

# Communication LAW

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## Violence and the mass media

**Last October, Senator Michael Tate set up the National Committee on Violence to find ways of tackling the apparently increasing violence in Australian society. Here Janet Strickland assesses the likely effectiveness of the committee that must examine the controversial problem of violence and the media.**

**A**t last the Federal Government has decided to tackle the immensely difficult problems related to violence in Australian society.

Following the "Inquiry into Strategies to Deal with the Issue of Community violence" conducted by the Social Development Committee of the Victorian Parliament (established soon after the Queen Street and Hoddle Street massacres), the new Commonwealth and state-funded National Committee will examine and report on the following:

- the contemporary state of violent crime in Australia;
- related social, economic, psychological and environmental aspects;
- gender issues in violence;
- the impact of the mass media, including motion pictures and videotape recordings, in the incidence of violent behaviour;
- the association of violence with the use of alcohol and other drugs;
- factors instilling attitudes to violence among children and adolescents;
- the vulnerability to violence of particular groups;
- the development of specific strategies to prevent violence, including strategies to propagate anti-violence values throughout Australia, reduce violence involving young people, and promote community education programs;
- the need for support and assistance to victims of violence; and
- the need for special measures in the treatment of violent offenders.

In my view, this holistic approach is likely

to be much more productive and constructive than any inquiry that has hitherto been conducted, and could well result in the current inquiry by the ABT into the issue of violence on television, becoming an expensive and irrelevant side-show - as was the inquiry of the Joint Select Committee on Video Material.

**T**he danger with side-shows is that they tend to distract attention from the main event - the nub of the problem - and may lead the public to falsely believe that "something is being done", whereas all that "is being done" is to nibble

away at the edges - create new guidelines here; impose a little more censorship there; invite submissions; analyse existing research; write endless reports on reports and generally appear to be addressing the problem!

Both the Inquiry by the Joint Select Committee on Video Material and the more recently established ABT Inquiry into Violence on Television were a response, in part, to the perceived public concern about depictions of violence on film and television.

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## CAMLA Annual general meeting

The fourth annual general meeting of the Media Law Association of Australasia will be held in Sydney on February 9 when the company will be re-named the Communications and Media Law Association.

Early last year the Media Law Association and CAMLA were formally merged bringing together a wide range of professional people in law and public policy areas, the arts, communications and the media.

The AGM will resolve to have the merger approved and will elect office bearers and other members of the new committee. The AGM will be held in the Albert Room of the Intercontinental Hotel in Bridge Street, Sydney at 6.30pm.

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## Violence and the mass media

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After a 3-year Inquiry, the members of the Select Committee were unable to agree on the likely effect upon people of exposure to violent material on film. Neither were they able to agree on whether "hard-core" pornography has a deleterious effect on adults. The majority of 6 members stated that adverse effects were demonstrable; the minority of 5 said they were not - in either the violent nor the pornographic genres.

In spite of this lack of agreement on the correct interpretation on the work of the social scientist, they all agreed that "something had to be done" - so they unanimously recommended that stricter guidelines should be applied by the Film Censorship Board and the Films board of Review in the classification of films and videotapes, in order to reduce the amount of violence in each of the classification categories, (G, PG, M and R).

The majority also recommended a complete ban on "X"-rated (that is, "hard-core pornography") films and tapes - a view opposed by the minority. Both of these more restrictive recommendations were eagerly embraced by all the Commonwealth and State Censorship Ministers, in spite of the fact that "X"-rated videotapes have been legally available to adults in the ACT since 1983.

Arguably, the banning will merely create a black market, involving, in many cases, those already involved in drug and prostitution rackets - leading inevitably to more crime and more violence!

The more optimistic, but quite unrealistic view, in my opinion, is that as a result of these tougher censorship laws, Australian society will become a better and safer place in which to live!

On the other hand, the Committee was able to make a couple of constructive recommendations relating to the need to educate the public about the meaning of the existing film classifications and to the provision of more specific consumer guidance about the contents of each film and videotape - thus allowing people the opportunity to make more informed choices as to what they may or may not wish to see.

It is to be hoped that the ABT will be able to resist the temptation to box at shadows, or to believe that by attacking the shadow, the substance is altered in any way.

The harsh reality is that we live in a violent society - and this is the real problem, the core of the concern, the cause of the anxiety. (Inquiries like that of the Joint Select Committee into Video Material and that about to be conducted by the ABT) can be dangerously obfuscatory - and the more so if they lead to stricter censorship.

The elimination of those visual images which shock or outrage us may lead to a lowering of our levels of anxiety, but will there be less violence in our society? Is it harmful to be shocked or outraged? Will Thatcher's Britain become a safer place now that the Sinn Fein has been denied "the oxygen of publicity"? Are heavily-censored societies less violent than those with liberal traditions?

If we are really concerned about violent depictions in the mass media, we'll side-step the side-shows and focus on the central issue - that of violence in our society. Hopefully, the National Committee on Violence will prove to be a major event.

*Janet Strickland*

*Former Commonwealth Chief Film Censor, former member of the ABT and now a consultant to the film and television industries.*

## Gleeson speaks at CAMLA dinner

Dinner and an address by his Honour, Justice Murray Gleeson will follow the annual general meeting of the Communications and Media Law Association on February 9.

Mr Justice Gleeson was appointed the NSW Chief Justice early last year following the retirement of Justice Laurence Street.

CAMLA invites members and their guests to the dinner at the Albert Room of the Inter-continental Hotel in Bridge Street, Sydney at 7pm and afterwards to hear the address by Justice Gleeson. Those interested should ring: (02) 660 8858.

## New courses

The following new university courses are being offered to students during 1989.

### Electronic communications law

The university of NSW is offering Electronic Communications Law as part of the Law School's LLM degree. Overall, the course will be an advanced treatment of laws governing electronic communications, including telecommunications and broadcasting.

Topics include: Licensing of telecommunications and broadcasting facilities and services. Radiocommunications, cable, pay-TV and

quasi-broadcast regulation. Statutory monopolies and oligopolies. Restrictions on group ownership and control in broadcasting. Legal authorities such as the ABC, Austel, Telecom, and the SBS. Consultative and adjudicatory mechanisms for making decisions, including: litigation, public inquiries, self-regulation and statutory obligations to consult.

Because of the international character of communications development, the course will include considerable overseas material, especially from North America and the EEC countries. It will examine the functions and regulations of the International Telecommunications Union.

The communications Law Centre is associated with the Law School. Throughout its national charter and large list of projects, the centre will provide the opportunity for clinical work by students as part of the course.

## Media law

The University of Melbourne Law School is offering Media Law as a subject for 1989. Media Law consists of two lectures per week throughout the year. It examines the legal rules which comments on matter of interest to the public. It deals with the legal rules which regulate the ownership of the media. So the course examines the regulation of the print and electronic media in Australia.

Topics to be considered include court reporting, investigative journalism, obscene and other illegal publications, programme standards and the ownership and control of the media.

Anyone interested in this subject should contact Sally Walker Senior Lecturer (03) 344 4000.

## Communications technology and policy

Macquarie University invites applications from graduates in any field for admission to the new MA program in Communications Technology and Policy, commencing in 1989.

This part-time coursework program, over two years, considers the nature of current communications technology and policy, and extends knowledge and skills in dealing with issues in this field. Students will examine the information economy, ways of interpreting technology, communications technology, cultural studies, communications policy and regulation, consumers and audiences, and aspects of managing communication.

For further information contact Dr Elizabeth More, Course Convener (02) 805 8725, or Mrs Jennifer Newton, Secretary (02) 805 8786.

# Defamation and Parliamentarians

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**It is well known that no action for defamation can be founded**

**on a statement made by a member of parliament in a speech made in the House.**

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**But should parliamentarians also be protected from defamation proceedings for material they publish outside the House?**

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In this article Sally Walker explores the extent of the protection given to members of parliament as well as media organisations who publish reports of defamatory statements made by parliamentarians.

**T**he absolute privilege accorded to Members of Parliament against liability for defamation is based on Article 9 of the Bill of Rights (1688).

Article 9 declares that:

"the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".<sup>1</sup>

The privilege of freedom of speech, as confirmed by Article 9, is enjoyed by Members of all Australian Houses of Parliament.<sup>2</sup>

It follows from Article 9 that no civil or criminal proceedings may be instituted against a Member of Parliament for anything said or done by the Member in parliamentary proceedings. For two reasons, it is important to emphasise that the immunity from liability for defamation is an application of the general rule embodied in Article 9.

First, if a Member's words cannot be said to be part of "proceedings in parliament" they are not privileged. Thus, May says that:

"it does not follow that everything that is said or done within the Chamber during the transaction of business forms part of the proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in the course of transaction, or is in a more general sense before the House".<sup>3</sup>

A remark made by a Member during a debate in a House, but in the course of a casual conversation, is not protected by absolute privilege: although the statement is made in the House, it is not part of the "proceedings in Parliament".

The second reason why it is important to emphasise that the Members' absolute privilege from liability for defamation is based on Article 9 is that the immunity is expressed to extend to "proceedings in parliament" rather than simply to parliamentary debates.

This indicates that Members of Parliament may be protected from liability when they publish defamatory material outside their Houses of Parliament, provided the publica-

*"Members of Parliament may be protected from liability when they publish defamatory material outside their Houses of Parliament."*

tion of the material is part of "proceedings in parliament".

Before discussing the meaning of "proceedings in Parliament" it is instructive to examine the significance of this issue to the media and to explain the object of the privilege.

