Communications LAW BULLETIN

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

Registered by Australia Post. NBG 4474 EDITED BY PAUL MALLAM VOL 12 No 2 September 1992

Telecommunications Inquiry reveals competition problems

Susan Lojkine outlines the findings of the New Zealand Commerce Commission

Three years after New Zealand's telecommunications were opened up to competition, new players have not had much help from the current regulatory regime in competing with Telecom New Zealand. In many important markets the inadequacy of the regime means that Telecom has become the de facto regulator as it controls the key players and makes the rules by which the others must play.

These are the key conclusions of the Commerce Commission's eight month long investigation into the industry. The Commission launched the inquiry last November after becoming concerned that competition had not developed as quickly as expected following deregulation in 1989.

A light-handed approach

In deregulating the industry, the Government opted for a "light handed" approach to ensure Telecom, as the dominant player, did not use its market power to frustrate competition. This relied on the *Commerce Act,* which sets out the rules of competition, and the *Telecommunications (Disclosure) Regulations* 1990, which require Telecom to disclose financial statements of its regional operating companies and prices, terms and conditions of certain of its services.

The Commission, which enforces the *Commerce Act,* wanted to determine how effective the Act and the Regulations were in removing the barriers facing new competitors. The Commission recognised that competition is underway in some markets, such as tolls, but found there were still significant areas where competition had yet to develop.

Of the 26 markets identified by the inquiry, competition had yet to develop in six. These were markets where Telecom controlled the entry conditions and included 0800 and 0900 services, directory services and local telephone services.

The Commission found competition had developed in ten markets, including payphone services, customer premises equipment, facsimile services, alarm monitoring services and consultancy services and was developing in another six markets, including tolls, mobile radio, video conferencing services and voice mail. The inquiry also uncovered nine possible breaches of the *Commerce Act* which are now being investigated.

Barriers to competition

The inquiry identified eight significant barriers to competition which are frustrating the ability of competitors and potential competitors to gain a foothold in telecommunications markets. The obstacles all reflect Telecom's ability to be both a supplier of a product or service and to control the means for competition to develop. They include interconnection agreements and fees, the numbering plan, access codes, the bundling of services, the availability of dedicated circuits and the Kiwi Share.

For a full review of recent developments see **Communications News** at page 25

The ability to negotiate interconnection agreements with Telecom has proved a significant barrier. To provide effective competition, a new competitor needs to reach a commercially realistic agreement with the incumbent operator about connecting to its network. However, negotiations with Telecom have proved to be a lengthy process for new competitors. This has slowed the development of competition in a number of important markets.

Interconnection fees are charged by the incumbent network operator for carrying traffic in its network. A new competitor may be disadvantaged if its customers must dial a greater number of digits than the incumbent's customers, or if the access code consists of inappropriate numbers, for example, where a local access code resembles a toll access code.

Where an incumbent operator offers many of the products and services available in the industry, a competitor offering a limited range of products or services may be disadvantaged by the incumbent bundling its product range. Bundling can give a competitive advantage unrelated to the efficiency of the operator, thereby locking out competitors.

To provide certain value-added services, suppliers must be able to lease sufficient circuits from the incumbent operator at a price which allows them to compete with it. This issue is the subject of the Commission's Megaplan case.

The Kiwi share

The rights attaching to the Government's "Kiwi Share" in Telecom place a ceiling upon the price of residential telephone

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services. The potential effect is to distort market pricing signals about this service. If competition in this segment is viable, then this distortion would interfere with competition.

The Commission found that the disclosure regulations are of virtually no assistance in helping competitors hurdle these obstacles. It is not so much information that is the problem, but rather such matters as terms and conditions of supply, which in turn are heavily influenced by the structure of the industry. Telecom owns or controls almost all the critical inputs; Telecom is competing against all the businesses to which it is also sole supplier of these critical inputs.

Disclosure requirements

The information disclosed under the Regulations is too broad and general to be used in levering entry by means of legal proceedings. While the *Commerce Act* may be of some help in resolving disputes, this can be a protracted, expensive and uncertain avenue not well suited to a fast moving industry. Only one provision, section 36, deals with abuse of market power, but this cannot provide remedies for denial of supply or impose competitive terms and conditions of supply, without requiring the Courts to stand in the shoes of business people and make business decisions.

Even with lay experts able to sit in the High Court, this is a formidable task, particularly when the issues in the industry are numerous and widespread. The Act's power to establish viable commercial agreements is still untested, making its usefulness uncertain.

The Commission is disappointed that many industry players are still facing significant barriers to competition, but it now fully understands the problems they face. This will allow the Commission to be more effective in resolving competition problems. It hopes the inquiry will also have served as a spur to all players to get on and make competition work.

Dr Susan Lojkine is Chairman of the New Zealand Commerce Commission.

Bruce Slane

Bruce Slane, the Bulletin's Associate Editor in New Zealand, was appointed recently as New Zealand's Privacy Commissioner. Bruce is a leading communications law practitioner in New Zealand and a former Chairman of the New Zealand Broadcasting Tribunal. We congratulate Bruce on his recent appointment.

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Media Ownership: New Issues and Old Remedies

Mark Armstrong analyses some of the conundrums of regulation of media ownership and suggests new remedies

Each year produces a fresh media ownership crisis. Subscription television is the 1992 battleground. Last year, it was foreign ownership of television and control of the Fairfax newspaper group. Earlier years witnessed the battles over TV audience reach, control by financial institutions, equalisation and regional TV ownership. Telecommunications joined the pandemonium more recently, with ownership of the second carrier (now Optus) making headlines, and the AOTC privatisation likely to raise similar controversies before too long. The frequency and scale of the controversies has been increasing for a decade.

"Parliament, its committees and the Government have been our media doctors"

Why does it happen? Why do other sectors such as mining, banking, agriculture and even airlines produce less controversy? What is so special about the media? Cynics might say that the media are self-indulgent: they like to dramatise their own fate; and politics are always interwoven, thus adding the spice of intrigue. However, there are deeper reasons for the recurring fits and fevers besetting our media ownership laws. If a patient keeps manifesting the same symptoms, despite medical treatment, there must be an underlying problem requiring further diagnosis. Parliament, its committees and the government have been our media doctors.

The most fashionable modern treatment, especially since 1981, has been number manipulation. Even in the new *Broadcasting Services Act*, we have examples like the 75 per cent audience reach for TV, the 20 per cent aggregate limit for foreign interests, the 50 per cent threshold for identifying a foreign person, and the 15 per cent deemed control threshold. The "science" of this treatment is alluring, because the formulae and schemes of regulation look so perfect on the blank page. They do not have the complex uncertainties of real-world communications. The formulae are particularly alluring to politicians, who are used to calculating electoral numbers.

"An older treatment is a stiff dose of administrative discretion"

An older treatment, now coming back into fashion, is a stiff dose of administrative discretion. Some prescribers are politicians, like the Treasurer making foreign ownership decisions. Others are independent administrators, like the new Australian Broadcasting Authority (ABA) which will be deciding when control of a company actually exists. Administrative discretion lacks the false science of the percentage formulae. But it requires great faith in the doctor. A wise, experienced doctor can produce excellent results. But an inexperienced, biased or unethical practitioner can wreak havoc on the patients.

This is the first in an occasional series of articles in which leading communications thinkers have been asked to write on a major communications policy issue of their choice. We thank Professor Mark Armstrong for providing this thoughtful article on media ownership.

A third approach is to let nature take its course, by applying no treatment at all. This approach was applied in the early days of commercial radio, and adopted again for VAEIS services in the 1980s. It still applies to most telecommunications services except carriers, to some new broadcasting services like narrowcasting, and to print media. However, the modern media environment is polluted by many laws, so that relief from industry-specific remedies actually reduces immunity to general laws like the *Trade Practices Act* and the *Foreign Acquisitions and Takeovers Act*. The real choice is between the whims of the specialists (communications lawyers) and the ignorance of the general practitioners, in the form of the *Trade Practices Act* and the *Foreign Acquisitions and Takeovers Act*.

Opinions differ on the specialist-GP issue. The media certainly attract unique freedom of speech issues which do not apply to steel Y-bars, breweries and biscuit factories. The March 1992 *News and Fair Facts* report of the House of Representatives Committee expressed bipartisan reservations about the ability of the current Trade Practices regime to handle sensitive media ownership issues. The majority recommended that special print media values like freedom of speech be included in the *Trade Practices Act*. This is an interesting hybrid solution, akin to requiring a general practitioner to take a special diploma before practising surgery.

Whatever the preferred treatments or practitioners, it is certainly true that none of the clinical experience to date has produced an agreed or refined approach to media ownership. The *Broadcasting Services Act* has revised and clarified the existing rules and processes affecting radio and TV. It has set new balances between all three traditional therapies. The percentage formulae and their related rules are simplified. The discretions given to the ABA are broader and clearer than those of the ABT, and a number of new areas (except subscription TV) are to receive no special treatment. The Act takes reform about as far as could be done without major policy changes, which were not its objective.

The laws we have are not suited to the new media environment. For example, old media like broadcasting which attracted separate rules are combining with new services like telecommunications. The boundaries of the separate legislative categories will continue to move. Subscription TV has many features of a point-to-point communications service, and will have more when it migrates to cable. On-line information services and data networks are moving towards becoming a new form of press or broadcasting, as are some radiocommunications and VAEIS services. Rights to "software" in news, sport and movies are cutting across old boundaries. International newsagencies offer the same satellite services to a variety of different media.

The viability of many different visual services is likely to depend on rights to movies. Audiovisual industries are integrating horizontally and vertically. Ownership is becoming more global as strategists take advantage of the economies now offered by satellite and the

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prospect of optical fibre undersea cables. In the next few years, direct satellite broadcasts from overseas will become common in Australia as they are already doing in the rest of Asia and in Europe.

Media concentration

What kinds of laws can address these changes? Extending the percentage formulae to proliferating sectors may become impossibly complex as the forms of media transmission merge, converge and multiply. Increasing the discretionary powers of Ministers, governments, or bodies such as the ABA, AUSTEL and the TPC can certainly produce flexibility, but it holds obvious dangers. Yet "letting nature take its course" may produce Orwellian results. The natural economies of telecommunications and media transmission are towards concentration. That power, affecting the terms of access to satellites, cables, integrated switched digital networks (ISDN), digital audio broadcasting (DAB), spectrum access rights and other innovations may, with the wrong planning, affect the structure and independence of those who provide news, information, entertainment and culture.

What support can the law offer to the growth and freedom of our media? One advance would be to change the legislative agenda from treating supposed illnesses to the positive agenda of encouraging health. All agree that freedom of speech and information are the ideal, so why not recognise them in our communications laws? There is no need to open a whole Bill of Rights debate. They can be written into our communications laws in quite a practical manner now.

At the moment, we have a void. The objects in section 3 of the *Telecommunications Act* speak of "efficiency", "accountability to customer needs" and "new and diverse telecommunications services", but neither the objects nor the body of the Act recognise the great influence which telecommunications channels and services have on freedom of speech. Yet media (especially broadcasting) are daily more dependent on the telecommunications system. The objects of the *Broadcasting Services Act* go so far as to recognise "diversity in control of the more influential broadcasting services", but the Act stops short of recognising freedom of speech.

Regulation of carriers

Control of carriage is another obvious issue which should be addressed directly. As all the media, including even the press, become more dependent on the providers of cables, satellites, radio frequency transmitters and other electronic pathways, it is time to ensure that control of the hardware is not abused.

This issue has been addressed in telecommunications, from an economic view at least. The *Telecommunications Act* contains the germs of a scheme to protect rights to interconnect with carriers and to prevent carriers from improperly favouring their own services. We need broader principles which apply to those who occupy the role of carrier, regardless of whether the medium is cabled or radiated. The US economy is large enough to support content-carrier separations in telecommunications and broadcasting. In a country like Australia where more resources must be shared, a clear statement of the rights of non-carriers may be the best approach, to ensure that there are opportunities for new and independent players to co-exist with the major teams.

Access to information

Another remedy is access to information. If the community knows who controls a media outlet, that information may be enough to prevent abuses, or to dispel the suspicion of abuse. Disclosure may also operate as a substitute for more intrusive forms of regulation. Furthermore, it favours competition, because disclosure narrows the gap between the industry intelligence of major established players and the smaller and newer entrepreneurs. Surprisingly, this idea is unfashionable. The statutory ABT function of assembling information and making it available to the public has not been conferred on the ABA. AUSTEL's main reporting and informing obligations are owed to the government, not to the public. As for radiocommunications, the terms on which existing operators have access to the spectrum have not always been regarded as public information. Conveniently published information about licensing and ownership in all three sectors would improve the lot of consumers and business.

Inevitably, there will also be a need to improve the old remedies. For example, the procedures which govern the Treasurer's discretion under the *Foreign Acquisitions and Takeovers Act* have been recognised as too loose and too private, and there are similar problems with the grant of licences under the *Radiocommunications Act*. But we must also look at new approaches like the three examples mentioned here. Detailed investigation may show that other, or different remedies will also be needed. What is clear is that the old remedies cannot on their own cope with the changes now under way.

Mark Armstrong is a Professor at the University of Melbourne Law School, which is planning to establish a research centre for media and telecommunications law. With Sally Walker and other colleagues, he is conducting research supported by the Administrative Review Council into ownership of new channels of media communication. He is also chair of the ABC Board. The views expressed in this article are his own personal views.

When The Screen Becomes a Billboard

Grantly Brown examines product placement in the US to determine likely legal developments in Australia

Product placement involves the display of branded products in film and television programs as props. In exchange producers are paid a fee, or, more usually in Australia, are given the prop at no cost. A popular variant in the US includes film producers benefiting through advertising campaigns which tie in the placed products with the new film. Pepsi, for instance, recently spent US$10 million to promote Pepsi in association with the release of the film *Terminator II* in which Pepsi was placed.

Product placement appears to be the perfect solution for film and television producers seeking to trim total production costs and businesses seeking to promote products in a manner which does not provide viewers with an opportunity to "zap" or fast forward commercials. While product placement occurs in Australia it is most developed in the USA, where dozens of agencies specialise in securing placements for the majority of *Fortune's* 500 top corporations.

The US industry

The cost of placing a product in feature films generally varies from several thousand dollars to hundreds of thousands of dollars for films considered likely to do well at the box office. For example, McDonald's paid the producers of *Santa Claus — The Movie* US$5 million to have Dudley Moore eat one of its hamburgers on screen.

While some scepticism exists among mainstream advertising agencies as to the effectiveness of product placement, specialist placement agencies claim that surveys show viewers are twice as likely to recall a placed product than the subject of a distinct advertisement. Rates are also attractive. A 30 second national exposure on prime-time network TV will cost a six figure sum. Accordingly, US$20,000 for a placement in a major studio film which, after international theatrical release, will be released on video, then pay TV before finally being shown on free-to-air television across the world several times, must seem an attractive option.

