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FORTHCOMING SEMINARS

JUNE: *ACLA Luncheon*

An ACLA luncheon has also been tentatively arranged for 27 June, 1985 at which speakers from AUSSAT will update the present position regarding the domestic satellite. This is particularly topical in view of the fact that the first satellite is due to be launched in July of this year.

JULY: *ACLA Seminar on New B&T Bill*

The Australian Communications Law Association is planning a seminar on the Broadcasting and Television Amendment Bill 1985 which was introduced on 15 May, 1985. This Bill covers subjects such as RCTS licences, area licensing enquiries and service based areas. The seminar will be held in early July at the Sydney University Law School between 6 and 8 p.m. Members of ACLA will be circulated regarding this seminar. Any other enquiries should be addressed to Catriona Hughes at the Australian Film Commission on 922 6855 or to Ros Gonczi on 660 1645.

AUGUST: *Copyright Society's Second Copyright Symposium*

Readers' attention is drawn to the second Copyright Law and Practice Symposium which is being held by the Copyright Society of Australia Inc., and the Australian Copyright Council. A dinner will be held on 8 August, 1985. At the Symposium on Friday, 9 August, 1985 topics will include recent developments in Australian copyright law, satellites and copyright, the computer amendments to the Copyright Act 1968, developments in US copyright law and software licensing. All enquiries should be addressed to the Copyright Council on 92 1151, or to Ros Gonczi on 660 1645.

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Contributors to this Issue: Robert Pullan - Author; Wentworth Hill - Magnus Nankervis & Curl; Noric Dilanchian - Legal Officer, Angus & Robertson Publishers.

The *Communications Law Bulletin* welcomes articles, case notes, letters, news items, notes on recent publications, details of forthcoming events and other contributions. Forward all correspondence and contributions to:- **Editorial Board, P.O. Box K541, Haymarket, N.S.W. 2000.** Registered by Australia Post — Publication No NBH 4474.

Defamation

The timid tampers of public debate who defend our libel laws always argued that libel balances the conflicting interests of reputations and free speech.

What could be more reasonable? We the people give up part of our free speech and in return the protection of the law is thrown around our reputations.

This is the key to the libel debate: it is used by all defenders of the libel law. It is the common theme of judgments in all the Supreme Courts, of learned articles in the law journals, of seminars on media law.

It is accepted by Judge Graham Fricke of the Victorian County Court, in his recent book 'Libels, Lampoons and Litigants', and by Justice David Hunt of the New South Wales Supreme Court, who wrote the book's foreword.

But notwithstanding its universal acceptance by lawyers, the formula is false.

The first part is true: libel certainly means that we the people give up part of our free speech - the most interesting part, as it happens: the free speech which exposes a famous and powerful person, most often a politician, to 'hatred ridicule or contempt.'

Exposing a politician, particularly a New South Wales politician, to ridicule or contempt is of course very easy - which means that the censored area of our public discourse is huge. Rex Jackson, the former NSW Corrective Services Minister, for example, had 28 writs for libel out against Sydney newspapers when he went to trial charged with crimes associated with the early release of prisoners. When reporters exposed the NSW Government's payment of Jackson's legal fees, he issued still more.

So what is the balance? What do we get in return for surrendering the most important and interesting parts of our public debate to the curtain of silence?

What we get, at a substantial monetary - not to mention political, social and I believe psychological cost - is nothing at all.

Joe and Jill Average bring an insignificant number of libel actions - about one in fifty - and the lists are crowded with Federal and State Cabinet Ministers, Premiers, corporate heads like Kerry Packer, Alan Bond and Robert Holmes a Court, famed architects, lawyers and sports figures and a variety of thugs and killers. [redacted] won more than [redacted].

Very well. Does the law 'protect' the reputations of Premiers and Packers? Not a bit of it. Justice Jim Stamples of the 'Conciliation and Arbitration Commission' suggests that Sydney is 'the defamation capital of the world' - and every one of the multitude of writs is evidence not of the system's success, but of its failure.

Each one of the actions, that is, is designed to compensate the Premiers and Packers for reputations which have been damaged. A system designed to protect reputations would aim at minimising damage, not merely at giving dollars for damage after it has occurred.

There is such a system. It works already in the Australian parliaments and in our courts. It works in the United States under the First Amendment to the Constitution. It is the system called freedom of speech.

The evidence from these systems points consistently, as we would expect, in one direction: people's reputations are better protected than they are under our system of state regulated speech.

Although there are occasional 'abuses' of free speech in our parliaments, it is certainly not true that parliamentary debate is more careless, venomous and damaging to innocent reputations than debate outside the parliaments.

As for the U.S. example - even Gareth Evans when he was Attorney-General and rigidly defending the Australian libel

(Cont'd PAGE 25)

END OF UNIFORM DEFAMATION LAW

On 2 May, 1985 the standing committees of Attorneys-General decided to abandon plans to develop a uniform defamation law for Australia.

Discussions had been underway for two years to establish a uniform law, but the key question of justification arose as the main area of disagreement. The States continued to disagree as to whether the defence in defamation actions should be truth alone, truth plus public benefit or truth with protection for sensitive private facts.

Uniform Defamation Law

Address given by the NSW Attorney-General, the Hon. T. Sheahan, to the ACLA luncheon on 15 May 1985 in Sydney.

Given the history of Australia's consideration of uniform defamation laws by the Standing Committee of Attorneys-General - and of course the media attention which was focussed upon that exercise - it is difficult not to feel some sense of difficulty about addressing this learned gathering on the topic.

Of course you will also appreciate that I came into this exercise very late in the date.

Consequently I cannot enrich these proceedings with an accurate account of, or a real insight into, the intellectual acrobatics evidently performed by the Standing Committee since the release of the Australian Law Reform Commisson's report in 1979.

I am certainly not going to pretend that I have had the opportunity, or the inclination, to study the enormous amount of material that has been written for, and submitted to, the Standing Committee on this topic.

Because positions had by then been assumed and lines of disagreement were clear, the wider question - whether public apprehensions even needed to be addressed - couldn't have arisen until the Standing Committee's internal differences could be resolved.

