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Commercial Viability Under the Microscope

An analysis of commercial viability by the Bureau of Transport and Communications Economics challenges its usefulness

The *Broadcasting Act* requires the Australian Broadcasting Tribunal (ABT) to have regard to the commercial viability of other services in the service area when considering the grant of a licence.

It is broadly accepted that commercial viability refers to the ability of a licensee to carry on a broadcasting business in *compliance with the licensing* requirements. Although linked to it, commercial viability is not the same as profitability. The licensing of a new service may significantly reduce the profitability of an existing service (indeed, generate losses in the short term) without necessarily destroying its ability to survive commercially in the long term.

Anti-competitive Policy

The justification for this anti-*competitive policy has always* involved the 'public trustee' position of broadcasters. Its proponents argue that the protection of a broadcaster's financial situation is a necessary condition for them to be able to comply with their public interest obligations. These obligations might include the provision of translators in marginally profitable rural areas or compliance with Australian content requirements. In the initial periods of commercial television and radio it *probably contained some truth. Then* broadcasters would have been reluctant to invest in the necessary capital equipment and, for example, provide relay stations in rural areas generating marginal advertising revenue if they faced a threat of potential, unencumbered new station entry.

However, as broadcast licence values increase to reflect the profit generated because of the absence of the threat of entry, but still accounting for the cost of complying with the "public interest" requirements, the argument loses force.

Public Interest

The "public interest" assessment *of the impact of an additional* licence in a given service area has legislative precedence over considerations of commercial viability. However, the 'public benefit' arising from the introduction of an additional station is not easy to identify. The actual outcome depends on the variance in taste of the audience in the coverage area. It may well be different between cities. For example, additional radio stations in an ethnically diverse market, such as Melbourne, may well result in niche formats which con*siderably increase listener satisfaction.* In a more culturally homogeneous market, such as Hobart perhaps, such a benefit may not occur. The addition of a new station may result in an existing service switching programming from a magazine type format (catering for different groups of people at different times of the day) to a lowest common denominator format in direct competition with the new station.

Delay

The ABT *or any appeal court* would therefore have difficulty using the 'public interest' criteria to override the commercial viability criteria. In fact, planning decisions and the commercial viability criteria combined historically to preclude entry. More recently the major observable impact has been to delay the entry of new stations because the existing stations have engaged in litigation before the ABT and appeal courts, which have not found the concept easy to define (e.g. licensing of a new radio service for Gosford-Wyong in 1988). Given the administrative and delay costs associated with the consideration of commercial viability, the question arises: what public benefit has resulted from the application of the criterion? In the absence of the criterion, the entry of a new service in an area capable of supporting less than two adequate and comprehensive services would result in one of three possible outcomes:

- the new service fails to achieve viability; or
- the new service achieves viability but forces the existing service into insolvency; or
- both the existing and new service survive but each provides a less than adequate and comprehensive service.

In the first two of the possible outcomes, although only one service survives, the surviving service (in a contestable service area) is likely to be more efficient than a single service protected from entry competition. The mere possibility that a competitive new service could be established would put pressure on the existing licensee to provide the best possible service. The effect of the third possible outcome is not clear-cut. Whether the community would be better or worse off in such a case would depend on the values which the potential audience places on the availability of choice, or the perceived quality of the available services or on any loss of comprehensiveness in the existing service.

There have also been other criterion

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which adversely affect the public interest.

The original reasoning behind the notion of protecting the commercial viability of incumbent broadcasters, and its subsequent inclusion in the *Broadcasting Act,* was that additional profits earned by stations, as a result of limited or no competition, would be used consequences of the commercial viability to fund publicly (but perhaps not commercially desirable) functions. This reasoning was probably valid for the initial licensees. However, as advertising revenue grew, few new stations were added, licence levies were not raised sufficiently and content regulations not made more onerous. Licence values grew considerably. Despite some recent, much publicised write-downs, the value of a licence remains a major (in some cases the dominant) portion of the total value of many broadcasters.

The new owners were thus faced with the servicing of a significantly higher level of investment and, consequently, a reduced capacity to fund increases in the public interest obligations of their licences. For example, the escalation of licence values represents an opportunity foregone to set "higher" program standards. Thus, higher Australian content requirements for television could have been introduced gradually, thereby increasing operational expenditure and reducing operational profits which, in turn, would have acted as a constraint on the escalation of licence values.

The only winners from such protection appear to be the original licence holders who are able to capture the scarcity value of these licences. The new owners of the licence, not being recipients of supernormal returns on their investment, would be in a weaker position to improve program quality, and consequently are likely vigorously to oppose increases in mandatory program obligations. Similarly they would be likely to oppose increases in licence levies.

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GRANTLY BROWN

This issue marks the retirement of Grantly Brown as Editor of the Bulletin. Grantly has worked tirelessly on the Bulletin for some two years. We thank him for his important contribution to communications law by ensuring a Bulletin of a high standard. We wish him well in any new endeavours which might occupy his recently discovered leisure time.

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Local Newspapers and Predatory Pricing

Gina Cass-Gottlieb and Mark Dorney examine a recent Trade Practices case on newspaper advertising

In the recent decision of *Eastern Express Pty Ltd* v. *General Newspapers Pty Ltd* the Federal Court of Australia held that when the publishers of the *Wentworth Courier* reduced its display advertising rates so as to attract real estate advertising away from a competing local newspaper, they had engaged in lawful price cutting. In the circumstances of the case, the reduction in display advertising rates to a level which still permitted the Wentworth Courier to make a profit was not predatory pricing contrary to s46 of the *Trade Practices Act* ('the Act'). The case also contains interesting observations on what is the relevant market when competition for the advertising of local real estate in newspapers is at issue.

The Facts

The *Wentworth Courier* is a free newspaper published and distributed in the Woollahra and Waverley areas of Sydney since 1961, funded entirely by advertising revenue. Evidence was given that, for most of its history, the *Wentworth Courier* enjoyed a virtual monopoly over the advertising of real estate situated in those areas.

After the *Eastern Express* entered the market in February 1990, the publishers of the *Wentworth Courier* dramatically reduced its advertising rates. Notwithstanding the price cuts, the *Wentworth Courier* was not published at a loss.

Trade Practices Claim

The publishers of the *Eastern Express* alleged that the publishers of the *Wentworth Courier* had breached s46(1)(a) of the Act (misuse of market power). The alleged contravening conduct was the cutting of the price of display advertisements in the *Wentworth Courier*.

The Relevant Market

The market in issue was held to be the market in which eastern suburbs real estate agents acquired real estate display advertisements in local newspapers circulating in that area.

The test of "market power" applied was "the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product". This test was extracted from the High Court decision in *Queensland Wire Industries Proprietary Limited* v. *The Broken Hill Proprietary Company Limited*.

The test of "substantial" market power was held to be power in the relevant market "which is more than trivial or minimal, which is real and of substance". Although market share is conceptually different to market power, there is often an evidentiary relationship between the two. The *Wentworth Courier* was found to enjoy, even after the entry of the *Eastern Express*, a substantial share of the market and commensurate market power.

Wilcox J. found that, prior to the entry of the *Eastern Express*, the *Wentworth Courier* could charge for its display advertising up to the point where vendors would decide to dispense altogether with local advertising. It could do so because it had a substantial reputation within the eastern suburbs community, significant reader loyalty and strong support from advertisers (especially among local real estate agents), access to substantial vertically integrated resources (eg publishing, printing and distribution), and economies of scale. These factors were found to constitute formidable barriers to entry, a key component of market power. Even after entry of the competition, the above advantages were found to give the *Wentworth Courier* substantial market power.

Was there a misuse of market power

The Court held that mere competitive activity (such as price cutting), which results in one competitor inflicting commercial damage on one or more other competitors, is not in itself a breach of s46 of the Act. The fact that prices are fixed with the intention of diverting custom from a competitor to the price cutter is not itself a prohibited purpose. This conduct was found to be a normal part of commercial activity "the very stuff of competition, the result that Part IV (of the Act) seeks to achieve."

'Predatory pricing' is the deliberate lowering of prices to levels which will drive competitors out of the market and enable the predator to then raise prices to levels unconstrained by competition. The Court held that it is this purpose which distinguishes predatory pricing, which is anti-competitive conduct contrary to s46, from mere price-cutting, which is pro-competitive and lawful.

Predatory Pricing

The trial judge outlined the following indicia of predatory pricing: the price is below cost and the price cutting is temporary or sporadic. The critical question is not the fact of sales at a loss but the purpose lying behind those sales. The determination of the purpose underlying the fixing of the price levels is assisted by a two stage enquiry. If the defendant's prices are below average total cost but above average variable cost, the onus is on the plaintiff to show that the defendant's pricing is predatory. However, if the plaintiff proves that the defendant's prices are below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the onus shifts to the defendant to prove that the prices are justified without regard to any anticipated destructive effect they may have on competitors.

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For a full review of recent developments see Communications News at page 32

Public Domain Films

Kendall Odgers discusses the impact of international copyright laws on films in which the copyright is about to expire

The last few years have seen "public domain" video distributors in the US generate millions of dollars in earnings from film titles which, with the passing of time, have lost their copyright protection in the US. The US public domain distributors have already made their presence felt in Australia with the release of a large catalogue of 1930's titles. Companies seeking to distribute this material in Australia must however deal with a very complex legal question — is a film which is in the public domain in the US also in the public domain here?

This question is one of the most complex in copyright law, and, because of the relatively recent nature of the industry, is not one which courts in this country have had much opportunity to consider. It arises largely because the period of copyright protection of films in the US is different to that in Australia.

US v Australian Law

Take the example of *Gone with the Wind*, first released in 1939. Under US law, the film was entitled to an initial 28 year period of copyright protection and, providing it had been registered for copyright in that initial 28 year period, a further 28 years protection upon renewal in 1967. Assuming the registration requirements were complied with, *Gone with the Wind* will enter the public domain in the US in 1995.

Under Australian law, a film made in 1939 is not protected as a film, but as a series of photographs and as a dramatic work. The copyright in the photographs comprising *Gone with the Wind* would have lasted 50 years, and expired in 1989. The copyright in a film as a dramatic work expires 50 years after the end of the year in which the "author" of the film died.

One of the many uncertainties is the meaning of "author" in relation to a film. It is possible that the author of a film could be the script writer, or the director, or both. If the latter, copyright in *Gone with the Wind* as a dramatic work will not expire until 50 years has elapsed since the year in which the survivor of the script writer and the director died.

Assuming that 50 years has not passed since the death of the "author" *of Gone with the Wind*, the film will be protected by copyright in Australia (up until the end of the relevant year) — subject however to Australia's International Copyright Protection Regulations.

These regulations provide that a "published" film will not be protected by copyright in Australia if protection "in the nature of copyright" in the film has expired in the "country of origin". Accordingly, if *Gone with the Wind* has been "published" and the "country of origin" of the film (under the Regulations) is the US, the film will no longer be protected by copyright in Australia once copyright in the film in the US expires in 1995.

Defining Publication and Origin

The definition of "publication" used in the Regulations is not what might be expected — a film is "published" if copies of the film have been sold or hired to the public. Under this definition, merely exhibiting a film in a theatre will not of itself constitute "publication", because copies have not been sold or hired to the public. It is arguable that "publication" does occur according to this definition where copies of a film are hired to cinema operators for public exhibition in their cinemas — depending on whether cinema operators can be considered to be "the public". Certainly, release of a film on video will constitute "publication".

The definition of "country of origin" is also a problem area. The US will clearly be the "country of origin" of *Gone with the Wind* if first publication was in the US and the film was not published anywhere else within the next 14 days. On the other hand, if the film was first published in the US and then also published in the UK within 14 days, either country could be the "country of origin" for the purpose of the Regulations.

To summarise, if *Gone with the Wind* has been "published" and its "country of origin" is the US, the film will enter the public domain in Australia at the same time as the US, that is, no later than 1995. If, however, the film was simultaneously published in the US as a result of which the UK is the "country of origin", copyright protection in Australia for *Gone with the Wind* could subsist well beyond 1995 — because the films are protected by copyright in the UK in the same way as they are in Australia (that is, as a series of photographs and as a dramatic work).

Lessons for Distributors

The lessons for distributors of US public domain material looking to operate in Australia are clear. While many films will enter the public domain in Australia at the same time as they become public domain in the US, caution must be taken to determine the "country of origin" and whether the film has been "published". If a film is unpublished, or the country of origin is not the US, a "public domain" distributor may find that instead of successfully exploiting a new market for its products in Australia, it is faced with costly legal proceedings for copyright infringement which may result in loss of the products and damages payments to the owner of the copyright in the film.

Quite apart from any question of copyright protection, considerable care must also be taken to avoid any misleading suggestion on packaging or advertising that a film has been released in Australia by or with the approval of the former (or present) copyright owner.

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In both cases, they would be able to point to their relatively weak financial positions. The Government and, more so, the community are the losers. The Government finds itself with a reduced capacity to capture an increased proportion of the scarcity value of licences. The community, however, not only forgoes the benefits of increased program choices which would have resulted from the entry of competing broadcasters, but also suffers from the reduced capacity of the existing broadcasters to increase their program quality.

This article is an edited version of an article published by the BTCE in its journal, "Indicators". Copies of the BTCE's Report, "Economic Aspects of Broadcasting Regulation", are available at Commonwealth Bookshops in all capital cities.

Interconnection of Mobile Services

Ian McGill examines the new regulatory regime governing mobile telephone services and points out some of the pitfalls for service providers.

Competition for the provision of mobile telephone services is achieved through the issue of three mobile telephone services ("PMTS") licences including one to AOTC, one to the second carrier and one to a third operator. Further operators are contemplated after 1995. Public Access Cordless Telephone Services ("PACTS") are also open to competition under a class licence. This article examines some of the key issues which will confront mobile service providers.

Definitional maze

The definition in the *Telecommunications Act* of public mobile service (PMTS) is reasonably complex as it does a number of things:

- it has to define a mobile service without being too technology specific;
- it must distinguish a PMTS service from a PACTS service; and
- it must distinguish PMTS from functionally similar types of services provided solely or mainly by means of radiocommunications, such as paging and trunked land mobile radio services.

The consequence of satisfying the Act definition of PMTS is that the right to supply those services is reserved to the mobile carriers (Section 94 of the Act) or to a person making direct or indirect use of a PMTS supplied by a mobile carrier through a resale chain.

Under the Act you have a PACTS and not a PMTS when, essentially, there is no capacity for intercell handover (the ability to move between cells while on the same call). So a PACT under the Act certainly includes CT-2 technology. However some PACTS services (eg, CT-3) have intercell handover capability. The legislative drafter has contemplated this by providing a mechanism for the regulations to replace the definition in the Act if the development of new technology gives PACTS services intercell handover capability. The PACTS class licence does contemplate that the regulations may allow call handover in *specific places* such as railway stations, airports and shopping centres.

Just in case some entrepreneurs were developing incipient excitement that the PACTS definition could be used to take advantage of open competition to establish themselves as a de facto public mobile carrier, the Act provides that the regulations can prescribe certain services as not being PACT services.

New GSM Standard

AUSTEL recommended and the Government has accepted that mobile operators commence service with the EC standard General Special Mobiles (GSM) digital technology in accordance with standards to be determined by AUSTEL.

GSM is capable of supporting about three times the number of callers in a given band width than analogue. The availability of this standard which supports the start up of three competitors in mobile was a cornerstone of AUSTEL's recommendations. It is likely that the GSM technology is going to have an impact on subscriber growth. It is hoped that GSM will bring down the cost of operation which will help to lower service costs and stimulate demand. I understand that GSM terminals will initially be quite expensive but should fall below the price of analogue terminals within one to two years from implementation. AUSTEL also recommended the introduction of GSM because it was an available digital standard which supported the start up of three competitors.

As recommended by AUSTEL, AOTC's licence requires it to sell air time on its existing analogue (AMPS) network to the second carrier and the third mobile and they are prohibited in their licences from installing and operating an AMPS network.

Carriers and Interconnection

Part 8 of the Act includes rules relating to the access of carriers to other carrier's networks and services. The Act creates access rights of two kinds:

- the first is the basic right of any carrier to connect its facilities to the network of any other carrier and have its calls carried and completed over that network; and
- the second are supplementary access rights created by a condition on a carrier's licence.

A licensee must, when requested to do so by another mobile carrier, provide prescribed information to that carrier relating to its network.

These rights will, hopefully, assist in the second and third mobile carriers achieving competitive status with the incumbent.

As between AOTC and the second general carrier, Government policy clearly suggests an equal access regime should apply. That is, an access service which is economically and technically efficient and non-discriminatory between carriers in terms of its functionality, quality and performance. However, there is little guidance on the type of interconnection which should apply between the AOTC local network and PMTS networks, between PMTS (local) networks and AOTC or the second carrier's long distance networks or between the different PMTS networks themselves.

At least in the short term, where Telecom has a well entrenched local access network, I would expect that mobile-fixed local network interconnection will be guided by broad access interconnection principles. The extent to which that interconnection will include service provider selection in a single stage calling process and other carrier interconnection capabilities will be a matter for commercial negotiation.

Resellers and Interconnection

It is a principal feature of the 1991 Act that all restrictions on resale of domestic and international telecommunications capacity are removed. Accordingly, PMTS services can also be supplied by a person other than a carrier under the eligible services class licence. I suspect that it is the potential for resale of PMTS services supplied by a general carrier which might excite a deal of commercial interest.

The question is whether the Act actually provides sufficient protections to ensure that potential competitors have access to the facilities and services necessary to participate in the market for mobile (or PACTS operators under the Class Licence).

The position of service providers and resellers of mobile services (whether AMPS or GSM) is difficult from an interconnection point of view. AUSTEL, in its June 1991 report, *A Technical/Operational Framework for Interconnection and Equal Access* with admirable frankness recognised that neither the Government's policy decisions nor the Act specifically addressed carrier-

service provider interconnection rights with respect to access to basic carriage services. AUSTEL stated:

"The presence of more than one carrier in the market place, however, should provide sufficient competitive incentive to ensure service providers achieve adequate access to interconnection facilities/services and information under a purely commercial carrier-service provider relationship."

As the Australian Telecommunications Users Group (ATUG) has noted, this hope may prove unfounded. I wholeheartedly agree with ATUG for some avenue of appeal to AUSTEL to intervene if carrier competition does not provide the incentive to ensure that service providers can acquire the level of, in particular, technical interconnection they seek.

In this area, the Act does, at first glance, include service provider safeguards such as:

- the reporting of Basic Carriage Services (BCS) charges;
- the ability of AUSTEL to give a direction to a carrier to unbundle a BCS (ie, requiring a carrier to make available the lower level BCS necessary to provide other telecommunication services);
- the prohibitions on discrimination provided in the Act; and
- resellers who are eligible service providers are provided with a statutory right of access to the telecommunications networks of the carriers under Section 234 of the Act for the purpose of supplying eligible services.

Tariffing

In relation to tariffing, AOTC as the dominant carrier, will be required to charge in accordance with the provisions of its tariff while the second carrier is only obliged to ensure that its charges do not exceed its current tariff (refer sections 197 and 198 of the Act). Essentially, therefore, there should be a great deal of transparency for resellers in relation to the cost of the building blocks of their network. The tariffed rates cannot be overridden by anything contained in an access agreement between the carrier and the reseller (see section 199 of the Act). Because the second carrier is permitted to charge for a BCS below its tariff this is the obvious supplier of mobile BCS to resellers.

It is in the interests of a mobile reseller to attempt to drive the carriers below their tariffs. The reseller appears to be at significant disadvantage to the PMTS licensees in dealings with Telecom/AOTC. AOTC must sell airtime on its AMPS network to the other mobile licensees. Under the Ministerial Privacy Principles those carriers will have the benefit of the 'directly attributable incremental costs' requirement. Resellers will not because the carrier-reseller price relationship is subject to commercial forces, with some trade practices-like protectors.

