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Communications LAW B•U•L•L•E•T•I•N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED

Print Post Approved PP: 234093/00011 EDITED BY NIRANJAN ARASARATNAM AND SHANE BARBER Vol 21 No 4 2002

The Role of Media Satire in Australia and its Relation to Defamation Law

Paul Satouris, winner of the 2002 CAMLA essay competition, discusses the potential dangers of regulating the use of satire.

"Everything is funny as long as it is happening to someone else"

Will Rogers

Society has defined satire as a composition in which vice, folly or a foolish person is held up to ridicule[1]. However, as modern law has evolved, the concept of ridicule has been developed into a legal defence, as a subsection of defamation law. Consequently, the question must be asked: has society indeed lost its sense of humour? The concept of freedom of speech, which is so prevalent in US society, as emblematised in their Bill of Rights, lacks validity in Australia, as it is only an implied freedom in our constitution. As such, careful consideration must be given to how suitable the judiciary is as an authority of social values, and furthermore, how essential humour is in modern society. Satire is just one method of expression, and to limit its usage would be to limit the rights of society to make comments on community issues. As George Orwell has stated, "*if liberty means anything at all, it means the right to tell people what they do not want to hear*".

Satire has encountered many difficulties in our current legal environment as it juxtaposes the deeply entrenched legal concept of defamation. The basic comedic notion behind satire is by exaggerating fact or rumour and consequently placing the object or situation up to ridicule in a parodic or humorous way. However, there has been a great disparity in the law internationally with regard to where satire becomes ridicule. In Australia, a cartoon captioned 'News Flash'[2], which featured Anne Fulwood seated naked from the waist down at a news desk was withdrawn from publication in 1993 when defamation action was threatened. The publisher, *Australian Penthouse,* also publicly apologised to the newsreader for the cartoon's offensive treatment of her, and consented to a court order, which directed that the originals of the cartoon be handed over to her. This stands in stark contrast to recent rulings in the US. For example, *Hustler Magazine* printed a satirical cartoon depicting the Reverend Jerry Falwell as a drunk who indulged in sexual relations with his mother in an outhouse. Reverend Falwell's attempt to retract the cartoon under defamation law failed in Court, as the trial judge believed that the most "precious privilege" of a democracy was "open political debate"[3]. The trial judge went further and said:

> *"Satire is particularly well suited for social criticism because it tears down facades, deflates stuffed shirts and unmasks hypocrisy by cutting through the constraints imposed by pomp and ceremony, it is a form of irrelevance as welcome as fresh air...Nothing is more thoroughly democratic than to have the high and mighty lampooned and spoofed."*

The contrast in US and Australian rulings with regard to satire is based principally in the absence of an Australian Bill of Rights. There are no general rights of freedom of speech in Australia; rather, the common law has identified an implied guarantee of freedom of political communication. Thus it can be seen that freedom of speech is also qualified as it does not include commercial speech or satire, but is based purely on political or government matters. This lack of an articulated freedom of expression restricts the exercise of parliamentary powers to curtail the freedom of political communication. It can also be argued that

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this power to comment on politics is limited, as seen in the Pauline Pantsdown case[4], where a controversial political figure and her policies were parodied, and ruled to be defamatory. Australia's lack of a constitutional right to free speech is a subject that is recognised by Article 19 of the International Covenant on Civil and Political Rights. As Ronald Dworkin said, *"Freedom of Speech...is the core of the choice modern democracies have made"*[5]. By Australia not embracing this fundamental freedom, it diminishes the efficacy of our democracy.

The overarching polemic faced by legal observers, is whether the judiciary is a suitable measure by which societal values are upheld. This problem is exacerbated by the incongruence of international ideals of democracy and free speech, and recent rulings in defamation in Australia. In *Morosi v Mirror Newspapers Ltd*[6], the NSW Court of Appeal held that a cartoon published in the *Daily Telegraph* early in 1975 insinuated that there was a politically embarrassing romantic attachment between the then Federal Treasurer and his secretary. The Court held that such an allegation was capable of defaming the secretary. This precedent set in Australia is completely contradictory to international cases, which deal with common issues. For example in England, the case of *Charelston v News Group Newspapers Ltd*[7] considered the issue of whether obviously fake photos of two popular soap stars, whose heads had been superimposed onto porn star bodies, were defamatory. The fakery of the lewd photos was not concealed, with a warning that "Soap studs Harold and Madge's faces are

- continued implementation of the Government's $163 million package of rural communications measures in response to the *Besley Inquiry*, including: the $52 million National Communications Fund; $50.5 million for improved mobile coverage, $48 million Internet Assistance Program, and satellite handset subsidies;[9]

- roll-out of a satellite internet subsidy by Telstra, as part of the provision of untimed local calls in the most remote areas of the country ("the Extended Zones");[10]

- announcement of a $187 million upgrade by Telstra to rural networks;[11]

- announcement by Senator Alston of consideration of "future proofing" options for telecommunications services;[12]

- The Rural Telecommunications Inquiry (*Estens Inquiry*) – a three month inquiry into current and future rural telecommunications services that reported in November 2002. The report made generally positive findings about the state and future of rural telecommunications, and made detailed recommendations. The Government is expect to consider and respond to those recommendation in February 2003.[13]

For most of 2002 – at least beneath the public statements about rural services being "up to scratch" – the sale of Telstra seemed a key priority for the Government to progress as quickly as possible.

There were two key hurdles, though. First, gaining the agreement of the National Party, parts of which remained implacably opposed to the further sale. Second, was the need for Senate approval. Given the seemingly firm commitment of the Democrats and the Greens to oppose any further sale, approval would require the agreement of all of the four remaining other minor party/independent Senators, namely Senator Meg Less (Independent and former Democrat), Senator Len Harris (One Nation), Senator Shayne Murphy (Independent and former ALP), Senator Brian Harradine (Independent).

As 2002 progressed, the prospect of gaining support of all four Senators seemed increasingly remote. The Report of the *Estens Inquiry* in November 2002, whilst finding improvements in services, made a number of recommendations requiring specific response and action by the Government. Until that was well in train, it was unlikely that that National Party would accept that services were "up to scratch". At the same time, the Telstra share price continued to languish.

It was in that context that in late November 2002 the Government indicated its intention to defer the sale of Telstra beyond 2003. It justified this on the basis that the Government was unlikely to obtain the proper return from a sale in the near term, given the Telstra share price.

The Government gave signals, however, that Cabinet would still proceed to consider the introduction of legislation authorising the sale in the short term, and the Government would seek the passage of that legislation. The Government would then be free to determine the timing of the actual sale following passage of the legislation.

Should legislation be introduced in 2003 the fact that the Government has put off the actual sale means that the temperature of the public and political debate may be lower, and the stakes not as high for the Government. If the legislation is rejected by the Senate, it has the potential to create a double dissolution trigger.

Labor's continued and strident opposition to the further sale of Telstra has been a key differentiating point for the Opposition. The Shadow Minister for Communications, Lindsay Tanner, broadened the Telstra debate from the Opposition perspective by issuing a discussion paper in May 2002 "Reforming Telstra" which examined Telstra's structure, and options for separation of Telstra. Separation (beyond the accounting separation framework contained in the Bill discussed above) was opposed by the Government.

It was curious then that later in the year (December 2002), Senator Alston commissioned an inquiry by the House of Representatives Standing Committee on Communications Information Technology and the Arts into the very topic of structural separation. The Committee was asked to examine the impact of structurally separating Telstra's core network from its core businesses, and reducing the Commonwealth's current shareholding in Telstra's non-network businesses.

It seems that the Minister's strategy was an attempt to embarrass or "tease" the Opposition by giving it the platform to raise the issue, on the basis that the inquiry would not illicit a groundswell of opinion in favour of structural separation, and that the Committee would ultimately oppose structural separation.

It was originally planned that the inquiry would last through most of 2003. This was a risky strategy given the Government's hope to introduce sale legislation as soon as possible. The two would potentially cut across each other. The Government seemed to subsequently recognise this in truncating the inquiry and requiring it to report in March 2003.

1 *Trade Practices Act Amendment (Telecommunications) Bill 2001.*

2 Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Telecommunications Regime to be Made More Competitive, 24 April 2002.

3 Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "No Government Plans for Telstra Structural Separation", 22 April 2002.

4 Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Consumers to Benefit From Telstra Price Caps", 24 April 2002.

5 Media Release, Lindsay Tanner, Shadow Minister for Communications, " Labor Moves to Stop Telstra Price Grab", 17 September 2002.

6 The Howard Government Telecommunications Policy Statement, November 2001.

7 Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Groundbreaking Network Reliability Framework", 16 July 2002.

8 Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Telephone Service Guarantees for all Australians", 27 July 2002.

9 See, e.g. Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Federal Government Satellite Handset Subsidy Plus Progress Report on TSI initiatives", 21 May 2002.

10 See e.g. Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "2-way Satellite Internet Offer for Remote Areas", 28 June 2002.

11 Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Telstra Network Upgrade Funding a Bonus for Rural Australia", 1 July 2002.

12 Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Future-Proofing of Telecommunications Services in Regional Australia", 12 July 2002.

13 See e.g. Media Release, Senator Richard Alston, Minister for Communications, Information Technology & the Arts, "Report of the Regional Telecommunications Inquiry, 13 November 2002.

The views expressed in this article are those of the author and not necessarily those of Optus.

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to the previous low usage rebate scheme that potentially advantaged high earners with holiday homes or whose home fixed line use was limited due to use of work mobiles.

The most politically controversial part of the reforms was allowing Telstra to "rebalance", and thus significantly increase line rental. This possibly explains why the Government chose to roll-over the existing price cap regime for another year in mid-2001, rather make these changes in the lead up to the December 2001 election.

Relaxation of the price cap was advocated by Telstra, its competitors, as well as – in principle – by the ACCC.

Telstra's ability to re-balance has benefits not just for Telstra, but for the competitive environment generally. This is because of the distortionary impact on the competitive market caused by the arrangements. The difference between what Telstra should charge for line rental, and what it actually charges as a result of the price cap regime, is known as the "access deficit". The ACCC requires other carriers to compensate Telstra for this access deficit. This is achieved by other carriers paying to Telstra an "access deficit contribution" (ADC) as a component of interconnect payments to Telstra. The ADC can be in the order of 30% of interconnect costs.

A sensitive component in the price caps regime is the amount by which Telstra is required to reduce its prices across the relevant basket of services. The amount of the annual reduction, after taking into account CPI, is known as the "x" factor. As indicated above, x in the case of the recent reforms is 4.5%.

Because Telstra can choose how to apply the reductions across the basket of services, its incentive is to cut prices most in more competitive markets, eg STD and IDD, and less so in less competitive markets such as local calls. If the x factor is too high, then there is the potential for Telstra to price below cost in these more competitive markets. This has the potential to drive competitors from the market, with a harmful impact on competition.

The Government's decision to impose an x factor of 4.5%, together with the exclusion of mobile calls from the basket, means that the new regime does not compel such sharp price reductions as the previous regime did. In other words, the Government has struck a somewhat different balance between imposing a degree of pricing discipline, and not distorting the competitive environment, than under the previous regime.

The Government accepted the view of the ACCC, and arguments by mobiles operators, that mobile services should be removed from the basket because the market was sufficiently competitive. Maintaining mobiles in the basket would have provided greater opportunity for Telstra to meet the price cap by reducing mobile prices. Such pricing is likely to have been driven by the market in any event, at the expense of reductions in less competitive services.

Perhaps the key component to gaining Government acceptance for the reforms was the development of the low income package that accompanied the reforms. Importantly, the Government and Telstra had worked with welfare groups in developing the package, and obtained their public endorsement to the total package of measures.

Notwithstanding support by welfare groups, following the Government's announcement in April 2002, the Opposition criticised the Government as failing to offer assistance for many whose line rental cost would increase to over $30 per month. However, at this point the Opposition gave no indication of its intention to take action with respect to the increases.

As the Government's decision was not implemented via legislation, but by subordinate legislation, any Parliamentary consideration of the proposal would need to occur by way of a motion of disallowance of the regulation in either House.

