

## Fund raising for films - does "Lightning Jack" represent a one off or a way forward into the future?

David Williams discusses an innovative form of funding for films

In the middle of 1993 the public was offered the opportunity to invest in the big budget film "Lightning Jack", to star Paul Hogan. The offer was made via a registered prospectus and related to units in a unit trust, which units would be listed on the ASX. The offer was partially underwritten and was successful. The film is now in the stage of completion with release scheduled for March 1994.

Finding investment funds to produce films is a continuing problem for all but a few film producers. The *Lightning Jack* approach, which combined elements which had not previously appeared together, is one which has now succeeded and broken new ground. The real issue is whether others can follow in the footsteps.

### Critical features of the float

The critical features of the *Lightning Jack* float (not in any order of priority) seem to have been:

- total risk attaching to the investment (i.e: no guaranteed returns);
- Marquee Name attached;
- marketable security rather than a permanent economically non-transferable investment;
- unit trust structure;
- ATO Tax Ruling;
- large amount being raised;
- underwritten offer;
- Village Roadshow involvement;
- an interesting and easy to read prospectus; and
- an ADR program.

Other people may focus on other aspects and judge them to be critical factors. The following comments on the critical features may be of interest.

### Total Risk

Unlike most other film-based projects offered to the public, *Lightning Jack* was a "total risk" or "entrepreneurial investment" rather than a "financial investment" (which would normally have a guaranteed level of return to ensure at least no capital loss occurred).

Investors were asked to take a risk that could involve them losing the whole of their investment (excluding any tax benefits under Division 10B of the *Tax Act*). This, of necessity, involved investors making a commercial judgement on the likelihood of the Project recovering its cost and making a profit.

There is a significant difference between this situation and the type of film investment marketed in Australia over the past 10 years on a "no risk, guaranteed return" basis.

The investments competing with *Lightning Jack* for investors funds were the Woolworths float and the Channel 7 float and not tax shelter products such as normal Division 10BA film investments and agricultural shelters. What it demonstrated

was the existence of such a market, provided that the right elements are present.

### The profile of investors

On speaking to a number of these investors, it became clear that they were treating the whole of their investment as money that could be lost. Approximately two-thirds of investors invested only \$2,000, ie: the minimum amount of investment.

In other words, it was not an investment where the investor "needed" to recover the principal and minimum return or otherwise they would suffer a severe financial disadvantage. It is not clear what would have been the level of investment on response to the offer if there had been a minimum investment limit fixed at say \$20,000.

### The marquee element

The presence of a marquee element(s) is critical to the success or otherwise of such an offer to investors. However, this is a very subjective matter involving investor perception.

At the time of the float Paul Hogan was well-known both in Australia and overseas. He has a good track record in an industry historically littered with failures. The success of the *Crocodile Dundee* films is legendary. The market knew this.

In my view, there would be few other marquee elements (including good track record) that could achieve a successful *Lightning Jack* style float. However, this is a very subjective issue.



## Stock exchange listing

**O**n a "going forward" basis, the ability to quit an investment in reaction to changing circumstances seems to be a critical aspect of any investment portfolio and the ability to offer a "liquid" investment increased the attractiveness of *Lightning Jack* units as an investment.

The trading in *Lightning Jack* units has been more consistent with investors wanting to hold a piece of the action and see where it takes them. I suspect most investors are treating the investment as a pure risk investment and, unless faced with immediate financial difficulties, are unlikely to quit the investment before the release of the film and an indication of its likely commercial success. At that time there is likely to be a significant increase in trading in the stock.

## The ADR Program

**T**his simply enhances the investment, in that there is potentially an increased market of purchasers should the investor wish to sell. This is the result of being able to trade the units over the counter in certain US banks without the normal SEC requirements for a public issue of securities.

Unless there is a significant US exposure, as is the case with *Lightning Jack*, this may be a neutral factor.

## Distribution, Tax & Underwriting

**T**he fact that a major Australian distributor, Village Roadshow, was closely involved in the production of the project may have influenced investors to invest. It is not clear how much this acted as a confirmation to potential investors that the project was worth investing in as a risk investment or indeed on what basis it would be interpreted by potential investors.

Increasingly, there is a need to obtain certainty of tax treatment up front. The project was submitted to the ATO and extensively reviewed.

A binding private ruling was issued to the trustee and to one prospective investor and this was disclosed in the prospectus. This minimised the element of uncertainty associated with the taxation treatment of an investment (particularly where the investment involved innovative aspects).

Again, underwriting sends a message to potential investors of an underwriter being confident that it will be a fully subscribed issue.

Underwriting also gives comfort that an investment will be a real investment

and not returned because minimum subscription for the issue is not reached.

## A way forward - into the future?

**I**s it practical for other film promoters to adopt a similar approach? Only time will provide the answer to this question.

Hopefully for the Australian film industry the answer is yes.

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# New Zealand Judge finds news monitoring business to be "parasitic"

Paul Sumpter reports on a recent decision involving TVNZ and

## Newsmonitor Services Limited

One of the classic conundrums of intellectual property law is the demarcation between the monopoly rights given to creators and the right of the general public to benefit from the fruits of their labour. In some quarters the recent New Zealand case between *Television New Zealand -v- Newsmonitor Services Limited* ("Newsmonitor") is being heralded as a victory for the creators (in this case TVNZ). Certainly, the case represents to the television industry what *De Garis -v- Neville Jeffress Pidler* meant to the newspaper industry.

But in many respects the *Newsmonitor* findings were predictable and the decision perhaps more accurately illustrates the extent to which copyright law can be misunderstood and/or ignored (and the dangers of doing so). However the case may indirectly give much needed impetus to the long-heralded reform of the *New Zealand Copyright Act 1962*, a piece of legislation having very important ramifications for those in the media and communications industry.

### The action

Newsmonitor's business consisted of taping broadcasts of television and radio news and current affairs programs and providing transcripts of program portions specified by fee paying clients. TVNZ was seeking a permanent injunction and damages for alleged copyright infringement, although the case proceeded on the question of liability only and the argument was confined to the scripts of sixteen specimen programs for which TVNZ sought a declaration that Newsmonitor had infringed copyright.

TVNZ claimed it possessed copyright in its scripts ("literary works"), programs ("dramatic works"), video tapes ("cinematographic films") and the actual broadcasts.

### The decision

The television company scored four out of five, failing only to convince the Judge that the news and current affairs program scripts qualified as unpublished, original "dramatic works".

This was because the Judge - citing the leading Australian academic Dr Sam Ricketson - held that the scripts were not essentially intended to be performed or represented but rather simply read or narrated. (It is faintly ironical that TVNZ had itself some years back successfully, and unsurprisingly, defended itself against a claim by the English talent quest presenter, Hughie Green, who tried to claim that his unscripted ideas for his show "*Opportunity Knocks*" comprised a "dramatic work".)

Whilst TVNZ's interesting argument on dramatic works lost out, Justice Blanchard had little difficulty in concluding that the reporters' field scripts and final scripts used in the presentation of the news programmes were "literary works". This was despite the fact that substantial portions of a typical news broadcast consisted of video tapes of someone speaking either to a reporter or addressing one or more third parties such as an audience.

But a long line of copyright cases have emphasised that there is a very low threshold for an item to qualify as original and therefore enjoy the fruits of copyright protection. One well known case from the turn of the century was specifically referred to, *Walter -v- Lane*, when the English House of Lords effectively decided that the mere reporting of words of another gives rise to a reporters' copyright so long as there is a modicum of skill and judgement used in composing the reports.

The Judge also found that TVNZ possessed copyright in the video tapes of the scripts (which qualified as cinematograph films) and in the broadcasts as such. He went on to decide that Newsmonitor had infringed the copyrights, though not before discussing and dismissing a number of interesting defences.

### Public Interest

Newsmonitors' initial counter attack was based on public interest. Its lawyers argued that TVNZ's claim was contrary to provisions in the *New Zealand Bill of Rights Act* to do with freedom of expression. Indeed this line has been echoed subsequent to the release of the decision by one New Zealand Member

of Parliament who, in a press release, has trumpeted that the case represents "an ominous development, and one at which Parliament should have a close look at an early opportunity. If public broadcasters start claiming they own those rights [free speech], and control who can disseminate news once it has been publicly broadcast, then will every person's rights be at risk?"

Blanchard J, pointed out that there was no "statutory monopoly" in the information broadcast by TVNZ and that anyone was free to summarise the contents of programmes and to disseminate these summaries to customers. Newsmonitor's rejoinder to this no doubt would be that the essence of its business is in obtaining the news verbatim. However the judgment was clear and conformed to a familiar pattern - news gathering services cannot be allowed to reap where they have not sown, at least not without paying a fee.

An interesting side note to this part of the argument is the issue of government censorship by means of the *Copyright Act*. Not so long ago in New Zealand there was a considerable hoo-ha that the Crown's copyright legislation, parliamentary material and judgments, provided the opportunity for the deliberate suppression of publication of the law for political ends or at least enabled strict control for revenue based objectives. Indeed a then MP, Mr Doug Graham, put forward a private members bill to rectify the perceived problems. The bill had as its basic principle the unrestricted right of access for all of the laws in New Zealand. The bill did not proceed. Graham is the present New Zealand Minister of Justice.

### Fair Dealing

In its defence to the claim for copyright in the broadcasts Newsmonitor relied upon the "fair dealing" provisions which are common to most copyright laws throughout the western world. They have all been difficult to interpret. As in the Australian *De Garis* case the defence advanced the argument that Newsmonitor's service was fair use of material for "research or private study". But the New Zealand judge decided that Newsmonitor itself was doing no research or study but appropriating the

material for commercial profit (though Newsmonitor's customers were acquiring the transcripts for the purposes for research or private study).

Interestingly, the Judge also decided however that Newsmonitor's habit of taping all programmes in their entirety from which they selected transcripts on order for clients was a "fair dealing" because the tapes were not used for any other purpose and were then destroyed once the extracts had been made.

Although Blanchard J did not therefore need to deal with the question of what is "fair" in terms of a fair dealing defence, he did review the 16 individual extracts in this light. The defendant here put forward again a vigorous "public policy" submission that "fair dealing" should be interpreted rather liberally because the copyright material pertained to news and current affairs and there was a public interest in the dissemination of this material (which Newsmonitor but not TVNZ was willing to make available). Justice Blanchard however remarked:

*"A news monitoring business is parasitic. Why should it have a free ride on a broadcaster which has put considerable amounts of time and money into producing the news and current affairs programmes which are the source for the transcripts".*

#### Other issues

**T**here was also the question of what constituted a "work" - the whole programme or each news item or segment? On this important though academic question, in choosing the complete programme the Judge was able to find that ten of the sixteen items were "fair dealings" for the purpose of research or private study.

A defence which was successful in relation to one item, concerned the exception in the *New Zealand Copyright Act* where something is copied for the "purposes of a judicial proceeding". The Judge gave a fairly generous interpretation to this provision to permit material to be copied for the purpose of legal advice. This exception may not however be as broad as it seems.

One final point worthy of mention is the claim made by TVNZ that a "private purposes" exemption in relation to broadcasts in the *New Zealand Act* did not apply to the other types of copyright so that a broadcaster such as TVNZ who also happened to own the copyright in literary, dramatic or cinematographic works contained in the broadcast was able to claim infringement even in relation to private taping. The "absurd" result, as the Judge put it, would have meant that New Zealanders could not lawfully make a tape of a rugby test match by time recording it for

private viewing. Clearly this would be beyond the pale and the Judge interpreted the *Copyright Act* provisions accordingly. But the question may not be closed.

#### Comment

**T**he case has therefore clarified some matters of copyright for the media industry and will no doubt be welcomed on both sides of the Tasman by broadcasters who have had difficulties with monitoring organisations.

On the other hand, if those whose feathers have now been ruffled choose to raise the cry of reform (as a New Zealand MP has already done) this may be a very beneficial spin-off. Despite periodic lobbying and reports issued by the New

Zealand Justice Department in 1985 and 1989 nothing has yet emerged in the shape of concrete proposals. Australians have at least embarked upon piecemeal reform. The technological changes that have occurred since the 1960's have exposed considerable chasms in copyright law. There are many examples some of which should be of far greater concern to TVNZ than news scripts - such as the question of cable TV and satellite broadcasts. Indeed, if I were a TVNZ executive I would be lobbying the New Zealand Government fast right now. But that is another story...

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## Indigenous media is a priority, and not just a luxury

**In this, the second of a two part article based on her 1993 Boyer Lecture, Dot West outlines the mechanisms for establishing a national Indigenous Media service**

#### Out of the Silent Land

**I**n early 1984 the Federal Government formed a special task force to advise on Aboriginal broadcasting and telecommunications policies. The Task Force report, *"Out of the Silent Land"*, was released later that year and in 1985 the government endorsed over fifty of its recommendations. *"Out of the Silent Land"* addressed the lack of telecommunications and electronic media available to Aboriginal people living in remote Australia and at the same time stated that city based broadcasting was being catered for through the Public broadcasting sector. Sadly this report did not go far enough to cater to the growing needs of Indigenous Media and the eight years since the report was written were stifling for many groups.