Anti-Discrimination

AOTC as a dominant carrier cannot discriminate between acquirers of telecommunication services (section 183 of the Act) and a general carrier cannot discriminate between resellers or their customers (section 184 of the Act).

The differential pricing that may result between AMPS airtime sales to mobile carriers and to resellers may result in a breach of section 183 of the Act. However, presumably Telecom/AOTC can argue that discrimination between the mobile carriers and resellers is protected by the statutory exception to non-discrimination: cost related discrimination, for example, volume discounts.

As between resellers, the prohibitions will not apply if any reseller can convince the carriers to supply mobile BCS below tariff if the discrimination in relation to those charges makes only reasonable allowance for differences in costs in supplying the services if those differences result from, for example, the volume in which the services are supplied.

To persuade a carrier to discriminate may be difficult (the carrier bears the onus of proof in establishing the reasonable allowance in any proceeding for a contravention of the discrimination rules) and in the case of Telecom may be impossible if there is a condition in their public mobile carrier licence prohibiting bulk volume discounts until notified in writing by the Minister.

Once GSM is up and running, however, the Telecom MobileNet network may find a niche between the enhanced digital services and the CT-2 city only networks. It seems to to me that Telecom might validly discriminate between acquirers of GSM capacity and MobileNet capacity because, presumably, such discrimination makes only reasonable allowance for the reduction in costs associated with the difference performance characteristics (which equate with quality of service) at which MobileNet is supplied. This price-cutting should be good news for resellers and consumers.

Unbundling and connection

The mobile carrier can, under section 237 of the Act, refuse to supply a BCS. This refusal to supply is subject to the unbundling regime in the Act (that is, requiring the carrier to make available BCS necessary to provide other telecommunications services). The unbundling regime will not, initially, apply to the second or third mobile carriers (because, presumably, those carriers will not be in a position to dominate a market).

In addition unbundling requires an AUSTEL inquiry and there seems to be plenty of scope for the mobile carriers to shelter behind the argument that it may not be technically feasible (because of, for example, limitations of spectrum) to resell mobile services (particularly AMPS).

A carrier must connect an eligible service provider to its network. However, this right to connect is subject to the significant restraint that the carrier is under no obligation to connect if there is included in another carrier's BCS tariff the telecommunications service that would otherwise have been supplied by the carrier.

There may be significant technical constraints to competition in the mobile cellular area using the existing AMPS service. The introduction of the GSM cellular standard is certainly predicated on the assumption that it will facilitate competition.

Because of the evident Government policy and freezing the introduction of GSM and prohibiting the second carrier from installing and operating an AMPS network there is a valiant attempt to level the playing field. This is also evidenced by the requirement that Telecom must sell its airtime on its existing AMPS network to the other mobile carriers requesting that airtime. Once GSM is established there may be significant opportunities for Telecom to price-cut its analogue network.

The position of cellular mobile resellers looks to me to be very difficult in the short to medium term. There is insufficient guidance given by the Act or Government policy as to the existence of a right of interconnection and access.

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Forum

The Broadcasting Services Bill

Peter Westerway

Peter Westerway examines the major features of the most sweeping overhaul of broadcasting regulation to take place in Australia

There has been some speculation in the past that the government intended to abolish the Australian Broadcasting Tribunal. Those fears may now finally be put to rest. As the Minister, Mr. Beazley, said in his speech on Friday 29th November, far from disappearing, the Tribunal "will be at the heart of the move to implement the reforms".

The Australian Broadcasting Authority (ABA), which is to rise from the ashes of the Tribunal, will be both more powerful and more flexible than its predecessor. Indeed, the Minister did not exaggerate when he described it as having "unprecedented powers to enforce its demands".

It therefore seems appropriate to concentrate for a moment on those powers. In what respects are the powers of the ABA to be different from those of the ABT? Such an approach leads us to three main areas: policy, planning and enforcement.

Policy

Section 3 of the Bill is a breakthrough in Australian broadcasting law and represents the fulfilment of a personal crusade. I first read the Canadian *Broadcasting Act* in 1978 — and returned to Australia recommending to my Minister that we should also have policy objectives spelled out in our legislation. So you will understand if I now tell you that this part of the bill has my enthusiastic personal support.

The content of the objectives is also significant. In 1984 I succeeded in persuading the then Minister, Michael Duffy, to take a list of broadcasting policy objectives to the cabinet. The subsequent cabinet decision listed five policy objectives, basically those spelled out by the Tribunal of the day in its 1982 *Satellite Program Services* report. Briefly, they were:

1. To maximise diversity of choice;
2. To maintain the viability of the broadcasting system;
3. To encourage an Australian look;
4. To provide broadcasting services responsive to local neecds; and
5. To discourage concentration of media ownership and control.

Like that cabinet decision, the Broadcasting Services Bill lists multiple, competing objectives, which will allow both the regulator and those appearing before it full play for their forensic skills. I have no problem with this. Only fools and innocents believe that the formulation of public policy is a linear process. I will not attempt to list them all, but there are also some significant additions and omissions from the 1984 list.

Firstly, the Bill omits "viability" and lists efficiency, competition and responsiveness to consumer needs as objectives. Apart from noting that these three (all of which are listed in the first subclause) are often mutually contradictory, we might also note that none of them has ever been mentioned in the same breath as the words: "broadcasting policy". Up to this point, broadcasting, both in Australia and overseas, has typically been heavily regulated and oligopolistic. Implicit in these objectives is the concession that crucial assumptions about scarcity which lie at the heart of existing broadcasting policy have now been abandoned. We are looking at a new era of managing for abundance.

Secondly, we should note two objects which the Act (and therefore the regulator) is to promote. Subclause 3(e) gives Broadcasting Services a role in "developing and reflecting *a sense of national identity, character and culture*". Subclause 2(f) requires the Act "to promote the provisions of *high quality and innovative programming*". Paradoxical as it may seem, neither promoting a sense of national identity nor quality programming have ever before been listed as objectives of broadcasting policy.

Thirdly, commercial and community broadcasting services providers (but not the others) are to be *encouraged* to provide "a balanced coverage of matters of public interest" and "an appropriate coverage of matters of local significance", to respect "prevailing community attitudes to matters of taste and decency" and to establish "appropriate means for addressing complaints".

Fourthly, and applying to all the categories of service, regulatory policy is to be applied across the range of services according to the *degree of influence* that the relevant service is able to exert in shaping community views. In speeches since the release of the Bill, the Minister has used the words "pervasive" and "persuasive" to expand on this notion. On other occasions departmental officers have spoken of "modular regulation". To put it bluntly, the more clout your service has, the more regulation you can expect.

The implications of these four matters collectively represent a watershed in the way Australian governments have thought about broadcasting. They are radical in the classic meaning of that term; in going to the very roots of the conceptual framework we bring to the subject.

Planning

Let me take you now to planning. If there is a bomb waiting to explode in this Bill it is in planning. Again, I am not unwilling to hear the explosions, but I do know that they are coming.

You will recall that I referred earlier to the concept of managing for abundance. The rationale for regulating braodcasting has rested upon three central notions: scarcity, public interest and accountability.

Scarcity, because the electromagnetic spectrum is a limited (albeit renewable) natural resource. Public interest, because broadcasting is uniquely powerful. Accountability, because the privilege of controlling these scarce, uniquely influential, natural resources can be granted to only a few. This implies a reciprocal obligation to serve the community; ie. the broadcaster is a *trustee*.

Use of Spectrum to be Maximised

The new regime demolishes scarcity as a planning imperative. Indeed, it tells the ABT that unless the Minister has deliberately reserved capacity for national or community broadcasters, it is to "ensure that the *maximum use* is made of the Broadcasting Services Bands" (section 28(1)).

On my reading, this deceptively simple phrase "maximum use" has all the revolutionary potential of "liberty, equality and fraternity". Perhaps the authors understood what they were saying or perhaps they knew not what they wrote.

That is not to say that future developments like digitisation are not recognised; they are. However, those who have not worked in the field often do not realise that to change even one of the quite simple assumptions made by the engineers in developing their planning guidelines can have huge consequences. Let me remind you that if the old PMG planning guidelines had specified lower levels of protection against interference, we could have had some 4000 radio stations in Australia since the 1930s. Equally revolutionary consequences would follow simple changes in the existing planning rules.

I am also unsure whether the authors have fully allowed for the inherent plasticity of the spectrum. The VHF band can be used for radio, television or telecommunications; the UHF band can be used for radio, pay TV or cooking chops. The planner who seeks to maximise use of the broadcasting bands is opening Pandora's box.

Public Consultation

On the other matter of opening up the planning process, however, I find myself in enthusiastic agreement. In performing its functions the ABA is to make provision for "wide public consultation" (Section 27(1)), which presumably means that we should never again witness the spectacle of decision makers hiding behind their technical advisers in order to avoid debating unpalatable truths. Public consultation processes are already widely used in the Tribunal and I see considerable benefit for all concerned in their translation into the planning process.

Before we leave planning, let me remind you of the social contract supposedly implicit in the granting of a broadcasting licence: the broadcaster, as trustee, in return for enjoying the privilege of a licence, accepts the social obligation to act in ways which do not maximise its profits. (For example, it provides high levels of relatively expensive Australian programs or children's programs).

Community Service Obligations

It is something of a surprise to me that the policymakers who were the architects of the bill did not transpose the notion of community service obligations (CSOs) from the telecommunications legislation into this Bill.

CSOs are a concept borrowed from the social welfare debate surrounding European integration and they rest upon three legs: firstly that an organisation enjoys a privilege bestowed by government; secondly, that the government imposes reciprocal obligations on the organisation; and, thirdly, that these obligations can only be met at a cost to the organisation. Their advantage is that they provide a conceptual framework for rational analysis and debate about what are otherwise hidden cross subsidies. Moreover, they reflect a specific time, place and technological environment, so that they are dynamic, or capable of adaptation to meet changing social and political expectations.

Few of the quite onerous conditions imposed upon broadcasters by regulation are accurately costed. While this has suited the broadcasters (who are vertically integrated and not above padding their costs to impress the public and the politicians) it is not helpful to rational decision making. There can be little doubt that the quality of the debate about telecommunications policy improved with the use of the notion of the CSOs. And while broadcasters have also profited from fuzzing the figures in the past, they now stand to lose unless a similar approach is imported into the broadcasting debate.

I mean by this that the world of abundance in which they will now be obliged to live makes no allowance for subsidising the local production industry or showing great children's programs. Instead of trying to defend the indefensible, that is, to maintain their oligopolies, they might be well advised to ask how the cost of providing these socially desirable, but very expensive, programs is to be spread over other, competing service providers.

Commercial Viability

Let me make myself clear. I am *not* suggesting that there should be, for example, no Australian content requirements. But I am concerned that the immediate reaction of some network spokesmen (supported by some public interest groups) has been to argue that the concept of "commercial viability" should be retained. We should be clear in our minds that commercial viability reflects a regime with substantial barriers to entry. Unless we intend to have such barriers (and it is probably impossible to maintain them), it is fruitless to dwell on the past. In order to address the watershed of 1997 we need to think about *new* arrangements. To quote the Minister: "The future cannot be avoided."

Enforcement

Finally, a few brief words on enforcement. The Minister has made a point of stressing that the Bill deemphasises ownership, preferring to address the concept of control. The manifest deficiencies of the 1942 Act, he says, sprang largely from its obsession with numbers. "...the Act tried to specify every means by which control could exist, was preoccupied with numbers and lacked the flexibility to deal with the complex corporate structures of the modern market place". (The new Broadcasting Services Bill, 29 November 1991).

I would agree with this. In the past I have likened the 1942 Act to Dr Johnson's dog, which you may remember danced on two legs. The marvel was not that it danced badly, but that it danced at all. In recent days I have moved on to a different analogy. I now think of the Act as one of those obstacle courses used to train the police, SAS and similar modern heroes — the sort in which figures suddenly pop up out of nowhere and the candidate has to shoot or be shot. If he shoots a woman with a child in her arms, he is a failure; if he hesitates and the figure is a villain, he is also a failure. He can only win if he shoots the villain. *Cherchez le criminel.*

The problem with the 1942 Act has always been to decide who is a villain before he or she dies of old age.

Accordingly, we welcome the flexibility provided by the proposed regime and, in particular, the capacity to address matters

at issue *before* major transactions are undertaken.

Let me finish by saying that the Tribunal welcomes the *Broadcasting Services Bill* and I congratulate both the departmental officers who produced it and the Minister who has already brought it to this point for their industry and their initiative. The debate in which we will all now have to take part should be frank and explicit if it is to be useful. But I should not want my frankness to be interpreted as opposition.

Having been involved in several similar attempts at reform of the legislation I have no illusions about the dimensions of their achievement.

Peter Westerway is Chairman of the Australian Broadcasting Tribunal.

Bob Campbell gives a commercial broadcaster's perspective on the Bill

The provisions in the Broadcasting Services Bill which are of concern to the Seven Network are a consequence of two fundamental misconceptions by government.

The first misconception is a belief that if irreparable damage to our existing television services occurs on a sufficiently extended timetable, the damage is acceptable. And secondly, the belief that a dramatically increased number of services will offer viewers greater program diversity.

At present, on any given night, a viewer might choose between, say, one or two local drama series, a local sitcom, local current affairs and one or two overseas offerings (all of them first runs). The alternatives are quality alternatives — and the choices are meaningful. This is real program diversity. A choice between 10 or more broadcast and pay services, each running inexpensive, studio-based programs, re-runs and overseas product does not represent genuine or meaningful program diversity.

What is at risk is an internationally recognised quality television system, generating large scale local production. Our government advisors have chosen to draw from the experience of the northern hemisphere and ignore the economic realities of a large and isolated country with a small population.

The high quality of the existing system is no accident. Limited restraints on entry have created an environment in which it has been possible to develop and nurture an expanding inventory of quality local programming. By any measure and all relevant international comparisons, commercial broadcasters in this country have devoted an extraordinarily high proportion of revenue to programming. The latest available Tribunal figures indicate that metropolitan broadcasters spent 85 percent of net revenues (after the deduction of compulsory licence fees and agency commissions) on programming. Seventy percent of this expenditure is spent on Australian programming.

Cost Cutting

Our high quality system devoting, as it does, such a large proportion of revenue to programming is fragile. Not fragile because of entrepreneurial excesses, mountains of debt or mismanagement, but fragile simply because in all markets, five very competitive services divided up between one million people at one end of the spectrum and 3.7 million people at the other end of the spectrum continually push the financial and creative resources of the system to breaking point. Before interest and tax, free-to-air commercial television of the quality currently enjoyed in Australia is a marginal business.

Revenue growth over the short to medium term will be nominal. Thereafter, faced with stagnant revenue growth and with the application of such a high proportion of revenue to programming, there are very few options that the commercial broadcaster can pursue to cut costs in order to maintain marginal viability without cutting back on Australian produced programs. Cost cutting at the margin involving staff, capital expenditure and administration is all but complete in the commercial industry.

Therefore, revenue erosion as contemplated post 1997 will leave existing broadcasters with only one choice. That is, to take the cleaver to the current level of domestic production. For those programs that remain, the quality of writing, casting and overall production will suffer.

Pay TV and Advertising

One of the big issues in the Broadcasting Services Bill is the introduction of pay TV. From the experience gained in overseas markets, it is clear that as penetration rates for pay TV become significant (upwards of 20 percent) broadcast networks will face a significant reduction in audience levels.

This reduction will put a cap on advertising rate increases below the cost of living increases and, if the overseas experience is anything to go by, well below the rate of increase in program prices. With 20 percent penetration, pay TV will (after 1997) begin to become attractive to advertisers, thus diverting advertising revenue from broadcasters. This expanding revenue base available to pay operators, will mean aggressive competition for available programming thereby driving prices even higher.

Advertising budgets are finite and therefore there is a substitution effect between free-to-air broadcasters and pay operators. Pay operators the world over set subscription rates to cover programming and other operating costs. The high margins associated with the advertising streams will enable pay TV operators to offer advertisers deep cost per thousand discounts.

Effect on Programming

In the United States, the audience and revenue erosion of U.S. broadcasters' schedules has resulted in a market trend towards what is termed more 'cost effective programming'. This means:

- few expensive one-offs;
- a marked decrease in the number of drama series produced;
- a shift from expensive drama series formats (including location shooting) to less expensive formats;
- a significant increase in relatively inexpensive studio based situation comedies;
- a significant increase in magazine style (reality) programming.

This means more *Hard Copy* and *Cops* and less *LA Law*, *Murder She Wrote* and *60 Minutes*, which would be replaced by an extensive menu of repeat programming — especially off-peak and in prime-time shoulders.

1997 Sunset

The logic of having a proposed sunset clause of 1 July 1997 for three commercial broadcasting services that coincides with the expiration of the proposed moratorium on advertising for pay TV and the introduction of unlimited additional pay services, is perverse.

Australian broadcasters will be facing a period of profound structural adjustment in the period leading up to 1997. Unless proper care and attention is provided to the correct balance between free-to-air broadcasters and the new subscription services, the landscape could look like this:

- audience erosion from pay will be biting hard;
- advertising on pay will become intrusive;
- there will be a completely new programming landscape.

Self-regulation

The public interest groups have been appeased (at least to some extent) by the effective continuations of quotas relating to children's programming and Australian content, while at the same time proposing an open skies policy of new frequencies and pay TV. But even the most elementary economics student can see the conflicts. Certainly even the architects of the new Bill recognise that program standards in the new environment are "increasingly difficult to justify".

Much has been said of the new Australian Broadcasting Authority and self-regulation. Given recent experience, you will have to excuse a broadcaster's cynicism in saying that guided self regulation under the ABA is likely to be more of the same with much more draconian penalties than is currently the case. In our view, there should be either true self-regulation with substantial penalties or the retention of the status quo.

Audience Reach

One superficially pleasing aspect of the draft Bill is that the Government proposes to implement its 75 percent audience reach policy, thus allowing capital city national networks to remain in place as opposed to having four cities in a capital city network and one city in isolation.

Pleasing as this is, and despite the hard work we have put into achieving this, I would give it up tomorrow for the security and belief that proper thought had been given to both the on-going commercial viability of operators and proper consideration had been given to the retention of the quality and depth of television that this country has become renowned for.

The new Broadcasting Services Bill, in our contention, represents an unrealistic and uninformed policy agenda and will be subject to vigorous representation by us in Canberra.

This the edited text of a speech given by Bob Campbell to a CAMLA luncheon on 21 November 1991.

Bob Campbell is the Managing Director of the Seven Network.

Les Heil finds that the new Bill will cause vast changes to Australian commercial radio

From the standpoint of commercial radio, the essence of the Broadcasting Services Bill is that barriers to entry are going to be either removed or reduced to the absolute minimum, without regard to whether stations can remain viable. Also significant is the fact that radio will be excluded from the cross-media ownership rules.

At the outset, let me say that I have great doubts whether the final result of this revolutionary piece of legislation will be a better commercial radio system than the one we have. Both in technical and program service terms, the current system provides a high quality service. Time spent listening to Australian commercial radio is among the highest in the world.

More Services

It certainly does not follow that more is necessarily better. Advertising, which is the sole source of revenue for commercial radio, is finite. The more thinly that revenue has to be spread, the more pressure there will be to reduce costs, a fact which ultimately will have to be reflected in the services provided.

The approach being proposed is highly derivative of other countries — New Zealand in particular. In my opinion it is far too early to conclude that the New Zealand experiment is anything more than that — an experiment. We really have no evidence that New Zealand listeners are benefiting from the new regime; no indication, for example, that the public is better served as a result of the fact that almost all radio news now emanates from one central source. And finally, is the experiment in New Zealand designed for a population of three million, really relevant to the far more diverse service which already exists in Australia, currently serving a population of 17 million people?

