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- defamation
- broadcasting
- copyright
- advertising
- information technology
- freedom of information
- contempt
- privacy
- censorship
- film law
- telecommunications
- the Internet & on-line services

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

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

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Communications Law BULLETIN

CAMLA

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The New Workplace Surveillance Act: Impacts On Media Organisations

Sophie Dawson and Arthur Artinian look at some of the implications of the new *Workplace Surveillance Act* and its consequences for media reporting.

The *Workplace Surveillance Act* 2005 (NSW) **"(Act)"** was passed by both Houses of Parliament on 21 June 2005 and was assented to on 23 June 2005, but has not yet commenced. The Act regulates the surveillance of employees in the workplace with reference to computer, camera and tracking surveillance. It also operates to restrict the ability of employers and others from disclosing and using surveillance records.

In view of the expected commencement of the Act and the notice requirements under the Act, all NSW employers (including media organisations) should now take steps to ensure compliance with the Act.

Impact on Media Organisations

The Act has two important implications for media organisations. First, as employers and heavy users of computer and communications technologies, media organisations will be required to comply with the notification requirements under the Act for surveillance of employees who are at work and will be subject to the restrictions on covert surveillance.

Second, and perhaps more importantly, the Act is likely to limit the extent to which media organisations can obtain and publish material obtained through workplace surveillance. This has the potential to have an adverse impact on investigative journalism. The extent of this impact will to a large extent depend on the way which courts interpret "computer surveillance" and the exceptions to the prohibition on use and disclosure of notified surveillance.

Media organisations as employers

Media organisations will need to move quickly to reassess their current surveillance practices, including notices to employees and review of the measures they use to control employees' use of company computer systems. This may include entering into agreements with a suitable employee organisation, meeting the notification requirements which are specified in the Act or both. It will also involve putting in place appropriate compliance policies and reviewing internet and email policies and practices.

The Act makes it an offence for an employer to carry out any surveillance by camera, computer or tracking when an employee is not "at work". This applies whenever an employee is not in the workplace and is not performing work for the employer elsewhere. There is a limited exception to this offence where an employer conducts computer surveillance of "equipment or resources provided by or at the expense of the employer". The Act also makes it an offence to carry out surveillance in any change room, toilet facility, shower or other bathing facility at work.

Surveillance

Notified Surveillance

The Act allows employers to conduct surveillance if they meet a general notice requirement and specific requirements for each type of surveillance.

Employees must be given notice in writing 14 days prior to the commencement of any surveillance, unless an employee agrees to a lesser period of notice (**"General Notice Requirement"**). The General Notice

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Inside This Issue

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Small Noise, Big Trouble

Shane Barber examines the recent decision in City of Mitcham v Hutchison 3G Australia Pty Ltd and examines its potential impact on the government's telecommunications network policies

A recent decision of the Supreme Court of South Australia ("**Court**") in relation to the manner in which telecommunications carriers rollout their networks is, on first blush, a victory for opponents of those networks in the community, but on closer analysis is potentially a significant self inflicted wound for those groups.

The Court's decision may inadvertently have limited the powers and immunities enjoyed by carriers in rolling out their telecommunications network by removing the option open to carriers of co-locating their infrastructure on existing facilities and poles. Perversely, this may lead to a wider proliferation of stand alone mobile telecommunications infrastructure if the decision is not overturned by the High Court of Australia.

The Court's decision may inadvertently have limited the powers and immunities enjoyed by carriers in rolling out their telecommunications networks by removing the option open to carriers of co-locating their infrastructure on existing facilities and poles

In July 2005, the High Court granted Hutchison 3G Australia Pty Limited ("**H3GA**"), the relevant carrier, special leave to appeal the decision. No doubt, the Commonwealth Government will be eagerly watching the decision of the High Court to consider the considerable impact the case may have on the Government's long standing policy of encouraging co-location of infrastructure and avoiding the proliferation of a stand alone infrastructure.

Background

On 11 March 2005, the Court delivered its judgment in *City of Mitcham v Hutchison 3G Australia Pty Limited and Ors [2005] SASC 78* ("**Mitcham Case**"). The bench in the Mitcham Case comprised their Honours Perry J and Gray J, forming the majority, and Bleby J.

The Mitcham Case concerned matters arising from the installation by H3GA of certain telecommunications facilities on and adjacent to "stobie poles" owned and operated by the public utility ETSA at five locations within the City of Mitcham in South Australia. The installations were undertaken as part of H3GA's third generation mobile telecommunications network rollout. While their Honours found in relation to a number of matters, the majority made determinations regarding the impact of noise from an element of those installations, being domestic style air-conditioning units on the equipment shelters installed by H3GA adjacent to those stobie poles. As discussed in this article, the Court's decision appears to be at odds with the Commonwealth Government policy which encourages carriers to co-locate their facilities with other carriers or public utilities.

Relevant Regulation

Pursuant to clause 6 of Schedule 3 of the *Telecommunications Act 1997* ("**Act**") a carrier may undertake the installation of a facility if, among other things, the facility is a "low impact" facility. The Mitcham Case principally concerned whether H3GA's installation was a low impact facility.

Pursuant to clause 37 of Schedule 3 of the Act, a carrier may undertake the installation of a low impact facility pursuant to clause 6 of Schedule 3 of the Act despite a law of a State or Territory regarding a number of matters, including:

- the assessment of the environmental effects of engaging in the activity;
- town planning;
- the planning, design, siting, construction, alteration or removal of a structure;
- the powers and functions of a local government body; and
- the use of land.

The *Telecommunications (Low Impact Facility) Determination, 1997* ("**Determination**") establishes the types of installations which may be considered "low impact" for the purposes of clause 6 of Schedule 3 to the Act.

Item 2 of Part 7 of the Schedule to the Determination provides that, *prima facie*, certain facilities of a type commonly installed by mobile carriers will only be considered low impact in residential and commercial areas in circumstances where they are co-located on or within an "original facility" or "public utility structure" where, among other things,

> *"(f) the levels of noise that are likely to result from the operation of the co-located facilities are less than or equal to the levels of noise that resulted from the operation of the original facility or the public utility structure."*

Importantly, this noise qualification does not apply if those low impact facilities are not being co-located, but otherwise installed in residential and commercial areas.

For the purpose of the Determination, an "original facility" means an original structure that is currently used, or intended to be used, for connection to a telecommunications network where the original structure was in place on 17 August 1999, or installed after that date by means other that in accordance with Item 7 of the Schedule to the Determination.

