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THE MINISTER OUTLINES PROPOSALS FOR CHANGE

Proposed changes to the law relating to communications and "some areas where changes may have to be considered" were outlined by the Minister for Communications, the Hon Neil Brown, QC, to the Australian Communications Law Association, (ACLA), at a Sydney luncheon on 2 September 1982.

The Minister told ACLA members of the need to define: "What we are trying to achieve through communications law".

"Inevitably, there is a need for some degree of control and regulation", he said, "but our concern should be that we do not over-control or over-regulate".

"That can certainly be counter-productive. The classic case of this must surely be the ban introduced some years ago on radio and television advertisements of cigarettes and tobacco. The result is clearly that by sponsorship of sporting and other events which is legitimate and lawful, we now have more exposure to cigarettes and tobacco on television than we had before the ban. That is the result of an excessive desire to control and regulate and shows how counter-productive it can be because we now have more of what was to be banned and we now have it on the ABC

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as well. So, before we go banning advertisements for other products we should temper our zeal with some common sense."

AUSTRALIAN BROADCASTING CORPORATION

The Bill to establish the new Australian Broadcasting Corporation was expected to come before the Parliament shortly, Mr Brown said.

"The processes which will end with the introduction of the Bill are a fascinating study in public administration, just as the Dix Committee Report is a fascinating analysis of the operations of a large statutory authority."

The Minister continued:

"The Dix Committee made more than 270 recommendations for changes to or within the ABC. While many of these were matters mainly for the authority to consider - and I instance the management practices of the ABC - some of those matters were of such importance that the Government felt it necessary that it consider the implications and convey its views to the ABC. All of the recommendations had to be grouped and considered in an orderly way, which itself was an imposing and time-consuming task."

"Many of the recommendations of the Dix Committee that we accepted, and many of the other decisions that we made, clearly had to be embodied in legislation. It became very apparent that what was needed was a new Act of Parliament dealing with the ABC, establishing it anew, declaring its charter and providing the details of its structure and functions. The ABC will therefore have a separate Act and that, by itself, will be a major advance in communications law."

"The removal from the Broadcasting and Television Act of legislation establishing the ABC and defining its powers and functions is the first step to confining that Act to the regulatory framework of broadcasting and television services. I hope that that is what the Broadcasting and Television Act will become - an Act dealing with the regulation of radio and television broadcasting, not cluttered up with other matters that should be contained in separate statutes."

"The Special Broadcasting Service should also have its own statute. This will not solve the undue complexities in the Broadcasting and Television Act, but at least it will mean that this legislation is not cluttered with provisions which solely concern the administration of services provided by statutory authorities of the Commonwealth. We will then be in a position to make the Broadcasting and Television Act a clearer and better directed legislative framework for radio and television broadcasting."

SUPPLEMENTARY RADIO AND TELEVISION LICENCES

"I announced recently the decision to provide for supplementary radio and television licences in areas outside the five mainland State capital cities. There are now provisions in the Broadcasting and Television Act for the grant of supplementary radio licences, but there will be some necessary amendments and improvements made to those provisions. The most significant, of course, will be to extend the supplementary licence concept to television", the Minister told the ACLA luncheon.

He continued: "Because of the short time scale involved, there may be some difficulty in finalising the bill for supplementary broadcasting and television station licences before the Autumn 1983 Session of the Parliament. However, it is our intention to introduce and pass the legislation this Session if at all possible."

"It is intended that the Bill should seek to simplify the legislation, for example by changing the basis of the scheme from the licensing of a 'station' to the licensing of a 'service'. For those concerned with communications law, the new supplementary licence provisions will be a very significant addition to that body of law."

RADIOCOMMUNICATIONS BILL

"There will shortly be a new Radiocommunications Bill. This will be a major legislative proposal concerning the administration of the radio spectrum."

"The Wireless Telegraphy Act 1904 provides for administration of the radio spectrum through the grant of licences for non-broadcasting purposes. This may not be the most ancient piece of Federal legislation remaining on the Statute books, but it certainly would be one of the oldest pieces of Federal legislation which is still serving a major regulatory purpose."

"There have been few amendments to the Wireless Telegraphy Act since 1904. This is not to suggest that regulation of the radio spectrum has not been regarded as an important function of government. The reason for the legislative inactivity is that we have not, until recently, had the demand experienced in other countries for access to the radio spectrum for private communication purposes."

"I believe also that we have, in a national sense, been somewhat conservative in allowing private organisations to have access to the radio spectrum. Some part of this conservatism related to the protection desirable or otherwise, of the national telecommunications system from competition, particularly when the radio spectrum and telecommunications services were the responsibilities of the former Postmaster-General's Department."

"All that has changed in recent years with development in electronics, which has resulted in less costly receiving and transmitting equipment being freely available."

"The proposed Radiocommunications Bill will introduce substantial reforms to the administration of the radio frequency spectrum. I have to say that the proposed Bill may increase the regulatory powers of the Government in some respects. Without proper regulation, radio equipment may interfere inadvertently with the use or enjoyment of public or private services. A common complaint is that of private radio equipment interfering with reception of radio and television services. In other cases, the use of equipment such as electric drills and welders can cause severe interference to the television services in neighbouring houses. These complaints are costly to investigate, and in some cases we are powerless to act and prevent the interference continuing."