Radio Formats

It is not difficult to predict what at least some of the consequences of the Bill will be. Formats will become more and more specialised. For every format there is an economic limit dictated by the number of listeners it can attract, and obviously the potential number of listeners in every market is finite. More stations therefore mean fewer listeners per station, on average, and intensifies the task of identifying particular program preferences in a cost-effective manner. However, it can be fatal to get too deeply into niche radio. If you are delivering fewer and fewer customers per station, niche broadcasting — extended too far — is not the panacea that some people think. In addition, advertisers will be able to target their customers with increasing precision. This is simply a logical outcome of increased program specialisation.

Cost-cutting will be refined to an art form. There will be less duplication of resources, more sharing of facilities, more syndication of programs, less localism in regional markets. Deals will be made even between competitors to reduce expenses. There will be staff reductions and in some cases a reduction in the level of service provided.

Stations will be bought and sold like second-hand cars. This will probably give rise to the emergence of a new industry such as they have in the United States — station brokers.

According to the essay which accompanied the Bill, the new broadcasting authority will have to work out a mechanism for a price-based, competitive process for determining who will receive licences. Consideration may have to be given to the transition of existing licensees to whatever new approach is adopted, and to moving from an on-going taxing regime to a once-only, "up front" payment as economic rent.

Digital Audio Broadcasting

There does not appear to be any guarantee or assurance that the existing licensees will be given any preference or even a guaranteed place in the continuing march of technology — in DAB, for example. The imperative of disposing of FM frequencies as quickly as possible also raises questions. A cynic could be forgiven for discounting the lofty ideals set out in the ministerial statement and postulate that the Government, having indicated that DAB will be with us in five years or less, must move quickly to sell off the remaining FM frequencies before they become either worthless or have to be sold off at giveaway prices.

The "one to a market" limitation which would apply in markets of less than seven commercial radio services is unnecessarily restrictive. With radio removed from the cross media restrictions, there would be

nothing to stop a local television station or a local newspaper from also controlling a local radio station, thus gaining two media outlets in the one market. Why, therefore, prevent the holding of two radio outlets in any market when the system is supposed to be committed to providing listeners with as many services as possible?

Program standards

The highly commendable attempt to simplify the drafting may not always achieve the intent of reducing legalism and potential litigation. I think this particularly applies in the area of program standards, and in clauses such a sub-clause 43(3) which provides that where a commercial radio licensee "broadcasts a significant proportion of contemporary popular music, the ABA may impose a condition on the licensee requiring the licensee to broadcast a specified percentage of Australian contemporary popular music." It is not clear if words like "significant", "contemporary" "popular" and "music" refer to compositions, performances or both. All are badly in need of definition — including the word "Australian".

We need to remember that the proposed legislation may undergo significant change. The Opposition may well introduce substantial amendments and the Bill may be extensively modified during the general consultation process. Many of us, however, remember the charade involved in the consultation processes for other activities such as the Forward Development Unit for radio. That so called 'consultation' left us with a feeling that it was more of a formality than a desire to benefit from the experience of the industry which has been serving the people of Australia extremely well for 65 years.

But I am optimistic that the approach will be different this time. We must await the outcome of such perennial issues as commercial viability, regulation versus self-regulation, public accountability and Australian content.

Les Heil is the Managing Director of KZFM Radio and has received the Order of Australia for services to the radio industry.

John Griffiths inspects the teeth of the proposed Australian Broadcasting Authority

The Broadcasting Services Bill contemplates a very different regulatory body to administer broadcasting legislation than is the case at present. The Australian Broadcasting Tribunal ("ABT") will be replaced by the Australian Broadcasting Authority ("ABA"). The Government expects the ABA to operate as an overseeing body, more akin to the Trade Practices Commission or the Australian Securities Commission, than to the ABT. The ABA is expected to be proactive rather than reactive, to conduct informal and *in camera* investigations in preference to public hearings, and to exercise wide discretionary powers on a range of matters with much less parliamentary guidance than is contained in existing legislation.

Incomplete picture

The Bill paints only part of the picture of the Government's expectations of the new ABA. Many matters are entirely omitted or left teasingly unanswered in the Bill. The Minister's Explanatory Statement paints a fuller yet still incomplete picture of how the Government expects the ABA to operate; for example, how it will enforce not only the letter but also the spirit of broadcasting law; how it will use external consultants and corporate lawyers in its investigatory work, particularly in the areas of control and suspected criminal offences; and how it will conduct control audits behind closed doors to detect breaches of control provisions.

We are told in the Explanatory Statement that this brave new world of broadcasting regulation is necessary to put a stop to the bad old days in which licensees are portrayed as exploiting loopholes in ownership and control restrictions and generally avoiding their obligations in the face of a powerless, cumbersome and largely ineffective ABT. However, the picture painted of the ABT as an ineffectual regulator frequently outsmarted by a broadcasting industry hell-bent on legalism, avoidance and exploitation of loopholes grossly distorts reality. The ABT's involvement in inquiries such as those relating to Alan Bond, the Seven and Ten restructures and, more recently, Tourang's bid for Fairfax, demonstrate just how sharp its bite can be. It is also important not to lose sight of the fact that the overwhelming majority of licensees and their shareholders generally comply with their legal responsibilities. No-one could deny the need for some reforms of both a procedural and substantive nature. But the distorted perspectives described above have produced a Bill which contains many overreactions and proposes "solutions" which pay inadequate attention to the need to:

(a) allow appropriate public participation in broadcasting regulation;
(b) safeguard individual rights and interests; and
(c) ensure proper accountability of public administrators.

ABA's role

The ABA will have a wider range of tasks to perform than the ABT. Its primary tasks will include quasi-legislative, licensing, regulatory, administrative, advisory, planning, arbitral and quasi-judicial functions.

Is it desirable or appropriate to vest such a wide and disparate range of functions in a single body? Would it not be more sensible to create a two-tier system, along the lines of the Trade Practices Commission and the Trade Practices Tribunal, and divide administrative responsibilities from quasi-judicial functions?

It is not clear whether the proposed powers to issue binding opinions on control and categorisation of broadcasting services are invalid on the grounds that they amount to the conferral of judicial power on an administrative body, contrary to the separation of powers required by the Constitution. The Bill provides that the ABA's opinion on categorisation of a broadcasting service or whether control of a licence exists or will exist, confers protection against penalties being applied elsewhere under the Bill. That protection or immunity runs for five years in the case of categorisation opinions and indefinitely in the case of control opinions, assuming circumstances remain substantially the same as in the original application. Accordingly, those opinions have a conclusive or binding quality about them which distinguishes them from other administrative discretions.

ABA procedures

A feature of the proposed reforms is the sharp shift away from the conduct of inquiries by way of public

hearing to a much more informal and flexible system involving the conduct of private investigations by the ABA with public hearings being held only as a last resort. While such a system may result in administrative efficiencies and cost savings, real issues are raised as to whether such processes allow appropriate public participation in, and knowledge of, the ABA's activities and also as to whether adequate safeguards exist to protect important individual rights and interests. Although the Bill confers a right to have an adviser present during a private investigation, curiously there is no express guarantee of legal representation in an ABA public hearing: the matter is left entirely to the ABA's discretion. Furthermore, the ABA's powers to conduct investigations seem to be at large and are virtually unrestricted.

Discussion of these significant matters is handicapped by the host of issues left unanswered in the Bill regarding details of the ABA's procedures. For example, is it intended that the ABA will be master of its own procedures? If so, will the ABA formulate uniform procedures applying to each of its various functions? What will such procedures involve?

A person can be compelled to attend before a *delegate* of the ABA to answer questions on oath and/or produce documents. Failure to answer a question that is relevant to a matter the ABA is either investigating or is to investigate carries a fixed penalty of one year's imprisonment. The Bill stipulates that such investigations and examinations *must* take place in private, leaving no scope for a person summoned before the ABA's delegate to elect to have the matter dealt with publicly. The Explanatory Statement defends such secrecy on the grounds that publicity might prejudice criminal prosecutions. The broadcasting industry is effectively being told by Big Brother that it must suffer a loss of individual rights because of the possibility that a few may commit criminal offences.

This shroud of secrecy and private inquisition is heightened by the proposed power in the ABA to compel attendance at private conferences during the course of a public hearing. Such conferences may be ordered to take place in the presence of a member of either the ABA or its staff. Failure to attend can result in disqualification from participation in the public hearing.

Whether the ABA publishes a report about any particular investigation is left entirely to its discretion, except in those instances (which are likely to be rare) where the Minister has directed an investigation take place. Consequently, the requirement to provide a person affected by findings in an investigation with an opportunity to comment will not apply to all investigations conducted by the ABA or its staff. And since the Bill provides elsewhere that ABA members may reach decisions not only on the basis of the evidence or material put before them in an investigation or hearing, but also may rely on "their knowledge and experience" in arriving at decisions (clause 158), isn't there a clear risk that decisions adverse to individuals may subsequently be taken on the basis of untested and unpublished information which has come into the ABA's possession during the course of one of these private investigations conducted by a delegate? Where is the natural justice in that scenario?

The procedures to apply to public hearings are vague and uncertain. The few provisions in the Bill dealing with hearing procedures give rise to other problems. For example, where the ABA has completed a hearing, it must prepare and publish a report setting out its findings. That is a sensible requirement, but it is unclear if this obligation is different from the standard obligation on administrators imposed by both the *Administrative Decisions (Judicial Review) Act* and the *Acts Interpretation Act* to provide upon request written reasons for decisions and also identify findings of fact and refer to the material or other evidence upon which such findings were based.

Accountability

The Bill contains what are now standard provisions relating to the power of the Minister to notify the ABA of general policies of Government and to give specific directions of a general nature as to the performance of the ABA's functions. Otherwise, the ABA is not subject to direction by or on behalf of the Commonwealth. The ABA is charged with responsibility for advising the Minister on the operation of the Act.

The Bill expressly provides for various forms of ABA accountability but their adequacy is to be questioned. For example, the Bill sets out a range of ABA decisions which will be amenable to review on the merits by the Administrative Appeals Tribunal ('AAT'). That list includes some decisions which at present cannot be appealed to the AAT; for example, decisions relating to the alteration of service areas (to be called "licence areas"). Closer scrutiny, however, reveals several key omissions. Most notably, no right of appeal to the AAT is provided in respect of the ABA's power to give an opinion as to in which licensing category a particular broadcasting service falls, or whether a person is, or would be, in control of a licence. Consequently, not only is a disappointed applicant for such an opinion unable to seek merits review, but an affected third party aggrieved by an ABA opinion which is favourable to the applicant is unable to test that opinion before the AAT. Presumably the only recourse available to such a person would be to commence judicial review proceedings in the Federal Court challenging the ABA's opinion on grounds of error of law. But that course will not be free from difficulty due to doubts regarding standing and the procedural limitations of judicial reviews.

Other key decisions of the ABA which will impact on individual rights are also excluded from the AAT appeal list. For example, the ABA's decision to issue a notice under clause 71 aimed at rectifying a breach of provisions relating to control, foreign ownership, directorships, or cross media restrictions, is not subject to merits review. The failure to provide for AAT appeal of such notices was deliberate. The Explanatory Statement defends the position on the ground that notices are issued to correct a breach of the Act and will form the basis of a prosecution of a licensee for an offence. Accordingly, it is said that "it is inappropriate for the AAT to be in a position of considering whether a prosecution should be launched and, as such, notices are not subject to AAT appeal". Interestingly, the Bill provides that the ABA is empowered on application prior to a transaction taking place to approve a temporary breach and a refusal to make such a decision is amenable to AAT review at the behest of the unsuccessful applicant.

Finally, also conspicuous by its absence from the list of decisions amenable to AAT review are ABA procedural decisions. The possibility of ABT procedural decisions being exposed to AAT review is one of the matters dealt with in the Administrative Review Council's current discussion paper reviewing ABT Inquiries Procedures.

Dr. John Griffiths is a partner in the Sydney office of Blake Dawson Waldron Solicitors.

Beth McRae of Open Channel puts the community television case

In all the recent attention and debate surrounding Australian media ownership, regulation and control, the introduction of pay TV and current focus on the Government, draft Broadcasting Services Bill, there is a notable absence of consideration in circles of power about the meaning and effect of the imminent introduction of non-profit community television and its inclusion in the likely use for the remaining sixth television channel, UHF 31.

Tossed in with the grabbag of future television services, community access television is perched alongside consideration of educational television, parliamentary television and, in a somewhat mystifying move for the film industry, possibly an additional outlet for independent film producers. The House of Representatives Standing Committee on Transport, Communications and Infrastructure (HRSCOTCI) inquiry into the possible uses of the sixth high power television channel is expected to be completed for tabling in Parliament by the end of May 1992, which will allow sufficient time to garner convincing arguments for the community's right to access at least a small slice of airwaves.

However, the inquiry's objective of deciding on a fair and effective structure for the new channel that can accommodate all interests will be a herculean task. Already chinks in the argument have emerged with educational television advocates proposing use of evening prime time with community broadcasters relegated to the weekends. The community TV sector intend to maximise co-operation with other sectors but are not likely to tolerate being shoved aside to downtime viewing slots.

Any legislative changes that stem from HRSCOTCI will need to be tabled in Parliament by the end of May 1992 to allow for incorporation into the Government's draft Broadcasting Services Bill for which public comment closes by the end of February.

Already criticism has been voiced about the Broadcasting Services Bill's proposed changes to sponsorship regulation and the detrimental effect on the financial resourcing of any viable community TV service. The draft Bill restricts sponsorship to four minutes an hour, whereas the current *Broadcasting Act* has no restrictions, although there is little or no restriction on the content or form of sponsorship announcements.

There will presumably be detailed discussion about the self determination requirement for a code of practice and setting of limits for sponsorship announcements by both the television and radio sectors of community broadcasting during the coming weeks.

A further concern about the draft Bill is the allocation of the broadcast spectrum on a user pay basis, which will inevitably exclude any community use. This of course emphasises the critical urgency for community TV to prove that any decision about the use of UHF 31 should recognise the priority of the public interest.

During January and February, the co-ordinator of the Public Broadcasting Association of Australia will be organising seminars in Sydney and Melbourne culminating in a national seminar to formulate submission to the HRSCOTCI inquiry.

Beth McRae is the General Manager, Open Channel of Melbourne

Bob Weis puts the production industry's case for changes to the Bill

There is much to like about the Broadcasting Services Bill. It is, for instance, written in plain English and it is therefore relatively easy to understand. The Australian Broadcasting Authority (ABA), the new regulator, and broadcasters both present and future will have a clear understanding of the regulations and what can happen in cases of breach.

With the introduction of pay television via satellite and the possibility of a great many new services delivered by fibre optics toward the end of the decade, the BSB tries to be as technologically neutral as possible, while addressing the problems of allocation of frequencies and regulation of service providers.

There are some anomalies in the Bill as it stands. The most obvious one is the attempt to bring the ABC and the SBS within the control of the ABA.

From the SPAA point of view, however, the problems with the BSB are not related to the agenda as set out in the Bill but to those things that are not adequately dealt with or indeed not dealt with at all.

Reregulation in broadcasting is a global phenomenon as governments come to grips with the impact of new technologies and the proliferation of services. The major areas of concern in many of these attempts can be summarised under two broad headings: cultural and economic. In many ways the arguments about the broadcasting industries intertwine these two topics in beguiling ways.

Cultural Imperatives

Australia is the only country that has quotas for local content. Everybody else has quotas for foreign content. Largely a hangover of the cultural cringe we still have to fight about the preservation of domestic standards. The BSB allows for transitionary arrangements for content standards until the ABA sets in train the processes to determine new ones. Meanwhile the EC has determined a minimum 50% of local production for member states with individual states setting higher percentages.

The USA presents a curious case. Ostensibly they have no content regulations. Over the past fifty years of broadcasting the US networks have screened one foreign TV series. Clearly with this kind of cultural chauvinism there is no need for legislative protection.

The Canadian *Broadcasting Act* of 1991 gives tremendous importance to the role of locally originated programming in the Cultural life of the country and spends much language on the requirement for Canadian broadcasters to pay attention to the need for programming that reflects their society. It also talks of issues of quality and innovation. While the BSB certainly mentions issues of cultural identity and quality they are listed fifth and sixth in the objects of the Act. The cultural objectives of reregulation of broadcasting should be put right up front to let the industry and the Australian people know that what is being contemplated is a broadcasting regime for Australians.

While the BSB does not envisage dropping domestic content standards on free television it does not give any guidance on what they should be. The Bill should reflect the need to enshrine appropriate levels of domestic content. Our view is that this should begin at a minimum of 60% across all time zones.

Economists and flat earthers

It has been argued by the flat earth economists in favour of deregulation that our broadcasters are over-regulated and that the market should be left to decide on questions of content. If the market wants Australian programs, it should be prepared to pay the price. Further it is argued that content rules create price distortions that work against the free market.

While the subsidy/quota argument may be relevant to the shoe industry (read car, widget or any manufactured item) the production of intellectual property rights is fundamentally different. The cost of selling a licence for using a program does not have to bear any relationship to the cost of manufacture. A British production company can produce an hour of drama for $1,500,000, recoup most of its costs from the UK and onsell rights to an Australian broadcaster for say $30,000 per hour.

Having to compete with this product in our domestic market on price is clearly impossible. The recognition of this fact is that broadcasters all over the world pay a premium price for locally originated material because of local content rules or because of cultural barriers to imported material. In terms of cost efficiency the Australian producers are among the cheapest in the world and are significantly cheaper than their US, Canadian and UK counterparts.

Microeconomic Reform

The economic argument in broadcasting is focusing entirely on the wrong issue. While other government departments attempt to wrestle with the problems of microeconomic reform and structural efficiency the BSB does not examine the structural relationships in broadcast trading.

Australian business by and large prefers monopoly trading to genuine competition and the regulatory and cultural environment has traditionally encouraged it. In the USA networks cannot produce their own programs. Nor can they have equity in the future sales of the programs they commission. Producers and broadcasters deal at arm's length.

Similarly in the UK the new rules for broadcasters require a minimum 25% of all production be made by independent producers (ie structurally independent from the broadcasters they are supplying).

These arrangements deliver diversity, choice and economic efficiency. Independent producers with low overheads, competing for sales, are always going to be cheaper than the networks in delivering programs.

Australian networks, including the ABC, are basically built on the 1950's model of total vertical integration of manufacturing, distribution and exhibition (retailing).

SPAA would like to see a provision in the Bill that requires broadcasters to commission a minimum of 50% of their total Australian content from independent producers. Further anti-monopoly provisions need to be enacted to make sure that unfair market strength is not used to acquire future equity in commissioned programs.

The film and television industry has been subjected to thirteen separate government inquiries in the past two years. The bipartisan support for the industry for cultural reasons has been strong for the past twenty five years. It is time to translate that support into practical measures that affect the fundamental terms of trade.

Pay Television

The BSB will also pave the way for the introduction of pay television. Here again there is almost a complete abdication of policy making. The then Minister in his explanatory notes and elsewhere explains the need to tread softly in establishing local content rules for the new service by comparing it to a retail operation where the relationship between the customer and the retailer determines the stock to be carried.

In so far as it goes this is a reasonable model to apply. Subscribers pay a weekly fee and if they do not like the service they are getting they don't keep paying. Therefore, it is argued, local content rules might endanger the viability of the operators who will be risking large amounts of money to establish the service.

Elsewhere the then Minister argued that the late arrival of new technologies to our shores gave us the benefit of learning from other countries' successes and failures.

The retail argument on the face of it looks persuasive until we scrutinise it in detail and apply the overseas experience. Audiences here have demonstrated on free TV their overwhelming preference for Australian product. The concern for pay TV is the cost of local programming compared to the relatively small cost of acquiring overseas (predominantly American) movies for an entertainment channel.

