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International rules and national spectrum planning

Colin Oliver explains the history and role of international rules in national spectrum planning and argues that we have a vested interest in effective international regulation

Introduction

Since 1903, there have been international agreements on the use of the radio frequency spectrum. Today, these agreements are hammered out by the International Telecommunication Union (ITU), in large and usually lengthy World Administrative Radio Conference (WARCs) and embodied in the international Radio Regulations annexed to the International Telecommunications Convention.

Radio signals are propagated by radiated electromagnetic energy, and the "radio frequency spectrum" is the range of cyclical oscillation rates that can be used to convey information. Cycles per second are expressed as Hertz. One kilo-Hertz equals 1000 Hertz. One Giga-Hertz (GHz) equals 1,000,000,000 Hertz.

Producing multilateral treaty agreements on radiocommunications has never been easy. Right now, demands for spectrum for new technologies like high definition television (HDTV), digital audio broadcasting, satellite and terrestrial mobile services are producing new puzzles for the ITU.

Microwave frequencies in the general range of 1-3 GHz are sought for satellite sound broadcasting, public land mobile telephone services and satellite mobile services. This frequency range is already heavily used by other services. Spectrum for satellite broadcasting of HDTV is being sought at much higher frequencies - up to 25 GHz - where present usage is much lighter.

Toward the lower end of the radio frequency spectrum, the prospects for finding more frequency bands for short wave broadcasting are very daunting: these bands have been congested and turbulent since the 1930s and many neighbouring bands are heavily used by developing countries for basic national communication links.

History

The discipline of spectrum management developed in response to a real problem. Radio stations interfered with each other, sometimes across national borders, and some agreements were required to prevent this happening. Similarly, it was obvious from the beginning that communications between ships and stations on land required agreement on which particular channels should be used for particular purposes. The apparent failure in 1912 of a nearby ship to listen for SOS signals while the "Titanic" was sinking shocked governments into recognition of a need for greater international discipline in the use of radio communications.

The first American broadcasting services competed with each other by using more and more power in order to be heard by their listeners, and their frustrations prompted the comment from Herbert Hoover, then Secretary of Commerce, that "broadcasting is probably the only industry of the US that is unanimously in favour of having itself regulated." The creation of the Federal Communications Commission followed in 1927.

Similar problems occurred in Europe where regional agreements were adopted to bring order to the scene and these agreements were later absorbed into the ITU regime.

Some of these problems are still with us. For example, a power struggle continues to this day in the use of the international high frequency (short wave) broadcasting bands, although the outbreak of peace in Europe should have had a positive effect on broadcasters interested in that region.

In this Issue –

National rights within the radio regulations

The present international rules for use of the radio frequency spectrum took shape after the Second World War, when there was an urgent need to put an end to wartime disorder in the use of radio and, equally, there was an opportunity to plan the use of new technologies and higher frequency bands which could now be used for peacetime purposes. Subsequently, the international frequency table has grown, as planning has extended, to ever higher frequency bands in an effort to make possible the orderly introduction of new equipment and services.

ITU signatories agree under Article 6 of the ITU Constitution to be bound by Regulations "in all telecommunication offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio services or other countries"

Obviously, as an island continent, Australia has more flexibility in national spectrum planning than many other countries because, at least in some frequency bands, radio

interference is unlikely between Australia and our neighbours.

The Radio Regulations define which services may use which frequency bands. In some cases, international planning extends to the allotment of individual national frequency assignments, especially for broadcasting services where there is international sensitivity about satellite transponder communications.

Within the Radio Regulations, we should notice not only the existence of world agreements here, but also the way these apparently simple agreements are qualified within the Radio Regulations themselves. Firstly, we should note that for many frequency bands in the international frequency table there are multiple allocations. For example, where the allocation is to FIXED and MOBILE services on an equal primary basis, national administrations have a great deal of flexibility in deciding how best to use the frequency band within its national borders. Will we have fixed or mobile services in Australia? What kind of fixed or mobile service shall we have? In this sense, many international frequency allocations are permissive rather than prescriptive. Other allocations, of course, are very specific indeed, especially for international safety services.

Secondly, there are regional variations between the Americas, Europe and Africa, and the Asia Pacific region. Often in our region we find that there are equal primary allocations allowing us to follow the lead of the Americans or the Europeans, as we see fit.

Thirdly, within a particular agreed international allocation are national footnotes by which a particular country or group of countries assert the right to do things differently from the crowd. This is not a minor point; AUSSAT is configured within an Australian national footnote to the international frequency table.

Fourthly, when countries sign the Final Acts of conferences amending the Radio Regulations, they may state a "reservation", announcing that they do not accept an obligation to conform to the agreement on some point.

Enlightened self-interest

No country can ignore the Radio Regulations. At the formal level of international law, services that do not accord with the Radio Regulations and which cause interference to the legitimate services of other countries are treaty infringements, and the offender will be expected to stop. There is no enforcement procedure, but it is in everyone's interest to observe the rules.

A number of practical considerations support observance of the Radio Regulations. First, there is the likely economic cost of departing from international practice where this means having no ready access to transmission equipment, or losing the benefit of world production economies or market opportunities.

Second, there is the problem that idiosyncratic frequency plans must operate within strict geographical limits, to avoid radio interference. Obviously, mobile transceivers in ships, aircraft or international road transports, or the simple broadcasting receiver in a traveller's baggage, will be of no use without uniform international frequency allocations. The increasingly global scale of business activity emphasises the importance of "roaming" capabilities for mobile radio communications - and "mobiles" are the current major growth area.

Finally, there is the risk that new service allocations agreed internationally could be difficult to exploit at home if major investments have been made that diverge from the world pattern. The scope that exists for national variations from international patterns must be assessed case by case. Where international communication links are required, the case for conformity is compelling. Where international interference is a risk, there is an international obligation to conform. Where neither of these constraints apply, national flexibility is constrained primarily by equipment availability and cost. World production of equipment generally conforms with patterns established by the ITU's Radio Regulations.

Innovation and continuity

When new radio communications technology is introduced, it will often fit readily into known operational patterns and established frequency plans. However, where this is not possible, because the technology requires a clear block of spectrum to commence service, new frequency allocations are required.

Unfortunately, many spectrum allocation questions amount to a zero sum game: one new service will gain spectrum only at the expense of another, and frequency bands must often be cleared of one type of user (say a broadcasting service) before another user (such as a mobile service) can take over.

Frequency band clearances or re-organisations are never easy. One thing that makes them a little easier is the existence of an international agreement on what has to be done, and on the time in which a change should be completed. There are usually compelling reasons to conform to the international pattern for the introduction of a new service. For example, if a satellite sound broadcasting service is to be introduced in bands currently used by other services, international agreements help to persuade governments to make the hard decisions on the necessary band clearances, and they also give investors in the new technology some assurance that they will be able to implement a service.

Prospects for reform of the international system

Although the present international system of spectrum planning has worked well enough for almost a century, the stresses are evident. The pace of change is such that changes to the Radio Regulations often lag behind the technology, and it appears that the Radio Regulations are beginning to fail under their own weight.

We only need look at the two thousand pages of detail in the Radio Regulations; the complexity of the procedures for registration of radio communication services, especially satellite services; the inability of many ITU Members, especially the smaller developing countries, to follow the procedures. All this points to the need for a thorough overhaul of the system. In fact the ITU is currently setting up a group of experts to review and simplify the Regulations.

Conclusions

The ITU is currently looking at spectrum options for satellite sound broadcasting, for new satellite and terrestrial mobile services, and for satellite broadcasting of wide-band high definition television programs. It will also look at expanding the spectrum for high frequency broadcasters. In Australia, a great deal of work is being done to consult with all the interested parties to develop Australian policy positions for WARC-92 which will decide these matters. Local arrangements cannot solve these problems; international agreement is essential.

Australia's geographical place in the world does not isolate us from the major international constraints on spectrum management. In fact, our geography often requires Australian delegations to the ITU to vigorously represent our special requirements for technologies suited to our remoteness, our broad outback spaces, and our industrialised urban centres.

As we proceed with reforms, we should remember that we have an interest in the health of the international spectrum management system.

Colin Oliver has represented Australia in delegations to two World Administrative Radio Conferences and on the special group that drafted the new ITU Constitution and Convention. He is currently Director of the International Section in the Communications Policy and Planning Division, Department of Transport and Communications.

Resale of telecommunications capacity

Peter Waters argues that in developing its resale policy, the government must be careful in weighing up the competing interests of carriers and resellers

As the Review of the Structural Arrangements Between the Carriers illustrates, whenever the Federal government pulls on a thread in the telecommunications industry, the whole sleeve of telecommunications policy is likely to fall off. The government's determination to rid itself of the AUSSAT embarrassment quickly unravelled the long established telephone monopoly. The treatment of the resale issue could just as easily unwind the new duopoly, even before the government has cut the fabric of that new regime.

The problem of resale

Some of the heat in the resale debate is generated by a confusion over what is meant by resale in the Australian context. Resale can mean one of three things:

- the construction and operation of network facilities by non-carriers, and the resale of capacity on those facilities to third parties;
- the purchase of capacity from the carriers to establish private networks and then resale of excess capacity by the user or by a commercial facilities manager;
- the provision of value added or information services are provided wholly over the public switched telephone network (PSTN), or using a combination of leased carrier capacity and the PSTN.

Resale of the first kind looms large in the collective minds of foreign telecommunications companies, particularly the US carriers. Resellers and their customers are able to bypass not only the public switched services provided by the carriers but also the network hardware into which the carriers have sunk large amounts of capital.

If this kind of resale was permitted public utilities could lay cable along their statutory easements, or a reseller could build private earth stations and purchase INTELSAT or INMARSAT satellite capacity, bypassing the privatised AUSSAT capacity. While the duopoly essentially is to be facilities-based, the government has not yet made clear the extent to which third parties will be able to build their own facilities or utilise existing facilities for limited resale (eg not interconnected with the PSTN).

Carriers are usually unconcerned with the third type of resale, since there is no bypass either of their public switched services or networks. The value added service (VAS) provider's activities actually encourage the greater use of the carrier's basic voice telephony or data transmission services. However, the Government's declared intention to do away with the distinction between basic/VAS services draws VAS providers into the maelstrom surrounding resale.

In Australia, resale usually means the second kind of resale identified above, the on-sale of capacity leased from the carriers for private networks. Resale of leased carrier capacity, of course, does not result in bypass of the carriers' networks since the resellers can only lease capacity from the carriers. The more traffic which the reseller carries the more capacity it has to lease from the carriers, thus benefitting them and possibly assisting the second carrier in building its own network more quickly. However, the traffic which travels over leased capacity is not always "new" traffic to the network, but has been diverted from the PSTN.

Carriers have claimed that substantial bypass of their PSTN services through carrier leased capacity diminishes their ability to generate sufficient surplus from their highly profitable routes which is necessary to fund the capital intensive requirements of network construction and the provision of less profitable services on thinner routes.

The case for extensive resale

Economic, competitive and nationalistic arguments are mustered in favour of extensive resale of leased carrier capacity.

The main economic and competitive advantages of resale are said to be:

- Resale leads to better utilisation of network capacity by permitting use of redundant capacity on private networks;
- Resale encourages a wider diversity of telecommunications products and stimulates innovation;
- Resale provides greater price competition to the carriers, and encourages them to cut costs and improve efficiency. An unadulterated duopoly is a risky way of securing more competition as the duopolists may opt for the quiet life and co-ordinate their market behaviour.

Resale also permits entry into a wider telecommunications market of Australian companies which would not have had the financial capacity to participate in the larger picture of the second carrier. The reseller market has low capital barriers to entry because the main capital expenditure falls to the duopoly carriers in providing the capacity used by the reseller.

The case against extensive resale rights

If the overseas experience is anything to go by, extensive resale rights are likely to be bitterly opposed by the carriers. Rumours are already circulating that a number of foreign telecommunications companies have taken fright over the government's resale rights, and forsaken Australia for more promising telecommunications opportunities elsewhere, such as in eastern Europe.

The carriers' position is likely to be that extensive resale rights are at odds with the basic concept of a duopoly, for the following reasons:

- Competition in the basic network will take root more effectively if a single competitor is first allowed to become established before the door is further opened to admit additional competitors. Abruptly opening the telecommunications industry to competition may simply produce small, weak competitors and reinforce the dominant position of the former monopoly.
- The overseas experience is that telecommunications customers, both business and residential, are fairly conservative and not readily dislodged from the former monopoly carrier. Immediate unrestricted entry which results in an array of separate offerings could confuse consumers, causing them to cling more firmly to their traditional carrier.
- If resold capacity could be used to provide carrier-like services, resellers would have a considerable advantage over carriers. In return for their privileged status, carriers are subject to significant obligations, including the requirement to provide or fund universal service, regulation of service standards, and prohibitions against discrimination in supply of services and facilities. Resellers would have many of the advantages of carrier status but without these obligations. The asymmetical regulation of similar services undermines the efficacy and relevance of a regulatory

dividing line between the carriers and resellers.

- The building of a viable second network will involve a great commitment of capital in an inherently risky operation. If resold capacity can be used to provide carrier-like services, the second carrier might itself instead opt for a smaller commitment of capital and technology and limit itself to reselling leased capacity to certain large customers.

The range of possible boundary lines around resale

Finding an appropriate boundary line between functions which are reserved to carriers and those which are open to wider competition has been a continuing problem in the world's telecommunications regimes as they move towards deregulation. No single or readily apparent answer has emerged.

In the progressive liberalisation of resale, a point is reached where resellers should no longer be viewed merely as customers of the carriers but as carriers themselves. Where it is decided to go the way of a duopoly, then logic dictates that some boundary lines be drawn between carriers and resellers. Where those boundary lines should be drawn is essentially a political and commercial judgment about how big or small the duopoly domain needs to be in order to attract bidders for AUSSAT, and then to sustain the second carrier and the prompt roll-out of its network. The domain reserved to the duopoly should be sufficient to achieve those policy objectives while at the same time allowing enough ambit in the marketplace for the resellers.

Distinctions between basic and enhanced services, or "reserved services" and "value added services" in the Australian context are being overtaken by technology. Value is continually being added to telecommunications networks and services as a result of technological change, innovation in network design and the evolution of software. The concept of added value inevitably becomes a relative, not absolute, concept, and will be constantly shifting as the carrier upgrades its basic services. A function which would be regarded as "value added" today may become part of tomorrow's basic service offering by a carrier.

The European Commission has endeavoured to avoid the basic/enhanced difficulties by settling for a distinction between voice and non-voice services. This distinction is much clearer and more obvious than the basic/enhanced distinction. Voice services are also more traditionally associated with monopoly carriers, and there is more likely to be consensus on this boundary line. However, with the roll-out of digital networks, it will be technically difficult to distinguish between voice and non-voice signals.

Current Australian facilities-based limitations essentially prohibit double ended interconnection of private networks and traffic may only be private-public, or public-private, but not public-private-public. Facilities-based limitations have also been criticised as a regulatory contrivance which artificially restricts the technological capacities of resellers and ignores consumer requirements.

Shared use of telecommunications capacity can be limited within a defined group of users, such as AUSTEL's pre-duopoly proposal that "common interest" groups for private networks be defined by joint and severable liability for each other's communications charges. However, user-based limitations can be ill-defined and difficult to police or can be pushed out to permit the assembly of disparate users into virtual "private telephone companies" within the wider public network. In Japan, a common interest group can cover a single industrial sector, including suppliers, manufacturers, distributors and competitors.

'Logic dictates that some boundary lines be drawn between carriers and resellers'

The government's proposal

Given the difficulties discussed above, and its desire to maximise competition, the Government has apparently decided to abandon any endeavour to draw boundary lines around resale. Instead, the vertical relationship between the resellers and the second carrier will be constructed on the different price at which each buys capacity from Telecom/OTC.

The carrier-to-carrier prices, both for interconnection and lease of capacity, are to be set by negotiation between the carriers and, failing that, by AUSTEL. The required margin can only be achieved if not only the "bottom" of the margin bracket - carrier-to-carrier prices for leased capacity and interconnect - are set, but also the top of the bracket -Telecom-reseller prices for both - are fixed in some manner.

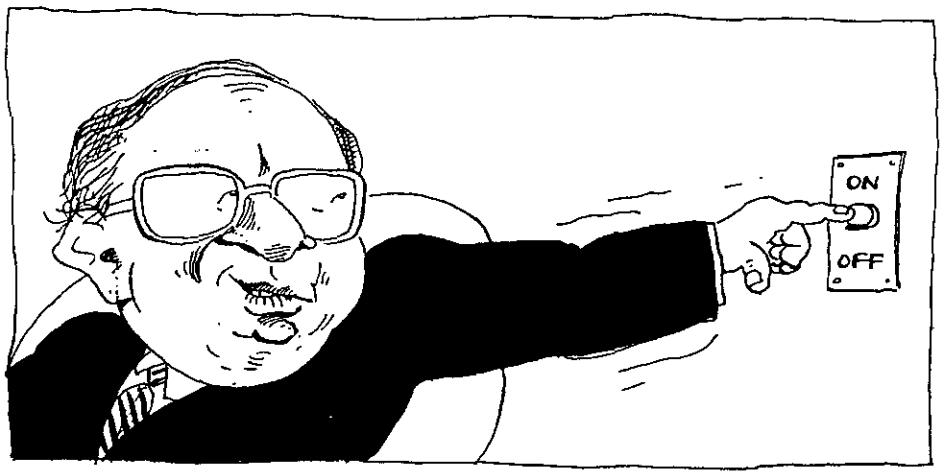
There may be competitive risks in leaving the determination of the Telecom/OTC-non-carrier prices entirely to "market forces", since Telecom/OTC's dominant position in the market could allow it to substantially influence or manipulate the market. If Telecom/OTC has an unrestricted ability to drive the carrier/non-carrier price towards the fixed carrier/carrier price, Telecom/OTC could undermine the vertical structure of the duopoly. While Telecom/OTC would forgo revenue in the short term, the longer term advantage in pitting the second carrier against the non-carriers would be to undermine the challenge presented by the second carrier to Telecom/OTC's entrenched position. Telecom/OTC's unrestrained ability to narrow the pricing gap between the second carrier and non-carriers could undermine the government's objective to achieve vigorous facilities-based competition through the medium of a duopoly.

AUSTEL could be given authority to determine the Telecom/OTC-non-carrier price in rate setting proceedings, but this is likely to create a more intrusive, complex regulatory regime than the government wants. An alternative option which preserves pricing autonomy for Telecom/OTC would be to require Telecom/OTC to publish its schedule of charges and terms. The schedule could establish differential pricing based on cost differences in volume, transmission capacity, distance, performance characteristics or supply period. Essentially, the current grounds of defence to discrimination under section 98 of the *Telcommunications Act 1989* would be used as the criteria by which Telecom is to construct a tariff schedule.

As the above discussion demonstrates, the resale issue is not simple nor is the answer apparent. Having opted for a duopoly, the government must fashion a resale policy which comfortably fits within that framework, and does not undermine it. The duopoly is a creation of government policy, and cannot be abandoned at the moment of its birth, or put on a starvation diet. On the other hand, competitive service providers are an important fact of life in the Australian telecommunications market, and they can bring greater diversity and innovation in telecommunications services. The trick is to ensure that the second carrier and the resellers each have a sufficient market to survive and prosper.

Peter Waters is a solicitor with the Sydney firm of Gilbert & Tobin. Shortly before publication, AUSTEL's Resale Report was released. The Report has been the subject of vigorous debate, and an update will be in the next CLB.

Forum 1: Restrictive trade practices regulation of media



TPC Chairman Bob Baxt tries his hand at media regulation

Warren Pengilley of Sly & Weigall, asks: Does the media tail wag the merger policy dog?

If one wants to debate Australian merger policy, where does one start? Obviously, say journalists, with the media. One of the most surprising things is that most merger law reforms pushed by various interests seem to hang their reformist hats on media events. Maybe this is because journalists, not surprisingly, are intimately affected by such events. It should not, however, be forgotten (but for many the point is simply not even considered) that calls for *Trade Practices Act* merger law reform are calls for reform which affects all Australian business. The media is, of course, one important area of Australian business. But Australian business overall is much more important than any limited segment of it.

Politicians seem to have some belief that news has some uniquely nationalistic Australian qualities which are apparently missing in other products. Added to this is the intrinsic and frequently uncritically accepted dogma that, for some reason, media has to be "regulated". All of this makes it almost impossible often even to suggest, let alone have seriously considered, what could be quite sensible solutions to the present Australian media slough of despond.

Why not let in an overseas television network? Would not this new independent network have a pro-competitive impact? Could not the consumer decide whether to watch Jana Wendt or (in Minister Beazley's words) "some blonde haired vapid bimbo out of Los Angeles"? But we cannot have this because it would, apparently, corrupt our "Australianism" notwithstanding the fact that, world wide, there is always a demand for local television programming and presumably the Broadcasting Tribunal would still heavy us all with "Australian content" rules. Instead, we bumble along with at least two networks in a parlous state and a media policy which seems to prevent the influx of much needed capital into either of them.

Regulation has caused the problems

Apparently, we do not reach the obvious conclusion that regulation of television in the first place has caused most of the problems in the industry. Why? Because the regulatory system prevents the entry of new competitors (local or overseas) - be they new TV stations or be they pay TV. Legislatively mandated monopolies (or oligopolies) create artificial scarcity. People will pay for this scarcity because it represents insulation from competition. Put simply, the present position is that buyers have paid too much for their artificially created assets. If the present heavy regulatory system did not exist to the same extent no such problem (or no problem of such magnitude) would have arisen.

Strange, indeed, it is that regulations in relation to TV networks have been oriented in so many ways towards the preservation of media viability yet they have produced precisely the opposite result. The fault, of course, lies in the regulations themselves and not in their administration. It is all very well after the event to say the regulators should not have allowed Bond or Skase to buy into TV because the prices being paid made them non-viable. Who, at the time of such purchases, could have credibly run this line?

At the fringes, we have the Trade Practices Commission. It is concerned with the preservation of competition. It operates under a statute which does not give it wide discretions in relation to individual operative decisions. The Commission, unlike the Broadcasting Tribunal, cannot, for example, find anyone not to be "fit and proper" and thus to be excluded from media participation. It thus asserts that it is not a "regulator" like all the other watchdog bodies. But neither the absence of statutory authority nor the Commission's philosophy has, apparently, been a matter of undue concern to the Commission when television networks are involved. The writer understands from press reports, such as that appearing in the *Sydney Morning Herald* on 17 September 1990, that the Commission was prepared to seek an injunction against Malcolm Turnbull having any involvement in the Network Ten receivership. Although press reports were silent on the exact terms of the TPC intervention, this involvement seems to the writer to infringe no section of the *Trade Practices Act* unless Turnbull can be characterised as a "share" or an "asset" being acquired by a company (and, in law, he cannot, of course, be so characterised). Had Turnbull not terminated his affiliation with Channel Nine, the Commission could have justified its stand on the basis that Network Ten could have been regarded as "associated" with another network leading to a possible breach of S.50 (2A) of the *Trade Practices Act*. But Turnbull's association with Nine had been terminated so this argument could not be run.

Commission fails to justify

Commission Chairman, Bob Baxt, when recently questioned as to the statutory authority which permitted him to act as he did, was reported in the *Business Age* of 3 October 1990 as having been "unusually reticent. Someone else - ie Turnbull - had also asked the question, he said, and the Commission was under a QC's recommendation not to talk about it". So, our national competition authority has also taken unto itself an interventionist regulatory role which it cannot, or will not, justify in terms of its legislative brief.

The writer finds it quite extraordinary that the Commission, a high profile public body, cannot cite even the legislative authority for its actions. This view is taken whatever any Queen's Counsel may have said on the issue. The public is thus left with having to try and make sense of the Commission's conduct from what little has been reported in the

ress. Until convinced otherwise, this writer elieves that there is no authority in the *Trade Practices Act* for what the Commission did. It s hard to see how competition law prevents Malcolm Turnbull from taking up the Ten ecovery challenge. Is the media different or oes the Commission now have some general role in vetting directors and consultants s to their acceptability? If so, why? If not, why he attitude in relation to Turnbull?