Placement in free-to-air television programs, instructional videos and pay TV are also common. For example, IBM supplies computers to act as props for *LA Law.*

The US Federal Trade Commission has been petitioned to require disclosure of placed products in film credits. The Centre for Science in Public Interest (CSPI) claims that all compensated product placements constitute advertisements. In 1989 CSPI wrote to all US State Attorneys-General stating that *"undisclosed paid product placements are inherently deceptive, because they purport to be part entertainment material, but are in fact commercial matter."* CSPI wants oral and full screen messages at the beginning of films detailing which products are placed and subscript to scenes including placed products reading "advertisement".

Last February it was reported that a suit had been filed in Los Angeles against Philip Morris, American Tobacco Corp., Eddie Murphy Productions and Warner Communications, claiming that sequences in *Superman II* promoted Marlboro cigarettes and that *Beverley Hills Cop II* promoted Lucky Strike and Pall Mall cigarettes. The producers of *Superman II* were paid $42,000 by Marlboro. Pall Mall and Lucky Strike provided $25,000 worth of cigarettes to the makers of *Beverley Hills Cops II* for that film's opening sequences involving cigarette smuggling. The plaintiff in these proceedings claims that the defendants breached the *Federal Labelling and Advertising Act* 1979 (which banned cigarette advertising on TV) as these films were available on video and had been aired a number of times on free-to-air and cable TV in the United States.

Australian broadcast law

In Australia under the new *Broadcasting Services Act* operators of broadcast and narrowcasting services will be prohibited (at Schedule 2 of the Act) from broadcasting an advertisement or sponsorship announcement for cigarettes or tobacco products. Paragraph 2(1) provides that for the purposes of that Schedule a person will not be taken to be broadcasting an advertisement if:

(a) the advertising matter is an accidental or incidental accompaniment to the broadcasting of other matter; and
b) the person does not receive payment or other valuable consideration for broadcasting the advertising matter.

This paragraph is similar to section 110(10) of the current *Broadcasting Act,* which was recently considered by the Australian Broadcasting Tribunal in relation to the broadcasting by the Nine Network of the 1990 Adelaide Grand Prix. That inquiry examined whether the broadcast of the Grand Prix breached the prohibition on broadcasting advertiseaments for cigarettes and cigarette products at section 100(5A) of the *Broadcasting Act.*

The Nine Network had not been paid for the 653 sponsorship images shown during the broadcast and it was conceded that the broadcast of these images was not an accidental accompaniment of the broadcast. However, the Tribunal found that the objective of this promotional material was subordinate, and therefore only incidental, to the broadcast as a whole.

Outside of Schedule 2, program standards will be largely left to broadcasters themselves to develop in the form of Codes of Practice under Part IX of the new Act. Section 123(2)(e)(iv) provides that these Codes of Practice may relate to preventing the broadcasting of programs that:

> *"Use or involve the process known as 'subliminal perception' or any other technique that attempts to convey information to the audience by broadcasting messages below or near the threshold of normal awareness."*

There is no legal authority on the status of product placement as subliminal, or near subliminal advertising, but consideration by courts or legislators of this issue cannot be far away.

A program standard on product placement can only be developed by the soon to be established Australia Broadcasting Authority (ABA) under section 125 of the new Act where it is satisfied that there is a need for such regulation and that the industry developed Codes have not dealt with that need or have not addressed it properly. It therefore remains to be seen whether and how broadcasters will tackle this question of product placement.

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Trade Practices Act

Also relevant to product placement in Australia is the Commonwealth *Trade Practices Act 1974* (and the related *Fair Trading Acts*) which regulate many aspects of the conduct of commerce in Australia. Section 52 provides that corporations will not in trade or commerce engage in conduct which is "misleading or deceptive or is likely to mislead or deceive".

It is unlikely that courts in Australia, in applying section 52, would accept the proposition of the CSPI in the USA that product placement is inherently deceptive, at least in relation to product placement in general entertainment programs. This was, however, the position taken in Germany in the case of *Altenburger und Stralsunder Spielkartenfabriken v Zweites Deutsches Fernsehen* (1990) which involved a similar provision to Australia's section 52.

An example of product placement in editorial and, indeed, entertainment programming that may constitute a breach of the *Trade Practices Act* is the close association of particular journalists or characters with placed products such as the wearing of clothes supplied by a particular manufacturer or retailer. If these persons do not actually favour the product used, it may be argued that they have been portrayed in a manner which falsely suggests that they personally endorse these products. This kind of character merchandising without the consent of the presenters or actors involved may fall foul of sections 52 and 53 of the Act. Section 53(c) provides that corporations may not:

> *"represent that goods or services have sponsorship, (or) approval, they do not have"*

US actress, Daryl Hannah, recently received a six figure settlement after clips from her film *Roxanne*, in which Coca-Cola had been placed, were made available to Coca-Cola for a promotion campaign without her consent.

Another type of product placement is negative product placement. This may occur as intentional competitive conduct or inadvertently. For example, in the film *Missing*, Coke was the preferred drink of the good guy, while an over-large Pepsi vending machine was evident in the background at the offices of the complicitous authorities.

In Australia the unfortunate victim of such advertising could bring an action against the producers and broadcasters under the rubric of the exotic tort of slander of goods, but would be more likely to bring the action under section 52. Under section 52 it would be unnecessary to prove any intent on the part of the producers to slander its products or establish that it had suffered identifiable damage.

In the 1985 case of *Decor Corporation v Bowater-Scott* the Federal Court found that the use of the applicant's readily identifiable wine cooler product to advertise the respondent's new "Sorbent" toilet tissue in television advertisements was not in breach of the *Trade Practices Act* or a slander of goods. The court held that the incidental use of the wine cooler would not be considered by a reasonable viewer as anything other than a prop. Accordingly, the alleged representations conveyed by the carrying of toilet rolls to restaurants in a wine cooler, that the cooler was not a prestigious or quality product, were not found by the court to be made out.

Implications for broadcasters

Hitherto, Australia's broadcasters, newspaper and magazine publishers, have considered themselves largely immune from attack under the provisions of Part V of the *Trade Practices Act*, due to the operations of section 65A of that Act.

Section 65A exempts persons who carry on the "business of providing information" from the operation of the substantive sections of Part V of that Act in relation to publications (which may be by way of broadcast), provided such publications were not made "on behalf of, or pursuant to a contract, arrangement or understanding with" a supplier of goods or services. The exemption is expressed not to apply to publications promoting the information provider's own goods and services and the goods and services of related corporations.

The recent Federal Court decision of *Sun Earth Homes v ABC* (1990) has dramatically narrowed the potential operation of the section 65A exemption. The ABC unsuccessfully sought an order that claims made by the applicants that the ABC had engaged in misleading and deceptive conduct should be struck out. The Court found that the editorial TV program in question fell outside the ambit of the exemption, partly because the program's subject matter concerned the supply of the applicant's services to consumers and had been broadcast pursuant to "an understanding" between the ABC and the applicants that if they allowed themselves to be interviewed for the program, the program would be balanced and fair.

At a time when Australia's television networks are increasingly turning to independent production houses for programming, it is also unclear whether a broadcaster could rely upon the exemption in relation to purchased programming heavily influenced by the program maker's sponsors. The defences available under the Act provide some comfort for broadcasters who have purchased programs found to be in breach of the Act. Section 85, however, requires that for a broadcaster to escape liability it has to establish that:

(a) it had made a "reasonable mistake" (sub-section 85(1)(a)); or
(b) that its breach was the result of its reasonable reliance on the information supplied by another person (sub-section 85(1)(b));
(c) that it had taken reasonable precautions to avoid the breach which was due to the act of another (sub-section 85(1)(c)); or
(d) in relation to a breach contained in an advertisement, that the advertisement was received by it in its ordinary course of business and that it "did not know and had no reason to suspect that its" broadcast would be in breach of the Act (sub-section 85(3)).

The first three of these defences require the broadcaster to establish its conduct was reasonable. Certainly a broadcaster who made no effort to satisfy itself that purchased programming was not in contravention of the Act would have some difficulty making out these defences. The final defence turns upon the offending material being an "advertisement" which begs the question: are programs with placed products advertisements?

It does not appear likely that product placement will be prevented under Australian broadcasting law in the near future or that it is currently misleading and deceptive *per se*. However, experience from the more developed US industry suggests broadcasters, producers and advertisers should still be careful in entering into placement arrangements. As the practice becomes more widespread locally, it is likely that there will be pressure from public interest and consumer groups to prevent, or at least severely limit, product placement.

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Recent Cases

A roundup of recent cases from Australia and New Zealand

AMPS-A Spectrum

The New Zealand Court of Appeal has ruled that Telecom New Zealand could acquire rights to the AMPS-A Spectrum, compatible with its existing cellular telephone network, because it was in the public interest. But the Court strongly indicated that it preferred to see a third cellular network, explicitly mentioning Broadcast Communications Ltd, take the TACS-B rights to reduce the risk of collusion in the cellular telephone market. For a full review of this case see page 12.

Blank tape royalties

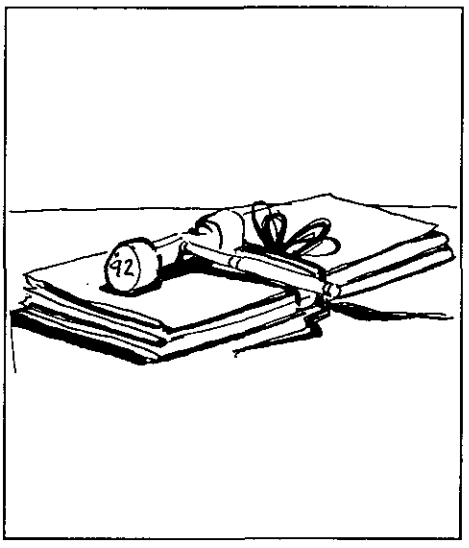
On 11 March 1992, the High Court reserved its decision on the action brought by Australian Tape Manufacturers Association Limited, BASF Australia Limited and TDK (Australia) Pty Ltd against the Commonwealth of Australia, challenging the constitutional validity of *Copyright Act* 1968 (Cth) Part VC (use of blank tapes for private and domestic copying) and section 153E (determination of amount of blank tape royalty by Copyright Tribunal). The applicants claimed that the provisions were beyond the legislative competence of the Commonwealth Parliament because they are not laws with respect to copyright (s51(xviii) *Constitution*), or laws with respect to taxation (s51(ii) *Constitution*), or laws effecting an acquisition of property on just terms (s521(xxxi) *Constitution*); and further, if the provisions did impose taxation, they were invalid because they did not comply with section 55 and 81 *Constitution*.

Justice Sheppard sitting as the Copyright Tribunal on the inquiry to determine the amount of blank tape royalty, has held that the inquiry be adjourned to 11 December 1992, with liberty to restore if the High Court hands down its decision in the meantime.

Trade Practices aspects of advertising rate-cutting

In *Eastern Express Pty Ltd* v *General Newspapers Pty Ltd*, Eastern Express appealed from the decision of Justice Wilcox that price cutting by the proprietor of the Wentworth Courier, General Newspapers Pty Ltd, was not a misuse of market power, in contravention of section 46 of the *Trade Practices Act*. The appeal was dismissed, but the analysis of the Full Court differed significantly from that of Justice Wilcox.

The relevant market in this case was the acquisition by real estate agents of advertising services for real estate located in the Eastern suburbs of Sydney in local newspapers. When determining market power it is critical to consider barriers to entry. Other relevant factors include constraints on pricing above supply cost, other constraints imposed by competitors or potential competitors, market share and vertical integration. The Full Court found that General Newspapers at the relevant time did not have a substantial degree of market power.



Justices Lockhart and Gummow expressed concern over the use of American cases on "predatory pricing" in determining misuse of market power under section 46. In addition they held that there could be no fixed approach to the level of pricing or the practice of costing in determining whether or not price-cutting was for a prescribed purpose. The Court must look beyond profitability and consider "general human experience".

Eastern Express is appealing the decision and the Trade Practices Commission has sought leave to intervene. The High Court hearing is set down for 11 December 1992 in Sydney.

Commercial viability

The commercial viability provisions of the *Broadcasting Act* continue to provoke litigation, with the Federal Court handing down three decisions in the past few months. Although the Act will probably be repealed from 1 October 1992, these decisions will be relevant to a large number of radio licence grant inquiries which remain to be determined under the *Broadcasting Act* (see page 16).

WREB Cooperative Ltd v *Australian Broadcasting Tribunal* involved the interpretation of a definition of "commercial viability" introduced into the *Broadcasting Act* on 4 January 1992. In general terms, that definition provides that an incumbent radio service is commercially viable if it would continue to be provided. In a judgment handed down on 29 May 1992, Justice Beaumont held that a reduction in quality of service did not satisfy this definition. His Honour held that the question was one of degree, under which a change in the nature of the incumbent service could be so great that the service ceased to be provided.

In *Barrier Reef Broadcasting* v *Australian Broadcasting Tribunal* Justice Wilcox held that the Tribunal had erred in finding that the Court's previous decision in *Wesgo* v *ABT* precluded it from considering evidence regarding the relevance of depreciation to commercial viability.

Richmond Rivers v *Australian Broadcasting Tribunal* involved consideration of a preliminary view by the Tribunal that the incumbent service in the Lismore market would remain commercially viable upon the introduction of a competitive service. Justice Wilcox rejected an application by the incumbent for the ABT member conducting the inquiry to be replaced, on the ground that the preliminary findings involved predetermination of the issues and, therefore, bias. Ultimately, that ABT member reversed his preliminary findings and decided not to grant a competitive commercial FM licence, finding that the incumbent service would not remain commercially viable.

Television advertising standards

On 24 June 1992 the Federal Court rejected various procedural grounds of challenge to the Australian Broad-

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The National Transmission Agency - The New Force in Broadcasting

Richard Lee and Phillip Edwards describe the rise of the NTA

With the ABC celebrating its sixtieth birthday, it is topical to consider a birth in one often overlooked aspect of the broadcasting sector. Just how do *Four Corners* and *Radio National's Daybreak* reach us? The answer is via one of the nation's best-kept secrets: the National Transmission Network. From 1 July 1992, this strategically vital asset was vested in a new body called the National Transmission Agency (NTA).

The network consists of over 500 transmitter sites in all parts of the country. Although it is primarily used to transmit the programs of the national broadcasters, the ABC (including Radio Australia) and the SBS, its facilities are also used by many commercial broadcasters, especially since the equalisation policy, and a variety of radio communication users such as emergency services.

Planning, constructing, maintaining and operating this huge network are functions that were until recently administered by the National Broadcasting Branch of the Department of Transport and Communications (DOTAC). However, much of the actual work of construction and maintenance and the day to day operation of the network is carried out by the AOTC's Broadcasting Division (referred to as TBD), acting as contractors to the Department.

Both AOTC and the National Broadcasting Branch (through their respective predecessors) have been associated with the network since the first ABC broadcasts. Both have therefore played a vital role in the development of Australia and in providing a much needed channel of communication to urban, regional and remote communities alike.

Birth of the NTA

The birth of the NTA can be traced to a Government review which was completed in late 1991. The review recommended that the management of the assets of the network should be transferred to a new body, which was later named the National Transmission Agency, and that the new body should operate as far as possible along commercial lines.