A "public utility structure" means a structure used, or for use, by a public utility for the provision to the public of:

- reticulated products or services, such as electricity, gas, water, sewerage or drainage; or
- carriage services (other than carriage services supplied by a carriage service provider); or
- transport services; or
- a product or service of a similar kind.

The Minister for Communications, Information Technology and the Arts ("**Minister**") has previously made the *Telecommunications Code of Practice, 1997* ("**Code**") which provides further rights and obligations of carriers in relation to the exercise of their powers and immunities pursuant to Schedule 3 of the Act. Relevantly, the Minister has expressed Commonwealth Government policy at clause 4.13 of the Code as follows:

> *"4.13 (1) Before engaging in a low impact facility activity, a carrier*

in the future, they could not thereafter be increased (not even to return to current levels).

Section 122 of the *Broadcasting Services Act 1992* (Cth) has therefore been amended to incorporate those elements of Australian content requirements that are subject to the ratchet mechanism to ensure that they cannot be reduced in the future, except through a legislative amendment.

Conclusion

Many amendments implementing the AUSFTA are relevant to the media. Organisations dealing with copyright works should be aware of the new term of protection. The widening civil and criminal liability relating to broadcast decoding devices and the broader standing to seek civil remedies should come as good news to broadcasters and channel providers while the changes to the *Broadcasting Services Act* ensure that future changes to Australian content quota requirements will not be onerous.

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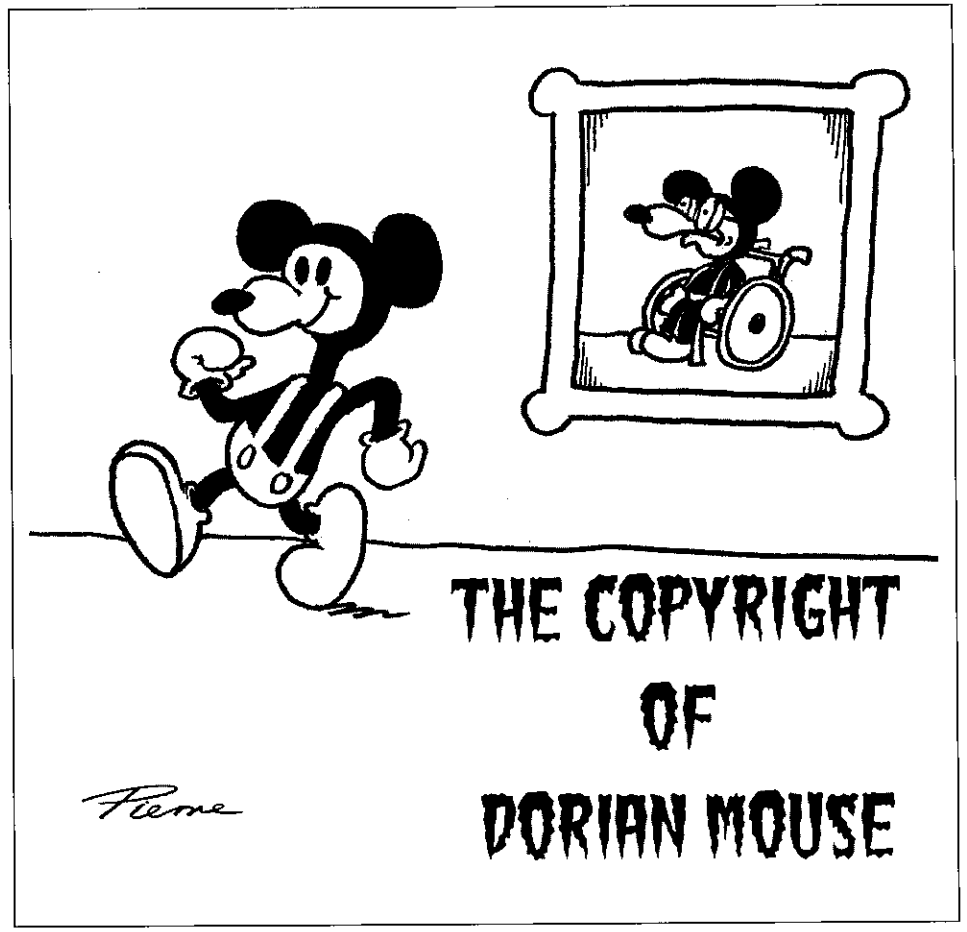

The Development of a Telecommunications Network Colocation Regime in New Zealand

Shane Barber and Bridget Edghill critique New Zealand's developing approach to telecommunications network colocations.

Introduction

Until relatively recently, New Zealand had not adopted a telecommunications specific regulatory regime, but rather relied on broader competition legislation.

Since the introduction of its industry specific regime in 2001, the New Zealand government has been slowly building its telecommunications industry arsenal of legislation, regulation and codes, no doubt with an eye on developments not only across the Tasman in Australia, but in Europe and the United States.

During the course of 2005, a number of new entrants have expressed interest in rolling out new GSM and 3G mobile networks throughout New Zealand to compete with the relatively small numbers of existing networks (for example, Telecom NZ's CDMA network, Vodafone NZ's GSM network and the network of Telstra Clear).

These new participants are currently putting pressure on the New Zealand government and its regulatory authorities to ensure that the regulatory regime is responsive to the needs not only of these new entrants, but also the consumers they seek to serve. What has become apparent is that considerable development is still required in the fledgling New Zealand regulatory regime in order to meet these goals.

In this article, we critique just one essential element of a successful telecommunications regulatory regime, being the ability to foster the rollout of competitive networks in a manner which encourages co-location of infrastructure to avoid both the proliferation of facilities and the community backlash which same inevitably creates.

The existing New Zealand regulatory framework in relation to co-location

No price regulation

The *Telecommunications Act 2001 (NZ)* ("**Act**") establishes the regulatory regime applicable specifically to telecommunications in New Zealand. An access system is set out in Part 2 of the Act and is based on the concepts of Designated Services and Specified Services, which are described in Schedule 1 of the Act.

Pursuant to Part 3 of Schedule 1 to the Act, the co-location of mobile network infrastructure is currently a Specified Service.

The Act does not stipulate all terms of access to be adhered to when a party seeks access

The media and the Australia – United States Free Trade Agreement

Karen Gettens and Johanna O'Rourke consider the impact of the Australian-United States Free Trade Agreement on Australian copyright laws

Major changes to Australian copyright law came into effect on 1 January 2005 as a result of the *Australian-United States Free Trade Agreement* (**"AUSFTA"**). Some of those changes will affect the media, with greater protection of encoded broadcasts, greater performer's rights, and continuing Australian content quotas for television and advertisements.