"One of the reforms which the new radiocommunications legislation will probably propose is to authorise the Minister to approve standards for all transmitters and certain classes of receivers. The proposed legislation would make it an offence to supply, possess or import such equipment which does not meet the standards determined."

"The only power which now exists in respect of importing radio equipment is recourse to regulations under the Customs Act. This is a cumbersome procedure and makes it difficult, if not impossible, for positive action to be taken in time to prevent sub-standard equipment being imported and sold here on a large scale. The Minister would also under the Bill be empowered to determine standards for non-communications equipment which emit radio waves."

"It is not intended to introduce the Radio Communications Bill and then to have it passed by the Parliament forthwith. It is clearly one of those pieces of proposed legislation that should be left for some time for public debate and discussion before it is passed. We certainly would not pass it before receiving the report of the Davidson Inquiry into Telecommunications and considering its recommendations. I hope that those with a close interest in communications law will study the Bill and come forward with constructive comments and suggestions."

CABLE TELEVISION

"On the first day of the Budget sittings I tabled the interim report of the Australian Broadcasting Tribunal on 'Cable and Subscription Relevision Services for Australia'." (**Ed: For a summary of the ABT**

recommendations see 2CLB-17 to 23.) "It is a matter of record that the Tribunal has recommended that both radiated subscription television services and cable television services should be introduced as soon as practicable."

"The full report of the Tribunal, which is in a number of volumes, will be available in a month or so, but it is obvious that the issues to be considered are complex and that in particular the proposals for cable television cannot be considered in isolation from the recommendations of the Davidson Inquiry on private sector participation in the provision of telecommunications services."

"But if (and I must emphasise the 'if') the Government were to decide to proceed with cable and/or subscription television, they would require substantial and very significant changes to the communications law of this country. Such changes would constitute a very fertile field indeed and impose at the same time a very heavy burden of responsibility on those with skills in communications law."

SATELLITE COMMUNICATIONS SERVICES

"The other separate issue on the provision of telecommunications services, which still awaits government decision, is the provision of those services by satellite and the involvement of Aussat Pty Ltd in the provision of such services."

"The Government has decided that private organisations which utilise the national communications satellite system may establish their own ground stations to transmit to and receive traffic relayed through the satellites. This is an important decision. Until recently, Canadian law required that all users of its domestic satellite system must obtain access to satellites through the ground network provided by Telesat, the company established to own and operate the Canadian satellite system. It is only recently that Canadian users, including the Canadian Broadcasting Corporation, have been permitted to establish ground networks for their own purposes. There are still several major issues requiring decisions on the use of our national communications satellite system. Aussat Pty Ltd has been authorised to establish ground stations in the major capital cities and in other centres to meet the company's needs. We have not decided, however, whether the company should be solely a carrier of communications traffic or should be able to enter the so-called enhanced services area in competition with Telecom. Similarly, the Government has yet to consider whether and, if so, which private organisations may utilise the national satellite system to provide enhanced services to other users."

"The report of the Davidson Committee will clearly have a major contribution to thinking on these issues. That report is now looming as one of the key documents in the review of our national telecommunications policies. Linking as it does the report of the Broadcasting Tribunal on cable television services, and the use of the national satellite system by Aussat Pty Ltd, Telecom and private organisation.

REGULATION OF TELECOMMUNICATIONS SERVICES

"One of the interesting recommendations of the Broadcasting Tribunal in its most recent report is that, in the long term, a single Federal authority be established with responsibility, including regulatory responsibility, for both broadcasting and telecommunications. This recommendation will, of course, receive careful consideration."

"Once decisions are made on the extent to which there should be competition in those areas where Telecom now has a monopoly, the extent to which there is a need for regulation of competing services will be considered."

"Even in this brief outline of possible changes to our law of communications, it is apparent that much is going to happen over the next few years."

"I think the communications area is unique for the number and nature of

the changes which are on the horizon. New or improved services, now available through advances made in electronics and developments in communications carrier systems, can aid society in the pursuit of learning and leisure. What I see as the main challenge is to develop the legal framework which will encourage institutions to take advantage of the new technologies, but will also see that the interests of the consumer are protected where this is necessary."

"There will be a heavy responsibility placed on those who have professional skills in communications law and an interest in this challenging field", the Minister concluded.

Telecom in the 80's

Telecom Australia, having provided the Australian community with an information system amongst the world's best, now faced the challenge of traumatic change, Mr Bill Mansfield, Federal Secretary of the Australian Telecommunications Employees Association, told an ACLA luncheon in Sydney on 28 July.

He said the communications system of tomorrow would be significantly different to today, but the changes would be an extension of today and not a communications system which was fundamentally different.

"For business and commerce we are looking at systems which provide voice, data, facsimile and video facilities", Mr Mansfield said. He continued:

"The transmission costs for broad band systems are falling in real terms. In the future, advances in digital switching and transmission systems will result in a decrease in the cost of these systems."

