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Communications LAW

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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 23 No 1 2004

A Big Boo Boo: The FTA and Copyright Duration

Leon Sher and Niranjan Arasaratnam critique the proposed 20 year extension of copyright announced as part of the recent Australia United States Free Trade Agreement.

Perhaps one of the greatest beneficiaries of the recent Free Trade Agreement (*FTA*) concluded between the US and Australia is Yogi Bear. Under the terms of the agreement, which is subject to approval by both Parliament and Congress, the duration of copyright protection is to be extended by 20 years.[1] Yogi debuted in 1958, and under the 50 year term of protection for films, his first appearance would be out of copyright at the start of 2008. However, Warner Bros will now retain control of Yogi for a further 20 years.[2]

Surprisingly, this particular change to copyright law has largely escaped attention in the popular press, even though the term of copyright has been described as 'the single most important issue in copyright law'.[3] Nevertheless it has created a storm of controversy amongst librarians, university academics and intellectual property experts alike. This paper argues that the extension of the term is not justified in Australia, and is a 'Mickey Mouse' deal that directly contradicts the Government's own position. In response to a report by the Intellectual Property and Competition Review Committee (*IPCRC*), which saw no merit in extending the term,[4] the Government stated that it had 'no plans to extend the general term for works'.[5] It is submitted that the agreement to extend the term is better viewed as a trade 'concession' provided as part of the wider conclusion of the Free Trade Agreement.

A BALANCING ACT: DETERMINING THE DURATION

Copyright law attempts to balance two distinct rights: the right of authors to exploit their creation and obtain a return for their labour, and the right of the public to appropriate and adapt the creation. This balance is achieved by affording authors a *limited time* in which to exercise exclusive rights over the use of their work, after which the work becomes part of the public domain. Currently, section 33 of the *Copyright Act 1968* (Cth) provides that copyright in literary, dramatic, musical and artistic works extends until the end of the 50th year after the death of the author. Copyright in film and sound recordings extends until the end of the 50th year after the year of publication. The focus of this article will be on the extension of copyright works, however the proposed 20 year extension applies to other subject matter as well, including sound recordings and films.

The arbitrariness of selecting life plus 50 was acknowledged by the Copyright Law Review Committee in a report compiled in 1959: 'In weighing up the interests of the community as against those of the author any period of copyright that is chosen will be a somewhat arbitrary one'.[6] The decision to adopt life plus 50 was based on the British term, and in 1912 the Australian Parliament passed a new Copyright Act essentially adopting the British position.

The duration of copyright protection for Australian works overseas varies

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depending on the jurisdiction. In contrast to Australia, both the EU and US have adopted a term of life plus 70 years. The protection of Australian works in the EU is partly governed by the Berne Convention (to which Australia is a party), which imposes several obligations regarding the copyright term. Article 7 prescribes the term as being no less than the life of the author plus 50 years. Article 9 contains what is known as the 'rule of the shorter term', which in certain circumstances allows nations to shorten the protection of foreign works. Where both nations protect copyright for longer than life plus 50, they merely have to reciprocate protection, meaning foreign works are protected for only as long as they would be in their own country. Therefore Australian works receive life plus 50 years of protection in the EU, whereas local European works receive life plus 70.

In the US the copyright term was extended by the *Copyright Term Extension Act 1998* (US) to life plus 70. However, in the US there is no comparison of terms requirement, so foreign works enjoy the same protection as local works. Therefore, Australian works receive life plus 70 years protection in the US.

If legislation to give effect to the Free Trade Agreement is passed by Parliament, Australian works will enjoy a further 20 years of protection in Australia. They will also enjoy 20 extra years in the EU due to the rule of shorter term, and continue to receive life plus 70 in the US. Under Article 17.4.5 of the draft version of the Free Trade Agreement there is no obligation on Australia to enact retrospective protection for those works already in the public domain.

THE EXTENSION LAID BEAR

The term of copyright protection is designed to provide authors with a return for their labour and thus provide sufficient incentives to create. At the same time the public has an interest in using, enjoying and building upon these works. It is necessary to consider what effect the extension will have on these interests, and any other benefits or detriments that it may bring.

Incentives vs public domain

The main economic rationale for copyright is to supply a sufficient incentive for creation.[7] By providing protection to authors it allows them to recoup their initial investment and prevent others from simply copying the fruits of their labour. Therefore the question is whether an extra 20 years provides such an *added* incentive to create, that it is justified when balanced against the overall loss to the public domain.

The answer is that it is doubtful whether such future benefit will be taken into account by authors when deciding whether to create work or not. 'Distant advantages tend to be much less persuasive as a motivator of action than relatively immediate advantage'.[8] The IPCRC came to a similar conclusion, stating that there was no evidence that an extension would provide incentives to create works not already being produced.

The actual economic value of a 20 year extension is worth very little to the author. In an *amicus curiae* submission made to the United States Supreme Court in *Eldred v Ashcroft* (a constitutional law case challenging the legitimacy of the 20 year extension), a group of esteemed economists wrote that the twenty year extension provided 'essentially no incentive to create new works.'[9] This view was expressed by Justice Breyer in his dissent in *Eldred.* Using assumptions about the time value of money provided by the economists, he wrote: '[I]t seems fair to say that…a 1% likelihood of earning $100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.'[10]

The marginal added incentive must be compared against the detriment to the public domain. The most immediate effect of a 20 year extension means that potential authors are further deprived of the opportunity to reshape works to reflect the events and culture of their time. As Chafee wrote, 'a dwarf standing on the shoulders of a giant can see farther than the giant himself'.[11] In other words, works can be enriched by the input and development of new authors. It has been suggested that the public domain is not static, and that access to works can be obtained through a variety of exceptions to copyright rules, for example fair dealing.[12] Nevertheless the fair dealing provisions

mobile devices as 'pervasive' technologies, might feed into the advances of the MHP or a related standard, producing new levels of connectivity with mobile devices.[28]

CONCLUSION

New ideas for digital broadcasting developments, some suggested in this paper, could be included in a future model for improved understanding. The sale of transmission services in Australia, and forthcoming spectrum still require solutions that might be better understood by knowledge of the' *distance* between communication partners'[29] especially as these entities involve major transactions.

Digital television is barely *visible* to the average consumer or citizen, yet the consumer continues to pay for infrastructure and is reduced to a citizen with limited *access* to knowledge about developments.

The Australian public must have knowledge of the technologies and transactions of change in order to remain vigilant about Australian broadcasting as a cultural and financial asset. The focus must be on present problems and the plans for the sale of spectrum. Models need to be developed and critiqued by a range of industry experts who do not reach 'quick-fix' conclusions for policy. The closed transactions of Australia's transmission infrastructure suggest the need for a new approach to 'knowledge management' for Australia's *public* broadcasting future.

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2 Dowd, C, (2003), *Knowledge of Technologies for digital television in Australia*, Conference proceedings from the Communications Research Forum 2003, Canberra, http://www.dis.unimelb.edu.au/staff/cated/pubcate.htm.

3 The Digital Video Broadcasting Authority (DVB) sets broadcasting standards that can be recognised by the acronyms of the committees dealing with particular standards and are known within the broadcasting industry as DVB-C (cable), DVB-S (satellite) and DVB-T (terrestrial). "The DVB (Digital Video Broadcasting Project) is an industry-led consortium of over 300 broadcasters, manufacturers, network operators, software developers, regulatory bodies and others in over 35 countries committed to designing global standards for the delivery of digital television and data services" (http://www.dvb.org/latesthtml, 2002).

4 Foucault, M. (1970) *The Order of Things. An archaeology of the human sciences.* Routledge. London, 262.

5 Commercial-in-Confidence has been described as " a confidentiality provision, which enables companies to put details of research and development, tenders or other deals off limits to both public and parliament It doesn't have to be approved, but once it's applied, any flow of information abruptly ceases and appeals can result in long, drawn-out legal battles": Pelly J. (1999). *Commercial in Confidence and the rise of Secret Government*, retrieved from the web http://www.aidwatch.org.au/news/18/l2.htm. This quote was published by Aid Watch, but was not available via the web at the time of writing this paper.

6 Kaufer, D.S., & Carley, KM, above n 1, 144.

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12 The sale of Australia's national transmission network took place in March 1999 and is listed in the government asset sales register located at http://www.finance.gov.au/as_seJsales/Website Information - Asset Sa/website information - asset sa.htm.

13 Issues on the sale of spectrum as noted by the Productivity Commission are contained in section IV of the Productivity Commission's Inquiry into Broadcasting Report on 'Opening up the Spectrum', located at http://www.pc.gov.au/inquiry/broadcst/finalreport/index.html. See also ABA time line at http://www.aba.gov.au/tv/digitaltv/industry/timeline.htm.

14 Payment for spectrum is evident in the Productivity Commission's Enquiry into Broadcasting Report with reference to spectrum on 'loan' to broadcasters. See p.199 ofhttp://www.pc.gov.au/inquirv/broadcst/finalreport/chapter06.pdf.

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21 The draft MHPI.O was published in July 2000 by ETSIIO (European Telecommunications Standards Institute). Works in progress related to MHP can be located via http://pda.etsi.org/pda/queryform.asp.

22 The DGTEC model from early 2002 included operability for HDTV, surround sound, multiple views, closed captions and other features. See http://www.dg-tec.com.au/homepage.html for specifications. Some services included multi-camera angles notably developed by channel 10 Sports. The first Set-top box released in Australia in 2001 did not enable reception of high definition signals (see Hillery, above n 18, 37-40).

23 DVB Digital Video Broadcasting, (2002), Digital Video Broadcasting (DVB) Multimedia Home Platform (MHP) Specification 1.2.1, retrieved from the web 2002 http://pda.etsi.org/pda/Queryform.asp, 55.

24 The MPEG 2 Transport stream is the common standard for all profiles of an MHP system, whether it is for enhanced, interactive or Internet profiles. See the broadcast Channel Protocol stack on page 56 and the platform profile definitions on p.362 of the MHP 1.1 draft document or corresponding pages of the later MHP version 2 via http://pda.etsi.org/pdalqueryform.asp.