The Federal Government agreed with the overall thrust of the review. Specifically, the Government decided that:

- the NTA would be set up as a separate cost centre within DOTAC with effect from 1 July 1992;
- the position of the NTA would be reviewed within 18 months to determine whether it should become a government business enterprise;
- the NTA would introduce competitive tendering for services related to the construction, maintenance and operation of the transmission facilities;
- the costs associated with delivering the national broadcasting services would be made transparent.

Some options were rejected. For example, there is no requirement that the NTA should earn a commercial rate of return on the network assets, nor was any decision made to provide the ABC and the SBS with funds to purchase transmission services from the NTA. This latter point will be reviewed once the NTA is up and running. For the time being, the Commonwealth will fund the NTA directly.

Strategic planning for the NTA

In early 1992, DOTAC commissioned Deloitte Ross Tohmatsu Management Consultants to develop a strategic plan for the NTA. Specifically the aims of the strategic review were to set the direction for the NTA, to document its strategic goals and objectives, to determine what its relationship should be with the national broadcasters and to draw up an action plan to transform the National Broadcasting Branch into the NTA.

The overall aims of the NTA are:

- to provide the services and facilities needed to broadcast the programs of the ABC and the SBS to as many Australians as possible, in a reliable, high quality and cost-effective manner, and
- to be a vital communications organisation through:
  - (a) becoming more responsive and sensitive to clients and their needs;
  - (b) developing a strong service culture;
  - (c) satisfying clients' needs by constant attention to quality;
  - (d) exploring commercial opportunities; and
  - (e) seeking ways to improve the return on investment for the NTA's assets.

One of the key issues for the strategic review was whether a customer/supplier relationship existed between the NTA and the national broadcasters. After very careful consideration it was concluded that the conditions of a contestable market do not exist. In practice, the ABC and the SBS are substantially tied to the NTA. There is no real alternative supplier. The other side of the coin is that without the ABC and SBS, the NTA has little reason to exist. The reality is that these organisations are all instruments of government broadcasting policy. Instead of customer/supplier, the concept of partnering was introduced in the strategic plan, under which the NTA and the national broadcasters will work closely together in delivering the broadcasters' programs to the Australian public.

Nevertheless, the NTA has been given a firm objective to exploit commercial opportunities to use any excess capacity, although with a firm emphasis that meeting the needs of the ABC and the SBS are paramount.

Richard Lee and Phillip Edwards are management consultants with the firm Deloitte Ross Tohmatsu.

Recent Cases continued

casting Tribunal's standard limiting the amount of non-program matter broadcast on commercial television. Argument on the remaining grounds of challenge was heard on 31 August 1992.

Pre-action discovery

Aitken v Neville Jeffress Pidler involved an application for pre-action discovery by 295 journalists who apprehended that NJP, a media monitoring service, had infringed copyright in the journalists' works. Gummow J in the Federal Court ordered that NJP produce various documents for inspection, in order for the journalists to determine if they had a cause of action for infringement of copyright.

Contributions to Recent Cases may be sent to the Editor.

Group Defamation and the Vilification of Women

Jocelynne Scutt argues that a law against sex vilification would render most media depictions of women unlawful

Defamation has generally been the preserve of the rich and the powerful. In a world where women continue to earn, at best, 83 per cent of men's wages (and many are paid far less, or not paid at all for their work), there can be little surprise that women are less likely to appear in courts as plaintiffs in defamation actions. Even more, in a world where "reputation" is associated with business acumen (or what passes for it), masculine posturing and pontification, little wonder that women are hardly seen as having any reputation to sully by defamatory words. And in a society where women are readily classed as "damned whores" or dykes by reason of dress, what "reputation" is there for woman to lose? High heels and high hems, low heels and long skirts, tight dresses, loose dresses, diaphanous gowns all add up to "loose women"; as do make-up and fashionable hair-design; jeans and gymshoes, overalls and sneakers, designer denims and doc martens may equally signify sexual perversity in women. As do no make-up and unfashionable hair.

Sexist depictions

Yet women are more likely than men to be vilified through sexist advertising, pornographic displays, "page three" representations of "real" womanhood: boobs-bums-beaver *are* all. This general depiction and description of women as sum total = sex objectified, both provides a possibility of taking group defamation action, yet simultaneously makes it more difficult for women to establish that defamation. If vilification of women is so generalised that it is an integral part of Australian culture, its very familiarity lends it a credence it otherwise would not have. If it is all pervasive, then penalising it in any way, or ruling it out of order as unlawful and discriminatory creates a very real problem. A sexual vilification law may well render unlawful the vast majority of advertisements, reel after reel of film and video, rack upon rack of newspapers and magazines.

In Western Australia, New South Wales, Victoria and federally, laws are designed to provide redress for racial vilification. Section 20C of the *Anti Discrimination Act* 1977 (NSW) provides that:

"*It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group*"

How would the law work if it were drafted to provide that it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a woman or group of women on the ground of the sex of the woman or members of the group woman? How many "popular" films, rack upon rack of magazines, and advertisements would survive this definition of unlawfulness?

Section 20D creates an offence of serious racial vilification by a public act. "Public act" is widely defined in the Act, but excludes:

(a) a fair report of a public act of racial vilification;

(b) a communication or the distribution or dissemination of any matter which is subject to a defence of absolute privilege in proceedings for defamation; or

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Soapies unlawful?

Where would so many of the "soapies" stand if it were unlawful for a person, by a public act, to incite serious contempt for, or severe ridicule of, a woman or group of women on the ground of the sex of the woman or members of the group of women? What of recent woman-hating films, shown in mainstream theatres, and novels, sold in regular bookstores, if there were an injunction against persons, by public acts, inciting hatred towards women on the ground of their sex?

Public debate and controversy accompanied the passage of racial vilification legislation. Nonetheless, vilification on the ground of race is now against the law in New South Wales and soon will be federally and in Victoria. There is an overwhelming recognition that inciting hatred towards people of a particular race, on grounds of that race, is unacceptable.

Sex vilification

Why do governments and parliaments not see that women are even more likely than racial groups to be vilified? (Does the constancy blind their eyes?) And frequently, women are vilified as *women* of a particular racial or ethnic grouping. Take the notorious "trade in women" participated in by too many Australian men who believe they have a "right" to travel to countries to Australia's north to "buy" or "lease" women. The women who are their targets are invariably depicted as submissive, compliant, perpetual sexual toys. This portrayal is centred in the fact that the women are *women*. Not only is it not about race alone. It is *less* about race than about sex.

The same situation exists in Australia. Words exist in the English language specifically to denote Aboriginal women as sex objects. This sex objectification is linked to race; and it is inextricably bound up in the femaleness of the subjects of the attack.

That governments have drafted laws directed toward racial vilification and not sex vilification indicates an inability to recognise women's rights as human rights, and a lack of attention to priorities. Racism must be eradicated. Laws rendering racism and racial vilification unlawful are a positive recognition of this need. Equally, sexism must be eliminated and laws passed to recognise not only that sex discrimination is unlawful, but also that sex vilification offends against social and political harmony.

Or is the question "whose harmony"? Is women's peace of mind to be subjugated perennially to the "right" of men — media moguls, publishers, film makers, brothel owners, television producers, "topless waitress" hoteliers — to retain their piece of the action?

Jocelynne Scutt is a lawyer and writer. Her books include Women and the Law, 1990 (Law Book Co) and Breaking Through — Women, Work and Careers 1992.

Collins on Broadcasting

An edited extract of Senator Bob Collins' first public address since the passage of the Broadcasting Services Act

If you had little more than a passing interest in the debate you could be forgiven for thinking the Broadcasting Services Bill is all about pay television and sinister attempts by bureaucrats to hoodwink politicians into establishing a star chamber to terrify mild mannered journalists.

I can assure anyone who continues to labour under this misapprehension that it is not. I shall attempt to put some of those fears to rest by putting this legislation into its political and historical context.

When the Federal Labor Government came into office in 1983 it inherited the *Broadcasting and Television Act* 1942. The Act was, of course, introduced by the Curtin Labor Government. Australia was at war, radio was still a fledgling industry. It would be 14 years before the launch of Australia's first regular television service, TCN9 in Sydney. Its introduction was timed to coincide with the Olympic Games in Melbourne in 1956.

Historical parallels

The comparison between the introduction of commercial television in Australia and the frustrations being experienced by the Federal Government now in attempting to introduce a pay television industry are uncanny. British and American experiments in television transmission were followed with considerable interest in Australia from the 1920's. The British Broadcasting Commission was launched in 1936 and the first commercial networks in America began three years later but it was not until the mid 1950's that Australians first obtained access to commercial television. Preliminary discussions began in earnest in Australia under the Curtin Government in 1942. A parliamentary standing committee at the time recommended tenders be called for television transmitters and receivers and transmission be controlled by a national authority. The Chifley Labor Government established the Australian Broadcasting Control Board in 1948.

It recommended television stations be established in the six state capital cities. Prime Minister Chifley announced the Government would introduce a national television service as quickly as possible. After the defeat of the Chifley Government in 1949 all progress on giving Australians access to the television, which had now been enjoyed by the British and American populations for more than a decade, was dashed. The new Prime Minister Robert Menzies shelved all proposals to introduce television. Public demand, however, was such that the Government eventually had to appoint a Royal Commission in 1953 to inquire into the question. It reported the following year and recommended a gradual introduction amid intense debate about excluding metropolitan newspaper proprietors from seeking licences for fear of creating a media monopoly. Australia's first regular commercial television service was eventually launched in Sydney on Sunday, September 16, 1956 — 30 years after debate began. It was not until 1971 that the northern most capital, Darwin gained its first commercial transmission.

As I said earlier the comparisons with pay television are uncanny. Despite the Government's enthusiasm Australians are still waiting to access pay television — a service which has been enjoyed by Britons and Americans for many years.

Ad hoc amendments

There had been a score of substantial amendments to the old Act since 1983 in an attempt to bring the legislation to grips with a rapidly growing industry. However, it was felt further ad hoc amendments would only add to its complexity. It was clear we needed legislation capable of allowing the broadcasting industry to grow into the next century. In my view this legislation contains all the ingredients to let it do just that. We now have an entirely new framework which allows the industry to respond to the modern market place and the opportunities created by new technology. Both the industry and audience will be winners. The aim is sensible competition and structural adjustment with consistent yet flexible guidelines. In my view this legislation will give the industry a sense of confidence and predictability. And this has been reflected in wide spread support within the industry for the major elements of these reforms. The Act also provides for proper commercial and public accountability. It is also written in plain English, which has to be one of its best features.

ABA powers

The new Australian Broadcasting Authority (ABA) has also been given wide-ranging information gathering powers. The purpose is obvious. The ABA must have teeth if it is to obtain the necessary information to uncover major breaches of the Act. However, the Government will expect the Authority to act in a prudent and reasonable manner when using these powers.

I mentioned earlier the concerns expressed that these powers posed a threat to investigative journalists and their sources. This concern is misplaced. The government has already acted in response to concerns expressed by journalists and their advocates about the search and seizure provisions contained in clause 198 of the Bill.

Journalists' sources

The legal protection of journalist sources, however, is a totally different issue and public debate on this issue has not been helped by some of the media coverage on the passage of the Bill.

By way of example I will cite one recent feature article in the *Adelaide Advertiser.*

It was headlined: "MUZZLE ON THE WATCHDOGS". The first few paragraphs are as follows:

> *"In a dark, locked room, sinister and faceless bureaucrats grab a journalist's hair. They jerk the head back and shine a bright light in the face."*
>
> *Quote: "We have ways of making you talk" unquote, they sneer over their embarrassment at the journalist's published revelations.*
>
> *Quote: "For the last time — who gave you that story?" Unquote.*

The author of the article goes on to say that this alarmist scenario, while of course exaggerated, is the imaginative extreme to which public servants could take powers contained in this legislation. I agree with the author. This is alarmist. But I do not consider it to be the "imaginative extreme". In fact, it is pure fantasy.

Continued p11

I assure you, the ABA will not have the power to drag journalists kicking and screaming into star chambers and compel them to divulge confidential sources on pain of 12 months imprisonment.

There will be no jackboots issued with the keys to ABA offices. The investigatory powers of the ABA are, essentially, the same as those of the Australian Broadcasting Tribunal (ABT) under the *Broadcasting Act* 1942. The ABT had the same powers to examine in private, on oath, and to seek the production of documents.

The *Broadcasting Services Act* is not the place to consider the wider legal question of journalist sources. It is a complex legal policy question. My personal view is that there should be some form of protection and there are many options which can be considered. I have been discussing these with my colleague the Attorney General, Michael Duffy. This matter is under active consideration.

Public access and accountability

There have been suggestions in a number of trade journals in recent weeks that the new Bill contains few provisions for public involvement in the work of the new authority. This is rubbish. Public input will be important to the planning of services. The input could not be more fundamental. This means the ABA will only make planning decisions following extensive public consultation. This obviously ensures the regulator is publicly accountable. In addition it will publish:

- the results of hearings;
- changes to licence conditions;
- licence allocations and renewals;
- variations to categories of services;
- planning decisions;
- alterations to program standards; and
- opinions on service categories or control.

The ABA must also maintain many registers for public information including people in control of broadcasters and newspapers, and codes of practice. It will also be required to submit an annual report to Parliament. The codes of practice must take into account community attitudes such as the portrayal of physical violence, sexual conduct and nudity, and material likely to incite or perpetuate hatred on the basis of ethnicity, gender, sexual preference or disability. These codes will not be developed in a vacuum.

Continuation of licensing arrangements

The ABA will come into being on October 1 as planned. I will shortly be announcing the Authority members. I have been advised that there is some concern over licensing arrangements between now and the first of October.

I have decided that it would be wrong to seek any new grants of commercial licences because the arrangements are so different under the old and new Acts. However, as the selection process for allocating community licences is much the same as the current public licence allocation process, I have no trouble continuing that program.

This means that we will be proceeding with the established program where the use of an additional frequency will not unduly restrict the planning processes required by the Act.

AM/FM conversion

Applications for AM/FM conversion received after July 14 will not be considered. This does not, of course, apply to those conversions covered by the transitional arrangements. The fact is that there are already more conversion applications in the pipeline than could possibly be dealt with by 1 October. So there had to be a cut-off date. We are working flat out to finalise as many conversions of commercial radio licences as possible over the next few weeks.

Some proposals for new frequency assignments to allow licensees to better serve their licence areas will need to be put on the back burner until the ABA's planning processes are well under way.

But overall, the radio industry does very well out of this Act. Licence holders will be allowed to hold both an FM and AM licence in the same market, instead of only one. And there are no limits on foreign ownership for them, so they can find foreign capital if they want to. I am sure that the ABA will have many existing players banging on its door to argue for high priority to their claims for a second licence. Planning is obviously one of the keys to the new regime.

Soon after 1 October, the ABA should be able to identify priorities for the planning of frequency allocation and licence areas, and the arrangements for public consultation.

Commercial advantages

I am pleased to see the *Broadcasting Services Act* 1992 is already having an impact. I have noticed that one broadcaster has moved quickly to take advantage of the two-to-a-market rule in the Sydney radio market. There are many commercial advantages to be taken up, and I am sure that other players will soon follow suit. This new regime is essentially what the industry wanted.