In the newspaper world, things are not nuch better. In terms of ownership, Rupert Murdoch runs or sponsors seven out of the en of the country's surviving capital city newspapers. It is not licensing barriers which have created the problems here. The Australian phobia of overseas control may well be relevant, however, in that the Treasurer is unlikely to permit a substantial overseas stake being taken in the Fairfax Group -the very thing which may perhaps make it more competitive with the Murdoch chain. The overseas investment guidelines may even prevent an overseas new entry to compete with both newspaper chains should someone want to do this.

The spectre of Murdoch

This leaves the possibility of Murdoch buying out Fairfax. This is a result which is quite unacceptable in competition terms and the Commission, quite rightly, is opposed to it.

The Commission says that Murdoch could structure his arrangements so as to avoid the merger provisions of the *Trade Practices Act* based on the principles upheld by the Federal Court in the Commission's litigation loss in the *New Zealand Steel* case. The Commission has convinced Attorney-General Duffy to amend the merger provisions of the *Trade Practices Act* to take account of a perceived threat that Murdoch would act in this way. But there must be a fear that we have here, as elsewhere, the media tail wagging the merger policy dog. This is because:-

1. The *New Zealand Steel* case involved an attempt by the Trade Practices Commission to injunct in Australia a merger blessed on public benefit grounds in New Zealand. This has real repercussions under the Closer Economic Relations Treaty with New Zealand and in terms of Australian antitrust imperialism intruding into areas which are of more immediate concern to other countries. It is hoped that this issue will be considered in any amendments. However, such issues may well be bypassed in an obsession to do something in a "media case".
2. The Attorney's statement is that the legislation amending the *Trade Practices Act*, when enacted, will operate from 8 October 1990. The despicable habit of regulation by Press Release, so long a major cause of uncertainty in the taxation area, is thus also to be repeated in relation to amendments to our competition law.
3. Amendments to trade practices legislation are generally slow in gestation. Despite the immediacy politicians see in them at the time, they have in the past taken up to a couple of years to be effected when important policy considerations are involved. There is now yet another "study" into merger law to be engaged in. How many more enquiries and studies on merger law do we need? The study is not, it is to be understood, to be limited to *New Zealand Steel* type issues but may well put the whole of the merger law test back into the melting pot. No doubt any amendments will await a report of the newly commissioned study and debate on it. How can the commercial community operate with any degree of certainty in the interim?
4. If the above appears to state the case too highly, it should be noted that the amendments suggested may well require definitional amendments to such quite fundamental provisions in the *Trade Practices Act* as the term "acquire". If this is so, the amendments may have considerable repercussion in many areas of competition law quite unrelated to merger policy. Of course, it is possible that the amendments may not go as far as this. But who knows? Do we have to live with the uncertainty of retrospectivity in many areas of the *Trade Practices Act* whose exact parameters are currently quite unknown?

In short, the media simply has too many regulatory cooks brewing too many divergent broths. Much of the present debacle is caused by regulations aimed at protecting the public but which have, in fact, done anything but this. Should we not perhaps think of dismantling a substantial number of these regulatory constraints? Should we not think of changing our views on overseas investment in Australian media? Above all, there must be concern for the way in which media problems are paraded as justification for many of the attacks on merger laws. Media simply is not the most important Australian industry upon which merger laws operate - something which cannot and must not be forgotten. One is forced to wonder why we want still more enquiries into the adequacy of merger laws. We have had the present test blessed by each political party and by the recent Griffiths Committee Parliamentary Inquiry. The present merger law test of dominance may have its problems but it appears to be the best we can evolve.

Certainty needed in competition law

There has to be a time when business can feel safe in planning on the basis that the law is unlikely to change before each year ends. Above all, purely because the Commission wants to amend the Act to cover the deficiencies which it feels are in the Act, and which gave rise to its loss in the *New Zealand Steel* case, let us not subject the whole of Australian industry to that uncertainty in the competition law which previously characterised only the tax system. And lastly, will someone (hopefully the Commission itself) tell us all how the Trade Practices Commission justifies its stand in relation to Malcolm Turnbull? Does the Commission have some new found role to regulate those who may participate in the media and, if so, where does it find its statutory authority for such role? Is the media unique or is the Commission's new found "regulatory" role now quite a general one? These questions must be publicly answered. The writer holds no brief either for or against Malcolm Turnbull but the point is an important one and of vast impact in relation to any future media advice - and perhaps to future advice in wider areas as well. Silence, or hiding behind Queen's Counsel's robes, is simply not good enough on an issue as important as this.

Dr Pengilley is a partner in the Sydney office of Sly and Weigall, lawyers. He is a former Commissioner of the Australian Trade Practices Commission. This article is written for the CLB as at 15 October 1990.

Paul Malone of the Trade Practices Commission argues that the Commission's processes and media industry dynamics are poorly understood by the Commission's critics

The day after the Trade Practices Commission released its determination on the West Australian Newspapers Ltd bid for the *Daily News*, a News' representative on Perth talkback radio implored listeners to ring the Commission and tell what they thought of the decision. Within minutes the Commission switchboard in Perth lit up with calls.

Commission Chairman, Professor Bob Baxt, took one of the first calls himself. "Will there be a *Daily News* today", the caller asked. "I don't know. You'd better ask the management of the Daily News", Baxt replied. "Your decision was appalling", the caller said. "Have you read it?" Baxt asked. "No", the caller said. So the conversation continued until finally the caller asked "Are you going to change your

decision?" "We can't", said Baxt. "Oh", said the caller taken aback "Then I've just wasted 22 cents."

The call was one of many which illustrated the ignorance of many on the role of Commission and the issues at stake - an ignorance not confined to the general public. Senior politicians and West Australian commentators showed the same command of detail as the anonymous caller.

The day after the Commission rejected the application by West Australian Newspapers Ltd (WAN) on September 10, 1990, the management of the Daily News announced the closure of the paper, blaming the Commission for its action. The Commission was blamed, not only by the management but by others, for the loss of journalists', printers' and staff jobs.

Bob Baxt faced a Perth press conference, not surprisingly crowded with Daily News journalists and sympathisers, in an effort to explain the difficulties the Commission had had with the decision and the possible options that were open to the *Daily News* management.

But little of his comments and the Commission's considered determination came across in the media coverage. With few exceptions - P.P. McGuinness in *The Australian* and Alan Kohler in the *Australian Financial Review* were two - the Commission's decision was condemned.

Afternoon newspaper markets in decline

Three weeks after the *Daily News* announcement the management of News Ltd announced the merger of its morning and afternoon newspapers in Sydney and Melbourne. Newspaper commentators now began a rational discussion of the afternoon newspaper market. The worldwide decline in afternoon newspapers was noted. The influence of television on the demand for papers, the changing habits of city commuters, the advertising preferences of retailers and the quality of the papers themselves, all came up for discussion. The future of two remaining capital city afternoon papers - the Adelaide afternoon tabloid, *The News*, and the *Sun* in Brisbane - was also raised.

What was clear, if it was not clear to the commentators at the time of the Commission determination on September 10, was that the *Daily News* closed because of its own financial plight. The *Daily News'* operating loss in 1987 was $371,517. The following year it rose to $4.12 million and in 1989 was $3.92 million. At a conference with the Commission on August 29, the *Daily News'* management revealed that current debts stood at $13.22 million, of which $92 million was owed to WAN. Circulation of the *Daily News* fell from 101,000 in 1985 to 75,000 in August 1990.

One aspect which had escaped the West Australian critics of the Commission's determination was that WAN chose not to explore the avenues which might have enabled it to take over the *Daily News* and maintain its operations. Immediately the Commission announced its determination, the *Daily News* management, in which WAN exercised a substantial degree of influence through its 49.9 per cent interest in the company, announced the closure of the paper.

As Professor Baxt indicated to the anonymous caller, the Commission could not overturn its determination, but WAN could have pursued an appeal against the Commission's determination before the Trade Practices Tribunal. Commentators should also have understood (and some of them did not) that the Commission does not have the power to decide that a merger is illegal, thus preventing it taking place. This power rests in the courts. If the Commission believes that a merger would result in market dominance, the Commission is required to fight the issue before the Federal Court.

The Commission decided that the public benefits which might result from the *Daily News* takeover did not outweigh the anti-competitive detriment. It was open to WAN to test this view before the Tribunal.

The Commission noted that from a competition point of view, closure of the *Daily News* would reduce the barriers faced by a new entrant. An opportunity for successful entry to the West Australian newspaper market could be created. The Daily News was said to have had a circulation of 75,000 and a readership of 200,000. It was said to be able to attract certain advertising, eg Friday entertainment. If it closed, another newspaper might be able to pick up this demand.

'clear anti-competitive consequences would arise from the acquisition of the Daily News *by WAN'*

In the Commission's view, clear anti-competitive consequences would arise from the acquisition of the *Daily News* by WAN. The creation of a dominant firm publishing both the morning and afternoon newspapers in Perth would raise barriers to entry which would make entry for a new metropolitan daily difficult. The long established positions of the *West Australian* and the *Daily News* and the limited size of the available readership and advertising in Perth would constitute substantial deterrents to any new entrant.

There were other matters the media did not pick up. WAN offered $13.22 million for the *Daily News*, a generous offer when compared with the $250,000 Heytesbury Holdings Ltd offered for the rights to the masthead of the paper. But while suggesting that the Heytesbury offer was derisory, the West Australian media commentators never asked why WAN was willing to pay so much for the loss making operation. Could it have been that the premium was due to the fact that ownership of both papers would ensure no new entrant could get into the Perth daily newspaper market?

In its determination the Commission considered the "failing company" arguments put on behalf of the merger. The questions to be considered in this context include:

- Is the potentially failing firm going to fail irrespective of whether or not authorisation is granted?
- What are the real causes of the failure of the firms?
- What alternative solutions to a merger are available?
- Is the proposed acquirer the only available purchaser?
- Is the proposed acquirer the least anti-competitive acquirer available? and
- Will the apparent cause of failure of the firm be addressed by the new acquirer?

On the question of the *Daily News*, the Commission expressed concern that irrespective of its decision, in the longer term the Daily News might not survive, or at least not survive in its current form.

Calls for reform

Currently there are calls for an inquiry into media ownership in Australia. Some have suggested that the Trade Practices Commission should be given a reference to conduct such as inquiry. At the same time the government is reviewing the *Trade Practices Act*.

The Act currently is concerned with mergers which result in or enhance dominance of a substantial market for goods or services in Australia, a State or Territory. Among the proposals for change is the suggestion that the "dominance" test be replaced by a "substantial lessening of competition" test, the test that applied before 1977.

Commission Deputy Chairman, Brian Johns has pointed out that had there been a "substantial lessening of competition" test in 1987, the much criticised Commission decision on the News Ltd takeover of the Herald and Weekly Times, would have been different.

The Commission had a different make-up at the time of the Herald and Weekly Times takeover and, when questioned recently, Commission Chairman, Professor Bob Baxt said that, in the context of what had happened, since he was sure that had the decision been taken today, all the implications would have resulted in a different approach.

The News Ltd decision to merge its afternoon and morning newspaper operations in

oth Sydney and Melbourne highlights the conomic realities of the newspaper industry. fternoon newspapers - even with successful rother morning papers - face an uphill battle o survive. The pressure newspapers face is ot due to the existence of the *Trade Practices ct*. Nothing is achieved by using the Comission as a scapegoat. No one can compel a ompany or individual to go on losing money on a business venture.

The *Trade Practices Act* is designed to promote a dynamic competitive environment - the environment which holds the greatest prospect for the long term survival of a variety of operations.

Paul Malone is the Information Director of the Trade Practices Commission.

Anne Davies of the Communications Law Centre argues there is no ground for Trade Practices Commission regulation of broadcasting or the conferral of Commission - like powers on the Broadcasting Tribunal

Considering that Australia now has one of the most concentrated levels of newspaper ownership in the world, the print media industry is not one of the Trade Practices Commission's success stories. It is therefore surprising that the *Trade Practices Act* is being flagged as a model for future regulation of ownership and control in the broadcasting sector.

Options have ranged from handing responsibility for ownership and control of broadcasting to the Trade Practices Commission, to adopting a similar regulatory approach, by creating explicit prohibitions on exceeding the ownership limits and introducing a range of monetary penalties for breaches.

No-one would dispute that the ownership and control provisions of the *Broadcasting Act* rival the taxation legislation in sheer complexity. Worse still, the events of the 1980s demonstrate they are ineffective. Licensees have regularly ignored the intent of the Act to limit foreign ownership to 20 per cent, and to limit audience reach to 60 per cent, by taking advantage of loopholes and extensive grace periods.

Overhauling the Broadcasting Act

With the industry now reeling from the after-effects of the media binge during the late 1980s, the Federal government is finally moving to overhaul the Act. The Minister for Transport and Communications, Mr Beazley, is expected to make a statement of principles underlying the legislation early in 1991. An exposure draft of legislation will be released for public comment probably by March.

However a departmental review team, headed by the Deputy Secretary, Mr Mike Hutchinson, has been working on options since late 1989. The rhetoric and thinking of the Department of Transport and Communications (DOTAC) has been guided by a belief that market forces, as far as is practically and politically possible, should be imported into the regulation of broadcasting. Longstanding principles that broadcasting involves a public trust, a view expressed most eloquently by Chief Justice Mason of the High Court in the *Australian Broadcasting Tribunal* v *Alan Bond* (1990), are dismissed as outmoded.

It is therefore not so surprising that the review team has lighted on the *Trade Practices Act* as the preferred model for reform of the ownership and control provisions of the *Broadcasting Act*.

Yet as no stage has there been any real analysis of either the adequacy of the *Trade Practices Act* as the preferred model for reform of the ownership and control provisions of the *Broadcasting Act*.

'The government is exploring... "self enforcement" of the ownership limits'

Yet at no stage has there been any real analysis of either the adequacy of the *Trade Practices Act* in regulating the media industry or the impact of divorcing the ownership and control rules from the other major regulatory task of the Broadcasting Tribunal: ensuring quality and diversity of the media by way of regulation of program content.

Emasculation of the Tribunal

The first proposal originally floated by the department was the effective dismemberment of the Broadcasting Tribunal by transferring responsibility for ownership and control to the Trade Practices Commission while foreign ownership questions would be dealt with by the Foreign Investment Review Board. Mr Beazley's strong stance on foreign ownership seems to have put that idea to rest, at least in the short term although the Opposition has made encouraging noises about this proposal.

More recent reports have indicated that the government is exploring what has been termed "self enforcement" of the ownership limits. This would involve enshrining the current rules as prohibitions in the Act. In the same way as Part IV of the *Trade Practices Act* prohibits a takeover which will lead to dominance in a market, the new broadcasting act would simply state that a person shall not control licences for television stations which reach more than 60 per cent of the audience. So far DOTAC has not elaborated on how this might work in practice, but has promised that the Tribunal will be given the sanctions such as large fines to ensure compliance.

Apart from the difficulty inherent in monitoring the share structures of media groups, a number of which are now unlisted private companies, this approach raises a number of questions.

The policy objectives underlying broadcasting regulation are far more complex and in some ways contradictory to those which underly the *Trade Practices Act*. The Trade Practice Commission's charter is relatively simple: to promote fair competition. In broadcasting, however, the regulatory objectives are more complex and in some cases contradictory. There is a tension between, on the one hand, encouraging a diversity of services, and on the other achieving a level of quality and Australian content. As the minister recently acknowledged in a speech at the Australian Broadcasting Tribunal conference in November: "The industry is protected by limiting competition, in return for which we expect program quality, choice and diversity".

A divorcing of the ownership provisions from the regulation of content, whether it be by handing that responsibility direct to the Commission or by adopting a similar style of regulation, has implications for what many believe is the more important objective of broadcasting, of encouraging quality programming on television and radio. Nowhere is this more visible than in the licensing area. There is little point in awarding licences on merit of the service provided, if the licence can be transferred without considering the quality of service that will be delivered by the new owner.

Secondly, there remains a general level of community dissatisfaction with the Commission's handling of the print industry, stemming mainly from the definition of the market adopted when the Commission approved the takeover of Herald and Weekly Times Ltd by News Corporation Ltd in 1987. The Commission's decision to treat each geographic market as discrete meant it did not consider the overall issue of concentration of the market for news and ideas. Similar problems may well be experienced if the principles were to be applied to broadcasting.

Roles of the Tribunal and Commission different

The roles of the two bodies are also quite different. The Commission is foremost a policy body. Adjudication and enforcement of the Act are structurally separated and are the responsibility of either the Trade Practices Tribunal, in the case of authorisations under Section 45, or the Federal Court, in the case of mergers under section 50. Although the Commission gives informal rulings on whether a particular transaction will contravene the Act, it must go to the Federal Court to seek injunctions or the imposition of fines.

In contrast, the Broadcasting Tribunal has both an investigative and prosecutory role, as well as a quasi-judicial role. It not only investigates breaches of the Act, but rules on whether the Act has in fact been breached. It is able to impose some sanctions directly, such as imposing conditions on the licence or even revoking a licence, but where the penalties involve fines, it must refer these to the Director for Public Prosecutions. In practice, referrals to the DPP have been rare. In the last ten years there has been one prosecution which related to the breach of the incidental advertising provisions.

As part of the review, both the Department and the Minister have promised to expand the range of sanctions available to the Broadcasting Tribunal, citing the hefty fines available for breaches of the *Trade Practices Act*, as an example of the types of penalties that might be available. We may be left with the curious position where the Tribunal is able to revoke a licence but must, for constitutional reasons, go to the Federal Court to impose a fine.

More curious perhaps, is DOTAC's strong opposition to the idea of pre-notification to the Broadcasting Tribunal of ownership transactions, particularly as a number of commissioners at the Trade Practices Commission, notably Professor Brian Johns, believe that the *Trade Practices Act* would work a lot better if there was a similar requirement in relation to takeovers.

Before the government styles the new broadcasting act on the *Trade Practices Act*, they would be wise to take a closer look first at the failings of the *Trade Practices Act* in dealing with the media industry, and secondly, at the implications of adopting this regulatory structure for the multifacetted role of the Broadcasting Tribunal.

Jim Stevenson of Buddle Findlay on competition law and the New Zealand communications market

The policy rationale

The last four years have seen comprehensive reform of the regulatory environment of the New Zealand communications sector. Communications markets in telecommunications, broadcasting, radio frequency rights and postal services are now among the least regulated markets in OECD countries. Deregulation has also been manifested in the fundamental changes that have been made to the competition law framework of the communications sector.

It is useful, first, to examine briefly the reasons for, and scope of, reform. The underlying aim, common to many Labour government initiatives in a variety of industries, was to promote greater efficiency in the use of resources in the New Zealand economy. More particularly for the communications sector, the aims were twofold: to achieve greater consumer choice and economic growth, and to promote social objectives more efficiently.

Like many OECD countries, the New Zealand communications sector had been characterised by substantial government intervention. government ownership of trading departments or organisations, which also carried out advisory and regulatory functions for the government, was prevalent. The protection of those agencies from competition mainly through restrictions on market entry was also typical.

The principal instrument of change has been the removal of regulatory barriers to entry for virtually all communications markets, the corporatisation of trading departments as companies under the *Companies Act* 1955 and the transfer of non-commercial functions to the New Zealand Ministry of Commerce. A property rights system has been introduced for the management of the radio spectrum.

Moves have followed to privatise the newly formed state-owned enterprises. Telecom Corporation of New Zealand Limited has been sold. The election policies of the new National government have hinted at the privatisation of at least part of Television New Zealand (TVNZ) and the commercial stations of Radio New Zealand (RNZ). There is also the prospect of privatisation of New Zealand Post Limited should the residual protection of letter post services be lifted.

Management rights and licences for radio frequencies are being sold allowing for frequency management by private sector organisations within defined conditions.

Overseas ownership in telecommunications and radio spectrum rights has been permitted, and the new government has proposals to liberalise, substantially, foreign ownership controls in broadcasting.

The legal framework

he consequence of these policy decisions is that the former legal framework for communications services has disappeared. Departmental control legislation, together with often impenetrable regulations and departmental administrative decision-making as well as licensing systems have given way to a framework relying on general competition and consumer legislation. These industry specific statutes and regulations which have been introduced mostly have the fundamentally different purpose of facilitating competitive entry into communications markets. Social policy objectives, notably in broadcasting, have been implemented in a more targeted way or in a considerably modified form.

These sweeping changes have meant that legal practitioners in the communications services markets need to become more versed in New Zealand's competitive law under the *Commerce Act* as well as commercial and administrative law issues. Indeed there is a greater diversity of participants in these markets and an increase in commercial activity leading to a demand for specialist legal services. Below is an outline of the new framework and some of the issues which are emerging.

The Commerce Act 1986

Probably the most problematic inheritance of government intervention has been highly concentrated market structures in the communication markets and especially the prevalence of dominant firms. Each of the State-owned Enterprises (in one case now a privatised company) such as Telecom, TVNZ, RNZ and NZ Post either are dominant or have considerable influence in their primary service markets and have the potential for dominance in others. The characteristics of those markets and New Zealand's small size means that, despite the removal of regulatory barriers, dominance will remain a key policy issue.

Misuse of a dominant position, or the potential for misuse of that position is addressed in three ways under New Zealand's general competition law, the *Commerce Act 1986* (as amended in 1990). Part II of the Act includes provisions prohibiting the misuse of a dominant position. Part II (as in force on 1 January 1990) prohibits acquisition of assets or shares which result in dominance or strengthening of dominance. Part IV provides for the imposition of price control (under current policy seen as a last resort) in conditions of limited competition.

These general constraints are underpinned by supplementary measures specific to the industry which are principally concerned with facilitating the prospects of entry into the newly deregulated markets. While

[illegible] debate will continue over the [illegible] of these constraints, the New Zealand government approach to date has been to minimise direct intervention procedures [illegible] to tip the balance in favour of new entrants while closely monitoring the need for further intervention. Industry specific [illegible] and related issues are discussed below.

Telecommunications

The *Telecommunications Act 1987* and the 1988 amendments have been the vehicle for the phased liberalisation of customer premises equipment and telecommunication services of all kinds. Other features of the Act include assistance to new providers who require access to land and regulatory powers with respect to international telecommunications services. The *Telecommunications (International Services) Regulations 1989* govern public switched telecommunications services or leased circuits between New Zealand and other countries. These are designed in effect to counter over-monopoly service operators deriving the benefit of competition in New Zealand. As a result of a pre-privatisation review of the regulatory environment the *Telecommunications Amendment Act 1990* (inter alia) introduces ministerial making powers to impose information disclosure requirements on Telecom. The draft regulations require Telecom to publish information on the prices, terms and conditions under which certain prescribed services are supplied. Telecom is further required to prepare separate financial statements for its [illegible] regional operating companies to [illegible] transparency in their operations.

Broadcasting

The *Broadcasting Act 1989* essentially removed most regulatory barriers to entry in broadcasting and supplemented 1988 legislation restructuring the Broadcasting Corporation of New Zealand into two distinct state-owned enterprises for television and radio. The Act also implements certain social policy objectives. It maintains a [illegible] minimum behaviour standards in broadcasting administrated by the Broadcasting Commission to fund amongst other things New Zealand content and minority programming from the New Zealand Public Broadcasting Fee. The essence of the scheme is to maximise the benefits of public funds [illegible] competitive bids for those funds in preference to quota arrangements.

No special legislative or regulatory measures have been seen as necessary to enhance [illegible] by enterprises providing competing services to TVNZ and RNZ.

They are subject to the *Commerce Act* in relation to any misuse of dominant positions and their business acquisitions. A number of statutory privileges and disadvantages of the former BCNZ were nevertheless abolished under the 1988 and 1989 legislation. Moreover the "bottleneck" transmission facilities of the BCNZ were separated into a separate TVNZ subsidiary company, Broadcast Communications Limited, which has given undertakings to government concerning the arms length character of the transmission services it provides as between TVNZ and alternative television broadcasters.