25 DVB Digital Video Broadcasting, above n 23, 55.

26 Ibid 364.

27 A user agent is a helper application involving an 'actor' that communicates the 'runtime' of applications with an Application Program Interface. See page 73 of the DVB-MHP 1.1 document, above n 23.

28 Dowd C, 2003, above n 2.

29 Kaufer, D.S., & Carley, KM, above n 1, 100.

problems. The strategic approach for digital broadcasting leads to a plan for spectrum. The return of one digital channel from each broadcaster by 2008, to the government, once the simulcast period is over, appears to be designed so that the extra channels can be available as commodities to new players, without acknowledgement that in such a competitive market there will be finite advertising dollars.

The plans for spectrum do not appear to offer any guarantees for public broadcasting, or even genuine alternative services beyond 2006, only more competition and more content. Without critics of the 'authoritative information that has formed from knowledge and positions',[15] especially for spectrum management, and with a lack of diverse viewpoints, the 'reach of ideas'[16] is stifled and cannot promote innovation!

The potential use of spectrum as a choice between alternative services or wide screen images via a single channel is bound in legislation that partly defines how some broadcasters use their allocated 7MHz of spectrum. However, a quota for HDTV content for all free-to air broadcasters involves high costs for production and consumption and is difficult to achieve, indeed 'Australia has mandated a unique, high cost system',[17] which continues to thwart the progress of digital television.

The risky cycle of developments involves fragmented knowledge about markets and investments for creative content for *more* or *less* interactive services, with more or less bandwidth. There is also a gap in knowledge about related 'social values' during this major technological change that should involve cultural institutions and individuals in understanding change for 'citizens' of the future, beyond being users or consumers.

DIGITAL CONTENT PRODUCTION AND MULTI-CHANNELS

Broadcasters at the start of the 21st century remain focused on the core developments of digital broadcasting for fixed media in residential settings whilst mobile devices are mostly used, in a broadcasting context, only for interactive feedback. However, mobile devices of the future are likely to be different and might involve television. At present one-way interactivity, enabled with a set-top box, such as user choice for different camera angles on sports programs is best achieved using a wide-screen television set.

The HDTV format uses an aspect ratio of 16:9 compared to a standard television aspect ratio of 4:3, the latter commonly associated with 'the box'. The core of content for television over the years has been filmed in the standard format and until substantially new content is shot in 16:9 the old standard dominates the broadcasting screen. The variations in visual screen dimensions in the digital television environment were first noted by Hillery in a review of the first set-top box for Australia in 2002.[18] Broadcasters still only produce and purchase a limited amount of content in wide-screen in 2003.

A contemporary set-top box can enable one-way interactivity and multi-channel services that for a short time were offered by the ABC according to legislation[19]. Between 2002 and 2003 the ABC developed two multi-channels consisting of separate streams on a limited basis for a children's television channel called ABCKids™, and a youth stream called Fly™ TV[20]. The services were also retransmissions via Pay TV, including OPTUS channel 37 and AUSTAR Channel 14, however the ABC cut these services in June 2003 due to funding problems.

Multi-channels provide a means for specialised content for targeted audiences, but also have a potential to fragment markets. The sheer volume of content required for multi-channels can also be a burden that impacts on the potential explorations for progressive content. Knowledge of new digital television directions can be partly understood by understanding the basic system architecture and functionality of a reception device.

SYSTEMS AND STANDARDS FOR DIGITAL RECEPTION & INTERACTION

Between 2001 and 2003 several DVB Multimedia Home Platform[21] compliant set-top boxes were manufactured for the Australian market. However each box had different levels of functionality.[22] The open MHP standards for free to-air broadcasting are a contrast to the closed systems used for Pay TV and include evolutionary stages of development for technological convergence with the protocols of the World Wide Web and other standards.

The MHP system architecture and systems, which are akin to an operating system, use three core application areas based on profiles, for either 'enhanced broadcasting, interactive broadcasting, or internet access'.[23] Each profile consists of two levels accommodating for evolutionary stages of development, some of which are clearly dependent on other solutions, such as telecommunications entities.

Digital interactive content has so far been developed for numerous broadcasts, including the BBC documentary 'Walking with Beasts', which contained features such as resizable video windows and alternative narrative streams. These levels of functionality are possible due to the communication channels and other protocols[24] of an MHP system and the networks that the system connects with,[25] particularly for interactivity, and Internet connectivity.

The broadcast channel protocols enable the download and retrieval of programs via transmission streams in a specified way and apply across all three profiles of an MHP system. It is mandatory[26] for all digital receiver products, whether basic or advanced, to use these protocols if they are to conform to the MHP standard. Such uniformity is critical for broadcast content to be retrieved.

The MHP system is hardware independent and involves 'user agents'[27] that enable systems to function across a variety of platforms. It is not inconceivable that the commonality between 'digital' systems, including

have not been interpreted as widely in Australia as in the US for example. In Australia the fair dealing system is prescriptive; that is, if the usage is outside the stipulated scope then it is not fair dealing. In the US on the other hand the system is more open-ended and flexible; users must study four factors in determining whether the reproduction is fair. These include the purpose of the use, the nature of the copyrighted work, the amount used and the effect on the potential market.[13]

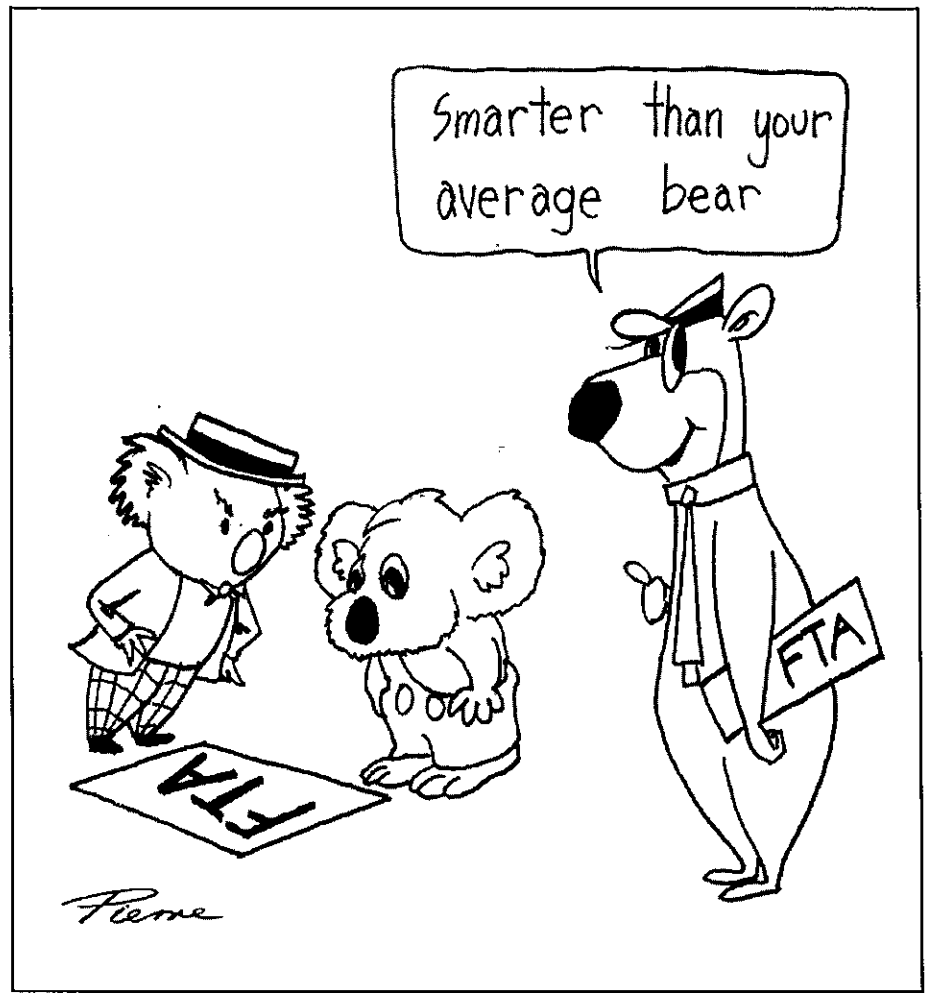
Essentially, the proposed copyright extension ensures potential authors can only see as far as the dwarf for a further 20 years. Therefore, the extension cannot be justified on economic grounds, since the added incentive to create is insubstantial, and does not outweigh the corresponding detriment in preventing public access for another 20 years.

Balance of trade

Australia is a net importer of copyright material, therefore any increased copyright protection benefits foreign copyright owners at the expense of local consumers. Whilst there are limited economic data, a report prepared by Allen Consulting Group in 2001 showed that the growth rate in imports of copyright material to Australia is outstripping the growth of Australian exports.[14]

As has already been pointed out, Australian works currently receive life plus 70 in the US, so it is difficult to see what gains are made by extending the term. On the other hand, US works only receive life plus 50 years in Australia, so an extension here allows US authors and companies, who export a vast array of intellectual property, an extra 20 years of royalty payments. It can be seen therefore why the US would desire Australia to increase its protection. It is these extra payments that will have an impact on both universities and libraries; Australian universities alone pay approximately $20 million a year in copyright fees.[15]

It might be argued that many works do not retain their commercial value, and even those that do would see reduced sales such that the cost of the extension might not be as high as first thought. However the extension still requires 20 extra years of payments, and also brings with it a variety of other transactional



costs. For example, if works are still under copyright control then there are costs involved in tracing the works to ensure that no infringement is taking place. The older the works become the harder they are to trace, and thus more costly. Adding a further 20 years will only make it more difficult to locate the copyright holders of works that have been protected for a long period. Further, the creators of documentaries, for example, must negotiate with a variety of previous copyright holders often for minimal uses of their works. Extending the term of protection ensures an increase in such transaction costs as well as a reduction in the number of new works.