## Importance to the media

**A**t common law, a fair and accurate report of parliamentary proceedings in the jurisdiction in which the report is published is protected by qualified privilege.<sup>4</sup> As privilege is qualified, rather than absolute, the defence will fail if the publisher was actuated by malice. In 1987 the Commonwealth Parliament enacted legislation protecting fair and accurate reports of proceedings at a meeting of a Federal House of Parliament.<sup>5</sup> The legislation preserves the common law.

Thus, a media organisation may rely on the common law to obtain qualified privilege for the publication of a fair and accurate report of proceedings which were not part of a meeting of a House, but which were, nonetheless, "proceedings in parliament".

Thus, the extent to which the publication of material outside Houses of Parliament is part of "proceedings in parliament" is of significance to the media.

The position regarding the publication of reports of State and Territory parliamentary proceedings is more complicated. In each State and Territory the common law qualified privilege accorded to fair and accurate reports of parliamentary proceedings is embodied in legislation although, with exception of

the Victorian provision, the sections are expressed to apply to reports of "proceedings of a House" rather than "parliamentary proceedings".<sup>6</sup> It follows that, except in Victoria, to obtain qualified privilege for the publication of a fair and accurate report of proceedings which did not take place in the House, a media organisation would have to rely on the common law. This would be possible in all jurisdictions except Queensland, Tasmanian and Western Australian where the statutory provisions are part of a code. In these jurisdictions a media organisation could, however, rely on the qualified privilege accorded to the publication of material "for the purpose of giving information" to protect it from liability for publishing a fair report of parliamentary proceedings which were not part a parliamentary debate.<sup>7</sup>

**T**he object of the absolute privilege from liability for defamation is to enable Members to carry out their functions; it enables Members of Parliament to speak freely in the House, making assertions and allegations which they could not otherwise make without the risk of liability for defamation.

The Australian Law Reform Commission concluded that, because debate should not be impeded by the consequences of plain speaking, this absolute privilege should not be abolished or curtailed.<sup>8</sup>

Owing to the importance of the committee system in modern parliaments, it has been recognised by the courts and the legislature that witnesses who give evidence before parliamentary committees are to be accorded absolute privilege from liability for defamation in respect of statements made by them in the course of the committee's proceedings.<sup>9</sup>

One area where it is uncertain whether the law has taken into account the modern nature of Parliamentary work concerns the unresolved question of the protection accorded to communications between Members.<sup>10</sup> Such a communication may be accorded qualified privilege,<sup>11</sup> but there is some doubt whether it would be protected by absolute privilege as part of "proceedings in

*Continued on p15*

# Names or no names?

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**A Judge's statement that  
"no names are to be published in relation to the matter"  
was ruled no order by the Appeals Court.**

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**T**he NSW Court of Appeal has ruled that the statement of a District Court Judge made in the course of a sexual assault trial - "No names are to be published in relation to the matter" - did not amount to an order of the court.

Kirby P, Hope JA and Rogers AJA came to that unanimous conclusion on 18 August 1988 in *John Fairfax and Sons Limited v District Court of NSW & Ors.*

That matter arose out of the trial before Herron J in the District Court of Clive Milton Wilson; a prominent Lord Howe Island churchman, who pleaded guilty to two charges of indecently assaulting a 15-year-old girl on the island in 1987.

John Fairfax and Sons Limited sought relief in the Court of Appeal from what it believed was an order by Herron J that no names were to be published in relation to the District Court hearing of the charges against Wilson.

The Court of Appeal was told that at the committal hearings of the charges in 1987 the presiding magistrate had not made any order suppressing Wilson's name. His name and address had been published in *The Sydney Morning Herald* in its report of the committal proceedings, as had his connection with the church, details of the offences and the character evidence given on Wilson's behalf by the former NSW Premier, Mr Wran, and a former Supreme Court judge, Mr C.L.D. Meares.

In the District Court the following exchange occurred, according to the shorthand notes of the Herald court reporter, Mr Daniel Moore. (The Court, at the invitation of the parties, acted on Mr Moore's notes which were more elaborate than the official transcript.)

Crown Prosecutor: Seeking a non-publication order

His Honour: No names are to be published in relation to the matter.

Crown Prosecutor: Was only seeking that name of victim not be published.

His Honour: The names of the people involved are not to be published. Because once you have a name published the other can usually be identified.

Counsel for John Fairfax & Sons Limited argued that what Herron J had said amounted to an order and that such an order showed an error of law and of jurisdiction on the face of the record. Opposing the claim, counsel for the Attorney-General argued that Herron J's

statement was not an order but merely a passing observation on the terms of Section 578A(2) of the Crimes Act 1900. (There was no explicit reference in either the official transcript or the reporter's notes of his Honour's statement to Section 578A or to Section 578.)

Section 578A(2), added to the Crimes Act in 1987, says in part:

"A person shall not publish any matter which identifies the complainant in prescribed sexual offence proceedings identification of the complainant."

In the leading judgment Kirby P closely examined the words used by Herron J. He conceded that "No names are to be published in relation to the matter" did amount to "emphatic and even imperative language". However, he thought the explanation "Because once you have a name published the other can usually be identified" allowed the possibility that what Herron J was doing was attempting to describe his perception of the effect of Section 578A(2). If the latter interpretation was the correct one, Kirby P said, then it appeared Herron J had gone beyond the terms authorised by the sub-section.

"It would be to overstate the effect of Section 578A, and to distort the sensitive balance of our law against the background of which that subsection is written, to accept an operation of Section 578A as of right, in the terms in which Herron DCJ expressed it. To that extent, I am inclined to consider that Herron DCJ may have mis-stated the operation of the subsection. By his statement "No names are to be published" and "the names of people involved are not to be published", his Honour appears to have contemplated a wider embargo on publication of the names of persons involved in the case than ever Section 578A contemplated."

Kirby P said it was not entirely clear whether Herron J's words should be characterised as an order or as a partly erroneous description of the operation of Section 578A. He said it should not be readily imputed that a judge had gone beyond jurisdiction. Where there was ambiguity, it might be more readily inferred that the judge had not gone beyond jurisdiction. He noted that his Honour had not used the word "order". He said the reference to names and the nature of the case suggested that Herron J had Section 578A in mind. In the end he preferred to conclude that what Herron J had said was not an order.

Accordingly, Kirby P declined to make the first of the declaration sought by John Fairfax & Sons Limited, that the District Court had been in error in making the order. He also declined to make the second declaration sought, that John Fairfax & Sons Limited was at liberty to publish Wilson's name in connection with the proceedings before Herron J, because the Court did not normally give advisory opinions, especially where the criminal law or the law of contempt were concerned. He thought it undesirable that the Court should "invade unnecessarily" the functions of the criminal courts.

Nevertheless, Kirby P decided to make a declaration in the form that was ultimately sought by John Fairfax & Sons. He made this decision because of the "justifiable confusion" in the effect of what Herron J had said, because that confusion had initiated the proceedings in the Court of Appeal and because he considered what his Honour had said had gone beyond the terms of operation of Section 578A. He therefore proposed that the Court:

"Declare that what his Honour Judge Herron said on 8 August 1988 of and concerning these proceedings was not, and did not purport to be, an order under Section 578 or Section 578A of the Crimes Act 1900 or otherwise."

Hope JA, agreeing with Kirby P, concluded:

"Especially where, as in the present case, nobody is present to make submissions on the public interest in knowing what goes on in court, judges should be very careful and hesitate long before making comments of this kind."

Rogers AJA agreed with the orders proposed. He said all his Honour had been concerned to do was to protect the victim of the criminal offence, not, as had been suggested, to hide the offender behind a screen of secrecy. He thought it was very difficult for the Court to say whether his Honour should have expressed the view he did, because his Honour had been in possession of considerably more information than had members of the Court of Appeal.

John Fairfax and Sons Limited was ordered to pay its own costs as well as the costs of Wilson's submitting appearance.

*Richard Coleman specialises in defamation law with Mallesons Stephen Jaques.*

# Australian music on radio

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**Late last year a challenge was mounted  
against the ABT's new program**

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**standard for Australian music on Radio.**

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**Here Charles Alexander of Minter Ellison reviews  
that challenge.**

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**T**his decision of the Federal Court of Australia (Mr Justice Davies) was handed down on 16 September 1988 and concerned Ballarat Broadcasters Pty Ltd & Ors v Australian Broadcasting Tribunal & Ors.

This judgement arose out of an application for judicial review of a decision of the Australian Broadcasting Tribunal ("Tribunal") under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJRA").

The Decision of the Tribunal outlined the new Program Standard the Australian Music on Radio to commence on 1 July 1988 and went on to state:

"Although incentives will not be offered for the broadcasting of new recordings, new independent material and station-originated music which the Tribunal wishes to encourage, it proposes at Licence renewal to request stations to supply evidence that they have used a significant amount of this material. If stations cannot demonstrate use of this material conditions may then be placed on a licence in order to encourage the use of (such material) depending on the relevance of this material to the station's format".

*"not a decision  
capable of review  
but simply an  
informal advice"*

The applicant radio stations claimed that they were uncertain of the effect of this paragraph - whether there was an obligation to broadcast new independent material, new recordings and station originated music; whether failure to broadcast such material would prejudice the renewal of their licences or whether renewal would be subject to some

special condition. The meaning of the words "significant amount" also required clarification. The applicants submitted that the decision was so uncertain as to be an improper exercise of power and relied on Sections 5(1) (e) and 6 (2) (h) and 6(1) (e) and (2) (h) of the ADJRA.

