tend to manifest themselves when most needed.

The unfortunate aspect of the PSA enquiries is that instead of truly serving the public interest, they have been directed at changing copyright law in a reactionary mode. And even more unfortunate for the multi-nationals, a lot of sins of the past have come back to haunt them in terms of loss of power and bad publicity. Perhaps the worst problem we face is that our industry is one of the most visible in the world because the products we sell represent fame and fortune and people resent both. Within our industry, there is a constant power struggle fuelled by egos and lawyers: always a volatile combination.

The best thing to come out of the PSA inquiry is the mass of information that has been put forth by both the major and minor players in the industry. For those interested in more information, I suggest getting hold of copies of the submissions to that inquiry for a fascinating view of a complex industry.

Book publishing: Michael Webster of D W Thorpe

Observers of media proprietorship might be forgiven for thinking that book publishing was spared the takeover fever that gripped the 1980's.

After all, while changes of newspaper, magazine, radio or television ownership commanded front page attention, government inquiries and widespread community concern, the ownership concentration into fewer and fewer corporate hands of book publishing drew little, if any, attention. This is of particular concern considering the permanency of the book, its cultural significance and the educational and societal influence it has.

Those of us working within the industry were spared none of it. The appetites for acquisition were just as strong, as were the predators. Takeovers were endemic at prices that left us startled then, and concerned now, as owners struggle to justify investments that seem impossibly optimistic given the low profitability, over produc-

Table 1 WORLD'S LARGEST PUBLISHERS

Company	Owner (base)	Turnover ($A est)	Imprints
Harper & Collins	News Limited (USA/Aust)	1.8 billion	William Collins, Harper & Row, Marshall Pickering, Unwin Hyman, Holmes McDougall, Fount, Bartholomew, Fonatana, Flamingo, Paladin, Thorsons, Scott Foresman etc
Simon & Schuster	Gulf & Western (USA)	1.6 billion	Simon & Schuster, Prentice Hall
Hachette	Hachette (France)	1.3 billion	Grolier, Franklin Watts, Diamonds
Bertelsmann	Bertelsmann (Germany)	1.2 billion	Bantam, Corgi, Dell, Doubleday, Transworld, etc.
Harcourt Brace Jovanovich	HBJJ (USA)	1.1 billion	HBJ
Reed	Reed (UK)	1.1 billion	Octopus, Heinemann, Boweker, Saur, Butterworths, Mandarin, Focal, Hns Zell, Hamlyn, Secker & Warburg, Methuen, Kaye & Ward, Ginn Miller, Conran Octopus Mandarin, Minerva, etc.
Pearson	Pearson (UK)	1.0 billion	Penguin, Lognman, Viking, Ladybird, Hamish Hamilton, Michael Joseph, Rainbird, Arkana, Puffin, Fantail, Pelham, Frederick Warne, Sphere, New American Library, Pitman, etc.
Readers Digest	Readers Digest (USA)	1.0	Readers Digest
Times Warne	Time/Warner Bros (USA)	900 million	Time, Warner, Little Brown
Times Mirror	Times Mirror (USA)	700 million	Times Mirror Professional
Random House	S I Newhouse (USA)	700 million	Random House, Random Century, Jonathon Cape, Chatto & Windus, Bodley Head, Hutchinson, Arrow, etc.
Maxwell	MCC (UK)	700 million	Macmillan (USA), Pergamon, CommunicationsMacdonald, Merrill, Berlitz, etc.
Table 1 Elsevier	Elsevier (Netherlands)	600 million	Elsevier
Thomson	ITOL (Canada)	400 million	Sweet & Maxwell, Janes, Van Niostrand, Wadsworth, Edward Arnold, Thomas Nelson, Law Book Company, Gale Research, etc.

Table 2 AUSTRALIA'S TOP 10

Company	Owner (base)	Turnover (est)	Imprints
Collins/Angus & & Robertson	News Limited (USA/Aust)	$90 million	Overseas imprints , plus Angus & Robertson, Collins Dove, Gordon & Gotch, Golden Press, Shakespeare Head
Reed	Reed (UK)	$85 million	Overseas imprints, plus Budget Books, Treasure Press, Thorpe
Pearson	Pearson (UK)	$70 million	Overseas imprints, plus McPhee Gribble, Greenhouse, Viking O'Neil
Readers Digest	Readers Digest (USA)	$50 million	Overseas imprints only
Thomson	ITOL (Canada)	$40 million	Overseas imprints, plus Nelson Education, Law Book Company
Ashton Scholastic	Scholastic Inc (USA)	$40 million	Ashton Scholastic
Pan/Macmillan	Macmillan (UK)	$35 million	Pan, Macmillan, Sun, Sidgwick & Jackson, St Martin's Press, Picador Piper
Transworld	Bertelsmann (Germany)	$30 million	Overseas imprints, plus Doubleday Book Club
Random-Century	Random House (USA)	$25 million	Overseas imprints, plus Hutchinson Aust
Universal Press	Universal (Aust)	$19 million	Greogory's, Scientific, UBD, Robinsons

tion and essential cottage-industry culture of the industry.

Not that the appetite has been suppressed. Acquisitions for strategic reasons continue both locally and internationally, no more so than in the USA, with its growing home illiteracy and unspectacular growth potential as its industry prepares for the full impact of a united and open-market Europe in 1992. The UK, the other major English-language publisher, must face this and other challenges to its traditional markets, not least of which is the effect of territorial changes planned by the Australian government to the Copyright Act in the next sitting of parliament.

In the space permitted me by the Editor, it's impossible to give a comprehensive "who's who" of book publishing. Suffice to say that many of the personalities will be familiar to you, as will the companies that control what is now a record output of around 100,000 new English-language titles a year (5500 from Australia and New Zealand) - that's 136 new books every morning and 136 each afternoon, every day of the year! On top of these new books there are the two million or so books in print at any time. And you thought you were well read!

So who are the big players, and what is their influence in Australia?

Based on turnover, the world's largest publisher last year was Harper & Collins, Rupert Murdoch's US $1.4 billion turnover religious, educational, general, cartographic and retailing empire. Here in Australia the names Angus & Robertson, Harper & Row, William Collins, Golden Press, Gordon & Gotch are just some of the familiar imprints. Australia's largest book retailer, the Angus & Robertson chain, was included, but in June it was sold to the locally owned Brashe' music retailer. The start of the 1990s dismantling, maybe?

Following, in descending order of turnover, are the USA's Simon & Schuster; France's Hachette; Germany's Bertelsmann; USA's Harcourt Brace Jovanovich; the UK's Reed and Pearson groups; America's Readers Digest, Times Warner, Times Mirror, and Random House; UK's Maxwell Macmillan; Holland's Elsevier; and then, probably, Canada's International Thomson (refer table 1). Closer to home, in the Australian retail market valued at around $1 billion (45 per cent local 55 per cent imported; 60 per cent general/40 per cent educational), the main players are decided by their control of distribution, as much as publishing output. Of the 1000 or so publishers operating here (a publisher being defined from inclusion in Australian Books in Print), it's the major 30 that control nearly 80 per cent of output and turnover.

Formal statistics covering the Australian industry are outdated and notoriously unreliable (as the Prices Surveillance Authority found during its recent inquiry into local prices and availability). However, based on educated guesses, the top 10 of Australian publishing/distribution are as set out in table 2. All of these publishers, whatever their ownership, are actively involved in publishing local books as well as distributing their own and others from overseas.

Whatever the shape of the industry by the late 1990s, speculation on which is for another article, ownership, especially in the education sector of the industry, is already sufficiently concentrated in overseas hands to demand more attention. But does anyone care?

Electronic media: Bill Childs of Minter Ellison

Xenophobia and jingoism are clouding the debate over the need for regulation of foreign ownership of the new forms of encrypted, subscriber supported electronic media services (electronic media services) in Australia, just as they continue to cloud the debate over the regulation of foreign ownership of commercial broadcasting.

When considering the overall need to regulate electronic media services (which includes pay/cable television) Australian politicians and commentators alike are too often influenced by the severe regulatory regime in which broadcasting is conducted.

The government's recently announced decision to place further limits on foreign ownership of radio and television licences will tend to exacerbate this situation.

The Minister for Transport and Communications, in a 22 May 1990 media release said that the need for increased foreign ownership restrictions arose because radio and television stations are "...major outlets for political debate and exploration of cultural identity".

The Minister said the government believes that it is of national importance that there be stringent limits on foreign ownership of the electronic media "... to reinforce the requirements for certain levels of Australian programming content".

He said the proposed legislation, which will be retrospective to 22 May 1990, will correct anomalies by:

- reaffirming that an individual foreign investor cannot exceed the current 15 per cent ownership limit, either directly or indirectly;
- strictly limiting aggregate foreign investment to a level of 20 per cent in direct and indirect interests;
- limiting the number of foreign directors of a broadcasting licensee company to no more that 20 per cent of the total;
- ensuring effective arrangements are in place to prevent collusive practices which would give rise to de facto foreign control;
- giving any licensee with interests currently in excess of the new ownership limits three years from 22 May 1990 to

comply, but providing for the Australian Broadcasting Tribunal (ABT) to consider an extension should it believe there are strong grounds for doing so; and

- giving any licensee company currently in excess of the 20 per cent rule for foreign directors twelve months from 22 May 1990 in which to replace their excess foreign directors with Australian directors.

The Minister warned that interests acquired after 22 May 1990 would be taken to be in breach as soon as the legislation was passed and the three year period for divestment would not apply.

The debate surrounding the need to regulate electronic media services has also been influenced by "old fashioned" regulatory approaches to outdated American and European technology.

Future discussions of regulation generally and regulation of foreign ownership particularly, must recognise that delivery technologies are changing too rapidly to formulate regulatory policy on today's technology and vital differences exist between broadcasting and electronic media services. These differences include:

- conditional access to the service by encrypting or encoding the delivery signal;
- new methods of delivery to the consumer;
- choice by the subscriber of the precise nature and extent of the services for which they are prepared to pay; and
- the service provider's ability to address an audience as narrow or as wide as he or she chooses.

The Saunderson Committee said in its report To Pay Or Not To Pay?:

"There are also grounds for providing foreign ownership and control regulations [for pay/cable television] similar to that for television station operations in existing broadcasting legislation and for similar reasons - the importance of broadcasting and its potential to influence public opinion."

It is of particular note that such an important topic was dismissed by the committee in one sentence.

Electronic media services, because they are encrypted, are not "broadcasting" under the Broadcasting Act 1942. That Act defines broadcasting as operating a radio-communications transmitter for the purpose of the transmission to the general public of television programs.

When electronic media services are delivered by optical fibre cable, an ISDN network or some other technology which does not involve a radiocommunications transmitter, no possibility of "broadcasting" arises.

To date the Australian government has assumed that electronic media services fall under the Radiocommunications Act 1983. The fact that the first VAEIS service (Sky Channel) is delivered by radiocommunications transmitters located in AUSSAT's satellites supported this assumption.

Electronic media services which do not utilise radiocommunications transmitters should be recognised for what they are, an integral part of international and national "telecommunications services" which are regulated in Australia under the Telecommunications Act 1989.

These services are surely "value added services" (VAS) which fall within the VAS Class Licence issued by AUSTEL under section 75 of the Telecommunications Act.

Arguably, AUSSAT delivered electronic media services also qualify as VAS under that Act even though a radiocommunications transmitter is used by AUSSAT in providing its "network".

Indeed, in the report upon which the Telecommunications Act was based "Australian Telecommunications Services: A New Framework", the government recognised electronic media services as VAS.

'Xenophobia and jingoism are clouding the debate'

Further evolution of VAS is likely to encompass not only business applications, but also a greater degree of entertainment and education uses as the broadband transmission capabilities of the public network infrastructure are increased to enable improved video transmission.

The major connection between these new VAS services and broadcasting is that they may be viewed on the same receiving apparatus. They may at times also provide similar services. This does not mean they are the same, nor does it mean the same rules should apply.

Beyond the laws applying to traffic carried on telecommunications networks and the general law relating to community standards of decency, defamation etc, no provision is made under the Telecommunications Act for regulating foreign ownership and control of VAS providers or the content of services provided under a VAS Class Licence.

If foreign ownership or content regulation is to be imposed it should be imposed uniformly where the circumstances are the same. However it should not be imposed because a service is of a particular category but rather because there is a demonstrated need for regulation.

By the mid 1990's someone in the USA, Japan or Asia may supply electronic media services directly to subscribers in the south eastern regions of Australia via INTELSAT VII satellites.

When installation of the Pacific and the Telecom optical fibre cable networks is completed, Australian domestic subscribers using B-ISDN technology will be able to "dial access" electronic media services supplied from virtually anywhere in the world.

The particular country where the pictures, sounds or data (information) are generated and stored is unlikely to be of overwhelming importance to a subscriber who elects to pay for a service which provides him or her with that information. Indeed the technological transparency of the access systems will mean that subscribers might not even be aware of the country of origin. If subscribers to the electronic media services in Australia have unlimited access to these sources of information, the arguments which have influenced the regulation of broadcasting such as the "scarce resources" and the "capacity to influence public opinion" theories will have no or reduced application.

The introduction of these new services also raises the question of whether and, to what extent, there is a continuing need to regulate "free to air" television and radio broadcasting. Broadcasters should be treated fairly in the new regime, so that the "playing field" remains level.

The move to greater restriction on "free to air" broadcasters just before the introduction of the new regime could well turn out to be a massive and costly mistake because its consequences have not been considered in the appropriate context.

The Economic Imperative: Jeremey Kirkwook of Mariot Moore

Australia must prepare itself to accept more foreign involvement in its media. Alternatively, we will suffer an industry which supplies a lower quality product in less quantities at a higher cost. There is no doubt that media is becoming a global industry and if Australia is not plugged into that process its media industry will suffer.

While this article is supportive of increased foreign involvement in our media, it should not be taken as implicit approval of concentration of media ownership or channelling of power to international media companies, or indeed the loss of Australia's "identity" in our media. But they are separate

:o the issue of ownership and foreign capital. There are other ways of protecting Australia from such problems than limiting foreign ownership outright.

Ironically, limiting foreign investment in Australian media has concentrated ownership in fewer hands. In our view, this is of greater concern than having more owners, some of which are foreign.

Within the television industry, Australia has protection from undesirable foreign influence through two layers of defence: restriction on ownership of shares and control of a broadcaster; and conditions included in the licensing of television broadcasters. Only one layer is needed.

