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Journalists in Contempt

Michael Sexton reviews some recent developments which threaten the confidentiality of a journalist's sources of information

A number of recent decisions suggest that journalists have even less protection for their sources of information than has been generally accepted. One group of decisions deals with the so-called "newspaper rule" which provides that, in the case of defamation proceedings, a journalist would not normally be required to disclose his or her sources of information prior to giving evidence (if at all) in the trial of the action. In other words, the sources would not have to be revealed at the stage of discovery and interrogatories, unless the interests of justice required such disclosure.

But in three recent decisions the Queensland Supreme Court has required journalists to disclose their sources of information in answer to interrogatories. In each case the Court referred to the fact that the provisions of the Code shared by Queensland and Tasmania provide a defence to defamatory publications made in good faith, but place the onus of demonstrating lack of good faith on the plaintiff bringing the proceedings. In these circumstances the Court considered that the plaintiff was entitled to know in advance of the trial what would be an important element in the decision to publish — the identity and character of the sources of information. In *Hodder v Queensland Newspapers Pty Limited*, the plaintiff was a trade union official and the article in question specified other officials and members of the union as sources of the allegations against the plaintiff. The court considered that this style of reporting used the unnamed sources to give credence to the allegations and so effectively waived the protection that might normally be afforded by the newspaper rule.

Obviously, this is a common style of reporting for events within political parties, trade unions and many other community bodies. If this approach is followed in other jurisdictions, there will be increased pressure on journalists to disclose their sources prior to the trial stage in defamation proceedings.

Legal problems for journalists

There is, however, an even more dangerous legal area for journalists and that is the action for preliminary discovery. This action seeks to identify the journalist's sources so that the plaintiff may bring proceedings against those persons in addition to or instead of the media organisation.

If an action for preliminary discovery is successful, the orders obtained would normally require the journalist in question to attend court to be examined. As he or she will inevitably be asked the source of the documents or other information obtained, a refusal to answer will almost inevitably involve a contempt of court for which penalties of a fine or imprisonment may be ordered.

The proceedings for preliminary discovery that are available under the rules of a number of the Australian jurisdictions are largely based upon the concept of the Bill of Discovery in equity. This action was used by the British Steel Corporation in the early 1980s to obtain orders for the examination of a journalist after Granada Television broadcast a program concerning a strike in the steel industry, during which a number of confidential documents belonging to the Corporation were quoted.

Rupert Murdoch on the Pacific Rim and Australia's future.

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Possible avenues of resistance

The High Court made it clear in *John Fairfax & Sons Limited v Cojuangco* that, where a plaintiff intends to bring defamation proceedings against the sources, he or she will be entitled to know their identity unless the media organisation is prepared to abandon any defence that would place it in a better position to defend the action than the original sources would be. This position at least gives the employer of the journalist a choice. If it is prepared to accept full liability for the publication (whatever the extent of that liability might be) the sources of information are unlikely to be required by the Court.

But if the proceedings that the plaintiff desires to bring are not in defamation but in some other action, such as breach of confidence, even this option evaporates. In a situation where, for example, a journalist has been given confidential information about the tax avoidance activities of a multi-national corporation by a source within the Federal Government, the company may decline to sue the media organisation in defamation. Instead it may bring proceedings for preliminary discovery against the journalist to obtain the identity of the Government source in order to bring an action in breach of confidence against that person.

In the example given, there is little room for legal manoeuvre on the part of the journalist. One possible basis for

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resisting an order for disclosure is the so-called "iniquity rule". A number of English decisions have suggested that if the material supplied by the source reveals criminal or fraudulent conduct on the part of the plaintiff, no action for breach of confidence will be available despite the way in which the material was obtained. It must be said, however, that the extent of this rule is uncertain. In any case, it is likely that an Australian court would consider there to be no criminality or fraud involved in tax avoidance, however harmful it may be in its effects on the general community.

"Blood Money"

In a recent decision of the New South Wales Supreme Court, Mr Justice Brownie made orders for preliminary discovery against the ABC and two of its journalists as a result of a *Four Corners* program. The program, entitled "Blood Money", dealt with some aspects of the financial operations of pathology companies. The directors of one pathology company alleged that documents originally seized under search warrant by the Federal Police had been used in the compiling of the program. They maintained that they wished to bring proceedings in breach of confidence against any persons who had given such material to the ABC. The NSW Court of Appeal granted leave to the ABC to appeal against the decision of Mr Justice Brownie. However, in late 1992 the entire proceedings were settled on terms not to be disclosed.

Michael Sexton is a barrister practising at the Sydney Bar.

COMMUNICATIONS NEWS NEW FORMAT

In this edition of the Bulletin Communications News has been provided as a looseleaf supplement. This format will enable us to ensure that Communications News is as up to date as possible. As Communications News represents an important record of regulatory developments, please remember to file it with your copy of the Bulletin.

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Privacy in New Zealand (so far)

William Akel surveys some recent cases regarding a tort of privacy

In New Zealand, until recently, the issue of privacy had not been dealt with comprehensively in either legislation or judge made law. Legislation has been passed in the form of the *Privacy Commissioner Act* and the Privacy Information Bill is currently under review.

The New Zealand Broadcasting Standards Authority sought to establish some guidelines for television and radio, when in June of this year it recorded five relevant privacy guidelines:

1. the protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities;
2. protection against the public disclosure of some kinds of public facts — facts which have, in effect, become private, for example through the passage of time. The public disclosure of these facts must be highly offensive to the reasonable person;
3. protection against intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person. Protection does not extend to being observed, followed or photographed in a public place;
4. discussing the matter in the "public interest" (defined as a legitimate concern to the public), is a defence to an individual's claim for privacy;
5. an individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for breach of privacy.

In addition, the High Court has referred to a right to privacy on the special facts of a small number of cases. All have involved interim injunctions where the applicant has been required to show only that an arguable case of breach of privacy exists.

The Brain Dead case

The most recent decision is that of Mr Justice Gallen in *Bradley v Wingnut Films Limited* (unreported, Wellington High Court, CF 258/92). In this case the judge considered that although privacy did exist as a common law right in New Zealand, it was crucial that it should not impinge on the right of a free press. The case concerns the somewhat controversial New Zealand movie *Brain Dead*. Part of the film was shot at a Wellington cemetery, where the plaintiff holds a burial plot. The plot has a large marble tombstone. Part of the tombstone appeared in the movie without the plaintiff's permission. The plaintiff was shocked and upset that the tombstone was associated with the movie (the movie having been labelled a "splatter film"). He brought an injunction against the movie company to prevent the circulation of the movie. One of the plaintiff's claims was that his right to privacy had been breached.

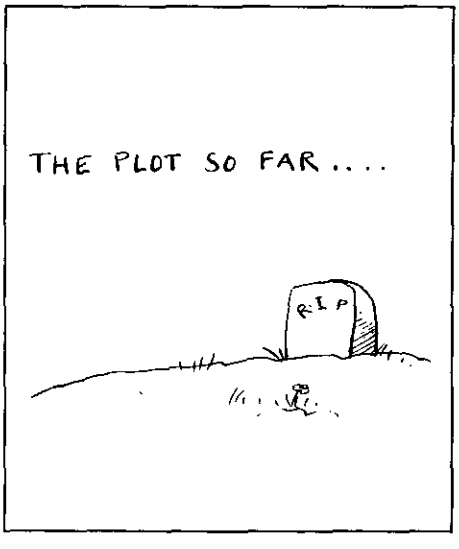
Gallen J, while holding that the common law tort of privacy existed in New Zealand, stressed that its extent should be regarded with caution. He stated:

"While the importance of the rights of the individual should not be understated, freedom of expression is also an important principle of our society."

He found that the plaintiff and his family did not have the right to privacy. He said:

"If the tombstone or burial plot had been shown as directly involved in the particular incidents which occur in the cemetery and as having a significance beyond being part of the background, there might have been more to support this argument. There is nothing in the sequence in the cemetery to suggest that there is any connection between the action filmed as taking place and the plaintiff's tombstone and grave plot."

Gallen J referred in particular to *Tucker v New Media Ownership Ltd* in his findings in favour of a right to privacy in New Zealand. Although *Tucker* went to the Court of Appeal, it is of use to look at the decision of Mr Justice Jeffries in the High Court.



Publication of criminal record

The case involved the publication of details of a potential heart transplant patient's previous criminal convictions. As part of his fundraising campaign he was interviewed on television and radio, and newspaper advertisements were published. During this campaign he was told that the weekly newspaper *Truth* had received information that he had been convicted of criminal offences. The plaintiff sought an injunction against the publisher of *Truth*, News Media Ownership Ltd and other media.

The plaintiff travelled to Australia to be assessed for a heart transplant operation. While there, one of his major sponsors, without giving reasons, withdrew its offer of funds. After this, Radio Windy, which was not a party to the injunction proceedings, broadcast details of the convictions. Soon after, the same item had been broadcast by almost the entire independent radio network in New Zealand, and a Sydney newspaper had published an article referring to the plaintiff's convictions.

The court looked at whether the tort of privacy could apply in the plaintiff's case. Jeffries J commented:

"I am aware of the development in other jurisdictions of the tort of invasion of privacy and the facts of this case seem to raise such an issue in a dramatic form. A person who lives an ordinary life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired, publicity or public disclosure."

The court held that in its view the right to privacy may provide the plaintiff with a valid cause of action in New Zealand. It found that this seemed a natural progression of the tort of intentional infliction of emotional distress and was in accordance with the ability of the common law to provide a remedy for a wrong. Jeffries J considered that the essence of the tort of privacy was unwarranted publication of intimate details of the plaintiff's private life. These must be outside the realm of legitimate public concern, or curiosity.

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Although not referred to by Gallen J in the *Brain Dead* case, the concept of privacy was considered by Mr Justice Holland in *Morgan v Television New Zealand* (unreported Christchurch, High Court, March 1990), regarding the then ongoing Hillary Morgan international custody battle. Holland J granted an injunction restraining Television New Zealand from transmitting a programme that had been broadcast overseas about the custody dispute. The injunction was granted on the basis that according to Holland J the law of New Zealand recognised some right of privacy of an individual. The judge indicated that he could see little public interest in disclosing very private matters about the child's life. This was despite the fact of widespread publicity about the case.

However, in a subsequent hearing involving the *Hillary Morgan* case, Holland J, while satisfied that there were privacy rights vested in the child, referred to the major issues involved in such injunction cases including the liberty of the press. On this occasion no injunction was ordered. The so called right to privacy did not override freedom of expression.

What is protected?

In *Marris v TV 3 Network Ltd* (unreported, 14 October 1991) Mr Justice Neazor again considered privacy on an injunction application. Dr Marris was subject to disciplinary action by the Medical Practitioners Disciplinary Committee for failure to make a proper diagnosis of a patient's condition. That disciplinary action took place some months prior to the injunction application and information about it had been published in a provincial newspaper. TV 3 had made and proposed to screen a television programme relating to the illness in respect of which the professional disciplinary action was taken against Dr Marris. Dr Marris and his wife objected to the manner and circumstance in which he was filmed by TV 3 and in which discussions with him were recorded for use in the proposed programme. TV 3 proposed to broadcast some film of Dr Marris' private house, the reporter concerned going up to the front door of the house and Dr Marris speaking to the reporter from an upstairs window. The voice over would say that Dr Marris refused to be interviewed.

Whether or not there was an arguable issue as to tort liability arising in respect of invasion of privacy was not really an issue. Counsel for TV 3 submitted that even if the recognition of the existence of the tort was arguable, it was not seriously arguable that it would extend to the facts of that case.

Neazor J held that what was in issue in *Marris* could not be put higher than upset and anger on the part of Dr and Mrs Marris when faced with the actions of TV 3, and a degree of anger and embarrassment that the disciplinary proceedings should be publicly resurrected by TV 3 in the proposed broadcast. The court thus did not grant an interim injunction on the basis of breach of privacy.

The court noted that there are distinct problems in the issue of what is or will be protected by any tort of invasion of privacy and whether any, and if so what, resulting damage is an ingredient of the tort. For example, whether obtaining information without legitimate reason is enough, or whether publication is required as well, and what is to be regarded as "without legitimate reason".

Elements of the tort

In both *Tucker* and the *Brain Dead* cases the Court referred to *Prosser on Torts*, which refers to two distinct privacy torts:

1. cases involving public disclosure of private facts, which are highly offensive and objectionable to a reasonable person of ordinary sensibilities;
2. publicity which places the plaintiff in a false light in the public eye.

In *Brain Dead*, Gallen J accepted these American formulations as being valid in New Zealand. The court found that from these formulations three requirements must be satisfied before a tort of privacy will arise:

1. the disclosure of the private facts must be a public disclosure and not a private one;
2. the facts disclosed to the public must be private facts and not public ones;
3. the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

The question of privacy is yet to be addressed in detail by the Court of Appeal. Until this occurs, it is difficult to say with any certainty that the tort of privacy will be completely accepted in New Zealand law. In the *Tucker* case, the Court of Appeal stated that the concept of privacy is at least arguable. It will be interesting to see the result if a full privacy case comes before the Court of Appeal.

