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Government's new Bill to re-regulate Telecommunications

In March, Ros Kelly, assisting the Minister for Transport and Communications, Ralph Willis released a draft of the long-awaited Telecommunications Bill for public comment. The Bill follows the Minister's policy statement last May, which announced the government's intention to re-regulate the telecommunications market.

The new Bill also provides a prescription for "reserved services" within which Telecom will enjoy a monopoly, and a licensing regime for value added services and private networks.

While the industry generally welcomed the Government's May 1988 policy initiatives, many now regard the draft Bill as a disappointing effort, because of substantial concessions made to Telecom.

Stephen Menzies of Allen, Allen & Hemsley summarises the Bill then discusses in detail the all-important "reserved services" provision as defined in the new Bill.

There is considerable criticism by the industry of the terms of the new Telecommunications Bill. It is understood that both ATUG and AIIA will be putting submissions to the Department in respect of a number of provisions in the Bill.

The key features of the Bill are:

Establishment of AUSTEL

AUSTEL is established with three members, a chairperson and two others, with provision for the Minister to appoint further associate members.

AUSTEL is empowered to perform the following functions:

- establish a class licence system for value added services and private network services;
- authorise interconnection and the availability of facilities between authorised carriers (Telecom, OTC and AUSSAT);
- administer the boundaries between "reserved services" and competitively provided services;
- regulate competition between the carriers; and
- protect against unfair practices by carriers.

AUSTEL is subject to direction by the Minister.

Definition of reserved services

The Bill establishes a definition of "reserved services", being a service for "primary communications carriage between two or more cadastrally separated places or persons". The concept of a "cadastrally separated" place is one situated in premises owned or occupied by different persons, or if owner occupied by the same persons, that have different titles at law.

The term "primary communications carriage" is of crucial importance. This term means any service so far as it consists only of the functions necessary:

(a) to "arrange, operate and manage connectivity" across the network; and

(b) to "carry communications across the network" (with provision that once delivery standards are adopted by AUSTEL, that such carriage does not result in standards being exceeded in the supply of the service).

Provision of value added services

It is intended that value added services would be provided in a competitive environment.

However, the Bill proceeds to establish a "class licence" system, under which the benefits of competition will truly be available only upon the establishment of a class licence.

The provider of a value added service can elect to register with AUSTEL. Registration gives two benefits:

(a) The service is deemed to be within the class licence, providing some protection to action by Telecom for infringement of its monopoly; and

(b) AUSTEL cannot declare the service to be an unlicensed service, removing the

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service provider's rights and benefits under the class licence.

However, contrary to the hopes of industry, the registration procedures for registration under a class licence appear cumbersome, because AUSTEL must satisfy itself that the application relates to services falling within the description of the class.

Procedures of AUSTEL

All AUSTEL procedures will be conducted by paper, with applications supported by statutory declaration.

There is no procedure for appeal against various decisions of AUSTEL, other than those described in Clauses 436 and 580. Crucial decisions of AUSTEL are not subject to appeal eg failure to establish a new class licence.

AUSTEL has no power to conduct hearings. AUSTEL will simply issue a statement of reasons, which must then be challenged in the AAT, where permitted.

New board for CAMLA

A new board of directors was elected at the fourth annual general meeting of CAMLA in February. They are:

Mark Armstrong	**President**
Stephen Menzies	**Vice-President**
Alec Shand	**Vice-President**
Victoria Rubensohn	**Secretary**
Des Foster	**Treasurer**

Directors:

Ian Angus	Malcolm Long
Martin Cooper	John Morgan
Graham Dethridge	Terry O'Connor
Adrian Deamer	Richard Phillipps
Gareth Evans	Jonquil Ritter
Dominique Fisher	Joanna Simpson
Kate Harrison	Janet Strickland
Peter Hohnen	Doug Spence
Brian Hogben	Den Taylor
Paddy Jones	David Watts
Hugh Keller	Julia Wilkinson
Peter Leonard	

Constitutional changes

The following special resolutions were also passed at the annual general meeting:

That the merger of the Media Law Association of Australasia with the Australian Communications Law Association pursuant to the merger agreement be approved.

That the Articles of Association of the Media Law Association of Australasia be amended as follows:

By deleting the words in article 31 after the word 'of' in the first line and replacing them with the following:

Five office-bearers, being a president, secretary, treasurer and two vice-presidents, each of whom shall be a member of the committee:

By deleting all of article 32 and inserting a new article 32 as follows:

'Solicitors, or barristers who are in private practice at the time of the election, shall not exceed two-thirds of the total membership of the committee.'

Adding value to Telecommunications

With certain reservations, the industry has welcomed the policy initiatives of the government, as set out in the Policy Statement of 25 May, 1988. That Policy Statement established three important philosophies, which underpin a number of specific recommendations:

Value added services will be opened to full competition.

The government's statement placed considerable importance on the potential for value added services in economic growth and to foster Australian participation in the wider information economy.

In the light of this policy, the Policy Statement contemplated full competition for value added services and specifically that:

(a) any new regulatory framework would minimise the necessary regulation of value added services and clarify the application of any remaining regulations, to ensure the competition is both permitted and encouraged within the boundary of the regulatory arrangements and to safeguard against misuse of Telecom market power (par 4.29); and

(b) any telecommunications service not explicitly reserved to Telecom, OTC or AUSSAT will be opened to competitive provision (par 4.37), with the legislation and regulations setting out those network services that are reserved, on the basis that all others are opened to general competitive entry (par 6.37).

Telecom's monopoly will be preserved for services necessary to sustain its universal service objective, but with regulation against predatory or anti-competitive conduct.

The Policy Statement described at length the need to maintain some limited monopoly for Telecom and elected to restrict that monopoly to the "reserved services", subject to a number of initiatives to restrain an abuse of monopolist power. Telecom was to be under supervision by the Australian Telecommunications Authority (AUSTEL) and to be subject to the Trade Practices Act.

In the Policy Statement, the government stated that its approach to redefining the scope of Telecom's monopoly was based on two considerations:

(a) the need to maintain and extend universal services by maintaining Telecom's ability to provide access to standard telephone services through costs averaging and cross-subsidy; and

(b) the need to secure the orderly and efficient development of the basic network by enabling the fullest exploitation of efficiency arising from economy of scale and scope, and by avoiding costly and uneconomic duplication of facilities (par 3.50).

The government considered that "reserved services" would comprise the basic terrestrial network, as a facility, and basic switched voice services, together with services which are directly substitutable for voice services. In addition, the category of "reserved services" was expanded to include certain "established services currently provided" by Telecom and OTC on the basis of traditional trafficking principles that derived from the public switched network: these services included DATEL and AUSTPAC and public switched ISDN.

Having determined the boundary of the "reserved services" which are specified in the Policy Statement, the government stated that regulations would define those boundaries. AUSTEL was charged with the duty of administering that legislation and, as technological changes took place, to make recommendations concerning any change to the boundaries of monopoly, when reporting on the efficiency and adequacy with which Telecom fulfilled its service obligations (par 3.101).

As a consequence of this policy, Telecom was to be organised as a more commercial organisation. Telecom was to be permitted to participate, through subsidiary companies, in the provision of value added services on terms competitive with other service providers.

Telecom was to act as a true common carrier.

A common carrier is one which provides access to the telecommunications system without discrimination. Telecom has

not always acted as a common carrier.

The Policy Statement provided for the worthwhile policy of a new supervisory agency, AUSTEL, which would police any intrusion on Telecom's monopoly, but also ensure that the monopoly carrier acted fairly and without discrimination. For example, when AUSTEL licensed their value added service through a private network, the Policy Statement provided that the licensee would have an automatic right of access to the Telecom public network and Telecom could not discriminate on the terms on which that access was provided (par 4.38).

Subsequent to the publication of the Policy Statement, the Department has circulated draft guidelines for industry comment: These guidelines have concerned three areas:

- Standards for Customer Premises Equipment (CPE);
- Licensing of private networks, and
- Class licences for value added services.

Considerable debate arose in connection with those guidelines and the future rights and role of Telecom, once AUSTEL was established. The following issues have emerged:

Should Telecom be able to review or approve AUSTEL applications?

One issue which has been very contentious is whether Telecom should have a role in reviewing or approving applications to AUSTEL for value added services or private networks. The Policy Statement contemplated that there may be challenge to an application, but did not specify how this would operate in practice.

The principal thrust of the Policy Statement was that there would be full competition in all areas of telecommunication, other than "reserved services". The onus was to be on Telecom to justify the boundary of these "reserved services".

Telecom should not, however, be able to review all proposals for value added services in any application to AUSTEL prior to approval and dispute the proposed approval of any new service, involving lengthy delays or litigation. Telecom must not be able unilaterally to withhold interconnection to the public network whenever it believes that the licensed service infringes its monopoly.

Licensing system should not be bureaucratic and cumbersome

The Policy Statement contemplated that AUSTEL would introduce an efficient regime for licensing value added services, which was inducive to a competitive environment. That system would proceed on a "class licence", under which, it seemed, that there would be minimum regulation. Except in the case of services which may offend the monopoly conferred on Telecom for "reserved services", a licence was to proceed automatically by notification.