Local Content on Pay

Here, we need to learn from the French in the regulations they applied to their pay TV operator, Canal Plus. The French government saw the possibility of a locally owned pay network having the majority of its profits being siphoned to Hollywood and its inventory stacked with studio product. They also wanted to see a high percentage of French language originated programming for cultural reasons. They are very proud of French culture.

The rules they enacted are ingenious in a number of ways. I won't list them all here but the significant ones are:

1. Canal Plus cannot buy packages of films, they must purchase transmission rights on a film by film basis. This means that the studio practice of selling blockbuster films as a package cannot be used and the channel's inventory is not filled with films they don't want.
2. A fixed acquisition cap expressed as a percentage of after tax revenues is imposed on program purchases. It doesn't say how much can be spent on any one film but it limits the total acquisition budget so that siphoning of profits offshore is prevented.
3. 10% of revenue goes toward local programming.

It should be pointed out that Canal Plus is the most financially successful pay operation in the world.

The French also have high levels of local content written into pay; 60% EC and 50% French language original programming. Canal Plus now accounts for 40% of total French TV investment in their local industry and 10% of overall French cinema production budgets.

SPAA is taking up these points with the current Minister and the department over the coming months. The opportunity is there to reregulate the industry in a way that delivers national objectives both culturally and economically. The draft BSB goes some of the way. The final Bill should go much further toward structural adjustments in the industry and securing the Australian peoples' right to see and hear their stories and perspectives on their screens.

Bob Weis is President of the Screen Producers Association of Australia.

Importation of foreign actors

Martin Cooper discusses the background to recent changes to the Migration Regulations

and argues the amendments will prove a laborious and arbitrary fetter upon Australian producers

The importation of actors to appear in film and television productions has been a matter of vexed dispute between the film and television production industries and the various unions involved, particularly Actors Equity, for many years.

In an attempt to lower the level of dispute, in April 1988, a voluntary agreement was entered into between the producers and Actors Equity pursuant to which the terms and conditions of entry of foreign actors was regulated subject to usual immigration formalities.

After experiencing the agreement in action for some time, the producers perceived that the importation of actors pursuant to this Agreement was unnecessarily inhibiting and in December, 1990 gave notice that it proposed to terminate that agreement on 22 February, 1991.

Employment benefit test

From that date applications for the importation of actors were dealt with by the Department of Immigration, Local Government, and Ethnic Affairs ('DILGEA') in accordance with Regulation 62(1) of the Regulations made under the *Immigration Act, 1958.*

This Regulation made the essence of the importation requirements prior to the Agreement law and applied the so-called 'net employment benefit' test which provides:

"The entry of each overseas artist or non-performing creative or administrative professional taking part in an Australian production... will result in the employment of at least one additional Australian resident within the entertainment industry. Sponsors need to show that the entry of the overseas entertainer will generate more employment than a local entertainer would generate, if a local entertainer were to undertake the same activity."

The guidelines issued by DILGEA required that consultations take place with the relevant Australian unions on the employment or engagement of the foreign applicant in Australia.

This test of importation was perceived by the unions as giving an unacceptable flexibility to producers. Under pressure from the unions, the Department of Arts, Sport, the Environment, Tourism and Territories ('DASETT') undertook an extensive review of the guidelines relating to the importation of foreign actors and, in absence of any consensus between the producers and the unions, Section 62 of the *Migration Regulations* were substantially amended with effect from 17 September, 1991.

The New Test

The effect of these amendments is to introduce a relatively objective set of tests to apply to the importation of actors, much along the lines of the voluntary agreement abandoned in February.

These tests divide productions into two categories:

1. Government subsidised productions, i.e., productions having any form of Government subsidy other than development funding and tax concessions ordinarily available under Division 10B or 10BA of the *Income Tax Assessment Act;* and
2. Non-Government subsidised productions.

With Government subsidised productions, the test which is applied is primarily one of permitting various numbers of imports depending upon the size of the budget of the film production and the nature of that production. The various categories are detailed and relatively arbitrary.

So far as non-Government subsidised productions are concerned, the only requirement is that there be proof of a reasonable opportunity having been provided to Australian actors to participate in all levels of the production and that there is a clear need for the foreign actor whose fee must be more than met by foreign investment in the production.

These new regulations use the word "consultation" in relation to union input but practice seems to indicate that if the union is opposed to the importation of an actor the chances of importing that actor are very slim.

Very extensive guidelines have been issued by DASETT as to what constitutes giving a reasonable opportunity to Australians to play the role in question. These "casting guidelines" effectively require that professional auditions are carried out such that an actor has every reasonable opportunity to show his capacity for the role. Again experience shows that unless actors' agents show great discrimination in the persons they send to such casting sessions, the process will be very lengthy and laborious.

Finally, the Regulation details a set of guidelines as to the method and process by which consultation with Equity is to occur. These guidelines require the Producer to reveal a considerable amount of detail about the financing and production of his film in order to be said to have consulted with the unions.

Laborious & Arbitrary

While the new Regulation has not been in force long enough to permit any real experience of the way in which it will work in practical terms to be obtained, early experience would seem to indicate that producers have had imposed upon them a laborious and tedious process even if they fall within the arbitrary categories of permitted imports. Such a method of determining when importation can occur is understandable given the reluctance of bureaucrats to become involved in qualitative decisions about whether an importation is justifiable, but in the context of the internationalisation of the film and television production industries it seems a somewhat arcane if not unrealistic process.

Of course, the Government finds itself caught in the dilemma of balancing the need to ensure that Australian tax payer's money is used in this area to promote Australian culture but in such a way as not to profit any reasonable economic return being made from the production of such "culture". The simple realities of the international film and television market place appear to be that if foreign actors are not used in many types of Australia produced films, international commercial success cannot reasonably be expected. There will always be exceptional films which are very "culturally exact" and which attract a substantial international audience, but as a general rule experience shows the two are mutually exclusive.

Whatever the dilemma the question becomes whether it is an appropriate thing for organisations such as unions to be determining immigration policy or for Australian producers to be burdened with commercially unrealistic casting if they are to obtain access to any form of Government subsidy. The extent of the

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Who will be the gatekeeper?

Holly Raiche discusses the AUSTEL inquiry into privacy in telecommunications in Australia

AUSTEL has recently announced an inquiry into 'The Privacy Implications of Telecommunications Services'. The inquiry will examine two privacy issues: personal information and intrusion. Personal information issues arise when information is made available without the knowledge and/or consent or the person involved. Intrusion issues arise through, for example, unsolicited telephone calls by telemarketing agents.

The inquiry's terms of reference do not include determining where responsibility should lie for handling telecommunications privacy issues or how they will be enforced. Clearly, the Privacy Commissioner would not have jurisdiction over the private sector second carrier. However, the 1991 legislation has removed the new Australian and Overseas Telecommunications Corporation (AOTC) from the Commissioner's jurisdiction as well.

Section 6 of the Privacy Act, defines an agency (to which that Act applies) as:

"(c) a body ... or a tribunal established or appointed ***for a public purpose*** *by or under a Commonwealth Enactment..."*

When the AOTC Act 1991 is proclaimed, it will, under section 26, create an entity which will be taken for the purpose of Commonwealth, State or Territory laws as:

"(a) ***not to have been incorporated or established for a public purpose*** *or for a purpose of the Commonwealth".*

The Government's rationale for removing AOTC from the jurisdiction of the Privacy Commissioner was the 'level playing field' argument. AOTC should not be put under restrictions which will not apply to the second carrier.

Licence Conditions

The only specific privacy protections required of the two carriers are in their licences. One licence condition requires the carriers (and any other mobile operator) to ensure that any raw directories data is provided only:

"(c) in accordance with the Information Privacy Principles set out in section 14 of the Privacy Act 1988 as if the licensee were an agency within the meaning of that Act..."

As well, in providing information to emergecy services, a licensee must:

"(b) ... do whatever is necessary to comply with the Privacy Act 1988 (and, in particular, Information Privacy Principle II of that Act) as if the licensee were an agency within the meaning of that Act."

The storage and release of information which is not covered by the licence conditions is unprotected. Further, the licences do not mention how privacy principles will be enforced.

There are three options for locating responsibility for privacy issues: AUSTEL, the Privacy Commissioner (operating under an amended *Privacy Act*) or the proposed Telecommunications Industry Ombudsman.

A Role for AUSTEL

Under the *Telecommunications Act,* AUSTEL could assume responsibility for privacy issues as part of its general function of consumer protection against 'unfair practices'. AUSTEL would have to determine what carrier or service provider breaches of privacy principles amounted to 'unfair practices' and then use its powers of direction to enforce its decisions on privacy issues.

AUSTEL could also provide privacy protection through its enforcement of licence conditions. As discussed above, however, the licences require carrier adherence to privacy principles only on specific issues. Other privacy issues would have to be dealt with as 'unfair practices'.

The *Telecommunications Act* does provide AUSTEL with mechanisms for handling complaints and detailed provisions for the conduct of investigations. But it has not been determined what processes AUSTEL would use in protecting an individual's privacy. Certainly the part of the Act dealing with public inquiries does not now require an inquiry on privacy issues.

The concern with AUSTEL assuming responsibility for privacy protection springs from AUSTEL's stated terms of reference which seek comment on:

"the weight which should be given to privacy considerations in assessing the potential economic and social impacts of telecommunications services, taking into account the benefits and costs involved."

That looks very much like a trade off between an individual's right to privacy against cost. Nothing in the *Privacy Act* suggests such a trade off should be made.

The Privacy Commissioner

Another option is amending the *Privacy Act* to cover telecommunications carriers (and possibly other service providers) similar to the way it was amended in 1990 to cover credit providers. Such an amendment would ensure that privacy issues across a range of areas are dealth with by one organisation with privacy as its prime focus.

Giving the Privacy Commissioner jurisdiction over telecommunications issues would also mean that all privacy issues are handled consistently.

Other advantages in extending the Privacy Commissioner's jurisdiction include:

- The principles are clearly spelled out for anyone to read and are enshrined in legislation:
- The process for public complaint is clearly spelled out and enshrined in legislation: anyone can complain and at no cost;
- The functions of the Commissioner are 'proactive', requiring him or her to "undertake research and monitor developments, promote an understanding and acceptance of privacy principles", and importantly, to "conduct audits of records of personal information maintained by agencies". Further, the Commissioner has strong investigative powers.

Industry Ombudsman

The third option is to incorporate privacy issues into the kinds of complaints handled by the proposed industry ombudsman. The licences require carriers to establish an industry ombudsman but, at this stage, nothing further has been decided on the ombudsman's structure or functions. However, the proposed ombudsman could come to some arrangement about privacy issues, which could at the least, draw on the Privacy Commissioner's expertise and produce consistent results.

The processes of privacy protection in telecommunications are surely as important as the determinations about specific privacy issues. And clearly, those processes should be addressed as part of the public's response to AUSTEL's inquiry. Whatever approach is followed, an individual's right to privacy should have the same level of protection currently afforded by the Privacy Commissioner and the process should continue to genuinely open to the public.

Holly Raiche is a Researcher and Policy Advisor with the Sydney office of The Communications Law Centre.

Uniform Defamation Bill 1991

Peter Bartlett reviews the main features of this long-awaited bill

November 1991 witnessed a significant step towards more uniform defamation laws in Australia, with the introduction of bills into the Parliaments of New South Wales, Victoria, Queensland and the Australian Capital Territory. The bills largely follow the New South Wales *Defamation Act* 1974, with some novel reforms. Victoria, Queensland and the Australian Capital Territory will need to consider whether they wish to adopt in large part, the New South Wales Act, an Act which was described as complex and difficult to apply.

Justification — truth and privacy

The Attorneys-General of Queensland, New South Wales and Victoria have agreed to introduce a 'hybrid truth and privacy' defence. The defence will be available if the publication is substantially true. The defence of truth alone will not be available where the publication relates to the health, private behaviour, homelife or personal or family relationships of the person concerned. The Bill then takes the unusual step of providing some examples of situations in which the publication of a person's private affairs may be warranted in the public interest.

It is felt by the Attorneys-General that truth as an absolute defence (which presently exists in South Australia, Western Australia, Northern Territory and Victoria) does not sufficiently protect a person's privacy. Implicit in the above argument is an acceptance by the Attorneys-General that the law of defamation should provide a compromise between the competing interests of the individual's right to privacy and the public's entitlement to being fully informed.

A "hybrid truth and privacy defence", assumes that reputation and privacy are inextricably linked. The Victorian Attorney-General Kennan remarked that "a law of defamation that permits the media to justify intrusions of privacy on the basis of truth alone is no longer an appropriate law".

It is questionable whether reputation and privacy should be linked in such terms. First, defamation and privacy are concerned with different interests. Defamation law is designed to protect a person's reputation. On the other hand privay protects a person's private matters such as marital or family relationships.

The recent disclosure in a Melbourne Sunday newspaper of the HIV positive status of an acclaimed ballet dancer serves as a good illustration of the differences between the concepts of privacy and reputation. Invasion of privacy was the ballet dancer's real grievance. However, to obtain a remedy under the truth and privacy defence, the ballet dancer would be forced to bring an action in defamation which inevitably focuses on his reputation, when reputation was irrelevant to the grievance complained of.

A further problem is that unwarranted intrusions into a person's privacy may not always be defamatory. For instance the Law Council of Australia in its second submission gave the example of a politician of whom it was published that his child was a drug addict. Even though the politician may have felt there was an unwarranted intrusion into his private life, it was probably not defamatory of him to say that his child was a drug addict. In these circumstances no remedy is available.

Truth alone should be a defence in defamation. Publishers should be free to publish material that is true. If material deals with privacy matters then the appropriate remedy should be contained in a new privacy tort.

Truth alone is also simpler, clearer and easier to apply than a truth plus privacy provision. Proof of the truth of the matter is sufficient. Journalists and editors are also assisted in their work by the ease with which they may apply this rule. The inherent vagueness of the notion 'privacy' makes the application of a defence of truth and privacy more complicated. The media and their legal advisors may find a need to edit by second guessing juries. This can have a significant impact on freedom of speech.

Contextual truth

At common law the defendant will only succeed in a defence of justification if it can prove the truth of every imputation pleaded by the plaintiff.

The common law has been modified in New South Wales and Tasmania. Section 16 of the New South Wales Defamation Act provides a defence to any imputation complained of so long as one or more of the imputations contextual to the imputation complained of are matters of substantial truth.

The Attorneys-General have proposed the introduction of a defence of contextual truth, similar to s16 of the New South Wales Defamation Act. However, the defence will only be available where at least one imputation is substantially true, and the publication carrying the imputation was not an unwarranted intrusion on the plaintiff's privacy.

It would seem to be in the interests of justice that a defendant who can prove serious imputations against a plaintiff, should not be liable for damages if the defendant fails to prove the truth of lesser imputations.

Official notices

Every jurisdiction in Australia affords some protection to the publication of official notices. Victoria, via s.5A of the Victorian Wrongs Act, provides the narrowest protection. Publication of documents is privileged so long as they are issued by a senior member of the Victorian Police Force, and are for the purpose of protecting the public or gaining information that may be of assistance in the investigation of an alleged crime. All other jurisdictions provide protection for the publication of a notice or report by a government department or officer, at the request of the government department or officer.

The proposal of the Attorneys-General expands on the statutory qualified privilege provided for official notices by extending the categories of protected official reports. A defence will be available for the publication of any notice, or fair report or summary of the notice of report in accordance with an official request. Official requests can now come from any member of the police force, a council, board or other authority or a person appointed for public purposes under the legislation of any State or Territory or of the Commonwealth.

Qualified privilege

The defence of qualified privilege is an acknowledgment that it is, in some circumstances, in the public interest for people and the media to express themselves freely, and be protected, even if the publication is untrue and defamatory.

At common law a statement will attract qualified privilege if the material was published in the performance of a legal, moral or social duty, to a person who had duty to receive it. It has been virtually impossible for the media successfully to plead the defence.

Section 22 of the New South Wales Defamation Act 1974 was aimed at giving the media greater access to the defence. However, narrow interpretations by the courts of the 'reasonableness' requirement has effectively denied the availability of qualified privilege as a defence for the media.

The current bills retain the common law qualified privilege defences and the present statutory defences in New South Wales and Queensland, and provide a new defence, so long as the defendant proves that a statement related to a matter of public interest, was made in good faith and was made after reasonable inquiries.

Even though the reform is touted as a significant move toward opening the availability of qualified privilege to the media, it may turn out that this defence will not make much difference to the present interpretation of s22 of the New South Wales Act.

It is difficult to see how the media can succeed in the new defence, unless they are prepared to disclose their sources. The defence will however be useful where sources are not in issue.

Correction statements

Court-recommended correction statements would be a novelty to all jurisdictions in Australia. As pointed out by the Attorneys-General, their introduction is based on the belief that they "may be very effective in partially, or even in some cases fully, restoring reputation and assuaging damaged feelings."

A prompt and well placed apology is viewed by the Attorneys-General as often the most appropriate remedy to restore a person's reputation.

Monetary damages have traditionally been the main compensatory tool for damaged reputations. However their status as the main remedy has been said to be more historical than practical. The Australian Law Reform Commission was similarly not enthused about damages when it reported that "not merely are damages inappropriate to vindicate reputation, the link between liability and damages has prejudiced plaintiffs".

However, the proposal in the bills contains practical and administrative problems. The creation of this new remedy will impose additional legal expense on both parties. There will be a need for at least two appearances before the Court. An application for a correction statement will be dealt with on an interlocutory basis if defamation proceedings have been commenced. Will the application be by oral evidence or affidavit material? If by affidavit, what does the mediator do if the defendant simply swears that it stands by the story and will plead justification.

Variation in the standard of proof and the admission of evidence between interlocutory proceedings and trials can also be of importance. For instance, hearsay evidence is admissible at interlocutory proceedings but is inadmissible at trial. The standard of proof at interlocutory proceedings is the balance of convenience, whereas at trial it is based on the balance of probabilities.

The bills also omits to define the way in which correction statements are to be labelled. If the correction was labelled 'court ordered' or 'court recommended' then the public could be deceived in thinking that the matter had been fully settled, while if it appeared that the defendant published it at his or her own volition, subsequent success at trial by the defendant would confuse the public.

In terms of vindicating a person's reputation, a correction order would need to be obtained quickly. The Attorneys-General believed that "to be effective, it is imperative that this system be a 'fast track' procedure." For defendants, normally media groups, the 'fast track' procedure may not provide sufficient time for a proper assessment of the matter. If the Attorneys-General believe that court involvement in this area is justified, which is open to some doubt, a system of compulsory pre-trial conferences, immediately after the issue of the proceedings, would be preferable.

The role of juries

In New South Wales all defamation actions are heard by juries. In the Australian Capital Territory they are all heard by a judge sitting alone. In Victoria both the plaintiff and the defendant can elect to have the case heard by a jury, otherwise the case is head by a judge sitting alone. If the case is being heard by a jury, the jury would determine both whether the publication was defamatory, and if so, the level of damages.

There will be no alteration to the present law in Victoria. New South Wales and Queensland will allow the jury still to decide whether the publication is defamatory, but the judge will decide quantum. The Australian Capital Territory Bill follows the New South Wales Bill, but it is not clear whether that envisages the introduction of juries into the Australian Capital Territory.

This is an area in which there will not be uniformity between the various states. This is unfortunate. A preferable course is to allow the jury to continue to assess damages, with the judge providing some guidance, a system recently accepted by the High Court. Without recounting all the arguments for the retention of the juries, it is still widely accepted that a jury has the capacity to reflect wide sectional community values. In this sense, the value placed on a person's reputation by a jury is more representative of the social morals. In addition, there is some doubt that the Attorneys'-General view that judges deciding quantum will lead to lower verdicts, is accurate.