It is possible to regulate the editorial or programming aspects apart from the ownership aspects. The concerns of those interest groups who are reluctant to embrace increased foreign involvement in Australia's media can be embodied in such editorial responsibilities or licensing conditions. This is a far preferable method for dealing with genuine concerns associated with foreign capital than restricting its availability.

The newspaper industry has a greater level of natural protection than television. Consumers can choose not to buy a particular paper if its produces rubbish or pushes an unacceptable editorial line. Once turned on, television invades the subconscious until a conscious decision to turn off or switch channels is made.

Australia needs more capital in its media industry. Preferably that capital should come from a party who can add value to our media industry. This could be through management expertise, programming and other software procurement, or technology sourcing.

There are two fundamental reasons for the required capital to be foreign: the long term economics of the industry are global not national; and the current parlous state of the domestic industry coupled with our presently shallow and inactive capital markets (to be fair to Australia, most OECD capital markets are relatively paralysed at the moment).

In all sectors of the Australian media industry there is evidence of hardship: the television companies are crippled by debt and face increased capital expenditure to tool up for aggregation; radio is losing market share and is suffering from further auctioning of the spectrum and AM to FM conversions; print is also suffering from debt and capital expenditure requirements.

These problems are compounded by the lack of equity in the industry and the reluctance of funds managers to invest in highly geared companies. Sources of capital for the media sector are limited. Of the traditional media owners only Kerry Packer and John B Fairfax appear to be in a position to actually invest further capital. Others are restricted by their own financial problems or by regulations from expanding.

The cash rich investors, such as superfunds and life insurance companies are investing on very strict guidelines. These make it difficult for an entrepreneurial or inexperienced industry player to raise capital.

Companies not currently involved in media but with surplus capital are a potential source for the media industry. However the current corporate trend is against diversification. The amount of capital required by the media sector cannot be satisfied by Australian non-media related corporates.

'The media industry is now driven by international economics'

Foreign companies are prepared to invest in Australian television but are restricted from holding more than 20 per cent, or 15 per cent by any one group. This does not allow them to provide sufficient capital to assist in the current crisis.

Unless there is a change in Australia's capital markets we can look forward to a diminished television service. Evidence of this is already apparent: the mooted merger of Channels Seven and Ten; the slow process of aggregation in regional television; an increasing number of repeats and lower quality programs; and staff cuts at the networks.

With Robert Maxwell determined to take a major stake in "The West Australian", we will soon see the level of government's resolve to limit foreign ownership of the press. Whilst currently regulated under Foreign Investment Review Board requirements, the government appears to want to limit investment in the print media to around 25 per cent. Apart from Mr Maxwell's endeavours it will be interesting to see how the John Fairfax Group situation is resolved. Much of its subordinated and senior debt is held by foreign institutions.

In addition to the current pressing need for relaxing of foreign ownership restrictions, there is a more fundamental factor which is perhaps a greater imperative for change. The media industry is now driven by international economics. The cost of production of software (programs and copy) is determined by economics of scale. Thus the US and UK produce programs at a much lower cost per consumer hour or column inch than in Australia.

News, sport and current affairs is another major cost for the networks and demand for international content is increasing. This raises the cost of gathering material and putting programming together. The capital linking of international and Australian media companies would lead to reduced costs through sourcing product and greater efficiencies in gathering material.

Technology is also changing the economics of broadcasting with far more efficient and compact computer digital equipment replacing outmoded analog and shaft machines. An efficiently set up TV station can now go to air with as little as two or three staff operating the broadcasting equipment. Most of this equipment involves high capital costs and needs to be imported.

Australia can have media with quality product, wide choice and low cost without endangering the principles we want to protect. But we must act soon as our media companies are on their knees and currently the only source of sufficient capital is from overseas. We may not like it but that is the reality. So let's find a way to control the process and revive our media rather than kill it slowly.

Broadcasting in New Zealand: Bruce Slane of Cairns Slane

The Broadcasting Act 1989 (NZ) imposes special restrictions on the ownership and control of "broadcasters". The term broadcaster is used to describe persons or companies who broadcast programs for reception by the public through receiving apparatus whether or not the programs are encrypted.

By way of preface it should be noted that New Zealand's general policy in relation to overseas investment is liberal. In practice few proposals needing approval are declined.

Section 61 of the Broadcasting Act provides that no overseas person shall broadcast programs in New Zealand. The regime for persons who are companies is more detailed.

An overseas person is defined by the Overseas Investment Act 1973. It includes any person not ordinarily resident in New Zealand as well as foreign companies and their subsidiaries. New Zealand registered companies in which 25 per cent or more of any class of shares is held by overseas persons or in which an overseas person has the right to exercise or control the exercise of 25 per cent or more of the voting power at a general meeting are also caught by the definition.

Section 62(1) of the Broadcasting Act provides that no overseas person shall, either alone or in association with any other

person, be in a position to exercise control of:

- The operations of a company that broadcasts programs;
- The management of any broadcasting station operated by a company that broadcasts programs;
- The management of the programs broadcast by a company; or
- The selection or provision of programs to be broadcast by a company the broadcasts programs.

The control provisions of Section 62 are similar to the provisions of regulations made under the previous Broadcasting Act. As they have not been the subject of any significant or contentious interpretations by the now defunct Broadcasting Tribunal or the courts, their importance could easily be underestimated. They can have an inhibiting affect on management arrangement linked with overseas shareholdings.

Section 62 also limits the aggregate voting power of overseas persons to not more than 15 per cent of the total voting powers exercisable by all the members of the company.

However, with the approval of the Minister, overseas persons may, in respect of a sound radio broadcaster, have shareholding interests which, when aggregated are between 15 per cent and 25 per cent of the total voting powers.

The Minister has first to be satisfied that the overseas person would not be a person who would, either alone or in association with any other person, actually exercise the types of control set out in Section 62(l)(a), (b), (d) or (d).

The Minister must also be satisfied that the holding would not, in all the circumstances, be contrary to the public interest.

The Minister may give approval subject to conditions. The Minister may withdraw his approval and any condition may be revoked, varied or added to by the Minister. Complex tracing provisions capture significant shareholding interests held indirectly.

Section 64 provides for the Minister to approve excessive holdings by overseas persons where he is satisfied that the overseas person intends to dispose of the interest or reduce it or take any other action to comply with the Act and needs time to do so.

Such an approval may include conditions and can be withdrawn at any time. The conditions may be revoked, varied or added to by the Minister. In practice the Minister is likely to impose a time limit but no other special conditions.

A special provision enables an insurance company which is an overseas person to be deemed not to be an overseas person for the purposes of Section 62 (and for the purpose of determining whether any other company is an overseas person for the purposes to Section 62). This requires the approval of the Minister who is to be satisfied that the shareholding interest was acquired out of funds usually held by the insurance company for investment in New Zealand. He also has to be satisfied that the insurance company will not actually exercise the control set out in Section 62(1) (a), (b), (c) or (d). The Minister must also be satisfied that the shareholding would not, in all the circumstances, be contrary to the public interest.

Special provisions have been made for overseas companies financing broadcasters. Most banks in New Zealand are overseas persons.

'The Minister must also be satisfied that the holding would not....be contary to the public interest'

An overseas person is not prevented by Section 62 from holding note, debenture, mortgage or other security in which a broadcaster is a debtor. Nor is that overseas person prevented from exercising any of the rights or remedies under the security.

Where the security confers voting rights which are exercisable:

- during a period in which any payment is in default;
- on the proposal to reduce the capital of the company;
- on a proposal that affects rights attached to the debenture mortgage or other security;
- on a proposal to wind the company up;
- on a proposal for the disposal of the whole of the property, business, and undertaking of the company;
- during the winding-up of the company, an overseas person is not prevented from holding or exercising those voting rights.

The holding of any such notes, debentures, mortgages or other security or such voting rights is deemed not to be the control of the exercise of voting power or the holding of a shareholding interest.

Section 68 makes it lawful for an overseas person to continue holding a shareholding interest which was held before 17 May 1989.

While there are no restrictions on the participation of overseas persons as directors of a broadcaster as such, care has to be taken that they are not in a position to exercise the control set out in Section 62(1)(a), (b) (c) and (d). There are no special controls on the aggregation of ownership of broadcasters. However the relevant competition legislation, the Commerce Act, applies.

tection of defamatory material which involved a matter of public concern, a grey area emerges as to the distinction between matters of public concern and matters of purely private concern.

It is anticipated that similar questions arise in defining who is a *"public figure"*.

Limitation period

Victoria remains committed to its existing six-year limitation period. However, Queensland and New South Wales consider a shorter limitation period would be beneficial. Both States recommend the limitation period be reduced to six months from the date the plaintiff first learned of the publication with an absolute limitation period of three years.

In support of the Queensland and New South Wales position, the discussion paper states:

"... it is argued that the very nature of a defamation action requires that a person take action to restore their reputation as soon as becoming aware of the defamatory publication. Any further delay in commencing action could result in problems in obtaining evidence or locating witnesses and may impose unnecessary hardship on publishers."

Criminal Defamation

New South Wales and Victoria are in favour of retaining some form of criminal defamation. Queensland is considering abolishing it.

In New South Wales, Section 50 of the Defamation Act provides that a person shall not without lawful excuse publish a matter which is defamatory of another living person, either with intent to cause serious harm, or with knowledge that the publication will cause serious harm to any person. The section can only be acted on with the consent of the Attorney-General.

In Victoria, the Director of Public Prosecutions has discretion in the filing of presentments. Queensland considers there to be little purpose in retaining criminal defamation because of its extremely limited use in the past.

Contempt

Queensland, New South Wales and Victoria are all considering the creation of a new tort, committed where a publication prejudices a trial to the extent that it has to be delayed or aborted. Liability would depend on establishing either that:

- the publisher ran a deliberate risk of aborting the trial; or
- there was serious editorial or managerial indifference to the duty to establish risk minimisation procedures.

Wesgo v Minister for Transport and Communications

Jack Ford and Andrew Chalk report on this recent case concerning AM/FM metropolitan conversion scheme

Legal action by the Wesgo Group recently exposed significant anomalies and drafting errors in the National Metropolitan Radio Plan. In a successful challenge to decisions by the Minister for Transport and Communications in setting up stage 1 of the Plan, Justice Davies in the Federal Court found that the Broadcasting Act gave the Minister no power to discriminate between tenderers for FM conversion on the basis of existing restrictions to their licences. The effect of the decision is that some commercial radio licence holders will be able to extend their broadcast service areas and potentially avoid or change other existing licence restrictions by successfully tendering for FM conversion.

Wesgo holds the commercial AM radio licence for 2WS, a music based station in Sydney's west. The conditions of the licence restrict 2WS's broadcast service area to the western side of the city including the areas surrounding Campbelltown and the Blue Mountains.

The plan

Under the plan it was intended that two commercial radio licence holders in each large city or town be allowed to convert to FM. Selection was by tender. On 18 April 1989, the Minister published a notice in the Gazette inviting tenders for conversion in Sydney, Melbourne, Perth, Brisbane and Adelaide. The notice set out the technical conditions for the new licences. In respect of all Sydney licences except 2WS, the conditions included a provision specifying that transmission was to be from a site located at Willoughby, the nearest high ground to the CBD. The notice also specified beam direction strengths. These were sufficient to ensure that the new licensees transmitted to the whole of the Sydney metropolitan area.

Those licensees eligible to tender for conversion are defined in section 4(16) of the Broadcasting Act. In all cases but one (2WS), they comprise licensees whose service area includes the GPO of the town or city in which the new licences are being offered; section 4(16)(a). However, the deeming provisions in section 4(16)(b) enable other licensees to tender even if their service area does not encompass the CBD provided that certain conditions are met. These conditions include being subject to a declaration under section 89T that the licensee shares a substantial market in common with another licensee whose service area covers the GPO. Wesgo's service area excluded the GPO, but it met the definition of a commercial metropolitan AM radio licence as set out in section 4(16)(b) making it eligible to tender.

Subject to licensees meeting certain standard requirements, tenders are decided solely on the value of the bid; section 89 DAL. To prevent Wesgo, in the event that it was a successful tenderer, from gaining the benefit of the new technical conditions and thereby dramatically increasing the population size of its service area, the Minister added a clause to the notice stating that the published technical conditions applied only to those tenderers whose existing service areas already included the Sydney GPO and that "other tenderers must, if successful, negotiate with the Department for approval for alternative FM transmitter sites and technical conditions which maintain their existing AM service areas."

Wesgo's position

Wesgo pointed out to the Minister that the notice did not comply with section 89 DAB in that, amongst other matters, the technical conditions which were intended to apply to Wesgo were not specified. The Minister responded by publishing an amending notice which set out alternative technical conditions to be applied depending on whether the tenderer's service area included the GPO or not. From its phrasing, the notice appeared to suggest that an additional licence was being offered in western Sydney to compliment the two planned for Willoughby. Thus, a further amending notice was published making it plain that only two FM conversion licences were being offered.

Wesgo challenged the notices claiming discrimination. Effectively, it was being ruled out of contention for FM conversion by being required to make a competitive bid for a restricted licence against stations who shared no such restrictions. In ranking the bids, no allowance was to be made for differences in licence conditions.

Justice Davies considered that the Act gave the Minister no power to differentiate between tenderers who were eligible to bid by reason of section 4(16)(a) as against those who qualified under section 4(16)(b). He said:

"Any licensee who meets the qualifications of section 4(16) for the holder of a licence in the particular large city or town is entitled to tender on an equal basis with every other such tenderer for the two licences which are offered. Subject to section 89 DAP(2), the successful tenderers are to be determined, not by planning considerations or by service area, but solely by reference to the competitiveness of their bids. The conversion of a licensee from AM to FM will therefore necessarily incoporate the technical conditions specified by the Minister for the FM frequency which is allocated".

Future options

For now, the ball is back with the Minister. The options are to proceed with the Sydney tendering on the basis that 2WS will be planning to convert not only its frequency but also its licence conditions. Alternatively, the Minister can defer the process until further amendments are passed that enable differing licence restrictions to be taken into account when valuing bids.

Finally, there is a third option which may avoid both the possibility of licence conditions being altered as well as amendments having to be made to the Act. That option is to offer 2WS an FM licence in western Sydney with conditions matching those currently applying to 2WS on AM in return for payment of a fixed fee (similar to the conversion process in other regional markets). The Sydney tendering could then proceed unimpeded.