It is flexible because it allows the use of new technologies, yet it is predictable which is important when people are making business decisions. As for the public, viewers and listeners must be winners through greater diversity and choice of services and programs.

This is an edited extract of an address given by Senator Bob Collins at a Blake Dawson Waldron seminar on 29 July 1992.

CAMLA COCKTAIL PARTY

CAMLA will hold its first Christmas Cocktail Party at 5.30pm on Tuesday 1, December 1992.

Paul Styles, the noted Media Consultant to KPMG Peat Marwick London, will deliver an address.

The venue and other details will be provided to members in the near future.

Please mark your diary.

The Telecom New Zealand Case

Gina Cass-Gottlieb and John Mackay examine the implications of the Telecom New Zealand Court of Appeal case

The 20 year management rights to three radio frequency bands appropriate for use in cellular mobile telephone services were offered for sale by tender by the New Zealand Government as part of its privatisation policy. As a result of the tendering process and subject to the Commerce Commission's approval, Telecom Corporation of New Zealand Limited ("Telecom") became entitled to the management rights to two frequencies, AMPS A (the most sought after frequency) and TACS B. BellSouth acquired, through a New Zealand subsidiary, the rights to use a third frequency, TACS A.

The Commerce Commission refused to grant clearance or authorisation to Telecom for the purchase of the rights to AMPS A. Clearance was given for Telecom's purchase of the rights to TACS B on the condition that Telecom would sell the TACS B rights by public tender if it acquired the AMPS A rights. Telecom appealed from the decision of the Commerce Commission to the High Court. The High Court dismissed the appeal. Telecom then appealed to the Court of Appeal, which delivered its judgment on 23 June 1992.

The Issues

In essence, the issues before the Court of Appeal were:

1. Whether without the AMPS A rights Telecom had a dominant position in the market for mobile telephone services?
2. Whether any existing dominant position of Telecom would be strengthened by the acquisition of the AMPS A rights?
3. If so, whether the likely benefits to the public of the acquisition by Telecom would outweigh the likely detriment? If so, Telecom was entitled to an authorisation under s66(8) of the *Commerce Act*.

The Court of Appeal decision

The Court confirmed the Commission's and the High Court's treatment of the mobile and fixed telephone service markets as distinct markets.

However, it overturned the High Court's decision, with Justices Cooke, Casey and McKay adopting one line of reasoning, and Justices Richardson and Hardie Boys another. However, all five judges agreed with the result, which was to permit the acquisition by Telecom New Zealand of the AMPS A rights to proceed.

Was Telecom dominant?

Justices Cooke, Casey and McKay held that Telecom was and is in a position to exercise a dominant influence over the supply and price of services in both the fixed and mobile markets. It was stressed by the Court that imminent developments could be taken into account in determining the dominance of Telecom in the mobile and fixed telephone services markets. Justice Cooke found that BellSouth would be providing strong competition in the mobile market once an agreement with Telecom was finalised, but did not think that either at the time of the Commission's decision or at the time of judgment this prospect could properly be described as imminent.

On the other hand, Justice Richardson (with whom Justice Hardie Boys agreed) held that the question whether or not Telecom was in a position to exercise a dominant influence in the mobile telephone market depended on an overall assessment, having particular regard to the behavioural constraints on Telecom. Justice Richardson found that Telecom was not in a dominant position in the mobile market and accordingly was entitled to a clearance under section 66(7) for the following reasons:

- the constraints operating on Telecom were real and effective;
- there was no evidence that Telecom was extracting monopoly profits in the mobile market;
- there was no evidence that Telecom would forestall access to newcomers or only offer interconnection on discriminatory terms; and
- assessed over an appropriate time frame, BellSouth's entry, the likely entry of another competitor on the TACS band, regulatory and legal controls and the commercial and public environment provided substantial assurance of non-discriminatory interconnection. Accordingly, Telecom would be operating in an effectively competitive environment.

Authorisation of acquisition

Because Justices Cooke, Casey and McKay found Telecom to be dominant, the crucial issue for them was whether Telecom was entitled to an authorisation under section 66(8) of the Commerce Act. Section 66(8) provides:

> *"The Commission shall grant an authorisation under subsection (6) of this section if it is satisfied that the merger or takeover proposal, if implemented, would result or would be likely to result, in a benefit to the public which would outweigh any detriment to the public which would result or be likely to result from any person (whether or not that person is a participant in or otherwise a party to the merger or takeover proposal) acquiring a dominant position in a market or strengthening a dominant position in a market."*

What is required by the legislation is a balancing exercise between the likely public benefit from the acquisition and likely public detriment from the strengthening of Telecom's dominant position in either matter. Telecom argued that obtaining additional AMPS spectrum was important to Telecom in the ongoing development and upgrading of its analogue mobile network.

Justice Cooke (with whom Justices Casey and McKay agreed) accepted that the transition to digital technology was necessary to enable Telecom to improve its service and meet competition. He also held that users of Telecom's service would benefit if AMPS A and AMPS B were to be operated in tandem. In the fixed market Telecom was experiencing vigorous competition from Clear Communications Limited and in the mobile market BellSouth would be a formidable competitor as soon as it commenced business.

Justice Cooke held that the *Commerce Act* does not provide that unlimited competition is to be pursued at all costs, however wasteful of resources. If a reasonable amount of competition is being promoted, the public detriment from excluding further competition may not be

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The investigative journalists who trespass against us

Anthony Mrsnik reports on a recent unsuccessful attempt to injunct The Investigators from broadcasting a program

A recent decision of the Supreme Court of New South Wales looked at what restrictions the law will place upon the publication of material gained during the course of a trespass.

In *Heritage Real Estate Pty Ltd & Michael Tzovaras v. Australian Broadcasting Corporation*, Supreme Court of New South Wales (21 July 1992), Justice Sharpe stated that:

"It is almost the rule rather than the exception in this day of exposé television media programs, that in one manner or another there is a trespass or otherwise invasion of the privacy of the broadcaster's target".

The facts of *Heritage* were determined as follows. Over a period of approximately 16 days, the defendant made repeated requests to the second plaintiff to accede to a recorded interview with respect to a story proposed by *The Investigators*. The requests were both oral and in writing and contained a list of proposed questions. The second plaintiff ultimately declined to appear on camera owing to a concern over the nature of the story and the failure of *The Investigators* to provide him with a synopsis.

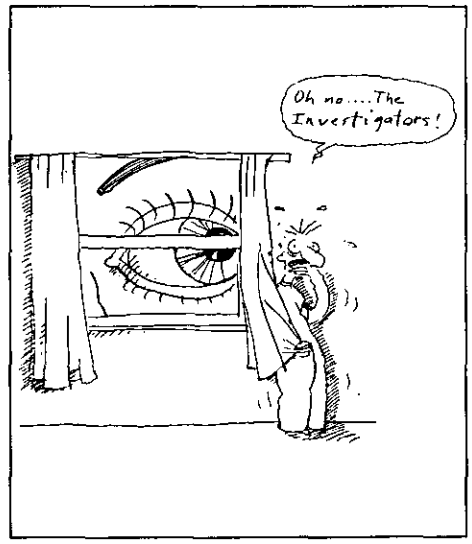
Trespass

On the seventeenth day, the defendant's reporter and a 2 person crew entered the reception area of the plaintiff's premises and moved, as Justice Sharpe described "in a somewhat aggressive fashion", towards the open door of the second plaintiff's private office. The reporter then placed a bag against the open door and proceeded to question the second plaintiff whilst placing himself in a position which did not allow for the door to be closed. The interview continued for approximately 5 minutes.

From the start, the second plaintiff indicated that he had no wish to continue the interview. The second plaintiff answered some questions and refused to answer others. It was not until some two thirds of the way through the interview that the second plaintiff requested the reporter to leave the premises and thereby confirmed that he was trespassing.

Injunctive relief

By way of summons issued at 4pm on the day of the scheduled 8pm broadcast of *The Investigators* program, the plaintiffs attempted to restrain (amongst other things) the broadcast of material involving the second plaintiff. The plaintiffs argued that they feared that the publication of unfavourable and probably defamatory material would cause both irreparable damage to their business and prejudice a pending defamation action against a newspaper proprietor.



His Honour, finding that a trespass had been committed, made it clear that trespass *per se* is no absolute prohibition to the right to publish material obtained in the course of a trespass. Justice Sharpe adopted dicta of Justice Young in *Lincoln Hunt Australia Pty Ltd v. Willesee & Ors* which required that the plaintiffs establish both a strong prima facie case that a trespass has occurred and that the case is the sort where the court may grant an injunction. Further, it must be shown that the damage likely to occur if an injunction is not granted would be irreparable and that the balance of convenience favours the granting of an injunction.

Damage to plaintiff

During the course of evidence, the second plaintiff conceded that the earlier publication by a newspaper, which was the subject of current defamation proceedings, had been the cause of a serious downturn in his company's business. Justice Sharpe, after considering the proposed story by the *The Investigators* in its entirety, was not satisfied on the question of irreparable damage.

His Honour added that the plaintiffs had sufficient notice of the tenor of the defendant's publication. This gave the plaintiffs adequate opportunity to approach the Court at an earlier date seeking interlocutory relief and subsequent discovery. This, in turn, would have provided the defendants with ample opportunity to reschedule its broadcast. Justice Sharpe made it quite clear, however, that particular facts may override an argument which sought to preclude the grant of eleventh hour interlocutory relief.

Unconscionable conduct

The notion of "unconscionable conduct" has featured regularly in the language of earlier cases in this line of authority. It is interesting to note that neither the plaintiffs in their submissions nor Justice Sharpe in his judgment make direct reference to the issue.

While *Heritage* did not directly concern itself with arguments based on unconscionable conduct, it is a relevant submission to be made by lawyers seeking to restrain publication of material. Judicial reasoning indicates that unconscionable conduct falls into the "balancing of convenience" through the court's reluctance to condone a tort which cannot be adequately compensated through damages.

Anthony Mrsnik is a solicitor with the Australian Broadcasting Corporation.

Pacific Rim Report: Telecommunications Structure and Development in Malaysia

Gerald Wakefield reports on Malaysia's system of telecommunications regulation

Historical Perspective

Malaysia is a federation of Peninsula Malaysia and includes the States of Jahore, Kodah, Kelantan, Malacca, Negri, Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu (referred to as "West Malaysia") and the States of Sarawak and Sabah (referred to as "East Malaysia"). Diverse political history has left numerous legal jurisdictions which are now being replaced by Malaysian Acts applying to all states. Nevertheless, by virtue of its historical background, the legal system of Malaysia is steeped in English legal tradition and philosophy.

There is equal protection under the law for foreigners and foreign-owned companies and the court procedure is very similar to that which exists in England. Appeals to the Privy Council from the Supreme Court of Malaysia were abolished in 1985. Commercial disputes may be resolved by arbitration conducted either ad hoc or under the auspices of the Regional Centre for Arbitration in Kuala Lumpur, with rules based on the UNCITRAL model. In 1986 Malaysia gave effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Development of Telecommunications

Before World War II, telecommunications services were introduced into Malaysia to provide links for the various tea and rubber estates and tin mines. Since the early 1950s a network linking the main towns has been installed. The desirability of a central role and programmed growth of the telecommunications infrastructure was recognised by the Government and reflected in the allocation for the third Five Year Plan (1975-1980), where a 200 percent increase in financial spending was committed compared with the previous five years.

The telecommunications development in Malaysia is well illustrated by a recurrent advertisement in *UTUSAN MALAYSIA*, a leading Malay language newspaper. This paper regularly carries an advertisement depicting a TABIB, a traditional practitioner of Malay medicine and sex therapy, advertising his services which purport (there is no TPA section 52 equivalent in Malaysian law) to guarantee enhancement of the male sex life and general health. There is nothing peculiar about this advertisement except the TABIB is holding a cordless phone to his ear. Is this, one asks, the new technological age image of the traditional medicine man? Any sexually impaired male from any country may now contact the TABIB instantaneously, at any hour for advice (the author has the telephone number should any reader feel the need to interconnect).

This is the second article in the Bulletin's series on communications developments in the Pacific Rim. As a telecommunications law practitioner, Gerald Wakefield is one of a growing number of Australians providing consultancy services to the expanding communications sector in South-East Asia and Indo-China. This article provides an excellent overview of Malaysia's telecommunications development and regulatory structure.

This emphasises the important role of modern telecommunications in the day-to-day affairs of Malaysians. In the streets of Malaysia it is now possible to see hawkers raking orders from their regular customers through the cellular mobile phone network, and as in many other Malaysian cities, it is not uncommon to see businessmen in Kuala Lumpur equipped with hand or car phones.

The legislative framework for the telecommunications infrastructure in Malaysia consists of the Malaysian *Telecommunications Act* 1950 (as revised in 1970 and 1985) which gives the Government the exclusive privilege of establishing, maintaining and working telecommunications in Malaysia. In practice, this is through ministerial determination on advice from Jabatan Telecom Malaysia (JTM), the regulator, and through a licensing system in telecommunications, radio communications and satellite communications.

The infrastructure is therefore deregulated in the sense that if the Minister can be persuaded that a service is required in Malaysia, he has the power to authorise such a service with whatever conditions he chooses in the licence. So far, the Minister through JTM has not authorised a second terrestrial carrier.

The Monopoly Carrier

Telecom Malaysia (formerly STM) is the monopoly carrier for terrestrial based voice and data telecommunication services in East and West Malaysia and for international services. Telecom Malaysia operates under a licence to establish, maintain and work a telecommunications system providing domestic and international voice and other services to the public for a 20 year period which is renewable. The carrier under the licence must also permit interconnection to its system from other operators.

An essential feature of the regulatory framework is the mandatory nature of community service obligations. These are provided for not only in the operating licence of Telecom Malaysia, but also in the 1985 amendments to the *Telecommunications Act* 1950.

The shares of STM were listed on the Kuala Lumpur Stock Exchange in 1990. In September of that year 23.8% of the corporation's issued paid up capital was floated. In accordance with the Malaysian Government's policy of enhancing indigenous equity stake, Telecom Malaysia reserved some 30% of the issued shares to Bumiputera related institutions and individuals, 5% to foreigners and 15% to Telecom Malaysia's employees. The Annual Report of Telecom Malaysia in 1990 indicated that the Government of Malaysia holds the majority of 76% of Malaysian shares, individuals from Malaysia own 3.3% and foreigners including Singaporeans 3.7%.

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The Regulator

The independent Government regulator Jabatan Telecom Malaysia (JTM), was established as part of a restructuring scheme hereby the Government retained the egulatory functions. The legislation ates the functions of this body as:

To regulate the conduct of telecommunications;

To regulate the running of telecommunications services;

The establishment of standards and their enforcement;

To regulate the use of radiofrequency spectrum;

To regulate the national use of the geostationary-satellite orbit.

As well as these regulatory functions, TM has other functions which include overnment representation at inter- ational fora, the promotion of consumers' nterests in respect of price, quality and ariety of services, the encouragement of najor users to establish business in Malaysia and the promotion of research.