The UK system of class licences has not proved successful and, it is understood, the Department does not intend to follow that system. Rather, it is hoped that AUSTEL will establish at an early stage various classes of licences which replicate all of the current services which Telecom has approved, both in its "readily approved category" and approvals issued on a case by case analysis, in accordance with its current Value Added Services Policy.

The debate over "reserved services"

It is necessary to consider an appropriate definition of "reserved services", for incorporation in the new Australian Telecommunications Authority Bill, due for release in April 1989.

The Ministerial Statement of 25th May 1988 provides a number of guidelines as to how "reserved services" should be defined. The most important policies enunciated in the Ministerial Statement which bear upon a definition of "reserved services" were:

(1) any telecommunication service not explicitly reserved to Telecom, OTC or AUSSAT would be open to competitive provision (par 4.37 of the Ministerial Statement): that is, the definition should be so cast as to be exclusive, rather that inclusive,

(2) the definition of "reserved services" would be made by the government, and not AUSTEL: AUSTEL would merely give effect to the government's policy in that definition: that is, before the establishment of AUSTEL, it is important that the government prescribe a definition of "reserved services" which is not descriptive of particular services, but rather represents the policy; and

(3) the basic monopoly of Telecom is to be the provision of "basic switched voice" services (para 3.52), with that monopoly extended only to additional services which are provided jointly with public switched voice services (ISDN) or as a direct substitute for those services, eg leased lines, or have derived from voice services, eg public switched data, (par 3.57).

Essential features of "reserved services"

The definition of "reserved services" should confer on the common carriers, Telecom and OTC, a right in relation to services which fulfil these policy aims of the government. There are four essential requirements of any "reserved service":

(1) the service must be a basic voice or data service: the definition should exclude from "reserved services" any service component which is "value added";

(2) "reserved services" must be "public switched" services or a direct substitute therefore: a switched service is one where an interconnection is provided on demand, ie it is not a "dedicated" service;

(3) any "reserved service" must be "public" switched: the term "public switched" is one of common industry usage and refers to a service made available to any member of the public on a non-discriminatory basis, where connection from one subscriber, being a member of the public, to another subscriber is available on demand at a common tariff and on common terms; and

(4) any "reserved service" must be provided by the carrier as a common carrier. This fourth characteristic is implicit both in the Ministerial Statement and in Telecom's own description of what is a public switched service. Telecom, in its Interconnectiion Policy of January 1988, defines "public switched network" to be the exchanges, lines and circuits controlled by Telecom for the provision of telecommunication services between customers **in its role as national common carriers.**

The Ministerial Statement suggests that the definition of "reserved services" serves a twofold purpose: firstly, it defines the area within which Telecom has a monopoly, and secondly, it prescribes the area of conduct within which the carriers may act as monopolist, and so be protected from the provisions of the Trade Practices Act. The definition of "reserved services" is crucial not only for the defence of the carriers, but also for the promotion of competition **outside the role of common carrier.** One can compare this policy with that which has emerged in the United States where government policy has conferred limited monopolies on carriers, but only to the extent that they "common carriers". A body of law has emerged to define the characteristics of a "common carrier" which is entirely consistent with the regulatory environment contemplated by the Ministerial Statement.

Telecom, OTC, ATUG and AIIA have, it is understood, each provided comprehensive statements as to how reserved services should be defined. The issues

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which have emerged from these submissions are as follows:

Descriptive or prescriptive

Should the definition be prescriptive or descriptive? The advocates of a prescriptive definition rely upon the fact that the Minister only reserves to Telecom specific services and are concerned that any descriptive definition may, with technological change, bring other services within the "reserved services" in an unintended manner. On the other hand, the proponents of a prescriptive definition are concerned that the Minister was not focusing on particular services but on the realm and nature of competition.

Function or technology

Should the definition be based on the functionality of services or on some technological basis? Proponents of the former argue for a distinction between "basic" services and "enhanced" or "value added" services, where the "basic" service would be any service which provided for the transmission of a signal from point to point without change in the nature of the information conveyed and without any delay in transmission. On the other hand, proponents of a technological definition point to the difficulties encountered in other jurisdictions in defining what is a "basic" conveyance and seek to import technical models, and in particular the OSI model.

Scope of network boundary

How should the definition define the network boundary in relation to reserved services? On the one hand reserved services could extend well beyond the terrestrial network operated by Telecom, eg mobile cellular phones, whereas proponents of competition contend that the network boundary should be at the outer premises of any customer premises and never extend to any signal not conveyed by line, ie exclude microwave links, etc which are regulated under the Radio Communications Act.

Public switched

What is the concept of "public switched" communication, as referred to in the Policy Statement? Is it intended to limit the concept of "reserved services" to services provided to the general public by switched exchange, or is it intended to apply to any service which may be offered between any two persons who are members of the public, ie, any group of people outside the "common interest group" as now proved by Telecom?

Protocol conversion

In what manner should one treat network protocols which "enhance" services offered by the network, but are essentially related to the carriage of information? On the one hand, Telecom seeks to reserve to itself all packetised information services, such as AUSTPAC, whereas proponents of competition say that no protocol conversion should be considered within the concept of a "basic" conveyance.

The Bill

Clause 52 of the new Bill provides a definition of "reserved service" as follows:

"A telecommunications service is a reserved service if it is a service for primary communications carriage between two or more cadastrally separated places or persons."

This definition relies on two key concepts:

"Cadastrally separated"

For the purposes of the Bill, places or persons are taken to be "cadastrally separated" where places or persons are situated in areas of land or premises that are owned or occupied by different persons or, if the areas are owned and occupied by the same person, there are different titles in relation to those areas.

"Primary communication carriage"

The term "primary communications carriage" refers to a telecommunications service so far as it consists only of the functions necessary:

(a) to arrange, operate and manage connectivity across the telecommunications network; and

(b) to carry communications across the network or, if service delivery standards are prescribed by regulation, to carry communications in a manner that does not result in the service delivery standards being exceeded.

Objections to definitions

(1) "Reserved services" should not include services between two or more cadastrally separated places: communication between one "person", ie employees of the same company, who are located at separate places will fall within the definition of "reserved services". Clause 7 provides a meaning of "cadastral separation" which has the effect that even where two lots of land are owned or occupied by the one person (ie the employer), but there are different titles to those two areas, such land will be deemed to be cadastrally separated. These provisions substantially narrow the "own premises" exemption, now contained in Clause 39. Clause 39 restricts the operation of the monopoly conferred by Clause 37 on Telecom, but the prohibition on the provision of reserved services (Clause 56) is not subject to Clause 39.

(2) A "reserved service" is any service for "primary communications carriage". That term has been expanded substantially since earlier drafts of the Bill. "Primary communications carriage" is now defined to consist of functions necessary to "arrange, operate and manage come activity" and to "carry communications" unless and until standards are adopted in respect of the service.

(3) The concept of "primary communications carriage" is sufficiently broad to include all telecommunications carriage, within all seven layers of the OSI model. This is made absolutely clear by the notes on the clause, which state that paragraph (a) is **"intended to encompass"** all switching, control and operational functions internal to the network and **associated with provision of the service**. These functions expressly include billing systems, network traffic management, handling of customer request, directory maintenance and "a range of higher functions internal to the network such as those associated with a provision of intelligent networks and enhanced features of the ISDN reserved service".

Primary communication carriage should **not** include functions necessary to "manage connectivity", nor functions to "carry communications". The expert consultants to the Department recommended that primary communication carriage would only include the bottom three layers of the OSI model, to the extent necessary to establish call set-up and tear down and to "provide for" transmission, with a provision that such transmission was in as delay-free and transparent manner as possible. This concept has been totally abandoned by the Department.

(4) It is unnecessary for "service delivery standards" to be provided for under the regulations (Clause 54). Until such standards are prescribed, there is no limitation upon the functions which are included in "primary communications carriage" by para 53(b). The section should provide an automatic test, imposing accepted standards and including in the concept of "primary communications carriage" only carriage under which transmission is in a delay-free and transparent manner.

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...Of judges and journalists

Mr Justice Gleeson, Chief Justice of NSW addressed the relationship between the judiciary and the media in his speech at a dinner following the recent Annual General Meeting of CAMLA.

As many of you will know, there is a very contentious issue as to the range of subjects which it is proper for judges to address on occasions when they find themselves invited to speak in public.

An English journalist, Mr Bernard Levin, has had some pointed observations to make about this matter. He wrote an article in the London Times after some substantial publicity had been given to pronouncements made by an English judge named Judge Pickles. Judge Pickles made some public remarks which led to a rebuke and, indeed, threat of removal, by the Lord Chancellor. Mr Levin weighed in on the side of the Lord Chancellor. He wrote expressing his horror at the possibilities that might result if conduct such as that engaged in by Judge Pickles were encouraged.

He said:

"Just as politicians, eager to get themselves before the public, will answer any question from a reporter who telephones them, so the judges will be reported as saying what they think of the post office, Gower's cricket captaincy, or Dennis Thatcher's feelings about a possible third term for his spouse."