Jack Ford is a partner in the Sydney office of Blake Dawson Waldron, Solicitors; Andrew Chalk is a solicitor with that firm.

Co-producing film and television

Jock Given explains Australia's international co-production scheme

Earlier this year, the Australian government entered into film and television co-production treaties with the UK and Canada. While the kind of arrangements are common in other countries, they are Australia's first such treaties and represent important milestones in the official co-production program established by the Australian Film Commission (AFC) in 1985.

The treaties provide a mechanism for Australian producers to collaborate creatively and financially with UK and Canadian colleagues on film and television projects while receiving some of the benefits available to local production in their respective countries.

History of the program

The official co-production program is a government-sanctioned scheme to encourage Australian producers who wish to produce film and television projects either in collaboration with foreign colleagues, where the storyline demands foreign creative participation, or where the budget demands substantial foreign equity.

It acknowledges that some of the stories which Australian program-makers wish to tell do not fit neatly into existing categories, that some are entirely set overseas, some require foreign casts, and others demand the insights of a native speaking director. The program allows film and program-makers to form partnerships with those from other countries to tell stories together, while recognising the difficulty of raising the whole budget for feature film, high quality television dramas and documentaries through sales in the Australian market alone.

An official co-production status allows an Australian producer to seek finance from the Australian Film Finance Corporation (AFFC) and the AFC and tax deductability under Division 10BA of the Income Tax Assessment Act and gives rise to assistance with the temporary importation of personnel and equipment. Each of the projects is assessed for the purposes of the Australian Broadcasting Tribunal's quotas for Australian programs according to the same test as other programs.

In the early years of the program, the AFC entered into memoranda of understanding or administrative arrangements of less than treaty status with the Centre Nationale de la Cinematographie (France), the Corporation for Public Broadcasting (US), the New Zealand Film Commission, Channel 4 and the BBC (UK) and the Bundesampt fur Wirtschaft (West Germany). These agreements were based upon a November 1985 accord between the AFC and industry unions and associations. Such arrangements allowed five mini-series and seven feature films to proceed as official co-productions with another three feature films currently being formally considered. This represents around $100 million in combined production costs.

These agreements limited potential partnerships, however, to the participating organisations and to the AFC. By contrast, the treaties provide access to all available co-producers in the respective countries, a familiar, understandable and continuing framework for producers, governments and authorities and a process which is enforceable through government to government treaty obligations.

The arrangements with France and New Zealand will continue until it seems appropriate for a treaty to replace them. Negotiations over a treaty are beginning with West Germany, Israel, Sweden, Italy and the Soviet Union.

Rules

The qualification rules for the program require an official international co-production to be made under the terms of either a treaty between Australia and another country or an arrangement of "less-than-treaty" status between appropriate authorities of those countries. Such projects are formally included in definitions of "Australian film" In the Income Tax Assessment Act (the Tax Act section 124ZAA(1)) and "Australian program" in the Australian Film Commission Act (section 3(1)).

The treaties and other less than treaty status agreements (memoranda of understanding) require a producer from each of the two countries. There also must be a balance between the Australian financial equity in the project and the Australian creative components (minimum 30% under the treaties, 40% under less-than-treaty arrangements). Creative equity is determined by combined schemes of a point system for key cast and crew and an equivalent percentage of other cast and crew, an equivalent percentage in the amount of money spent in Australia or on Australian elements within the production budget.

In addition, both the UK treaty and less than treaty status arrangements require that an overall balance of elements between the respective countries be maintained across co-production over a period of time. It is therefore possible that a proposal, eligible under the conditions listed above, might not qualify if it contributes to an imbalance within a series of co-productions approved under a given treaty or arrangement.

Procedures

The procedure for obtaining official co-production status requires that the Australian co-producer apply to the AFC. The foreign co-producer must make a separate application to the equivalent foreign competent authority. The AFC makes a preliminary assessment of each proposed official co-production taking into consideration the recommendation of an Industry Advisory Panel consisting of representatives of various industry bodies such as Actors' Equity and the Screen Producers' Association of Australia. Consultation then takes place between the AFC and its equivalent foreign competent authority. Final approval cannot be given until both the AFC and the foreign competent authority have both approved the production as eligible.

Once the project is approved the AFC countersigns the producer's application to the Department of the Arts, Sport, the Environment, Tourism and Territories. The Department then issues the project with a provisional Division 10BA certificate provided it is satisfied that the project is a "qualifying Australia film" (ie feature film, telemovie, documentary or television mini-series). This certificate allows the producers to make application to the AFFC or to the AFC for financial assistance for the project, and/or private Australian investors in the production interested in obtaining tax benefits under Division 10BA once a final certificate for the film or program is obtained after its completion.

It should be noted, however, that approval as an official co-production does not guarantee financing from either the AFFC or the AFC. These bodies continue to apply existing policies in making investment decisions.

Jock Given is a Policy Advisor with the Australian Film Commission.

CSOs: What are they?

Holly Raiche of the Communications Law Centre

The Telecommunications Act and the Australian Telecommunications Corporation Act (the ATC Act) in 1989 substantially overhauled the structure of telecommunications. Section 27 of the ATC Act expressly imposed on Telecom community service obligations or CSOs. Strategies and policies to meet those CSOs must be included in Telecom's Corporate Plan which is then subject to Ministerial approval and oversight by AUSTEL. Yet, over a year later, there are no agreed meanings attached to the terms describing Telecom's CSOs.

Section 27 states that Telecom is to provide a standard telephone service, which is further defined as the public switched telephone service. Telecom must ensure that, in view of the social importance of this service, it is reasonably accessible to all persons in Australia on an equitable basis, wherever they reside or carry on business and that the performance standards of the service reasonably meet the social, industrial and commercial needs of the Australian community. As both overseas and Australian experience suggest, there are a range of meanings which can be attached to these terms, as well as a variety of specific strategies which might be used to carry out Telecom's CSOs.

Social concerns

The Bureau of Transport and Communications Economics (BTCE) recently issued its report The Cost of Telecom's Community Service Obligations (1989). However, the BTCE definition for the CSO - a standard telephone service - was the provision of a dedicated line, wiring and the first phone instrument, with the costing exercise focusing on what it judged to be unprofitable telephone exchanges. What was missing from that report and its "costing" of CSOs was a reflection of the range of social concerns implicit in the legislation itself.

The other major report to date on CSOs was a paper produced for the Commission For the Future by Peter White, Community Service Obligations, and the Future of Telecommunications (1989) which reflected the range of concerns raised by CSO terminology. The paper, based on discussion from a range of community groups, reflected concerns that CSOs would be interpreted so broadly as to support continued Telecom subsidies for its CSOs. The paper also explored the range of social concerns felt by other community groups who saw access to a telephone as a vital community need which should be provided for all.

The problem in ascertaining the social importance of the telephone is that there has been little research to date on precisely how Australians use the phone in their non-business lives. One of the few recent studies on women's use of the telephone suggests the importance of the phone as a transport substitute, in the acculturation of migrant women, and in rural and remote areas as, maintaining ties of family, friendship and community.

In much overseas literature, "reasonably accessible" has been taken to relate to financial barriers in accessing a phone - of connection fees and/or a bond, and the charges for usage. While cost is often a significant barrier to access, there are other barriers as well. Providing a quadriplegic with a standard handset or more generally providing poor technical services does not amount to providing access to a phone.

Legal rights

At issue is whether the obligations amount to individual, enforceable rights. Telecom is statutorily required to provide a standard telephone service, but only as efficiently and economically as practicable, and the performance standards for that service must only be reasonably meet. The recent dismissal of the case brought by Northern Territory aborigines against Telecom suggests that Telecom has considerable discretion in determining how to meet its CSOs.

Also, Telecom is the only carrier given specific CSOs. The use of satellite technology could greatly improve the range of communications services to rural and remote areas, yet AUSSAT has no obligation in relation to the provision of such services. Nor is OTC obliged to take account of community need in the supply or price of its reserved services.

CSOs and technological development

As CSOs are defined in terms of a public switched telephone service, which may exclude public mobile telephone service. Telecommunications between people and/or machines will increasingly have a mobile component, yet the obligation to provide a telephone service to meet community needs is now tied to a fixed, switched technology.

As the intelligence and capacity of the network itself is enhanced, would Telecom's CSOs require it to upgrade a standard telephone service to include the range of services available throughout the public switched network?

Finally, the results of Government policy reviews may well be a more competitive environment where community obligations will have to be implemented, costed and monitored in totally different ways and by other carriers apart from Telecom.

There is a clear and urgent need for the development of a clearer legislative framework and more specific CSO terminology to ensure that the needs of the community for telecommunications services are met.

Holly Raiche is a researcher with the Sydney office of the Communications Law Centre.

SUBMISSIONS CALLED

The Attorney's General of New South Wales, Queensland and Victoria have released a discussion paper on Reform of Defamation Law and invited members of CAMLA to comment on this paper and this area generally.
Members interested in obtaining a copy of this paper or in commenting on its contents should write to:

The Secretary
New South Wales Attorney General's Department
Goodsell Building
8-12 Chiefley Square
SYDNEY NSW 2000

THe Director-General
Queensland Attorney General's Department
14th Floor, State Law Buidling
Cnr George and Ann Streets
BRISBANE QLD 4000

Chairman
Victorian Law Reform Commission
7th Floor, 160 Queen Street
MELBOURNE VIC 3000

De Garis & Moore v Neville Jeffress Pidler Pty Limited

Michael Hall reports on this recent Federal Court decision

On 6 July 1990 Justice Beaumont of the Federal Court gave judgment in this important copyright case. The case, brought by two journalists against a media monitoring company (NJP), tested the rights of journalists to restrain, or to collect licence fees for, use of their original literary works by press clipping bureaus. The Federal Court upheld the claims of the journalists, holding that a media monitor requires permission of the original author of the work, before it may reproduce an article for distribution to its clients.

Dr Brian de Garis complained that his book review *Looking Past the Winners* had been copied by NJP for sale to one of its customers. De Garis is a freelance writer and there was no serious question about his ownership of the copyright. The case turned on four defences raised by NJP: three of "fair dealing" in sections 40, 41 and 42 of the Copyright Act 1968, and a claim that authors, by permitting their works to be published in newspapers, impliedly licence others to reproduce those articles in the course of media monitoring.

Matthew Moore is an employed journalist with the Sydney Morning Herald. In his case, the same defences were raised, but there was the additional question of ownership of copyright.

The general rule is that the author owns the copyright in a literary work, notwithstanding that it was written in the course of employment. Section 35(4) of the Act, however, creates an exception for employed journalists. By that section, where a literary work is made by an author in pursuance of the terms of her employment by the proprietor of a newspaper, for the purpose of publication in a newspaper, the proprietor is the owner of the copyright in so far as the copyright relates to:

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

(b) broadcasting the work; or

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

Justice Beaumont held that section 35(4) has the effect of dividing up the ownership of copyright. The newspaper proprietor owns the copyright for the purpose of publication of the work in a newspaper, etc., or broadcasting, but the journalist owns the copyright for all other purposes.

Justice Beaumont briefly considered, but did not decide, the question of whether the syndication right, that is the right to republish the work in further newspapers or periodicals after its first publication, was held by the journalist or the proprietor.

Fair dealing

Section 40 governs fair dealing for the purpose of research or study. NJP argued that its purpose was research. Justice Beaumont considered the meaning of research meant diligent and systematic enquiry or investigation into a subject in order to discover facts or principles. He rejected the contention that NJP was entitled to claim that this was its purpose, on two grounds. First, while NJP made a systematic enquiry to recover articles or newspaper clippings on a particular subject, it did this for purely commercial reasons, rather than to make any discovery of facts or principles concerning that subject; second, the relevant purpose has to be that of the person who was making the copy, so that an intention by NJP's customer itself to carry out research, could not assist the monitoring organisation.

Section 41 of the Act protects a fair dealing for the purpose of criticism or review. Justice Beaumont held that the monitoring organisation did not make enough cognitive input to qualify as either a critic or a reviewer. Its process involved scanning the media for particular subjects, and did not extend to the passing of a judgment as to the merit of the articles identified. He therefore rejected the contention that NJP's purpose was within section 41.

Section 42 deals with fair dealing for the purpose of reporting news. Reporting news, it has been established, goes well beyond the reporting of current events, but in this case, Justice Beaumont decided that it did not stretch to reproducing de Garis's book review. In Moore's case, it was clear that the material being copied was news. The defence failed here, however, because the section is limited to such reporting in a newspaper, magazine or similar periodical. Justice Beaumont did not consider NJP's clippings constituted a newspaper.

Finally, Justice Beaumont held that, even if NJP had established that it had any of the requisite purposes for sections 40, 41 or 42, its use of the works would still not have been fair. To have copied the whole of the work, as opposed to a small portion of it, for a purely commercial purpose without making any payment, could not be considered to be fair.

Implied licence

Justice Beaumont dismissed the defence of implied licence. He agreed that a freelance writer submitting an article to a media organisation impliedly gave that organisation a licence to publish it in its newspaper or magazine. This was necessary to give commercial efficacy to the contract. However, that contract could work without any need to imply a further licence to third parties, unknown to the journalist, to further reproduce the work.

The intention of the Australian Journalists Association, which supported the two applicants, is now to offer licences to media monitors to reproduce the original copyright works of all Australian journalists. The AJA proposes to appoint the Copyright Agency Limited to collect the copyright licensing fees.

This case is currently on appeal in the Full Court of the Federal Court.

Michael Hall is a lawyer with the Sydney office of Phillips Fox, Solicitors. This article is an edited version of a piece in that firm's newsletter "Briefings".

Mutual promotion

Members will receive with this edition of the Bulletin a free copy of the Communications Update and a flier on the Gazette of Law and Journalism. Both these publications will also be sending their subscribers promotional material on the Communications and Media Law Association.

The CAMLA Executive has endorsed the Bulletin's participation in these mutual promotional activities as it feels they are consistent with CAMLA's objective of widening the debate on law and policy issues affecting the media. We hope you find the publications interesting.

Julia Madden President, CAMLA

Australian Broadcasting Tribunal v Alan Bond

Giles Tanner and John Corker discuss this recent case on fitness and propriety and judicial review of the ABT

If the catch-cry of the eighties was "let the free markets roar!", the nineties may be shaping up as the decade of "let the regulators regulate" - that is, if the High Court's recent Bond judgment is anything to go by.

The judgment is the culmination of a two-year Australian Broadcasting Tribunal inquiry into the fitness and propriety of radio and television stations associated with Mr Alan Bond to continue to hold broadcasting licences.