In September 2002, the Opposition announced its intention to introduce a disallowance motion into the Senate.[5] This was on the basis of Telstra's subsequent line rental increases which the Opposition claimed were not appropriately offset by call reductions. The Opposition were also critical of the exclusion of mobile services from the basket. There was speculation that Opposition were initiating the disallowance motion as part of their strategy in the lead up to the Cunningham by-election to be held on 19 October 2002.

A successful disallowance motion would have resulted in the previous regime being reinstated until 30 June 2003. Thereafter it would have been for the Government to implement a new regime. Senator Alston threatened that if the Opposition were successful, there might be no price cap regime in place from mid-2003.

In the result, the Democrats were persuaded that the new arrangements delivered a net benefit – approximately $115 million per annum – to consumers. They opposed the disallowance motion, but in doing so extracted from Telstra a $10 million expansion to the $150 million low income package. As numbers in the Senate meant that the Democrats' support for the motion was essential, the disallowance motion failed, and the Government's reforms remain in place.

POTENTIAL SALE OF TELSTRA AND RURAL COMMUNICATIONS

Recent policy in telecommunications needs to be seen in light of the Government's goal of the full sale of Telstra.

The Government's stated position has been that it will "not proceed with any further sale of Telstra until it is fully satisfied that arrangements are in place to deliver adequate services to all Australians."[6] In other words, the sale is not to proceed until rural, regional and remote communications services are – to use the Prime Minister's vernacular – "up to scratch".

Throughout 2002 telecommunications policy was focused on creating the environment to establish that non-metropolitan services were "up to scratch". There were also a raft of announcements and initiatives to create a "belts and braces" approach to consumer and competition regulation to enable the Government to assert that protections are in place, irrespective of the ownership status of Telstra.

In relation to the latter, initiatives throughout 2002 included:

- changes to the competition regulatory regime with the passage of the *Telecommunications Competition Bill 2002* including imposing an accounting separation regime on Telstra (see discussion above);
- establishment of a Network Reliability Framework (NRF) on Telstra;[7]
- announcement that the Customer Services Guarantee would continue to apply to all services providers (contrary to a recommendation of the *Besley Inquiry* that it should only apply to Telstra).[8]

In relation to rural communications, initiatives throughout 2002 included:

added to porn actors' bodies". Consequently this item was not defamatory as the ridiculous nature of the photo, coupled with the warning, were palpable. Satire is one method by which the public can make comment on issues and circumstances – to limit free speech in Australia is to deprive the nation of a powerful medium by which individuals can express themselves.

Finally, satirical humour is an integral component of society, as it allows humour to be integrated into less comic situations. Lewis has stated:

> *"The limit of what is permissible in the way of cartoons and satire are undefined. Words obviously intended only as a joke are not actionable...but serious imputations of fact lying behind the superficially jocular may well be".*

Unfortunately, common law has failed to appreciate this divide, which consequently has diminished the validity of the law in this regard. In other nations such as the US, satire has been allowed to develop, shielded by the First Amendment. It has evolved to a medium, which can convey societal issues into a lower-brow context, while still being inherently intelligent. As Tony Fitzgerald states:

> *"Satirical humour uniquely combines laughter with information and criticism, enlightens facts and ideas, and encourages iconoclasm in preference to reverence and acquiescence"*[8].

Freedom of speech is an integral part of the democratic system of government that all western nations have embraced over the past century. The law of defamation has been inconsistently applied around Australia, and consequently is inherently flawed in its application; in some parts of the country it is codified, in others it is a fusion of statute and common law. The difficulties surrounding defamation law are indicative of their inapplicability to modern societal notions of free speech. Satire is just one medium by which society can express itself and make comment on events, people and circumstances. To regulate satire, is to dictate what can and cannot be discussed by society. As Jim Morrison once stated, *"Whoever controls the media, controls the mind"*.

1 *Collins Gem English Dictionary, 1982*

2 *Sydney Morning Herald*, 19 May 1993

3 Wilkinson J in *Falwell v Flynt*, 805 F2d 484 at 487

4 *ABC v Pauline Hanson* (Unreported, 28 September 1998, Supreme Court of QLD, Court of Appeal)

5 Dworkin, "Liberty and Pornography", *New York Review of Books*, 38:14 (August 15 1991)

6 [1977] 2 NSWLR 749

7 [1995] 2 AC 65

8 Justice Tony Fitzgerald, *Telling the Truth, Laughing*, Communications Law Centre, Sydney 1998

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Dow Jones v Gutnick – Certainty For Australian Defamation Law but Uncertainty For International Publishers and Content Providers

Catherine Dickson and Aaron Timms examine this recent headline grabbing case.

While the recent unanimous decision of the Australian High Court *in Dow Jones v Gutnick*[1] follows defamation authority in Australia, it highlights the fact that activity on the Internet is answerable to national laws around the world. It also raises questions regarding the current trends in international law in Australia and elsewhere.

BACKGROUND

Joseph Gutnick sued Dow Jones & Co Inc[2] in Victoria in respect of an article, "Unholy Gains", published in the October 2000 edition of *Barron's* magazine (both hard copy and online).

Dow Jones sought a stay of the Victorian proceedings, or for the service of process to be set aside, partly on the ground that publication (a key element in proving defamation) took place in New Jersey upon "uploading" and therefore the Supreme Court of Victoria had no jurisdiction to hear the case. Gutnick argued that publication occurs when the defamatory material is made comprehensible to a third party, by being displayed on the subscriber's computer screen, i.e. on "downloading".

The High Court dismissed the appeal against the August 2001 interlocutory decision of Justice Hedigan of the Supreme Court of Victoria regarding the request for a stay of proceedings. It found that the Supreme Court of Victoria had jurisdiction to hear the case, even though Dow Jones uploaded the internet publication onto its web server in New Jersey.

The Court unanimously concluded that the trial judge was correct in finding that the tort of defamation in Australia is actionable where the publication is seen or heard and comprehended by the reader or hearer. The Court found that since the article was downloaded in Victoria, publication had taken place there. Therefore the Victorian Court was able to exercise jurisdiction. We now examine some of the issues raised by such a finding.

JURISDICTION, CHOICE OF LAW AND THE DOCTRINE OF FORUM NON CONVENIENS

The decision of the Court, as well as the interrelation between the issues of juisdiction, choice of law, and *forum non conveniens*, is summarised in the judgment of Kirby J:

> *"If Victoria is identified as the place of the tort, that finding would provide a strong foundation to support the jurisdiction of the Supreme Court of Victoria; and to sustain a conclusion that the law to be applied in the proceedings, as framed, is the law of Victoria. These conclusions would, in*

is that the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is in legal efect, one publication which gives rise to one cause of action and that the applicable statute of limitations runs from the date of that publication. In contrast, common law views every publication as a separate tort.

After examining the single publication argument and the context of how the rule came to be law in 27 of the States of America, the Majority was of the view that applying the rule in Australian law is problematic because *"what began as a term describing a rule that all causes of action for widely circulated defamation should be litigated in one trial....came to be understood as affecting, even determining, the choice of law to be applied in deciding the action"*.[28] Australian law has separate principles, one dealing with prevention of multiple suits and choice of law principles to deal with which law should be applied. Notwithstanding that the single publication rule is influential in the US, it was rejected by the Hight Court as it does not fit with defamation law as developed in Australia.

WIDELY DISSEMINATED PUBLICATIONS - POTENTIAL FOR DEVELOPMENT OF THE LAW

The Majority does canvass the problems in applying their decision where damage to reputation is suffered in numerous jurisdictions. They consider that where there is an injury to reputation said to have occurred as a result of publication in a number of different places, then it may be necessary to distinguish between cases where the complaint is confined to Australian publication as opposed to cases where publication is alleged to have occurred both in and outside Australia.

The first issue they canvass is that the forum may well be considered as clearly inappropriate (as discussed above) and the litigation vexatious if more than one action is brought.

Secondly, they suggest that where the publisher's conduct has occurred outside the forum then there may be a need for development of common law defences to defamation to recognise where a publisher has acted reasonably before publishing the material that is subject to complaint. This development of the common law they suggest, has a precedent in the development of the defence of innocent dissemination.

However the view of the Majority is that three natural limitations to liability for internet publishers should be considered and balanced before embarking on further development of the common law defences to defamation. The Majority considers that these are natural limitations to what at first seems to be unrestricted liability for Internet publishers. They are:

- due weight should be given to the fact that substantial damages will only be available where the plaintiff has a reputation in the place of publication;
- judgments must be enforceable in a place where the defendant has assets; and
- if the two considerations above do not limit the concerns of those publishing on the internet, identifying the person about whom the material is to be published will readily identify the defamation law to which the person may resort.

FORUM SHOPPING AND A GRAB FOR EXTRATERRITORIAL JURISDICTION

The natural limitations suggested above do not, in our view, realistically prevent plaintiffs from embarking on forum shopping in defamation cases, particularly as communications continue to improve and reputations extend all over the world. Further there is nothing in the decision that would encourage courts around the world to exercise restraint and discretion before exercising long-arm jurisdiction in international matters.

A practical consequence of the Court's unanimous decision that the proper law(s) of a defamation is the place(s) of publication, is that public figures could theoretically sue in all jurisdictions where they believe there is damage to their reputation. Of course they should consider the extent of enforceability of the decision, but the problem nevertheless is that there is no effective restraint on forum shopping and even plaintiffs suing concurrently in more than one jurisdiction.

Theoretically, under Australian defamation law a number of different suits are possible. However, the Majority and Gaudron J say that practically this will not occur. The common law favours the policy of the resolution of particular disputes by the bringing of a single action. They say that the policy can be applied to cases where a plaintiff complains about the publication of defamatory material to many people in many places. The policy can be given effect by applying principles preventing vexation by separate suits[29] or after judgment by applying principles of preclusion such as Anshun estoppel[30]. We acknowledge that the High Court must view this issue from an Australian context however we question whether this is enough in an international context given that common law principles do not govern the entire world.

The decision highlights the reality for internet (and other international) publishers. International publication means making a risk assessment when deciding on which laws to comply with, regarding a particular publication. This is of particular concern with the internet publications that can be made almost anywhere. Without some international agreement there is, and continues to be, considerable uncertainty regarding the law(s) that will apply to such publications.

Kirby J's View

Kirby J was the only judge to reflect on features of the internet that may require a new approach:

> *"Its basic lack of locality suggests the need for a formulation of new legal rules to address the absence of congruence between cyberspace and the boundaries and laws of any jurisdiction"*.[31]

In his view the advent of the internet has brought about a need to:

> *"adopt new principles, or to strengthen old ones in responding to questions of forum or choice of law that identify, by reference to the conduct that is to be influenced, the place that has the strongest connection with or is the best position to control or regulate such conduct"*[32].

