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Reforming the Broadcasting Act

Peter Westerway discusses deficiencies in the Broadcasting Act revealed by recent Tribunal experiences

The *Broadcasting Act 1984*, a poor, wretched animal, designed for reasons which are less and less relevant and made grotesque by years of patchwork amendment, has only one saving grace: it is scheduled to be put down at the earliest opportunity. One can only hope that it is not too long a-dying.

Meanwhile, it must totter along doing the best job it can and I want to look at what that means for some of the people involved and share with you some of the Australian Broadcasting Tribunal's more recent experiences. In particular, I want to discuss some issues on which we have been breaking new ground and some key points which the Government will need to address as it prepares its draft legislation.

The Tribunal and the courts

It is always hard to know from the inside what impression others have of an institution. However, you would not be unusual if you regarded the Tribunal as legalistic, even litigious, in the way it goes about performing this function. Over its 14 year history, it has been party to many court cases. Fifty-five of these were in the Federal Court, six in the Administrative Appeals Tribunal and no less than 10 in the High Court.

Does this mean that the Tribunal is always running to the courts? Unequivocally, no. Throughout the whole of that period the Tribunal originated action on just three cases (all of them in the Bond matter). Experience shows that Tribunal decisions are challenged more often than those of most administrative tribunals.

What is not always so obvious is that any tendency to litigiousness among interested parties is greatly exacerbated by the complexity of the legislation. During my 15 years as a senior advisor in this area, it came to be accepted that the *Broadcasting Act* would require at least one major amendment Bill every year. The *Broadcasting Act's* complex provisions also encourage those who simply want to frustrate its processes - to prevent action, no matter towards what end that action might be directed.

The *Broadcasting Act* is also more subtly blighted. The Act is illogical (for instance, broadcasters having different obligations to those imposed on the press in relation to access to material which may be in contempt of court), incomplete (for instance, it does not address the role of receivers) and incapable of keeping pace with technological change. But, most important of all, it is inconsistent with accepted industry practice.

Networks are the central economic reality of commercial television, both here and overseas. Yet the extraordinary fact is that after 30 years of experience, the Act regulating commercial television in Australia not only fails to cover them but actually ignores their existence. There is no mention of networks or networking in the *Broadcasting Act*.

The Tribunal has returned to this issue in its recent first volume of the Sydney-Melbourne commercial television licence renewals. Thanks to the willing cooperation of the Tribunal, six licensees, several network owners, a considerable number of network executives, several other parties and hundreds of submitters, the proceedings were relatively rational. But this was despite the Act, not because of it. The Act assumes that each licensee makes independent decisions over a whole range of matters and is then properly held to account for them. Yet everyone concerned knows perfectly well that to conduct an inquiry on this basis would soon reduce the proceedings to high farce.

If one accepts that legislation which ignores commercial reality is bad legislation, there is an obvious implication that the Government should address this issue in its review and my understanding is that the Minister intends this.

Financial capability

When the Tribunal is dealing with renewal of a commercial television licence, it is required to consider a number of quite specific criteria. Included among the criteria are 'financial, technical and management capabilities'. In most inquiries there is no problem in satisfying ourselves as to 'technical capability'. Indeed, until quite recent times, it was unusual for us to have to address the financial or management capability criteria in any great detail.

But time moves on and things change, not always for the better. Having spent a great deal of time considering submissions and argument on the point, the Tribunal ruled in the *Sydney Melbourne Report* that it would approach the term: 'financial capability' as requiring a licensee to demonstrate that it had "...the necessary financial resources, or access to the necessary financial resources, to broadcast programs that meet the standard imposed by the Act for the duration of the licence period".

There are various types of resources which a licensee can cite in support of its claims. The Tribunal has a distinct preference for equity capital rather than debt for pretty

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obvious reasons. If net cash flow is negative, lenders still have to be paid and there will always be a temptation to cut services to the public rather than to face up to less palatable measures.

Once the acquisition has occurred and been approved (retrospectively) by the Tribunal, the problem continues. The gearing of many licensees has deteriorated in recent times to the point where the Tribunal may need to fall back on the second leg of the approach, that is, it has to identify a 'guarantor' for the licensee. Enter commercial reality. The fact is that most licensees now work within groups involved in anything from beach resorts to breweries. This group is the natural candidate for guarantor. But what of a two-dollar company owned by the group borrowed the money to buy the licensee, the loan is guaranteed by a second two-dollar company owned by the group and this company in turn has a charge on the assets of the licensee (also now owned by the group)? It sounds complicated and it is, but refer to the *Sydney-Melbourne Report* for a helpful diagram.

The licensee is now one of many businesses in a group, not solely a broadcaster. Moreover, its broadcasting assets may have been mortgaged to buy not only its shares but also speculative assets, such as high risk property. Since the licensee has no better claim on cash available to the group than any of the other companies in it, there is a real danger that its primary responsibilities as a broadcaster will be overlooked or forgotten.

We now have ample evidence that the problems are real. Since the *Broadcasting Act* does not require a substantial injection of capital into a television station at the time of acquisition, two-dollar shelf companies with quite meaningless debt/equity ratios which do not reflect prudent management or banking practices could be and were utilised during the salad days of the 1980s. But television stations are no longer 'cash cows' and the 'upstreaming' of profits from broadcasting into speculative activities soon produced major problems. In one example, the group treasury gave the payment of licence fees such low priority that a licence was endangered.

If you are running beach resorts or breweries, you may choose to cut back the level of service you offer in response to market pressures. But in broadcasting that option is not available. Broadcasting is regulated. The primary purpose of that regulation is to guarantee the level and quality of services the community expects. The Tribunal has the job of holding that thin, bright line which differentiates a public service from a business.

I have nothing but admiration for people like Frank Lowy, who got into a business where the rules were foreign to him, learned the unpalatable truth and then chose to leave it with honour and dignity intact. How many of the experts could have made that choice? I also have considerable sympathy for those investors, bankers or businessmen who inadvertently find themselves contemplating ownership of a licence. They are entitled to assume that the *Broadcasting Act* will provide them with a valid chart around which to plot their course. And it does not.

Peter Westerway is the Acting Chairman of the Australian Broadcasting Tribunal. This is an edited text of a paper delivered at the Royal Australian Institute of Public Administration, Sydney, on Thursday 14 March 1991.

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Frequency tendering or retendering in NZ

Brent Impey questions the fairness of the second tender round

The focal point of the previous Labour Government's so called deregulation policy was the establishment of a property rights scheme for frequencies. The stated aim was to remove economic/viability criteria for entry to the radio spectrum and to replace it with a market system. This was based on the successful highest bidder paying the second highest bid price. The market of course, was dictated by the number of frequencies released for tender.

The Ministry of Commerce assured the industry that all available frequencies, the whole of the AM band and the FM band from 89 to 100MHz, excluding those reserved for non-commercial use, would be made available for tender.

The discussion paper

In preparation for the tender, the Ministry of Commerce released a discussion paper in May 1990 based on the expressions of interest. This followed planning by the department of frequencies available and the demand for new services, the outcome being "the development of draft plans for the exploitation of the AM and FM bands. The paper concluded in relation to AM, that the band has "little, if any, provision for future development" and for FM, that there is "some capability for expansion beyond that which is currently being made available. This capability has been reserved to ensure that future developments may also be made without unduly inhibiting current expansion".

There was criticism of the conservative technical approach, the main allegation being that more frequencies could have been made available for tendering. Notwithstanding, the Ministry of Commerce proceeded to call for tenders in July 1990 and the management rights to the frequencies were confirmed, and applied from 3 April 1991.

So far so good. There then emerged a number of issues relating to certain frequencies and a number of inconsistencies. Some successful tenderers found that there were no technical reasons why frequencies couldn't be relocated. In one case, a frequency which had been allocated to the Kapiti Coast was shown to be able to be relocated to Wellington servicing a population five times larger. In another, a high powered frequency in Auckland, which had been allocated to a site where the successful tenderer would have needed to undertake difficult town planning applications before utilisation, found that it could be used at Waiatarua, which is where all Auckland's television and FM radio services are co-sited. The difference in value was $400,000 in terms of price paid between that frequency and a comparative one at Waiatarua. There are other examples of tenderers obtaining frequencies which they knew could be enhanced in terms of power and coverage.

How to deal with these issues has resulted in philosophical and policy shifts. The original Government reports and Government policy referred to a market based system where only technical constraints should apply. Ever since, those principles have been watered down by a succession of policies which have restricted variations to existing licences. Now the Ministry is advising that if any power increase results in coverage improvement of more than ten per cent then the frequency shall be retendered.

New frequencies

On top of that, the Government has announced that there will be a further tender in September and October of this year. Further frequencies have been "discovered" including FM frequencies in the metropolitan markets.

Some of these frequencies will be reserved for Maori use, but others will be available for general tender. This raises several key questions. Why weren't these frequencies available when tenders were called? On what grounds have the technical criteria changed, if at all? What compensation is due to successful tenderers who find additional frequencies being placed for tender in their markets? Or alternatively, should there be a base below which the frequency will not be allocated, such as the lowest price paid for a comparable frequency in last year's tender?

Other frequencies are also going to be offered for tender; those where there were disputes surrounding their inclusion in the last call for tenders. One example is an AM frequency in Palmerston North where the existing user claimed incumbancy. Another is a frequency which has been surrendered because the operator is using an alternative frequency on a short term basis in a different location. There are issues here too. These frequencies will be the only ones offered for tender in these markets and are likely to attract more attention from bidders than would have been the case had they been included in last year's tender of the "whole" band. Given that the frequencies are, in most cases, presently being utilised, wouldn't a fairer solution be to set an annual rental for the 20 year period of the licence? The Crown answers that it has no power under the Act. It is a lame excuse. In these instances there is substantial opportunity for market manipulation.

Changing policies

The problem for the industry in all these areas is the changing policy. The change from the market deregulated policy to one of ad hoc decision making causes concern particularly when the same officials within the Ministry of Commerce draft the policy, advise the Minister, interpret the policy and enforce it. The only avenues of redress available to the industry are lobbying or civil proceedings, a costly and lengthy process, inappropriate in many cases given the technical nature of the issues involved.

The overall policy, however, has many positives and there are none within the industry who seek a return to the economic licensing system. Also, in many cases the Ministry of Commerce has been flexible and produced pragmatic solutions. The real danger now is that the exceptions to the policy are dealt with in such an ad hoc manner by officials who wear so many hats, that the value of what they have achieved in the past four years will be discredited.

Brent Impey is Executive Director of the Independent Broadcasters Association and Chairman of Independent Broadcasting Company Limited. The Ministry of Commerce has indicated that it will reply to this article in the next edition of the CLB.

Qualified privilege and the media

... paper examines the background to this defence in Australia and finds the defence of limited application to the media

Qualified privilege covers two subject headings: first, for 'fair' reports of ... ary debates, court ... meetings and public ... could loosely be ... secondly, protection ... version of facts or the ... or's opinion, or a ... in most cases could ... as 'commentary'. ... for fair reports of ... gs is covered in each ... law and the same ... court proceedings, but ... in the case of extra- ... which cannot be ... sed but which should ... er is concerned with ... ory of privilege,

... commentary

... the other two classic ... s, namely truth and ... ment, are not avail- ... statement may yet be ... is made in "the ... gal, moral or social ... ving a corresponding ... ive it" (*Adam* v *Ward*

... were formulated, it was ... they would apply to the ... even more obvious when ... test for the existence ... social duty' from the ... ngstone* (1930):

... ss of right minded men ... fendant have considered ... circumstances, to make

... Zealand case of *Truth* ... was observed that the ... st relationship could ... relation to the mass ... dients' were the public

... ulty in understanding ... distinct from agreeing ... word 'interest' is not ... se of 'public interest' ... sity. The old cases ... matters as reporting ... nours and writing ... ing employees, in the ... ur on some innocent character was mistakenly, but honestly, placed. The 'duty' was to make the report, something which is viewed by modern standards as less of an obligation. The 'interest' was the rightful concern of the person, group of organisation receiving the report in what the report contained, eg a concern to shun unreliable employees or prosecute felons. Applying this rule to publishers and broadcasters aiming at an audience of millions, requires a giant step across an unbridgeable gap.

'any degree of uniformity and predictability is an advance on the present situation'

A good example of the difficulty in applying the test to media publications was supplied by a 1932 English case, *Chapman* v *Ellesmere*, where it was held that *The Times* was not protected by privilege when it published a decision of the stewards of the Jockey Club - only a section of readers had an interest in racing. But a publication of the same decision in the *Racing Calendar* was protected, because it was presumed that all its readers were interested in racing.

In Australia, *Morosi* v *Mirror Newspaper* (1977), seems to have settled that, for the press, any common law defence of qualified privilege is an illusion. *Blackshaw* v *Lord* (1983) was a recent English case where the question of qualified privilege for a newspaper was raised squarely. A public servant had been employed in a department which had been found responsible, by a House of Commons committee, for wasting large sums of money in a North Sea Oil development. The public servant had not been named, but a journalist discovered his name and published a report suggesting that his resignation from the public service had been connected with this irregularity. The plaintiff sued and was awarded $45,000 for the libel. The Court of Appeal held that for a newspaper report to be protected by qualified privilege at common law, it was not enough that the report was of general interest to the public. The public at large had to have a legitimate interest in receiving the information contained in the report and the publisher had to have a corresponding duty to publish the report to the public at large. At the time the article was written, the allegation of incompetence against the plaintiff had not been established, so the public at large could not be said to have had a legitimate interest in reading the defendant's inference or speculation that he had been dismissed for incompetence and the question was a mere rumour.

Loveday v *Sun Newspapers* (1937) illustrates an exception to the rule. In this case the plaintiff had attacked the Town Clerk in a newspaper, and the Town Clerk had used the same medium for a response, which contained the words complained of. The High Court held that the Town Clerk and the newspaper were justified in writing and publishing the counter-attack. This must be seen as a special and unusual case well outside the ordinary realm of mass-media publication.

Qualified privilege by statute

For Victoria this subject is no longer academic because of the likelihood that Victoria will become a 'Code State', at least in part, following an accord with New South Wales and Queensland.

Unlike the common law which requires a 'corresponding interest or duty' between the communicants, this kind of 'reciprocity' is not required under the Codes.

In Queensland (section 379) and Tasmania (section 20), the defence of qualified privilege operates in a wide range of circumstances including publications in the media on subjects of public interest:

- protecting the interests of the person making the publication, or some other person, or for the public good
- for the purpose of giving information to the person to whom it is made with respect to some subject on which the person has, or is believed, on reasonable grounds, to have, such an interest in knowing the truth as to make the publication reasonable under the circumstances.

The first test goes beyond the common law in sanctioning a publication made for the protection of the interests of some person other than the defendant without stipulating a corresponding duty in the recipient to protect the interest mentioned. The term 'public good' is unclear, although *Calwell* v *Ipec* (1975) suggests it correlates with a liberally

defined 'public interest'.

Unlike the restricted meaning of 'interest' at common law, the Codes construe the term broadly so that it includes information on any matter of genuine interest to readers of a general newspaper as long as reasonable care has been taken to check the facts.

New South Wales

In this State the rule that the receiver of the defamatory statement must have an interest or duty is modified by Section 21 of the *Defamation Act* to the extent that if the publisher of the statement believes on reasonable grounds that the recipient has an interest or duty, the defence will succeed.

Furthermore, in NSW, section 22 of the Act provides that if the recipient has an interest or an apparent interest in some subject and the matter is published to him in the course of giving him information and the publisher's conduct is reasonable, then the defence of qualified privilege exists. The recipient has an apparent interest if, but only if, at the time of the publication the publisher believes on reasonable grounds that he has an interest.

However, as was stated in the *Morosi* case, section 22 gives no carte blanche to newspapers to publish defamatory matter merely because the public has an interest in receiving information on the relevant subject. What the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law principles require to be established.

Section 20(3) also provides that in a multiple publication where some but not all of the recipients are such that qualified privilege would exist and the extent of the publication is reasonable, "having regard to the matter published and to the occasion of qualified privilege", the defence exists as regards all recipients.

Where the privilege is lost

Unlike the common law which says that qualified privilege is lost if the publication was actuated by malice, the codes in Queensland and Tasmania impose a test of good faith.