Narrowed scope

This case has significantly narrowed the scope of decisions that can be challenged by way of judicial review under the Administrative Decisions Judicial Review Act (the ADJR Act).

The Tribunal found that Mr Bond had deliberately given false and misleading evidence to it, that he agreed to pay Sir Joh Bjelke Petersen $400,000 to settle his defamation claim believing that if he did otherwise, the Premier might harm his interests in Queensland, that Mr Bond threatened to use his then TV staff to gather information on the AMP Society and to expose them by showing the results on television and that Mr Bond was no longer a fit and proper person to hold a commercial television licence.

However, the High Court ruled that none of these findings of fact by the Tribunal were reviewable as they were not "decisions made under an enactment" in accordance with section 3 of the ADJR Act which provides that:

> *"decision to which this Act applies 'means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or" [certain decisions prescribed in that Act].*

The Tribunal findings were considered as only steps along the way to reaching a decision that the licensees were no longer fit and proper persons to hold the licences and thus only this final decision was reviewable. It is now clear that unless a statute provides for the making of a finding or ruling on that point, it will not be reviewable under section 5 of the ADJR Act.

Administrative law in this country is relatively new and to date the courts have been keen to expand the scope of review available to ordinary persons. It is ironic that the Broadcasting Tribunal, whose job it is to protect the public interest, is the body whose decisions have led to a narrowing of the scope of judicial review.

Perhaps this is not surprising. The judgment indicates, there comes a point where the greater risk that the efficient administration of government will be impaired prevails.

Alan Bond

Conduct

For those seeking to review the conduct of a decision maker pursuant to section 6 of the ADJR Act, this concept is now clearly elucidated in the judgment and is restricted to matters that are essentially procedural in character. Conduct points to action taken rather than a decision made and looks to the way in which proceedings have been conducted.

A nice point that flows from this is that under section 13 of the ADJR Act, a decision maker is not compellable to provide reasons for a decision made that is purely to do with the conduct of the matter, such as a refusal to grant an adjournment. A person aggrieved is only entitled to reasons for a decision made which is a decision under an enactment. As reasons cannot be obtained for such decisions, it makes it harder to prove that the decision maker's discretion has miscarried or that there has been a denial of natural justice.

Fit and proper person

In the commercial broadcasting context, the High Court has favoured a wide view of matters potentially relevant to the fitness and propriety of a licence holder. It strongly affirms that broadcasters have a duty to the public, attendant on their power to influence public opinion.

Justices Gaudron and Toohey noted the significant role broadcasters play in the dissemination of information and ideas, a dissemination vital to the maintenance of a free and democratic society. Characterising this role as an obligation to the community, they said that the community was entitled to expect that a licensee would discharge its obligation and that it would not abuse its influence.

Chief Justice Mason referred back to the 1954 Royal Commission on Television, which described the possession of a broadcasting licence and the privileges it conferred as "in the nature of a public trust for the benefit of all members of our society".

It follows that the question for the Broadcasting Tribunal is not whether improper conduct has occurred, but whether the general community will have confidence that it will not occur. Amongst other things, character and reputation (because they provide an indication as to public perceptions of the likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to hold a commercial broadcasting licence.

Corporate veil

The Court also confirmed that the Tribunal is entitled to lift the corporate veil in determining whether a licence holder is a fit and proper person. The question of what matters go to fitness and propriety will be one of fact, dependant on the particular circumstances of each case. In appropriate circumstances, said Justices Toohey and Gaudron, the question may be determined by reference to the conduct, character or reputation of a single person associated with a company. This is in contrast to the Federal Court's position, which was that the Tribunal erred in not examining and taking into account the character, reputation and performance of the boards and management of the licensee companies.

Giles Tanner and John Corker are Legal Officers with the Australian Broadcasting Tribunal.

Government plans for country radio listeners: fair deal or foul?

Martin Hartcher discusses progress in the government's plan to introduce commercial FM to rural areas

Progress in the government's plans to introduce commercial FM to country listeners which (in terms of broadcast planning, means all listeners in Australia outside the five mainland state capital cities) has been tardy.

- In 1981 the Broadcasting Act was amended to provide for supplementary FM licences.
- In 1984 the Minister for Transport and Communications Michael Duffy, sought supplementary licence applications and received 69.
- The Minister referred the supplementary applications for Mildura and Canberra to the Australian Broadcasting Tribunal (ABT) and in the latter case also called for applications for an independent licence.
- In 1987 the market groups approach was announced by Mr Duffy and he called for new licence applications in five markets and referred two supplementary applications to the ABT.
- Since 1987, the Minister has had the ABT consider 12 more markets.
- In march this year, the Federation of Australian Radio Broadcastings (FARB) called on the government not to classify any more markets until the effects of television aggregation on country radio could be examined. The government agreed.

So at this moratorium juncture, lets see how country listeners have fared.

Progress to date

The supplementary licence scheme sees three FM services on air, or in terms of markets - two. The additional services policy sees five markets with FM services (Gold Coast, Geelong, Ipswich, Newcastle, Hobart) and another four soon to be on air. (Gosford, Shepparton, Darwin, Geraldton).

Three other markets (Alice Springs, Mildura and Albany) are in limbo. The ABT has yet to make decisions in five other markets (Mackay, Wagga, Albury, Renmark and Kempsey) and three other markets are tied up in disputes before the Federal Court. of course there is also one remote commercial radio service on air.

So if you were a country listener and thought in 1981 you would soon enjoy commercial FM you would have seen nine years elapse with only eight services coming on air: about one a year.

Who is to blame?

Some people accuse the stations of tying the process up with Federal Court appeals. As far as I am aware there have been 16 licensing decisions by the ABT.

- Two of these determinations were for new services (Albany and Geraldton). It is unknown whether yet there will be appeals.
- There have been four appeals by outsiders, two unsuccessful (Canberra, Shepparton) and two as yet without result (Townsville, Nowra).
- There have been four appeals by incumbents (Newcastle, Gosford, Lismore, Mildura) all of which have been successful, at least at first instance.

Undoubtedly some blame rests with the ABT. For example, in Moree there were no opposing submissions but the supplementary grant took 18 months.

But the real blame rests with the government preoccupation encouraging competing services and providing opportunities for new players.

Common sense says that a supplementary service is far more likely to deliver complementary programming to a market than head-to-head targeted competition. Supplementary services would also mean operations have a better capital base to provide more, and more costly, services than competitive services.

The competitive service argument also falls down when the government's cross media ownership prohibition which broke regional media monopolies is taken into account. At the same time, the expansion of ABC and public radio services in country areas has meant a vast increase in competition for audiences in regional markets. Television aggregation and burgeoning rural press have also increased competition for the advertising dollar.

But what about opportunities for new players? Today you can buy a number of radio stations for less than the establishment fee and costs of an ABT hearing. Most new services are being run by old players anyway and when you realise the significance of the ABT grant criteria that calls for strong experience in commercial radio - this is not hard to understand.

Where are all the new players? Many of the markets have seen only one applicant and in many of these it is the same applicant.

One is left then with the cynical view that it is all about government extracting revenue from the industry. If revenue foregone in the form of establishment and conversion fees is the real concern, then the government ought to consider a supplementary licence fee in larger markets.

FARB's new policy

The industry has launched a regional services policy containing the following elements:

- The government should immediately abandon its additional regional services program entailing market categorisation and long ABT inquiries.
- In large regional solus markets, the licensee should be offered the automatic grant of a supplementary licence or else the market should be treated as a 'B' category market under the present Tribunal procedures. (The latter to give a licensee his 'day in court' if he believes his market can support neither a supplementary nor new service.)
- In regional multi-station markets conversion should be offered for a fee.
- While some stations may wish to remain AM for practical reasons, stations in smaller regional solus markets should be offered the opportunity of the automatic grant of a supplementary licence or conversion.
- The concept of commercial viability needs to be more clearly defined in the Broadcasting Act.
- The present policy on remote commercial radio service areas should remain.

This policy should not be seen as reflective of a FARB position in respect of the issue of metropolitan conversion.

I would like to convey to the government, and the ABT, the need for them to look at country listeners and have concern for the delivery of commercial FM services to them in a way which will bring about the speedy and inexpensive delivery of quality FM.

Martin Hartcher is the Federal Director of the Federation of Australian Radio Broadcasters. This article is an edited text of a speech given to a CAMLA luncheon on 19 July, 1990.

The media: why the critics are wrong

Chris Anderson examines some of the barriers to better reporting and suggests the media's critics are too severe

I would like to outline what I see as barriers to the conduct of our craft and a defence against the more strident and more public of our critics.

Without in any way presuming what we do is always right, noble or above complaint, let me also outline why I feel our media broadly is worthy of defence.

Defamation

Defamation is certainly one of the barriers we face.

At present in Sydney, Fairfax has 146 actions before the courts - the Sydney Morning Herald has 99; the Sun-Herald 24 and the Australian Financial Review has 23.

Premiers from Eric Willis on have been promising me that they will undertake defamation law reform. We are still waiting.

Last year, at an Australian Press Council seminar at Bond University, the NSW Attorney-General, John Dowd, said:

"There is no doubt in my mind that the very high awards of recent times cannot be justified in the absence of evidence establishing either a malevolent and calculated campaign for boosting the profits of the media organisation concerned, or proof by the plaintiff of a sizeable economic loss."

If Mr Dowd supports this proposition, we would urge Mr Dowd to consider:

- Introducing a United States "public figure" defence, where a person who is a public figure cannot be defamed unless the publisher has published with actual malice and a desire to harm.
- The abolition of the requirement that as well as having to prove that an article is true, the publisher has to show that it was published in the public interest. This is not a requirement in Victoria, South Australia or in the United Kingdom.
- If we publish an apology promptly and prominently, then the plaintiff cannot be awarded damages without proving actual financial loss.

We also agree with Mr Dowd that such reforms as increasing juries from 4 to 6 (to stop one juror unduly influencing the others) and taking away the assessment of damages from the jury and giving the power to the judge, would also help. This would engender predictability, spur out-of-court settlements, and lead to fewer appeals.

Such reforms may stop lawyers, politicians, media people - sadly the main plaintiffs in actions and hardly the afflicted or oppressed - resorting to the court as the first, rather than the final, course of action.

Clearly like the overhang of debt - the crippling impact of the defamation laws casts a shadow over our craft.

Training

Another barrier - which is probably not a barrier as much as challenge - is training.

Firstly let me pay tribute to the people in the Australian Journalists Association (AJA) who have been pushing (sometimes against employer resistance) for improvements in training and media education. Through the structural efficiency process, the AJA and the newspaper employers have agreed upon a procedure which provides training modules to improve basic journalistic skills.

In the earlier grades, progression will be based on both skills obtained from successful completion of these modules and their performance as working journalists.

By-and-large, our reporters are now better educated, more rounded and equipped people than ever before when entering our craft. In my view, our new recruits are also better calibre people - with a better idea of what's right and what's wrong - than when I entered the craft nearly 25 years ago.

But despite that 75 per cent of our errors are due to our own sloppiness. One has to ask about the contradiction. Of the 300 to 400 young people entering the media each year in this country (about 3 to 4 per cent of the nation's total journalistic workforce) the bulk would be tertiary-educated and often now have second or post-graduate degrees. Of 193 new cadets taken into Fairfax in the past three years, 176 had first or second degrees.

Is it because of our training, our lack of supervision, or is it endemic with the new technology that better, more educated people are still producing those errors? We must continue to work to improve standards.

The siege mentality

Another barrier is the very conservatism of our society and, frankly, despite our outward bravado, the fear of criticism. We are a thin skinned society. A seige mentality still afflicts many of our politicians, business and union leaders in their dealings with the media.

Politicians, from the PM down, fall like ninepins to the press and talkback hosts during an election campaign, but they are hardly as forthcoming when secured in the fortress of a new Parliament House in Canberra, once a majority is tucked away. Business and unions are much the same. For example, when under threat from takeover, BHP made constant personal calls to newspaper offices, radio and TV stations. Now the company is a little less forthcoming. The same goes for our major banks. Under attack from foreign competition some years ago NAB, Westpac and ANZ plagued media offices. Now, apart from sanitised releases or managed appearances (or indeed, stopwrits over some recent debt stories or press conferences when a merger has fallen through), they are often as difficult to secure as a new mortgage.

In our defence

If those are some of the barriers, what about the media's role, and how do we defend ourselves to our media critics?

Of course it is true that reporters are humanly fallible, our reports are too often inaccurate; too instantaneous - much too much news is written from the cuts and served up again, often inaccurately, from the archives.

But, Joh Bjelke-Petersen has been ousted and Qld. Inc. exposed, initially by the activities of the ABC and the Courier-Mail, and then monitored by constant media attention. While we may abhor the consequences of it, Mr Goss, whatever his failings, was largely put there by the Queensland media.

Mr Bond's, Mr Skase's and Mr Connell's tangles have been brought to light by the work (again) of the ABC, and also the writings in the Sydney Morning Herald, the Australian Financial Review and the Australian.

The NSW Police corruption stench was originally brought home by the work of Marian Wilkinson, Bob Bottom and Evan Whitton.

The bottom-of-the-harbour tax scams were unearthed and detailed largely by the Sydney Morning Herald.

We realise - perhaps not enough - just

how fragile our economy is following the "banana republic" statements of Treasurer Keating to John Laws. And if we do go over the economic edge, you couldn't say Max Walsh hadn't warned us.

Abe Saffron, Murray Farquhar, Roger Rogerson - and others - went behind bars because of the work of the Sydney press.

As I mentioned recently, a distinguished friend of mine, Peter Robinson, Editor-in-Chief of the Australian Financial Review, put it rather neatly thus:

"There is no blanket, all-embracing defence of the (Australian) media to be made... except to the extent that seen in their totality they provide what a free press should provide - a wide diversity of approaches to the concerns of the community, an alert interest in humbuggery, hypocrisy and demagoguery and a certain scepticism.

"We are not perfect - more than that: we are an industry that almost by definition is incapable of being perfect. At the simplest level that arises from the obvious fact that one person's truth is another person's distortion...

"We turn out a product by the tens of thousands every night, yet every night it is inherently different.

"Our inputs other than paper and ink are completely unpredictable. Our ingredients are produced by staffs who are not assembly-line workers performing the same task every day, but are part artist, part lawyer, part intelligence agent, part writer and part detective. They work to inherently difficult deadlines imposed not merely by the production process and the distribution commitments, but also by the unfolding of events themselves."