The report also highlighted the need to offset the impact of western television and radio in remote communities, which was brought about by the launch of AUSSAT's first generation of satellites. In the year of the bicentennial some 85 remote Aboriginal and Torres Strait Islander communities were given, through the Department for Aboriginal Affairs, a facility called BRACS, Broadcasting for Remote Aboriginal Communities Scheme. The package included a satellite dish and

decoder along with some basic equipment which allowed the community to interrupt the radio or television signal and broadcast their own programs within a 5km radius.

Brilliant idea, fantastic plan, but what was forgotten were three very important factors for the system's success: consultation, training and on-going funding. In many of the 85 communities who received BRACS, there was no consultation by the Department of Aboriginal Affairs about whether they wanted the equipment or not. It was just delivered and installed. Many of these communities say that they were given only a half hour course in how to operate the equipment. About a year later the bureaucrats got it together enough to realise training programs were necessary to teach the community members how to interrupt the incoming signal and to make and present their own community based programs. But in most cases it wasn't until two years after the installation of BRACS that people received this training.

In the meantime the communities had become accustomed to the daily soaps and the general infiltration of western culture. As an Aboriginal person you start to wonder about the motivation behind BRACS and the governments' failure to meet the challenge it supposedly set itself: to allow remote

Aboriginal and Islander communities to interrupt the broadcasting of western civilisation to their communities. Was the delay in providing training and infrastructure a sub-conscious infiltration of white society into Australia's indigenous communities? It certainly appeared that way.

## ATSIC

**N**ow that we have the Aboriginal and Torres Strait Islander Commission (ATSIC), things are looking up for the remote communities. Just this year (1993) the Commissioners realised the worth of Indigenous media and the importance of BRACS. In their new policy paper they have said they will develop a detailed strategy for the "revitalisation", over the next three years, of BRACS. In the first year they plan to pump \$1 M into the revitalisation and another quarter of a million into training.

Even though BRACS has been installed in communities for a number of years without clear government policy or assistance, in many parts of Australia BRACS' local programming is a vibrant part of many community's daily life. It has

been used to bail up government officials and visitors to communities which then allows community members who don't attend the council meetings an insight as to who's visiting, and why. It is also used extensively to inform the community of the daily business of council and its workers, and community schools can access the service and broadcast their own programs and learn about electronic media.

Setting up our media groups around Australia has been hard work, especially in the absence of progressive government policy for Indigenous media. The Department for Aboriginal and Islander Affairs began a policy development process back in 1987. Indigenous Media workers, along with their communities, became extremely frustrated when reports were not produced even though the consultation process, in an ad hoc fashion, had been conducted. We've been waiting for the promised new policy for over five years now. It has been extremely hard for the broadcasting sector within the Department of Aboriginal and Torres Strait Islander Affairs to attract extra money without a clear policy. There was only a small number of Aboriginal and Torres Strait Islander media groups who were

fortunate enough to get on the funding list of the then Department for Aboriginal Affairs. The rest were left to fend for themselves or try for the small amount of funding available for Aboriginal broadcasting in the Public broadcast sector.

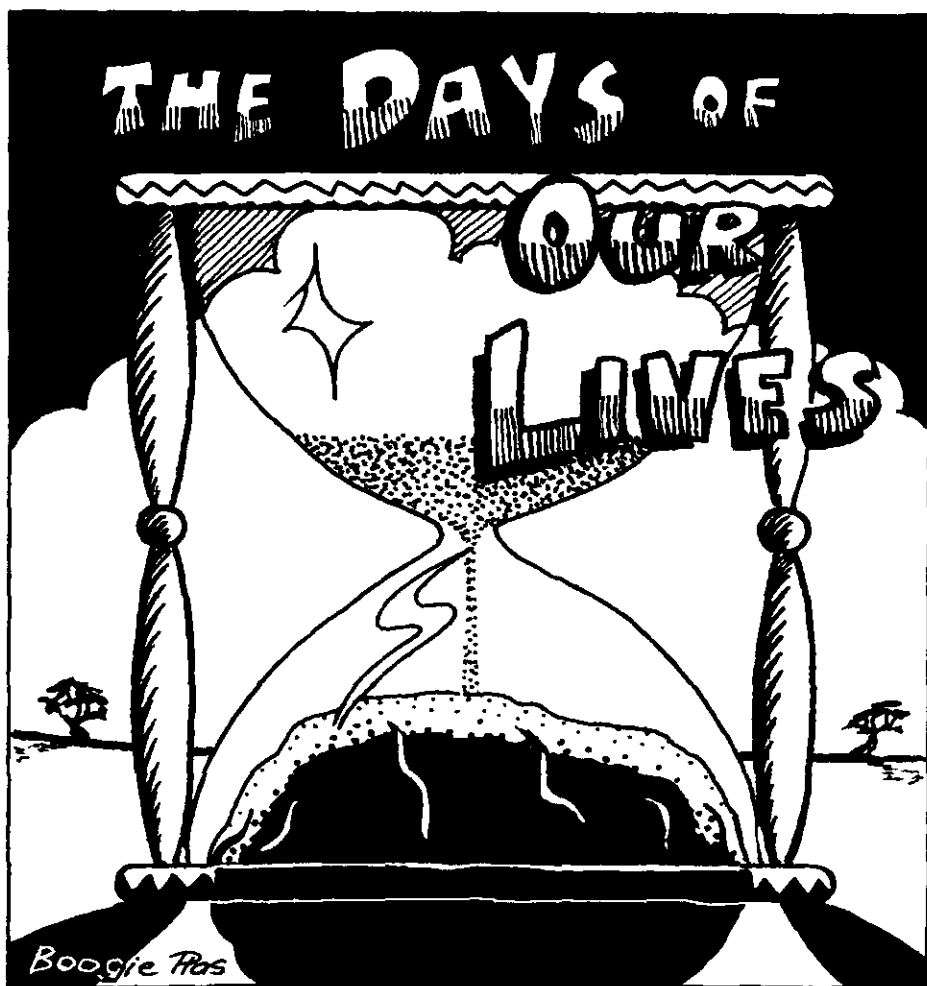
## New Approach

**I**t was not until October 1991, nearly 70 years after the birth of Australian radio, that ATSIC, along with the Department of Transport and Communication, wrote a discussion paper about Aboriginal and Torres Strait Islander broadcasting policy. In April 1993, after much consultation, the Commissioners of ATSIC endorsed a new policy paper for Indigenous Media in Australia.

To a certain extent the new policy paper is reflective of what is happening within Aboriginal and Torres Strait Islander Broadcasting and what will be developed in the future. However, there are still some areas of concern. The major one is the use of the word broadcasting when in actual fact we in the industry also include our newspaper outlets, but the policy paper doesn't recognise this form of media. There are other areas of concern but it is apparent that ATSIC plans to use the newly formed National Indigenous Media Association as a body to consult with and receive advice from. We as the Indigenous Media industry now have a forum for negotiations.

There is one other important aspect of this new paper; a long term goal. In association with Aboriginal and Torres Strait Islander Broadcasters, ATSIC will seek recognition and appropriate funding of the indigenous broadcasting sector in its own right within the framework of the government's mainstream broadcasting structure. If this goal is implemented it will mean that we will be competing for funds with the rest of the broadcasting sector of Australia such as the ABC and SBS and it will also allow our Industry to have the same recognition and importance as our National broadcasters.

At the moment media organisations who receive ATSIC grants are required to go to their ATSIC regional councils for funding. This raises a conflict of interest and is a major reason why the funding of Indigenous media needs to be separated from ATSIC. Our communities expect Indigenous media to report truthfully and fairly on all stories we broadcast. But in some instances it becomes extremely



difficult for this to happen in relation to ATSIIC, our funding body. If there is an adverse story about a regional council or councillor it becomes very difficult when these same people decide on your organisation's funding.

### **National Indigenous Media Association**

**A**s Indigenous media groups we have operated for many years in separate arenas. There were the groups who received DAA/ATSIIC funding, and the groups who broadcast on Public radio; others who broadcast on the ABC; the print media; the television and video production groups and not forgetting our individual Indigenous media worker's in the ABC and the SBS.

In May of 1992 a meeting was held in Canberra which formed the National body on an interim basis and in May 1993 the National Indigenous Media Association of Australia held its inaugural Annual General Meeting. The association's major objective is to represent Indigenous media groups individually and collectively on a local, state, national and international basis while maintaining and respecting the uniqueness and authority of every group. As a collective of all indigenous media in Australia we want to enhance and further develop the industry nationally and assist communities in the establishment, operating and development of their own media.

### **Future Vision**

**I**would like Australia to recognise there is an Indigenous media sector which does exist and has existed and developed for many years. We currently have the ABC and SBS fully funded and resourced by the Federal government as national media services. Why then not a national Indigenous media service? Why not a national Indigenous television station which can be accessed from anywhere in Australia.

The service should have the capacity to not only be televised from a capital city, but also to broadcast nationally from a region such as the Kimberley. Also, Indigenous media should have the capabilities of BRACS, and be able to intercept the national broadcast and televise our own local programs. This would need to be an important aspect of the service in recognition of our cultural diversity and the language differences within Australia's indigenous nation. The same approach could also apply to radio on a national scale.

An organisation such as the National Indigenous Media Association could provide support and resources to its member associations by way of providing a national news service, music library, research assistance, technical advice and even administer the funding to its member groups.

Non-Indigenous Australians could benefit enormously from a strong Indigenous media service. You would not

only get a better informed view about our culture but also you'd be able to see pictures of yourselves from another point of view. What about Aboriginal people making a series of documentaries about white suburbia? What about Aboriginal comedy and soapies? I'm sure you as White Australians are sick of seeing and hearing all the political and contentious issues surrounding us, but there's a lot more to life and we can share this with you.

Everyone in Australia could benefit from such a media service which would give a more truthful and positive view about ourselves as Indigenous Australians. The possibilities for our future development are endless but we can't do it without community and government support. After all we are an essential service and we see ourselves as providers of a service for all Australians. A service that reflects the cultural diversity of this country. With this, a greater understanding and awareness will evolve and a healthier Australia will emerge.

I will end with these words from a poem of Jack Davis'.

*Let these two worlds combine,  
Yours and mine.  
The door between us is not locked,  
Just ajar.*

*Dot West is Chairperson of NIMAA, Training and Broadcasting Co-ordinator for the Broome Aboriginal Media Association, and presents a weekly program on Radio Goolarri in Broome.*

## **The innocent dissemination defence in defamation**

**Paul Svilans reviews a recent decision on the defence of innocent dissemination in defamation proceedings and its implications for broadcasters**

**I**n a recent decision by Gallop J in the ACT Supreme Court, *Thompson -v- Australian Capital Television and Ors*, the availability of the defence of innocent dissemination in defamation proceedings has been extended to include broadcasters taking material by relay.

### **The Proceedings**

**T**he proceedings arose out of the broadcast of "The Today Show" in February 1994 in the Australian Capital Territory by Australian

Capital Television ("Capital TV"). The programme contained a segment in which a woman made allegations that her father (being the Plaintiff) had an incestuous relationship with her while she was a child. Those allegations were false.

The Plaintiff first instituted defamation proceedings against Channel Nine, Sydney in the Supreme Court of NSW. Channel Nine was responsible for broadcasting the matter in Sydney, which was taken on relay by Capital TV. The proceedings against Channel Nine were subsequently

settled by Deed of Release in which Channel Nine agreed to pay the Plaintiff the sum of \$50,000 damages.

The Plaintiff thereafter instituted additional defamation proceedings, this time against Capital TV over the publication of the same broadcast in the Australian Capital Territory. The imputations relied upon by the Plaintiff were that the Plaintiff was guilty of incest with his daughter of seven years of age and thereafter, and that the Plaintiff had

fathered a child with his daughter when she was only fourteen years of age.

Save for an argument on the imputations pleaded, Capital TV pleaded the defence of innocent dissemination and defences arising out of the release given by the Plaintiff to Channel Nine.

### Innocent Dissemination

**G**allop J held that it was settled law that a person who was not the author, printer of the "first or main publisher of a work which contains a libel", but has only taken "a subordinate part in disseminating it" will not be liable if he succeeds in showing:

- (a) that he did not know that the book or paper contained the libel complained of;
- (b) that he did not know that the book or paper was of a character liable to contain a libel; and
- (c) that such want of knowledge was not due to any negligence on his part.

These principles are an application of those stated in the decision in *Emmens v Pottle And Ors*.

In the circumstances of the subject proceedings, Gallop J found that:

- (a) Capital TV had received no forewarning from Channel Nine or otherwise of the content of the programme containing the matter complained of;
- (b) Capital TV played no part in editing any of the material which went to air, nor did it have any means in place or other arrangement with Channel Nine by which the material to go to air could be previewed;
- (c) there was no indication to Capital TV prior to the programme being transmitted that the programme was likely to contain defamatory matter and Capital TV did not have any reason to suspect that it might;
- (d) there was nothing in the licence agreement between Channel Nine and Capital TV which gave Capital TV as licensee the right to vary or interfere with the content of the broadcast, except to insert local advertising materials;
- (e) the first Capital TV knew of any complaint concerning the content of

the broadcast was when a letter of demand was subsequently received from the Plaintiff's solicitors.

The court concluded that Channel Nine was in complete control of the conduct of the broadcast and it was intended and expected by Channel Nine that the matter would be published without alteration. In short, it was found that the role of Capital TV was that of a conduit. Consequently, Gallop J determined that Capital TV was in the circumstances entitled to succeed upon the defence of innocent disseminator.