"The ability of Telecom to continue to provide services to the community in an equitable manner at prices most can afford will depend on two key factors:

- Firstly, the maintenance of the arrangements whereby Telecom continues to be essentially the sole provider of long distance circuits.
- Secondly, the attitude of Government towards Telecom being allowed to expand its services to take account of new technological developments."

"The present prospects are that in both areas Telecom will experience changes which will be to its disadvantage and to the disadvantage of the majority of users of the national telecommunications system."

"A feature of virtually all national telecommunications networks to date has been the transfer of profits from high revenue areas to areas of loss, so that costs are held down and services brought within the reach of a larger group in the community."

"In Australia, several areas incur annual financial losses. Rural telephone services, the public telegram service and public telephones suffer losses of around $290 million each year."

"The losses in these areas are subsidised by profits from the long distance communications area. This transfer is referred to as a cross subsidy. In commenting on the areas where profit was made Telecom's 1980/81 report stated:

> 'On a geographic basis, the main profit centre was the coastal strip from Brisbane through Sydney and Melbourne to Adelaide.
>
> On a service basis, trunk calls, particularly the high volume, high growth, inter-capital calls were easily the most important generators of profit.'"

"Telecom has estimated that if its ability to cross subsidise the areas of financial loss is seriously reduced there will inevitably be increases in charges."

"The position of the entrepreneurs

who wish to get into the telecommunications area is not one of social equity or universal service. It can be called a preoccupation with the profits to be made from exploiting the vulnerable position of a service oriented industry."

"The entrepreneurs are not interested in providing a public telegram service, although they are attracted to the public telex service. The national responsibility of providing a domestic switching network infrastructure is avoided whilst the lucrative long distance traffic is eagerly sought after."

"The question remains as to whether the private interests will achieve their ambitions. The Davidson Inquiry is considering the positions which will be recommended to Government. However the vested interests which are seeking change are powerful. Publishing and Broadcasting, IBM, Myers and others have demonstrated their power and influence in the past."

Mr Mansfield said there was a serious risk that Telecom's role as the exclusive provider of public long distance communications would be lost. He continued:

"The second key issue to the future of Telecom is its ability to enter into new growth areas. There is a range of new technology applications which are open to be utilised."

"The key areas of future growth are in the non-voice areas of telecommunications. Quoting from an Arthur D. Little study, McKinsey and Company in a 1981 report stated that growth in voice-based products in the US was expected to be abour 4 - 6 per cent p.a. while non-voice areas such as facsimile, data and cable TV was expected to be 10 - 25 per cent p.a."

"The present Government has rejected several of Telecom Australia's attempts to enter new growth areas. These initiatives have included approaches for Telecom to be permitted to supply services such as facsimile machines, telephone answering machines, and videotex services. Telecom has also tried to obtain permission to market and supply under 50 line private automatic branch exchanges. Each of these initiatives has either been rejected by Government or not responded to. Each was designed to give Telecom competitive rights in the sought after area and not monopoly powers."

"The reasons why Telecom Australia was refused entry to the markets listed above appear to be political and ideological rather than a rational assessment of what the future requires for a viable and dynamic Australian communications enterprise."

"The Videotex decision, which was made public late in 1981, provides the best opportunity to examine the current Government's commitment to the future viability of Telecom Australia and the provision of new services in a manner which optimises their value to the entire community."

"Videotex is a communications system which allows centrally stored information to be interrogated, selected and transmitted via telephone lines for display on a screen monitor or television set. Over about three years Telecom Australia investigated the possibilities of a Videotex system for Australia. During 1980 Telecom formally proposed to the Minister, Mr Sinclair, that Telecom be permitted to enter the Videotex market as a supplier of the British Telecom-developed Prestel system."

"The proposal of Telecom Australia was made only after a long, expensive and detailed investigation: four overseas visits by Telecom experts examined the alternative systems; Telecom Research Laboratories experimented with Videotex techniques; and, a marketing strategy was developed and a team of technical and commercial specialists put together."

"Telecom's proposal was detailed to the Minister on 9 January 1981."

"In the correspondence, some of the points made were:

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Freedom of Legislation Act 1982 'better than no law at all'

The much-delayed Commonwealth Freedom of Information Act 1982 is now due to come into operation on 1 December 1982. Kevin O'Connor comments that: "It is better than no law at all".

"Nonetheless", says O'Connor, "it contains a number of deficiencies which leaves the state of access to government information enjoyed by Australians well short of anything conjured up by the expression 'freedom of information'". O'Connor continues*:

Even though all decisions to deny documents will be amenable to judicial review, those related to the most significant classes of documents from the viewpoint of democratic rights cannot be overruled by a judicial body. In these cases, the judicial body - the Document Review Tribunal - can only proffer its opinion to the Minister who may well ignore it. Under the Act, there is no general right of access to documents which have or which will have come into existence prior to the commencement date of the new legislation.

There are still far too many exemptions and some are expressed in very wide language though legitimate on their face. Many of the criticisms of the Senate Standing Committee on Constitutional and Legal Affairs in its bipartisan 1979 Report in these regards have been rejected by the Government without any substantial reasons being given.