Harmonisation

The fact that an extra 20 years would bring Australia's term of protection into line with major trading partners, in particular the EU and the US, has been seized upon as a justification for the extension.[16] It would reduce transaction costs, as it would be easier to manage portfolios of rights since they would all expire at the same time. It would also allow for greater certainty and simplicity in trade.

Arguments such as these compelled the European Commission to extend their copyright term in 1993 to life plus 70; the goal was to ensure a single duration across the EU. It was thought that differences in protection would impede the free movement of goods and services and distort competition in the common market.[17] It is worth noting that the arguments here for harmonisation focused on relations *within* the EU, rather than relations with international trading partners, such as the US. (Incidentally, at that point in time the US had a term of life plus 50 years.)

The focus of harmonisation arguments has been the US and the EU, however it should not be forgotten that another of Australia's largest trading partners, Japan, favours a term of life plus 50.

Whilst harmonisation with our major trading partners is important and clearly a positive outcome, there is a lack of evidence that the reduction of transaction costs associated with harmonisation will prove sufficient to justify the 20 year extension.

Technology today

The recent growth in communications

media has meant that copyright holders want added protection, particularly in light of the increasing ease with which copyright infringements occur. A 2003 report by the Allen Consulting Group suggested that technological developments were undermining the incentives provided by copyright law and that protection should therefore be extended.[18] However, what is at issue there is not the period of copyright protection per se, but rather the width of protection whilst copyright subsists. Piracy will occur regardless of the term, and what is important is finding better methods to enforce authors' rights rather than providing them with the same rights for a longer period.

CONCLUSION

There is little evidence that Australia should be embracing an extra 20 years of protection for copyright works. Whilst extending the term will provide some benefits in the form of easier copyright management and harmonisation with major trading partners, these are overwhelmingly outweighed by the detriments it will bring. The extension is highly unlikely to provide any greater incentives for creation and it reduces the public domain of works. It also offers little in the way of economic advantages since Australia is a net importer of copyright material. Given that Australian material already receives life plus 70 years of protection in the US, extending the term here only benefits US copyright owners.

The decision to extend the term is best understood as a trade concession provided to the US in the course of concluding the Free Trade Agreement. Perhaps the negotiators believed that overall Australia had more to gain than lose from the Agreement and were thus willing to make the desired changes to copyright. However, the decision has wide-ranging effects on the public availability and development of copyright works, making it a real 'boo boo'.

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1 The draft version of the agreement can be found at: http://www.dfat.gov.au/trade/negotiations/us_fta/text/index.html. The legislation will not be retrospective.

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18 Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, above n 12, 35.

Broadband Wars

David McCulloch provides a perspective on the recent ACCC moves against Telstra's wholesale and retail broadband pricing.

Australia is at a critical point in the growth of broadband. This is reflected in the serious battles being waged between Telstra and its wholesale internet service provider (***ISP***) customers over Telstra's broadband pricing. The Australian Competition and Consumer Commission (***ACCC***) stands in the middle of the fray, seeking to adjudicate.

STATE OF BROADBAND IN AUSTRALIA

To set the scene for the hostilities it is necessary to take a snapshot of the state of broadband in Australia. Currently, there are about 600,000 broadband subscribers, or about 7% of households. At the retail level about half of these services are provided by Telstra, either on its Hybrid Fibre Coaxial (***HFC***) cable, or via DSL, which uses the traditional copper phone line, commonly known as the public switched telephone network (***PSTN***), as the conduit.

With the exception of about 130,000 customers on the Optus HFC cable, most of the remainder of subscribers acquire their services from ISPs who are reselling Telstra's DSL service.

The industry sees broadband as an area of considerable growth. Telstra has a publicly stated goal of acquiring at least 1 million customers (retail and wholesale) by the end of 2005.

Whilst Australia's broadband penetration rates are behind countries like Hong Kong at 53% and Canada at 35%, there is a sense that a tipping point has been reached. In part, this is because there is a ready market for broadband - dial up internet users. How quickly broadband penetration can increase is reflected in the Canadian experience, which increased from 2% penetration to its current level of 35% in only three years.

CATALYST FOR HOSTILITIES

To meet its goals Telstra needed to drive take-up, and increase both its retail and wholesale customer base. At the same time, Optus – the second largest player in the market – needed

agents that are still being understood by those who embrace theory and practice and 'read everything and know all the institutions and practices'.[4]

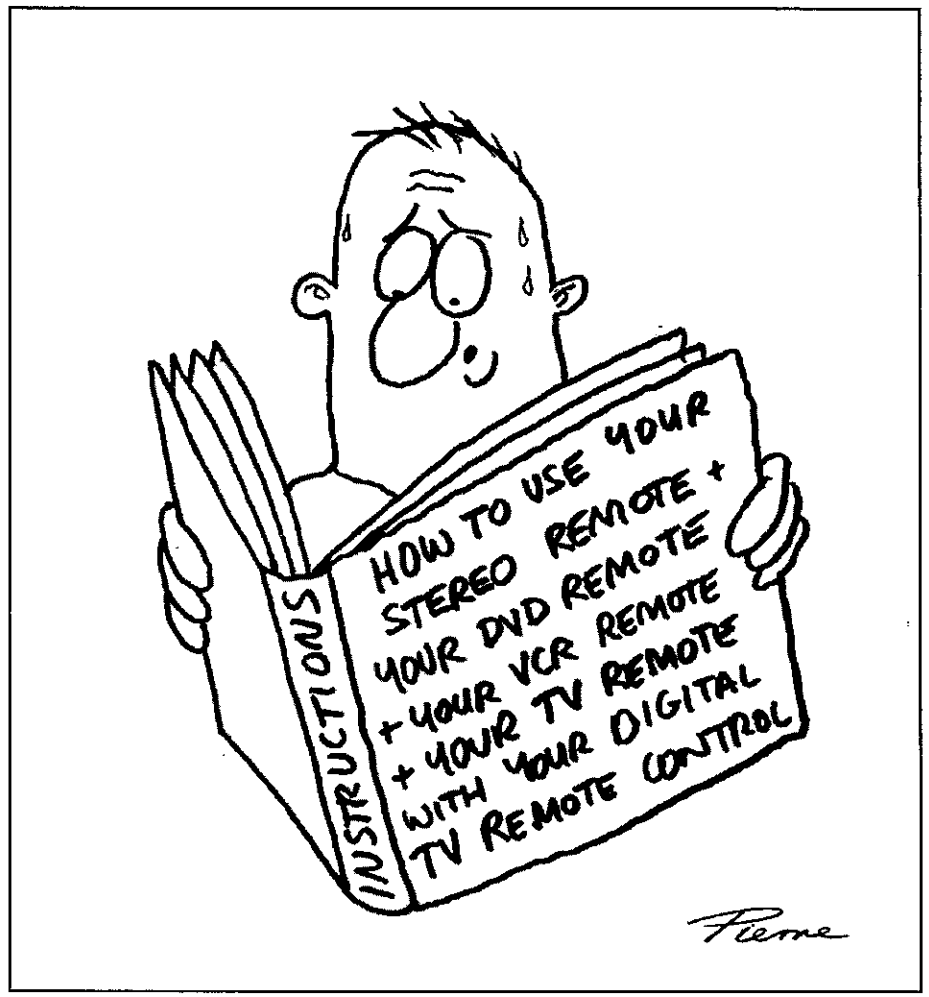
Digital transmission infrastructure developments in Australia began with negotiations for new facilities that involved the ABC, the Australian Government and an international ICT company, Ntl. The *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth) marked the major turning point that synchronised with the pre-sale of national transmission services in 1999. The changes evolved behind a screen of commercial-in-confidence,[5] which meant that 'interaction-knowledge cycles'[6] about the Commonwealth transmission towers were barely noticed, indeed were contained. However, the transactions for implementation of services did produce limited services in major metropolitan regions by 2002, but these were highly disproportionate to the costs. Plans for regional Australia are another stage of developments for 2004.[7]

By July 1999 the Australian Broadcasting Authority (ABA) had published technical plans for approaches to digital terrestrial television broadcasting, which included digital channel plans (DCP) for the nation. From mid 2000 until January 2001 transmitters and digital signals for the ABC were tested in a period of consolidation.

Ntl, the international company that entered into a contract for 15 years with the Australian Government and the ABC was pleased with a long-term contract to deliver digital broadcasting transmission services:

'Ntl's services to the ABC covering a whole network of analogue TV and radio and digital television transmission services, is probably the largest out-sourced transmission contract in the world.' (Ntl, 2000)[8]

The provision of transmission services via an international company has presented ongoing risks for 'national-public' broadcasters as they have a high dependency on large networks, which



are increasingly owned by private operators whose primary interests are in making profits.

By mid 2001 an Australian newspaper reported that "transmission specialist Ntl, is bedevilled with old technology… and crippling debts of almost $40 billion".[9] By the end of 2001 Ntl announced a series of 'cost cutting initiatives'.[10] In February 2002 Ntl announced that it would sell its Australian Broadcast Business for $850 million dollars to Macquarie Bank and focus on its core business in Europe.[11]

Although the closed transactions for transmission services were limited to a few agents of change due to commercial-in-confidence in negotiations the flaws were soon exposed. However Australian citizens have been denied knowledge (and services) about public assets valued somewhere between $650 million (see Government Assets Sales Register)[12] and $850 million dollars. Had information about transmission infrastructure been factored into a model as a communicative transaction, not just a financial one, the *reach* of knowledge may have been higher.

Digital technologies have already enabled multi-channels and a range of creative concepts in the broadcasting domain and spectrum is emerging with a potential commercial value. For some years the Australian Government has speculated on the returns from the sale of spectrum, adopting a *commodity* approach that is apparent in Productivity Commission documents.[13] Spectrum management plans as noted via the Productivity Commission could only ever be achieved once digital infrastructure systems, ie transmission facilities, were in place.