Limitation periods

The bills propose that actions in defamation be brought within six months from the date upon which the plaintiff first learned of the publication, with an absolute limitation period of three years.

If forum shopping is to be avoided then proposed changes to the limitation period need to be uniform. When limitation periods differ between jurisdictions, plaintiffs whose actions are barred by jurisdiction have the opportunity to sue in another jurisdiction where the limitation period is longer.

Peter Bartlett is a partner with the law firm Minter Ellison.

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anticipated union involvement in the immigration aspects of the importation of artists is borne out by the fact that Actors Equity has now advertised for the appointment of a full-time employee to be known as the "Imported Artists Officer". Finally, we must ask the question of whether it is not appropriate that Australian actors should attain their professional status and acceptance solely through talent rather than through artificial barriers to competition. In a climate where such barriers are removed for all manufacturing and secondary industries we must ask whether they should not also be removed for the so-called 'cultural industries'.

Martin Cooper is the principal of Martin Cooper & Associates, solicitors of Sydney.

Commercial Impact of the Uniform Defamation Bills

Robert Todd discusses the practical effects of the new Bills on broadcasters and publishers

Australia has moved a step closer to uniform defamation laws with the recent tabling in Queensland, New South Wales, Victoria and the Australian Capital Territory of draft Defamation Bills. The Bills mark the culmination of a lengthy and controversial period of consultation which is to continue while the Bills proceed through the Parliaments. It is anticipated that consultation will continue until approximately February 1992 when each of the governments have indicated that they are likely to legislate to make the principal provisions law in each State.

The Bills adopt a format which is similar to that adopted by the *New South Wales Defamation Act 1974*. This will provide a level of consistency and comfort for most media organisations who will be familiar with the provisions of the Act although some of the changes to the Act have been criticised as being regressive or unnecessary. The Bills, like the Act, do not exclude the operation of the common law but insofar as the Act provides, but modify it in certain respects.

The adoption of the New South Wales *Defamation Act* as a basis for the new Bills may assist in limiting the impact of their introduction on the conduct of national publishers or broadcasters who already have to adopt an approach of accepting the lowest common denominator to ensure compliance with the variety of existing State legislation. The Bills will have their most significant impact on publishers in States other than New South Wales. Lawyers with experience of the New South Wales *Defamation Act* will be able to provide immediate advice on the Bills' likely operation on those States.

Impact on Publishers and Broadcasters

However, the Bills will have a significant impact on publishers and broadcasters in the following areas:

Damages: While the legislators hope damages will be limited by their assessment by judges rather than juries, this may not be the effect of the legislation. In jurisdictions which allow the assessment of damages by judges a number of high awards have been made but low awards are not uncommon. Thus, plaintiffs are more likely to institute and pursue proceedings if judges' assessments result in greater certainty. Further, the legal costs associated with defamation litigation, are unlikely to be restrained by this development given the increasing imposition of costs penalties by way of either offers of compromise and/or the effect of the proposed correction statements.

Correction Statements: It is likely that these provisions will lead to a signifiant number of applications for court recommended correction statements to enable plaintiffs to take advantage of the costs and damages sanctions. Most publishers and broadcasters will need to have in place a system for dealing with these applications quickly and efficiently.

Limitation Periods: Whilst the reduction in limitation periods is likely to be beneficial to publishers and broadcasters by eliminating some potential actions, it is also likely to encourage prospective plaintiffs to apply for a correction statement in circumstances where they would otherwise have delayed action.

Legal Compliance: Publishers and broadcasters will need to review their existing compliance systems to ensure that they are updated and, im particular, will have to ensure that all journalists and management understand the Bills and their operation.

Correction statements

The most commercially significant of the proposed changes will probably be the correction statements.

Publishers, in handling complaints, will be under significant time constraints and pressure. Their response to complaints and demands for correction statements will require careful and speedy consideration of any matters of significance and importance to publishers and journalists.

Clause 44 of the New South Wales *Defamation Bill* provides that a party or prospective party to defamation proceedings (whether or not proceedings have been commenced) may apply to the court for an order *recommending* that the publisher publish in a specified way and time a correction order in the form approved by a court or by a mediator appointed by the court.

It should be noted that:

- Publication of the correction statement is not mandatory.
- No inference of liability can be drawn from the publication of the correction statement.
- Evidence of, or relating to, the correction statement is not admissable in evidence before a jury.
- Correction statement can only be sought within a period of 14 days after service of initiating process or prior to the initiation of proceedings.
- Correction statements are initiated by way of a notice of motion before the appropriate court.

Sanctions for correction statements

Clause 59 of the New South Wales *Defamation Bill* provides that a court in assessing damages or awarding costs may take into account five factors:

- Whether a correction statement was published.
- Whether or not a plaintiff applied for a statement and an application for a statement promptly.
- If a correction statement is published — whether it was published promptly, its contents, position and prominence.
- If publication is made after an order under Clause 44, the publisher's reasonableness in adopting the recommendation or any unreasonable rejection by a plaintiff of the defendent's willingness to publish such a statement.

It is highly likely that in all actions, either contemplated or initiated, a prudent plaintiff will make an application for a correction statement to maximse the potential award of damages or costs particularly as the failure to do so may adversely affect his/her position. In those circumstances, publishers must have in place a system by which they can prepare material to establish their case for an appropriate correction statement, or that a correction statement would not be appropriate. This proposed clause will significantly increase the managerial and legal time spent in dealing with complaints.

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Pay TV: A new policy for Australia

Kim Beazley outlines the Government's plan for the regulation of pay TV

Pay TV is to become an integral part of a package of reforms in broadcasting foreshadowed by the Prime Minister during the 1990 election. As you know the draft enabling legislation for pay TV services is contained in the Broadcasting Services Bill. The Bill is not, I stress, a final Government position: it is the basis on which wide-ranging public consultation can be undertaken. However, there are some fundamental building blocks within it which deserve attention.

The community and the industry must realise how different pay TV is from free-to-air TV.

Free-to-air TV has been the most successful mass entertainment media in history and will continue that dominance in mass audience reach well into the 21st century. But there has always been widespread consensus that the viewers need government intervention to fully protect their interest.

Often this has been by way of regulation, to guarantee adequate and comprehensive cover or to ensure Australian content. That is because it is the viewers who have always been the goods on sale in the commercial TV market, rather than the programs. It is the advertisers who have been the consumers, and they measure the value of their purchase by the cost per thousand reached, not the quality or quantity of the programs on air.

Pay TV is different. It is a new market place for programs, somewhat like a retail shop. The individual viewer chooses whether to buy and which products are bought. The monthly subscription returns should give a clear indication of individual levels of satisfaction with types of programs in a way not hitherto possible in television. Unless the program package is very different from free broadcasting, the public will not pay for something they can obtain by simply turning on their TV sets.

The regulation must recognise this difference. We must not make easy assumptions about this new service, based purely on radio and TV experience.

Considerable Risks

The Government knows the considerable risks in starting a new business on the scale of a national, satellite delivered pay TV service. It will need a group of people with vision, great skills and very long pockets, to assist at the birth of this new

industry. But there is also a tremendously exciting opportunity on offer. There is no longer any reason why entrepreneurs should not be given an opportunity to balance the risks against possible gains.

It is because the Government recognises these risks that it has decided that there will be a single four channel national pay TV licence in the first instance. The timing of the allocation of rights to any further channels will be a matter for Government consideration. It is also in the viewers' interest to have certainty about the supply of the service as they are making threshhold decisions as to whether to buy new receiving equipment and subscriptions.

Although most Australians will get to know subscription TV through the national pay service, the exposure draft leaves the way open for niche services. This is an opportunity for community language services which would not be viable on a national scale and also for highly localised operations and the licencing regime will reflect this.

At this stage it appears technologies, other than the satellite, cannot provide large scale TV services for subscription. If the pace of technological change quickens over the next few years, the draft rules should provide enough flexibility for any necessary adjustments.

Licensing

Through the licence allocation process, the Government expects to hold detailed talks with potential service providers as a necessary part of setting workable licence conditions.

The allocation of rights for the four channel pay TV service on Aussat will be a price based allocation process. I wish to proceed as soon as possible with the sale, but licence allocation cannot be concluded until the enabling legislation is in place.

My present thinking is that we would proceed as with the sale of Aussat and the second telecommunications carrier licence. We have learnt that this process has positive features in this type of sale, particularly in gathering industry information to enable practical licence conditions and selection criteria to be set.

We should be advertising early in 1992 for expressions of interest in providing a four channel satellite service, as the first stage of the process. Further stages could include a request for proposals and a formal information memorandum from the Government, before the final tender process is concluded.

Existing broadcasters have argued that pay TV will undermine their audience base and affect revenues. But even without competition from pay TV, average weekly viewing declined in the 1980s as viewers sought out their own alternatives to a night in front of free-to-air programming.

However, as a safeguard, the five year advertising moratorium gives existing broadcasters ample time to resolve their current predicament and adjust to new and emerging services such as pay TV. Indeed, the decision enables some diversification of their broadcasting operations to aid in that adjustment.

Ownership Rules

There is a limit to which existing broadcasters will be able to diversify their operations into pay TV. I might emphasise at this point that a limit of 25 per cent has been imposed, not because of some Government paranoia about any media ownership. There is a principle at stake here about the risks to society from insufficient diversity of ownership in the media if pay TV is not structured to encourage new participants. The Government also has an eye towards adverse effects on business competition.

The Government has already acted to cap foreign ownership in commercial TV because of television's pervasiveness and power to influence. But pay TV is, as I have said, different. After five years it will reach probably only 20 per cent of

households, and even then the audience will be spread over four channels.

But the Government is also conscious of the substantial capital resources a pay TV operation will require and that severe limits on foreign equity could lead to additional foreign debt, particularly since there may be only a limited pool of Australian investment funds. Banks are certainly a lot tougher these days on broadcasting finance. A venture into pay TV could be enhanced by the equity, experience, technical expertise and access to program material overseas companies could contribute.

The Government considers that it is in the national interest to ensure majority Australian ownership for pay TV. However, this is a new industry with an as yet undetermined structure and market base. Specific limits could jeopardise the industry's viability if they were locked in, at the wrong level, before the Government had the opportunity to discover more details of that market.

After the expressions of interest phase, the Government will set the limits for both aggregate cross media ownership and foreign ownership and either legislate them, or make them part of the licence conditions to be enforced by the new Australian Broadcasting Authority.

Delivery Technology

The Government has made an in-principle decision that pay TV delivery technology should be, to the greatest extent possible, a matter for commercial decision.

Nevertheless the Government sees considerable national benefits in establishing common in-home electronics infrastructure that receives and manages decoding and subscription services. This would minimise consumer equipment costs and minimise the likelihood of the emergence of a technological barrier to entry for future market participants. This is why the Government, with the involvement of AUSTEL, will be seeking to get together with the industry after the allocation process for the four channel satellite service has been finalised to settle on a transmission system which will optimise those benefits to the nation.

The Government will also expect the successful four channel licensee to develop a local industry package to minimise the involvement of Australian industry in the development of pay TV. This should not be difficult.

Program Siphoning

One issue which seemed to be reported widely during the recent public debate over pay TV was the issue of program siphoning. There is no doubt that Australian television audiences are accustomed to watching key sporting and cultural events of national significance. The Government considered this should continue to be the case.

We were also aware that pay TV could also open up new markets for some sporting events that now get little free-to-air coverage such as softball, netball or baseball. It should also provide more coverage for existing sports, which have only limited coverage, like Sheffield Shield cricket.

Rather than prohibiting pay TV from acquiring any rights to events of national importance and cultural significance, the Government sought to facilitate the wider coverage of events by only banning pay TV from the *exclusive* rights to events on a special list before free-to-air broadcasters have purchased them. This would allow pay TV services to have access to programming but would not prevent non-subscribers from receiving important events on free-to-air TV.

This list would be promulgated by the existing Minister for Transport and Communications, and I would imagine could include such events as the Melbourne Cup, the Commonwealth Games and football grand finals. However, I expect that any public opinion on the contents of the list will be expressed during the public consultation phase on the new Broadcasting Services Bill. We must make it clear to potential pay TV operators which events are to be protected under the anti-siphoning provisions.

I also fully expect rumours of sport disappearing will circulate regularly but the Government intention is clear. Pay TV is designed to augment free-to-air sports coverage.

Australian Content

Australian content on pay TV is another important issue. The Government believes Australian content is an essential component in fulfilling its broadcasting objectives. There is evidence that audiences have a preference for Australian drama, sport and news. I expect pay TV to achieve a high level of Australian content, from its inception, on any sport and news channels. Where coverage of cultural events or educational programming is part of the package, it will also need Australian content to build subscriber interest. This will provide employment opportunities for presenters, reporters, producers and camera crews.

I believe pay TV will also provide an additional outlet for Australian drama, often seen as the leading edge of programming which explores the Australian identity. Producers will be able to sell their programs to both pay TV and free-to-air TV, knowing they have a bigger range of customers. Many programs produced in Australia for pay TV will also have significant export potential into a world market where the expansion of TV channels (largely subscription) is leading to a demand for programs that Hollywood will not be able to satisfy.

Regulations for a minimum level and diversity of Australian content has been applied to free-to-air broadcasting to ensure that television reflects an Australian identity and Australian cultural values. The regulation also provides a degree of security for the Australian production industry.

But the Government has to take into account the direct contractual relationship between pay TV subscribers and program providers: if viewers don't like programs across the four channels they will not subscribe. Therefore pay TV is, more akin to hiring a video or buying a magazine. The Australian content policy must reflect consumers' greater influence. This is already the challenge for producers and programmers watching what happens in the video shop and cinema.

The Government also understands that in the early years when it has only a small subscriber base, pay TV will be financially limited in its capacity to commission much in the way of the more expensive drama programs — as broadcasters were limited at the start of television.

With no experience of pay TV in Australia, there is the potential for misallocation of resources if mistakes are made in trying to guess the viability of the industry and subscriber demand.

In these circumstances, the Government saw the benefit in determining any prescribed level of Australian content when more is known about the cost structure of the pay service. This is why it is more appropriate that the Australian Broadcasting Authority should consider the Australian content requirements for pay TV, when it is clearer what sort of programming is under consideration.

But there is no question of the Government's commitment to the role of pay TV in deepening the resource base for Australian programming. We must all learn as we go how best to do this.

This is the edited text of a 15 November 1991 address given by Kim Beazley, then Minister for Transport and Communications, to a Pay TV conference in Sydney.

Judicial recognition of the insert business

Allan Sorrell discusses a recent English case which found that publications can have valuable goodwill as providers of inserted advertising material to their readers

The "Insert" business involves the inclusion of supplementary material, especially advertising fliers, within publications such as newspapers. It is a huge business worldwide. The *New Zealand Herald,* has reportedly spent (NZ) $40 million to exploit this market, including the purchase of a Swiss Ferag insert system, capable of regionalised advertising inserts for any one of six regions.

The English Court of Appeal has recently delivered a blow to some players in the insert business in a decision which was handed down in June last year.

The dispute

Associated Newspaper Plc publishers of the *Daily Mail, the Mail on Sunday* and the supplement *You* magazine, sued Insert Media Limited. It sought an injunction to stop Insert Media inserting advertising and other material into Associated Newspapers' publications. Associated Newspapers was already in the business of selling the rights to insert material and wanted to stop insertions of unauthorised material.

After a five day hearing, the Court granted the injunction, but Insert Media appealed. The Court of Appeal judgment gives persuasive guidance as to what would happen in similar situations before the New Zealand and Australian courts. It also assists in identifying what might happen where advertising is attached to other products.

Before the first hearing Insert Media in fact offered to print on each insert a disclaimer dissociating the insert from the particular Associated Newspapers' publication.

Evidence was given that the *Daily Mail,* had a circulation of 1.8 million, while *The Mail on Sunday* and its supplement *You* had a circulation total of 1.9 million.

The source of revenue derived from those publications was interesting. The Court accepted that about 60 per cent of the income from the *Daily Mail* was from actual sales. This figure was 25 per cent in the case of *The Mail on Sunday.* The balance came from advertising revenue. Associated Newspapers charged for the rights to insert advertising material, either loose or stitched in, at different rates from advertisements incorporated within the copy of the newspapers.

Evidence was given of a boom in inserts over the last five years. The Judge listed the evidence as to the benefits of insert advertising, which included flexibility and more accurate targeting than can be achieved through advertising within the body of the copy.

Goodwill and standards

It was accepted by Associated Newspapers and Insert Media that Associated Newspapers had established goodwill as a media for advertising to their readership. The Court of Appeal was greatly influenced by the benefits advertisers derive from association with a reputable newspaper.

Associated alleged that the unauthorised inserts damaged that goodwill in a number of ways. Loss of control over the content was a major issue. Associated had obligations arising from membership of the Mail Order Protection Scheme and the Newspaper Publishers Association and submissions to the British Code of Advertising Practice. These standards did much to maintain advertising standards and improve protection for readers. The Court found Media Insert did not belong or submit to any similar organisation.

Agreement with wholesalers

Evidence was given that about 75 per cent of the wholesalers had agreed not to make unauthorised inserts while discussions were continuing with most other wholesalers. This practice had been approved by the equivalent of the New Zealand Commerce Commission and the Australian Trade Practices Commission.

Disclaimer and Damages

The Court refused to accept that the disclaimer proposed by Media Insert would be effective. Associated Newspapers' rights for which protection was being sought were broader than rights attaching to other products. There was a misrepresentation that the insert, albeit loose and only folded in, was produced by Associated to their standards. This is the key finding by the Court of Appeal. It said this misrepresentation, with these facts, could not be undone by a disclaimer.

In another situation consumers of Sony products not backed by manufacturers warranties were considered adequately protected by disclaimer stickers. Purchasers of Seiko watches, in circumstances where the manufacturer's warranty was invalidated, have been held by the courts to be adequately protected by a disclaimer.

A point of distinction may be that the decision to purchase a newspaper will be taken without the careful reflection or examination made by the buyer of a watch or a Sony product. The damage is still hard to identify. A purchaser of the newspaper may be disgruntled by the insert but, at that point would, by virtue of the disclaimer, be aware it was not the newspaper publisher's product.

The Court of Appeal nonetheless found there was damage to reputation and goodwill. They also signalled, but did not determine, the possibility that damage occurred where advertisers were able to use inserts at a lower cost through newsagents with the result that the revenues of Associated Newspapers would be impaired.

The English Court of Appeal has therefore effectively protected the business opportunity represented by the practice of inserting advertising material in publications.

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November amendments: fundamental or technical?

Joan Malkin and Deena Shiff discuss recent amendments to the Telecommunications Act

The November 1990 Micro Economic Reform Statement on telecommunications foreshadowed the main competitive safeguards for the introduction of a second carrier in Australia. These included the obligations that the Australian and Overseas Telecommunications Corporation (AOTC) interconnect its network to the network of the new carrier and that it gives the new carrier access to ancillary facilities which it required. AOTC would also be required to carry and complete calls on behalf of the new carrier.

Responsibility for the determination on how interconnection and access would work was delegated to AUSTEL. The result was a series of reports issued in June on the commercial and technical aspects of interconnection. Shortly thereafter, the *Telecommunications Act* 1991 was enacted giving effect to the restructure of the industry and providing for the introduction of the second carrier.

The boundaries of the concepts of interconnection and access in the Act, together with the licence conditions establishing 'supplementary access' (eg to facilities such as ducts, poles and masts) determine the boundaries of the regulated (and preferential) pricing regime available to the second carrier, the permissible scope of a registered access agreement between the two carriers and each carrier's obligation to provide services to the other.

Section 137

In November, Parliament passed a series of amendments to the Act. The amendments to section 137 of the Act were described by the Senate as "of a technical nature" and which the Supplementary Explanatory Memorandum noted were necessary to remedy "technical defects" in the original section 137. Technical perhaps, but the amendment has resulted in a fundamental change in the conceptual underpinnings of the Act.