How to improve

This leads us to what can be done about improving the community's faith in its media.

Clearly, training - and better media performance - are both obvious and crucial, but safety gauges such as the Press Council and, indeed, the AJA Ethics Committee should figure more prominently. Professor Flint, I feel, is now beginning to make genuine efforts to enhance the role of the Council and clearly, it is up to people like myself to aid that cause. The AJA also has a responsibility in the area of public perception. The Ethics Committee of the AJA has, I am told, about 10 cases before it at any one time and about 30 cases a year - but its deliberations are held in secret and we usually fail to find out its results publicly.

Finally, I believe that the public has a role. It is a free society and ultimately it is also up to the consumers of the media - our readers, listeners, viewers and advertisers - to use the market to encourage standards. I think it is self-evident that newspapers that deceive or constantly exaggerate the truth will be boycotted. Looking at the market fall-off in the consumption of the more extreme afternoon newspapers around the world, that is happening already. The famous London Sun is now in steady decline and newspapers of that ilk will find it hard to prosper in the decades ahead. Radio hosts who manipulate, or TV shows that constantly mislead, will also eventually fail.

The Australian media has to face difficult times ahead; not least in rationalising its daunting debts, improving its training standards and combating constraining laws. An enhancement of our performance and an honest appraisal and scrutiny of our failings, can only aid that.

Chris Anderson is the former Editorial Chief and Chairman of the Board of the Fairfax Group. This article is an edited text of an address given earlier this year at The Journalists Club, Sydney.

Holes in the net

Dr Perry Morrison examines issues surrounding the USENet

Recently, the education debate took an interesting twist with the blocking of access through Australian Academic Research Network (AARNet) to USENet. USENet has carried discussions on sex and drug related topics and has sometimes provided risque or sexually explicitly images. USENet has been sensationalised in the U.S. media as a porn ring.

What is USENet?

USENet began in 1979 when two U.S. computer gurus wrote software that allowed their sites to exchange data on a regular basis. Demand quickly grew to the stage where thousands of sites throughout the world are new interlinked by various forms of modem, landline, satellite and microwave connection. Users at these sites can send electronic mail to each other and can contribute items of interest to the USENet newsgroups that circulate around the world.

The variety and quality of information on USENet is enormous, ranging from newsgroups that discuss technical aspects of computer programming and software engineering, to conference notices, job advertisements, the impact of computers on society and a vast array of other topics. In addition, there are a huge variety of "unofficial" newsgroups that are carried on USENet, making it something of a global, anarchic bulletin board. In these newsgroups one can find something for every taste; such as how to repair your bicycle, prepare vegetarian meals, discussions on any political topic or ideology, on any style of music.

AARNet operates as the Australian branch of the Internet - a global collection of mainly government supported networks. AARNet provides a backbone through which many Australians can gain informal access to USENet.

Herein lies the problem. AARNet isn't really free. The principal communications links are (indirectly) paid for by the Australian taxpayer through funding to universities and CSIRO. Some are asking why taxpayers' money should be wasted in transmitting sexually explicit images or in supporting discussions of the "is there really a G-spot" type.

On the other hand, the communications lines are leased and costs are constant regardless of how much you use them. Therefore, the unproductive traffic isn't really costing anything at all and, it is argued, suppressing it is merely a veiled suppression of academic freedom. However, a great deal of traffic in the more "respectable" newsgroups is widely considered to be garbage. Should these groups be censored too?

No net effect with censoring?

Shutting down offending USENet newsgroups will not stop the flow of sexually explicit material. This material is publicly accessible at sites all over the world, quite outside of the newsgroups, such as through privately owned bulletins or by subscribing to a mailing list which would use electronic mail (e-mail) as the medium of transmission. Even if every e-mail message into and out of Australia were inspected (ethically, legally and practically dubious) the contents could easily be encrypted to prevent it.

While AARNet itself could be shutdown by removing funding for its communications links, distribution of USENet newsgroups would be impossible to eliminate because sites store what they receive and feed the next one, thereby providing an enormous amount of redundancy. If one's feed machine is disabled, then all one has to do is to seek a feed "upstream" of the site. Indeed, even if the major arterial communications

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Phones in the desert: CSOs examined

Peter Leonard examines the Federal Court's recent decision in the Yugul Mangi Community v Telecom

Telecom's failure to provide switched telephone services to remote Aboriginal communities in the Northern Territory gave rise to the first legal challenge under the Australian Telecommunications Corporation Act 1989. On 24 August 1990 Justice Burchett found for Telecom on a number of grounds, including a claim by the community that Telecom had failed to discharge its community service obligations.

Through the fact thicket

In 1979, Telecom commissioned a study to investigate the provision of telephone services to remote areas. This study compared Digital Radio Concentrator Systems (DRCS) and satellite technology as a means to provide telephone service to three categories of potential users: isolated agricultural and pastoral properties, remote communities and remote mining and other commercial operations. In what subsequently became a controversial decision, Telecom decided firstly, to utilise DRCS to service the first two groups and second, that satellite technology, (which was alleged to be more costly) would be utilised for special purposes, such as the needs of mining and petroleum exploration ventures and in special situations, such as Lord Howe Island.

The planned completion date of DRCS was subsequently set back from 1990 to 1992. In the interim, a number of remote Aboriginal communities depend upon high frequency radio telephone services provided by Telecom and the Royal Flying Doctor Service/St Johns Ambulance HF radio. These services have a number of drawbacks: susceptibility to interruptions of transmission, particularly during the wet season; lack of a duplex speech path; and failure to guarantee privacy.

Pending availability of DRCS, to be progressively rolled out under Telecom's Rural and Remote Areas Programme (or RRAP), the only alternative to current radio telephone services is AUSSAT's Iterra service. Considerable evidence was placed before the Court that the relative cost of interim provision of Iterra services, as against rescheduling of DRCS availability, would be relatively small, although the absolute cost would be not inconsiderable: the costings were the subject of considerable debate.

Satellite vs DRCS

So why not use the satellite? Telecom suggested three reasons. Firstly, Telecom said that the communities are not the only people with unmet claims to improved telephone service, and it should not be asked to discriminate in favour of the communities. Secondly, if Iterra was provided on an interim basis, the demand from other communities and services for supply of similar services would soon result in a limit being reached at which the Iterra service would not be available, simply because there would be no capacity to cope with the additional demand which would be involved. This would mean that Telecom's planned use of Iterra service as a more expensive service for special purposes would be disrupted, resulting in inability to meet the needs of other users and the loss of profits derived from meeting those needs. Thirdly, in determining RRAP priorities, Telecom had to take account of competing (alleged) community service obligations (CSOs), including hospital services, telephone services at concessional rates to pensioners and the disabled, and public pay phones. The complexity of the these competing priorities raised questions which, Telecom said, the legislation left to Telecom's determination.

Clearly, the communities had a legitimate grievance: inadequate and unreliable phone service. They alleged that Telecom favoured business interests by reserving the satellite for commercial services. They pointed out that if Telecom could not provide timely interim services using their commercial satellite service, AUSSAT could. They estimated the cost of interim services would be 0.09% of Telecom's 1988/89 profit or 0.38% of the annual cost of Telecom's CSOs as measured by the Bureau of Transport and Communications Economics. It was also suggested that Telecom had not properly considered the relative cost of satellite and DRCS service and that had there been a proper evaluation of the relative costs of these services, satellite would have been the preferred option.

Were the communities entitled to allege that Telecom failed to discharge its community service obligations? Telecom was required to prepare corporate plans setting out its policies and objectives including a statement of the strategies and policies that Telecom is to follow to carry out its community service obligations. The Minister could direct Telecom to vary its statement of strategies and policies where considered necessary in the public interest. In addition, AUSTEL was given authority to direct Telecom to supply standard telephone service or a pay phone for a particular place or area where AUSTEL was of the opinion that Telecom's refusal or failure to provide such service was inconsistent with Telecom's corporate plan. On this basis, Telecom suggested that the process of approval for its corporate plan, including its plans for CSO expenditure, by the Minister, and of oversight by AUSTEL, was intended to oust further supervisory jurisdiction by the Courts. As Telecom put it in submissions, "there can be no implication that the legislature contemplated even a limited accountability of the Corporation [Telecom] to the Courts, as opposed to an accountability to Parliament itself as to the manner of performance of obligations".

CSOs and the law

Before the 1989 legislation, Telecom's charter was expressed in general terms and its duties were stated to be not enforceable by court proceedings. This changed in 1989: section 27 of the Australian Telecommunications Corporation Act required Telecom to "supply a standard telephone service", being "public switched telephone service", "between places within Australia", "as efficiently and economically as practicable". Section 30 of that Act granted Telecom immunity from actions bought by any person "because of any act or omission (whether negligent or otherwise) by or on behalf of Telecom in relation to the supply of a reserved service". The Telecommunications Act 1989 gave AUSTEL powers to monitor and report to the Minister on the appropriateness and adequacy of Telecom CSO strategies and policies and the efficiency with which Telecom carries out those obligations.

The communities, although accepting that DRCS as and when provided would fulfil Telecom's obligations, claimed that the

services provided by radio telephone were not part of "the standard telephone service" and that this service was not reasonably accessible to them on an equitable basis when only accessible by HF radio. Telecom's legal response was firstly, that the communities had no legal entitlement to bring proceedings against it, and secondly, that there was no breach of Telecom's obligations, as Telecom had taken reasonable and proper steps to satisfy its obligations within a reasonable time, by progressively rolling out DRCS in accordance with plans and strategies approved by the Minister.

The court's findings

The court construed section 27 as calling for, in each case, "an adjustment between ideal goals and what Telecom is able to do". The judge found that "it is Telecom which must make that adjustment, notwithstanding that other sections [of the Australian Telecommunications Corporation Act] require it to do so subject to the direction of the Minister". As competing considerations required the balancing of individual interests to achieve the broader public interest, section 27 should be read as imposing a duty upon Telecom to achieve the set goals within a reasonable time, having regard to these competing needs, the resources available, and Telecom's assessment of the relative priorities of each need. The judge concluded that as the broad duty imposed by section 27 involved the development and application of policy objectives, to be performed nationally, the fulfilment of which, being subject to many constraints, could not be achieved absolutely and could be achieved (so far as was possible) in many different ways, it was Telecom that must make the assessment of when and how to implement its plans.

Justice Burdnett stated:

"Finance, manpower and the availability of equipment being all subject to limitations, it could only have been disruptive to have conferred a right such as that which the applicants claim: a right enforceable in the Courts, and not restricted by the wide discretion which the nature of the problems suggest".

Accordingly, the Court concluded that section 27 was not intended to allow complainants, such as the Aboriginal communities, to "interfere" with the staged implementation of plans fulfilling Telecom's community service obligation. The powers of direction conferred upon AUSTEL suggested that it was AUSTEL, not the courts, that should deal with cases where Telecom's performance of its CSO's is challenged. As the policy issues were so complex and intertwined, it was not appropriate for the courts to determine how Telecom should allocate its priorities in fulfilling community service obligations.

For similar reasons, the court rejected the Aboriginal communities application under the Administrative Decisions (Judicial Review) Act for the court to exercise its discretion to review Telecom's exercise of its administrative discretions (ie its RRAP programme). The nature of the discretion conferred upon Telecom was such that it would be extremely difficult to find that the limits of the exercise of Telecom's administrative discretions had been passed, and the court was not well equipped to undertake such a policy enquiry. Further, given that the communities could seek a review by AUSTEL of Telecom's decision, adequate alternative avenues of redress were available to the applicants.

Implications of the decision

On the basis of this decision, only in most unusual cases will a court intervene in decisions as to when and in what manner Telecom will fulfil its community service obligations. The case stands in strong contrast to United States administrative law cases and demonstrates the conservative attitude of Australian courts towards intervention in decision making by public instrumentalities.

The court did not say that Telecom was immune from private challenges as to performance of its community service obligations. Instead, the Judge said that "nothing put before me suggests that Telecom has gone outside of the bounds of the very wide discretion conferred upon it. At least unless it does so, section 27 creates no private right of action as the applicants seek to pursue". Accordingly, except in the most blatant and unreasonable cases of refusal to provide switched telephone service, the appropriate avenue for redress will be complaint to AUSTEL and a request that AUSTEL exercises it's discretion to give directions to Telecom requiring it to provide switched telephone service or a public payphone for a particular place or area.

It should also be noted that the case does not say that HF radio telephone service is an acceptable level of service in discharging Telecom's community service obligations. Rather, the case acknowledges that Telecom's obligation to provide switched telephone service must be qualified so as allow Telecom a reasonable time to roll out such service, having regard to competing priorities and needs.

The case confirms the importance of AUSTEL's role and responsibilities in monitoring and reviewing Telecom's performance. This places a heavy responsibility upon AUSTEL to keep abreast of Telecom plans and to make its own evaluation of the extent to which competing needs are being met. This also means that isolated and remote communities will need to pay attention to Telecom strategic plans as submitted to the Minister and focus their requests for improved service at the political level or, failing Ministerial assistance, through AUSTEL.

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EDI: the legal fuss

Ian Cunliffe examines some of the legal issues raised by this news technology

EDI - electronic data interchange - is in many ways the child of transactions which for hundreds of years have been conducted by people exchanging bits of paper - quotations, order forms, offers, acceptances, contracts. However, while there is a lot in common between Mitsubishi placing an order electronically for a thousand mufflers, and placing the same order by mail, telex or even fax, there are also important differences.

In the first place, over the hundreds of years that we have been buying and selling things with bits of paper, the courts have worked out most of the hard but important questions - like when an acceptance is made and thus a binding contract is entered - or conversely, the latest time at which an offer can be revoked.

Some of that law translates readily enough to the electronic analogy of paper transaction (i.e. EDI). But some of it does not. Questions like the following will arise:

- When is an acceptance effective where, for example, the acceptance is sent to an electronic "mail box"?
- Is an order which was automatically generated by a malfunctioning computer, without any human intervention, a binding offer or acceptance?
- Does the fact that an EDI transaction is recorded on CD Rom, with electronic "signatures" of the parties, sufficient to satisfy the requirements of laws like the Statute of Frauds which require that certain agreements be "in writing" and "signed" by the parties?

If matters are not carefully spelt out in advance, there will be uncertainty about what might happen in the event of a dispute.