That means that the material published must be:

(a) relevant to the matters the existence of which may excuse the publication of the defamatory material;
(b) that the manner and extent of publication do not exceed what is reasonably sufficient for the occasion; and
(c) that the publisher is not actuated by ill-will or improper motive and does not believe the defamatory material to be untrue.

In most respects, the codes reflect the common law test of malice which applies to "material published for the information of he public". Sections 14 and 15 of the *Defamation Act* in New South Wales make it clear that qualified privilege is not defeated by malice if the imputation was true and the manner of the publication is reasonable having regard to the imputation and the occasion of qualified privilege.

However, for publication of fair reports or extracts, the test of good faith applies. In the *Waterhouse* case, Justice Hunt said that in the NSW legislation absence of good faith was not the same as the common law concept of malice.

Reasonableness

Section 22 of the *Defamation Act* (NSW) makes it clear that a publisher must establish that the publication of the defamatory imputation was reasonable.

The policy consideration underlying the 'reasonableness' requirement was stated by the Privy Council in *Austin* v *Mirror Newspapers* (1986) to be the interests of society in ensuring that a journalist has the facts right, otherwise it would condone carelessness by newspapers in their reporting.

Deciding whether the publication of material is reasonable was held in the *Austin* case to involve considering "all the circumstances leading up to and surrounding the publication".

Until the *Morgan* v *John Fairfax* (1990) case, it was generally accepted that the court's view of what is 'reasonable' had hampered the potential of the section 22 defence in New South Wales. The article in the *Australian Financial Review* at the centre of this case was a survey of arguments relating to the Aussat satellite and included the words:

"Not surprisingly, the arguments of the Telecom unions have had a strong influence in the councils of the Government. They have been willing to produce totally phony estimates of costs and usage of the new saiellite, employing supposedly reputable and independent commentators".

The plaintiff, though not named, was identifiable as one of those 'commentators'.

At the trial, the jury rejected defences of truth and fair comment and found for the plaintiff, awarding $150,000 damages. But the defendant moved for judgment on the ground of 'reasonableness' under section 22(1)(c) of the Act.

Justice Matthews said that the article of the defendant was 'reasonably' published for a number of reasons including: another person highly qualified had reached similar conclusions to that of the defendant; it was reasonable for the defendant to take the view that there was no possible explanation for the defects in the plaintiff's study; all the circumstances of the case will determine whether a defendant must make further enquiry before defaming a person upon the basis solely of that person's written output; and ample material was possessed by the defendant for it to have reasonably published the matter being judged by the objective standards.

Unhappily, although the reasonableness/privilege defence is a matter for the Judge under Section 23, the questions of the fact that establish that defence are for the jury, in the absence of consent. The jury had been unable to agree on various questions submitted to them, so had brought in a general verdict for the plaintiff thus ensuring no precise answer by the jury to the vital question of whether the author genuinely believed to be true the imputations alleging dishonesty, bias and other defects which the jury's verdict showed the passage to have conveyed concerning the plaintiff, and to have been in fact untrue. The Court of Appeal directed a new trial, with expressions of regret befitting a Greek tragedy - especially as the new trial was to be not the second, but the third, a prior trial having been unaccountably mistried.

Future directions

Remarkable as it may seem, the Attorneys-General of Queensland, New South Wales and Victoria have reached broad agreement about uniform defamation laws, including qualified privilege extending to the media. Disagreements in the latest *Discussion Paper* (January 1991) have evidently been overcome and the Bills should be ready for submission to the respective parliaments later this year. It is devoutly to be wished that the Bills will actually be debated in parliament, as well as in the public forums, but, equally, that they will not founder because of bickering amongst pressure groups.

I understand it is proposed that qualified privilege will apply where the publication was made in good faith, in the public interest and 'reasonable enquiries' were made - presumably, enquiries as to the existence of facts, but possibly extending to 'adequate homework' so as to justify an expressed opinion, as in the *Morgan* case.

Even when the text of the new law is known, it will be as hard to predict how it will work in practice, as it was in the case of the NSW 1974 Act. What is certain is that any degree of uniformity and predictability is an advance on the present situation. If achieved, will it be followed in the other states? Wait and see.

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Forum Telecommunications

Thomas Arthur of Telecom outlines his view of what the new legislation means for the merged carrier

This is not an official Telecom view but my own observations as a member of CAMLA.

The reforms before the Parliament are the outcome of changing perceptions about how to create national wealth. It is no longer generally accepted that sheltered domestic infants naturally become internationally competitive firms. Professor Porter in his *The Competitive Advantage of Nations* (1990) writes:

"Creating competitive advantage in sophisticated industries demands improvement and innovation - finding better ways to compete and exploiting them globally, and relentlessly upgrading the firm's products and processes. Nations succeed in industries if their national circumstances provide an environment that supports this sort of behaviour."

The Minister in his Second Reading Speech on the legislation set out the Government's strategy, comprising the following elements:

"to introduce genuine and sustainable network competition for the benefit of the wider Australian economy; and

to create a world class telecommunications company that has the ability and ethos to compete vigorously in what will be a key industry in a new competitive global environment."

The Minister also gave a firm commitment to social equity and consumer protection, particularly in markets with little foreseeable competition.

In answer to the question, 'What does the new legislation mean for Telecom?', Telecom expects to experience unrelenting domestic and international competition against the world's best companies, together with owner expectations centred on global markets. As a corollary, the new company would expect to operate with commercial freedoms and disciplines on a par with its competitors and appropriate for the investment cycles in this industry.

It is essential to Telecom that the philosophy behind the reforms - the importance of wealth creation for Australia - be retained. This means that the following policy goals should be aimed for:

- establishment of a sustainable competitive environment where market forces predominate, resulting in increased efficiency and innovation;
- allowing the managers to manage and be accountable for results; and
- ensuring that AOTC (the company formed from the merger of Telecom and OTC) is led with vision and given the resources to fulfil its potential.

Against these considerations, short to medium term compromise such as price control (both interconnection and customer contracts), capital availability, market structure (duopoly or more open competition) and access to infrastructure must be balanced.

Specific comments

There was considerable discussion during the public exposure stages of the drafting process about the discretions granted to the Minister and Austel. It is my belief that appropriate checks and balances have been built into the legislation in relation to the discretions (that is, public, judicial or parliamentary supervision).

The concepts of higher level services (HLS) and basic carriage services (BCS) have resulted in a great deal of discussion. In examining these concepts it must be remembered that the legislation does not reserve the provision of services to the licensees. BCS's may be provided by resellers under the foreshadowed Austel class licence. From a licensee's perspective, a BCS classification for a service clarifies the jurisdiction of the Trade Practices Commission and Austel. Secondly, it acknowledges the fact that many telecommunications services are derived from 'the network' and it is a very complex matter to unbundle services provided in this way.

The commercial reasons why the licensees are likely to prefer that many of their services be offered as HLS's flow from the high level of regulatory control over the provision of BCS's. These controls centre around provision of information, tariff requirements and very stringent competition policy requirements which represent complementary provisions to part IV of the *Trade Practices Act 1974*.

The legislation provides that carriers have the right to interconnect network facilities and that carriers must carry communications across their respective networks on each other's behalf. Telecom and OTC are well advanced in their preparations for negotiations with the new carrier and would expect that an interconnect agreement could be ready when the new carrier commences operations. In passing, it is noteworthy that the scheme of the legislation is largely reciprocal in relation to interconnection rights. This is crucially important. As an example, if a customer attached to one carrier's network chooses to use services from another carrier's network, the first carrier will need to pass basic billing information such as the calling party's number to the other carrier. This is so regardless of the relative market shares of the carriers.

Powers and immunities

Telecom currently enjoys statutory immunity from suit in contract and tort in relation to network service operations. The new arrangements will provide a power for Austel to determine a liability ceiling for tort actions. The reason that this is necessary is that there are situations where it is not possible for public carrier to either have privity of contract with all users of its services or to apply a user-pays system for the potential range of 'neighbours' in tort that could be affected by a failure of its standard services. In addition, liability insurance in practice is not feasible.

The carriers will have powers in relation to land similar to those currently enjoyed by Telecom. A related issue is the application of State and Territory laws in relation network infrastructure but not administrative office developments. The Government has opted for a national code reflecting the national nature of the telecommunications network rather than multiple State and Territory jurisdictions regulating these activities. State law application will be modified to the extent to which the foreshadowed Code applies to planning, asset use and operations.

Telecom looks forward to realising the promise held out by the new legislation. This will mean lower domestic prices, new and innovative services and continuing service quality improvements, and continuing management challenge. Internationally, it will mean increased wealth for Australia through exports, growth of assets around the world and repatriated profits. Most importantly, it will mean that decisions about tomorrow's communications needs are being made by Australians with Australia's strategic development needs upper most in mind.

Thomas Arthur is the Manager, Implementation of New Carrier Arrangements, Telecom Australia.

Anne Davies, Director of the Communications Law Centre gives a public interest perspective

From a public interest perspective the *Telecommunications Act*, as it has finally emerged, is a substantial improvement on the draft bill released for public comment earlier this year. Amendments have enhanced the consumer protection role of Austel, and provided for a public process. However, there remains a very fundamental concern about the extent to which the Minister (in reality the Department of Transport and Communications) has power over key areas of decision making.

It is somewhat ironic that the more important the category of licence, the smaller the role for Austel. In the case of general telecommunications licences - the class of licence under which Telecom/OTC and the second carrier will be licensed - many of the key decisions rest not with Austel but with the Minister. (Contrast this to the substantive decisions Austel can make in relation to enhanced services and cabling licences).

In relation to general telecommunications licences, Austel is more accurately described as an adviser to the Minister, rather than a regulator. Unlike the Australian Broadcasting Tribunal, it has no role in granting licences or in determining the conditions of the licence, both of which remain the responsibility of the Minister. Those important decisions will be taken behind closed doors in Canberra. Some might argue that it is preferable that the Government retain control of major decisions affecting telecommunications policy, but that argument ignores the difficulty that poorly resourced consumer groups face in accessing the bureaucracy.

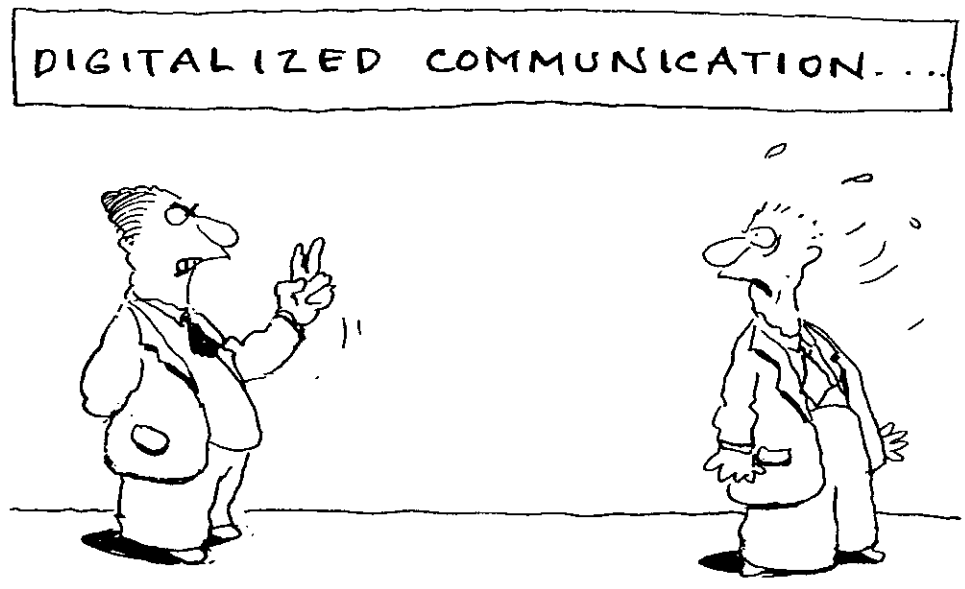
Public input

However, some avenue of public input into the decision-making process has been provided as a result of amendments moved by the Democrats, which require the Minister to first seek a report from Austel before he imposes, revokes or changes licence conditions. Of course he can ignore the Austel report, but his decision will also be a disallowable instrument, and subject to parliamentary veto. The success of this administrative model will depend very much on how it works in practice, and the modus operandi which Austel adopts in carrying out its advisory function.

A number of other areas of the telecommunications package which affect consumers also remain unresolved. The Government has included a definition of the universal service obligation (USO) which broadly defines what is expected of the carrier or carriers who are declared to be USO carriers. However the definition remains imprecise. Funding of services to disabled and other groups is still being investigated by an interdepartmental committee. Despite pleas by the consumer groups for an inquiry which would explore the appropriate scope of the USO now and into the future, the Government is still to commit itself to such an investigation.

The draft licences, circulated in June for public comment, also caused some anxiety. Many of the conditions that consumer groups had expected to find in the drafts, such as requirements for network roll-out by the second carrier, and enforceable standards of service, were absent. Whether the Government intends to make quality of service enforceable is uncertain. Austel's functions under the Act include establishing quality of service indicators, but Austel has already acknowledged that these are indicators only, and are not enforceable by it or by individual consumers.

Finally, there is still much work to be done in devising a system of complaints handling for the new environment. The Government has announced that it will establish an industry ombudsman by 1993, and the House of Representatives Committee into Telecom Complaints has endorsed that option, suggesting it should come under the auspices of Austel. In the interim it is important that complaints processes do not put the consumer in the untenable position of having to shop between carriers if they have a problem with their service.



Robin Davey, Chairman of Austel, outlines the challenges facing the Government's regulator

One of the greatest challenges facing Austel under the new telecommunications regime is how best to ensure a smooth transition from the old to the new. Some idea of what is involved in meeting that challenge may be gained by contrasting the new with the old regime.

The principle features of the **new regime** are:

- a fixed network duopoly, licensed to supply a full range of domestic and international services using all or any available technologies. That is, the establishment by the end of 1991 of a private sector competitor to a merged Telecom/OTC;
- each of the duopolists being granted a mobile licence and being allowed to supply public access cordless telecommunications services under an Austel class licence;
- full competition in public access cordless telecommunications services under the Austel class licence;
- a third mobile operator (to be selected by the end of 1992 and be licensed to begin operations in the second half of 1993);
- full resale of domestic and international telecommunications capacity;
- an end to the duopoly in 1997; and
- a 'universal service obligation' to be

shared among carriers on an equitable basis.

Under the **old regime**:

- rather than a duopoly there was a series of facilities and service monopolies with:
- Telecom having the domestic fixed and mobile network monopolies;
- OTC having the international monopoly;
- AUSSAT having the monopoly to provide the space segment of Australia's domestic satellite system;
- competition was allowed at the margins only in the area of value added services and in the supply of customer equipment and customer cabling;
- while private networks were allowed, with liberalised common interests, resale was prohibited;
- there were no public access cordless telecommunications services; and
- finally, Telecom alone bore the responsibility of meeting "community service obligations".

The challenge is all the greater because there was no gradual evolving change from the old to the new due to market forces, such as may occur in other industries. The changes were forced; the result of deliberate decisions to move as quickly and effectively as possible:

- from statutory entrenched monopolies, with competition at the margins only;
- through a period of duopoly that will face significant competition from resale, mobile and cordless operations; and
- to a period of open competition in 1997.

Trade practices regulation

Expressing the changes in those terms helps to explain why the Government opted for industry specific legislation with an industry specific regulator, Austel, rather than leaving the challenge to be met entirely by way of the general trade practices laws administered by the Trade Practices Commission.

That is not to say that the *Trade Practices Act* will have no application to the telecommunications industry. Indeed, it will. For example, its customer protection provisions would apply to false or misleading representations about a service or about customer equipment and its exclusive dealing provisions would apply to public access cordless telecommunications services base station site agreements.

But the *Trade Practices Act* will have no application to the agreements central to the success of competition in the industry, namely, the terms and conditions of interconnection and access agreed between the carriers and registered with Austel or, in the absence of agreement, arbitrated and determined by Austel. Such agreements or determinations are 'specifically authorised' by the legislation and taken outside the ambit of the *Trade Practices Act*.