Prior to the amendment, section 137 provided that a carrier had the right to interconnect its network facilities with the network of another carrier. It also obliged the other carrier to carry communications across its network for the purpose of the first carrier supplying telecommunications services. The Explanatory Memorandum noted that section 137 established both a carrier's right of interconnection and the associated right of having its calls carried and completed by another carrier. It noted that "these rights are of the kind that should reasonably apply to all carriers in an open competitive environment".

Section 138

These rights are to be distinguished from the supplementary access rights provided for in section 138 of the original Act. Prior to amendment section 138 rights related to access to facilities, information, and billing and directory services. The Explanatory Memorandum noted that these rights were "necessary to assist a second general carrier in overcoming the competitive advantage of the dominant incumbent".

The regime established by the Act, then, provided the two classes of rights. The section 137 class of rights related essentially to the interoperability of the carriers' networks. The rights were reciprocal in nature and could be justified by the fact that, with interconnected networks, a carrier necessarily has to carry and complete calls of the other carrier's customers.

By contrast, the section 138 rights were warranted because of the incumbent carrier's dominance and advantage: to enable the second carrier to 'catch up'. These rights were to be reflected as conditions of the dominant carrier's licence, an instrument more readily capable of amendment than the Act. As the Government expects that in time the telecommunications market will become effective and competitive, these supplementary access rights will only last so long as AOTC is the dominant carrier.

Telecommunications services

The November amendments marked a significant shift in emphasis from the original carefully plotted regime. While Section 137, as amended, preserves the right to interconnect facilities and networks, the carriage obligation has been replaced by the obligation to supply telecommunications services.

The term 'telecommunications service' is defined broadly in the Act to mean "a service for carrying communications by means of guided or unguided electromagnetic energy or both". It encompasses higher level services, which a carrier has no obligation to provide under the original section 137 (except perhaps where incidental to carriage across its network). It also encompasses basic carriage services, bringing within the reach of section 137 services which are wholly unrelated to interconnection and network interoperability.

By way of example, section 137 now obliges a carrier to provide transmission capacity to another carrier, even where that transmission capacity is utilised in, and as part of, the other carrier's network or where it is used for non-interconnected calls. The exclusion of such services under the original section 137 is one of the technical defects referred to in the Supplementary Explanatory Memorandum.

"In particular... section 137 was not clear (as to whether) dedicated capacity and leased lines may become part of the network of the second carrier for the purposes of section 137, and accordingly would not be dealt with under the access right in the existing subsection 137(2)".

Reasonableness

In short, while earlier concerns focused on the scope of interconnection and access, the amendments to section 137 have redirected attention to the range of services one carrier must provide to the other. The obligation to supply telecommunications services is subject to a carrier 'reasonably requesting' the service. 'Reasonableness' is largely to be determined having regard to the objects set out in section 136.

Section 136 speaks of:

- promoting the long-term interests of consumers;
- protecting and promoting competition
- enabling the carriers to compete on a level playing field protecting carriers from a misuse of market power in relation to access to essential facilities or access to customers.

While the boundaries of 'reasonableness' are certain to be tested at each turn, it is too early to assess how the objects will be interpreted. At a minimum, the notion of 'essential

New Zealand access to the Australian broadcasting industry

Jim Stevenson discusses the framework governing the trade in broadcast services between Australia and New Zealand and concludes that freer trade requires further micro-economic reform and Government commitment in Australia.

The capacity of individual states to intervene in all facets of the broadcasting industry is becoming increasingly limited in the global broadcasting market. Neither New Zealand nor Australia can operate regimes effectively in the longer term which seek to insulate their countries from global factors.

In the markets for the provision of services both to and by the broadcasters, we are seeing increased linkages in business and employment in both countries. This dimension to our integration in the global market place is likely to intensify as a result of Closer Economic Relations (CER) micro-economic reform of the Australian economy.

New Zealand regime

The New Zealand regime for services to broadcasters and services by broadcasters is very liberal by international standards. There are no statutory entry restrictions into broadcasting, including no industry specific foreign ownership restrictions. There are no cross media ownership restrictions apart from New Zealand's general competition law under the *Commerce Act 1986*.

Ample radio frequencies for television and radio have been released and spectrum management policies are liberally administered. Provision is made for the regulation of technical standards but few regulations exist — except to prevent radio interference.

Behavioural standards are largely based on self regulation although backed by intervention by a Broadcasting Standards Authority.

There are no mandatory content quotas on broadcasters. Cultural and social policy objectives in broadcasting are assisted directly by a public tax described as the public broadcasting fee which is dispensed by an independent authority on competitive terms. There has been some experimentation with voluntary 'quotas'; for instance New Zealand music on radio.

The national environment for broadcasting in New Zealand reflects the underlying micro-economic reforms in New Zealand in recent years to make New Zealand's economy internationally competitive. It also reflects other factors. For example New Zealand is a net importer of technology and of programming. Unlike other industrialised countries, New Zealand has ample spectrum availability. Unfortunately there are limitations on a small economy to sustain significant infusions of public money or advertising revenue in broadcasting and this limits New Zealand's ability to support New Zealand identity programming. We have to use what we have efficiently.

Australian regime

The Australian national environment for broadcasting is much more regulated at present. There are continuing restrictions on entry into television and radio markets although Australia does enjoy a range of national and regional television and radio options. Management of the radio spectrum is along traditional administrative lines and distinguishes between different technologies and markets, for instance, video audio entertainment and information services (VAIES) and pay TV. There are artificial markets in FM frequencies.

Restrictions on foreign ownership. There are also cross-media ownership restrictions in addition to general competition law.

Australia maintains an independent regulatory authority, the Australian Broadcasting Tribunal, which administers elaborate regulation of entry and Australian content.

The current regime in Australia, in part, reflects the more limited progress on micro-economic reform in Australia. In part it reflects the interests which have arisen from earlier commercial entry into radio and television than took place in New Zealand. There is a very strong emphasis placed on promoting Australian cultural identity in an economy with a greater capacity to support assistance measures. Spectrum management policies reflect all the above factors. Correspondingly the greater range of competitive restrictions on services to and services by broadcasters leaves Australia more vulnerable to complaint internationally and bilaterally from New Zealand.

The TransTasman framework

Bilaterally the main elements of the TransTasman trade framework for broadcasting services are:

- the ANZCERTA agreement;
- the Services Protocol;
- ministerial Undertakings and Arrangements;
- inter agency cooperation; and
- national legislation.

ANZCERTA was primarily designed to facilitate the free flow in goods, but under its auspices all manner of arrangements have been concluded.

Services Protocol

The Services Protocol of 1988 is the key instrument for the further development of free trade in services, and particularly in broadcasting.

The objectives of the Protocol are to liberalise barriers to trade in services, to improve the efficiency and competitiveness of service industry sectors, to establish a framework of rules to govern trade in services and to facilitate competition in trade in services. The Protocol requires each country to grant to persons of the other country and services provided by them both access rights and treatment in its market no less favourable than those allowed to its own persons and services provided by them. The Protocol applies to all service sectors, except those sectors inscribed by each country in the Annex to the Protocol. Both countries inscribed various aspects of broadcasting and communications in the Annex.

Ministerial understandings and arrangements

In this category falls the exchange of letters of 1988/1989 relating to Ministerial understandings on the use of AUSSAT satellite facilities for

telecommunications and broadcast services between Australia and New Zealand. In particular, New Zealand sought an undertaking from the Australian Government that TransTasman broadcasting (and telecommunications services) take into account respective standards regimes. I understand these arrangements are presently under review no doubt to tie in with the changing environment for AUSSAT. Another example of TransTasman cooperation is found in the necessary coordination mainly under the International Telecommunications Union of AM radio services. Australian and New Zealand officials also consult regularly on spectrum management issues of mutual interest including harmonization of technical standards.

Retention of reservations

Australia's list of exemptions from the Services Protocol includes extensive coverage of telecommunications and broadcasting regulations. At the time the Protocol was negotiated in 1988 New Zealand had not advanced beyond the point of policy commitments to liberalisation in its broadcasting sector. New Zealand's reservation referred to the then broadcasting warrant restrictions as well as foreign ownership restrictions. It also noted restrictions on short-wave radio services and satellite broadcasting and narrowcasting services. For its part, New Zealand with its extensive liberalisation of broadcasting markets, should have no particular reason to maintain its reservation. For its part, Australian regulation has been retained and arguably intensified in some quarters. Obviously New Zealand's commercial objective is to seek further movement in the lists.

There have been various officials' meetings over the past year or so with respect to the Protocol and the reservations in particular, as part of the agenda to be worked through for the 1992 review of the CER relationship. I understand that although there may be a willingness on both sides to update the reservations, substantive changes are not yet envisaged on the Australian side. The Australians do not see the micro-economic reform process being driven by CER considerations.

Program standards

New Zealand believes that Australian television and radio programming and television advertising standards are not in conformity with the national treatment provisions of the Services Protocol. They do not provide fully for equal national treatment for service providers. The three standards which have caused most concern in the area of television are Australian content for television programs (TPS14) and television advertisements (TPS19).

TPS14 sets a detailed scoring system for drama which is intended to ensure minimum levels of Australian drama and children's drama, and a quota which is intended to ensure that a specific percentage of transmission time is devoted to Australian programming. The aim of TPS14 is to seek an 'Australian look'.

New Zealand's position is that it does not accept that TPS14, constitutes a justifiable exception to the services Protocol. Australia for its part has argued that TPS14 does not discriminate against other foreign investment or involvement of foreign executive producers in the production of Australian drama. Australia also claims that its obligations under the OECD liberalisation code do not allow it to discriminate in favour of New Zealand.

Generally, New Zealand has made no progress at the official or ministerial level on this general issue, but some movement was detected in the terms of reference given by the Kim Beasley, the former Minister of Transport and Communication, to the ABT, to enquire into the effects of co-production treaties on the Australian film and television industry. New Zealand's arrangement with with Australia fell within the terms of reference, which directed the ABT to consider Australia's international obligations. But far from giving full consideration to the Services Protocol and the CER relationship, the Tribunal surprisingly delivered a robust dismissal of Australian obligations under CER in its Report. The New Zealand Government, in August 1991, delivered a strenuous and detailed rebuttal of both the interpretation of CER and the Services Protocol, and the general obligation of Government agencies to give effect to treaty obligations in their domestic practices.

Advertising standards

The case of TPS 19 illustrates difficulties which have arisen in ensuring compliance with the Services Protocol obligations. The ABT is conducting an inquiry into foreign content in TV advertisements. The present arrangement is that advertisements produced in New Zealand are treated as Australian made advertisements. Accordingly, New Zealand made advertisements are not subject to the foreign content rules on advertising established by the ABT.

However, in the course of a 1990 inquiry, the ABT issued a 'Preliminary View', a draft proposal which would reclassify New Zealand made advertisements as foreign advertisements.

Following publication of the Preliminary View, both the New Zealand Government and advertising industry made a series of representations to the ABT and to the Australian Government. As a result of these representations, the ABT released a second draft proposal which restored the classification of New Zealand advertisements as locally made.

This second draft has not yet been implemented. But even if it is promulgated in its present form, it would represent only the maintenance, after a significant struggle, of the status quo. There still remain aspects of the present standard which discriminate against the New Zealand advertising industry. The present standard states that advertisements with a level of foreign content higher than the prescribed limit of 20 per cent may be permitted if produced outside Australia by Australian personnel. However I understand that a further effort is now being made to persuade the ABT to liberalise in this area as well.

Conclusion

Free trade in TransTasman services affecting broadcasting are still some distance away. In part, progress will depend on micro-economic reform in Australia.

Compliance issues under the Service Protocol have also arisen largely because insufficient effect has been given to the Protocol by some administrative agencies in Australia. In part this may be a reflection on the level of commitment of Australia to free trade in services but it may also reflect the difficulties internationally of maintaining elaborate regimes to protect cultural identities based on regulation rather than direct financial assistance.

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Blasphemy in a pluralistic society

Kerrie Henderson discusses the recent Monitor blasphemy case in Indonesia, and considers its implications for Australia.

Under Australian common law, blasphemy can only be committed in a Judaeo-Christian context. Blasphemy against religions not based upon the bible is not an offence. To justify a conviction the material complained of must 'shock and outrage the feelings of Christians': fairly difficult in an increasingly secularised community. Provided you express your views temperately, not even a denial of the fundamental doctrines of Christianity will found a successful prosecution.

As Australian multiculturalism develops, protecting only one religion from attack has become incongruous. It can be seen as state preference for one social group above others. For the sake of equity, some people have argued that outraging the feelings of people of any religion should be punishable, while others argue that this just highlights the absurdity of the state intervening to protect religion in a pluralistic society. The latter argue that the offence should be done away with as an interference with free speech.

The offending material

A case earlier this year in Indonesia raises some pertinent questions for the Australian debate.

Monitor was a popular Jakarta based tabloid journal, of the gossip and scandal variety, published by one of Indonesia's largest publishing houses. The magazine's editor, Arswendo Atmowiloto, was famous as a journalist and writer and for his pursuit of celebrities with intimate questions.

Monitor conducted a poll in which it asked its readers to write in and nominate the person they most admired. The results were published in October 1990, and the top ten included President Suharto, the Minister for Technology (Habibie) and Arswendo himself. Unfortunately for Arswendo the top 10 did not include the Prophet Mohammed, who came in at number 11.

The outcry was immediate and dramatic. *Monitor's* permission to publish was withdrawn. Arswendo was thrown out of the Journalists' Association, sacked from all Gramedia businesses and boards and arrested on charges of affronting Islam and breaching the press ordinances in his capacity as editor.

The trial

The principal charge against Arswendo was that he had breached section 156(a) of the *Criminal Code* which forbids conduct which affronts a recognised religion (which in Indonesia means Islam, Buddhism, Hinduism, Catholicism or Protestantism). 'Affronting' is said to be characterised by hostility towards the religion. *Monitor* was in breach of the *Main Press Ordinance* of 1982, section 19 of which prescribes the publication of blasphemous material.

On behalf of Arswendo, it was argued that the criminal offence of affronting religion required both intention to offend and the use of insulting words. While Arswendo had been careless or negligent, he had not intended to offend and had merely published a factual reflection of what readers sent him, without any comment or remark.

The bench of three judges ruled however that the *Criminal Code* did not require the use of insulting language, and that intention to do the offensive act was sufficient without intention to offend. Expert Islamic lawyers explained that according to Islamic law Allah, the Prophet and the Koran are inseparable and comparison of any of them to mortal things or people was to demean and denigrate the standing of all.

Having found that the publication was blasphemous, the judges also found that it breached the *Press Ordinance*. They then decided that, as editor, Arswendo was personally responsible for this breach even if he had in fact delegated the task of compiling results and preparing copy to others.

Arswendo is now serving a five year jail sentence and is required to pay a (Aus) $5,000 fine.

Australian Implications

The Arswendo case highlights a number of pertinent questions which will need to be resolved if Australia's present blasphemy laws are to extend to all religions.

Firstly, how do you define what a religion is? Indonesia has adopted the course of simply recognising a limited number of religions and requiring all citizens to adhere to one or other of them. That course would not be acceptable here. Is Scientology to be considered a religion for blasphemy purposes? Can you shock and outrage the adherents of so-called cults by suggesting that their dogma is a fraud?

Secondly, how do you determine what shocks and outrages the adherents of a particular religion? The law of blasphemy works from the assumption that everyone is Christian, with the result that any reasonable person can determine what would cause affront. Once you recognise a multiplicity of beliefs how do you assess degrees of offensiveness? In the Arswendo case the Indonesian court did so by calling Koranic lawyers as expert witnesses to testify: which means that offensiveness is assessed on a subjective basis, from the point of view of the reasonably learned adherent of the religion in question. Adopting this sort of standard creates the impossible situation where detailed knowledge of different religions would be the only way one could avoid giving offence to anyone.

Linked to this is the problem of drawing the limits of offensiveness in any given case. Simply including the Prophet in the poll was sufficient in Arswendo case. On the other hand it is unlikely that a similar listing of Jesus Christ or Buddha would generate outrage among most Buddhists or Christians. Catering to variations in religious sentiments may be even more offensive to egalitarian sentiments than the current position.

Further, who would judge such cases? Religion is an intensely personal and emotional matter, where strong views abound. It is unrealistic to expect the religious sentiments of judges and jurors to be able to be effectively excluded.

If blasphemy laws are inegalitarian the preferable course is to abolish them entirely. The Indonesian laws work, if harshly, only because of the highly regulated nature of that society. In a more open pluralistic environment like ours the extension of blasphemy protection to any and all religions is more likely to result in an unholy mess than in religious equality.

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Technological developments in the music industry

Randall Harper examines the implications for copyright law and contracting in the music industry of recent developments in technologies and argues the legislators should be more pro-active.

With the advent of digital technology, the past five years have seen vast and rapid developments both in the style of music being recorded and the manner in which it is distributed. The use of computer technology and digital recording methods has seen the emergence of new and exciting genres of music, the boundaries of which are limited only by the creativity and vision of our artists.

Even more dramatic have been the rapid developments communications technology systems. Twenty years ago, things like home banking computers and direct to residence entertainment systems were just dreams. However, modern communications technology has changed that and these developments are likely to have a profound effect on the structure and dynamics of the music industry as we know it today.

Digital technology

All of these new technologies involve digital recording reproduction and transmission techniques. Compact disc has now become by far the dominant physical carrier, all but eliminating vinyl as a viable product. Digital audio tape (DAT) was touted some years ago as being the natural successor to CD due to the inherent flexibility of tape over disc formats, particularly for recording purposes. It has, however, now been virtually conceded that DAT is unlikely to evolve into a product for public consumption and will remain a professional product for studio use. In the short term the music industry sees digital compact cassette (DCC) as being the next major leap forward in product development.

While these technologies present great opportunities they also give rise to some problems. The challenges posed by CD and DCC technology revolve around the flexibility and more efficient re-recording opportunities that digital technology offers. CD and DCC constitute, effectively, a first generation master standard which means that any copy of an original CD or DCC will also be of the highest order in terms of quality. This will undoubtedly lead to increased home taping.

Gone are the days when one needed to have a $5,000 hi-fi system and use chrome tapes to replicate an acceptable reproduction quality from an analogue sound recording. Digital recording techniques mean that quality virtually equivalent to master standard can be achieved with the most inexpensive of home entertainment systems. In addition, digital tracking enables a home taper to pick and choose what tracks they wish to record with great ease. Thus, the home taping problem is likely to escalate dramatically.

As the quality of CD recordings do not degrade as readily as vinyl recordings, we are also likely to see the emergence of record rental as a major challenge. During the past eighteen months there has been quite a large increase in the number of rental outlets operating throughout Australia. Given the Japanese experience, where there are currently some 6,000 record rental outlets, it is easy to see why the industry is so concerned. Unfortunately, the federal government has been very slow to react to the threat of record rental and even today is equivocating about legislative action.

Pay for play

In the short term we will see the introduction of DCC and a progressive shake-out of current product lines so that eventually we will just have CD and DCC as the only carriers. These carriers and technologies by their very nature will lead to many new and exciting marketing opportunities.

In the long term, however, I believe communications technologies will have a far greater impact on the music industry. Optical fibre cabling offers the ability to deliver music and other entertainment services in an extremely fast and efficient manner without any degradation of quality and theoretically with a virtually unlimited capacity.

The so-called 'black box', whereby a consumer will subscribe to an entertainment service provider by means of his home computer and the public telephone system may seem fanciful but the reality is that the technology for such systems already exists. With the use of integrated computer technology it will also be possible for consumer to dial up a music provider, select the music required, and down-load that music onto a CD or DCC.