However, it is abundantly evident from my research that the assembled Attorneys-General have over the years approached this difficult and frustrating project with impeccable integrity and a sincere and obviously overwhelming concern to produce an Australia defamation code which properly balanced the community interest in freedom of speech against the other equally sensitive and important community interest in protecting both the privacy of the individual and his or her right to some form of redress when reputation is damaged as a result of careless or malicious assertions. It is interesting to note that in this period of six years there have been more than 20 Attorneys-General involved in this process, so high is the attrition rate.

In regard to the Standing Committee I am pleased to have this opportunity to place on record my considerable respect for the earnest and tenacious efforts of Senator Gareth Evans in attempting to bring about an end to what we all recognise is an absurd situation whereby the principal law relating to freedom of speech in this country is fragmented and inconsistent, creating a web of juridictional and technical complexities.

Gareth Evans went to extraordinary lengths on behalf of the Standing Committee to consult the Australian media on the content of a uniform code and it would be silly to suggest that he made those efforts for any reason apart from his genuine commitment to rationalising the unfortunate state of the Australian law in this area.

What troubles me most about the criticism Gareth Evans took over the terms of the various drafts of the Uniform Defamation Bill was the failure of most if not all of his critics to offer any sensibly balanced alternatives.

Some media interests would perhaps never accept that view but I doubt that anyone present could show me where, while Gareth Evans was attempting to meet the needs and wishes of the media, any real attention was paid to the interests of the plaintiffs.

Maybe it would be hoping too much to expect the media, on a matter of such special sensitivity, to offer both sides of the argument; but I can assure this gathering that those people who took the time to communicate with my predecessors on this subject were generally more concerned with suggested excesses by the media than they were with the more esoteric arguments presented in the press and elsewhere on the alleged denial of fundamental rights and liberties represented by the Bill made public by Senator Evans.

As a Minister with no relevant responsibilities during the time of exposure of the Bill, I could not help noting that hardly any of the feature writers in our nation's newspapers could be restrained from pouring scorn on the Bill.

It was clearly a well orchestrated campaign which will make any future denials of editorial direction to working journalists and feature writers difficult to swallow.

I have alluded to the approaches made to successive Attorneys-General by ordinary members of the community concerning defamation laws, but that correspondence

was more a trickle than a torrent.

The fact is that defamation laws are of little obvious consequence to the man in the street.

Although it can be argued that the fundamental rights and freedoms allegedly denied by the state of our defamation laws might have consequences with which the community ought to be concerned, the reality is that, apart from public figures such as politicians, newspaper editors and the owners of TV stations, the vast majority of the community will never have any direct need for the protection of the law in this area.

The occasional, "Australian insult" is very seldom likely to occasion damage which seriously ought to be the subject of monetary compensation.

I would suggest to you that the "apathy factor" and the consequent feeling among Attorneys that there were more urgent matters to which they ought to devote their time were equally significant in the recent decision of the Standing Committee to abandon efforts to reach agreement on an acceptable Uniform Australian Defamation Law Code.

On that subject I should comment briefly on the real breadth of the issues which remained to be resolved among the various jurisdicitons before true agreement could be reached.

I think the letter from the Deputy Prime Minister and Attorney-General of the Commonwealth, Lionel Bowen, published in last Thursday's Herald adequately demonstrates the problems that still faced the Standing Committee after six years of debate.

Certainly the content of the defence of justification - truth or truth and public interest or some other formulation designed to protect the private affairs of the individual - was a major stumbling block.

But even more fundamental issues such as the definition of "defamatory imputation" or the extent and application of limitation periods were the subject of real doubt, particularly following a meeting between Senator Evans and media interests in August last year.

It became evident that there were a series of issues which remained to be clarified, even though they had been the subject of discussion and apparent agreement before.

All I am suggesting here is that it is a significant over-simplification to suggest that the sensitive interests of privacy protection alone were sufficient to justify the demise of the uniformity exercise.

Rather it was the inability to reach agreement on that fundamental issue of the defence of justification which directed the attention of the various jurisdictions to the reality that if agreement was ever to be attained it would not be achieved within the forum of the Standing Committee without a disproportionate, and probably unjustifiable, concentration of resources, both time and energy, on the topic.

Last Monday week the Herald editorialist sought "the fullest possible account of the Committee's most recent discussion".

Let me say that such an account would be unlikely to hold the rapt attention of the community for any period of time, simply because the issues were more complex, more legally technical and more obscure than the critics of the exercise appear to understand.

The same editorialist has begged the question - Will the exercise start again?

Let me say that in N.S.W. our law represents the implementation of a 1971 report of the N.S.W. Law Reform Commission.

I realise that there are eminent commentators on the defamation law who consider that the N.S.W. Law Reform Commission's report is an impeccable document and that the present state of the N.S.W. law, reflecting as it does elements of that report, is difficult to improve on, given the obvious difficulties in achieving any real consensus on the subject.

That should not be taken to mean that I shall ignore my ordinary responsibility as an Attorney-General to keep the state of the law under review.

In fact I have already asked my Department to report to me on those aspects of the uniformity proposals which might represent appropriate reform in N.S.W.

But you may be assured that this will not entail radical change from the present N.S.W. position which, as I have said, has not been the subject of particular criticism so far as I am aware.

That statement may well cause a welter of correspondence but I am sure you would generally agree it would be very remiss of me, following the cessation of the uniformity exercise, not to make it clear that I remain amenable to any reasoned submission for change in the N.S.W. law.

As I have said there were more issues standing in the way of agreement than simply the form of the defence of justifica-

tion but to my mind the greater problem was the atmosphere in which the debate was conducted in the press and elsewhere.

Nobody could suggest that there was any attempt by the Attorneys-General to conceal the results of their deliberations.

Over the years regular announcements were made and the media was provided with proper opportunities for review.

The reward for this open handed approach was a fairly hysterical knee-jerk from the media as a whole.

It is quite frankly difficult to credit the various inferences that the Attorneys had embarked on draconian attempts to deny freedom of the press, but the media had the only means of conveying to the general public the nature of the issues at hand and it seems to me it did so in a somewhat unbalanced fashion.