THE COST OF SPECTRUM

Australia's broadcasting infrastructure problems combined with payments to the Government for particular usage of digital technology for multiple streams or Datacasting as outlined by the productivity commission[14] suggests

On this view, interests beyond the broadcasting industry may be concerned that the uncertainty produced by the High Court's decision will exert an unfortunate stifling effect on the televised public domain, as various forms of comment and criticism which make use of other broadcasters' content may disappear from our TV screens.[9]

The Panel case currently awaits reconsideration by the Full Federal Court, which will determine the application of the substantial part test and the availability of the fair dealing defence in light of the High Court's findings. Given that the substantial part test is underdeveloped in the context of Part IV of the Act, there remains the distinct possibility that there will be another series of appeals before the matter is ultimately resolved.

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1 Network Ten Pty Limited v TCN Channel Nine Pty Limited [2004] HCA 14.

2 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2002) 118 FCR 417.

3 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2001) 108 FCR 235.

4 See eg Nine Network Australia Pty Ltd v Australian Broadcasting Corporation (1999) 48 IPR 333 at 340, Time Warner Entertainment Co Ltd v Channel 4 Television Corporation PLC (1993) 28 IPR 459 at 468 and Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142 at par 61.

5 Above, n 1 at [75].

6 Ibid.

7 Above, n 1 at [155].

8 See, for example, Michael Handler, 'The Panel Case and Television Broadcast Copyright' (2003) 25 SydLR 390.

9 See Melissa de Zwart, 'Seriously entertaining: The Panel and the future of fair dealing' (2003) 8 Media & Arts LR 1.

Knowledge Cycles of Digital Television in Australia

In this edited version of her paper presented at the Communications Research Forum 2003, Cate Dowd looks at the development of Australian digital television and some future directions.

Information about Australia's digital television infrastructure and a limited knowledge of reception systems may have impacted on the knowledge base for early-development decisions. The *timely reach* of information for knowledge formation remains important to the progress of digital television. The shortfalls of implementation suggest a need for a model that represents digital television as an evolving enterprise of diverse agents and complex transactions.

The base for a theoretical model might include 'knowledge cycles and communicative transactions'[1] as a means of understanding digital television as a form of major technological change. It might include ideas, motivation and agents for change as an extension of conventional information analysis and design. An 'eco-techno' system model[2] would represent *technological* change as an ecology beyond static architectures, entities and agents. Such a model might assist understanding and direct policy in a time of review, which otherwise appears likely to be marked by a *commodity* approach.

The sale of Australia's national transmission network in the early stages of developments led to a broken contract for transmission services, due to claims of unprofitable investments by the international company involved. The operational plans for Australia's transmission infrastructure also remain entangled in access issues for detailed information.

Understanding the early *communicative* transactions for change is as important as the identification of financial transactions. Important questions have been raised by the approaches so far. First, how can transmission infrastructure be reinstated as a public asset? Secondly, will the Australian Government succumb to international corporate interests with the anticipated sale of spectrum for broadcasting?

The technical knowledge of digital television involves many entities that stand against legislative requirements for broadcasters, including a quota for HDTV content that occupies the whole bandwidth of a digital channel. The potential of a channel is actually more sophisticated than this reduction, suggesting that policy needs to be informed by deeper knowledge of the technologies, beyond market models produced by a *productivity* agent of a government. The motivation behind change, via text agents, could also be reviewed and include reflections on the phenomena of technological convergence.

The agents of change for digital television include major technical standards that have been designed as open and evolutionary standards. Australian broadcasters, content developers, consumers and manufacturers are all influenced by the cycles of knowledge in the development process. The Multimedia Home Platform standard for the set-top box (commonly referred to as the MHP) will ultimately involve transactions with other agents for functionality, such as metadata standards. These entities need to be represented in a model of transactions with other distribution systems, such as mobile phones as a set of digital systems.

THE EMERGENCE OF DIGITAL TELEVISION IN AUSTRALIA

The digital transmission systems and standards for reception devices developed by the DBV[3] based in Geneva are major areas of development for Australian digital television. These entities involve complex and dynamic transactions across organisations and

to expand the reach of its broadband network, which was limited to 1.3 million addressable homes on its HFC network in Sydney, Melbourne and Brisbane. As Telstra knew from past experience in mobile telephony, the entry of a sizeable competitor acts as a stimulant, and drives takeup.

These complementary goals lead Telstra and Optus to negotiate a deal for Optus to re-sell Telstra's DSL product. This deal was finalised in November 2003, and meant an effective tripling of the size of the Optus network.

Ironically, this mutually beneficial agreement has set the stage for current hostilities.

TELSTRA'S PRICE REDUCTIONS

The day before the launch of Optus's DSL consumer broadband offering in mid-February 2004, Telstra announced significant reductions in retail offerings across all of its plans. Most significantly, Telsta reduced its entry level 256/64kbs service from $39.95 per month to $29.95 per month. And when you examine price reductions across all Telstra plans from the time of the Optus wholesale agreement with Telstra in November 2003 to the launch of Optus DSL product, you find price decreases of between 45% to 50%.

At issue was the fact that Telstra did not offer corresponding price reductions to its wholesale customers (the ISP resellers). This caused an outcry from those ISPs, who claimed they were being caught in an anti-competitive price squeeze, and were unable to make an adequate margin. For Telstra's entry level $29.95 product, the wholesale price was many dollars above the retail price, meaning that the ISP resellers would be making losses if they sought to match Telstra's retail price for this product.

COMPETITION NOTICE SOUGHT

The ISPs complained en masse to the ACCC seeking the issuing of a Competition Notice under Part XIB of the *Trade Practices Act 1974* (Cth) (the *Act*). Such a Notice is a mechanism designed as a deterrent to anti-competitive behaviour.

In issuing a Competition Notice, the ACCC must have reason to believe that a carrier has engaged in anti-competitive conduct. This will be the case if the carrier has market power, and takes advantage of that power with the effect, or likely effect, of substantially lessening competition in a telecommunications market.

The ACCC can issue either a Part A or a Part B Competition Notice. The Part A Notice is normally the first step following the forming of the relevant belief by the ACCC. However, the Part A Notice need not specify the particular conduct.

The Notice gives the ACCC – as well as affected parties – the right to take court action based on the conduct from the time that the Notice is given, and to seek damages. The ACCC can seek damages for each contravention of up to $10 million, and $1 million for each day that the contravention continues.

The Part A Notice is designed to open the gate for court action, and to warn the recipient to cease the conduct.

The next stage is the issuing of a Part B Competition Notice, which must set out the particulars of the alleged contravention. The Notice then is taken to be prima facie evidence of the matters in the notice. This then reverses the onus of proof, and makes it easier for the ACCC to succeed in court action.

THE COMPLAINT OF THE ISPS

Some of the arguments in support of Telstra's having engaged in anti-competitive conduct are as follows.

The conduct in question is Telstra's creation of the price squeeze. Telstra has taken advantage of its dominance in the wholesale market by lowering retail prices without corresponding wholesale reductions. If the wholesale market were competitive, Telstra would lose market share if it did not lower wholesale prices.

In addition, Telstra was able to time its pricing announcement, because as a wholesale provider to Optus it had much greater knowledge of Optus' activities than would have been the case were Telstra not the supplier.

This conduct causes a substantial lessening of competition in a number of markets, including:

- in the *retail broadband market*. other providers would be unable to compete, and thus Telstra would establish a dominant market share, leaving it unconstrained to raise prices in the medium term. The conduct was particularly critical at this "tipping point" in broadband's market development; and
- in the *wholesale broadband market*: constraining retail entry would have an impact on future wholesale competition, because building a retail customer base is an essential stepping stone for other providers to build their own DSL networks.

TELSTRA AND THE ACCC'S RESPONSE

Following the price reductions on 16 February 2004, and the ISP outcry, Telstra publicly stated that it was successfully negotiating new wholesale deals with many of its customers. However, many of these customers indicated that no fruitful negotiations were occurring. The price reductions that were offered provided nothing like the margins based on Telstra's original retail prices.

The ACCC took its first formal step on 25 February by issuing an Advisory Notice. This is a non-binding notice in which the ACCC can set out how a firm can change its conduct to avoid contravening the Act. The ACCC indicated that Telstra should consider dropping its wholesale prices.

Telstra subsequently did offer some price reductions, which many wholesale customers continued to indicate were inadequate. For example, the entry level wholesale price was reduced to about 20 cents below the retail price.

The ACCC ultimately accepted that

these reductions were not sufficient when it issued a Part A Competition Notice on 19 March 2004. This is a comparatively swift timeframe for the ACCC to issue a Competition Notice.

The ACCC hoped that the notice would ensure that Telstra offered appropriate reductions in the market place. The ACCC declined to advise Telstra what those reductions should be.

Telstra continued to make public statements that it was concluding wholesale arrangements with many wholesale customers. Again, many wholesale customers indicated that meaningful negotiations were not occurring. At the same time, representatives of Telstra let it be known that pricing was not anti-competitive, and that Telstra was prepared to have the matter adjudicated in court.

However, on 1 April 2004, Telstra released new wholesale pricing which offered two packages. The first, labelled as "Protected Rates" was described as providing an effective 40% discount off retail prices. The second, a "Growth Option" was described as offering greater reductions on higher speed plans.

The ACCC cautiously welcomed these plans.

The new pricing has not placated many ISPs who indicate that the extent of the margins is not as claimed, and that they only apply to ISPs that are prepared to exactly replicate Telstra's retail offerings. Some ISPs have expressed concern that Telstra has cleverly engineered a solution that will satisfy the ACCC but not wholesale customers.

At the time of writing (early April 2004), the ACCC is reviewing these revised plans in light of ISP objections.

WHAT NEXT?

It remains to be seen whether the ACCC accepts Telstra's recent offer and, if so, withdraws the Competition Notice, or if it determines that the offer is not sufficient.

If the ACCC does not take the matter further, it is open to a disgruntled ISP to seek damages in court, based on the Competition Notice, until such time as the ACCC withdraws the Notice, or until it expires (it is in force for 12 months, unless withdrawn).