William Akel is a media law partner at Simpson Grierson Butler White, barristers and solicitors, Auckland and Wellington.

ABA DEVELOPMENTS

This column is a brief review of the Australian Broadcasting Authority during its first two months of operation.

- In November 1992 the ABA conducted a series of national planning seminars for the radio industry. A similar series of seminars has been planned for the television industry in 1993.
- It is reported that the ABA has received a large number of requests for opinions regarding narrowcasting services. There has been significant debate over what constitutes a narrowcasting service, which is unlikely to be quelled until the first ABA opinions on narrowcasting are published. Mr Tim O'Keefe, a member of the ABA, has indicated that some proposed services are too wide in their appeal to currently be classified as narrowcasting services. The majority of applications received so far are for opinions on whether or not proposed tourist information services are narrowcasting services.
- The fee for an opinion on the category of service into which a proposed service falls has been set at $475. The fee for an opinion regarding control of a service is likely to be set at $2,500.
- The ABA has published a planning timetable, under which submissions on planning may be made to it by February 1993. The ABA expects to publish draft planning priorities by April 1993 and to have finalised them by mid-1993.
- On 26 November 1992 the Chairman of the ABA, Mr Brian Johns, addressed the Annual Conference of the Screen Producers' Association on local content. Mr. Johns indicated support for the concept of minimum levels of local content. However, he emphasised that it was more important to achieve improvements in quality and diversity of local content than simply increasing local content levels.

Pacific Rim Report: Westwood the Course of Empire

Rupert Murdoch provides a personal vision of Australia's future

I have used as a text for this paper, a famous line from the eighteenth century Irish bishop and philosopher George Berkeley, reflecting on the successive rise to power of Babylon, Greece and Rome. The poem opens, and I quote *"Westwood the Course of Empire Takes its Way"*. The title of Berkeley's poem was *On the Prospect of Planting Arts and Learning in America*. This is still a formidable task!

Berkeley's legacy is consequently to be found on the western edge of North America. Looking through San Francisco's Golden Gate out across the Pacific, it is the town that is now the home of the University of California — Berkeley.

It seems that Bishop Berkeley's two-hundred-and-fifty-year-old prophecy is still operating. The centre of global gravity appears to be making a further shift westward, into the Pacific. That is not to suggest, however, that I think the United States is going to be left behind. In fact, I think exactly the opposite. The sheer size, scope and complexity of the American phenomenon means that it can never be written off. As ex-Prime Minister Nakasone said in *The Economist* magazine a few years ago: *"The twentieth century was the American century. The twenty-first century will be the American century."*

Sharing the American Imperium

But I do think, however, that the American imperium is going to be shared, at least economically. After all, that is what happened in the last century. Several powers industrialised, following Britain's lead, and together they shared Western Europe's moment of greatness. In this next century, the several powers sharing America's moment of greatness seem likely to be those of the Pacific Rim. This is a region whose share of world trade was about 13% in 1980, and is projected to reach 33% in the year 2000. It is a region that already contains eight of Australia's eleven top export markets and whose total trade with Australia is greater than that of the European Community.

I would like to put this development into its true perspective. Recently, Milton Friedman, the Nobel Prize-winning economist, made an important statement: *"The combination of political and technological change (that we have recently witnessed) ... constitutes a real revolution in possible co-operation between capital-rich countries and labour-rich countries"* Professor Friedman also made this prediction: *"It could give us the equivalent of another industrial revolution."* In the Asia-Pacific region we are looking at something that affects the future of humanity itself.

Karl Marx, for example, was in no doubt that the industrial revolution was a breakthrough for humanity. Now we have the chance to extend to the whole of humanity the benefits that we enjoy in the developed world. The power for this breakthrough lies in the potential of the Asia-Pacific region.

Rupert Murdoch requires no introduction to any media watcher, in any part of the world. He has been described as the dominant global business force in the late twentieth century, and has certainly emerged as the dominant media figure of the 1990s. This recently delivered paper provides an insight into Mr Murdoch's vision for the Pacific Rim and Australia's place within it.

The Problem of Government

But there is a problem of government. Friedman expressed it as follows: *"What bothers me is this: not only the US but other countries seem to be missing this enormous opportunity. The capital-rich countries are going in a protectionist direction, building walls around their blocs. Fortress Europe. The US with Canada and Mexico"* Obviously, this is a problem we are all too familiar with in Australia.

Let me give another example of the problem of government. Obviously, the untapped potential of the East Germans is a tremendous asset to the world economy. But it has almost been turned into debit, with the West German Government's handling of it. The hasty unification of the currencies, the extension of West German regulations and benefits, distorted and virtually destroyed the system of price signals that would otherwise have guided East Germany efficiently into its appropriate place in the free world. Bonn will be fortunate if its interventionist policies do not create another Mezzogiorno — like Southern Italy, a permanent economic drain.

So let me summarise my thoughts on the significance of the Asia-Pacific region. The emergence of the Asia-Pacific economies is a cause for great hope but not for complacency. It is not beyond the scope of humanity to fumble this opportunity.

The Place of Australia

Where does this leave Australia? Technology has abolished the tyranny of distance and Australia is now well-located. This is firstly a matter of geographical reality. We are only 8 hours from Hong Kong, 12 hours from California and 24 hours from Europe. However, electronic technology is reducing the importance of geography. With a computer and a telephone, you can dispatch volumes of information to the other side of the globe with just a keystroke, at insignificant cost.

Whole new industries are developing around this fact, in some remarkable places. For example, located in a little town in the Utah Desert is one of the hottest software operations in America, the home of the Wordperfect word processing program. It is the equivalent of finding a major industry in Alice Springs. More importantly there is absolutely no reason why that company could not be in Alice Springs. Australians could have written that software. They could be sending it all over the world. In the future, I believe they will.

The Need for Skills

This ties back to Australia's role in the Asia-Pacific region. The prosperity of this region is not a question of tapping great new

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reserves of national resources, or even unskilled labour. It is not like the opening-up of Africa in the nineteenth century. What counts in this region is skills.

Australia is lucky in that its natural resources complement this great regional surge in economic activity. But ultimately, to participate fully in the Asia-Pacific boom, Australia has to get beyond natural resources altogether. I do not mean by that to repeat the conventional wisdom that Australia has to go from extraction to processing, from primary industries to secondary industries. That thinking still reflects a natural resources fixation, the fallacy that only tangible products are real.

Prosperity in this hemisphere is going to be a great arch of skills, vaulting from Australia to the emerging economies of the north. Australia will participate to the extent that it develops its skills. In the case of the computer industry, for example, it is a mistake to focus on trying to stimulate hardware manufacturing here by keeping imports out. That reflects the natural resources fixation again. Instead, Australia should allow as many imports as it can afford, to drive down the cost of computer power and encourage the computer hackers. It is from this hacking subculture that software products emerge. And that is an industry with vastly more potential than bolting widgets onto circuit boards — and an industry in which Australia is at no competitive disadvantage.

English as an Asset

Finally, there is a third sense in which Australia is well-located — one of politics, culture and history. Australia is the representative in this hemisphere of the larger English-speaking world. It is, and should be much more so, the nexus between the West and the emerging economies of East Asia.

The fact that Australia is part of the English-speaking world is a crucial asset. English is the international language of trade and technology. For this reason, as well as because of recent history, English will be the lingua franca of the Asia-Pacific region. This is potentially a great source of invisible earnings for Australia. Australian schools and universities are becoming national profit-centres. They are finding a rich market among the citizens of the Asia-Pacific region who want their children to learn English and the ways of the English-speaking world. Such invisible earnings are just as real as the manufacture and export of physical goods.

Modernisation of the Asia-Pacific

The Asia-Pacific region is entering the world economy because it is passing through the peculiar process sociologists call modernisation. Its societies are being forced to become more open and decentralised, less hierarchical and authoritarian. This is not just because of the moral force of the democratic idea, although China demonstrates that this cannot be indefinitely denied. Openness and lack of hierarchy are functional necessities if any society is to absorb and adapt, let alone advance, technological change.

The English-speaking world wrote the book on modernisation. Nowadays modernisation to a very large extent really just amounts to Americanisation. And this is something that Australia understands and has shown itself able to handle easily. Australia has achieved that very rare prize: freedom combined with political order. And I think this is too easily taken for granted. For that reason, in the Asia-Pacific region, Australia has an historic role to serve both as a model and a guide. To the extent that Australia can influence the emerging powers of Asia to follow the example of the English-speaking world, all of humanity will be in its debt.

The Venice of the South

Summarising my view on Australia, the tyranny of distance has been abolished. Australia is no longer on the periphery. It is now strategically located. It has the potential to become a great cultural and commercial entrepot. Australia could be the Venice of the southern hemisphere — profiting from the Asia-Pacific boom as Venice profited from trade following along the ancient silk road into the Mediterranean.

I say Australia *could* be the Venice of the southern hemisphere because, as I mentioned earlier, it is certainly not beyond the scope of humanity to fumble this opportunity. Obviously, Australia must avoid West Germany's mistake. Australians must learn to read the signals of the market if they are to identify and exploit all the possibilities that are open to them. Anything that interferes with those signals — tariffs, regulations, controls — will damage Australia's opportunity. Fundamentally, Australia has to shift from a defensive to an offensive approach.

There is a precise analogy to sailing a yacht — you can sail along slowly, being content with slow but sure progress. Or you can spread your sails and catch the winds. It takes intelligence and quick reflexes. But it is faster. And more fun.

On top of which there is this further point: When the wind blows strongly enough, it will capsize you anyway — even if your sails are furled. And some of Australia's protected and obsolete industries are already shipping water.

Let me make a personal confession here. Thirty years ago, I assumed with a lot of other people that government could and should intervene, that market forces can be contained and controlled. But in my own business I have learned the hard way. We do not have the predictive powers it would require, and there is the question of moral hazard. Our efforts too easily become corrupt and self-serving.

British Newspapers

I saw this process at work in British newspapers. Unions, managements and government effectively collaborated in an attempt to contain and control change. This was strangling the industry. Since we opened it up, by moving our printing operations to Wapping and finally introducing the so-called new technology, there has been a silver age in British journalism with more newspapers and better jobs for everyone.

Television is a classic example of a wind of change that cannot ultimately be contained or controlled by regulation, that will one day capsize all media businesses that try to ignore it — or be immensely beneficial to the companies and countries that catch it in their sails.

In conclusion, the Asia-Pacific region offers the potential for a new upsurge of global economic growth. Australia has the opportunity to become the Venice of the southern hemisphere. But it must learn

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Recent Cases

A roundup of recent cases from Australia and New Zealand

Freedom of communication

On 30 September 1992,the High Court handed down its reasons for holding that the *Political Broadcast and Political Disclosures Act* was invalid. The Act amended the *Broadcasting Act* by imposing a ban on political advertising during elections on television and radio, and forcing television stations to provide free advertising for political parties during elections. The decision, together with the *Nationwide News* case (see below), has been celebrated as a watershed in Australian constitutional history.

A majority of the High Court held that freedom of communication is essential to the system of representative government as provided for in the Constitution and therefore is necessarily implied in the Constitution. However, one judge declined to recognise the existence of an implied freedom of communication in the Constitution. Significantly, all of the judges who found it to be an implied freedom held that it was not an absolute freedom and that it would be at times necessary to weigh the competing public interests, one of which would be the public interest in freedom of communication.

Only one of the judges was prepared to go so far as to say that representative parliamentary democracy, as embodied in the Constitution, implies a fundamental right to freedom of speech.

In relation to section 92, the Court held that a law which incidentally restricts movement across State borders will not offend section 92 so long as the means adopted to achieve the real object of the law are neither inappropriate nor disproportionate. The main object of the Act was not to restrict broadcasting across State borders, this was only incidental, and therefore the Act did not offend section 92.

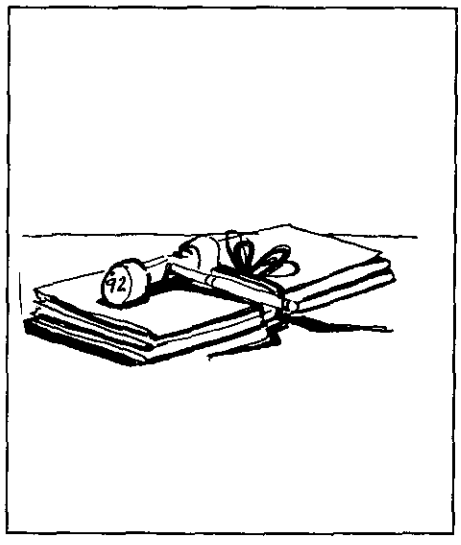
Significantly, the Court held that the advertising time which broadcasters were required to make available to political parties did not involve an acquisition of property. This aspect of the decision has potentially adverse consequences should any Government seek to enact legislation regulating advertising.