He went on to say:

"The full horror of the plan will be seen on television. They will infest question time and drive poor Robin Day into an early grave with their opinions; they will take walk-on parts as themselves in sitcoms, like Harold Wilson; they will interview talking dogs and sing with Des O'Connor in Christmas specials; and, most dreadful of all these dreadfulnesses, they will appear on chat shows, where they will make puns, essay risque jokes, fawn on pop singers whose knuckles brush the ground as they walk, and ask Selina Scott, with a roguish smile, what she is doing after the show."

He concluded as follows:

"However much and however often I have criticised judges, I have never wavered from my belief that a visibly impartial and independent system of law is crucial to a free society. But this includes an essential element of remoteness, even of inhumanity, in the judges and their work."

Bearing those considerations in mind I came to the conclusion that it might not be inappropriate, since I presume the invitation was extended to me by reason of the fact that I have recently been appointed to head the Supreme Court of New South Wales, if I were to say something which some of you may find of interest about the Supreme Court of New South Wales and its relations with the press.

As some of you will know, the present Supreme Court, whose existence was continued by the Supreme Court Act of 1970, was established under an instrument called a Charter of Justice in 1823. The original territorial jurisdiction of the Court included what are now the States of Queensland and Victoria, and indeed there was a time in the early 1840's when it also included New Zealand.

Apparently, nice conceptions concerning the separation of legislative, executive, and judicial powers were not uppermost in the minds of those who established the Colony, and the Supreme Court. The first Chief Justice, Francis Forbes, was also a member of the Legislative Council and, indeed, had a kind of power of veto in connection with legislation to which I shall later refer.

Relations between the judges of the court and the media have not always accorded with their present state of quiet harmony. Strange as it may seem journalists were not always as respectful towards judges as they now are. As it happens, one of the most prominent barristers in the early history of the Colony was also a media proprietor, and a vigorous controversialist.

There early developed an issue as to the freedom of the press in the Colony. The first issue of the newspaper "The Australian" appeared in October 1824, and Governor Brisbane reported to the Colonial Secretary:

"These gentlemen (referring to Wentworth and Wardell) never solicited my permission to publish their paper, and as the opinion of the law officers of the Crown coincided with my own that there existed no power to interpose to prevent it without going to the Council, I considered it most expedient to try the experiment of the full latitude of the freedom of the press."

That experiment seems still to be underway. It did not continue uninterrupted, however. The government of the Colony used the mechanism of prosecutions for criminal libel as a method of endeavouring to control the press, and such prosecutions were for several years a large part of the work of the Supreme Court.

Sir Victor Windeyer writes:

"The Court was used as a forum for political controversy and propaganda. The unrestrained language against the government which Wardell and Wentworth used when addressing juries and which was eagerly reported in the opposition newspapers, as they no doubt intended it should be, was at times beyond the bounds of fair and decorous advocacy, or would be so considered today. Whatever may be urged for them as the champions of a free press, this is not really an edifying chapter in the history of the Bar."

One of the early judges of the Court wrote:

"The Supreme Court has constantly been the scene of most difficult, painful and disagreeable discussion."

Sir Francis Forbes, the first Chief Justice, was not in favour of an unrestricted press:

"An unrestricted press," he wrote, "is not politic or safe in a land where one half of the people are convicts who have been free men, and the other half of the people are free."

However, when Governor Darling attempted to bring down a Bill requiring all publishers of newspapers to take out an annual license revocable at any time by the Governor on the advice of his Executive Council, the Chief Justice declined to certify that the Bill was not repugnant to the law of England.

"By that law," he wrote, "every free man has the right to use the common trade of printing and publishing newspapers. By the proposed Bill, this right is confined to such persons as the Governor thinks proper. By the law of England, the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint; by the Proposed Bill, a preliminary license is required which is to destroy the freedom of the press and place it at the discretion of the government."

Although Forbes had refused to certify the clauses relating to the resumable license, the rest of the Bill, imposing registration and requiring recognisance to pay fines that might

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be imposed for blasphemous or seditious libel passed into law on 25 April 1827.

The Gazette, the Gleaner and Moniter criticised it as an unnecessary restraint on liberty.

The Governor then attempted to bring down a second Bill, which imposed a stamp duty on newspapers which would have effectively taxed the newspapers out of existence. Forbes withheld his certificate again, on the grounds that it was ostensibly imposed to defray printing costs while its real purpose was to suppress the publication of newspapers in the Colony.

Chief Justice Forbes' refusal to certify that Governor Darling's Bills were not repugnant to the law of England infuriated the Governor, who sought repeatedly to blacken the Chief Justice's character to the Imperial authorities and when that failed, resorted to social revenge. Lady Forbes wrote:

"If we gave a dinner party, General Darling would issue invitations, at the last moment, to our guests, for the same evening, his invitations being headed, 'the Governor commands your attendance at dinner', etc and our promised guests would arrive at our house to make their excuses so that they might obey His Excellency's mandate. In order to save ourselves, and our friends from this humiliation, we felt sure of our guests, as the members of the Bar were not subject to government control."

However, fines and imprisonment for libel proved inadequate as a means of suppressing the outspoken comments of editors such as Edward Smith Hall, of the Monitor and Hayes of The Australian. Both Hall and Hayes had been imprisoned for seditious libel, but that did not prevent them from continuing to pen further criminal libels from the security of the Parramatta Gaol.

In order to silence Hayes and Hall, but particularly Hall, Governor Darling induced the Legislative Council to pass unanimously a new press law based on one of the repressive Six Acts of 1819. This made it mandatory for the Court to impose a sentence of banishment on any person convicted for seditious libel for the second time. The Australian bitterly condemned the Act, as "this Gagging – Strangling – Press extinction" but nevertheless refrained from publishing editorials. In the Monitor, the freedom of the press was mourned by means of a figure of a coffin with a Latin epitaph.

However, the irony of distance meant that Darling's Act reached London at the very time Parliament was in the process of repealing those sections of the 1819 Statute that related to banishment. The colonial act thereby became inconsistent with English law and Darling had once again been defeated.

Governor Darling's unsuccessful attempts to suppress the press of course inspired violent criticism, dominated by Wardell of The Australian, who was charged with criminal libel on seven occasions, for his allegations of incompetence and other insults directed at the Governor and at the hapless Saxe Bannister, the Attorney-General. When, in 1828, the Governor refused to initiate proceedings for criminal libel against Wardell, Bannister had recourse to more direct methods, and challenged Dr Wardell to a duel. The duel was fought at Pyrmont. Shots were exchanged, but neither party was hurt. This seems to have been the only duel between lawyers fought in Australia.

The judges of the Supreme Court found themselves caught up in the recurring controversies concerning the division of the legal profession into two branches, and the rights of solicitors concerning the matter of audience before the court.

Generally speaking, the judges supported the position of the barristers. This earned them robust vilification.

The judges gave practical support to the position of the Bar by procuring or promulgating rules of court, and the validity of those rules was then unsuccessfully challenged before the same judges.

There appeared in "The Australian" an article in the following terms:

"We have heard that the learned judges of the Supreme Court deny that the rule for the division of the Bar was procured by their means. Now this is either true or false. If the former, we regret being under the necessity of charging them with a gross neglect of duty – for, seeing that the division is a question of expediency as well as legality, it especially behoved the court to have given to His Majesty's advisers in England the best data for deciding in a matter so deeply involving private and public interest. This is one horn of the dilemma – we shall forbear pressing upon the public attention the unfortunate predicament in which an escape from it leaves the court."

Styles in journalism appear to have changed. Modern writers in newspapers seem very rarely to forbear from pressing upon the public attention a point they desire to make.

The proprietors of The Australian at the time that article was written were two solicitors; Francis Stephen, a son of John Stephen, the judge, and George Robert Nichols, who was also its editor – which of course explains their attack upon the judiciary.

That article, among others, in fact led to the first recorded Australian case of scandalous "libel" on a Supreme Court. In the opinion of the Supreme Court, the article was "highly offensive and in contemptuous derogation of the authority of this Court." Stephen was adjudged guilty of contempt, fined fifty pounds and placed on a two year good behaviour bond. No doubt the gravity of his offence was exacerbated by his status as an officer of the Court, although that factor was not mentioned by the Court.

Of course, the Court has grown enormously in size since those days. For some reason which I have never heard satisfactorily explained New South Wales seems to be by far the most litigious state in the Commonwealth, even allowing for population differences. As one would expect, leaving aside the Family Court, the Supreme Court of New South Wales is by far the busiest superior court in the Commonwealth. However, the degree by which the extent of its business exceeds that of other superior courts is not easy to explain. Of particular concern to media lawyers is the fact that it is by far the court which deals with the most defamation work, although it should be added that, in terms of the number of defamation cases that are actually fought out to the finish in court, there is relatively little of such work. I have the strong impression that whilst there is a good deal of activity at an interlocutory stage in relation to defamation matters, the number of such cases that are actually fought out to a conclusion at trial is quite small.

The Supreme Court of New South Wales seems to lead the Commonwealth in terms of the size of verdicts that are awarded in defamation actions, where the defendants are usually newspapers or broadcasters. However, the size of those verdicts is by no means extravagant when compared with the sums which one sees have recently been awarded, or agreed to be paid, by English newspapers in libel actions. I have been told by those older in the profession than me that up until about twenty or twenty-five years ago defamation actions in New South Wales were generally regarded as "backyarders" and verdicts relatively small. I have an impression, which may be able to be confirmed by others here, that it was the verdict in **Hopman v Mirror Newspapers** that constituted something of a great leap forward.