Secondly, in their present state, the laws of evidence are ill adapted to cope with

proving what happened in an EDI transaction. Those laws differ from state to state, and in some states the only "evidence" of a paperless transaction may simply be inadmissible.

Thirdly, in relation to certain transactions, the question of who carries the risk - and so, who bears a loss if one is suffered - will depend on whether the transaction is by EDI or by paper. The law of negotiable instruments has well-established rules, which are generally conceded to be equitable, to allocate losses when someone is defrauded in a cheque transaction. But the law is not so clear, and may not be so equitable, in an EDI money transaction.

Paper bills of lading for carriage of goods by sea or air themselves confer title in those goods. The goods can be sold while at sea by selling and transferring the paper. What will the EDI analogy be? Will it be foolproof against fraud?

That leads into the fourth point - the question of security generally. Security is needed against the fraudulent and against the malicious. We have well developed means of ensuring that an order for copper wire is authenticated and delivered to the correct address; and that the payment for it is sent to the correct person. There is a danger that we will fall into the trap of regarding the computer as infallible or the information transmitted as incorruptible.

Computer viruses could reek havoc if they got into the systems which keep business running. Increasingly those systems will be EDI systems. If anything, our vulnerability is increased as business embraces the "just in time" (JIT) philosophy of management. Because EDI holds out the promise of greatly reduced response times, and the promise of the ability to monitor stock levels and movement of goods in transit, businesses which aim to be efficient are looking increasingly to working with reduced levels of stock, spare parts and components. The obligations of all participants to maintain security should be clearly spelt out.

The banking industry, which has long experience with electronic transactions, has always understood that where big sums of money are involved, both accuracy and security are vitally important. But even in banking with closed systems used only by bankers, there have been problems of fraud and problems or error which have cost enormous sums of money. Somebody bears the cost of these things. The question is who?

Inevitably similar problems will arise with EDI transactions. For one thing, those transactions will give rise to large payment orders. Secondly, very valuable commodities will sometimes be involved in these transactions - for example a ship load of wheat or iron ore. The danger there is not so much that somebody will fraudulently make off with the cargo, but that somebody will fraudulently create the appearance that they have title to the cargo and will sell it or raise money using it as security.

There is also the unhappy fact that businesses do fail. When a company goes into liquidation, for example, it becomes a vitally important question as to whether a particular shipment of goods had passed, or as to whether a particular payment has been made, or is still incomplete and capable of being stopped.

The attitude that problems within industries should be sorted out by negotiation and without resort to litigation is probably to be encouraged. But our courts are full of examples of former trading partners unable to compromise and resolve matters without the intervention of the courts. In those cases it is vitally important to know just what the legalities are. Prudent business people will want to know that in advance. And they will derive little satisfaction from seeing their company's name in the High Court lists - even if in the end they prevail - when they reflect that a well-drafted agreement negotiated at the outset might have saved all that trouble and expense.

Public television in Australia

Beth McRae argues that public television is being ignored

The campaign to establish a community based public TV service in Australia has had a long and contentious history stretching back to 1974, when community resource video centres flourished. By the early 1980s organisations such as Open Channel in Melbourne and Metro in Sydney transmitted public TV programming on SBS television.

The costs of broadcasting and lack of any real commitment on the part of the federal government contributed to dissipation of the demand for an alternative television service until the late 1980s when a resurgence of demand led to the then Minister for Transport and Communication, Gareth Evans, making the inspired decision to permit the first test transmission on a separate UHF frequency.

Since mid 1988, approximately 20 weeks of test transmissions have gone to air in metropolitan Sydney, Melbourne and Adelaide, produced by ten locally based public TV groups. Nearly all have had high levels of programs produced by or for community groups. Programming has at times been dazzling in its ambitious nature, particularly considering inadequate financial resources and the dependence on volunteers.

In the telecommunications debates of recent times, public television barely rates a mention. Considering the fundamental notion that the airwaves are a public resource on licence in the public trust, one can ruminate endlessly about why the issue is so thwarted and regrettably marginalized.

Financial viability

Inevitably it comes down to dollars. There are no potential profits to be made and financing the cost of operation is not simple. While public television groups have ample evidence of strong community demand for public TV it has been impossible to date to convincingly prove that the financial models will work. Because legislation to permit sponsorship announcements during test transmissions is still before parliament, the degree of potential sponsorship revenue has yet to be tested. The public TV sector has always expected to use sponsorship as an important revenue source. Sale of air time, subscriber membership fees, workshop training and program sales would generate additional revenue.

As with public radio, the issue of financial viability for public TV is difficult. Although the federal government has made it clear it will not provide funding, the public TV sector is likely to seek initial assistance for start up costs. State government departments and local councils are a more realistic possibility for on-going assistance. Already local government organisations have shown strong interest in test transmissions. Given that the essence of public TV is local community access, control and ownership, indications are that local government may become intensely involved.

Reports and reviews

Over 15 years there have been no fewer than nine reports into the feasibility of

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Deregulation of broadcasting in New Zealand

Beverley Wakem examines the realities, myths and impact of deregulation on New Zealand's national broadcasters

In New Zealand, the past few years have been characterised by a deregulatory thrust in just about every sector of the economy. Broadcasting was certainly not immune from this tidal wave of free market theology, and the New Zealand government has gone, as the song says "about as far as you can go".

There is no longer a sanctified high priesthood with a monopoly to provide the traditional public broadcasting services. Now there is a mix of funding mechanisms and regulation to ensure contestability in the provision of those services and, it is hoped, with the consequential effect of economic, cost-efficient provision of a range of services at a diminishing cost in real terms to the tax-payer.

The basic principles

The basic principles which underlie the approach taken by the Government are:

- That economic licensing of broadcasters should be removed along with any special restrictions on the types of technology they use and services they provide.
- That there is a case for some restrictions on ownership mainly for social policy reasons. These include restrictions on foreign ownership, cross-media ownership and monopolisation of broadcasting markets through aggregation. The Government also decided to retain public ownership of two TV channels and at least two radio networks.
- That certain social objectives in broadcasting should be promoted. Giving effect to this requires government intervention, through the provision of financial assistance and regulation. Objectives to be assisted financially relate to such matters as community access to radio and TV signals, minority interests and New Zealand content. Regulation is required to maintain program standards.
- That greater competition should be permitted throughout the broadcasting sector and the adoption of the principle of removing the competitive privileges and disadvantages of the Broadcasting Corporation. That is, the competitive neutrality principle.

The government separated the public broadcasting fee from the state owned broadcaster thus achieving the neutrality required in a competitive commercial environment.

It established some objectives for the promotion of a New Zealand culture and identity and funding for those objectives from the public broadcasting fee through competitive bids for projects and services judged on the basis of whether they provide value for money.

The government went for direct funding assistance rather then a quota to meet its objectives because, it argued:

- it is neutral between broadcasters;
- its costs and benefits are identifiable;
- it keeps costs down because it is a top up; and
- it is consumer led.

What does it mean in practice?

In summary, the changes are -

1. The Broadcasting Tribunal was abolished. Its allocation (i.e. licensing) functions were replaced by the tendering out of new radio and television frequencies. All frequency owners will pay an annual resource rental. The Tribunal's media standards role was transferred to a Broadcasting Standards Authority. Explicit local content requirements were abolished.
2. The Broadcasting Corporation of New Zealand was abolished and Radio New Zealand and Television New Zealand (TVNZ) were set up as separate companies. The process of translating to a state owned enterprise means that the primary concern of each entity will be to generate a return upon its assets, which is paid to its shareholders - currently the Crown.
3. The Public Broadcasting Fee (PBF) was increased, and is now dispensed by a statutory (and independent) Broadcasting Commission with its main functions to reflect and develop New Zealand identity and culture by (i) promoting programs about New Zealand and New Zealand interests; and (ii) promoting Maori language and Maori culture and to ensure that a range of broadcasts is available to provide for the interests of women and children and persons with disabilities and minorities in the community including ethnic minorities.

Culture vs commercialism

It is clear from the New Zealand experience that the national broadcaster is no longer seen as having a role in maintaining the cultural continuum of the nation. Except insofar as that broadcaster is able to compete successfully for public funding to support programs which meet the Government's stated social and cultural objectives in broadcasting.

It is, essentially, a commercial view of broadcasting which says that unless specifically funded to do otherwise, the broadcaster has no other role then to maximise the return to the shareholder. The net social benefit is said to be a lowering of the resource cost to the consumer - I think.

Now, against that background how do the national radio and television broadcasters in New Zealand articulate their role?

It goes without saying that we continue to provide a range, depth and choice of programs in both our public fee funded services and in our commercial services. We believe that there is still a distinction between the quality of what we offer and the contribution it makes to national debate, the maintenance and strengthening of the New Zealand identity, the reflection of minority interests and aspirations.

In radio, Radio New Zealand (RNZ) has perhaps an easier task than its sister medium. We maintain two publicly funded national networks which exhibit, in every sense, in their programming what service to the public has traditionally been all about in broadcasting terms. In talks, features, drama, music, current affairs and continuing education we believe we give the nation a sense of itself, and draw it together.

I would also argue, very forcibly, that our commercial stations continue - at the local level to provide a forum for the community to talk to itself effectively, and through the provision of a first class national news service, give those same communities a window on the world. The fact that we lead audience ratings in every major market shows that it's possible to provide quality while earning a return on the assets. Indeed we

would argue that unless you provide quality programming you will not attract a quality audience.

While TVNZ is a successful competitor in the commercial environment (winning better than 80 per cent of the audience against competition) TVNZ willingly accepts a special obligation to reflect New Zealand identity and culture. The majority of TVNZ's local programs are funded from its commercial revenue. This year 2,700 hours of New Zealand programming will be screened, representing an investment of approximately $150 million. Included within that is about $12 million worth of Maori language, children's and minority programming funded by the licence fee.

Independence

On the issue of independence, especially in news and current affairs, I think the two organisations would have a common view. There is no special guarantee of independence in any system of ownership or operation. Independence is a product of security and strength in a society which values freedom of speech.

A commercial broadcaster is said to be potentially in the thrall of advertisers; a state-owned operation is similarly said to be at risk from the politicians who ultimately hold the purse strings.

We have the apparent double disadvantage of being, on the one hand, owned by the state, and on the other dependent on commercial advertising for the bulk of our income. However, I believe, it is precisely this mixed form of funding that shields us from the excesses of government on the one hand, and of big business on the other. The relationship with the Broadcasting Commission is at arm's length, and it is, itself, statutorily independent. A good commercial income in fact ensures independence from political influence. The owners of the business, on the other hand, have no commercial motives for interfering with editorial processes. In New Zealand, the legislation expressly prohibits government interference in programming and news.

The existence and application of the PBF means programming is not driven solely by the rhetoric of the cash register. There have been suggestions that the PBF should be abolished. That would be a retrograde step. It puts public broadcasting directly under the influence of government - an influence not shown to be outstandingly beneficial where it occurs - and hostage to the exigencies of the government's budgeting.

Funding

For television in New Zealand the advertising industry will deliver approximately $300 million; public funding will supply about $32 million for television overall. The economic reality is that the market cannot be persuaded to deliver more advertising and viewers are unwilling to pay more than the existing $100 or so per year licence fee.

One solution is participation in wider markets: TVNZ has a 35 per cent shareholding in Sky Pay TV, which draws on a different income base from broadcast TV (it is a competitor for the $170 million or so a year New Zealanders spend on VCR rentals). A further alternative is to seek wider markets through export activity, and TVNZ has begun this expansion with satellite services to the Pacific region.

'There is no special guarantee of independencein any system of ownership or operation'

Radio, in New Zealand, has traditionally enjoyed a higher share of the total advertising media spend than it has in other countries (UK 1-2 per cent, USA 7-8 per cent, Aust. 9-10 per cent, NZ 12.8 per cent). But, like TVNZ, RNZ will have to diversify into other areas of business allied to radio.

The pressure on commercial radio income is already intense. This is a very mature market nearly 60 stations on a population base roughly the same as Sydney's. You can imagine the effect of the latest announcement by the New Zealand Radio Frequency Service that it will be putting 38 AM and 110 FM frequencies up to tender in July.

Like RNZ, TVNZ is free to sell any form of sponsorship, but it still forms only about 3 per cent of total commercial revenue. Good popular local programming is the cornerstone of effective competitive performance. It will become the principle weapon of television operators against satellite delivered competition. In a competitive environment in New Zealand, local programs (including News) take nine out of the top ten and seventeen out of the top twenty-five ratings.

The Broadcasting Commission has formed the view that if sponsorship is allowable it ought to be encouraged, primarily as a way of limiting the dependence of its clients on the total funding from the PBF.

We have resisted this on two grounds - that, given the limited pool of available advertising, existing budgets will tend to be divided not extended, and that will have an impact on our commercial revenue streams; secondly, and more importantly, we believe that New Zealanders are entitled to have a choice of programming free of advertising.

National identity

In New Zealand, the mechanism for ensuring the continuation of minority programming is the Broadcasting Commission, the recipient and distributor of the licence fee. A lively debate has developed over the role of the Commission. Its managers see the Commission as an agent for investment in commercial prime time, increasing New Zealand content by supporting, for example, a local comedy show or soap opera. In the small New Zealand market, however, the Commission is the only source of funds for true minority broadcasting, and diversion of public funds to prime time soaps would mean the end for Maori language programming.

The mechanism seems to be effective in radio, but for television legislation may be needed to give clear directions to those appointed to administer public funds.

In radio, the National and Concert networks are fully funded by the Commission, and specific attention has been paid to developing Maori broadcasting initiatives. The latter are becoming established as stand alone local tribal stations, and the provision of specialised news and current affairs programs for use on both RNZ and local stations.

Community access stations are also springing up in main centres - democratising the medium, so to speak. Unlike their counterparts in Australia, these stations will also attract Commission funding.

Summary

Whether the deregulation of broadcasting and telecommunications in New Zealand will lead to a plurality of quality services to the public remains to be seen.

Initially, however, there is no doubt that the national broadcasters have greater freedom from bureaucratic restraints to take advantage of all the opportunities which the deregulated environment allows. That it has caused them to become more efficient and effective as service providers is beyond question.

But the public continues to debate whether more TV and more radio has yet led to a marked improvement in programming and only time will tell whether the cultural landscape will be enriched or become increasingly arid.

Personally, I'm optimistic.

Beverley Wakem is the Chief Executive of Radio New Zealand Limited. This article is an edited version of a paper presented to the conference "Australia's National Broadcasters in the 1990's" held in Sydney in June.

