Communications LAW B·U·L·L·E·T·I·N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION (CAMLA) A.C.N. 002 651 005

Registered by Australia Post. NBG 4474 EDITED BY PAUL MALLAM VOL 13 No 2 1993

Freedom of expression or the right to lie?

William Akel reports on some aspects of the freedom of speech debate

An Englishman, David Irving, has been in the news recently causing public outcry, not only in Australia and New Zealand but also throughout other parts of the world. Irving alleges certain aspects of the World War II Nazi Holocaust against the Jews are exaggerated and after 30 years of research, has found no evidence that Hitler had knowledge of the atrocities which were being committed.

A threat to civil liberties

Irving's comments have incensed many, and there would probably be very few Australians and New Zealanders who would accept what he says. He has been banned from entering Australia. However, Queensland Civil Liberties Council president Terry O'Gorman says such a ban was a threat to freedom of speech and could lead to wider censorship in Australia. "While I find Irving a pompous white supremacist who revels in the unwholesome notoriety he attracts to himself by his distorted revisionist theories of the Holocaust, it is necessary that his views be heard by allowing him a visitor's permit", he said recently.

O'Gorman's point is that it is important that even people with views that are totally repugnant still get heard. People should be able to speak out, even at the risk of offending others.

In New Zealand, the right to freedom of expression is recognised in section 14 of the New Zealand *Bill of Rights Act* 1990:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

Did six million people really die?

The furore over David Irving's beliefs is not a new phenomenon. A very similar situation recently rocked Canada, ending up in the Supreme Court of Canada. The case was *Zundel v The Queen*. Zundel had published a 32-page booklet entitled "Did Six Million Really Die?". The bulk of the booklet critically reviewed a number of publications and suggested that it has not been established that six million Jewish people were killed before and during World War II and that the Holocaust is a myth perpetrated by a worldwide Jewish conspiracy. Zundel's assertions were extremely offensive to many.

The case arrived at the Supreme Court after Zundel had already been through two trials, each resulting in his conviction under section 181 of Canada's criminal code:

"Everyone who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

The issue in the Supreme Court was whether section 181 violated sections 2(b) and 7 of the Canadian Charter of Rights and Freedoms (akin to, but constitutionally wider than the provisions in New Zealand's Bill of Rights in that the rights and freedoms expressed are guaranteed).

Section 2(b), similar to New Zealand's section 14, says:

"Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

The Supreme Court judgments are fascinating examples of legal jurisprudence on fundamental rights in today's society. The judges were split 4-3. The judgments represent the classic arguments for and against freedom of "expression" in circumstances where the expression is the very antithesis, and strikes at the heart, of a democratic society.

The right to freedom of expression

The majority of the judges found that section 181 violated section 2(b) of the Charter. Zundel's pamphlet was protected by section 2(b) and his convictions were overturned. In a powerful decision delivered by Madame Justice McLachlin these judges stressed that the purpose of section 2(b) is to permit freedom of expression to allow promotion of truth, political or social participation, and self-fulfilment.

The court said that often minorities will have views that totally fly in the face of what the majority of society believes, but they should still have the right to put their views, "unless the physical form by which the communication is made (for example, by a violent act) excludes protection". The court said it adheres to the precept: "It is often the unpopular statement which is most in need of protection under the guarantee of free speech."

The prosecution argued that what Zundel had written were deliberate lies and because of this they had no value, and were unlawful. But this did not persuade the majority of the court. McLachlin J said: "Exaggeration – even clear falsification – may arguably serve useful social purposes linked to the values underlying freedom of

expression ... an artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's "Satanic Verses" viewed by Muslim societies as perpetrating deliberate lies against the prophet."

In saying this the court stressed it was not condoning Zundel's assertions. However, the court held that if his comments were outside the protection of section 2(b), so would comments like those made by Rushdie be outside section 2(b) and so would, for example a doctor's comments who exaggerates the number of geographical locations of people potentially affected with a virus, in order to persuade people to be inoculated against a burgeoning epidemic.

McLachlin J quoted from Cory J (significantly one of the minority judges) in another case:

"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhabited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."

The judge continued with reference to United States jurisprudence:

"As Holmes J stated over 60 years ago, the fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought we hate'."

The court eloquently summed up its reasons for giving the pamphlet the protection of section 2(b) by using a quote from another leading 1990 Canadian case, *R v Keegstra:*

"... it must be emphasised that the protection of extreme statements, even where they attack those principles underlying the freedom of expression, is not completely divorced from the aims of section 2(b) of the Charter ... [I]t is partly through clash with extreme and erroneous views that truth and democratic vision remain vigorous and alive .."

A charter for liars?

The views of the three judges in the minority were expressed in an equally powerful joint decision delivered by Cory and Iacobucci JJ. To them the fundamental importance of freedom of expression to a free and democratic society was beyond question. At issue was whether section 181 contravened that right. The minority judges characterised Zundel's activity as involving:

"The deliberate and wilful publication of lies which were extremely damaging to members of the Jewish community, misleading to all who read his words and antithetical to the core values of a multi-cultural democracy ...".

They added:

"The publication of such lies makes the concept of multi-culturalism in a true democracy impossible to attain. These materials do not merely operate to ferment discord and hatred, but they do so in an extraordinarily duplicitous manner."

The judges in the minority analysed the Canadian Charter of Rights and Freedoms as a fundamental document setting out essential features of Canada's vision of democracy. The Charter provided indications of which values go to the very core of the Canadian political structure:

"A democratic society capable of giving effect to the Charter's guarantees is one which strives towards creating a community committed to quality, liberty and human dignity. The public interest is, therefore, in preserving and promoting these goals."

The minority looked at other provisions of the Charter and in particular section 15 which provides that every individual is equal before and under the law and should be free of discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability (similar to section 19 of New Zealand's *Bill of Rights Act*).

Cory and Iacobucci JJ noted:

"If the wilful publication of statements which are known to be false seriously injures a group identifiable under s.15, such an act would tear at the very fabric of Canadian society. It follows that the wilful publication of such lies would be contrary to the public interest."

The minority judges said that the focus of section 181 of the Criminal Code was on manipulative and injurious false statements of fact disguised as authentic research. They concluded:

"Basically the thrust of the appellant's argument is that s.181 is an unjustifiable limit on freedom of expression. Such an argument, in this context, is more accurately characterised as an argument in support of the appellant's freedom to lie. Under s.181 the appellant is free to tell all the lies that he wants to in private. He is free, under this section, to publish lies that have an overall beneficial or neutral effect. It is only where the deliberate publication of false facts is likely to seriously injure a public interest that the impugned section is invoked. This minimal intrusion on the freedom to lie fits into the broad category of criminal code offences which punish lying. Those offences include, inter alia, the provisions dealing with fraud, forgery, false prospectuses, perjury and defamatory libel."

Abrogation of free speech

In justifying its abrogation of freedom of expression the minority expressed its concerns that:

"Racism tears asunder the bonds which hold a democracy together. Parliament strives to ensure that its commitment to social equality is not merely a slogan but a manifest reality. Where any vulnerable group in society is subject to threat because of their position as a group historically subjected to oppression, we are all the poorer for it. A society is to be measured and judged by the protections it offers to the vulnerable in its midst. Where racial and social intolerance is fermented through the deliberate manipulation of people of good faith by unscrupulous fabrications, a limitation on the expression of such speech is rationally connected to its eradication."

Significantly, the majority judgment specifically said it did not assert that Parliament cannot criminalise the dissemination of racial slurs and hate propaganda. Instead, the issue was whether section 181 could be used in the way the prosecution contended. The majority's concern was that any such provision must be drafted with sufficient particularity to offer assurances that it could not be abused so as to stifle a broad range of legitimate and valuable speech. The importance of freedom of expression was beyond question.