The law leaves individuals unhappy with a decision to refuse access with the right to utilise the necessary but sometimes cumbersome and off-putting machinery of internal agency review and appeal to the Administrative Appeals Tribunal or referral to the Document Review Tribunal. The Government has failed to take up the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs to give a range of powers to the Ombudsman for assisting individuals in exercising their rights under the new law.

Commonwealth statutes will abound with secrecy provisions preventing the release of information which are given precedence over the new freedom of information rights.

The point should be emphasised that this law applies only to the Commonwealth government and certain territories within responsibility. State governments have no freedom of information laws.

By the end of 1982, Victoria is likely to have become the first Australian State to have enacted a Freedom of Information Act.

Credit for this situation should be given to the Premier and Attorney-General, John Cain, who as Shadow Attorney-General did considerable work on the subject, culminating in the release for public discussion in April 1981 of a draft private member's bill. That action stimulated the Victorian Cabinet of the day to take up the issue, and shortly after Mr Cain had tabled his private member's bill in Parliament, the former Government tabled its own measure, the Freedom of Information Bill 1981.

With the change of Government, the Cain Bill formed the basis of Government policy on the subject. The proposed Labor Bill represents a considerable improvement on the Commonwealth's Freedom of Information Act 1982. Whilst the Bill adopts a structure similar to the Federal legislation, it does not

have as many or as wide exemptions. The smaller number of exemptions is partly attributable to the narrower scope of State Government functions, e.g. States do not have interests to protect by way of exemptions in such areas as defence, national security and international relations which are a Commonwealth domain.

But the key limiting feature of several exemptions in the Bill is the requirement that, in addition to establishing that a document falls into a protected category, an agency must demonstrate that non-disclosure is in the public interest.

The Bill applies to the documents of all State Government agencies. Furthermore the Government intends to apply the principle of freedom of information to local government records by separate legislation to be introduced in 1983. The Bill gives applicants who have been denied access a right of appeal to a County Court judge.

The proposed Bill goes significantly further than the Commonwealth Act in relation to retrospective access. It sets down no limit on access to personal records, and in relation to other records permits access to them if they were brought into existence within five years prior to the date of commencement.

If the proposed Bill is enacted substantially in its present form, Victorians will have a right to access to State Government records much broader than that which applies to Federal Government records.

SUMMARY OF THE MAIN FEATURES OF THE COMMONWEALTH FREEDOM OF INFORMATION ACT 1982:

RIGHT OF ACCESS

The individual's right of access to government information is expressed in these terms:

> Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to -
> (a) a document of an agency, other than an exempt document; or
> (b) an official document of a Minister, other than an exempt document. **(s11)**

The key terms, "agency", "document", "document of an agency", "exempt document" and "official document of a Minister" are defined by the legislation **(s4(1))**. Of these, the critical term is "document". It is defined as including:

> any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, plan, photograph, article or thing, but does not include library material maintained for reference purposes. **(s4(1))**

Separate provision is made for permitting access to computer-stored material by means of print-out or similar means **(s17)**.

EXEMPTIONS FROM ACCESS

A wide range of documents are the subject of exemption: documents affecting national security, defence, international relations and relations with the States; Cabinet documents; Executive Council documents; internal working documents; documents affecting the enforcement of the law and public safety; documents to which secrecy provisions of enactments apply; documents affecting financial or property interests of the Commonwealth; documents concerning certain operations of agencies; documents affecting personal privacy; documents affecting legal proceedings or subject to legal professional privilege; documents relating to business affairs; documents affecting national economy; documents containing material obtained in confidence; documents disclosure of which would be contempt of Parliament or contempt of court; privileged documents; and certain documents arising out of companies and securities legislation **(Part IV, s32(f))**.

An agency is not bound to refuse

disclosure of a document which falls within an exempt category; the exemptions are permissive. Nonetheless the sheer number and range of exemptions will produce considerable conflict over their interpretation and application.

REVIEW OF DENIALS OF ACCESS

Administrative Appeals Tribunal In the case of all but four categories of exemption, an individual denied access may apply for review of the denial to the Administrative Appeals Tribunal which may overrule the decision of the Minister or agency concerned (**s58(1)**). The four categories to which this right of review does not apply are, in the view of many, the most significant documents affecting national security, defence, international relations and relations with the States; Cabinet documents; Executive Council documents; and internal working documents.

In earlier drafts of the legislation, the Government had steadfastly refused to permit any form of review. However, the Government ultimately relented to the extent of enabling applications for review of denials of access in these areas to be referred to a Document Review Tribunal (**s58(4)** and **(5)**).

Document Review Tribunal The Tribunal is to be constituted by one or three members of the statute of a Supreme Court judge or equivalent, the number of members being determined according to the public importance of the question referred to it (**s81**).

In the case of application for review of decisions under the first three categories, the Document Review Tribunal's jurisdiction is limited to considering the question whether the Minister or public servant empowered to issue certificates that a document falls within one of these categories had reasonable grounds for that claim (**s58(4)**).