Contempt injunctions: the "Mr Bubbles" case

Alec Leopold and Alister Henskens report on this important new decision on contempt

In June of this year TCN Channel Nine Pty Limited (Channel Nine) broadcast throughout Australia on the 60 Minutes program a story concerning alleged child abuse by a man widely known as "Mr Bubbles". On the last business day prior to the broadcast of the program the Attorney-General for New South Wales, Mr Dowd, sought an injunction preventing the program from being aired.

In November 1988 Mr Anthony Deren (and others) had been charged with alleged acts of indecency with, and indecent assault of, children who attended a kindergarten in Sydney. During the subsequent committal proceedings in July 1989 the magistrate concluded that the evidence of the children should not be admitted in support of the charges laid. Following this ruling the prosecution was withdrawn.

The defamation proceedings

The committal proceedings and the dropping of the charges gave rise to a considerable amount of publicity. Further, on the night that the charges were withdrawn the Hinch program broadcast an interview with Mr Deren. During the course of that interview Mr Deren admitted to an earlier incident concerning two girls between the ages of 10 and 13 in Papua New Guinea. Mr Deren said during the interview "I seem to have this need to touch young girls in the private parts, and on one occasion I was apprehended by the police."

After the withdrawal of charges against Mr Deren, he and his wife commenced a number of defamation proceedings. Which would be heard by a jury. It was these proceedings which were the subject of the injunction application by the Attorney-General but the hearing before Justice Hunt focused only upon the defamation action brought by Mr Deren against the publisher of New Idea magazine.

During the six days prior to the Attorney-General's application for an injunction to restrain broadcast of the 60 Minutes program, Channel Nine had broadcast a number of excerpts from it by way of promotion. It was said that the promotional material indicated that the program would be an analysis of whether Mr Deren was in truth guilty of the charges which had been dropped.

When the hearing commenced before Justice Hunt Mr and Mrs Deren were, at their request, joined as plaintiffs in the Attorney-General's application for an injunction. This was, as the Judge said in his judgment, a rather unusual course. Normally an aggrieved plaintiff only institutes proceedings for contempt of court where the Attorney-General declines to do so.

Legal reasons

The plaintiffs did not contend that an injunction ought to be granted on the basis that the program was defamatory - see generally the *Greg Chappell* case (1988). Their only contention was that the broadcast should be restrained as being a contempt.

Justice Hunt applied a two-step analysis in determining whether the injunction should be granted. He asked:

- did the program amount to a contempt (in effect treating the test at this interlocutory hearing as being the same as it would have been for a final hearing); and if so
- would the likely effects of such a contempt outweigh the inconvenience or injury to Channel Nine if an interlocutory injunction were granted (ie the "balance of convenience" test)?

The judge applied the civil onus of proof notwithstanding the criminal nature of a contempt. But he did so subject to the *Briginshaw* v *Briginshaw* (1938) criteria and took into account the seriousness of the allegation of contempt being made as well as the grave consequence of an order, namely prior restraint of a media publication.

There were two bases for the plaintiffs' application:

- that the program had a tendency as a matter of practical reality to interfere with the trial of the New Idea proceedings as it had a tendency to influence the minds of potential jurors - a "jury contempt"; and
- that the program so exposed Mr Deren to the prejudice of prejudgment of the issues or of the merits of the New Idea proceedings as to apply pressure upon him to settle them on terms to which he would not otherwise have agreed - a "prejudgment contempt".

Jury contempt

Justice Hunt accepted that the defamation action would, in all likelihood, take place about 10 to 12 months after the program.

In determining whether the program had a tendency as a matter of practical reality to interfere with the New Idea proceedings, the judge adopted a realistic and flexible approach. The cases on this type of contempt make it clear that the appropriate test to be applied is whether the program has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case. However, although there purports to be an element of practicality within the test, it is typically applied in such a way that the court will not speculate on post-publication events including events at the very trial which is allegedly prejudiced. This means, in practice, that courts will not usually consider the admissibility or non-admissibility of evidence at the ultimate hearing (for example, the admissibility of a confession in a criminal trial in circumstances where a publication has disclosed the fact that a confession has been made).

Justice Hunt was prepared to consider what evidence would be admissible at the New Idea hearing. He adopted the practical approach that only evidence in the program complained of which would not be heard at the ultimate hearing could have a tendency to prejudice the outcome of the New Idea hearing. In summary, the Judge concluded that the inadmissible and prejudicial material contained within the program would not have added very much to the material which would have been admissible as evidence of the truth of the imputations pleaded by Mr Deren in the New Idea proceedings. He therefore concluded that the program did not, as a matter of practical reality, have the appropriate tendency to prejudice the New Idea hearing.

In making this determination, the Judge noted that the imputations drafted by Mr Deren in the New Idea proceedings were broad and on the basis of the decision in *Maisel* v *Financial Times Limited* (1915) the broad imputations would allow New Idea magazine to call a wide range of evidence. This would include evidence such as evidence of Mr Deren's activities in Papua New Guinea.

In addition, Justice Hunt thought that there was a very real possibility that the evidence of the children would be admissible.

Moreover, the judge also adopted a more practical approach when considering the effect of the program in the context of other

prejudicial but legitimate publicity and did not confine himself to prior publications. He held that:

"There will undoubtedly be throughout the year leading up to the hearing of Mr Deren's claim against the New Idea magazine a continuing public discussion of a subject of intense public interest - namely, the adequacy of the methods of investigation adopted by the police into allegations of child sexual abuse where very young children are concerned ... [I]n the course of that inevitable (and much needed) public discussion during the next year, it is also inevitable that the problems which arose in the 'Mr Bubbles' case will be referred to ..."

The courts have always been prepared to consider the effect of subsequent publicity but only in respect of events that are strictly inevitable, such as committal proceedings. The udge's conclusion that future media coverage would be inevitable represents a significant relaxation of a hitherto unrealistic judicial approach.

Prejudgment contempt

In considering whether the program prejudged the defamation proceedings and would exert pressure on Mr Deren to settle, Justice Hunt considered a number of factors.

Firstly, Justice Hunt noted that in the two leading cases on this form of contempt - the 1974 *Sunday Times (Thalidomide)* case and *Commercial Bank of Australia* v *Preston* (1981) - the litigation alleged to be prejudged was not only the subject matter of the publication but was largely its inspiration. Indeed, in the *Sunday Times* case, the newspaper expressly stated that its intention was to bring pressure to bear upon the drug manufacturer.

Secondly, Justice Hunt noted that not only was the thrust of the program directed to the aborted committal proceedings but that it did not even mention the defamation proceedings being brought against New Idea. He drew a distinction between different types of contempt: the jury contempt may arise irrespective of the publisher's ignorance of the proceedings in question, whereas a publisher who is ignorant of the fact that proceedings are on foot cannot be guilty of prejudgment contempt. On this basis Justice Hunt held that there was no prejudgment contempt and the *Sunday Times and CBA* v *Preston* cases were distinguishable.

Thirdly, Justice Hunt held that in any event (as he had found in holding that there was no jury contempt) the weight of previous publications was not materially added to by the program so as to put any significant additional pressure upon Mr Deren to settle as alleged.

As the court found that no contempt existed, there was no need to look at the question of the balance of convenience.

The practical implications

1. The case highlights the risk that publishers run when they seek to promote in advance matters which are potentially contentious.
2. The case is also a reminder to the media to have an eye not only to the risks of defamation and contempt of criminal proceedings but also to contempt of civil proceedings, and even then to prejudgment contempt as well as to jury contempt.

'the jury contempt and the prejudgment contempt will often stand or fall together'

3. It is often assumed by lawyers and journalists alike that a publication will be safe from proceedings for contempt of court if it contains material which has already been placed in the public domain by previous publications which are themselves legitimate and not in contempt. In this case a novel proposition was put by the Attorney-General and accepted in principle (but not on the facts) by Justice Hunt: where for the first time a publication gathers together material previously published separately then (particularly, if coupled with a sensational presentation) the overall effect may be sufficiently prejudicial as to constitute contempt.
4. The acceptance by Justice Hunt of the proposition that ignorance of pending legal proceedings is sufficient to avoid liability for prejudgment contempt raises a difficult practical issue for the media: should the journalist make inquiries of court registries to ascertain what relevant proceedings might be on foot? Although such a search may arm the journalist with useful information to prevent any potential jury contempt, the information may deprive him or her of the excuse of ignorance in relation to a prejudgment contempt. Query if mere knowledge of the existence of the litigation deprives him or her of that excuse or whether, as Justice Hunt seems to suggest, the excuse is only open to someone who is ignorant of both the existence of proceedings and the nature of [the] issues. The latter approach on its face encourages the journalist who knows merely that X has sued Y to turn a blind eye to the issues.
5. In considering the argument that the program prejudged Mr Deren's proceedings, the judge was prepared to attach some weight to the inclusion in the program of the Hinch interview with Mr and Mrs Deren in which they denied the allegations made against them. This led the judge to "reject a description of the program as a whole as amounting to a prejudgment of the issues or merits of the defamation claim ..." However, the judge was careful not to attach too much weight to the inclusion or omission of such a rebuttal in case it was abused in future by a plaintiff who uses the simple expedient of refusing to respond or to refute allegations to increase his or her chances of obtaining an injunction on the basis that the program prejudges the issues in a one-sided manner. The clear signal to journalists - if ever it were needed - is that the subject of a contentious program which risks being in contempt should be invited to present his or her side of the argument.
6. The case demonstrates that the jury contempt and the prejudgment contempt will often stand or fall together where a jury case is concerned. It was ultimately similar reasoning which led Justice Hunt to the conclusions that the jurors would not have been unduly influenced and that Mr Deren would not have been unfairly pressured. It is, however, possible to imagine at least two types of jury cases in which there could be a prejudgment contempt on the basis of the publication putting unfair pressure on a party to settle the litigation, without there being a jury contempt:
   (a) where there is a sufficient delay between publication and trial so as not to risk influencing the jurors as a matter of practical reality; or
   (b) where the recipients of the publication are sufficiently limited to avoid the risk of a jury contempt but nevertheless the publication is influential in the pressure which it brings to bear on a party.

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Developments in character merchandising

Patrick Fair examines some recent cases in this area and suggests the scope for such claims is narrowing

Recent decisions on the common law action of passing off and misleading or deceptive conduct under section 52 of the Trade Practices Act illustrate the developing sophistication of the law in the area of character merchandising.

Since the landmark decision in *Henderson* v *Radio Corporation* (1960) it has been recognised in Australia that the action of passing off can be used to prevent the unauthorised use of a valuable commercial reputation. In that case, a photograph of the Hendersons, a couple renowned for professional ballroom dancing, appeared on an album of dance music without their permission. The full Court of the New South Wales Supreme Court found that the Hendersons had a valuable reputation as ballroom dancers and the use of their photograph amounted to a passing off of the dance album as being associated with or endorsed by them.

Common activity

The English Courts have limited the scope of the action by application of a common field of activity test. The doctrine first appeared in *McCulloch* v *May* (1948) where a morning radio announcer broadcasting under the name "Uncle Mac" sued the manufacturers of shredded wheat breakfast cereal marketed under the name "Uncle Mac". In that case, the lack of any common field of activity led to the failure of the plaintiff's action.

Australian courts have rejected the application of a common field of activity test as such on the basis that the real question is whether consumers are likely to be misled regarding a connection between the goods and the relevant character, a matter which leads to a consideration of the fields of activity but which is not solely dependent on such consideration.

An Australian case which highlighted the limitations of passing off and misleading or deceptive conduct actions in character merchandising decided during the 1970's is the case of *Cadbury Schweppes Pty Ltd* v *Pub Squash* (1980). In that case, the makers of the lemon drink Solo, advertisements for which featured the vigorous [ed: but tragically unco-ordinated] Solo Man sued Pub Squash for making advertisements which used similar imagery to promote their lemon squash product. The court found that the image of rugged outdoor activity even when used in a commercial context to market a product was not one in which a product owner could obtain a right. The court did not think consumers were misled regarding the origin or endorsement of the products.

Recent cases

A more recent Australian case which further develops the law in this area is the 10th *Cantanee* v *Shostana* (1987) case. Both at first instance and on appeal, the plaintiff failed to restrain use of her name (Sue Smith) by the advertisers of Blaupunkt televisions. The advertisement, showed a woman with blonde hair watching a Blaupunkt television using the remote control. Sue Smith had different colour hair and when the face of the woman in the advertisement was briefly seen, it was not Sue Smith. The court rejected the claim on the basis that Sue Smith would not have been recognised by the audience of the advertisements as the woman in the advertisements particularly because the name Sue Smith lacked distinctiveness. She had a different appearance to the woman in the advertisement and was not widely enough known for it to have been likely that the audience would make any association between the product and the plaintiff. Character merchandising issues were closely considered in two cases involving the first Crocodile Dundee movie and a case involving Tracy Wickham. The *Tracy Wickham* v *Associated Pool Builders* (1988) case involved a dispute over a licence granted by Tracy Wickham to Associated Pool Builders to use her name in relation to the sale of their swimming pools. There was a dispute over whether the licence had been terminated and an argument by Associated Pool Builders that even if it was terminated they had built up a reputation for selling their pools under the name "Tracy Wickham Pools" and were entitled to continue to enjoy that established reputation. The judge rejected the pool builder's claim. He found that it was acceptable for Tracy Wickham to license her name for a period to be used in relation to a product and, that upon that licence coming to an end, it was misleading or deceptive conduct for the pool building company to continue to use her name without her approval.

Similarly, when Paul Hogan and Rimfire Films (which made the Crocodile Dundee movies) sued the proprietors of two shops trading as "Dundee Country" their claim succeeded (*Hogan* v *Koala Dundee* 1989). In that case the shops sold various Australian paraphernalia marketed under the names and in association with images and names which clearly made a link with the Crocodile Dundee film including a character "Koala Dundee" who was dressed as the character Mick Dundee from the Crocodile Dundee films, brandishing a large hunting knife of the kind which featured in the first film. Justice Gummow decided an ordinary consumer entering the shop would mistakenly believe business was carried on with the approval of the makers of the Crocodile Dundee films.

The Appeal Court second decision in the other Hogan case (*Hogan* v *Pacific Dunlop* 1988) is a leading case in the area. Pacific Dunlop produced a series of advertisements including a television advertisement and some posters featuring a character who, although clearly not Paul Hogan, was dressed as Mick Dundee and promoted Crosby Leather shoes.