He explicitly admits that there could be undesirable consequences of rendering a website owner potentially liable to poceedings in courts of every legal jurisdiction where the subject enjoys a reputation. He says that the publisher

Guidelines about the ACCC's powers to regulate anti-competitive conduct.	The ACCC is required to formulate guidelines for the exercise of its power to use Part A competition notices.[50]	The Bill requires the ACCC, within 12 months of the Bill's enactment, to address in those guidelines the appropriateness of issuing competition notices as opposed to using other powers contained in Parts XIB or XIC of the TPA.[51]
Telecommunications access codes.	The TPA empowers the ACCC to declare an industry body as the Telecommunications Access Forum (TAF).[52]	The Bill abolishes the TAF. The ACCC will have power to make telecommunications access codes.[53]
Exemption from standard access obligations.	The ACCC is able to exempt a specified class of carrier or CSP from the requirements of SAOs in relation to an active declared service.[54]	The ACCC will be able to exempt prospectively a specified class of carrier or CSP from the requirements of an SAO.[55]
Access undertakings.	Under Division 5 of Part XIC, approvals of access undertakings are only available for active declared services.	The Bill will enable the ACCC to accept an undertaking from existing and potential access providers, irrespective of whether the services have or will be declared or are in existence. Further, the Bill will create two types of undertakings: ordinary access undertakings and special access undertakings.
Ordering and provisioning	Implied but not explicitly stated that the requirements of an SAO include the ordering and provisioning of an active declared service.[56]	The Bill explicitly includes ordering and provisioning as an aspect of "technical and operational quality" for the purposes of an SAO[57] and allows for the regulations to specify an act or thing as ordering or provisioning.[58]
Review of competition decisions.	The TPS sets out the functions and powers of the ACT in relation to decisions of the ACCC.[59]	The Bill clarifies these powers. In particular, the amendment makes clear that the ACT has the power to substitute a decision where the ACCC has decided not to do something.
Competition notices and advisory notices etc.	The ACCC is not required to consult with an affected party prior to issuing a Part A competition notice.[60]	The ACCC will be required to consult with the affected party prior to issuing a Part A competition notice.[61] The Bill will also allow the ACCC to issue an advisory notice whether or not it has issued a Part A competition notice.[62]
Record-keeping rules and disclosure directions.	The ACCC can make record-keeping rules requiring carriers or CSPs to keep records as directed.[63]	The Bill empowers the Minister to direct the ACCC in relation to the exercise of its powers under s151BU and three further sections added by the Bill.[64] These three inserted sections (151BUDA, 151BUDB and 151BUDC) provide for public access to ministerially-directed reports and periodic reports at the ACCC's direction. The Bill would also allow for a person to request the ACCC to exercise its power under the existing ss151BUA, 151BUB and 151BUC in relation to a particular report or series of reports.[65] Also power to issue special Telstra directions and order ACCC analysis of reports.

Summary – Key Changes Under The Trade Practices Act

Description	Existing Provisions	New Provisions
Model terms and conditions relating to access to core services etc.	None	The ACCC will be required to publish non-binding conditions for access to "core" services. [32]
Merits review of final determinations.	The TPA allows a party to apply to ACT for merits review from a final determination of the ACCC.[33]	Merits review will be removed except in respect of exemption orders[34] and access undertakings.[35] Rights of judicial review will not be altered. Transitional provisions mean merits review retained for current arbitrations.
Duration of declarations.	No expiry date need be specified for "declared service" declarations under the relevant section.[36]	The ACCC will be required to specify an expiry date within 5 years of the declaration.[37] Extensions of this specified date not exceeding 5 years are possible following a public inquiry.[38] Enquiry to be held during the 12 months prior to the expiry of a declaration.
Revocation of declarations of minor importance.	The ACCC must hold a public inquiry before revoking a declaration and may only vary a delcaration where it is "of a minor nature".[39]	The ACCC will be able to revoke declarations in respect of services it considers "of minor importance" without holding a public inquiry.[40]
Service provider's reasonably anticipated requirements.	A service provider's requirements are ascertained by reference to the time the "dispute was notified".[41]	The relevant time becomes when the "access seeker made a request to the service under section 152AR.[42]
Costs of extending or enhancing the capability of a facility etc.	The ACCC can not make a determination which would require a party (other than the access seeker) to bear "some or all of the costs" of improving facilities.[43]	The Bill amends the relevant prohibition to "an unreasonable amount of the costs".[44]
Hindering the fulfilment of a standard obligation etc.	The TPA prohibits certain persons preventing or hindering access by a service provider where that access is in accordance with an SAO or a determination.[45] The Act also requires compliance with an SAO where there is a commercial relationship, and undertaking or a determination by the ACCC.[46]	The amendment contained in Part 7 emphasises the independent enforceability of SAOs from the existence and effect of any determinations by the ACCC or a commercial agreement.[47]
Backdating of final determinations.	The ACCC is able to backdate final determinations without reference to any guidelines for the exercise of this power.[48]	The ACCC will be required to publish guidelines regarding its power under s152DNA including the method the ACCC will use in the calculation of interest.[49]

may freeze publication or restrict access to content for people in countries like Australia. Yet, he also accepts that the nature of the internet is such that it is impossible to be completely sure that a particular geographic area on the earth's surface is isolated for accessing a particular website. There are also other ways that Australians can access US content, e.g. by using an American credit card.

However, in applying the Victorian Supreme Court Rules to the facts, Kirby J agrees that the Victorian Court has jurisdiction to hear the matter. He says that although this may seem to be "long-arm" and conflict with principles of public international law, the validity of the law was not challenged in the proceedings. Further legislation giving courts long-arm jurisdiction is becoming increasingly common around the world, following recent controversial assertions of jurisdiction in US legislation.[33]

Kirby J says that the advent of the internet suggests a need to "*adopt new principles, or to strengthen old ones, in reponding to questions of forum or choice of law that identify, by reference to the conduct that is to be influenced, the place that has the strongest connection with, or is in the best position to control or regulate, such conduct*".[34] He says that the disparities between different countries regarding their approach to the defamation balance (the balance between freedom of information and the right to reputation and privacy) necessitate the need for a clear, single, readily ascertainable choice of law rule.[35] He makes a call to courts throughout the world to "*address the immediate need to piece together gradually a coherent transnational law appropriate to the 'digital millennium'.... Simply to apply old rules, created on assumptions of geographical boundaries, would encourage an inappropriate and unusually ineffective grab for extra territorial jurisdiction*". [36]

CURRENT INTERNATIONAL INITIATIVES - THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAWS

It is submitted that if there was international agreement to adopt a choice of law procedure similar to Article 10 of the preliminary draft *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (**"Hague Convention"**) adopted by the Special

Commission of the Hague Conference on Private International Laws in 30 October 1999, then there would be far more certainty for Internet publishers regarding the law to be applied in a particular circumstance. However, ironically enough, those who have stymied the progress of the convention would now benefit from the certainty of the application of agreed principles similar to Article 10. For now it is undeniable that, at least under Australian law, the defamation laws in all jurisdictions can theoretically apply. The view put forward by such interests is that if the Hague Convention is widely adopted then it will cripple the internet:

> *"In a nutshell, it will strangle the internet with a suffocating blanket of overlapping jurisdictional claims, expose every web-page publisher to liabilities for libel, defamation and other speech offences from virtually any country, effectively strip internet service providers of protections from litigation over the content they carry".*[37]

Consequently agreement to the Hague Convention has been postponed to allow for further discussion regarding developments in the field of electronic commerce. Perhaps it is now worthwhile for internet interests to revisit these concerns.

If Article 10 is applied to the case of alleged international defamatory conduct then it would mean that a plaintiff could only bring an action in the courts of a State in which the injury arose and only to the extent that the defendant cannot establish that the person claimed to be responsible could not have reasonably foreseen that the act or omission could result in an injury of the same nature in that State.[38] There is also further protection for a defendant in Article 10.4:

> *"If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State."*

So, applying these rules, if a plaintiff has a worldwide reputation then he/she is more likely to sue in the jurisdiction of his or her habitual residence.

Australia, the USA and the UK are all members of the Hague Conference.

CONCLUSION

Defamation laws around the world balance the competing rights of freedom of information and protection of reputation. Different cultures will continue to have different values and priorities regarding this balance. Consequently, it is to some extent futile to attempt to impose one culture's values on another. The decision in *Dow Jones v Gutnick* is an illustration of this. No one approach to law is ultimately correct. While this decision brings into sharp focus the questionable practice of courts exercising a long-arm jurisdiction, it also highlights that an international agreement regarding jurisdiction and applicable law will at least give publishers, content providers and Internet users some certainty regarding the various laws that they will be answerable to.

1. Ibid. at paragraph 71. the US-based publisher of *Barron's Online* and *Barron's* magazine
2. Ibid. at paragraphs 45-48.
3. Ibid. at paragraphs 100-103.
4. Ibid. per Kirby J at paragraph 101.
5. Ibid. per Kirby J. at paragraph 145.
6. [2000] HCA 36.
7. Ibid. per Gleeson CJ. Gaudron, McHugh, Gummow and Hayne JJ at paragraph 35.
8. [1971] AC 458.
9. Ibid. per Lord Pearson at 468.
10. *Dow Jones & Company Inc. v Gutnick* [2002] HCA 56 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at paragraph 44.
11. Ibid.
12. Cheshire and North, *Private International Law*, 11th cd. (1987) at 450, cited by Kirby J. at paragraph 145.
13. *Distillers Co. (Biochemicals) Ltd v Thompson* [1971] AC 458.
14. Ibid para 43.
15. (1870) LR 5 CP 542.
16. *The Albaforth* [1984] 2 Lloyd's Rep. 91.
17. (1990) 171 CLR 538.
18. Ibid. per Mason CJ, Deane, Dawson and Gaudron JJ at 569.
19. [2002] HCA 10.
20. [1987] AC 460.
21. [2002] HCA 10
22. Ibid at para 64.
23. Ibid at para 39.
24. Ibid at para 39.
25. Ibid at para 198-199.
26. Ibid at par 35.
27. Ibid at para 36.
28. Part of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589
29. Ibid at para 113.
30. Ibid at para 114.
31. Ibid at para 101.
32. Ibid at para 114.
33. Ibid at para 117.
34. Ibid at para 119.
35. Quotation from James Love, director of Ralph Nader's Consumer Project on Technology in Washington DC in Australian Financial Review 5 July 2001 p53.
36. Article 10.1(b).

The views expressed in this article are those of the authors and not necessarily those of the firm or its clients.

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The Andrew Olle Lecture 2002 Delivered by Mr Lachlan Murdoch Sydney, October 18, 2002

Good Business: Great Journalism

Lachlan Murdoch, in this much discussed lecture, examines a range of issues confronting modern journalism.

Thank you for inviting me to address Australia's pre-eminent media event generously hosted by the ABC. It is a night that honours our industry at the same time honouring Andrew Olle, a great Australian journalist. I very much thank you for this opportunity.

Although I give the odd speech now and then, I've never actually given a lecture before, so I hope you'll bear with me.

In preparing for speeches I generally try to read over previous speakers' comments, to gain a sense of the type of speech you may be expecting. Reading Kerry Stokes' comments from last year was extremely poignant, as this lecture is once again held under a pall of terrible tragedy. Sadly, Kerry's speech could just as well be given again tonight, as we again find ourselves in all too familiar territory.

JOURNALISM IN TIMES OF CRISIS

Tonight, as we honour the memory of a great Australian journalist, it is also a timely occasion to mark the work of all our colleagues and friends who have strived under heart-breaking circumstances to inform their fellow Australians and in many instances, the rest of the world. After last week's bombing in Bali, so many of our journalists, photographers and camera crews are again working in extreme conditions and under incredible duress to piece together the harrowing story that unfolded on October 12. We sometimes forget that those we send to report for us from places like Bali feel the trauma and grief like everyone else. We forget that those working behind a camera, a recorder or notebook feel the pulse of humanity as we do.

The best of them feel that pulse more strongly.

It struck me when I heard *The Sydney Morning Herald's* Matthew Moore and *The Daily Telegraph's* Peter Lalor speaking to Sally on ABC radio earlier this week, their voices trembling.

Reporting in *The Tele* on Tuesday Peter went on to write:

> *"There are times when a pen and a notebook are inadequate shields against the world....Tomorrow I promise I will be hard-nosed, today I have to grieve with all these people. My people... "*

Later that day, Peter rang his editor, Campbell Reid, and said he may not be able to report for Wednesday's newspaper. He had joined a search for the missing. Later, he did file his story.

- *transparency*: particularly in relation to Telstra's wholesale and retail operations; and
- *competition*: improvements to processes dealing with anti-competitive conduct.

Considerable opinion and evidence was presented during the consultative process disputing whether the Bill went far enough to achieve these objectives. The Committee noted a number of these concerns in its hearings, if not in its Report. Despite this and some quite strong views expressed in the Committee's minority and supplementary reports, the Bill was not amended to address those shortcomings.

THE SCOPE OF "CORE SERVICES"

The rationale for limiting the ambit of "core services" to the PSTN, ULLS and LCS was that these services have been the subject of greatest access disputation.[27] The definition of "core" is limited to those services which relate to the customer access network (CAN), chosen on the basis that they relate to Telstra's dominance over fixed line service delivery.[28]

Not included in this criteria are a number of other services which are subject to monopoly supply by Telstra, such as ISDN. The reasoning for this omission was the lack of industry pressure for ISDN to be included as a core service and the absence of a history of disputes connected with the service. Nevertheless, there is scope for model terms and conditions for ISDN to be prescribed in future, as declared services can be specified by regulation to be "core" in nature.