Counsel for the Australian Record Industry Association and the Phonographic Performance Company of Australia (which had intervened) filed an objection to competency on the ground that the paragraph was not a "decision" capable of review but simply an informal advice with respect of obligations already imposed on the licensees under Sections 83(5) and 114(1) of the Broadcasting Act 1942 ("the Act") under which licensees were obliged to provide an adequate and comprehensive service and use the services of Australians in the production and presentation of radio programmes.

Davies J in rejecting this argument, considered that the paragraph was not expressed as mere advice but rather in terms of the imposition of an obligation.

His Honour considered a number of alternative possibilities in determining whether the decision could be supported.

He found the subject paragraph did not amount to a standard as the matter dealt with in the paragraph was deliberately excluded from the standard; neither did it express a condition to which all licences were subject and it was not expressed as an order having force of law in that it did not order any person to do or refrain from doing any act, breach of which would be an offence under Section 132 of the Act.

Finally he rejected the Tribunal's contention that it constituted a direction made pursuant to Section 17. His Honour held that in order to constitute a direction it must direct all or specified licensees to do or refrain from doing an act, and to make it clear that the recipient of the direction must comply with it or

be guilty of an offence as provided in Section 132 of the Act.

*"Such an exercise  
of power is  
an improper  
exercise of power"*

In considering the question of uncertainty Davies J held that the uncertainty lay "not in the meaning of the words used in the paragraph but the impossibility of determining what precise power it was that the Tribunal considered itself to be exercising and what effect it intended the paragraph to have."

Because the Tribunal did not specify, and as it was impossible to determine what power it exercised, the result of the exercise of the power was uncertain. Such an exercise of power is an improper exercise of power.

Davies J therefore made an order declaring that the paragraph did not constitute a valid standard, condition, order or direction. He also made it clear that he considered the paragraph in question to have no effect as it added nothing to the consideration of whether a licensee had complied with its obligations under the Act. His Honour added by way of obiter dictum, that, should a licensee not be in breach of its undertakings or the obligation, it may be an arbitrary and invalid exercise of power to impose upon the particular licensee a special condition or obligation with respect to new recordings, new independent material and station-originated music in the absence of a standard with respect to such material.

This remains a question for final determination on another day, as does the question of whether the Tribunal has the power to make such a standard.

# Television – the next decade

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**The following extracts have been edited from a recent one-day seminar in Sydney which looked at the options for new television technology, media, regulations and markets in the next decade. The seminar was organised by Strategic Technology Management Pty Ltd and attracted more than 100 senior professionals from the broadcast industry, academia, advertising, film industry and government bodies.**

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## When is pay on the way?

**I**t is apparent that an array of complex questions would confront government consideration of the possible introduction of pay television, and I have no doubt that others will emerge from industry and the community.

I am sure that you will be interested in the timetable for the process.

My department has nearly completed an options paper, which is intended for public release early in the new year. I would like to stress that it is an options paper rather than a definitive prescription of the future for pay TV.

After public release of the report, I expect that a period of several months will be set aside for public and industry comment and discussion on the matters raised.

During this period it is likely that the House of Representatives Standing Committee on Transport and Communications and infrastructure will also conduct an inquiry into pay television.

After this period of public comment, I intend to take a submission to cabinet to establish a clear government policy on pay television.

As I said earlier, there is a moratorium on pay television until at least September 1990. If it is decided to proceed with pay television, the timetable I have just outlined will enable an announcement well in advance of that date.

The future for pay television in Australia will depend very much upon the public response to this review process. It is apparent from experience in other countries that pay television has the potential to make a major

contribution to the future of television. Nevertheless, the possible introduction also raises matters of concern to which the government needs to give careful attention.

*Ralph Willis  
Minister for Transport and Communications*

## New opportunities for cable television in Australia

**A**lthough never introduced into Australia, cable television systems have achieved substantial penetration world-wide especially in North America and parts of Europe. In 1988, more than 50% of US homes have cable services, and more than 80% of homes have the opportunity to access these services if required. These services however, because of their historical nature, use mature coaxial cable technology and are limited in the number of channels available, the quality of the video services and the degree of interactivity available to users.

Australia, because of its decision not to introduce cable television prior, has the opportunity to introduce a cable television service without the technical and regulatory restrictions existing elsewhere in the world. The use of an optical fibre infrastructure provided by the common carrier will allow users access to an unlimited range of increasing quality video services. In turn, the close relationship with the telecommunications switched network will introduce new interactive service opportunities.

The operational model traditionally utilised in North America and in parts of

Europe, requires both cable television services and the infrastructure to be provided to an area on a franchise basis, ie, a single body controls both the services available to the user, and the infrastructure used to deliver the services.

The objective driving the introduction of pay television services in Australia is to increase the diversity of choice available to Australian consumers. To this extent, pay television services provide opportunities for narrowcasting services aimed at specific consumer requirements and preferences. Three elements are required to ensure that a large range of diverse services are made available in Australia:

- a pay television industry model which ensures that no restrictive practices can be used to control the variety of choice available to the consumer.
- an economically viable infrastructure which will not technically restrict the number of programs available to the user.
- a competitive market capability for the supply of pay television services to provide both the number and range of different services.

Considerable technical advances have been made in recent years which allow these three elements to be incorporated in Australia. In particular, optical fibre technology developments allow an infrastructure to be established in the 1990s which will both integrate telecommunications services and cable television services onto a single infrastructure. The multi service nature of this infrastructure makes available for the first time the economical viability of separating cable television programs from the cable television carriage. This service content and service carriage separation model



for the pay television industry ensures that no restriction can be made by the infrastructure provider on the programs available to the user, satisfying the first requirement outlined above. Furthermore, the nature of an optical fibre switched network will provide an unlimited availability of channels to the consumer, allowing the second requirement above to be satisfied.

The third necessary element in this model can be achieved by ensuring that the common carrier provides non-discriminatory access to any pay television program supplier who wishes to reach the consumer base. Free competition in program supply and non-discriminatory access by the common carrier will ensure that no restrictions are placed on what the consumer may view, subject to the censorship laws provided by the Government.

The use of this service content - service carriage separation model in Australia will therefore position Australia with a more open and competitive industry than that available even in the United States.

Telecom believes that the adoption of this model positions Australia to achieve the efficiencies of an integrated cable television telecommunications network whilst opening up and stimulating the supply of program material to optimise the choice of programs available to users.

*John Burton  
Director Strategic Planning  
Telecom Australia*

## Pay-TV via satellite

**A**ussat believes that, given a decision by the government to proceed with Pay-TV, the only practical commercial solution in the first instance will be via satellite. The terrestrial alternatives are essentially UHF transmission or fibre optic cables into the home.

UHF does not appear to offer a viable proposition, since only one frequency is available in the majority of capital cities.

Fibre-optics may prove to be the ultimate means of delivery of Pay-TV and other services, but the penetration rate into domestic premises for such a solution can be expected to be relatively slow. From the point of view of the Pay-TV licensees, high levels of penetration early in the life of the service are essential for all important cash flow.

These considerations lead Aussat to the view that satellite delivery must be the solution, at least for the early years.

Regarding timetable, Aussat's first B-series satellite is due for launch in the third quarter of 1991. This timetable provides a deliberate margin of 15-18 months compared to the forecast end-of-life date of the A1 satellite (December 1992), to protect the sched-

ule against launch delays or launch failures. However, if the market need were present, in the form of a Pay-TV requirement for example, the satellite would be placed in service early.

While this paper does not address high definition television (HDTV), several points are noteworthy. A standard for HDTV has yet to emerge, with several alternative systems currently being developed around the world. HDTV could form part of the marketing mix of a Pay-TV system introduced in the early to mid 1990s. Aussat is continuously monitoring developments in HDTV standards and believes that the B-series design will enable carriage of whatever standard or standards finally emerges.

In summary, DBS is an emerging world technology for the provision of Pay-TV. DBS services already exist in Australia, and use of this technology for Pay-TV will consolidate existing government policy for HACBSS and RCTS, both by promoting purchase of more earth stations in remote locations and by extending program choice with the addition of Pay-TV to these transponder services. A stimulus to earth station or component manufacture is also provided, with potentially positive results for investment, employment and export income.

Aussat is now committed on the B series satellites to provide a DBS capability that will enable up to fourteen channels to be operational from late 1991. Ninety per cent of the Australian population could receive pay services from these satellites by direct reception. The remaining ten per cent of the population has not been overlooked; pay services can be provided to other areas by use of local re-transmission facilities and/or by use of RCTS and HACBSS transponders.

There are significant advantages in introducing Pay-TV by means of DBS. Satellite technology permits the introduction of pay services on a low cost, rapid installation and limited risk basis but will not preclude an evolution to cable or optic fibre distribution at a later stage.

Aussat strongly supports the introduction of Pay-TV in Australia in the early 1990s and believes that potential service providers should be given the opportunity to make use of satellites in the delivery of Pay-TV programs.

*Richard Johnson  
General Manager, Aussat Pty Ltd*

## Closer Economic Relations

The far-reaching decisions by the Governments of New Zealand and Australia on telecommunications and Broadcasting have

coincided with an impetus under CER for an inter-governmental agreement on trade in services generally. Both areas at the moment, however, are among the few service sectors specifically exempted by both governments from the full services protocol. However, this obscures an emerging process of consultation between the authorities of both countries and the potential for developing trade in these sectors.

Broadcasting has been characterised by considerable regulation with entry and investment restrictions. Albeit to a lesser extent, these remain, and as a consequence broadcasting is not yet in the full CER services agreement.