Disclosure of Journalists' Sources

In *Bacich v Australian Broadcasting Corporation* Mr Justice Brownie of the NSW Supreme Court made orders that the ABC and two of its journalists be examined in court as to the identity or description of their sources who supplied them with relevant information or documents about the plaintiffs. Orders also were made for the production of those documents which revealed the identity or description of the sources.

The ABC had telecast a program in relation to the affairs of the Bacichs' company which had previously been investigated by the Federal Police, the Health Insurance Commission and the ASC. The ABC's reporters made the details of some of those inquiries public. The plaintiffs claimed the entitlement to bring proceedings against some person or persons who they were not able to identify, in order to protect the confidentiality of certain information.

The ABC and its employees conceded that the "newspaper rule" did not apply but submitted that the Court had the discretion not to make an order for preliminary discovery. The Court held that there was a confidentiality attaching to the relevant documents and information, and that that confidentiality was breached by the wrongful conduct of the ABC and its employees. The ABC and its employees failed to establish the defence of iniquity, and so the orders were made. The proceedings have since been settled.



Fair Dealing with a Video in News Reporting

On 19 August 1992 Mr Justice White of the Supreme Court of Queensland declined to dissolve injunctions restraining television stations from broadcasting or publishing video tapes of interviews between doctors and a "vampire" murderer.

The plaintiff was convicted of murder in a case which achieved considerable notoriety in the press as a "vampire" murder. The plaintiff's public defender authorised the making of video tapes of hypnotic sessions which were conducted by a psychiatrist and a psychologist with the plaintiff, to assist in the preparation of her defence. The copyright in those tapes vested in the State of Queensland as employer of the makers of the tapes and so the State of Queensland was also plaintiff in a separate action heard with the first. The defendants were a number of television stations who sought the dissolution of injunctions granted to restrain the broadcasting or publishing of the video tapes.

The defendants submitted that the proposed use of the tapes in an upcoming television program would constitute "fair dealing" of the tape within the meaning of the *Copyright Act*. It was common ground between the parties that the playing of the tapes was an infringement of the copyright, but that it was a good defence if there has been "fair dealing" of the video tape, as defined in the *Copyright Act*. The broadcasters argued that if a reasonable defence of fair dealing was made out, then the injunction ought to be dissolved. It was submitted that the fair dealing occurred when the tapes were played before the Mental Health Tribunal.

However, the Court held that the tapes were sufficiently unpublished and that their content had not yet passed into the public domain. Therefore, the broadcasters failed to establish the defence of fair dealing.

ABT Licensing Decisions

In its last week in September 1992, the ABT handed down a number of licence decisions. These included the grant of supplementary radio licences in Cairns, Bundaberg and Albury-Wodonga. There were no appeals against these decisions. The Tribunal decided to refer an inquiry into the granting of a commercial radio licence to serve Darwin to the ABA, which commenced operation on 5 October 1992.

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Contempt of Court

The NSW Court of Appeal recently handed down two decisions finding that 2UE Sydney Pty Ltd and Mr Alan Jones had committed contempt of court. The first two proceedings related to two separate broadcasts which were said to amount to contempt of court for the broadcasting of matter which was likely or calculated or had a tendency to interfere with the administration of justice in connection with the trial of a Mr Killen. The New South Wales Court of Appeal held that Mr Jones had been unaware of the pendency of the trial. However, it considered that contempt of court is committed when publication creates a real risk of interference with the administration of justice, regardless of a lack of intention. On the evidence it was held that both broadcasts created a real risk of interference with the administration of justice and therefore were in contempt of court.

Review of Ad Time Standard

On 30 September 1992, Mr Justice French of the Federal Court dismissed applications by the Seven and Nine Television Networks seeking judicial review of the ABT's decision to make a television program standard imposing advertising restrictions.

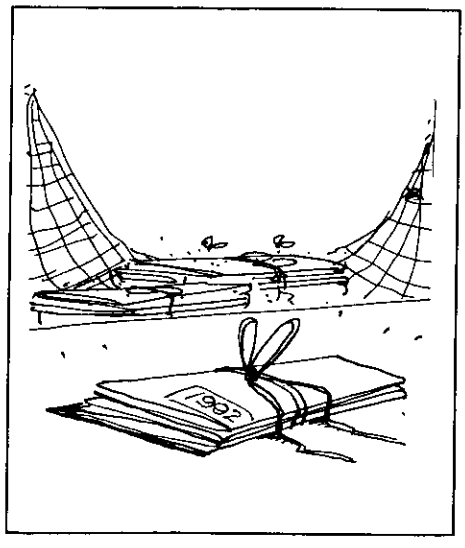
The applicants alleged that the Tribunal's published reasons of its decision in introducing the standard were inadequate and incomplete and in breach of the Tribunal's statutory duty to give reasons for its decision. In particular, they submitted that the Tribunal failed to properly consider the financial impact of the standard on commercial television licensees. They also contended that there were elements of irrationality and unreasonableness in the decision, and that the Tribunal failed to observe procedural fairness as required by the rules of natural justice. Various factual findings of the Tribunal were also attacked on the basis that they reflected or constituted a failure to take into account relevant considerations or the taking into account of irrelevant considerations.

Mr Justice French found that the Tribunal had discharged its duty of carrying out a thorough investigation of all matters relevant to the inquiry, as well as its duty to consult with representatives of the licensees. He also held that the Tribunal demonstrated a rational basis for its conclusions even though they involved elements of evaluative and normative judgment. He regarded the reasons for the decision published by the Tribunal to be sufficient and certain. He concluded that the applicants sought to attack the Tribunal's decision on an essentially factual basis. Further, they could not succeed without involving the Court in a process of review on the merits of the findings of a specialist Tribunal in areas in which the Tribunal has the relevant expertise. The applications were dismissed.

The Nationwide News Case

On 28 August 1992, the Full High Court of Australia made orders in relation to section 299(1)(d)(ii) of the *Industrial Relations Act 1988*, and held that it was constitutionally invalid. The section provides that it is an offence to use, by writing or speech, "words calculated...to bring a member of the Commission or the Commission into disrepute, however justified and true".

The applicant, Nationwide News Pty Limited, is the proprietor and publisher of The Australian newspaper. An article published by it contained *"a virulent attack on the integrity and independence of the Arbitration Commission and its members"*. This was argued to be a reference to the Australian Industrial Relations Commission and its members under the present Act.



Several judges considered the existence of an implied guarantee of freedom of communication in the Constitution. Brennan J considered that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege. It is inherent in the idea of a representative democracy. He held that no law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose. Therefore, the right of freedom of speech may be constrained to the extent necessary to protect other legitimate interests. However, it could not substantially impair the capacity of, or opportunity for, Australian people to form the political judgments required for the exercise of their constitutional function. Mr Justice Brennan considered that the balancing of the protection of other interests (such as the interests of justice, personal reputation or the community's sense of decency) against the freedom to discuss governments and political matters is, under the Constitution, a matter for the Parliament to determine and for the Courts to supervise.

Mr Justices Deane and Toohey also discussed the implication of freedom of communication in the Constitution. They held that, in the Constitution, which incorporates the doctrine of representative government, there can be found an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealths.

They held that a prohibition on the communication of well-founded and relevant criticism of a governmental instrumentality or tribunal cannot be justified as being in the public interest merely because it is calculated to bring the instrumentality or tribunal or its members into disrepute. Rather, if the criticism is well founded and relevant, the publication should be supported rather than suppressed.

Madam Justice Gaudron also considered that the representative parliamentary democracy embodied in the Constitution does not authorise laws which impair or curtail freedom of political discourse, although she said that that freedom is not an absolute one.

This case, together with the freedom of communication case, has been hailed as a major development of Australian constitutional law. A fuller analysis of the freedom of communication case appears at page 16.

This edition of Recent Cases was prepared by Gillian Saville, a solicitor of Blake Dawson Waldron. Contributions to Recent Cases may be submitted to the Editor.

Shopping Centres and the Investigative Way — Unbalanced and Partial, but not in Contempt

Anthony Mrsnik examines another unsuccessful attempt to restrain The Investigators

The Federal Court recently ruled on the question of whether material, proposed to be broadcast by *The Investigators* program, was in contempt of civil proceedings underway in the Federal Court. In *P.T. Limited and Didus Pty Limited v Australian Broadcasting Corporation*, (Federal Court of Australia 9 October 1992), Mr Justice French refused to grant an application which sought to restrain the broadcast of certain material argued to be a contempt.

Westfield complaints

The Investigators proposed a story based on complaints that it had received from tenants occupying premises in several Westfield Shopping Centres. The complaints concerned variations in rental, relocation and refurbishment requirements, the renewal of leases and alleged oral representations made prior to the date of contract. Westfield management was approached for comment in mid-September of this year. However, they declined to comment in relation to one of the complainants to the program, a Mr Theoklis, who had recently instituted proceedings in the Federal Court against Westfield seeking relief pursuant to sections 52, 53A and 80 of the *Trade Practices Act*. Westfield is defending the matter. Westfield sought assurances from the ABC that it would not broadcast conclusions on those issues or materials which assumed that a particular version of the matter before the Court is correct. Westfield was willing to discuss all other non-confidential matters involving merchants in their centres.

Mr Theoklis commenced proceedings on 19 August 1992. On 18 September 1992, Foster J made various orders relating to the pleadings and adjourned the directions hearing to 30 October 1992. It was not until late September that *The Investigators*, having finalised their transmission schedule, advised Westfield of the revised date of the intended broadcast. Westfield then sought to restrain certain material from being broadcast.

After examining the proposed script of the broadcast, French J observed that *"the script undoubtedly conveys criticism by a number of tenants of the conduct of Westfield and tends to suggest a general acceptance of those criticisms by the presenters of the program"*. His Honour observed that the case did not concern the accuracy of the allegations or the impartiality of the presenters, but whether the material dealing with Mr Theoklis should be restrained as a potential contempt of court.

Effect of proposed broadcast

Issues considered by the Court were firstly the effect of the proposed broadcast on Westfield in the conduct of its litigation with Mr Theoklis. Through affidavit evidence, Westfield stated that a number of Westfield employees would be called to dispute various allegations made by Mr Theoklis. Further, if the ABC published material which followed those lines indicated by the ABC during the course of telephone conversations and written correspondence, then this would generate publicity adverse to Westfield. Westfield argued that *"the expectation of that occurring would be a factor which would be taken into account in deciding whether or not to maintain (Westfield's) defence of the proceedings"* instituted by Theoklis. Mr Justice French considered the relevant authorities and decided that as Westfield were not to be subjected to the kind of "media bath" described in *CBA v Preston*, there was no evidence of a serious possibility that Westfield would be deterred from maintaining their defences if the program went to air.

Potential witnesses

The effect on potential witness was also considered — whether once interviewed for broadcast, they would subsequently either "soft-peddle" or "seek to vindicate themselves". Given the length of time until the trial (approximately 6 months) and the requirement that the tendency to affect the attitude of witnesses must be established, Mr Justice French held that the evidence only demonstrated a "theoretical" risk to witnesses.

His Honour discussed the potential effect upon the impartiality of the court with respect to jury trials and judge alone trials. The significant factor is whether a publication criticises witnesses so as to "deter" or "influence" their acts. This extends to criticisms of a party which will be impugned because of their possible effect upon witnesses. To establish a contempt, a party must be able to point to something more than speculation — they must show a *"concrete basis upon which there is a serious possibility that witnesses will be affected in one way or the other by the publication which is impugned"*.

The need for balance

Another course in establishing a contempt is whether media prejudgment is such as to bring pressure to bear on a litigant to compromise claims brought against it, as illustrated in the *Sunday Times/Thalidomide* case. Mr Justice French stated that the question ultimately reduces to a balancing of the competing public interests of the due administration of justice and the freedom of public discussion. He was not satisfied that a serious case of prejudice would be derived from the impact of the publication upon Westfield itself or other parties to the litigation. His Honour further stated that *"in any event the bulk of the adverse publicity affecting (Westfield) by publication of the program would arise whether or not the specific reference to the Theoklis complaint were included"* and that such effect would not be mitigated to any significant degree by requiring the exclusion of the Theoklis segment.