In the case of applications relating to the fourth category, internal working documents, the Tribunal's function is to consider the question whether there was reasonable grounds for the decision that disclosure would be contrary to the public interest (**s58(5)**). (The AAT is entitled to consider the other question arising under this category of exemption - whether the document is properly classifiable as an internal working document.) The findings of the Document Review Tribunal on these questions are merely advisory. It is left to the responsible Minister to decide whether to accept the Tribunal's opinion and revoke a certificate (**s67(3)**).

The Tribunal will normally sit in public. If it wishes to inspect the documents the subject of a claim for exemption, it may do so on a confidential basis (**s68**). This solution to the problem of reviewing denials of access to a number of classes of government information of a particularly sensitive character is, undoubtedly, an improvement on the previous approach.

It remains to be seen whether the mechanism of accountability to Parliament will work to reverse the decisions of Ministers who refuse to accept a Document Review Tribunal opinion that a claim is unreasonable. This approach falls far short of the robust United States position under which all claims to exemption (and their compass is considerably narrower than in Australia) may be overruled by the judiciary.

ACCESS TO PERSONAL DOCUMENTS

The combined effect of the general right of access and the exemption relating to personal privacy is, normally, to limit access to personal records held by government about an individual to that individual (**s41**, esp. **s4(2)**). This right is likely to be utilised by many members of the community, especially those who have been adversely treated in areas such as social security, repatriation and taxation.

In line with a number of overseas laws on access to personal data, the legislation makes detailed provision for a right to seek amendment of statements contained in personal records released to the subject

(**Part V, s48F**). Moreover, the subject is entitled to receive access to personal documents created up to five years before the commencement of the legislation (**s12(2)(a)**).

ACCESS MACHINERY

Requests for access to documents must be made in writing and provide such information as is reasonably necessary to enable the agency to identify the document sought. Requests must be dealt with as soon as possible with a maximum time limit of 60 days (**s19**).

Narrow grounds for deferring a response to a request for access are also provided (**s21**).

A document may be supplied in response to a request with exempt matter deleted provided that is practicable and the document as supplied would not be misleading (**s22**).

Information Access Offices will be established by agencies, and agencies will be required to give access to a document at the Information Access Office nearest to the residence of the applicant which has appropriate facilities to provide access in the form requested (**s28**).

Detailed provision is also made in relation to the levying of charges for access. The criteria governing the setting of charges seek to limit them to direct costs of providing access and confer a wide discretion on the agency to remit charges (**ss29, 30** and **94(2)**).

INDEXES, DIRECTORIES AND DEPARTMENTAL MANUALS

To make effective use of these rights, applicants need to have the means of identifying the location of information in which they may have an interest. This concern is addressed by provisions in the legislation which require agencies to publish indexes and directories outlining the contents of their information systems (**s8**).

Moreover, certain types of documents held in agencies must be periodically published and made available on request. These are documents used by an agency in making decisions or recommendations with respect to the rights, privileges or benefits of people under any scheme administered by an agency.

In particular, the legislation specifies manuals or other documents containing interpretation, rules, guidelines or precedents including precedents in the nature of letters of advice (**s9**). The importance of giving individuals a right of access to these basic documents in the administration of Commonwealth benefits cannot be overestimated.

TOTAL EXCLUSIONS FROM THE OPERATION OF THE LAW

In addition to the wide range of exemptions listed above and enjoyed by all Commonwealth agencies, a number of Commonwealth agencies are not subject to the legislation in any respect, while several have been given exemption in regard to certain special classes of documents. These total exclusions are set out in Schedules to the legislation.

Several of the exempt agencies are engaged in commercial operations, e.g. Australian National Airlines Commission, Commonwealth Banking Corporation. The rationale for their exclusion is that they would be placed at a significant disadvantage in their competition or dealings with private sector organisations in the same field if those organisations, themselves free of any duty to disclose information, were able to obtain valuable information through FOI machinery. Others are concerned with aboriginal self-management (the Aboriginal Land Councils and Land Trusts), labor relations (National Labor Consultative Council) and possibly of most interest, national security (Australian Secret Intelligence Service, Australian Security Intelligence Organisation, and Office of National Assessments).

Nineteen agencies have exemptions in respect of particular classes of documents. Most relate to documents in respect of the agency's competitive commercial activities.

Examples of other interests given protection are: the Australian Broadcasting Commission in relation to its program material; and the Department of Defence in relation to documents in respect of activities of the Defence Signals Directorate and the Joint Intelligence Organisation. These provisions and the retention of a large number of secrecy provisions in other Commonwealth legislation (these are currently under review) represent major inroads on the principle of freedom of information.

COMMENCEMENT AND ACCESS TO PRIOR DOCUMENTS

Despite criticism, the legislation sets no specific date for commencement. The Government has promised that the law will come into operation on 1 December 1982.

Furthermore, agencies are given an additional 12 months after commencement to comply with the requirements in relation to indexes, directories and manuals.