In the meantime officials of both governments have already had to examine the consequences of television broadcasting via satellite which was brought into focus by the recent decision of the Australian Government to allow Aussat to provide international and in particular trans-Tasman services as from 1 April 1989, subject to agreement from the global satellite organisation Intelsat, and countries in the region, notably ourselves.

**T**he issues are not simple, but they are much more readily understood if we make clear distinctions between three types of services:

The first type of service is broadcasts which are linked internationally via satellite, but which are then re-transmitted terrestrially within the recipient country. It is important to recognise that in this case, the re-transmission clearly falls within the laws and jurisdiction of the recipient country, and is therefore subject to its requirements concerning foreign ownership (of the company making the re-transmission), standards and content. Thus there are no special regulatory or access issues in this case.

Secondly, there are broadcasts originating overseas which are received fortuitously: that is, broadcasts which are not intended primarily for an overseas country, but can be picked up on a satellite dish in an overseas country. Both the Australian and New Zealand Governments have recognised that there is very little that can be done to prevent or regulate such fortuitous reception of overseas broadcasts without resorting to measures which would be unacceptable in an open society. Thus broadcasts uplinked in New Zealand primarily for New Zealand audiences, which spill-over into Australia, will not be regulated by the Australian authorities, and vice-versa. It must be noted, however, that the signal strength of such fortuitously received broadcasts tend to be weak, so that large and expensive dishes are required. This puts reception out of reach of ordinary households, and greatly limits market penetration. It is also important to note that such broadcasts are subject to the regulatory requirements of the originating country, for whose

citizens the broadcasts are primarily intended. This means that many concerns about lowering of standards are misplaced. Standards regulation on both sides of the Tasman is likely to remain tough.

Thirdly, there are direct broadcast services or D.B.S. These are broadcasts which are transmitted via satellites with sufficient power to be received on small and inexpensive dishes easily affordable by most households. This type of satellite broadcast originating overseas raises contentious issues on content and standards. However such DBS, although increasingly common in Europe in particular, are still a few years away in New Zealand, at least because there are no satellites with genuine DBS capability operating in our part of the world. The first ones are likely to be the first generation of Aussat satellites, due for launching in 1991 and 1992. It is important to note, however, that DBS broadcasts into New Zealand are unlikely to be fortuitous that is a spill-over into New Zealand from broadcasts intended primarily for another country. This is because of our geographical isolation (unlike neighbouring countries in Europe) which means spot beams have to be focussed specifically on New Zealand to reach DBS field strength.

When it comes to DBS services, recipient countries, including New Zealand, do have legitimate concerns about standards. As part of decisions last August the Minister of Broadcasting was asked to seek inter-governmental agreements on programme standards in relation to the use of satellites for broadcasting equivalent to those to be prescribed in legislation in New Zealand. An assurance has been received from Australia that Aussat facilities will only be contracted for services which meet the regulatory requirements of all recipient countries. This will enable New Zealand to maintain whatever standards we consider appropriate for non-fortuitous broadcasts coming into New Zealand via Aussat; and of course for Australia to do likewise.

Although it has no practical effect presently, Australia has also agreed that New Zealand companies will be able to broadcast into Australia via satellite any service meeting Australia's regulatory requirements. In practice this is essentially limited to what you call VAEIS services, (Video and Audio Entertainment and Information Services). Of course your VAEIS regulations are still being considered along with the possibility of allowing pay TV for domestic subscribers New Zealand will, of course in the context of CER, be seeking to ensure that New Zealand broadcasters are able to provide pay television services into Australia if Australia decides to introduce such services.

Finally, Australia has given an undertaking that it will not use Aussat as an instrument of regulatory policy. That is Aussat will not be directed by the Australian Government (its

owner) to prevent or limit any service provided from New Zealand to Australia.

Some useful progress is being made in the area of trans-Tasman relations for broadcasting services. The CER services protocol is up for review in 1990, and there is a General Review of CER scheduled for 1992. In the meantime a start has been made in evolving a framework within which television broadcasting services can be developed with market opportunities for firms on both sides of the Tasman.

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### **Naming sources**

**Mr Justice Hunt on January 6, 1989 set aside orders that Sydney Morning Herald Journalist, Peter Hastings name his sources for an article which was published in The Herald on 13 January, 1985. The next issue of The Bulletin will examine the issues raised by the Hastings case.**

## **FM Licence Grants**

# **What makes a winner?**

**Paula Pazies is a media/entertainment lawyer with**

**Blake Dawson Waldron. She represented the**

**winning applicant in the recent Gold Coast licence grant**

**and the runner up in the Newcastle licence grant.**

**I**n 1986 the Government announced its intention to bring commercial FM services to more than three million people outside metropolitan state markets by 1992. This plan has involved and will continue to involve the Australian Broadcasting Tribunal, in licence grant inquiries around the country-side. To date decisions have been made for Newcastle, the Gold Coast, Geelong, Gosford and Shepparton. Of the five decisions, three are currently on appeal to the Federal Court of Australia. Although the Newcastle decision was appealed successfully, the ABT found in favour of the original winner.

Currently there are a number of licence grant inquiries in train and applications for a number of markets are yet to be called. On the surface, prospective licence applicants have the benefit of five decisions of the ABT to refer to when planning and structuring their applications, to obtain some insight into the ABT's thinking on what makes an FM winner. But is that really the case?

An analysis of the five decisions to date demonstrates that there is no clear formula to be adopted which might guide prospective applicants to a win position. In fact, in all markets the make up of the winner and the grounds for decision have differed. For ex-

ample, in the Geelong licence grant, the overriding determining factor for the ABT was the nature and extent of local involvement in terms of shareholding spread of the applicant company, number of local directors on the Board, the extent of local input into the application, and the encouragement for use and development of local talent and resources.

Applicants with 45% non-local shareholding were immediately disqualified from the race. One month later the ABT found in Gosford for an applicant with 50% non-local shareholding and with a Chairman and Deputy-Chairman living outside the service area having the major responsibility for implementation of the service.

The ABT has a very wide discretion within the scope of the Broadcasting Act 1942 (the "Act") to grant licences, and decisions are made with reference to the scope and intention of the Act, the public interest and the market.

Section 83(6) of the Act lists the considerations the ABT may take into account, to the exclusion of other considerations, when deciding whether or not an applicant qualifies for the grant of a licence. To satisfy the test the ABT must have regard to whether the applicant is fit and proper to hold the licence, has demonstrated



financial, technical and management capability, will provide an adequate and comprehensive service and encourage Australian creative resources in connection with that service, has the capability of complying with the conditions on the licence, and, whether there will be an undue concentration of influence in relation to the new licensee and incumbent licensee(s).

These matters are not defined in the Act and accordingly the ABT considers these with reference to its own policies, practice and interpretation of the individual concepts.

If all applicants pass the 83(6) test then pursuant to section 83(9) of the Act the ABT must make the selection of the most suitable applicant of all the applicants who qualify for the grant of the licence. It is at this stage of the game that the ABT becomes possessed with very wide discretionary powers and may choose between applicants on any aspect of the application.

**I**n *Our Town FM Pty Limited v The Australian Broadcasting Tribunal and Newcastle FM Pty Limited* 1 (1988) 77 ALR 577, (the Newcastle appeal) Mr Justice Wilcox confirmed the discretionary powers of the ABT. He stated that "the Tribunal would be entitled, if it so chose, to take into account all the matters raised by Sec 83(6), selecting as the most suitable applicant that company which impressed most over the whole range of these matters. Alternatively, it could select a particular aspect of the relevant service, for example, the news coverage, local content or target audience which it thought to be particularly important in connection with that licence and judge to be the 'most suitable' that applicant which best dealt with that aspect".

The ABT's decision in Newcastle turned on the criteria of management capability. In that case it stated that with the exception of the management capability criteria, all applicants were generally equal. The ABT referred to management capability in terms of ensuring plans and policies for the proposed new service are implemented. In determining management capability the ABT considered the applicants capability in terms of the stability of both the Board and the company and the professional and personal qualities of individual directors and shareholders. In the case of the winner in Newcastle it was the combination of these factors that impressed the ABT. The runner-up had a stable shareholding and Board with relevant radio, business and administrative experience but in the ABT's view it was not relevant enough. The decision came down to a comparison of the personal qualities of the directors and in particular the Chairman and proposed Managing Director.

On the Gold Coast the ABT found that on a comparative analysis the winner was superior on all counts. In that case the ABT said

that the winning applicant stood out because of high quality in all areas traversed by the Inquiry and because the directors had actually drawn the research, planning, shareholders, community proposals, programming proposals, staffing etc into one integrated strategy. So in this case the ABT compared applicants over the range of matters presented to it. However, as in the Newcastle case, it would appear the qualities of the directors were focused upon. The ABT was impressed by the fact that it was able to know that the plans proposed and promises made would be realised.

*"fundamentally a non-local applicant will not be in as strong a position to interpret, appreciate and respond to the needs and interests of the people living in the service area as an applicant with considerable local connections at Board or senior management level"*

**I**n Gosford, like Newcastle, the Tribunal found that the winner had superior management capability reflected in the stability and cohesiveness of the Board and the company. It is interesting, however that the company structure of the winning Gosford application was quite different to that of the winning Newcastle application. In Newcastle the company was a private company which was approximately 70% locally owned and with only one of its six directors being a non-resident of the service area. In Gosford, the Company was a public company, 50% owned by an interest not resident in the service area, with Board representation in the form of Chairman and Deputy Chairman living outside the service area. The company also proposed a public float of 40% of the shares to local residents after the grant of licence.