If the ACCC is not satisfied with Telstra's offer, it could seek to apply pressure to Telstra to make a better offer. The ACCC can also seek damages pursuant to the Part A Competition Notice. However, it is more likely in that event the ACCC would issue a Part B Competition Notice which would specifically outline the anti-competitive conduct. In enforcing that Notice in the court, the onus would be on Telstra to rebut the allegation.

TELSTRA'S MOTIVATION/ STRATEGY/JUSTIFICATION?

When the retail price reductions first occurred, without corresponding wholesale price reductions, it was speculated that this was because of a lack of communication between Telstra's wholesale and retail departments (even though they report to the same person).

However, the more time that transpired without Telstra making substantial wholesale reductions, the greater the speculation that this was a deliberate strategy to take market share before the regulator was able to marshal itself to act. To put it another way, the speculation was that Telstra was willing – to use an analogy - to cop a speeding fine, because the rewards for getting to its destination early were so much greater.

Telstra has variously claimed that it *has* been offering substantial reductions to wholesale customers, or that its prices were not creating an anti-competitive price squeeze. In particular, offering low entry level retail prices was a legitimate loss leading strategy.

With the issuing of revised prices following the Competition Notice, Telstra claims that those revisions should settle any question of anti-competitive conduct.

CONCLUSION

The outcome of the current pricing debate is yet to be determined, as is its impact on a competitive broadband market.

The importance of the issue is not limited to just broadband as we know it. It extends to the full range of advanced services which broadband provides the platform to potentially deliver. A key application – and the key danger to the incumbent - is voice over IP. New entrants who today provide standard broadband services to consumers may tomorrow be in a position to offer an effective substitute for traditional PSTN voice telephony services. This potentially has huge ramifications for Telstra's local access and local call revenues. This is a key reason why the current battle is being fought so hard, and why a game of brinkmanship with the regulator is being waged.

It is also why it is so important that the competition regulatory regime - and the regulator - are able to efficiently and expeditiously prevent leveraging of market dominance to stymie the development of a more competitive and advanced communications environment in Australia.

David McCulloch is General Manager, Government Affairs at Optus in Sydney.

HIGH COURT: MAJORITY DECISION

The High Court, by a three to two majority, overturned the Full Federal Court's decision. The High Court held that a single image appearing on a television screen with accompanying audio does not constitute a television broadcast. The majority found that, in this case, the 'television broadcasts' were the 20 separate Channel Nine programs from which the excerpts shown by Ten had been taken. The Court described these as broadcasts "put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title... which would attract the attention of the public".[5]

In coming to this conclusion, the majority criticised the Full Court's approach for giving an artificial meaning to the terms of the Act and for privileging the rights of television broadcasters over those of other copyright holders. The majority's interpretation of the Act drew on the historical and legislative context surrounding the first grant of broadcast copyright in both Australia and the United Kingdom and pointed to the use of the term 'program' in other legislation applicable to the broadcasting industry.

The High Court agreed with Justice Conti that television advertisements are discrete television broadcasts. However, the Court declined to decide whether an individual segment within a television program qualifies as 'a television broadcast' in which copyright subsists. Indeed, the Court's interpretation of 'a television broadcast' remains, by its own admission, imprecise; the majority noted that "there can be no absolute precision as to what in any of an infinite possibility of circumstances will constitute a television broadcast".[6] However, the majority indicated that it would not necessarily consider separate segments, items or 'stories' within a prime-time news broadcast as separate 'television broadcasts' in which copyright subsists.

The High Court remitted the case to the Full Federal Court for redetermination of whether, in light of its findings on the scope of the television broadcast copyright, the excerpts shown by Ten were substantial parts of Channel Nine's programs contrary to Justice Conti's findings.

MINORITY DECISIONS

In separate judgments, Justices Kirby and Callinan both agreed with the Full Federal Court's broad construction of 'a television broadcast' as each single visual image and the accompanying sound broadcast. Both minority judgments gave priority to the text of the legislation over the ancillary materials, and maintained that the wording of the Act established the limits to a purposive approach to statutory construction favoured by the majority.

Furthermore, the minority focused closely on the nature of the interests to be protected by the broadcast copyright. Referring to the well-known test that 'what is worth copying is *prima facie* worth protecting', Justices Kirby and Callinan argued that, in the highly competitive and commercialised broadcasting industry, broadcasters have a strong interest in re-broadcasting snippets of footage from their competitors and that the broadcast copyright should protect against this conduct.

The minority judges recognised that their broad interpretation of broadcast copyright gave a stronger degree of protection to broadcasters than other copyright holders. While Justice Kirby was almost apologetic that his analysis led to such a result, Justice Callinan reasoned that the broadcast copyright was intended to be a unique form of copyright, and that a greater level of protection was justified in the competitive and 'nakedly commercial context' of broadcasting, in which 'expansive infrastructures, fees, techniques and resources are required'.[7]

COMMENTS

The High Court's decision in *The Panel* case may be welcomed for having addressed some of the key criticisms directed at the Full Federal Court judgment.[8] In particular, by raising the infringement threshold, the High Court has ensured that television broadcasters are no longer privileged with a greater degree of copyright protection than other copyright holders, including the producers of other Part IV subject matter (most notably films) and the creators of a broadcast's underlying works. Furthermore, the High Court decision reaffirms the utility of the substantial part test within the television broadcast copyright regime, thus restoring a key mechanism by which the courts have traditionally sought to resolve copyright law's fundamental tension between the private interest in protection and the public interest in access.

But for those in the broadcasting industries, the High Court's decision does not offer any real comfort beyond confirming that broadcast copyright subsists in discrete television programs and advertisements. Indeed, by its reliance on an unresolved definition of 'television broadcast', the High Court has allowed an unfortunate degree of uncertainty to survive in relation to the subject matter of this form of copyright. For broadcasters wishing to reproduce parts of television programs for their own use, any uncertainty as to whether their actions might be in breach of the *Copyright Act* is compounded by the subjectivity involved in the court's determination of whether the use constitutes fair dealing. As the history of *The Panel* case itself reveals, the courts have assessed the fair dealing defence in a highly erratic fashion. It seems unlikely that broadcasters will risk using excerpts of other broadcasters' programming on such an unreliable and uncertain basis, especially when consideration is given to the high costs involved in the television industry.

Casenote: The *Panel* Decision and the Substantial Problem of Television Broadcast Copyright

Brendan Plant and Niranjan Arasaratnam review the High Court's recent decision in the *'Panel'* case, and provide some comment on its implications for industry.

The High Court[1] has overturned the decision of the Full Federal Court,[2] which held that the owner of the copyright in a television broadcast had the exclusive right to reproduce *any* of the images and accompanying audio broadcast.

On one hand, the High Court's decision will be welcomed by broadcasters, editors, producers and others within the television and movie industries because, by narrowing the scope of the broadcast right, the threshold for infringement seems to have been raised.

However, while the majority of the High Court found that television programs and individual advertisements both answer the description of a 'television broadcast' for the purpose of the *Copyright Act 1968* (Cth) (the *Act*), it left open the question of whether a particular segment of a program may also constitute 'a television broadcast'. It also gave no guidance on how a 'substantial part' of a television broadcast is to be determined for the purpose of infringement.

BACKGROUND

Channel Nine commenced copyright infringement proceedings in the Federal Court against Network Ten under the Act for broadcasting short excerpts of Channel Nine programs on its television show, *The Panel*. Network Ten defended the action on the basis that it had not re-broadcast a substantial part of Nine's broadcasts or, if it had, that its broadcast of the segments constituted 'fair dealing' under the Act.

THE TRIAL JUDGE

At first instance,[3] Justice Conti considered two main issues: first, the scope of the copyright granted to television broadcasts as 'Other Subject Matter' under Part IV of the Act; and, second, the application of the fair dealing defence.

Justice Conti held that, in order to infringe television broadcast copyright, it was necessary to copy or re-broadcast a 'substantial part' of that subject matter. In relation to television broadcasts, the subject matter was a program or, in certain cases, a segment of a program with a self-contained theme. His Honour treated television advertisements as discrete television broadcasts worthy of protection.

Justice Conti concluded that Network Ten had not infringed copyright in Channel Nine's programs because the excerpts taken were not substantial in terms of quality or quantity and were not taken for a commercial purpose. Although not strictly necessary given his findings on the scope of the copyright, Justice Conti proceeded to address the availability of fair dealing defences in these circumstances. His Honour considered that 11 out of the 20 broadcasts were fair dealings for the purpose of criticism and review or for the purpose of reporting news.

THE FULL FEDERAL COURT

The Full Court of the Federal Court disagreed with Justice Conti's decision, finding unanimously that Network Ten had infringed the copyright Channel Nine held in its television broadcasts. The Full Court held that making videos of another channel's television footage and re-broadcasting *any* of the actual images and sounds of that broadcast is an infringement of copyright. The Court also held that there was no requirement that the visual images must constitute a *substantial part* of the original broadcast.

In reaching this conclusion, the Court drew a distinction between a cinematograph film and a television broadcast. The definition of cinematograph film in the Act is an 'aggregate of visual images... capable... of being shown as a moving picture'. In contrast, the Full Court considered a television broadcast to be a sequence of still images with accompanying sounds. Therefore, the Court held that copyright can subsist in each and every still image that is transmitted or capable of being observed as a separate image on a television screen.

Having found that Network Ten's actions had infringed Channel Nine's copyright, the Full Court went on to consider the fair dealing defences argued by Ten. Although the Court broadly agreed on the principles that emerged from authorities involving the application of the fair dealing defences,[4] the three Full Court judges (Justices Hely, Sundberg and Finkelstein) reached different conclusions as to whether or not the fair dealing defences were available to Ten in relation to some of the re-broadcast segments.

Network Ten appealed to the High Court, arguing that the Full Federal Court had misinterpreted the term 'a television broadcast' in the Act.

"Sexing It Up": Lord Hutton's Report on the BBC and the Implications for the Australian Media

This is the transcript of a speech made by Peter Manning at the meeting of CAMLA on 30 March 2004 at Mallesons Stephen Jaques in Sydney.