Most importantly, it will normally not be possible to obtain access to documents brought into existence prior to the commencement date (**s12(2)**). This rule is subject to two significant qualifications: personal records which came into existence not more than 5 years before the date of commencement must be released if requested (as noted earlier) and documents reasonably necessary to enable a proper understanding of the principal accessed must be released (**ss12(2)(a)** and **(b)**).

* This article is based on material originally published by the Legal Service Bulletin and by the Victorian Council of Social Service and is re-published with the kind permission of those organisations. Kevin O'Connor LL.M (Melb.), LL.M. (Illinois) is Secretary of the Victorian Council for Civil Liberties.

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- Prestel was the only Videotex technology developed to the point where a public commercial system was in operation.
- Telecom would maximise private enterprise involvement in the provision of Videotex. It was estimated that over 80 per cent of employment and earnings from Videotex would have been outside Telecom.
- Public ownership of the Videotex system would ensure a national service being established. It would avoid the potential for conflict of interest between commercial owners of a system and users and it would also encourage the partial use of the system for reasons based upon social need rather than strictly profit-potential considerations. Telecom proposed unit fee access to the central computer for subscribers wherever they resided."

"Telecom's proposal meant only a small amount of capital would need to be expended to commence commercial operation of the Videotex system. This was estimated in the first year to be less than $2 million out of total capital expenditure of around $1100 million. Telecom, therefore, proposed to provide a new communications service to the Australian community in a manner which maximised private enterprise involvement and also took account of the national interest."

"Telecom's submission was opposed by certain private interests. In particular, it was reported that the media giant, Publishing and Broadcasting Ltd, and the retailers, Myers, were lobbying for the Minister to reject Telecom's proposals. Both organisations are members of BTS."

"On October 16, 1981, Mr Sinclair announced that Telecom had been refused permission to provide a Videotex service."

"Two days prior to the Minister's announcement, the Publishing and Broadcasting representative in the United Kingdom had passed information to British Telecom (BT) to the

effect that Telecom was not going to be permitted to enter the Videotex market."

"This communication led to a telex inquiry from BT to Telecom Australia requesting a statement of the current position. When the telex was received Telex Australia had no knowledge of the Government decision and only later did Mr Sinclair inform Telecom Australia, the public enterprise he was responsible for, that its request to introduce a new service had been rejected."

"Despite criticisms of Telecom's exclusion from the Videotex area the Minister maintained his position. As a consequence, the team of technical and commercial specialists put together by Telecom had to be broken up and re-located on other functions - and the initiatives which Telecom had taken in establishing a marketing plan have been for nought."

"There have been other instances of Telecom attempting to expand its range of services. On a number of occasions these have been stopped by the Minister of the day, due to 'pressure' being applied from the private interests affected."

"If Telecom is not permitted to move into new growth areas and the long distance area is reduced in value and importance Telecom could essentially become a switcher, providing the expensive infrastructure for those with the financial ability to pay for a service."

"With the combination of political forces hostile to the public sector and profit-motivated private interests, the potential exists for a turnaway from the values of the past with their emphasis on social equity and universal service. Those most at risk in the changes which may come are lower-income earners and residents in localities where costs of delivering telecommunications are high. The broader issue of access to information will also be of concern. If the future delivery of information is to be based solely on ability to pay, rather than social needs, the divisions within our society will grow larger."

"The example of Videotex is relevant as an illustration of the approach of a public service compared to a private provider."

"In the Telecom 2000 report it was suggested that Telecom should:

> 'Plan the introduction of new types of telecommunications services in ways that will support social equity, so that the distribution of telecommunications services does not worsen the position of deprived segments within society, reinforcing the power of the information elite.'"

"Do we believe that the brave new world of competition in telecommunications will put forward similar objectives and values?"

"The telecommunications system is in a period of transition. The questions remain whether it will be able to service the needs of the community for a cheap, reliable modern and universal service: this has been the record of performance in the past."

"Any major change along the lines proposed by the BTS group can only weaken its ability to do so in the future", Mr Mansfield concluded.

Correction

As readers will be aware, Communications Law Bulletin Vol 2 No 3 contained only a summary of the Australian Broadcasting Tribunal's Recommendations on Cable TV. Lack of space precluded a summary of the Recommendations of RSTV (Recommendations 40-76), which appear at ps34-44 of Vol I of the Tribunal's Report. The Report has now been published.

The ABC's Special Responsibility

"The ABC's special responsibility is to persuade those who do not think of themselves as wanting to extend their interests - or as being capable of doing so - that they too can enjoy the best, that is to say the programs which have a claim to permanence, as well as those which are ephemeral", Professor Leonie Kramer said recently.

The Commission's Chairman made this comment in an address, "The ABC: Survival Into the '80s", to ACLA in Melbourne on Friday, 25 June 1982. Here is an edited version of that talk:

Not long after the birth of the ABC, A.D. Hope in his poem "Australia", described Australians as "the ultimate men"

> Whose boast is not: 'We live', but 'we survive'
> A type who will inhabit the dying earth.

The distinction between survival and living is worth pondering, as is the fact that my title refers to the former and not the latter. Though I did not invent the form of words in the title, I agreed to it because it seems to represent a not uncommon sentiment about the ABC's present and possible future situation. It proposes an organisation under threat; it suggests a struggle for mere existence and an uncertain future.