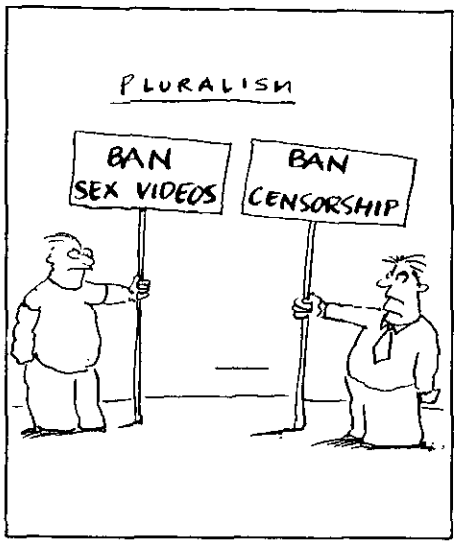
Previous authority, as confirmed in this case, lays down that it is not a contempt to publish material unless it has a real or substantial tendency to prejudice proceedings.

In assessing whether a real or substantial tendency exists, the law engages in a balancing of conveniences. In this case, the balance favoured the freedom of discussion — even discussion which the Judge said may be "unbalanced or discussion which lacks impartiality ...".

Anthony Mrsnik is a Legal Officer with the ABC.

Forum

Censorship in the 1990s



Janet Stickland argues that censorship creep is taking over

Whether or not the Office of Film and Literature Classification ("OFLC") is becoming increasingly heavy-handed and censorious, I leave for others to judge. A matter of specific concern to me, is the octopus-like creep and expansion of the powers of government regulatory bodies such as the OFLC.

I am alarmed because the outstretching of the tentacles reflects a return to the protectionist, paternalistic and monolithic censorship structures of the past. It is also a movement away from the pluralistic, diverse and tolerant value system which Australians have espoused over the last two decades.

Retrograde action

I am dismayed because the turning back of the clock has *not* been the subject of much public discussion and debate. Further, its retrograde action has been positively assisted by the agenda setters of the 1960s, whose social consciences have now been lulled to sleep by advancing age and its often attendant conservatism. The *would-be* agenda setters, now in their early 20's, quite understandably are more concerned with the importance of getting and keeping a job in a tough economic environment, than with focussing their attention on such matters as freedom of speech, and the freedom to impart and receive ideas and information.

In order to illustrate the phenomenon I call "censorship creep", I would like to draw your attention to the recent decision of the OFLC to ban the importation of the book, *Final Exit*, on the application of the Right to Life movement. I do not believe that it was intended that the relevant legislation would be used to ban access by adults to *Final Exit*, which is a book about euthanasia, not banned anywhere else in the world. I wonder if a book containing information on abortion may be similarly banned.

The OFLC was given the power to censor books and publications on behalf of some of the States when, in 1988, John Dickie became not only the Chief Film Censor, but also the Chief Executive of the Office of Film and Literature Classification. The OFLC claim that they now have the power to censor literature only because the State Attorneys General gave them the power. That, of course, is true. But what has not been made clear is that they *sought* this power. In the last two years they have also sought the power to censor telephone information services, computer games, clothing carrying advertisements, television programs and pay television.

Consistency and uniformity?

They have claimed that their experience in interpreting community standards in relation to the classification of film and video has given them the expertise to be able to apply relevant criteria based on community standards in all the other areas just mentioned. They argue there should be consistency and uniformity in the standards applicable to all these different media and art forms. However, no explanation or argument has been given as to why the standards applicable to the content of books, films, television, pay TV, computer games and advertising on clothing *should* be the same.

Content standards should reflect the differences in the needs and expectations of the consumer, the difference in target audiences, the difference in the ease of accessibility to the product by children, and most importantly, the difference in degree of choice able to be exercised by the consumer. Where there is a maximum choice of program/product by the consumer, where access is restricted to adults only, and where the nature or content of the product/program is made known to the consumer prior to her or his choice, the least restrictive regulatory/ censorship structure should apply. On the other hand, where there is easy access by children and least choice of program/ product by the consumer, and least warning as to the nature or content of the program/product, the most restrictive regulatory environment could legitimately be imposed.

Pluralistic Approach

But, if there is to be a consistent and uniform approach to the setting of content standards, then the most restrictive regime (being that of television) would be imposed. This would result in the program standards for television applying to, for example, films, books, telephone information services and pay TV. We need a pluralistic approach to the setting of content standards which reflect the differences between the various art forms and communication media in the same way, for example, as different program standards apply to radio and television.

In my opinion, attempts by government agencies to impose consistency and uniformity on the marketplace of ideas and communication should be firmly resisted. These values can lead to an increasing intolerance of diversity, unacceptable restrictions on permissible forms of expression, and a rejection of the pluralistic values which, as a democratic society, we have espoused for at least the past couple of decades.

Janet Strickland is a former Chief Censor.

David Haines outlines the policy of OFLC

For some years now the term censorship has been to a large extent misleading. There are a number of films (mostly sexually explicit videos) and publications (most often pamphlets giving instructions on booby traps to kill or maim, or how to convert an air gun into a rocket launcher)

which we do "ban". However, our approach reflects the basic philosophy of government that adults in a free society should be allowed as far as possible to see what they wish, provided there are safeguards to protect young people and people are not exposed unwittingly to material they may find offensive.

To assist us to reflect current community standards, we have guidelines which are reviewed from time to time, in light of perceived changes in those standards endorsed by State and Territory ministers. In addition to interpreting these guidelines, the Office must take into consideration the particular provisions of State, Territory and Commonwealth legislation as it relates both to videos for sale or hire, films for public exhibition, publications and material for importation.

We at the Office are mindful of our responsibilities in reflecting community standards and jealous of our independence. Nevertheless, it is important to remember that we classify on behalf of the States under their legislation. If Ministers ask us to interpret the classification guidelines relating to violence more strictly in response to their perception of community concerns, then we must be responsive to their requests.

Consumer advice

In addition to the classification symbols, the Office has, since 1989, assigned an additional consumer advice line which indicates the strongest elements to be found in a particular film. Viewers now have access to the information that a film is, for example, classified M, is recommended for mature audiences over 15 years, and contains, for example, high level violence and medium level coarse language. Armed with this information, those likely to be offended by violence or coarse language can avoid seeing this film. State legislation requiring advertising matter to carry this classification information has been introduced over the last two years. Although it is prominently displayed on videos, it is disappointing that it is often missing or inadequately shown on cinema advertising.

In its 1988 report the Joint Select Committee on Video Material recommended that there should be a Public Awareness Campaign to address what it saw as widespread ignorance in the community about the classification system. Prior to embarking on this campaign, the Office conducted research to establish what the community knew and understood about the system. This research demonstrated that there was a fair degree of awareness of the classifications, but little understanding of what they meant or how they might be used. It was also clear that the people who were most concerned were parents, particularly those with youngsters under the age of about 13 or 14.

More censorship?

A number of issues relating both to the classification and refusal of films and publications have received attention in the media over the last 12 months. These have been interpreted in some quarters as an indication that the Office is becoming more censorious. However, the number of cinema films refused registration for importation by the Board has remained fairly constant since the introduction of video legislation in 1984.

Forum

In the case of the book *Final Exit* an adverse decision was made after careful consideration of legal advice relating to provisions of the *Customs Prohibited Import Regulations*, which make it an offence to import material which instructs in matters of crime. This highly confused situation was resolved after an appeal was lodged with the Film and Literature Board of Review and upheld. The book is now available to adults, and the recommendation that it be declared a prohibited import has been lifted.

Censorship of literature

Despite an extreme reluctance to become involved with mainstream literature, the Office is required to classify all publications which are submitted. For this reason we found ourselves considering the novel *American Psycho* by novelist Brett Easton Ellis. This was the first book which might be described as literature to be considered by the Office since *Portnoy's Complaint* in 1971. While the Office considered that it was a legitimate literary work, which did not warrant refusal, an unrestricted classification was considered inappropriate because of the level of offensiveness and because it was unsuitable for perusal by minors.

It was with some trepidation that we recently took a call from a journalist enquiring whether *The Bulletin* of that week had been classified by us. The cause of the enquiry was the illustration on the cover which depicted a youth stabbing a young Burmese with a knife, only feet from the photographer.

I was somewhat nonplussed when I asked a couple of acquaintances who I knew had read that issue whether they had noticed anything about the cover. They replied that they had not, but there was an awful article on revenge inside accompanied by a couple of totally gratuitous and tasteless photographs. One of these of course was a smaller version of the cover which had not excited their attention!

The observation that the Office is becoming increasingly heavy handed is sorely tested by the level of complaint we have received in recent months about the classifications of the films *Silence of the Lambs* and *Cape Fear*, and at the release of *American Psycho* and the edited version of *Henry — Portrait of a Serial Killer*.

Censorship and violence

Is it our place to respond to perceptions the community has that, for example, violence in society is on the increase and can be attributed to material on film and video? Should these perceptions, which do not appear to be based on factual evidence, be given the same weight in our deliberations as other factors indicative of community standards?

In my view, community standards applicable to films should be measured by the standard of what a reasonable adult would find acceptable within each classification, bearing in mind that each classification gives a clear indication of the age group that the material is suitable for. This does not mean that we are insensitive to the genuinely felt concerns of those who ask that films like *The Last Temptation of Christ* or *Henry — Portrait of a Serial Killer* be banned, but we would not be fulfilling our responsibilities if knee-jerk reactions dictated our decisions.

We live in an age of uncertainty and fear about the future. Older people, in particular, are seeking the certainties of years gone by, they complain that it is no longer safe to go out at night, and seek easy answers by pointing the finger at films and videos. But violence in society is a complex issue and we at the Board do not believe increased censorship is the answer.

David Haines is the Deputy Chief Censor, Office of Film and Literature Classification.

Cathy Robinson examines film censorship

I want to explain why censorship and classification issues matter to the Australian Film Commission ("AFC"). Some of the AFC's most visible activities are investments in specific film and television projects. Recent examples include *Proof, The Good Woman of Bangkok* and *Black Harvest.*

AFC concerns

But we are not just a cash dispenser for filmmakers. Film is about communicating — audience and reception are fundamental to its creation of meaning. Our film culture encompasses the whole environment in which films and television programs are made, distributed and watched. The censorship and classification system is central to that environment because it partly determines whether and in what circumstances audiences are able to watch a film.

Very broadly, the AFC recognises that Parliaments will seek to prohibit or qualify access to certain kinds of films and televisions programs. However, we believe the focus of censorship and classification policy should be to inform audiences about their viewing choices rather than to circumscribe those choices. Questions of violence, sexuality, racism and others need to be explored by our film and television program makers. Violent, patriarchal and racist societies do not change if those qualities are hidden from our cinema and television audiences.

ALRC Report

Two significant matters in which we have taken a recent interest are the Australian Law Reform Commission's Report into Censorship Procedure and the recent replacement of the *Broadcasting Act* 1942 with the *Broadcasting Services Act* 1992. The ALRC report contains a number of proposals which we welcome. Most importantly, we strongly support the idea of a national film classification system. This should simplify the day-to-day administration of this area and also facilitate potential rule changes. We also support the need for a continuing public awareness campaign conducted by the Office of Film and Literature Classification.

We are not so enthusiastic about some other recommendations. As a general point, I think the Report tilts the balance between individual freedom and socially-imposed restriction too far in favour of restriction. We oppose the recommendation to expand the classifiable media to include clothing and computer programs and possibly audio material. Although these fall outside the AFC's direct areas of responsibility, they are of concern because they represent substantial changes to censorship policy. No detailed evidence is provided in support of this recommendation. The AFC has real concerns about the further encroachment of censorship requirements into new areas of creative activity.

A second area where we believe the ALRC has gone too far is in its recommendation that radio advertisements for a film or video include a statement of the film's classification and other consumer advice. I support consumer advice in television and print advertising. But on radio such a requirement would create an unnecessary but costly and jarring intervention into programming for the sake of information which most people will see anyway.

Broadcasting Services Act

The philosophy of the Report is to ask why should we be any *less* interventionist in one market than in another market selling similar products? A different approach seems to be taken in the new *Broadcasting Services Act.* It asks why we should be any *more* interventionist in one market than another similar one selling similar products? But, significantly, the legislation's announced enthusiasm for less regulatory approaches is not always reflected in its provisions. Fortunately, we still have Australian content and children's programming requirements for commercial television.

On censorship and classification issues too, laissez-faire attitudes give way to intervention. While the detail of "Australian content" and "children's programs" standards — some of the things which are to be encouraged — are left to the regulatory authority to sort out, there is lots of guidance about the things which are to be discouraged or banned altogether.

Its not that programs portraying violence, sex or racial vilification or other related issues do not deserve the regulator's and the Parliament's careful attention. Recent ABT research shows viewers are concerned about these issues: 47% are very concerned about violence, 29% about abusive language, 22% about sex scenes and 17% about nudity, although a much higher proportion — 76% — believe that television "doesn't concern them" since they can always turn it off. The level of concern deserves a response, and a careful one. However, the *Broadcasting Services Act* shows no overall sense of program regulation and cultural policy as a set of interventions to create and diversify viewing choices. To me, that reflects a disturbingly limited view of what television should be doing.