Austel's role in relation to those interconnection/access agreements illustrates another challenge for Austel. The role calls for skills and expertise in respect of matters going beyond the confines of Austel's former focus on the customer side of the network. Another area where that expansion poses a challenge for Austel is its responsibility for the national numbering plan. Numbering has significant competitive implications and meeting the challenge will involve the application of Austel's considerable technical and economic skills in consultation with all interested parties. Yet another area where Austel will be meeting the challenge in consultation with all interested parties is its responsibility for managing Australia's input to the setting of international technical standards under the policy guidance of the Minister. Austel already has 'runs on the board' in meeting this challenge and is well placed to make Australia a key player in the region and to bring influence to bear in this strategically important area of international standards.

Perhaps the greatest challenge for Austel is how best to promote the permitted competition and to ensure that it is real and effective competition, so that the true benefits of that competition to consumers, industry and the national economy may be fully realised.

Consultative process

Much of Austel's success has been due to its commitment to consult with interested parties and the willingness of persons outside Austel to participate in that consultative process.

The consultative process is most important in the area of consumer interests. The enormous changes in the telecommunications industry present an educational challenge for Austel. Part of this challenge is to create, monitor and publish indicative performance standards against which consumers may satisfactorily measure the quality and prices of the services offered in a competitive environment. At the end of the day, the benefits of the changes will be measured against their impact on domestic and business users. The adequacy and sensitivity of the processes which involve these consumers may be Austel's greatest challenge.

Austel for its part will continue its commitment to the consultative process and it hopes for a continuation of the willingness of others to participate in that process.

Given the continuation of the willingness of others to participate in the consultative process, Austel is confident that it will be able to meet all the challenges facing it under the new telecommunications regime and, in particular, ensure that the permitted competition is real and effective competition with all that should flow from that.

Brian Perkins of AAP Communications gives a reseller's view of the reforms

After 90 years of prohibition resale and its sibling, the carriage of third party traffic, have finally taken on the cloak of legitimacy and respectability.

At last the fertile marketing minds in companies other than Telecom and OTC can be unleashed to create and develop new innovative service offerings based on the resale of capacity and carriage of third party traffic on basic facilities of services supplied by the carriers.

These new reseller-provided services may now be offered as 'eligible services' under conditions to be described in a new class licence currently being drafted by Austel.

Eligible services may include just about any service it is possible to conceive. However, the class licence conditions will ensure that certain technical standards are met where interconnection with the carriers' public switched networks is required. Other licence conditions are likely to address the supply of international services to ensure that the national interest is protected and Australia's international obligations are met.

Within these, hopefully broad, limits resellers may offer any eligible service to the marketplace.

The objectives

What does the Government hope this will achieve? Clearly the answer is, amongst other things, lower prices, better customer service and a wider range of products and services.

Resellers can play an important role in achieving these objectives if they are able to operate profitably. However, to do this they must receive fair treatment from the carriers, particularly Telecom/OTC who will be both

their supplier and often their competitor. To be competitive, they must be able to buy the basic carriage services they require, at reasonable prices. In the future, competition between the two carriers will be important in ensuring that the prices of these basic services are directly related to the cost of providing them.

Interconnect charges

Initially, however, all basic carriage services must be purchased or leased from Telecom/OTC, and resellers will have little bargaining power to ensure affordable prices and reasonable conditions of supply. This will be particularly true in regard to charges and conditions for interconnection to the public switched networks, especially the public switched network and integrated switched digital network.

With the current dominance of Telecom/OTC in mind, the Minister has reserved the right to review and, if necessary, disallow the charges set by Telecom/OTC for interconnection of reseller's networks. This provides a level of comfort to resellers they might not otherwise have enjoyed.

Nevertheless, there are already indications that the price resellers will be expected to pay Telecom/OTC (and the future second carrier) may well be higher than each carrier pays to the other for the same, or even technically better, interconnection facility. There appears to be no justification for this.

On the contrary, a strong argument can be made in favour of setting a standard interconnection charge for all service providers, carriers and non-carriers. In accordance with normal business practice, appropriate discounts could be offered for high volume usage and this would naturally and reasonably favour the carriers. Resellers would be unlikely to find argument with this.

Under the new regulatory regime the carriers, by virtue of their facilities reservations, have a financial advantage in the supply of basic carriage services. This is an acceptable benefit arising from having the rights and responsibilities of a general carrier licence. However, it should not, and must not, be extended to the provision of higher level services especially by the dominant carrier, Telecom/OTC.

Austel, through its chart of accounts and cost allocation manual, will no doubt keep the prices at which Telecom/OTC transfers basic carriage services to its higher level services arms under close scrutiny. This will be critical to resellers in maintaining their competitiveness.

Containing BCS

For similar reasons, resellers are relying on Austel not to broaden the scope of the carriers' basic carriage service offerings. To do so would limit the range of services over which resellers could compete on equal terms with the carriers and thus reduce resellers' abilities to establish viable business operations.

In the long term, innovative and high quality, multi-feature services will be the key to competition between resellers and carriers. However, if resellers cannot possibly be price competitive then there will be no widespread competition to inhibit the two carriers from entering into a comfortable market sharing arrangement and we will very likely end up with the type of duopoly which operated in the Australian airline industry for many years.

The resale sector of the telecommunications industry should be seen as the 'nursery' of future network competition as it is most likely that, from the ranks of the resellers, network competitors will emerge in the post-1997 period. It will be a matter of concern to the whole industry if, when the sunset expires on the duopoly, no new network competitors emerge to challenge the incumbents.

Alan Robertson of The Australian Telecommunications Users Group on the impact of the reforms for users

At the time of writing the Telecommunications Bill 1991 is still being debated so that it is possible, if highly unlikely, for changes to be made which could alter conditions under which users will operate.

There are several features of the legislation which will set the framework. The main ones are the definition of basic carriage service; the latitude to be allowed for establishing private line links; interconnect arrangements; and resale of both mobile services and network capacity. Of course, the tariffs set for Telecom services will continue to affect all users, but the recent decision to set the price-cap for certain charges at CPI minus 5.5 per cent (2 per cent for local calls, connections and rentals) should keep prices down reasonably satisfactorily - especially if the CPI is only 4 per cent. But these prices, and other charges which the Minister has to approve are not dependent on the new legislation; those conditions were already established under the 1989 Act.

The definition of basic carriage service (BCS) is critical because it establishes the bench mark for what is, and is not, reserved to the two carriers. In turn, this will determine which will become the competing value added services (to use the old expression). Anyone will be allowed to sell basic carriage services but non-carriers will have to buy them at commercial rates. When the dominant carrier uses BCS for value added services (now called higher level services when offered by carriers) they are required to charge their own high level service arm the same commercial rates which it charges non-carriers. It should be noted that non-carriers' offerings are called 'eligible services' - a term embracing both resold BCS and value added services.

The definition in the legislation is only one aspect. Austel's interpretation and the determination it makes as to what are BCS will be the acid test for competition in value added services.

The point is that users who are in the market for value added services are likely to find out fairly quickly just how effective competition in value added services will be. The Australian Telecommunications Users Group has worked hard to keep the definition of BCS as tight as possible for this reason, but, as indicated above, much will depend on Austel's determination.

It will be vitally important to a number of people, not least PABX suppliers, whether Telecom's Centrex service is determined to be a BCS or not. As far as users are concerned that decision will have an impact on the cost of such a service. The decision is also likely to have a major impact on the market for virtual private networks.

The provision that a dominant carrier may be required by Austel to unbundle a service it provides also has considerable potential benefits for users.

Under the existing Act private line links were only permitted across public places with the concurrence of Telecom. Though a few approvals had been given in the past, more recent applications have not succeeded. The new legislation allows for contiguous areas, specifically defined as areas which share common borders - to be designated as an 'eligible combined area'. This gets over the dreaded 'cadastral separation' and its silly consequences where an occupier of adjacent premises which had separate titles could not cable them up to be serviced by a single PABX, for instance. The new legislation will go further, we understand, to cover what is sometimes known as the 'Myer case'. That is, where an organisation occupies adjacent but non-contiguous areas (such as a department

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CAMLA PRESIDENT'S AGM ADDRESS

Julia Madden's address to the sixth annual general meeting of CAMLA on 18 April 1991

Since last year's Annual General Meeting CAMLA's membership has rapidly grown - increasing from 340 members in March 1990 to 490 in March 1991.

This growth is in no small part attributable to CAMLA's masthead, *Communications Law Bulletin*, the quality of which has gone from strength to strength in the past 12 months. The increased diversity of issues which it covers and the quality of each of the articles has attracted new members. Such a feat has been due to the efforts of *CLB's* Editor, Grantly Brown. He has been initiator of many of the promotional distributions of *CLB* to a number of groups targeted as a source of potential members. The format of the *CLB* is constantly improving and we have recently seen the introduction of graphics. Early last year Associate Editors were appointed and we are greatly indebted to each of these, being Christine Allen, Richard Coleman, Kerrie Henderson, Page Henty, Yasna Palaysa, Stephen Peach, Bruce Slane and Peter Waters, for their contribution in ensuring the success of *CLB*. The Associate Editors come from various backgrounds which engender the diversity of issues *CLB* now contains.

However, in any voluntary organisation there are also the committee members in the 'backroom'. Not that I am suggesting anything clandestine in the activities of the CAMLA committee but rather wanting to emphasise that it is the contribution of those behind the scenes which enable the heart of CAMLA to continue pumping. It is the committee members who contribute ideas and energy and who organise luncheon addresses and our Annual Dinner address. This is no mean feat as to start with the organiser has to be willing to insert promotional fliers for the event in what is now nearly 500 envelopes. These events have included addresses by Kevin O'Connor, the Federal Privacy Commissioner, David Dale, Martin Hartcher, Richard Thwaites, Christopher Warren, Peter Banki, Richard Coleman, David McKnight, Jock Given, Janette Paramore and the Minister for Transport and Communications, Kim Beazley who addressed CAMLA's Annual Dinner. Without the generous contributions by each of these speakers CAMLA would not be able to offer its members the opportunity to attend such forums and exchange views.

The contributions of the entire committee are acknowledged but the contribution of one must be singled out. If you followed the proceedings of the last AGM, you could be forgiven for wondering why in fact Mark Armstrong isn't standing here giving this address tonight rather than me. In September last year Mark resigned as President due to unexpected family commitments and I was voted to fill this casual vacancy. Mark's contribution to CAMLA has been immeasurable. He has been at the helm in steering the course of CAMLA since its creation following the merger of the Australian Communications Law Association and the Media Law Association in early 1989 (and, of course, prior to that time charting the course of the Australian Communications Law Association). Those who know Mark will attest to his consistent tireless and unselfish efforts and enthusiasm in furthering CAMLA's interests. It is only through Mark's efforts as President of CAMLA for the first 18 months of its life that it is as strong as it is now. On behalf of the committee I would like to take this opportunity to thank Mark Armstrong formally. However, his contribution to CAMLA did not end in September - he was elected as Vice President and in that position has continued his invaluable contribution.

In December last year I attended the inaugural function in Auckland to mark the formal commencement of CAMLA's activities in New Zealand. This function, addressed by Maurice Williamson, the New Zealand Minister of Communications and Brian Corban, Chairman of Television New Zealand, was highly successful and received media attention including press reports both prior to and following the function. Largely as a result of CAMLA's New Zealand committee member, Bruce Slane, CAMLA's membership now includes 40 New Zealand members and is growing. You will recall that earlier this year Cleo Sabadine relinquished the administrative tasks she has so competently performed since CAMLA's inception. CAMLA is greatly indebted to her for her time and effort. We are now lucky enough to have the services of Roz Gonczi and I would like to welcome her to CAMLA. Our agenda for the next 12 months is to increase and improve CAMLA's activities for its members - both in Sydney and other places such as Melbourne and New Zealand. Our ability to fulfil this ambition depends on the contribution of all committee members together with support from all of CAMLA's members for those activities which CAMLA organises.

In conclusion CAMLA, as a voluntary organisation, has had a highly successful year and the coming year should enable us to capitalise on CAMLA's achievements of 1990.

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store occupying adjacent premises on more than one city block; or an educational establishment which has public road running through its grounds). It is understood that the Minister will make regulations under Clause 106 permitting private cabling across public property (roads for instance) within a specified distance, say 500 metres. This victory for commonsense should be of considerable benefit to users who are currently chafing under the 1989 Act.

There are two aspects here. One is that double-ended interconnect will now be permitted. The other is that users are yet to know what the new interconnect fee will be, and to whom it will apply. It may only be a charge to services providers while private network operators are spared.

Unrestricted resale - with some limitations on international resale - should benefit large users with spare capacity, even though they will not be able to compete with the price for which carriers can sell BCS. Even so, freedom to resell capacity can be expected to benefit both the seller, who would otherwise have it lying idle and getting no revenue from it at all, and the buyer, a small user, who may be able to get access to a private network at very competitive rates.

Resale of mobile services can be expected to benefit all users, and provide much needed competition in this service.

The most important effect, of course, will be the effect of network competition which, ATUG fervently hopes, will be felt increasingly during the course of 1992 and beyond as the competition to Megacom (AOTC) gets into its stride. In that context the most obvious benefit will be felt in lower tariffs for long distance calls.

Update on rental rights

Stephen Peach argues the A-G's decision not to introduce a record rental right is based on a misconception about the relationship between rental rights and the blank tape royalty

In the Summer 1990 issue of the *Communications Law Bulletin*, I discussed the concept of record rental and the potentially disastrous consequences for copyright owners (and through them recording artists and composers) resulting from this activity.

At that time, the Commonwealth Attorney-General's Department was considering the proposal by the Australian Record Industry Association Limited (ARIA) that the *Copyright Act 1968* be amended to include a right of rental as part of the copyright in sound recordings.

On 8 July 1991, the Attorney-General, Mr Duffy, announced that, for the time being, the ARIA proposals would not be accepted and that no amendment would be made to the Act to include a 'rental right'. This decision was made even though this right has been regarded as necessary in many countries, including the USA and Canada.

Blank tape royalty

Mr Duffy stated that he was not satisfied that rental had yet been transformed into a new use of copyright such as to attract copyright control. He also expressed the opinion that the extent to which rental facilitates home taping of records is a factor which would be taken into account in the determination of the blank tape royalty.

The *Copyright Amendment Act 1989* introduced Part Vc into the Act which contains the relevant provisions relating to the introduction of a royalty on the sale of blank audio tapes. That royalty is intended to compensate the owners of copyright in sound recordings and musical works for the home taping of copyright material. The royalty rate is to be determined by the Copyright Tribunal.

However, the validity of Part Vc of the Act is currently the subject of a challenge in the High Court of Australia, brought by the blank tape manufacturers and distributors, alleging that the blank tape royalty legislation was beyond the power of the Commonwealth to enact under the Constitution. The Government proposes to reconsider the question of a rental right when the High Court hands down its decision in those proceedings.

The Minister's announcement is remarkable for two reasons. First, it implies that record rental and home taping constitute the same use of copyright. Secondly, it also implies that the blank tape royalty and a licence fee obtained in respect of record rental are alternative and equivalent methods of compensating copyright owners for that use.

Michael Duffy

Same use

The notion that the blank tape royalty and any record rental licence fees are, in effect, licence fees for the same activity is fallacious. It fails to recognise that two separate and distinct uses are being made of the copyright in the sound recording even though only one of these uses is presently recognised by the Act. The blank tape royalty is designed to compensate a copyright owner for the exercise by a consumer of the owner's 'reproduction right' (the right to make a copy of the sound recording). The exploitation of sound recordings or musical works by way of rental is not, of course, an exercise of the owner's reproduction right as no copying of the recording occurs at the time of rental.

No copying is involved in the renting of a record, yet it is clearly an activity which involves the use of the sound recording for commercial gain. The fact that the consumer may subsequently seek to exercise (or, as is presently the case, infringe) the copyright owner's reproduction right is an entirely irrelevant consideration. The consumer may or may not tape a record that he or she rents. However, the consumer's decision as to whether or not a copy will be made of the record has no bearing on the rental transaction. The person renting the record will receive hire fees regardless of the subsequent use made of the record by the consumer.