Certainly, the Attorneys were a group of politicians who had set themselves up to be intimidated, lobbied and the recipients of representations. The media perceived that if it could successfully intimidate, it might achieve the ultimate goal of abolishing the common law principles in our defamation law and substituting the bizarre mechanisms which frequently operate in the Untied States.

Let me say that, had the uniformity exercise proceeded, there would have been a real concern that too much emphasis was placed on the views of representatives of the media, because the media evinced no real concern with the protection of individual reputation.

Rather it sought to emphasise the supposed public interest in the airing of information, whether or not it be unsubstantiated rumour and innuendo, under the guise of "investigative reporting".

Given the nature of the debate I suppose one could hardly expect otherwise, but it did not contribute to a rational assessment of what was an appropriate balance in Australian defamation law between freedom to publish and the protection of the individual's private life from the public gaze.

It also seems to me that the oft repeated fiction that "the existing law requires the media to sit on stories of great public interest" is ripe for challenge.

The essence of the problem is the question of whether the elements of the allegedly repressed material are true - not simply a reflection of rumour or gossip.

I submit to you that if the material is both of great public interest and true - what is to prevent publication?

Now I know the great majority of journalists are responsible professionals who would not allow their reputations to be sullied by suggestions of negligent reporting.

I suggest that category of professional has very little to fear from the existing defamation law, nor would there have been a great problem with the announced elements of the proposed uniform code.

Rather the code would have significantly reduced the financial component in awards by the introduction of the correction order process.

Ultimately the pity of the cessation of the uniformity exercise is that the sensible proposals for remedies of a non-financial kind, designed specifically to restore lost reputation, have been buried along with those more difficult problems upon which no agreement could be reached.

Let me say in conclusion that I recognise that in our modern environment where access to print and electronic media is the expectation of the whole population, it is absurd that different rules relating to the protection of reputation apply in each Australian jurisdiction.

But it is equally important that the media should be obliged to adopt the high standards of propriety in reporting.

That ought not to be done by any criminal code or licensing system which would threaten a journalist's capacity to earn a living.

In our common law system that leaves us with the need for a tort which casts an obligation to take proper care in reporting on matters concerning individuals' private lives and public conduct. That is the defamation law and whatever its faults, I believe that the Australian position, so far as freedom of speech and freedom to publish are concerned, is difficult to denigrate.

As to the future of uniformity, I suspect it will be brought about by a less dramatic process through which courts and legislators will eventually reach a lowest common denominator in the common law.

Unfortunately that will not happen overnight, but, given the response to the genuine attempts over the past six years to formulate a balanced code, I suggest it will be some time before a group of lawmakers direct a similar volume of resources of time and energy into a similar daunting project.

How Strong is the Case for Global Advertising?

The Saatchi & Saatchi decision has certainly brought home to Australia the potential disruptive impact of the concept of Global Advertising.

Time is short. Therefore, I shall attempt to concentrate on major elements only.

In principle, Global Advertising offers enormous competitive advantages and financial rewards to the successful applicants "if" it can be pulled off. Savings in man hours and production costs ensure that. Consequently, attempts to achieve it cannot be expected to disappear just because the Federal Government waves its magic wand and new legislation protecting the Australian market suddenly appears.

If realistic commercial judgements by marketers and advertising agencies are to be applied, then it is paramount that there be a clear understanding of the premises underwriting Saatchi's rationale for its Global Advertising vision.

Saatchi's drive for free trade internationally is a major bid for, in its own words, "International economies of scale as the basis of long-term strategic security". Saatchi's strategy appears to have been picked up from the case advanced in 1983 by Theodore Levitt, a Harvard Business School marketing professor.

Levitt, argued that "the new republic of technology homogenises world tastes, wants, and possibilities into global market proportions, which allows for world-standardised products". Thus, according to Levitt's hypothesis, a global marketer's economies of scale will enable price reductions and the means to thrash competitors.

In line with this, Saatchi has put forward a case attempting to justify Global Advertising. This case centres on currently indisputable converging macro-economic influences in the major industrial economies of the western world. These influences are:

- Ageing Populations
- Falling Birth Rates
- Increasing Female Employment
- The decline of the Nuclear Family
- Increasing Cultural Convergence
- Increasing Media Convergence
- Increasing Wholesaler and Retailer Sophistication

These trends, combined with Levitt's so-called "republic of technology", are, to varying degrees, having a major impact on consumption patterns of many goods and services throughout the world. The consumption patterns are, to a large extent, common. It is just their rates of change and the degrees of penetration of consumer markets in various countries that are varying. Consequently, the net result is the marketers' perceived risks of market place opportunities are decreasing, and the world is increasingly being seen as one big marketing opportunity.

Obviously, with such an economic backdrop that even blind Freddie could see, it would be commercially irresponsible for a Company not to attempt to capture available economies of scale associated with various components of the marketing mix.

This is equally so in the area of international advertising agency networks. These have to be paid for. In London, it has been pointed out by one U.K. agency, that as more and more agencies join Saatchi's and its listed competitors on the stock market, they are relentlessly pushed by the city to show growth and increased profitability. The result of this pressure is to cause these agencies to diversify overseas.

And these actions are easily justified when described with terms such as expansion that avoids conflict, opening new markets, and benefiting from economies of scale.

In seeking the benefit of international network economies of scale, Saatchi's has extended the concept further than has been applied to date. The emphasis so far has been on networks of offices to service international clients in different countries. The Saatchi vision is that, if economies of scale can be achieved through the economic trends and concommitantly their impact on consumption patterns, then ceteris paribus, economies of scale can be achieved in advertising executions. But economics is famous for its cop outs. Because, in the area of understanding and relating to consumer behaviour to meet the needs of marketing and advertising, it is very inadequate.

In applying the caveat of ceteris paribus to justify global economies of scale to consumer advertising, we have

just hidden behind the ultimate escape route of economists - the academically reliable, but managerially deficient caveat of "all other things being equal".

This is because, on the one hand the more communications channels there are, the easier it is to participate in them and, on the other hand, by the fact that such participation is selective with such selectivity influenced heavily by cultural differences.

The overall net result likely from cultural convergence is richer, individual cultural tapestries which are more complex and more demanding in interpretation, and to tap into. This is especially so in the developed economies, where as people get better educated and more affluent, their tastes actually diverge.