Some simple facts, and some well publicised assertions, have encouraged these gloomy speculations.

Physical conditions, especially in Sydney and Melbourne, fragment the ABC's operations. In both cities 'The ABC' is in fact many ABC cells. If one worked in any one of these, it would take a quite exceptional blend of faith and imagination to develop a sense of a total organisation, working with a common purpose as a national broadcasting service.

The Government has shown that it is now aware of and sympathetic to these problems, and anxious to find solutions to them. We have survived with them, and now look forward to living without them. To the facts I've summarised, the Dix Committee added assertions about the ABC's decline, its unresponsiveness to change, its sluggishness, its poor morale, and so on. I have frequently questioned these assertions, because they are sweeping, undocumented, and themselves based upon assumptions about the nature and meaning of change which should not go unchallenged.

One factor which defines the difference between survival and living is the level of funds made available to the ABC. On this matter there seems to me to be considerable misunderstanding. Since the abolition of licence fees in 1973, the ABC has been totally dependent upon annual government allocations for its income. Alone of the national broadcasting systems in the English-speaking world, the ABC has no other source of funds. The BBC, BCNZ, SABC and CBC are funded by, in varying proportions, licence fees, advertising and merchandising.

NHK is unique in being funded (to the extent of 98% of its income) by licence fees, and is thus independent of both government and commercial interests.

And even these organisations are concerned at the widening gap between the level of resources and costs, especially the costs of television.

It therefore seems to me unlikely that any government will be able, in

the immediate future, to fund the ABC to a level at which it can make high quality large-scale TV programs as a regular part of its output. It will have to continue to make co-financing and co-production arrangements, and, I would hope, attract corporate underwriting.

So far I have been talking about the mechanics of survival. Our mechanical ingenuity might well enable us to survive, but will not justify our survival. So I suggest that we need to ask the question 'Why should the ABC survive?' - or, to put it even more bluntly, 'Does the ABC deserve to survive?'

Early this year, Robert J. Chitester, president of a public TV station in Pennsylvania wrote an article in the New York Times on 'Public TV without Government Funding'.

I was struck by one point he made. "What public television must do is make appealing and therefore popular the more complex forms of artistic endeavour and intellectual inquiry." Underlying this statement is an implicit position about the duty of public television, and a concept of audience. Both repay exploration, as does the connection between broadcasting output and its audience.

The ABC is the victim of myth-making. To some it is Aunty, who is presumably not as young as she used to be, but essentially a benign figure. Her dress might be a little unfashionable, but she is well-meaning, kindly, perhaps somewhat staid.

How does one interpret this metaphor? At one level it is simply an expression of attachment to the familiar; at another a comment on the ABC's commitment to certain standards of broadcasting and a relatively benign criticism of its supposed failure to keep up with the times. Those who think of the ABC as Aunty represent, I would suggest, that section of the audience which is likely to resist radical changes in programming.

On the whole, audiences are conservative, in the sense that they become accustomed to certain kinds of programs and to particular time slots. Listening and viewing are habits and any disturbance to them can create a reaction quite disproportionate to the nature of the change. I am not critical of audience habits; on the contrary, I think that the ABC must be sensitive to them, for they reflect the stable needs of our audience. Reasonable notice should be given of major changes, so that listeners and viewers can adjust to the idea of difference in advance. None of us would like to find the whole house rearranged each night when we arrived home from work.

Other sections of the audience have different expectations. The ABC, they will say, should be the instrument of change; it should be provocative, daring, radical and controversial. It should be a critic of society, a detonator of old mythologies, an uncomfortable and discomfiting conscience, reminding public and political figures of their duties and sniffing out their shortcomings.

This set of attitudes also represents a legitimate cluster of expectations. For it is the business of the ABC to be searching in its examination of ideas, constructively critical in its analysis of the problems of the day and public issues, and adventurous and inventive in its programming.

The ABC should, however, have a view of itself which, starting from its legal responsibilities under the Act, recognises the need to balance, as far as is possible, its duty to provide for the relatively stable and continuing needs of its audience, and its equal duty to be a step ahead, not so much of its competitors, as of orthodox thinking about both the possible subject matter and methods of programming. This means it should constantly be looking for new ideas, thinking of new programs to make and inventing new ways of presenting them.

Perhaps because broadcasting is relatively new, it is not yet absolutely clear that it is an art.

Certainly, because its output is ephemeral, it seems to be disqualified from the kind of permanence we associate with painting, literature, music and other arts. The products of broadcasting are rarely recalled.

In fact, the ABC should, as part of its output, make programs whose immediate appeal might be small, but which will, in time, become part of a repertoire of memorable contributions to the art of broadcasting.

This brings me back to Robert Chitester and I appropriate his words in order to say that the ABC should, in addition to all its other activities in news, entertainment, sport and so on, "make appealing and therefore popular the more complex forms of artistic endeavour and intellectual inquiry".

The ABC cannot make this attempt if it is constrained by any simple notion of its audience. There is a real sense in which an audience is a fiction. It does not exist; it has to be created.