Alternative methods of compensation

Without wishing to give any credence to the notion that record rental and home taping constitute the same use of copyright, the Minister has failed to recognise that the blank tape royalty is not an adequate substitute for a record rental licence fee. The blank tape royalty legislation is based, in part, on the concept of reciprocity - the royalty will be calculated by reference to, amongst other things, the use made in Australia of sound recordings and musical works from countries that have similar blank tape royalty legislation in place and which also compensate Australian copyright owners for the use made of Australian sound recordings in those countries. At present, while such legislation has been enacted in some countries (such as France, Germany and Austria), the Minister has not recognised any of those countries for the purpose of determining the amount of the blank tape royalty. It has yet to be established that any of those countries distribute any of the royalty proceeds to Australian rights holders for the use made of Australian sound recordings and musical works in those countries. For the foreseeable future, the blank tape royalty will be calculated having regard only to the use made in Australia of Australian sound recordings and musical works.

Record rental, on the other hand, involves the exploitation of sound recordings and musical works from around the world, particularly the United States of America and the United Kingdom. Accordingly, there can be no basis for the implication, inherent in the Minister's statement, that the blank tape royalty would adequately compensate copyright owners for the use made of their sound recordings and musical works through rental.

There is no justification on the part of the Minister in delaying the reconsideration of the record rental issue until the validity of the blank tape royalty legislation is determined. An immediate reconsideration is warranted.

Stephen Peach is a lawyer with the Sydney firm of Gilbert & Tobin.

Victorian inquiry into print media ownership

Race Mathews, Creighton Burns, Sally Walker and Paul Chadwick respond to Grant Hattam's critique of their report

This article attempts to answer criticisms of the report of the Victorian Attorney-General's working party into print media ownership which appeared in the last edition of the *Communications Law Bulletin.*

We four comprised the working party.

We feel that some of the confusion may have resulted from the space in the article given over to criticisms of the working party's recommendations rather than discussing the body of the report.

We also wish to continue debate on this important public issue beyond the basics which have been so methodically laid out by Mr Hattam, a former legal advisor to News Limited in Melbourne.

On 11 July 1990, the Victorian Attorney-General, Jim Kennan, asked us to examine:

- the extent of concentration of ownership and control of newspapers in Victoria;
- the effects or possible effects of this concentration on all aspects of the life of Victoria and on the practice of journalism;
- whether it would be in the public interest to regulate ownership and control of corporations publishing newspapers having a substantial circulation in Victoria or any part of Victoria; and, if so,
- what form of legislation, regulations, restrictions or other action was warranted and desirable and what required implementation by the Victorian Government and/or the Commonwealth Government;

We were also required to examine "the barriers which may impede or obstruct entry to the newspaper industry, including the availability of wire services, plant, newsprint and distribution systems; and ways in which such barriers can be reduced or eliminated".

Our recommendations were to be "directed in all respects to the protection and enhancement of freedom of expression".

Background

Our starting point was the 1981 Inquiry into the Ownership and Control of Newspapers in Victoria by the retired Supreme Court judge, the late Sir John Norris. It remains the only government-sponsored inquiry - it lacked any legal basis or powers - of its type in Australia.

Norris had found "a very high degree of concentration of ownership and control", which seemed then to be increasing "largely in consequence of the operation of economic factors". Norris thought the press a major instrument in the working of our social and political life, notwithstanding the growth of the electronic media.

The two major dangers associated with concentration were, in his view, "loss of diversity in the expression of opinion and, second, the power of a very few men to influence the outlook and opinions of large numbers of people, and consequently the decisions made in society".

Potential for harm

While he found no evidence of a deleterious effect of concentrated ownership, Norris believed the potential for harm was real. Writing when Rupert Murdoch's unsuccessful 1979 bid for the Herald and Weekly Times Ltd (HWT) was a recent memory, Norris concluded that the "probability of harm from a change in the existing state of affairs is by no means so negligible as not to require legislative remedy in the public interest".

Neither the then Liberal Government, nor the Labor Government in office since April 1982, enacted the legislative remedy Norris proposed.

In 1987, Murdoch acquired HWT.

The industry has changed considerably since Norris, and the concentration which concerned him is worse:

- Concentration of ownership and control increased in the categories of metropolitan daily newspapers, Sundays, regional non-dailies and suburbans.
- Overall, in 1981 the major six owners controlled 91.4 percent of total weekly circulation of all types of paper in Victoria. In December 1990, there were four major owners controlling 85 percent of total circulation.
- Victoria's total number of newspapers fell 11.8 percent from 169 in 1981 to 149 in December 1990.
- In 1981, three of the five metropolitan daily newspapers and the two Melbourne Sunday papers were under Victorian control. As at 24 December 1990, none of the metropolitan dailies or Sundays was owned by Victorians

We made it plain to the Attorney that a group like ours, volunteers working with minimal resources, could only hope to sketch the problems and potential remedies, for they are national in scope and, in a sense, need to be understood in an international context.

We recommended a major public inquiry be undertaken as a matter of urgency, preferably by the national government but, if necessary, by Victoria and other States or by Victoria alone. Terms of reference should be similar to ours. The inquiry should examine particularly the issues of divestment, appropriate limits on ownership and control and appropriate measures to encourage diversity. Resources and powers should be adequate to the task, for unlike some of our critics, we were at pains not to oversimplify the complexities and delicacy of the issue. A request to the Prime Minister from the Premier for a national inquiry has since come to nothing and the Victorian Cabinet has decided to establish its own inquiry. At present the Attorney-General is deciding on the appropriate powers and personnel.

Our terms of reference demanded more of us than a brief diagnosis and recommendation for further inquiry. On 10 December 1990, just before we reported, the John Fairfax Group was placed in receivership. It seemed then, and remains a distinct possibility at time of writing, that the sale of the Fairfax papers could result in a worsening of concentration.

The price of not having responded to Norris might be paid again.

Recommended legislation

The working party's recommended legislation is not exactly as Mr Hattam reported. We did not recommend that "there should be legislation immediately or over a period of time to dilute existing concentration which would bring it down to set limits". Our draft legislation does not address divestment of existing ownership.

The report says an inquiry should consider the issue and "divestment down to set limits may be required". It would be in the public interest to dilute existing concentration.

The draft legislation aims to ensure that transactions involving 10 percent or more of a body corporate which publishes a newspaper circulating in Victoria would be subject to the scrutiny of an independent three-member Press Diversity Tribunal.

Under sections 4 and 5, a person or company acquiring one tenth or more of the voting shares of such a publishing company would be required to obtain an authorization from the Tribunal. Under section 7, read together with section 2, the Tribunal could prohibit a person or company from acquiring shares where the result is that person or company, alone or together with associates, obtains a controlling interest (10 percent or more of voting shares) in a body corporate which publishes a newspaper circulating in Victoria.

Mr Hattam implies that the legislation could be circumvented if "11 or so individuals join together to own 9 percent or less each". This is quite wrong. Section 7 would enable the Tribunal to scrutinise such a transaction.

The detailed provisions which aim to ensure that the Tribunal could examine all relevant transactions (section 2 and section 4(2)) are too detailed to reproduce, but two examples will illustrate the method. First, the legislation would catch an attempt to gain control of 10 percent or more of the shares through "means of arrangements or practices, whether or not having legal or equitable force". Second, it would catch acquisition by a person or company together with 'associates', a term widely defined in the draft bill.

Lawyers who read section 2 and section 4(2) will find that the terminology is familiar; the sections are based on provisions already in several pieces of federal legislation.

If the legislation were enacted, we must regrettably expect attempts to avoid such provisions, but they would not be avoided in the manner Mr Hattam suggests.

Mr Hattam accurately reports our distillation of the possible adverse effects of concentration and he does not dispute them.

The public policy issue, then, is what shall we do to avert or ameliorate them?

Trade Practices

We do not share Mr Hattam's faith in market forces and in the *Trade Practices Act* 1974 (Cth). These factors, combined, have brought us to the present position, and to the risk of worse. Mr Hattam has nothing to say about how they might now improve matters.

Section 50 did not avert the concentration. If we accept the 'economic reality' that the dominant operators will not knowingly shrink, nor welcome robust competitors, what evidence is there that the present regulatory scheme works in the newspaper industry?

If we are to put our trust in the *Trade Practices Act* we must consider the lessons of having tried to apply a general anti-monopoly statute to a unique industry such as the press. Britain has provisions in its *Fair Trading Act* which expressly deal with newspaper transactions. US anti-trust cases involving the press are always decided under the special umbrella of the First Amendment. Australia has so far failed to apply special considerations to the special case that the press constitutes. The results are both plain and adverse.

How, precisely, might the *Trade Practices Act* lower the barriers to entry? The reply that the Act can deal adequately with abuse of market power is dubious but debatable. What is less uncertain is the likelihood that no fledgling competitor, subjected to such abuse, would be able to withstand it long enough to have the matter settled in court.

Authorization process

Under the authorization procedure of the *Trade Practices Act*, the Trade Practices Commission (TPC) can consider whether a merger benefits the public only if the person acquiring the shares or assets applies for authorization. This is a major limitation on the capacity of the TPC to protect public interest, and our recommended legislation seeks to avoid this flaw by requiring the person acquiring shares to apply for authorization.

The TPC cannot presently grant authorization unless it is satisfied that the acquisition "should result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place". We adopted the same test in our draft legislation. Mr Hattam thinks "a better test might have been that the Tribunal had power to block a transaction 'if it was not in the public interest' for such a transaction to take place".

He is worried about the 'benefit' test, and about the powers of the proposed Tribunal. But that Tribunal would have to act in accordance with section 3 (5), which requires that it "shall be guided by the principle that further concentration of ownership or control of newspapers is contrary to the public interest". This provision is designed precisely to prevent a focus on individuals and whether or not they are suitable to be owners of newspapers.

We have tried to ensure that Parliament prescribes the key question: would the proposed transaction further concentrate ownership or control? If yes, the transaction would not be allowed unless there were a countervailing public interest such as the likelihood of closure (section 5 (3)). If the answer were no, the transaction should be authorised. The 'neutral' transactions, for which Mr Hattam expresses concern, would go ahead.

It is no answer to criticisms of current concentration to list the number of radio and television stations as if their mere existence ensured the diversity of information and opinion on which - and this appears to be common ground - a free society depends. This incorrectly equates the number of outlets with diversity.

The press, especially the quality papers, remain the 'agenda-setting' medium, with radio and TV taking their lead from them for the day's cacophony. While the number of separate commercial radio stations is large (145 nationwide), the range of sources of news and information is very small (six services, three of which have combined to provide a single service out of Canberra). For the rest, the radio services and much TV news rely on the wire service of Australian Associated Press, which also supplements metropolitan dailies and the regional and country press.

The power which Mr Hattam ascribes to the discerning consumer to exercise judgements to discipline a proprietor who abuses his or her power, seems almost utopian.

Not to worry, he hypothesises, if *The Age* suppresses something, its rival the *Herald-Sun* will point out its bias and so the credibility and readership of *The Age* will be dented. This argument neglects the tendency to avoid stone-throwing in a glass house. But let us pursue it: how is the *Herald-Sun* to know what *The Age* has suppressed? If the *Herald-Sun* does find out and tells its own readers, how will that help readers of *The Age*?

This method of accountability is possible, but surely the chances of it working to benefit the reading public grow in proportion to the number of rivals checking and counter-checking each other.

The greater the stable controlled by one owner, the greater the likely damage when his or her biases are expressed, either by distorted coverage or suppression.

It has long been recognised, even by media owners, that this unique category of privately owned property has a public interest dimension. Media are fundamental to the operation of the freedoms of members of a society, chief among which is the freedom to speak and to be informed, especially on political matters.

Whose rights should prevail?

Mr Hattam's conception of the property rights of media owners seems very old-fashioned. It dates from the days of greater diversity when proprietors usually also edited their paper and naturally made it say what they wished it to say.

It may be convenient to today's large media corporations - some multinational and with diverse non-media interests - to style themselves as individuals with a right to

express their opinion in a democracy in any way they can.

But does this libertarian conception of all media owners as individuals with rights neither greater nor smaller than everyone else make sense today? Those who control major media have such very large megaphones.

It is nonsense to suggest that there is no alternative to the free exercise by owners of their property rights in media, however vast, other than 'for the government to own and control all print media'.

Mr Hattam is partly right: such a result would be disastrous and impractical.

The issue is at what point, and in what way, a society, through parliament, can act not to silence such owners, but to reduce their volume, or at least stop it getting louder. We thought, as Norris did, that in Victoria that point had been reached.

Some with an eye to the history of the fight for freedom of the press in Britain - and in other countries still - will prefer concentration by private interests to any form of legislation by parliament. It is a potent argument and it need not be put in such a way as to imply that those who think differently today are somehow lining up on the side of tyrants who would repress freedom of expression.

The working party agreed that special legislation should be eschewed in relation to newspaper content, but not in relation to ownership and control.

The challenge to those who would defend freedom of the press is to acknowledge the modern and not just the traditional threats to it. One threat is concentration of media power in too few hands. As the US Supreme Court Justice Hugo Black observed "freedom of the press from governmental interference...does not sanction repression of that freedom by private interests".

Minimising risk

hat said, the working party was acutely aware of the risks of recommending that politicians legislate in this sensitive area. It attached to its recommendations the same principles that Norris pinned to his:

- *"the means to be employed to allow the press to function as it should must not themselves threaten its freedom;*
- *any legislation to regulate ownership and control must be so drawn as to not interfere with the content of the press, or with the liberty of persons to publish. Any concept of licensing the press or regulating its content must be eschewed; and*
- *if the relevant legislation is to satisfy (such conditions)...it must not constitute the executive government the repository of the authority to grant or withhold favours."*

We attempted to draw the recommended legislation in this way and welcome informed debate about whether we succeeded.

Race Mathews MLA is a former Cain Cabinet Minister, Creighton Burns is the former editor of The Age, Sally Walker is a senior lecturer in law at the University of Melbourne and Paul Chadwick is Victorian co-ordinator of the Communications Law Centre. (Copies of the report and draft legislation can be sought from Ms Kathy Ettershank, Policy and Research, Attorney-General's Dept, 220 Queen Street, Melbourne, 3000.)

Suppression orders

Ross Duncan discusses the novel approach of the South Australian State Bank Royal Commission to extraterritorial suppression orders

The South Australian judiciary's predilection for making suppression orders is notorious. But while Sections 69 and 69a of the *Evidence Act* 1929 (SA) have become the bane of every local court reporter's existence, it has long been thought that these suppression provisions did not limit media coverage outside the State.

Now, however, a ruling by the South Australian State Bank Royal Commission, recently upheld in the Supreme Court, restricts publication of the Commission proceedings throughout Australia, and suggests that Sections 69 and 69a might also have extraterritorial effect.

In May this year, Royal Commissioner Jacobs made a preliminary ruling under section 16a of the *Royal Commissions Act*, 1917 (SA) suppressing publication of any evidence tending to reveal the identity and financial affairs of clients and other persons past or present who had dealings with the State Bank. While acknowledging that the proceedings should as far as possible be conducted in public and without restriction on publication, the Commissioner said he made the order to satisfy Clause 9 of the Terms of Reference - to avoid prejudicing the Bank's ongoing operations and to protect the confidential Bank/Customer relationship.

Extraterritorial effect

Without more, this order would have gagged the local media but would not have applied outside the state where the details could have been freely reported. At least, that was the traditional view. However, the Commissioner, having stated that the Bank had clients beyond the State, went on to declare that:

"...for the purpose of giving full effect to the order ... the prohibition extends to any verbal, written, telephonic, electronic or telegraphic transmission of evidence ..."

As a result, publication outside South Australia is effectively prevented since reporters covering the proceedings cannot communicate by a phone call, fax or otherwise the suppressed information to their colleagues inter-state. The ruling is carefully worded in that it does not attempt to affect directly the conduct of persons outside the jurisdiction but achieves that objective by prohibiting any means of communicating the information by persons within the jurisdiction.

For the national media it also sets an unfortunate precedent which the Australian Broadcasting Corporation sought to have overturned by the South Australian Supreme Court. From the outset, however, the ABC faced one major obstacle. Section 9 of the *Royal Commissions Act* 1917 (SA) provides that:

"9. No decision, determination, certificate, or other act or proceedings of the commission, or anything done or the omission of anything, or anything proposed to be done or omitted to be done, by the commission, shall, in any manner whatsoever, be questioned or reviewed, or be restrained or removed by prohibition, injunction, certiorari, or otherwise howsoever".