### Release from Channel Nine

**C**apital TV also argued that it was entitled to rely upon the Deed of Release given by the Plaintiff to Channel Nine in its defence because Capital TV and Channel Nine were joint tortfeasors and the release by the Plaintiff of Channel Nine operated as a release in favour of Capital TV. Further, it was argued, inter alia, that the terms of the Deed of Release also covered Capital TV, and therefore Capital TV was also released from the Plaintiff's cause of action.

Despite holding that Channel Nine and Capital TV were both joint tortfeasors, Gallop J determined that the effect of section 11 of the *Law Reform (Miscellaneous Provisions) Act, 1955 (ACT)* precluded him from finding that the release of Channel Nine also operated so as to release Capital TV. His Honour followed the reasoning of Beazley J in *New South Wales v- McCloy Hutcherson* (1993) where it was held that the rule that the release of one joint tortfeasor operates in favour of all joint tortfeasors did not survive the enactment of section 5(1) of the *Law Reform (Miscellaneous Provisions) Act (NSW)*.

However, Gallop J found that the Plaintiff did intend, in the Deed of Release between the Plaintiff and Channel Nine, to embrace any publication for which Channel Nine was responsible, wherever it took place, including publication by Capital TV in the ACT, and Capital TV was therefore also entitled to succeed on this ground.

His Honour consequently ordered judgment in favour of Capital TV.

The Plaintiff has appealed to the Full

Bench of the Federal Court (*Ed - refer "Recent ACT defamation cases" this issue*).

### Implications

**S**ubject to the judgment withstanding the appeal, the judgment will provide welcome relief to the many broadcasters who take programmes on relay. Such broadcasters often find themselves sued for defamatory material contained in broadcasts taken on relay, despite the broadcaster having no other involvement whatsoever in the material sued upon. The decision would appear to recognise that a Plaintiff will not suffer any prejudice by having to sue the original broadcaster, who will in the usual course be liable for the republication of the matter subsequently rebroadcast.

However, a Plaintiff may suffer prejudice where the original publisher is not solvent or where the prospective Plaintiff incurs some disadvantage if the proceedings cannot be heard in his/her own choice of forum. It is submitted that such prejudice would be minimal and the circumstances are no different to the traditional circumstances where a distributor of, say, imported magazines may have the defence available irrespective of the solvency of the overseas publisher.

The decision may also give some impetus to the finding of a similar defence for printers. There are numerous defamation proceedings on foot in a number of jurisdictions against printers of allegedly defamatory material. While historically one could understand why a printer could be held to have taken a relatively substantial part in the publication of material held to be defamatory, printers under modern technological conditions no longer have such an input, arguably entitling them also to take advantage of the innocent disseminator's defence.

As far as the joint tortfeasor rule is concerned, there would be few who would be unhappy with the burying of the rule. The rule has been a notorious "trap for young players" and its demise may avoid the necessity for utilising cumbersome covenants not to sue when settling with one joint tortfeasor but not the other.

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# Telecom's trial of Calling Line Identification services

John Mackay reports on the introduction of calling number display and other telecommunications services

**T**elecom has announced that it will trial calling line identification ("CLI") services in the Northern New South Wales town of Wauchope for three months from March of this year. More than 400 households and businesses in Wauchope will be supplied with devices to take part in the experiment which will be designed to assess the social and privacy implications of CLI services before their introduction. Wauchope has been selected by Telecom as the area in which to conduct a trial because of the high percentage of local calls which are made by residents - 60% of total calls are between local residents.

## Functions

**C**LI is data that is generated at the time a call is established and includes the called party's phone number, the calling party's phone number, the time of day, the duration of the call and the routing of the call. One CLI service (known as calling number display ("CND")) enables the calling party's number to be displayed on a miniature screen attached to the called party's phone. CND will allow people to screen incoming calls and to make a choice whether or not to answer them (provided that the calling party has not blocked the transmission of its CND).

Another CLI service is call return, which allows a customer to instruct the network to dial the number of the last person who called that customer. Selective call diversion services will allow calls from numbers chosen by the subscriber to the service to be diverted to another number specified by the subscriber. CLI can also operate as a de facto answering service because the device affixed to the receiver can store the last 20 telephone numbers which have called. If the experiment is successful, Telecom anticipates that it could begin offering CLI services on a commercial basis later this year.

CLI services not only offer customers new applications, CLI services are claimed to facilitate efficient management of traffic on the telecommunications network, efficient route selection and billing

procedures and enables more effective information management systems to be established.

## Privacy

**T**here are, however, serious concerns that the privacy of users will not be adequately protected. In response to the concerns regarding privacy Telecom has set up a local group to monitor the progress of the experiment and has also established a privacy committee to advise it during the trial.

In short, the most important issue is whether users will understand that information about their telephone number will be transmitted to the party they are calling. There is the risk that there will be inadvertent transmission of a customer's number to the called party. For example, in a domestic violence situation where a couple has separated, the calling party may not wish the called party to know the telephone number that the party is calling from.

Another major privacy issue involves business use of CLI. There is concern that businesses will use CLI to identify people making anonymous enquires and pursue them with unwanted follow-up material. As part of its experiment in Wauchope, it is proposed that Telecom will provide laptop computers to ten businesses which will allow them to identify the caller immediately from their number using reverse phone book software.

Some of the privacy concerns associated with CLI services may be reduced by making available to customers a "blocking" facility. "Blocking" refers to the ability of the maker of the phone call to decide whether or not to send their number identification on any particular occasion. There are two ways in which blocking might occur:

1. Choosing not to send number identification for a particular phone call. The calling party would activate that choice by dialling a particular code for each phone call made.
2. Choosing not to send number identification from a particular phone line.

Blocking number identification prevents

the number appearing on the phone of the called party, but does not prevent the information being collected and stored in the network. Tracing threatening, obscene or malicious calls will be possible even if the caller has blocked their number identification. Information will also be available to the emergency services about the origin of the call, even when the caller has blocked their number identification.

## Recommendations

**T**he trial of CLI services was recommended by Austel in its report on Telecommunications Privacy in December 1992. Austel recommended that telecommunications operators should adopt a cautious approach to the introduction of CLI services with weight being given to consumer-based privacy concerns. The principle of informed choice was emphasised by Austel under which consumers should be given an adequate opportunity to understand how the service is going to work, and how it will affect them given their particular circumstances.

As part of this principle of informed choice, Austel recommended that the Telecommunications Privacy Committee supervise the development by the carriers and other interested parties of a code of conduct that should ensure that customers have the opportunity to make an informed choice. The code would make provision for a public awareness program to inform the community about the implications of both sending and receiving CND and the "default option" where a customer does not make a choice.

## Telecommunications Act

**I**n relation to service providers, Austel recommended that the *Telecommunications Act* be amended to remove any doubt whether Austel may vary its service providers class licence to require a service provider receiving CLI to develop for approval by the proposed Telecommunications Privacy Committee a code of conduct for dealing with such information.

Austel recommended that the code be subject to the jurisdiction of the Telecommunications Industry Ombudsman so that the Ombudsman can receive and resolve complaints alleging breaches of the code

and, where applicable, recommend to Austel whether it should take action under the service provider's class licence for a breach of the service provider's obligation to observe the code.

We await with interest the results of Telecom's experiment in Wauchope.

*John Mackay is a solicitor at Blake Dawson Waldron*

# Copyright Convergence Group

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## Bridget Godwin describes the Group's functions and Terms of Reference

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**A** government initiative to establish the Copyright Convergence Group (the CCG) was announced by the Minister for Justice, Duncan Kerr, in October 1993. The Group was formed in January 1994. The Chair of CCG is Victoria Rubensohn, a communications consultant. The other members of the Group are Professor Mark Armstrong, chair of the ABC and director of the Centre for Media and Telecommunications Law and Policy, Peter Banki, Chairman of the Copyright Council of Australia and a partner at Phillips Fox, and Malcolm Colless, the General Manager for Corporate Development and a director of News Limited.

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### Terms of Reference

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**T**he CCG recently advertised for comments and contributions from members of the public and interested parties. The Terms of Reference for the Group were released by the Minister on 16 March 1994 and read as follows:

The Copyright Convergence Group is asked to consider, having regard to the fundamental changes which are occurring in the manner in which copyright materials are being used and the need to facilitate such uses while providing appropriate protection for copyright owners and creating a positive environment for the development of industry, and having regard to Australia's current international obligations and ongoing consideration in relevant international fora, the adequacy and appropriateness of protection under the *Copyright Act 1968* (the *Act*) for broadcasts and other electronic transmissions and the underlying copyright materials used in those transmissions, in particular:

- (i) the scope of the diffusion right granted to authors of original works (s.31), the makers of cinematograph films (s.86) and the operation of s.26 of the *Act* (references to subscribers to a diffusion service) and to what extent (if any) the rights of authors and makers of cinematograph films to control the electronic transmission of their works should be varied or extended;
- (ii) whether the owners of copyright in sound recordings, and television and sound broadcasts should have the same exclusive rights with respect to cable and other electronic transmissions as are currently afforded to authors of works and makers of cinematograph films and to what extent (if any) the rights of the owners of copyright in sound recordings and television and sound broadcasts to control the electronic transmission of those recordings and broadcasts should be varied or extended;
- (iii) whether copyright should subsist in electronic transmissions which are currently not the subject of protection under the *Act* and if so, the nature of any such copyright;
- (iv) the operation of s.199 of the *Act* (reception of broadcasts);
- (v) the need for regulation of the unauthorised use of secured or encoded transmissions;
- (vi) amendments which may be consequential on any of the above.

The Copyright Convergence Group intends to consult widely with a broad range of parties to assist them in developing their views. Part of this process is the opportunity to present written comments to the CCG. Contributions should be received by the Group by 22 April 1994. As is evident from the Terms of Reference the CCG is not undertaking a

complete review of all copyright principles. The CCG has been established to produce a concise list of specific proposals for legislative change which can be considered by the government for early implementation, and which are intended to address some of the more immediate problems arising in the *Copyright Act* as a result of technological convergence.

In addition to the process of written consultation, the CCG will be holding a seminar in early to mid June, which is intended to be a further opportunity for interested parties to comment on the work of the Group. The Group will be distributing an issues paper with some preliminary views on necessary amendments prior to the seminar, which will be held in Sydney.

The Copyright Convergence Group may be contacted by telephone on (02) 581 7417 or by facsimile on (02) 581 7778.

*Bridget Godwin, Co-ordinator, Copyright Convergence Group*

# Asia Pacific Satellite Fallout

Liz Fell reports

**T**he burgeoning number of regional satellites and TV networks beaming across national boundaries is straining regulatory frameworks at both the national and international levels.

Governments in virtually every Asian country are grappling with the fallout in three separate areas: broadcasting, telecommunications and radio communications.

Positioned at the southern edge of the region, Australia has been relatively sheltered from the plethora of new satellite-delivered TV networks, though domestic TV signals have been dropped on our neighbours via Aussat (now Optus).

The new *Broadcasting Services Act* will be tested next year when Apstar-2 and AsiaSat-2 begin beaming satellite TV to some 53 countries, including Australia.

Alongside the ABC's Australia TV (complete with ads), China's Apstar-2 will carry the Galaxy group of programmers which includes CNN, Home Box Office, ESPN and others. News Corp's Star TV, based in Hong Kong, will use AsiaSat-2 to deliver another menu of channels.

## Redistribution

**B**oth Star and Galaxy are competing for redistribution agreements with what will be initially a limited number of licensed TV operators in each country they are targeting.

After entering the region with free advertising channels, Star is now planning to secure additional revenue from subscribers. Through "entitlements marketing", for instance, it will package encrypted channels into tiers, themes and pay-per-view options for national redistributors in different countries/regions.

Without national redistribution agreements, Star and Galaxy must try to reach subscribers or viewers directly. This direct-to-home delivery, which is banned in some countries is expected to become more expensive when our programmers migrate to digital compression technology, especially if they opt for proprietary encryption/security systems.

Whether Australia becomes a large dish farm with satellite TV antenna perched on suburban or rural rooftops, will depend in part on these redistribution agreements and the speed with which licensed operators,

and Telecom, implement terrestrial infrastructure to homes.

## Privatisation

**A**pstar and AsiaSat are only two of the private satellites planning to beam into Australia within the next 18 months. Private operators from Indonesia, Japan, Russia and the US are also planning to launch powerful new regional satellites with footprints that can cover all or part of the continent.

The move towards private satellites competing at a regional or global level with the Intelsat consortium was unleashed in the early 1980's by Regan's "open skies" policy in the US and by the new Luxemburg-based Astra satellite in Europe.

With the widespread adoption of privatisation and private competition in the communications sector, Asian governments have been quick to follow by licensing their own satellite operators. This has allowed some powerful conglomerates to enter the telecoms carrier/TV sectors: Bimantara from Indonesia, Shinawatra from Thailand, Usaha Tegas and TRI in Malaysia and several Japanese *soga sosha* such as Mitsubishi.

US-based PanAmSat has become the first private operator to challenge Australia's regulatory arrangements under the *Telecommunications Act* which are designed to ensure the two general carriers are the primary suppliers of satellite capacity within Australia. For services beyond Australia, customers can secure capacity directly from non-carrier satellite operators.