Pay Television

Pay television is forcing us to confront overlaps across cinema, video viewing and free-to-air television. In doing so, we should not rush to a single classification system, if it ignores the fundamental differences between these forms of viewing and the audiences which undertake them.

Further, I am concerned about how the ABA might use its new powers to hear complaints against the national broadcasters, the ABC and the SBS. The ABT had a role only in relation to the commercial broadcasters. Now, the ABC and the SBS, two broadcasters who are most responsible for intelligent exploration of the limits of public taste, may find themselves increasingly unable to make their own judgments about their own audiences.

The ABA cannot help but pull these services towards a singular notion of the television audience. Most monopolies need to be resisted — a monopoly of public taste or community attitudes might be one of the more insidious.

Cathy Robinson is the Chief Executive of the Australian Film Commission.

Marlene Goldsmith argues for restrictions on some material now generally available

On 4 March 1992, I gave notice of motion in the Legislative Council of my intention to bring in a Bill for the Protection of Children from Indecent Materials. Nevertheless, I am a product of the 1960s, an era when we had to fight to read works of literature, and I was part of the fight. Those of us who are products of that time are probably more resistant than most to the tyrannies of censorship.

For me to reach the position represented by my Bill has taken much soul searching. Simply to state that the pendulum has swung too far in the direction of liberty is inaccurate. Rather, in my view there are some fundamental issues that simply have not been canvassed in the censorship debate.

Responsibility to children

First, there is society's responsibility to protect its children. David Haines has stated the role of Chief Censor as being a reactive rather than proactive one. That concerns me, because I believe society does have a responsibility to its children. Ideally, that responsibility belongs to parents, but all of us know instances of children watching television until eleven p.m. or midnight.

Second, there is the nature of freedom itself. "Freedom for" must also imply the concept of "freedom from", or the concept is meaningless. A valid question is whether certain materials which a substantial number of people consider to be offensive should be exposed in public places, where they cannot be avoided. Some people do not want to see photos of naked women in demeaning positions displayed in shop windows. These people are entitled to their rights as well. If we expect parents to safeguard their children, how can they when such materials are prominently and publicly displayed?

Human rights

Third, there is another fundamental human right: the right to physical integrity. The increasing amount of research showing links between, for instance, the availability of pornography and the level of rape in various states and countries ought to be of concern. There are still many who dispute this connection, but it is becoming more difficult to do so. The argument that an open society, where pornography is freely available, is one where rape is much more likely to be reported falls down on two counts. Some such societies have very low levels of reported, but much higher levels of actual rape (for example, Sweden, where 87.7% of accused rapists are freed by the courts). Where the likelihood of getting a conviction in court is low, reporting tends also to be low. Again, the open society argument does not explain cases where the availability of pornography has subsequently been restricted, to be followed by a drop in rape rates, such as Hawaii in the mid-70s.

Sooner or later, the free speech debate must consider the issue of women's rights, the issue of whether a pornographer's right to make a buck is more important than a woman's right not to be raped. The issue includes male and child rape, and even murder, but female rape has reached such astronomical levels that, in my view, we must address it. Extrapolating from the 1991 Bureau of Crime Statistics figures for reported rape in NSW and estimates by the NSW Sexual Assault Committee, over a lifespan of 75 years, a woman has at least one chance in eight of being raped. I mentioned this to a group I was addressing recently, saying that, on these statistics, three of them in the room would get raped during the course of their lives — and afterwards three of them came forward to confess they already had been raped. One is left to wonder how many did not come forward.

Debasement of women

A major problem in dealing with this issue is the confusion between the erotic and the debasing. It is simple and easy to dismiss those of us with concerns about pornography as wowsers: stick on a label, and you can deride and dismiss the wearer. But the sort of material I am concerned about primarily involves the subjugation of women, with violence rather than sex — or, more dangerously, with violence as sex. The image that finally pushed me to propose my Bill was the *People* magazine cover in February this year showing a naked woman on all fours on a dog collar on a tight leash, with the caption "Covergirl WOOF: More Wild Animals Inside". The message here was about woman's place in the world, as was the message on the following cover of *People:* a photo of a naked woman on her back covered in bruises, with the caption "Lightning Strips Golf Stunnas".

Magazines like *People* and *Picture* specialise in images of naked women as animals, as tables, as objects and things. The language used about women is similarly depersonalising. Publisher of *People* Richard Walsh has claimed publicly that he is aiming the magazine deliberately at what he calls "the working class male". In my view, his target is a somewhat different one: men of low social status, whose jobs and environment give them little support for their self-esteem, but who need such support. Walsh provides them with someone to look down on. No matter how menial their position, the readers of *People* can reassure themselves that they are above fifty percent of the human race — the female fifty percent. The Ku Klux Klan provides its members with a disturbingly similar feeling of superiority.

In a society where women are demonstrably unequal, we must ask ourselves whether the freedom to publish, promote and sell such magazines is a violation of women's opportunities, and even their right to be treated as human beings. If it is, then how do we resolve this clash of competing rights?

The distinction between word and image is intrinsic to any discussion of "freedom of speech", a notion traditionally linked with words. What of the power of the visual image, whether photographic or increasingly film? Psychological research shows that print is processed by the analytical, rational left side of the brain, but visual material by the holistic, creative right side. Need we be concerned about media that requires no "translation" (as does abstract print), and that are processed with perhaps little input from rationality?

A shifting debate

The debate has shifted. The world of the 90s is not the world of the 60s. It is about time that all of us started trying to grapple with the issues that confront free speech *now:* with the meaning of "free speech", and the fact that it does not exist in a vacuum but competes with other freedoms, with our duty to our children, with the rights and opportunities of women, and with the power of the image.

Polarisation into opposite rigidities on this fundamental democratic freedom can only thwart relevant debate and risk a political resolution that is much less than optimal. Nor is it enough to argue, as commentators such as Phillip Adams and Richard Neville have done, that "this is all terrible, and something needs to be done, but we cannot contemplate censorship" (or words to that effect), without suggesting what the "something" might be. My Bill is not about censorship — adults will still be able to buy what they bought before — but so far censorship seems to be the only suggestion on the table.

Dr Marlene Goldsmith is a member of the New South Wales Legislative Council.

Julie Steiner Gives a Publisher's Perspective

In *Sense and Censoring* Michael Pollack suggests that the "prevention of a person from freely expressing his or her views is violence". The issue for publishers commenced in earnest in 1455, with the first book ever printed using movable type — the Gutenberg Bible. By 1521 the Holy Roman Emperor prohibited the printing, sale, possession, reading or copying of Martin Luther's works.

Controlled Freedom?

In Australia the subjugation of thought, through stringent censorship and draconian defamation laws has existed throughout 200 years of white settlement. The tenor of Australia's defamation laws was defined by one of NSW's earliest Solicitor-Generals, William Foster, who stressed the need for restraint of free speech: *"Properly maintained, I look upon a free press as the fountain of all good, but when it is allowed to run wild, as it has done too long in the colonies, it is a pest, worse than Pandora's box".*

This sense of a controlled freedom, of a prescribed liberalism, is an important and unresolved issue in the 1990's. The dilemma over censorship is summed up in Article 10 of the European Convention of Human Rights. It starts off full of good intentions:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information without interference by public authority and regardless of frontiers".

Then the Convention appears to have second thoughts:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary".

The constraints on free speech are rarely determined by any democratic process and seem, by this convention, to be constraints on the dissemination of a fact/non-fiction, or the impact of a fiction/an influence.

The Publisher's Perspective

Book publishers, though losing some influence to the popular and powerful reach of television, radio, cinema and magazines, still have the ability to influence thought and feeling. Their once held monopoly on information has been lost and replaced by a rare monopoly of permanence.

Since the book began, censorship has been with it. The issue for publishers is not only "Are we for or against censorship"? Rather, given that censorship is institutionalised, the questions are how we identify the real issues and debate them in the social context of the 80s and 90s.

Issues In the 1990s

I would like to identify briefly what I believe to be the 1990s challenges to free expression. Firstly, libel, of which John Lawrence, the President of the AJA wrote in 1983, *"Defamation laws in Australia assume that knowledge is dangerous, that ignorance is safer than information and that there can be an informed society by encouraging suppression".* The need for the public to have a "right to know" needs to be analysed in two parts. The right can never be challenged, but if it is to be protected from falsehood, what is known can and should be challenged.

Secondly, obscenity — since the *Lady Chatterly* trial in 1961, moral campaigners have been able to question the effect of fiction on the basis that it may *"tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it".* This is now more often linked to pornography. We have to ask whether pornography is a symptom or a cause of some men's mistreatment of and violence towards women, and whether it differs from eroticism. Ironically D.H. Lawrence wrote that *"even I would censor pornography, rigorously".*

Another issue is the incitement of racial hatred. In every nation there are terms of abuse for outsiders and foreigners, frequently the first step to greater brutalities. But what are the consequences of trying to prevent people expressing their prejudice in this way? Terrorism, war and lack of control over disclosure, also represent key areas where publishers must take a position. In Western Europe, terrorism has been the pretext for some of the most stringent restrictions.

"Truth is the first casualty of war" is an old saying. Every government censors in wartime. Military language itself euphemises killing. Examples include the Pentagon Papers in 1971, Mrs Thatcher wanting a "good men's war" in the Falklands in 1982 and the CNN coverage of the Iran/Iraq conflict which sorely hindered publishers' access to the truth.

Finally, the 1980s revealed a powerful censorship — the lack of disclosure by banks, governments and business. The official elites were not obliged to disclose information. The 1990s will not easily overcome this social violence.

In summary, censorship never dies, but just changes its form. Times and morality change. History shows us that J.S. Mill's hope in *On Liberty,* that the abolition of censorship was imminent, was a false one. However, the philosophical heirs of Mill must take heart, the boundaries are being challenged, many victories are achieved and ultimately censorship is forced to change its face.

Julie Steiner is the General Manager of ABC Enterprises and a Board Member of the Australian Book Publishers' Association.

Forum

This forum was an edited selection of the papers delivered at a recent seminar jointly hosted by the Communications and Media Law Association and the Free Speech Commitee.

Editorial constraints prevented us from publishing all papers delivered. However, we would like to again thank all speakers for contributing to this extremely successful seminar.

Privileged Communications

Queensland Attorney General Deane Wells revisits the issue of privileged communications

A number of professions have ethical rules which require certain communications between the professional and certain other parties to be kept secret. The clergy, the medical profession and journalists all subscribe to codes of ethics which say that in certain circumstances communications cannot be divulged, even to a court of law. The code of ethics of the medical profession even spells out that in certain circumstances the medical practitioner will have to make a decision as to whether to divulge information or to go to jail.

The law however recognises legal professional privilege, but describes this as a privilege which is vested in the client not in the lawyer. It is clear at any rate that the legal system, as we know it, would be unworkable if clients did not have that privilege at law. The assumption that a person is innocent unless proven guilty and the proposition that an accused person should not be found guilty unless admissible evidence is available to prove that person's guilt, together require that a client must be able to have confidential discussions with a legal adviser to determine what evidence in his or her interests can be put before the court.

Conflicting principles

The question of privileged communication has become one of heightened interest in Queensland since the jailing of a journalist earlier this year for refusing to divulge the source of confidential information. That event highlights a problem which needs to be addressed on a national scale. There are two conflicting principles at stake. The first is that honourable men and women should not be required to go to jail merely for acting in accordance with the code of ethics of an honourable profession. The second is that no person should be judge (and jury) in their own cause by denying the court access to part of the truth which is essential to the just determination of a case before it. Just to spell this antimony out a little further — it is all very well if the professional claiming confidentiality of communication is telling the truth. In such cases the professional (whether it be a clergyman, a doctor or a journalist) should not have to reveal sources. However, on the other hand, unless the sources are revealed, how can the court know that the professional is telling the truth? And, of course, courts can only convict someone, or find them liable, on the basis of what has been proved — not on the basis of what somebody, using the shield of a code of ethics, asks the court to take on faith.

A middle ground?

One might have thought that there would be some middle ground here that everybody could, with comfort, occupy. Surely it is possible for the law to recognise ethical constraints upon professionals, while still maintaining the position that whatever part of the whole truth which is essential for the delivery of justice should not be withheld from the court. The debate has, I think, become too polarised, with two sides standing firm on immovable ground. Journalists and the media argue that their professional ethics cannot be compromised, and the legal community argues that journalists should not regard themselves as above the law.

Judicial comment on the subject has not always been conducive to promoting an equitable compromise. For example, the High Court has said:

"The recognition of an immunity from disclosure of sources of information would enable irresponsible persons to shelter behind anonymous, or even fictitious sources."

Undoubtedly there are liars and crooks in every profession. Clerics, doctors, lawyers, journalists and even politicians would all admit that there are, among their number, corrupt persons or persons capable of being corrupted. But this should not prevent the recognition of codes of ethics subscribed to by members of those honourable professions. The fact that some journalists do sometimes make up fictitious sources for their stories should not, by itself, be a bar to the recognition that journalists have a code of ethics to which the law should have regard, when justice will allow that to be done.