The major amendments affecting the media are as follows:

Terms of Copyright

From 1 January 2005, most copyright works (for example, artistic, dramatic, musical and literary works) will now have copyright protection for the life of the author plus 70 years. This is an increase of 20 years from the previous term of protection for these works. The term of copyright protection for sound recordings and films has also increased by 20 years, to 70 years after first publication. However this extension only applies to works that were still within copyright as at 1 January 2005.

Not all copyright works have had copyright protection extended. The exceptions are:

- TV and Sound Broadcasts – remain 50 years from the end of the calendar year of first broadcast;
- Published Editions – remain 25 years from the end of the calendar year of first publication; and
- Government owned works – remain 50 years from the end of the calendar year of first publication.

The most substantial extension of copyright is for photographs. Prior to the AUSFTA the duration of copyright in a photograph was generally 50 years from the date the photograph was first published. After the AUSFTA, photographs are protected for the life of the author plus 70 years.

New Performers Rights

Performers have now been given an economic interest in any sound recordings made of their performances. In the past performers had a right to control the unauthorised recording of their performance; now they also have the potential to control authorised recordings of their performance because of their new copyright interest in the recording. A substantial limitation to these new rights however is that they do not apply where the performer has been commissioned or is undertaking the performance in the course of their employment, therefore for most commercial media uses of performances, the new rights will not apply.

The amendments have strengthened the protection of encoded broadcasts by widening the scope of both criminal and civil liability for unauthorised use.

Tougher Penalties Relating to use of Broadcast Decoding Devices

As a result of the AUSFTA, a series of amendments have been made to the encoded broadcast provisions in Part VAA of the *Copyright Act 1968* (Cth) (**"Copyright Act"**). The amendments have strengthened the protection of encoded broadcasts by widening the scope of both criminal and civil liability for unauthorised use. A broadcast decoding device is a device used to obtain unauthorised access to broadcast subscription services, usually pay television or free to air television that has been limited geographically.

Criminal liability will now extend to the commercial use of encoded broadcasts which have been accessed without the authorisation of the broadcaster through the use of a broadcasting decoding device. Criminal liability also extends to the distribution of a decoded broadcast without authorisation irrespective of whether the distribution is for commercial advantage or profit.

The amendments also extend the scope of the civil liability provisions under the Copyright Act which previously applied only to the use of a broadcast decoding device for the purpose of, or in connection with, a trade or business. Standing to seek civil remedies has also been extended from broadcasters only, to channel providers and any other person with an interest in the copyright in the content of the encoded broadcast.

The amendments to Part VAA apply to encoded broadcasts regardless of the mode of delivery. In adopting a technology neutral approach, Australia has gone further than is required by its obligations under the AUSFTA by capturing both cable and satellite signals.

Preservation of Australian Content Quotas

In negotiating the AUSFTA, the Australian Government committed not to raise the Australian content quotas for free to air commercial television above the current 55% quota for overall programming between 6am and midnight, and the 80% quota for advertising between 6am and midnight.

Under the terms of the AUSFTA, these commitments are subject to a 'ratchet' mechanism. This means that if the 55% and 80% requirements were to be reduced

must take all reasonable steps to find out whether any of the following things (existing facilities) is available for the activity:

a) cabling, conduits or other facilities of the carrier or another carrier; or

(b) a facility of a public utility; or

(c) an easement attaching to land for a public purpose.

(2) A carrier must take all reasonable steps to use the existing facility for the activity."

Correspondingly, in Schedule 1 to the Act, the Commonwealth Government has further expressed its policy intention in relation to co-location by requiring that incumbent carriers:

- must provide other carriers with access to facilities for the purpose of enabling the other carriers to provide competitive facilities and competitive carriage services or to establish their own facilities; and
- must provide other carriers with access to:
  - telecommunications transmission towers;
  - the sites of telecommunications transmission towers; and
  - underground facilities that are designed to hold lines.

In accordance with Commonwealth Government policy, mobile telecommunications carriers have co-located a significant proportion of their mobile facilities on "original facilities" or "public utility structures" using the powers granted to them pursuant to the regime described above. Many of these will have been located in residential or commercial areas and will therefore be directly impacted by the decision in the Mitcham Case.

Facts

In the circumstances the subject of the Mitcham Case, H3GA endeavoured to co-locate its facilities on ETSA'S stobie poles throughout the City of Mitcham pursuant to the regime described above. For the purposes of Item 2 of Part 7 of the Schedule to the Determination, it was accepted that the antennas and dishes attached to the stobie poles were facilities mentioned in Part 1 of the Schedule and that the stobie poles were a public utility structure, prima facie satisfying the requirements of the co-location regime. There was also no evidence that the antennas and dishes located on the stobie poles emitted any noise.

However, in relation to H3GA's installation at one site within the City of Mitcham Council

argued that the level of noise emitted from a domestic style air-conditioning unit installed in an equipment shelter which is part of H3GA's installation at that site leads to the conclusion that H3GA's entire installation at that site fails to satisfy the requirements of paragraph (f) of Item 2 of Part 7 of the Schedule to the Determination, in that the level of noise emitted is not "*less than or equal to the level of noise that resulted from the operation of the ... public utility structure.*" Council argued that the entire installation could not be considered low-impact and H3GA was therefore required to obtain relevant State or local government development consent before proceeding.

Regulatory Issues Arising

In his judgment in the Mitcham Case, Perry J (with whom Gray J concurred) relevantly held two matters:

- First, His Honour held that the Determination should be construed such that each element which is separately listed in the Schedule to the Determination and which was installed by H3GA at the co-located site may not be considered separately, but rather all of the elements together must be considered as the one facility when applying the provisions of Item 2 of Part 7 of the Schedule to the Determination.
- Second, His Honour held that, if all of the elements of the installation are considered as the one facility, then even though only one of those elements is actually co-located on ETSA's pole (the antennas), for the purpose of applying Item 2 of Part 7 the level of noise emanating from the air-conditioning unit on the equipment shelter located separately to those co-located elements should be considered when determining the level of noise arising from the facility. Any noise, no matter how minor, emanating from that domestic style air-conditioning unit must necessarily be in addition to whatever noise previously resulted from the operation of the public utility structure, with the result that H3GA does not meet the requirements of Item 2 of Part 7 of the Schedule to the Determination.