The impression I gained when I was in practice at the Bar was that the growth area in communications and media law was not so much that of defamation, which is within the province of the Supreme Court, but rather in relation to administrative law which is, by and large, more within the province of the Federal Court.

Nevertheless, the Supreme Court and the media will, I have no doubt, continue to be of interest to each other.

The Australian Broadcasting Tribunal where to from here?

John Saunderson MP is the Chairman of the House of Representatives Committee on Transport, Communications and Infrastructure. In December 1988 his committee released its report on the role and functions of the ABT. On March 7 John Saunderson spoke at a CAMLA lunch in Sydney about the future of the ABT.

Since election in 1983 this government has presided over the most dramatic and sweeping changes, resulting in a restructuring of broadcasting not seen since the introduction of television in the 1950's. Amongst these reforms have been changes to

- the level of permissible ownerships from a maximum of two stations to a % of audience reach
- the finalisation of aggregation procedures for rural networks
- the introduction of video and audio entertainment and information services regulation, resulting in the commencement of 'Sky Channel' amongst other new services

These reforms have also resulted in a complete overturning of the old established ownership groups in broadcasting.

The three major networks have all changed ownerships since 1984.

The Nine and Seven Network had been controlled by the same management group since the issuing of the first licences in the 50's.

These reforms have not been without their critics – their criticism primarily centred around the question of the concentration of ownership.

It is certainly true that whilst diversity of ownership has occurred between the different branches of the media family, it is equally true that, within each branch of the media, concentration of ownership has increased.

The Australian Broadcasting Tribunal, the body created to enforce the rules and create the regulation, has been expected to cope with these dynamic events with outdated legislation. The lack of attention by governments to updating legislation has left the Tribunal with 19th century mechanisms to deal with a 21st century industry. This resulted in Deirdre O'Connor's now famous plea for 'teeth for the tiger'.

This now brings me to the role of my committee, not because of our dental expertise, but rather a recently presented report 'The Role and Functions of the Australian Broadcasting Tribunal'. This report came about because of concerns within the community about the Tribunal's capacity to handle the newly restructured industry, and possible future industry developments, within its current legislative framework.

"It is television's powerful capacity to influence, combined with its ownership by a few, that has produced regimes of regulation and control throughout the western world."

Our first report is an attempt to address the changes required to cover the existing free-to-air system and our second report will cover the future technologies and issues such as VAEIS.

The terms of reference received for this inquiry required us to examine the role and functions of the ABT in **regulating** the commercial broadcasting sector with particular reference to licence grants and licence renewals; ownership changes; establishment of program and advertising standards and enforcement of these standards.

Taken as a whole, they cover the case for, and need for, regulation.

The case for regulation of television is based on two factors which make broadcasting unique. The first is the impact of television which is received into our lounge rooms and seen by adults and children alike. It deals with the particularly sensitive commodities of ideas, information, thought and opinion, compounded by the public perception of the mass media as opinion makers, image formers and culture disseminators. The second factor is the structure of the industry where television in Australia is dominated by three commercial networks.

It is television's powerful capacity to influence, combined with its ownership by a few, that has produced regimes of regulation and control throughout the western world.

Regulation itself can be separated into program regulation and structural regulation. I will not dwell on the detail and will only list the conclusions reached on program regulation. These were that:

- there is a clear case for program regulation of television which should cover the establishment and maintenance of program and advertising standards – children's programs, standards on taste and violence and Australian content;
- there is also a clear case for the regulatory authority to have the power to improve the quality of television; and
- self-regulation, where appropriate, should be the outcome of a public participation process with licensees being accountable to the regulatory authority.

The case for structural regulation covers control of entry into the market, prevention of undue concentration and restriction of foreign ownership and prohibition of foreign control of commercial broadcasting.

Control of entry into the market has always been a feature of commercial radio and commercial television in Australia. Today, it is being questioned as an objective of structural regulation.

Control of entry into the market is connected with the need for maintaining commercial viability. At present the minister has the primary role and the Tribunal a subsidiary role in determining viability, and thus regulating entry. The traditional argument supporting viability is that of the 'trade-off'.

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Licensees are compelled to provide certain types of programs which result in both additional costs and loss of revenue. The trade-off for such costs and losses is the protection of advertising revenue by restricting entry into the industry.

The second reference the committee received from the Minister was examination of the possibilities for the development of and the appropriate means of regulating new broadcasting-related services. This inquiry was advertised in December 1988 and submissions are now being received.

In respect of structural regulation, the findings of the committee were that:

- the regulation of entry into commercial television markets should continue until the possible effects of Pay TV (Satellite and Cable) have been fully considered;
- the government should keep under constant review the issuing of new licences as a means of providing greater competition and increased variety of programs;
- regulation which prevents undue concentration of ownership and control of commercial broadcasting should be maintained; and
- regulation of foreign ownership and the prohibition of foreign control of commercial broadcasting should also be maintained.

As the trade-off argument suggests, there are interconnections between structural and program regulation. Maintaining commercial viability is a major objective of broadcasting policy which has the capacity to sustain many other objectives, particularly those relating to the encouragement of Australian contents and drama quotas and improvements in quality. It is what a United Kingdom House of Commons Committee calls the 'seamless robe' of broadcasting: that finance, structure and technical developments are all interrelated and that changes in one area would affect the whole of the current structure of broadcasting.

There is a clear case for the regulation of commercial broadcasting. The need is conceded by all licenses who appeared before the committee, although there were and are differing viewpoints on the extent and nature of that regulation. An associated matter then is the setting of roles and responsibilities of Parliament, government and the Tribunal in regulating commercial broadcasting.

The Tribunal and others have asked for the Broadcasting Act to contain a concise set of policy objectives. These would show legislative intent in the regulatory process.

The committee accepted these proposals and has recommended that the Broadcasting Act specify the objectives of broadcasting policy. But by itself this is insufficient. It is well known that policy objectives are malleable, subject from time to time to different interpretations. My earlier comments on commercial viability illustrate that well. Therefore, the committee also recommended that from time to time the relevant minister make a statement in the Parliament, detailing the ways in which the policy objectives in the Act would be implemented.

We said that the legislation should also give the ABT guidance on its role and functions. The committee's recommendation was that the Broadcasting Act should say that, subject to judicial review by the courts and the institutions of administrative law, the role of the ABT is to protect the public interest by:

- undertaking those functions set down in the Act; and
- having regard to the policy objectives in the Act and policy statements on broadcasting made by the relevant minister pursuant to the Act.

" broadcasters or licensees are accountable to the Tribunal and not to any one else."

In short, the Tribunal is the Parliament's regulator of commercial broadcasting, and the recommendation I have just read out makes this abundantly clear. It must surely follow then, that if the words 'accountability' or 'public accountability' are to have relevance or meaning, broadcasters or licensees are accountable to the Tribunal and not to any one else.

The fallacy of broadcasters being accountable to the public gained currency with the Tribunal's 1977 report, Self-Regulation for Broadcasters. This concept of public accountability is a misnomer. Licensees are not directly accountable to the public but to the regulatory authority, the Australian Broadcasting Tribunal, by means of a process of public participation. The power of the Tribunal over licence renewals, for example, demonstrates the accuracy and relevance of the committee's approach to accountability.

Recognition of the reality of licensees being accountable to the Tribunal should reinforce the role of the Tribunal as the protector of the public interest.

Broadcasters are accountable to the Tribunal which in turn is accountable to the Administrative Appeals Tribunal for the quality of some ABT decisions. This is what our report refers to as the second tier of accountability. It is a tier some witnesses, particularly the Australian Broadcasting Tribunal, want removed.

The Administrative Review Council is examining the need for appeals to the AAT from Tribunal decisions. Because of this the committee made no recommendation on this matter.

The Broadcasting Tribunal bases its case for exemption on two special features, the public inquiry process and the expert body argument. The committee report did not concede either argument.

In the broadest sense, appeals to the AAT are a check against the possible misuse of power. It appears to me, and this was not in the report, that administrative law is an application to public sector bureaucracies of Lord Acton's famous dictum: power tends to corrupt and absolute power corrupts absolutely.

It is in this way that the appeals debate should be resolved, by considering the importance of those decisions. The committee endorsed the view that review on the merits of ABT decisions is part of an accountability process which in its essence should be no different to other important decisions made by other organisations subject to review by the Administrative Appeals Tribunal.

I don't intend to cover all of the areas of recommendation within our report. I will however make comment about one more and that is our recommendations relating to the ABC and SBS coming under the umbrella of the ABT.

It has been argued that these recommendations cover an area outside our reference. I refute that argument. It was clear to us that if our prime aim was to ensure that the ABT could properly administer its responsibilities, it must have control of the whole industry, not simply part of it. It was also clear that, unless the ABC and SBS were required by law to participate in areas of ABT interest, such as standards, the current violence inquiry, possible future area inquires, Australian content regulations, their level of participation would probably be less than satisfactory.