Therefore on one hand, there is a lack of future-proofing to regulate potential access disputes for ISDN and other important services. As the Committee heard and as was recommended in some submissions, caution should be exercised against over-regulating services and fostering uncertainty in how others will be regulated. At the same time, flexibility should be retained to enable potential future disputes in other services. It should be recognised, however, that the making of subordinate legislative instruments is subject to its own vagaries and the addition of any other service to the "core" list may be too late - after an access dispute has commenced. The benefits of a set of model terms may arrive too late for current non-core services, while those same benefits will be delivered for services in which the battles have already been fought and settled (there are currently no disputes before the ACCC in relation to the PSTN, ULLS or LCS). The Committee considered that access to pay TV services was a potential area for future dispute, but stopped short of recommending its specific inclusion as a core service.[29]

How far will accounting separation go?

The Bill does not specifically enshrine a requirement on Telstra to prepare its wholesale and retails accounts in the manner proposed by the Government in its public statement, or as contained in the Explanatory Memorandum (such as current / historic costs) and the analysis which may be required of a Ministerially-directed report from the ACCC (such as an imputation analysis). Considering that a special Telstra direction is open to public comment, and the time limit for deliberation on those comments is at the Minister's discretion, it is feasible that the desired benefits of the accounting separation process will be subject to delay and uncertainty. Such a result would be contrary to the premise of accounting separation and the overall objectives of transparency and timeliness which underscore the Bill. It is not inconceivable that Telstra will raise objections on such grounds as confidentiality and reasonableness.

There is also the question as to how realistically the aim of disclosing key non-price terms and conditions will be achieved. Although in its amended form, reference is now made to "wholesale and retail operations", no explicit requirement exists regarding such terms and conditions to be disclosed as part of the revamped record-keeping rule process. Separation of price of itself is an inadequate form of accounting separation, if the goal of transparency is to bolster non-discrimination between access providers and seekers.[30] For these reasons, it remains to be seen whether an effective Ministerial direction will actually be issued and implemented in a manner which provides true price and non-price transparency.

The retention of merits review on timeliness

The retention of merits review for access undertakings was considered by a number of submissions to be a half-improvement against regulatory gaming. With a renewed emphasis on access undertakings ("ordinary" and "special" undertakings), the potential exists for regulatory gaming to simply shift to another forum, thereby undermining the rationale for improved timeliness.

It is therefore uncertain whether the benefits of removing arbitration decisions from merits review will yield its purported benefits. The "watch and see" view of the Committee and the Government could mean that gaming counter-measures arrive too late.

WHERE TO FROM HERE?

It remains to be seen in practice how the reforms will be implemented, such as:

- What will the ACCC include in its model terms and conditions for core services and how far will they assist commercial negotiations?
- What will be the effect of the consultative process on the model terms?
- How will decisions on the inclusion of future core services be determined?
- Will the record-keeping rule framework really deliver on transparency in price and non-price for Telstra's wholesale and retail operations?
- Will the renewed emphasis on undertakings promote negotiated access, or will regulatory gaming move in following the retention of merits review?

In light of the recently announced parliamentary inquiry into the structural separation of Telstra's network and businesses,[31] these questions are likely to become even more acute. While the Committee has confirmed the Government's position on a commitment to T3, this examination of structural separation may or may not have a discernable impact on these latest legislative reforms. The industry and investors will continue to monitor these developments with interest.

The views expressed in this article are those of the authors and not necessarily those of the firm or its clients

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- Telstra publishes information comparing its performance in supplying core services to itself and to access seekers for key non-price terms and conditions (such as ordering and provisioning).[21]

It is notable that such specific measures were not specified in the Bill until the Government itself introduced amendments enabling the Minister to give a specific direction about Telstra's wholesale and retail accounts.[22] The new section 151BUAAA was the first time the terms "wholesale", "retail" and "Telstra" were actually mentioned in the accounting separation context. In its original form, the Bill inserted the enabling mechanisms for Ministerial directions outlined above, but not explicitly concerning Telstra.

The Government's amendments introduced a new concept of a "special Telstra direction". This is a Ministerial direction, which the Minister must take all reasonable steps to issue within six months, relating to Telstra's wholesale and retail operations and requiring the ACCC to issue specific rules for Telstra's accounts. A special Telstra direction will also be subject to public consultation in a draft form and the Minister must consider any submissions received. The term "wholesale operations" is an inclusive one relating to services Telstra supplies to itself and to others (to enable them to provide carriage or content services).

The amendments also enable the Minister to prescribe the type of analysis the ACCC must give to a Ministerially-directed report and to publish that analysis. The rationale here is to provide more information to the market about the accounting reports received as a result of a direction.

Model terms and conditions for access to "core services"

The ACCC will be required to determine non-binding model terms and conditions of access for "core services": the Domestic Public Switched Telephone Network (Originating and Terminating) Services (the PSTN); the Unconditioned Local Loop Service (ULLS); and the Local Carriage Service (LCS). Any declared service specified in the regulations may also be deemed to be a core service. The ACCC will be required to take all reasonable steps to ensure that a determination relating to these services is made within six months after commencement of these provisions. The ACCC must also consult with the public and the ACA prior to making a determination.

The model terms are intended to guide industry about what the ACCC considers to be appropriate terms and conditions of access, including non-price terms. To date, the ACCC has published indicative access terms limited to price. Yet ordering and provisioning processes, for example, can be strategically employed to disadvantage the access seeker's terms of access. It is significant that regulatory oversight is now specifically directed to non-price issues.

The emphasis on model terms also reflects growing international recognition of the benefits of benchmarks, particularly to assist commercial resolution of access terms. As such, the model terms are aimed at re-focussing on the fundamental premise of the Australian telecommunications access regime: negotiation first, arbitration second. The rationale is that both access providers and seekers will have greater certainty in their respective bargaining positions, facilitating more timely, commercially-negotiated access agreements. Access disputes are also more likely to be resolved expeditiously if each party is privy to the benchmarks the regulator will use if its arbitration powers are invoked.

This regulator benchmarking process effectively replaces the self-regulatory approach under which the Telecommunications Access Forum made the TAF Access Code. The abolition of the TAF is an interesting move away from self-regulation in the access area where it is seen to have failed. Self-regulation of controversial and highly commercial issues such as access does not seem to have worked effectively in Australia.

Ordering and provisioning as part of the standard access obligations

Prior to the amendments, there was considerable uncertainty about whether the non-discrimination forming part of the standard access obligations applied to ordering and provisioning. The Telecommunications Competition Bill incorporates important amendments to confirm that access providers are required to ensure that it treats ordering and provisioning of declared services by access seekers on an equivalent basis to that which the access provider provides to itself.[23]

Another important clarification incorporated in the amendments is that the SAOs operate and are enforceable independently from the terms and conditions made pursuant to the SAOs.[24] This means that an access provider is obliged to supply declared services irrespective of whether terms and conditions have been agreed.

Advisory notices

Under Part XIB as currently drafted, advisory notices may only be issued at the same time or after a Part A competition notice has been issued.[25] This must necessarily occur after the ACCC has a reason to believe there has been a contravention of the competition rule.

The *Telecommunications Competition Bill* allows the ACCC to issue an advisory notice irrespective of a Part A competition notice.[26] This means that the ACCC may issue a non-binding advisory notice very early in an investigation and prior to the ACCC even having a reason to suspect a contravention of the competition rule. This power will allow the ACCC to participate in speedy and effective intervention where necessary, particularly to guide parties in commercial negotiations or when a new product is released in the market.

THE INDUSTRY DEVELOPMENT PLAN PROCESS

Although the abolition of industry development plans was recommended by the Productivity Commission and supported by most submissions, including initially by the Government, the Bill in its final form was passed with the retention of the IDP process.

In its amended form, the obligation to lodge IDPs will continue, however the ACA will be enabled to exempt certain carriers from the process.

DO THE REFORMS GO THE DISTANCE?

Four objectives consistently featured in the Government's rationale for the reforms:

- *timeliness*: speeding up access to core services;
- *investment*: greater incentives and certainty in telecommunications infrastructure;

The reports from Bali, the scenes at Australia's airports, the stories of loss, of heartbreak and mateship and valour underscore the depth and quality of the Australian spirit. That spirit unites us. It makes us proud. I hope it makes us strong. We will need all our strength and determination to emerge from this catastrophe a whole nation and do the job at hand. In the weeks ahead we must strengthen our unity and resolve to bring these murderers to justice; and to continue the war against terror.

As an Australian in New York on September 11, I was inspired by how the citizens in that tough and sometimes ruthless city responded to their tragedy. They came together. They shared their shock, their grief and ultimately their resolve to emerge from their ordeal a far stronger community.

I think the media in that city played some part in helping to support and bolster that unity and resilience -- or at the very least to reflect it strongly. *The New York Times*, not my favourite newspaper, did an extraordinarily good job producing their series, *A Nation Challenged*. Over a few months the inside back page of that section carried the faces and stories of every single World Trade Centre victim, under the title, "Portraits of Grief". One year on, *The New York Post*, which I publish, decided that it was time to move forward, and focus again on the strengths of the city. We launched the first annual New York Liberty Medals, a successful attempt to honour the greatest acts of citizenship and bravery in New York. We received thousands of entries for the 11 awards, and over several weeks published many of the inspirational stories of ordinary New Yorkers doing extraordinary things.

I have reflected often these past days on how we, the Australian media, will respond to our own tragedy. How will we play our part in serving our own devastated communities? What choices will we make as we step through the various stages of healing our nation? Will we stand with our national leaders, on both sides of parliament, as they seek to bring justice to the cowards that murdered our countrymen and women? Or will we allow ourselves to be misused as a forum for division, effectively undermining community strength and cohesion when our country needs those qualities most? Will we allow ourselves to descend into a shallow blame game, when we all know that the only people deserving of blame are the perpetrators themselves?

I ponder these questions from the twin perspective of running media properties in both New York and here, and believe that the tragedies of the last 13 months must remind us all of the great responsibility we carry.

I am now spending a fair portion of my time in New York, and when I first moved into my new office at *The New York Post*, I wanted to fill it with reminders of home. Aussie artwork and photos, that sort of thing. But also, I wanted something on my wall that was of particular relevance to that newspaper. I wanted to find some picture out of our archives that represented the paper and had some special meaning to me.

Well, it didn't take long to find, and now, in a position of relative prominence, hangs a black and white photograph of a handsome six year old boy holding a copy of the famous paper and dressed in a ridiculously over-sized newspaper seller's apron. He is standing on the loading dock, amidst the trucks and stacks of papers. This boy was too young to yet understand the business of selling newspapers, but he clearly loved them, even then. He loved them, not for the business but for the craft of journalism that they represented.

The picture was taken 25 years ago and that young boy was me.

BUSINESS, JOURNALISM AND THE ORTHODOXY OF THE MEDIA ELITE

Over the last 25 years, I have been privileged to grow up retaining the love of good journalism, the craft, while learning its business: the dollars and cents. I have learnt that they are not mutually exclusive but integrally self-reliant. Each dependent on the other. Good journalism is good business practice; good business supports great journalism.

I know that reality may be anathema to many of you here tonight. But I don't expect I should be here to tell you what you want to hear. Good speeches are those that come from the heart, that ring true. And tonight I want to challenge what I regard as the orthodoxy of the media elite.

The industry is littered with self-styled purists who believe the business of media - the requirement to make a profit - somehow corrupts the craft. The self-anointed media elite among us believe, somewhat self-servingly, that not only the act, or process of making a profit is positively sinister, but also that the very desire to do so is.