Program makers, like teachers, must constantly be devising new ways of making the arts and ideas comprehensible, accessible, and exciting, thereby enlarging the audience, however slowly.

The ABC's formal contributions to education are a significant part of its endeavour; but its contribution through its general programming might well, in the end, be even more valuable.

In the '80s and towards 2,000, it seems to me that the ABC has more, not less, to do; and that we should be therefore talking not of whether we survive, but of why we are indispensable.

If people will work even shorter hours, and more might, by choice or necessity, not work at all, there will be an urgent need for the ABC to expand its efforts to provide a diversity of programs to assist people to enjoy their leisure time, and to provide nourishment for the mind and imagination. It must ignore the dismal prophecies of those who think that it has lost its way and the criticism of those who talk about mass entertainment with that peculiar brand of insensitivity which seems to afflict the disciples of populism.

Chitester remarks that "The same need attracts viewers to soap opera and patrons to the Met". That seems to me to be misconception of an important idea. It would be much nearer the truth to say that the same people can be attracted to serious programs and to light entertainment and frequently are. There is no need to worry about people who range over the whole spectrum of entertainment, choosing according to mood and inclination.

The ABC's special responsibility is to persuade those who do not think of themselves as wanting to extend their interests, or as being capable of doing so, that they too can enjoy the best, that is to say the programs which have a claim to permanence, as well as those which are ephemeral.

If one has this concept of an audience, then the standard argument about ratings is very thin indeed. For it attaches importance only to numbers, not to active engagement; it addresses 'the mass' whose interests are assumed, not the individuals whose interests can be cultivated.

The ABC is not 'elitist' (whatever you take that to mean); it is interested in quality. It does not talk about mass audiences, because it knows its audience is composed of individuals. There is a great difference between the drive for mass appeal and the recognition of common interests. It is the difference between prescription and the provision of opportunities.

The ABC moves into the '80s with a will to live, because in its efforts to effect a balance between the expected and the unexpected, the light and the serious, the ephemeral and the permanent, it has the whole of man's intellectual history on its side.

Plan on Court Reporting Backfires

The press was quick to pounce on a Bill relating to law reporting which was recently introduced by the Victorian Government. The Bill was read for a first time in the Legislative Assembly in June and sought to amend the Council of Law Reporting in Victoria Act 1967.

Law reporting in Victoria is controlled by the Council of Law Reporting, a body which consists of the Attorney-General, a Supreme Court judge, the Solicitor-General, the Librarian of the Supreme Court, two solicitors and two barristers. The Council supervises the publication of judicial decisions in all Victorian courts and any person seeking to public reports of such, or commence a new series of law reports must first obtain the Council's consent.

Under s10(3) of the Act, it is not lawful "for any person firm or company other than the Council to commence the publication of or to publish a new series of reports of any court in Victoria ... except with the consent of the Council".

The amendment sought to delete the words "publication of or to publish a new series of", inserting instead "publication or to publish the whole **or any part of any**" (emphasis added).

Various newspapers and news magazines interpreted this change to mean that the media would need to obtain the Council's permission to report on judicial proceedings. In an editorial entitled "Intolerable Attack on Freedom of the Press", the **Australian** described the Bill as "a serious threat to the fundamental right of the press to report on the courts and to the people's right to know what the courts are deciding".**(1)** The **Bulletin** dubbed it "draconian".**(2)** In Brisbane, the **Courier Mail** saw it as "an undemocratic attempt to suppress the dissemination of information flowing from publicly funded courts".**(3)**

This curious over-reaction from the news media clouded the real controversy over the Bill's stated aims. The thrust of the amendment was to extend the meaning of "public" and "publication" in s10 so as to include the introduction of any material into a computerised data bank. The Victorian Attorney-General and Premier, John Cain, said that the aim of the Bill was to pave the way for the introduction of a computerised legal information system, adding "it was never intended to affect media publication of the courts".**(4)** The nett effect of the changes would have been a Council monopoly on all forms of court reporting in Victoria, including reports from courts exercising federal jurisdiction. Considering the evidently poor drafting, the Bill was remitted to the Solicitor-General's office in early August for reconsideration.

On 11 September, **Business Review Weekly** reported that intense lobbying from the CCH publishing group, coupled with pressure from the Federal Attorney-General's office, had resulted in the Bill being withdrawn altogether. CCH, a leading publisher of taxation, family and company law reports, was understandably concerned at the effect the amendments would have had on its extensive loose-leaf reporting services. At the company's bidding, hundreds of CCH subscribers wrote to Cain and the CLRV in protect over the proposed changes. The failure of the Bill will doubtless be seen as a victory for private enterprise in the face of a government attempt to monopolise law reporting in Victoria. More importantly, it should serve as a warning to the Cain Government in relation to sloppy legislative drafting.

* The Bill was finally amended to exempt newspapers and other periodicals, radio and television. It was passed and came into force on 21 September.

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1. Australian, 31.7.82
2. Bulletin, 14.9.82
3. Courier Mail, 6.9.82
4. Australian, 2.8.82