An interesting judgment along these lines was advanced by Lord Denning:

"It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer, but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer a question when directed to by a judge. The judge will respect the confidence which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only is it relevant, but also a proper and indeed necessary question in the person entrusted, on behalf of the community to weigh these conflicting interests — to weigh on the one hand the ultimate interests of the community, in justice being done, or ... a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse."

Lord Denning's remarks were made in the context of what is possibly a slightly different common law tradition from Australia, and latterly a different statutory environment. It does, however, represent an emphasis which I think it would be desirable for Australian law also to highlight.

Review of contempt laws

The Standing Committee of Attorneys General is currently examining the law relating to contempt of court, and the law of evidence, with a view to drafting uniform statutory provisions to be adopted by all jurisdictions. One specific matter which is under consideration is the question of whether a judge should be capable, at law, of dealing with contempt of his or her own court. The argument is that a judge who perceives contempt to have been committed, should not then determine whether such contempt has been committed. The argument is that this makes the judge a judge in his or her own cause. That, of course, is contrary to the principles of natural justice. Another matter which will be reviewed is the question of the recognition to be granted to codes of professional ethics. The United Kingdom and New Zealand statutes, which reflect a policy which is also evident in the remarks of Lord Denning which I quoted above, are on the table.

It would be useful at this point to recur to an earlier theme. Legal professional privilege is said to be the privilege of a client not of the lawyer. In addition legal professional privilege is crucial to the effective functioning of the legal system.

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Freedom of political speech under the Australian Constitution

Ian McGill reviews the freedom of speech case widely recognised as a turning point in Australian constitutional history

The decision of the High Court in *Australian Capital Television Pty Limited v The Commonwealth* is one of the most significant cases in the recent history of the Court. Indeed, as a participant, I would like to think the most significant in terms of constitutional interpretation since the *Engineers* case overturned the doctrines of reserved State powers and intergovernmental immunity.

In the arguably legalistic *Engineers* case, the High Court insisted that the words of the Constitution be given their ordinary, natural meaning without making vague and subjective implications based on some unstated concept of federalism. In *Australian Capital Television* the Court by majority found, in the written text of the Constitution, an implied guarantee of freedom of political communication arising from the principle of responsible government. By majority, the whole of Part IIID of the *Broadcasting Act* ("the Ad Ban provisions") was found invalid as inconsistent with the implied guarantee. Apart from Messrs Justices Deane and Toohey (who wrote a joint judgment) all majority judges wrote separate judgments taking slightly different approaches to the derivation of the guarantee and, most importantly, its content. Although resoundingly rejecting the implication of a guarantee of freedom of communications, Mr Justice Dawson did admit the existence of a more limited constitutional implication.

An outrageous Act

Some cynics find it difficult to understand how the existence of an implication has been magically uncovered in 1992. In answer, it was not until 1992 that the legislature decided to introduce outrageous legislation which risked distorting the electoral process and thereby interfering with representative democracy. Another answer is that the Constitution is not merely an Act of the Imperial Parliament but an instrument capable of development in step with Australia.

Constitutional interpretation is neither a simple nor scientific exercise. With regard to implied limits on Federal power it is a most difficult exercise indeed. On the one hand, the Court has (despite some nonsensical comment on the case by some Senators recently) the undoubted power to declare invalid laws of a democratically elected Parliament. On the other hand, it must maintain the credibility and legitimacy of judicial review.

For this reason the High Court tends to proceed not by revolutionary or sweeping steps. It proceeds incrementally and usually says no more than is necessary to dispose of the case before it. Accordingly, the repercussions of the implication of a freedom of political communication are tantalisingly unclear in some respects.

The legislation

The effect of the Ad Ban provisions was to exclude the use of radio and television during election periods as a medium for political campaigning. Even their use for the dissemination of political information, comment and argument and as a forum of discussion was prohibited except insofar as:

(a) Section 95A permitted the broadcasting of news and current affairs items and talk back radio programmes;
(b) Division 3 of the Act permitted free election broadcasts; and
(c) Division 4 permitted the broadcasting of policy launches.

There were some elements of the Ad Ban provisions that clearly troubled the majority of the High Court. Firstly, the discriminatory way in which the free-time provisions operated was disturbing. The statements by the Minister in his Second Reading Speech were not lost on the Court. There was a very substantial element of "jockeying the boys home" in the free-time provisions. If you were not a political party or, even if you were, and you were not already represented in Parliament, the free-time rights were illusory.

Secondly, the Commonwealth argued that the ban did not inhibit broadcasting of news and current affairs items, talk-back radio programs and announcements affecting matters of specific public interest. However, the majority of the Court had obvious and considerable difficulty in the Parliament preferring one form of lawful electoral communication over another.

The proceedings

The galvanising force behind *Australian Capital Television* was the Nine Network. There is some irony in this because the Nine Network's last brush with the Constitution and the High Court (in *Miller v TCN Channel Nine Pty Limited*) appeared to dampen any possibility of an implied right of freedom of movement or communication. However, in *Australian Capital Television* the decision in *Miller* was explained away as proceeding on the narrow ground of rejecting an implied guarantee operating in the very area of the express guarantee in Section 92 of the Constitution.

The television stations sought interlocutory injunctions on 14 January 1992 restraining the Commonwealth from enforcing or causing to be enforced the Ad Ban provisions and, in the alternative, an expedited hearing of the action. The proceedings were heard by the Chief Justice.

At the time of the interlocutory proceedings elections current or in prospect were:

(a) the by-election for the New South Wales Electoral District of The Entrance (for which the polling day was 18 January 1992);
(b) the election of the House of Assembly in Tasmania for which the polling day was 1 February 1992; and
(c) an ordinary election for the Legislative Assembly for the Australian Capital Territory to be held on 15 February 1992.

The eight plaintiffs had been carefully selected in order to have standing in relation to each of those elections.

The arguments

The arguments advanced by the plaintiffs were that the Ad Ban provisions constituted a contravention of:

(a) an implied guarantee of a freedom of communication in relation to political and electoral processes;
(b) the express guarantee of freedom of intercourse in Section 92 of the Constitution;

(c) an implied guarantee of freedom of communication arising from the common citzenship of the Australian people;
(d) the implied prohibition against Commonwealth interference with the capacity of a State to function; and
(e) the express Constitutional guarantee of acquisition of property only on just terms.

Interlocutory relief

It is notoriously difficult to obtain interlocutory relief in constitutional cases. The Court, without compelling grounds, will defer to the enactment of the legislature until the final determination of the matter. However, the commercial television stations drew comfort from strong statements by the Chief Justice in his decision on the injunction proceedings that the arguments raised by the plaintiffs merited the attention of the Full Court.

With the benefit of hindsight, however, I believe that the television stations went within millimetres of an interlocutory injunction. While we had put before the Chief Justice evidence that the affected licensees would suffer a material adverse effect on their revenues as a result of the ban, we were unable to quantify that revenue because (in a legislative error) the Commonwealth had not — at the time the proceedings commenced — gazetted regulations implementing the ban. Without the regulations, and the calculation of free time that had to be broadcast, we could not conclusively prove detriment. In any event an expedited hearing of the action was ordered and the matter was set down for hearing in March 1992.

The decision

All Judges on the Court found the existence of a Constitutional implication derived from responsible Government. The most narrow was Mr Justice Dawson. To his mind the Constitution provides for a Parliament directly chosen by the people and that must mean a "true choice". Accordingly, an election affected by legislation that denied electors access to the information necessary for the exercise of a true choice *"is not the kind of election envisaged by the Constitution"*, would be *"incompatible with the Constitution"* and would (presumably) be invalid. A slightly broader position was taken by Mr Justice McHugh. Having regard to the provisions of the Constitution relating to representative and responsible Government, *"the people have a Constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in an election for the Senate or the House of Representatives"*.

To Mr Justice Brennan, the Constitution implied a freedom of discussion of political and economic matters essential to maintain the system of representative Government in the Constitution.

Messrs Justices Deane and Toohey characterised the implication as a freedom, within the Commonwealth, of communication about matters relating to the Government of the Commonwealth and of the States and of all levels of public Government within the Commonwealth. The extension of the implication to all three levels of Government is significant and was supported by the Chief Justice, Mr Justice Mason. To the Chief Justice, the implication was constituted by a freedom of communication about public affairs and political discussion at all levels of Government. Such discussion was, in the Chief Justice's mind, indivisible.

To her Honour Justice Gaudron, the Commonwealth's legislative power did not extend to the making of laws that *"impaired the full flow of information and ideas on matters falling within the area of political discourse"*.

In finding the Ad Ban provisions invalid the majority proceeded with due regard and deference to the objectives of the Parliament referred to above. Having found the Constitutional implication, it was necessary then to test the legislation against the implication. That is, to ascertain the extent of the restriction on the implied guarantee of freedom of political discussion, to examine the interests served by that restriction and to examine the proportionality of the restriction to the interest served. Those Judges in the majority who found that the Ad Ban provisions were invalid, necessarily found that the provisions were out of all proportion to the interest or the aims sought by the Parliament.

Implications

Whether or not the freedom of political discussion amounts to an individual right awaits to be seen. Clearly the freedom is not absolute. There are many restrictions on the dissemination of ideas and information and in each case the question is whether the burden is disproportionate to the competing public interest. For example, there is a clear public interest in the protection of reputation and any State or Commonwealth law conferring the right to protect that reputation would clearly be valid.

Under section 106 of the Constitution the Constitutions of the States are subject to the Federal Constitution. Any exercise of State legislative power inconsistent with the implied guarantee would be invalid. Future developments of the implied guarantee are now awaited with great interest.

Ian McGill is a partner with Allen Allen and Hemsley and acted for the plaintiffs in this case.

CAMLA EVENTS

The Communications and Media Law Association is committed to the development, circulation and analysis of communications law and policy issues. In 1992 the Association organised a schedule of luncheons and seminars to further discussion of these issues. Another schedule of events is being prepared for 1993 and will be published in future issues of the Bulletin.

The Bulletin is an important part of CAMLA's commitment to the promotion of debate about communications-related issues. We wish to thank all contributors to the Bulletin during 1992, who gave freely of their time to write articles for publication.

1993 promises to be an equally exciting year, as major new issues are emerging. Contributions to the 1993 Bulletin are welcome and will no doubt earn their authors some special place in heaven.

Competition, Viability and Diversity of Service

Bob Peters argues that broadcasting regulators could learn from developments in the United States

Advocates of freer, less regulated and more competitive local broadcasting markets often cite the broadcasting system in the United States, with its significantly larger number of commercial television, cable and radio services, as being the classic example of what Australia has to gain from rapidly moving to a more open and competitive broadcasting environment.

Such a view is predicted upon the usually unstated and largely untested assumption that, in any given market, any increase in the number of operators and competing services inevitably will lead to an improvement in the quality and diversity of services available to the public in that market. It is generally assumed that "more always means better", regardless of the possible adverse financial consequences of new competition or the threat of a decline in the quality of services offered by the incumbents.

Curiously, the local advocates of such open market, pro-competitive views appear to be either unaware of, or uninfluenced by, some extremely relevant recent regulatory developments in the United States. Those developments cast serious doubt upon the wisdom of introducing sudden increases in any form of broadcasting or narrowcasting competition into the marketplace.

In September of this year, the Federal Communications Commission ("FCC") relaxed radio station ownership limits in the United States. In effect, the FCC concluded that remedial regulatory action was warranted because too much new competition had been introduced too quickly in the United States in recent years. The Commission found that excessive competition now threatened both the economic viability of the American commercial radio industry and the public interest.

Viability and program diversity

These recent experiences in the United States are relevant to the Australian radio and television industries. They clearly demonstrate that the development of new and diverse services in any marketplace is dependent not only on the total number of broadcasting services available, but also on the economic viability of those services. Too many services can lead to deterioration in the quality and diversity of available services. The close relationship between economic viability and program diversity in the American radio market suggests that, although Australia's new *Broadcasting Services Act* ("BSA") makes no specific reference to commercial viability criteria, the new Australian Broadcasting Authority ("ABA") nevertheless should take the economic viability of all commercial broadcasters into account when considering the allocation of new licences in the future. There is no doubt that the number of audio and visual entertainment media outlets in Australia will continue to grow as a result of technological development. Given such an environment, the challenge for Governments and regulators, will be to plan sensibly for their introduction.

The recent radio ownership rule relaxation introduced by the FCC is intended to promote a financially vibrant marketplace, which the FCC views as a prerequisite for the promotion of economic competition and program diversity. Following a review of its previous radio ownership rules, the FCC concluded that an increase in the concentration of radio station ownership would probably produce an improvement, rather than a deterioration, in both program diversity and in the development of new broadcasting services.