PanAmSat last September asked the then Communications Minister for a limited exemption to distribute domestic TV and radio services and to supply private domestic telecoms networks through the PAS-2 Pacific satellite. It is not challenging the Optus monopoly on subscription TV broadcasters under the *Broadcasting Services Act*, though narrowcasters would appear to fall within its ambit.

## Regulatory issues

**O**ther governments in the region face similar regulatory minefields as they begin to grapple with problems such as national bypass and whether to allow landing rights for non-

carrier satellite operators and their TV customers.

Subject to the *Telecommunications and Broadcasting Services Acts*, Australian programmers can uplink and downlink to non-carrier satellites, provided they have a licence to operate a prescribed earth station under the *Radiocommunications Act*.

In the international arena, privatisation of international satellite supply has been accompanied by a shift towards viewing the geostationary orbit (GEO) and radiofrequency spectrum as an economic good rather than as a public resource.

This market-based shift is challenging the spirit of intergovernmental co-operation underlying the ITU, the specialist UN agency responsible for, inter alia, regulating access to and use of orbit/spectrum. Based on the non-appropriation principles governing the use of outer space resources, the ITU radio regulations supplement the ITU Constitution/Convention and have the force of an international treaty for members.

Fierce competition to occupy the GEO arc that "sees" the high growth Asian nations has led to operators trading in orbit/spectrum, staking out multiple "speculative" claims and parking "end-of-life" satellites in slots claimed by others.

Current ITU listing suggests that there is not enough orbit/spectrum in the unplanned fixed satellite service (FSS) bands for all the proposed satellite networks to operate without interference. Even tiny Singapore has filed for six slots.

This situation, which some have characterised as "anarchic" has triggered calls for changes to the unwieldy ITU radio regulations. Others argue that many new filings are "speculative" and will not reach the financing, manufacture or launch stage. This appears to be the position of the US government which is planning to allow PanAmSat to launch its PAS-2 satellite close to an unused slot registered to PNG.

With Australia and several other regional nations applying to the ITU for spectrum to launch Direct Audio Broadcast (DAB) satellites, new technical co-ordination and regulatory hurdles may also be on the horizon.

*Liz Fell lectures in International Communications and is a specialist freelance journalist*

## Feature

# Australian and American libel law reform

Professor David Flint, Chairman, Australian Press Council

**T**hose Australians, who see our defamation law as a significant barrier to the free flow of information, quite often refer with approval to the American model.

For example, Robert Pullan, that energetic champion of free speech, says in *"Guilty Secrets"*, that the "... American system works on the assumption that free speech is the road towards truth and that, where speech is legally inhibited, gagged by cultural institutions or self censored, the lives of the people are not their own. The *First Amendment* to the American Constitution is itself a product of the period when Americans embraced free speech and the free press as a means of asserting the rights of the people against the authority of King George III".

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press ..."

Until the decision in *New York Times v- Sullivan* in 1964, Australian and US laws of libel were similar. The Supreme Court there ruled that public officials (later public figures) have to show that an allegedly defamatory statement was published with knowledge of its falsity. Alternatively, the plaintiff must show the defendant published the material with a reckless disregard for the truth. A central question in US cases is whether the newspaper or station entertained serious doubts about the truth of the publication. Later the Supreme Court required private plaintiffs (as distinct from public figures) to show the media acted at least negligently when publishing false statements (*Gertz v- Robert Welch Inc*). As a result, the media lose few defamation cases in the US. When they do, damages are often reduced on appeal.

### Recent Australian cases

**I**n two recent Australian High Court cases (*Stephen & Ors v- West Australian Newspaper Ltd* and *Theophanous v- The Herald & Weekly Times Ltd. & Ruxton*), similar but narrower arguments based on the implied freedom of political communication the Court has identified in our Constitution were put by West Australian Newspapers and the Herald and Weekly Times. In both cases the plaintiffs are politicians.

One case is described in detail in Pullan's book. The West Australian had described a trip by six members of a Legislative Council Committee to inquire into the cost and accountability of government agencies as "a junket of mammoth proportions". According to Pullan, the West's youthful, energetic editor Paul Murray thought of the *Political Advertising* case (*Australian Capital Television Pty Ltd v- The Commonwealth (No 2)*) as "the High Court doing what generations of politicians have failed to do" for free speech. He believed the West, "this little newspaper selling on the wrong side of Australia", was trying to do something for the liberty of the national press.

In the *Political Advertising* case, the High Court found in the *penumbrae* of the Constitution an implied freedom of political communication. The Court, almost twenty years later than the Supreme Court of the United States, but without the advantage of an express guarantee, significantly moved the balance between freedom of and restrictions on speech. In breathing new life into the Constitution, a particularly strong High Court may now be about to do something which legislatures have been unable to do - effect some reform of defamation law.

### Problems with convergence

**T**his potential convergence between our two jurisdictions, that the judiciary not the legislature is the only likely source of defamation law reform, points to a fundamental problem. It is not in the interest of many legislators to reform defamation law while it provides an opportunity to stop unfavourable discussion and indeed offer the possibility of substantial damages.

Resort to defamation law may, at the same time, chill legitimate investigative reporting of matters of public interest. Pullan reminds us, for example, that when the Melbourne Herald reported in 1975 that Minerals and Energy Minister R F Connor had continued to negotiate loans with Tirath Khemlani after Connor's authority had been revoked, the Minister issued a writ for libel. Shortly after, he departed from the Ministry

for that very fault. Pullan also reminds us of Jana Wendt's interview with Alan Bond where the explanation of a settlement to a defamation action brought by Sir Joh Bjelke-Peterson was: "We would have been liable in any event. ... [T]he Premier made it [clear] that if we were going to continue to do business successfully in Queensland, then he expected that matter to be resolved".

### Relevant factors in the US

**T**he present advantage for the media in American substantive and constitutional law, which seems to weigh defamation law against the public figure plaintiff, is, however, balanced by certain ethical and procedural factors which work against the media defendant. These are not restricted to libel law; they apply to all civil litigation in the US.

Walter K Olson argues that the extraordinary level of litigation in the US is the result of certain ethical and procedural changes adopted over the years. The first factor is that in the US costs do not follow the cause. The winner cannot expect to recover costs from the loser.

The second is the triumph of the contingency fee. In almost every other country it is considered unethical (as it is with doctors) for lawyers to be paid more for success in litigation. The system seems to have developed, says Olson, from the first factor - that costs do not follow the cause. Impecunious or unwilling clients have had to have another way of recompensing their lawyers.

While University of Iowa research shows that many libel plaintiffs, at least initially, would have been satisfied with a correction or retraction, the contingency fee system means a legal action is no longer owned only by the plaintiff. He or she takes on his or her lawyer as a partner "maybe a senior partner, to whom words of forgiveness butter no parsnips and gestures of mercy pay for no beachfront condos". Hiring a lawyer by the hour is similar to the control one has over a taxi fare. The contingency fee takes the client along for someone else's ride, aboard a high powered machine typically geared to breaking

altitude records. These two factors - contingency fees and the fact that costs do not follow the cause - mean in effect there is no disincentive to litigation. The way is open for the irresponsible plaintiff.

The third factor which facilitates litigation are the rules of civil procedure which from 1938 simplified pleading to such an extent that from *Dioguardi v. Durning* plaintiffs were no longer required to allege facts sufficient to constitute a cause of action. After that it was very hard to get pleadings thrown out on technicalities. And they can be varied without great difficulty. The previous prescription, the need to set out a plausible case against a defendant when beginning litigation, is no longer necessary.

In addition, with the adoption of generous rules allowing discovery and the taking of oral depositions, which are not restricted against "fishing expeditions", American litigation now has a "sue first and verify later spirit".

Discovery is now not even limited to each side taking turns - the process can be a free for all with simultaneous motions and notices. Inevitably, says Olson, pretrial litigation has become a much bigger source of legal business than trials themselves!

It is understandable, given the nature of the *Sullivan* test which puts in issue the mind of the journalist, there is a need for reasonably generous discovery rules. But it seems that in the US discovery is used more to intimidate, to harass and to burden the opposition with enormous legal costs. The procedures can be protracted, and often attract media attention. Nor is the trial made cheaper, a result one would at least have expected from these changes. Since marginal issues and evidence are admitted, the trial in fact usually takes longer than before.

Thus while American substantive law seems to favour the media, American trial procedures, long, complicated and extremely expensive, ensure that litigation costs are often prohibitive. In one notorious case, discovery, and discovery related litigation, continued for thirteen years! The deposition of a TV producer filled twenty-six volumes, totalling 3,000 pages and 240 exhibits - all about the state of mind of the editor and journalists on whether they seriously doubted the truth of the publication.

The effectiveness of their defamation law therefore concerns American as the Australian law concerns our reformers, but for different reasons. Randall P Bezanson, Dean of the Washington and Lee University Law School, says American defamation law is fundamentally "broken and dysfunctional". Complexities and costs are such that only those desperately interested in protecting their reputations or positions sue. With noted US defamation law reformer,

Professor John Soloski, he has made a major study on defamation law reform. They found that plaintiffs often have motivations other than damages in suing for libel.

### **The 1991 US draft model: Uniform Defamation Act**

It is the fear of the cost of a libel suit itself which discourages US media publishing or pursuing controversial stories of public importance. To overcome this, US law reformers produced draft legislation in 1991, the model *Uniform Defamation Act*. (The Press Council has proposed adoption of similar procedures in Australia). The key to the model was to be a new "vindication action". Plaintiffs could sue for a court declaration establishing the truth or falsity of a story. Defendants would thus lose their constitutional defences because the reason for them - the chilling effect on newspapers of the prospect of heavy damages - would disappear. The action was to be simple, and was not to be clogged by procedural issues. Plaintiffs would be attracted by its speed and the lower costs involved.

The model Act provided that if at any time before 90 days after service of process the defendant agreed to publish a sufficient retraction, the court was to dismiss the action. Defendants would not have been obliged to concede falsity, something defendants are rarely willing to do. They would have been required to stipulate that they do not assert the truth of the publication or do not intend asserting its truth.

If the plaintiff were successful, the defendant would have been ordered to publish the written findings of fact which would be required to be included in the judgment. Alternatively, at the option of the defendant, he or she would have been ordered to pay to the plaintiff the cost of publishing those written findings of fact. In certain cases costs could have been awarded. Damages would only have been awarded where the *New York Times v. Sullivan* rule was satisfied.

There was, however, little support for the 1991 model Act from any sector and, indeed, rigorous opposition from media groups. The Act was doomed. With little hope of being adopted, it was eventually withdrawn.

### **The 1993 US draft model: Uniform Correction or Clarification of Defamation Act - Central features**

The largely unnoticed retraction provisions were, however, revived in another draft model, the *Uniform Correction or Clarification of*

*Defamation Act (1993)*. This model has attracted wide support and was approved by the uniform state law commissioners this year.

Central to the 1993 model Act is section 5 which provides:

*"If a timely and sufficient correction or clarification is made, a person may recover only provable economic loss, as mitigated by the correction or clarification."*

According to the framers, the section is designed to encourage a publisher to grant a request for correction or clarification by providing that a requesting party may seek only damages for provable economic loss in the event of the timely publication of a sufficient correction or clarification. To be "timely" and "sufficient", the correction or clarification must meet the requirements of section 6 (*Ed - see boxed section*).

In limiting recovery of damages to provable economic loss as mitigated by the correction or clarification, the Act anticipates that any loss caused by the publication can be significantly reduced by publication of the correction or clarification.

Under section 6 and subject to possible extension under section 4(c), a "timely" correction or clarification must be published before or within 45 days of a request for correction or clarification.

In the accompanying commentary, the authors of the draft explain that the characteristics of a "sufficient" correction or clarification will vary depending upon the frequency and nature of the original publication and upon the timing and nature of the correcting or clarifying publication. The general focus of "sufficiency" under s.6 is to seek to assure that the correcting or clarifying publication is "reasonably likely to reach substantially the same audience" as the challenged publication. The Act thus uses a functional standard aimed at effective vindication of reputation rather than one focussing mechanistically on particular location, identity of medium, specific size of audience, or the like. In attempting to effectuate the goal of reaching substantially the same audience as the challenged publication, the 1993 model Act requires that the correction or clarification also be judged in terms of its prominence and the manner and medium of its publication. These criteria require that a judgment be made in each particular case with respect to the sufficiency of the particular publication.

The authors point out that newspapers and other frequent publications have been the principal subjects of correction or clarification statutes in the United States. At times the corrections or clarifications have been required to be placed in similar if not identical locations to those in which the original story occurred, although even this

**Section 6 provides:**

- (a) A correction or clarification is timely if it is published before, or within 45 days after, receipt of a request for correction or clarification, unless the period is extended under Section 4(c).
- (b) A correction or clarification is sufficient if it:
  - (1) is published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of;
  - (2) refers to the statement being corrected or clarified and:
    - (i) corrects the statement;
    - (ii) in the case of defamatory meaning arising from other than the express language of the publication, disclaims an intent to communicate that meaning or to assert its truth; or
    - (iii) in the case of a statement attributed to another person, identifies the person and disclaims an intent to assert the truth of the statement; and
  - (3) is communicated to the person who has made a request for correction or clarification.
- (c) A correction or clarification is published in a medium reasonably likely to reach substantially the same audience as the publication complained of if it is published in a later issue, edition, or broadcast of the original publication.
- (d) If a later issue, edition, or broadcast of the original publication will not be published within the time limits established for a timely correction or clarification, a correction or clarification is published in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of if:
  - (1) it is timely published in a reasonably prominent manner:
    - (i) in another medium likely to reach an audience reasonably equivalent to the original publication; or
    - (ii) if the parties cannot agree on another medium, in the newspaper with the largest general circulation in the region in which the original publication was distributed;
  - (2) reasonable steps are taken to correct undistributed copies of the original publication, if any; and
  - (3) it is published in the next practicable issue, edition, or broadcast, if any, of the original publication.
- (e) A correction or clarification is timely and sufficient if the parties agree in writing that it is timely and sufficient.

rule has been dependent upon a number of factors, including the nature and scope of the original story as well as the newspaper's practices concerning reserved space for corrections.