Of particular relevance are the comments made by the ABT in the Newcastle grant in respect of the same group who went on to win the Gosford licence at a later date. In its Newcastle decision the ABT saw a negative aspect of the application being the 40% shareholding earmarked for the public as it was an unknown shareholding and judgement could

not be made about future shareholders.

In Gosford it was not perceived as a problem. As to non-local involvement, the ABT stated in the Newcastle decision that "fundamentally a non-local applicant will not be in as strong a position to interpret, appreciate and respond to the needs and interests of the people living in the service area as an applicant with considerable local connections at Board or senior management level". This attitude was confirmed in the Geelong decision and then abandoned in Gosford.

**I**n Geelong the ABT selected the successful applicant having regard to the nature and extent of the local involvement in its application and also because that applicant's proposal to use and encourage the use of Australian creative resources were considered superior to those of other applicants. The ABT determined that companies that had more than 45% of the shares placed in non-local hands were immediately considered less suitable applicants. Of those contestants left the ABT then tested the applicants on the basis of effective local input including the ability of the local directors to grasp the elements of the application and to implement proposals for the service.

Another interesting aspect of the Geelong decision was the fact that the ABT appeared to be influenced by the fact that the Geelong service area received fortuitous signals from Melbourne FM stations. The ABT stated that as a consequence of this the new FM station would have to compete with those signals and to do so effectively would need a strong professional local base. This situation is not dissimilar to the Gold Coast service area where Brisbane signals are received. However, in that case the ABT placed no particular emphasis on this matter.

In Shepparton, the ABT considered an important factor in selecting the most suitable applicant to be the programming proposals developed in response to the research conducted in the area. It would appear realistic proposals for the development of creative resources was also considered important. In this case actual knowledge and articulation of the understanding of the Australian music industry and the promotion of talent was considered critical. Innovation and adventurous programming was the key. One applicant was criticised for showing a dependence on the metropolitan FM market model and yet this model or similar models were adopted by the Gold Coast and Newcastle licence winners.

Also, the ABT took into account whether or not the winning applicant had any major shareholders with existing media interests. The ABT felt that it would be better not to have any such alliance.

*Continued on p14*

# UK Broadcasting in the '90s

**Always seeking to improve competition, choice and quality in broadcasting, the British Government last month released a White Paper setting out its legislative agenda for broadcasting in the 1990s. This is an edited version.**

## The key proposals

- Most viewers will have a major increase in choice with the authorisation of a new fifth channel, to be operated as a national channel, with different companies providing the services at different times of the day. A sixth channel will also be authorised should technical studies show this to be feasible.
- The present ITV system will be replaced by a regionally based Channel 3 with positive programming obligations but also greater freedom to match its programming to market conditions.
- Provision will be made for at least one body which is effectively equipped to provide high quality news programmes on Channel 3.
- Options are canvassed for the future constitution of Channel 4 on the basis that its distinctive remit is preserved and its advertising is sold separately from that on Channel 3. The Welsh Fourth Channel Authority will continue to provide the Fourth Channel in Wales.

There will be a new flexible regime for the development of multi-channel local services through both cable and microwave transmission (MVDS). This will provide a further major extension of viewer choice.
- The UK's two remaining Direct Broadcasting by Satellite (DBS) frequencies will be advertised by the Independent Broadcasting Authority (IBA) early next year. This will provide scope for two further UK DBS channels in addition to the three being provided by British Satellite Broadcasting (BSB).
- Viewers will continue to be able to receive other satellite services directly, including those from the proposed medium-powered Astra and Eutelsat II satellites. Steps will be taken to ensure that the programme content of all such services is supervised.
- All television services (including those of the British Broadcasting Corporation (BBC)) will be given freedom to raise finance through subscription and sponsorship (subject to proper safeguards). All services (except the BBC) will also be free to carry advertising.
- A new agency, the Independent Television Commission (ITC), will be established in place of the Independent Broadcasting Authority (IBA) and the Cable Authority to license and supervise all parts of a liberalised commercial television sector. It will operate with a lighter touch than the IBA but will have tough sanction. Its functions are set out in the Annex to this White Paper.
- The BBC will continue as the cornerstone of public service broadcasting. The Government looks forward to the eventual replacement of the licence fee which will, however, continue for some time to come.
- The night hours from one of the BBC's channels will be assigned to the ITC. The BBC will be allowed to retain the other set on the basis that it uses it as fully as possible for developing subscription services.
- The part played by independent producers in programme making in the UK will continue to grow.
- The Government will proceed with its proposals for the deregulation and expansion of independent radio, under the light touch regulation of a new Radio Authority.
- All UK television and radio services will be subject to consumer protection obligations on such matters as taste, decency and balance.
- The Broadcasting Standards Council (BSC), established to reinforce standards on taste and decency and the portrayal of sex and violence, will be placed on a statutory footing.
- The exemption of broadcasting from the obscenity legislation will be removed.
- There will be a major reform of the transmission arrangements, giving scope for greater private sector involvement. The principles underlying the Government's approach are these.
- Broadcasting services must remain independent of Government editorially and, to the greatest extent possible, in economic and regulatory terms.
- Because of broadcasting's power, immediacy and influence, there should be continued provisions, through both the law and regulatory oversight, governing programme standards, including the portrayal of violence and sex.
- There are significant differences between radio and television as broadcasting media which need to be reflected in their respective regulatory arrangements.
- There should be no unnecessary constraints on increasing the range, variety and quality of programmes from which viewers and listeners can choose.
- There should be increasing opportunities for direct payment for television programme services through subscription, whether on a pay per channel or pay per programme basis.
- There should be vigilance against uncompetitive practices and market distortions. Partly for this reason, and to limit barriers to the entry of new operators in the market, there should be a greater separation between the various functions which make up broadcasting and have in the past been carried out by one organisation. These include programme production, channel packaging and retailing, and transmission or delivery.
- The emergence of a production sector which is independent in that it neither controls nor has guaranteed access to a delivery system fits this objective and should be further encouraged.
- Broadcasting companies and organisations of all kinds should be briskly and efficiently run. They should give value for money to the viewer and listener and compete effectively with each other and abroad. The present duopoly can no longer be insulated from the disciplines necessary to bring this about.
- Through greater competition, downward pressure should be exerted on the costs to UK industry of television airtime.
- Wherever possible the Government's approach to broadcasting should be consistent with its overall deregulation policy. This is that the Government should help enterprises to set up, develop and meet the needs of consumers by removing unnecessary regulatory barriers. This implies both less regulation (removing restrictions which are outmoded or unnecessary) and better regulation (lighter, more flexible, more efficiently administered).

## The role of the BBC

The BBC has a special role. It will continue to be expected to provide high quality programming across the full range of public tastes and interests, including both programmes of popular appeal and programmes of minority interest, and to offer education, information and cultural material as well as entertainment. It also makes a major contribution to the operation of the Open University. The Government agrees with the Home Affairs Committee that the BBC "is still, and will remain for the foreseeable future, the cornerstone of British broadcasting". This does not mean that the BBC has to involve itself in every aspect of broadcasting, or that it should be insulated from change.

The Peacock Committee believed that both the BBC and the ITV system had suffered from cost and efficiency problems arising from what it called "the comfortable duopoly". The Government's proposals for the independent television sector will mean that the BBC will face much greater competition. Over the past months the BBC itself has striven for increased efficiency and has also sought to be more open and responsive and accountable to viewers about the way in which it works. The Corporation has started on a process of tightening its management structure and shifting resources into programme improvements through savings elsewhere. There is scope for further progress.

Consistent with its Charter the BBC is also taking a more enterprising approach to commercial opportunities in order to finance programme developments. BBC Enterprises Ltd - the world's largest exporter of television programmes and also responsible for co-productions, magazines and consumer products - is being developed as a competitive commercial company.

## Subscription, licence fee and night hours

The BBC has a role in the Government's desire to enable subscription to develop. Subscription for BBC programmes cannot be considered in isolation from the future of the licence fee and the use made of the night hours.

The Government's consultants advised against the wholesale immediate switch of existing services to subscription, mainly because this would result in a loss of consumer welfare since some viewers would not subscribe to services now available to them. But they went on to note that subscription already plays an important role on new services provided by cable and satellite, and also recommended the gradual, incremental in-

roduction of subscription on existing terrestrial services. They suggested that the down-loading of services in encrypted form during unused night hours would be a natural starting point.

As new television services proliferate, the system of financing the BBC television and radio services by a compulsory licence fee alone will become harder to sustain. Though the Government accepts the advice of its consultants that a sudden, wholesale switch to subscription would be undesirable and damaging, there should be a greater role for subscription. The Government looks forward to the eventual replacement of the licence fee. The timing will depend on experience gained of the impetus and effects of BBC and other new subscription services. The Government intends to encourage the progressive introduction of subscription on the BBC's television services. Account will need to be taken in due course of the implications for financing BBC radio services.

The Government accordingly proposes to authorise the BBC to encrypt its services so that it can raise money through subscription. The extent and pace of the move towards subscription will be for the BBC to judge in the first instance. But the BBC will have in mind the objective of replacing the licence fee. To provide a financial incentive, the Government intends after

April 1991 to agree licence fee increases of less than the RPI increase in a way which takes account of the BBC's capacity to generate income from subscription. If subscription goes well it may be possible to freeze or even reduce the licence fee. The Government has informed the BBC of these decisions and will be discussing the details further before firm targets are set.

The Home Affairs Committee supported the responsible introduction of sponsorship of BBC programmes in the field of the arts and sport. The Government shares the BBC's view that any relaxation of current sponsorship restrictions should not be at the expense of editorial independence or transparency for the viewer.