Radiocommunications

The key to entry into many telecommunications and broadcasting markets is radio frequencies. An administrative first come first served licensing system founded largely on the government telecommunications monopoly and warrant restrictions on broadcasting was clearly inadequate and abolished under the *Radio Communications Act 1989*.

The Act provides for the establishment of new markets in radio frequencies through the creation of 20 year management rights. It has been government policy that where surplus demands for such rights or licences exists they will be tendered. Residual licensing of frequencies for other telecommunications purposes (other than tendered areas) are also administered flexibly.

'The key to entry into many telecommunications and broadcasting markets is radio frequencies'

In order to guard against the concentration of market power in downstream telecommunications and broadcasting markets, acquisitions of frequency rights and licences are treated as business acquisitions under the *Commerce Act*.

In its new jurisdiction the Commerce Commission has been required to grapple with several contested rights acquisition proposals and to define complex downstream markets. The growth of secondary markets in frequency rights will pose additional competition issues for the Commerce Commission.

It is perhaps ironic that one of the oldest form of communication, the letter post, remains subject to statutory protection under the *Postal Services Act 1987* although the scope of the monopoly has been modified under the 1990 amendment Act. Prohibitions on entry and ambiguity over entry into certain, services markets has nevertheless been removed. The 1990 amendment Act has also introduced information disclosure requirements to promote transparency between NZ Posts protected services operations and its unregulated operations.

Conclusion

Actions taken under the Commerce Act and the number of acquisition proposals determined by the Commerce Commission suggest that competition law in communications services will be an active jurisdiction. It is vital that the law continues to evolve to facilitate rather than hinder commercial growth in the sector.

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Comparative advertising: Choosing the best "take"

Mark Adams examines the Makita Case and finds that it illustrates the principle that in comparative advertising, accuracy is essential

One of the most effective forms of advertising available today is comparative advertising. Whether it is the endurance of a battery, the power of a motor vehicle or sugar content in food, if your product can outmatch a competition's product in an important area, then its worth letting the buying public know "whatever he can do, I can do better"

Comparative advertising has its greatest impact on television viewers when the competing products are tested and compared before the viewer's eyes so that one product can be seen outperforming a competing product.

It is imperative therefore that an advertiser engaging in comparative advertising ensures that the advertisement is an accurate representation of the facts. Given the positive impact of such advertisements in favour of the advertiser's product, and the adverse effect on the competitor's product, an advertiser who fails to present facts truthfully may find itself on the wrong end of a law suit for breach of Section 52 of the *Trade Practices Act* which prohibits misleading or deceptive conduct. Such a suit was recently brought by Makita against Black & Decker for misleading and deceptive conduct after Black & Decker screened a television commercial comparing its new drill with a Makita product already on the market.

The advertisement

In the *Makita* case, Black & Decker made a television commercial comparing the power of a new Black & Decker 1166 industrial drill with a Makita 6010BVR. Despite attempts made to obscure the name "Makita" on the drill, the court found that the Makita was readily recognised because of its distinctive blue colour.

In the commercial, the drills were mounted facing each other and linked by a 10mm shaft. The Makita was turned on first, followed by the Black & Decker a few seconds later. The latter almost instantaneously reversed the Makita's drills shaft rotation.

In the televised commercial smoke was shown to be emanating from the Makita drill after 2.7 seconds. In the four "takes" edited to make up the final version, smoke emanated from the Makita after a period of between 5.84 and 9.57 seconds. Furthermore, on two occasions during the "takes", the Black & Decker drill had stalled, and on another it commenced to smoke at the end of a demonstration. None of the "take" incidents were shown in the final commercial.

The above visuals were accompanied by the following "voice-over":

"Here is an amazing demonstration. Two 10mm industrial drills are linked by a command shaft. The blue drill is turned on first. Then, the new Black & Decker industrial. With superior power, it's actually reversing the spin of the other drill."

The court's findings

The main issue to be decided by the court was whether the advertisement was misleading or deceptive in breach of Section 52 in presenting a visual image more favourable to Black & Decker than the results of the four "takes" and expert testing had indicated. These expert tests showed that the Makita drill had taken somewhat longer than 2.7 seconds before emitting smoke. Furthermore, the Black & Decker drill had emanated smoke in five out of six tests.

The court held in a judgment handed down on 30 May 1990 that the advertisement was in breach of Section 52 for being misleading. It was acknowledged that the main thrust of the advertisement was to show the overall superior power of the Black & Decker drill over the Makita drill, and in this respect the advertisement was accurate. However, the court said:

"... smoke emanating from the Makita drill provides a striking visual image. The impression given by the advertisement is not merely of a contest between two drills in which one of them demonstrates its superior power by reversing the turn previously achieved by the other; but, rather, of a contest in which one drill is completely devastated, quickly overheating and smoking, whilst the other drill is apparently unaffected by the ordeal ... to state that one boxer is capable of eventually knocking out an opponent is one thing; to suggest that he is able to do almost immediately, without injury or even raising a sweat, is another".

Accuracy essential

The *Makita* case demonstrates that, particularly in relation to comparative advertising, the impression created in the mind of the viewer by the advertisement must accurately reflect the true state of affairs. Undoubtedly, as was argued in the *Makita* case, the main point of the advertisement was to drive home the superior performance of the Black & Decker and the visuals merely assisted in creating what was in fact a true impression regarding the Black & Decker drill. The court was not, however, prepared to accept this. It held that the visual images (such as the smoke or lack thereof on the part of the Black & Decker drill) were important parts of the advertisement and had to be accurately portrayed.

The *Makita* case also serves as a warning to those editing advertisements for the purpose of creating the most favourable impression for the advertiser. It is not sufficient to screen as the final commercial what took place in a comparative test on one occasion if the commercial does not accurately reflect the true state of affairs. The clear lesson in the *Makita* Case is that advertisements must be accurate in all respects and advertisers ought to choose their "takes" carefully.

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Industrial Commission v. Entertainment Industry Act Complaints Committee

Therese Burke examines the powers of the Complaints Committee To review contracts under the Entertainment Industry Act and suggests the Industrial Commission may be more effective

The *Entertainment Industry Act 1989* provides for the establishment of a Complaints Committee to be forum for the hearing and resolution of industry complaints.

The establishment of the Complaints Committee was one of the recommendations of the Report of the Ministerial Committee to Review the Theatrical Agency and Employers legislation. In making this recommendation, the committee recognised that there are already other jurisdictions in respect of which certain disputes in the industry may be resolved, but noted that judicial relief could be extremely expensive and unwarranted having regard to the nature of the complaint.

The new Complaints Committee therefore is intended to offer a speedy, effective and cheap means for the resolution of industry complaints.

Whether it becomes the intended forum for resolution of contractual disputes however remains to be seen, particularly as it seems to be far less comprehensive than Section 88F of the *Industrial Arbitration Act*, both in respect of the grounds for which relief can be granted, and the orders that can be made. It may well be that its main function becomes that of a disciplinary tribunal for dealing with misconduct in the industry.

Powers of the Complaints Committee

Under the Act, the Complaints Committee may investigate and make determinations concerning any of the following matters:

- misconduct by an entertainment industry representative, an entertainment industry employer or a performer;
- allegations that an entertainment industry contract or a provision of such a contract is unfair, harsh or unconscionable; and
- the failure of a person to pay an amount owing to an entertainment industry representative or a performer under an award, industrial agreement or entertainment industry contract.

Under Section 12 of the Act, the Committee may order, if it finds that an entertainment industry contract or a provision of such contract is unfair, harsh or unconscionable, that the contract or a provision of the contract be varied. The Committee may not, however, vary a contract or a provision of such a contract which has been fully performed.

The Committee also has power under the Section 13, if it finds that a person has failed to pay an amount owing to an entertainment industry representative, an entertainment industry employer or a performer under an entertainment industry contract to make an order requiring payment of that amount, provided that the amount is less $20,000, and that the parties have agreed to be bound by the Committee's determination at the commencement of the enquiry.

In any other circumstances, the Complaints Committee may issue a certificate to the effect that a person has failed to pay an amount, and that certificate will be admissible in proceedings in court of competent jurisdiction to recover the amount owing.

Entertainment industry contracts

The jurisdiction of the Complaints Committee to make a determination about a contract or the provision of a contract is limited to "entertainment industry contracts" as defined in the Act. This involves the assessment of a myriad of definitions. However, broadly speaking, any contract:

- where a performer appoints an agent or manager;
- with a performer relating to the terms and conditions of performances to be given by him or her; or
- relating to the venue at which those performances are to take place,

which relates to the "entertainment industry" (which is, curiously, not defined) will be covered by the Act.

It accordingly appears that most types of standard industry contracts will be caught by this definition, including recording contracts, contracts between television stations and performers for appearances, theatrical booking agency contracts and management and agency contracts.

Unfair, harsh or unconscionable

In order to vary an entertainment industry contract, the Complaints Committee must consider that the contract, or a provision of it, is unfair, harsh or unconscionable, having regard to the public interest and all of the circumstances of the case. But what is meant by the phrase "unfair, harsh or unconscionable"? Some guidance is provided by the decisions relating to Section 88F of the *Industrial Arbitration Act*.

Section 88F of the Industrial Arbitration Act

Section 88F of the *Industrial Arbitration Act* grants to the New South Wales Industrial Commission wide and general powers to set aside or vary the terms of contracts or arrangements under which a person performs work in any industry. The Commission is entitled to look behind the express terms of the document and ascertain the reality of the relationship between the parties and may, in exercising its powers take into account the way that the contract or arrangement was actually carried out between the parties, as well as the express terms.

The orders that the Commission can make include orders varying or remaking the contract and orders for the payment of money including lump sum compensatory payments, interest and costs.

Section 88F will apply to any contract where a person performs work in any "industry". That term is defined in Section 5 of the *Industrial Arbitration Act* to be a "craft, occupation or calling in which persons of either sex are employed for hire or reward.....", and would clearly cover an entertainment industry contract.

Much of the decided cases on Section 88F have centred around a determination of what is fair in contracts to which the provision relates. Because of the similarity in wording between this section and the relevant provision of the *Entertainment Industry Act*, these cases are likely to provide a valuable source of guidance to the Complaints Committee in making its determinations under the *Entertainment Industry Act*.

Decided cases under Section 88F have shown that judges will apply standards which appear to provide a proper balance or division of advantage or disadvantage between the parties who have made the contract or arrangement, bearing in mind the conduct of the parties, their capacity to understand the bargain that they made (taking into account such considerations as their relative

standards of education and commercial experience) their comparative bargaining positions (including whether the contract was a standard form one or whether its terms were negotiated by the parties) and the representations or undertakings made by the various parties at the time the contracts was entered into.

The Commission will not set aside contracts which are on their face unfair, but operate fairly, or where unforeseen events render the contract unfair. Nor will the Commission use its discretion to interfere with bargains freely made by a person who is under no constraint or inequality, or has made a bargain on even terms with which he or she is now disgruntled, or who has taken an unsuccessful business risk.

Advantages of Section 88F

Section 88F has the following advantages over the scheme for review in the *Entertainment Industry Act*:

1. It extends to arrangements of understandings and conditions and collateral arrangements - not just "contracts".
2. Section 88F applies whether contracts are "executed" or not.
3. The applicant under Section 88F need not worry about falling within the precise definition of an "employment industry contract" - as long as the contract relates to work being performed in any industry, the Commission has jurisdiction.
4. The Industrial Commission under Section 88F is able to look not only at the terms of the contract, and the way it was made, but also the way that it operates in practice.
5. The Commission may order contracts void in whole or in part or vary a contract in whole or in part either from the time it was entered into of from some other time.
6. Under Section 88F the Commission also has jurisdiction to review contracts which are against the public interest, for example, contracts which would be an unreasonable restraint or trade (as considered in A *Schroeder Music Publishing Co Limited* v. *Macauley*).
7. Under Section 88F the Commission has broad powers to make compensatory orders in favour of an applicant. By comparison, under the *Entertainment Industry Act* the Complaints Committee's only power to make the orders for the payment of money seems to be where the order relates to the failure by one of the parties to pay an amount owing under the contract.
8. The Complaints Committee has no general power under the Act to award costs.
9. The Industrial Commissioners are skilled in the determination of the issues before them in Section 88F cases - expertise which the Complaints Committee members will no doubt quickly acquire, but may not initially possess.

To be fair, the stated objective of the *Entertainment Industry Act* was not to replace other forums for hearing disputes, rather to provide an additional and speedy, effective and cheap means for resolving complaints. It should be noted, however, that the Industrial Commission is a relatively cheap and speedy forum for the resolution of disputes relating to industrial contacts and provides many additional advantages. Perhaps the main functions of the Complaints Committee under the *Entertainment Industry Act* will be to deal with complaints about misconduct by entertainment industry representatives, entertainment industry employers or performers (in the case of which the Complaints Committee has the very real and relevant power to suspend, cancel or vary the condition of the licence held by those persons under the Act), and to make orders for the payment of money owing to entertainment industry representatives, entertainment industry employers and performers where the complainant chooses not to bring proceedings in the courts.

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New Zealand broadcaster's "Double Jeopardy"

Chris Turver discusses a recent victory by New Zealand broadcasters in overturning a 1989 amendment to the Broadcasting Act which subjected them to the risk of double jeopardy

Justice has prevailed after a year of "double jeopardy" under which New Zealand broadcasters faced a guilty verdict in one forum - and then a court action for damages on the basis of that verdict.

The issue centered on the outcome of tough statutory formal complaints procedures which broadcasters must comply with.

New Zealand broadcasters have been required since 1977 to deal with formal complaints under the *Broadcasting Act* in a formal way. Dissatisfaction with the outcome entitled the complainant to refer the complaint to the Broadcasting Tribunal. But they had to make a declaration that they would not also take legal action through the courts if they used this procedure. The Justice Department considered this deprived complainants of their legal rights and the *Broadcasting Act 1989* deleted the restriction when the Tribunal was abolished and a new Standards Authority was set up.

Under the new regime, viewers and listeners have the right to complain to the new Broadcasting Standards Authority to ensure compliance with performance standards. The Authority's rulings must be publicly announced. However, a previous provision which recognised the "double jeopardy" factor was removed against the protests of the broadcasters.

Broadcasters warned during the passage of the 1989 Act that removing the requirement that a complainant either lodge a formal complaint against a broadcaster or take that broadcaster direct to court - but not both - would lead complainants (some of whom are becoming increasingly sophisticated in "milking" the system) to use a formal complaints verdict in a subsequent court action for damages.

Over the last year, several attempts were made by broadcasters, led by Radio New Zealand, to seek renewed protection on the grounds that where a formal complaint was upheld against a broadcaster:

- the ability of a broadcaster to defend any subsequent legal action would be compromised from the start by the evidence produced from a formal complaint hearing.
- a significant breach in the normal impartiality of a court hearing would occur.
- prejudicing a court case in this matter would influence a jury in awarding any damages.

In evidence to a parliamentary select committee reviewing the *Broadcasting Act* in August 1990, the broadcasters illustrated their concern by disclosing several current cases where a formal complaint had been lodged, and parallel notice had been served of court action. The select committee rejected their submissions.

Radio New Zealand pursued the issue

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Broadcasting deregulation

Bob Campbell identifies the issues broadcasters feel need to be taken into account in any overhaul of the Broadcasting Act

In an age of international deregulation of broadcasting our government was busy:

- reducing the permissible levels of foreign ownership in broadcast holding companies from 50 per cent to 20 per cent;
- introducing extraordinary tracing provisions for foreign ownership that were designed to ferret out any hint of irrelevant and remote foreign interests in holding companies;
- introducing sweeping concepts of actual control and association into the *Broadcasting Act*;
- affirming the continuing regulation of Australian content and children's programming.

It seems to me that there is a real danger the deregulation debate in Australia will end up being a one way street, a street that could potentially lead the broadcasters to be no less regulated than they currently are and in some financial peril.

Foreign ownership provisions have been tightened thus cutting off a critical source of investment finance while at the same time, the government contemplates new forms of economic rent, such as licence auctioning, and is contemplating a relaxation of barriers to market entry.

Continued regulation of Australian content and of children's programming is affirmed while the government contemplates so called "self regulation" of the ownership and control provisions of the Act. These provisions carry attendant penalties for noncompliance and sweeping powers for the regulatory authority to demand information from licensees.

Additional licences

It will come as no surprise that I fundamentally endorse the position of the Minister that he has no present intention to grant any additional commercial television licences in this country.

My support for his position will be regarded as a blinding glimpse of the obvious and before it is taken as being simply self-serving, it is wise to reflect on the quality of service that commercial television provides in this country where every significant Australian population centre in the near future will be able to see three commercial services, a national service and the SBS.

It is high time we as commercial broadcasters got on the front foot again and said to

Bob Campbell

the academics, theoreticians and commentators that what we have here, in the most general sense, is as good as it is going to get and comparable to the best in the world.

A small and scattered population seeing as it does a diverse and quality range of domestic and international production is something for which this country can be justifiably proud, and for which it receives international recognition.

The successful export of much of our production is testimony to not just the country's critical eye of our local viewers but the critical eye of those viewers in countries which our critics would regard as being more sophisticated and highly developed.

Economic viability is a critical measure of what can and cannot be sustained in this nation and by any test of economic viability, three commercial networks, compatible with the sophisticated service that is provided, are at the limit of what can be sustained.

Commonsense says that the high levels of viewing in this country and television's large acceptance by our viewing constituents are a ringing endorsement of the three competing services striving as each of us does for quality, diversity and localism. This represents an infinitely better alternative than a multiplicity of low budget import-orientated stations with a maze of repeat programming as their principal fare. This, of course, is largely the characterisation of independent television in the United States.

The second threshold question that needs examination is "on what basis should competing licences be allocated?"

Should licences be awarded to the most suitable applicant or should they be awarded to the richest applicant via a tender or auction process or should they be merely drawn out of a hat? It is our firm view at the Seven Network that licences should be allocated in the most general sense on "the basis of the most suitable applicant".

The auction system for new licences is simply a disguised tax in an environment where television licensees pay company tax, payroll tax, sales tax and licence fees - this business makes more than its fair share of contributions to consolidated revenue.

The auction process, of course, in addition to having the potential to be financially debilitating, provides no guarantee as to the general suitability of the applicant or his future ability to provide a suitable service.

Financial capability when married to localism or management capability or suitability or service or commitment to domestic production is a necessary and appropriate basis on which to judge the allocation of licences. Financial muscle, on the other hand, via the auction system is not a suitable basis to judge the prospective licensee.

The results of financial muscle or at least perceived financial muscle, have been adequately demonstrated firstly, in the 1987 round of network acquisitions and secondly, in the AM/FM conversion process with the resultant handback of FM licences by over enthusiastic licensees who have revisited their balance sheets to find their initial bids over the top.

Administration

The determination of the need for new licences in our view should continue to be done by the Minister on advice from an expert group of people.

The judgment of the need for the allocation of new licences should be:

- apolitical;
- based on sound social and economic research; and
- be informed by independent expert opinion.

If reasoned opinion deemed further licences are to be issued then the best body to allocate the new licences is the Australian Broadcasting Tribunal (ABT) or its successor body.

The ABT has a wide perspective across all broadcasting issues, it has the powers and capability of gathering a broad range of information and presumably, it will continue to have a blend of legal, broadcasting, bureaucratic and technical expertise on which it can call.

If the future direction of planning is to be

contained within the ABT, and this is not a suggestion I would endorse, I would caution that the body responsibility for determining whether there should be additional licences should be separate from the body given the responsibility of judging the successful applicants for such new licences.

Licence criteria

In assessing the most suitable applicant the regulatory authority would inevitably need to satisfy itself that the eligible applicants fulfilled basic licensing criteria. These criteria currently include:

- financial capability in providing an adequate and comprehensive service;
- technical and management capability;
- commitment to domestic production;
- the commercial viability of competing services, and
- fitness and propriety.

With the exception of fitness and propriety, there can be no fundamental objection with the overall thrust of these criteria. It is fair to say that sensibly administered, these criteria work well in underpinning the quality and consistency of our broadcast service.

One might quibble with the scope of adequate and comprehensive or argue at the margins about the limits of financial capability, but the criteria have, when sensibly administered, served both the industry and the public well in the past and in my view, will continue to do so in the future.

We are told continually that the Act is nightmarish. I happily concede it is not an easy read, however, it seems that the most complex aspects of the legislation are often those that have least application in the day to day running of our business, e.g. the grandfathering provisions, overlapping service areas, aggregation and MCS provisions. In any repeal or review process, the baby should not be thrown out with the bath water.

Adequate and comprehensive

While the definition of adequate and comprehensive may provide some comfort for the regulators, the service provided by commercial television will fundamentally be economically driven. That is, the proprietors and the bankers will only ever be in a position to provide a service that is affordable.

In sensibly administering provisions such as adequate and comprehensive, constant reference must be made to:

- the total services available in the market and the programming these services provide;
- the scheduling practice of a licensee and its competitors in providing a market perspective of what is available to the public; and
- the licensee or network's compliance with the statutory obligations in areas such as Australian drama and children's programming.

Financial capability

In operating a business, financial capability is a vital ingredient that is frequently and conveniently overlooked by commercial television's critics and commentators in pursuit of sectional and vested interests. In the broadest commercial sense, financial capability, as a concept, should not be seen simply as a tool for excluding licence applicants or for punishing the incumbents at the time of renewal. Also relevant under financial capability is what the industry can afford by way of impost.

An assessment of financial capability, of course, must take into account holding companies above the licensee companies. In prospect, it now seems that Australia's three commercial networks will be recapitalised at realistic levels. Tomorrow hopefully, the industry will not be required to service massive debts.

The fine balance of television profitability must take note of the historical earning power of the television market, in general, and of each of the three commercial networks in particular. It must also take into account current marketplace interest rates, the need for continual maintenance and update of capital expenditure, the seasonal nature of the television revenues and the economic sensitivities that are inclined to disproportionately affect these revenues.

Domestic production

In the 1989 debate on Australian content regulation, children's lobby groups, Australian independent production companies and groups such as Actors Equity paid little or no heed to what this business can afford in their pursuit of ambit and sectional claims for particular program types they wished to pursue for their own economic enhancement.

The ABT in this arena provided a valuable forum and distillation process for the range of views that was canvassed. It is important to note that two of the three networks were and are producing at levels significantly above the minimum statutory requirements. The market demands that commercial television has an Australian look and those who ignore the voice of their constituents do so at their own economic peril.

Regulation to protect and develop a domestic production base has well served its purpose. Twenty years on, viewers demand of us what quotas once obliged us to produce.

Fitness and propriety

The prolonged Bond inquiry amplified the fundamentally unworkable nature of the fitness and propriety provisions. It is the Seven Network's contention that there should be people who cannot own television licences and beyond that, all should be eligible to be involved in the television business.

People, for example, who should not own television licences or be eligible to own television licences are foreigners, people who have been convicted of certain criminal offences, and people who have displayed a lack of honesty or candour with the ABT or similar regulatory authorities, such as the Australian Stock Exchange. These are the only "fitness" conditions that should apply for people who wish to be granted broadcasting licences. The moment any broader criteria are included, the regulator is put in an impossible position.

Reforming the licensing process

There should be automatic licence renewal for five year terms unless an interested person has shown substantial reasons as to why the licence should not be renewed or why it should be conditionally renewed or why it should be renewed for a shorter period.

In our view the Act should focus much more on control and much less on ownership. After all control is the issue in relation to an Australian look for the Australian television industry. Control is the issue that the management of licenses must address in placing proper emphasis on the balance between returns for shareholders and the inherent responsibilities that come with the conduct of a license.

There should be a reduction in licence fees. This is particularly relevant while the industry recapitalises and gets itself back on its feet. The current licence fees are simply a disguised turnover tax and in our view, are very inequitous. The large producing stations taking all the financial risks with production and having all the infrastructure needed to carry out this production are bearing a disproportionate share of licence fees when compared to the smaller non-producing stations who simply put a piece of videotape on the air receive a satellite delivered signal for retransmission.