"Under the Act such alternatives, as well as others presented in different types of media must be judged in each case in terms of the requirement that the correction or clarification, in its location and prominence, should be reasonably calculated to reach substantially the same audience as the original publication. Thus, in the case of an alleged newspaper defamation occurring in a smaller story appearing on an inside page, use of a regularly published corrections column at a fixed location, e.g. at the front or back of a news section or opposite an editorial page, may often suffice. Use of such a regularly placed column may or may not suffice for a publication appearing on the front page or in a specialised section of the paper."

**- Other aspects of the 1993 model Act**

**T**he 1993 model Act is published with a detailed commentary, and the following paragraphs are based on that.

The authors explain that in the case of an alleged **radio or television broadcast or cablecast defamation**, publication of a correction or clarification in a subsequent broadcast or cablecast of the same program (e.g. during a succeeding daily news program, or weekly newsmagazine program, in the same time period) would ordinarily suffice. Where the original broadcast or cablecast had been on a non-recurring program, however, publication of the correction or clarification on the same station or network or cable system during the same time of day would likely constitute a reasonable alternative in most instances.

There are other contexts. The authors say, for example, that correction or clarification of a **defamatory employee reference or evaluation** may require no more than contacting those persons or firms to whom the defamatory statement was communicated. If the statement had made its way into permanent files or had reached

broader audiences, however, reasonable efforts to have the material removed from such files or to communicate the correction or clarification to identifiable members of the broader audience might be required. In the case of an oral defamation to friends or colleagues, a letter to those persons correcting or clarifying the defamation might suffice, on the assumption that word of the correction or clarification would spread as rapidly in the channels of gossip as did the original defamation.

*For a book currently being sold*, where a subsequent printing or edition will not be timely published, reasonable efforts to correct or clarify are set out in subsection (d) and involve the following measures: timely publication in an alternative medium; appropriate corrections in any future editions; and reasonable steps to correct undistributed copies (by "undistributed" is meant books not yet shipped by the publisher to its customers). Suitable alternative media and reasonable steps to correct undistributed copies should be left, in the first instance, to the parties, and, if necessary, to the courts to evolve over time. Where the parties cannot agree on an alternative medium and the original distribution was national in scope, use of a publication likely to reach a substantially equivalent audience should ordinarily suffice.

Finally, the requirement of making **reasonable efforts to reach substantially the same audience** should be equitably construed, the authors say, so as to achieve the over-riding purpose of the Act to give incentives for the publication of reasonably effective corrections or clarifications. To this end, the section is not intended to guarantee that in all cases a correction or clarification will reach the very same audience, nor does it require that a publisher achieve the impossible in attempting to reach a substantially equivalent audience.

Subsection (b) (2) states the general rule that a "**sufficient**" correction or clarification must correct the original communication. An equivocal correction or clarification will not satisfy this requirement.

An interesting provision is that used when an **innuendo** is published. Where the alleged defamation was the result of a meaning arising from other than the express language of the publication or a statement attributed in the publication to another person, a sufficient correction or clarification need only contain a statement that the party making the communication did not intend the non-expressed meaning and disclaims it, or that in publishing the attributed statement of another person the publisher disclaims any intent to attest to the truth of the facts contained therein. This will allow the publisher to disavow the alleged meaning and yet stand behind the

"facts" of the story.

Subsection (b) (2) (iii) provides a mechanism for a defendant who *repeats a defamation from another source* to "correct" or "clarify" by indicating that the defendant did not intend to assert the truth of the statement but merely reported what another had said. This form of "correction" does not, however, vindicate the plaintiff's reputation because it does not necessarily indicate that the statement is false, only that the particular defendant does not assert that it is true. A defendant relieved of liability for all but provable economic loss by such a correction should be required to identify the person asserting the truth of the statement even if the original publication did not do so. This provides the plaintiff the opportunity to seek vindication from the source.

Nothing in this section, however, requires the news media or others to disclose *the identity of confidential sources*. Thus, if there is a confidential source, the media defendant would have three alternative courses of action: (1) limit liability by issuing a correction under this section and identifying its source; (2) issue a correction under subsection (b) (2) (i) or (ii) without identifying the source but fully vindicating the plaintiff's reputation; or (3) defend the defamation action.

The 1993 model Act would apply to all claims for damages arising out of harm to personal reputation caused by the publication of falsehoods. Thus, certain *actions for emotional stress and breach of privacy* could be covered, although not defamation as such.

#### **- Responses**

**T**his model Act has attracted significant media support. It does not seek, of course, to cure the inadequacies of US litigation at large - that would mean taking on too many vested interests.

However, Henry Kaufman, general counsel of the New York based Libel Defence Resource Center, which represents media defendants, is cautious about the 1993 model Act. He says:

"It is possible to envision that more potential claims will be resolved without litigation and that what litigation does go forward - despite publication of a correction or clarification - will be less costly and less extended. It is even possible ultimately to envision that, with the fear of costly and extended litigation lessened, both the accuracy of journalism and the protection of reputation will be enhanced."

The unacceptability to the media of the earlier proposal for a "vindication action" and the lack of support from other quarters for the *Uniform Defamation Act* demonstrate

the difficulties for defamation law reform whether here or in the US. The latest American proposal does seem to have the advantage of stressing the vindication of reputation as the primary justification for defamation law - a point made by the NSW Law Reform Commission.

The *quid pro quo* in the correction procedure of limiting damages to economic loss would, if approved here, have a bigger impact because plaintiffs have a more successful record. If this is to be coupled with a change in the substantive law making it more difficult for public figures to sue, it would be more attractive to plaintiffs.

The great advantage of such a change in the defamation law would be the pursuit, and the early publication by the media, of matters of public interest. If, for example, the Australian public had earlier notice of some of the major financial debacles of the 1980s, it is possible that the losses could have been lower. The beauty of the current US proposal is not that the media's power would be unlimited - it would still be liable for losses - but that plaintiffs would have to prove loss. This is food for thought for reformers here.

#### **Development**

**T**here is potential for some convergence between the US and Australian substantive libel law being modified by constitutional considerations. The present High Court has already demonstrated a remarkable ability to lead the development of the law in a number of

significant areas. The context of litigation in the US has opened up libel law to the impecunious and even unwilling libel plaintiff which because of the procedural complexities impose considerable unrecoverable costs which only the richest media organisation can contemplate. In Australia, only the rich and powerful normally have access to the courts for defamation. However, Australians do have access to an established system of alternate dispute resolution through the Press Council. While the way American litigation is conducted calls out for reform, the suggested solution, for practical purposes, seeks to side-step and cut short those complexities.

Its success depends on the proposition, supported by research, that many if not most American litigants, at least initially, are more interested in vindication than damages. But how does one persuade the plaintiff's lawyers to follow this course?

An alternative to this approach might be for the American media to endorse the concept of media accountability through press or news councils. Professor Louise W Hermanson's work in this area, including her major survey of news council complaints, suggests that alternative dispute resolution through such bodies, supported by the media, may well provide the remedy which the principled libel plaintiff cannot easily achieve in the litigation forest. This process should not inhibit the application of the proposals for legislative reform; experience demonstrates that successful news councils can exist alongside legislation.

## **Cast And Crew contracts - ASC provides prospectus relief**

**Katherine Sainty outlines a Class Order issued by the  
Australian Securities Commission**

**P**roducers who offer points to cast and crew as part of their package have been exempted from the prospectus provisions of the Corporations Law. Under a new Class Order effective from 6 October 1993, the ASC has exempted service contracts that offer points or an entitlement to revenue or copyright in a film.

The exemption is extensive and also applies to contracts offering a share in the final work or revenue to any person in the film, writing and entertainment industries who provides personal or professional services, or a script.

The exemption does not apply to private investors - a producer will still have to provide a prospectus for their contributions.

The Class Order effectively ends debate on the way in which contracts for cast and crew should be drafted to avoid the risk of contravention of the Corporations Law, by recognising and reinstating an industry practice. The exemption has a wider reach than the film and television industries and encompasses arrangements reached with recording artists and live performers in stage productions.

Practically, where a producer proposes a contract for a cast or crew member for a film

where they are given a share of the net profits of the film, the Class Order requires that the contract include the following elements:

1. Personal or professional services are to be provided;
2. No money is to be paid to the producer by the cast or crew member for the profit share;
3. The right of the cast or crew member under its contract to terminate the contract or take action for default is independent of other crew members' contracts;
4. No other participation interest is given and the profit share does not relate to any other securities;
5. The contract is made before 31 December 1995.

If a contract is one with a script writer for the acquisition of the rights in a script, it will also be exempt from the prospectus provisions of the Corporations Law under this Class Order if the script has been written by the person receiving the profit share or an employee or officer of the company receiving the profit share. In other words, if a producer has commissioned a script from a script writer who is not an employee or officer of that producer's company and the producer wishes to assign

the rights in the script to a second producer, the producer is not entitled to any profit share as part of the consideration for that assignment.

This is consistent with the rationale which prompted the ASC to grant the ruling. The ASC views cast and crew contracts and others as service contracts rather than investment contracts with the entitlement to the participation interest or profit share being an incidence of payment for those services.

However, where a participation interest is granted as part of the sale of an asset, to a party who is unrelated to the provision of services, no relief is available.

The Class Order has a sunset provision, 31 December 1995. The Order and related issues will be reviewed prior to that date.

Philip French of the ASC has acknowledged the valuable contribution of a number of industry bodies in formulating the Class Order.

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and music and acts as a collecting agency for the payment of royalties to the relevant songwriters and publishers. APRA contended that Telstra Corporation Limited (trading as "Telecom"), which provided a music on hold service known as CustomNet, was:

- by transmitting music on hold played by third parties, or by playing its own music on hold - performing the music (that is, the "work") in public and causing the work to be transmitted to subscribers to a diffusion service in breach of the Act; and
- by transmitting music on hold to mobile telephones - broadcasting the work in breach of the Act.

APRA based its case on sections 31(1)(a)(iii)-(v) of the Act which provide that copyright, in relation to a literary or musical work, includes, respectively, the exclusive right to perform the work in public, to broadcast the work and to cause the work to be transmitted to subscribers to a diffusion service.

### The Decision

The Court held as follows:

#### **Performance of a work in public (s31(1)(a)(iii))**

A public performance resulting from the emission of sounds from an apparatus which receives electromagnetic signals is deemed under the Act to be caused by the operation of the receiving apparatus, not the transmitting apparatus (refer s27(3) of the Act). The Court held that this clearly refers to the person who has control of the receiver (being the earpiece or speaker of a telephone). Accordingly, Telecom could not be said to have caused a public performance by playing music on hold.

#### **Broadcasting a work (s31(1)(a)(iv))**

Playing music on hold to callers who are using a mobile telephone network constitutes a transmission by wireless telegraphy (an element of the definition of "broadcast" in the Act). However, to be a broadcast within the meaning of the Act, the transmission must be "to the public". As a technical matter, each mobile telephone user, according to the Court, is properly to be viewed as receiving a separate transmission. In addition, the mobile telephone network service is essentially a service to facilitate confidential communication between two people.

The Court held that it would be a distortion of the broadcasting provisions of the Act to hold that if, during the course of this private communication, one party was to communicate a work to the other

## "Music on Hold" copyright test case - future challenges

**Anne Peters looks at a recent important test case which considered the copyright implications of playing music to telephone callers placed on hold**

**I**n this report Peters says the case highlights certain difficulties under copyright law, and suggests that the whole question of music on hold might be an appropriate area for consideration by the newly-formed Copyright Convergence Group.

### The case

**I**n *APRA Ltd v Telstra Corporation Ltd*, the Federal Court (Gummow J) decided that playing music to telephone callers placed on hold ("music on hold") does not constitute an infringement of copyright under the *Copyright Act 1968* (the "Act"). The parties to the case sought to test the consequences under the copyright law of a number of agreed factual situations.

The Court held that none of the

exclusive copyright rights referred to below had been breached and that Telecom, and businesses using equipment connected to Telecom's telecommunications network, were therefore entitled to play music on hold without infringing copyright.

At the date of writing, appeal papers were due to go to the Federal Court registrar for settling in mid-February 1994. No date has yet been set for the appeal hearing. Accordingly, the decision should be treated with some caution at this stage.

### Background to the Decision

**T**he Australasian Performing Right Association Limited ("APRA") is the assignee of certain copyright rights in the majority of Australian lyrics

party, this would amount to a broadcast by Telecom "to the public". It would be irrelevant who played the music which was transmitted to the mobile telephones.