This may mean that record companies will act as entertainment service providers distributing their catalogue of recordings via communications technology and not via a physical medium such as a CD or DCC. Partnerships and mergers between record and communications companies can also be expected.

The recording process itself is likely to change as well. Traditionally artists record albums of music because that is the medium by which music is traditionally distributed. If however there are no physical carriers but rather music is distributed electronically will artists still record the obligatory 10 track 40 minute album?

Copyright problems

The revolution in technology will also require a revolution in copyright law and the manner in which creators of music go about protecting their rights. One of the most important developments in this regard is the concept of a blank tape royalty scheme.

Australia has been leading the way in the development of a blank tape royalty scheme although it is currently stalled due to a constitutional challenge. Moves to introduce similar schemes in the United States and United Kingdom have also been stalled at government level.

However, recently in the United States the music industry and hardware manufacturers negotiated a deal relating to the use of DCC technology for the distribution of music. Essentially the hardware manufacturers have agreed to the imposition of a blank tape royalty and a royalty on the sale of hardware in return for record companies making their software available to the technology. However the royalty at this time only applies to digital audio and video tape and players with digital capability. The scheme is currently before the USA

Congress and should see a speedy passage.

In addition, the hardware manufacturers have agreed to incorporate a serial copying code in their equipment. This effectively inhibits reproduction of a recording so that it is only possible to reproduce from an original version of the sound recording in question. It is not possible to take a copy and then copy from the copy.

The fact that electronic transmission knows no borders will also present major problems requiring a radical rethink about territorial divisibility of copyright.

Reactive not pro-active

The current *Copyright Act* was enacted in 1968 drawing largely from the 1911 Act. Consequently, much of the language and many of the concepts enunciated and embodied in the Act evolved from the very beginning of copyright and fail to deal adequately with changes in the way copyright material is exploited. In particular, technological developments are simply not catered for by the current Act. Consequently, our copyright law is reactive to technological change, rather than being pro-active.

For example, under current copyright law (in relation to sound recordings) copyright is said to be the right to reproduce a sound recording, broadcast a sound recording and publicly perform a sound recording. There is no diffusion right afforded sound recordings, therefore it does not constitute a breach of copyright to transmit a sound recording down a telephone line. Similarly, there is no record rental right so that it is not an infringement to exploit a sound recording by means of rental. By defining copyright rights in exhaustive terms such as these, and in particular by reference to a specific act or technology, problems will always exist. Copyright law must get away from this and start talking in terms of protecting the exploitation of copyright material.

Why does it matter that the use is either a reproduction, broadcast or public performance? Surely if a sound recording is being commercially exploited then the copyright owner should be remunerated accordingly and/or have the right to control that exploitation.

he music industry recognises that copyright infringement will continue to pose major problems and has begun developing a system whereby original sound recordings can be identified by means of a unique number encoded in the digital code of the sound recording. The code constitutes digits that identify country of source, company, and the recording in much the same way that bar codes are structured. The code system is being developed by the International Federation of Phonographic Industry (IFPI) and is known as the International Standard Recording Code (ISRC). The system enables copies of a recording to be identified quite readily and when fully introduced will be of enormous benefit in enforcing copyright rights.

Tracking use

However, the main benefit of the ISRC does not lie with copyright protection, but rather in offering a way in which the legitimate use of sound recordings can be tracked for the purposes of remunerating copyright owners. If the 'black box' does evolve, or indeed if record rental is legitimised, the ISRC will enable each and every use made of a particular recording to be tracked and identified. There will no doubt be many marketing uses to which such statistics could be put, but most importantly it will enable not only the record company and publisher to be remunerated for the use but will provide an effective system by which to calculate and pay the appropriate royalty to their artists and songwriters.

Details of each access to a recording would be collected by the service provider or on 'smart cards' which the consumer would require for access to the service. The statistics would then be collated and analysed for the necessary and appropriate royalty computations.

The ISRC system has now been fully developed by IFPI and is ready for implementation. Indeed I understand that all major companies are now using the code and it is now about to be implemented in Australia by the Australian Record Industry Association for Australian companies and recordings.

Contracts

By and large recording contracts are structured around an artist rendering their exclusive recording services to the record company to produce albums and for the record company to have a right to exploit those albums in any manner appropriate. In exchange the record company pays the artist a royalty based on the sale of records. Most recording contracts will incorporate a clause dealing with sundry or ancillary income, broadcasting and public performance royalties but usually this is couched in very general terms and therefore presents some problems.

We are already seeing an increase in the amount of broadcasting and public performance income and, if the blank tape royalty scheme ultimately becomes operational, substantial income streams from this source will also be realised. Additionally, if the government enacts record rental and diffusion rights we are likely to see further large revenue flows from such rights. Consequently, sundry income clauses or royalty provisions dealing with such matters can no longer be simply left as an after-thought. Music companies will have to make provision in their contracts for appropriate remuneration to their artists. Moreover, record companies will need to begin developing accounting systems to cope with their obligations to remunerate their artists for these other uses.

Distribution of income

The major problem is to determine how income should be distributed. For example, public performance and broadcasting income is usually paid to record companies in a lump sum based on market share of record sales. Is this appropriate given that record sales are not necessarily indicative of broadcast and public performance activity? Should a record company be able to adopt a method of distributing such income to its artists which is at odds with the method adopted to account to the record company in the first place. Blank tape royalties may be distributed on a different basis and record rental a different basis again. The manner in which this income is treated will have to become much more sophisticated if the distribution is to be equitable.

We are experiencing a revolution in communications and computer technology which is likely to have a profound effect on the manner in which the music industry is structured with a consequential impact on copyright law and deal making. It will require the industry to be more forward thinking, pragmatic and lateral when addressing these developments if it is to fully realise the opportunities arising.

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The hidden impact of the law on reporting

Julianne Schultz argues that not only the defamation laws but the legal system and commercial considerations constrain investigative journalism

It is important that by welcoming the reforms to the law of defamation that the Attorneys-General of the eastern States have put, we do not give the impression that the press will be much freer as a result of those changes. As well as defamation and contempt laws, political and economic pressures have a very significant impact on what the media publishes and broadcasts.

The legal playing field is not an even one. It may seem trite to point out that the way media law operates reflects the political and economic relationships of the individuals and institutions involved — but there has been almost nothing written analysing the media law from this point of view.

What price are we paying for Australia's restrictive defamation laws — restrictions in loss of information and freedom of expression? How much of that price is due to timid publishers and the high general costs of litigation and how much to the law itself? How often do important stories remain in the notebooks of journalists?

The law itself, except in a few cases, has not prevented the publication or broadcast of whole articles or programmes. But when you examine the whole of the legal process, defamation law affects the form and content of stories told.

As Armstrong, Blakeney and Watterson acknowledge in their manual *Media Law in Australia*, "no satisfactory empirical studies about the practical effect of defamation law have been carried out". It is not surprising then that the proposals for reform contained in the recent discussion paper issued by the Attorneys-General have been framed with more understanding of the problems the law presents for lawyers, than of its practical impact on the day to day workings of the media in general and journalists in particular.

The study

The approach adopted in a research project being undertaken by me and Wendy Bacon is to examine what is lost from stories before publication and the role of threats of legal action and apologies and closed door negotiations which have little to do with the defamation writs as such.

Our project involves a detailed study of the impact of the law on twenty-five investigative articles and programmes. The stories have been chosen randomly although we have attempted to spread between different states and media, and have included many of the best known stories of the 1980s. The study also includes interviews with a number of journalists and lawyers about their views and impressions of the impact of the law on journalism.

The Moonlight State

Without Chris Masters' report on Four Corners, *The Moonlight State*, there probably would have been no Fitzgerald inquiry. That program got to air, but sections of it were line-ball. A less courageous executive producer and legal adviser might have been prepared to expose illegal gambling and prostitution rackets, but not to raise serious questions about the police commissioner. But without its political dimension, the program would not have had the same impact.

At the time the program was broadcast, there was no evidence which could have been produced in court of actual corruption directly involving ex-Police Commissioner Terry Lewis. And yet he had presided over a police force which was corrupt. There was no assertion in the program that he was corrupt, but would his very presence impute corruption as well as incompetence? This is the sort of fine distinction that the defamation advice turned on. In the case of Lewis, ABC lawyer Bruce Donald, advised in favour of publication. Even so journalists involved were disappointed that ex-Premier Joh Bjelke Peterson had to be suitably distanced from the action disclosed, and felt that the program may have lost impact as a result.

Would any other broadcaster than the ABC, with its public service charter, have broadcast this story? The answer to this question is almost certainly no. This is an important distinction, because it was the commitment to a public debate that informed the legal advice. Such a commitment is often excluded by those seeking to interpret the law more strictly.

Legal vetting

Most investigative stories are legally vetted as a matter of course before publication. Certainly lawyers went over most of the stories we are examining with a fine-tooth comb. In a number of cases, the legal advice given to editors and producers was equivocal: for instance, "there are dangers but it is up to you".

In many cases, sections were omitted and words fine-tuned, with an ear to legal imputations, before publication, sometimes in a way journalists believed weakened the impact or obscured the meaning. Only one story was not published at all (ostensibly) for legal reasons.

Of the twenty-five stories, twelve actually attracted at least one writ after publication. There were attempts to injunct four other stories before publication, for reasons other than defamation such as secrecy laws. Most of these defamation writs have not gone beyond the statement of claim stage.

Five of the writs have been resolved in favour of the plaintiff. But since this might give the impression that, at least in these cases, innocent victims of the media have been deservedly compensated, it is worth looking more carefully at these results.

In the one case which went to trial, a jury found that two policemen, who claimed associates could identify them from an article about police corruption, had been defamed but awarded only nominal damages. In another case, in a confidential settlement, ex-NSW policeman Roger Rogerson was paid a sum of money by Channel 9 for a program which dealt with his role in the shooting of heroin trafficker Warren Lanfranchi.

The other three cases involved well-known public figures. In each case, management became directly involved in negotiations with a representative of the plaintiff while the journalists and editors were kept in the dark until after negotiations had been completed. In each of these cases, there is a strong possibility that political or commercial, rather than simply legal considerations, were involved in these negotiations.

Who negotiates?

To spell out the significance of what happened in these cases one needs to remember the procedures which are *usually* followed at settlement of legal cases. Settlement is negotiated between lawyers in consultation with clients. In the case of an alleged defamatory story, journalists and editors and executive producers, and lawyers representing the organisation will be involved in consultations leading up to settlement. Journalists will not necessarily be informed of the actual terms of confidential settlements.

You might expect the senior management of the media organisation to become involved when decisions are being made about spending money but not to the exclusion of editors and certainly not to the exclusion of the lawyers acting for them.

In these cases, media management became directly involved in negotiations with representatives of the plaintiff to settle the cases while journalists and editors were kept in the dark until after negotiations had been completed. In one case, even the Fairfax lawyers were unclear about the reasons for a settlement with Alan Bond.

These cases occurred in the mid eighties. Each involved an extremely powerful plaintiff. Unfortunately, space dictates that only one case be discussed.

Bond case

This case involved an article in the *Sydney Morning Herald* alleging that directors of Bond Corporation had taken advantage of the public shareholders to the tune of millions of dollars. One needs to remember that this was the mid eighties and this was only the second critical article to appear in the otherwise laudatory press enjoyed by Bond. Martin Saxon, who co-authored the *Sydney Morning Herald* article with Colleen Ryan, had originally prepared the article for publication in the Robert Holmes A'Court owned *Western Mail*. Despite the piece being legally approved, the paper refused to publish the story and Saxon resigned. There was much agonising at the *Herald* before publication, however, the article was passed by a QC and the decision to go ahead was finally given. Bond not only sued but withdrew all the Tooheys beer advertising from John Fairfax and Sons.

While the writ was pending, another smaller *Times on Sunday* article dealing With Bond's affairs was stopped at a managerial level although it had been approved both legally and by the editor. There is still confusion amongst editorial staff about the terms of settlement with Bond which came unexpectedly. Despite legal advice that the company could defend the action, Bond was given a large advertisement in which to state his case against the article in the *Herald*.

Self-censorship

Do journalists have a lot of stories which they feel should be published but cannot be because of the defamation laws? This question is difficult to answer because experienced journalists may adapt so well to the law that they do not attempt to write stories which they know will not reach the standard of evidence that lawyers require. For example, one journalist interviewed several independent, but confidential, sources who supplied information about the corrupt practices of a leading Australian businessman. She was personally convinced of the veracity of the story, but knew it was no use writing it except anonymously in the context of a more general piece about business corruption. Another journalist believed material he had gathered in taped interviews should have been published but was convinced that it would not be legally approved, so did not attempt to write it up until after the NSW illegal tapes story was published. He blamed this cautious approach on his previous experience with the particular lawyers and publishers involved, rather than on the law itself.

Nevertheless, it is significant that some of these experienced journalists could not name a story they had been unable to publish at all because of the law and were even sceptical of journalists who blamed the law for their own inadequacies. One even said that stories which were completely knocked back by lawyers were not up to scratch anyway. These journalists have learnt the standards of proof required by lawyers and several commented that they thought they had become better, more careful and imaginative reporters as a result.

Yet most investigative journalists are still very critical of the way the defamation laws work. Some of their reasons are:

- To meet the standards required by our restrictive defamation laws, stories can become more obscure and writing more clumsy. For example citing court reports and Parliamentary proceedings because they are privileged. Since these reports have to be identified, a story can develop an awkward and distracting chronology.
- Journalists are tempted to adopt a bargaining attitude, eliminating or weakening some points in their dealings with lawyers in order to get a story published.
- Defamation laws use up valuable time and resources. Journalists spend days preparing material for lawyers in cases in which the plaintiff never intends to proceed. Small publishers may scarcely even be able to afford to file a defence in an action, let alone defend it in court.
- Publishers often become more cautious if there is a risk of exacerbating damages following the commencement of proceedings ('stop writs') or if a public figure is known to be litigious.
- Journalists often use confidential sources. Because a journalist who will not name a source, he or she can be charged with contempt and lawyers will not consider calling him or her as witness in a defamation trial. As a result, settlements are reached in cases where the publisher believes in the truth of the story.
- Journalists are frustrated by having to prove not only the truth of each separate assertion and the inferences they intend to draw from these but also meanings they never intended in the first place.

Conclusion

Journalism plays a crucial watchdog role in the effective functioning of a democratic state. For journalism to serve this function effectively journalists need to be able to publish or broadcast matters of public importance in a way which is less fettered than the current law permits. But they should also not shirk from doing the hard work of proving the allegations they wish to raise as conclusively as possible.

Some have argued that the defamation law itself is not the problem, but merely the cautiousness of journalists and lawyers. The two cannot be easily separated. That cautiousness is itself a reflection of the uncertainty, fine distinctions in the law and the threat of damages which, in the leaner 90's, few can afford to run the risk of having to pay.

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Alcohol Advertising in New Zealand

Bruce Slane examines new solutions for the broadcast of alcohol advertisements

Double standards have been nowhere more evident in New Zealand than in official and private attitudes towards the regulation and control of alcohol.

A nation with a high per capita consumption of beer (in particular) nearly carried prohibition during the First World War and maintained 6 pm closing of bars until well after the Second World War. Restrictions have always been maintained against brand advertising of alcoholic beverages on radio and television.

Background

Under the previous *Broadcasting Act 1976* an attempt was made to introduce a rational code for radio advertising of alcohol products. When the State owned Broadcasting Corporation of New Zealand resisted change, the independent radio broadcasters requested me to preside over a special meeting of the Broadcasting Rules Committee and deliver a casting vote in the event of a deadlock. I did so in favour of the adoption of some rules based on the British Code.

Within about a week the Muldoon Government had passed a regulation outsting the new rules and restoring the old ones. For the next ten years the New Zealand Broadcasting Tribunal received a series of complaints, mainly from one complainant, about breaches of the alcohol advertising rules. The Broadcasting Rules were accepted as anomalous, badly drafted, inconsistent and in many ways avoidable. No government was prepared to tackle the situation. It was convenient for the Government to say that brand advertising was banned.

Corporate Advertising

The evidence seen and heard by the public was that brands were promoted. One simple way was to use the provision for corporate advertising. This provision allowed the name of a company, even though it incorporated the brand name of an alcoholic beverage, to be promoted and advertised on television and radio.

Liquor companies formed subsidiaries whose names were identical with their brands. While a complete ban on advertising of cigarettes was successful, was quite impossible to control brand advertising of alcohol. Tobacco outlets do not incorporate the name of cigarette brands into their trading names. Liquor outlets did. An effective rule would have incidentally banned the advertising of the names of many restaurants and hotels. Sponsorship of sport and recreational events was another problem.

The liquor industry seemed not unhappy with the anomalous rules. Broadcasters became increasingly frustrated as they saw media advertising budgets allocated to print and extensive sponsorship deals providing "free" television and radio coverage of brand names.

The position was not resolved by the *Broadcasting Act 1989* but it did provide a framework by authorising the Broadcasting Standards Authority to approve codes for advertising and to maintain restrictions on alcohol advertising and to protect the young in respect of advertising.

Liberalisation

The Broadcasting Standards Authority (BSA) accepted the challenge and after carefully preparing the ground with interested groups and carrying out research, has proceeded to liberalisation to permit liquor brand advertising in return for concurrent moderation messages of sophistication and impact. While some believe that the broadcast media have sold themselves into a package that they will find increasingly inconvenient in the years to come, and the liquor industry does not seem to have encouraged the changes, the charge is over and direct brand advertising commenced on 1 February 1992.

Significantly, the BSA has adopted an industry code developed for some years for the print media and more latterly incorporated into the Broadcasting Standards under the old regime where it sat somewhat uneasily. The BSA has made some specific modifications for both radio and television but has come down firmly in favour of an alcohol code for all media with specific rules as may be necessary for a particular medium.

Self-regulation

The advertising industry's body, the Advertising Standards Authority Inc. (ASA) promulgates and administers a voluntary code and has set up the Advertising Standards Complaints Board (ASCB) with lay participation to adjudicate on complaints. The ASCB has dealt with a large number of complaints quickly and informally. It has made a bid to take over administration of complaints under the *Broadcasting Act*. The BSA has resisted this move saying that it should at least be responsible for the promulgation of the code. The industry body has no disciplinary power other than the agreement of all media to desist from publishing an offending advertisement. A review by the Ministry of Commerce favours a transfer of the complaints jurisdiction from the BSA to the self-regulating ASCB.

It will be interesting to see whether the Government accepts that a non-legally enforceable role for an industry body is acceptable or whether it needs to be vested with statutory powers. Its lack of statutory powers enables it to act informally and to be largely free from judicial review.

The speed with which it can deal with complaints is somewhat better than the BSA which has to follow statutory procedures and is subject to a right of appeal to the High Court.

Brand Advertising

The BSA was aware that the existing rules regarding sponsorship advertising by alcohol advertisers were being evaded and the meaning of the rules inappropriately extended. The new rules would bring sponsorship advertising under the same strict code which currently covers brand advertising in print and cinema.

Research had shown that sponsorship advertising had become so extensive that the public were under the impression that alcohol advertising was already permitted on radio and television.

The BSA had also been concerned that the existing alcohol sponsorship advertising was "very macho and aggressive", a style which it finds undesirable.

The BSA acknowledged that there could be an effect on the amount of sponsorship money available when direct brand advertising became available, but it believed that direct brand advertising was to be preferred to sponsorship provided it was carefully controlled in content and

timing. The existing rules tended to prevent the advertising of essential information about price and availability while sponsorship promoted alcohol products by giving them positive images of health, fun, sport, winning, the positive attributes of a team approach, and nationalism.

Overall the Authority found that there was more evidence that there was no strong casual link between advertising and consumption than there was to the contrary.