Any prospective pay television service should be subscriber based only and not have the dual income streams of subscription and advertising. The Australian market is too small, the economics are too fragile and the advertising dollar per capita spend too low for the market to support three viable free to air

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Mobile phones in taxis

Denis Dalton examines a recent finding by the Trade Practices Commission that the use of mobile phones by taxi drivers is in the public benefit

The Trade Practices Commission has recently ruled on Silver Top Taxi Service's application that it be allowed to prohibit the use of car telephones in members cabs as authorised conduct under the *Trade Practices Act 1975*.

Like other taxi companies operating throughout Australia, Silver Top provides a radio communication network service between the public and taxi operators who are individual owners of taxi licences. Silver Top's application was supported by other taxi companies.

Submissions

The representatives of the taxi companies strongly argued that the interests of the public were best served by banning car phones because the use of car phones undermined the integrity of their radio networks. It was strongly argued that the maintenance and improvement of the radio networks was in the public benefit. The installation of new equipment to improve this service could only be done if the taxi industry was not fragmented. It was further argued that the use of car phones undermined the effectiveness of the extensive monitoring of the standard of service provided by the taxi companies and that it would subsequently be detrimental to the allocation of the resources of the taxi industry to the public.

The submissions on behalf of the taxi companies also covered a range of matters, including references to the safety of the driver and the passenger, the return of lost goods left in taxi cabs, "bottling up" of jobs by drivers with car phones, the misuse of car phones to cancel jobs of other drivers, that there would be no means of applying pressure to drivers to maintain standards, the drivers would take jobs when not in the area and there would be no recourse against them, the car phone operators would only operate during the busy period, that drivers with car and phones might develop their own clientele.

The submissions made on behalf of the taxi companies were opposed by a number of independent drivers. The independent drivers argued that they were concerned to offer the best possible service and that the use of car telephones was an integral part of providing a service to a range of people who wanted the reliability and cleanliness offered by someone with whom they were familiar. The independent drivers in particular pointed out the benefits to groups such as the elderly and the disabled, who were able to call up the driver of their choice for regular trips that they might need to take.

Bob Baxt

Determination

In its Determination on 21 September 1990, the Commission made reference to the tests under both Section 90(6) and Section 90(8) of the *Trade Practices Act 1975* concluding on the authority of the Tribunal's decision in *Re Media Council of Australia No. 2* (1987) that the tests under the two subsections were the same. The Commission in applying this test concluded that the proposed conduct was anti-competitive. It did not accept that there were public benefits flowing from such conduct which should cause the Commission to authorise the conduct. On the contrary, the Commission concluded that there were positive public benefits to be seen in allowing the use of telephones in taxis in addition to the public detriments that might arise from preventing their use. The Commission acknowledged that there are public benefits in improving the service offered by the radio networks, that new technology is important to improved service and considered that the taxi industry was setting and achieving standards for itself.

However, the Commission did not accept that the public was best served by supplying the taxi companies with a monopoly on the use of technology. The taxi companies were unable to convince the Commission that there was any difference between a booking taken through a car telephone and one taken from a street hiring from the point of view of monitoring and deploying taxi cabs.

Public benefits

The Commission concluded that the major public benefit from allowing the use of car telephones is that it permits passengers or customers, by the use of the most modern technology, to communicate with a driver with whom they wish to deal, rather than customers having to accept the driver that is allocated by the taxi company. The use of a car telephone permits the customer to arrange transport with someone who the customer knows is reliable and offers a good service both in punctuality and cleanliness. The Commission saw these matters as pro-competitive. Under the present system there is little responsibility on particular drivers to offer a good standard of service.

Another benefit that the Commission saw available to the public was that passengers would know when the vehicle was arriving and would be able to change the arrangements. In making its Determination, the Commission concluded that the overall effect of allowing the use of car telephones in taxis would be to provide a benefit to the public in improving the level of service and forcing taxi operators to provide as high a standard as possible.

The Commission also noted that as the provision of mobile telecommunications services may be opened up to competition in the near future, drivers and owners of taxi cabs would be free to have access to whichever service providers may be licensed in the future.

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ERRATA

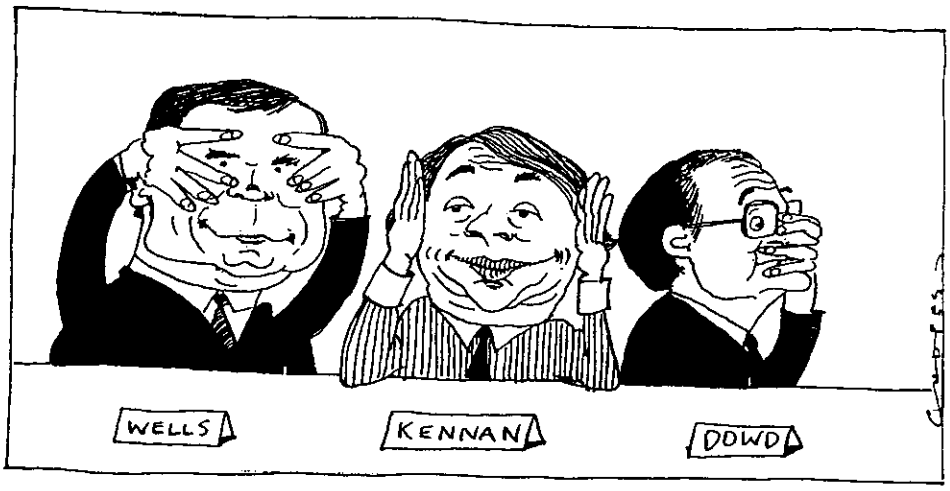
In the Winter Edition of the Communications Law Bulletin (Vol. 10 no. 3) the following errors were made:

In the article *"De Garis and Moore* v *Neville Jeffress Pidler Pty Limited"* by Michael Hall, the statement that "the general rule is that the author owns the copyright in a literary work, notwithstanding that it was written in the course of the employment" is wrong. The general rule is that the author is the owner of copyright in the literary work, but Section 35(6) creates an exception when the work is written in the course of employment. The employer is then the owner of the copyright. Section 35(4) is a further exception to the Section 35(6) rule, as the article then went on to discuss.

Ian Cunliff, the author of the article "EDI: The Legal Fuss", is a solicitor with the Sydney office of Blake Dawson Waldron.

Forum 2: Defamation law reform

Sally Walker of Melbourne University examines two aspects of the reforms proposed by the Attorneys-General of three states



The process of reforming Australia's defamation laws should involve an appraisal of the policies justifying defamation law and a critical evaluation of the present law. The recent proposals of the Attorneys-General of New South Wales, Queensland and Victoria for reforming our defamation laws are characterized by a failure to show the kind of understanding of defamation law which is necessary to ensure that only appropriate reforms are enacted. The deficiencies of the approach taken by the attorneys in their first *Discussion Paper* and developed at the Free Speech Committee's Seminar held in Sydney in October 1990 can be illustrated by the manner in which they have dealt with two significant areas: justification and the public figure concept.

Justification

At the Free Speech Committee's Seminar, the Attorneys indicated that they had reached agreement that the defence of justification should be one of 'truth plus privacy'; the defence should not be available in respect of material relating to the "health, private behaviour, home life or personal or family relationships" of the plaintiff unless:

(a) the matter was the subject of government or judicial record available for public inspection;

(b) the publication was made reasonably for the purpose of preserving the personal safety, or protecting the property of any person; or protecting the property of any person; or

(c) the matter was relevant to a topic of public interest.

An assertion made by the Queensland Attorney General that this is a "very major concession for Queensland and New South Wales" is fallacious. If this formulation were adopted, the impact on the law as it now operates in New South Wales and Queensland would be minimal; the real impact would be felt in Victoria where publishers would no longer be able to rely on truth as an absolute defence when publishing persona information, but would have to satisfy the additional hurdle constituted by paragraph (a), (b) or (c).

The Attorneys seem to be of the opinion that the 'truth plus privacy' concept will protect against invasions of privacy. At the Seminar, Victorian Attorney-General Kennan said:

"The Australian media, and in particular the electronic media, has a propensity to impose on people's homes and private lives, often using heavy-handed tactics. A law of defamation that permits the media to justify intrusions of privacy on the basis of truth alone is no longer an appropriate law".

In fact, the proposal would do little to protect privacy. It must be remembered that 'truth plus privacy' would be raised only as a possible defence to an action for defamation. In many cases an invasion of privacy does not involve any issue relating to defamation law. Even if the invasion of privacy involves the publication of material, not all statements regarding private matters are defamatory.

At one point in the Victorian Attorney-General's paper, he said that the three States had agreed on the option of "truth alone as the defence *plus the provision of a remedy for breaches of privacy*". Later in his paper it became clear that the Attorney's proposal would not give a remedy for invasion of privacy, but merely add a privacy hurdle to the defence of justification in the terms outlined above. It is little wonder that press reports of the Seminar were somewhat confused.

Something should be said also about the Queensland Attorney's view regarding the defence of justification. The Attorney General suggested that, in determining what should be the role of qualified privilege, the issue to be addressed is "what damaging and false statements do you wish to allow to be non-defamatory?" According to the Attorney, this is the correct way to go about determining what should be protected by qualified privilege because "true statements" are protected by the defence of justification. This fails to take account of the limited nature of the protection accorded by the defence of justification. First, the defendant must prove the truth of the imputations arising from the published material, not the truth of the *statement*; it is not enough that a statement is literally true, the imputations must be shown to be true. Secondly, the defendant has the burden of proving that the defamatory imputation is true; practical problems may be faced: a witness may have died, or changed his or her mind about giving evidence, before the case comes to trial; there may be a desire to protect a journalist's sources. Finally, the law of evidence may make it difficult to establish the truth because it limits what evidence may be admitted in court proceedings.

Public figure test

The Attorneys agree that Australia should not adopt the America law as developed in *New York Times* v *Sullivan* (1964) under which a public figure cannot recover damages in respect of defamatory material relating to his or her official conduct unless the statement was made with malice.

The reasons given by the attorneys for rejecting the American position include: the American concept is vague and uncertain; the reputation of public figures; litigation is protracted. None of these reasons addresses the role of defamation law. In fact, if regard were had to the policy justifying the law of defamation, there are good reasons for not adopting this part of the American law. The malice requirement concentrates attention on the publisher's state of mind rather than on the nature of the published material; American cases focus on the fault of the defendant rather than upon the truth or falsity of the statement at issue. The problem with this is that the state of mind of a publisher has no relationship to the individual's interest in his or her reputation and it is this interest which justifies the existence of the tort of defamation.

It is worth noting that the attorneys do not address the other aspect of the American

public figure concept, that is, that a public figure plaintiff bears the burden of proving the falsity of the defamatory imputations *Garrison* v *Louisiana* (1964).

Conclusion

The *Discussion Paper* makes it clear that the attorneys' aim is to achieve a uniform defamation law. At the Free Speech Committee's Seminar there were many references to "concessions" made in order to achieve uniformity. While it certainly is in the public interest that Australia should have a uniform defamation law, it is equally important that decisions regarding the content of that law should be made having regard to the policy objectives justifying the civil action for defamation rather than as part of a process more fitting to a bartering transaction than the process of law reform. It would be most unwise to seek uniformity simply for the sake of uniformity or to introduce "reforms" simply to be shown to have tried.

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Gareth Evans of Queensland Newspapers, gives a publisher's perspective

The Pancake Concord - the historic deal on uniform defamation reached by the Attorneys-General from Queensland, New South Wales and Victoria – should, insofar as it goes, be welcomed by Australian publishers.

While there is still a long way to go between the deal worked out over the breakfast table at the Pancake Parlour in Sydney's Rocks and actual legislation, Messrs Wells, Dowd and Kennan have shown that something positive can be done to bring some sort of uniformity to this complex area.

Their efforts to date certainly appear to have gained more ground than those of my namesake when he tried to make progress in the same difficult territory. Senator Evans' efforts were virtually scuttled because of the intractable attitude of one major publisher.

In summary, the Pancake Concord signalled agreement on the following:

- Criminal defamation will be retained in all jurisdictions subject to the discretion of the Director of Prosecutions.
- Truth alone would be a defence with statutory protection for privacy.
- Court recommended corrections will be established.
- There will be a six month limitation period to commence an action with a three year maximum.
- New South Wales and Queensland will allow juries to determine guilt with judges to determine damages. Victoria intends to allow juries to determine both matters.
- Statutory incentives would be provided to encourage the media to play a responsible role in regulations in this area so that, if a matter was arbitrated by the Press Council, that may be taken into account in the determination of quantum of damages.
- All three states will introduce a statutory tort of contempt which would be contained in a separate bill.
- A further *Green Paper* should issue soon summarising other areas to be examined, including qualified privilege, parliamentary privilege and model rules for defamation actions.

Clearly, this *Green Paper* will allow further debate on all issues under consideration, but two of the announced proposals invite critical comment.

Role of Press Council

The role of the Press Council in Australia has come under repeated criticism, mainly by the Australian Journalists' Association (AJA) who were instrumental in its original establishment in 1976. The AJA withdrew its support from the Press Council when the Council, quite correctly, refused to enter the political debate that followed the News Limited takeoever of the Herald & Weekly Times Ltd in January 1987.

Since that time, the AJA has waged a campaign to undermine the Press Council despite the fact that several of the Association's eminent members continue to sit on the Council and adjudicate at complaints committee hearings.

The Queensland Attorney-General, Mr Wells, has spoken of "the possibility of providing a meaningful role for a meaningful Press Council." Publishers would be very wary of any "statutory incentives" which would see a weakening of the role of the Press Council and an increased role for any government in "regulation" of the media.

The proposal, that Press Council arbitrations be taken into account when determining damages, shows an ignorance of the Council's operation or perhaps a desire to bring its operation increasingly under government control.

Complainants to the Press Council may be asked to sign a legal waiver if the Council considers the complaint could be the basis of legal action. This waiver is vital if publishers are to continue to be taken before the Press Council's complaints committee. Without it, publishers would be asked to argue their case before a non-judicial body.

It might even mean that lawyers get to appear at Press Council complaints hearings, an area they are quite sensibly precluded from at the moment.

Such statutory authority would clearly undermine the independence of the Council.

Tort of contempt

The other concern to publishers could be the content of the proposed Bill designed to introduce a new statutory tort of contempt.

Australian newspaper publishers should appreciate the concern of the Attorneys General in relation to the publication of inflammatory or prejudicial material, in particular careless use of photographs or television footage in cases where identity is an issue to be determined by the criminal court.

It's arguable that a new tort is necessary. Electronic media personalities have clearly abused the contempt laws for the sake of notoriety.

However, any problems which have arisen in recent years in this area are the result of unexplained failure by prosecuting authorities to invoke existing laws of contempt, particularly against the electronic media. Further the reform of defamation laws is not an appropriate occasion to consider piecemeal reform to the law of contempt. If a separate bill is designed to consider comprehensive proposals for reform of the law of contempt, the print and other media should be invited to respond to these proposals.

Criminal defamation

Most newspaper publishers could be disappointed that criminal defamation has not been abolished. Many of the supposed functions of criminal defamation, such as avoiding breaches of the peace, are served by other existing provisions which concern the use of threatening, abusive or insulting words in public.

To the extent that existing criminal offences do not follow the same operation of criminal libel, at least in Queensland, civil actions for defamation provide adequate protection against defamatory statements. Criminal proceedings are therefore unnecessary.

The Attorneys General have agreed that the discretion of the Director of Prosecutions should determine if actions for criminal defamation should be implemented. It would seem to make more sense that, if criminal defamation is to be retained, then the requirement of leave of the Supreme Court before proceedings are commenced should be retained.

If the Attorneys are not swayed by this argument, criminal defamation should be clearly and narrowly defined in any new bill.

The agreement that the truth alone should be a defence to an action for

defamation represents a significant breakthrough. There is the rider that statutory protection of privacy should accompany such a defence.

The law of defamation would be a crude and uncertain means to protect personal privacy. Personal privacy should be the subject of separate legislation which directly addresses that issue. If sensitive private facts are to be protected, it should be done by a law relating to privacy.

If the law of defamation is to be used as an uncertain mechanism to protect individual privacy, then the person complaining of the invasion of privacy should carry the burden of establishing this element.

Court ordered retractions

Further debate has been flagged on the hoary matter of court sanctioned corrections. This was the stumbling block encountered by Senator Evans in previous moves for uniform defamation review.

Newspaper publishers should support a system whereby the publication of a retraction within a reasonable time entitles a plaintiff to recover only pecuniary damages when these can be proved, or, alternatively, general damages limited in amount.

The law should provide that evidence of an apology or a correction or an offer to publish or correct shall not be tendered against the defendant as an admission. The defendant, however, should be able to tender that evidence if it seeks to do so on the question of damages.

As to court-ordered or sanctioned retractions, the print media has a legitimate concern that a publisher should not be forced to something which it knows or believes to be false. Several paths may well be open publishers.

The first is that the defendant publisher should not be required to state that it adopts or accepts any statement of fact found by the court. The second would be that the defendant newspaper may accompany the correction or retraction with a statement that it is doing so to abide by a court order. There also need to be safeguards against frivolous plaintiffs. A further protection could be for the defendant publisher to elect not to publish a retraction and to defend proceedings at a considerable risk or increased costs and damages if the defence is unsuccessful.

Evidence of a defendant/publisher's acceptance or non-acceptance or any court-sanctioned correction should not be admissible in later proceedings other than in the judge's assessment of any damages. If a defendant publisher elects to publish a retraction of the defamatory statement or an apology or publish a correction, the plaintiff should be entitled only to damages for proven actual economic loss caused by the publication.

If a fast track procedure of court-sanctioned retractions is to be available to plaintiffs, defendants should also be entitled to press for a summary hearing. Such a summary hearing should be granted unless the court decides that a published apology, retraction or correction and payment of a nominated sum would be an inadequate remedy.

Most Australian publishers should have no difficulty with the provisions forecast for limitation periods and the for role of the jury in defamation actions.

Qualified privilege and the public figure test

Publishers should also welcome the opportunity to contribute submissions concerning qualified privilege and the role of parliamentary privilege.

One concern would be that any redrafting of qualified privilege should cover the existing protection in this area, although these protections vary from State to State. The examination of qualified privilege may also allow for another airing of the so-called "public figure test".

The Attorneys-General have said they consider that the introduction of a "public figure test" would automatically operate to deprive such figures of protection in relation to defamatory remarks about their purely private affairs.

Publishers could argue there is an obvious need to fashion a defence of qualified privilege which promotes public discussion on matters of legitimate public interest, but does not involve the perceived technicality and other disadvantages of the "public figure test".

To the extent which the defence of qualified privilege accords the media protection to discuss the public conduct of public figures, such protection should be retained.

The purpose of the defence of qualified privilege is not to deprive public figures of protection, although this sometimes may be its necessary consequence, it exits so that the public can be informed on matters of legitimate public interest.

The AttorneysGeneral plan to welcome further discussion on all the matters they have raised. If the Pancake Concord was breakfast, it could be quite a while until both government, the media and other interested parties work through the menu.

Gareth Evans is Editorial Manager of Queensland Newspapers Pty Ltd and is a member of the CAMLA executive. Some of the above material is part of Queensland Newspapers' submission to Queensland Attorney-General Wells on the First Green Paper on Defamation Reform.

Michael Hall of Phillips Fox gives a plaintiff's perspective on the proposed reforms

Defamation law will always be controversial. It represents the conflict between two social values, both generally recognised as valid: the protection of free speech pitted against the individual's right to protect her or his good name from intrusive, inaccurate reporting. Whatever the state of the law, those who feel most keenly for one value or the other will consider themselves to be hard done by. The fact there has been since at least the 1950's an almost continuous clamour for defamation law reform is not enough to demonstrate that the present state of the law is seriously defective – whatever reforms are made, someone will continue to lobby for change.

I believe that the present defamation laws of New South Wales do, with a few anomalies, provide a workable and roughly fair balance between the competing interests of media organisations and those upon whom they report. It appears to me that most of the difficulties and inequities of certain classes of plaintiffs (such as politicians who should perhaps be less sensitive to robust criticism) and of defendants, or of the delays and expenses inherent in all types of litigation rather than faults in the law itself. To introduce restrictions on the right of action, with the incidental effect of excluding worthy plaintiffs, is not the proper response to excessive use of the system by some plaintiffs.

I therefore propose to confine my contribution to this forum to comments on two specific aspects of the present proposals.

Truth and privacy

Those calling for reform of Australian defamation law have long complained that truth alone should be a defence, without the additional need for public interest (public benefit in Queensland) or qualified privilege.

The practical consequences of the additional requirement of public interest or qualified privilege in the New South Wales defence have never been great. However, the proposal to move to a "truth alone" defence will simplify the law, and few plaintiffs, I suspect, will object.

While I welcome the move to "truth alone", it seems that the proposed exclusion from the defence of "certain private facts" is a confusion of the purpose of defamation laws. Defamation law is here being used to protect not reputation, but privacy. If there are certain facts which are so private that their protection outweighs free speech, then that example of the problems this can cause is

provided by the proceedings brought last year by actor Gordon Kaye against the British newspaper "Sunday Sport".

Gordon Kaye, a well known television comedy actor, was severely injured during a freak hurricane which struck England in January of 1990. He was placed on a life support machine, and to assist his recovery, notices were placed at the entrance to the hospital ward instructing visitors to see a member of staff before visiting Kaye.

On 13 February 1990 a journalist and photographer from the *Sunday Sport*, a newspaper which the Court of Appeal described as "lurid and sensational" ignored the notices and entered his room, to take photographs. Mr Kaye, perhaps not surprisingly in view of his condition, did not raise any objection, instructed the journalist and photographer to leave, but they refused and were eventually ejected by staff. Kaye, when asked, was entirely unaware of their visit.

The Sunday Sport refused an invitation to return the photographs, and indicated its intention to publish them, and to sell them to other newspapers.

Kaye's family brought proceedings to prevent publication of the photographs and an alleged "interview". Their action, framed in defamation, trespass and invasion of privacy, failed. The Appeal Court said, persuasively, that the action was not properly brought in defamation – the photographs could inspire only pity, not ridicule or contempt. There was no separate right to privacy, and therefore Kaye and his family had no means of preventing publication.

This case is an example of the unfortunate consequences of confusing defamation law with the protection of privacy. I therefore do not agree that plaintiffs (or anyone else) will benefit from the proposed exclusion from the defence of truth, of "certain private facts". If privacy is to be protected, it merits its own separate cause of action.

Court ordered apologies

While the Federal Court's power under the *Trade Practices Act* to order corrective advertising has attracted little comment, suggestions that the Supreme Court have an equivalent power to order a correction, when it finds that a defamatory, untrue settlement has been published, meet with howls of protest.

However, the value of such a power, unless the corrective statements can be obtained exceptionally quickly, must be limited. Advocates of defamation law reform on the media side are quick to criticise plaintiffs for seeking monetary damages at all – saying that if it is the restoration of a reputation which is at stake, that can be sufficiently done by an apology.

My own experience, assisting a variety of complainants in relation to alleged defamations, has been that newspaper proprietors in particular expect to be allowed days and even weeks in which to make up their minds to publish the most obliquely worded "clarification" or "correction", and then take umbridge when a complainant suggest that this is not sufficient to totally restore her or his good name.

I do not believe that it is practically possible to adopt a system which will compel newspapers or broadcasters to publish retractions or apologies, by court order, sufficiently quickly for them to have a real effect in restoring a plaintiff's reputation. Seldom can an apology published later than the next edition of the newspaper or program be sufficient to fully correct defamatory material. It can be no surprise therefore that some plaintiff, having gone through the process of trying to persuade a newspaper or broadcaster to correct mistakes, seek to recover monetary damages in addition to an apology.

Conclusion

To read many contributions to the defamation law debate from the media side (I do not include the other contributors to this Forum), is to gain the impression that all plaintiffs in defamation actions are unworthy gold diggers, seeking to gag the press. I do not believe it is so. Very few defamation plaintiffs make a profit from their cases, and those who do pay a great price in the discomfort and indignities of court proceedings. Publishers, meanwhile, are portrayed as martyrs to free debate and the democratic process, struggling to bring unpublishable truths to their readers or viewers. In fact, if we drove motor cars with the reckless disregard to other persons and their property that some reporters and media organisations show for the accuracy of their stories, and for the protection of individual reputations, we would be sued no less often, with equally expensive results and, in addition, would be likely to face criminal prosecution. I do not share the view that defamation laws in Australia should be substantially reined back.