(With respect, it is difficult to see how "confidentiality" has any bearing on the public/private distinction drawn in previous cases regarding the meaning of "public" - a communication could be a "public" communication (being between people in their public capacity), but be confidential.)

***Causing a work to be distributed to subscribers to a diffusion service (s31(1)(a)(v))***

A central feature of any "distribution" is a uni-directional flow of something from one to more than one. The service provided in this case had the primary function of facilitating communication between two people and could not be regarded as a service of distributing matter (such as music). Nor was music on hold a service transmitted to the premises of subscribers to the service, because nobody subscribes to receive music on hold.

Even if the provision of music on hold was a service of distributing matter, there was no agreement to provide such service. Therefore, Telecom had not caused music to be transmitted to subscribers to a diffusion service. The Court noted that the above principles applied equally to the transmission of recorded music as to the transmission of music derived from radio.

### **Comment on the Decision**

In view of the increasing incidence of music on hold, the question of copyright infringement in relation to this activity is one of some importance. It is to be welcomed that this test case was instigated, however facts citing broader examples of instances of the provision of music on hold would have assisted in resolving certain issues otherwise highlighted by the case. The increasingly common use of "loudspeaking facilities" on certain telephones affords an example of one such issue.

It would appear to follow from the Court's reasoning, that if a calling party were to receive music on hold whilst waiting for the called party, and was in turn to place that music on hold onto the loudspeaker of their telephone, this might constitute the giving of a public performance by the calling party (as the person causing the operation of the receiving apparatus) under s27(3) of the Act.

One relevant issue would be whether there was a performance of the work in "public". In the context of telephone loudspeaker use, this could depend on a number of variables, for example:

- whether there happened to be other persons who were capable (or might be capable) of hearing that particular music on hold being played; and
- whether, if there were such persons so capable, whether they were hearing the music in their public or private capacity. The case law has consistently drawn the obvious, and rather unhelpful, conclusion that "public" means not "private, domestic or quasi-domestic".

It should be apparent that, as a practical matter, these variables are such as to make it very difficult both for copyright owners (and collecting societies) to monitor when there has been a public performance of a copyright work and for companies to ascertain with any degree of certainty their liability in respect of such "performances".

Furthermore, when one considers, as the Court mentioned, that music on hold comes unbidden to a calling party, it is difficult to characterise our loudspeaker example as a "public performance" (as popularly understood) or to accept that such a result could have been intended by the legislature.

It has been said (by G.Weil) that:

"(i) f the performance occurs as an adjunct to some commercial activity, then almost certainly the performance can be regarded as public ... The critical factor which the court will have regard to is the character of the audience. If it is a domestic or quasi-domestic audience, then it will be treated as a private performance. The question as to what is a domestic audience is not easy to answer. *Factors which will be looked at include the commercial nature of the performance, the effect of the performance on the value of the copyright, and the question as to whether the copyright owner has any legitimate expectation of reaching the audience in issue.*" (emphasis added)

As an example, suppose that a calling party rings a department store from their office about a personal charge account and places music on hold onto a telephone loudspeaker which in turn is heard by fellow employees. On one interpretation of the above passage, the fellow employees are there in their "public" capacity and thus there would be a public performance.

Another interpretation would be that the "performance" was not commercial in nature and had little, if any, effect on the value of the copyright, and therefore was not a public performance under the Act.

### **Future Reforms**

Although, for immediate purposes, it is not necessary to draw any final conclusions, the above example serves to illustrate that existing copyright law is not always readily adaptable to new forms of technology and new uses of copyright works. Any such uncertainty is undesirable and clearly serves only to increase the costs of securing corporate compliance.

We can expect that collecting societies (such as APRA) will continue to take an assertive stance in relation to collecting royalties for use of copyright works (the development of a blanket licence scheme by the Copyright Agency Limited for photocopying by large corporations is one such example). However, it may be more appropriate, no matter the outcome of the appeal in this case, for the newly-created Copyright Convergence Group to place on their agenda, the question of whether or not the balance of public interests is in favour of copyright owners having exclusive rights in relation to music on hold.

### **APRA Corporate Licence Scheme**

In the context of a recent case, APRA agreed to grant to the Commonwealth Bank, a licence to perform in public any musical work in APRA's repertoire for a fee of 50 cents per full-time employee per annum, indexed annually in line with the CPI increase. The same terms are now offered generally by APRA to corporations who use music in the workplace under APRA's Corporate Licence Scheme.

This "blanket" licence eliminates the need to negotiate a performing licence fee on a song-by-song basis and, if applicable, the obligation to maintain accurate records of such public performances. It is still possible, of course, to negotiate a "per usage" licence with APRA. The Corporate Licence Scheme could also cover use of music on hold which might amount to a public performance (as referred to in the examples cited above).

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# Recent ACT defamation cases

Noel Greenslade provides a round-up

In *Packer -v- The Australian Broadcasting Corporation & Ors*, the plaintiff sued in respect of an edition of "Lateline" broadcast on 11 October 1990. The program dealt with corporate collapses in the 1980's, the alleged failure of the Labor Government to prevent these events, and depicted now failed entrepreneurs such as Messrs Bond and Skase as having enjoyed access, through financial patronage to government leaders. The program described practices used by unscrupulous corporation controllers to "rip off" shareholders, such as "skimming", "window dressing", and "insider trading", and the reporter then said:

"It's now clear in the heady boom times of the 1980's, many major corporations used these practices and many more were tempted to use them. But what is not clear is why no one in the Labor Government did anything to seriously investigate them or stop them.

The immediate reason can be found in the events of the time".

At this point in the broadcast, a background shot displaying the plaintiff engaged in conversation with the then Prime Minister, Mr Hawke was broadcast lasting approximately 4 seconds, during which time the reporter said:

"Before the crash, entrepreneurs were national heroes, their deals were barely questioned. They might, if you were lucky, even assist you in your re-election".

Later in the program there was an interview with the Hon. Michael Duffy, Federal Attorney General on the role of the NCSC. The interviewer asked Mr Duffy at the beginning of the interview:

"If Malcolm Fraser and John Howard presided over the era of the tax evader, and the avoider, it would be fair to say, would it not, that your Labor Government has presided in the 80's over the era of the corporate crook?".

and in a later question:

"Talking for obvious reasons in general terms, do you believe that there are business people walking around in Australia now who should be behind bars and, secondly, if so, how confident can you be that that is where they will end up?".

At the end of the interview, as the program closed, the image of the plaintiff and Mr Hawke was broadcast again.

The plaintiff's lawyers wrote to the ABC complaining of defamatory inferences that

they alleged flowed from the program concerning the plaintiff, and demanded an apology. The ABC responded by denying that any of the specific imputations alleged by the plaintiff's lawyers could have arisen from the broadcast and stated that they did not believe an apology was warranted. Nevertheless, on 18 October 1990, the ABC wrote to the plaintiff's solicitors and suggested a statement in the following terms:

"Welcome to the program ... before we start tonight, I'd like to refer back to our program last Thursday.

You may be aware that lawyers acting for Mr Kerry Packer have complained to the ABC about the Lateline program.

It was called "The Horse has Bolted" and examined why the Hawke Government had failed to properly regulate the corporate sector.

The Report included three seconds of well-known file footage of Mr Packer at a dinner with Prime Minister Hawke.

Mr Packer's lawyers have complained that some viewers may have concluded that Mr Packer was in some way involved in corporate fraud.

We didn't intend any such meaning and we don't believe viewers would have drawn this conclusion, but if any viewers did so, we apologise to Mr Packer for that".

The plaintiff was not satisfied with this offer and through his solicitors replied suggesting a different form of words. However, on 18 October 1990, the first defendant's version was broadcast with the exception that the words "four seconds" were substituted for the words "three seconds".

In his reasons for decision of 25 November 1993, Justice Higgins found that whilst the program did impute that the plaintiff had aided politicians being re-elected, such an imputation alone was not defamatory unless it was further imputed that such assistance in gaining re-election was for an illegal or improper purpose, and found that an imputation that the plaintiff had bribed politicians to ensure they did not investigate his criminal activities was not made out. However, the following imputations were found to be made out:

- (a) that the plaintiff was guilty of corporate fraud;
- (b) that the plaintiff had acted deceitfully in manipulating company accounts;

(c) that the plaintiff had acted dishonestly in stripping companies of their assets for his personal benefit; and

(d) that the plaintiff had engaged in disreputable financial dealings in connection with companies controlled by him.

Justice Higgins awarded \$40,000 for damage to the plaintiff's reputation, \$5,000 for aggravated damages, and \$2,750 for interest. Matters aggravating damages were the admitted falsity of the allegations, although His Honour noted that he was not satisfied that the defendants had intended to defame the plaintiff, and the rejection of the plaintiff's request for an appropriate apology and the publication of an inadequate apology which was described as "... appallingly incompetent and arrogant....".

## Defamation of a "class" or "group" - identification of individuals

Richard Farley, Graham Blight, John MacKenzie, William Bodman, Ross MacIver, and Neil Samuels have all brought separate proceedings in the A.C.T. Supreme Court against John Fairfax Group Pty Ltd & Ors in respect of an article published in the "Financial Review" on 22 June 1992 entitled "Meatman sent packing to undertakers". The article criticised activities of unnamed officials, representatives, lawyers and consultants engaged by or acting for the National Farmers Federation and the Victorian Farmers Federation. The Plaintiffs allege that they are, or were at the relevant time, officials of the National Farmers Federation or the Victorian Farmers Federation, and each of them alleges that the matter complained of was defamatory of him.

The defendants (except for William Matthews) brought an application to strike out the statement of claim on the basis that none of the plaintiffs could be identified from the matter complained of. Justice Higgins dismissed the application and in his reasons for decision of 25 November 1993, discussed the factors he considered relevant to whether defamatory statements made about members of a class of persons without expressly identifying individuals within that class, can give rise to cause of action

on behalf of individuals within the class so described. Those factors were:

1. Whether the matter complained of properly interpreted, defames all or some of the class; if the matter complained of conveys a meaning that defames all members of the class, it is more likely that each member of the class will have a cause of action.
2. The size of the class; the smaller the size of the class, the more likely it is that individuals within the class will have a cause of action.
3. The generality of the defamatory allegation; Justice Higgins commented: "The more general the allegation, the less likely it is that the average reasonable reader would interpret the matter complained of as defaming each member of the class or, if appropriate, any of them. On the other hand, the more specific the allegations against a large class, the less likely it is that the average reader could accept that the matter complained of conveys the relevant imputation against each member of the class".
4. The extravagance of the allegation: the more extravagant the allegation, the less likely that the average reasonable reader would accept that imputations were conveyed against any or all members of the class.

His Honour found in this case that because the allegations in the article related to a specific fact situation and were not, per se, extravagant it was not possible for him to conclude that it was impossible for the matter complained of to defame the plaintiffs and accordingly the application was refused. (*Ed - an application by the defendants for leave to appeal has been refused*).

### **Thompson -v- Australian Capital Television Pty Limited - Appeal**

**A** Notice of Appeal against the decision of Justice Gallop of 20 December 1993 was filed in the Federal court on 7 January 1994.

In substance the two grounds of Appeal are:

1. That the defence of innocent dissemination is not open to a television broadcaster who has deliberately re-broadcast a programme containing libel (whether that broadcaster was aware the program contained libel or not); and
2. That the Learned Judge erred in holding that on its terms the Deed of Release

executed on 23 August 1985 released the defendant.

The Court's decision in relation to the first point of Appeal, will obviously be of great importance to television broadcasters, particularly regional stations, that take broadcasts on relay.

### **High Court - Statutory Privilege**

**I**n *Pervan -v- North Queensland Newspaper Company Limited & Anor*, the High Court was required to consider the application of the statutory defence provided by Section 377(8) of the *Criminal Code Act 1899 (QLD)* which provides:

"It is a lawful excuse for the publication of defamatory matter .....