The evidence showed that the advertisements had been produced as a spoof of the movie. The majority of the full Federal Court found that the effect of the ads was immediately to grab the audience's attention by use of the Crocodile Dundee imagery and for that reason Pacific Dunlop's conduct in using a spoof of the Crocodile Dundee character to promote its products amounted to passing off. In dissent, Justice Shepherd said that there was no misleading or deceptive conduct or passing off because the evidence showed that although consumers were drawn to consider the product by the name or image, none of them really believed the produce was made by anyone other than Pacific Dunlop; Crosby being a well-known brand name and Leather shoes a Crosby product.

A narrowing of the principle

Justice Shepherd's view is similar to the view taken by the High Court of England against the Grundy organization when they sought to restrain the sale of a booklet of photographs of characters from Neighbours (*Grundy* v *Startrain* 1988). Grundy sought to restrain the publication of the booklet on the basis that it misrepresented an authorisation or approval by the program Neighbours.

The judge, consistent with the view that has been taken in the United Kingdom cases on this point, found that there was no other way to sell a book featuring photographs of the characters of Neighbours other than to describe them as such and that to do so was entirely permissible. When one examined the book one discovered that it was produced by an independent organization. The photographs belong to the publisher or had been printed with the licence of the owner of the copyright. Accordingly, publication of the booklet was not passing off and should not be restrained. The view being taken on this point in the United Kingdom must concern Australian lawyers, particularly having regard to Justice Shepherd's dissenting judgment in the Hogan case.

The most recent decision in the area is the Federal Court of Appeal decision in the Gary Honey case, *Honey* v *Australian Airlines* (1989) and on appeal (1990). Gary Honey is a champion long jumper who holds a number of Australian and Commonwealth records. He competed in the Commonwealth Games on behalf of Australia and was photographed in full flight during the long jump. The photograph was taken with the permission of the copyright owner and used on posters distributed in schools by Australian Airlines. Australian Airlines had produced a range of posters of various athletes. The poster featuring Gary Honey featured in small letters in one corner his name, description of the event and the words "Australian Airlines". The same photograph was also used by a religious organization of the charismatic church in South Australia called the House of Tabor.

Gary Honey sued Australian Airlines on a character merchandising point. He asserted his image was being used to promote the business of Australian Airlines without his approval. Against the House of Tabor he also argued that he was a Catholic and objected to having his image associated with the House of Tabor and the promotion of its products.

Gary Honey's case failed at first instance and on appeal. On appeal, the court acknowledged that it is possible for someone with a valuable commercial reputation to prevent it being used in a commercial context without their permission. However, the court found that the manner of the use of the photograph in both instances conveyed to an on-looker a vigorous athlete in full flight rather than the personality or reputation of Gary Honey. The court also had regard to the fact that Gary Honey was an amateur athlete who would have been obliged to pay his royalties to the Amateur Athletic Association and to the manner in which both items were distributed: the poster to schools and the House of Tabor's publication to Christian bookshops.

'our law is based on misleading and deceptive conduct and passing off'

The finding for the defendants was made notwithstanding a recognition that Australian Airlines' principle objective in promoting sport in schools is one of improving the goodwill and standing of the company in the community and evidence to the effect that Gary Honey had received sponsorship for promotion of sportsgoods in previous years.

The recent cases demonstrate that our law in the area of character merchandising is based on misleading and deceptive conduct and passing off and not on any recognition of a property in personality or character. In the absence of copyright or registered trade mark right which is infringed by the unauthorised use of character, the owner of a valuable character must have a well established reputation and the offending message must be in a manner which conveys a commercial endorsement before the owner can be confident of success.

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Public television in Australia

from p23

public TV, culminating in the Department of Transport and Communications commissioning the Communications Law Centre (CLC) to prepare a major report evaluating the test transmissions and assessing the readiness of public TV groups to provide a sustainable television service.

The Department is now reviewing responses to the report from the public TV sector and other interested parties. The CLC report concludes that the groups which are ready to provide public TV services, on an interim or test basis, should be allowed to do so and emphasises that TVU in Melbourne, in association with Open Channel, and Metro TV in Sydney are best resourced for this. Most groups are considering setting up consortiums which could accommodate various community organisations and educational institutions. This would assist the financial viability of an alternative new television service.

It is extraordinary that the federal government will shortly decide about the introduction of pay TV services without simultaneously making a long overdue decision regarding public TV.

Local programming

It would be naively optimistic to assume that any pay TV service would accommodate local production (although some aspirant players argue differently), or community and educational programming. The likely scenario of pay TV channels transmitting movies, sport and other entertainment, without a high level of Australian content suggests there is a great need to introduce a public TV service that would create a balance in the overall broadcasting framework and would hopefully provide the missing link in the programming diversity.

The Saunderson Inquiry report *To Pay or Not to Pay* , recommended that pay TV (delivered by cable) should include provision for one channel to be allocated for community programming that would be cross subsidised by a percentage of the operator's gross revenue. This raises the possibility that any Australian public TV service could be partially supported by pay TV.

Meanwhile, the public TV sector continues to argue that the remaining UHF band 4 frequency, Channel 31, should be allocated to public TV. Considerable uncertainty surrounds the government's plans for use of the sixth channel and absence of relevant policy regarding frequency allocation has lead to the public TV sector staking a claim.

Ultimately the real prohibiting factor to introducing public TV is the lack of the political will to do so, as demonstrated by successive governments. With a new Minister in Kim Beazley and proposed sweeping reforms to broadcast and telecommunications regulatory regimes it is critical that public broadcasting is fully on the agenda.

Beth McRae is the General Manager of Open Channel Co-Operative Limited

Right of reply

Peter Bartlett discusses the current ABT inquiry into a new program standard to create a right of reply

The Australian Broadcasting Tribunal (ABT) is considering whether to determine new television and radio program standards to provide a right of reply to any person or group directly affected by broadcasts on controversial issues of public importance.

Standards imposing a duty on broadcasters to present news programs in an accurate and fair manner already exist. Television Program Standard 15 requires that news programs present news accurately, fairly and impartially while Radio Program Standard 5 requires radio news programs to present news accurately.

Should there be a right of reply?

Acknowledging that there are many sides to a debate it follows that it will be almost impossible to allow every shade of opinion to be heard. Unlike a newspaper, a radio or television station cannot simply expand its output to make room for all the views which wish to be heard: the right of reply will be broadcast at the expense of other material.

The ABT's proposal goes far beyond the overseas examples cited in its Information Paper for this inquiry.

The American Fairness Doctrine simply requires that a broadcaster provide opportunities for the presentation of opposing view points, and does not confer an enforceable right for people possessing certain views to be heard. The Canadian Broadcasting Commission merely requires equitable treatment of more than one view. The European right of reply is only available in defamation cases. The British guidelines deal only with corrections, where an individual or organisation has been misrepresented.

A right of reply requires broadcasters to make available their resources and broadcast time in order to transmit views and opinions which may be unrepresentative and peripheral. It implies a shift of editorial control from journalists and broadcasters to the ABT which will ultimately have to enforce the right of reply.

Who will have the right of reply?

The proposed test for entitlement to a right of reply has two distinct parts:

1. any person or group directly affected; and
2. broadcasts on controversial issues of public importance.

The first part of the test would probably be broad enough to encompass people who were distressed or shocked by a broadcast as well as those whose reputation or financial interests were damaged by it. It seeks to ensure that people seeking a right of reply must have sufficient connection with the controversial issue of public importance. But is it the right connection?

For example: a broadcast on a local radio station endorses a controversial new development in a wilderness area, which would degrade the nearby farming land and affect the livelihood of local fishermen and which is opposed by national conservation bodies. If the development proceeds the developer will be enriched, and the fishermen and farmers impoverished. The conservation bodies will not be affected. Who has a right of reply?

The second part of the test is satisfied, because in the area where the radio station broadcasts the development is very controversial. However it can only be said that anyone is affected if one assumes that the broadcast improves the development's chances of approval, and even so it is unlikely that the broadcast's effect on any particular individual or group will be sufficiently direct to attract a right of reply. How is full and fair debate ensured by this process?

The requirement that someone must be directly affected by a broadcast may exclude those who have a legitimate interest in participating in debate on public issues because it requires that a person be affected by the broadcast rather than by the issue itself.

How will the right be recognised?

To be effective a reply should reach exactly the same audience as those who received the original material, at a time when the original material is still in their minds. The greater the delay between the broadcast of the original material and the broadcast of the reply the less relevant will be the reply, the greater the chance that it will reach a different audience, and the less likely it is that the audience will remember the original material. Far from redressing the balance, the reply might simply be a second one-sided broadcast on the issue.

The most likely way for the right to be enforced is by the ABT or court upon the application of a person who has viewed or heard the broadcast. The longer the ABT or court takes to reach its decision about whether a right of reply exists the less relevant and effective will be the exercise of that right. On the other hand the quicker the determination the greater the injustice which may be done to the broadcaster, who may suffer an order that a right of reply exists simply because it is unable adequately to defend defensible material at short notice.

Liability for reply

Who will be liable for defamatory remarks made by a person exercising a right of reply?

If the broadcaster is to be liable it may suffer a great injustice if it cannot control the contents of a reply. On the other hand, the broadcaster may then be able to rob the person exercising a right of reply of its value. Further, if the broadcaster is not liable a person injured by a widely broadcast reply may be left with no remedy except an action against an insolvent person exercising a right of reply.

If a broadcast reply is capable of generating further replies, a broadcaster may find that its broadcast time is taken over by a controversy fuelled by material it never wanted to broadcast. If replies to replies are not allowed, the content of replies would be more protected than other broadcast material.

Conclusion - a right of reply is not necessary

There is no practicable way of making a right of reply achieve its purpose. The best way of ensuring a full and fair debate is simply to impose an obligation upon television and radio stations that broadcasts, and not just news programs, should be accurate, fair and impartial.

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"Telecommunications law, Australian perspectives"

Alan Robertson reviews the first Australian text on this area

The stated aim of this book is to provide public access to the widest range of experience, and insights from experts concerned with making and reforming the laws and applying them in practices.

The question to be answered, therefore, is whether it achieves that laudable aim.

Note that the target is 'public access', so that it is apparently not meant to be a specialised reference work only for lawyers. The texts I sampled - and that is most of them - are very readable. Potential readers who are not lawyers can be reassured that they will not suffer the mind-numbing that may have occurred when struggling with some other legal commentaries.

In all, the book follows the excellent example set by Justice Michael Kirby, whose Foreword is both interesting and informative, while, at the same time giving a brief survey of how some contributors' perspectives differ from one another.

I believe that the aim of appealing to a wider public interest has been achieved. By offering a range of different views, rather than having all contributors follow a common line, the work achieves balance.

The scope of the book

Some idea of the scope of the book can be gained from the subject matter of chapters. These begin with an outline of how the telecommunications regulatory environment has developed from colonial times, through federation, up to the 1989 Telecommunications Act, with expectations of more to follow as a result of the government's review of the role of and relationship between, the public telecommunications carriers. Different perspectives of the 1989 Act, and how it came about, are then discussed before we get to specifics. These cover private networks, resale and interconnect, value added services, cabling, Telecom's joint ventures, international regulations, electronic data interchange, regulatory approvals by Telecom before 1989 and by AUSTEL since then, the Trade Practices Act and the role of competition law.

The last six chapters are concerned with Telecom's community service obligations, social responsibilities of government-owned utilities, fair pricing of monopoly services, the alternative of competition, and the consumer protection which the Ombudsman can provide for users.

Altogether the coverage is thorough and comprehensive. Many people in the industry may be reasonably familiar with a lot of the matters discussed but will still find this collection of topics and the manner they are dealt with most useful. Newcomers to the Australian regulatory environment, or those whose employment in the industry has not involved them in policy issues to any extent will find this an invaluable reference. The convenience of having one volume containing details of the more important events and decisions of the last ten years or so should appeal to a wide range of people.

Other aspects

The main index is detailed. Using it to check on the inclusion of a number of different matters of particular interest to me did not show up any deficiencies. The dreaded 'cadastral separation' requirement, which is going to plague many of us until the law is changed, gets a mention by three of the contributors, for instance.

As well as the main index there is a very useful legislation index, although I suspect that will be of more interest to lawyers than to general readers. Diagrams, tables and appendices are given a separate listing and are consequently easy to find. Brief biographical notes are provided for all contributors and there is a glossary of abbreviations.

As to the production of the book, the typeface is clear and big enough so that hose of us over forty will have no trouble reading it. The binding looks durable; the artwork of the cover is distinctive without being pretentious. It should be easily spotted on the bookshelf.

In summary, "Telecommunications Law" should be a most welcome reference for a wide cross-section of people in the industry. We all need to be better informed on the issues it covers. It will be a comfort to have it handy, and be able to quote from it. At $78 a copy - including postage - it won't break anyone's bank. Besides, it should be tax deductable.

The editor, Professor Armstrong, his sponsors at CIRCIT and the individual contributors are to be congratulated on a timely and very useful book. Highly recommended.

Alan Robertson is Issues Manager with the Australian Telecommunications User Group. "Telecommunications Law" retails for $78.00 and is published by Media Arm Pty Ltd of PO Box 56, Parkville, Victoria, 3052.

Holes in the net *from p20*

links were removed, then users with modems or radiolinks would take over. Admittedly costs would increase and volume decline, but USENet would survive, even over Australia's long-haul distances.

Net Value

The net is a living organism, an information bazaar of staggering variety and scope. Despite the pettiness and immaturity of the minority, some of the best minds in the world grace the net with their presence. Problems are solved, issues are clarified. The net has a culture and etiquette all of its own. For some months now, professional and amateur astronomers have been discussing and calculating the best way to deflect large asteroids that could be on a collision course with Earth. It is difficult to think of any other medium that could bring so many first-rate minds together so easily and for such an important technical problem.

What people do with the net will challenge legal minds, transborder agreements, and especially our social mores and cultural values. Until now it has been an unregulated combination of intellectual feast and interpersonal vomit. What happens to it now and what AARNet's contribution to it will be is anyone's guess. Hopefully, some combination of public debate and bean counting will determine what it becomes and what it is for.

Dr Perry Morrison lectures in computing at the University of New England.

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Richard Coleman, Kerrie Henderson, Page Henty, Yasna Palaysa, Stephen Peach, 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:

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Communications and Media Law Association

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

Issues of interest to CAMLA members include:

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

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

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

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

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

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- telecommunications
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- censorship
- film law
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