In discharging these duties JTM is equired to consider efficiency and conomy, satisfaction of all reasonable emands, encouraging the world wide evelopment and expansion of elecommunication services and the rovision of domestic and overseas ervices at rates consistent with efficient ervice.

Ministerial Powers

In addition to the powers conferred on JTM, the statute gives the Minister wide regulatory powers. These relate to tariffs, conditions subject to which lata may be transmitted and equipment ired, the necessary precautions for reventing improper interception or lisclosure of data, the form of licences and he manner in which applications for icences are made, the prescription of erms, conditions and restrictions on icences (and subject to which licences are ranted), the fees payable for any licences, he working and use of radio ommunication equipment and the icences of dealers in the sale or transfer f radio communication equipment.

Licences

The Minister retains the power to establish, maintain or work a telecommunication in any part of Malaysia, and, subject to the approval of the Land Authority, a licence may extend to authorising the licensee to place, lay, carry or maintain any posts, cables or wires for the purpose of the telecommunication. A licence may be revoked at any time on the breach of any of the conditions or in default of payment of fees.

In addition to terrestrial services, the Minister retains the power to licence the establishment of any radiocommunication station or the installation or working of any radiocommunications apparatus in any place in Malaysia or on board any local vessel, or local aircraft or in any vehicle including satellites.

Enhanced Services

Even though Telecom Malaysia is the monopoly carrier, it has been possible for some years for private organisations to operate within a liberalisation policy. For example, customers may own and maintain their own terminal equipment, and the maintenance of PABX or other terminal equipment may be carried out by private firms. Paging services are provided directly by a number of private companies. This liberalisation policy now extends to other value added services. In Malaysia, the determination of what is a value added service, which is not defined in the legislation or regulations, is somewhat ad hoc, although so far, in practice, this approach has worked.

Cellular Mobile

In the areas of cellular mobile, there is competition within the system. Malaysia's first cellular mobile system called ATUR (Automatic Telephone Using Radio) is operated by Telecom Malaysia, and is based on the Nordic mobile system and Ericsson is the provider. By the beginning of 1986, Malaysia was the first country in Asia with a fully automatic nationwide cellular mobile telephone system. It provided coverage to 329,749 square kilometres of country using 86 radio base stations and a coverage of 95 per cent of the population with 68,000 subscribers. At the end of Phase 4 development there will be capacity for 85,000 subscribers. In 1988 a 900 MHz CMTS was installed to complement the ATUR 400 MHz System. Celcom is in competition with Telecom Malaysia's nationwide NMT 450 MHz services with a predominantly urban E-TACS 900 MHZ service with a subscriber base of 60,000.

Value Added Services

In the value added services market, there are several suppliers. One example of such a service is the network offered by Information Networking Corporation Snd Bhd (INC).

INC was incorporated in February 1990 with a paid up capital of $11 million, with the Tabung Haji (the organisation that acts as a bank for pilgrims journeying to Mecca) holding 40% and the remaining 60% being equally shared by Gelombang Udara Smd Bhd and Modcomp It(m) Snd Bhd. INC has spent some $32 million Malaysian dollars on establishing its infrastructure of which some 80% is investment in equipment. The Tabung Haji head office building in Kuala Lumpur acts as the central communications hub for INC which has nodes in every State including East Malaysia. All are linked through Telecom Malaysia's existing Network. In order to gain international access, INC has established a link via the AsiaSat space segment into Hong Kong Telecom International, from which INC gains worldwide access to databases and networks. INC is online with the Kuala Lumpur Stock Exchange and through the Hong Kong link has access to information from all of the world's stock exchanges. INC also offers an EDI service and is associated with SNS in Singapore.

Malaysia has also decided to establish its own regional satellite facilities for South East Asia. A memorandum of understanding for the manufacture and launching of the MEASAT (Malaysian East Asian Satellite) Satellites has been signed for launching before 1 January 1995. The memorandum was signed between Binariang Snd Bhd, the Malaysian owner, Hughes Communications International Inc, the satellite manufacturer and ArianeSpace, the European launch organisation. According to the Malaysian press, the project is estimated to cost $M300 million and is designed as a regional satellite system with footprint covering countries in South East Asia only.

Binariang has also signed a Satellite Users Agreement with four companies in the region including Philippines Long Distance Telephone Company (PLDT), Malaysia's Uniphone, Communications and Satellite Services and World Sport and Entertainment of the US.

Malaysia is growing strongly. The Bureau of Transport and Communications Economics in 1991 estimated its growth rate in gross domestic product at 7.7% in

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The Broadcasting Act lives on for Regional Radio

John Corker outlines some Broadcasting Act issues which will continue to arise in regional radio licence grants

The *Broadcasting Act* 1942 appears set to be repealed on 1 October 1992, bringing with it the demise of the Australian Broadcasting Tribunal (ABT). Nevertheless, all applications for the grant of commercial and supplementary FM radio licences pending at that time are preserved and must be determined by the new Australian Broadcasting Authority (ABA), apparently in accordance with the existing procedural rules based on the current criteria as set out in the *Broadcasting Act*.

Delay in licence grants

Ever since the Government's regional radio program commenced in 1987, the licence grant process has been characterised by delay, repeated amendments to the relevant legislation and costly inquiries which have provided a fertile ground for legal argument and litigation.

Since February 1987, 29 applications for review of ABT decisions in regional radio licence grant inquiries have been lodged in the Federal Court and 2 applications for special leave to the High Court have been made. Of these, 6 applications have been ultimately successful in having a Tribunal decision set aside (1 reversed on appeal), 8 applications have been dismissed by the Court, 11 applications have been discontinued or withdrawn prior to hearing and 3 applications have dealt with ancillary matters such as costs or extensions of time. Of the 24 service areas where applications have been referred to the ABT for decision since May 1987, 13 now have new licensed operating services, the Tribunal has decided not to grant a new licence in 3 and applications are still pending or litigation is current in 8. Some of the applications for the grant of a supplementary licence were lodged with the Minister as far back as 1983.

A number of reasons have been cited for the tardy and unproductive process, including delays in the planning process, the complexity of the relevant legislation and the number of times it has been amended (seven relevant amending Acts since 1987), lengthy ABT inquiries, the zealous efforts made by incumbent licensees to delay the inquiry processes and the economic downturn generally.

Amending legislation

The *Broadcasting Amendment Act (No 2)* 1991 was introduced by the then Minister Kim Beazley "to implement reforms which will encourage more expeditious introduction of new FM commercial and supplementary radio services to listeners in regional Australia." Late last year, the Exposure Draft of the *Broadcasting Services Bill 1992* had been released but the Minister was of the view that "urgent remedial measures should not be put off pending that fundamental reform."
The amending Act:

(a) defines the term "commercial viability" and limits the circumstances in which the Tribunal must have regard to commercial viability;
(b) gives a clear preference for the grant of an independent commercial radio licence, when the Tribunal is considering applications for a commercial radio licence and a supplementary radio licence simultaneously and determines that only one licence should be granted;
(c) allows a supplementary radio licence to be sold anytime after two years from commencement of the supplementary service;
(d) substantially reduces the fees payable by new services commencing on the FM band;
(e) allows direct conversion of AM services to FM on payment of a fee.

Whilst some of the amendments may have achieved their purpose, the preference procedure provisions and their applicability to particular inquiries have generated much legal argument.

The term "commercial viability" has generated much debate for as long as it has existed in the *Broadcasting Act 1942* and the new definition has not changed matters. The Federal Court has already had to rule on its new meaning in *WREB Cooperative Limited v Australian Broadcasting Tribunal* and the definition was further amended in June 1992.

Preference for independent licences

In some of the current inquiries, three difficult questions of interpretation have arisen in relation to the preference process provisions described in paragraph (b) above. The first question is whether these provisions require the Tribunal to grant an independent FM licence if there is a suitable applicant for that licence, irrespective of the effect of that licence grant on the commercial viability of an incumbent licensee.

The Tribunal and some parties have agreed that the legislature could not have intended that a consideration of the commercial viability of any overlapping services should be entirely excluded. To make sense of section 82AAA in this way thus requires a departure from the plain and ordinary meaning of the words of the section.

The second and third questions concern whether the preference process provisions apply at all to current inquiries. First it is argued that they are not expressed to apply retrospectively and only apply to applications lodged or referred after the commencement of the section on 4 January 1992. Secondly, it is argued that they only apply to inquiries where the publication of the notice by the Minister inviting applications for the grant of an independent licence post dates the lodgement or referral of the supplementary licence application.

Argument continues about the answers to these questions and it may continue into the Federal Court. At present, applications for commercial and/or supplementary radio licences remain unresolved in the areas of Mackay, Cairns, Lismore, Darwin, Bundaberg, Albury, Sale and Wagga Wagga and the above arguments are potentially relevant to several of these inquiries.

Although some of these problems would have been avoided by better legislative drafting, it seems almost inevitable that when legislation is amended time and time again it becomes fraught with problems. It seems therefore that at least in the granting of commercial radio licences the *Broadcasting Act* 1942 will not be put out of its misery quite as quickly as some had thought. Very recent amendments may well be the subject of litigation that lingers on in the courts in spite of the new regime.

John Corker is a legal officer with the Australian Broadcasting Tribunal.

Pornography and Violence

Richard Read argues that case studies reveal a link between pornography and violent sex crimes

The last two decades have seen a significant shift in the nature of sexual offences committed. In the late 1960s and early 1970s rape usually involved an indecent assault accompanied by vaginal intercourse. Today, if a woman is raped it is commonplace to hear that she has suffered a combination of assaults including touching her genitals, insertion of objects such as beer bottles into her vagina or anus and the insertion of a penis in her mouth. Other degrading acts such as forced oral contact with her attacker's anus are not uncommon. Not infrequently she will be raped in this fashion by a number of males at the same time.

With the increase in violent crime generally and the change in the way sex crimes are committed, there is a compelling need to find out how much of this violent crime is being caused by depicted violence and pornography in the print, cinema and electronic media.

The broad community acceptance that advertising influences human behaviour is to some extent reflected in the enormous amount of money generated by advertising that seeks to influence the habits and choices of consumers. This, coupled with the free availability of pornographic material at newsagents, service stations and video shops, has lead me to consider the impact depicted violence has on the actions of individuals.

Anti-social behaviour

The sexual and aggressive drives are strong in males, and conditioning from childhood is intended to restrain male expression in socially acceptable ways. It is likely that if a male child, or young adult with poor impulse control, views this material he is likely not only to become sexually aroused, but also to lose control over those mechanisms which inhibit anti-social behaviour in normal people. He is likely, if opportunity presents itself, to imitate the violence or sexual activity he saw in the film or in the magazine. He will not know that the women he saw engaging in such acts as oral sex were in fact being paid, blackmailed or forced to perform those acts. He may also assume that such conduct is the norm and accepted generally by women.

Constant exposure to violent or explicit sexual material, whether on video, cinema, television or in magazines is not only detrimental to young people, but in some cases will be the trigger factor which leads them to commit a crime of violence. This material is capable of moulding the young mind and teaching that person all he needs to know to commit a violent crime, providing him with the knowledge he might not otherwise have had. It can have the same effect on an adult with poor judgment and poor impulse control. It can turn fantasy into reality with those who cannot or are unable to differentiate between reality and fiction.

Case studies

I have located some files in the office of the Director of Public Prosecutions in Victoria which support my assessment of the situation. My "exploratory study" was designed to obtain relevant factual information and identify questions as a starting point for further research into actual case histories, an aspect which has received very little attention in Australia. My research is designed to encourage more detailed research by others, and no question of any statistical inferences can arise. I shall confine my comments to actual case studies which provide compelling evidence of the link.

Case study 1

In my opinion, the first case is a graphic example of the serious problem which our community faces as a result of hard core pornographic material being made freely available since the early 1970s.

This case involves the abduction at knife point of a woman, who was bound with a rope and placed in the boot of a vehicle and driven to a deserted reserve outside Melbourne. The woman was violently sexually assaulted, and sustained extensive bruising, abrasions and cuts, some cuts being 8 inches long.

When arrested and interviewed by the police, the offender explained his strong sexual drive and why he took the rope and the knife with him that night:

"Because I have been reading books on bondage and I felt a strong urge to act out what was in the books. I knew it was wrong, but I couldn't help myself."

When asked why he had cut one of the woman's nipples off, he replied:

It's those bondage books, sex feeds on sex, that's what has done it, you sort of get an insatiable appetite. You read in those books where women liked to be tied up and spanked, and at the time you know it's serious, but you don't think you are doing wrong. The books show women need to be dominated, and that to grab a woman off the street and tie her up and rape her isn't really wrong, and as I said to (her) that night that I had to do it once to get it out of my system you know...."

The police showed him some drawings that they had seized from his house and he admitted making those drawings. The drawings depict cutting off a breast, removal of a nipple and other sexual activities. He also agreed that photographs that were seized showed a knife on a woman on similar positions to those forced upon his victim. He then said:

"I realise that I have been doing the wrong things by reading bondage books because they have been putting ideas into my head."

He gave a very interesting description of these events when he said:

"This incident became a terrible nightmare instead of a fantasy come true."

The court was told that a large number of books and magazines on sex were found in his bungalow. They included "Robbed and Raped", "Bondage Love" and "Kidnapped".

His Counsel described "Bondage Love" as being "almost a blueprint of what actually occurred."

The psychological evidence established that this offender had poor judgment and poor control of his sexual instincts.

A forensic psychologist said it was his opinion that:

"Something was going to happen at this particular point in time regardless, you know. It seems to me that he had the blueprint for this behaviour. He didn't have to make up anything from his own resources and he just went ahead and followed them. I think that is the learning phenomenon that occurred, and in the natural course of events something was going to occur in any case I felt at this particular time."

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Mr Justice McGarvie said that what this offender did followed fairly closely a story written in one of the magazines found by police. In sentencing, his Honour said:

"He (counsel) has drawn my attention to the number of bondage books or bondage magazines which were in your possession, and I have looked at a number of them and read several of them. It is a despicable thing that people in this community make profit by carrying on such an evil trade as the sale of those magazines. The message which is strongly made in those magazines is that it is socially acceptable for a man to engage sexually in cruel, degrading and humiliating conduct towards women. Indeed the books convey the impression that women like to be dominated and cruelly treated in their sexual relations."

Case study 2

A case heard in the Children's Court at Melbourne in 1987 demonstrates the strong link between the pornographic literature read by the ten year old offender and the crime he committed on a six year old girl.

At the preliminary examination, the police gave evidence that they had attended at the young boy's home on the day they arrested him and collected a large box of pornographic magazines. The box of magazines, numbering about 50, were all pornographic magazines of the most explicit kind. Each of the sexual acts inflicted on the girl were graphically depicted in close up colour photographs in those magazines.

A very experienced forensic psychologist said:

"It would further appear that one of the significant contributing factors in relation to this behaviour at the time was his discovery of pornographic magazines and video films belonging to his elder brother aged 19, which were concealed in that sibling's bedroom. This in turn appears to have aroused his curiosity and lead to this most unfortunate sequence of events."