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Rental rights – and the Copyright Act

Stephen Peach argues that the advent of digital technology has opened up new avenues for exploiting musical copyright for which artists should be remunerated

The advent of digital technology in the sound recording industry may, contrary to initial expectations, result in the decimation of that industry unless appropriate amendments are made to the *Copyright Act 1968*.

The acceptance of the compact disc format in Australia, in keeping with the experience of other major markets in the western world, has exceeded all industry expectations. In Australia, vinyl records now account for less than 10 per cent of all records sold each year and that figure is steadily declining. By way of contrast, sales of compact discs now account for more than 50 per cent of the balance.

The advantages of compact discs for the listener are well documented. One of these advantages, which is on the verge of being commercially exploited in Australia on a massive scale, is that a compact disc (or, more importantly, the sound embodied within the compact disc) does not deteriorate with repeated playing. It is, for all practical purposes, indestructible.

Of course, this characteristic also makes the rental of compact discs a commercially viable proposition. Regardless of the quality of the equipment used to play the disc, the disc itself will remain unaffected. This is in stark contrast to vinyl records which will suffer from significant and rapid deterioration depending upon the care taken with the record and the quality of the equipment on which it is played. The susceptibility of vinyl records to such damage has, in the past, acted as an effective barrier to the commercial exploitation of records through rental. The compact disc has eliminated that barrier and, already, compact discs are available for rental on a limited basis through many smaller record stores and video rental stores. However, if the experience of Japan is any indication (where in excess of 6000 rental outlets are currently operating), large scale compact disc rental is just around the corner.

No rental right

Section 85 of the *Copyright Act 1968*, which specifies the nature of copyright in sound recordings, provides that it is the exclusive right to make a copy of the sound recording, to cause it to be heard in public or to broadcast it.

A similar provision is contained in the Act in relation to musical works which, in the case of records, are embodied in the sound recordings. Section 31 of the Act provides that, in relation to musical works, copyright includes the exclusive right to reproduce the work in a material form, to publish it, to perform it in public, to broadcast it, to cause it to be transmitted to subscribers to a diffusion service and to make an adaptation of it. Neither section contains any reference to a right to hire the sound recording or the musical work. It has generally being accepted that, in those circumstances, the owner of copyright in the sound recording or the musical work has no "rental right". That is, the owner does not have a right to prevent unauthorised rental of records embodying the sound recording or musical work or a right to receive royalties or other compensation for the rental of those records.

No distribution right

It has been argued, following the decision of the Frankfurt Am Main Regional Court (Germany) in *Andreas Vollenweider and Friends AG* v *Medienpool Gesellschaft* (1989) that, at least in relation to musical works, there is a right to prevent unauthorised hiring of such works. The court in that decision held that a right of distribution (such as is specifically provided in the German copyright legislation) is divisible and that an owner of copyright can reserve the right to lend or hire when selling or authorising the sale of an article embodying copyright material.

To apply that decision in Australia, where the legislation does not provide for copyright to include a right of distribution, requires the right of publication (as contained in Section 31 of the Act in relation to musical works) to be construed as a right of distribution or to include such a right. Whilst there has been some debate on that issue, Section 29(3) of the Act would appear to render such debate irrelevant, at least in relation to the distribution of records. That sub-section provides, in part, that "the supplying (by sale or otherwise) to the public of records of a ...musical work... does not constitute publication of the work." Accordingly, even if the right of publication was held to contain a right of distribution (arguably entitling the copyright owner to reserve rights of rental), the sale or other distribution of records, at which point the rental right would need to be exercised, will not constitute an exercise of that publication right.

Royalties should be remuneration for exploitation

On the assumption that no rental right presently exists under the Act, the growth of CD rental outlets in Australia poses a great threat to the continued viability of the sound recording industry and the artists and composers who rely upon it. The income of copyright owners, including recording artists and composers, is still largely tied to, and dependant upon, the sale of "original" copies of records manufactured and/or distributed by record companies. The artist or composer typically receives a royalty for each record sold. The linking of the royalty with the sale of the record, whilst understandable in historical and commercial terms, blurs the concept of the royalty as remuneration for the use of the sound recording and the musical work embodied therein. The fact that such use, up until recent times, has largely been limited to the manufacture of records is simply a result of the available technology. However, current technological developments enable the dissemination of high quality copies of sound recordings in a number of different ways that do not depend upon the purchase of the record. Each alternative method of distribution of a sound recording, including the rental of the record, nonetheless constitutes an exploitation of the sound recording and the musical work in respect of which the copyright owner is entitled to be remunerated.

Survey evidence from Japan has revealed that in excess of 90 per cent of the compact discs rented are used to make a home copy. There is little doubt that this experience would be repeated in Australia. If the income of copyright owners continues to be tied to the sale of records, then the level of income derived form the exploitation of sound recordings and musical works will decline. While the implications for recording artists who are presently under contract are serious, they are catastrophic for those who hope to obtain a recording contract in the future, especially if the artist's music is of limited or marginal appeal. Declining incomes will result in less money being available to foster developing artists.

Amending the Copyright Act

The *Copyright Act 1968* is intended to ensure that the exploitation of a person's intellectual property is properly protected and/or properly compensated, however that exploitation may occur. Advances in technology have, however, tended to undermine the protection afforded by the Act. CD rental, which enables high quality copies of sound recordings to be obtained at a significantly lower cost to the consumer, is nothing more or less than the commercial exploitation of another's intellectual property for personal gain. The copyright owner is not presently entitled to receive any compensation for this new, and now commercially viable, use of the copyright material.

There can be no moral or legal justification for the failure of government to adequately protect the rights of copyright owners and to continue to protect those rental rights have already been introduced into the copyright law of many countries, including the United Kingdom, United States of America, France and Germany, in recognition of the growing threat to copyright protection posed by CD rental. At a time when Australian music is contributing significantly to the growth in Australia's export income, the need to protect that income is self evident.

Submissions have been made by the Australian record Industry Association ("ARIA") to the Commonwealth Attorney-General seeking amendment of the Act to include a rental right. The Department is presently seeking submissions from other interested parties on the amendment proposed by ARIA and on the question of rental rights generally.

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commercial services and advertiser supported pay TV.

Finally, there should be continued, indeed expanded, self-regulation in appropriate areas. The voluntary codes on violence and self regulation of commercial airtime have been successful. It has been a co-operative effort between the broadcasters with the input, advice and overview of the regulators and we believe there is significant further scope using these role models.

In conclusion, I think it is fair to say you will be hearing from us a lot more and a lot less defensively than has recently been the case. We cannot underwrite our continued economic viability while, at the same time, adopting a heavy regulatory hand with what remains of our businesses.

The real test of how serious we are about self regulation will be to see how much progress is made in the review process of the Broadcasting Act and the significant scope for self-regulation within that review between now and the time of the next election.

Bob Campbell is the Chief Executive of Network Seven. This is an edited version of a paper presented to the ABT Conference, "Deregulation ... in Step with the World", held in Sydney in November 1990.

Restrictions on tobacco advertising

The future for tobacco advertising in print and "sponsorship" advertising on television

Ian McGill examines new legislation regulating the advertising of tobacco products in the print media

The *Smoking and Tobacco Products Advertisements (Prohibition) Act, 1989*, ("the Act") came into effect on 28 December 1990.

The Act is an integral step in the Federal Government's continuing strategy to reduce smoking in the community. The Act is commendably short: nevertheless it does raise issues of concern and interest to print publishers.

In this article, the exemption for publication of accidental or incidental advertising matter is also briefly considered. However, in almost all cases publishers would receive consideration for the publishing of the advertising matter. Where consideration is received by the publisher the exemption does not operate.

Sponsorship

In a media release dated 27 December 1990, Peter Staples, the Minister for Aged, Family and Health Services stated that the ban implemented by the Act would release funds which the tobacco companies presently use to promote their products and that they could therefore be expected to seek sponsorship opportunities which will enable them to reach the widest possible audiences.

The Minister's press release stated:

"Sponsorship is another form of advertising that the Federal Government is examining ... it is particularly insidious because it links smoking with healthy, sophisticated and enjoyable activities, thereby conflicting with health messages designed to protect our children."

Although the prohibition does not, as yet, affect tobacco sponsorships it may affect the advertising of tobacco sponsorships in the print media.

The prohibition in the Act

Section 5(1) of the Act provides that:

"Subject to Section 6 [the Act does not apply to media printed outside Australia and not intended for distribution or use in Australia], a corporation must not publish or cause to be published, in a print medium an advertisement:

(a) for smoking; or

(b) for, or for the use of:

(i) cigarettes; or

(ii) cigarette tobacco; or

(iii) other tobacco products."

The penalty for a contravention of Section 5 is $60,000.

For the purposes of Section 5 "smoking" means inhaling or puffing the smoke of cigarettes or cigars of any composition or tobacco in any form: Section 3(1) of the Act.

The prohibition in Section 5(1)(b) of the Act is identical to the prohibition in Section 100(5A) of the *Broadcasting Act 1942 (Cth)*. By Section 5(1)(a) of the Act, the prohibition has been extended to "smoking". Presumably this slight change in emphasis from the *Broadcasting Act* proscription is to capture "lifestyle" advertising not directly related to cigarette products.

It is reasonably clear, therefore, that a number of the reported decisions on the operation of the *Broadcasting Act* prohibition are directly relevant to the consideration of the ambit of the prohibition in Section 5 of the Act.

Publication

The proscribed activity in the Act is the *publication* of the offending advertisement after 282December 1990.

The Act defines "published" but only so as to exclude from its operation communications to a person in the tobacco trade or in a tobacco product trade.

The Explanatory Memorandum and Second Reading Speech for the Act are not helpful in providing further definition. In its natural construction the term "published" means "made public" and in the context of the printed word would presumably embody the distribution of all copies to retailers for the purposes of sale to the public.

The ordinary and natural meaning more or less corresponds with the meaning of the word "published" in other Commonwealth legislation, such as the *Copyright Act 1968* as well as judicial consideration of that legislation.

Accordingly, printed material supplied or made available to the public before 28 December 1990 could continue to be sold after that date. The matter would be "published" upon completion of the distribution of the matter to retailers.

On the other hand, if matter was distributed to retailers not for the intention of immediate sale to the public but for sale to the public after 28 December 1990 then the prohibition in the Act would bite.

For this reason, the conservative and proper advice to publishers is that all printed matter which carries tobacco or tobacco product advertisements should have been distributed prior to 28 December 1990 to retailers with instructions that they be immediately made available to the public. If this was done, sales of the matter after 28 December should not infringe the Act.

The meaning of "advertisement"

The question in every case is whether the printed matter published is an advertisement for smoking cigarettes.

The term "advertisement" is not defined in the Act. However, material designed or calculated to draw public attention to a product or to promote its use may constitute an advertisement: *Deputy Commissioner of Taxation* v *Rotary Offset Press* (1971) and on appeal (1972), *Rothmans of Pall Mall (Australia)* v *The Australian Broadcasting Tribunal* (1985).

Whether or not any matter published will be considered to be an advertisement for smoking, for or for the use of cigarettes:

(a) will be determined objectively without regard to the intentions of the publisher in publishing the matter; and

(b) is a question of fact for the judge or a jury to determine in a prosecution under Section 5(1).

That is, extrinsic evidence is admissible (and would, for example, be placed before the jury) to prove that the words, symbols or images in the published matter were designed or calculated to promote smoking or cigarettes or the use of cigarettes.

The *Rothmans* case and others are authority for the following series of important propositions:

- Even a single word, such as the product name is capable of conveying a message, through an association of ideas, to an informed audience.
- A corporate name can be so closely identified with a product that the mention of the name brings the product to mind.
- Matter can be designed or calculated to draw public attention to a product or to promote its use without explicit description or exhortation (and may be of a subliminal character).
- Many advertisements are calculated to enhance the general reputation or corporate image of an advertiser -

however, the fact that a particular advertisement may have that propensity, or that it may be produced with that intention, does not preclude its characterisation as an advertisement for smoking or for cigarettes.

- An advertisement need not mention the word "cigarette" (or "smoking") or contain a picture of it (or that activity) - it is possible to convey a message through an association of ideas.

In Section 5(1) of the Act, the advertisement must be "for" smoking or cigarettes. The meaning of this word is narrower than "in relation to". In the *Rothmans* case, the Federal Court held that the word "for" should be read as meaning "in favour of" or "on behalf of". The prohibition is against advertisements tending to promote or support cigarettes and their use and not against those advertisements of the contrary tendency.

Practical examples

In *Director of Prosecutions* v *United Telecasters Sydney Limited* (1990) the issue was whether a particular telecast was a contravention of the prohibition in the *Broadcasting Act*. The telecast consisted of coverage or glimpses of the following:

- dancers dressed in red and white;
- a banner showing the words "Winfield Cup 1984"; and
- an A frame situated at the perimeter of the football ground which carried an advertisement for Winfield cigarettes.

In the case, the High Court of Australia stated that evidence of extrinsic facts was admissible to prove that the words, symbols or images televised were calculated to promote the use of cigarettes or the practice of smoking.

At the trial, evidence was admitted in the form of a packet of Winfield cigarettes and a colour photograph of an advertisement hoarding which showed an open packet of Winfield cigarettes with the words "Five Smokes Ahead of the Rest" and "Anyhow Have a Winfield 25's". Both exhibits showed the name Winfield upon a packet of cigarettes and showed the packet to be coloured red and white.

The jury had no difficulty in determining on the basis of this extrinsic evidence that the telecast was an "advertisement" for Winfield cigarettes.

"Test cricket – field of battle"

In the *Rothmans* case material in a film advertisement showed two medieval knights in a slow motion sword fight. The visual content progressed to show cricketers in the same stylised fashion, with the voice track echoing the field of battle" motif. The final part of the advertisement included extracts from previous test matches (including Benson & Hedges coat of arms and distinctly lettered name in gold, on black, together with a voice overstating "proudly sponsored by the Benson & Hedges company").

The Australian Broadcasting Tribunal concluded that this was an advertisement for cigarettes within the meaning of the relevant prohibition in the Broadcasting Act.

The Tribunal gave the following reasons:

"The issue in this advertisement is whether the sponsorship announcement, including the use of the Benson and Hedges, arms and colours, breaches sub-section 100(5A). The name and arms of the Benson and Hedges Company are, in the public mind, associated almost exclusively with cigarettes, notwithstanding some other activities undertaken by Benson and Hedges. An advertisement placed by Benson and Hedges (rather than the relevant sporting body) which gives as much prominence to promoting the Benson and Hedges Company as this advertisement does, can reasonably be assumed to be intended to promote, or obtain goodwill for the only product universally identifiable with that company, namely cigarettes. It should be noted that the simple mention of the name Benson and Hedges as part of the title of the event would not itself lead to this conclusion in the absence of the strong visual images at the end of the advertisement which closely parallel (although in "negative") the design of the Benson and Hedges cigarette packet.

....The Tribunal is of the opinion that a reasonable person would regard the sponsorship announcement, in all the circumstances, as seeking indirectly to promote Benson and Hedges cigarettes."

The Federal Court upheld the Tribunal's decision: it stated that it was for the Tribunal to determine, as a matter of fact, the relationship between the name and coat of arms of the company, each of which was used in the advertisement, and the cigarettes which it produced.

An appeal court dealing with a decision at first instance under the Act, would take a similarly non-interventionist approach on such a factual determination.

There is one aspect of this decision that publishers should be aware of: the Tribunal held that the simple mention of the name "Benson and Hedges" as part of the title of an event would not of itself lead to a conclusion that it was an advertisement for cigarettes. For similar reasons the names of cigarette companies associated with sponsored sporting and other events would arguably not, of themselves, lead to a conclusion that publication of those words amounts to advertising for cigarettes or for smoking.

However, even in those instances the advertisements for those sponsored events would have to be carefully vetted to ensure that there was not associated or editorial matter that could lead to the suggestion that the advertisement was not for the particular sponsored event. Particular attention needs to be focused on the layout and "get-up" of the advertisement for the sponsored event and care taken to ensure that undue prominence is not given to the name of the tobacco sponsor.

Australian Ballet sponsorship

The other advertisement considered in the *Rothmans* case involved a ballerina who explained the forthcoming program of the Australian Ballet. The Benson and Hedges coat of arms and distinctly lettered name in gold on black, together with a voice overstating "proudly sponsored by the Benson and Hedges Company" was included.

The Tribunal determined that the sponsorship announcement was an advertisement for cigarettes within the meaning of the relevant prohibition of the *Broadcasting Act*.

In giving its reasons, the Tribunal stated that the advertisement contained a sponsorship announcement which was identical to that attached to the test cricket advertisement "Field of Battle". The Tribunal stated:

"For the reasons expressed in relation to that advertisement, the Tribunal is of the opinion that a reasonable person would regard the sponsorship announcement, in all the circumstances, as seeking indirectly to promote Benson and Hedges cigarettes."

The Federal Court found that there was no error of law involved in the Tribunal's decision.

Accidental or incidental advertising

In cases where a publisher does not receive payment or consideration for publication of matter of an advertising character then consideration must be given to the exemption in Section 5(2) of the Act.

The finder of fact in any prosecution must be able to conclude beyond reasonable doubt that the publication of matter of an advertising character was not an "accidental or incidental" accompaniment to the publication of other matter.

Accordingly, if the mere name of a tobacco company can be regarded as "matter of an advertising character" then it will be necessary to identify other matter that accompanies it.

In the *United Telecasters* case, all judges clearly held that to activate the exemption the advertising matter must be published contemporaneously with the "other matter" and must be published in some fortuitous or subordinate conjunction with that other matter.

If the advertising matter is self contained and is not merely incidental to other matter

published then the finder of fact would be entitled to hold that the publisher was not exculpated by the exemption.

Conclusion

In all cases where a publisher contemplates the publication of matter for a corporation which produces only a tobacco product, the proscription in the Act must be considered. In these cases, it may be that the publication of the corporate name will draw attention to the product with which that name is so closely identified.

It is important to ensure that, where the corporate name of the cigarette manufacturer is given prominence, the publisher will need to be in a position to convince the finder of fact in any subsequent prosecution that the publication of that name was not calculated to draw public attention to smoking, cigarettes or to promote the use of cigarettes. In all cases, the publisher will have to be certain that the advertisement, viewed objectively, was calculated to draw public attention to a matter other than cigarettes or smoking.

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Arthur Chesterfield-Evans details the campaign that has been waged against "sponsorship" of broadcast events and other TV programming by tobacco companies

The fuss over the cigarette advertising associated with the Adelaide Formula 1 Grand Prix in November 1990 was the most recent salvo in a long war by health groups to get tobacco promotion off TV.

In 1976 the *Broadcasting and Television Act* was amended to ban cigarette ads on TV, but Section 100(5A) still allowed "accidental or incidental" advertising.

This led to a huge rise in sponsorship of sport and culture by tobacco companies. Health interests protested to the Broadcasting Tribunal, which ruled against Rothmans and Benson & Hedges ads in a number of cases in the early 1980s.

The tobacco companies challenged the Tribunal's rulings in the Federal Court. The Court upheld decisions regarding "promotional" commercials such as "Field of Battle" which promoted the Benson & Hedges cricket, but said the Tribunal was in error in calling the 1982 "Winfield" Rugby League Grand Final an advertisement. In *Benson & Hedges* v *Australian Broadcasting Tribunal* (1985) the Federal Court set the test as follows:

"Does the material, on its face and as a whole, appear to be designed or calculated to draw public attention to, or to promote the sale or use of, cigarettes or to promote the practice of smoking?"

The decision still left the status of perimeter advertising unclear.

1984 - the "Winfield Spectacular"

The situation was not satisfactory to the health interests. The Non-Smokers Movement of Australia (NSMA) alleged that Channel 10 (United Telecasters) had breached the Act during the telecast of the 1984 Winfield Rugby League Grand Final. They alleged that much of the game was an advertisement, including the commentary. The magistrate limited the definition of an "advertisement" to a short segment, and the "Winfield Spectacular" was chosen. This involved the unfurling of a huge Winfield flag by dancers while the "Winfield theme" was played. A helicopter shot afforded the TV audience a better view of the flag than the live spectators had.

Channel 10 was committed for trial and the Director of Public Prosecutions (DPP) took up the case. At the end of the hearing, Judge Sinclair summarised the issues for the jury as:

1. Was the "Winfield Spectacular" broadcast as part of the 1984 Rugby League Grand Final an advertisement for Winfield cigarettes?
2. If so, was the advertisement "accidental" or "incidental" within the scope of the provisions of the *Broadcasting and Television Act*, and therefore excepted from the prohibition?

After five and a half hours deliberation, and reports of loud arguments coming from the jury room, a jury found them guilty. Channel 10 appealed to the Supreme Court on the grounds that the display of cigarette marketing material by the prosecution during the trial was inadmissible evidence. The Supreme Court upheld the appeal, and the DPP appealed to the High Court, which upheld the original conviction on 15 February, 1990 (*DPP* v *United Telecasters*).

This series of appeals took nearly five years. NSMA again sued over a 1989 Winfield Cup League semi-final. Channel 10 were committed for trial, with the whole telecast being allowed as evidence (*McBride* v *United Telecasters*, (1990). But this second time the DPP declined to take up the case.

The Grand Prix case

Even after the High Court decision there was no clear ruling on perimeter advertising. NSMA asked Channel 9 for an assurance that there would be no cigarette advertising material associated with the Adelaide Formula 1 Grand Prix including no cigarette brand names on the cars, drivers, pit crew or perimeters and that commentators not make gratuitous references to brand names.

When Channel 9 failed to give these assurances, NSMA asked the Federal Attorney General for his "fiat" to apply for an injunction. When he declined NSMA pressed ahead in the NSW Supreme Court.

The Non-Smokers' evidence showed billboards being painted and a car with Marlboro on it. It also pointed out that a media analysis of the 1989 Grand Prix had shown that the Marlboro name or logo appeared on screen 35.7 per cent of the sample time. Photos and a videotape of the British and German Grands Prix showed the differences in advertising there. The final piece of evidence was that the perimeter Marlboro signs were orange rather than red, and that such an orange colour would look red on TV. This suggested that the signs existed for the TV audience rather than the trackside spectators.

In giving his verdict on 2 November 1990, Justice Needham seemed impressed by the evidence but ruled that NSMA did not have standing to bring the case.

The Broadcasting Tribunal has now agreed to examine whether Channel 9 breached the Act during the Grand Prix telecast. Its findings will affect other telecasts like the cricket and the Winfield Cup.

The solution?

Democrat Senator Janet Powell moved an amendment to close the "accidental or incidental" loophole in the *Broadcasting Act*. This had much support from the AMA and Cancer Councils, but was defeated by the major parties. This was probably because the sports lobby opposed any solution that did not give them an alternative source of funding. A Health Promotion Foundation on the Victorian model, which hypothecates a percentage of tobacco excise to replace sponsorship, is therefore probably necessary to placate those interests. The question is whether the Government will introduce it.

Dr Arthur Chesterfield-Evans is a member of the Non-Smokers Movement of Australia. This article was prepared with the assistance of The NSMA's solicitors, Cashman & Partners of Sydney.

Regulation of pay TV

Peter Westerway discusses some of the issues to be taken into account in developing a regulatory regime and argues the principal consideration should be increasing program diversity

The objectives of pay TV

Regulation is not a random activity. It is instituted by governments for a purpose and must be seen as an instrument for achieving their social objectives. So what objectives is the government likely to have in mind in developing an appropriate regulatory regime for pay TV?

The best place to start in identifying likely government objectives for pay TV is with the objectives of broadcasting policy. This does not assume that pay TV is simply a variant of broadcast television - it is my strong view that it is not - but inevitably that will be the starting point of the public debate.