Market fragmentation

In arriving at this decision, the FCC found that, as a result of a continuing increase in the number of radio and non-radio outlets, such as cable, which compete with radio broadcasters for audience and advertising, the radio industry in the United States was experiencing tremendous market fragmentation which, in turn, was creating "severe economic stress" for many broadcasters. So severe and widespread was this economic stress, that it led the FCC to question the American radio industry's continued ability to serve the public interest. Moreover, the FCC concluded that it was time to allow the industry to adapt to current market conditions free of artificial constraints that prevent valuable efficiencies from being realised.

By relaxing its radio ownership rules, the FCC expected to assist both radio operators and radio listeners, giving the former the potential to reduce operating costs and offering the latter the prospect of improved programming quality and choice. However, when setting its new radio station ownership limits, the FCC was careful to strike a balance which allowed a greater concentration of ownership to enhance the industry's overall economic viability, while not threatening industry competition and diversity.

The new FCC rules

The FCC's recent radio ownership rules changes have two main features. The first is that the national radio station ownership limits were increased from 12 to 18 AM stations and 18 FM stations initially, and to 20 AM stations and 20 FM stations after two years. The second feature is that the local market radio station ownership limits were increased from their previous limit of one AM and one FM station in a market. Under the revised ownership rules, in markets with 15 or more stations, a single entity now can own up to two AM and two FM stations, provided the proposed combination does not lead to excessive concentration in the local market.

In markets with fewer than 15 stations, a single entity now may own up to three radio stations with no more than two on the same band, provided that the commonly owned stations represent less than half the total number of stations in the market.

In relation to the national station ownership limit, the FCC concluded that it could "... *safely be relaxed ... without adversely affecting competition and diversity in the national marketplace of ideas*". In arriving at this decision, the FCC reaffirmed that "... *competition and diversity are relevant primarily at the local, not the national level*". The FCC also argued that an increase in national station ownership limits could actually increase viewpoint diversity. It accepted evidence that group-owned stations take editorial positions, engage in basic reporting and make coverage decisions on an autonomous basis.

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Economies of scale

In terms of likely financial benefits accruing to operators, the FCC observed that expenditure on news and information programming in part was a function of economies of scale which should be assisted by a relaxation of the national radio ownership limits. Although the FCC noted that it could have justified an even higher new national station limit, it emphasised that its recent relaxation of national ownership restrictions were intentionally gradual and evolutionary in nature rather than sudden and revolutionary. Such an approach contrasts the FCC's earlier more radical stance as exemplified by the Docket 80-90 decision, which produced a flood of new FM radio stations. The danger associated with such radical change, was enunciated by Commissioner Duggan in a separate statement accompanying the Report and Order issued in April of this year. He described Docket 80-90 as an economic disaster for the industry.

In relation to its revised local radio ownership limits, the FCC concluded that its commitment to promote competition in both the economic marketplace and the marketplace for ideas would not be threatened by a moderate reduction in the local ownership rules. The FCC was also concerned that the existing local ownership rules could actually be hampering competition and diversity by denying stations economies of scale.

Increase in media

The severe economic stress experienced by many American radio broadcasters is directly related to explosive growth in new radio and alternative entertainment media outlets. The major increases in competition were from more commercial radio services and an increase in the penetration, popularity and usage of cable television services and video cassette recorders ("VCR"). Between 1980 and 1991, the total number of radio stations in the United States increased by 20%.

Among the alternative forms of entertainment media, cable television has presented the most serious new competitive challenge to radio over the past decade. Between 1980 and 1991, for example, the number of subscribing homes increased from 25% to 64% of all homes with televisions. The share of total television viewing captured by basic cable programming (not retransmitted free-to-air programming) increased from 14% to 24%.

Video cassettes recorders ("VCR") were the other fast growing competitor to radio in the home entertainment market during the 1980s. According to the Television Bureau of Advertising, VCR penetration increased from only 1.1% of all television households in 1980 to 71.9% by 1991. As VCR penetration increased, so too did its usage. Gross expenditure on the purchase and rental of videos grew dramatically during the 1980s, by a rate in excess of 585%.

Although during the 1980's total radio industry advertising revenues grew at a rate which was slightly in excess of the overall economic growth rate, radio advertising revenues per station in real terms declined after 1988. This reflected both the continuing growth in the number of stations throughout the 1980's and a slowdown in industry advertising revenue growth from 1985.

As a result of falling real revenues per station and a cyclical downturn in the American economy overall, radio industry profitability declined dramatically during the latter part of the last decade. Consequently, more than half of all American commercial radio stations lost money in 1990 and, as a result of profit pressures, more than 287 radio stations were off the air by early 1992.

Lessons for Australia

The recent economic and regulatory developments in the American radio industry have a number of important implications for the broadcasting industry in Australia. First, the American experience clearly demonstrates the close link between the economic viability of commercial radio and television and their ability to continue to serve the public interest by providing quality programming on an on-going basis. Second, developments in America over the past decade also demonstrate that the introduction of too much new competition too quickly can jeopardise the capacity of the commercial broadcasting industry to continue to serve the public interest. Third, commercial radio and television stations compete not only among themselves for audiences and advertising revenues, but also, to varying degrees, with non-commercial radio services and alternative entertainment media, including cable or pay television services, cable or pay audio services and video cassette recorders, most of which have experienced strong growth over the past decade and are likely to continue to do so in the foreseeable future.

Like its American counterpart, the commercial radio industry in Australia has experienced significant increases in direct and indirect competition over the past decade which has contributed to its current extremely fragile financial state. Despite its vulnerable financial condition, it is inevitable that the local commercial radio industry will be subjected to further increases in competition in the future, the most immediate being the impending introduction of pay television which, based on the American experience, should prove to be a formidable new rival.

In view of the above factors, future Australian Governments, as well as the ABA, should be strongly encouraged to take a gradual, rather than a radical approach, to the introduction of further new commercial radio and television services, be they of a broadcasting or a narrowcasting nature. The ABA also should be encouraged, and preferably required, to specifically take the economic viability of operators into account when considering the issue of new broadcasting or narrowcasting licences in the future, as is now required of the Canadian Radio-Television and Telecommunications Commission.

New technology

With onoing technological developments Australia, like every other country, faces the prospect of ever-increasing fragmentation and competition among its entertainment media in the future. If Australia's legislators and regulators wish to ensure that these local entertainment media continue to serve the public interest with the provision of quality, culturally relevant programming, then they should be concerned to maintain and nurture the economic viability of these various media.

As part of the nurturing process, Governments and regulators should seek to avoid, rather than to imitate, the mistakes which have been made in overseas markets such as the United States. In particular, they should not mistakenly equate the quantity of services provided with the quality of services provided. Nor should they seek to introduce too many new competitive services too quickly. Finally, they should continue to monitor the results of their policy decisions and take remedial action when those decisions fail to achieve their intended objectives.

Bob Peters is a director of ANZ Capel Court, based in Melbourne and recently visited the United States to study the regulatory changes discussed in this paper.

Journalists' Copyright

Charles Alexander argues that employed journalists should cease to be the owners of copyright under the Copyright Act

This paper addresses from the publishers' perspective the current debate about recognition and protection of journalists' copyright under section 35(4) of the *Copyright Act*.

History of Copyright

In 1809 copyright was first protected by statute. 1842 saw the *Copyright Act* amended to include a provision under which publishers of encyclopedias, reviews, magazines or periodical works were granted the copyright in works prepared by employees for a period of 28 years from first publication. Thereafter the rights reverted to the employees for the purpose of separately publishing those works. This provision was amended in the 1911 UK Act to include a provision to the effect that publisher/employers were entitled to copyright in their employees' works subject to the employee being able to restrain their employer from publishing those works in publications other than newspapers and magazines.

Section 35(4) of the Australian *Copyright Act* in its present form came into existence in the 1968 Act. As in the 1911 Act, the 1968 Act (in section 35(6)) sets out the general provision that where a work is made by an author in pursuance of the terms of his or her employment the employer is the owner of copyright in the work. However, section 35(4) provides that where a work is made by the author in pursuance of the terms of his or her employment by the proprietor of a newspaper, magazine or similar periodical, for the purpose of publication in the newspaper, magazine or similar periodical, the proprietor is the owner of the copyright insofar as the copyright relates to:

(a) publication of the work in any newspaper, magazine or similar periodical;
(b) broadcasting the work; or
(c) reproduction of the work for the purpose of it being so published or broadcast but not otherwise.

It was also the 1968 Act which introduced the concept of a copyright in a published edition of a literary, dramatic, musical or artistic work. The ownership of this right was given to the publisher of the work and it appears that the right extends only to the typographical arrangement of a work.

Over the next 20 odd years the provisions were not the subject of any significant interest. However, in July 1990 their significance came into sharp relief when Mr Justice Beaumont handed down his decision in the *De Garis* and *Moore* cases. In that decision his Honour held that the copyright in certain underlying works contained in newspapers, one prepared by an employee and the other by a freelancer, was infringed when it was photocopied by a press clipping agency, Neville Jeffress Pidler. Despite this favourable decision the Court is yet to determine the "value" of any of the articles which were copied.

A little time prior to this decision, the AJA (now the Media and Arts Alliance) had joined Copyright Agency Limited ("CAL") with a view to CAL licensing copying of works by its members. In these early days the AJA seemed to be suggesting that the funds which they hoped to receive from this licensing would be used for the general purpose of the AJA, because of the difficulties of identifying authors. It now seems that the AJA may have changed tack and is prepared to distribute funds to its members in respect of works where the authors are identified. However, it is understood that it still claims a right to retain funds received from CAL for articles copied from newspapers and magazines where the author cannot be identified.

Following the *De Garis* and *Moore* decisions, CAL commenced negotiations with the Government to obtain payment for Government copying performed under the authority given in section 183 of the Act. Section 183 allows the Crown to do any acts comprised in the copyright if the acts are done for the services of the Commonwealth or a State. The great majority of publishers of newspapers and magazines have not joined CAL. For this reason CAL only sought payments from the Commonwealth in respect of copying of the published edition. Nevertheless, CAL appears to have been able to complete one of the best deals concluded by a copyright owner in the history of copyright. It negotiated to be paid by the Government $1 an A4 page for copying taken from a newspaper and $4 an A4 page of copying taken from a magazine. The copying by Government departments is very substantial and the arrangement will result in large payments being made to CAL.

CAL also has been collecting amounts for copies from educational institutions. It says it is only collecting for works, not published editions, and that therefore the publishers are not entitled to any payment for copying of their works by those educational institutions. This is presently the subject of litigation with CAL.

The publishers' concerns

This leads to the present position faced by the publishers:

(a) they publish newspapers and magazines paying wages, related expenses, rent, production costs, research and development costs but find the material contained in databases, for which they could license access to third parties, may belong to the journalists who wrote it rather than the publishers who store it and who developed those databases; and
(b) if someone copies a newspaper or magazine with a photocopier instead of buying that newspaper or magazine it is the employed journalist who gets paid. This is not a bad incentive for employed journalists to encourage photocopying.

Therefore, with some justification, the publishers have questioned the present law. They are concerned about their investment in databases. They also consider that photocopies of newspapers are just their newspapers in other forms, and that if anyone is to be paid for photocopying it should be them. The Attorney General has announced an inquiry into whether section 35(4) should be abolished or amended.

Contentions

It is a principal contention of the publishers that the *Copyright Act* is a statute concerned with rewarding enterprise with a view to encouraging the making of further works. In this context, the publishers contend that it is they who provide the total environment and resources for creation, publication and dissemination of news. It is the publishers who have developed systems which provide for faster and

better news reporting and new methods of disseminating news. They consider it is the publishers that should be provided with incentive to develop that system. In their view, the journalists themselves are already fully rewarded. Those journalists who have special skills and expertise (and therefore, might expect to have their works copied more frequently) are receiving very considerable rewards in recognition of their talent. The situation is entirely different from those authors who are not usually paid until they have achieved success and whose endeavours are entirely their own. This is the category of the freelance journalist who can negotiate with the publisher to decide on what basis he or she will sell their product. The freelance is not usually paid for time spent, but is paid for the product he or she produces and negotiates how that product may be used.

It is the publishers' contention that the Act, in section 35(6), generally recognises the philosophical concept of an employer ownership. There is no basis upon which employers of journalists should be treated differently. In saying this the publishers have made it clear that if a journalist uses his or her materials in publication of a book they would in recognition of past practice not expect ownership for that purpose.

Technology outpacing law

The other major contention of the publishers is that this is yet another area where the law has not kept pace with technological change. The law when framed and later revised in reality, only resulted in the journalist being able to use his or her works for publishing in book form. Indeed when broadcasting was introduced, the Act was amended to ensure that the rights of the publishers were extended to allow them to use works prepared by employees for the purpose of broadcasting those works either by themselves or third parties. However, since 1968, photocopying and computer technology have opened new horizons and opportunities. The publishers claim they are being denied the right to exploit those opportunities, while at the same time having to compete against the new technology. This new technology in reality allows publication of newspapers in a different form, but the substance remains the same.