Justice Matheson rejected the ABC's argument that, because of the rule of statutory interpretation that where particular words in a statute are followed by general words, the general words are limited to ambit to the particular words, the section ruled out the declaration which the ABC had sought. He said the terms of section 9 which were "very wide indeed, and certainly as far as any particular Royal Commission is concerned, they are extremely wide" ousted the Court's jurisdiction.

He held, in effect, that while the term 'publication' did not encompass one to one communications, it did catch any communication with a "public aspect" to it. "In the case of a reporter ringing his editor and saying 'here is what happened this

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The legality of product placement

William Van Caenegan argues that broadcasting and trade practices laws are not adequate to regulate product placement in all cases in Australia and New Zealand

These days, when watching TV, a video or a cinema film, you may notice that one or another product appears with unusual prominence or regularity. Actors show a marked preference for a certain softdrink, car or brand of sunglasses.

Increasingly, the chances are this is no coincidence. For consideration of some sort, products are visibly and recognisably displayed in productions of all kinds. The US is the biggest market for product placement, but any nation that produces and shows film or TV programs has to live with this, at least in Australia and New Zealand, still relatively new phenomenon.

Consideration for the placing of products can range from free provision of the items concerned, to large sums of money. Deals may simply provide that the products involved will not be shown in a denigrating context, but often the parameters of where and how the product will be shown are worked out in great detail between manufacturer and program producer.

Blurring the divide between advertising and non-advertising program material is attractive for several reasons. An increasingly recalcitrant TV viewing public often avoids watching advertisements by switching channels when ads appear. More people have video recorders, and hire videos or use them to record TV programs and fast-forward through advertising blocks.

Product placement has the additional advantage of eliminating the normally critical attitude the consumer has towards evaluating advertising messages, and also the mental 'switching off' that much recognisable advertising triggers.

Censorship v. freedom

Product placement arrangements put pressure on program producers to adapt form and content to the explicit or implicit expectations of the advertiser. Artistic integrity is not an absolute, however, and insistence on it varies widely.

Moreover, excessive commercialism may reduce the popular appeal of a program, thus balancing out commercial pressures to include more placed products.

More worrying than pressures on artistic freedom are restrictions on editorial freedom and integrity in non-entertainment programming that can exist where there are close ties between advertisers and producers.

For these kinds of programs the viewer expects neutral information, and the ethical journalist wishes to provide it. Commercial pressures on him or her to do otherwise are invidious. The cure might, however, be worse than the disease if excessive scrutiny of program production provides a new kind of commercially based censorship. A balance needs to be achieved, protecting freedom of speech and information from pressures from both sides.

Viewers are generally unaware that a program may be acting as a hidden commercial and targeting them as consumers. Although product placement does not lie in the realm of subliminal advertising, viewers are still unwittingly tricked out of the normal state of critical viewing and analysis.

Broadcasting law

Under section 16(d) of the *Broadcasting Act* 1942 (Cth) the Australian Broadcasting Tribunal (ABT) may determine television program standards (TPS) to be observed by licensees.

TPS provides;

"(i) *An advertisement...must be clearly distinguishable as such to the viewer.*

(ii) *This standard applies to items transmitted:*

(a) *between programs* ;

(b) *during or within a program; or*

(c) *as a visual or audio superimposition over a program".*

TPS 15 (d) which provides that "programs must not present advertising matter as if it were news" is seemingly aimed at advertising spots presented as new items.

The *New Zealand Broadcasting Act* 1989 provides that broadcasters must observe any "approved code of broadcasting practice applying to the programs." The same Act created the Broadcasting Standards Authority (BSA). It has approved both the Codes of Broadcasting Practice for television (developed by a committee comprising TVNZ and Channel 3) and the standards developed by the Committee of Advertising Practice, an industry self-regulatory body made up of publishers, advertisers and broadcasters.

The TV Advertising Standards (Part of the Codes of Broadcasting Practice) contain the following rules:

"General... (i) "Advertisements shall be clearly distinguishable from other programme material."

(ii) Advertisements must not utilise news presentation methods or be presented in a form in which could cause confusion with news information."

In addition, the TV Program Standards (which together with the Advertising Standards make up the Codes of Broadcasting Practice), General Section, No 7, provide that broadcasters are required:

"To avoid the use of any deceptive program practice which takes advantage of the confidence viewers have in the integrity of broadcasting".

This last provision may be interpreted as a guarantee of editorial independence from the influence of advertisers. However, it is unclear whether product placement would be caught by this provision. A clear statement of the need for editorial neutrality would still be welcome in both countries.

The Codes of Practice of the Committee of Advertising Practice is also relevant and provides at 1:

"Identification - Advertisements must be clearly distinguishable as such, whatever their form and whatever the medium used; when an advertisement appears in a medium which contains news or editorial matter, it must be presented so that it is readily recognised as an advertisement"

Rather than ruling out any advertising within editorial or news style programs this requirement merely requires clear identification. This does not go far enough as the second leg of the provision, at least, seems to accept advertising within such programs.

What is an advertisement?

The degree to which the basic 'separation requirement' in both countries' regulations will impact on product placement depends upon the definition of 'advertisement'.

Some guidance can be had from the definitions given in the two Broadcasting Acts. In Australia the Television Advertising Code (TAC) 1 provides a definition, but it is unclear:

"(i)... matter which draws the attention of the public, or a segment thereof, to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose, directly or indirectly that product, service, per-

son, organisation or line of conduct."

The TPS states that an 'advertisement' excludes accidental or incidental advertising material, if no valuable consideration is received by the licensee for broadcasting it.

The *New Zealand Broadcasting Act* 1989, at section 2 states:

'Advertising Program' means a program or part of a program intended to promote the interest of any person, or to promote any product or service for the commercial advantage of any person, and for which, in either case, payment is made, whether in money or otherwise."

The key to both definitions is the precise meaning of 'in a manner calculated' or 'intended' to promote. There is an advertisement if certain images of products are presented in a way program producers think will have the effect of promoting that product.

Considerations

Where no consideration is given to achieve this effect, the *New Zealand Act* excludes programs automatically form being advertisements. In Australia, that is not necessarily so: only if advertising matter is an accidental or incidental accompaniment of the program does the definition make consideration relevant. In other words, it is still possible to have an advertisement, even where no consideration is received, as long as it is presented in a manner calculated to promote the product.

Although product placement will not normally be provided free, the question of consideration may be relevant in editorial style programs where there may not be obvious signs of pressures on editorial integrity, but the overall relationship between advertisers and broadcaster may influence the attitudes and decisions taken by journalists. However, it is doubtful that even if one takes the Australian definition of advertisement (which does not require consideration) sufficiently stringent separation between editorial integrity and advertising related pressures is achieved.

What is 'a manner calculated to promote'? It might be that where the showing (or manner of showing) of a product is not required or necessary in the light of the dramatic, artistic or editorial demands of the program, there is effectively an advertisement.

Some Australian cases have considered the question of what constitutes an advertisement [*Bensen & Hedges* v *ABT* (1985); *United Telecasters* v *DPP* (1988)]. These cases seem to confirm that matter which is objectively and on its face designed or calculated to promote a product is, irrespective of consideration received or of motivation or interests concerned, advertising matter. The fact that an advertisement is contained within non-advertising material does not seem relevant. Indeed, many advertisements are conceived to function in exactly that way.

By comparison, in New Zealand, the TV Advertising Standards refer to the statutory definition of advertising programs to explain the meaning of 'advertisement'. This definition clearly states that a part of a non-advertising program can constitute an advertisement.

In line with these cases and statutory definitions, it is fairly clear that both in Australia and New Zealand a case can be made out that product placement may be contrary to the Broadcasting Acts in certain circumstances.

Certainly, where consideration is received to present products in a manner aimed at promoting them, the rule of separation would be broken. Another indication would be whether the way a product is shown is dictated by (or 'necessary' for) artistic or editorial requirements.

The Broadcasting Acts do not provide sufficient safeguards for editorial style programs. In many cases pressures and influences can be brought to bear on program producers where there is no obvious form of consideration. For this reason influencing of any kind by commercial concerns should be prohibited for such programs, even if no consideration is received or there is no visible displaying of products over and above what is editorially or artistically necessary.

Trade Practices Legislation

In the recent German Federal Supreme Court decision in *Altenburger und Stralsunder Spielkartenfabriken* v *ZDF and Others* (1990). The Federal Supreme Court stated that where product placement had occurred, the public could be mislead into believing that what was actually an advertisement was intended to be neutral and objective information.

Given the wide terms of sections 52 (and 53) of the *Australian Trade Practices Act* and section 9 of the *New Zealand Fair Trading Act* a similar approach could be effective in Australia and New Zealand. In Germany, section 1 of the UWG reads:

"Whoever commits acts that are contrary to good mores in commerce for competitive purposes is liable to compensation or injunctive relief."

The Australian and New Zealand formulation is even wider, not requiring any competitive purpose: section 9 of the *Fair Trading Act* reads:

"No person shall, in trade engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The scope of Trade Practices legislation is wider: it covers conduct in any media, not just on television. It is also more flexible, because it takes the effect of conduct on consumers as a starting point, rather than imposing detailed rules and standards on commercial conduct. In that way it makes a distinction between different kinds of programs easier to achieve. Policing is more effective, because anyone can bring an action under the Acts, and a wider, more immediate and more effective spectrum of relief is available. The sole test is an objective one. It need not be shown that anyone is actually misled or has suffered damage. When product placement occurs, viewers are unaware of the true nature of what appears on screen. A program which they expect or believe is based on artistic or editorial considerations is, at least in part, based on commercial motives; accordingly, consumers may be considered to be 'misled' or 'deceived'.

Although TV programs are generally excluded from the operation of Section 53 of the *Trade Practices Act* by Section 65A of that Act, this exclusion does not apply to advertisements and to programs connected to the sale of goods or services. Product placement which involves consideration or is an advertisement on the basis of an objective test, is therefore probably covered by Section 52. Section 65A does illustrate legislative concern about 'commercial censorship'.

It would be too severe a restriction on broadcasting and freedom of speech to say that any product placement is deceptive or misleading. It would also deprive producers of potential income, an unhappy effect in the current TV climate. In that sense the German Federal Supreme Court decision goes too far, certainly for commercial broadcasting.

A distinction between informative style programs with editorial content which rely on integrity and neutrality, and entertainment style programs, might offer a balanced solution. For the latter the rule suggested earlier might be appropriate: product placement is acceptable as long as it does not influence artistic and programmatic decisions. Program producers need to use props of some kind, and it is hardly deceptive, even if they do so for consideration, when it is done in a way not aimed at influencing the consumer's buying behaviour, but purely governed by artistic considerations. That it may influence consumers is then merely a coincidental effect, that would in any case be unavoidable whenever recognisable consumer products are used. Existing Trade Practices and Fair Trading legislation is sufficient to regulate product placement in this kind of programming.

For editorial style programs, however, there is a need for stricter separation to

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Pay TV: why regulate?

Rory Sutton examines the Industry Commission paper on the continuing prohibition of pay TV being delivered to Australian households

The moratorium imposed on pay TV in 1986 technically is no more, ending in October last year. Yet the introduction of pay TV was further stalled earlier this year after Transport and Communications Minister Kim Beazley took a submission to Cabinet. It foundered ostensibly on the rock of the potential adverse effect pay TV would have on the balance of payments. The suspicion is that, in addition, there was more than a tad of political infighting and commercial pressure involved. Whatever the reasons, Beazley lost the battle, though yet may win the war, and was told to re-submit at a later date.

The irony of the 'balance of payments' argument is that the proposed carrier for pay TV is to be the fully imported, new generation of Aussat satellites. Kim Beazley's aim is to sell them to private enterprise as part of his strategy to build a strong, outward looking telecommunications industry which will survive and prosper in a global market. The proposition that Aussat should have a monopoly on the carriage of pay TV is seen as an added inducement to potential purchasers. The probability is that the successful buyer will be from overseas, with any profits presumably following the same path.

The Industry Commission's Office of Regulation Review (ORR) has provided a trenchant critique and analysis of the Cabinet's current position, a position based on a range of previous reports, reviews and it seems a predilection to continue to protect and embrace the regulated strictures of the current free to air services in Australia.

Business regulation?

In its paper *'Pay TV: Why Regulate?'*, the ORR asserts that the ongoing prohibition of household pay TV services in Australia is an extreme form of government regulation of business. It claims Australian consumers are being denied access to this service, thereby foregoing the benefits of expanded choice, and where the profit motive alone will produce the range of goods and services that most satisfies consumer preferences and enhances community welfare. Not that a public outcry demanding the introduction of pay TV exists presently.

The ORR states that pay TV should be introduced promptly and with minimum regulation. Somewhat predictably, market forces are its core tenet. Rejected is the view that Aussat should be given a monopoly as the sole carrier for pay. Rejected is the view that pay TV will affect materially the advertising revenue of the established commercial stations. The latter view, incidentally, has gained credence by the recent decision to allow SBS to carry five minutes of advertising every hour with estimates of revenue ranging between $15 to $30 million annually. Consistent with its free market philosophy, the ORR advocates an untrammelled pay TV service, without censorship, foreign ownership restrictions and without Australian content regulations.

Its only concession to regulatory forces is a recognition that radio spectrum property rights may need some protection and that there may be some danger from 'siphoning', where free to air viewers could be deprived of particular and significant programs. The ORR claims this would occur only if pay TV attained a substantial audience. It concludes that the history of costly and misdirected regulation of broadcasting and telecommunications justifies a careful approach to further government intervention in these markets.

Narrow focus

While it is difficult to dispute the 'dry' economic force of the review, it is disappointing for its narrow focus. The introduction of the Television Remote Control, or 'zapper', has revolutionised viewing habits and demands. The future appears to be 'random access' for viewers, with the opportunity to tap into a vast global video library. The technologies of fibre optic cable and signal compression foretell an access explosion for all kinds of information, including pay TV. The consequence of this may be a rapid decline of broadcasting networks as presently constituted, with the emphasis on niche markets and diversity. A dream world for 'user pay' and the smart entrepreneur.

Even if the major networks do survive, there could be significant economies to be gained from overhauling current infrastructures, such that the networks would no longer retain exclusive, but costly transmission facilities. Issues, such as compression technology, have not been addressed by the ORR, nor does it assess the opportunities for Australia to exploit its "clever country" status by developing and manufacturing its own requirements. Overall, the ORR Review essentially only reinforces the myriad of other reviews and papers supporting the introduction of pay TV into this country. It is doubtful that the Federal Cabinet has any more information now upon which to make a rational decision than it had previously.

The fear must be that Australia will miss an opportunity to be a major force in the development of a burgeoning industry. This applies especially in the Asian Region. By contrast New Zealand is an aggressive player in the pay TV market. It has introduced the service to a population of only three million. At the same time it is actively pursuing market opportunities both in Asia and the Pacific, helped by some significant partners from the U.S. The danger is that Australia could be left behind, and find itself with no say or income from any of its pay TV services. If this does occur, the outcome for the balance of payments will be gloomy indeed. It may be a case of pay now or pay even more in the long term.

Rory Sutton is an ABC TV executive

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safeguard editorial freedom and integrity and reliable, neutral news. Any product placement in such programs is undesirable. Forbidding any product placement in editorial style programs makes detailed policing as to how editorial decisions have been made unnecessary, thus doing away with the risk of excessive commercial censorship.

The existing regulatory framework is only partially effective. A two tier approach is possible.

The first tier would concern programs without any editorial or objective information content: there product placement would be acceptable, as long as products were shown in a manner dictated principally by artistic or editorial considerations.

The second tier would cover editorial style programs. All advertising influence on these kinds of programs should be avoided. Therefore any kind of product placement would be unacceptable, whether it influences editorial decisions or not, and whether consideration is received or not.

William Van Caenegan is an Assistant Professor of Law at Bond University

'American Psycho': missing the point

Rosemary Sorensen argues that Bret Easton Ellis' controversial new book is a misunderstood scapegoat

The publication of Bret Easton Ellis's *American Psycho* has confirmed, if such confirmation were needed, the fears of even the most pessimistic social commentators. Not only is contemporary society stupid and crass but it doesn't have the mechanisms to judge stupidity and crassness.

American Psycho is bleak and nasty. It is frightening and loud in its insistences. It is black in its humour - and all the funnier for that, since the laughter induced by horror is the kind that cuts deepest, if we're awake enough to feel the knife. And it is also one of the most effective indictments available of the idiocies which are not only tolerated in western society but in fact constructed by it.