The broadcasting objectives formally approved by the government in 1984 are:

- to maximise diversity of choice in radio and television services, so that all Australians have access to as wide a range of services as possible;
- to bring a similar range of entertainment and information through broadcasting services to all Australians, especially those currently without any or with inadequate services;
- to maintain the viability of the broadcasting system;
- to encourage an Australian look for television and radio by maintenance of an appropriate Australian content level and the fostering of an Australian production industry;
- to provide broadcasting services which are relevant and responsive to local needs; and
- to discourage concentration of media ownership and control of stations.

It will be seen that some of these objectives could appropriately be applied to pay TV, while others are quite obviously irrelevant. In order to distinguish between the two, we need to ask what is different about pay TV.

Pay TV is different

Essentially the phrase 'pay TV' describes a relationship between providers and customers quite different to the relationship between broadcasters and their viewers. Pay TV customers pay specifically to receive a selection of programs which are uncut (and usually uninterrupted) at a time of their choice. The operational consequences of this relationship are that pay TV only superficially resembles broadcasting. Indeed, the nearest true analogy is a retail business and it is useful to think of pay TV providers not as a new kind of broadcaster, but as a new kind of shopkeeper. Like other shopkeepers, pay TV providers need an infrastructure designed to make them highly responsive to customer demand - otherwise they go broke. It is precisely for this reason that any pay TV provider will have a whole series of activities which usually do not exist in broadcasting: marketing, installation and servicing, warehousing, computer systems, credit and collections, promotions and publications.

This essential functional difference also dictates a different approach to the matter which concerns the bottom line of the business: programming. Commercial broadcast television is directed towards maximising audiences attracting most of the viewers most of the time. Its aim is to hold its viewers some three or four hours a day, 365 days of the year (well, perhaps not in non-survey periods). Because it is supported by advertising, and basically sells potential customers, its success is measured by the ratings.

By contrast (whatever the fears of existing broadcasters) pay TV is not reliant on advertising and is therefore only marginally interested in ratings. It needs to enrol subscribers and keep them enrolled, so it concentrates upon a limited number of hours of programming and repeats those hours frequently. Its essential aim is to give its subscribers what they want and they do not want a commercial television service which they could have watched without paying a monthly subscription.

Programming differences

This structural imperative critically affects the approach to programming. Unless pay TV is synonymous with high quality entertainment or information, which its subscribers can opt to watch at their convenience, they simply cancel their subscriptions. And since subscribers already have a full diet of situation comedies, quiz shows and 'personality' programs available through broadcasting for nothing, they will not pay for these on pay TV.

There is a direct causal relationship between the way a video service is funded and the programming philosophy of the service provider. Commercial television is a mass medium, but pay TV is interested in minorities; television is broadcasting, while pay TV is narrowcasting. Typically, then, the commercial television approach to programming has six distinctive characteristics:

- it relies upon continuity of programming;
- it delivers potential customers to advertisers (and is therefore very sensitive to ratings);
- it values first and second release; ie the value of a program diminishes with every repeat;
- it necessarily includes commercials;
- it is required to be comprehensive; ie it is subject to program standards; and
- it generally tends to produce programs in-house.

It is important to understand that the structural imperative of pay TV produces a quite different approach to programming:

- pay TV relies upon a revolving pattern of programming; ie 'time shifting' is built into the system;
- it delivers programs to subscribers (and is therefore highly sensitive to subscriber dissatisfaction);
- it deliberately builds in repeats; they are part of the attraction, because the subscriber can choose when to watch;
- at least until it is mature, it does not have commercials; the cash flow from subscriptions is so many times the value of the advertising which could be sold that the question does not really arise;
- it is by nature selective rather than comprehensive; and
- it tends to buy programs rather than to produce them; pay TV providers are not manufacturers - they are retail video shopkeepers.

This structural difference needs constantly to be kept in mind, for the resultant differences in programming approach are the only self-evident justification for considering domestic pay TV. As the 1988 Department of Transport and Communications report said:

"Put simply, pay television enables the viewer to spend more time watching what he or she wishes to watch rather than what happens to be available on broadcast television...".

Since there would simply be no point in introducing domestic pay TV unless it heightens 'consumer sovereignty' logically,

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Aggregation: a progress report

Bob Peters examines three recent reports and finds that regional broadcasters have been sacrificed by the government in pursuit of a popular policy objective

Introduction

A financial bloodbath in the regional television industry is a result of the Federal Government's decision to use aggregation as the means for providing increased commercial services to most country television viewers.

In her article, The Economics of Aggregation (*Communications Law Bulletin* Vol 10, No. 1 Autumn 1990), Ms Cass O'Connor forecast that the anticipated financial fiasco could have been avoided if the Government had selected the alternative multi-channel service ("MCS") method to deliver three commercial television services to regional areas under its Television Equalisation Plan ("the Equalisation Plan").

Regardless of the comparative merits of the MCS alternative, the Government appears to be irrevocably committed to its aggregation policy, which now has been in operation for more than 18 months in certain parts of the Southern New South Wales regional market (known as "Approved Market C" under the Equalisation Plan).

Thus, the relevant question in relation to aggregation no longer is whether it will proceed, but rather, whether its implementation will produce the dire financial consequences predicted by Ms O'Connor.

A preliminary assessment of those predictions recently has been made possible following the release of three reports dealing with various aspects of aggregation. Unfortunately, the early indications are not encouraging for country television and radio broadcasters.

Recent aggregation research reports

The first of the recent aggregation reports, *Attitudes to Television In The Southern NSW Aggregated Market* was released in September of last year. It was commissioned by the Australian Broadcasting Tribunal ("ABT") and dealt with viewer attitudes and perceptions in relation to the television aggregation in the Southern New South Wales regional television market (ie Approved Market C).

The second report *Television Licence Renewals, Financial Results 1986-90 For The Southern NSW Aggregated Market*, was released in October. It was conducted by the ABT and dealt with the financial performance, both pre-aggregation and post-aggregation, of the commercial television and radio stations in Approved Market C.

The most recent of the three aggregation reports was released in mid-November and was conducted by the Bureau of Transport and Communications Economics ("BTCE"), *The Economic Effect of Commercial Television Aggregation on Commercial Radio Services in Approved Market C.*

Audience attitudes

Not surprisingly, aggregation appears to be very successful in terms of viewing audience attitudes and perceptions.

Market research conducted for the ABT by Reark Research indicated that 81 per cent of television viewers in Approved Market C now are receiving three commercial television services.

The results of this research showed that among those regional television viewers who are receiving three commercial services:

- 63 per cent felt that the variety of programming had improved as a result of aggregation;
- 52 per cent believed that the overall quality of their television service was better under aggregation; and
- 50 per cent felt that information about their local community area had improved since the commencement of aggregation.

Moreover, only a small minority of viewers took contrary views.

Clearly, the results of this ABT research indicate that the introduction of two additional commercial television services under aggregation, to date, has been a positive development from a country viewer's perspective.

Financial performance of regional television stations

Unfortunately, according to the ABT's Financial Results report, the early effects of aggregation on the financial performance of regional television operators in Approved Market C have been extremely negative and thus broadly consistent with Ms O'Connor's pessimistic predictions.

Between 1987/88, the last full financial year prior to aggregation, and 1989/90, the first full financial year of operation under aggregation, the commercial television stations in the Southern New South Wales aggregated market experienced a serious deterioration in profitability, according to the financial research conducted by the ABT.

The financial results, which are summarised in Table One, show that although advertising and total broadcasting revenues increased by 27 per cent and 43 per cent respectively, over the two year period in question, this revenue growth was far outstripped by substantial increases in expenditure, a large portion of which was directly attributable to aggregation.

For example, total expenditure (excluding depreciation and interest), rose by 72 per cent between 1987/88 and 1989/90. This included increases of:

- 32 per cent for sales & marketing;
- 67 per cent for programming;
- 104 per cent for administration; and
- 111 per cent for technical & operational expenses.

The commercial television stations in Approved Market C also experienced a doubling of depreciation charges and a 5,785 per cent increase in interest expenses. These expenses largely were related to the sizeable capital expenditures made by the commercial television station operators to enable them to broadcast their respective television services throughout the aggregated market.

As a result of expenditure growth outpacing revenue growth, the regional television stations in Approved Market C experienced a dramatic decline in earnings, with broadcasting earnings before interest and tax falling by 59 per cent and broadcasting profits declining by 135 per cent.

In terms of dollar amounts, the ABT statistics show that, since the commencement of aggregation, the three regional television operators in Approved Market C collectively have experienced an $18 million reversal in broadcasting profit.

Thus, it reasonably could be argued that, had aggregation not occurred, the three television operators in Approved Market C might well have enjoyed broadcasting profits which equalled, or even exceeded, the $13 million which they generated in 1987/88, rather than suffering the $5 million broadcasting loss which they actually incurred under aggregation last year.

If this $18 million per annum aggregation-related profit reversal in the Southern New South Wales market were to be extrapolated across the other three soon-to-aggregate approved markets, then the regional television industry soon may be forgoing broadcasting profits of about $70 million per annum, over a

number of years, to effectively finance the Government's Equalisation Plan.

Assuming that profit reversals of this order are experienced in each of the four approved markets for at least three years following aggregation, then the implementation of aggregation could cost the regional television industry in excess of $200 million in foregone profits.

Given the magnitude of such numbers, it is not surprising that some regional television station owners continue to actively lobby the Government either to abandon its commitment to aggregation or at least to provide an increased level of financial assistance to the industry, as compensation for the substantial profit reversal to which it is being subjected as a result of aggregation.

Financial performance of regional radio stations

Another unfortunate, and somewhat unanticipated, effect on aggregation has been the adverse impact which it had on the financial performance of the commercial regional radio industry.

Both the ABT's Financial Results report and the BTCE report suggest that the revenue and profit growth of many country radio stations with Approved Market C has been negatively affected by television aggregation. This has occurred as a result of the operators of the new television services heavily discounting their advertising rates to levels which are extremely price competitive with radio advertising rates.

Table Two shows that, between 1987/88 and 1989/90, total broadcasting revenues for the 18 commercial radio stations operating in Approved Market C grew by only 13 per cent, which in real terms represented a decline, and which was well below the revenue growth experienced by the television stations operating in that market.

As total expenditure by these radio stations, grew by 19 per cent over the same period, their collective broadcasting profitability declined by 24 per cent on a pre-interest expense basis and by 53 per cent on a post-interest expense basis.

In the Canberra market, the financial difficulties of the local commercial radio broadcasters were compounded by the introduction of two new commercial FM radio services in March 1988.

Table Three shows that, between 1986/87, the last full financial year prior to the commencement of the two new commercial FM radio services in Canberra, and 1988/89, the first full financial year following the introduction of those services, the profitability of the local radio stations declined by 292 per cent on a pre-interest expense basis and by 323 per cent on a post-interest expense basis.

Table 1 Financial performance of commercial television services in approved market C pre and post aggregation in current dollars

	a. 1987-88	b. 1989-90	% CHANGE
REVENUE	$000's	$000's	%
A. Total Advertising Revenue	54,879	69,712	27
B. Other Broadcasting Revenue	1,576	11,034 d.	600
C. Total Broadcasting Revenue (A+B)	56,455	80,746	43
EXPENDITURE			
D. Total Expenditure (Excluding Depreciation & Interest)	40,518	70,290	73
E. Depreciation & Amortisation	2,498	4,997	100
F. Interest	172	10,122	5,785
G. Total Expenditure (D+E+F)	43,188	85,409	98
PROFITABILITY			
H. Broadcasting E.B.I.T. c. (C-(D+E))	13,439	5,459 d.	(59)
I. Broadcasting Profit (C - G)	13,267	(4,663) d.	(135)

NOTES:
(a) Last full financial year prior to aggregation.
(b) First full financial year of aggregation.
(c) Earnings before deducting interest and tax.
(d) Includes a partial Government rebate of broadcasting licence fees paid and therefore overstates broadcasting revenue and profits.
SOURCE: Australian Broadcasting Tribunal: *Financial Results 1986-90 for The Southern NSW Aggregated Market October 1990.*

Table 2 Financial performance of commercial radio in approved market C pre and post aggregation in current dollars

	a. 1987-88	b. 1989-90	% CHANGE
REVENUE	$000's	$000's	%
A. Total Advertising Revenue	26,153	29,218	12
B. Other Broadcasting Revenue	188	459 d.	144
C. Total Broadcasting Revenue (A+B)	26,341	29,677	13
EXPENDITURE			
D. Total Expenditure (Excluding Depreciation & Interest)	21,985	26,234	19
E. Depreciation & Amortisation	1,305	1,126	(14)
F. Interest	667	1,186	78
G. Total Expenditure (D+E+F)	23,957	28,546	19
PROFITABILITY			
H. Broadcasting E.B.I.T. c. (C-(D+E))	3,051	2,317	(24)
I. Broadcasting Profit (C - G)	2,384	1,131	(53)

NOTES:
(a) Last full financial year prior to aggregation. (b) First full financial year of aggregation.
(c) Earnings before deducting interest and tax.
SOURCE: Australian Broadcasting Tribunal: *Financial Results 1986-90 for The Southern NSW Aggregated Market October 1990.*

This substantial fall in profit occurred because total broadcasting revenues rose by only 11 per cent over the two year period while total expenditure grew by 59 per cent.

The current commercial radio broadcasters recently have used the Canberra experience to argue, with a considerable amount of commercial logic, that the Government needs to take into account the negative impact which television aggregation is likely to have on regional radio when assessing the capacity of individual regional radio markets to cope with new commercial radio competition in the near future.

Conclusion

Recent research indicates that while aggregation has been very popular with country television viewers, to date, it also has been a financial disaster for regional television and radio operators.

Previously profitable regional broadcasters recently have been plunged into losses as a direct result of the Government's television

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When does sampling infringe copyright?

Randall Harper discusses the copyright issues surrounding this recent recording technique and explains how the music industry has reacted

The technological advances over the past decade or so have brought great benefits to the music industry. Digital recording equipment, computers, developments in tape manufacture, the compact disc and many other technological advances have resulted in higher and in some cases near perfect quality recorded products being made for consumer consumption. It has also seen the emergence of new forms of music. However, with the new technology and in particular digital technology, we have seen the introduction of a number of problems for the industry, one of the most topical being the sampling issue.

What is sampling?

Sampling involves copying the sounds of a source record, usually a compact disc, and storing those sounds in digital code on a disc or tape attached to or embodied in the sampling equipment. Once copied, the digital codes can be used to produce an identical copy of that part of the original record that has been sampled, or they can be used to change the pitch, rhythm or tempo to produce a version of the recording which can be vastly different to the original.

Completely new songs can be constructed by using the sample as the base of the new song. This is done by using the sample in a so-called loop and adding other music to it as required. By changing pitch, rhythm or tempo, the resulting song can be quite unrecognisable to the average listener. This use of sampling is quite prevalent with rap or hip-hop songs, particularly in the United States, which is where sampling arose in the first place (eg M.C. Hammer's "U Can't Touch This" which is lifted from the Rick James track "Superfreak").

Alternatively, the sampled sound (eg. a guitar riff, drum sound or even a vocal) will simply be dropped into another recording in order to enhance or otherwise complement the other recording. For example, it has been reported that Phil Collins' drum sound has been frequently sampled over the past few years and it is also said that Jon Farriss' (INXS) drum sound was also doing the rounds of Sydney recording studios not so long ago.

In the 1970s, synthesisers enabled producers to create music without the need for musicians or at the very least producers were able to limit the number of musicians required in a particular project. In the 90s, the sampler has the ability not only to replace musicians, but also enables producers to capture and use sounds in recording projects distinctive of particular musicians. In other words, it enables the reproduction of a particular instrument, played by a particular musician in a particular setting, engineered by a particular engineer and produced by a particular producer.

In the United States, because sampled sounds can be stored on compact discs and easily replicated or duplicated from compact discs, libraries of digital samples have been created and are being commercially exploited. Manufacturers of sampling equipment have also developed libraries of sampled sounds to support their hardware, as individual studios have developed sample libraries for use by their clients.

At first blush, the sampling of a recording constitutes an infringement of copyright in the sound recording concerned as well as the underlying musical work. However, there are a number of problems that may arise in relation to proving any claim of copyright infringement.

Substantiality

It is of course not necessary to copy or reproduce the entire work or sound recording to infringe the copyright subsisting in that work or sound recording. Pursuant to Section 14 of the Copyright Act, an infringement will arise if a "substantial" part of the work or other subject matter is copied or reproduced. What constitutes "substantial" is not easy to determine as each particular instance needs to be assessed in its own circumstances. Indeed the Courts have always been reluctant to prescribe any particular formula for determining what constitutes a "substantial part", although it has generally been held that this term refers to qualitative considerations and not those of quantity (*Blackie & Sons* v *Lothian Book Publishing* [1921]. Consequently a very small but well known portion of a work may constitute being "substantial" for the purposes of copyright infringement while a much longer but unremarkable and unrecognisable portion of a work may not. It appears to be a question of whether the part of the work in question is essential to the work, or is an essential feature of the work (*Hawkes & Son* v *Paramount Film Service* (1934); *Joy Music* v *Sunday Pictorial Newspapers* (1960).

In relation to sampling the question of substantiality needs to be assessed from two viewpoints. First, does the sample have that "essential" quality, in relation to the original recording or work, to constitute it being a "substantial" part, the use of which would amount to a copyright infringement? This needs to be looked at not only from the viewpoint of the sound recording itself but also the underlying work and the result may be somewhat different for each. It may well be that the part of the work that has been sampled is quite unremarkable and indistinctive while the recording may be very distinctive of the particular musician who performed it and it is so distinctive that it is easily recognisable. In such a circumstance it may be argued that the work has not been infringed because a "substantial part" of the work has not been reproduced while the sound recording copyright has been infringed because the sample does constitute a "substantial part" of the original recording.

The second issue to consider is whether or not the resulting copy sufficiently resembles the original to constitute an infringement of the copyright in the original. This is particularly relevant with sound recordings. Quite often only certain elements of a sound recording, for example one instrument only, will be sampled. It may well be that this instrument on its own is not so distinctive of the original recording that the subsequent recording in which it is embodied closely resembles the original. The problem is exacerbated if the rhythm, pitch or tempo of the sample is altered. This may make it quite impossible to recognise the original recording when it is incorporated into the new sound recording. If the original recording cannot be recognised then can it be said that a "substantial part" of the recording has been used? In addition, if the instrument or sound is not "essential" (on the *Hawkes & Son* principle) to the original recording, is it "substantial"?

Fear of litigation

These uncertainties have given rise to a great reluctance on the part of artists, songwriters and record companies instituting copyright infringement proceedings. There have been no such proceedings in Australia to my knowledge and very few in the United States, the most notable being the Turtles action against De La Soul for an alleged infringement of the Turtles "You Showed Me".

A number of actions have been threatened in the United States, such as in the case of Tone-Loc for his claimed use of Van Halen's "Jamie's Cryin" and the British act Beats International for use of the Clash's "Guns of Brixton". However, these and many other matters have not found their way into the legal system because both sides are afraid of setting a benchmark for "substantiality" which could open the floodgates or close them completely, depending on the particular side's point of view. What is happening is that artists, companies and users of samples are entering into agreements to regulate the use of sampled recordings. The record company or song writer grants a licence to the sampler in exchange for a royalty payment (the details of which are not common knowledge). Of course it is unlikely, at this time, that the amount of royalty payment for this use represents a commercial level of royalty and adequate return to the creator (unless of course the sample is so significant that it represents a clear infringement of copyright) but it does, where undertaken, nevertheless legitimise sampling as a concept and to some extent rewards the creators of the sampled copyright material or works.

Sampling has not yet become a major issue in the Australian music industry primarily because the type of music that lends itself to sampling is not widespread in this country at the moment. It is, however, inevitable that an increase in the use of sampling will happen in the near future. It will be interesting to see how Australian artists and record companies react.

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Book reviews

Sheila McGregor reviews "Telecommunications Reporter", the latest loose-leaf service on telecommunications law by Diana Sharpe, Gerald Wakefield and Mark McDonnel

The Law Book Company's *Telecommunications Reporter* is the first loose-leaf publication dedicated to providing a collection of materials on Australian telecommunications law and policy. The absence until now of a collection of such materials has required diligence on the part of practitioners in the area to assemble and keep up to date their own set of the materials. So the *Reporter* should be very useful for them and the editors are to be commended for their industry in producing it.

The *Reporter* contains the full text of the *Telecommunications Act 1989*, the *Australian Telecommunications Corporation Act 1989* (*Telecom Act*), the *Radiocommunications Act 1983*, the *OTC Act 1946*, the *AUSSAT Act 1984* and extracts from the *Trade Practices Act* as well as the VAEIS Guidelines and all of the AUSTEL forms, guidelines and reports. The AUSTEL documentation which is not readily available (other than from AUSTEL) will probably be the most useful section of the Reporter. It's surprising that AUSTEL itself has not established a system for distributing its documentation – OFTEL for example has a very efficient distribution system. This may come with the increased resources which AUSTEL will acquire with the implementation of the government's reforms. AUSTEL has also announced that it will shortly be opening shop front offices around Australia.

The *Reporter* contains a discussion of government policy and strategy in both telecommunications and other areas which impact on the telecommunications industry such as the Industry Development Arrangements and Information Industry Strategy. In doing so it puts into context the role of the Department of Transport and Communications and the Department of Industry, Technology and Commerce (DITAC). This information is useful particularly in relation to DITAC because it can be difficult for practitioners to keep up to date with changes in government policy and strategy. This section needs to be kept very-up-to-date if it is to retain its usefulness - for example, the government is apparently considering at the moment changes to the Australian Civil Offsets program and the Partnerships for Development Scheme.

The telecommunications industry's use of acronyms to refer to technologies as well as to describe the industry associations is well known - the *Reporter's* two and a half pages of abbreviations give some indication of this. The first section of the *Reporter* entitled *Telecommunications Industry Profile* which includes some background material on the associations is therefore a particularly useful reference. It will be especially so for newcomers to the area who will come across references to ACSI, ATUG, or AEEMA but may not really have a clear idea of the various associations' memberships and objectives. This section of the *Reporter* also sets out a useful summary of the rights and obligations of the carriers as specified in the *Telecommunications Act*, the *Telecom Act*, the *AUSSAT Act* and the *OTC Act*.

In the section on the Trade Practices Commission the editors comment briefly on some of the restrictive trade practices provisions (Part IV) in the *Trade Practices Act 1974*. Given the *Reporter's* discussion of the statutory monopolies conferred on the carriers under the *Telecommunications Act* it is noteworthy that the editors have not reproduced the *Trade Practices (Telecommunications Exemptions) Regulations*. These regulations contain important exemptions from some of the conduct prohibited under Part IV of the *Trade Practices Act*. Several of the exemptions cease to be effective as of 30 June 1989 or 31 December 1988. A number of the exemptions should remain applicable until implementation of the government's recent reforms.

As the editors point out in the *International* section, the May 1988 Statement touched only lightly on international policy issues. However, this section of the *Reporter* contains an interesting discussion of the relationship between those issues and the domestic telecommunications services framework.

Updates to the *Reporter* may clarify the focus of the *Case Law* section of the *Reporter*. There are decisions other than the two summarised which are relevant to the industry but which have not been included, for example the Tytel-Telecom decisions. These may have been excluded because the editors decided to concentrate on very recent decisions. One of the case summarised, the ASX-Pont Data decision, has been appealed against by the ASX and the Full Federal Court has heard the appeal. In future updates it will be necessary to include editorial comment on the cases summarised if this section of the *Reporter* is to have an ongoing purpose.

Since the publication of the *Reporter* in September the government has announced major reforms to introduce network competition. These include the merger of Telecom and OTC, the sale of AUSSAT and the grant of three cellular mobile telephone licences. The government has said that the "reforms in telecommunications represent the most radical restructuring of this key industry ever undertaken in Australia". The reforms mean major amendments to the *Telecommunications Act* and to other legislation - a draft bill to amend the *AUSSAT Act* has already been tabled in Parliament. The reforms mean a substantial rewrite of most sections of the *Reporter* will be required as the reforms are implemented. One of the reforms - the

abolition of appeals from decisions of AUSTEL to the Administrative Appeals Tribunal (AAT) on the merits - means the *Reporter's* section on the Administrative Appeals Tribunal will no longer be applicable to the decisions of AUSTEL under the *Telecommunications Act*. However Ministerial decisions under the *Radiocommunications Act* (in particular in relation to licensing) will presumably still be reviewable by the AAT.