Two years ago this forum was told that Australian journalists worked in two distinct camps - "commercial journalism or serious journalism". In that speech we were told, and I quote, :

> *"The horse has bolted. The idea that owners of media organisations regard the practise of journalism as a public service is as outdated as the idea that businesses operate in the interests of a better world... If you want to apportion guilt, blame a system that demands growth and profits and lower costs from every public organisation."*

The speaker went on to say that commercial journalism encompassed "popular magazines, tabloid newspapers and news and current affairs on commercial TV and radio", while serious journalism, he told us, was restricted to metropolitan broadsheets and the ABC, because, absurdly, serious journalism was more akin to charity than to business.

Well, this bloke couldn't have been more wrong.

You can see here that the Australian media elite define their club through standards designed only to exclude. Entry requires that you either rely on tax payer's money to draw your paycheque, or that your newspaper folds twice over, and God forbid, don't ever even think about a profit. I noted a letter to *The Australian* this Thursday on this very issue. It quoted the Canadian writer, John Ralston Saul, who said: *"Highly sophisticated elites are the easiest and least original thing a society can produce."*

I agree. I happen to think that serious journalism is about informing the community, reflecting their interests and championing their causes. The size of a newspaper is simply irrelevant. *The Times* of London may be one of our finest journalistic institutions; but in Australia so too is *The Herald Sun*, a tabloid and a great commercial success. I am equally proud of *The Australian*, *The Daily Telegraph*, *The Courier Mail* and the

'*Tizer*, and the way they each strive to serve their readers.

I believe narrow-mindedness – disguised as high-mindedness – risks making its media irrelevant, instead of being as diverse and valuable to as many people as possible. We all have to expand our capabilities to encompass the changing world, its growing diversity and, indeed, its complexity. And we all have to avoid the perils of that narrow-mindedness that threatens to narrow our future - to restrict our opportunity – at a time when that future and opportunity is vast.

It seems that those who criticise the larger media companies for their reach and diversity are those who have time and again been unsuccessful in their efforts to mimic them. Their criticisms, ironically, identify the factors for our success and their failure.

I think a point of pride for companies like our own is our ability to cater to all members of society; to all demographics and everyone who demands and deserves their own quality media. Our lack of loftiness is a point of distinction. We do not patronise our readers and audiences. We believe there's no "high culture" or "low culture". No media is more worthy than any other because of the age, income or status of its target audience.

We at News find no disparity in publishing a Nobel Prize winning book, as we did this year, at the same time making profitable movies such as "Titanic", or even, "Dude, Where's My Car". There is no room for dictating taste in the diverse and dynamic world of media. To limit taste only limits the role we play for people of all kinds. Intelligent media companies strive to provide both intellectual and comedy programs, groundbreaking and reflective articles, art house and popular movies. Not to be open minded in providing a full range of quality media would be a failure to serve the breadth and depth of the communities we live in.

But in order to serve these diverse communities, we must be profitable. The profit motive is not only fundamental to our ability to reward shareholders and pay employees; it's fundamental to excellent journalism. Far from corrupting the craft, profits enhance it. Expansion drives diversity and diversity protects and stengthens our craft. As Baz Luhrmann once put it: "*Our currency is not dollars and cents. Our currency is stories. Dollars and cents are the by-product*". A by-product that allows us to constantly improve the real currency, the story. Our profits enable us to grow as we seek to meet the increasing demands of an increasing number of readers and viewers in a challenging and fragmented marketplace. It is the profit factor that has underpinned the enormous advances made in newspaper technology in such a relatively short time.

Only fifteen years ago newspapers were printed in black and white with occasional spot colour. Our image reproduction was terrible, and full colour coverage was an impossibility. While we employed the very best photo-journalists and artists in the world, their work was drastically undermined by the industrial limitations of the printing process. Every successful newspaper company has now invested hundreds of millions of dollars in new colour plants, all paid for out of profits. Today Australian newspapers reproduce better than any in the world, and our photographs and associated artwork more accurately represent the images that they capture.

But the investment has not been limited to physical production alone. The earnings from our most popular media products enable us to take editorial and artistic chances that may not make a lot of money – but make the media industry more exciting and again more diverse.

Take *The Australian*, for instance, created because we believed a national newspaper was essential for the nation but at first entirely supported by the profits of our state-based newspapers. It's no secret that *The Australian* once struggled for profitability. In those days, it was the profits from elsewhere in the group that supported the paper.

At the other end of the spectrum, we launched a sexy newspaper in Melbourne last year, called *MX*. This paper is designed specifically for younger, urban people who are not regular newspaper readers. It has been a great success and is internationally renowned for its groundbreaking design and unique perspective.

The important point here is that both *The Australian* and *MX* were launched out of the profits of our other newspapers, with whom they now compete vigorously. *The Australian* competes against all our metropolitan dailies and *MX* with *The Herald-Sun*.

The profits of those papers have thus allowed for greater diversity and a greater range of quality journalism in Australia. Profits have increased competition, not lessened it, and made our media landscape far richer.

Another manner in which the health and ultimate growth of our company has broadly benefited our industry is in the sharing of something very powerful: human talent. The ability to move individuals and intellect from all over the globe has given Australia an enormous benefit, as Australians now populate many key positions in the media overseas.

The oldest continuously-published paper in America is headed by an Australian editor, Col Allan. Les Hinton, who runs our British newspapers, started his career as a copy boy on the Adelaide News, BSkyB's Richard Freudenstein hails from here too as does Fox Sports CEO, David Hill. And it was a *cause célebre* when we appointed Robert Thomson editor of *The Times*. It is not possible to mention each Australian reporter, photographer, sub-editor and cadet that we have posted overseas.

I am amused that in Australia, News is often referred to as a US company, while in the US and in the UK we are seen, culturally and legally, as very much Australian. And we are proud that as a globally profitable company we can offer Australian journalists and media executives opportunities to compete on the world stage, gain invaluable experience, and perhaps one day bring that experience home.

THE CRAFT AND THE BUSINESS OF JOURNALISM: A MUTUAL INTER-DEPENDENCE

Above all else, profits underwrite our most important work without any regard for the bottom line. For news organisations world-wide, this was the case on September 11, 2001, and just one week ago when we all scrambled to cover another act of terror... this time on our own doorstep.

My first reactions on September 11 were, like everyone else, of horror and bewilderment. My next thoughts were those of a newspaper publisher. Where

and supplementary reports prepared by the Opposition and the Democrats signalled that clear passage of the Bill was unlikely. The amended Bill reflects in part the Government's objective to ensure its provisions become law before the year's end.

SPECIFIC PROVISIONS

The Committee's report focussed on the following key reforms to the regulatory regime under the *Trade Practices Act*, which were also the subject of greatest overall contention in its hearings and the submissions considered:

Merits review

The Bill removes a party's right to merits review by the ACT from a final determination of the ACCC. These measures will not, however, affect the ability of a party to seek merits review of decisions of the ACCC under Part XIC to accept or reject an application for an exemption order under section 152AT, nor an access undertaking under section 152BU, nor the ability to seek judicial review of a final determination.

One of the most significant Government amendments to the Bill arose as a result of the transitional arrangements raised by the Seven Network in its submissions before the Committee. Seven argued that the effect of the changes would be to remove rights of merits review from disputes which were currently on foot, but would not be the subject of an ACCC determination at the time the reforms become effective. According to Seven, it commenced its arbitration in reliance on the existing provisions of the access regime, including the opportunity to appeal. As a result, the Bill was amended to preserve merits review for final determinations for an access dispute notified prior to 26 September 2002, or if a final determination was made before commence the removal of merits review provisions.

The Bill does not incorporate explicit anti-gaming provisions. For example, there is a risk that a quasi-merits review will operate in practice to arbitration determinations. This might occur if arbitrations are commenced with a view to obtaining the regulator's views about an issue. The access provider may then lodge an access undertaking if it does not agree with the ACCC's arbitration determination, in order for it to appeal any decision about the undertaking; the consequent delay a potentially significant problem with the reforms. Presumably, the ability for the ACCC to issue guidelines about deferring access arbitrations while the ACCC is considering an access undertaking is an attempt to deal with gaming of the merits review process.[18]

Anticipatory exemptions and undertakings

At present, the ACCC can exempt certain parties from the requirements of the standard access obligations (**"SAOs"**) for the supply of an active declared service. Exemptions may be subject to such conditions or limitations as specified by the ACCC in its exemption determination. However, such exemptions can only be made in relation to declared services in operation. The Bill provides two mechanisms to overcome the resultant disincentive to invest in telecommunications infrastructure.

First, section 152ASA introduces anticipatory exemptions into the regime to allow the ACCC to determine that a class of carriers and/or carriage service providers are exempt from current and possible future SAOs in relation to a particular proposed service, even if that service is not in existence at the time that the exemption is sought.

Secondly, the Bill extends the current provisions relating to access undertakings under Part XIC by allowing the ACCC to accept undertakings from existing and potential access providers of all telecommunications services, irrespective of whether those services have or will be declared or are in existence.

The amendments create two types of undertakings: ordinary access undertakings and special access undertakings. Special access undertakings will cover proposed services and services which may exist to some extent but are not yet declared. Further, unlike ordinary access undertakings, special access undertakings will not have maximum time limits, although they must specify some expiry date.

Accounting separation

The Minister will now be able to direct the ACCC in the use of its current record-keeping powers under Part XIB.

This means that by issuing a written direction to the ACCC, the ACCC must formulate rules in accordance with that direction for:

- how carriers or carriage service providers must keep and retain records (the current record-keeping rules). If a record-keeping rule is made and it requires the preparation of a report, this report will be known as a "Ministerially-directed report". The ACCC may make a Ministerially-directed report publicly available;
- carriers or carriage service providers to themselves give access to Ministerially-directed reports; or
- for carriers or carriage service providers to give access to Ministerially-directed periodic reports.[19]

In this way, the framework of the ACCC's existing record-keeping rule powers will now be subject to Ministerial direction, rather than at the discretion of the ACCC itself, while avoiding re-inventing a new model of accounting disclosure.

At the time of the Government's initial announcement that accounting separation measures would be introduced, questions arose as to how, "a more transparent regulatory market" would be achieved and how "accounting separation of Telstra's wholesale and retail operations"[20] would work in practice. The preparation and publications of accounts to ensure transparency of Telstra's wholesale and retail costs was specifically announced immediately prior to the tabling of the Bill with a statement that the ACCC will be required to ensure that:

- Telstra prepares current and existing cost accounts to compare its ongoing and sustainable wholesale and retail costs;
- Telstra publishes current and historic cost key financial statements for core interconnect services (excluding commercially-sensitive detailed financial and traffic data);
- it prepares and publishes an imputation analysis to examine any systemic price squeeze behaviour (based on Telstra purchasing the core interconnect services at the price it charges access seekers); and

While both of these recommendations support direct Government funding, the Government would be expected to favour a continuation af placing much of the cost in provding consumer safeguards on the industry. Industry participants, on the other hand, will see the recommendations and the Government's push to sell Telstra as an opportunity for change.

The views expressed in this article are those of the author and not necessarily those of the firm or its clients

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Preparing for T3? –Telecommunications Reforms for Implementation in 2003

Angus Henderson and Michelle Rowland[1] review the watershed reforms proposed by the Telecommunications Competition Bill 2002.

Almost a year after the release of the Productivity Commission's final report into telecommunications-specific competition law,[2] the Parliament has finally passed legislation to enact a series of key reforms in response to a number of its recommendations.

The *Telecommunications Competition Bill 2002* (**"Bill"**) was thought to be the pre-cursor to the Government's sale of the third tranche in Telstra, known as T3. Notwithstanding that T3 appears to have been placed on hold for the time being – whether this is due to a political or economically unpalatable climate[3] - the Government has proceeded with potentially the most critical set of reforms in Australian telecommunications since the enactment of Parts XIB and XIC of the *Trade Practices Act* (**"Act"**). The Bill has now cleared both houses of Parliament following amendments in a number of critical areas and is expected to commence shortly.