It would be no wonder if professional people whose shallow ideologies and self-seeking systems of belief are directly and brilliantly attacked in this book would be keen to swoop down and stamp it to death. If the book is right, however, these people are too busy consuming to get around to reading a book such as this. When I discussed *American Psycho* on a television program with lawyer Jocelyn Scutt she said that the ghastly, stupid, shallow, ugly, consumerist, crass, greedy, ill-educated creeps that people the pages of Ellis's satire on American yuppies are 'normal'. What worried Scutt was that Ellis places a psychopathic murderer among these charmers and they don't even notice. The fact that this is the point of the book tends to be lost among the reaction towards the descriptions of this man's crazy psychopathic fantasies, which are very nasty indeed. The point of the book is reinforced by the fact that people persist in not noticing what is before their eyes. The 'normal' ones don't even notice that this very 'sick' man is amongst them. He fits in!

Convenient scapegoat

Why can't we read this kind of book appropriately? Why do people with lots of education, influence, wit and wisdom come out with perfectly stupid comments such as 'I have chosen not to read this book as political statement'? Why do the very same people not publicly denounce the harmful vulgarity of so much advertising and popular culture?

American Psycho is a convenient scapegoat. Ban the heinous pornography, they say, and go home to their television and video and magazines all bursting with garrulous sell-outs. Even those who claim that, while they don't particularly want to read about rats up vaginas and other fantastic perversions they would defend the book according to the right for free speech, are missing the point.

By all means, let us work towards something called freedom - although the way we use language (and the legal profession is perfectly well-adapted to this) should alert us to our atrophied state in relation to anything remotely like creative or imaginative freedom. If, on the other hand, there is even the slightest suspicion that some representation, whether of real or imagined worlds, will result in cruelty being inflicted on even a single human being, then let's legislate against it - trouble is, we'd have to ban most television, most film, most magazine advertising and a whole lot of other discourses if this were acted on because these are more likely to contribute to perversion than the rudely aggressive satire of *American Psycho*.

Analytical gap

And when a journal called *Communications Law Bulletin* suggests that an article should "concentrate on the legal/social issues raised by the novel's publication rather than any literary merit the book might or might not have", then, again, the point of the book is reinforced.

Until we accept that all discourses are connected, that the legal system is marked by and responsible to the systems set up by corporations, educational institutions, family networks, religious groups, as well as the many cultural systems, including that of literature, then the scenario of perversion, cruelty and ignorance operating successfully within an arrogantly incompetent society must be taken as belonging not to a pornographic code but to a representation of the status quo.

The division of the debate around the publication of *American Psycho* into 'literary' and 'social/legal' attenuates the possibility of positive outcomes from a hugely negative book. And, again, vindicates that negativity. It's not the novel's publication that challenges social stability, moral rectitude, health, wealth and the American way: it's the inability of the society to even read it with any kind of ability to judge what is being said.

Given this colossal and widening analytical gap, it is not surprising that our publishers are not up to taking their place in an open process by which a society can construct an adequate system of ethics. When a publisher runs so scared after publishing a hot potato like *American Psycho* as to claim that it has no books for review, to claim to be unable to give out press information, to clam up in the hope that the backwash will pass over them, then there is good reason to believe, along with Bret Easton Ellis, that we may well be technologically and materially whiz-bang but we're morally and intellectually bankrupt. Pan in Australia decided to close most of their eyes and just peek a little until the storm passed over and the cheques were cashed. Sounds to me like the preferred formula for success in the 1990s.

Rosemary Sorensen is the editor of Australian Book Review and wrote this piece on behalf of the Australian Book Publishers Association

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morning' it is easy to draw the conclusion that there is a publication" he said.

He added that Section 16a has an extraterritorial operation although the *Royal Commission Act* does not expressly indicate an intention that it should have, and hinted that, contrary to popular thinking, Sections 69 and 69a of the *Evidence Act* may also have extraterritorial effect.

"My conclusion that Section 16a and the Royal Commissioner's ruling have an extraterritorial operation is inconsistent with the view that has commonly been held that orders made under Section 69 and 69a of the Evidence Act can only operate within the borders of South Australia. There may be some basis for distinguishing the legislation not presently apparent to me, but if my decision here enables orders under that Act to give the protection their judicial authors desire in the cases considered appropriate by Parliament, it may not be such a bad thing," he said.

Justice Matheson's comments on Sections 69 and 69a in this case were clearly made in passing and therefore are not binding on other Courts but suggest that media outside South Australia may in future need to be more cautious when reporting Court proceedings which are subject to suppression orders under that State's *Evidence Act*.

Ross Duncan is a Senior Legal Officer with the Australian Broadcasting Corporation

Uniform defamation laws - the final chapter

Victoria's Attorney-General, Jim Kennan, outlines the reforms proposed by the Attorneys-General of the eastern States

Agreement between the Victorian, New South Wales & Queensland Attorneys-General should lead to uniform defamation Bills being introduced in these states later this year.

There are currently eight different defamation laws which operate throughout Australia, one for each of the States and Territories. Such lack of uniformity has two particular adverse effects: firstly, people defamed by the mass media shop around for the most favourable jurisdiction in which to sue; and secondly, juries are often obliged to apply up to eight different laws in reaching their verdicts.

In 1984, 'Uniform Defamation Laws' was an agenda item at the Standing Committee of Attorneys-General (SCAG). Discussions among the States broke down, particularly after agreement could not be reached on truth alone as a defence to defamation.

Defamation was put back on the SCAG Agenda in March 1990. After several meetings and discussions, myself and the Attorneys-General of Queensland and New South Wales agreed to work towards uniform defamation laws in those three jurisdictions.

Two discussion papers were released by the Queensland, New South Wales and Victorian Attorneys-General. Discussion Paper No. 1 was released in August 1990; Discussion Paper No. 2 was released in January of this year. Many submissions were received in response to the discussion papers.

A series of further meetings between the three Attorneys-General was held to discuss the outstanding areas of disagreement. Finally, in April, 1991, consensus was reached between myself and my counterparts and the matters below agreed as forming the basis of uniform defamation laws for Victoria, Queensland and New South Wales. We had reached historic agreement on all substantial issues.

Justification

In Victoria, a defamatory statement is justified if the defendant establishes its truth; in New South Wales, the defendant must prove that the statement is true and that it relates to a matter of public interest or it is published under qualified privilege; in Queensland, the defence of justification consists of truth plus public benefit.

In a major breakthrough in the push for uniformity, we have agreed that justification will be made out if the defendant establishes that the statement is substantially true and that it is not an unwarranted invasion of privacy. The law of defamation must seek to balance these three objectives simultaneously.

At common law, if the defendant pleads justification, every defamatory imputation pleaded by the plaintiff must be justified. This rule operates unfairly where one imputation that is not proven to be true is minor and does not further injure the reputation of the plaintiff in the light of the imputations that are proven.

Section 16 of the *Defamation Act* 1974 (NSW) provides in effect that partial justification is a complete defence where the truth of any imputation not justified does not further injure the plaintiff in the light of the imputations that are proven to be true.

We considered that a defence of contextual truth based on the New South Wales formulation should apply in all three jurisdictions.

Qualified privilege

In Victoria, the defence of qualified privilege is of limited scope: the defendant must show that he or she had a duty or interest in making the statement, and that the person who received the statement had a reciprocal duty or interest to receive it. Similarly, the New South Wales statutory defence of qualified privilege is of narrow application: section 22 of the *Defamation Act* 1974 (NSW) requires that defendant to act carefully, honestly and reasonably.

As a consequence, qualified privilege is rarely available to the media in New South Wales and Victoria. In Queensland, qualified privilege is afforded to publications that fall within certain categories specified in section 377 of its Criminal Code. The Queensland provision is used by the media.

We have agreed to open up the defence of qualified privilege to the media, but with strict conditions. The Bill will allow a defence of qualified privilege where the publication was made in good faith in the public interest and reasonable enquiries were made.

'Good faith' will include a willingness to allow a right of reply; the making of reasonable enquiries will extend to whether, in appropriate circumstances, the matter was put to the person allegedly defamed to confirm or deny its truth prior to publication; and, finally, if qualified privilege is successfully pleaded and it is apparent that the statement is false, the court will have a discretion to order a right of reply.

These conditions should promote responsible journalism, and avoid reckless, baseless or sensational statements that are injurious to reputation.

Correction statements

Unprecedented damages awards in some jurisdictions over recent years have called into question the relevance of monetary damages to compensate for injury to reputation. Damage to reputation is much less tangible than physical injury or property damage. Often all a plaintiff seeks is a retraction or correction. Given that correction statements may be effective in fully or partially restoring injured reputations, the Attorneys propose to introduce a system of court-recommended correction statements.

A plaintiff will be able to apply to the court for a mediator to be appointed to determine the form and content of a correction statement. It will not be mandatory for the defendant to publicise the correction statement; but in assessing damages, the court may take into account whether or not a correction statement was sought or published.

This procedure will establish a 'fast track' remedy for a plaintiff seeking a retraction rather than monetary damages. It will also encourage early settlement of actions, and prevent 'gold-digging' plaintiffs seeking large damages awards.

New South Wales and Victoria rely principally on the common law as the source of their defamation laws; although the Defamation Act 1974 modified the common law position in New South Wales. Queensland is a code State: its defamation law derives mainly from its Criminal Code.

We have agreed that the Bill will not operate as a code; rather it will modify the common law with respect to the matters agreed.

In Queensland, New South Wales and Victoria, defamation proceedings must be brought within six years of publication of the

alleged defamatory statement. In its report *Unfair Publication: Defamation and Privacy*, the Australian Law Reform Commission proposed that defamation actions be subject to a special limitation period in order to achieve speedy trials and timely corrections of false statements.

In line with these recommendations, we have determined that defamation actions must be brought within six months of the date the plaintiff first became aware of the publication or three years from the date of the publication, whichever is the earlier.

Privilege & innocent publication

Anything said in Parliament by a member of Parliament in his or her capacity as a member is protected by absolute privilege. Qualified privilege attaches to fair and accurate reports of 'parliamentary proceedings', and will deal with a number of ancillary matters, such as preparation of papers intended for tabling.

At common law, a statement is defamatory if the reasonable recipient of the statement would regard it as defamatory. It does not matter whether the published intended the statement to be defamatory, or knew it contained defamatory matter.

These principles operate unfairly against the maker of a statement who is unaware that the statement is defamatory. Division 8 of the New South Wales *Defamation Act* alleviates a number of difficulties in this area by permitting a defendant to make an 'offer of amends'. We have agreed that provisions similar to those in New South Wales be adopted in all three jurisdictions.

Damages

It is the responsibility of juries to assess the quantum of plaintiffs' damages. Due principally to large damages awards in their jurisdictions, New South Wales and Queensland intend to give judges the task of assessing damages. In Victoria, where large damages awards are a rarity and the jury system works well in this area, assessment of damages will remain the function of the jury.

Libel is actionable without proof of damage: to succeed in an action for slander, the plaintiff must as a general rule show that he or she has suffered some damage.

Victoria retains the distinction between libel and slander. The distinction is described variously as the difference between defamatory statements in permanent (libel) or transient (slander) form; or alternatively, as the difference between defamatory statements addressed to the sense of sight (libel) or communicated to the ear (slander).

The distinction between libel and slander is based on the old forms of actions, is archaic and no longer serves any useful purpose. It has been abolished in New South Wales and Queensland. It will also be abolished in Victoria.

The above matters form the basis for the uniform defamation laws. It is proposed that amendments will be introduced in the Spring session of the respective parliaments later this year.

I would now hope that other States will re-examine their laws to provide us with truly national defamation laws.

Book reviews

Peter Bartlett reviews

'Australian Defamation Law and Practice'

For many years media lawyers have had to rely upon United Kingdom publications such as *Gatley on Libel and Slander*. There were very few Australian texts that covered this area. *Fleming on Torts* contained a very good chapter on defamation. However it was not comprehensive enough for such a complicated area of law. At the time when Sydney was already known as the defamation capital of Australia and Justice Hunt and the New South Wales Court of Appeal was bringing down so many important decisions, we had no Australian textbooks. In 1983 Mark Armstrong, Michael Blakeney and Ray Watterson published a book entitled *Media Law in Australia* (Second Edition 1988) and in 1989 Sally Walker's excellent book *The Law of Journalism in Australia* was published. Both these books were for journalists, broadcasts and lawyers.

Australian Defamation Law and Practice is aimed directly at lawyers. It has many admirable features, the first and probably the most important being that it is a loose leaf service. Most practitioners would regard the ability to include statutory amendments, judicial interpretation and up-to-date case analysis as paramount. Another admirable feature is that it covers all Australian jurisdictions. It therefore brings together in a comprehensive fashion the legislation covering all the States and Territories. This allows a practitioner easy access to legislation from the other States, and hopefully access to the most recent amendments.

With a draft Bill to reform the law of defamation in Victoria, New South Wales and Queensland now nearing completion, this book may be the first to reach us with a detailed analysis.

When considering the book I compared its treatment of various limited sections, with that of Gatley and Walker.

One topical area is the media's attempts to rely on statutory and common law qualified privilege. None of the books of course refer to Justice Matthew's welcome judgement in *Morgan* v *John Fairfax* (1990).

However, Tobin and Sexton, Gatley and Walker confirm that only in extremely limited circumstances would the media succeed. This book gives a fuller coverage to the topic and quotes from the more encouraging judgement of Justice Smithers in *Australian Broadcasting Corporation* v *Comalco Limited* (1986).

In the last few years we have had some interesting cases where a party has attempted to introduce into evidence parliamentary records, documents or Hansard. These include *R* v *Murphy* (1986), *R* v *Jackson* (1987) and *Wright and Advertiser Newspapers Limited* v. *Lewis* (1990). The *Westpac letters* case earlier this year could also have invoked this complex area of law.

Tobin and Sexton's treatment of this area also compares very well with Walker and Gatley. To be fair of course it must be pointed our that Walker's book covers areas far wider than those limited to defamation.

Later updates to the book will enable the authors to include more obscure statutory provisions covering the issue of defamation. For example, there is no reference to Section 5A of the *Victorian Wrongs Act* (which provides qualified privilege in limited circumstances for publications made at the request of the Police Force) or Section 62 of the *Victorian Freedom of Information Act* (protection against actions for defamation).

A visit to the defamation list in Sydney is a unique experience, in particular for an interstate practitioner. The ability of barristers to quote from endless unreported decisions is astounding. The difficulty, of course, is to gain access to these unreported decisions. This book contains a tab for unreported

decision (although it is a bit thin at the present time). This may put the occasional visitor to the list on a more equal footing with the recognised defamation bar.

When I saw 'Practice' included in the title of the book I envisaged seeing some of the useful material included in Justice Hunt *Notes on Defamation Practice* (a 1982 College of Law publication) together with material from his annual NSW Reading Programme Lecture. The authors may give consideration to including that material in future updates.

Tobin and Sexton's book, *Australian Defamation Law and Practice*, is another significant step in the direction from rags to riches in the defamation minefield. Twenty years ago we only had Gatley. This is an extremely good text book and an essential addition to the shelves of any media lawyer.

Peter Bartlett is a partner in the Melbourne office of Minter Ellison, solicitors. T.K. Tobin's and M.G. Sexton's 'Australian Defamation Law and Practice' is published by Butterworths and retails for $445.00

David Casperson reviews 'Aspects of the Law of Defamation in New South Wales'

This publication collects in a 156 page book seminar papers delivered on various aspects of the law of defamation. The seminars were organised by the Young Lawyers Section of the Law Society of New South Wales.

The book also includes the seminar paper Justice David Hunt prepared on pre-trial defamation practice for new members of the New South Wales Bar.

The papers present a very useful and practical guide to the more important aspects of defamation law in New South Wales. They are written by a very impressive list of authors with years of practical experience in this area of the law.

In the Introduction Justice McHugh writes about 'What is an Actionable Defamation'. This is followed by the paper on pre-trial practice by Justice David Hunt. Nine seminar papers delivered by various barristers, namely Mr H. Nicholas Q.C., Mr T Tobin Q.C., Mr J Sackar Q.C. and Mr M. Sexton on various issues encountered in defamation cases are then included in the book. These include papers on drafting a statement of claim, defending a defamation action, conducting a defamation trial and various procedural matters.