The young offender said he had discovered the pornography prior to the offence and had viewed the magazines alone and watched the pornographic videos on television and had become sexually aroused.

Case study 3

In July, 1989 a nineteen year old prostitute engaged a male customer in St Kilda, Melbourne. The deal was $50 for oral sex only. She performed oral sex as agreed, but he then became violent and demanded free vaginal and anal sex. He then forced her fist up her vagina causing her severe pain.

A few weeks later, he indecently assaulted another prostitute by forcing his fist into her vagina in a punching action, causing her to scream in pain.

The offender pleaded guilty, and in sentencing him the County Court judge said:

"The indecent assault on the same woman, and on another prostitute, were more invasive and traumatic, having as I accept you did, watched a number of video cassettes that demonstrated the technique of inserting a human fist into the vagina."

When the police arrested him they searched his house and found a large number of pornographic videos and magazines. The magazines included the title "Fist Fucking".

When interviewed by the police he was asked "... would it be fair to say that fist fucking would be your fantasy?" and he replied "Yeah". He agreed that what he had done to these women had been a re-enactment of what appeared on the videos found in his house.

Nexus between pornography and violence

I believe it is highly probable that the present levels of violent crime and violent sex crime in Australia are linked to the proliferation of increasingly violent and pornographic videos, magazines and other material. In my view, the time has now come for all Australian Governments to pass and enforce the necessary legislation to control the distribution of this material in Australia. I believe that my sample study of actual case histories clearly establishes in each case the very strong probability that the videos and magazines, which each of these offenders viewed, were a significant motivating factor in the subsequent violence and sexual assaults which occurred. There is also a significant body of academic research overseas and in Australia which supports my conclusions. Many reported cases also demonstrate the link, such as the video recorded interview with Ted Bundy a few hours before his execution in Florida in January 1989. Much of the academic work which claims there is no causal link is based on social science evidence consisting of experimental studies with university students in clinical surroundings or interviews with people who view X rated videos, many of whom would be unlikely to admit to interviewers that the pornographic material they are using makes them imitate what they have seen.

There have also been a number of inquiries in the United States, the United Kingdom and in Australia. The value of that type of research is greatly diminished unless it includes in depth actual case studies. Future research must include actual case studies and interviews with police, prosecution authorities, forensic psychiatrists and others dealing with violence in the front line.

With the present level of violent crime and violent sexual crime, the onus of proving that there is no significant link between pornography and imitative criminal behaviour, lies squarely with those who assert, contrary to human experience, that there is no such causal link.

Except in exceptional circumstances, I do not believe in censorship, but common sense dictates that we have gone too far and some restrictions need to be put in place.

Richard Read is a Prosecutor for the Queen in Victoria. He has practised as a barrister for 21 years. This is an edited extract of a paper delivered at the Second Melbourne Criminal Justice Symposium.

CENSORSHIP SEMINAR

On 14 August 1992 CAMLA hosted, in conjunction with the Free Speech Committee, an extremely successful seminar on censorship in the 1990's. CAMLA wishes to thank all speakers and chairpersons at the seminar for giving so freely of their time. Elizabeth Johnstone also deserves special thanks for her time and efforts in organising the seminar. An edited selection of the papers delivered at the seminar will be published in the next issue of the Bulletin.

Pornography, Free Speech and the Status of Women

Sarah Ross-Smith argues for a new rationale for the censorship of pornography

The current censorship classification guidelines came into effect on 3 July 1992. They state that one of the guiding principles is that "adults in a free society should be able to see, hear, and read what they wish, provided there is sufficient protection for young people and that those who may be offended are not exposed to unwanted and unsolicited adult material".

These statements of guiding considerations encapsulate conflicting principles. On the one hand there is a liberal and permissive approach: we live in a free society, therefore liberal freedoms of expression and action are permitted. But this has to be counterbalanced against other, collective goals, which may modify or limit an absolute right to see, hear and express one's self in a particular manner.

Freedom of speech

Freedom of speech is a hallmark of democratic society: it purportedly enables all groups within society the opportunity for criticism of facets of that society, allows for vigorous debate, encourages critical thought and allows any citizen the opportunity to express dissenting political or social views.

But to what extent should this be conceptualised in terms of an absolute right? How far can we allow the right of the citizen to self expression to encroach upon another's claim to dignity, self respect and equality?

Free speech and the right to self expression are seen as an ends in themselves. Their very existence is a priori a valuable thing, to be protected without questioning its underlying purpose, nor a consideration of its sometimes harmful effects.

Absolute rights?

The current debate surrounding pornography has defined the argument in terms of an absolute right to freedom of speech and a collateral right to view and hear. Any threat to this freedom to speak or to see is presented as the "thin edge of the wedge"; advocates of the continued existence of hard core and violent pornography which degrades and demeans women are seen as the protectors of "society".

Perhaps this says something about how we value women, that we are prepared to see the protection of pornography as the protection of democracy, but the eradication of demeaning and dangerous depictions of women as destructive, and fundamentally inconsistent with the aims of a democratic society. Even ardent supporters of democratic rights do not assert that all rights are absolute in all situations. But the rights talk which is conducted in the media discussion of pornography consistently pushes the misconception that the right to freedom of speech is an absolute freedom irrespective of its consequences.

Pornography and classification

The recognition that some forms of self expression are damaging both to individuals and society, has resulted in the regulation and restriction of certain kinds of publication. But the standard for regulation has almost invariably come back to notions of "obscenity" of "offensiveness".

The current guidelines are no exception, for although there is some consideration of demeaning images, that is not a ground per se for a refusal to classify, only to restrict publication.

Bestiality, children, cruel and dangerous acts and nonconsensual sex, predictably, get the gong. Additionally, publications which "promote, incite or instruct in matters of crime" or "promote, incite or encourage the use of prohibited drugs" will also be refused classification. Surely, the continued humiliation and degradation of women is of greater concern than the use of prohibited drugs, and constitutes an "urgent" policy consideration, justifying refusal to classify this sort of material altogether?

The distinction between an approach which advocates non-publication on the ground of morality and those who assert non-publication because it demeans women, is that the latter is a political, not a moral objection. Erotic images are not per se pornographic. What is pornographic is the deception of women which is demeaning, which constructs women in a way that entrenches gender inequalities in our society and which values women only as the objects of male sexual desire. The word "pornography" derives from the Greek "porne" meaning harlot and the definition is useful because it provides an historical location of the practice. If we see pornography as something demeaning and disempowering to women, and that it is the status of women within our society which is infringed, rather than appealing to an homogenous moral code, then the offence standard should be replaced.

The difficulty with an obscenity or offensiveness approach is that it merely enforces prevailing standards of morality; it does not necessarily eradicate images of women which devalue and degrade, and which make a mockery of our liberal society's claim to equality.

Sarah Ross-Smith is a final year law student at the University of Sydney Law School.

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serious. It may more readily be outweighed by the public benefit of economies of scale and other efficiences.

The strengthening of Telecom's market dominance by the acquisition of AMPS A was found to be moderate and would diminish over time. Justices Cooke, Casey and McKay therefore allowed the appeal and granted to Telecom an authorisation under s66(8) of the *Commerce Act* for the acquisition of the management rights to AMPS A.

Justice Richardson considered that even if he were wrong in his conclusion that Telecom was not in a dominant position in the mobile market, he was satisfied that its dominance would be likely to be strengthened by the acquisition of the AMPS A management rights. However, the likely benefit to the public of the acquisition would outweigh the likely detriment for the purposes of s66(8) of the *Commerce Act*.

Telecom's appeal was therefore allowed.

John Mackay and Gina Cass-Gottlieb are solicitors with Blake Dawson Waldron.

The New Face on the Regulator

Peter Webb outlines the role of the ABA

This article gives me the chance to articulate the nature of the role that the Australian Broadcasting Authority is likely to play on and after 1 October 1992, the planned date for the proclamation of the *Broadcasting Services Act* 1992. I cannot speak with absolute conviction about this because quite obviously the Authority has not yet been constituted.

Nevertheless it is possible to give some reasonably clear indication of the difference in approach that the Authority will certainly take to the discharge of its functions from that which has been taken by the Tribunal over the years. This difference is mandated by the new Act which, both procedurally and substantively, stands in marked contrast to its predecessor of 50 years, the *Broadcasting Act* 1942. In order to illustrate the difference it is best first to glance backwards to what will soon be the regulatory environment of the past.

Background

In the few years shortly after the conclusion of the Second World War, the Australian Broadcasting Control Board was established with the objective of helping the Government to cope better with the remarkable post-war development of broadcasting. The Board was given limited roles in planning the broadcasting system, in recommending licence grants and in regulating programs, but all major powers were left for the Government to exercise.

A judicialised form of inquiry was introduced by the Board which presumably saw this, and perhaps quite correctly, as the answer to very difficult broadcasting issues, including those posed by the introduction of television to Australia in the mid-1950's, and the emergence of that volatile mix of newspaper and broadcasting interests.

When the Control Board was abolished and the Australian Broadcasting Tribunal established in 1976, the Tribunal was given what the Control Board had been denied – the right to licence commercial broadcasters. For the first time in the history of broadcasting in this country, the important licensing power was to be entirely removed from government control and influence. The planning process, designed to protect the frequency spectrum as a national resource, remained under direct government control.

The ABT, for its part, retained the model of quasi-judicial hearings that it inherited from the Control Board, and, in the occasional circumstance where it was most needed, that model proved quite useful. Unfortunately, however, the mandatory nature of inquiries – made necessary by Parliamentary Act and later Ministerial Regulations recommended by the Administrative Review Council, that the Tribunal found as stifling as did the industry – served only to bureaucratise both the licensing and programming processes of the Tribunal to the intense frustration of all.

The 1976 Green Inquiry, which recommended the Tribunal's creation, placed emphasis on the legitimate interest of the public in the whole of the licensing process. The holding of public inquiries by the proposed Tribunal was seen by Mr Green, and I hope I do him no disservice in my reading of his report, as an end in itself rather than as a means to an end. Unfortunately, too literal an interpretation seemed to be placed on this inquiry recommendation in the Green report, and in many instances where a formal inquiry by the ABT was clearly not only not necessary but was actually inimical to the public interest, it was, nonetheless, unavoidable under the Act.

Public Participation

Public participation remains, obviously, an important element in broadcasting policy. The Government has proposed, and the Parliament has agreed, that the Australian Broadcasting Authority (the "ABA") should be given some of those planning powers, hitherto reserved unto government, for independent determination.

Other references appear in the new Act to the need for public involvement in certain processes, but, and clearly quite intentionally, the Parliament has not sought to dictate the procedure by which that might be achieved, leaving it instead to the good sense of the responsible parties.

The sweeping away of these procedural barriers to efficiency and effectiveness by the new Act should not be taken as some sign that the Parliament feels that the public interest is not as important as it once was. I am sure this is not the Parliament's view. Rather, I think, it deserves to be seen as an acknowledgement that at this stage of our history a more mature approach can now be taken to regulation of the broadcasting industry. No longer is it thought necessary that the future legislative framework for regulation should be as prescriptive of procedural detail as it now is. Instead, the Parliament has had the confidence to prescribe the outcomes that it wishes to see achieved and to stay comparatively silent about the means of getting to them.

The public consultation requirement for broadcasting planning is designed to make those decisions more transparent. The new Act places a duty on the ABA to undertake wide public consultation on all aspects of planning, especially in the setting of priorities, and the development of guidelines, frequency allotment plans and licence area plans.

Planning to be driving force

In so doing, the ABA will consider the range of demographic, social and economic factors set out in the new Act. This contrasts with the previous system where public interest decisions were largely left to the Minister of the day, while channel allocation decisions were considered to be in the realm of physics and engineering. It will be a new experience for all of us to focus the debate on public policy outcomes of engineering options, before engineering decisions lock the outcomes into place. The planning process will, in fact, become the driving force of broadcasting regulation.

It is at the planning stage, and in response to the public process, that the Minister and the ABA will make judgments about the number and types of services to be made available in each market area. This does not mean that planning will be a single one off event, after which there will no longer be any scope to respond to changing circumstances. Variations to frequency allotment plans and licence area plans will undoubtedly be necessary from time to time. However, consideration of all such changes will be through an open public process under which the full public impact of the change can be assessed. I would expect however, that once planning for a market is completed it could be several years before any significant planning or market review occurs, and then only in response to clearly evident market and public demand.

Developments in technology will change the face of broadcasting service delivery over time. It is highly likely that within a few years new technology will make it possible to accommodate more services of comparable or better technical quality in the existing spectrum allocated to broadcasting services.

While the planning process is pivotal in the release of broadcasting services band licences, the new Act is otherwise technology-indifferent and concerned principally with the service, not its delivery. That distinction is reinforced by the fact that the technology licences for broadcasting transmitters will be issued under the *Radiocommunications Act* 1983, not the *Broadcasting Services Act*. To streamline these spectrum licensing arrangements, the Minister is expected to provide appropriate delegations for the ABA to issue the relevant radiocommunications licence.

The ABA will arrange for broadcasting channels not immediately required for commercial national or community services to be made available for other uses for a fixed period of time determined by the ABA. At the end of that period the spectrum so allocated will once again become available for allocation to broadcasting.

Licences for commercial broadcasting will generally be allocated using a price based allocation system. Thus, the present lengthy and litigation-prone commercial licence grant procedure will be replaced by a simple auction or sale. In single markets, however, the new Act requires the ABA, on request, to allocate to incumbents licences equivalent to present supplementary licences where there are at least two commercial radio channels available.

I expect the ABA will approach these planning tasks in several stages so that it can quickly make licences available in the areas of greatest need. This may involve initial consideration of priorities and planning based on current work and the results of recent market studies, coupled with direct public consultation in the relevant markets.

At the same time the ABA will likely open the way for a more comprehensive but slower review of planning and service development needs. This will encompass the future planning framework and as far as possible match the distribution of channel capacity with identified demand and the planning criteria set out in the Act. This will involve reconsideration of the planning assumptions that have been used for the past few years.

Commercial viability

The Parliament has also decided that the much-litigated and difficult to determine concept of commercial viability should be discarded, and the issue approached in a different way. The ABT has, in the past, experienced quite a lot of difficulty in deciding whether incumbent radio licensees could remain commercially viable in the face of competition. No matter which way its final decision went, a disappointed party either became a litigant or a strong critic of the ABT, or more usually both. The ABT became a whipping post virtually every time it handed down a decision.

Market forces

The Parliament has decided to let market forces and risk assumption, steered of course by frequency planning, determine viability questions in future. The price-based allocation system will let an applicant bear the burden of its own judgment about the price it is prepared to pay for a licence. The Minister might give the ABA directions about actual reserve prices to apply to individual licences, and the ABA, for its part, might, in the absence of any such direction, set a reserve price. But that consideration apart, potential licensees will in future bear the risk themselves of pitching a price bid at a level that is economically viable for them.

"Beauty" or "Merit" contests will be no more, community licences aside; viability of the proposed service or existing services will not specifically be a factor to be taken into account in the licensing process, (although concepts of efficiency and competitiveness will be considered at a macro level in the planning process); a licence may only be refused or cancelled because the licensee is unsuitable.