I intend to spend little time tonight talking about the Australian media. There are so many similarities between the circumstances of the journalism of Andrew Gilligan, the BBC, the war on Iraq and the desperate search for weapons of mass destruction, the popular feeling against the war, the tension between the BBC and the Government and the position of the Prime Minister vis a vis the Bush agenda – all of that and the Australian scene as to make it almost irrelevant to spend much time recasting for Australia. The implications are all too obvious.

Instead, I shall talk about the context in which this report by Andrew Gilligan took place, the nature of the leak from Dr David Kelly to Gilligan and its circumstances, the substance of the allegations Gilligan made, the BBC's processes of editorial review, mistakes, if such they were, that were made and the implications both for the law and for national politics.

CONTEXT

Who was Andrew Gilligan – and I say "was" advisedly because his career, alone, is almost certainly ruined. The greater tragedy, of course, is the suicide of David Kelly and the continuing pain of his family. But Gilligan, too, whatever his personality and his alleged somewhat gung-ho style, is a major victim. Several BBC heads have fallen on their sword but I suspect others will rise again. So who was Gilligan? Well, he was the BBC's Defence Correspondent. In his mid-thirties, he had carriage of the most difficult specialism in the corporation, maybe only superseded by the Political Correspondent at Westminster. I say "maybe" because being a member of the parliamentary Press Gallery gives you a collegiate protection, enables you to swim in a larger pool, gives you better warning signals that something is amiss and enables you to build a system of contacts and defences against personal vendettas.

Britain was at war in the period of Gilligan's report. Gilligan, as the Defence Correspondent of four years' standing, was a central player in the marketing game to sell a difficult war to a sceptical public, indeed to a sceptical Labor caucus. And Gilligan had already caused mayhem with the Ministry of Defence in the months and years gone by. A former Cambridge history major graduate, a former Defence Correspondent for the Sunday Telegraph, a man who had reported for the BBC from 40 countries, in the relatively short time he had been back in Britain he had broken several stories embarrassing to the Ministry of Defence (***MOD***): the ease with which you could buy illegal landmines abroad, the case of the RAF million-pound jet that couldn't drop precision bombs, and the revelation of the draft of the new European Union constitution. Number 10, run by Tony Blair's hard man Alistair Campbell as media director, responded publicly with a personal epithet: he was dubbed "gullible Gilligan". The stories stood.

So Gilligan was a thorn in the Government's side – and at a time when this was no popular Falklands war, but a highly divisive adventure back into old imperial territory. The Government was feeling the strain. Apart from the Murdoch press, there were no cowboy media calling "Gotcha!" and the BBC was part of the reflection on a debate that divided the Government, the experts, the generals and the public. Alistair Campbell went into attack mode, accusing the government-funded media arm, the BBC, of running an anti-war agenda. Shades of Bob Hawke in 1991 and Richard Alston a decade later.

So what other contextual factors colour May 2003 – the month of Gilligan's report? Well, the dossier he reports on, of course, is the third document that the Government had put before the British public. The first had been found, embarrassingly, to be a plagiarist re-write from the Internet of a university thesis. The second, about tubes from Nigeria, had been found to be based on false information from an unreliable Iraqi source. So the validity, status and credibility of sources were a crucial matter, not only to high-ranking journalists in the BBC but to the Government's credibility as well. The third dossier was *the* document that had to "stand up".

And then there was the situation in Iraq. It was seven or more weeks since the fall of Saddam but two factors were playing heavily against the Government: one, no WMDs were being found; and two, British and American troops were not being greeted as liberators but as occupiers - and occupiers breaking their promises of safety and good order to the people at that. Tony Blair was in Iraq that month to demonstrate his pride in British troops in Basra but there was precious little to celebrate.

And finally, it is clear from the Hutton Report that David Kelly, the Government's most highly experienced specialist on chemical and biological weapons – he was a biologist by training – was briefing several journalists about his concerns that the dossier that the Blair Government had used to justify the pre-emptive invasion over-stretched the truth. He, and others, felt under pressure to provide the case for war.

I have spent some time on this context because I believe it shows the pressures

both sides – Government and BBC – were under at the time Gilligan reported on May 28. The fact is relations between the two were poisonous. This is also shown in the tone of the letters that followed Gilligan's report. Richard Sambrook, BBC News Director, writes to Campbell plainly, a month after Gilligan on June 27, and says:

> 'It is our firm view that Number 10 tried to intimidate the BBC in its reporting of events leading up to the war and during the course of the war itself... we have to believe that you are conducting a personal vendetta against a particular journalist whose reports on a number of occasions have caused you discomfort.'

The BBC clearly felt under siege – and, I suspect, so did Blair and his team.

THE LEAK

When David Kelly met Gilligan at the Charing Cross Hotel on May 22 it was not the first time. While not close, they had spoken several times before. Kelly, the MOD's top weapons specialist, was meeting the BBC's Defence Correspondent. It is impossible to believe that Kelly was in any sense being "taken for a ride" by the BBC journalist. There could not have been any naïvete here. Not only did Kelly have many journalist friends and talk to them off-the-record regularly, he was letting many of them know of his concerns. Some of them, like Judith Miller of the *New York Times* were key figures in deconstructing their government's case for war. In addition, Gilligan's notes of his conversation with Kelly reveal that he went back over the tale he would publicly tell with Kelly making it clear he was to "break" a story from this classic "leak" meeting. Finally, Gilligan had just returned from a trip to Iraq and was "full bottle" on the unfolding chaos and the lack of progress on the search for WMDs.

The notes of the conversation with Kelly, tendered in several forms at the inquiry, make it absolutely clear that Kelly was saying that the Government was misrepresenting the seriousness of the threat from Saddam. In particular, Kelly himself zeroes in on the claim in the public dossier, read by Blair, that some of the dictator's WMDs would be ready within 45 minutes of an order to use them. In further particular, he makes it plain that Alistair Campbell, Blair's media man, had been meddling with the dossier and trying to harden its case for war.

In any journalist's terms, this was a giant story. The key document used by the Government was messed with and over-cooked – or "sexed up" as Gilligan termed it. It is not clear how many people Gilligan told inside the BBC that he had this scoop. In the normal course, and for reasons of exclusivity and outwitting your competitors, you would not be going around blabbing that some time soon you would be breaking a big WMD story. That Gilligan let it be known that he had such a story was told to some because the presenters of his radio program knew about it and so did his producers from the previous night. In the night before the early morning interview, MOD media people were told a major story on WMDs would break the next morning on the "Today" program. They were duly listening.

At 6.07 am Gilligan did the following interview live to air from his phone at home, one week after talking off-the-record to Kelly:

> 'That's right, that was the central claim in his dossier which he published in September, the main erm, case if you like against er, against Iraq and the main statement of the British government's belief of what it thought Iraq was up to and what we've been told by one of the senior officials in charge of drawing up that dossier was that, actually the government probably erm, knew that that forty five minute figure was wrong, even before it decided to put it in. What this person says, is that a week before the publication date of the dossier, it was actually rather erm, a bland production. It didn't, the, the draft prepared for Mr Blair by the Intelligence Agencies actually didn't say very much more than was public knowledge already and erm, Downing Street, our source says ordered a week before publication, ordered it to be sexed up, to be made more exciting and ordered more facts to be er, to be discovered... essentially, erm, the 45 minute point er, was, was probably the most important thing that was added...
>
> 'Well the 45 minute isn't just a detail, it did go to the heart of the government's case that Saddam was an imminent threat and it was repeated four times in the dossier, including by the Prime Minister himself, in the foreword; so I think it probably does matter. Clearly, you know, if erm, if it, if it was, if it was wrong, things do, things are, got wrong in good faith but if they knew it was wrong before they actually made the claim, that's perhaps a bit more serious.'

Note that the claims that Lord Hutton spends 300 pages on are not the substantive claim that the dossier had been "sexed up" under government pressure, causing concern among intelligence officials. They are the added extras, that (a) the government "probably knew" the 45 minute claim was wrong; and (b) the reason the 45 minute claim was not in the original dossier draft was because it was single sourced and therefore unreliable.

THE SUBSTANCE

Did Gilligan do a 'Thorpe' or did he dive in deliberately?

His notes reveal a typical journalist's jumble of thoughts, names, quips and ideas. In my view, there is no clue there as to any hidden agenda on Gilligan's part. I'll read some:

> '... transformed week before publication to make it sexier... the classic was the 45 mins most things in dossier were double source but that was single source. One source said it took 45 minutes to set up a missile assembly, that was misinterpreted... most people in intelligence weren't happy with it, because it didn't reflect the considered view they were putting forward... Campbell... real info but unreliable, included against our wishes... not in original draft – dull, he asked, if anything else could go in... etc etc etc'

The notes are classic. I suspect he was concentrating on Kelly, not wanting to get the burden of Kelly's remarks wrong, taking notes that he would "write up" later when he got back and could recall what passed between them. That's what he did. In general, to me, a

was required to comply with the ARPANSA Standard, and that the Applicant did comply with the ARPANSA Standard. On the Applicant's evidence the estimated level of EMR emissions as a result of the development would be 0.0009 per cent of the maximum exposure limits under the ARPANSA Standard. The Court held that the application of the precautionary principle had not been triggered and that, because the measurement of 1V/m was not a recognised standard approved and imposed by a regulatory body, the proposed condition to restrict EMR emissions to less than 1 V/m should not be included in the conditions of consent.