This book is not meant to be a textbook. It is a practical synopsis of the important principles, procedures and considerations in a defamation action. The book discusses and highlights the common issues and problems a practitioner will encounter in this area of the law.

The book's value to the practitioner is increased because it is very well indexed. There are two bibliographies, an index to cases and an index to words whose meanings have been considered in various defamation cases.

This is a good practical guide to the important areas of defamation law in New South Wales.

David Casperson is a Sydney barrister. 'Aspects of the Law of Defamation in New South Wales', edited by J C Gibson, is published by the Young Lawyers Section of the Law Society of New South Wales and retails for $49.00.

Peter Comans reviews 'Misleading or Deceptive Conduct': Healey and Terry

The authors reveal, with the substantial judicial assistance of over 600 reported decisions, that section 52 of the *Trade Practices Act 1974* is itself in some respects deceptive, if not misleading. As Chief Justice Gibbs observed in the *Parkdale Custom Built Furniture* v *Puxu* (1982) case:

"Like most general precepts framed in abstract terms, the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions."

The value of this book is that it leads the reader through the shoals of the decided cases. Any student or practitioner faced with a real world problem needs a good chart to navigate these waters as the sheer volume of decided cases otherwise makes the task of focussed and efficient research impossible. This work provides such a chart. Additionally, it is an eminently readable book, written in an easy and familiar style. It is not a deeply intellectual work and the analysis of related fields of law is characterised by rather oversimplified summary. Nevertheless the book would certainly be of considerable use to anyone looking for references to decided cases in any particular area of section 52.

There is still plenty of scope for uncertainty about some of the most fundamental aspects of section 52.

The authors quote Justice McHugh in *Concrete Constructions* v *Nelson* (1990):

"As a matter of construction, the headings to Part V and Div. 1 identify the scope of section 52 as being limited to unfair practices which mislead or deceive or are likely to mislead or deceive consumers. Those headings are inconsistent with the hypothesis that section 52 is directed to unfair practices generally or to those unfair practices which are of an essentially trading or commercial character."

Although the majority of the High Court in the Nelson case rejected the limitation suggested in the above passage, they imported into the section a different limitation arising from the 'trade and commerce' requirement.

This illustrates that there clearly remains room for further significant development in the interpretation of section 52, notwithstanding the considerable accumulated jurisprudence contained in decided cases. Until the decision in the *Nelson* case it was regarded in many quarters, including the Full Federal Court (see *Beyanere* v *Lubidineuse* (1985), that the issue of whether the section was to be read down as limited to 'consumer protection' in the light of the headings to Part V (or as Justice Toohey preferred "the framework of consumer protection" in which section 52 is found) was resolved conclusively in the negative. Although the Full Federal Court was ultimately upheld on the point, a High Court split 4 to 3 on this issue provides little comfort that the last chapter in this aspect of the ambit of section 52 has been written"

Now a note on a rather mundane, but to me significant matter. No doubt as a result of the work being published by CCH, it adopts CCH references to cases. This results in the busy litigation practitioner being forced to conduct a time-consuming cross referencing exercise to the authorised reports before any reference found in the book can be used. It would in my view have been a sensible approach to include alternative citations at least in the main case table. Additionally, in splitting responsibility for the text of various chapters of the book, the authors have allowed a degree of repetition to occur which would not be the case in a work by a single author.

Overall, I found this book to be both readable and useful, but not (and I am sure it was not intended to be) a legal classic.

C P Comans is a Sydney Barrister 'Misleading and Deceptive Conduct' is published by CCH and retails for $64.00

Competition a slow train coming

Mike Pickles explains how, in the face of a government's deregulatory policies, to hang on to a monopoly, Filipino style

As in many countries of the Asia-Pacific region, the oft-repeated aim of the Philippine government is to liberalise the entry, operation and expansion of telecommunication enterprises. While 94 per cent of the telecommunications traffic in the Philippines is carried by a single privately-owned carrier, the Philippine Long Distance Telephone Company (PLDT), the current situation is that of a regulated monopoly. The government's involvement in the sector is basically through two agencies; the Department of Transportation and Communications (DOTC) is the policy-making body, while the National Telecommunications Office (TELOF) is the operating arm which provides limited telegraph and telephone services in rural areas.

The monopoly

Despite the inevitably slow incursions into its domain by competitors, particularly in the field of international services by Eastern Telecommunications Philippines (ETPI) and Philippine Global Communications, the PLDT's net income for 1990 surged 55 per cent. The news was met with criticism from the new Transportation and Communications Minister, who charged the PLDT with "raking huge profits against its insufficient, dismal and inadequate service." With a backlog of 300,000 telephone applications in Manila alone, the strongest consumer complaint against PLDT has been its slow response to requests for telephone connections.

No matter how much the government wants to break the virtual monopoly of the PLDT, by far the largest of the 56 entities providing telephone services, there is a realisation that working with them offers the only feasible option if the objective is a rapid expansion of telecommunications in the short to medium term. The PDLT managed to delay the expansion of its only cellular competitor, Extelcom, for 15 months by obtaining a temporary restraining order on the grounds of an irregularity in the latter's operating licence.

Following a change of attitude by the Philippine government towards cellular telephones which occurred after the 1990 earthquake, when all landline telephone connection with Baguio City was lost leaving cellular as the only working system, the PLDT decided to boost the capitalisation of its rural operating subsidiary, the Philipino Telephone Corporation (Piltel). The company was then projected into the cellular arena to apply for a nationwide operating licence. Piltel became the first company to hold a provisional nationwide authority, helped along by its giant brother which vacated the cell sites around Manila in order to be replaced by Piltel's new Mobiline system.

PLDT moved as fast as possible to get its system up and running. Piltel was signing up 200 subscribers per day in May, and the 'Mobiline' network was being extended to the islands of Cebu and Mindanao.

New kid on the block

The Express Telecommunications Company inc. (Extelcom), was set up some 30 years ago when it was granted a 50 year licence to provide radio frequency services. The original founders sold their shareholding in 1986 to the present joint-venture company in which Millicom Incorporated and Comvik International AB together have a 40 per cent share. The Philippine partners, headed by Ruby Tiong Tan, own 60 per cent of the company, according to Philippine regulations.

'the government wants to break the virtual monopoly of the PLDT ... working with them offers the only feasible option'

Millicom announced on 21 December 1988 that the joint venture had been granted a licence to build and operate a cellular system "initially serving metropolitan Manila and other points on the island of Luzon with later expansion to other areas of the Philippine islands". At that time the company had been granted a provisional authority by the National Telecommunications Commission (NTC) to install, operate and maintain a cellular mobile telephone system as Phase I of its system in Metro Manila only.

On 12 December 1988 and again on 8 May 1989 the NTC ordered the two cellular operators, PLDT and Extelcom, to interconnect.

Immediately following the installation of its Motorola-supplied system in February 1990, a temporary restraining order was issued by the court against Extelcom, applied for by PLDT on the grounds that the NTC had no right to order the two companies to interconnect, and that Extelcom was operating on a franchise that was obtained 30 years before by the original owners, not the present joint venture.

Extelcom appealed to the Supreme Court on the basis that it was the company that was granted the franchise. The Supreme Court in October 1990 upheld the two orders directing the PLDT to permit Extelcom to interconnect with its wireless and wireline systems.

The company has been unable to charge its 200 customers for the use of its system since February 1990, but offered virtually free use of its closed-loop cellular network to any purchaser of a terminal. When the restraining order was finally lifted, Extelcom went ahead with its application for provisional authority to implement Phases II, III and IV of its proposed Nationwide Cellular Mobile Telephone Systems using the AMPS-B band. An Interconnect Agreement was finally signed with PLDT on 8 March 1991, but was not in place even in mid-June due to 'technical problems'.

More legal battles

Extelcom's legal battles may not be entirely over despite the Supreme Court's landmark ruling. On the heels of the ruling, the Rizal provincial prosecutor filed a civil case in the Makati Regional Trial Court on behalf of five private stockholders of PLDT again seeking the annulment of Extelcom's franchise. That court issued yet another restraining order against Extelcom.

The Solicitor General has asked for the case to be dismissed on the grounds that only the Solicitor General has the authority to file such a case, and claiming that the provincial prosecutor's case was against public interest. The outcome of this latest desperate salve fired by the PLDT has still to be fully resolved. Extelcom's fortitude in the face of mounting costs and the relentless opposition of its huge adversary is little short of incredible.

Mike Pickles is the Regional Editor Asia-Pacific of "World Cellular Markets Products Report"

Throwing off the TV policy cringe

Mark Armstrong argues that Australia's television, having arrested the mass importation of foreign culture, is now poised as a promising export earner

Australian novels, films, plays and TV series have been widely accepted in their own country since the 1960s. It is easy to forget that until recently 'history' meant European history, an 'educated' accent meant an English accent, and the UK and US were the most respectable sources of academic qualifications. At last, the cultural cringe has passed.

Television was the major force in unleashing the demand of Australians to know about themselves, to dream their own dreams and explore their own reality. Without the large critical mass of risk capital delivered by commercial TV, we might still be seeing the world and ourselves through Northern hemisphere eyes. The ABC played a vital role in developing local production, particularly in current affairs, documentaries and drama.

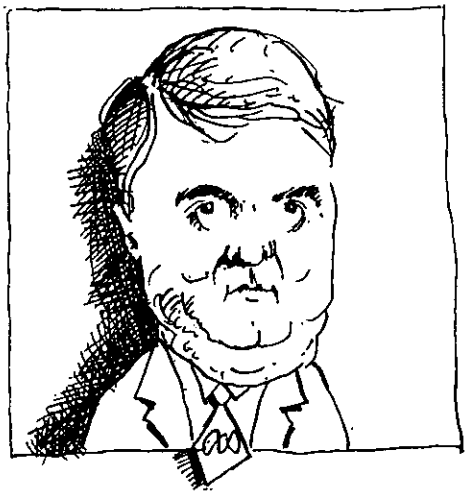
A mixed industry

Since the 1930s, Australian broadcasting has enjoyed a mixed economy of privately owned commercial channels and publicly owned non-commercial channels. The UK moved to a mixed system decades later, and the US is still struggling to create a non-commercial public TV sector. The experience of diversity is an advantage to the ABC, which has long experience of succeeding in a commercial environment.

For all its wealth, power and resources, the US has nothing to compare with the ABC or SBS. There is no universal service like the ABC, which offers nearly every Australian citizen free access to the best entertainment and information, ranging from popular comedy to the arts, religion, education and science. Even Europe, with its many languages, has no equivalent of the SBS.

The traditional Australian approach to making policy is to collect material from the Northern hemisphere, especially the UK and US, then copy it. Much of our communications planning comes from this 'policy cringe', which has lasted longer than the 'cultural cringe'. Where the overseas policies are based on different conditions, copying can be dangerous. Both the US and UK have self-sustaining markets for local TV programs. Both have significant locally-owned electronics industries. Australia has neither.

The Canberra policy agenda for TV is not success-oriented. Major issues are: limiting ownership and control, cutting 'fat' out of existing players, and devising new kinds of licence fees and spectrum fees. New opportunities are mainly for 'new players'. Companies which have achieved success in existing media are by definition 'old players', and therefore viewed with less favour.



Mark Armstrong

A clever country?

On the other hand, we are told that Australia must become a clever country, and that it must build up its information industries, particularly in the services sector. This case was strongly restated in the *May Report* of the House of Representatives Standing Committee for Long Term Strategies, chaired by Barry Jones. The report says that Australia has failed to develop high value-added exports in the information sector, or 'brand-name goods or services which sell internationally by reputation, rather than price.'

Australia's audio-visual industries appear to meet all the criteria demanded by the 'clever country' advocates. What could be better examples of high value-added tertiary sector exports than *Neighbours*, *Beyond 2000*, and *A Country Practice*, which are viewed on TV screens around the world. They are 'brand-names' which include Australia's image in their selling message. US television helped open new markets to American products and services in the 1950s. TV and film are the ultimate 'corporate advertising' for a country and its products. Yet the connection between the audio-visual industries and the clever country is rarely drawn. Sometimes it seems that science and technology are the only kinds of cleverness.

TV, film and music are among the few sectors where Australians have achieved world-ranking successes in supplying domestic demand for high value-added services and breaking into overseas markets. Our media and entertainment industries are essential to economic survival, as well as to culture. Ability to sell programs overseas will become more important as technology puts all the developed world's television on-line around the globe. *The Economist* estimated that the world entertainment industry brings in roughly $150 billion in sales each year, with increases between 10-15 per cent each year. Media/entertainment is the second-largest net US export earner, after aerospace.

Software not hardware

In order to build on success, we need to change some basic attitudes. The technological cargo cult which sees communications hardware making everyone rich and prosperous needs to be exposed as an illusion. Australians will never grow rich from creating telecommunications facilities, although we do need some local manufacturing to decrease the enormous cost of importing. The facilities add value only when used as channels for software. Current policies, emphasising expansion of telecommunications infrastructure and increases in numbers of broadcast channels, may see scarce Australian capital consumed in building channels for other people's programs.

Other countries have clear competitive advantages in communications manufacturing, but there are many niche markets in media software which Australians have already developed. The 'brand names' and the good reputation are already established, as witnessed by international awareness of Australian film and TV programs. Broadcasting is just as 'clever' as computing, or telecommunications, or science.

To seize the opportunities we need to throw off the policy cringe, which borrows policies from countries whose strength is communications hardware; and which borrows ideas from the US and European literature without asking whether it suits us or our region. Now that we have overcome the cultural cringe, surely we can throw off the policy cringe.

Mark Armstrong is Chairman of the ABC

Proposed ban on political advertising

Anthony Short argues the Federal Government's proposed legislation will not achieve its objectives and is in breach of international law

The Political Broadcasts and Political Disclosure Bill 1991 will, if passed, result in a ban on political advertising on electronic media. Such advertising will include express or implicit reference to or comment on a matter intended or likely to affect voting at an election. The ban will apply to Commonwealth, State and Local government elections.

It will apply to advertisements by political parties, interest groups and other members of the community. Broadcasters will also be banned from running advertisements for governments or government authorities for prescribed periods prior to elections. A breach of the ban will constitute a breach of a broadcaster's licence conditions, and so be relevant at any renewal hearing.

The government has raised two main justifications for the ban. First, that the pressure of funding election advertising has potential for abuse and corruption. Secondly, that the ban will provide a level playing field for those seeking election.

The arguments against

There will be no ban on print media advertising. Political parties will still be free to spend as much as they like in relation to papers, posters, pamphlets and mail. The demands for funding will remain; simply the areas of expense will alter. The same temptations, needs and problems will exist as are currently said to justify the proposed ban.

The Bill includes disclosure aspects in relation to political donations. These aspects go a long way to rebutting arguments in favour of the advertising ban based on potential corruption.

The political playing field will not be levelled however. Smaller parties will still have the same difficulties in trying to match print media or mail campaigns of larger parties. They will still struggle for equal air time on news or current affairs programs.

It is also difficult to see any nexus between a ban on conservation or other lobby groups running special interest advertising campaigns and political party corruption.

While political parties will be entitled to free time for policy launches, the Bill will not allow any person or organisation who is banned from advertising by virtue of the legislation a grant of free time. They will simply be restricted from communicating their views as they wish.

The Bill's ban on advertising making even an implicit reference to an issue "likely to be submitted or otherwise before" electors, is also undesirably vague.

The ban will also disadvantage those persons who have restricted access to the print media, including those who have difficulty reading, are in remote locations, or have language difficulties.

It has been the subject of strong criticism from the Human Rights Commissioner. He has pointed out that insofar as the Government relies upon the report of the joint standing committee on electoral matters, it both goes beyond the recommendations of the report, and relies upon incorrect factual material.

'The ban will also disadvantage those persons who have restricted access to the print media'

International obligations

Australia is a signatory to the *International Covenant on Civil And Political Rights* which has been enacted into Australian law as Schedule 2 to the *Human Rights and Equal Opportunity Commission Act* 1986. Article 19.2 provides:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The right is not absolute. Article 19.3 reads:

"The exercise of the rights provided for in paragraph 2 ... may ... be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) *For respect of the rights or reputation of others;*

(b) *For the protection of national security or of public order ... or of public health or morals."*

Whatever slim case may be made out to justify the ban under sub paragraphs (a) and (b), there does not appear to be a clearly demonstrated need so as to make the ban 'necessary'. This is the view the Human Rights Commissioner has taken.