Complaints from some ABC and SBS staff and management show that they have not only missed the reasons behind the recommendations, but also that they do not understand the current standards set by the ABT.

It is my view that the standards would not inhibit in any way the presentation of quality programs.

Before criticising our recommendations, the ABC and SBS should first obtain copies of the standards from the ABT, read them and apply them, rather that simply pointing to examples of 'excessive censorship' by the networks.

Before coming back to our original

discussion topic, I would like to raise one other recommendation: the one regarding the introduction of a 'trustee' system of major share transactions similar to that in use in the United States.

The current inquiry by the ABT into the Bond Corporation presents a scenario which, in my view, makes introduction of the 'trustee' system imperative.

Should the ABT find that Alan Bond is not a fit and proper person to hold a licence, it has two choices: either to require Alan Bond to be removed from a position of influence on the Board of the Bond Corporation; or to order divestiture by the Bond Corporation of the Nine Network. In either instance, a period of grace would almost certainly be provided to allow this to be done. Leaving Alan Bond in a position of influence over the company holding the licence during this period of grace, this would clearly be a ludicrous situation.

If the ABT had the power to require the transfer of shares to a trust arrangement this situation could be avoided.

Our first report we believe, provides the framework to allow the ABT to deal with its existing responsibilities in a more effective and efficient way. It provides the ABT with more options to deal with issues but also ensures that individuals are provided with the necessary protective mechanisms in the event of excessive ABT decisions as they arise.

The next report, will I hope address the issue of tying all of the new technologies under the same umbrella of the ABT and provide the necessary protective mechanism if required to ensure that existing program quality or choice is not effected by new concepts such as PAY TV if and when they are introduced. Just as importantly we would hope that whatever new options are introduced, it is done in a way which ensures a further diversity of ownership and a continued separation of ownership between the arms of the media.

This will we hope ensure that we not only have a top quality broadcasting industry in Australia but one which provides a wide range of diverse views and options.

Note: The Chairman of the Australian Broadcasting Tribunal, Deidre O'Connor was also a guest speaker at the CAMLA lunch. She acknowledged the recommendations of the Saunderson Committee report and expressed appreciation for the positive way it highlighted the ABT's limited powers and inadequate resources for regulating the broadcasting industry.

The ACLA/MLA merger completed

The President's address to the annual general meeting

We have not provided much information during the year about how our association was functioning, or where our plans had reached. That is because most of the year was consumed in strenuous but successful, efforts to build up the organisation. Throughout the year, the merger of the Media Law Association and Australian Communications Law Association has been executory and inchoate. Our animation has been slightly suspended. A report on progress would have said that great things would be happening at the time known in the US computer industry as 'real soon now'.

Happily, the Annual General Meeting marked the end of the 'real soon now' stage. It is time to tell of the work which went into building the new framework of the association.

The history of the decisions to merge the MLA and ACLA is well known. At the AGM, both former organisations disappeared into the Communications and Media Law Association, the renamed company limited by guarantee which was formerly the corporate base of the MLA. It was a considerable achievement to bring the results of the negotiations of 1987 and earlier, in which our two vice-presidents Alec Shand and Stephen Menzies represented the two sides, to fruition. Hugh Keller kindly prepared the final documentation to bring the changes into effect.

Some of the greatest challenges in the last year went beyond the legal framework to the human framework of understanding, contact, enthusiasm and cooperation. This was not like the merger of the two businesses with offices, staff and resources. It was the merger of two non-profit organisations both depending largely on voluntary work. By unfortunate coincidence, both organisations had run out of part-time administrative support just around the time the merger started to happen. The Australian Chamber Orchestra had the good fortune to hire Roz Gonczi who had provided outstanding administrative support to ACLA. The MLA was in a similar condition.

Vital continuity

Some vital continuity was provided by our treasurer Des Foster, who maintained the financial life of our organisation whilst it was on the operating table undergoing merger surgery. There were a lot of demands on his time and complications, including different membership fees and payment dates for the two previous associations, different banks, accounts and authorities, different membership records, and varying cost structures and circulations of the Communications Law Bulletin.

Into the administrative void stepped Cleo Sabadine, a person of great experience in communications who had recently retired from running the secretariat of the Broadcasting Tribunal. From a standing start, and working from home without basic office resources, Cleo built up what is now a very reliable administrative base for the Association. Members should be aware that a lot of the work she does for us is voluntary.

The last character in this dramatis personae of people who created order from chaos is the honorary secretary, Victoria Rubensohn. Victoria has brought a superhuman level of energy and inspiration to every activity and function of the Association: and she has done this despite the travels and travails of her demanding job.

Looking at the association as a whole, nobody could have anticipated the number or the height of the administrative hurdles we had to jump. On the other hand, the main problems which people did foresee before the merger did not happen. Perhaps the lesson is that a foreseen problem is unlikely to cause trouble: and vice versa. Some had doubted whether the two existing committees of ACLA and MLA would work happily together. In reality, there was no issue on which people split along ACLA/MLA lines, formally or informally. There was unbounded goodwill, no faction, and no unbalance of one side or the other. It was a single, harmonious committee from day one.

Making way for new blood

Another legitimate fear was that the transitional arrangement under the merger documents, whereby large existing committees combined into one would produce unweildy meetings. In fact, we sometimes had the opposite problem of barely a quorum present. Because we were two merged existing

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The conversion of metropolitan commercial radio services to FM

Since the introduction of commercial FM radio services in Australia about nine years ago, licensees of commercial AM radio services have been seeking the opportunity to convert to the FM frequency band.

Paul Marx assesses the progress of the conversion procedures

Prior to the introduction of new FM services many AM licensees were advocating the proposition that FM radio represented a technological advance similar to the introduction of colour television transmissions and, as such, existing AM radio licensees should be permitted to convert to FM as a matter of right.

Representations to Government advocating AM/FM conversion intensified as the new commercial FM radio services attracted larger audiences and their advertising revenues increased largely at the expense of many long-established AM services. The AM licensees argued that the increased popularity of commercial FM radio was attributable to superior technical quality of FM transmissions, particularly for the broadcast of music. The FM licensees attributed their success to better programming and management of the new services.

Conversion of commercial AM services to FM has always been a relatively simple administrative procedure pursuant to the Broadcasting Act 1942 ("the Act"). The technical transmission aspects of commercial radio services (AM v. FM) are matters for the Minister. S.89D of the Act provides, inter alia, that where the Australian Broadcasting Tribunal ("the Tribunal") has determined that a licence should be granted to a person, the Minister shall grant the person a licence warrant in respect of the licence that specifies the technical conditions that are to be complied with. The definition of "technical condition" in s.4(1) of the Act includes "the design, siting, installation, maintenance or operation (including operating power, constancy and frequency) of the radiocommunications transmitter or transmitters to be used for the transmission of programs pursuant to the licence".

Section 89(D)(6) provides that the Minister may by notice in writing to the licensee vary any of the technical conditions to be applicable to the licence warrant. Before so doing the Minister must give the licensee notice in writing of the proposed variation informing the licensee that it may make representations to the Minister and the Minister is to have regard to such representations. Hence the conversion of a commercial radio service from AM to FM is effected by the Minister varying the frequency of the relevant radiocommunications transmitted or transmitters specified in the licence warrant. There may also be a requirement pursuant to s.125D of the Act that the Minister consult with representatives of the Australian Broadcasting Corporation, the Special Broadcasting Service and other licensees should conversion of a particular service from Am to Fm affect them.

Nothwithstanding the relatively simple administrative procedures involved in the conversion of Am radio services to FM, amendments have been made to the Act. Those amendments have been made for two reasons, namely the number of available FM frequencies (which it seems is less than the number of AM licensees desirous of converting to FM) and the desire to raise substantial revenue from the process of conversion.

The Act was amended in 1987 (Act 134 of 1987 s.3) by the insertion of a new s.82AA. That section provides that a fee (in some instances several million dollars) is to be paid by successful commercial radio licence applicants on the grant of proposed licences. The payment of such an "establishment fee" which is calculated by reference to the licence fee payable by relevant existing radio licensees (and hence the "gross earnings" of such licensees) must be made in full prior to the grant of the subject licence. Its introduction was a consequence of the abandonment of the Government's proposal to "auction" new commercial radio licences because of likely rejection of the necessary legislative amendments in the Senate by Coalition Senators.

In conjunction with the introduction of the requirement that new commercial radio licensees pay an "establishment fee", an amendment was made to the Radio Licence Fees Act 1964 ("the Licence Fees Act"). In 1987 s6B was inserted to provide for the payment of a fee in circumstances where a licence warrant granted in respect of a non-metropolitan commercial radio licence is varied by the Minister at the request of a licensee so as to authorise very high frequency (i.e. FM) transmission. The term "non-metropolitan commercial radio licence" is defined in s.6B(3) to mean a commercial radio licence other than a large city licence. A commercial radio licence is a "large city licence" if the service area of the licence includes the general post office or main post office of a city or town and the population of the statistical district or statistical division for the city or town exceeds 800 000, or such higher figure as is prescribed (s.6B(2)). The fee payable is to be an amount equal to 50% of the "establishment fee" payable under s.82AA(1) of the Act in relation to a new licence and is only payable where the Minister publishes a notice (after 1 March 1987) inviting applications for the grant of a new commercial radio service having a service area substantially the same as the existing AM licence. In other circumstances the Minister is unlikely to vary licence warrants to permit AM/FM conversion of non-metropolitan commercial radio licences.