(8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

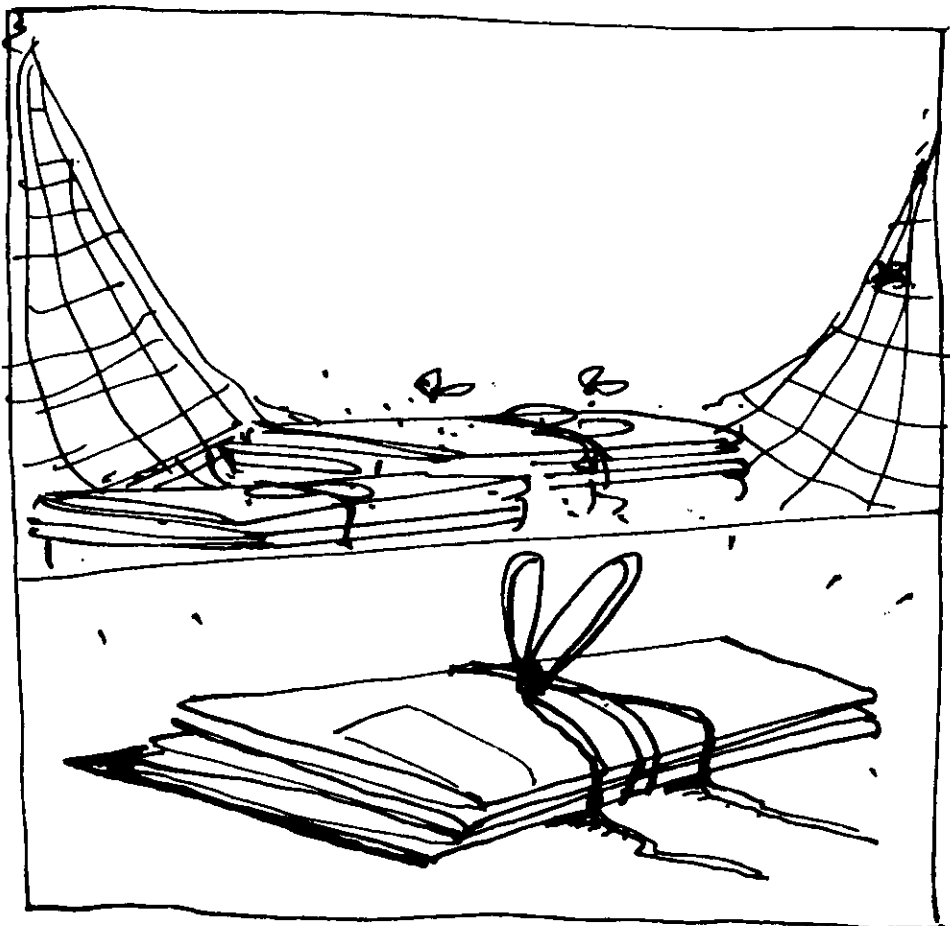
For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse

the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue".

In 1986, a member of the Parliament of Queensland, made allegations in the Parliament that Mr Pervan, a Councillor of the Johnston Shire Council and Chairman of its Works Committee, had misapplied the Council's Cyclone Relief funds, and had been "feathering his own nest". The first respondent, the publisher of the "*Innisfail Advocate*" had twice published a fair report of these allegations. It then published on behalf of the second respondent in its Public Notice section, an advertisement in the following terms:

*"Councillors feathering their own nests? Funds being misappropriated? This is doing irreparable damage to the image of our shire. It is now more important than ever to attend the ratepayers and residents Meeting at the Grand Central Hotel, Tuesday, 12th August at 8pm".*

The plaintiff brought proceedings in the District Court of Queensland. The Trial



Judge excluded the defence under s.377(8) from the jury's consideration, and the plaintiff received \$4,000 damages.

The Full Court of the Supreme Court of Queensland allowed an appeal by the North Queensland Newspaper Company; found that the defence under s.377(8) should have been left to the jury, and that on the evidence, Judgment should have been entered for the first respondent.

The plaintiff appealed against the Full Court finding, and on 17 November 1993, the appeal was dismissed by the majority of Mason C J, Brennan, Deane, Dawson, Toohey and Gaudron J J with McHugh J dissenting.

The majority in their joint judgment considered that s.377(8) gave rise to two principal questions:

- (1) Is the protection under that sub-section for comment which is fair only available when the facts on which the comment is based are indeed true and stated, referred to or notorious to those to whom the matter is published?
- (2) Is it an essential element of the defence when pleaded in relation to the publication of another's comment that the publisher hold the opinion expressed in the comment?

In answering the first of those two questions, the Court approved the approach of Sugerman J in *Rigby -v- Associated Newspapers Limited* and held that reference in s.377(8) to "fair comment" does not require that the facts upon which that comment is based to be true, provided that, at the time the comment is published the publisher does not hold a belief that such facts are untrue. The Court commented:

"When the paramount policy interest

manifest on the face of s.377(8) is the encouragement and protection of freedom of discussion on a matter of public interest for the benefit of the public, it would be inappropriate to construe that sub-section as requiring that a person wishing to participate in the discussion of such a matter by way of comment on the facts stated on a privileged occasion, when that discussion is for the public benefit, should firstly satisfy himself or herself the truth of those facts before commenting upon them".

Further, it was held that it was not necessary that there be a statement of the facts on which the comment is based in the publication, provided that the jury is satisfied that such facts are sufficiently indicated or notorious to enable persons to whom the defamatory matter is published to judge for themselves the fairness or otherwise of the comment.

In relation to the second question, the Court held that it was not an essential element of the defence that the publisher of another's comment hold the opinion expressed in the comment, and held that "it is sufficient if the publication is objectively fair and the plaintiff does not prove that the defendant publisher was actuated by malice". The Court cited with approval the comments of Dickson J in his dissenting judgment in *Cherneskey -v- Armadale Publishers Ltd* a decision of the Supreme Court of Canada:

"It does not require any great perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the

views expressed, but defenceless if it did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press".

In applying s.377(8) to the present case, the Court found that the statements made in Parliament constituted a sufficient substratum of fact upon which to base the publication; that the comment was fair, and that there was no evidence to suggest that anyone connected with the first respondent believed the contents of the advertisement to be untrue.

A submission by the appellant that the manner and extent of the publication exceeded that that was reasonably sufficient for the occasion because the first respondent's Newspaper circulated in an area which extended outside the Johnston Shire was described as "... utterly without merit" and rejected on the basis that the administration of the Johnston Shire was a matter of public interest to persons resident outside the Shire, including ratepayers of the Johnston Shire who reside outside the shire, and that there was nothing to suggest that placing the advertisement in another publication would have succeeded in bringing the matter sufficiently to the attention of the ratepayers and residents of the shire.

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## Interconnection and the dominant market position in New Zealand

John Mackay and Jane Trethewey report on the recent decision in *Clear Communications Limited*

-v- Telecom Corporation of New Zealand and Ors.

**O**n 17 December 1993, the New Zealand Court of Appeal handed down its judgment on the application of s.36 of the *Commerce Act 1986* to negotiations between New Zealand Telecom and Clear Communications for the interconnection of Clear's network to Telecom's network. Section 36 (the New Zealand equivalent of s.46 of the *Trade Practices Act 1974*) proscribes the use of a dominant position in a market for the purpose

of restricting the entry of a person into a market, preventing or deterring a person from engaging in competitive conduct in a market or eliminating a person from a market.

Clear (which was formed in 1990 to compete in the newly deregulated telecommunications market in New Zealand) wished to establish local telephone services to business subscribers. Access to Telecom's network was essential to enable Clear's and Telecom's customers to call one

another. After protracted negotiations, the parties could not agree on the terms for interconnection. Telecom's conduct and the stance adopted by it in the negotiations were alleged to contravene s. 36.

It was accepted that Telecom was in a dominant position in the relevant market, being the national market for standard switched telephone services, as the majority of the Court held in *Telecom Corporation of New Zealand Ltd -v- Commerce Commission*.

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## The Facts

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**T**elecom effectively refused to deal on the terms suggested by Clear and instead proposed terms which included an access code and an access levy as a contribution to Telecom's network infrastructure costs, including its "cross-subsidy burden" (constraints on pricing for residential telephone services retained by the Government when Telecom was privatised in 1990). Clear objected strongly to the access code and levy.

Clear had successfully tendered for the supply to the NZ Justice Department of telephone services on the basis that it would be fully interconnected with Telecom's network and that there would be no access code. Under its contract with the Justice Department, Clear was subject to substantial penalties if it could not provide the service by the required time. When it became clear that the negotiations were not proceeding quickly enough, Clear applied to Telecom for a standard DDI service to enable it to meet its obligations to the Justice Department. Telecom refused the permit for the service.

The parties subsequently agreed on an interim arrangement for the Justice Department contract and negotiations continued on the final arrangements for interconnection. Telecom put forward a new proposal which included passing on to its customers any charges by Clear for calls onto Clear's network, an access code only if Clear made such charges, charges for calls onto Telecom's network at Telecom's standard PABX call rates and a monthly charge for the interconnection (an access levy). The figures were calculated by reference not to overhead costs, but to the opportunity cost to Telecom representing revenue lost by Telecom to Clear. Clear objected to being charged for calls as a PABX customer and to the access code and levy.

The High Court found that Telecom had breached s.36 in not accepting Clear as an ordinary DDI customer and that Clear was entitled to damages. The Court also held that Telecom had breached s.36 in treating Clear as a PABX customer rather than a network operator, requiring the access code and for charging excessive prices for connection to the loop. However, the Court found that Clear had not suffered loss. The delays in negotiations were not in themselves in breach of s.36 nor was the proposed opportunity cost pricing mechanism.

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## The Court of Appeal

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**T**he main issue considered by the Court of Appeal was whether the proposed pricing mechanism contravened s.36. Telecom argued that the opportunity cost method of pricing the provision of interconnection services was consistent with what would be done in a competitive environment.

The Court held that this pricing mechanism was anti-competitive and in breach of s.36 as it included monopoly profits, effectively requiring the competitor to indemnify the monopolist against any loss of custom. The Court rejected the argument that any monopoly rents would be eliminated over time through the competitive process, through a price review mechanism, pointing out that this mechanism was at best imperfect, allowing Telecom to exploit the margin until the next review, and at worst may constitute a further barrier to entry because of the transaction costs involved. The Court also rejected the submission that persistent monopoly rents could be dealt with by regulation, including the price control provisions of the Commerce Act. This was said to be unrealistic in view of the Government's policy of a "light-handed" approach to telecommunications industry regulation.

The access code requirement was also held to be anti-competitive, as it was unnecessary for charging purposes or to enable customers to differentiate between the networks and would impose a major competitive disadvantage on Clear. The Court also found that Telecom's refusal to issue a DDI permit was in breach of s.36. The Court said that, taken together as a package, Telecom's terms for interconnection were more onerous than could have been insisted upon in a fully competitive environment and prevented Clear from entering the market.

The Court inferred anti-competitive purpose and rejected submissions that Telecom's conduct was due merely to inexperience and reliance upon expert advice in a complex commercial arrangement.

The Court gave a declaration that the terms for interconnection set by Telecom in its various proposals contravened s.36 of the *Commerce Act*, refusing to give more detailed orders given that the parties were still in negotiation. The award of damages for the refusal to grant a DDI permit was upheld. Clear's claim for damages flowing

from breach of s.36 in relation to the terms for interconnection was rejected because Clear had not established that the parties would have been likely to reach agreement but for the breach.

The Court gave guidance as to the appropriate pricing mechanism for interconnection focusing on the incremental costs of providing the service, including fixed and common costs such as the cost of its obligations to residential users, plus a reasonable return for providing the services.

The Court also suggested that both parties re-evaluate their approach to the negotiations - Clear should accept that Telecom is entitled to charge a line rental to recover proper incremental costs and a reasonable return for the provision of interconnection services, while Telecom should not treat Clear as equivalent to a PABX customer and should change its attitude to reciprocity.

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## Comment

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**T**his judgment illustrates the difficulties in determining appropriate terms for interconnection where there is little or no legislative guidance. In contrast to the New Zealand policy decision to rely on little regulation and primarily upon market forces for the development of competition, the Australian *Telecommunication Act 1991* regulates the carriers in significant ways: prohibitions on anti-competitive conduct; carriers are given the right to interconnect with the networks of other carriers and to request the provision of telecommunications services and necessary supplementary services; in the event of a failure to agree terms of interconnection the parties can submit the matter to AUSTEL for arbitration; the terms of the interconnection agreement are subject to AUSTEL's scrutiny in the process of registration; and the prices which Telecom may charge for interconnection are regulated.

If NZ Telecom and Clear are unable to reach agreement on the terms of interconnection, the carriers may need to arbitrate or may face Government regulation in a similar form to that which the carriers face in Australia. The longer the parties take to reach agreement the greater the benefit to Telecom from the delay in Clear entering the market.

*John Mackay and Jane Trethewey are solicitors at Blake Dawson Waldron*

# GATT deal - what it means

Jock Given outlines the practical consequences of the concluded

## Uruguay Round

In December, the 115 members of the General Agreement on Tariffs and Trade ("GATT") finally settled on a package of agreements aimed at liberalising world trade. These countries account for 90% of world merchandise trade.

The Industry Commission estimates that the long-term effects of the Uruguay Round will be an increase in Australia's exports over \$A5 billion, and an increase in Australia's GDP of around \$A3.7 billion.

The deal came some seven years after the Uruguay Round was launched at Punta del Este in 1986. It represents a major achievement by negotiators and Ministers from Australia and all other countries. A formal ceremony at which the agreements - some 6,500 pages of them - are signed by relevant Ministers and will be held in Morocco in mid April.

For the film and television industries in Australia, there are two key agreements:

- Services - the General Agreement on Trade in Services ("GATS"); and
- Intellectual Property - Trade Related aspects of Intellectual Property Rights ("TRIPS").

The services agreement will have minimal immediate effect on Australia. The Intellectual property agreement will require some changes to Australia's copyright legislation and substantial changes to copyright laws in some other countries which are not currently members of the major international copyright agreements.

### Services

Last minute negotiations between the US and the EC about the audiovisual sector proved highly contentious. It was widely reported that audiovisual services were "excluded" from the final agreement. This is not the case.

Audiovisual services are covered by the agreement. However, this does not mean the countries are obliged to remove all forms of assistance arrangements in the sector.

It means, firstly, that some general obligations like "transparency" (the requirement that information about assistance arrangements and regulatory

measures be made publicly available) will apply in the audiovisual sector.

Secondly, another general obligation - "most favoured nation" (also known as "non-discrimination" - the obligation to treat each nation's services or service providers as favourably as the "most favoured nation's" services or service providers) - will apply, but countries may take out specific exemptions to it in particular sectors.