Consequently, relating to the various cultures will require increasingly individual approaches.

Indicative of this has been the history of "international brands". For consumers, they are now very much past tense as aspirational goods and services.

Consumers generally have experienced the "international" pitfalls - the frustrations of airports, the discomfort of flying, the plastic economies of traveling. The glamour of "international" has been heavily devalued. Many brands which have attempted to cling to international associations have ended up as everyday price fighters.

As consumers have experienced such international reality and responded accordingly, advertising has increasingly given up the symbols of international branding. These have been replaced by the realistic and everyday world of real human experience which people automatically and extensively relate to.

In its rationale, Saatchi's touches indirectly on the problem but makes no clear effort to come to grips with it in stating:

> "Local customs, language, media availability and, not least of all, local invested interests, will militate against easy decision making in the framing of international brand positioning strategies. Equally, in the quest for a common position, the drift to a 'lowest common denominator' has to be avoided."

In summary, Saatchi would like to establish for various brands, high powered central propositions and advertising common to all markets yet relevant to, and compelling for each market. And this is commendable.

Right at the moment, there is no hard quantifiable evidence to confirm that the Saatchi vision of Global Advertising is more powerful than strategic concepts developed and executed to be as relevant as is possible to individual markets, which differ culturally and economically. Also Levitt, despite his vision of total worldwide standardisation, offers no quantitive proof that it works.

In anything, the academic and practioner evidence both qualitative and quantitative currently available is strongly in favour of tailoring advertising in most instances to the local culture to maximise its relevance to customers and, in turn, to maximise its resistance to the competition. Obviously, there are opportunities where strategies and advertising executions can be transferred from one geographic marketplace to another, but not in all markets given cultural and different degrees of competitive development by brands.

If the Saatchi global concept were to be implemented, there is a case to be made that local brands might be able to compete even better provided they could position themselves in a way to be more relevant.

Wentworth Hill

NEWS

ABC MOVES TO ESTABLISH SUBSIDIARY COMPANIES

It is proposed to amend the Australian Broadcasting Corporation Act 1983 to provide for subsidiary business companies. Such companies are designed to increase revenue for programming purposes for the ABC. The amendments to the Act have now been introduced into Parliament.

The activities which are considered appropriate for business companies include the marketing of satellite program services, concert entrepreneurship, ABC publications, ABC program sales, audience research and hiring of spare ABC capacities.

The setting up of the subsidiary companies will enable the ABC to use private capital to provide a more comprehensive range of services.

The Freedom of Information Act, the ABT and ABT 12 Forms

Actors' Equity Association of Australia and Australian Consumer's Association v Australian Broadcasting Tribunal (No. 2) and The Federation of Australian Commercial Television Stations

Administrative Appeals Tribunal, No. N83/483, 29 March, 1985.

In this decision the ADMINISTRATIVE APPEALS TRIBUNAL ("the AAT") refused to review a decision of the AUSTRALIAN BROADCASTING TRIBUNAL ("the ABT") refusing access by Actors' Equity to certain documents under the Freedom of Information Act 1982 ("the FOI Act"). Subsequent to the commencement of the proceedings the Australian Consumers Association was added as a party in support of Actors' Equity in its application and the Federation of Australian Commercial Television Stations in support of the ABT. The application was heard on the basis that the information sought was the information contained in form ABT 12 lodged by commercial television stations with the ABT in accordance with provisions of s106A(3)(b) of the Broadcasting and Television Act ("the B&T Act"). In fact, Actors' Equity had sought audited balance sheets and profit and loss accounts, the costs of production of Australian programs, the revenue earned by the resale of those programs, information obtained by the Tribunal in the performance of its functions. Equity said that it required such information for its submission to the ABT's enquiry in Australian content on commercial television.

Section 106A(3) of the B&T Act provided for access to information in the possession of the Tribunal on request, but this had been refused, as had access under the FOI Act.

The first question referred to in the decision was whether information contained in form ABT 12 was information supplied gratuitously to the Tribunal and not in pursuance of its statutory function, or whether or not it was supplied pursuant to the provisions of s106, which required the licensees to make available financial accounts to the Tribunal.

In looking at ABT 12 the AAT said that it had all the essential character of a profit and loss statement in an approved form. Accordingly, it did fall within s106.

The Tribunal had denied access to information under s43 of the FOI Act, the exemption relating to documents the exposure of which would disclose information relating to a person in respect of its business or its professional affairs. FACTS also argued that the documents in question were exempt within ss38 and 45 of the FOI Act. The ABT subsequently accepted the s38 argument, but not that relating to section 45. Section 38 provides an exemption where there is an enactment applying to specific information of the kind contained in the documents prohibiting persons referred to the enactment from exposing information of that kind. Section 45 related to breaches of confidence.

The AAT said that s38 did not found a claim for exemption of the documents in question and so proceeded to hear evidence in relation to the other claims for exemption.

The AAT characterised the questions which were to be answered under s43(1)(c)(i) as:-

(i) Would disclosure affect the licensees adversely in respect of their affairs?
(ii) Alternatively, could disclosure reasonably be expected to affect the licensees adversely in respect of such affairs?
(iii) If yes to 1 and 2 above, would such effect be unreasonable.

There was evidence of a number of impact factors, including competition for advertising revenue, competition with persons doing business with television stations such as film distributors, competition with other licensees seeking to buy or sell telecast rights and competition with people seeking to hire production facilities owned by the various licensees. These were not matters which would affect the work of the licensee, but rather the conduct of its day to day business. An adverse affect arising from them would ultimately be reflected in the overall profitability of a licensee being lower than otherwise. These were the factors which the AAT took into account. It did not feel that it was necessary to consider factors such as the value of shares in companies owning television licences, the vulnerability of such companies to

takeovers, or the value of those companies of television licences.

They found that the cumulative effect of information that could be gained from the ABT 12's, if disclosed and placed with other information would be considerable and could be made available to other licensees or other organisations who were either directly competing with licensees or who were otherwise involved in the fields of business in question. They also considered that there be a considerable value in making year by year comparisons. The information from the ABT 12's together with other information would enable competitors to determine accurately specific cost structures department by department, which would provide valuable information as to efficiency or otherwise and would be indicative of excessive monetary expenditure by licensees.