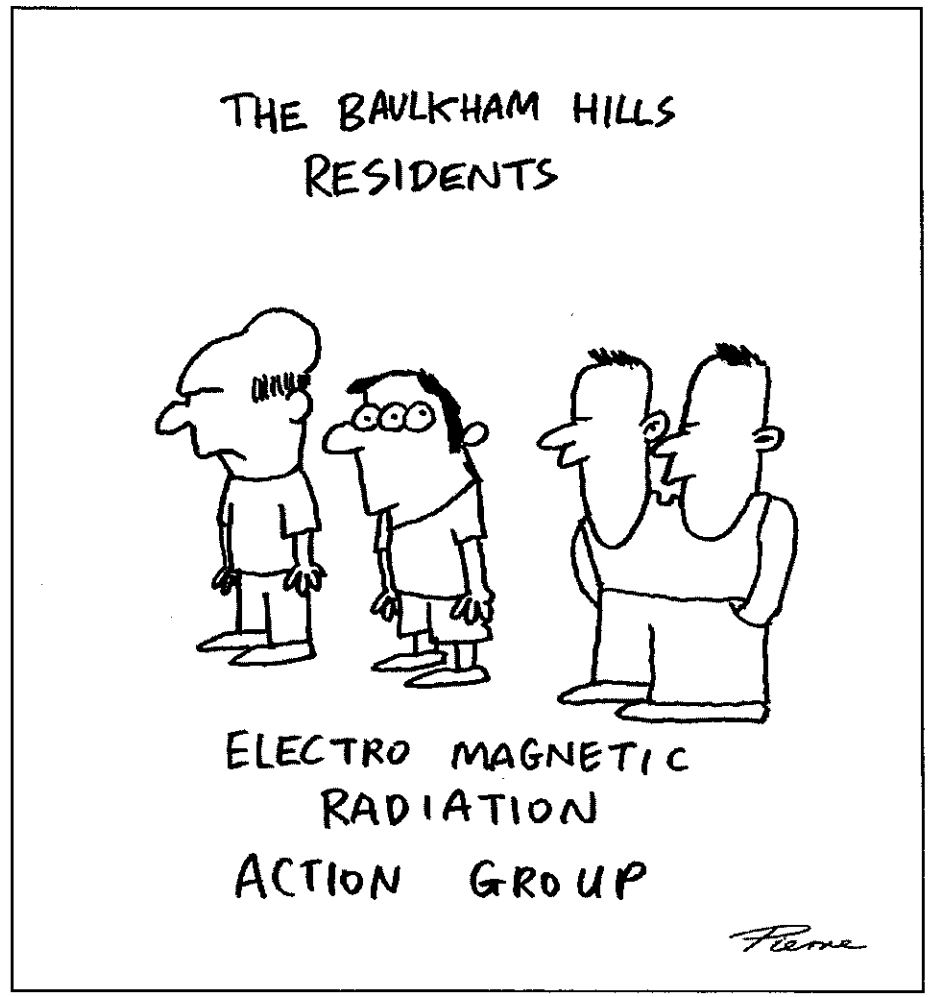
In *NTL Australia Ltd v Willoughby Council* [2000] NSWLEC 244 (27 November 2000) per Bignold J the respondent Council submitted it should be a condition of consent that EMR emissions be less than the predicted emissions stated in a report by Broadcast Communications Limited ("**BCL Report**").

The parties and the Court agreed that the relevant standard to be applied was found under the International Commission on Non-Ionizing Radiation Protection (ICNIRP) *1998 Guidelines* ("**ICNIRP 1998 Guidelines**"). The maximum non-occupational exposure level under the ICNIRP 1998 Guidelines was 200W/cm^2 which is the same as the current ARPANSA Standard of 0.08W/kg.

The proposed condition was opposed by the Applicant on the grounds that:-

- the condition ignored the expert evidence showing predicted emissions to be well below the levels set out under the ICNIRP 1998 Guidelines; and
- the condition ignored the existence and appropriateness of the ICNIRP 1998 Guidelines.

The Court held that the proposed condition went far beyond the recommendations made in the BCL Report, "*by in effect elevating to a criterion or standard, the [predicted] levels of electromagnetic radiation*". The Court also referred to the maximum exposure levels under the ICNIRP 1998 Guidelines as being "*the generally recognised standard*".



The Court accepted expert evidence presented by the Applicant that there was already an applicable standard and it was therefore inappropriate to attempt to elevate predicted levels into "pseudo standards".

Future co-location

The Court rejected the imposition of this proposed condition because it attempted to deal with possible future activities and did not relate to the DA. It was further noted that the Telecommunications Act actually encourages co-location and that a carrier proposing to co-locate is generally exempt from any need to obtain development consent as a facility seeking to co-locate on an existing pole will generally constitute a "low impact facility" which does not require development consent under the EP&A Act. In other words, the Court could not prevent that which the Telecommunications Act specifically permits and encourages.

IMPORTANT OUTCOMES

The key outcomes of the decision of the Court are that:

- the Court cannot grant consent for more than that which is applied for in the development application;
- the Court will not impose a pseudo or arbitrary standard upon EMR emissions where there already exists an appropriate standard approved and imposed by a recognised regulatory body; and
- the Court cannot prevent that which the Telecommunications Act specifically permits and encourages.

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radiofrequency spectrum by the telecommunications industry. Providers of telecommunications services must be appropriately licensed under both the Telecommunications Act and the Radiocommunications Act before they can utilise the radio spectrum to provide telecommunications services. The Australian Communications Authority (the ACA) is the Commonwealth government body which is responsible for administering the Telecommunications Act and the Radiocommunications Act and, in particular, the licensing regime governed by the Radiocommunications Act. The ACA has made the Radiocommunications (Apparatus Licence) Determination 2003 (the Radiocommunications Determination) under the Radiocommunications Act. The Radiocommunications Determination contains additional conditions relating to exposure to electromagnetic radiation which apply to spectrum licences issued under the Radiocommunications Act and stipulates that, in areas where the public have access, the level of emissions must not exceed those contained in the ARPANSA Standard.

CONSENT AND CONDITIONS

Power to the antennae to be limited to 10 watts

The Council's proposed condition to limit the power to the antennae to 10 watts was the result of three considerations:-

- the DA specified 10 watts of power and the Court could only grant consent for that which the Applicant had applied;
- an attempt to restrict future co-location of other carriers who would use the Applicant's pole and equipment; and
- a concern that power above 10 watts could result in EMR emissions which exceed 1 V/m.

The Court accepted this condition by inserting the following sentence into the conditions of consent:-

> *The power supply to the antennae must be no more than 10 watts as described in the application.*

The Court's decision was made on the basis that the Court cannot grant consent beyond that which was applied for in the DA. As a result, it is unlikely that this restriction has any general application to carriers.

The Dutch study the precautionary principle

The Council submitted that the facility's EMR emissions should not exceed 1V/m - a measurement drawn from a singular Dutch study published in September 2003 by the TNO Physics & Electronics Laboratory. The study had not been replicated or peer reviewed by anybody anywhere in the world, however the Council submitted the Court should apply this limit in light of the precautionary principle referred to in the ARPANSA Standard.

One of the objectives of the EP&A Act is to encourage "ecologically sustainable development" and while there this was not defined under the EP&A Act, a definition of this phrase is found in Section 6(2) of the Protection of the Environment Administration Act 1991 (**POEA Act**). On the Council's submission, the Court accepted that, in the absence of a definition in the ARPANSA Standard, an "ecologically sustainable development" and "the precautionary principle" could be defined by the following passage found in the POEA Act:

> *... ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:*
>
> *(a) the precautionary principle— namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:*
>
> *(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*
>
> *(ii) an assessment of the risk-weighted consequences of various options. ...*

It was the Council's further submission that the precautionary principle was triggered because further scientific research needed to be carried out before the Court could be satisfied that the ARPANSA Standard was an adequate standard to ensure the safety and health of the community.

Hutchison opposed this submission on the basis that it was against accepted scientific procedure to adopt the implications of a preliminary study and was therefore not in the public interest. In addition, Hutchison argued that it was not within the Court's jurisdiction to impose a "pseudo-standard" or "arbitrary limit" where it had not been approved by a regulatory body.

The Court held that the Council had not been able to show that 1V/m standard was recognised, appropriate or in the public interest and that an application of the precautionary principle had not been triggered. In making this finding the Court directly addressed the issue whether the Court "should impose stricter limits than are contained in the ARPANSA Standard in the absence of another recognised standard." The Court then noted the decision in *R Hyett v Shire of Corangmite* [1999] VCAT 794 (30 April 1999) where it was held that:

> *...the Tribunal is obliged to apply the relevant regulatory standards as it finds them and not to pioneer standards of its own. The creation of new standards is a matter for other authorities.*

The parties agreed that the Applicant

long way from Britain, his report on the "Today" show that day broadly reflected the message from the notes.

So were his additions – the ones that so enraged Campbell, Blair and Lord Hutton - sloppiness, politics or his true belief? I suspect that the circumstances – which incline towards sloppiness (the lack of a script and the need for immediacy and thinking on your feet) – encouraged Gilligan to say what he actually believed to be true: that the Government, already heavily interfering in the production of the dossier to itself, must have known that the 45 minute claim was shaky.

Gilligan, of course, had no way of knowing. Kelly was not about to offer up the single source for the 45 minute claim despite his belief that he was unreliable. Certainly, those higher in the food chain at MOD would not be offering up the source, probably yet another Iraqi refugee from Saddam's brutal regime. Gilligan may well have reasoned that if the Government was brazen enough to present the dossier as an arm's length piece of advice to the Ministry of Defence when in fact it had undergone considerable change at the hands of Number Ten and was, in major part, a production of spinmeister Alistair Campbell, then it may well have known, further, that the 45 minute claim was shaky. And if the Government had been prepared to present a university thesis as evidence for war, and then relied on an unreliable Iraqi talking of Nigerian uranium tubes, then such a Government might have no compunction about stretching the truth on the 45 minutes claim.

And when is "stretching the truth" the moral equivalent of "lying"? Kelly was not saying, certainly not in Gilligan's notes, that the Government was lying. But he was saying the truth was being stretched. Do governments and politicians lie to achieve their policy objectives and serve the national interest? Of course they do. Was this such a case?

In that grey area between exaggeration and lying, Gilligan crossed a line. He was made aware by Kelly of the politicisation of the intelligence process, a corrupting of the public service requirement to provide frank and fearless advice – indeed, many would

say, in these circumstances, a military necessity in time of impending war – and I suspect he went on a hunch born of his dealings with MOD, Campbell and the Blair Government.