The publishers contend that the time has come for them to be treated like other employers in the United Kingdom and the United States and, indeed, all other employers in Australia. There is no ground for continuing the discriminatory provisions which are contained in section 35(4) of the Act.

Charles Alexander is a Sydney partner of the law firm Minter Ellison Morris Fletcher.

World Review

A survey of some recent International developments

Japan is to launch commercial TV satellites in the new year, the Japanese Government announced last month. A basic program for a satellite television service is to be drawn up by an advisory panel of the Posts and Telecommunications Ministry. Six channels will be provided for satellite broadcasting at first. About ten firms are reported to be interested in applying for a licence.

Hungary's Muzertechnika (MT), the national monopoly carrier signed an agreement recently with Orbital Communications (OrbComm), a US based satellite corporation, to become the exclusive provider of OrbComm services in Hungary. MT will own and operate the OrbComm network and the service will commence fully in 1995, complementing MT's plans to vastly expand the scope of telecommunications services offered in Hungary.

Korean company Samsung has also been enlisted by OrbComm as its sole service provider in Korea, as well as sole supplier of OrbComm personal communicators.

Lithuania has finally been connected up to the world telephone network in a move which reinforces the state's independence from Moscow. The state now has access to a satellite link from Kaunas to Copenhagen, providing direct links to the global network. Beforehand, all calls were routed through Moscow or St. Petersburg.

China made what is believed to have been its largest single order for fibre optic cable. Pirelli Cables won the $10 million contract to supply over 2,300 kilometres of cable to the Hunan Post and Telecommunications Bureau.

Greece and **Korea** have both awarded mobile telephone network licences to consortia including Arena GSM consortium member Vodaphone, the group bidding for Australia's third telecom licence.

Finland has announced moves to open up its long distance telecommunications links to competition from 1994. Local telephone companies have apparently been waiting for twenty years for deregulation to occur, and are now pushing for deregulation in Finland's domestic market.

Europe: British Telecom has won a three year contract to provide a fully managed network for the European offices of BP Chemicals. The contract means the first combination of Syncordia, BT's global outsourcing subsidiary and Global Network Services, its present international managed data networking service.

FLAG (Fibre Optic Link Around the Globe), has entered into its final planning stages. Nine telecommunication carriers in Malaysia, Korea, Singapore, Indonesia, India, Egypt, Gibraltar, Italy and the UK all signed an agreement to land the cable, while the Japanese are presently at the negotiating table. The cable will link Japan and the UK via the Indian Ocean. To be operational by the end of 1996, FLAG will cost its backers in excess of $1.4 billion, becoming the world's longest undersea fibre optic cable, 25,000 kilometres in length.

Sri Lanka's Telecom has chosen OTC Australia, the international arm of AOTC, as its partner to provide a cellular mobile telephone service in Sri Lanka.

This edition of World Review was prepared by Richard Phillips, itinerant traveller and undergraduate at Caius College, Cambridge.

World Television

Chris Irwin surveys international developments and explains the BBC's approach to issues now facing Australia's ABC

The world of television is being shaped by two phenomena: first, the technological changes that allow new methods of television distribution and encourage the advent of new channels; and second, the increasing globalisation of programming.

The first should lead to the liberation of the viewer — multiplicity should mean greater freedom of information and a wider range of channels from which to choose. But the great majority of viewers will exercise choice only if the new distribution technologies increase the range of attractive programming available. Good programming is expensive. Unless the money available to generate new programming can be increased, it is doubtful whether consumers will be drawn to the new technologies, unlikely that the causes of freedom of information and consumer choice will be furthered and almost certain that the economics of international programme provision will not permit an adequate response to national tastes and interests.

Potential for new television services

In assessing the potential of other markets, I have developed a simple conceptual model which can be used to forecast prospective television revenue and the sustainability of new services. It takes as its base the historic revenue available to programme suppliers, uses independent projections of future growth and seeks to identify the future revenues available to the operators of television services.

This simple extrapolation in real terms suggests that, theoretically, in Australia there is likely to be sufficient expenditure to fund the operation of perhaps six or seven new viable channels by the end of the decade. It is assumed in this calculation that costs can be kept under control, with no inflation in programme supply costs.

The model ignores the hefty working capital costs involved in the start of any new service. The B Sky B experience in the UK provides a salutary reminder of the potential enormity of these costs. But B Sky B also suggests that new services can expect high returns in the long term. As with all pay television ventures, success depends on deep pockets and long-term commitment. But it is not guaranteed: some win, but most do not within any normal period for return on investment.

The ingredients for success

Success seems to depend on several factors. First, all the successful operations have had access to good distribution networks: a developed cable environment in the United States for HBO and easily accessed terrestrial networks faced by weak competition in France for Canal Plus and South Africa for M-NET. Ease of access is vital: it is important to minimise cost of entry for consumers by keeping hardware prices down.

Secondly, the staples of pay television are generic channels. In the United States films, family entertainment, sport, news and information channels are the basic ingredients for programme-led new distribution technologies. Economic logic demonstrates the trade-off between programme costs and audience size for different categories of programming provided by the BBC in its domestic services. Light entertainment, acquired films and series, sport, children's programming and news and current affairs give a higher audience return per pound invested than religion, features, education and drama (even allowing for the relatively low cost but high pulling power of drama soaps).

This is not to say that services based on films, family entertainment, sport and news and information channels will inevitably succeed. Audiences (and willingness to pay) will be determined by programme quality. The bulk of the programme assets of high quality are controlled by relatively few suppliers internationally. The value of these assets means that those who control them will look to maximise their returns on their exploitation. This will inevitably encourage the emergence of a handful of global English language channels during the decade, only some of which will be tailored to regional markets.

Limited program supply

In part this is driven by the fact that there is a global imbalance in product sourcing. A few suppliers are in a position to control the bulk of material suited to global exploitation. We can already see this in the film industry. The size of the US domestic market, which of late has generated more than 500 new releases each year, pales the ability of other national film industry markets to deliver English language releases. Despite its relative vigour, the Australian film industry appears to have generated less than 20% of the volume of its US counterparts — although this is a major achievement given the relative size of the two population bases. No less significant is the importance of the home video market in generating film industry revenues, the insignificance, in revenue terms, of network television film purchases and the rising importance of pay television revenues.

News and sport

In the sports world, the 1980s was marked by the increasing internationalisation of sporting rights and the emergence of ESPN and Prime Sports, together with the regional broadcasting unions and other sporting rights wholesalers as sports costs escalated. A similar pattern can be observed in news provision. The very high fixed costs associated with maintaining correspondents overseas has seen a general contraction in overseas coverage by national networks (the BBC is one important exception) and the preeminence of the two global television news agencies, Visnews and WTN. For example, the American networks have generally moved from maintaining national bureaux in individual countries to regional hubs. NBC and CBS have significantly reduced their bureaux structure and laid off many of their international staff. ABC (US), with its controlling interest in WTN, has been an exception. Even so, ABC played a positive role in the subsequently aborted negotiations last year intended to bring about a merger of WTN with Visnews.

Reuters has since supported Visnews (in which it is the controlling shareholder) in Visnews' expansion. Visnews — which is a major supplier for BBC World Service Television Ltd — currently operates 35 bureaux around the world and plans to open additional bureaux.

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BBC News Services

The BBC has also been expanding its own international news gathering base for its television and radio services, both domestic and international. The BBC now has more than 50 bureaux and well over 250 correspondents and stringers around the world. As BBC World Service Television Limited has developed, it has also made arrangements for expanded international picture supply with third parties. BBC World Service Television Ltd has been talking to the ABC in Australia about the possibility of complementary coverage with access to ABC bureaux and correspondents in those areas — particularly in South-east Asia — where ABC has developed its news gathering expertise. We believe that, as an alternative to the approach adopted by NBC and CBS, collaboration with other newsgatherers in order to secure a greater return on the high fixed costs entailed in newsgathering, is a step forward. It also helps secure plurality of news supply.

This is a vital corollary of freedom of information to which BBC World Service Television is committed. We are committed to the principle that a better informed world makes for better international relations. Constraints on plurality of sourcing and the freedom of information are the handmaidens of bigotry and bias. The BBC's international reputation rests on its commitment to impartiality and accuracy and its readiness to reflect a diversity of views. Newsgathering partnerships around the world are an important element of this, as is the international polyglot expertise that can be found in the BBC World Service.

BBC World Service Television

It was an awareness of the brand strength of the BBC internationally that led to the creation of BBC World Service Television Limited. The company was established as a wholly owned commercial subsidiary of the BBC in March 1991. Its mission statement sets it the task of "creating a self-funding television equivalent of BBC World Service Radio, with the aim of being in every continent by the end of 1993". It has already launched services with regional partners covering Europe, Asia and Africa and we are in various stages of development with plans for services for Japan, America and the Pacific. The ventures are wholly self-funding. BBC World Service Television Limited has recourse neither to BBC domestic licence revenue nor to grant-in-aid. Relations with the BBC and other suppliers are governed by normal commercial contracts and licences.

The logic for the creation of BBC World Service Television was governed by a number of considerations. First, there was the desire for the BBC to retain its competitive position as a respected provider of impartial and accurate information as the growth of television attracted listeners away from radio. Second, there was a realisation that without an international television presence, the BBC might find itself marginalised in the increasingly competitive global market for rights. Finally, it was considered that the status of the BBC as an international broadcaster might temper attempts to interfere with the future operation of the BBC on purely domestic grounds. Those of us who work for the BBC or who, around the world, rely on its contribution to the free flow of information internationally, see it as a global asset.

Regional partners

At this stage of its development, BBC World Service Television provides primarily news and information services, tailored to the needs of the different regional markets covered by its satellite outlets. We rely on our strategic regional partners to secure the revenue for the service and to advise the company on the best way of tailoring its services to the needs of each region.

These important relationships have helped already to shape the service and to reinforce our recognition of the need for a two-way street in the field of information flow. A World Service cannot achieve its aim if it does not actively promote that flow by, for example, entering into collaborative newsgathering arrangements. Cultural imperialism is inimicable to the free flow of information and a better informed world. We believe that in working with others who broadly share this vision, drawing on their resources to improve international coverage and by making that international coverage available to supplement national news services, we can make a contribution to global information that is both outstanding for its breadth and cost-effective in its provision.

The development of BBC World Service Television as a commercial, wholly self-funding subsidiary of the BBC is also helping to ensure that the BBC, as the UK's principal broadcaster, is streamlined for a new, more competitive era. It avoids the Corporation being marginalised in a multi-channel environment whilst reinforcing the disciplines of competition and the need to adapt rapidly to survive in a harsher economic world. This strategy seems to us to be the most desirable way of exploiting the opportunities created by the new distribution technologies, whilst tempering the globalisation of programme supply and ensuring responsiveness to national tastes and interests.

Chris Irwin is Chief Executive of BBC World Service Television.

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to read the signals of the market and not to repress them. Then, we may well see Bishop Berkeley's prophecy finally completed, with the world reaching new heights as it comes full circle, and Australia playing an important part.

This is an edited version of a paper delivered by Rupert Murdoch at an Asia-Pacific Congress in Sydney on 18 October 1992.

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However, it might be argued that in some circumstances the same claims may be fairly made for the ethically secret communications of other professionals. Certain communications of other professional groups may also be the privilege of the client (or patient or penitent) rather than of the professional. And the effective operation of a code of professional ethics often serves the ends of the legal system, by promoting its spirit. Should it be possible to delineate circumstances in which these two conditions obtained, it would be hard to see what objections could be made to according legal recognition to professional privilege of professions other than lawyers.

The bottom line, however, is that any protection which is afforded must be protection which serves the end of justice. A code of ethics should not be a shield which prevents a court from having access to information which is crucial to the dispensing of justice in the case before it. Nevertheless, this still leaves a great deal of scope for just recognition of codes of ethics. It should not be beyond the wit of our lawmakers collectively, to devise a system in which the courts are required to obtain from witnesses only that portion of the truth which is necessary to serve the ends of justice.

Deane Wells is the Attorney General for the State of Queensland.

Associate Editors

Ross Duncan, Kerrie Henderson, Page Henty, Bruce Slane, Sarah Ross-Smith, Chris Woodforde

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Contributions and comments should be forwarded to:

PAUL MALLAM
Editor
Communications Law Bulletin
C/- Blake Dawson Waldron
Lawyers
Grosvenor Place
225 George Street
SYDNEY NSW 2001

N.Z. Contributions & Comments

New Zealand contributions and comments should be forwarded to:

BRUCE SLANE
Associate Editor
Communications Law Bulletin
C/- P.O. Box 7263
Auckland 1
New Zealand

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