The immediate challenge facing the editors over the next 12 to 18 months will be keeping the *Reporter* up to date with amendments to legislation and other developments as a result of the government's reforms - this is a challenge with any loose-leaf service. Where the full text of amendments or other developments is not promptly available brief and timely summaries in the form of one or two page bulletins of developments are essential if the *Reporter* is to continue to be useful as a reliable collection of the current materials.

As the focus of the industry changes from policy development, which has characterised the past five years, to policy implementation, commentary on new legislation and the ramifications of the policies will need to be developed if the *Reporter* is to keep a permanent place on practitioners' shelves.

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Nathalie Curtis reviews the second edition of Volume II of the AFA's: "A Practical Guide to Marketing and Advertising Laws and Regulations, Volume 2, Source Materials"

The second edition of the *Advertising Federation of Australia's Guide to Marketing and Advertising Laws and Regulations* updates Volume 2 of the previous 1986 edition of the same name. It is intended as a "hands on guide" for those involved in the commissioning and preparation of advertisements, their evaluation and placement and serves as a companion to Volume 1 (1986).

The book is essentially a compilation of various texts and regulations relating to advertising and marketing of products on all media, including various industry guidelines, The Media Council of Australia (MCA) voluntary codes and extracts of relevant legislation in a number of areas such as the pharmaceutical industry and the tobacco industry. The extensive range of material covered in this edition will come as no surprise to those with the arduous task of reviewing and classifying advertising material.

The book begins with a brief description of the Australian media and advertising industry, pinpointing the relative functions of the councils, committees and bodies involved in the co-regulatory structure adopted by the industry. Each has a common stated aim of vetting the publication of misleading or offensive advertising. These first chapters provide the reader with useful practical information such as contact points for various industry association clearance bodies and a valuable outline of the complaints procedure and relevant penalties. The reader is reminded that failure to obtain a clearance number from the appropriate clearance body constitutes a breach of the advertising code of the Media Council of Australia.

The success of the self-regulatory system requires strict adherence by advertisers to the MCA codes. These codes are reproduced in the next few chapters which provide the reference points for the reader actively involved in ensuring that commercials achieve approved industry standards. They include the Advertising Code of Ethics, the codes for advertising of therapeutic goods, alcoholic beverages, cigarettes and the slimming codes.

Another chapter contains extracts of legislation and agreements relating to tobacco advertising. The appendix on the size and appearance of health warnings on outdoor advertisements is particularly handy.

Topics covered in other chapters include legislation and regulation relevant to the pharmaceutical industry, labelling and advertising of foods, advertising guidelines for pet foods, and miscellaneous items such as the portrayal of the national flag by advertisers, representation of Australian banknotes, trade promotions and lotteries. This latter topic is a difficult area to monitor due to the differences in the State regulations. It is therefore useful to have the various State requirements consolidated in the one chapter.

I would recommend the Trade Practices Commission guidelines on trade practices aspects of advertising reproduced in Chapter 8. These guidelines cover topics such as two price advertising and commercials for motor vehicle dealers. They are written in a simple and informative style, interspersed with examples which make the information user-friendly and particularly helpful to readers who are not legal practitioners.

The final chapter lists the more relevant federal and state legislation that control advertising and is particularly valuable as a quick guide to locate whether a topic has been legislated in a particular state. This chapter would be well worth expanding in future editions.

Does this text have a place on the shelves of lawyers and advertisers? My view is that the value of this guide as a "hands on" tool for persons commissioning and preparing advertising is restricted by the hardback cover format chosen by the AFA, which prohibits the insertion of regular updates. The material covered in this edition will, given the ever changing nature of regulations in this area, rapidly become outdated. As it stands, there are already amendments required. For example there is a new *Therapeutic Goods Code* which requires the Pharmaceutical Products Association to approve advertising of therapeutic goods. There is also a recent amendment to the tobacco advertising code which prohibits advertising tobacco in the print media. Neither of these is incorporated in the 1990 edition.

Anyone involved in advertising and marketing will be aware that the task of vetting commercials requires access to all updated regulations and legislation which cover the contents of the commercial, or the vettor runs the risk of falling foul of some new regulation which requires reworking the advertisement to meet the new standard, attracting considerable additional expense to the advertiser.

I was disappointed at the lack of editorial input in this edition of Volume 2. Whilst I understand that this volume is only intended to reproduce source materials, there is scope for restructuring some of that material to avoid repetition of information, and to facilitate access to the information required. For example it would also have been helpful to have some sort of cross reference between Volume 1 and Volume 2.

All in all, as Bruce Cormack, Federal Director of the Advertising Federation of Australia notes in his forward to the guide, the manual is not intended as a legal service in a formal sense, and reliance should not be placed solely on the materials contained therein. However, the guide serves the useful function of providing background information on the current regulatory structure surrounding advertising and marketing, and consequently deserves standing as a reference tool. There is still however a market for a loose-leaf service on Marketing and Media regulations which covers material contained in both Volumes in 1 and 2 of the AFA publication updated on a regular basis. Perhaps the AFA could consider this format for their next edition. This would ensure that the book meets its stated aim to function as an accessible and practical hands-on tool for all those involved in marketing and advertising.

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Peter Leonard reviews Peter Westerway's new primer on telecommunications: "Electronic Highways"

Six years ago, a mere terrestrial was faced with his first "asteroids and other space calamities". Study of science and "Star Trek" had equipped him with the knowledge that such calamities need not be fatal. However, advising on an AUSSAT Transponder Agreement was certainly fraught with danger: aside from its novel *force majeure* provision dealing with wayward heavenly bodies, the agreement was littered with arcane and mysterious concepts: sun transit, rain attenuation, saturation flux density service performance levels, peak deviation rates, and so on.

All of this seemed much more exciting than contracts for tin cans and string, particularly as it also involved unravelling the unfathomable mysteries of the (then) *Satellite Communications Act 1984* and a welcome relief from the mundanity of Telecom regulatory policies. Somewhere along the line, telecommunications had become complex, technological and interesting.

The difficulty then was to find out what all this was about. The law library shelves were bare: contrast today when we have two competing and comprehensive loose-leaf services covering communications law and policy. The engineering and scientific libraries were replete with arcane expositions of technology suitable only for the knowledgable or foolhardy. However, there were few introductions to the technology, business or international comparative regulation of telecommunications.

Today there are dozens of books describing the divestiture of AT&T and introducing the technology, right down to the 8 year old's bible, *My First Book of Communications*, which I received for Christmas from my secretary (was there a hidden meaning?).

So do we need Peter Westerway's *Electronic Highways*? The writer's stated aim was to produce "a useful primer, a beginners guide to those who were starting in the field". In a mere 82 pages of text (disregarding appendices) the book could be little more, particularly as Mr Westerway ambitiously endeavours to cover history, technology, regulatory, international and economic telecommunications issues.

Inevitably, some areas must be omitted or treated in less detail than would be desirable. For example, the technology discussion concentrates on wireline technologies and makes only incidental references to satellite, cellular and public access cordless services. This is an unfortunate omission given the increasing strategic importance of those technologies for telecommunications utilities. Similarly, the discussion of regulation does not draw out the potential importance of mobile technologies and private networks offering quasi-public services in challenging the public telecommunications carrier's wireline monopoly as a regulatory policy. The discussion of regulation reflects a regulator's perspective by emphasising the importance of the Government's social and industrial policies, while (perhaps in deference to Mr Westerway's continuing role as Acting Chairman of the Australian Broadcasting Tribunal) avoiding discussion of what are appropriate policy objectives and whether regulation is the most effective means to achieve these goals.

One shortcoming with the book was inevitable: any book on telecommunications suffers from short shelf life due to the dramatic rate of change in the industry. In particular, regulatory developments in Australia, the United Kingdom, Germany and at the supra national European Community and CCITT levels, have superseded certain of Mr Westerway's discussion in the text. That, unfortunately, is the nature of the game.

Such criticisms are, of course, mere quibbles. The book will not equip the reader to understand the complexities of resale and interconnection policy or the rationale for transferring control of the numbering plan or for pricing regulation. But the reader will be able to understand the range of players and interests involved in the telecommunications industry and appreciate why these interest groups have emerged so dramatically over the last two decades. For troops marching on to weightier tomes, Mr Westerway provides a concise reading list and assists those with fallible memories (like the reviewer) with an excellent index. In short, the book largely achieves its limited objective and is therefore to be recommended to readers entering the telecommunications field for the first time. The book would be, in particular, a very useful introductory text to school and university courses covering telecommunications. Recommended for such audiences, but snatch one quickly before it goes out of date!

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its principal objective should be to increase diversity of choice in television services in response to viewer demand.

Foreign models for program regulation

Although it is currently under review, the existing United States system is a paradigm of the free market approach with all its attendant strengths and all its weaknesses. Once a franchise to operate a cable or radiated system is granted, the pay TV provider is free to operate without substantial regulatory intervention. The only programming requirements have been to observe the usual statutory provisions regarding obscenity, blasphemy and sedition, plus any local obligations regarding community access.

Pre-1992 Europe shows considerable diversity, but the abundance of delivery pathways provided by the new telecommunications technologies has generally undermined the scarcity rationale for regulation. There is movement towards flexible regulation based on a free market philosophy and enhancing the competitiveness of new services. For example in the Netherlands, regulations directed towards the preservation of cultural identity and maintaining quality use a mix of indicative guidelines and self regulation. (Australian policy-makers may be interested in one innovative provision, whereby providers can choose whether to present local productions or to pay for satellite carriage of their signals.) By contrast, in the UK, pay TV program standards tend to mirror broadcasting standards, with a cable authority to enforce them. There are standards regarding advertising, program categories, decency, etc. However, it is worth noting that, even in Britain, pay TV operators are not required to meet the same standards relating to range and balance of programming as broadcasters.

On the far end of the continuum, Canada provides a very useful object lesson, so far as program regulation is concerned. Pay TV policy in that country was initially driven by the same demon that drives its broadcasting policy - the overwhelming presence of the US big brother next door. However, the Canadian Radiocommunications and Television Commission (CRTC) made the fundamental error of regarding pay TV as a variant of broadcast television and required pay TV operators to provide between 30 and 50 per cent of Canadian content. The inevitable happened. As the local industry's relatively modest bank of program material was totally used up, operators were forced either to buy substandard Canadian programs or to offer endless repeats.

A well-intended policy therefore achieved exactly the opposite of its intended effect, as subscriber cancellations increased to a maelstrom and every pay TV operator made losses. Of course, the CRTC also made many other mistakes, including an excessive insistence on competition, but there can be little doubt that the CRTC's program policy was the real killer. As Andre Bureau, Chairman of

the CRTC, told the Canadian cable TV conference in 1984: "If two years ago we had been asked to draw up a plan of how to kill an industry, we could not have been more creative."

Two basic models

From these overseas experiences we can identify two basic models for the regulation of pay TV. The first is the broadcasting model, meaning that similar specific program standards would apply to pay TV as apply to broadcasting. In this context, it is perhaps worth reminding ourselves that this model is highly interventionist and not necessarily the choice one would expect in a democratic society.

The second is the publishing model, which assumes that pay TV should be regulated in essentially the same way as most other industries. That is, inasmuch as we would have program standards, they would be those based on the common law which also applies to non-electronic media and cover obscenity, blasphemy and sedition, defamation and so on.

When the government finally designs a regulatory framework for pay TV it will in effect choose between variants of these two basic models. However, the actual arguments, the arguments which catch public attention and have the potential to escalate into political causes, will not be pursued in terms of analytical models. The debate will revolve around the following issues.

Quality

The broadcasting model requires a program regulator, such as the Australian Broadcasting Tribunal, to establish and enforce quality standards. As the Saunderson Committee enquiry into pay TV rationalised this approach: the public resources utilised by licensees in order to provide their services are scarce; licensees therefore are privileged; accordingly, they bear a reciprocal obligation to enrich the moral, emotional and cultural life of our society. This view was recently endorsed (in another context) by the High Court in the Bond case.

It can confidently be expected that groups associated with the production industry and public interest groups generally will argue for quality standards, while those interested in providing services will argue that they would be redundant, if not counterproductive.

Those wanting maximum freedom for pay TV providers emphasise the special nature of the relationship between pay TV providers and their subscribers: pay television is a discretionary service and subscribers make a decision whether or not to view each of the programs available at any particular time.

But even when they claim to recognise

Peter Westerway

the validity of this argument, it is very difficult for people who regard pay TV as basically a variant of broadcast television to accept the logic of it. They tend to acknowledge that the services are different, but because some programs do look the same, in the next sentence they insist that they are comparing 'like with like'.

Australian content and children's programming

When we consider whether there should be standards for pay TV relating to Australian content it is pertinent to note that, while we might agree with a case putting the merits of supporting Australian artists or Australian production houses, that case is only relevant if it addresses the critical question of consumer sovereignty. If we do not allow the consumers to choose, we may create some other very attractive system, but it will not be pay TV.

The same persistent need to recognise consumer sovereignty as the essence of pay TV will dog those who seek simply to transfer broadcasting standards regarding children's programs to this very different industry. As it happens, there are pay TV channels in North America which offer quality "family" and children's programs; eg Nickelodeon or Disney Channel. But how are we to argue, as the Saunderson Committee did, "that program standards for pay TV family viewing and children's presentations should be identical with those for free-to-air television". No pay TV service (as distinct from some of the programs which appear on pay TV) is "similar to" a broadcasting service. They all require subscribers to make a deliberate choice once a month.

Localism and siphoning

Again, with regard to localism, which despite obvious difficulties still remains in the authorised list of objectives for broadcasting policy, the differences between the two industries make it impossible simply to transfer broadcasting thinking to pay TV, particularly if the government chooses to initiate the system using national satellite delivery.

As most people here will know, 'siphoning' refers to pay TV operators buying programs which would otherwise have been shown on broadcast television. Even as we speak cable and broadcasting companies are lobbying congressmen in the USA regarding the use of exclusive contracts and the FCC is trying to apply a 'blackout' policy, which seeks to stop cable systems from showing programs to which broadcasters in the same area have bought rights.

I do not want to canvass the issues involved, such as whether there is a general public right to view certain material, or whether broadcasters should be protected, but it did seem appropriate to end a paper which has constantly raised problems without offering solutions by referring you to a very prominent broadcaster, the president of NBC, Mr Robert Wright. Early last year Wright spoke to a group of editors and writers about pay TV. The USA, he told them, has already "switched over to pay TV". Many people who had been in television for years were sad to see the golden age disappear, but he disagreed. It was exactly why NBC had moved into pay, he said, and "It's not bad or good - just different."

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with the Government and, after researching all relevant legislation, found a precedent for the broadcaster's case. It discovered that the *Police Complaints Authority Act* recognised a comparable example of "double jeopardy" by specifying that no evidence or findings from that Authority could be used in any subsequent court hearing on the same issue.

The then Communications Minister, Jonathan Hunt, agreed on 21 August that "a convincing case was put up by broadcasters" and the 1989 *Broadcasting Act* was subsequently amended to overcome the "double jeopardy" factor.

The outcome? The *Broadcasting and Radiocommunications Reform Act* specifies that no response made by a broadcaster to any complaint, nor any statement made or answer given by any person, nor any decision of the Broadcasting Standards Authority, nor any decision made by the High Court on appeal, can be admissible in evidence in any court or in any inquiry or other proceeding.

Chris Turver is Controller, Corporate Affairs for Radio New Zealand Limited

Whose copyright should it be? – another perspective

Ian Robertson examines the background to the Neville Jeffress case and argues that Section 35(4) of the Copyright Act should be reviewed

Historical background

Since 1842 employed journalists in the print media in Britain (and, subsequently, Australia) have enjoyed a privilege in respect of copyright which is not available to other employees who create material in which copyright subsists.

Section 18 of the Copyright Act 1842 (U.K.) provided, in summary, that works composed by the employees of publishers were, subject to agreement to the contrary, the property of the publisher. However, the right of the publisher to publish essays or articles was only for a period of 28 years after first publication and during that 28 year period the employee author had certain rights of approval in respect of such publication.

These rights of the employee journalist were extended by the Copyright Act 1911 (U.K.) which provided that employees who were the authors of articles or other contributions to a newspaper, magazine or similar periodical had the right, in the absence of agreement to the contrary, to restrain the publication of the work otherwise than as part of a newspaper, magazine or similar periodical. The Copyright Act 1912 (Aust.) provided for the Copyright Act 1911 (U.K.) to have force in Australia.

In 1958 the Menzies government appointed the Spicer Committee of Inquiry to consider what alterations were desirable to the Copyright Act 1912. The Australian Journalists' Association (AJA) submitted to the Spicer Committee that employed journalists should, in the absence of agreement to the contrary, have copyright jointly with their employers in works produced in the course of their employment insofar as the copyright relates to publication in any newspaper, magazine or similar periodical other than the first one in which it is published.

In other words, the AJA sought to limit the publisher's exclusive rights in the work of employed journalists to the right of first publication. The AJA requested this protection on the ground that overseas sales and extensive syndication "provide a huge and profitable field for the exploitation of material out of all proportion to the wage which is the employee's sole claim, under the [then] present law, to profit from exceptional work".

The Spicer Committee rejected this submission and expressed doubt as to whether such a provision would make any practical difference to the position of journalists as "a newspaper proprietor could, and doubtless would, ensure that his employee's contract of service provided to the contrary".

Print journalists favoured

The Committee instead recommended the enactment of a provision in similar terms to the present Section 35(4). In making that recommendation the Committee stated that "journalists who are employees are, and will under these recommendations continue to be, in a uniquely favourable position as compared with employees in other fields".

Pursuant to Section 35(4) of the Copyright Act 1968 copyright in works made by the employees of newspaper and magazine publishers pursuant to the terms of their employment is owned by the publisher insofar as the copyright relates to publication in any newspaper, magazine or similar periodical, or to broadcast of the works, or to reproduction of the works for those purposes, but not otherwise. The remainder of the copyright in such works is, accordingly, impliedly reserved to the employee.

Journalists who are employed in the electronic media, in advertising, public relations and other fields enjoy no such advantage. Like all other employees, in the absence of agreement to the contrary, the copyright in works made by them in the course of their employment is owned by their employer.

This favoured position of employee print journalists is difficult to justify.

The U.K. and the U.S.A.

It is perhaps for this reason that the copyright privilege enjoyed by employed print journalists was recently abolished in the United Kingdom. Pursuant to Section 11 of the Copyright, Designs and Patents Act 1988 (UK) employed journalists in the British print media are no longer afforded special treatment in respect of the ownership of copyright in the works they create. Rather, they are treated in the same manner as all other employees and copyright in their work is owned by their employers.

The legislation is based on the principle that if a person is employed to produce copyright works and is paid for those services then the employer should be entitled to the use of that work at least for the purposes of the employer's business.

This brings the United Kingdom into line with the USA where journalists are not accorded any exemption from the general rule that, in the absence of express written agreement to the contrary, the employer owns all of the rights comprised in the copyright of its employee's works.

In persisting with Section 35(4) of the Copyright Act 1968 Australia is substantially out of line with the world's two major English speaking nations.

Copyright in newspaper and magazine articles

Newspapers and magazines are, of course, collective works. A number of copyrights usually subsist in a collective work including the copyrights of the authors of the published articles and the copyright of the publisher of the work as a whole.

A major article in a newspaper may include the works of several journalists, at least one sub-editor, one or more artists, and (perhaps) cartoonists and photographers. If these people are all employees of the newspaper publisher they will own the copyright in their respective works other than for the purpose of publication in a newspaper, magazine or similar periodical, or for broadcast.

In addition, the publisher will own the copyright in the compilation of the article which is entirely separate from the works which comprise the article. Finally, there is also copyright in the published edition of a newspaper or magazine which is owned by the publisher.

This myriad of copyrights is further complicated by the different contractual arrangements which pertain to material published in newspapers and magazines. In addition to articles, photographs, cartoons and graphic art produced by employees, this material is also obtained from independent contractors, news services, and other publications.

While the use of by-lines and acknowledgments in newspapers and magazines is now prevalent, a substantial number of the copyrights in these publications are nevertheless anonymous. (Indeed, newspapers

such as *The Economist* appear to consider by-lines to be somewhat vulgar).

Practical considerations undoubtedly play a part in this need for anonymity. If all the copyrights subsisting in a substantial newspaper article of the type referred to above were acknowledged, the copyright acknowledgments would more closely resemble film credits than by-lines.

The NJP case

In the recent case of *DeGaris & Moore* v *Neville Jefress Pidler Pty. Limited* ("the NJP Case") Justice Beaumont in the Federal Court held that the copyright of an employed journalist and a freelance journalist respectively was infringed by NJP when it photocopied newspaper articles written by them in the course of providing its newspaper clipping service. However, the case leaves unanswered two important questions concerning the practical application of Section 35(4).

First, the applicants were the authors of the relevant articles reproduced by NJP. However, the other owners of the copyrights which may have subsisted in the articles including, in particular, the publishers of the newspapers concerned were not parties to the proceedings.

The question therefore remains as to whether newspaper publishers can themselves restrain the reproduction of material from their newspapers by commercial clipping services. In some cases it is likely that they can.

Secondly, how are the owners of the copyrights which are infringed by unlawful reproduction to be fairly recompensed?

It is understood that the Copyright Agency Limited is to collect a royalty from NJP, on behalf of the AJA, for each article reproduced. It is unclear as to what arrangements have been made to collect royalties on behalf of the owners of copyrights infringed by NJP who are not members of the AJA.

More importantly, it is also unclear as to how the royalties collected on behalf of the AJA are to be distributed. An article by the Federal Secretary of the AJA in the August, 1990 edition of *The Journalist* acknowledges this problem in stating that "It will be almost impossible to identify individuals whose work has been copied without onerous administrative costs that would wipe out most of the gains made".

This difficulty appears to have been overcome in the short term by the AJA's decision not to distribute the royalties collected to its members at all. Instead, the royalties "will be used for a copyright fighting fund to fund the AJA's legal and educational campaign on copyright".

It would have been more usual (and sensible) for the trade union to have taken up the suggestion of the Spicer Committee some 30 years ago when it stated that the question of journalists' ownership of copyright is "related to conditions of employment that would be more appropriately dealt with by an industrial tribunal than by the copyright law".

Direct negotiation with newspaper and magazine publishers (particularly when they were solvent) for appropriate remuneration for AJA members as a result of the use of their works for purposes additional to those specified in Section 35(4) may have led to a more direct benefit for the AJA's members.

Other Section 35(4) issues

In an endeavour to maintain newspaper circulations (and, of course, advertising revenues) Australian newspaper publishers have constantly sought new ways to promote their products. In addition to the traditional area of photographic sales, clipping services and educational services for readers have been introduced by some publishers primarily as a means of promoting their newspapers. These services can usually not be justified as stand-alone profit centres.

To the extent that these services utilise material produced by employees of newspapers and magazines it is unlikely that the publisher owns the copyright in that material for such purposes.

'It is difficult to justify the favoured position of employee print journalists'

It remains to be seen whether the next stage of the copyright enforcement process by employed journalists in the print media will be an attack on these reader services. If so, it is likely that publishers will have little economic choice but to close the services which may not be in the longer-term interest of the newspaper industry.

Another area for future legal consideration is the ownership of syndication rights in the work of employed journalists. This issue was referred to in the judgment of Justice Beaumont in the NJP Case but was not decided. The question centres on the newspaper and magazine publisher's ownership of the copyright in its employees' works insofar as the copyright relates to "publication of the work in any newspaper, magazine or similar periodical". Does "publication" in fact mean "first publication"?

Finally, the ownership of the copyright in works contained in computer data bases will undoubtedly emerge as a significant issue. It is likely that employed journalists own the copyright in data base services which are delivered by means of telephone lines or similar cables. These services are most likely diffusion services for the purposes of copyright law and the right of transmission by means of the services is one of the rights impliedly reserved to employee journalists in the print media by Section 35(4).