In most instances to which s.6B of the Licence Fees Act is applicable there is no relevant shortage of FM frequencies. The 1987 amendment to the Licence Fees Act can only be attributed to the legislature's desire to raise revenue from the AM/FM conversion process. To date one non-metropolitan AM service, namely 4GG, Gold Coast (now 4GGG) has been converted from AM to FM upon payment of the fee specified in s.6B of the Licence Fees Act. Conversion from AM to FM of "non-metropolitan" commercial radio licences is not a right conferred on AM licensees subject to the payment of the prescribed fee. A variation of the relevant licence warrant pursuant to s.89D(6) of the Act is a matter for the Minister. It remains to be seen whether the Minister will

permit AM/FM conversion in service areas such as Newcastle, Hobart and Townsville where there are more than one existing AM radio services. Conversion in such areas appears likely and the Minister's Department has already prepared draft guidelines in respect of at least Townsville.

AM/FM conversion in capital cities was addressed by the then Minister for Transport and Communications, Senator the Hon. Gareth Evans Q.C. in August 1988 when he unveiled his grand plan for the development of metropolitan radio services (Media Statement 83 (A)/88 dated 9 August, 1988). At that time the Minister stated that a "number of long-standing broadcasting policy issue are simultaneously resolved by the National Plan for Development of Metropolitan Radio Services announced today following final approval by Cabinet last week." Senator Evans stated that the problems and issues addressed by the "Plan" included, inter alia,:

"• the strongly pursued claim of many existing AM licensees to convert to FM on commercial, and in some cases technical, grounds
- the need to guarantee a secure and technically effective future for the Radio for the Print Handicapped (RPH) service
- the need to find a delivery mechanism for Parliamentary broadcasts which does not hopelessly disrupt ABC programming, but is not prohibitively expensive to establish
- the need to not only minimise Government financial outlays to secure these various objectives, but to ensure an appropriate financial return to the community from the right to profit from the respect of a scarce public resource."

The grand plan for the development of metropolitan radio services not only contemplated AM/FM conversion. Stage 2 of that plan contemplated the introduction of two further FM frequencies in each of Sydney, Melbourne, Brisbane, Adelaide and Perth in the period 1990 – 1992. This article does not consider Stage 2 of the grand plan.

Because of the shortage of FM frequencies in capital cities it was necessary to amend the Act to provide a mechanism to allocate a scarce resource. According to the current Minister, the Hon. Ralph Willis, MP of "the 27 AM commercial licensees Australian-wide eligible to apply for conversion of their licences, 24 have expressed interest in tendering" (Media Statement 25/89 dated 18 April 1989). The amendments to the Act were made by the Broadcasting (National Metropolitan Radio Plan) Act 1988 ("the Radio Plan Act"). The Radio Plan Act inserted a new Division 1A of Part IIIB of the Act and new sections 89DAA to 89DAP. The License Fees Act was also amended by the Radio Licence Fees (National Metropolitan Radio Plan) Act 1988. The latter act inserted into the Licence Fees Act an obligation on the part of relevant licensees to pay a fee upon conversion from AM to FM. That fee is determined according to the formula B – V where B is the amount of the bid made by the successful converting AM licensee and V is the value of the AM licensee's existing transmission facilities. That amendment satisfied the legislature's requirement to raise revenue from AM/FM conversion. The Broadcasting (National Metropolitan Radio Plan) Bill amended the Act by inserting in the ACT procedures for the submission and processing of bids to be made by AM licensees desirous of converting to FM. Those amendments to the Act were designed to overcome the problem of allocating a scare resource, namely the limited number of available FM frequencies. The solution to that problem was to require AM licensees to participate in an auction. The auction for FM frequencies in large cities or towns is conducted as follows:

- The process of AM/FM conversion commences when the Minister publishes a notice in the Gazette inviting AM licensees eligible for conversion to lodge applications with the Tender Board of the Department of Transport and Communications. That Tender Board is established under s.89DAF of the Act. The Minister published such notices on 18 April, 1988 inviting tenders for the conversion of a total of 10 AM services (2 in each of Sydney, Melbourne, Brisbane, Adelaide and Perth). The Minister expects all of the new FM services to be operating by the end of 1989 except in Brisbane where the frequency for the second service "will not be available until 1991" (Media Release 29/89 dated 18 April 1989).
- The matters which must be included in the Minister's notice inviting applications for AM/FM conversion are specified in s.89DAB.
- In response to the notice by the Minister, AM licensees may lodge with the Tender Board an application for conversion to FM. That application must be accompanied by various documents (s.89DAE) including a sealed envelope that contains a written statement of the amount of the licensee's bid for conversion to FM and statements by the Secretary of the Department of Transport and Communications approving the technical adequacy of the AM transmission equipment to be transferred to the Commonwealth as part of the conversion process and stating the value of the transmission facilities. That equipment is to be used by the Commonwealth (for Parliamentary broadcasts or radio for the print handicapped)
- The amount of the bid submitted by a licensee must be expressed as a single amount and the bid must exceed the value of the transmission facilities (s.89DAE). Prior to making an application for conversion an AM licensee must have paid to the Commonwealth a deposit. The amount of that deposit is specified in the Minister's notice inviting applications for conversion. (ss.89DAE and 89DAM).
- Section 89DAH specifies the manner in which applications for conversion to FM are to be processed by the Tender Board. Essentially, that Board will open the envelopes containing the various bids and prepare a list that sets out the names of the licensees and the amounts of their bids in descending order according to the amounts of the bids. Where the bids of two or more licensees are the same, the order in which the licensees' names are to be set out on that list are to be determined by lot. The Minister has previously determined the amount of the reserve that is to apply to the conversion of the FM licences concerned. That reserve naturally would be unknown to the various licensees bidding for conversion (ss89DAG and 89DAH). An application by a licensee whose bid is below the reserve is to be rejected (s.89DAH)
- After the Minister has received the Tender List from the Tender Board he is to publish a notice in the Gazette setting out the names of the licensees on the list according to their order on that list (s.89DAJ).
- The Minister is obliged to convert to FM the licence of an AM licensee who has been offered FM conversion and who meets the necessary pre-conditions for conversion before the end of the period specified in the notice from the Minister containing the offer of conversion (s.89DAP).

It remains to be seen how many metropolitan AM licensees will eventually convert to FM and the monetary value placed by such licensees on the ability to transmit on the FM Band. Documents considered by officers of the Department of Transport and Communications have estimated that tender bids for conversion to FM of an AM service in Sydney or Melbourne could be in the range of $16.8 million to $28.0 million. Such projected bids are based on an estimated dollar value of an FM frequency in Sydney or Melbourne of $42 million.

A successful tenderer for AM/FM conversion is some cities such as Sydney, is likely to encounter practical problems in implementing the conversion. The

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Judicial review of licence grant decisions by the Australian Broadcasting Tribunal

Two recent applications for judicial review of a decision by the Australian Broadcasting Tribunal ("ABT") to grant an additional commercial radio licence have been dismissed by the Federal Court.

The judgement by His Honour Justice Davis is reviewed by Paul Marx of Boyd House & Partners

The proceedings (Independent F.M. Radio Pty Limited v. Australian Broadcasting Tribunal and Anor NG 1047 of 1988, delivered 21 April, 1989 and Rich Rivers Radio Pty Limited v. Australian Broadcasting Tribunal G 1057 of 1988, delivered 21 April, 1989) were commenced by Independent F.M. Radio Pty Limited ("IFM") and Rich Rivers Radio Pty Limited ("Rich Rivers") following a decision by the ABT in June 1988 to grant to Goulburn Valley Broadcasters Pty Limited ("GVB") a new commercial radio licence to serve the Shepparton area of Victoria. IFM was one of the unsuccessful applicants for the grant of the licence. Rich Rivers was not an applicant but had submitted to the ABT that its interest as the holder of a commercial AM radio licence (2QN) in the Riverina area would be prejudiced by the grant of the proposed licence. The service area of 2QN overlapped the service area of the proposed new licence to the extent that approximately 18% of the persons resident in the Shepparton service area were also situated in the 2QN service area. Rich Rivers submitted to the ABT that the viability of 2QN and that of other services in the area could be prejudiced by the grant of the proposed new commercial FM licence.

In the proceedings commenced by Rich Rivers various grounds of review were put by the applicant to the Federal Court including a failure to comply with the principles of natural justice, that the procedures required to be observed by the ABT pursuant to ss.25(1) and 25B(1)(d) of the Broadcasting Act 1942 (requirements to make a thorough investigation and to give reasons for decisions) were not observed, that the ABT took into account irrelevant considerations and failed to take into account relevant considerations and that there was no evidence or other material which would have justified the decision.