KEY REFORMS

The key reforms in the *Telecommunications Competition Bill 2002* are:

- the removal of merits review of arbitration determinations;[4]
- the ability for access providers to lodge access undertakings in relation to non-declared services;[5]
- the empowerment of the Minister to direct the ACCC in relation to the making of record-keeping rules, including the implementation of accounting separation by Telstra;[6]
- replacement of the industry self regulatory mechanism for determining access terms and conditions through the Telecommunications Access Forum with an ACCC benchmarking process;[7]
- the expansion of the standard access obligations to include ordering and provisioning;[8] and
- the ability for the ACCC to issue advisory notices to persons about possible anti-competitive conduct, before the ACCC has a reason to suspect that a breach of the competition rule has occurred.[9]

TIMETABLE FOR IMPLEMENTATION

The ACCC and the Minister are required to implement a number of the key reforms over an express period of time as summarised below:

Timeframe	Function
Within 6 months	ACCC to make model terms and conditions relating to initial core services.[11]
Within 6 months	ACCC to issue guidelines about backdating determinations. [12]
Within 6 months	ACCC to set sunset period for existing declared services.[13]
Within 12 months	ACCC to issue guidelines about the appropriatemess of the ACCC issuing competition notices or other action.[14]
Within 6 months	ACCC to issue guidelines about the deferral to access disputes if an access undertaking has been lodged. [15]
Within 6 months	Minister to give direction to Telstra about Telstra's wholesale operations and retail operations.[16]

BACKGROUND

In April this year, the Minister for Communications, Information Technology and the Arts, announced the Government's intention to introduce a package of legislation in response to the Productivity Commission's report. The Bill was introduced to the Parliament five months later and was immediately referred to deliberation by a Senate Committee.[17] A series of public hearings were held and the Committee considered 23 submissions from telecommunications operators, broadcasters and industry organisations. This was in addition to the extensive consultative process undertaken by the Productivity Commission itself since first commencing its statutory-instigated inquiry in June 2000.

The Committee tabled its report on 22 November 2002, recommending that the Bill be passed unamended. The minority

were our journalists and other staff? Were they OK? Could we in these extreme circumstances even hope to publish a special afternoon edition of the Post to better inform our frightened readers?

But first, I had a more immediate problem : how to get from downtown Manhattan to the *Post's* editorial offices in midtown. Subways were closed, public transport shut down. The streets in my neighbourhood were blocked by thousands of people staring up in disbelief. From that moment on and for many months, the emotions in the city went from one extreme to the other. Shock, grief, anger, and fear.

Much the same emotions we Australians feel today.

But through all of this, all of us at the *Post* and Fox News – almost alone in an eerily empty midtown Manhattan – published and broadcast continuously. We added editions, and jettisoned advertising. Every resource devoted to a common end. Not once was cost mentioned or considered and they didn't have to be because these efforts were all supported by the underlying health of our company. To work in journalism on that morning, and ever since, is to know with renewed certainty the importance of what we do.

The events of September 11 tested, both personally and professionally, every reporter, editor, producer and employee of every newspaper and television channel around the world – but none more so than those in New York. For those journalists working to deliver the news from Ground Zero, the challenge was particularly daunting. Our journalists were among the firefighters and rescue workers who arrived on the scene moments after the first plane hit. Our print and television news teams worked around the clock, in an anthrax contaminated environment, conscious of the likelihood of further attacks.

It has been the same in Bali. Emotion-charged, exhausting work from our teams of reporters, and photographers.

These all-out efforts not only entailed great personal commitment but also substantial costs and sacrificed revenues. Ceaseless operations and nonstop programming inevitably result in many millions of dollars lost. But, thankfully,

we are in a position where we can make that right choice. It is here, where the craft of journalism and the business of journalism most clearly display their mutual inter-dependence.

And it is here where the media elite, who so stridently would build a great wall between so called serious journalism, narrow-minded and supported by charity, and so-called, commercial, popular journalism, are proven wrong. Without media companies driving for profits Australians would be bereft of many of the advances and services they now rely on. Not only would newspapers and other media outlets rely on old and obsolete technologies, but great papers such as *The Australian* and *MX* would simply not exist. Media choices would limited, if you left it up to the elite, and the blanket coverage of important stories would be impossible but through the lens of the ABC.

People say Australians are the most egalitarian people in the world. I certainly believe we are. But why then is it so hard for the media elite in this country to be open-minded and encourage all the good that we as an industry do?

A case in point is the baseless attack on the Farmhand Foundation. About a month ago John Hartigan called me to discuss a million dollar donation from News Ltd to create a foundation aimed at supporting our drought devastated farming communities and nurturing a wide ranging debate about our water policies. A number of other media and business representatives were joining us in this timely effort. How something so simple could be turned into a grand conspiracy to sell a phone company, I have no idea. But again, out of narrow mindedness disguised as high mindedness, rooted in jealously as the idea was not their own, our media elite launched a disgraceful and biased attack.

I wonder if things are getting worse in our country.

In 1994 News Ltd and Channel Nine launched a drought appeal that raised 19 million dollars for the bush. It was a great and successful appeal that helped many Australians in need. I wonder if it too, was connected to selling Telstra? Those among us who would dissuade the media from having a go to help people should be ashamed.

My grandfather, in his will, said that he wanted his children to "have the great opportunity of spending a useful, altruistic and full life in newspaper and broadcasting activities". All of us here tonight share that great opportunity of a full life in newspaper and broadcasting. And this week, journalists around the country proved their usefulness and yes, their altruism in reporting to a shattered nation. In doing so, we regained an appreciation for the role we play in people's lives.

Media is much more than an outlet for news; it is a forum for opinions, emotions and shared convictions that strengthen us all when we need strength most. This is why the providers of media must focus so hard on the pursuit of profits: because that enables us not to focus on profits at the times when our best and most important work has nothing to do with them. This is true not just in the case of monumental global events but all the time and in all our businesses. Profits fund the excellence of our media services and the high quality of our products. They also provide a measure of our success that is critical to our desire to improve.

Our hard work to maximise revenues at our newspapers and TV stations year-round means we won't be forced to compromise the quality of those papers and stations in the event of a worldwide advertising slump, a price war declared by a rival, or the kind of event we saw last year or last week. At News our three fundamental beliefs – the good use of profit, the importance of international diversity, and the dangers of elitism – are what drive the value, in my opinion, of all modern media providers.

Great journalism needs profits, it needs to be broad minded, and it needs to always steer clear of elitism.

You know, when I was 6 years old standing in *The New York Post's* loading dock, amongst the papers I loved then as I do now, I didn't really think about all this stuff. I only cared about the paper, its words and its images and I instinctively, I guess, understood its unique ability to relate to and inform its readers. I'd love to be back there now, in that headspace, and not be concerned about the realities of the world.

But none of us can do that. We've all grown up and don't have that luxury anymore.

Lachlan Murdoch is the Chairman of News Limited and Deputy Chief Operating Officer of News Corporation

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Olympic TV Rights

Toby Ryston-Pratt, in this highly commended finalist of the 2002 CAMLA essay competition, reviews the ever-evolving saga that is Olympic broadcasting rights.

In the lead up to the Melbourne Olympics, then International Olympic Committee (**"IOC"**) President, Avery Brundage, commented that *"the IOC has managed without TV for 60 years, and believe me, we are going to manage for another 60"*.[1] Brundage could not have been more wrong. Now the Olympics are supported by the sale of TV rights which account for 50% of Olympic revenue.[2] Although the Olympics have clearly moved on since Brundage's comment, broadcasting the Olympics continues to cause legal complication.[3] In this paper, I first consider the historical origins of the sale of Olympic TV rights. Second, I analyse the legal infrastructure of Olympic TV rights, focusing mainly on the Sydney Olympics. Finally, I consider the future of Olympic broadcasting.

HISTORICAL ORIGINS

Olympic TV rights were first sold for the 1948 London Olympics when the BBC reportedly paid 1000 guineas for exclusive rights - approximately AUS $4,000 using current exchange rates.[4] Despite this development, the IOC did not rush to embrace television and expressed concern that allowing payment for TV rights would be contrary to the Olympic ethos.[5]

Regardless of the IOC's conservative approach, by the time of the 1956 Melbourne Olympics, the progress of television internationally meant that the market for rights was a growth area. Sensing an opportunity, the Melbourne Olympic Committee (**"MOC"**) looked to capitalise on the sale of TV rights. The MOC reached agreement with Britain's principal broadcaster, Associate Rediffusion, who offered £25,000 after securing a US$500,000 sponsorship deal with Westinghouse.[6]

Despite the Rediffusion offer, international interest was limited. Wealthy US networks refused to pay for rights claiming that the Olympics were a news event, not entertainment. They appealed to the constitutional rights of free press and demanded free and equal access to the Melbourne Olympics.[7] As a compromise, the MOC offered the networks three minutes of footage per day, but maintained that any more would damage the commercial distribution of the official Olympic film. The US networks were not satisfied with the offer and demanded up to nine minutes per day. Amidst the furore, Rediffusion cancelled their contract and aligned with the US networks in arguing that the right to televise the Olympics should be free.[8]

The stalemate between the MOC and the international networks resulted in the networks boycotting the Olympics. *The New York Times* remarked that *"the Olympic Games as an institution, Australia as a nation and television as a medium of the free world...all have suffered from the consequences of the extensive black out"*.[9] Local stations, principally Channel Nine who secured a sponsorship deal with Ampol, did broadcast the Olympics, but only within Melbourne.[10]

Despite the negative impact of the Melbourne boycott, 1956 proved a key turning point in the history of Olympic TV rights. The IOC launched an investigation into the role of television in the Olympic Movement which resulted in amendment of the Olympic Charter to recognise the sale of TV rights.[11] Even so, Brundage remained sceptical and in

mechanisms need to be integrated and publicly articulated; and

- the ability to seek compensation for loss of business from carriage service providers is not sufficiently well known and could be given more prominence in industry and Government publicity material.

The Inquiry's recommendations mainly related to ensuring better communication of the existing legislative consumer rights.

SHARING FUTURE BENEFITS

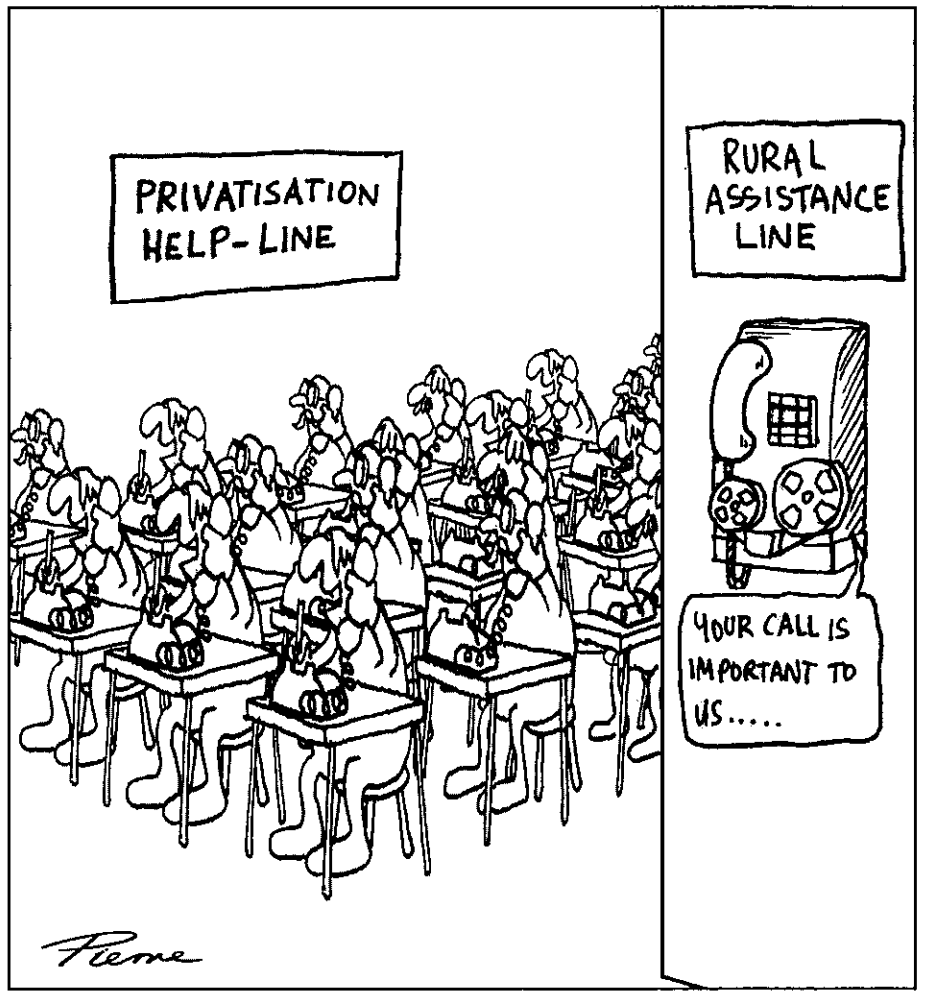
The Inquiry considered how regional Australia can share in the benefits of future technological advances and competition. This element of the Inquiry was intended to consider what 'future-proofing' mechanisms could be put in place, a key political issue in the further privatisation of Telstra.