I can see all the defamation lawyers in the room sighing deeply. Sydney, the defamation capital of the world, the black vortex for investigative journalists. Here we go again, the lawyers say. Gilligan crossed two lines: one, from accurate reporting of Kelly to unproven allegation; and two, from news reporting to comment. When he apologised for his errors, he was apologising for straying over these two lines. And if you ask me what drove him over the lines in that mellifluous live flow on air to his presenter, it was that Gilligan thought the Government had so polluted the normal processes that, having dived deep into the waters of the intelligence community, they must have known that a single source on this important claim of 45 minutes – since, of course, proven to be absurd – was untrue.

I think his slip is a reflection of the bitterness between the BBC and the Government, of the politicisation of the public service, and of the madness of the drive to war despite a divided nation. The only breakdown of trust that had *not* occurred was between the Government's top weapons expert and the BBC's Defence Correspondent. It was a recipe for disaster.

THE BBC'S PROCESSES

The BBC, as we know, took a bollicking from Hutton. Its upper structure crashed to the ground. Incidentally, much was made of the unwarranted defences of Gilligan by management. It is true that Gilligan's notes and his reporting should have been compared by editorial managers prior to such stout defence. But it is also all very well for the middle program managers to be installing editorial oversight systems after the event. Someone should be asking why, if Gilligan was thought by one editor to be "too black and white" why he was allowed to run his own race for so long by himself, breaking stories, reporting MOD, going live and talking to spooks? There seems to me to be a bit of none-too-delicate blame-shifting going on pre- and post-Hutton.

But the blame game is not the point. I think some important structural points are being missed both by Hutton and by the BBC here.

First, the BBC is under massive pressure to perform in the ratings, cut costs, outflank pay TV and pay-per-view and, as a public broadcaster, be all things to all people. It is under the usual thunder from the powerful Murdoch press in Britain. Its licence negotiations are coming up. As a result its investment in labour-intensive investigative reporting of the traditional kind – the kind you see on Panorama or Four Corners – has fallen sharply in the last 10 years.

Two, the CNN revolution has transformed news broadcasting around the world. BBC World was the first response to the idea that news is covered by having a reporter on-the-spot reporting live in to what the Americans call an anchor and we call a presenter. The disease has now infected domestic reporting as well. Everything is live, instant and it's just happened.

Three, the rundown of investigative reporting and the rise of instant news and opinion is a direct result of the extraordinary technological change of the last 15 years that began with satellites, went on to sat-phones, now involves fibre optic cable and broadband and has hit the streets as videocameras and videophones. Communication from anywhere to anywhere is possible and is getting massive use and deriving massive profits for some telcos. But the real question is still McLuhan's: is the medium the message? Is anyone saying anything worthwhile? Where has the content gone?

I suspect the judicial system, and Lord Hutton in particular, have little interest or knowledge in these changing media industry processes. On the surface, they seem to have little to do with the law. We in the media have seen the revolution. We see a foreign correspondent busting his gut and risking his life to get to a war zone only to send his report and hear his foreign editor say they only need some voice over – maybe written in London or Sydney – because pictures have already come via satellite from Reuters or CNN or NBC or Sky or agencies and yours aren't quite as good.

But in the real media world – the one that consumers listen to or watch – news is quick and dirty and it is competing with such wonderful inventions as lifestyle programming, reality television and pornography on the Net. How to make it interesting? The truth is that's the industry environment Andrew Gilligan was operating in and the BBC was setting up for him. The CNN-isation of news.

MISTAKES, JUDGMENTS AND THE LAW

In this environment, the distance between the working life of Andrew Gilligan and the working life of Lord Hutton could not be more different. Yet again, the disconnect between law and journalism. I would argue that this case shows clearly the need for a re-thinking of the law of defamation. We all make mistakes. I know, I know, my audience of lawyers will say journalists make more than others. But let's just say that no-one's an island and Andrew Gilligan had a great CV. He was working in an industry undergoing great change, emphasising fierce competition in the marketplace. He was also working in an organisation at virtual war with its sponsor. He was also working in the most contentious area of Government policy. He was also working under a seeming vendetta from the Prime Minister's PR man. Was a mistake, live and unscripted, inevitable?

If we answer 'yes' to that question, should we condemn the man, sack him and hope he never darkens a media door again and tut-tut all around the world? I think not. Should we close down "live" for the BBC and put it at a disadvantage in its battle with the private sector? I don't think so.

Here's an idea. Like the Americans, we should accept mistakes honestly made (or, in this case, if I am correct, beliefs reasonably held) and make legal allowances for the consequences. The consequences could be:

- quick retraction if proven false;
- debating the allegation; and/or
- equal and appropriate space for reply.

This notion has been swirling around defamation seminars for years. It's time to do something about it. Hutton refers derisively to recent (2001) judgments by Reynolds J about the need for protecting public reputation. This is true, but my cry is for an adult and fulsome public debate.

The BBC Defence Correspondent, in this case, believed, in my view, even though his source did not say it, that the Blair Government "probably knew" that the claim that Saddam could get chemical weapons launched within 45 minutes was nonsense. Is that thought, backed up by further evidence and argument, not worth an airing in a democratic polity? The problem was that it was tacked on to the Kelly interview but, in my opinion, had there been better editorial management, Gilligan should have been given space and time to put his view as an add-on to the Kelly report. Blair could have replied and the public could have judged. Let's not be so afraid of 'a man's reputation' (Blair's)! Politicians do lie!

CONCLUSION: GILLIGAN WAS 95% RIGHT!

These were extraordinary times. Some might wish we could wipe the slate clean and start this century again. The "big picture" was that Gilligan reported that the weapons of mass destruction were a political weapon, not a military threat to the West and that the political process was being rorted. Under Henry VIII, he would have lost his head, but that was a monarchy. Under Tony Blair, you lose your livelihood because we are in a democracy.

Gilligan listed his central Kelly charges in a letter he wrote to the Deputy Leader of the House of Commons in late June last year:

> 'As the transcript, available on the Internet, makes clear, I also repeated to the [Foreign Affairs] Committee the charges of my source that the dossier had been sexed up; that the 45-minute claim was uncorroborated and considered unreliable; that it was included in the dossier, in the words of the source, 'against our wishes'; that the intelligence services were unhappy with the general tone and tenor of the dossier because, in the words of my source, it 'did not reflect the considered view they were putting forward'; and that the dossier had been transformed just before it was published at the behest of Downing Street.'

All those were true.

The editor of *The Spectator* wrote that Gilligan was 95% right. Where he went wrong was to fall foul of the politicised decision-making process that the Blair government had installed in its drive to war. Gilligan's "added extra" was wrong-headed and mis-placed but it hit a Blair sore spot because the distinction between "lying" and "misrepresentation" had become so thin. In an environment where the WMDs didn't exist, Blair was on thin ice assuring the British public of their pre-eminence and imminent threat. I suspect Gilligan's report was not so much wrong as too close to the Prime Ministerial bone.

Andrew Gilligan is 95% scapegoat, 5% in error.

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Case Note: Electromagnetic Radiation and Telecommunications Networks

Mary-Ellen Horvath considers the recent decision of the NSW Land and Environment Court in *Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council.*

In the recent decision of *Hutchison Telecommunications (Australia) Pty Limited v Baulkham Hills Shire Council* [2004] NSWLEC 104, the Land and Environment Court of New South Wales (**Court**) considered the "precautionary principle" and confirmed the appropriate regulatory standards to be applied to electromagnetic radiation (**EMR**) emissions from mobile telecommunications base stations. Importantly, the Court held that it was inappropriate and not in the public interest for the Court to attempt to impose a standard that is not recognised by a national regulatory body and, moreover, that the creation of new regulatory standards is not a matter for the Court.

BACKGROUND

On 18 February 2003, Hutchison 3G Australia Pty Limited (**Hutchison**) lodged a development application (**DA**) with Baulkham Hills Shire Council (**Council**) to erect a mobile telecommunications base station - a monopole, approximately 36 metres in height with three panel antennae, located on land owned by Sydney Water in Castle Hill East (**facility**). On 20 August 2003, the Council gave notice of its determination refusing consent for the DA, stating:-

> *"The Development Application has been refused on the following grounds:-*
>
> *1. Based on lack of evidence.*
>
> *2. Duty of care to the residents.*
>
> *3. The application is not in the public interest."*

On 15 September 2003, Hutchison filed a Class 1 Application under s 97 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in the Court, appealing the Council's decision to refuse the DA.

ISSUES

In its Statement of Issues, the Council identified the following issues:-

- potential adverse health impacts of EMR;
- adverse visual impact; and
- public interest and objectors' concerns.

Two weeks prior to the hearing the Council resolved to grant consent, subject to certain conditions, many of which were disputed. In essence, the disputed conditions were that:

- the power to the antennae be limited to 10 watts;
- EMR emissions from the facility be measured at less than 1 volt metre (**1V/m**) in any place frequented by a member of the public (the origin of the measurement of 1V/m is addressed below); and
- future mobile operators proposing to co-locate on the new tower must submit details of their proposal to the Council and adhere to the conditions of consent imposed on Hutchison.

The most contentious issue was the potential adverse health impacts and whether the Court had the power to impose a standard which is more stringent than the relevant standard set out in *Radiation Protection Standard - Maximum Exposure Levels to Radiofrequency Fields - 3kHz to 300 kHz* published by the Australian Radiation Protection and Nuclear Safety Agency in May 2002 (**ARPANSA Standard**).

Legislative framework

The Court summarised the operation of relevant legislation and industry codes (at par 17):

> *The provision of telecommunications in Australia is governed by a complex regime of Commonwealth legislation. It is necessary to briefly review this to understand the legal framework relevant to this development application and the limits imposed on field strength under the Commonwealth regime. The Telecommunications Act 1997 (Cth) (the Telecommunications Act) in conjunction with the Trade Practices Act 1974 (Cth) regulates the telecommunications industry whilst the Radiocommunications Act 1992 (Cth) (the Radiocommunications Act) regulates the use of the*