## Independent television

The Government thinks it right that all independent sector television services should be brought within the ambit of a single agency which can look across the board, rather than being limited, as the IBA and Cable Authority now necessarily are, to particular delivery technologies. The Government therefore proposes that there should be an Independent Television Commission (ITC). The ITC would apply lighter, more objective programme requirements. The way in which the Commission enforced them could be tested

in the courts. The ITC would therefore adopt a less heavy handed and discretionary approach than the IBA necessarily does at present. The main functions which the Government envisages for the ITC are summarised in the Annex.

It would not be sensible for the ITC to take on the Cable Authority's duty to promote cable. The Government envisages that this will be displaced by a general duty to ensure fair competition across the independent television sector.

The Government proposes that the ITC should be licensing body rather than a broadcasting authority. This means that it will supervise, but not itself provide, programme services, applying broadly the same light touch regulation across the board.

There will need to be carefully worked out transitional arrangements for the hand-over from the IBA and the Cable Authority to the ITC, and the Government will pursue this in consultation with interested parties. The ITC will need to assume at least some of its functions as soon as enabling legislation has been enacted. The Government is considering whether it should be set up on a shadow basis after the Second Reading of the proposed Broadcasting Bill.

## Multi-channel regime

As the UK moves towards a more competitive multi-channel broadcasting market, the existing regime for ITV would become increasingly hard to sustain. It would be even less sustainable to try to make all new services conform to the present requirements of the ITV system. Many of these were laid down by Parliament because of the absence of competing alternative services. As viewers exercise greater choice there is no longer the same need for quality of service to be prescribed by legislation or regulatory fiat. The point is crucial and can be simply put. When there was only one television channel it was natural and right for the BBC to take great care about the balance between different types of programmes on that channel. When there are 10 or more channels within the reach of the average viewer he and she can increasingly sort this out for themselves provided that the choice before them is sufficiently varied. The development of payment by subscription, drawing on a new source of funding, will help to ensure that it is. That freedom of choice from a varied output of programmes is the Government's aim. The Government believes that the time is now right to make major changes to the regime for what might henceforth be called Channel 3. If Parliament agrees, these changes will take effect from 1 January 1993 when the present ITV contracts, as extended, come to an end.

There should be no relaxation of the requirements not to show material which is inherently unacceptable. The following "consumer protection" requirements will therefore apply to Channel 3, and to all independent sector television services including the BBC:

- news should be impartial and accurate;
- nothing should be included in the programmes which offends against taste and decency or anchors crime or disorder or is offensive to public feeling;
- programmes should omit all expressions of the views and opinions of the persons providing the service on religious matters or on matters which are of political or industrial controversy or relate to current public policy;
- due impartiality should be preserved in dealing with such matters; and
- the content of advertisements should be subject to the same requirements, where they are relevant.

In addition to these consumer protection requirements the Government proposes that Channel 3 should be subject to the following positive programme requirements.

- to show regional programming, including programmes produced in the region. The Government envisages that this should become, for the first time, an express statutory requirement;
- to show high quality news and current affairs dealing with national and international matters, and to include news coverage (and possibly also current affairs) in main viewing periods;
- to provide a diverse programme service calculated to appeal to a variety of tastes and interests;
- to ensure that a minimum of 25 per cent of original programming comes from independent producers; and
- to ensure that a proper proportion of programme material is of EC origin.

As a necessary safe-guard, the ITC would have power to withdraw, after adequate notice, its approval of a news organisation established under the arrangements discussed in the previous paragraph which failed to deliver an acceptable service.

## Night hours licence

In order to create more opportunities for entry to the broadcasting market and competition within it the Government proposes that there should be a separate night hours licence, or licences, for Channel 3. It will be for the ITC to determine the exact boundaries, and to decide on possible additional licences covering other times of day - eg for a breakfast time service. The ITC will also be responsible for the geographical division of Chan-

nel 3 into regions, whose particular interests licensees will need to cater for. The Government envisages that the extent to which the regional and any schools programming obligations apply to any night time or breakfast time licensees would be determined by the ITC taking account of the basis on which the Channel 3 licences were being divided up.

The ITC will not have or need the IBA's present powers to block takeovers, which reflect the discretionary nature of the present contract allocation process. But those buying into companies will have to satisfy the proposed programming tests and the ownership rules. Subject to these tests and rules, takeovers can be a useful way of bringing new ideas and talent into television and reinforcing pressures for efficiency.

## Licence terms

The Government proposes that the licence for UHF independent television services should be for a fixed term of 10 years (as recommended in paragraph 658 of the Peacock Report), but that it should be open to licensees, during the final years (perhaps the last four) of their licences, to apply for licence renewal for further 10 year terms. The licensee would have to satisfy the ITC that he was continuing to meet his programming obligations and otherwise sustaining a satisfactory performance, and the ITC would retain the ability to make structural changes in the system. The licensee would also have to pay a licence renewal fee to the ITC, which would be calculated on a formula based on the licensee's advertising, subscription and sponsorship revenue. Where the ITC was not satisfied that the licence should be renewed it would be open to it to proceed to competitive tender or else to invite the licensee to re-apply for renewal after a further existing licence.

## Channel 5

The Government proposes that Channel 5 should come on stream from the beginning of 1993, when the new Channel 3 licences will start. It will enlarge the choice of a majority of viewers in the UK, and should bring significant relief to the advertising market, though Channel 5 operators will be free to determine their own mix between advertising and subscription. Channel 5 will not be able to achieve universal coverage, but it will be expected to achieve sufficient coverage of those areas where it can be received to justify the allocation of scarce frequencies. Although it sees no need to impose the additional burdens inherent in a regional structure on Channel 5, the Government envisages that the Channel could be split up by time into two or more different licences covering different parts of the day and night. The Government sees a

good case for such segmentation, which will promote competition and enhance diversity. It will be for the ITC to decide how large these segments should be. Channel 5 licensees will, like those on Channel 3, be required to include accurate, impartial and high quality news and current affairs at suitable times in their schedules.

## Channel 4

The Government does not accept that in future only the BBC need concern itself with the range and quality of programmes traditionally associated with public service broadcasting. The Government accordingly proposes that Channel 4 should be required to cater for tastes and interests not served, or underrepresented, by other parts of the independent television sector; to encourage innovation and experiment in the form and content of programmes; to devote a suitable proportion of its airtime to educational programming; to devote a suitable proportion of its airtime to high quality news and current affairs programmes including during main viewing periods; and to maintain a distinctive character of its own. Channel 4 would also be expected to maintain universal coverage, to show a proper proportion of programme material of EC origin, and to observe the consumer protection requirements. The Government also envisages that Channel 4 would still be expected to operate on a publishing house model, commissioning much of its programming from the independent production sector.

The Government believes that Channel 4's special role is best fulfilled by an independent organisation subject to ITC oversight, but without direct financial or structural links to the Channel 3 or other channels; while this is probably best made the responsibility of Channel 4 it might in practice choose to contract this out.

## Direct broadcasting by satellite

British Satellite Broadcasting (BSB) plans to provide three channels nationwide. One Channel will introduce subscription, but the service as a whole will provide important relief to the television advertising market. BSB has gone ahead (without funding from the Government) to an extent not paralleled in other countries.

The Government gave BSB an undertaking last year that the UK's fourth and fifth DBS channels would not be allocated until BSB's service had been in operation for at least 3 years. BSB has, however, recently indicated that it would be willing to see this moratorium lifted. The Government has

therefore decided to make these channels available for allocation as soon as possible.

## Financing independent sector

The Government proposes to allow all independent sector TV operators the freedom to finance themselves by advertising or subscription or a mixture of the two.

The Government envisages that the ITC will have a duty to draw up and enforce a code or codes on advertising and sponsorship. This should allow more flexible regulation of advertising and sponsorship than is now possible under the Broadcasting Act 1981. The Government in particular favours liberalising the restrictions deriving from the 1981 Act on sponsorship, provided adequate safeguards are built in for editorial independence and transparency for the viewer. The Government proposes that any maximum limits on advertising minutage should be subject to Government approval, and that the Government itself should take power to adjust this limit, after consultation with the ITC, in case this should prove necessary in order to allow relief to be brought to the advertising market, or for other reasons.

## Ownership

With the greater choice and variety that lies ahead, the Government is determined that ownership in the independent sector should be, and remain, widely spread. The existing controls to takeovers will be removed. The underlying thrust will be that the ITC's regulation should bite on performance rather than through an extensive and rigid set of disqualifications, although some disqualifications will be necessary. But clear rules will also be needed which impose limits on concentration of ownership and on excessive cross-media ownership, in order to keep the market open for newcomers and to prevent any tendency towards editorial uniformity or domination by a few groups. The Government proposes to make the greatest possible use of subordinate legislation for such rules in order to ensure maximum flexibility in catering quickly for changing circumstances. The Government would welcome comments on the scope and formulation of such rules.

In the case of licences to provide Channel 3, 4 (if provided by a separate licensee) 5 or any further UHF services the following further restrictions will apply:

- no group may control or have an interest in more than two such licences
- no group may control or have an interest in more than one such licence if they cover the same area
- no group holding a licence with cross regional coverage may hold or have an

interest in any other licence covered in this paragraph.

## Programme standards

The Government sees no case for continuing the exemption of broadcasting from the Obscene Publications Act 1959, and proposes that it should be removed at the earliest opportunity. This does not imply any relaxation of the stricter consumer protection standards which broadcasters have long been required to observe throughout the hours of broadcasting. But there is no justification for not applying the obscenity law to broadcast programmes, particularly since it already applies to cable programmes.