All of this represents a marked departure from that which the industry has become used to, both substantively and procedurally. There are many challenges ahead for us all, and not least for the ABA in deciding its initial planning priorities.

Summary

In summary then, the Parliament has determined that the broadcasting industry has reached a stage of its development that is susceptible of lighter, less intrusive regulation than has been the case to date. The radio industry is obviously thought to be at a point where incumbents no longer need the protection of the commercial viability provisions, although incumbents in single markets, as something of a quid pro quo, will automatically be eligible for second licences.

The television "free to air" industry remains protected from further competitors for another five years, but pay TV could complicate that market in the not too distant future.

Planning will be more public, licensing will be streamlined, regulation will shift to a different, internal emphasis, and technological developments will be capable of much easier accommodation within the regulatory regime than is now the case.

The new Act, it can be said, has the marked advantage over its predecessor of being based on a vision — a vision of the future that tries to serve the public interest in all its dimensions — social, cultural and economic — while endeavouring to meet the present and future needs of the industry.

The new Authority will, I am sure, play its part in all this. It will be a business-like and professional organisation, doing its best to get in and help the industry where appropriate, but not afraid either to stand outside it or take firm regulatory action when that is clearly called for. The experiences of the past make it obvious that such action may be necessary from time to time but the Authority, in sympathy with its charter and the spirit that underpins it, will strive for balance in all things.

Peter Webb is the Acting Chairman of the Australian Broadcasting Tribunal.

Continued from p15

1991/1995. This compares with a figure of 4.2% in Australia. The Bureau has also estimated that Telecommunications Expenditure Forecasts for Malaysia will increase by an annual average rate of 17.1% from 1990 to 1995. This compares with 10.7% in Australia. The structure of the Malaysian industry appears to work extremely well with a privatised monopoly terrestrial carrier and strong competition in other services such as mobile, paging and value added services. Should the launch of the MEASAT satellite of services proceed in 1994 as planned, Malaysia will have positioned itself to become one of the centres for telecommunications development in South East Asia and will have established the infrastructure for its further development and industrialisation. Malaysia is planning to be a fully industrialised society by the year 2020, and is well on the way to achieving this goal by creating a state of the art telecommunications infrastructure.

Gerald Wakefield is a consultant with Sly & Weigall.

World Review

A survey of some recent international developments

EC draft copyright directive

The EC has issued a draft directive for the harmonisation of European copyright law. The directive proposes a standard copyright life of 70 years for the works of citizens of member states. However, works of citizens of non-member states would attract copyright for the same period as the period of copyright in the non-member country. The directive if promulgated would apply to all copyright which had not expired prior to 1 January 1995.

Pay TV in Hong Kong

A six month review of Hong Kong's broadcasting policy was completed in June 1992. Following the review, the Executive Council approved the grant of one territory-wide terrestrial subscription television licence by January 1993. The licensee will be given a three-year exclusivity period to establish itself. After that period expires, the market will be open to competition. Although fibre optic cable is the Government's preferred delivery technology, bids incorporating other methods of delivery will be considered.

Satellite Telecom Network for Kenya

The Kenyan Government has announced plans to establish a domestic satellite network. The network will enhance Kenya's television reception and telecommunications, including the development of mobile telephone services. The project, which will cost about US$80 million, will be undertaken jointly with the United States and Italy. The initiative will displace the laying of fibre optic cables, which has proved expensive to lay.

PacStar Report

The Government of Papua New Guinea, the majority owner of the PacStar regional satellite system, recently commissioned a report into satellite demand in the Pacific region. The report found:

- that at present there is a supply shortage in the Pacific Rim region, with capacity on three existing systems (Intelstat, Palapa and AsiaSat) being sold out;
- PacStar, if launched by 1995, would be the first of the new generation of satellites, although there would be other satellites by 1996;
- if all satellites planned for the region were launched, the current supply shortage could be replaced with a glut of capacity;
- there were several competitive service providers, including Intelstat, AsiaSat, Palapa, PanamSat, TRW Pacificom and Unicom, Measat, ThaiSat, KoreaSat, Optus and domestic satellites launched by Japan and the People's Republic of China.

Direct broadcast satellites

Hughes Communications Inc. and U.S. Satellite Broadcasting plan to launch new high-powered direct broadcast satellites in 1994. The satellites will be capable of providing in excess of 130 program channels to viewers throughout the United States. Programming would be received on 18-inch dishes. As well as offering competition to cable television, transmissions from the satellites will be received at locations where cable reception is not available.

Assistance to Latvia

Camla Executive Member, Victoria Rubensohn, recently returned from Latvia where she has been providing consultancy services to the Latvian Government. Latvia, along with most other East European countries and states formerly part of the Soviet Union, is currently establishing a new regulatory regime for telecommunications and broadcasting services.

Contributions to World Review may be forwarded to the Editor.

"Let's do lunch"

CAMLA lunches provide an excellent opportunity to hear leading figures speak on recent communications developments and policy issues.

The next CAMLA lunch will be on Thursday 12 November 1992 at 12.30pm at the Ramada Renaissance Hotel, Pitt Street, Sydney. The speaker will be:

Mr Warwick Smith MP
Opposition Spokesperson on Communications

Guests are welcome. CAMLA lunches are informative and entertaining social occasions, suitable for an invitation to be extended to a friend, business associate or client. As well as keeping you up-to-date, they allow informal discussion over lunch, during pre-lunch drinks and speakers' question time.

The cost is $60 per member and $65 for an invited guest. RSVP Friday 30 October 1992 to:

The Secretary, CAMLA, Box K541
Haymarket, Sydney NSW 2000

Please enclose your cheque, your name and the name of your organisation (if applicable). For further details contact Paul Mallam on 258 6577 or Ros Gonczi on 660 1645.

Media Access to Courts in South Australia

Ross Duncan reports on some recent somersaults by the South Australian Supreme Court

South Australia's rocky relationship with the principle of open justice reached new heights of absurdity recently. This article presents a brief chronology of events over a few weeks in the Adelaide autumn this year which saw one Supreme Court judge ban media sketch artists from his court; another allow television cameras to record proceedings before him; the Chief Justice ban sketch artists from the Supreme Court altogether, then suddenly reverse that decision.

Banning of sketch artists

On 26 March 1992 Mr Justice Cox, presiding over a murder trial, banned sketch artists from his court. While it has long been standard procedure in South Australia for the media to seek permission for their artists to sketch in court, Justice Cox's blanket prohibition was both unexpected and, to the author's knowledge, unprecedented.

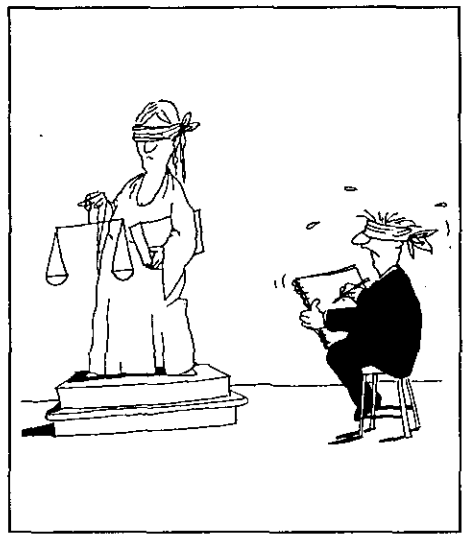
His Honour stated that he found the sketching of people including the accused, witnesses and jurors both intrusive and an invasion of privacy. He did not accept the argument that any member of the public could be sketched, photographed or even interviewed outside court and that, therefore, there is nothing wrong with sketches inside a courtroom.

The Advertiser and other media organisations were advised that they would be in contempt if sketch artists were in his courtroom in the future. The media then protested to the Chief Justice.

Television crews allowed

On 31 March 1992, Mr Justice Millhouse, in what was described as a landmark move, allowed not only sketch artists but press photographers and television cameras into his court. The permission was given in proceedings involving a hospital's attempts to prevent the South Australian Health Commission closing it down after withdrawal of funding.

The hospital had asked for the cameras to be allowed on the basis of strong media and community interest in the case. Justice Millhouse stated that his courtroom was a public place and he did not see any reason why cameras could not be allowed in. Attorney-General Chris Sumner stated that he would be seeking from the judiciary a consistent policy on the issue of pictorial representation of court proceedings.



The first policy

On 28 April 1992 Chief Justice King issued a letter to media organisations setting out the new consistent policy. In part the letter stated:

> *"The judges have decided that there should be a uniform policy prohibiting the use of television and other cameras* ***and also prohibiting sketching in the courtrooms."*** *(emphasis added).*
>
> *"Many persons in the courtroom ... are there under compulsion of law. They ought not on that account be made involuntary subjects of television or other photography or the work of sketch artists."*

The letter concluded that:

> *"It is an unfortunate fact of life that persons who come to court... are subjected to the attention of television and other photographers, often amounting to harassment, on the public footpaths in the vicinity of the courts and the judges feel obliged to ensure that such attention is not extended to the courtroom itself."*

The Australian Journalists' Association and media organisations protested to the Chief Justice and the Attorney General. Opposition legal affairs spokesman Trevor Griffin stated he saw nothing wrong with artists sketching in court. South Australian Law Society President, Neville Morcombe QC, said that he welcomed the uniform approach.

The second policy

On 25 May 1992 the Chief Justice issued another letter to the media. That letter stated that media sketch artists would be allowed back into South Australian Supreme courtrooms. This decision was made "in the light of further information." This further information was not revealed.

Moreover, a spokesman for Chief Justice King stated that the new policy differed from the situation before the ban. Media organisations would now be permitted to illustrate events in court as a matter of course except under circumstances in which a judge decides it should not take place. The ban on still and motion photography cameras remained in place.

It is extraordinary that at a time when the admittedly controversial issue of allowing television cameras into courtrooms is being seriously debated throughout Australia, (and on rare occasions allowed) and when tribunals like the W.A. Inc Royal Commission have established elaborate audio-visual facilities for the media, South Australia's Supreme Court should have seen it necessary, if only as an aberration, to ban sketch artists. In my view the whole episode will certainly not help Adelaide erase its reputation as the suppression capital of the country.

Ross Duncan is a solicitor with the Australian Broadcasting Corporation.

Political Advertising

On 28 August 1992 the High Court of Australia declared the so-called "political advertising ban" imposed on all electronic media unconstitutional. The Court's reasons are yet to be handed down, but will be analysed in a future edition of the Bulletin.

Ownership and Control - The New Approach

Jack Ford examines the new approach to ownership and control in the Broadcasting Services Act

There are four key claims in the Explanatory Memorandum which are relevant to the new approach to ownership and control under the *Broadcasting Services Act* 1992 ("BSA"):

1. The rules are intended to be clear, stable and predictable.
2. An important object is the establishment of minimum requirements expected of industry participants.
3. There is a desire to introduce flexibility into the regime to enable responsiveness to changing circumstances.
4. There is also the provision of a wide range of redressive measures to the Australian Broadcasting Authority ("ABA") to deal with breaches.

In my view many of these claims have been achieved in the BSA, although the results will not in every instance please industry participants. This paper reviews the general approach to ownership and control of commercial broadcasting services adopted in the Act.

Control

Central to the regulation of ownership and control under the BSA is a wide ranging general definition of control itself. The history of the legislature's and the ABT's dealings with control of the broadcasting industry is littered with a series of amendments (sometimes major) to the *Broadcasting Act*, long and complex Inquiries before the ABT and equally complex questions of law being tested in the Federal Court. This history is a direct function of the large amounts of money which have been invested in an industry which is itself regulated. For so long as this continues, it would be quite wrong to assume that legalism, investigations or hearings by the ABA or amendments to legislation like the BSA will not occur with the same frequency as had characterised the past.

In a considerably helpful development the BSA has for the first time included, in legislative form, an essay dealing with control. I briefly analyse some of its concepts.

Company interests

The first concept the essay deals with is that of company interests, which are defined to be:
(a) shareholding interests;
(b) voting interests;
(c) dividend interests; and
(d) winding up interests.

The first two interests are already well known under present legislation. The latter two, however, are new, not only to this legislation but also to other comparable legislation. In my view, these latter two interests go too far. There is no suggestion in the *Corporations Law*, one of the specific aims of which is to define control of companies, via definitions like relevant interests, that an entitlement to a dividend or return of capital upon winding up prima facie leads to control.

A winding up interest is, for 99% of the life of a company, a contingency only, in many cases a contingency that never becomes a reality. And yet a person with such a contingent interest is prima facie deemed under the BSA to control a company and its licence at all times, not simply when and if a contingency is realised.

Likewise, economic interests (or dividend interests) have not traditionally been regarded as conferring control, in the broadcasting or any other industry. Accordingly, what we will have from 1 October in my view is a broadcasting regime which is far stricter in its scope than any other Australian industry.

Unlike the position under the present *Broadcasting Act*, it is important to bear in mind that the control test under the BSA is a prima facie one only and can be disproved in any particular situation. Although the BSA provides that the present 15% level is, in the absence of proof to the contrary, to be regarded as a controlling position, it recognises that there will be instances where:

1. a person with interests far in excess of 15% will not be in a position to exercise control; and
2. a person with an interest of less than 15% could be in a position to exercise control.

People will have an opportunity to argue in any particular case that a level of shareholding, voting, economic interest or whatever, will not amount to control, no matter how high it may be. This will be advantageous to the industry in that it will provide the flexibility which is sought and also allow more flexible ownership structures. On the other hand, it will also provide the ABA with a considerably higher workload, in my view, than the present ABT, when it comes to working out whether a particular ownership structure will or will not amount to control. The tendency will increase due to the wideranging definition given to "associates" when examining questions of control.

Breaches

The BSA provides for dramatic penalties, up to $2 million, in the case of some breaches relating to commercial television licences or $200,000 in the case of commercial radio licences. Continuing offences attract a penalty of 10 per cent of the penalty applicable to the original breach per day with no maximum cap on the total penalty.

By comparison, in the United States the Federal Communications Commission is empowered to impose maximum penalties on an American television network of $US250,000. These penalties must be seen within the context that each American television network is in itself far larger than the entire Australian television industry and serves a population many times our size.

Additionally, in the event of a breach by a licensee it is open to the ABA, after giving a licensee notice and the opportunity to make submissions to it, to impose additional conditions on a licence.

In extreme circumstances, where a licensee has breached a condition of its licence or failed to comply with a notice given by the ABA to remedy a breach of a condition, the ABA may suspend the licence for up to 3 months or cancel it, again after giving a licensee notice and the opportunity to make submissions. These powers emphasise the importance that the ownership and control provisions will play under the BSA.

Jack Ford is a partner in the Sydney office of Blake Dawson Waldron.

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

AUSTRALIA

Optus

The second telecommunications carrier, Optus, began offering services to the public in June with the marketing of its cellular mobile service in each capital city, using leased capacity from AOTC. Optus has begun work on its own national telecommunications network. The former Minister for Transport and Communications, Senator Richardson, laid the first length of fibre optic cable for the company at a ceremony in Goulburn, New South Wales. The first section of the network will run from Goulburn to Canberra and the link between Sydney, Canberra and Melbourne is expected to be completed mid 1993. The Optus network will ultimately stretch from Cairns to Perth by 1997.