In the judgment His Honour Justice Davies said that he agreed that "the reasons given by the ABT did not really grapple with the question as what is the meaning of the term 'commercial viability' which appears in s.83(6)(c)(iii) of the Broadcasting Act or the question whether station 2QN would be likely to remain commercially viable in that sense after the introduction of the new licence and did not discuss nor delineate the ambit of the matters to be considered in determining 'the public interest' for the purposes of s.83(6)(c)(iii)." However Davies J. noted that the challenge made to the Federal Court was not that the ABT applied the wrong legal test but that it failed to give reasons for its decision. That challenge "was misconceived in that the ABT set out in detail the substance of its reasoning."

The submission by Rich Rivers that there was no evidence upon which the ABT could have concluded that Rich Rivers would remain commercially viable in the event of the grant of a new FM licence in the Shepparton area was rejected by Davies J. who held that on the evidence before it, the ABT "was entitled to conclude the station 2QN would be able to survive as a station and be able to provide an adequate and comprehensive service."

In the course of the proceedings it was submitted on behalf of Rich Rivers that there was no evidence before the ABT that the commercial viability of the Shepparton AM commercial radio station would not be seriously affected by the introduction of the new FM station. The licensee of 3SR has been a party to the ABT's inquiry but withdrew at an early stage. Rejecting that submission Davies J. said that the ABT "was entitled to draw the inference that 3SR did not consider its future jeopardised by the proposed new licence." The lack of submissions by the licensees of other overlapping services, other than 2QN, also entitled the ABT to conclude they thought their viability was not threatened by the new licence.

As regards the submissions by Rich Rivers that the ABT failed in its duty to make a thorough investigation in that it placed an onus upon Rich Rivers and drew adverse inferences from what it saw as Rich Rivers' failure to provide evidence to it, Davies J. said:

"However, the ABT proceeded by means of an inquiry procedure, in which interested parties participated and in which all parties were given a fair opportunity to make submissions and bring forward material for the ABT's consideration. The ABT was not bound itself to make inquiries of the persons who advertised with 2QN to ascertain what their reaction might be to the establishment of a new FM station at Shepparton. Indeed, the ABT would have prejudiced its impartiality had it done so. In expressing its lack of satisfaction with respect to certain matters which had merely been alleged before it, the ABT was not placing any improper onus of proof upon a party but was exposing its reasons as to why, having regard to the totality of the material before it, it was not satisfied either that the commercial viability of any other licence would be unduly prejudiced or that the public interest would be served by refusing the grant of the licence."

In the proceedings commenced by IFM most of the grounds for review of the ABT's decision to grant the new FM licence to GVB related to financial matters discussed by the ABT in its reasons for decision. In deciding between IFM and GVB for the purposes of s.83(9) of the Broadcasting Act ("the most suitable applicant") the ABT found the crucial marginal factor to be in financial considerations. As stated by Davies J. ".... GVB's provision of fewer facilities and of full automation, about which the

ABT had conceded there were doubts, turned the case [before the ABT] in its favour."

The IFM proceedings raised the issue as to the function of the Federal Court in proceedings for judicial review of decisions such as licence grant decisions made by the ABT. Counsel for IFM submitted that the ABT took into account irrelevant matters, namely incorrect findings of fact and failed to take into account relevant matters, namely the correct facts.

Davies J. agreed that the ABT had made some errors of fact and that "its decision was to that extent made on wrong facts and to that extent was unfair to IFM." The ABT reached wrong conclusions as to debt to equity ratio and the use made by the ABT of IFM's proposals concerning overdraft and leasing facilities. His Honour stated that these were unsatisfactory aspects of a finding by the ABT that GVB's estimates of revenue were preferable to those of IFM. The ABT's statement that IFM's revenue projections were at the top of the range "was not a fair description of them", the ABT did not explain why a lowering of proposed advertising rates would have a serious effect on its revenue projections and the ABT did not give adequate support for certain of its findings as to the consequence of advertising rate attrition.

Davies J. found that the ABT had made some findings of fact that, in his view, were wrong on the material before the ABT and to that extent took into account facts that were wrong and failed to take into account facts that ought to have been found on the material before the ABT. That, however, was held not to be sufficient to found a conclusion that irrelevant considerations were taken into account or that relevant considerations were ignored. His Honour said:

"It is necessary to find that the errors were of such a nature that no reasonable decision-maker could have made them or that there was no evidence before the ABT to justify the findings or that the findings were in some like vein an improper exercise of the decision-making power."

In conclusion Davies J. stated:

"On the whole, I find myself in the same position as was Pincus J. in Western Television Limited v. Australian Broadcasting Tribunal, cited above, where His Honour at p.429 expressed the view that a finding was not 'in the least convincing' and the 'I do not think any court would have made a finding adverse to the applicant on the basis of such tenuous material as is mentioned in the report' but that the Tribunal's finding nevertheless did not involve an error of one of the varieties mentioned in s.5 of the Adjr Act in the end it amounts to a judgment as to whether the approach taken by the ABT with respect to the several matters I have discussed in these reasons was an approach that no reasonable decision-maker would have taken."

The decision in Independent F.M. Radio Pty Limited v. Australian Broadcasting Tribunal and Anor gives little comfort to unsuccessful applicants aggrieved by ABT decisions to grant new licences. The legislature has not thought it appropriate to confer on such persons a right to apply to the Administrative Appeals Tribunal for review. Should such a right of appeal arise under s.119A of the Broadcasting Act the Administrative Appeals Tribunal would be constituted by a presidential member alone.

Paul Marx
Boyd House & Partners
24 April, 1989

ACLA/MLA merger

from p9

committees rather than a freshly-elected new one, we missed the opportunity to take in some new blood. I frankly encouraged existing committee members who would not be able to make an active contribution during the coming year to make way for new blood. For that purpose, a number of distinguished committee members who had served well in the past resigned or did not stand for re-election this time around. Thanks to them all. The vacancies allowed us to get our vast committee membership down to 30 members, including the vital infusion of new members from diverse backgrounds.

Our events and publications require less explanation, because they have been visible to all. A number of promised events did not get off the ground due to lack of volunteers, but all those which were held were well attended and successful. There were luncheons addressed by Henry Geller, the US communications lawyer and John Dowd, Attorney-General of NSW who spoke about defamation. There was also the evening OTC/IIC/CAMLA function addressed by Veronica Ahearn, a US telecommunications lawyer, and Peter Leonard of Sly &Weigall. The dinner following the AGM addressed by Gleeson CJ was a resounding success.

Communications Law Bulletin

The most manifest advance in 1988 was the upgrade of the Communications Law Bulletin. The current very successful approach was reached through effort, planning and experiment. Many were involved, but particular tribute must be paid to Michael Berry, the editor. Despite his commitments as a TV producer, Michael has done an outstanding job. Most of his work, like Cleo's, is unpaid. The Bulletin is dependent on the submission of articles by members and others. Don't be shy. Send your articles to the editor, or phone him to ask if he would be interested. There is always a shortage of articles about defamation, contempt and other basic areas of law relating to the content of communications. If you are working in that area, you should consider sharing your ideas through the Bulletin.

I have mentioned only a few names among the many committee members and others who built up the organisation in the last year. The expression *unius principle* does not apply to the many others not mentioned. Suffice it to say that the combined effort of all has produced a well-organised, united association with the promise of more activities in the coming year. Members based in Melbourne have expressed enthusiasm for holding some functions there, which is likely to happen. It is likely that Melbourne will be a centre of the new telecommunications law, in addition to traditional areas, as the Government has announced that Austel will be located there.

In conclusion, I would like to emphasise that ours is an independent and voluntary association. We do not provide the smooth, professional level of service which you would find in an industry association with a paid staff and an office. This fact is at its most obvious in the organisation of functions, when some people deal with Cleo Sabadine and other helpers as if they were the reservations staff at the Waldorf Astoria. What we do provide is something unique, inimitable, and priceless: an independent forum, in print and at functions, where people can come together from all the diverse avenues of communications law to share ideas and enjoy themselves. We will provide more of it in 1989.

This is the written version of Mark Armstrong's shorter oral address given at the meeting. Mark Armstrong is the Law Foundation Visiting Professor of Communications Law and Chairman of the Broadcasting Council.

Contributions
from members in the form of letters, feature articles, extracts, case notes etc. are appreciated.

Editorial submissions
should
be posted to:

The Editor
Communications Law Bulletin
4 Tulip St Chatswood 2067

Examining the procedures for granting FM radio licences

In the last issue of the Bulletin, Paul Paizies examined the ABT's inquiries into the granting of new FM radio licences in Newcastle and on the Gold Coast.

Now that the first four major inquiries have been completed, Martin Cooper analyses the procedures used by the ABT for awarding FM radio licences and asks, how appropriate they are for future inquiries.

Broadly speaking, the Australian Broadcasting Tribunal has adopted a documentary-based system for licence enquires accompanied by a brief oral presentation without cross examination of witnesses.

The documentary procedure is highly formalised, subject to a very strict timetable and involves massive amounts of paper since all parties must be circulated with all documents.

In brief outline the procedure is as follows:

1. Each party is given approximately eight (8) weeks to prepare and file a detailed application accompanied by a large number of schedules which set out matters such as market research details, engineering details, corporate structure details, programming details and so on.
2. Each party is given an opportunity to ask questions of the other parties.
3. Each party is required to file supporting documents which will be used in presenting the application to the Tribunal, particularly including market research and engineering work.
4. Parties are given an opportunity to reply to the questions asked of them by the party.
5. Each party is required to submit a Statement of Facts and issues upon which they propose to rely in presenting their case to the Tribunal.
6. Each party is required to submit a list of witnesses and a Statement of Evidence to be given by them to the Tribunal.