As a further measure, the Government has sought to strengthen standards and reinforce the work of the individual regulatory bodies by establishing a Broadcasting Standards Council (BSC), initially on a non-statutory basis.

During the pre-statutory phase the Council's role is to:

- draw up, in consultation with broadcasting authorities and the other responsible bodies in the broadcasting, cable and video fields, a code on the portrayal of sex and violence and standards of taste and decency;
- monitor and report on the portrayal of violence and sex, and standards of taste and decency, in television and radio programmes received in the UK and in video works;
- receive, consider and make findings on complaints and comments from individuals and organisation on matters within its competence and ensure that such findings are effectively publicised;
- undertake research on matters such as the nature and effects on attitudes and behaviour of the portrayal of violence and sex in television and radio programmes and in video works;
- prepare an annual report, which the Home Secretary will lay before Parliament and publish.

## Radio proposals

In outline the Government's proposals are as follows. There will be scope for at least three new national commercial services operating alongside the BBC. A new VHF frequency will be available for one of these services. The BBC's existing Radio 1 and Radio 3 MF frequencies will be reassigned for the other two. The BBC will retain sufficient frequencies to broadcast its national services, whose editorial content it is seeking to strengthen. The new national services and

independent local services will be subject to a lighter regulatory regime. They will not be required to comprise education, information and entertainment, although they may follow a public service pattern if they wish. Programme operators will be responsible for their own services, subject to requirements of taste and decency and of avoiding editorialising and giving undue prominence to views on religious matters or matters of political or industrial controversy. At the local level licensing criteria will include financial viability, local audience demands and the extent to which the proposed services would enhance the range of programming and the diversity of listener choice. National services will be expected to provide a diverse programme service calculated to appeal to a variety of tastes and interests and not limited to a single narrow format. The proposed competitive tender procedure for national services will be subject to this test. National and local services will have to keep their promises of performance in order to retain their licences. In the interests of preserving a competitive radio broadcasting market, no group will be able to control more than one national service and more than six local services. There will be a 20 per cent limit on radio interests in newspapers, and vice versa. The Government will seek flexibility by setting these limits in subordinate legislation. There will be transitional arrangements striking a balance between the legitimate interest of existing stations and the importance of not delaying bringing new stations onto the air.

## Slim Radio Authority

A new slim Radio Authority will be responsible for assigning frequencies and issuing licences to, and supervising the performance of, all independent stations. Advertising and sponsorship will be more flexibly supervised: stations will not generally be able to receive public authority funding, but there will be certain clearly defined exceptions. Stations will be responsible for their own transmission arrangements, and will be expected to broadcast on single frequencies unless there are good reasons to the contrary. The number and scale of local services will depend on local demand and wishes. The Government's proposals will create an environment in which community radio, based on a combination of local identity and cultural diversity, will be able to fulfil its potential.

There is scope for a considerable expansion of radio services and a much wider range of listener choice. The Government proposes to help these developments by deregulation and the provision of a new enabling frame-



work. At the same time, the consumer protection requirements which safeguard minimum standards will be retained. Public service radio broadcasting will continue under the aegis of the BBC. BBC radio services will continue to be funded from the licence fee for some years to come. But BBC radio services will be subject to a much stronger stimulus of competition. The Government's proposals will create the conditions for an expansion of radio which should benefit broadcasters, advertisers and listeners alike. In the meantime the Government, as a step towards the new radio arrangements, has endorsed proposals by the IBA for a limited number of additional stations operating under present legislation.

## The UHF network

The UHF transmission networks run by the BBC and the IBA give a highly effective service to the public. They reach 99.4 per cent of the households in the UK, providing them with a reliable, high quality signal. This is a considerable engineering achievement, and it is highly regarded internationally. As broadcasting enters a more competitive phase, the Government intends to see that high technical standards are maintained, while moving the UHF transmission system progressively into the private sector, and separating transmission (ie service delivery) from service provision.

The Government considers that the best arrangement in due course would be a regionally based, privatised transmission system designed to promote competition, while containing certain common carrier obligations. The route towards this objective is complicated at present by the way in which the IBA's system is entwined with that of the BBC, and by the fact that the BBC's transmission responsibilities are rooted in its Charter which lasts until the end of 1996. The Government proposes to discuss with the BBC, the IBA and others how the objective of moving towards a privatised transmission system might best be taken forward. It will also be considering how, given its inherent monopolistic characteristics arising in part from topography, any necessary regulatory oversight should be arranged.

Until such a system is in place the BBC will continue to have responsibility for transmitting its television and radio services. The Government hopes that the BBC will, during this transitional period, test the market for the operation of its own transmission system by commercial contractors on a regional basis. This would be consistent with the steps which the BBC has already taken to test the market for a range of support services, as part of its general policy of devoting as great proportion as possible of its resources to programmes. This would be a useful step in

itself, and would also prepare the way for privatisation in due course. The advent of new services - such as the new national commercial radio services - will open up new commercial transmission opportunities. The Government also envisages that the BBC might, in the transitional period while it retains a transmission role, be able to arrange for its contractors to offer a transmission service to new entrants.

Under the existing arrangements the IBA owns and operates the uplink for its DBS contractors. The Government believes that DBS licensees should in future be responsible for the uplink themselves along with the rest of their transmission system (ie the satellite). The IBA is presently constructing the uplink for British Satellite Broadcasting and will operate it while the law remains as it is. The Government will discuss the transitional arrangements with the parties concerned.

## Independent productions

Traditionally, broadcasters in the UK have themselves made the television programmes they have not acquired from abroad. Channel 4 broke this mould. The results have exceeded all expectations. Independent producers constitute an important source of originality and talent which must be exploited, and have brought new pressures for efficiency and flexibility in production procedures.

The Government has already set the BBC and the ITV companies the target of commissioning 25 per cent of original material from independent producers as quickly as possible. Both the BBC and the ITV companies are committed to achieving this target by the end of 1992, subject to satisfaction on cost and quality. Good progress has already been made. A framework for the business arrangements for commissioning programmes has been agreed.

The Government has welcomed these developments, and the willingness of the BBC, IBA and ITV companies to embrace change. Under the arrangements proposed in Chapter VI, the Government envisages that independent producers will continue to play a greater part in programme making in the UK. So far as the position after 1992 is concerned, the Government's proposals for the independent television sector in any event envisage that no licensee should be required by the ITC to maintain any in-house production capacity as a condition of obtaining a licence.

Anyone interested in acquiring an unabridged copy of UK Broadcasting in the '90s should contact the BBC, 80 William St, Sydney. Tel: (02) 358 6411.

## FM Licence Grants

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Again, this position can be contrasted to the situation in Newcastle, Gosford and Geelong where all winners had a major media interest as a shareholder and the ABT found it to be an advantage to have input and support of this type.

Another interesting aspect of the Sheparton decision is that the ABT assessed the personal qualities of the directors and their ability to implement the proposals proposed after determining the most suitable applicant on the basis of the best programming. This is quite a different approach to all other decisions.

In conclusion it is obvious that the Tribunal makes its decisions on a case by case basis. If prospective licence applicants are looking for precedents on which to base their applications then they can take little comfort from past decisions of The Australian Broadcasting Tribunal.

## The ABC Bill

Several items in the Broadcasting Legislation Amendment Bill, which whizzed through Parliament in December should have had much more public discussion.

Foremost of concern is the new Limited Licence which is not, as many people think, connected with aborigines in remote areas but concerned with the broadcasting of events like an Olympic Games or a Bicentennial.

The ABC will have no control over the awarding of licences and permits as this will be done by the ABT with fees paid to the government. Vet Clauses 7, 34 and 43 of the Bill provide that the Corporation may make broadcasting facilities and staff available to a limited licence holder for them to transmit programmes to the general public pursuant

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## Contributions

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## Defamation and parliamentarians

from p3

parliament". It has been suggested that, for policy reasons, such a communication should be seen as part of parliamentary proceedings:

"When his House is not sitting, the only way a Member can make criticisms or seek information on controversial subjects is by communication with relevant Ministers, departments or Government instrumentalities. ...it would be against the public interest if Members, because of fear of possible defamation proceedings, were to be dissuaded when their Houses were not sitting from raising urgent and important matters."<sup>12</sup>

Traditionally, it has been assumed that a Member is not protected by absolute privilege if he or she re-publishes a speech made in the House outside the House.<sup>13</sup>

Recent decisions suggest that the courts may take a wider view of what is encompassed by "proceedings in parliament" so as to accord absolute privilege to the republication of a speech in certain circumstances.

### *The Privy Council opened the way for a broader interpretation in 1963*

**T**he Privy Council opened the way for a broader interpretation in 1963 when it said that: "it generally recognised that it is impossible to regard (a Member's) ... only proper functions as a Member as being confined to what he does on the floor of the House itself."<sup>14</sup> Subsequently, in *Roman Corp*, Canadian courts were called upon to decide whether a telegram sent by Prime Minister Trudeau and a press release by a Minister were absolutely privileged. The plaintiffs proposed selling their interests in a uranium mine to a company controlled by non-Canadian interests.

Prime Minister Trudeau and the relevant Minister made statements in the House indicating that they intended to prohibit the transaction. The telegram, which was sent to the plaintiffs, informed them of this decision; the press release set out the decision announced in the House. As a result, the transaction was not completed and the plaintiffs sued for damages; their action was based on a number of grounds, including wrongful procurement of breach of contract.