In interpreting s43 the AAT said that it was necessary to weigh the competing principles of public and private interest. Such interpretation had the support of Deputy president A.N. Hall in Chandra and the Department of Immigration and Ethnic Affairs (1984) ADMN 92-027.

In summary, the Tribunal said that the information gained by disclosure of ABT 12's would be likely to advantage a licensee in selling advertising time and other activities to the detriment of its competitors. Those competitors would include not only other licensees, but also other components of the media industry seeking funds available for advertising, such as magazines and radio. Other broadcasters competing for advertising revenue would be able to obtain a better picture for selling strategies adopted by one particular licensee. They also accepted that the dangers to a licensee would exist where licensees were in a market as buyers of rights to telecast local and overseas productions. The same considerations applied in respect of the part of the licensees' business which concerned the hire of production facilities.

Overall, they considered that what was fundamental was the likely ability of the competitor, once given the ABT 12 information, in conjunction with all other available information, to tip the scales of knowledge in relation to the opponent's costs in his share of the market. It seemed to the AAT almost axiomatic that the effects which were outlined would be unreasonable.

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RECENT CASES

Copyright Tribunal Sets Photocopying Rate

On 20 March, 1985 the President of the Copyright Tribunal, Mr Justice Sheppard gave his judgment in the case of Copyright Agency Limited v. The Department of Education of New South Wales & Ors.

This was the test case in relating to the assessment of the royalty payable to the owners of copyright in works under s53B of Copyright Act 1968 ("the Act"). The statutory licence in s35B provides for multiple copying of reasonable portions of works and articles in periodicals for the teaching purposes of educational institutions. As far as is material, the section provides as follows:-

> "(1) Subject to this section, the copyright in an article contained in a periodical publication is not infringed by the making of copies of the whole or a part of that article, by or on behalf of the body administering an educational institution for the teaching purposes of that or other educational institution.
>
> (2) Subject to this section, the copyright in a work (other than an article in a periodical publication) is not infringed by the making of copies of the whole or a part of that work, by or on behalf of the body administering an educational institution, for the teaching purposes of that or another educational institution.
>
> (3) Without limiting the generality of sub-section (1) or (2), a copy of the whole or a part of a work shall be taken to have been made for the teaching purposes of an educational institution if:-
>
> (a) it is made in connection with a particular course of instruction provided by that institution; or
>
> (b) it is made for the purpose of inclusion in the collection of a library of that institution.
>
> (4) Sub-section (1) does not apply in relation to copies of, or of parts of, 2 or more articles contained in

the same periodical publication unless the articles related to the same subject matter.

(5) Sub-section (2) does not apply in relation to copies of, or of more than a reasonable portion of, a work that has been separately published unless the person who makes the copies, or causes the copies to be made, for or on behalf of the body administering the educational institution, is satisfied, after reasonable investigation, that copies (not being second-hand copies) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(6) Sub-section (1) does not apply to copies of the whole or of part of an article contained in a periodical publication, being copies made, by or on behalf of the body administering an educational institution, for the teaching purposes of an educational institution, unless there is made, by or on behalf of that body, as soon as practicable after the making of those copies, a record of the copying setting out:-

(a) if the International Standard Serial Number in respect of the periodical publication is recorded in the periodical publication - that number;

(b) if the International Standard Serial Number in respect of the publication is not so recorded - the name of the periodical publication;

(c) the title or description of the article;

(d) the name of the author of the article (if that name is known);

(e) the volume, or volume and number, as the case requires, of the periodical publication containing the article;

(f) the page numbers of the pages in that volume, or in that number of that volume, that have been copied, or, in a case where a page so copied does not bear a page number, such description of the page as will enable it to be identified;

(g) the date on which those copies have been made;

(h) the number of copies made; and

(i) particulars of such matters as are prescribed.

...

(11) Where copies of the whole or a part of a work, not being copies stated in the record to be copies to which sub-section (9) or (10) applies, are made by or on behalf of the body administering an educational institution and, by virtue of this section, the making of those copies does not infringe copyright in the work, that body shall, if the owner of the copyright in the work makes a request, in writing, at any time during the prescribed period after the making of the copies, for payment for the making of the copies, pay to the owner such an amount by way of equitable remuneration for the making of those copies as is agreed upon between the owner and the body or, in default of agreement, as is determined by the Copyright Tribunal on the application of either the owner or the body.

(12) Where the Copyright Tribunal has determined the amount of equitable remuneration payable to the owner of copyright in a work by the body administering an educational institution in relation to copies of the whole or a part of that work that have been made by or on behalf of that body in reliance on this section, the owner may recover that amount from the body in a court of competent jurisdication as a debt due to him."

The applicant, Copyright Agency Limited, was a collecting society which was the agent for authors and publishers. The respondents were the Departments of Education for the States of New South Wales, Victoria, Queensland, South Australia, Western Australia, the Schools Authority of the Australian Capital Territory, The Association of Independent Schools, the Roman Catholic Archbishop of Sydney, Mac-

quarie University, the University of Sydney, The N.S.W. Institute of Technology, The South Australian College of Advanced Education and the New South Wales Department of Technical and Further Education. By agreement between the parties fifteen (15) applications were made pursuant to s53B and s149A of the Act, reflecting a range of copying instances. Section 149A is the section relating to the machinery for the holding of enquiries under s53B. At the request of the parties the Tribunal reached a single rate, although the President noted that s53B contemplated an equitable rate being fixed for each incidence of copying. The applicant argued that there was a most common fee charged by authors and publishers for permissions to copy, which was evidenced by an actuarial study produced in evidence. This was between 4 and 5 cents per copy page. It also argued that collection costs should be included in the rates.

The respondents argued that the appropriate rate was the royalty authors commonly received on the sale of their works in the form of books. They said that the applicant's most common fee approach ignored the large number of free permissions granted by authors and publishers. They pointed out that most copying was transient and was not retained by schools or pupils for long periods of time. They also said that fixing too high a rate would lessen the amount of copying and thus lower general standards of teaching.