Evidence presented to the BSA showed that the amount spent on alcohol advertising in New Zealand, in inflation adjusted dollars, had increased significantly over the past decade, whereas the consumption of branded alcohol products, excluding home brew, had stabilised or declined. For the protection of children and young people the BSA decided there would be no alcohol advertisements permitted on television between 6 am and 9 pm. It did not want to restrict too severely the time when brand advertising was permitted as the effect may be to create a blitz of advertising for products which, because of the saturation of advertising, emphasised the products unduly.

The BSA is opposed to alcohol advertisements which show children or teenagers at all, even though they are clearly not drinking alcohol. Beyond that, the BSA endorsed the present industry rule that anyone shown in an advertisement must be over 25 and depicted as an adult.

Clearly concerned about public opinion the BSA decided to trial the new codes for a two year period with the first review after six months. The BSA was particularly perturbed about aggressive macho themes in recent sponsorship advertising and wanted to see a willingness to facilitate promotion of educated messages regarding moderation and the no-alcohol option. It rejected compulsory warnings and advertisements in favour of an agreement with the industry which has to produce and broadcast moderation messages of a similar quality and standard to alcohol advertisements.

Some problem areas have been foreseen. Advertising on radio stations targeted at a young audience was one. The BSA has accepted broadcasters' assurances that the new rules will be followed in the spirit as well as the letter of the law. That was not always the case under the old rules.

Warnings to industry

There are warnings for the industry: if there is an impression of saturation of liquor promotion, including sponsorship and programme credits, the BSA will impose restrictions on the number of liquor promotion messages per hour: liquor advertisements must not employ aggressive themes, nor portray competitive behaviour or exaggerated stero-typed masculine images in an overly dramatic manner; advertisements which feature sport must place emphasis on scenes typical of the sport and within the rules of the sport rather than the aggression of the participants especially in contact sports.

Sponsorships may feature hereos or heroines of the young participating in a sponsored event or engaged in conduct related to a sponsored event but such people are banned from advertisements except those advocating moderation in alcohol consumption or the non-alcohol option, provided there was no reference to a branded product.

Although the definition of advertisement under the code does not include the former *Broadcasting Act* definition which defines advertisements to include those for which payment is made indirectly, it appears that the BSA, at least during the two year period, will have a heavy influence on the attitude of broadcasters who want to maintain the new regime.

The BSA appears to have done a very good job in pulling a difficult area together into some coherent and sensible approach. Probably it was the only body which could take this role. Certainly politicians would have buckled under a very long-standing and successful industry lobbying ability (and may yet do so)

Bruce Slane was the Chairman of the New Zealand Broadcasting Tribunal from 1977 to 1990. He is now a partner with Cairns Slane, Barristers & Solicitors, Auckland.

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 Slane

SECOND CARRIER OPTUS COMMUNICATIONS

On 6 December then Transport and Communications Minister Beazley announced that Optus Communications was selected to be the second Australian general telecommunications carrier. The announcement was made after the signing of formal contracts with the Federal Government for the sale of AUSSAT. At the signing, the Government accepted a deposit of $10 million in what will be a total payment of $800 million by Optus for the purchase of shares in AUSSAT.

Network rollout

The documents signed included an Optus industry commitment concerning telecommunications industry development in Australia, and a network rollout commitment in which Optus specified its confidential plans for a rival network to that of the merged Telecom/OTC. Signing of these documents now allows the final steps to be taken to enable Optus to take ownership of AUSSAT following repayment of AUSSAT's debt and the restructuring of lease arrangements associated with the acquisition and ownership of the AUSSAT satellites.

Future operations

In total, Optus plans to spend $1.6 billion over the next six years in building its own network. STD and IDD services will begin in Sydney and Melbourne in late 1992 and full competitive services will be available by 1997.

Optus Communications is a newly formed company, 51 percent owned by Australian investors including Mayne Nickless, AMP, National Mutual and the AIDC Telecommunications Fund. Overseas equity holders are Bell South of the US and Cable and Wireless of the UK.

Public mobile licences

Optus as second general carrier has also secured the second public mobile telephone licence. (The first to be held by the merged Telecom/OTC.) The third licence holder is expected to be selected towards the end of 1992.

OTHER TELECOMMUNICATIONS REFORM

National Transmission Agency

In October Mr Beazley announced the establishment of a new agency, to be called the National Transmission Agency ("NTA"), to operate the Commonwealth's broadcasting transmitting network and deliver, primarily, ABC and SBS services.

Transport and Communications amendments

On 25 November an omnibus *Transport and Communications*

Legislation Amendment Act was proclaimed. Amongst other things, this Act amends the *Telecommunications Act 1991* in relation to interconnection by carriers of networks and services of other carriers, and specifically gives each carrier the right to have other carriers supply telecommunications services to it for the purposes of it supplying telecommunications services. A distinction is also now drawn between domestic and international services for the purposes of the right to interconnection and the right of interconnection to network facilities, even if third parties also use or operate some or all of those facilities.

Telecommunications and Radiocommunications Statutory Rules

On 25 November a plethora of Telecommunications Regulations were gazetted which, among other things, permit the second carrier to engage in certain installation activities despite State and Territory laws, permit AUSTEL to allow another carrier to become a party to certain Telecom agreements, establish the financial mechanism for calculating the second carrier's fees, and detail how much each application to provide some form of telecommunication service will cost.

Radiocommunications Regulations were also gazetted, covering transmitter licences for public mobile telecommunications services and AUSSAT services, cordless telephone and public mobile telecommunications service licence. Further Radiocommunications Regulations were gazetted on 12 November which have eliminated some taxes, reduced licence fees, and provide new definitions of Multipoint Distribution Stations and other local systems.

New South Wales Government initiative

The New South Wales Government Telecommunications Bill 1992 has been enacted. It is an innovative method of achieving efficiencies for the State of New South Wales. The Act will permit the installation and maintenance of a Government network within 'designated land' (basically a corridor of land surrounding lines vested in a new Government Telecommunications Authority. The Act also centralises ownership of telecommunication infrastructure for the carriage of Government only traffic.

BROADCASTING SERVICES BILL

As reported in the last issue of this column, an exposure draft of the Broadcasting Services Bill was released on 6 November 1991. While the *Broadcasting Act 1942* has been profoundly criticised as a cumbersome relic, the draft Bill has also been rejected by a remarkable coalition of commercial broadcasting operators, the ABC, unions and public interest groups. The focus of opposition to the Bill is that it introduces too much competition too soon, and that could have undesirable effects on viability, Australian content and local productions.

A new regulatory framework

Commercial television faces not only pay-TV in a year but also the end of the three network limit in 1997. Radio faces immediate competition with the proposed abolition of foreign ownership limits and cross-media rules. Of greater significance is the abolition of all current barriers to industry entry and the doing away with of the 'commercial viability' test applied at the time of issue of new licences. Indeed, the new Australian Broadcasting Authority ('ABA') is specifically empowered to maximise the commercial use of the broadcasting spectrum. The Bill is also an attempt to reduce the amount of regulation of the broadcasting industry.

An avalanche of criticism

The ABC is opposed to those parts of the Bill that give the ABA any control whatsoever over it (eg complaints handling, pay-TV). Unions such as Actors Equity argue that the removal of barriers to entry will reduce the quality and local production.

The Bill's failure to recognise a basic disfunction between broadcasting diversity and quality television is perhaps its most serious weakness. The draft endorses both concepts which, on their own, are mutually inconsistent: more channels may produce diversity of viewing, but it will be mainly overseas programs as all channels will find it difficult to fund quality productions from their competition reduced revenues.

PAY TELEVISION

On 9 October the Federal Government cleared the way for the introduction of pay television in Australia, with the existing moratorium being lifted from 1 October 1992. Pay-TV would be delivered by at least four channels on AUSSAT satellites and an additional two AUSSAT channels would be available for the further development of pay-TV systems.

Programming

Strict syphoning rules would ensure that important programs, including national and international sporting and cultural events, would continue to be available on free to air television. The licence for the multi-channel national service will require the owner to develop a local industry package to maximise the involvement of Australian industry in the development of pay-TV. Mr Beazley said that the Australian Broadcasting Authority established under the Broadcasting Services Bill will be asked to consider appropriate Australian content requirements for pay-TV services.

Equity limits

No owner of a television licence will be permitted to own more than 25 percent of the national pay-TV licence, and a 25 percent limit on equity participation would also apply to the carriers of pay-TV signals. Mr Beazley said that the Federal government would ensure that there was a majority Australian ownership in a national pay-TV service, and would also give further consideration to an appropriate level of cross media participation. There will be no advertising on pay-TV for the first five years of operation.

OTHER BROADCASTING REFORM

Six TV channels?

On 6 December it was announced that a Federal Parliamentary Committee will shortly begin a national inquiry to investigate the potential for non-commercial use of the vacant sixth television channel. Public television groups have been seeking access to this channel for years and the potential for delivery of educational services via television is becoming increasingly recognised by educational institutions. The channel could also be used as an outlet for Australian independent film productions and for televising Parliamentary proceedings. The Committee has called for submissions to be in by the end of February 1992 and is planning to hold public hearings in March.

(Further) Broadcasting Amendments

On 6 November the Broadcasting Amendment Bill (No. 2) 1991 was introduced to Parliament. The amendments contained in this Bill to the *Broadcasting Act 1942* will define the term 'commercial viability' for the purposes of the licensing provisions of the Broadcasting Act and limit the circumstances in which commercial viability is considered by the Australian Broadcasting Tribunal when conducting certain licence grant inquiries.

It will also enable supplementary radio licences to serve an area smaller than that served by the related commercial radio licence when it would not be viable to serve the greater area. It will further allow a supplementary radio licence to be separated from the related commercial radio licence any time from two years after the

commencement of the commencement of the supplementary service.

This Bill also reduces fees payable by new services commencing on the FM radio band, and it will transfer provisions relating to the calculation of fees to the *Radio Licence Fees Act 1964*.

Equalisation

More than 1.5 million television viewers in northern New South Wales and regional Victoria will soon be able to tune in to two additional commercial stations under the Federal Government's TV Equalisation plan. TV Equalisation began in southern and central New South Wales in 1989 and was extended to regional Queensland early in 1991. Viewers from Cairns to Portland will soon have the same choice of commercial TV as capital city viewers. Preliminary planning is underway to extend Equalisation to Tasmania.

POLITICAL BROADCASTS AND POLITICAL DISCLOSURE BILL

On 5 December, legislation forcing television networks to provide free political advertising for political parties during elections passed the Senate, after 3 days and one full night of debate.

Political Free Time

The Bill will have the effect of amending the *Broadcasting Act* to provide for the creation of units of 'free time'. The Australian Broadcasting Tribunal must grant those units of free time in certain proportions to the various political parties. The Tribunal then allocates the units of free time that it has granted to those political parties to the broadcasters. Broadcasters who have been allocated these units of free time must make those units of time available to the person to whom it was granted for the purpose of making an election broadcast, free of charge. In return they are entitled to an amount of additional broadcasting time determined in accordance with regulations.

Television advertisements would be run simultaneously across all television stations in three two-minute spots a night, according to divisions decided by the Tribunal on a State-by-State basis. The advertisements will run for 15-22 days from the day nominations close to the Wednesday before an election, when a total blackout will apply. During State election campaigns, two two-minute blocks will be put aside for political broadcasting, while local Governments miss out on free time.

Democracy safe?

Not surprisingly debate over the merits of the Bill has been intense. The Federal Government, which has been pushing for legislation of this kind for the past 4 years, has said that the Bill is in conformity with many democracies throughout the world. Opponents to the Bill have attacked it on the grounds that it is contrary to freedom of speech and a challenge, on the grounds that the Bill is in breach of Section 51(xxxi) of the Constitution which states that compulsory acquisition of property must be made on just terms, is possible.

A High Court challenge

Various television licensees and the State of New South Wales have commenced proceedings in the High Court to have the Act declared unconstitutional. On 14 January, 1992 Chief Justice Mason refused to grant an interlocutory injunction to prevent the operation of the legislation in various elections. It is expected that the Full Court will hear full argument in mid-March. Prime Minister Keating has already indicated that the legislation may be reviewed.

TRIBUNAL INQUIRIES

Programme Classification Standards

The Tribunal has announced a two-stage inquiry to review classification standards for programs which have been in place since Australia's introduction to television in 1956, and advertisements on commercial television. The Tribunal would consider the portrayal of violence, sex, nudity, offensive language and drugs in relation to community attitudes. It will also examine advertisements about alcohol, betting, gambling and personal products. To encourage public debate standards, the Tribunal has published new research on community attitudes about classification which will be used in the inquiry.

Key search results indicate that there are high levels of concern about violence in particular, and concerned about how violence, abusive language, sex scenes and nudity were classified under the current regime. Any need to change the standards or create new ones will be handled during the inquiry's second stage.

Broadcasting regulation

The Tribunal has also released new research about community views on broadcasting regulation and broadcasters, which it claims indicates many Australians have a fairly laissez faire attitude to broadcasting as an industry but are concerned about its role in society. In general, the research shows that a very high proportion of radio users and viewers are satisfied with programs and with present levels of regulation, and there is no strong public support for deregulation, particularly in relation to content.

Half the respondents to the Tribunal's research agreed the broadcasting industry is quite responsible 'and should be left alone', but only a minority of people polled thought that control should not be imposed on broadcasters. Of significance is the fact that two-thirds of people polled agreed broadcasters can be manipulative and have too much power. The research involved discussions in June 1991 followed by a national telephone survey in July 1991 of 1,663 adults in city and country areas.

PORTRAYAL OF VIOLENCE ON TELEVISION

The New Zealand Broadcasting Standards Authority has declined to uphold a complaint about a TV3 broadcast of a newsitem about an Australian television talk show program where two men physically attacked each other. It was alleged that the item breached broadcasting standards relating to the portrayal of violence.. The complainant also alleged that Mr Leighton Smith, TV3's presenter, trivialised the horror of the violence portrayed by laughing at the item's conclusion.

The Authority concluded that Mr Smith's reaction was ambiguous and open to varoius interpretations. "His laughter could have been provoked by the sight of men making fools of themselves, as TV3 claimed. But it could also have been an indication he found the violence amusing, rather than deplorable ...". The Authority also noted that the other presenter Ms Joanna Paul, reacted in a manner which showed her disapproval of either the violence, or Mr Smith's reaction, or both.

However, the Authority did uphold a complaint about a promotion for a forthcoming progam stating that one of the fight's participants, Ron Casey, "Australia's heavy weight debating champ", would "step into the ring with the Ralston group". The Authority acknowledged "sadly but realistically" that this possibility may well increase viewer audience and thus the program's rating. However the Authority found the promo did not meet standard 22: "The gratuitous use of violence for the purposes of heightened impact is to be avoided." The Authority declined to uphold a complaint that the same broadcast breached standard 21 of the code: "Broadcasters have a responsibility to ensure that when violence forms an integral part of drama or news coverage the context can be justified".

N.Z. RADIO TENDER

An Australian broadcasting company that missed out on radio licences because it incorrectly filled in tender documents has applied

to the New Zealand High Court to stop the transfer of six licences by the Ministry of Commerce. Mr Justice Jeffries granted the Hobart-based Mirell an interim injunction. The company had tendered the highest amount for some licences in parts of New Zealand but was not awarded the frequencies because of errors in the tender document. It was reported that the lot numbers were not correctly stated. Nineteen licences were sold for about $216,000 but Mirell was reported as having bid $332,000.

NZ TELECOMMUNICATIONS LITIGATION

Telecom New Zealand has failed to get a High Court order to prevent the Commerce Commission from investigating the telecommunications industry under New Zealand's trade practices legilsation. Telecom alleged that the Commission was exceeding its powers, acting unreasonably and that the investigation could prejudice litigation between Telecom and Clear Communications.

Mr Justice Gallen said Telecom could simply not take part in the Commission's investigation and that if the Court found in its favour after a full hearing which would take place in April 1922 then it would have lost nothing. Mr Justice Gallen said the Commission was not required to act in a vacuum and must be able to make investigations before performing its policing powers under the *Commerce Act*. Telecom had not been able to establish a case strong enough for an interim order to be granted in the absence of any evidence in rebuttal.

NZ TELECOM TRADE PRACTICES DISPUTE

Clear Communications Limited has to wait until June 1992 for the High Court to hear its trade practices claim alleging Telecom New Zealand was abusing its dominant position in the market place over local calling. The manager of Clear Communications, Neil Tuckwell, has been concerned about the amount of time it was taking to handle telecommunications issues.

"While the judiciary is of the view that these are important matters and require careful consideration — and we respect that — time is also of the essence. If we were to apply the amount of time it has taken for the Amps-A (cellular telephone) decision then we might not expect to see anything final until 1993 and then we would still have to negotiate inter-connection", he said.

In another set of litigation, Telecom has appealed to the Court of Appeal against a Commerce Commission decision that the addition of the "A" band of the mobile phone system frequency to the "B" band it already has, would increase its market dominance. The case was due to be heard by the Court of Appeal. On 10 December the High Court upheld the Commerce Commission's decision. The High Court judgment means the frequency would return to the control of the Ministry of Commerce which has to decide whether to re-tender the frequencies or offer them to the next highest bidder.

NZ TELEPHONE NUMBERING PLAN

The Commerce Commission has also expressed the view that Telecom's control of the telephone numbering plan should cease. Telecom determines the numbers which its competitors use, including the 050 access code phone users dial to use Clear Communication's rival toll network. The Commission said that gave a commercial advantage to Telecom and suggested control should be vested outside the market, as it is in Australia. "Competition can best develop if there is no difference in the dialing procedures and the time taken to place a call through competing networks," the Commission said. Its views were presented to the Ministry of Commerce which has since produced an interim report. It found ownership of the numbering plan which passed to Telecom when the company was corporatised in 1987 remained with it after privatisation. The Ministry of Commerce found that Telecom had bought the right to its own telephone numbers but did not acquire the right to allocate numbers to competitors and that if there was evidence that competition was blocked or severely diminished by numbering issues, the Government could still legislate on the issue.

NEGOTIATION OF NZ CONTRACTS

The Communications Minister, Maurice Williamson, still saw competition as the best regulator of the telecommunications market in his speech at a telecommunications seminar in Auckland in December 1991. He said there was "a lot of posturing and commercial rhetoric" from Telecom and Clear and not enough effort was being put in negotiating contracts. The Minister revealed that he had written to the Telecom chairman asking for confirmation of earlier commitments to fair and reasonable competitor practices.

Mr. Williamson said the government would tighten its control if the companies did not play by the rules. "The major message to the players is to go away and negotiate in good faith and use the courts, which are the most appropriate body, for making a ruling on the very difficult contracts issue."

One commentator at the seminar said, "The risk for government policy was that unresolved disputes would take many months to sort out and involve costly court battles. Shifting major competitive issues into the courts could also effectively stifle the attempt to create a unique regulatory environment."

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facilities' can be expected to shape one carrier's obligations to supply telecommunications services to the other.

On the other hand, an interpretation which leans too far in favour of requiring the provision of telecommunications services between carriers — the 'what's yours is mine' approach could have perverse results as far as consumers are concerned.

The motivation to innovate is largely conditioned in a competitive environment on the risk that the competitor bears that one carrier will provide services to consumers of a quality and type which the other cannot match. If a new carrier has recourse to all of AOTC's established network and services to build its own network and to AOTC's complete inventory of services for resale to third parties, these are two possible consequences. First AOTC, as the established carrier, will have a reduced incentive to innovate, as the new entrant can parrot offerings that achieve market acceptance. Second, the competitor will have a reduced incentive to differentiate its service offerings, particularly in areas of service quality less visible to the public (e.g. transmission capacity like fast packet switching).

In this way, consumers and service providers could be denied the full benefits of competition.

Joan Malkin is a solicitor with Mallesons Stephen Jaques' Sydney office and Deena Shiff is the Manager Regulatory of AOTC.

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 inlcude:

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

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

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

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

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

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