Australia has taken out an exemption to the MFN obligation in relation to film and television co-production treaties. These would otherwise infringe the MFN obligation, because they treat co-producers from countries with whom Australia has co-production arrangements more favourably than those with whom Australia does not. The exemption will ensure that such arrangements can be maintained.

Thirdly, other obligations - like market access and national treatment (treating foreign services and service providers as favourably as domestic ones) - will apply only to the extent that individual countries offer to make them apply. This means, in particular, that domestic content quotas will only have to be removed or reduced if individual countries offer to do so.

The US has made an extensive offer in relation to audiovisual services. That is, it has committed itself not to introduce many forms of assistance measures common in other countries.

Australia and the EC have made no offers in this area. This means they have left themselves with the flexibility to introduce new measures or adapt existing measures to assist their audiovisual industries.

However, all members are committed to entering into successive rounds of negotiations beginning within five years of the signing of the agreement, "with a view to achieving a progressively higher level of liberalisation".

Overall, the services agreement is crucial in establishing legally enforceable multi-lateral rules for trade and investment in the services sector. It will act as a discipline on unilateral action being taken by countries who believe their trade interests are adversely affected by the actions of other countries. Once the agreement is signed, countries will be

forced to pursue liberalisation through multilateral disputes settlements procedures set out in it. Nevertheless, the obligation to seek higher levels of liberalisation in the future means that external pressure on Australia's domestic assistance arrangements is likely to continue in some form.

### Intellectual Property

The three major implications of this agreement are:

- Australia and those signatories which do not already have such a right will be required to introduce a "rental right" to give copyright control over rental of computer programs and sound recordings. This does not extend to cinematographic films. (The agreement actually obliges members to introduce a rental right for films, but allows them to avoid the obligation if rental activity in their countries has not created problems).
- Signatories will have to establish effective procedures for enforcing copyright and other intellectual property rights. The lack of such enforcement procedures has been a major deficiency in the existing international copyright conventions such as Berne. It has meant that countries could introduce copyright laws, but take little action to ensure they were enforced.
- GATT members who are not currently signatories to the major copyright conventions will be required to introduce copyright laws. Such countries include Indonesia and Singapore. However, developing countries will have four years in which to comply.
- The term of performers protection (a limited form of copyright which currently applies for 20 years under Australian Copyright Law) will need to be extended in all member countries to 50 years.

(This article appeared in the January 1994 issue of "AFC News").

Jock Given, Policy Advisor, Australian Film Commission

# A "Real Life" trespass at the Santa Fe Gold

Max Bonnell examines a recent Victorian decision on an attempt to prevent a broadcast of material obtained by concealed cameras

**T**he Supreme Court of Victoria refused to grant an injunction restraining Channel Seven's *"Real Life"* programme from broadcasting a videotape of a striptease show filmed by a hidden camera in a Melbourne hotel (*Whiskisoda Pty Limited -v- HSV Channel Seven Pty Limited*, judgment of McDonald J, 5 November 1993).

## The facts

**A**t 1.00 pm on 29 October 1993, four members of a crew from *Real Life* entered the Santa Fe Gold Hotel where, with a concealed camera, they filmed a lunchtime strip tease show that (according to McDonald J) featured "a nude woman engaged in a sexually explicit performance in the presence of a number of males".

During the following week, *Real Life* advertised that it intended to expose the entertainment at the Santa Fe Gold as "one of Melbourne's biggest embarrassments". On 4 November 1993, Whiskisoda Pty Limited, the licensee of the Santa Fe Gold, commenced proceedings against HSV Channel Seven Pty Limited and applied for an injunction to prevent the broadcasting of the videotape filmed at the hotel.

## The plaintiff's case: copyright, contract and trespass

**W**hiskisoda made three claims against Seven. The first that a broadcast would infringe its copyright in the performance was not pursued before McDonald J. Nor was much attention paid to the second, that Seven had breached an agreement with Whiskisoda not to film activities inside the hotel.

The remaining and the most substantial claim was that Seven had trespassed by breaching a condition of its licence to enter the hotel's premises. On this point there was conflicting evidence. Ross Kennedy, of Whiskisoda, said that signs displayed at the hotel's entrance read: "Strictly no filming permitted on premises". Warren Wilton, *Real Life's* Bureau Chief and a member of the crew that visited the Santa Fe Gold, said that he had seen no signs. If there were no signs, Seven argued, there was no limitation upon its crew's licence to enter the hotel.

## Walkins and trespass

**O**n the question of trespass, McDonald J turned to the decision of Young J in *Lincoln Hunt (Australia) Pty Limited v Willesee & Ors* (1986).

That case concerned a "walkin" by a Channel Nine camera crew on the premises of a company that sold investment schemes, accompanied by one of that company's dissatisfied customers. Refusing to grant an injunction restraining Channel Nine from broadcasting what it had filmed, Young J set out the following principles:

- a walkin crew commits a trespass if there is no licence for it to enter the premises;
- whether any licence exists depends upon an analysis of any implied or express invitation extended by the occupier;
- the court may grant an injunction to prevent publication of a tape filmed by a trespasser if confidentiality is involved or if the publication would be unconscionable; and
- to obtain such an injunction, the plaintiff must be able to show that it will suffer irreparable damage if the injunction is not granted. If damages are an adequate remedy, no injunction will be granted.

In short, the fact that a walkin camera crew may have committed an actionable trespass is not in itself a sufficient ground for the granting of an injunction to restrain the broadcasting of what was filmed. Something more is required: there must be a breach of confidentiality or the circumstances must be "such to make publication unconscionable".

Whiskisoda argued that the intended broadcast would breach confidentiality because it would enable the wide identification of the hotel's performers and customers, who were entitled to their anonymity. It was also argued that the broadcast would be unconscionable because it would make it difficult for the hotel to retain its performers and customers, causing irreparable damage.

McDonald J dismissed Whiskisoda's argument on confidentiality almost out of hand. He could find no legal principle that would protect the confidentiality of the performers or audience at a strip tease show. In any event, he did not believe it possible to identify any performer or spectator from *Real Life's* carefully edited tape.

## Serious questions

**M**cDonald J found that there were "serious questions" of both fact and law for the court to decide: essentially, these were whether the camera crew's licence to enter the hotel was limited in any way, and whether a trespass had occurred. Were the plaintiff to succeed, McDonald J considered, it could be compensated adequately by an award of damages, perhaps including exemplary damages. Accordingly, the broadcast would not be "unconscionable" in the sense intended by Young J, and the balance of convenience did not require that an injunction be granted.

The evidence brought in this application requires comment. Much of it - on both sides - amounted to little more than posturing. Kennedy, for Whiskisoda, claimed that if *Real Life's* tape were broadcast, performers would leave the hotel and customers would be reluctant to visit it, for fear that their exhibitionism and voyeurism might be broadcast to a wider public. This contained an inference that the hotel would suffer ongoing damage, which was without foundation for the simple reason that there was no realistic prospect that *Real Life's* visit would be repeated. A used story is a dead story: *Real Life* had its story, and had no reason to come back. The suggestion that camera crews might become regular visitors at the Santa Fe Gold was ridiculous.

For Seven, Wilton gave evidence that the purpose behind *Real Life's* story was to air the views of a group named the "Centre Against Sexual Assault" that the entertainment at Santa Fe Gold might encourage attacks against women. It was not possible, Wilton said, to deliver this message effectively without pictures. An injunction would damage the story because it would "go stale".

"Go stale"? It is safe to assume that Wilton did not mean to suggest that sexual assault would cease to be a newsworthy topic. He may have meant that Santa Fe Gold might stop giving strip shows, or that those shows would stop endangering women, but in either case, *Real Life's* act of public service would have been shown to be unnecessary. What Wilton really meant, of course, was that he had a good story in the can and wanted to use it. So why not say so?

It is usual for the publication or

broadcasting of prurient material to be justified by reference to a high moral purpose. There is nothing new in this. The practice is at least as old as Edmund Curll, the unlovely 18th century English pornographer, who defended some of his more lurid efforts by claiming that "they treat only of matters of the greatest importance to society ... are directly calculated for antidotes against debauchery

and unnatural lewdness."

Usually, of course, it is necessary for a publisher to raise a defence involving the public interest when defamation proceedings are brought. But no such proceedings were taken here. It would be refreshing, just once, for a broadcaster to tell a court; "Our business is to make a profit from entertaining people. It is a legitimate business. Television is a visual medium, so we need images.

People want to see pictures, not listen to descriptions. We try to give people what they want and so long as we remain within the law, we should not be stopped."

But perhaps it is naive to expect that kind of candour. It's very rare, in real life.

*Max Bonnell is a solicitor at Allen Allen & Hemsley*

## To preselect a carrier

**Trish Benson discusses the recent preselection of long distance telecommunications carriers**

**B**y early 1994, the residents of Sydney, Melbourne, Canberra and Brisbane will have voted to preselect their long distance telecommunications carrier as Telecom's monopoly on telecommunications services is opened up to competition from the second carrier, Optus. Progressively, all telephone subscribers across Australia will be asked to select their preferred carrier.

The ballot is seen as fast tracking competition and it is a part of the Government's commitment to micro economic reform. There are a number of issues that have not been adequately addressed in the economic reform debate (a debate that has become so pervasive both prior to and during the preselection ballot) and one of those issues is the need for deregulation; and inherent within deregulation is the need for competition within telecommunications.

Over the past one hundred years, the telephone has become an integral part of Australia's economic and social life. While the economic benefits of having an accessible and affordable telephone (and not related services, such as facsimiles, voice mail, the use of bulletin boards, etc) are well documented as advantaging the business community, the social functions and its benefits and not taken into account in the debates. The social functions of the telephone nearly always pertain to women's use of the phone and how that usage maintains and facilitates community life.

### Choice

The ballot has been applauded as providing consumer choice, however there is no recognition that choosing a phone company is very unlike choosing a can of baked beans from the supermarket shelf. The price of long distance phone calls became a major issue during the ballot (and providing consumers with pricing information became a major sticking point between consumer advocates during the ballot process). Some sections argued (reasonably coherently) during the ballot that the social functions and the provision of an affordable and accessible telecommunications network was a much wider issue than which

phone company provided the cheapest long distance calls - Telecom or Optus.

Even choosing a long distance carrier on pricing alone is extremely difficult for residential consumers. The carriers change their pricing structures regularly and the plethora of information made available (largely via advertising in the media) is exacerbated by the Telecom offered family and friends discounts and flexiplans, and what has become a catch cry of both carriers - "customer service".

### The costs

A criticism of the ballot process by consumer groups is the amounts of money being poured into advertising by both carriers - approximately \$20M. The ballot, which is being overseen by AUSTEL, the telecommunications regulator, is costing \$35M and includes a community education program. This criticism is again justified when many low-income earners cannot afford a telephone, are finding it increasingly difficult to pay for continued access to a telephone, or do not access to the standard telephone service (such as people who are hearing impaired, with speech difficulties or are deaf).

These criticism of the ballot process are indicative of the concerns that residential consumers also have towards the advent of competition. As far as residential consumers are concerned, some of the promises that competition promised have as yet to be realised.

Residential consumers may get cheaper long distance phone calls if they can wade through the plethora of information about pricing and if the issue of affordability and accessibility to the standard telephone service for many disadvantaged is not debated publicly. The question that needs to be asked is whether the quality of service that Telecom provided before the introduction of competition could have been improved without resorting to a very limited debate about the functions of a telecommunications network and millions of dollars being poured into the coffers of advertising agencies.

*This article by Trish Benson, Co-ordinator of the Consumers' Telecommunications Network, does not reflect the views of the Network.*

## VI\$COPY almost there

**David Throsby proclaims the near arrival of a new collecting society**

**T**he process of establishing a copyright collection agency for visual artists and craftspeople in Australia is now almost completed. The National Association for the Visual Arts (NAVA) has been working on this project for over four years, firstly by undertaking an extensive feasibility study with assistance from the Copyright Agency Limited (CAL) and then by setting in train the lengthy process of incorporation of the company, to be known as VI\$COPY.

Towards the end of last year, Hans Guldberg of Economic Strategies Ltd produced a detailed paper looking at the income projections for VI\$COPY in its first five years. The study analysed the histories and financial strategies of similar agencies in Europe and assessed the developing market sectors in Australia. From this study, a Business Plan was developed outlining the objectives, structure and projected financial arrangements for the proposed agency.

The Memo and Articles for VI\$COPY are being prepared by Corrs Chambers Westgarth following substantial input from Natasha Serventy, the legal consultant to the project. When these are finalised, the company will seek incorporation. There has been strong support for the establishment of VI\$COPY from a number of sources, including the Visual Arts/Craft Board of the Australia Council, the NSW Ministry for the Arts and other State Ministries, the Australian Cultural Development Office, and CAL. NAVA is still actively lobbying to put together a financial support package to carry VI\$COPY through its establishment stages towards full self-sufficient operation.

VI\$COPY looks forward to the final stages of negotiating for funding and the commencement of operations during the year. The establishment of VI\$COPY will at last fill a significant gap in the existing scope of provision for copyright protection of Australian artist.

*David Throsby, Chair, N.A.V.A.*

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

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## Communications and Media Law Association

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

Issues of interest to CAMLA members include:

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

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

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