The total documentary preparation has in recent enquiries required up to one thousand (1000) pages of material from each applicant and thus, where as many as nine (9) parties to an enquiry exist the volume of paper can be imagined.

The presentation of each party's case was preceded by an arbitrary determination of an order of presentation by which the parties present their case "in chief" by assembling the board of directors of the company (and other persons if deemed desirable) for presentation of the partys case and "examination" by the Tribunal.

Subsequently, the parties present a final address to the Tribunal in reverse order to the presentation of the cases "in chief".

"A great deal of time has been expended on examining corporate structures, carrying out company searches..."

Generally speaking, the parties have intended to use the case "in chief" to speak to their written application and to emphasis their strengths and weaknesses. The final submission has been used to summarise and to criticise the cases put by other parties. Final addresses have normally been confined to one hour or less.

From a practitioners point of view, the procedure as presently laid down is impossibly complex and inefficient. The shear volume of paperwork makes a proper analysis and assessment of all applications almost impossible. Since the Tribunal has not clearly indicated which areas the applications it regards as most significant, the parties have felt it necessary to respond to almost every detail so that, for example, a great deal of time has been expended on examining corporate structures, carrying out company searches, examining company minutes and records to attempt to discover the examples of the failures to comply with the strict requirements of the Company's Code. Such activity would seem to be pointless except, perhaps, to establish a disregard for procedural niceties indicating a general unfitness to hold the broadcasting licence.

Equally, minute analysis of each applicant's market research has been necessary in order to attempt to establish which research is more accurate. Since so much of research is qualitative in its processes, such an exercise would seem to be of limited value. Obviously, if the market research has not been carried out by a professional organisation or contains a fundamental flaw such matter might be relevant but minute analysis of research techniques and so on would appear to be an entirely fruitless exercise.

The interview system is also very inefficient. It places great emphasis upon presentational skills and the "showmanship" of individual directors but would seem to have little or no relevance to the vital issue of which board of directors is able to cohere together and act with financial and community responsibility in the organisation of a radio station and its programming.

"Some lawyers have approached the application process as a highly forensic exercise in which every i must be dotted, t crossed and ambiguity exercised"

Because of the interview technique it is notable that a number of applicants have attempted to insert media personalities and "celebrities" on their board line-ups in an attempt to impress with their presentation.

The content has often suffered.

The highly ambivalent attitude of the Tribunal to the use of lawyers and to the scope of their activities in the enquiry process has not only lead to much uncertainty but has multiplied the wasteful work which has had to be undertaken by applicants.

Some applicants have used lawyers to actually present material to the Tribunal whereas others have kept their lawyers very much in the background. Some lawyers have approached the application process as a highly forensic exercise in which every "i" must be dotted, "t" crossed and ambiguity exercised. Again this has lead to great complexity. For example, in the Geelong applications, one party sent out questions to other applicants which in some cases ran to over thirty (30) pages and read very like interrogatories in a commercial litigation matter. They invited replies of equally forensic complexity.

The ultimate criticism of the present procedure must lie in the fact that the generally anticipatory nature of the entire process makes it impossible to engage in any real analysis of applications. If the available audience is known only in the most general outline, if the size of the revenue in the market can only be guessed at, if the influence of overlapping stations and other media can only be guessed at and if the decision of the other station or stations in the market to go FM or not is not known at the time of the application, one wonders how any Tribunal can possibly carry out a realistic and fact based comparison of applications.

"The present system is patently not working and is grossly inefficient"

The present system is patently not working and is grossly inefficient. It has been estimated that each applicant in the Gold Coast spent in total executive time and direct costs more than $300 000.00 in preparing their applications. This means, if combined with the Tribunal's costs in conducting the enquiry, a total cost exceeding $4 000 000.00. Would this money have not been better spent in establishing the station?

If it is accepted that the process does not provide the Tribunal with any real answers as to which applicant is the most suitable to operate the station (except to perhaps eliminate the totally incompetent or the financially insecure), is there not a better system?

It is suggested that the following reforms could be easily implemented and would have a substantial impact upon the cost of Applications whilst providing the Tribunal with a clearer picture of potential applicants:

1. Before applications for grant are called, a "viability" hearing should be conducted at which the encumbent licensee or licensees will be entitled to argue the issue of their commercial liability in the context of the grant of the new licence. Potential applicants should be entitled to appear at this preliminary hearing and to ask questions of the encumbents.
2. An application fee of $25 000.00 per applicant should be charged;
3. These monies would be used to provide a single comprehensive market research and engineering analysis which would be made available to all applicants and which the Tribunal would use as the basis for all factual findings about engineering and audience matters.
4. The Tribunal would assume that all applicants are capable of providing the technical facilities necessary for an appropriate station and examination of issues such as studio size and numbers would be eliminated. Of course, each applicant would be required to give appropriate undertakings in relation to technical matters.
5. The Tribunal would lay down an appropriate corporate structure which applicants are invited to accept. If they wish to use some other structure then this must be specifically justified.
6. The Tribunal would lay down minimum capital requirements for all applicants for each particular station.
7. The Tribunal would lay down a series of criteria which it will use to assess applicants including the desirable level of local anticipation, the minimum amount of local programming, the minimum percentage of Australia content and similar matters.
8. Applications would be very simple in format and would primarily consist of a series of undertakings to comply with the outlined procedures and structures accompanied by schedules in which an applicant's choice to vary from the basic structural guidelines could be set out.
9. Each applicant would have a **private interview** with the Tribunal in which the Tribunal would be free to ask for further explanation of any aspect of an applicant's application or proposed management. At this time the Tribunal could ask for specific undertakings in relation to programming matters.
10. Each party would be given an opportunity to present in writing a final submission in support of its application.

This procedure should reduce if not eliminate the competitive nature of applications. Criticism of other applicants should be discouraged. In certain circumstances the Tribunal might even suggest the amalgamation of two or more applicants which, if the parties agree, would ensure the grant of the licence.

"Criticism of other applicants should be discouraged"

In the private interview process, the Tribunal could "negotiate" with applicants to ensure matters the Tribunal considered were important were included in applications although, of course, applicants would be free not to accept "suggestions" from the Tribunal.

Much greater emphasis should be placed upon the first licence renewal of each successful applicant to ensure that all undertakings given have been complied with unless the Tribunal has been notified and approved the variation from those undertakings. It is the sanction of loss of licence for failure to comply with undertakings which will be the most important part of this reformed licence grant system.

It is suggested that the reforms proposed above comply with the requirements of the Broadcasting Act and yet provide an efficient, cheap and fair licence grant system.

The administrative structures of the Tribunal will not be stressed to breaking point, citizens will obtain additional radio services much more quickly and efficiently and the encumbent will be treated more fairly.

New Telecommunications Bill *from p4*

(5) Clause 52 and the definition of "reserved services" has an expanded operation by the "declaration of policy" contained in Clause 36. By stating an intention to Parliament referable to particular services, but without any attempt to define those services (eg "leased circuit services"), continuing argument will arise as to the proper interpretation of Clause 52. The scope of that argument is evident by the various submissions received by the Department concerning an appropriate definition of those terms. It is wrong to include those terms in the legislation, having regard to their acknowledged ambiguity.

Conversion of metropolitan commercial radio services

from p11

Department of Transport and Communications, on technical grounds, requires FM radio transmission facilities to be sited in the same area as the existing television transmitter facilities. In Sydney that requires FM licensees to instal antennae on either of the two existing towers used by the commercial television services. AM licensees desirous of converting will need to satisfy themselves that the structures of such towers are capable of supporting the additional transmission equipment. The Minister has announced (Media Release 16/89 dated 3 April 1989) that the Federal Government has commissioned an Environmental Impact Statement for a planned replacement broadcasting tower at Gore Hill in Sydney. That tower would be designed to "meet future demand for television and FM radio services in the Sydney region, including an expected five new FM radio services." Nevertheless, the construction of such a facility (which has been foreshadowed for about the past ten years) would seem to be some years away.

The Government's proposal to permit additional utilisation of the FM band by commercial radio services in mainland capital cities (as a consequence of AM/FM conversion and the introduction of new services as part of Stage 2 of the National Metropolitan Radio Plan) also raises issues as to the technical adequacy of the signals provided by the commercial FM radio services in some cities such as Sydney.

The existing commercial FM radio services in Sydney currently are unable to transmit an adequate signal to some densely populated parts of their service areas because of the topography of the area. The same problem would be faced by services converted from AM to FM. That difficulty could be overcome by an amendment to the relevant licence warrants so as to permit the installation of low powered secondary FM transmission facilities (translators) on the FM band. Such a course of action now appears unlikely to be approved by the Minister (notwithstanding the undertaking given by the licensees pursuant to the Act to provide an adequate and comprehensive service) on the ground that insufficient FM frequencies will be available following the implementation of the National Metropolitan Radio Plan.

Paul Marx
Boyd House & Partners
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