In June Optus signed an agreement with Digital Equipment Corporation (DEC) for the development of its operational support systems (OSS), estimated to be worth A$1 billion over the next 10 years. It will lead to DEC establishing a global OSS centre in Australia, as well as the development of a business plan to provide long term export growth.

Optus claims that its first network service, an analogue mobile system resold off the AOTC network, would deliver average savings of 10% compared to AOTC. The savings, depending on which of the three plans a subscriber chooses, range from 3% to 24% compared with the five Telecom Mobile Net Plans. Optus has indicated that it would respond to any price cuts announced by AOTC, but it would not wish to enter into a price war with AOTC.

Optus has signed 5 year agreements with Fujitsu and Nortel worth approximately A$450M in preparation for the rollout of its network in October. Optus has also entered into an agreement with Nokia for the supply of its digital cellular network. Nortel will supply digital switching equipment and Fujitsu will supply advanced transmission systems.

AOTC Developments

Telecom is making a bid for the Victorian State Government owned telecommunications company Vistel, which if successful, would eliminate a competitor that has established a 13% share of the Victorian government market against Telecom since 1987.

However Telecom is also considering selling two subsidiaries, Telesoft Communications, manager of the Telecom Discovery Service, and Telecom Industries, a manufacturing unit. An alternative to the sale of Telesoft Communications is transferring all its operations to other divisions, leaving a shell company behind. The sale of Telecom Industries also hinges on whether Telecom can overcome intense opposition from the unions and Labour caucus because of the potential loss of 1,300 jobs.

These proposed sales of subsidiaries are part of Telecom's preparation to face competition from Optus, which includes AOTC's plans to shed 4,400 more staff over the next twelve months, but the leading unions at AOTC, the Communications Workers' Union (CWU) and the Public Sector Union (PSU) are set to wage industrial campaigns to counter the moves.

The redundancies will come from the consumer business unit and the operator assisted services area to result in a total AOTC workforce of around 74,500.

AOTC has also announced that it will be implementing the next generation transmission system, Synchronous Digital Hierachi (SDH) in the first quarter of 1993. SDH will allow for more precise network management, better customer service and increased transmission speeds. AOTC has awarded a A$200 million contract for SDH equipment to NEC, Siemens, Alcatel and Phillips.

Payphone Increases

AOTC plans to increase the price of a standard payphone call from 30¢ to 40¢ have been referred to AUSTEL under Section 24(2) of the *Australian and Overseas Telecommunications Corporation Act* 1991. AOTC claims that the provision of public payphones was an unprofitable part of its operations and the proposed price increase is sought to reduce the substantial forecast loss for 1992/93 of $46 million. AOTC has said that the local call fee has not been increased since 1986 and that the current proposal was equivalent to a 6% real price reduction over the 6 year period.

Cellular Mobile Phones

Ten bidders have lodged expressions of interest in the third cellular mobile phone licence that will be issued later in the year. Those that have publicly announced their interest are Hutchison Telecommunications of Hong Kong, Singapore Telecom and the Vodafone-Lead Arena Consortium of the U.K.

Potential bidders were asked to provide their corporate, managerial and financial structure as well as their telecommunications experience and their preliminary views on industry development and network roll-out. Following the submissions, the Department of Transport and Communications Selection Team invited several of the bidders to produce a more detailed proposal.

The winner of the third mobile telephone licence will be licensed to commence cellular digital GSM services from July 1993.

AUSTEL BCS Opinion

In April AUSTEL produced a draft opinion at the request of ATUG as to whether particular intelligent network services were basic carriage services ("BCS") within the meaning of the Telecommunications Act 1991. It was AUSTEL's opinion that virtually all of AOTC's intelligent network services, including the various Easycall, Centel, Call Plan, CustomNet One 3, CustomNet Spectrum and CustomNet Horizon services are BCS. This was in contrast to ATUG's view that these intelligent network services could be classified as higher level services ("HLS").

The advantage for service providers if these services were to be classified as HLS is that they can then buy BCS components for the same amount as the dominant carrier charges itself, add its own HLS components, and compete against the carriers. If more services are classified as BCS, the carriers can charge slightly more for the BCS services and subsidise the sale of cheap HLS, making it difficult for service providers to compete.

AUSTEL's opinion is only advisory and is not binding. Following public consultation, AUSTEL is expecting to release a final opinion by late September or early October.

Environmental Code for AOTC and Optus

AUSTEL has been seeking public comment on the draft National Code for carriers. The public consultation process discharges the

Continued p26

obligation of the Minister under Section 117(5)(b) of the *Telecommunications Act* and is a necessary step to the final determination of the Code. AUSTEL expects to report to the Minister by late September and that the Code will be in place by the end of this year. Pending the finalisation of the Code, the draft Code is binding on the carriers under their respective licences.

"Adult" Messages Banned from 0055 Telephone Services

Following action taken by the telephone message services industry body, TelSPAA (Telephone Service Providers Association of Australia) to remove from 0055 lines all "adult" services provided by its members, the Senate Select Committee on Community Standards and Telecommunications released a report in May recommending a set of measures which would ensure that sexually suggestive recorded telephone messages would never again be heard on open access lines like Telecom's 0055 service. Such services will be now restricted to closed access lines like Telecom's 0051 service, which is restricted to adults who must choose to subscribe and who must make use of a PIN number assigned to them to enable them to call 0051 lines.

Transport and Communications Legislation Amendment Bill

A number of amendments have been made to the *Telecommunications Act* 1991 by the Transport and Communications Legislation Amendment Bill (No.2) 1992. This Bill deals with applications for general telecommunications licences and certain public mobile licences, the determination of an allocation system for certain public mobile licences, the collection and recovery of public mobile licensed charges and amendments to the discrimination and tariffing provisions. Section 183 of the *Telecommunications Act* has been amended to allow certain exceptions to the rule that prevents a dominant carrier from discriminating between customers. The purpose of this amendment is to allow AOTC to proceed with proposals to offer concessions to low income and other disadvantaged customers. Section 194 of the *Telecommunications Act* has been amended to enable regulations to be made allowing for the supply of certain basic carriage services or the supply of such services in certain circumstances without the services being included in a tariff. This will enable international transit arrangements to be excluded from the tariffing requirement.

International Code of Practice

AUSTEL has released a draft Telecommunications International Code of Practice (the "Code") which seeks to prevent the misuse of market power by international telecommunications operators and by general carriers. The Telecommunications (International Code of Practice) Direction No. 1 of 1992 confers upon AUSTEL, and requires AUSTEL to use, substantial powers of investigation of contraventions of the Code. Subject to certain conditions, this Direction prima facie allows AUSTEL to freely distribute information of a highly sensitive commercial or technical nature.

Ministerial Directions

The AOTC Carrier Charges Price Control Determination 1992 imposes upon AOTC price control arrangements for connections, rentals, local, STD and international calls, domestic and international leased lines and cellular mobile services. Price controls are put in place such that no individual service charge may increase more than the CPI and the charges for most baskets of services must fall in real terms. This Determination does not apply in relation to carrier access agreements or existing allowed price increases.

Amendment of Multipoint Distribution System Band Plan

Multipoint Distribution Systems (MDS) allow transmissions on a bandwidth broad enough for sound and full-motion pictures to multiple receivers. When pay television is (perhaps) allowed to proceed from 1 October 1992 there could be a strong demand for MDS channels to deliver such services. Under the *Broadcasting Services Act* the Government had decided that pay television should be able to be provided using technologies other than satellite delivery, including optical fibre and MDS.

The MDS band plan has been amended to prevent any new MDS licences being granted until 1 October 1992. The intention is to prevent MDS licences being obtained for speculative purposes that may frustrate the envisaged allocation of MDS channels for pay television.

Broadcasting Services Act

The *Broadcasting Services Act* (the "Act") passed both houses of Federal Parliament, minus the provisions dealing with pay television. It was assented to on 14 July but will not operate, presumably, until the pay television imbroglio is resolved.

The Bill as passed by the House of Representatives and the Senate is substantially similar to the Exposure Draft released late last year, however there are a number of significant differences. There is no longer a provision allowing the ABA to seek a warrant to seize documents where there has been a failure to produce them at an investigation or hearing. In addition, special provisions deeming authorised lenders and financial institutions not to be in control of a media company, licence or a newspaper have been introduced. The Exposure Draft also allowed for the ABA to issue more commercial television licences in a licence area from 1 July 1997, but the Bill now requires a Ministerial review of whether more than 3 commercial television licencees in a licence area should be allowed.

Pay Television

The most significant differences between the Act and Exposure Draft however lie in provisions dealing with pay television. Following much political wrangling pay television has been sent back to the drawing board with the pay TV provisions of the Act (Part 7) having been referred to a Senate Select Committee which delivered its report on 16 September 1992.

Community Standards For Services Utilizing Telecommunications Technologies

In June, a Senate Select Committee on community standards relevant to the supply of services utilizing telecommunications technologies issued its final report. That report recommended that X-rated material should not be considered suitable for screening on pay television, whether provided as subscription television broadcasting or subscription television narrowcasting services, and regardless of the means of delivery. It was also recommended that the ABA conduct Australia-wide, qualitative and quantitative research on community standards of taste and decency in relation to classifications for pay television, on what levels of violence and depictions of sex should be allowed, and what other matters should be included for viewing by adults and chidren in the various classifications. Until such time as the results of this research become available, standards for programs on pay television should be the same as those currently set by the Australian Broadcasting Tribunal (the "Tribunal") for free-to-air television.

Television Program Classification Inquiry

The Tribunal has completed a discussion paper drawing together material gathered in its inquiry into the classification of program material on television. The discussion paper examined the current

Continued p27

classification systems for television and film and their policy rationale, the changing environment for the classification of television programs, the pattern of TV viewing, program promotions, advertising restrictions and specific areas of community concern.

The most common theme of individual submissions to the inquiry was the concern about the amount of sex and nudity, violence and offensive language on television, together with a general belief that the standard of television had declined, which was associated with the deterioration in moral standards. However, research conducted by the Tribunal in 1991 indicates that the views of complainants to the Tribunal and submitted to this inquiry may not be quite representative of the views of the wider community. In terms of the appropriateness of classification time slots, many submissions (including three childrens television organisations) argued that the evening AO period in particular should commence later than 8.30 p.m. while the Federation of Australian Commercial Television Stations argued that the current time slots are suitable.

Print Media Inquiry

As reported in the last issue of "Communications News" the House of Representatives Select Committee on the Print Media has released its report. However, more than four months after the release of the report the main recommendations lie untouched by the Federal Government. It appears unlikely that the Government will enact the report's proposals for certain criteria to be applied by the Trade Practices Commission to certain print media transactions.

NEW ZEALAND

Fourth Mobile Telephone Frequency

The United States telecommunications group, Bellsouth, is confident that the Communications Minister, Mr Maurice Williamson, will approve the re-tendering of the fourth mobile telephone frequency now held by Telecom New Zealand. Telecom had indicated it was no longer interested in the 20-year management right to the mobile telephone frequency known as TACS-B for which it bid $5,000 in a 1990 government tender. Telecom also won the AMPS-A frequency after it bid $11.1 million. The company already owned the AMPS-B frequency. Bellsouth paid $25.2 million in the tender for the only other mobile telephone frequency, TACS-A. Telecom was refused permission to hold the AMPS-A and TACS-B by the Commerce Commission in October 1990, but the New Zealand Court of Appeal overturned that decision.

The Commerce Commission said that the Court of Appeal's ruling on Telecom's acquisition of the AMPS-A band had resulted in confusion rather than clarification of competition issues. It was a condition of the Court of Appeal's approval for Telecom to uplift the AMPS-A that it give an undertaking to provide inter-connection to Bellsouth by January 1 1993 or any other date Bellsouth nominates.

The Commerce Commission pointed out that there was considerable divergence of opinion among the five judges hearing the appeal as to the facts, the law and the analysis required by the *Commerce Act*. While a majority of the judges agreed Telecom was already dominant in the cellular market and the acquisition of AMPS-A would increase that dominance, they decided the benefits to the public outweighed the drawbacks.

Caller ID

Telecom New Zealand has commissioned CM Research Associates to gauge public response to new technology which would allow caller line identification or caller number identification or caller I.D. as it is variously known.

Telecom Profits Down

Telecom New Zealand has said it needs to boost its revenue from residential telephone business after two of its four regional companies suffered a drop in profits in the year to March 1992. The Kiwi Share Agreement, negotiated when Telecom was sold by the Government to American owners two years ago, prevents residential line rentals rising faster than inflation unless regional profits are unreasonably constrained. The drop in inflation in New Zealand appears to have been unpredicted by Telecom.

Television Turnoff

The Great New Zealand Television Turnoff resulted in a drop of a couple of percentage points in viewing levels. The week was promoted by those who were opposed to the deregulation of television and the profit orientation of the state owned enterprise, Television New Zealand, and by the Library Association.

NZ Pay TV acquires Rugby rights

The Minister of Broadcasting, Maurice Williamson recently refused to rule out the possibility of government legislation to ensure all New Zealanders could watch television coverage of All Black-South African matches. The rights were won by the pay TV company Sky. He thought Sky Television, in which Television New Zealand is a 16% shareholder, would be able to strike a deal with Television New Zealand to extend the coverage to all households. He said he would be reluctant to be involved. The threat to pass a law to take away contractual rights drew severe criticism.

The issue, which had always been on the cards since deregulation, but which no procedure or regulatory body had any control over, arose when Sky withdrew from a consortium with Television New Zealand and made an independent bid. As a result the Chief Executive of Television New Zealand, Brent Harman, resigned as a director of Sky Television and launched legal proceedings for an injunction to prevent Sky carrying out its proposal to carry the matches exclusively in the areas it covered and in conjunction with TV3 in the rest of the TV3 coverage area.

Court proceedings resulted in TVNZ being allowed to carry a replay at 8 am on Sunday mornings following the Live Sky Coverage at 1.30 am. This result was anticipated by some observers as the likely outcome when Sky had attracted Rugby fanatics as subscribers, but did not wish to alienate the rest of the potential audience. As a result TV3 dropped its deal to carry the live broadcasts in areas not reached by the Sky signal.

Maori Language Claims

The Maori Council is deciding whether or not to take its three and a half year old Maori language claims to the Privy Council after the Court of Appeal granted leave for the case to be taken to the law lords following failure of the Maori Council in both the High Court and the Court of Appeal. Until the matter is completed, state owned enterprises, Television New Zealand Ltd and Radio New Zealand Ltd cannot dispose of any assets.

Communications News is prepared by Ian McGill of Allen, Allen and Hemsley, Sydney, and Bruce Slane, New Zealand's Privacy Commissioner.

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

Contributions & Comments

From members and non-members of the Association in the form of features, articles, extracts, case notes, etc. are appreciated. Members are also welcome to make suggestions on the content and format of the Bulletin.

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Communications and Media Law Association

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

Issues of interest to CAMLA members include:

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

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

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

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

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

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