Impact on Mobile Telecommunications Carriers and Consumers

In the event that the majority judgment in the Mitcham Case is not overturned, there are a number of impacts on mobile telecommunications carriers, communities and consumers as follows:

- To the extent that the equipment shelters of mobile telecommunications carriers are required to have air-conditioning for the purposes of protecting the equipment contained within those shelters (which is the case for all but infrequently used microcell transceivers and repeaters), perversely carriers will be able to use their powers and immunities to install such facilities (if they are otherwise low-impact) in non co-location sites in residential, commercial, industrial and rural areas but not co-location sites in residential and commercial areas. For all such co-location sites development consent from the relevant State or local authority is likely to be required. This is hardly an ideal outcome for the community or the carrier.
- Carriers are then encouraged, due to the efficiencies created by the use of their powers and immunities contained in Schedule 3 to the Act, to actively pursue a proliferation of stand-alone sites in residential and commercial areas rather than co-location sites. In this regard, the planned deployment of new mobile facilities is heavily weighted to low impact facilities, including co-location in residential and commercial areas, to reduce the proliferation of new towers and poles. The 3G strategies now adopted by mobile carriers, for instance, require a significant proportion of new installations to be co-located on two existing networks.
- Carriers may still need to consider their obligations in clause 4.13 of the Code and, in the event that they determine there are available existing facilities of other carriers and public utilities for their use, the carriers will need to determine what constitutes a "reasonable step" to use the existing facility for their activities. For instance, is it reasonable for a carrier to consider but dismiss all co-location possibilities in residential and commercial areas as it is not reasonable for a carrier to be required to pursue a development consent and obtain tenure for a particular installation when it could install a substantially similar but non co-located facility using its powers and immunities under Schedule 3 to the Act?
- Mobile telecommunications consumers will be directly impacted by delays in obtaining service or removal of service arising as a consequence. There is a potential for those delays to be considerable given that substantial negotiations with both local councils and land owners and occupiers may be required. These delays could be expected across all mobile networks in relation to affected sites. In addition, the cost to the industry would be considerable.
- During these periods, services for the benefit of the public generally, such as emergency services and disaster relief co-ordination, will be directly impacted.
- Potentially a carrier's use of its powers and immunities provided under Schedule 3 to the Act may be different in each State and Territory depending on the application in that State or Territory of the principles in either the Mitcham Case or the diametrically opposite outcome in *Hutchison 3G Australia Pty Ltd v Director of Housing and City of Port Phillip [2004] VSCA 99* (**"Director of Housing Case"**). While the decision in the Mitcham Case is only binding on other courts in South Australia, it is currently "persuasive authority" in other jurisdictions (with the possible exception of Victoria).
- Commonwealth Government policy will not be implemented to the detriment not only of carriers and consumers but the public generally.
- As the rollout of radio facilities in residential and commercial areas will likely be more expensive, time consuming and resource intensive, efficiency and international competitiveness of the Australian telecommunications industry may be undermined. In this regard, one of the main objects of the Act is to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community.
- The network architecture for 3G mobile telecommunications networks are particularly sensitive to non-optimum variations in site locations for each cell. To maintain network coverage and capacity, an inability to obtain the desired co-located location in one area may result in the requirement for multiple, smaller low impact sites in less technically suitable locations spread across the surrounding residential and commercial area.

In July 2005, the High Court of Australia granted H3GA special leave to appeal the decision in the Mitcham Case.

Appealing the Decision

In July 2005, the High Court of Australia granted H3GA special leave to appeal the decision in the Mitcham Case.

No doubt, any appeal will focus on issues such as the following:

- The noise limitation in Part 7 of the Schedule to the Determination only applies to "the co-located facilities". As the air-conditioning unit is on the equipment shelter, which is not "*installed on or within an original facility or a public utility structure*", but rather located adjacent to it, any noise from the air-conditioning unit should be disregarded;
- The decision of the majority in the Mitcham Case is reminiscent of the decision of Balmford J in the Victorian Supreme Court of Appeal's decision in the court below in the Director of Housing Case. That lower court among other things determined that, when considering whether a facility is low impact for the purposes of the Determination, consideration must be given to the installation as a whole, not its constituent parts. The Victorian Court of Appeal did not favour that approach, rather it preferred the view that each element of an installation should be looked at in isolation in determining whether it was low impact for the purposes of the Determination. That approach is consistent with the argument referred to immediately above; and
- Clause 3.1(3) of the Part 3 of the Determination provides that trivial variations for a facility mentioned in the Schedule to the Determination should be disregarded. Arguably the noise from a domestic style air-conditioning unit is a good example of a "trivial variation".

There will be considerable interest amongst the mobile carriers in the High Court's determination. No doubt, community groups which take an interest in the rollout of telecommunications infrastructure will also be interested in the outcome of the case and, given the decision's potential impact on the incentive on telecommunications carriers to co-locate their infrastructure, will be hoping that it is not a case of winning the battle but losing the war.

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circuit television or other technology or arrangements available to the complainant (new section 291(2)). As discussed below, however, it is clear that "in camera" does not have its usual meaning in this context.

The Court may direct the complainant evidence be given in open court only if:

- a party to the proceedings requests it;
- the court is satisfied that special reasons in the interests of justice require such an order; and
- the complainant consents to giving his or her evidence in open court.

The Amendment Act expressly provides that the principle of open justice does not of itself constitute a special reason (new section 291(4)).

The phrase "in camera" is generally understood to have the same meaning as "closed court" (for example, the terms "in camera" and "closed court" are used interchangeably in section 119 of the *Adoption Act 2000* (NSW)) . Where evidence is given in camera, media representatives do not usually have access to it, and publication of it by any representative who did obtain it would be likely to constitute a contempt on the basis that it would frustrate the order closing the court.

This position has been modified in the Amendment Act. In response to concern that the provisions of the original Bill would adversely impact on the media's ability to fully and fairly report on sexual offence proceedings, the Government introduced an amendment, section 291C, which expands the media's access to complainant evidence in camera. This modification has the effect of giving "in camera" a different meaning in the context of these provisions from that which it would ordinarily have.

The changes will not alter the meaning of the phrase "in camera" as it is more generally understood. Thus the position is likely to remain that a provision or order requiring proceedings to be held in camera will prevent media access and reporting in the ordinary case.

Where proceedings are held "in camera" under the new section 291, the media may be given access to proceedings. However, it is important to note that there is no guarantee of media access as the court retains a discretion to exclude media access. New section 291C(1) provides that in cases where the complainant chooses to give evidence via closed circuit television and is therefore not physically present in the courtroom, the media may remain in the court room to hear the complainant's evidence.

It is important to note that media access to court documents and reporting on them will still be subject to any suppression or non-publication orders made by the court.

New section 291C(2) provides that a court may make alternative arrangements to allow media representatives to view or hear the evidence while it is given or view a record of it but states that media representatives are not allowed to be present in the courtroom or other place where the evidence is given during the in camera proceedings. For example, alternative arrangements to facilitate the media's access to the complainant's evidence might include live audio feed from closed court, listening to a tape of the evidence, or reading the evidence from a transcript.

Although the Government has stated that it was "*never intended ... that sexual assault prosecutions would be held in secret and not reported on*" and that new section 291C will "*provide a certain degree of comfort to the media that their needs will be considered*" (Hansard, NSW Legislative Council, 4 May 2005), there remains a risk that media access to complainant's evidence will be compromised by the introduction of these changes. For example, the Honourable Robyn Parker expressed concern during the Upper House debate that:

> "*until there is a rollout of closed-circuit television and videotape equipment it will be difficult to provide such facilities, particularly in country areas*" (Hansard, NSW Legislative Council, 4 May 2005).

These practical issues may well cause judges to exercise their discretion against putting in place special arrangements for media access.

Any adverse effect on media access to, or reporting of, complainant's evidence would be a matter of concern. During debate of the Bill in Committee, Ms Lee Rhiannon stated that:

> *"[t]he media can play a very important role in alerting the community to the deficiencies of the judiciary and the defence during sexual assault hearings"* (Hansard, NSW Legislative Council, 4 May 2005).

In addition, any adverse effect on media access to or reporting of complainant evidence could lead to reports being skewed in favour of the accused's evidence, as the accused's evidence is in circumstances in which complainants are already protected by legislation in each Australian jurisdiction which prevents the media from identifying them in Court reports.

The new provisions will extend to proceedings instituted or partly heard before commencement of the Amendment Act and will apply in respect of any evidence given by the complainant after the commencement (section 44). The new provisions will also apply to prescribed sexual offence proceedings to which a child is a party (Schedule 2.1 of the Amendment Act) but will not apply to incest proceedings, which are to be held entirely in camera (new section 291B).

Access to Court Documents

The Amendment Act will also amend existing section 314 of the CPA. As section 314 currently stands, a registrar is prohibited from giving the media access to documents from proceedings held in closed court. The amendments will remove this prohibition.

According to the Second Reading Speech, the intention is that, by removing the prohibition, the media will be able to access these documents to enable them to prepare a full and fair report. It is important to note that media access to court documents and reporting on them will still be subject to any suppression or non-publication orders made by the court.

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programs.

[18] ibid, para 48.

[19] *Broadcasting Distribution Regulations 1998* (Can), s 6(2).

[20] No broadcasting licence may be issued to a person who is Non-Canadian: Government-in-Council *Direction to the CRTC (Ineligibility of Non-Canadians)* 8 April 1997, s 3.

[21] ss 59-61.

[22] CRTC Public Notice 1999-97 (Television Policy), para 17.

[23] CRTC Public Notice 1998-41 (Radio Policy), para 38.

[24] See Winseck, D., "Netscapes of power: convergence, consolidation and power in the Canadian mediascape" (2002) 24 *Media, Culture and Society* 795, 796.

[25] CRTC Public Notice 1999-97 (Television Policy), para 8.

[26] Zerbisias, A., "Ready or not, CRTC takes on media convergence" *The Toronto Star*, 14 April 2001.

[27] CRTC Decision 2001-458: *Licence renewals for the television stations controlled by Global*, para 103.

[28] ibid, para 106.

[29] Standing Committee on Transport and Communications, *Interim Report on the Canadian News Media*, Senate of Canada, April 2004, 36.

[30] Richard Stursberg quoted in Barron, J.A., "Globalism and national media policies in the United States and Canada: A critique of C. Edwin Baker's *Markets, Media and Democracy*", (2002) 27 Brook J Int'l L 971, 996.

[31] Evidence to the Canadian Standing Senate Committee on Transport and Communications inquiry into Canadian News Media, 25 September 2003.

[32] See CRTC Decision 2001-458, above n 19; CRTC Decision 2001-384: *Transfer of effective control of TVA to Quebecor Média Inc*; and CRTC Decision 2000-474: *Transfer of effective control of CTV Inc. to BCE Inc.* The *Broadcasting Services (Media Ownership) Bill 2002* (Cth) proposed exemption certificates for merged media entities which would allow otherwise prohibited cross-media mergers where the companies could demonstrate separate editorial policies, organisational charts consistent with separate decision-making, and separate editorial news management, news compilation processes and news gathering and news interpretation capabilities: s 61F.

[33] See Standing Committee on Canadian Heritage, above n 12, 399. In 2003, nearly 85% of Canadians were subscribers to a cable or other non-terrestrial broadcasting service: Canadian Cable Television Association statistics: http://www.ccta.com/english/View.asp?t=&x=14&pf=1. Like the United States, cable television has been a feature of the Canadian system since the 1950s, while pay television (ie subscribers paying extra for additional content beyond the basic cable offering) was introduced in the early 1980s.

[34] Evidence to the Australian Senate Committee inquiry into the Media Ownership Bill by visiting Canadian academic and journalist, Professor S. Kimber (*Environment, Communications, Information Technology and the Arts Hansard*, 21 May 2002 at 40-42); Associate Professor V. Carlin, School of Journalism, Ryerson University, evidence to the Canadian Standing Senate Committee on Transport and Communications Inquiry into the Canadian News Media, 13 May 2003.

[35] Estimate based on a possible A$12 billion-worth in merger and acquisition activity after deregulation: C. O'Connor from Carnegie, Wylie & Co., speaking at the "New Models for Australian Media" Forum hosted by the Australian Writers Guild and X|Media|Lab, Sydney, 4 March 2005.

[36] In 2002-03, Canadian films captured 3.2% of the Canadian box office, an increase from 1.9% in 2000-01: Statistics Canada, "Film, video and audio-visual distribution: data tables" (17 May 2004), <http://www.statcan.ca:80/english/freepub/87F0010XIE/2004001/distrib.htm>. Canadian films accounted for approximately 1% of the Canadian English language market in the period 1999-2002: Department of Canadian Heritage, "Canadian box office results" <http//www.canadianheritage.ga.ca/pc-ch/sujets-subjects/arts-culture/film-video/boxoffice_e.cfm>. In recent years, Australian films as a percentage of box office takings in Australia have dropped from 8% in 2000 & 2001, to just 1% in 2004. Over the past 12 years (1997-2004) Australian films have earned 5.2% of the local box office: Australian Film Commission, "What Australians are Watching: Australian films' share of the Australian box office, 1977-2004" <http://www.afc.gov.au/gtp/wcboshare.html>

[37] Standing Committee on Cultural Heritage, above n 15, 99.

[38] ibid, 136.

[39] Profits for the Australian television industry have reputedly grown by 17.4% per annum, from $80 million in 1988-89 to $761 million in 2002-03: Australian Association of National Advertisers, *Beyond the Three [illegible]rs*, Submission to the DCITA Review of the Provision [illegible]n-mercial Broadcasting Services after 31 December 2006, October 2004, 33.

Important changes to the reporting of prescribed sexual offence proceedings in New South Wales

Sophie Dawson and Julie Cheeseman review the *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) and its potential impact on court reporting

The *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) (**"Amendment Act"**) was passed by the NSW Parliament on 4 May 2005 and will commence on a date to be proclaimed. Once commenced, the Act will:

- expand the protections available to complainants when giving evidence in sexual offence proceedings; and
- change the way in which the media is entitled to report on sexual offence proceedings in New South Wales.

The amendments are a consequence of an election promise made by the Labor Government in 2003 to introduce reforms to improve the court process for complainants in sexual assault matters.

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Media access to complainant evidence in prescribed sexual offence proceedings

Under existing section 291 of the *Criminal Procedure Act 1986* (NSW) (**"CPA"**), journalists and members of the public can hear complainant evidence in prescribed sexual offence proceedings unless the court has ordered that such evidence be held in camera. When determining whether to exercise its discretion, a court would be required to take into account the principle of open justice. Orders are not made as a matter of course and media organisations have a right to be heard in relation to any application to close the court.

Once the Amendment Act commences, the existing section 291 of the CPA will be replaced with an entirely new provision which will require all complainant evidence in prescribed sexual offence proceedings to be heard in camera unless the court otherwise directs. This applies even if the complainant gives evidence by means of closed-

Offsetting Cross-media Ownership and Media Concentration: Examining the "Canadian model"

Simon Curtis discusses a potential model for the deregulation of Australia's cross-media ownership and media concentration laws based on the Canadian experience

The Australian film and television production community has been gearing up for the anticipated relaxation of media ownership laws during the Howard Government's fourth term, and the increased merger and acquisition activity likely to flow from any relaxation. With strong endorsement by some industry groups[1], the "Canadian model" of local content production financing has recently received favourable coverage in the local arts press[2]. Canada's comprehensive system of local content production subsidisation is funded by a combination of direct Government investment, annual licence fees for cable and satellite services, and substantial 'transaction fees' for any media mergers and acquisitions involving the transfer of broadcast licence ownership.

Transaction fees generated from major media mergers over the past five years have helped to significantly boost the levels of investment in Canadian content production. At the same time, these mergers have led to a highly concentrated media ownership structure. In evaluating the potential benefits of a similar system being implemented in Australia, policy makers must take into account the likelihood of further ownership concentration, and the possible effects that may have on ensuring that a diversity of news, views and opinion is represented in Australian media.

Canadian Media Policy

Canadian media policy reflects long-standing national concerns about maintaining Canada's cultural identity and independence from its southern neighbour[3]. A detailed system of Canadian content requirements for television (both free-to-air and subscription) and radio, as well as government-mandated financing of the Canadian production sector, have been considered necessary to ensure Canadian voices are heard above the cacophony of US cultural products. Canadian cultural policy became a contentious issue in negotiations with the United States over the *North American Free Trade Agreement*[4], and is still a source of trade policy friction between the two countries[5].

Regulation of Canada's broadcasting sector is the responsibility of the semi-autonomous Canadian Radio-television and Telecommunications Commission (**"CRTC"**). The CRTC regulates the broadcasting sector within the framework of the *Canadian Broadcasting Act 1991*[6] (**"Canadian Act"**), generally operating at arms-length from government. Canada's broadcasting policy, as set out in the Canadian Act, requires a Canadian broadcasting system that, inter alia, is

> *"a public service essential to the maintenance and enhancement of national identity and cultural sovereignty"* and is *"effectively owned and controlled by Canadians"*.

The Canadian broadcasting system aims to encourage the

> *"development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity"* and reflect *"the circumstances and aspirations of Canadian men, women and children"*[7].

Comparison

In comparison, the objectives of the Australian *Broadcasting Services Act 1992* (Cth) (**"Australian Act"**) include:

- to promote a *"diverse range of radio and television services offering entertainment, education and information"*;
- to encourage diversity in control of, and ensure that Australians have effective control of, the *"more influential broadcasting services"*; and
- *to "promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity"*[8].

While both Acts list similar objectives, the Canadian Act is notable for its stronger focus on Canadian content and representation. Ownership is mentioned only in the context of maintaining Canadian control of its broadcasting system – there is no reference to encouraging diversity in ownership and control.

With strong endorsement by some industry groups, the "Canadian model" of local content production financing has recently received favourable coverage in the local arts press

The Canadian Experience

Canada has a developed a number of interrelated funding mechanisms for local content production. In any transfer of ownership or control of a commercial television licence, parties to the transaction must commit 10% of the transaction cost to *"clear and unequivocal tangible benefits"* for the community or communities affected by the transfer, and to the Canadian broadcasting system as a whole[9]. Mergers or acquisitions involving radio licences incur a 6% transaction fee[10]. "Tangible benefits" tend to fall into three broad categories:

- operating expenditures (such as additional staff or programming improvements);
- capital expenditures for technical improvements; and
- grants and contributions to Canadian talent or program development funds[11].

Between 1999-2004, CAD$515.9 million was generated under the benefits policy[12].

"Broadcasting distribution undertakings" (BDUs – cable, satellite television, etc.) are required to pay a licence fee of 5% of annual revenue from broadcasting activities, the majority of which goes to the Canadian Television Fund (administered by the Department of Canadian Heritage and supplemented by equivalent public funding)[13]. Revenue from licence fees increased from CAD$79 million in 1999 to CAD$129 million in 2003[14]. Significant tax credits for production budgets are also available to both local and international producers depending on the extent of Canadian involvement in the project[15].

These mechanisms for investment in local content production are complemented by a highly detailed points system regulating the amount (by time) and diversity (by genre) of local content shown on free-to-air television and cable and satellite networks. Overall, free-to-air commercial television stations are required to devote at least 60% of the broadcast year and at least 50% of the evening broadcast period (6pm-12am) to Canadian programs. Content regulations also apply to Canadian radio[16]. The larger multi-station ownership groups are required to broadcast, on average over the broadcast year, at least 8 hours per week of "priority Canadian programs" during the 7pm to 11pm period[17]. Broadcasters can receive a 150% time credit against their peak-time priority program obligations by broadcasting first-run Canadian drama[18]. BDUs are required to ensure that a majority of the video and audio channels received by the subscriber are devoted to the distribution of Canadian programming[19].

With the exception of explicit controls on foreign ownership[20], regulation of media concentration and cross-media ownership is left largely to the discretionary powers of the CRTC, acting within the policy framework of the Canadian Act. There are no comparable provisions in Canadian broadcasting legislation to the cross-media or media concentration provisions of the Australian Act[21]. The CRTC has, however, developed general policies in relation to concentrated ownership in television and radio. The CRTC permits ownership of no more than one commercial television broadcasting licence in one language in a given market[22]. In respect of radio, the CRTC permits ownership or control of as many as three stations operating in a given language (including up to two in any one frequency band) in markets with less than eight commercial radio stations. In larger radio markets, a person may be permitted to own or control as many as two AM and two FM commercial stations in a given language[23]. While having no specific policy in relation to cross-media ownership, the CRTC attempts to take into account cross-media implications when investigating an application for transfer or renewal of a broadcasting licence.

In recent years, the CRTC has generally taken the pragmatic view that, in order to ensure Canadian media can compete with American media giants such as Time Warner, Disney & Viacom, Canada needs large media companies that can utilise the economies of scale available through cross-media ownership and media concentration. While during the 1980s the CRTC demonstrated caution in approving media mergers that significantly threatened ownership diversity, by the 1990s the CRTC more market-orientated approach to regulatory issues led to a reassessment of its ownership policy priorities[24]. In its 1999 television policy statement, the CRTC argued that media consolidation:

> *"...has resulted in efficiencies and synergies which should provide increased investment in Canadian programming and a greater likelihood of the export of that programming. The Commission expects the consolidation of broadcasting, production and communication companies will continue, to the benefit of Canadian audiences, the Canadian broadcasting system and the public interest."*[25]

In 2000-01, the CRTC approved a number of significant mergers and acquisitions which radically altered the media ownership landscape in Canada, particularly in relation to cross-media. As a result of these transactions, two media conglomerates, BCE-CTV and CanWest-Global, collectively now control over half of Canada's commercial television stations, while 60 per cent of Canadians get their local daily newspaper from the same company that owns one or more of their local television stations[26]. CanWest has a potential audience reach of 97.6% of the English television market[27]. In the province of British Columbia (which includes Vancouver), CanWest operates two television stations as well as three daily newspapers[28]. In both Montreal and Quebec City, the francophone-based media company Quebecor now owns the most popular daily newspaper and the most viewed television station[29].

As one commentator observed, an acceptance of increased media concentration could be seen as a trade-off between diversity of voice within Canada versus diversity of voice in a North American context[30]. In evidence to the Canadian Senate Committee on Transport and Communications, the CRTC Chairperson Charles Dalfen argued that, while issues of cross-ownership and concentration are of concern, in some cases these concerns may be outweighed by the "offsetting advantages"[31] of larger broadcasting companies with the resources for greater Canadian content production.

The CRTC has attempted to alleviate concerns regarding media concentration by imposing licence conditions designed to maintain editorial separation between television stations and affiliated newspapers, and commitments to maintain local and regional news and information programs across television networks[32]. In any event, Canadian regulators and media companies argue that the diversity created through Canada's long-established cable and subscription television networks, as well as the internet, lessen the need for more stringent ownership regulation[33]. Anecdotal evidence suggests, however, that consolidation of media outlets has, at least in some instances, led to a streamlining of newsgathering and editorial content across the different media platforms within the one media company, as well as a dilution of editorial control at the local level[34].

The Canadian model has obvious attraction for an Australian production sector that tends to lurch from project to project on intermittent and unreliable funding streams.

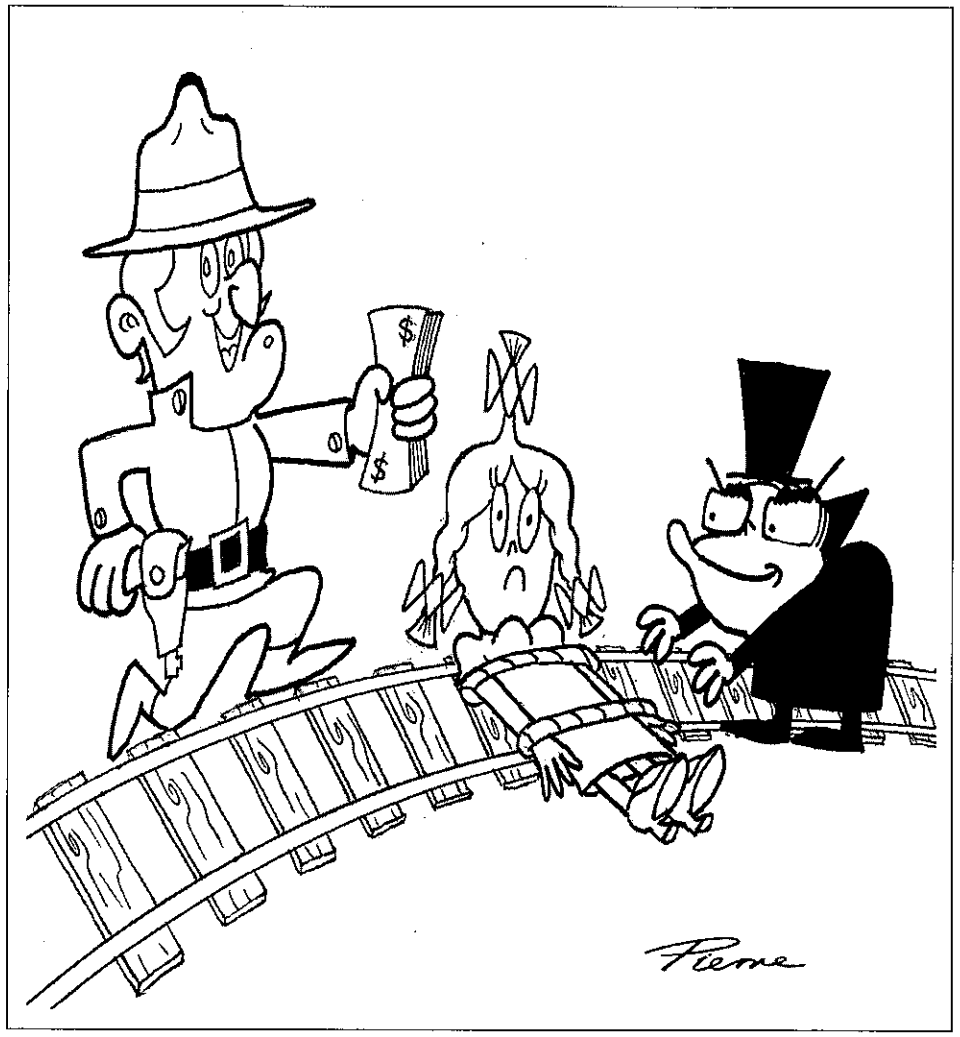
Application in Australia

The Canadian model has obvious attraction for an Australian production sector that tends to lurch from project to project on intermittent and unreliable funding streams. Any scheme that promises to increase funding and provide greater financial certainty for Australian content producers must be examined carefully. One analyst has estimated that a Canadian-style 'transaction fee' could generate up to A$1.2 billion in funds for production investment if Australian media ownership laws were relaxed[35].

Purely in terms of production investment and output, the Canadian system must be considered highly successful. However, more local content does not necessarily mean that more locals will watch. Canadian films have even less success at Canadian box offices than Australian films in the Australian market[36]. In relation to television, the Canadian Committee on Cultural Heritage, in its 2003 review of the Canadian broadcasting system, found that less than 10% of drama watched by anglophones was Canadian (26% for francophones) with 34% of overall viewing by anglophones being Canadian programmes (66% for francophones).[37] Even after subsidies and advertising revenue were taken into consideration, the review found that English-language Canadian television broadcasters averaged a net loss of about CAD$125,000 per hour of Canadian drama, making their profits largely from US programmes[38]. Despite a wealth of investment and output, content regulation still appears to be the most effective mechanism to ensure Canadian content is adequately represented in Canadian television and radio programming.

The adoption or adaptation of other aspects of the Canadian system for local production support would seem worth investigating in the Australian context. With the reported high profitability of Australia's commercial television networks[39], a proportion of their commercial broadcast licence fees could, for example, be used to finance independent Australian production funds. The effectiveness of Canada's tax credit incentives for production investment could be evaluated against current tax incentive schemes in Australia. The 'transaction fee' mechanism, however, appears to encourage, if not depend on, further media ownership concentration to achieve increased local production investment. While, in Canada, the widespread accessibility of non free-to-air television services may mitigate diversity concerns, the same cannot be said of Australia (particularly with the largest telecommunications company and two of the largest media companies with a near monopoly on subscription television distribution).

If we leave to one side the question as to whether such a scheme would ever likely be implemented in Australia, it is important when debating the future of broadcasting regulation not to confuse diversity of content with diversity of available news, views and opinions. While increased funding may well provide a wide variety of new programmes across a range of genres, this should not distract discussion on the value of having different and diverse sources of news sources, and consideration as to the most appropriate structural, operational and behavioural regulatory mechanisms for maintaining that diversity.



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(Endnotes)

[1] See, for example, Australian Writers Guild & X-Media Lab, "Financing Media Content: Canada's World Best Practice Model" <http://www.awg.com.au/artman/uploads/canadian_media_incentives.pdf> (accessed 14/04/05)

[2] See, for example, Kellerman, B., "Role Model", *Inside Film*, No. 75, April 2005, pp.55-56; Edwards, D., "Documentary: the great multiplatform adventure", *RealTime + OnScreen*, 66, April-May 2005. Australian regulators have examined the Canadian model on previous occasions: see Goldsmith et al, *The Future for Local Content? Options for Emerging Technologies*, ABA, June 2001, pp. 41-56.

[3] See Maule, C., "State of the Canada-US Relationship: Culture" (Spring 2003) *The American Review of Canadian Studies* 121; Gagne, G., "Cultural Sovereignty, Identity and North American Integration: on the Relevance of the US-Canada-Quebec Border" (2003) 36 *Quebec Studies* 29.

[4] Koningsberg, S.R., "Think globally, act locally: North American free trade, Canadian cultural industry exemption, and the liberalization of the broadcast ownership laws" (1994) 12 Cardozo Arts & Ent L J 218, 297-300.

[5] Mulcahy, K.V., "Cultural Imperialism and Cultural Sovereignty: US-Canadian Cultural Relations" (2002) 31(4) *Journal of Arts Management, Law and Society* 265.

[6] Like the Federal Communications Commission (US) and the Office of Communications (UK), the CRTC is also responsible for the regulation of telecommunications.

[7] *Broadcasting Act 1991* (Can) s 3.

[8] *Broadcasting Services Act 1992* (Cth), s 3.

[9] CRTC Public Notice 1999-97: *Building on Success – A Policy Framework for Canadian Television*, para 22.

[10] CRTC Public Notice 1998-41: *Commercial Radio Policy*, para 70.

[11] CRTC Public Notice 1993-68.

[12] CRTC, *Broadcasting Policy Monitoring Report 2004*, Ottawa, 72.

[13] CRTC Public Notice 1999-97 (Television Policy), para 29; CRTC Public Notice 1997-25: *New Regulatory Framework for Broadcasting Distribution Undertakings*.

[14] CRTC 2004, above n 12, 99.

[15] *The Canadian Film or Video Production Tax Credit*: The credit is equal to 25 per cent of the eligible labour costs of a Canadian-controlled production corporation for films or programmes that have high Canadian content, with the maximum amount of Canadian labour cost that qualifies for a tax credit being 60 per cent of the total cost of a film or video production. The *Film or Video Production Services Tax Credit* is a tax credit equal to 16 per cent of salary and wages paid to Canadian residents or taxable Canadian corporations (for amounts paid to employees who are Canadian residents) for services provided to the production in Canada after February 18, 2003. Tax credits and direct government support are also available at the provincial level: see Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*, Parliament of Canada, June 2003, 146-147.

[16] *Television Broadcasting Regulations 1987* (Can), s 4(7).

[17] CRTC 1999-97 (Television Policy), para 29. "Priority Programs" include Canadian drama, music/variety, long-form documentary, entertainment/magazine, and regionally produced programs, but not news or sports