The A-G's opinion

An opinion from the Commonwealth Attorney General's department tabled in the Senate on 28 May states in part:

"On the issues of necessity and proportionality, there is essentially a difference of view ... It must be emphasised that governments have a wide margin of discretion in relation to the public order exception. While Government has to justify any restriction, there is not, in my view, any requirement to justify with proof beyond reasonable doubt or even on the balance of probabilities ... Any international body will be slow to question a national legislative decision that is taken in good faith."

In relation to the definition of 'prescribed material' for the purposes of the ban, the opinion concluded that "it is possible to argue that inclusion of this clause was necessary and proportionate".

Conclusion

The Bill represents a serious attack upon the principle of freedom of speech. While it is recognised that this principal is not absolute, restrictions should only be imposed where necessary and are provided for by law.

The Chairman of the Law Council of Australia, Alex Chernov QC, summarised the position as well as anyone when he stated on 23rd March that it:

"is a retrograde step that any means of communication should be closed. It is particularly undesirable that two of the most widely accepted and used media in a modern and free society should be subject to the ban."

One can only hope the Government will reconsider the legislation, or that if passed, the constitutional challenge foreshadowed by New South Wales will succeed.

Andrew Short is a Lawyer with the Adelaide firm of Baker O'Loughlin

C•O•M•M•U•N•I•C•A•T•I•O•N•S N•E•W•S

Recent developments in Australia by Ian McGill and in New Zealand by Bruce Slan

Change in Canberra

It is no secret in the national capital that Minister for Transport and Communications, Mr Beazley, and the then Treasurer , Mr Keating, were often disparate forces in the debate over the reform of broadcasting and telecommunications. The conflict between these two political heavyweights in the lead up to the Government's announcement on telecommunications reform was well documented.

In March, Mr Beazley presented a controversial plan to grant an exclusive licence to operate a four channel pay-tv service using Aussat's new satellites. That plan was rejected by Cabinet.

Of course the political landscape has now changed. Mr Keating now presides over the policy wilderness of the backbench, whilst Mr Beazley's position can only be strengthened by his support for Mr Hawke. One could speculate then that Mr Beazley's repeated statements that the pay-tv moratorium is inextricably linked to the sale price of Aussat could well become Government policy. The Government is after all desperate to inject some value into Aussat. The loss of an economic rationalist, like Mr Keating, should at least diminish fears in Cabinet that the introduction of pay-tv will adversely affect the trade deficit.

Pay television

In yet another of the long line of similar recommendations the Office of Regulation Review (a Government think-tank) has recommended that the moratorium on household pay-tv should be lifted and the service should proceed subject to minimum regulation. The Office of Regulation Review found no social or economic rationale for the moratorium to continue. One can only wonder whether the report will gain more weight in Canberra given the changes detailed above.

Interestingly, the Senate Select Committee established to review the supply of telecommunications services (see below) has also been given a mandate to decide whether the content of pay-tv, were such a service to be introduced, should include material classified as "R" or "X".

Broadcasting reform & local content

The results of the continuing fundamental review of broadcasting policy should be public with the release of an exposure draft for the Broadcasting Bill sometime during the Budget Session.

The Australian Broadcasting Tribunal has released its background report for the four year inquiry into Australian programs on television. The report details the new program standard for Australian content on television (TPS14) which came into effect on 1 January, 1990. The report is in three volumes containing the discussion papers of the inquiry, summaries of submissions, results of research and other relevant information.

At the same time the Tribunal has released its survey of TPS14 for 1990 showing that all television licensees met the new standard for Australian content.

Voluntary code on violence on television

Earlier this year, as the culmination of a Tribunal inquiry, the self-regulatory Code on the Portrayal of Violence on Television was released. The Code was developed by the Federation of Australian Commercial Television Stations in conjunction with member licensees.

The Tribunal has foreshadowed that the Code could become a pilot for less intrusive kinds of regulation currently under consideration in the review of broadcasting policy. In this case, the Tribunal's role is limited to six-monthly reviews of licensees' compliance with the Code.

Tribunal inquiries

The Tribunal is in the process of conducting an inquiry into the fitness and propriety of ENT Limited, (a company controlling radio and television licences in regional Victoria and in Tasmania). The Tribunal is particularly interested in whether ENT Limited's principal, Edmund Rouse, is a fit and proper person to hold a broadcasting licence. At the same time a Royal Commission, established by the Tasmanian Government, is investigating the political bribery scandal involving Mr Rouse.

In April this year the Tribunal acceded to a request from the Royal Commissioner that it not investigate areas touching on the bribery matter during its inquiry. The Tribunal however intends to continue with its inquiry in conjunction with the Royal Commission. The implication is that the Tribunal is effectively gagged by the Royal Commission to the extent that the bribery scandal is integral to the fitness and propriety issue.

Tobacco advertising at the Adelaide Grand Prix

The Tribunal is continuing its inquiry into allegations of tobacco advertising during coverage of the Adelaide Grand Prix in November last year. In conjunction with that inquiry the Tribunal has released an empirical study into the instances that tobacco-related images appeared during the broadcasts. In summary the study found tobacco-related images were clearly visible on 653 separate occasions, comprising 17 per cent of race coverage.

The inquiry is still to determine whether the broadcasts in question contained advertisements for tobacco products or whether the images were an accidental or incidental accompaniment to the broadcasting of other matter.

Renewal of licence for TCN-9 Sydney

The Tribunal has renewed the licence for TCN-9 for a further period of five years.

This was possible after cross media contraventions involving TCN-9 and 2UE and 2CH were removed. Kimshaw Pty Limited in April this year sold its interest in 2UE and Adsteam Limited has disposed of AWA shares which gave it a prescribed interest in 2CH.

Aggregation

The staggered introduction of aggregation in regional Australia is proceeding. In Approved Market B, Northern New South Wales, one new commercial service should be available from 31 December 1991. Aggregation is scheduled to be completed in that Market by July 1992.

Aggregation in Approved Market D, regional Victoria, is scheduled to begin early in 1992.

The Department of Transport and Communications is currently undertaking an information campaign in Northern New South Wales to inform viewers of the new services that will be available.

Advertising allowed on the SBS

A new charter for the SBS will allow advertising on television and radio. The Government has announced that legislation to establish the charter will be introduced in Parliament in the Budget Session and will allow the SBS to sell up to five minutes of advertisements or sponsorship announcements per hour between programs or in natural program breaks. The SBS will retain all revenue earned through advertising and sponsorship.

At the same time the Government announced that the statutory prohibition against advertising and sponsorship on the ABC remains. However, funding for the ABC and the SBS has been guaranteed over the next three financial years in real terms.

Telecom/OTC merger fee

On 17 June 1991 the Opposition and the Democrats successfully combined to block the $1 billion fee the Government planned to levy Telecom for its merger with OTC. The Democrats' policy was probably best expressed by Senator Kernot when she said:

"We think it is a bit of cheek to charge two public utilities, which have already been paid for by the public, a merger fee of around one billion dollars simply for the luxury of implementing Government policy. We do not think it is at all ethical to use this Bill as a back door revenue raising measure..."

The Government, when reluctantly accepting the amendments in the House of Representatives, responded by stating that the merger of Telecom and OTC will not take place until "these issues have been resolved satisfactorily". The enabling Act for the merger provides that proclamation may occur at the Government's discretion. The chances are then that the Government will attempt again to appropriate some fee from AOTC in consideration for the supposed benefit it will enjoy when merged.

Valuation of Aussat

In what appears to be an extraordinary numerical coincidence, the Government has decided that it should pay $25 million for Telecom's 25 per cent share in Aussat. When the Department was asked by the Senate Estimates Committee what value the Government put on 100 per cent of Aussat they replied "the Government did not put value on Aussat. The $25 million paid to Telecom was considered a fair and reasonable price for its 25 per cent shareholding".

Senate to monitor supply of services utilising telecommunications

The Senate has decided to establish a 'Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies'.

The Committee will report by October 1991 on whether a code of conduct should be observed by eligible service providers and carriers of commercial recorded information or entertainment services utilising telecommunications and if so, its content, monitoring and enforcement. In particular, the Committee will pay attention to information and entertainment services carried by Telecom on its 0055 service.

Privatisation at Radio NZ

New Zealand's non-commercial radio services are principally financed by the Broadcasting Commission from the public broadcasting fee.

This year the funding for Radio New Zealand's non-commercial services, the Concert Program and National Radio, was slightly reduced. In the resulting public discussion the Minister of Broadcasting, Maurice Williamson, said he thought it would be appropriate for there to be public tenders for the provision of these services. A Friends of the National Radio group was formed (there already being a Friends of the Concert Program) to condemn the selection of the providers of such services by the lowest bid.

Subsequently the Minister backed away from the plan following talks on ways of meeting the demands of accountability while maintaining quality. The Minister said his floating of the tender plan had been a catalyst to get Radio New Zealand and the Commission together for talks. The advertising-free programs cost about $26 million a year. There had been concerns that some of the funds were supporting the commercial activities of Radio New Zealand.

Cuts at Radio NZ

Radio New Zealand Ltd has undergone a change of commercial fortunes which provoked a board plan to cut salaries to avoid major redundancies. Subsequently some redundancies were announced. A plan was then negotiated with the broadcaster's union, the Public Service Association which culminated in Radio New Zealand staff facing a further 70 to 120 job losses and agreeing to pay cuts averaging 7 per cent. The individual cuts will vary between 2 per cent and 10 per cent.

The Minister in charge of Radio New Zealand Ltd, Warren Cooper (the Minister of Broadcasting does not hold the shares in Radio New Zealand and TVNZ), later announced he was halving the size of the Board of Radio New Zealand, resignations being requested from three women members of the Board, the other woman member having already resigned. The Minister said the purpose was to have a more commercially-oriented Board. One vacancy was filled by the appointment of a prominent insolvency accountant. One of the women requested to resign was a qualified chartered accountant. Another had won an award as a businesswoman. A third was a lawyer.

The Opposition Spokesman on Broadcasting suggested that Radio New Zealand Ltd was being prepared for sale but the Minister denied that was the immediate intention although it was likely that some unprofitable country stations would be sold. Several management positions have disappeared -one through disestablishment, another through a voluntary retirement.

The Chief Executive of Radio New Zealand, Beverley Wakeam resigned before the pay cut proposal. A replacement is about to be appointed.

The Government may free Radio New Zealand from *State Owned Enterprise Act* obligations to be socially responsible and a good employer because, it is claimed, that puts RNZ at a disadvantage to the private sector. Mr Williamson said: "Now that radio is so competitive and there is much private sector radio, we have to look at whether we want Radio New Zealand to be bound by such a restrictive code relative to a lot of other companies."

TV2 and TV3

National Government policy to sell off one of the state owned television channels, TV2 has been reaffirmed as part of policy but not as an immediate objective, due to current economic conditions.

The holding operation, however, may make TV2 seem a less attractive buy. TV3's recent rating successes; particularly over a well-watched rugby league match played in Australia and several shrewd programming changes by a more recently appointed Australian programmer, have raised the image of TV3 which is still in the hands of Westpac's receiver.

National Government policy on overseas ownership of broadcasting has been considerably influenced by the plight of TV 3 for which Westpac has been seeking a buyer. The Government made no secret of the fact that recent moves, first in a bill to permit 49 per cent overseas ownership and then a select committee recommendation to allow 100 per cent overseas ownership of broadcasting stations in New Zealand, were influenced by the perceived need to maintain and strengthen competition for TVNZ.

Maori broadcasting

Litigation by Maori interests has resulted in the Court agreeing that the assets of the Crown that were passed to Radio New Zealand Ltd can be disposed of. Some FM frequencies have been reserved for Maori radio.

The position is different for television. The Government was told to go back and look at what should be done under the Treaty of Waitangi section of the *State Owned Enterprise Act* for the Maori language through television. In May the High Court directed the Crown to come up with measures to protect Maori television.

The Crown was given until 26 July to come up with a plan to meet its obligations under the Treaty of Waitangi. More Maori language television, a national Maori television channel or tribal based or regional television are three options proposed by the Minister of Commerce.

Broadcasting reform

Access to Air Waves is the title of a study edited by Professor Gary Hawke for the Institute of Policy Studies. The study includes 17 contributions to a seminar on broadcasting policy. Although the institute failed to invite Television New Zealand and TV3, their plea for a period of stability is supported by many of the contributions.

As Julian Mounter, Chief Executive, TVNZ said, "In an environment where Governments have changed broadcasting legislation 17 times in less than 30 years, that mildly phrased request for a breather is not surprising."

Advertising self-regulation

Control of advertising standards for radio and television may be vested in an advertising industry-appointed advertising standards complaints board.

The thrust for the move comes from private broadcasting interests and the Association of Advertising Agencies following an upgrade of the advertising industry's self-regulation and the appointment of a lawyer as part-time executive director of the advertising industry standards body.

Following the demise of the Broadcasting Tribunal in 1989 a Broadcasting Standards Authority was set up to cover both program content and advertising. The Authority has both a legislative and an adjudicative role but is required to consult and approve codes of standards under statutory guidelines.

The Minister has questioned some of the Authority's 'trivial' complaints but that, at least partly, seems to be a case of giving a body a duty to act judicially and then expecting it to act somewhat arbitrarily.

TV3, New Zealand's free to air independent television service, has issued proceedings under the *Commerce Act* against Television New Zealand. TV3 (in receivership) alleges TVNZ's unfair use of its dominant position (in the operation of TV1 and TV2) for counterprogramming TV3 and in program purchasing policies.

Pay TV and telecommunications

Sky Television, now 51% owned by Ameritech and Bell Atlantic Time-Life and Telecommunications Inc., has sacked 37 Auckland staff in June but promised subscribers and potential customers there would be no less spending on programs. Sky reconfirmed plans to be transmitting in Wellington and Christchurch by October in time for the Rugby World Cup. Sky operates three radiated subscriber television services in Auckland (news, sports and movies) and is planning a fourth.

Most of the sacked workers are reportedly in market servicing - dealing with new subscribers.

Ameritech and Bell Atlantic are major owners of Telecom New Zealand a formerly state owned monopoly. Television New Zealand Limited has a 16 per cent shareholding in Sky as well as a minority shareholding in Clear Communications Ltd, Telecom's new competitor which is partly owned by Bell Canada.

TVNZ: Scripts and programming

Eight projects by Auckland writers and producers are among those to receive funds totalling $165,000 from the Broadcasting Commission (NZ On Air) and Television New Zealand to develop scripts for prime time television programs. The awards will fund 14 projects for screening on TV1. The Executive Director of the Commission, Ruth Harley, said: "The funding is a first and if it is successful it will become an annual event".

Television New Zealand Limited has reached an agreement with an independent film maker, Greater Pacific Entertainment Co, to continue entertainment programs for channel 2. The company would continue to use TVNZ production facilities crews, and presenters.

Fine music radio

New Zealand's first privately owned fine music station plans to go on air in August with new technology.

Owned by the consortium headed by managing director of TV3, Trevor Egerton, the station will use an FM frequency in Auckland bought from Keywest, a community public service broadcaster which was one of the last stations to be licensed by the former Broadcasting Tribunal. A fine music warrant was also granted at the same time but the transitional arrangements under the *Broadcasting Act* did not require Tribunal conditions to be adhered to and the frequency was used by another station for FM simulcasts of an AM station.

The new consortium plans a low cost structure with only four full time employees. The fully automated station is acquiring pre-formatted tapes of classical music from a Californian station. Commercials will be largely spoken-word.

Independent regional TV

Canterbury Television, New Zealand's first independent locally-owned regional TV station, went to air in June from its studios in Christchurch which were formally TVNZ's. The station will run Christchurch advertisements made in the station's own studios as well as brand campaigns from national agencies. Commercial content will be 12 minutes per hour, the same as TVNZ and TV3. The advent of the station is expected to affect revenue for local radio stations.

Ian McGill is a partner with the firm of Allen Allen and Hemsley, Solicitors of Sydney. Bruce Slane is a partner with Cairns Slane, Barristers and Solicitors of Auckland

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:

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

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

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

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

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

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

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