### *It was decided that, as such, they were protected by the same absolute privilege as those communications made in the House itself*

**T**he Ontario High Court and the Ontario Court of Appeal held that the telegram and the press release were mere "extensions" of statements made by Trudeau and the Minister in the House; it was decided that, as such, they were protected by the same absolute privilege as those communications made in the House itself.<sup>15</sup> The Court of Appeal suggested that, because of the "complexities of modern government and ... the development and employment in government business of the greatly extended means of communication", courts were justified in broadening the meaning and application of the phrase "proceedings in parliament".<sup>16</sup> The Supreme Court of Canada dealt with an appeal from this decision "without dissenting from the views expressed in the Courts below as to the privilege attached to statements made in Parliament".<sup>17</sup>

Following *Roman Corp* the Ontario High Court has held that it is part of the "proceedings in parliament" to release to the media information used in Parliament.<sup>18</sup> Nonetheless, in the most recent relevant case, the Ontario High Court held that the fact that a Member's answer to journalists' questions was in substance the same as a statement which the Member has already read to the House was not in itself sufficient to bring it within the *Roman Corp* principle. The Court distinguished *Roman Corp*:

"A bona fide statement of Government policy concerning proposed legislation as in *Roman* is quite a different matter from the facts ... (here) where the defendant, in response to questions by reporters, made allegations of a serious nature against an individual."<sup>19</sup>

In 1986 in *Chatterton* the Full Court of the South Australian Supreme Court had occasion to consider the meaning of "proceedings in parliament". *Chatterton*, a Labour Party Member of the South Australian Legislative Council sued the ABC and a Liberal Party Member, Chapman, for defamation.

Chapman had asked questions in the House regarding an application made by *Chatterton's* family farming business for drought relief; the application was made while *Chatterton* was Minister of Agriculture. The ABC program which was the subject of the

proceedings, consisted of segments of question time in the House, segments by the two Members and comments by ABC journalists.

So far as the action was based on what was said in the House, it was held that Chapman was protected by absolute privilege and the ABC by qualified privilege. Zelling ACJ said that it was "arguable" that a Member who repeated outside the House what he or she said in the House was protected by absolute privilege.<sup>20</sup> Prior J acknowledged that the privilege attaching to proceedings in parliament does extend to some things happening outside the House, but he rejected the view that Chapman's repetition outside the House of what he said in the House attracted absolute privilege in this case.<sup>21</sup> The other member of the Court, Jacobs J, did not deal with this question.

It is regrettable that the judgments of members of the South Australian Supreme Court do not attempt to extract a principle from the Canadian cases regarding the meaning of "proceedings in parliament" and decide whether that principle should be adopted in Australia.

### *It is suggested that a principle can be extracted from the Canadian cases*

**I**t is suggested that a principle can be extracted from the Canadian cases: absolute privilege protects a Member of Parliament from liability for defamation for publishing a statement outside the House which releases information used in the House, but only where the Member's action outside the House in an "extension" of the proceedings in the House; to amount to an "extension" of proceedings in the House, the action outside the House must be necessary for the proper discharge of the Member's duties. This broadening of the protection accorded to Members of Parliament does not take it outside the rationale for granting the privilege.

### *It is to be hoped that Australian courts will recognise that ... the meaning of "proceedings in parliament" must be broadened*

## Defamation and parliamentarians

from p15

It is to be hoped that Australian courts, like the Canadian courts, will recognise that the nature of parliamentary work and developments in methods of communication are such that the meaning of "proceedings in parliament" must be broadened, at least to this extent.

The Parliamentary Privileges Act 1987 (Cth) defines "proceedings in Parliament" as "all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee".<sup>22</sup> The reference to "incidental" matters extends the protection accorded to statements made by Federal Members of Parliament beyond statements made in the House or in committee proceedings; it is suggested that the courts should not allow the legislation to be used to protect Members of Parliament in respect of the publication of material unless this was necessary for the proper discharge of the Member's duties.

It follows from the common law and legislative developments outlined in this note that media organisations will have to make a judgment regarding the nature of statements made by Members outside their Houses to assess whether they are part of "proceedings in parliament"; if the statement is part of parliamentary proceedings, a fair and accurate report will be protected by qualified privilege.

*The material in this article forms part of the book - The Law of Journalism in Australia - written by Sally Walker and published by The Law Book Company early next year. Sally Walker is a senior lecturer in law at the University of Melbourne.*

## The ABC Bill

from p14

to the licence. Also the holder of a limited licence may transfer the licence to another person or admit another person to participate in its benefits or to exercise any of the powers or authorities granted by the licence.

The holder of a limited licence shall not broadcast an advertisement if (my emphasis) the licensee receives payment or other consideration for broadcasting it. But this does not apply to a certain kind of licence and any holder of a special limited licence can broadcast details about a sponsor.

Clause 8 of the Bill repeals the existing 26 page section about staff and service, replacing it with 28 lines including, "the terms and conditions of employment shall be determined by the Corporation".

References to "officers" are replaced

## Notes

1 I Will and Mr Sess 2, c 2 (1688).

2 The privilege applies:

(a) pursuant to legislation which adopts the privileges of the House of Commons (see, for example, Commonwealth Constitution s 49 and Constitution Act 1975 (Vic) s 19(1) and *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ 35);

(b) pursuant to legislation which provides that the Bill of Rights is part of the law (see, for example, Parliamentary Privileges Act 1987 (Cth) sub-s 16(1) and Imperial Acts Application Act, 1969 (NSW) s 6); or

(c) at common law, on the basis of necessity (*Gipps v McElhone* (1881) 2 LR (NSW) 18 per Martin CJ 21-22, *Manning J* 24 and *Windeyer J* 25-26; *Chenard and Co v Arissol* (1949) AC 127, 133-134).

In the Northern Territory, freedom of speech is confirmed by the Legislative Assembly (Powers and Privileges) Act 1977 (NT) s 5(1).

3 Gordon C (Ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (20th ed, 1983) 94.

4 *Wason v Walter* (1868) LR 4 QB 73.

5 Parliamentary Privileges Act 1987 (Cth) s 10. Although the explanatory memorandum describes the defence as one of "qualified privilege", in fact, the privilege is expressed as an absolute privilege.

6 Defamation Act, 1974 (NSW) s 24 Sch 2 cl 2 (1) and s 26; *The Criminal Code* (Qld) s 374 (1); *Wrongs Act* 1936 (SA) s 7 (1)(ab); *Defamation Act* 1957 (Tas) s 13 (1)(a);

*Wrongs Act* 1958 (Vic) s 3A (1); *The Criminal Code* (WA) s 354 (1); *ACT: Defamation (Amendment) Act* 1909 (NSW) s 5(a) (applies only to newspaper reports); *Defamation Act* (NT) s 6(1)(ba) (applies only to newspaper reports). In New South Wales, Victoria, Western Australia and the Australian Capital Territory the statutory protection extends to the publication in that jurisdiction of a report of other State or Territory Parliaments.

7 *The Criminal Code* (Qld) s 377; *Defamation Act* 1957 (Tas) s 16; *The Criminal Code* (WA) s 357.

8 Aust, *The Law Reform Commission, Unfair Publication: Defamation and privacy* ALRC 11 para 135.

9 *R v Murphy* (1986) 5 NSWLR 18, 26-27; *Parliamentary Privileges Act* 1987 (Cth) para 16(2)(a); *Parliamentary Evidence Act* 1901 (NSW) s 12; *The Criminal Code* (Qld) s 372; *Defamation Act* 1957 (Tas) s 11(b).

10 See the discussion of the Strauss case in UK, Parl, Report from the Select Committee on Parliamentary Privilege HC Paper 34 (1967-8) paras 80-81 and 86.

11 *Adam v Ward* (1917) AC 309 and *Horrocks v Lowe* (1975) AC 135.

12 Aust, Parl, Joint Select Committee on Parliamentary Privilege Final Report (October 1984) PP no 219, 1984 para 5.15.

13 *R v Abingdon* (1793) 1 Esp 226 (170 ER 337), 228 (338) and *R v Creevey* (1813) 1 M & S 273 (105 ER 102) per Lord Ellenborough CJ 278 (104), *Grose J* 279-80 (104), *Bayley J* 280-281 (104-105) and *LeBlanc J* 281-282 (105). The Member might be able to rely on qualified privilege, but, where the common law operates, this would be most unlikely to protect the Member unless the material was published only to a limited audience (*Adam v Ward* (1917) AC 309 and *Horrocks v Lowe* (1975) AC 135).

14 *Attorney-General of Ceylon v De Livera* (1963) AC 103, 121.

15 *Roman Corp Ltd v Hudson's Bay Oil and Gas Co Ltd* (1971) 18 DLR (3d) 134, 142; (1971) 23 DLR (3d) 292, 298.

16 *Ibid* (1971) 23 DLR (3d) 292, 299.

17 (1973) 36 DLR (3d) 413, 419.

18 *Re Clark and Attorney-General of Canada* (1977) 81 DLR (3d) 33, 58.

19 *Stopforth v Goyer* (1978) 87 DLR (3d) 373, 382.

20 *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1, 18-19.

21 *Ibid* 30-36.

22 Sub-section 16 (2)

throughout by "employees" and there is nothing about training qualifications, retirement etc.

Also dubious is Section 70D, which gives the ABC, a publicly owned authority whose possessions are of public concern, the power to give these as security for moneys borrowed. This is because the legislation permits the ABC to borrow from sources other than the Commonwealth. However, the ABC is not a money-making industry like, for example, Qantas, so failure to pay back a private loan might mean loss of its property to private ownership.

These provisions, together with the proposed control of the ABC and SBS by the Australian Broadcasting Tribunal, spell out the end of ABC independence if they are implemented.

*Leila Cumming,  
Friends of the ABC*