Alternatively, it can be (and has been) argued that computer data bases are merely another method of publishing a newspaper, magazine or similar periodical and the newspaper or magazine publisher is accordingly the owner of the copyright pursuant to Section 35(4). However, it would seem that this approach involves a very substantial extension of the meaning of the words "newspaper, magazine or similar periodical".

Conclusion

It is difficult to justify the favoured position of employee print journalists in Australia on grounds of either equity or public policy.

Section 35(4) of the Copyright Act 1968 takes an approach to copyright ownership in the newspaper and magazine industries which is contrary to that now taken in the world's two major English-speaking nations. This has the potential to place Australia's newspaper and magazine industries at a local and international competitive disadvantage.

Other information providers are not similarly disadvantaged with regard to the ownership of the copyright in material produced by their employees. Further, the increasing globalisation of the print media means that newspaper and magazine publishers in the UK and the US may be well able to supply data bases and other information technologies to the Australian market without any need to recompense their employees or overcome the almost impossible administrative difficulties in trying to do so.

It is understood that Australia's newspaper and magazine publishers are seeking the removal of Section 35(4) from the Copyright Act. If these endeavours are successful the considerable industry discussion that has been generated by the NJP Case will have served a useful purpose.

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Interconnectivity of the new carrier

Ian Philip examines the policy and legal issues surrounding interconnection and argues the issues are more complex than the government appears to recognise

Interconnection with the Telecom/OTC network is an essential right for the second carrier because that second carrier will not have its own facilities in place from day one.

Interconnection is also essential for private network and value added services providers as they must rely on the facilities of the duopolists carriers to provide their services.

Added to this, there is a public benefit in all customers being able to speak to all other customers, notwithstanding a multiplicity of facilities put in place for so-called micro-economic reform reasons.

While identifying the importance of interconnection for a competitive second carrier the November Statement published by the Department of Transport and Communications (DOTAC) does not, however, grapple clearly with the way interconnection will be put in place or the interconnection implications for value added and private network service providers, both domestically and internationally.

Several approaches

There would appear to be several approaches that could be taken to providing for the second carrier's right of interconnection to Telecom circuits, that is, local, trunk and international circuits.

One method would be to impose on Telecom an obligation to interconnect the second carried in a manner similar to the obligation to connect non-carrier private network services and value added services found at Section 97 of the Act. Another method would be the way in which carriers under the Act can currently seek facilities from each other. That is, there would be a basic right to be provided by legislation, but the detailed terms would be the subject of an agreement which will be entered into between the parties.

The November Statement adopts the approach of requiring commercial agreement first then arbitration. The problem with this approach is that important details of public interest would be left to an agreement between Telecom and the second carrier.

This approach does not seem to have worked well in Britain or New Zealand, in establishing a level playing field for the second carrier. It is quite clear that Telecom has an unequal bargaining position and the results of any agreement, if the United Kingdom and New Zealand are any example, will mean that the second carrier will come off second best in relation to important aspects of interconnection such as numbering, billing information and other technical aspects. In the end, the losers are the customers.

There is one advantage to the approach of the November Statement. It will be simple for the legislators and easy to put in place. It just leaves the hard problems until later.

The second carrier perspective

A different approach is to be very particular about all of the aspects of the right of interconnection on behalf of the second carrier. Most prospective second carriers will take the view that this is appropriate. This detailed view can be accommodated again in two ways. The detailed rights could be incorporated in legislation, or to take the matter of enforcement of rights a step further, in the form of an agreement between the Government, Telecom and the second carrier. The second alternative would give the second carrier contractual remedies against Telecom for the failure to honour interconnection obligations in addition to those rights provided for in legislation.

Such an agreement could certainly reflect the interconnection requirements of the second carrier which will be part of the tender process that the Government expects to go through in the lead up to September 1991.

Following on from the reliance on the commercial agreement between Telecom and the second carrier in the November Statement, AUSTEL has indicated that it would be happy to provide supervision of interconnection. In this way the November Statement adopts the British example by which, again, the two carriers (British Telecom and Mercury) attempt to establish an agreement between themselves and only on failing agreement would AUSTEL become involved. It should be noted, however, that the Department of Trade and Industry in Britain has expressed concern that its regulator, OFTEL, could be overburdened with requests to settle disputes.

It will be evident from the following discussion of what should be included in an interconnection arrangement that much can't be accommodated in a commercial agreement.

Interconnection fees

The ALP's Special National Conference declared that the cost charged to the second carrier for interconnection to Telecom's network would at least cover Telecom's related costs in providing such interconnection, which the November Statement defines as directly attributable incremental costs.

In this way, the interconnection fees to be borne by the second carrier are to cover all Telecom's actual additional costs in providing access to and usage of its network (including allowance for any additional assets required to achieve interconnection and for the opportunity cost of capital).

The November Statement specifies that fees will be the subject of negotiation on a commercial basis between Telecom and the second carrier in the first instance, and to final determination by AUSTEL.

The only guidance given to AUSTEL is that the costs assessed as reasonably achievable under internationally competitive standards of efficiency in user interests. This assessment will not be an easy task, as there has never been much agreement about Telecom's and OTC's relative in cost efficiencies.

Most importantly, the actual additional cost formula is only one ingredient of the fee setting process.

Community service obligations

The November Statement clearly requires the fees payable by the second carrier to underpin Telecom's community service obligations ("CSOs") "on a pro rata basis".

The November Statement refers to the CSO question to an inter-departmental committee. It is unlikely, while they await this report, that the second carrier and Telecom will make much headway in commercial negotiations in relation to any component of interconnection charges reflecting CSOs.

As to what it means to include in interconnection fees an amount by which the CSOs are underpinned on a pro rata basis, it must be right that this cannot mean that the second carrier will have an equal responsibility for Telecom's CSOs at current costing from day one. To require equal sharing would ignore

Telecom's market power, and the substantial time it will take for the second carrier to break even.

The November Statement obliges the second carrier, through Aussat, to continue to provide capacity for Remote Commercial Television Services and the ABC's Homestead and Community Broadcasting Satellite Service, together with defence requirements. These constitute community service obligations akin to those of Telecom and yet there is no provision in the calculation of interconnection fees as between the second carrier and Telecom to accommodate this.

Fees and market information

The duration of the period for which interconnect fees may be fixed is not addressed in the November statement.

It may be appropriate that, particularly in the light of the sunset provision to take effect on 30 June 1997, interconnect fees be fixed until that time to enable the second carrier to have some certainty in relation to investment planning.

As interconnection fees are meant to reflect costs and, at most, an additional share of CSO costs, it seems inappropriate that interconnection fees be subject to any increase in accordance with any CPI - X price cap which applies to Telecom's services.

The November Statement requires Telecom to provide the second carrier with full access to information about traffic created and carried on its facilities and other information needed to ensure efficient interworking between networks.

The November Statement says that Telecom would be obliged to provide all relevant supplementary services including billing, operator and directory services and customer information required by the second carrier, with the government to consider further the control of telephone directory publications. Again, the services would be paid for by the second carrier, presumably on the basis of the same formula for interconnection fees.

The second carrier may require more information than this and, in particular, market information in relation to the roll out and modernisation of facilities. It may be that if a level of playing field is to be created at the outset, then all of this information should be provided to second carrier bidders as part of the tender process and not on the successful grant of a licence.

Numbering

The November Statement does not mention numbering as a specific interconnection issue. Numbering is, however, crucially important to the competitiveness of the second carrier's services. Multi-numbering access requirements in relation to different services and in different areas are extremely prohibitive if imposed on the second carrier.

The November Statement does say that overall control of numbering for telecommunications services will be transferred to AUSTEL from Telecom as soon as practicable, but this does not recognise that numbering will be an essential element of interconnection.

Numbering is equally important to customers. Will customers need to change numbers when changing between carriers? Will they be able to have the same number if they are customers of both carriers?

Technical standards

The November Statement refers to technical interconnection standards being a matter of agreement between Telecom and the second carrier, or as determined by AUSTEL in the case of disputation.

Consistent with its role under the current Act, technical standards should be determined by AUSTEL from the outset and form part of the interconnect arrangements from the outset.

In Britain, it has been recognised that it is essential, in relation to interconnection interfaces, that the Government take an active role in formalising standards, rather than permitting this to be resolved by way of commercial negotiation on a bit-by-bit basis. Otherwise one set of customers may be locked off from another set of customers. This may extend under interconnection arrangements to obliging carriers to provide protocol conversion interfaces.

Directory services and equal access

A customer of one carrier should be able to ascertain the numbers of the customers of the other carrier. If the two carriers are left to themselves, then it may be that these types of services are not interconnected, but are duplicated.

It would appear essential that government intervention in the terms and conditions of interconnection would be required to ensure that these services are provided on a standardised basis to all customers.

The November Statement requires Telecom to share with the second carrier ducts and radio sites where practicable and where these have been acquired as a result of Telecom's legislated rights of access, rather than on a commercial basis.

The second carrier will no doubt seek similar legislated rights as Telecom currently has over land for the construction of its facilities. Consideration should be given to the extent to which access to land by both the second carrier and Telecom should be co-ordinated, particularly with a view to the environmental damage that would be exacerbated through duplication.

Equal access

A benefit of competition for all customers may be said to be the implementation of the idea that the customer of one carrier should be able to call any customer of the other carrier. Are the customers of the carriers, regardless of with whom they have discrete contracts, going to be able to determine on whose trunk or international circuits their calls are carried? This will constitute the adoption of an open access system.

This is an interconnection issue and will arise once the second carrier has established trunk circuits and perhaps also international circuits. It would not be expected that the second carrier will move immediately to establish local circuits and will continue to rely on an interconnection right with Telecom for local circuits.

Equal access, however, does require sophisticated technology which is not yet onstream, even in Britain. It is likely that the imposition of equal access in interconnection arrangements, as a service obligation, may be the subject of resistance from both carriers. One of the implications of an equal access policy, which has been identified in Britain, is that equal access may itself retard entry of the second carrier into the local circuit market.

Conclusion

Even though AUSTEL will have powers to arbitrate between the carriers and make determinations it considers necessary to promote competition, to protect consumers and effect appropriate safeguards, a commercial agreement between the carriers will not be an efficient way of promptly establishing an even playing field for the second carrier.

This is one of the tensions of the November Statement that needs to be resolved and reflects the haste adopted by the Government in preparing the document.

For this reason, the November Statement should really be treated as a discussion draft and realistically no substantial investment decisions should be made on basis of the totality of the pronouncements of the November Statement, including full resale, being realised.

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Press freedom in New Zealand

P. J. Scherer examines recent developments and concludes that, while there have been gains, press freedom remains at threat in New Zealand and the South Pacific

In April the Commonwealth Law Conference in Auckland was told by our Chief Justice, Sir Robin Cooke, that in defamation the courts had achieved some results that could be described only as "grotesque... without the slightest exaggeration."

A visiting British lawyer, Geoffrey Robertson QC, in commenting on the substitution of rights of reply in various forms for more conventional defamation torts, thought that the Soviet Union and Czechoslovakia would soon have greater press freedom than New Zealand in some areas.

Defamation Laws in Need of Reform

While New Zealand undoubtedly enjoys a greater and much more comfortable degree of press freedom than in most Commonwealth jurisdictions, an unnecessarily oppressive defamation code remains our primary concern.

The present statute on defamation dates from 1954. In 1975 the Attorney-General commissioned a committee to recommend reform. On that panel, lawyers, practising and academic, outnumbered journalists, practising and proprietorial. Nevertheless, it found the present balance between protection of reputation and freedom of speech tilted too far towards the former.

Its 1977 report proposed specific remedies. Piqued by one newspaper's political criticisms, the Prime Minister of the day announced that the reforms had been put in a cupboard and the door locked.

Some five years ago, a new Administration revived the proposals but diluted them. A bill has been languishing before Parliament for two years now. The Attorney-General and, more recently, Prime Minister, Mr Palmer (who as a law professor had helped to draft the legislation) was unable to persuade sufficient of his colleagues of its virtues.

Meanwhile, chilling claims continue to mount. Some NZ$10 million or more is being sought by sundry politicians and others arising from one recent television program.

My paper and I are joined with civic officials in defending another claim for amounts aggregating $13 million - a record until this year topped by a suit against another paper and other municipal leaders for amounts aggregating $28 million and $33 million respectively.

The gains

There have, however, been gains on other fronts in recent seasons:

- We recently convinced the legislature to repeal section 9A of the *Race Relations Act* which contained sanctions against publication of material deemed likely to offend ethnic groups.
- Just three years ago, we succeeded in persuading Parliament to withdraw oppressive direct censorship provisions in an International Terrorism (Emergency Powers) Bill. For the first time in 55 years, the Government abandoned such reserve powers, originally taken to deal with labour and civil unrest, and later sustained as a wartime measure.
- Today, under the latest version of the criminal code, sedition is no longer an offence.
- The *Official Secrets Act* has now gone - replaced by an *Official Information Act*, a freedom of information Act. While imperfect it is certainly useful. It embraces not only the central government but also local government and, indeed, most of the trading agencies at either level of public administration.

'The Soviet Union... would soon have greater press freedom than New Zealand'

Despite such gains, we do find it a constant battle to counter a veritable stream of potential regulatory restrictions on press freedom, all of them earnest and well intentioned but often for vague social motives.

Threats on the horizon

In the past six months alone, the New Zealand Section of the Commonwealth Press Union has been dealing with:

- The defamation bill.
- Providing a member for a task-force revising and enhancing accountability and access under the Local Government Official Information and Meetings Act.
- Vainly opposing an invasion of commercial free speech under anti-tobacco-advertising measures.
- Protesting at deception apparently practised by police and military authorities over a major alpine tragedy.
- Helping to persuade the Government largely to abandon a scheme to appropriate broadcasting time for party political broadcasts.
- Successfully campaigning to preserve the application of not only the *Official Information Act* but also the *Ombudsman's Act* to state-owned enterprises.

In the previous year, the Press Union made representations on numerous other pieces of legislation, including bills or acts dealing with crown copyright, statutory publications, coroners, ombudsmen and criminal records.

Other areas of concern

Our concerns also extend offshore. In the past year, we have twice sent representatives to conferences in the nearer Pacific to monitor and resist calls for controls on journalists, particularly visiting journalists.

News coverage of the South Pacific has upset several nations, notably Fiji, Papua New Guinea and Vanuatu, because of alleged "cultural insensitivities" and "distortions". Much of the cause of the distress originates with television journalists. But is has produced talk of "a Pacific Press Council" and of "codes of conduct", with penalties for breaches of the "rules".

It was observed at the Executive Committee meeting of the Press Union in London this month that training and staff development still lay at the heart of Commonwealth Press Union's interest and concern. In New Zealand, we do not neglect that function; indeed, we have had our own annual scholarship bringing Pacific island students to New Zealand for training.

But, of our three committees:

- Training and education of journalists,
- Communications, and
- Editors;

The latter, known formerly as the press freedom committee, is the most important and most active.

This is an edited version of an address by P. J. Scherer, Editor of the New Zealand Herald, to the Commonwealth Press Union

Lawyers in love

David Fraser takes a look at the portrayal of lawyers and law in the media in this review of the films 'Presumed Innocent' and 'Reversal of Fortune'

Law and lawyers are recurrent themes in American popular culture and in the image-machine of Hollywood. From Gregory Peck in *To Kill a Mockingbird* to Al Pacino in to Paul Newman in *The Verdict*, the vision of the lawyer as hero, albeit an occasionally tarnished one, is a persistent icon. Two recent films, Alan J. Pakula's *Presumed Innocent* and Barbet Schroeder's *Reversal of Fortune* continue the trend of offering us lawyers as heroes.

On the surface, at least, these are starkly different films. *Presumed Innocent*, based on the Scot Turow novel, is the story of Rusty Sabich (Harrison Ford), a prosecuting attorney charged with the investigation of the murder of one of his colleagues, Carolyn Polhemus (Greta Scacchi). It turns out, of course, that Rusty has had an affair with Carolyn, an affair from which he has not really "recovered", and he soon becomes the chief suspect in the homicide. He is brought to trial, a lawyer accused of murder. Although written by a lawyer (Turow), *Presumed Innocent* is nonetheless a work of fiction, and as a whodunit exposing the intricacies, foibles and failures of the American criminal justice system, it is, without doubt, a good film.

On the other hand, *Reversal of Fortune*, in its genre a good film and like *Presumed Innocent* worth the price of admission, is based on fact. It is the story of the (in)famous *Claus von Bulow* case in which a mysterious European pseudo-aristocrat Claus von Bulow (Jeremy Irons) is accused of attempting to murder his socialite wife Sunny (Glenn Close) by a lethal injection of insulin. *Reversal of Fortune* tracks the efforts of Harvard law professor Alan Dershowitz (Ron Silver) and his team of dedicated Ivy-League helpers as they attempt to convince the appellate court to overturn von Bulow's conviction at trial.

Harrison Ford with Greta Scacchi in Presumed Innocent. Photo courtesy of Roadshow distributors.

The mythical lawyer

It would appear, then, that these are indeed starkly different films. One based on "fact", the other on "fiction". One involves the crimes and misdemeanours of the wealthy, while the other deals with the nitty-gritty world of "working-class" lawyers. One stars the handsome Harrison Ford in a kind of Indiana Jones meets Perry Mason, the other Ron Silver, the embodiment of the Dershowitz figure - Brooklyn street kid becomes Harvard law professor and defender of the oppressed. What is striking about these films, however, is not their stark contrasts, but what they share. And what they share is the creation not only of lawyers as heroes but of the underlying ideological artifacts (the public/private distinction and the absence of women) which permit the creation and powerful imagery of the mythical lawyer figure.

Thus, in each film, the lawyer hero (Rusty Sabich and Alan Dershowitz) faces an apparently radical disjunction between his public and private life. Rusty is a hard-working, honest, good lawyer whose career and family life are jeopardised when his private affair with his colleague becomes the focus of a very public and very different kind of affair, a murder trial. Like Sherman McCoy in Tom Wolfe's *Bonfire of the Vanities*, a private indiscretion becomes a public embarrassment as lawyers in love becomes a contradictory concept.

As the camera pans an empty courtroom, the film begins with a voice-over of Rusty explaining that he is a lawyer, that he believes in law, he believes in the truth and he believes in the absolute identity of truth, law and justice. The film ends with a similar scene but by now we know that truth, law and justice have little to do with one another in any philosophical or practical sense. At the same time we also know, and the Hollywood image-makers do not let us forget, that while the system may be flawed, corrupt and potentially open to abuse, it is still open to achieving the correct result through the skilful application of legal know-how by an attorney who masters not only the principles of the law, but how the system really works.

For Sandy Stern (Raul Julia), Rusty's defence attorney, there is no public/private distinction because only one thing counts, getting the "right" result without breaking the rules or at least without breaking them too much. Rusty faces an existential dilemma when his public and private personae come into opposition. Sandy Stern faces no such moment of truth because for him, and for the legal system, truth is a mere technicality, the ability to obtain the "correct" result through the application of practical wisdom and skill.

The hired-gun dilemma

In a somewhat different manner, Alan Dershowitz faces a similar moment of existential choice. When we first meet him, Alan is traumatised because two of his destitute clients now face the death penalty. When Claus approaches him to take *his* case, Dershowitz hesitates because adultery and murder among the wealthy of Newport, Rhode Island do not exactly fit either his own self-image or the public perception of him as a liberal crusader for civil liberties. At one level, this is the dilemma Dershowitz and his assistants live with throughout the film. Can they

really believe in Claus's innocence or can they justify their participation in the case on some other ground? This is, of course, the classic hired-gun dilemma. Does everyone deserve representation? Can despicable people come to represent important legal principles?

In the end, Dershowitz takes von Bulow's case, not because he likes Claus or believes in his innocence but because there is an important legal principle involved. And strangely enough, that legal principal is the importance of the public/private distinction. It becomes clear that Sunny's children and the maid have, in fact, engaged in a *private* investigation/prosecution of Claus, and for Dershowitz the liberal, this is intolerable. There cannot be one system of private justice for the wealthy and another system of public justice for the poor. So he takes the case and Claus's cash, which of course goes to subsidise Dershowitz's *pro-bono* efforts on behalf of the poor and oppressed. For some reason, this apparent contradiction in which Dershowitz recognises and denies the existence of public and private legal systems goes unnoticed by the Harvard intellectual who becomes our hero because he wins a great *legal victory*, leading to von Bulow's acquittal. As he tells Claus in their final meeting, however, on the moral question, von Bulow must stand alone.

In both *Presumed Innocent* and *Reversal of Fortune*, the moral, existential and ethical dilemmas of everyday life and everyday law practice can be ignored because in each case, issues of truth, justice, guilt or innocence are simply technical concerns solved by technical argument and mastery of the subtleties of the legal system.

The role of women

Some would argue that this amoral technocratic view of the legal system found in these two films is a distinctly "male" one. Whether this is necessarily the case with this point of view is immaterial here. What is important in each film, however, is the absence or subservience of women. In *Presumed Innocent*, Rusty's wife Barbara (Bonnie Bededlia) plays a key part but she remains defined by her traditional female role. A gifted mathematician, she gives up her promising career for marriage and a family. While a less qualified classmate "made professor", Barbara has to be content with "making beds". Worse yet, she has to be content with the knowledge that Rusty still lusts after the now-dead Carolyn, just as Sunny von Bulow is forced to tolerate an "arrangement" whereby Claus remains free to philander.

What the two films really share is the absence of the leading female protagonist. Carolyn is dead and is present only in flashbacks, flashbacks determined by the consciousness of the male leads. Sunny is comatose and present only in flashbacks and through the use of a bizarre narrative device in which she acts as our "guide" through the tangled web of competing versions of the "truth". But even in their absence they share another more powerful ideological message-bearing function. Like another Glenn Close character (*Fatal Attraction*), both Carolyn and Sunny (although somewhat more ambiguously in the latter case) symbolise the power of the untamed female. Carolyn "sleeps her way to the top", leaving in her wake a number of disgruntled but still passionate lovers. Her sexuality still controls them and in the end, it is this unbridled female sexuality which leads to her downfall and murder. Sunny falls not so much because of her sexuality but because of her failure to use her sexuality "properly". As her passion for Claus wanes, it is replaced by a desire to control him, to prevent him from fulfilling his manly role by getting a job and, in the end, she enters the half-world of a vegetative state.

Ron Silver and Annabella Sciorra in Reversal of Fortune. Photo courtesy of Roadshow distributors.

What these movies share as ideological artifacts and bearers of cultural messages is the primacy of the male - law, technical skill, amoral liberalism and the associated devaluation of the female - the dangerousness of unbridled or non-deferential sexuality. Unlike Perry Mason, modern lawyers in popular culture do have sex. But in the end, it only gets them in trouble. The only thing that can save them is law - a particularly unreassuring fate.

David Fraser is a lecturer in law at the University of Sydney. 'Presumed Innocent' is a Warner Brothers Film. 'Reversal of Fortune' is a Sovereign Pictures Film. Both films are distributed in Australia by Roadshow Distributors Pty Ltd.

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aggregation and regional radio plans, which are designed to significantly increase commercial television and radio competition in many country areas.

While these Government plans also have the noble social and popular political objectives of giving non-metropolitan residents access to a wider range of commercial television and radio programming, it is the commercial broadcasters who are being forced to foot the sizeable bills associated with providing these increased services.

Thus, it could be argued that private sector profits are being pillaged in the pursuit of a popular public policy objective.

Although the regional broadcasting industry probably will return to some level of profitability after it has digested the Government's television aggregation and regional radio plans, and although some individual broadcasters may eventually even prosper despite the introduction of increased competition, it is extremely unlikely that the regional television and radio industries as a whole will ever return the levels of profitability which they had achieved in the late 1980s.

Worse still, before that gestation period is completed, a number of regional television and radio stations could well follow their metropolitan counterparts and fall under the control of bank-appointed receivers and managers.

The Government needs to ask whether this is a socially and economically desirable outcome as it finalises its financial assistance package for the regional television industry.

Bob Peters is a Director of and Media Analyst with Capel Court Corporate Services Group

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.

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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:

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- copyright
- advertising
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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.

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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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