William Akel is a partner in the Auckland office of the New Zealand national law firm Simpson Grierson Butler White.

CABLE, CONVERGENCE AND MULTI-MEDIA: FURTHER CHALLENGES

Gina Cass-Gottlieb explores some challenges for copyright law

Technological developments herald the convergence of broadcasting, telecommunications networks and computer networks. These developments have placed significant strain upon the protection afforded by the *Copyright Act 1968* ("the Act"). The issue of eight cable pay TV licences by the Australian Broadcasting Authority under section 96 of the *Broadcasting Services Act* ("BSA") on 9 September 1993, the fact that cable delivered narrowcast services are already offered in limited areas pursuant to class licences and that hybrid delivery systems are likely to be utilised, make the question of the inadequacies of the *Copyright Act* treatment of program services transmitted by cable an urgent priority.

Lack of copyright protection

Those inadequacies include the lack of copyright in cable transmissions, the fact that the exclusive rights of a broadcaster are not infringed by an unauthorised cable transmission of the broadcast and that the holders of rights in underlying works comprised in the broadcast may not take action against subsequent cable transmission of the broadcast. The initial premises of the exclusion of cable retransmission from the exclusive rights of the underlying copyright holder were that diffusion services were used as a means of improving reception in areas where the original broadcast reception was poor. Accordingly, the rights holder, by authorising public broadcast, had effectively consented to all communication of the work to the public within the broadcast area. Those premises are now inconsistent with the introduction of pay cable and the anticipated introduction of pay MDS and satellite services. Under the current provisions of the Act a broadcast on a pay service delivered by MDS or satellite could be retransmitted on cable with or without charge, without the authorisation of the broadcaster or the underlying rights holders.

A central issue is the appropriate regulation to apply to cable retransmission of broadcasts and the underlying works comprised in the broadcasts. Debate has centred around the options of retaining the current exemption in favour of cable service providers from the exclusive rights of broadcasters and the underlying rights holders; the removal of that exemption leaving cable service providers to commercially secure consent and licences from the broadcasters and underlying rights holders; and compulsory statutory licences with the payment of negotiated royalties or as determined by the Copyright Tribunal.

US reforms

The history of US regulation, and particularly current reform proposals, are instructive in this debate. Under the *Copyright Revision Act* 1976, (Title 17 United States Code), there is a compulsory licence for secondary transmissions to the public by cable systems of primary transmissions by licensed broadcast stations. However, this compulsory licence only applies in limited circumstances including a

Index

requirement of authorisation by the Federal Communications Commission, accounting and reporting compliance by the cable system operator, and the requirement of simultaneous secondary transmission with the primary transmission. The royalty fees are paid to the Register of Copyrights and distributed among the copyright owners whose works were subject to secondary transmission by the cable system. Secondary transmissions to the public by cable systems which do not comply with the limited circumstances are actionable as copyright infringements. Of particular interest is the fact that an action lies if the content of the program or any advertisements or station announcements transmitted with the program and the primary transmission are wilfully altered by the cable system through changes, deletions or additions.

The reform proposals followed upon a Report of the Copyright Office *The cable and satellite carrier compulsory licences: An overview and analysis* of March 1992. The report recommended that the cable compulsory licence should eventually be phased out, which would mean that cable system operators would have to obtain licences from the broadcasters. The reform proposals also seek to amend the definition of cable system to include microwave or other technologies for the local distribution of secondary transmissions of broadcast programming. In the interim period before the termination of the compulsory licence system on 1 July, 1999, that system is to be replaced by a new compulsory licence for broadcast retransmission which is defined in a technologically neutral way.

Cable developments

The principal reasoning for the US reforms, apart from technological change, has been the large increase in the number of cable operators and in cable-originated programming. The likely predominance of cable originated programming in Australian pay cable services and the presence of DBS pay services, will distinguish the new Australian pay cable environment from the early American pay cable environment and will need to be taken into account in determining the applicability of particular stages of the US regulatory history to the current Australian situation.

Multimedia issues

A more complex question is raised by the convergence of multimedia computer applications combining full motion video and audio with television transmissions whether delivered by wireless means (UHF/VHF, MDS or satellite) or coaxial cable or optical fibre. The similarity between the utility of such services to end-users will be even greater with the advent of interactive television.

While under the current provisions of the Act a broadcaster has exclusive rights to make a cinematograph film of any of the visual images comprised in the broadcast, to copy such a film and to rebroadcast the broadcast, the protection of multimedia works consisting of visual images and audio generated by a multimedia "author" program on networked computer screens is in doubt. Such multimedia works would not appear to come within the protected subject matter "television broadcasts" because they are not "visual images broadcast by way of television". Further it does not appear that they qualify as cinematograph films because the visual images generated on the screen are not "embodied in an article or thing".

Report on computer software

The recent Copyright Law Review Committee *Draft Report on Computer Software Protection* expresses the Committee's doubt as to the protection of screen displays under the current provisions of the Act. The Committee invited submissions on the need for a form of protection for screen displays and also as to whether there are now new kinds of works not covered by the legislation. These questions are separate from the protection of the multimedia program or author program itself, which will be protected in common with other computer programs as a literary work under the Act.

The problems posed by attempting to apply the current concepts under the Act to recent developments are highlighted in the Committee's discussion of whether subscription databases should be treated as diffusion services. The Committee there considers whether the networking of databases to subscribers should be treated as a use of the copyright holder's exclusive right to diffuse the works comprised in the database. The Committee draws a line between the two on the basis that many databases will not fall within the definition of a diffusion service in that they will be limited to one entity and that the concept primarily contemplated the distribution of television and radio programs rather than other subject matter. With the pace of convergence of computer networks, multimedia works and interactive broadcasting, it will be increasingly difficult to draw such distinctions.

It must be recognised that the response of copyright law reform to technological progress has been by the addition of new categories of protected subject matter and the augmentation of the exclusive rights held by the makers of works rather than by variation to the existing framework of protection. International treaty obligations and the importance of maintaining a parity of protection with the protection offered by Australia's trading partners, constrain the ability to achieve a more streamlined, consistent, technologically neutral regime as was attempted for broadcasting in the BSA. However, within the existing framework by the means of varied definitions, addition of new subject matter and clarification of exclusive rights, the current deficiencies in protection must be addressed. A first step would be to follow the recommendations of the Australian Broadcasting Tribunal, in response to the 1980 direction from the Minister to inquire into matters relating to the introduction of cable and subscription television services, that a cable licensee should have similar rights in original cable transmissions as the rights held by a broadcaster in broadcasts.

Gina Cass-Gottlieb is a Senior Associate of Blake Dawson Waldron, Sydney.

Beware, the Walls Have Eyes

David Salter examines the ethics of concealed TV cameras and sound recorders

The amusing hypocrisy behind the use of concealed cameras and sound recorders is that in their purported desire to expose wrong-doing, the media eavesdroppers who employ these devices are most probably breaking the law themselves. And unlike the highway patrollers who may exceed the speed limit chasing a getaway car, the producers who instigate these hidden recordings can summon little moral defence for their actions.

The so-called "right of the public to know" is usually cited as a catch-all justification for the practice. At best this is the classic "ends justifies the means" position: that the greater public good is served, albeit at the cost of a questionable short-term working morality. But the ethical issues at stake are far more complex and disturbing than that.

There are now at least three distinctive *genres* within the current *praxis* of concealed recording. The first is genuine eavesdropping in a real situation. There is little difference between this approach and the "undercover" surveillance routinely carried out by police or other law enforcement agencies (and from which it appears to derive its veneer of "legitimacy").