The Inquiry's recommendations include:

- the Government establish a process to regularly review telecommunication services in regional, rural and remote Australia and to assess whether important new service advancements are being delivered equitably in those areas;
- the structure for future reviews should:
  - provide certainty for regional, rural and remote communities, including a "high degree of certainty that Government funds will be made available to service support improvements";
  - ensure that reviews are independent from executive governments;
  - allow flexible and appropriate policy responses to meet the range of needs in regional, rural and remote Australia; and
  - promote competition and commercial service delivery as the most effective and sustainable service outcome.

OTHER ISSUES

The Inquiry also addressed the provision of a local presence in regional Australia by Telstra and noted that its recommendation would be for it to maintain an ongoing local presence in the region, though this should be broadly



compatible with Telstra's commercial interests. Telstra should also be required to develop and publish a local presence plan to set out the range of activities and strategies it would deploy in regional Australia.

The Report also considers issues relevant to remote indigenous communities, education and health services, training awareness and support for consumers and online public access.

IMPLICATIONS FOR THE SALE OF TELSTRA

The establishment of the Inquiry had been seen as a precursor to a further privatisation of Telstra. Following Prime Minister John Howard's recent comments that there are three limbs to the sale proceeding – satisfaction about services to the bush, obtaining the authority of Parliament and obtaining a price that would maximise the return to the Australian public – the Government's timetable for a sale has been delayed. However, the first of the Prime Minister's triggers is assisted by the Report's general conclusion that arrangements are currently in place to address the community concerns as to the adequacy of telecommunications services in regional, rural and remote Australia.

IMPLEMENTING THE RECOMMENDATIONS

No doubt the Government will aim to action the recommendations with some urgency, in order to support its policy of privatising Telstra.

Many of the recommendations advocate action by Telstra, by way of one-off or ongoing actions, reports or reviews. Telstra, keen to move to full privatisation, is likely to actively address these issues. Its announcement on 13 November 2002 that it has implemented the Estens recommendation to cut connection times in minor rural and remote areas flags its intention to act promptly. To the extent that Telstra opposes the implementation of particular recommendations, new licence conditions may be imposed on it.

Most of the recommendations directed at the Government are expected to be referred to the ACA for action. The most difficult and contentious issues are likely to be:

- the review of arrangements for USO contestability, costing and funding; and
- the establishment of a structure for future reviews and responses.

- the Government should review arrangements for the costing and funding of the USO and should include assessing whether current arrangements are impeding the development of competition in regional, rural and remote Australia;

- the Government should examine the issue of network extension and trenching costs, to consider whether such costs should be removed from subscribers, and either borne by Telstra as part of its USO provision or supported by the Government through subsidies;

- extreme cases of CSG non compliance should receive direct priority attention by the service provider and should also be notified to the Australian Communications Authority (**"ACA"**) and/or the Telecommunications Industry Ombudsman (**"TIO"**) as technical breaches of the CSG;

- Telstra should report publicly on the outcome of its trial with the National Farmers Federation to reduce connection times in minor rural and remote areas and identify what follow up commitments it will make. If this trial is not successful in providing ongoing improvement in service outcomes in these areas, the Government should consider tightening of the CSG connection timeframes; and

- the worst performing exchange service areas (**"ESA"**) in regional, rural and remote Australia should be identified as soon as possible after the network reliability framework (**"NRF"**) commences in January 2003. Telstra should then be required to provide a formal undertaking to the Government on its strategy for raising the performance of these ESAs. The Government should also adjust and refine the NRF as necessary over time to improve its operation.

In relation to payphones, the Report sets out that while Telstra has maintained a number of payphones in regional areas in recent years, improvements could be made. For example, Telstra should make the sites of payphones publicly and readily available and report as soon as possible to the Government on causes of low levels of performance in meeting payphone repair timeframes, while the Government should review the provision of payphone services to people with disabilities.

MOBILE PHONE SERVICES

The Inquiry made the following findings in relation to mobile phone services:

- by the time all current Government supported contracts are fully implemented in 2004, more than 98% of Australians will have access to mobile phone coverage. It would be difficult to extend mobile coverage even with Government support for capital costs;

- prices for mobile services are standard across Australia. Strong competition results in pricing for all Australians ranking well in international terms. For the 2% of Australians without mobile coverage, the Government has put in place subsidies for satellite telephone coverage; and

- call drop out and congestion rates for Australian mobile networks were 'satisfactory'.

The Inquiry's recommendations included that the Government should identify areas where extending mobile phone services are still feasible through Government support for capital costs and consider extending the scope of its satellite telephone subsidy.

INTERNET SERVICES

In its review of the provision of Internet services the Inquiry reported that:

- all Australians can now access an Internet service provider (**"ISP"**) for the cost of an untimed local call and that a large number of ISPs now offer national dial up access at the rate of an untimed local call;

- the prices for dial up Internet services are equitable between metropolitan and regional, rural and remote subscribers;

- the ISP Guidelines are a good start in better informing consumers of ISP performance; and

- there is a need for Telstra and other service providers to promote more effectively and to facilitate access to fast and more effective services such as integrated services digital network (**"ISDN"**) and asymmetrical digital subscriber line (**"ADSL"**).

The Inquiry's primary recommendation in relation to Internet services was that a licence condition should be placed on Telstra that would require all Australians to be guaranteed dial up Internet speeds over the Telstra network of at least 19.2 Kbps. The Australian Telecommunications Users Group has noted that such a relatively low-speed must be seen as a starting point for any guaranteed Internet service levels.

HIGH BAND INTERNET SERVICES

In addition to the provision of basic Internet services to regional Australia the Inquiry also focussed on high bandwidth Internet services. The Inquiry found that access to broadband services is becoming vital for the economic and social development of regional, rural and remote Australia and that the major impediment to these areas having equitable access to high bandwidth Internet services is the higher prices that users in some areas pay for these services.

The recommendations in relation to broadband included:

- the Government should investigate whether the timeframes for connection and repair of ISDN services that are required to be provided under the Digital Data Services Obligation should be more closely aligned with regulated timeframes applying to telephone services;

- the Government should establish an incentive scheme for the provision of high bandwidth Internet services to regional, rural and remote areas; and

- the Government should further support communities to undertake demand aggregation strategies and other activities that support the take up of high bandwidth Internet services.

CONSUMER SAFEGUARDS

In relation to consumer safeguards the Report's findings included that:

- the existing framework of legislative consumer safeguards is effective and provides a strong level protection for telecommunication consumers, although there remains a scope for continuous improvement;

- compliance with legislative safeguards by carriers and service providers is generally high;

- the USO is not an effective mechanism for providing broad consumer access to an increased range of services in the future; alternative

1957 predicted that *"[i]t isn't going to be easy to get money for the television rights to the Olympic Games"*.[12]

It did not take long for Brundage's short-sightedness to become apparent. After Melbourne, the price paid for Olympic TV rights rose steadily until, in 1968, the true value of TV rights emerged. The American Broadcasting Corporation acquired US rights to the Mexico Olympics for US$4.5 million, and through advertising deals with major US corporations, including Coca Cola, recouped over US$20 million.[13] Since then, the price of Olympic TV rights has risen exponentially. From 1984 until 2008, the IOC has concluded broadcast agreements worth more than US$10 billion.[14] While the price has gone up, so have the numbers watching: only 100,000 people saw the Melbourne Olympics live on TV, whereas an estimated 3.7 billion viewed the Sydney Opening Ceremony.[15]

BROADCASTING THE SYDNEY OLYMPICS

The IOC sells Olympic TV rights on an exclusive territorial basis. Through contracts with the IOC, rights holders acquire rights such as to broadcast the Olympics on free-to-air television, cable television (but not pay per view), closed circuit television and to a limited extent, satellite and high definition television. The rights generally also include "pre-Olympic" events and "cultural events". For the Sydney Olympics, the Seven Network paid US$45 million for Australian rights and NBC paid US$705 million for the US rights.[16]

Sydney rights holders acquired footage from two main sources. The primary source of footage was the live feed produced by the host broadcaster, the Sydney Olympic Broadcasting Organisation (**"SOBO"**). SOBO produced international television and radio coverage of every Olympic event, utilising more than 900 cameras to produce 3400 hours of live footage. Compare this to the Melbourne Olympics where only three cameras were used to capture footage from the main arena.[17] Rights holders supplemented this footage with individual unilateral coverage.

In addition to rights holders, other members of the television media, known as "non-rights holders", were granted limited access to venues for the purposes of documenting the Olympics.[18]

THE IOC, RIGHTS HOLDERS AND NON-RIGHTS HOLDERS

The major issue relating to Olympic TV rights, particularly in light of the vast sums which are paid for those rights, is protecting exclusivity. It is important for both the IOC and rights holders that rights are not diminished in any way. Consequently, the IOC imposes rigorous demands and restrictions on both rights holders and non-rights holders to ensure the protection and standards of the Olympic Movement.

Rights holders and IOC copyright ownership

While being a Sydney Olympics rights holder entitled broadcasters to transmit Olympic images and sounds, it did not amount to a grant of ownership in Olympic footage nor an exclusive licence for the purposes of section 31 of the *Copyright Act* 1968 (Cth). The IOC retained copyright in Olympic material and was responsible for controlling the use of its copyright material. The retention of ownership by the IOC had three important consequences for Sydney rights holders.[19]

First, because Sydney rights holders did not own copyright in relation to Olympic footage, their use of that footage, outside the scope of any agreement with the IOC, was subject to IOC approval. This restriction applied to all footage except that which was defined as the rights holder's own material, such as commentary, interviews and historical features. The restrictions imposed on rights holders, subject to the specific contractual terms between the rights holders and the IOC, had broad practical implications ranging from preventing advertising or sponsor credits appearing at the same time as Olympic coverage, to requiring any sub-licensee of a rights holder to enter an individual agreement with the IOC and SOCOG.

Second, stringent restrictions were placed on the use of Olympic symbols by rights holders. This aspect is governed by Rule 17 of the Olympic Charter which provides that the IOC may take steps to prohibit any use of the Olympic symbol which is contrary to the Olympic Charter and, during the Sydney Olympic period, required SOCOG to protect the emblems that they devised. Similarly, under the Host City Contract, SOCOG and the AOC were to protect the intellectual property associated with the Olympics. The *Olympic Insignia Protection Act* 1987 (Cth), which granted a monopoly in the five ringed device and certain Olympic Designs to the AOC, provided that for the purposes of the *Copyright Act*, the Olympic symbol was an original artistic work in which copyright subsisted.[20]

Finally, the IOC's retention of ownership of Olympic broadcasts and symbols had particular consequences in relation to remedying any alleged breach of a rights holder's Olympic TV rights. A major concern for Sydney rights holders was that Olympic events could be illegally filmed or live feed intercepted and converted into digital format using a video capture card or other device. This material could then have been uploaded as live stream video and audio content and made available to the public in the usual manner. Clearly, an injunction would have remedied this problem, however, because of the ownership structure of the Olympic footage, the proper plaintiff in such an instance had to be the IOC, in the case of Olympic footage, or the AOC, in the case of Olympic expressions, and not the rights holders themselves. Thus, in the event of a breach, rights holders had to rely on the IOC or SOCOG to protect their exclusive rights.