Sheppard J set a rate of 2 cents per page for each page copied pursuant to s53B. He said that the rate should be set by analogy to the measure of damages for infringment of copyright. In doing so he referred to two earlier cases before the Copyright Tribunal, The Report of the Enquiry by the Copyright Tribunal into the Royalty Payment in respect of Records Generally (published 24 September, 1979) and WEA Records case it was said that the amount of damages from infringment of copyright otherwise the person taking a licence would pay more for acting lawfully than unlawfully. Sheppard J also referred to the judgment of the House of Lords in General Tyre and Rubber Co. v. Firestone Tyre and Rubber Co. Limited (1976) RPC 197.

In particular, he referred to the judgement of Lord Wilberforce who dealt with a case where there was no normal rate of profit or established licence royalties. In such cases he said that it was for the plaintiff to adduce evidence which would guide the Court. Such evidence might consist of practices in the relevant trade or an analagous trade, of expert opinion expressed in public or other factors on which the judge could decide the measure of loss. However, the ultimate process was one of judicial estimation. He said that the case fell within Lord Wilberforce's category of judicial estimation of the available indications. He noted that the factors which he had taken into account were, collection costs, the fact that copying would be discouraged if the rate were too high, the transient nature of the copies made, royalties authors received on the sales of their works and the value of commissions given since s53B was inserted into the Act.

He noted that he had specifically excluded the following factors; the facts of overseas comparison, the fact that some authors wrote for other than commercial reasons, comparison with conversion damages under s116 of the Act and the inability of authors to insist on attribution when their works were copied by educational institutions.

Robyn Durie

FREEDOM OF INFORMATION ...
(Cont'd from PAGE 20)

In reply to the argument put by Equity that the disclosure would lead to the common advantage of all licensees the AAT answered that the effect of acceptance would be to reduce all to the lowest common denominator. The essence of the character of the television industry was competition and in the AAT's view it was not the intended function of the FOI Act to change the character of a field of commerce by intrusion into it of the principles of disclosure which the Act laid down in relation to supply to the community of the information held by the government.

Robyn Durie

Directions as to Confidentiality in the ABT's Perth Enquiry

The Australian Broadcasting Tribunal ("the ABT") in its enquiry for the grant of a third commercial television licence in Perth has recently published extensive directions in relation to the production of documents and the confidentiality attached to such documents. The applicants had not agreed to the confidentiality provisions which applied in the Coffs Harbour case and left it to the Tribunal to make the appropriate orders that in respect of their financial records, the existing licensees were not in a comparable position to inventors or purchasers of trade secrets who had long been protected by the Courts from the destruction or diminution in value which would result from public disclosure of such trade secrets through public hearings. The main interests for which protection was sought were the television licences themselves. The almost inevitable fruit of those licences was considerable revenue. The licences were not private property, but a grant made virtually gratis on behalf of the Commonwealth. Until such time as a third licence was granted the two existing licensees were protected from competition by the Act. A major result of the decision made in the enquiry would be whether or not the two existing licensees will be exposed to competition.

One of the major issues in the enquiry is the argument by the two existing television licensees in Perth, STW and TVW, that the grant of a third licence would damage their own commercial viability. Under the Broadcasting the Television Act 1942 ("the Act") the Tribunal may refuse to grant a licence if it would affect the commercial viability of existing licensees (s83(6)(c)(ii)).

In considering its directions the Tribunal referred to s19(1) of the Act which provides that proceedings of the Tribunal should be held in public, although that section does go on to permit the Tribunal to take evidence in confidence. It pointed to its dilemma in cases like this where it was possible that if all claims for confidentiality were upheld and a licence were not granted, the basis of the decision not to grant a licence and the necessary time taken in hearing the matters, would be withheld from the public. Accordingly the Tribunal said that it would not be appropriate to shield documents from public view or from disclosure to other parties merely because the party producing the documents had some generalised concern about the concept of having their documents disclosed.

The ABT referred to two other factors. The first was that the existing licensees had voluntarily exercised their right to enter into the enquiry and to argue on financial and other grounds against the grant of a third licence. Accordingly, they could not then reasonably insist on protecting the basic evidence in their "commercial viability" case from other parties in the enquiry or from the public.

It was the Tribunal's view that financial operations operating under a licence were not entitled to such high protection from scrutiny as financial operations of a business created from private assets and opportunities in a market fully open to competition.

The Tribunal decided that the only available balancing of interests arising under the relevant sections of the Act (s21(2), s21AB(1)(i), s25(1), s25AB(d),-(e), s17, s25(3) in relation to the Tribunal's powers; s25(3), s80A — Natural justice and s25(2) - informality and expedition) would be to allow what might be called "limited disclosure" of some documents produced. The Tribunal attempted to confine this area to that which was truly necessary to protect information which really should remain secret and stated that it would attempt to conduct parts of the hearing which deal with the documents the subject of limited disclosure in public as far as it was possible to do so without actually disclosing the confidential material.

Attached to the directions were schedules setting out the classes of persons to whom material might be disclosed. There were two main classes of people who would have the benefit of limited disclosure and they were the legal representatives, to whom the widest field was practicable, and people advising those people, who were not themselves lawyers but who could advise the lawyers. Those people did not include employees of the existing licensees or of the TEN Network, which had intervened in the proceedings. All those to whom limited disclosure was granted were required to give an undertaking.

(Cont'd NEXT PAGE)

DEFAMATION (Cont'd from PAGE 14)

system acknowledged that public debate in the U.S. is much more scrupulous of personal reputation, and careful with the facts, than it is in more anxious jurisdictions like the U.K. and Australia.

Why, in the country of Patrick White and Thomas Keneally and David Williamson and Stephen Sewell do we put up with the State looking over our writers' shoulders?

Why does the recall and pulping of Ross Fitzgerald's "History of Queensland from 1915 to the Present" because of a complaint by the Chief Justice, Sir William Campbell, not provoke protests from academic believers in free scholarship?

Why do those great believers in individual creativity, the city architects, passively accept what Kevin Rice, president of the NSW chapter of the Royal Australian Institute of Architects, calls a debate on architectural standards 'stifled' by the laws of libel?

Why does one of the country's finest playrights, Alex Buzo, have to shell out to David Hill, head of the State Rail Authority, because Hill chose to identify himself as one of the less attractive characters in "Mackassar Reef"?

The assumptions running through our system of State regulated speech were well illustrated when the National Times published the story that Robert Askin when he was Premier of New South Wales had received $100,000 a year in payments from organised crime figures.

There was a storm of abuse of the National Times, the reporter, David Hickie, and the then editor, David Marr. It was 'despicable', said the then leader of the NSW Liberal Party, Bruce McDonald. It was in 'appalling bad taste' said the National Party's expert in family morality, Ian Sinclair. Neville Wran said it was 'tasteless in the extreme.' Askin's widow, Molly, wept on ABC radio as she asked why Marr and Hickie 'had to be such utter curs to wait until he died.'

The grieving widow did not have the consolation of the huge damages which no doubt would have been hers if the story had been published when Askin was alive. But she did have some consolation. When Askin died he left an estate of $1.8 million. When she died, Molly left $3.4 million. From a Premier's Salary.

The question which no politician asked while heaping abuse on the National Times was the one James Fairfax, chairman of the Fairfax Board, asked when he read the story: 'Why was this not published when Askin was Premier?'

I think the answer to this and the other fundamental questions about out libel system is another question: why do we not trust ourselves?

Robert Pullan

In its directions, the Tribunal also commented on the question of relevance. It decided not to require production of a number of documents which the parties had requested because they were not sufficiently relevant.

The ABT noted that the enquiry was not a judicial enquiry but an administrative one. It differed from a Court dealing with a dispute in that:-

(a) a Court had the benefit of issues being confined by pleadings, within a framework of established and well defined categories of forms of action, as well as a large volume of case law precedent;

(b) the legal rules of evidence have the effect of excluding from the proceedings of Courts a large amount of material which would otherwise arguably be relevant. Pursuant to s25(2) of the Act the Tribunal is not bound by the rules of evidence;

(c) the restraints of time and money which exert a natural break on prolixity in most proceedings of courts do not necessarily operate in proceedings before the ABT. In this regard the ABT noted that television markets of a size comparable to Perth were sometimes valued in the commercial world at over $50 million. With such economic interests involved, it was only natural that some delay might be preferred.

Accordingly, the issues which had some relevance to the enquiry were very broad. The ABT considered that it was required by the Act to make practical judgments about the likelihood, as a matter of practical reality, of its being helped to make a decision about the licence by evidence which as to profitability logical relevance was not sufficient. Accordingly, detailed internal financial information about advertising revenue would be required. For the same reasons a meticulous comparison with other metropolitan markets such as Brisbane and Adelaide was not relevant.

The enquiry is still proceeding.

Robyn Durie

The Connors Report: "The Right of the Australian Citizen as Taxpayer and Audience"

Seven years have passed since the passage of the Special Broadcasting Service (SBS) provisions of the Broadcasting and Television Act 1942. Now the Connors Report, released on 25 March 1985 and named after Xavier Connor, Chairman of the Committee of Review of the SBS, provides the most complete analysis to date of the SBS and the performance of its television and radio services. The Report fills a mammoth three volumes together with an 85-page Synopsis and Summary of Recommendations.

The Committee's eight terms of reference permitted a thorough review of the SBS's administration and its services. Broadly speaking, the terms of reference asked whether maintaining the SBS is justified given the existence of other services, particularly those of the ABC and public broadcasters. The Committee was also asked to review the principles and structures necessary to ensure firstly, greater community participation and consultation with the SBS and secondly, provision of English language learning.

The Committee makes a considerable number of recommendations which, if the Government adopts them, will have bearing on virtually every aspect and department of the SBS's operations in the future. The SBS is currently involved in assessment of the Report's impact on such various areas as community consultation and participation, program policy and scheduling, promotion and publicity of programs, staffing and industrial relations, technical issues and funding. This paper is more concerned with the way in which the Report is likely to affect broadcast planning.

The Committee's Report has a high level of sympathy with the concept of multiculturalism (see Chapter 3: "Multiculturalism and Broadcasting"). The Report notes the origins of the SBS in ethnic radio operated by ethnic communities on an entirely voluntary basis. Comparisons are made with services in Canada (for Eskimos and Canadian Indians), the United Kingdom (for West Indians and Asians), and the Netherlands and West Germany (for "guest workers"). Many countries have ethnic broadcasting, such as is practised on 2EA and 3EA which cater sequentially to different ethnic groups. But multicultural broadcasting, as on 0/28, is unique because it takes a mix of programs and schedules them for a broader, varied audience (para. 3.59). With respect to other multicultural and broadcasting terms the glossary in Part One of the Report is particularly useful.

A New Statutory Authority

Currently the SBS under Section 79D of the Broadcasting and Television Act 1942 is empowered to "provide multilingual broadcasting services" and to "provide broadcasting and television services for such special purposes as are prescribed". The Committee recommends the establishment of a new organisation to replace the SBS. This organisation should be set up as a statutory authority to be called the "Multicultural Broadcasting Corporation" (MBC). The legislation governing the new body should be similar to the Australian Broadcasting Corporation Act 1983. With respect to funding, the Committee rules out advertising or sponsorship on the MBC's radio and television stations. In addition to the name change, the Committee has made specific recommendations for the establishment of community consultation mechanisms. Additionally a number of recommendations deal with internal matters such as management and the recruitment, staffing and training of personnel.

The SBS-ABC Relationship

Appearing three years after the publication of the Dix Report and a year after the establishment of the Australian Broadcasting Corporation, the Connors Report takes up the issue of whether there is a case for an amalgamation of Australia's two major public sector broadcasters. The initial observation of the Committee is that efforts made by both the ABC and the SBS to meet the Dix recommendation of "maximum possible immediate collaboration" have been minimal. The managements of both bodies approach the question of amalgamation with limited interest.

It is all too evident to the Committee that a myriad of historical, emotional, attitudinal and structural factors keep the two bodies frozen in separate camps. The majority of submissions opposed any amalgamation of the ABC and the SBS. Of 670 submissions which

mentioned the issue, over 69 per cent opposed amalgamation, with around 18 per cent in favour and less than 13 per cent taking a neutral or undecided view (para. 5.32). Opposition to amalgamation was largely based on negative factors such as claims that the ABC itself had poor management and lacked sensitivity to multiculturalism. Those favouring amalgamation based their view on the economic argument and a fear that ethnic/ multicultural broadcasting would remain apart from the mainstream as long as the SBS continued to exist. But even with respect to the economic perspective on amalgamation it remains unclear from the Report whether significant savings would be made from the two budgets which in 1984-85 amounted to $340 million to the ABC and $39 million to the SBS.

In its conclusion, the Committee regards amalgamation as an ideal towards which both organisations should conscientiously work. To ensure that result, it goes two steps beyond the Dix Report by recommending that the ABC and the SBS should have a statutory obligation to report every six months to the Minister for Communications on the steps they have taken towards cooperation and coordination of resources and facilities. On this subject it also recommends cross-promotion of programs by ABC TV and multicultural television and a close coordination of their future program policies and schedules as well as a general standardisation of their operations. It also recommends that the Government should conduct a further inquiry in 1990 into both the ABC and the SBS/MBC to consider the question of their integration.

In sum, such recommendations will work to keep the amalgamation option open for the joint review in 1990. Naturally the performance of any new MBC and revamped ABC will also have bearing upon that decision.

The SBS and Public Broadcasters

The Committee recognised that with the limited ethnic radio service that currently exists there has grown a considerable demand for the expansion of ethnic radio services. The question before the Committee was whether to adopt the recommendations of the SBS or those of public broadcasters.

The Report observes that currently 16 public stations broadcasting ethnic programs are receiving government subsidies. Two of these, 5EBI in Adelaide and 4EB in Brisbane, are fully ethnic public stations. The subsidies amount to $655,000 and are distributed through the SBS. In contrast the cost of the SBS's 2EA and 3EA stations amounts to many millions. In its own words, the Committee "came down firmly in favour of public broadcasters as the major means of providing ethnic radio program services in parts of Australia not covered by the EA stations" (para. 2.23).

Having rejected the concept of a national ethnic radio network, the Committee goes on to recommend the establishment of a "National Program Packing Unit" to produce program material - particularly news, current affairs, features and information - for distribution to all public broadcasters, the ABC and commercial stations wanting to use them. It also recommends an increase in the funding for ethnic public broadcasting to $1 million for 1985-86, but advises that low coverage community stations in Sydney and Melbourne should not be funded. The Government should call for applications for ethnic public broadcasting station licences in Melbourne as soon as possible and in Sydney and Perth if demand is established.

Australian Content

Put bluntly, it appears that the Committee does not regard SBS television (in contrast to the SBS's radio stations) as having to date obtained sufficiently high ratings. The Committee goes to some length to qualify its views by stating that factors "not measurable with statistics" do justify the SBS's television services. Chief among these factors is the "respect" which those individuals and organisations making submissions said had been engendered for their heritage. Accordingly the Committee recommends that resources be made available to allow the SBS to increase the public's awareness of its services and to expand transmission time of multicultural television.

In this writer's view the Committee's observations regarding SBS television's ratings significantly strengthen the local production arguments of the Australian Film Commission with the ABC and the SBS (see AFC Annual Report 1984: pp. 12-14). The Committee observes that:

> The 0/28 news normally rates between 3 and 4. The best rating

(Cont'd NEXT PAGE)

ever achieved by 0/28 is 7: for episodes of "Women of the Sun", and for an Australian classic movie - both programs in English and of Australian origin." (para. 4.50).

In recent years high rating Australian television programs including "Women of the Sun", "Waterfront" and "The Cowra Breakout" have begun to feature subtitles, most commonly because they have been co-financed with overseas partners. With changes to Section 10BA of the Income Tax Assessment Act on the horizon and with the likely increase in co-productions and co-financing arrangements, multicultural television may in future be reviewed in very different market circumstances.

The Committee is more concerned with current perceived audience needs and recommends that multicultural television aim for a level of Australian content of 50 per cent by 1988. This will increase substantially its production and purchase of drama in English or primarily in English. The Committee becomes very specific when it also provides that approximately 50 per cent of programs in prime viewing time (6.00 p.m. to 10 p.m.) should be in English and of a multicultural nature. Furthermore, the Committee recommends that the SBS actively pursue all avenues for co-productions and joint ventures both within Australia and with broadcasters and producers overseas. But to implement these recommendations it's clear that the local production budget for 0/28 would definitely have to increase beyond the current $6 million allocation.

Towards 1990

The Connors Report is a well argued and extensively researched document. It would appear that the Committee was successful in its efforts to obtain public comment both during its hearings and from submissions made to it from a broad spectrum of sources.

Within three years multicultural television will have been extended to all capital cities, Wollongong and Newcastle and potentially to provincial centres through AUSSAT. Australia will then have a second, government funded, national television network. It will be interesting to observe the performance of the SBS in these new fields, and its relationship with the ABC and public broadcasters.

Noric Dilanchian

RECENT PUBLICATIONS

Communications Update - Newsletter of the Media and Communications Council, GPO Box 4264 Sydney 2001. 10 issues per year are to be published. The 4 page issue number 1 of March 1985 has been released.

Freedom of Information - Peter J. Byrne. This recently published book is an analysis of the Commonwealth Freedom of Information Act and the Victorian Freedom of Information Act. As well as providing an explanation of the provisions of the Acts, it includes a practical guide to using them. (The Law Book Company Limited)

After AUSSAT..? Edited by Keith Smith and Liz Fell. Papers of the AUSSAT conference held in 1984. (Australian Film and Television School).

Asian Pacific Review of Computers Technology and the Law. General Editor - John Connors. (Longman Professional Publishing).

Satelite and Cable Television: International Protection - Said Mosteshar and Stephen B. Bate An Oyez Longman Intelligence Report. (Longman Professional Publishing).

Annual Report 1983-84 - Australian Broadcasting Tribunal. 277p. (AGPS).

Manual - Australian Broadcasting Tribunal. 172p + Appendices (AGPS).

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