Moral issues

But the media are *not* the law. When a television program goes to the trouble of introducing concealed recording equipment into a situation, it does so in the expectation that something "juicy" will occur for them to capture and then replay on-air. Two significant ethical considerations immediately arise:

- If the activity to be recorded is likely to be a breach of the law, should not the police be informed so as to prevent the crime?
- If the activity to be recorded is not illegal, but is likely to involve some harm to third parties, should not those with useful prior knowledge (the eavesdroppers) intervene to minimise any damage?

In the competitive commercial battleground of Australian television, there is little evidence to suggest that any serious thought is ever given to these issues.

But far more worrying is the growing practice in which a program *manufactures* situations and then introduces hidden cameras to record the reactions of randomly involved, unsuspecting victims. These range from the hoary old "lost-purse-in-the-street" trick to more elaborate falsifications such as *A Current Affair's* recent "Waiters from Hell" segment. These items are very close to entrapment and there can be no reasonable justification for the damage they cause to the unwitting (and unwilling) participants. What is it that these victims have done to deserve being exposed, lampooned and belittled on national television? Nothing. They simply happened to be there when the camera was rolling.

The third frequent use of concealed recording equipment comes in what is usually thought of as respectable "consumer" television – those programs which drape themselves in the worthy cloak of seeking to protect humble citizens from the unscrupulous. It is a favourite device: the same faulty domestic appliance is taken to a number of repair shops and the various diagnoses and quotations compared. Likewise, a motor car may be deliberately de-tuned and shown to a range of mechanics, or a false diamond is presented for valuation.

Entrapment

In July, *Real Life* secreted money in the pockets of clothing, took their "seeded" trousers to the dry cleaners and then attempted to record, by concealed camera, the money being removed but not returned to the owners. The chance of securing any conviction in these circumstances would, of course, be remote in the extreme, yet this did nothing to restrain the program from making derogatory (and possibly defamatory) imputations about the people featured in their footage and casting a broad slur on dry cleaners in general.

Across town, on *A Current Affair*, "psychics" were secretly taped being asked to exorcise (for payment) ghosts which figured in scenarios fabricated by a staff member posing as a troubled victim. That each of these ghost busters then reported some phenomenon deriving from that false story was put forward by ACA as evidence of their charlatanism. A more reasonable explanation was that the psychics might have been simply providing a service for a fee, as requested.

From the outset, there is an uncomfortable "trial-by-television" flavour to material collected in this way. The distinctive quality of hidden camera footage – grainy images, poor lighting, unstable framing, indistinct sound – carries, in itself, a clear semiotic signal of furtiveness. The effect is of an implied presumption of *guilt* . Why else would we be shown the sequences if not to damn by "incriminating" reference?

Even laying aside (as the reporters invariably do) the scores of other variables which might have reasonably influenced the victim's responses, what has actually been *gained* by replaying footage obtained by concealed recording equipment? Would we not believe a straightforward account presented after the event by the reporter involved? If not, why should we believe *anything* in the story?

Right to privacy

From a more general moral standpoint, the whole practice of employing hidden cameras has serious implications for our right to privacy. The problem is not so much the techniques employed, but the nature and use of the material collected. Every day the police struggle to keep their activities within the limits of "reasonable suspicion". Notwithstanding those efforts, judges often feel compelled to remind them just how "reasonable" a suspicion needs to be before it can legally be acted upon. No such constraints seem to trouble the people who plan, authorise and then execute recordings by concealed cameras. The moral code of television appears to be somewhat more elastic than the law.

Unchecked, there is little reason to doubt that hidden equipment will soon be used to breach the privacy of the boardroom and the bedroom. Why not eavesdrop on conferences between barrister and client, doctor and patient?

But perhaps most breathtaking of all, the video mud-slingers employ this technique in direct contravention of their own professional rules. Specifically, the Australian Journalists' Association "Code of Ethics" provides that:

> *"7. They shall use fair and honest means to obtain news, films, tapes and documents.*
>
> *8. They shall identify themselves and their employers before any interview for publication or broadcast."*

If they can not be trusted to adhere to their own moral code, what hope is there that they might respect ours?

David Salter is the Executive Producer of Media Watch, screened on ABC Television. The views expressed are not necessarily those of either Media Watch or the ABC.

The correct approach to defamation damages

Paul Reidy reports on the latest developments in the Carson case

The High Court by a majority of 4 to 3 recently upheld a Court of Appeal decision to set aside two verdicts totalling $600,000 awarded to Sydney solicitor Mr Nicholas Carson in two defamation actions.

The initial proceedings dealt with articles written by a Mr Slee and published in 1987 and 1988 in the *Sydney Morning Herald*. The actions were heard together. The jury awarded Mr Carson $200,000 after it found that the first article, *"Dr Rajski: A War on many fronts"*, conveyed the following defamatory imputations:

> *"(a) [Mr Carson] wrongly attempted to intimidate Mr Metcalf by threatening to sue him for defamation in respect of a medical report written by him.*
>
> *(b) [Mr Carson] wrongly brought defamation proceedings against Mr Arthur Carney, a solicitor, for the sole purpose of causing Mr Carney to forthwith cease to act for his client, Mr Rajski."*

The jury awarded $400,000 after it found that the second article, *"The Criminal Phase of the Rajski Case"*, conveyed the following imputation:

> *"(a) [Mr Carson] was wrongfully party to a conspiracy with Mr Moshe Yerushalmy to obstruct the course of justice by evading service of criminal process."*

The Court of Appeal by a majority of 2 to 1 set aside both verdicts as excessive and ordered a new trial limited to the question of damages. In appealing to the High Court, Mr Carson claimed the Court of Appeal had erred by:

- Aggregating the two verdicts;
- Comparing defamation damages with personal injury damages; and
- Emphasising irrelevant factors.

Mason CJ, Deane, Dawson and Gaudron JJ made up the majority and delivered a joint judgment. Brennan, Toohey and McHugh JJ delivered separate dissenting judgments.

Aggregation of the verdicts

The majority found that the Court of Appeal had not erred in examining the damages in aggregate, given the "clear and close relationship between [the two articles]". Both were written by Mr Slee and published in the same section of different issues of the *Sydney Morning Herald*. Both related to the same series of litigation, and their defamatory effect was cumulative. It was therefore "permissible and sensible ... to take account of the aggregate 'harm' suffered by the plaintiff by reason of both of them".

In dissent, Brennan J stated that the first article made Mr Carson "more susceptible to injury by the second" and therefore justified the larger award. Also in dissent, McHugh J found that the verdicts could not be aggregated because the articles were "not of the same purport or effect".

Analogy with personal injury

Mason CJ, Deane, Dawson and Gaudron JJ approved of use of the analogy with personal injuries on appeal and at trial. Their Honours considered awards of general damages (for pain and suffering) in personal injury cases a "potentially relevant criterion" by which to test whether the jury's award was excessive. This did not mean making any "precise comparisons", nor blurring the distinction between bodily injury and defamation. The essence of the comparison is to "ensure a rational relationship between the scale of values applied in defamation and personal injury cases".

Brennan and Toohey JJ in the minority emphasised the differences between the different actions and damages awarded. Brennan J stated that it was impossible to compare them and that it was not within the judicial province to interfere with jury assessments based on particular evidence. His honour pointed out that personal injury awards were not more accurate than defamation awards. Toohey J felt that it was unreal to extract general damages from total personal injury damages. McHugh J said a jury verdict should only be set aside if "public opinion would be almost unanimous in its condemnation of the verdict".

The majority approach has most recently been used in an appeal in the *Ettinghausen* case, where counsel for ACP compared Ettinghausen's award of $350,000 with that of $275,000 awarded to a boy who lost the head of his penis in a "botched circumcision".

Other Matters

Although the purpose of a damages award set out by the majority was not disputed, the court's approach varied on the meaning of "vindication". The majority saw the sum for vindication of reputation as "at least the minimum necessary to signal to the public the vindication of the [defamed person's] reputation". It did not consider the issue in any greater detail. However, the minority judges used the vindication element to distinguish defamation damages from personal injury damages.

The majority also found that the 8 month delay before the publisher printed an apology for the first article could not aggravate damages. It merely failed to mitigate them.

In the minority, Brennan J found the delay meant that the defendants were "continuing to assert or not fully withdraw the imputations found to have existed in the first article". McHugh J stated that the jury was "entitled to regard the belated apology of the defendant as inadequate and indeed insulting". The minority justices found the failure to print an immediate apology relevant to malice, and therefore, harm.

Paul Reidy is a Solicitor with Blake Dawson Waldron.

Pacific Rim Report: Broadcasting in Asia

Peter Westerway argues that broadcasters have responsibilities to their Asian audiences.

It is easy to be glib about Asia. The Pacific Rim is an area whose time has arrived and bookstalls in every airport around the world are carrying magazines with stories like: "The largest consumer market in the world". But Asia is much more than a market. It is home to hundreds of millions of people who are our closest neighbours. I want to talk about what makes us welcome as broadcasters in that home.

Asia already has more than half the people in the world, and by the end of this decade – just seven years away – two thirds of all the world's people will live there. And many of them will be well off. Some 33 million households in Asia already have incomes of more than US$ 30 000 per year. By the year 2000, there are likely to be 51 million households in this income bracket. And another 400 million will have outstripped subsistence living and be in the market for basic goods and services.

Time magazine put it this way: "For the past decade or so the farsighted, both inside and outside the Asia-Pacific region, have been suggesting that the Age of the North Atlantic will yield in the 21st century to that of the Pacific. Seven years early, the Pacific Age appears to have arrived".

Asia as home

You may well take all this with the traditional grain of salt. After all, the heavy yen now has Japan in trouble and in several ways it has been the key player in the Asian boom. However, this is not my main point. I want to focus on Asia as the place where people live. In other words, ignore the numbers and remember the people.

To the technologists and the free marketeers – particularly those who come from very different societies and cultures – broadcasting in Asia looks pretty simple. The new delivery technologies now make it possible to provide radio and television programs direct into homes anywhere on earth. Broadcasters should therefore utilise the fruits of these technologies to achieve efficiencies of scale and provide the peoples of Asia with a global tapestry of programs at marginal cost. Coincidentally, they will provide access to the Asian millions, so that multinational advertisers, intent on reaching these huge new markets, will homogenise their goods and services and mount global advertising campaigns.

But the fact is that Asia is an area of dazzling diversity, ethnically, socially, culturally and politically. And we ignore this diversity at our peril. As some overly ambitious broadcasters have already discovered, this means that Asians (like most people) want their broadcasting services to provide a window on the world. But it must be their window, reflecting *their* values and covering *their* world as well as the rest.

Customizing

Some broadcasters have coined a term to describe the attempt to give their services a more local look. It is "customizing". You "customize" your service when you add a few local presenters and sometimes cover events like the Asian Olympics. Personally, I have come to dislike this term, not because there is anything wrong with these things, but because it reveals just the attitude I most deplore. It is not designed to affect the fundamental nature of the programming. Instead it is an attempt to con the customers into believing that they are getting something they transparently are not.

The issue suddenly come to head just last month as Mr Rupert Murdoch's News Corporation, which is Australian-based, but substantially American in its operations, paid US$525 million for a 64% stake in Star-TV's five channel, satellite direct broadcasting service. As one Asian publisher put it: "If someone was to buy the *New York Times* and his name was Li Ka-shing, how do you think the Americans would react?" Perhaps like Malaysian Prime Minister Matahir bin Mohammed, who complained that Western moguls were now trying to control the news Asians see.

Program standards

It is this issue, rather than the heady stuff of global advertisers and trillion dollar advertising revenues, that interests me because it takes us back to the central issue of whether broadcasting is a profession or a business. Of course, it is both, but I am old fashioned enough to believe that while viewers are customers, most of all they are people. And broadcasters are more than mere merchants. Being a broadcaster is still a privilege that carries with it the responsibility to be both sensitised and sensitive.

In Asia this means studying literally hundreds of local customs and mores. While no broadcaster deliberately offends its audience, there are traps here for the unwary. Satellite delivered services in particular have a difficult problem, because they cover so many cultures. In this context, I commend the original owners of Star-TV, for their recognition of these issues and their studied attempts to avoid giving offence on such matters as alcohol and nudity.

However, my point goes much further than merely avoiding offence. We are discussing here one of the major regions of the world – and a region destined to play an even greater role in world affairs. It is my strong feeling that broadcasters should be initiating a major debate – not with governments, but between themselves – about the issue of Asian program standards.

Cultural maintenance

In particular, I would like to see that debate cover three major issues: cultural maintenance, cross-cultural understanding and the concept of balance.

None of these is new and none of them is easy. Take for example, cultural maintenance. Indonesia, the

Asian country I know best, is an extremely diverse and heterogeneous country. Its economy, its ecology, its religions and its cultures are based on some 300 ethnic groups and nearly as many languages.

President Soeharto has described this diversity of ethnic and cultural backgrounds as "a multi-coloured rainbow" and outside observers often make the same point. Indonesians treasure and work hard to preserve their human rainbow. But Indonesia is not the only Asian country with this responsibility. Singapore, which many Australians regard as a Chinese city like Hong Kong, has exactly this approach as the linchpin of its social policy. It values and works hard to maintain the unique blend of Chinese, Malay and Indian cultures which distinguishes it from any other place in the world – including the rest of Asia.

Somehow we, as broadcasters, have to consider how we can contribute to this multiculturalism, the world's best defence against parochialism, let alone racism and hatred. Televisi Pendidikan Indonesia, a network for which my company sells airtime, maintains an 80% local program contribution. But it may just turn out to be the case that attempting to mirror the real world pays off. I am impressed that Star-TV's Mandarin and Hindi channels have done so well. But I also have a question for Star and other satellite broadcasters in this region. When are they going to introduce a Malay channel and reflect the culture and values of more than a quarter of a billion people in South East Asia?

Cross-cultural understanding

For much the same reasons, I feel that broadcasters must approach the issue of cross-cultural understanding, acting as educators, rather than mere entertainers. Broadcasting is a two edged sword. It can educate, inform and entertain more effectively than any other known medium. And if the invention of printing created ripples of revolution around the globe, what will historians of the future say about broadcasting? Clearly it has come to be the principal medium of communication in advanced societies, vitally affecting the way we see the world.

But broadcasting can also create cultural wastelands, swamping local cultures with a flood of material designed for totally different audiences. This material is not necessarily of poor quality. To the contrary, it is at its most potent precisely when its production values are at their highest. The highest rating program in Jakarta at the moment is not *The Ramayana*, but *Macgyver*.

Responsibility of broadcasters

I believe that broadcasters should accept the responsibility of approaching their programming decisions with the needs of the region at the forefront of their minds. The aim should be to provide a service that is tailored to the needs and aspirations of the audience, rather than a "spin off" from services devised for a totally different, non-Asian audience.

None of this is meant to suggest that Western programs should not be included. While they might not suffer much from missing *America's Funniest Home Videos*, it would be wrong to deprive Asian audiences of the wealth of first class material available from the West, whether it is rock videos, world class sports or the latest Hollywood blockbuster.

My point is rather that we have been through all this ourselves and now, as established players, we have a duty to help Asians "tell their own stories and sing their own songs". As neighbours, we should have regard for the mores of the neighbourhood. This is not to say encourage national chauvinism. For example, *The Mahabarata* (an Indian classical drama) and *Oshin* (a Japanese serial) are two of TIP's most popular programs because they relate directly to the region and therefore to viewers' shared experiences.

The concept of balance

This leads me to the concept of balance. Here my position is the same as Lord Reith's view: broadcasting's huge potential to influence comes at a cost. It places a reciprocal moral burden on us as broadcasters – and never so heavily as now, when the scope of our activities has been so dramatically extended, to girdle the civilised world. Carelessly used, broadcasting can subvert the social fabric of developing societies, encouraging expectations that they cannot possibly meet, diverting resources and promoting conflict over peripheral issues.

Making television is not like making toasters, because we wield great influence and the privilege we enjoy carries with it that reciprocal obligation. This is particularly relevant in societies where resources are scarce and the priority task is to improve the quality of life for people who have suffered considerable deprivation.

A duty of care?

Broadcasters are surprisingly uneasy about the notion of a duty of care. We have inherited the proud tradition of a free press and our automatic response to any notion that might limit that freedom is to reject it. I do not for a moment argue that these two notions are easily reconciled. Western societies have debated for centuries whether the public's need to know outweighs the individual's right to privacy; whether national security is more important than the duty to "tell it as it is"; whether freedom of the press carries with it a reciprocal obligation to act soberly and responsibly. In Asia – and certainly in Indonesia – those same questions are alive and well.

But the concept of balance does not take away our freedom to choose. It suggests that we make our choices carefully and with full awareness of possible consequences. In the particular context of Asia, it must be understood that until now broadcasting has worked at two quite distinct levels. At the level of satellite dishes and global information flows the diet of Western materialism common to our television which has been offered only to the affluent.

But the kampongs are a different story. While they have twitched whenever some sceptical report has highlighted their shortcomings, the power holders have only been irritated, not destroyed. We are now entering a phase of broadcasting technology in which no regime will be able to block access by even the poorest and most underprivileged to an undiluted flow of information.

As a democrat, one's first instinct is to cheer. But our recent experiences Europe should sound a warning that it

Continued page 14

RECENT CASES

A roundup of recent case law

ICAC v Cornwall

The Supreme Court of New South Wales recently considered the nature of confidentiality of journalists' sources, and in doing so, found the *Sydney Morning Herald* journalist, Deborah Cornwall, guilty of contempt. The contempt arose from Ms Cornwall's repeated refusals to disclose to the Independent Commission Against Corruption the source for her two 1992 articles concerning police corruption.

In delivering judgment, Abadee J acknowledged that there is a clear public interest in the provision of fair and accurate information in the media, which is aided by the exposure of important information to the community by anonymous persons. However, he emphasised that there is also a public interest in the public knowing the truth. Abadee J emphasised that there is no conscientious right which enables journalists to refuse to comply with lawful directions, to place themselves above the law. No private undertaking to a source could exonerate a journalist from complying with the law.

Although Abadee J expressed sympathy for Ms Cornwall, he found that there was no protection afforded by the Code of Ethics which binds journalists. He examined cl3 of the Code, which provides that "(i) in all circumstances they (journalists) shall respect all confidences received in the course of their calling". This provision, taken in conjunction with the evidence of Mr Christopher Warren the Federal Secretary of the Media Arts and Entertainment Alliance, led Abadee J to assert that on one view, the Code was drafted to "operate despite the law and perhaps intended to operate beyond it." The words "in all circumstances" were interpreted by Abadee J as being subject to the laws of the land. In this way, the Code and any subjective personal ethic which prevented the disclosure of the identity of sources, provided no ground or excuse for a refusal to answer lawful questions or produce documents lawfully required.

Counsel for Ms Cornwall sought to rely on an implied freedom of speech based on the High Court decisions in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 66 ALJR 695 and *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658. Abadee J rejected this argument, observing that the *Australian Capital Territory* case was decided in the context of a representative democratic government. The freedom which Ms Cornwall purported to assert did not relate to a discussion of a political matter. In addition, Abadee J stated that Ms Cornwall was free to write and have her story published. What was at issue was "her silence".

Cruise v Southdown Press Pty Ltd

Tom Cruise and Nicole Kidman recently sought an injunction in the Federal Court preventing the publication of a photograph of their child. In rejecting their application, Gray J stated that in the absence of a right of privacy in Australia, counsel for the applicants would have to argue protection of confidential information, breach of copyright and defamation.

The confidential nature of the photograph was asserted to be a "right to keep private the appearance of the child". Gray J stated that he was not at all sure if that were a matter capable of being the subject of a claim to impose confidentiality. Gray J said he simply did not know if the applicants were the owners of the copyright in the photograph, and that if they were, remedies other than an injunction were available for breach of copyright. Such remedies were assessed by Gray J to be "perfectly adequate", if the applicants were not attempting to squeeze the privacy claim into a claim for breach of copyright.

The claim of defamation was rejected by Gray J as well. His Honour observed that it is extremely rare for an injunction to be granted to restrain in advance the publication of material alleged to be defamatory.

Lever v Murray

The New South Wales Court of Appeal was once more called upon to consider an appeal in this defamation matter. The case involved statements by Mr Wal Murray, then Deputy Premier of New South Wales, about opponents to a proposed North Coast land development. The plaintiff claimed that Mr Murray had made statements that he falsely pretended to be an aboriginal and made land rights claims for an area to which he was not entitled.

It was previously reported in the Communications Law Bulletin (Vol 12 No 4) that the Court of Appeal had held that the trial judge erred in discharging a jury, after comments made by the plaintiff's counsel which the trial judge considered painted Mr Murray as a racist.

That matter was tried again with the judge entering judgment for the defendant. The plaintiff appealed claiming inter alia that the trial judge erred in withdrawing from the jury the imputation that the plaintiff was not worthwhile as a human being.

The basis for the imputation that the "plaintiff is not worth regarding as a human being" was the statement by Mr Murray that "we are not going to be pushed around by a heap of imports". Evidence was called by the plaintiff to establish that "import" had a special meaning in relation to Aboriginal people. The trial judge would not allow this evidence to go to the jury and ruled that the matter pleaded was incapable of conveying the imputation claimed to the ordinary reasonable reader. Sheller JA, with whom the other appeal judges agreed, agreed with this.

The appeal was dismissed and the plaintiff was ordered to pay costs.

Recent Cases was prepared with the assistance of Sarah Ross-Smith of Blake Dawson Waldron.

The South Australian Whistleblowers' Protection Act

Matthew Goode reviews the background to this new legislation

The decision to enact the South Australian *Whistleblowers' Protection Act* was grounded in the policy recommendations of the Fitzgerald Royal Commission, the Ontario Law Reform Commission and the Gibbs Committee. However, while there seemed to be general support for the protection of whistleblowers, that surface consensus masked divisions about the defensible limits of the idea. As ever, for example, the interests of the media lay in as much protected disclosure as possible. By contrast, for example, Government bodies were concerned about the preservation of confidentiality.

Establishment of general principles

In developing a Whistleblowers' Protection Bill, the threshold issue was the establishment of broad principles. First, what institutions should be subject to the regime of protected whistleblowing? The key problem here was whether to extend protection to the private sector. The Fitzgerald Committee recommended that it should. South Australia also adopted this approach, for the following reasons:

- In terms of the public interest, the distinction between private and public sector is being blurred. The influence of privatisation is the most obvious example of this development.
- The consequence of excluding the private sector entirely would be that, if one local council did its own rubbish disposal and did it appallingly, it could have the whistle blown on it, but if it contracted out the same appalling service to a private company, it could not. This made no sense.
- There are hard cases at the overlap. For example, are universities public or private sector organisations?

However, it made sense to differentiate between the private and public sectors in balancing the public and private interests in disclosure of information. The private sector could hardly argue that it should be able to conceal information about criminal activity, the improper use of public funds or conduct that causes a substantial risk to public health, safety or the environment. On the other hand, while there is a public interest in disclosure of information that a public officer is incompetent or negligent, the same considerations do not apply to the private sector. If a company wants to keep secret the fact that its managing director has shown incompetence, so be it. The legislation is structured to reflect those decisions. The Western Australian Royal Commission into the commercial activities of the Western Australian Government came to a similar conclusion in its approach to this issue.

Nature of protection

The next issue was the nature of the protection to be offered to a genuine whistleblower. The debate centred around the protection of the employment of the whistleblower from victimisation arising from his or her disclosure of confidential information. Working from the principle that another agency should not be created if an existing one could do the job, South Australia did not follow the Queensland model of a new Criminal Justice Commission. In South Australia, the Equal Opportunity Commissioner covers both private and public sector employment. Further, she deals with discrimination in employment on grounds deemed to be contrary to public policy. Accordingly, she was selected as the most appropriate avenue for review of victimisation allegations.

A tort of victimisation

When the Bill was debated in the South Australian Legislative Council, the Opposition moved to create a tort of victimisation as an additional option for the victimised whistleblower, subject to the proviso that a person must elect which of the two alternative remedies he or she will pursue. A civil remedy was, strictly speaking, unnecessary. The Equal Opportunity system contains the power to make the equivalent of injunctive orders and award compensation for loss or damage. Nevertheless the Government decided to accept the amendment. The argument against giving a victim a choice of remedy is that the equal opportunity route is designed to reduce confrontation, and encourage conciliation and education if possible, unlike the court based option. However, this factor was not so great as to warrant rejection of the amendment.

The other central component for protection was obvious – protection was with respect to civil and criminal liability. This is common to all whistleblower protection schemes. The other options for protection were the creation of a criminal offence of taking reprisals and a public sector disciplinary offence. South Australia rejected both of these. The criminal offence was rejected as overkill, and contrary to the general principle of parsimony in the criminal process – that is, that the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it. The public sector disciplinary offence, if adopted, would not take into account the private sector aspects of the legislation. In any event, the Commissioner for Public Employment has power to take appropriate action against a member of the public service who failed to comply with legislative directions such as the *Whistleblowers' Protection Act*.

Key elements

The core of whistleblowing was, in non-technical terms, the disclosure of information in the public interest to an appropriate body for genuine reasons. This involves three elements:

- what information engages the

public interest sufficiently to warrant this protection?

- what is the test for genuineness in a whistleblower?
- what restrictions, if any, should the legislation impose on the ability of the whistleblower to go public?

Each of these questions has key implications for the scope of the Bill.

The Bill originally contained the following definition of "public interest information":

"public interest information" means information that tends to show:

(a) that an adult person (whether or not a public officer), or a body corporate, is or has been involved (either before or after the commencement of this Act):
(i) in an illegal activity; or
(ii) in an irregular and unauthorised use of public money; or

(b) that a public officer is guilty of impropriety, negligence or incompetence in or in relation to the performance (either before or after the commencement of this Act) of official functions;..."

This definition was *relatively* uncontroversial, but some of its features require further comment:

- The restriction of the first part of the test to adults. This involved competing policy considerations, relating to the identity of alleged child offenders.
- The possible width of the term "incompetence". The term appears in the equivalent Queensland legislation. However, a number of other approaches have been taken in other jurisdictions. In the final analysis, it was the Local Government Association which persuaded the Government to change the definition. The Association argued, in effect, that the relevant public interest related to the *effects* of incompetence rather than the mere fact that it existed. The Bill was amended to replace the concept of "impropriety, negligence or incompetence" with the word "maladministration" and defined it to include "impropriety and negligence".
- The vagueness of the descriptive language used. However, any attempt to cast a net which will adequately cover the range of possible misconduct in both private and public sectors necessarily contemplates a deal of uncertainty.
- When the Bill was debated in the Legislative Council, the Opposition moved to amend the definition to add "the substantial mismanagement of public resources". The Government agreed to this amendment. It was thought that the Bill covered this conduct in any event, but there could be no objection to making it an express requirement.

Disclosure to proper channels

The next problem was whether a protected disclosure should be only via "the proper channels" or to the media. This involved competing arguments.

Ultimately, South Australia rejected the position taken by the Gibbs Committee and the New South Wales Bills that protection was conditional on disclosure via an official channel. South Australia agreed with the Queensland and Western Australian recommendations on this aspect.

The course South Australia adopted in the Act is to require disclosure to a person "to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure". The legislation deemed disclosure to an appropriate authority to be reasonable and appropriate. Certain appropriate authorities are listed, such as a Minister of the Crown; in relation to illegal activity – the police; in relation to the police – the Police Complainants Authority; in relation to fiddling public funds – the Auditor-General; in relation to public employees – the Commissioner of Public Employment; in relation to a judge – the Chief Justice; in relation to public officers who are not police or judges – the Ombudsman. However, some contentious issues arose:

- There was some pressure to make MPs "appropriate authorities". The Government did not agree to this. The Bill enacts a very powerful weapon indeed, once a disclosure falls within its scope. It provides complete protection against all legal action. It therefore potentially protects the leakage of confidential information from all levels of the public service. If a Member of Parliament was an "appropriate authority", then any member of the public service could with impunity leak information to any Member. This would seriously compromise the integrity of any Government.
- The Commissioner of Police requested that the Anti-Corruption Branch of the Police Force be made an appropriate authority in relation to allegations of corruption and the like. The Government considered this very carefully, and the Bill was amended to reflect the role of that Branch.
- It was put to the Government that there may well be new "appropriate authorities" created in the future. The Bill was amended to give a regulation making power to add and delete appropriate authorities.

What is a genuine whistleblower?

The third issue was the most difficult. In general terms, how do you define a genuine whistleblower? There were widely varying perceptions on the definition of a "whistleblower", which are often based on subjective attitudes towards whistleblowing as an activity. The consultation process for the Bill greatly assisted in developing an appropriate approach.

Initially, the Bill required a whistleblower to believe that the disclosed information was true. However, the Bill also created a defence to victimisation of a whistleblower if the disclosure was false or not made or intended in good faith. Further, it was a criminal offence to make an allegation knowing it to be false or misleading.

Respondents to the consultation process were not happy with this requirement for two reasons. Firstly, as a general proposition, many were concerned that it catered too much for a person who was very credulous and/or self-deluding. Secondly, that a person could genuinely believe that the information was true – thus attracting the protection – and still be aware of the possibility that it was false – thus also being guilty of the offence.

As it happened, the respondents in consultation preferred the test in the Queensland Bill that there must be a belief on reasonable grounds that the

Continued page 14

Hear today, gone tomorrow – listening devices revisited

Julie Eisenberg reviews the law regarding listening devices

Tony Packard's recent brush with the law has focused public attention on the illegal use of listening devices. In Packard's case, it was alleged that the information obtained by bugging rooms in which potential buyers discussed the course of negotiations was used to gain insight into customer intentions.

While this raises particular ethical considerations for business, from a strict legal perspective this activity is no different to the use of listening devices by the media to obtain information for the purpose of widespread publication. Media organisations face the additional consequence when they communicate such information to a mass market of being liable not only for the act of listening but also for publication.

The policy behind the legislative prohibition of recording and using private conversations is to protect people from "unjustified invasions of privacy". There is presently no overriding privacy legislation which regulates these rights. This leads to the interesting result that while there are legislative limitations on the use of listening devices, there is no corresponding regulation of visual recordings made without the subject's consent.

The recording and communication of private conversations is regulated by both State and Commonwealth legislation, the latter dealing specifically and exclusively with the interception of telecommunications. The State Acts more generally cover the use of listening devices. The New South Wales *Listening Devices Act 1984* ("the Act") is used to illustrate this discussion, but the particular provisions vary from State to State.

As a general observation, there is no recognised right of the media to overhear or record private conversations without the consent of those involved. By limiting the legislative exceptions largely to situations where an "eavesdropper" has a specific lawful interest, the legislature has underlined a policy reflected in the words of the NSW Attorney-General in his second reading speech for the New South Wales legislation:

"Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate and more obnoxious to a truly free society. People should not be expected to live in fear that every word they speak may be transmitted or recorded and later repeated to the entire world."

Unlawful use of listening devices

In general terms, the *Listening Devices Act* makes it unlawful, in the absence of a relevant consent, to:

- use or cause to be used a listening device to record certain private conversations (section 5(1));
- communicate or publish certain private conversations which have been unlawfully listened to (section 6(1));
- communicate or publish certain private conversations to which a person has been a party, whether or not the use of listening device was unlawful under section 5 (section 7(1)); or
- be in possession of a record of a private conversation knowing that it has been obtained in contravention of section 5 (section 8(1)).

A breach of any of these provisions is a criminal offence which may attract fines, imprisonment or both.

Subject to some exceptions (which are discussed below), section 5(1) of the Act contains a blanket prohibition on the use of a listening device to **record** private conversations, whether or not the person using the device is a party to the conversation. The section also prohibits the use of a device to **listen** to a conversation to which the person is not a party.

There are comparable provisions in Tasmania, the ACT and South Australia. However, in Queensland, Victoria, Western Australia and the Northern Territory there is no prohibition on taping a conversation to which the person is a party (the offence occurs, rather, when the substance of the conversation is published without consent).

The first element of the offence is the **use** of the listening device. The NSW legislation defines a listening device as "any instrument, apparatus, equipment or device capable of being used to record or listen to a private conversation simultaneously with its taking place."

In *Miller* v *TCN Channel Nine*, a 1988 decision, one person had a microphone hidden on her and another was outside the room operating the recording equipment. Both were found to have "used" the listening device even though its listening and recording functions were physically separated.

Private conversations

The second element is the recording or listening to the private conversation. In New South Wales, a "private conversation" is defined as:

"Any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only:

(a) by themselves; or

(b) by themselves, and by some other person who has the consent, express or implied, of all those persons to do so".

Given the policy basis of the legislation, the courts are likely to take a fairly strict view of what amounts to a "private conversation" and avoid strained and technical approaches. In *Miller*, a reporter posing as a model to investigate the activities of a theatrical/modelling agency secretly recorded conversations with agency personnel. The court found, among other things, that a

conversation does not cease to be private even though there is an open door to the room which could enable a conversation to be heard if a person walked past the door.

The definition of "private conversation" varies from State to State. For example, the Queensland *Invasion of Privacy Act* specifically excludes "words spoken by one person to another person in circumstances in which either of those persons ought reasonably to expect the words may be overheard, recorded, monitored or listened to by some other person, not being a person who has the consent, express or implied, of either of those persons to do so".

The narrower New South Wales definition of "private conversation" is similar to the definition used in Tasmania, South Australia and the Australian Capital Territory. The broader Queensland version has similarities to the definitions used in the Victorian, Western Australian and Northern Territory legislation.

Exceptions to section 5

Where a person has used a listening device to listen to or record a private conversation, they may still escape prosecution if they fall within one of the exceptions set out in sections 5(2) and 5(3). Many of the exceptions will not be available to members of the media. For example, section 5(2)(c) allows the use of a listening device to obtain evidence or information in connection with an imminent threat of serious violence to persons or of substantial damage to property or in connection with a serious narcotics offence, if it is necessary to use the device immediately to obtain that evidence or information.

There are further exceptions under section 5(3) where:

(a) all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used; or

(b) a principal party to the conversation consents to the listening device being so used and:

(i) the recording of the conversation is reasonably necessary for the protection of the lawful interests of that principal party; or

(ii) the recording of the conversation is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation.

Subsection (b)(ii) clearly excludes media defendants, which means that journalists using listening devices are in most cases legally compelled to disclose the fact that they are using them. It was made clear in *Miller* that while obtaining consent subsequently may diminish the likelihood of prosecution and potentially reduce penalty, it does not change the fact that an offence has been committed when the listening is done or the recording obtained without consent.

Publication of information

The statutory prohibitions on publication of information obtained through the use of a listening device apply whether or not the conversation was lawfully listened to in the first place. Where the conversation was unlawfully listened to, section 6(1) operates to prohibit a person knowingly communicating or publishing the conversation, or a report of it, that has come to the person's knowledge, as a result, directly or indirectly, of the use of a listening device in contravention of section 5.

Section 7(1) of the New South Wales legislation prohibits publication of a record of a conversation where the conversation was recorded by a party (whether or not in contravention of section 5). There are exceptions in both situations including where consent of all principal parties is obtained. However, as in the case of the exceptions to the "use" offence, most of the "non-consent" exceptions are of limited application to people in the media who wish to publish such conversations.

However, under section 6(2)(c), where a person has obtained knowledge of a private conversation from a source other than the unlawful recording, they are not prohibited from publishing that infomration even though they may also be aware of the contents of the unlawful recording.

Some of the other States provide for an exception where a party communicates the information in the recording in pursuance of a duty or to protect its lawful interests. Again, these provisions offer little comfort to the media in the ordinary course.

In New South Wales, Tasmania and the Australian Capital Territory it is an offence to be in possession of a record of a private conversation knowing that it has been obtained, directly or indirectly by the unlawful use of a listening device unless, among other things, all principal parties to the conversation consent. The Western Australian and Victorian legislation contain a provision compelling destruction of illegal recordings and prescribing penalties when this is not done promptly.

Who is responsible?

Any of the parties connected with, or responsible for the obtaining of the recording or listening to the conversation could potentially be committing an offence. This could include the journalist or person who uses the device, the program producer, production company, presenter and broadcaster. Additionally, their legal advisers could be liable for the offence of possession of an illegal recording.

For example, in *Miller*, it was submitted to the court that the television station, not the production company which sold the program containing the secret recording to the television station, was the party responsible for transmitting the program to the public. The court rejected this and found that the production company "took an active part in transmitting that program to the public". This was sufficient to make out the offence. In such a situation, more than one party could be found to bear the responsibility for committing an offence (although in this case, charges against the licensee were dismissed on other grounds).

The NSW legislation also deems each director of a corporation responsible for a corporation's conduct in committing an offence unless they fall within certain specified exceptions, including lack of knowledge of the contravention, inability to influence the conduct of the corporation or using all due diligence to prevent contravention.

Continued page 14

World Review

A survey of some recent international developments

British Telecom and MCI Communications have announced that they have formed an alliance to provide worldwide value added telecommunications services.

• In order to stimulate the development of Russia's domestic telecommunications infrastructure, the Russian Ministry of Communications has announced that it is postponing the issue of licences to develop international communications systems.

• Nine Asian carriers have signed a Memorandum of Understanding to build the Asia Pacific Cable Network – cable which will link Singapore with 8 other Asian nations. It is envisaged that the fibre link will be over ten thousand kilometres.

• Telstra's hopes of operating a second general carrier licence in Malaysia have been thwarted by the Malaysian Government's decision ruling out full deregulation of their telecommunications industry.

• The German Government has revealed plans to privatise Deutsche Bundepost Telekom and its related postal companies, whilst the French Government has also announced that France Telecom will be privatised and the country's telecommunications sector will undergo a major overhaul.

World Review was prepared by John Mackay of Blake Dawson Waldron.

Continued from page 8.

is not quite that simple. I believe that while these countries feel their way towards a free society, we need to take this concept of balance into account. Sometimes broadcasters will make exactly the same choice they would have made in Australia, Britain or the USA. But every now and then they may feel that reality is literally millions of people working desperately hard to pull themselves up by their own bootstraps and hesitate to set fire to their world.

Indonesia has surprised me by its sheer diversity. Secessionism is not abnormal – it is endemic. And I sometimes wonder how anyone can run the place at all. Another surprise has been how fiercely proud ordinary Indonesians are of their nation. We won our independence too easily to care so deeply.

Conclusion

As a codicil to all this, let me anticipate some reactions and say that I am not suggesting that existing regimes should be sacrosanct. Nor am I saying that governments should be encouraged to tell broadcasters what to say and how to say it. This is not a disguised plea for censorship. But I do feel that the more we understand our neighbours, the less comfortable we will be with "publish and be damned". That might just turn out to be prophetic.

Peter Westerway is a former Chairman of the Australian Broadcasting Tribunal and Managing Director of a Jakarta-based media company, Pt Gentamas Pro Team. This is an edited version of a paper delivered on 26 August 1993 to the International Institute of Communications in Sydney.

Continued from page 11.

information is true. The Government agreed for the above reasons and this became the test in the Act.

The second point is a little more subtle. The Commissioner for Equal Opportunity commented that the requirement that the person genuinely believe that the information is true created an unfair distinction. The distinction is best put as follows:

> *"As a matter of fairness it would seem to me that the Act ought to protect the fair-minded and objective person, who is unable to make up his or her own mind about the truth of the allegations, to the same extent as it protects the person who rashly accepts and believes everything he or she hears."*

This point was accepted. Accordingly, the test of belief on reasonable grounds is supplemented by an alternative as follows:

> *"... is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated."*

It will, of course, be necessary for a public awareness campaign to educate the public about the legislation. I look forward to co-operating with all concerned parties in that process.

Matthew Goode is a Senior Legal Officer in the South Australian Attorney-General's Department.

Continued from page 13

Prosecutions

The New South Wales legislation provides for a two year limitation period in which proceedings are to be commenced. The written consent of the Attorney General is required before proceedings can be instituted.

Most of the State Acts provide for fines or imprisonment or both as penalty for breach of the provisions discussed above. In New South Wales, the maximum fines range between $4,000 and $10,000 for individuals, depending on whether the conviction is summary or on indictment and $50,000 for corporations. The maximum sentences range from 2 to 5 years.

In *Miller's* case, which was decided in 1988 under the New South Wales legislation, the journalist was fined $500 after the court took into account her character, her belief (based on legal advice given to her employer) that she was not breaking the law and the fact that the legislation was relatively new. This penalty was upheld on appeal in *Donaldson v TCN Channel Nine* in 1989. The production company was fined a total of $25,000 for the offences of causing the use of a listening device, possessing the tape recording of the conversation and communicating it to viewers.

Julie Eisenberg is a solicitor in the Sydney office of Freehill Hollingdale and Page.

The Collection of Copyright Royalties

Charles Alexander and Murray Deakin report on the most recent round in the battle over journalists' copyright

The ability of Copyright Agency Limited ("CAL") to license use of news material, its collection and distribution procedures and its market representations are to be examined in proceedings in the Federal Court. Recently, a number of major newspapers and magazine publishers including News Limited, John Fairfax, David Syme & Co. and ACP commenced proceedings against CAL in an action which raises serious issues about CAL in its role as a copyright collection agency.

Administration of licensing scheme

The *Copyright Act* ("the Act") includes provisions under which educational institutions are permitted to copy printed materials provided it is within the guidelines set out in that Act. For a considerable period CAL has been offering licences to educational institutions which in some respects vary from the statutory licence contained in the Act. While this course is adopted for other reasons, CAL says it also permits it to avoid the stringent requirements in the Act relating to the applications of funds. CAL is also now promoting its services to other users including press clipping agencies, Commonwealth government departments and business users.

In undertaking this exercise CAL relies on its claim to represent a great number of print copyright owners in Australia and particularly the Media Entertainment and Arts Alliance, the trade union to which many Australian journalists belong. The heart of the current litigation lies in CAL's administration of its licensing schemes.

Newspapers and magazine publishers in Australia at present have declined to join CAL and have put CAL on notice that it has no rights to license any copyright which belongs to the publishers. Australian Associated Press ("AAP"), a wire service, has taken a similar position. The publishers claim that they have copyright both in the published edition of newspaper and magazine articles and in the compilation of those articles.

Rival contentions

While CAL does not have all the rights to license print copyright materials, the publishers allege that CAL appears to warrant that it does and is prepared to indemnify licence holders against claims for copyright infringement that might arise by reason of their copying pursuant to a voluntary licence. The publishers contend that CAL is authorising and encouraging a breach of copyright. CAL denies that the publishers have any rights which need to be licensed and also denies that AAP (which is not a newspaper publisher) owns the copyright in works prepared by its employees.

One of the interesting issues which will be determined in the Federal Court proceedings is the duties and responsibilities of CAL in relation to its granting of licences, the basis on which it holds money and any restrictions it should observe in making distributions of money collected. The publishers claim that where CAL is entitled to collect money it is bound by both the Act and its own Articles of Association to pay into a trust account and retain in that trust account:

(a) money received from educational institutions;

(b) money, the entitlement to which is disputed; and

(c) money where the information available to CAL is insufficient or not sufficiently accurate to enable an equitable and accurate allocation to be made.

Trustee obligations

The publishers and AAP claim that CAL has breached its duties as a trustee and its own Articles of Association by:

(a) failing to recognise the publishers' copyright;

(b) failing to recognise AAP's copyright;

(c) failing to pay the royalties that CAL has collected into a trust account and failing to retain those amounts in that trust account until the matter of entitlement to the royalties is solved.

Submissions made to the recent Copyright Law Review Committee indicated that CAL may have insufficient information to enable it to identify the authors of many articles. Modern newspaper and magazine publishing practices are such that a great number of articles are worked on by a number of different journalists, sub-editors and editors and the final article that is published in a newspaper or magazine is the product of multiple contributions. CAL seems to be of the opinion that the by-line on an article is sufficient evidence of authorship.

The hearing of the publishers' case will traverse a wide area and hopefully answer many questions relating to print copying and the role of collecting societies.

Charles Alexander and Murray Deakin are solicitors with Minter Ellison Morris Fletcher and act for a number of newspaper publishers.

AGM and Cocktail Party.
Please note that there will be an Annual General Meeting of CAMLA on Thursday 25 November 1993, followed by Christmas Cocktails.
The time and venue will be announced.
Please mark your diaries.

Associate Editors

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

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

Contributions & Comments

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

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

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

Communications and Media Law Association

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

Issues of interest to CAMLA members include:

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

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

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

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

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

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

Name:.....

Address:.....

Telephone:.....Fax:.....DX:.....

Principal areas of interest:.....

.....

I hereby apply for the category of membership ticked below, which includes a Communications Law Bulletin subscription, and enclose a cheque in favour of CAMLA for the annual fee indicated:

- Ordinary membership $85.00
- Corporate membership $350.00 (List names of individuals maximum of 5).
- Student membership $25.00
- Subscription without membership $85.00 (Library subscribers may obtian extra copies for $10.00 each).

Signature.....

Printed in Australia by Pirie Printers Pty Limited (06) 280 5410