In addition to copyright protection, the IOC had the power to protect Olympic TV rights under sections 52, 53(c) and 53(d) of the *Trade Practices Act* 1974 (Cth). These sections prohibit the making of a false representation or engaging in misleading or deceptive conduct. During the Olympics, Australian rights holder, Seven Network, repeatedly sought protection from these provisions where other broadcasters or advertisers made representations that they were in some way licensed Olympic broadcasters or had some connection with the Olympics.[21]

Similar protection was also available under the *Sydney 2000 Games (Indicia and Images) Protection Act* 1996 (Cth), which specifically targeted ambush marketing and unauthorised use of Olympic symbols and logos.[22] The protected symbols included the word *"Olympic"* and expressions *"Games City"*, *"Sydney Games"* and *"Summer Games"*. The Act prohibited the use of any of these indicia or images for a purpose which suggested some connection with the Olympic Games or the Paralympic Games. This Act was repealed at the end of 2000.

Restrictions on non-rights holders

Although it is imperative for the IOC and rights holders alike that Olympic TV rights are protected, it is also important that Olympic organisers strike a balance between protecting rights holders and maintaining harmony with the non-rights holders who are equally responsible for generating public interest in the Olympics. In order to achieve this balance, regulations control the activities of both rights holders and non-rights holders during Olympic periods.

Non-rights holding television networks cannot broadcast Olympic events or activities, except in accordance with the IOC's "Television News Access Rules".[23] In a manner which reflects the distinction between news and entertainment asserted prior to the Melbourne Olympics, the News Access Rules allow non-rights holders to use a certain proportion of Olympic footage as part of regularly scheduled news programs.[24] While the News Access Rules were developed by the IOC, the IOC permits them to be modified in each country so that they comply with local laws including local copyright law.

During the Sydney Olympics, use of footage was subject, among other restrictions, to the "'3 x 3 x 3" convention which provided that:

- Olympic material could appear in no more than three news programs per day;[25]
- the duration of the Olympic material used in any one news program was not to exceed a total of three minutes and the Olympic material not exceed one third, or 30 seconds, of the duration of a particular event. If the duration of a particular event was less than 15 seconds, such as the 100m sprint, the whole of the event could be shown;[26] and
- news programs in which the Olympic material appeared had to be separated by at least three hours.[27]

The 3 x 3 x 3 convention can be traced back to the 1960 Rome Olympics and is now a widely accepted convention for the use of sporting footage in the Australian television industry. The enforcement of the News Access Rules, particularly with the assistance of the AOC, through mechanisms such as linking access to athletes with the Rules, sparked considerable complaint from Australian non-rights holders who questioned the right of the AOC *"to take the fullness of the Olympic experience away from the people of Australia and the world and give it to the highest bidder"*.[28] Indeed, Sydney TV rights, like the Melbourne Olympics before them, were not without dispute.

A major area of dispute during the Sydney Olympics stemmed from the prohibitions imposed on non-rights holders by the *Guidelines for Media Access of Non-Rights Holders to the Common Domain, Sydney Olympic Park, Homebush Bay (Television and Radio)*. Under the Guidelines, non-rights holders were only allowed access to Olympic sites after being issued with accreditation by their national Olympic Committees.[29] This accreditation was of a limited nature and, with the exception of press conferences, did not entitle non-rights holders to originate any programming or feed from Olympic venues. In the lead up to the Olympics, the Olympic Co-ordination Authority (**"OCA"**) had planned to grant more accreditation to Australian non-rights holders, however, after substantial international pressure from organisations including Reuters and Associated Press, eight passes were available for both Australian and international rights holders.[30]

The OCA derived its power to regulate the media in part from the *Homebush Bay Operations Act* 1999 (NSW) which provided that no person could use audio, loudspeaker or broadcasting equipment or cameras without the permission of the OCA. This prohibition operated in Homebush Bay Olympic sites and was supplemented by the *Olympic Arrangements Act* 2000 (NSW) which prohibited, without OCA approval, any recording or transmitting of Olympic images. These powers were intended to facilitate efficient Olympic communications,[31] and at the same time, protect *"to the maximum extent possible, the entitlements of Olympic media rights holders"*.[32]

NEW MEDIA

The necessity of protecting TV rights has also pervaded IOC approaches towards the introduction of new Olympic broadcasting possibilities. In circumstances uncannily similar to the reluctance of the Olympic Movement to embrace television in 1956, the IOC has only cautiously approached internet technology.[33] The major concern for the IOC is how to sell internet rights. At a recent IOC World Conference on Sport and New Media, IOC Vice President, Dick Pound, remarked *"historically, we have sold in a particular territory. Until you can guarantee that the signal will be restricted to your territory, you cannot put real time video or real time audio on the Internet"*.[34] Unlike TV, which is limited to territorial broadcasts and can be sold to networks and consortiums individually, based on current technologies, the IOC would only be able to sell internet broadcasting rights on a global level.[35]

Partly in response to the strong criticism of the IOC and Olympic organisations for shutting out on-line journalism at the Sydney Olympics, the IOC has now begun to trial internet broadcasting technology assess the potential of limiting internet access to specific territories. The first official trial came during the 2002 Salt Lake Olympics, where a Swiss consortium offered internet broadcasting to Switzerland free for three days before introducing a fee.[36] Technologies have also been experimented with by other organisations including the Paralympics and soccer World Cup.

Although it is unlikely that internet developments will supersede television broadcasts, at least in the short term, they will have an effect, particularly in the more developed nations. As historian Stephen Wenn points out *"[a]ll of these new forms of media, broadcasting, production and access to information question the Olympic Movement and will force it to redefine its communication policies and strategies in the Internet era"*.[37] Just as the development of satellite technology enabled television to be broadcast live internationally rather than relying on the transport of tapes from place to place, new technologies, including cable and satellite and use of digital transmissions, will see the internet develop as a feasible and popular option for broadcasting images.

In any event, the future of Olympic broadcasting will have to deal with the development and possibilities of the internet in any future negotiations and planning. For now, and at least until the 2010 Winter Olympics, for which the IOC is yet to negotiate broadcast rights, the IOC's protection of TV rights holders and tough stance towards internet piracy is set to continue.[38] As Pound comments, *"the Internet is not ready[...]TV is the engine"*.[39]

1 Quoted Cahill S, "The Battle over Olympic Television Rights Returns to Australia, where it all began" (2000) 1(4) *ABCzINE* at 14.

2 "Olympic Broadcasting" <www.olympic.org> (Accessed 25/08/02).

3 Note 2.

4 Toohey K and Veal AJ, *The Olympic Games* (Wallingford: CABI Publishing, 2000), at 127.

5 Note 4 at 128.

6 Cahill, note 1 at 14.

7 Cahill, note 1 at 15.

8 Wenn SR, "Lights! Camera! Little Action" (1993) 10(1) *Sporting Traditions* at 44.

9 Quoted, note 8 at 45-6.

10 SOCOG, "Melbourne Olympic Games" <www.gamesinfo.com.au> (Accessed 25/08/02).

11 Slater J, "Changing Partners" in Barney RK et al (eds), *Global and Cultural Critique* (University of Western Ontario:, 1998), at 53.

12 Quoted Guttman A, *The Games Must Go On* (New York: Columbia University Press, 1984) at 218.

13 Wenn SR, "Growing Pains" (1995) 4 *OLYMPIKA* at 8.

14 "Broadcast rights" <http://www.olympic.org/uk/organisation/facts/revenue/broadcoast_uk.asp> (Accessed 25/08/02).

15 SOCOG, note 10.

16 SOCOG, note 10.

17 Hill-Douglas, "TV's Quantum Leap to Sydney" <http://www.apsattv.com/history/september2000.html> (Accessed 11/10/02).

18 Godwin G et al, "Let the games begin" (1996) 125 *Communications Update* at 2-4.

19 An example of the disputes which can arise from Olympic footage is *Australian Olympic Committee Inc v The Big Fights Inc* (1999) 46 IPR 53 which involved disputed ownership of copyright in films of the 1956 Melbourne Olympic Games.

20 This Act has been extended by the *Olympic Protection Amendment Act* 2001 (Cth) to cover *"Olympic expressions"*.

21 Two important cases illustrate the effect of these provisions: *Pacific Dunlop Ltd v Hogan* (1989) 23 FCR 553; and *Talmax Pty Ltd v Telstra Corporation Ltd* (1996) ATPR 41-484.

22 See Gourley O, "Ambush Marketing" (2000) 19(4) *Communications Law Bulletin* at 20.

23 *Television News Access Rules Applicable to the Sydney 2000 Olympic Games*, rule 1.

24 Fairbairn J, "Olympic broadcasting", (2000) 4(4) *TeleMedia* at 38.

25 Note 23, rule 2.

26 Note 23, rule 3.

27 Note 23, rule 4.

28 Godwin, note 18 at 4.

29 With the exception of three international press agencies and the Australian Associated Press, which received their accreditation from the IOC: Fairbairn, note 24 at 39.

30 Fairbairn, note 24 at 39.

31 "Procedure for allocation of permits" <www.gamesinfo.com.au/vn/OP/ARSOPMA.html> (Accessed 28/08/02).

32 *Guidelines for Media Access of Non-Rights Holders* at 1.2.

33 See Warner B, "Analysis: Internet Media Band from the Olympics" <www.cnn.com> (Accessed 25/08/02)

34 Quoted Klein S, "Back to the 20th century" <www.content-exchange.com> (Accessed 25/08/02).

35 Kramer SD, "Frustration" <www.ojr.org/ojr/business/p1017712999.php> (Accessed 25/08/02).

36 Williams M, "Olympic Games Go for the Gold Online" <cssvc.pcworld.compuserve.com> (Accessed 25/08/02).

37 Spá MM, "The Olympic Movement and the Information Society" <http://www.blues.uab.es/olympic.studies/pdf/OD011_eng.pdf> (Accessed 25/08/02) at 32.

38 Ward M, "Net faces 10-year Olympic shutout" <news.bbc.co.uk/1/hi/sci/tech/1054108.stm> (Accessed 25/08/02).

39 Quoted Klein, note 34.

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Regional Telecommunications Inquiry Report

Graham Phillips reports on the findings of the inquiry into regional telecommunications services chaired by Dick Estens.

On 8 November 2002, the Regional Telecommunications Inquiry (**"Inquiry"**) released its final report (**"Report"**) into the provision of telecommunications services in regional, rural and remote Australia. The Inquiry had been established by the Minister for Communications, Information Technology and the Arts, Senator Richard Alston on 16 August 2002 to assess the adequacy of telecommunication services in these areas.

Over 600 submissions were accepted from the public and telecommunications industry participants. The 35 findings and 37 recommendations of the Inquiry related mainly to the adequacy of:

- fixed telephone services and payphones;
- mobile telephone services;
- Internet services;
- high band Internet services; and
- legislated consumer safeguards.

Other issues such as the rural presence of Telstra and assuring future benefits were considered.

In general, the Report does not make any major policy recommendations. For the most part, the recommendations involve putting contentious issues to the Government for further review.

FIXED TELEPHONES AND PAYPHONES

The Inquiry's main findings in relation to fixed telephone services are:

- basic telephone services are readily available to Australians and have a high rate of connection;
- the universal service obligation (**"USO"**) contestability pilots have not yet delivered competitive outcomes. While as a matter of principle USO contestability is supported, further work is needed to validate its 'practical utility';
- Telstra's performance under the customer service guarantee (**"CSG"**) in providing connections and rectifying faults in regional, rural and remote areas is high and has been steadily improving. However, the length of the guaranteed connection timeframes for minor rural and remote areas remains long;
- faults in operation of Telstra's customer access network have increased but remain consistent with historical levels;
- priority assistance service is now available to consumers with pre-diagnosed life threatening medical conditions; and
- new Telstra pricing packages have improved consumer options but were not well promoted.

The Inquiry's recommendations regarding fixed telephone services include: