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Fit and proper person

Senator Richard Alston, Shadow Minister for Communications, suggests the "Fit and Proper Person" requirement in the Broadcasting Act has been abused by the Australian Broadcasting Tribunal. An alternative approach is outlined.

In 1987, the Prime Minister acknowledged the archaic state of the Broadcasting Act and promised that the Government would urgently reform "this nightmarish legislation".

But for the last two years, it has stood by and done nothing. Meanwhile, the Bond saga has slowly wound its way through the Australian Broadcasting Tribunal and the courts.

Such protracted and expensive courtroom battles are commercially debilitating. Senior executives of a licensee are required to devote many months to protecting a company's legal position rather than pursuing its business interests: an outcome not in the interests of shareholders, the community or the national economy.

It is surely in the community's interests to resolve allegations of breaches of broadcasting standards as expeditiously as possible. This cannot be done while even a relatively minor infringement could in theory lead to a licence cancellation.

Instead of legislating to give the ABT a broader range of discretionary powers or to allow the Federal Court to punish specified transgressions, the Government has allowed the perpetuation of an all or nothing approach. This is not only demoralising and distracting for broadcasters but prolongs the state of crises and uncertainty which continues to bedevil the industry.

The Current position

As a result of the 1981 amendments to the Broadcasting Act, the ABT may refuse, in the public interest, to grant, renew or transfer a television or radio licence to a person (or corporation) unless satisfied that such person is "a fit and proper person to hold a licence".

The phrase "fit and proper person" is not defined in the Act and has been criticised on the grounds that:

- It is so broad as to be quite unpredictable in its ambit. People should not be required to labour under laws and regulations, the scope and meaning of which are not capable of ready comprehension and reasonably precise definition. They have the right to know "where the line has been drawn" so that they can ensure that they do not step over it.
- It inevitably involves a subjective and therefore variable assessment of character and morality.
- Persons have a right not to be subject to onerous penalties for conduct, the legality of which is ruled on subsequently and then applied retrospectively.
- That it judges villains rather than villainy.
- Offenders should not be punished for the same transgression twice. The ABT has in a number of inquiries into fitness and propriety cast its net extremely widely to include consideration of previous convictions for conduct unrelated to broadcasting.

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The rationale

In 1984 the ABT issued Policy Statement 9 which endeavoured to spell out the relevant principles. The rationale for introducing a broad and subjective requirement was expressed in these terms: "The privileged position afforded to licensees, and the nature of broadcasting itself, mean that the standards of conduct and responsibility to the public required of licensees are different to those expected in many other areas of business, where entry is less restricted and public impact not so great".

The scarcity argument is weak. There are many areas of commercial endeavour where entry is restricted by the Government without such a requirement being placed on those enjoying privileged access eg, domestic and international air services into and through Australia; telecommunications and postal services.

The capacity to influence public opinion is admittedly significant but newspaper proprietors have never been subject to this type of regulation. Further, it would be easy to guard against the abuse of media power by developing program standards such as contained in s. 4 (2) (d) of the New Zealand Broadcasting Act which requires broadcasters to ensure that their programs are consistent with: "the principle that different points of view be aired on controversial issues (not necessarily in the same program)."

The Tribunal regards itself as having a very wide discretion as to the qualities which

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it can take into account. It has defined the relevant test as being: "is it likely that the existence or non existence of the quality under examination will adversely affect the manner in which the licence is conducted?" However, it concedes that the test does not make it clear what kinds of matters are to be taken into account.

It has identified the two essential elements of fitness and proprietory as trustworthiness and candour.

Trustworthiness of Broadcasters

According to the Tribunal "a licensee must be a person who can be trusted to:

(a) comply with the requirements of the Act, licence conditions and program standards, and
(b) provide the best possible service to the public, within reasonable financial bounds".

While the relevance of breaches of broadcasting laws is clear the Tribunal has, however, gone well beyond this domain. For example:

- by imposing licence conditions requiring a director of a radio licensee to resign from the board of directors following his conviction for failure to lodge income tax returns;
- holding the use of film tax minimisation schemes by two Packer companies as relevant although such activities were not illegal and did not bear on the performance of Broadcasting Act obligations.

The Tribunal insists that a licensee be trustworthy because the licensee has to be trusted to comply with the Act, standards and licence conditions and to provide the best possible service.

It is not clear, however, why the Tribunal must "trust" licensees in these respects, as licensees are explicitly enjoined to comply with all of these requirements elsewhere in the Act. There is thus unnecessary duplication: licensees must not only comply with the Act but there are separate provisions requiring them to be trusted to do so. This is an unnecessary gloss upon the substantive requirements in the Act.

Candour of broadcasters

The United States approach, adopted by the ABT, has been to impose a duty of candour on a licensee to inform the regulatory body of facts of which it ought to be aware in order to protect the public interest. This amounts to two basic duties:

(a) to notify the Tribunal of any matters which, to the knowledge of the person, might amount to a breach of the Act; and
(b) to supply full and accurate answers to any request by the Tribunal for information which properly relates to the Tribunal's functions.

Even if it is accepted that such obligations are appropriate, it does not follow that they should be imposed under the rubric of the fitness and propriety test. It would be a relatively simple matter for a licence to contain standard conditions imposing such requirements and specifying the consequences of deliberately withholding certain categories of information. The most appropriate regime would probably be a broad range of fines for all withholding offences with only repeated infringement jeopardising the licence.

The ABT argues it is appropriate for it to be able to rely upon licensees to provide full and accurate information when requested and even to volunteer relevant information when not requested. Given, however, the extensive powers of the Tribunal to conduct investigations, compel witnesses to give evidence on oath, to compel the production of documents and the ease with which third parties may make submissions to inquires, it is difficult to see why the ABT is peculiarly dependent on the candour of those it must regulate.

The Relevance of criminal conduct

The 1984 guidelines argue that any criminal conviction may jeopardise a licence - whether it does depend on the circumstances of the case, the nature and seriousness of the offence, how recently it was committed and the circumstances surrounding its commission.

Moreover, the commission of offences involving dishonesty by a director or senior executive are to be taken into account in assessing the trustworthiness of the corporation. Other serious offences would also be relevant if committed by a person in a position to exercise control over the operations of the licensee. This is a thoroughly vague and unsatisfactory situation.

In the absence of specific statutory or licence transgressions the current situation amounts to a pre judgement of guilt. This is analogous to the now discredited notion of consorting which presumes present criminality on the basis of past behaviour.

Nature of the licence

The fitness and propriety test has also been used as a means of achieving policy objectives. For example, the proposed structure of an applicant can be crucial where community participation is regarded as important. The Tribunal has even rejected an applicant as not fit and proper because it did not satisfy the Tribunal's special requirements for a TV repeater station.

These policy objectives could be achieved quite simply by the inclusion of special licence conditions. They have nothing to do with fitness and propriety in the sense that the term is used elsewhere and their employment as a device for ensuring social objectives is a clear abuse of the concept.

Similarly, the fitness and propriety formula has been used to ensure a preferred level of local involvement and association with a service area. Once again, such objectives can be specifically catered for without resort to the fitness and propriety requirement.

Cross media ownership

On the basis of a 1982 Administrative Appeals Tribunal decision the ABT considers that "depending on the particular circumstances" it may take into account the effect of a person's cross media interests when assessing fitness and propriety.

It simply does not make sense to suggest that a company's shareholding interests can be indicative of any moral shortcomings. Not only is this simply an artifice to achieve another policy objective which is easily capable of clear specification, but it once again introduces profound uncertainty into the corporate planning process.

An alternative approach to criminality

In so far as the ABT currently finds it necessary to investigate criminal conduct, it is not well equipped to do so. Such investigations are more appropriately the responsibility of the criminal justice system. Subsequent court proceedings could be seriously prejudiced by ABT inquiries, especially having regard to the increasingly high profile such inquiries are being accorded in the media.

Equally the abuse of "media power" to further a licensee's extra-broadcasting business or political interests would ordinarily be covered by State laws. Had Bond's alleged threat to investigate the AMP Society been established in court of law in New South Wales, it may well have constituted an offence under s.100A of the NSW Crimes Act, 1901. To the extent that existing laws do not

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Fitzgerald on the role of the media

Gary Evans, Editorial Manager of Queensland Press, has selected excerpts from the Fitzgerald Report concerning the role of the media in the reporting of the Inquiry and in dealing with Governments generally.

The Fitzgerald Inquiry could not have proceeded without public confidence, co-operation and support, Commissioner Fitzgerald, Q.C., says in his report.

The power of some of the individuals involved and the type of issues raised were such that it would have been impossible for the Inquiry to have succeeded without such public confidence, co-operation and support, Commissioner Fitzgerald said.

"That meant the Inquiry had to be as open as possible, so that the public, including people with information, could see that it was a genuine search for the truth. Such a course was also necessary so that the Inquiry could generate enough momentum to overcome any attempt which might have been made to interfere.

"Apart from one brief sitting, all the evidence of this Inquiry was heard in public. With a few exceptions, exhibits were made available to the media. Restrictions on publication were generally made only in cases where safety or continuing law enforcement operations would have been jeopardized by openness, or in some instances of pure hearsay which has, in itself, no probative value.

Hearsay evidence

"One of the most difficult and controversial issues facing the Inquiry was whether to admit and allow the publication of evidence with a dual character, including both a hearsay element and an element that was direct and probative. After taking submissions, the Commission decided to admit and allow publication of such evidence which could not be practically excluded or restricted from publication without producing gross distortions in what was publicly disclosed. The solution arrived at was not perfect, but it was the best workable compromise between competing legitimate interests.

"One of the most effective pieces of false propaganda used against the Inquiry, perpetrated by the media, the accused and some lawyers who should have known better, was that "most" or "much" of its evidence was "hearsay". In fact, the vast majority of evidence before this Commission is not hearsay and would be admissible in conventional legal proceedings.

Openess: The pros & cons

"There is no doubt whatsoever that this Commission could not have got as far as it did without openness. But openness also had disadvantages, which varied according to the innocence or guilt of those about whom evidence was given.

"Criminals abused the information they gained, as they did other privileges such as the leave to appear and access to transcripts and exhibits. Public hearings also greatly increased the likelihood that criminals would abscond, hide their illicit wealth and destroy evidence. All of those things almost certainly did occur.

"Meanwhile, individuals had to endure the ignominy of adverse publicity. But openness also helped the innocent. The publication of evidence and allegations brought forward more information and witnesses which, in some cases, helped to rebut allegations. More generally, openness helped to avoid uncertainties which would have bred suspicions and rumours, extending the range of innocent people affected. Of course, innocent people also had the same interest as others in the community in the overall success of the Inquiry, which was dependent on openness.

"So far as possible, steps were taken to lessen the disadvantages of openness. People implicated in evidence were given the right to appear before the Inquiry to make short, unsworn statements refuting allegations and giving their versions of events. The media was also able to seek comments from people named, and publish any statements of denial made outside the Commission.

"Permanent bodies will have to address similar considerations, but the balance which they strike might well be different. If the recommendations in this report are implemented, the permanent body which will continue this Commission's work will be primarily accountable to Parliament. It will still need public support and confidence, and there will be at least some occasions when open hearings will be appropriate."

The Quality of reporting of the inquiry

Commissioner Fitzgerald said that, on balance, the media had been helpful to his Inquiry.

"The efforts of journalists employed by the Australian Broadcasting Corporation and Queensland Newspapers Pty. Ltd were the immediate causes of the Commission being appointed, and these organisations were given leave to appear.

"More generally, all media organisations with journalists attending the Inquiry were able to represent the public to ensure that it was kept informed and that support and co-operation were maintained.

"The media not only heard the evidence, but was allowed to inspect almost every exhibit. Journalists were given a special section of the hearing room: and so far as was within the Commission's powers, their requests for facilities were met.

"Media releases were issued, and as far as possible the media was provided with information in response to requests.

"Determined attempts were made to enable the media to provide an effective link between the Inquiry and the public so as to achieve, as nearly as possible, the situation which would have existed if the community generally had been able to attend the public sittings of the Commission.

"There was for the most part a determined effort to be fair in reporting the proceedings, although there were some lapses in standards which caused concern."

"No proceedings were brought in respect of the many defamatory statements which were published, or the contempts which were committed. Journalists' ethical claims to confidentiality of sources were allowed, even in circumstances of considerable doubt about their validity.

"There was for the most part a determined effort to be fair in reporting the proceedings, although there were some lapses in standards which caused concern. "Scoops" were reported which unintentionally but unnecessarily hindered the Commission's work.

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"Sometimes admissible evidence with a "hearsay" component was reported as though the hearsay was probative. The names of prominent persons mesmerized some journalists and their employers.

"After Commission appeals for careful reporting, many reporters constantly described all evidence as "hearsay", even when it was clearly direct testimony.

"As well, sections of the media constantly claimed that most of the evidence was hearsay when in fact the vast majority of evidence accepted by the Commission was not hearsay and had no hearsay element. Almost all would have been admissible under the normal rules of evidence, provided that there was a proper understanding of the issue to which the evidence was material, and of its probative effect. Journalists were unfortunately encouraged in this aspect of misreporting by some of those who were the subject of allegations and by some lawyers.

"Other allegations aimed at undermining the Commission were published on the basis of rumour or misinformation from sources who had reason to fear the Commission's work. As a result, the public was misinformed.

"With some notable exceptions, there was insufficient careful or reasoned media analysis of the Commission's work. Most criticism was ill-considered or based on misconceptions, while the real issues were neglected.

"Some damaging reports were blatant propaganda and others were unsubstantiated and recklessly, if not deliberately damaging. Some created unrealistic community expectations, while others eroded essential public support. At the very least, controversies raised by such reports distracted Commission resources and energies from other pressing tasks.

"Nevertheless, there is no doubt that the Commission could not have achieved its task in secret. The openness of the hearings and the work of responsible journalists have, it is to be hoped, laid the basis in the public mind for the process of reform to begin."

The Use and abuse of media

Commissioner Fitzgerald said the media was one of the most important and effective mechanisms for the control of powerful institutions and individuals by reason of its ability to sway public opinion.

"Those who wish to mould public opinion must do so largely through the media.

"The media played a part in exposing corruption, and two media organisations contributed to the setting up of this Inquiry.

"Unfortunately, it is also true that parts of the media in this State have, over the years, contributed to a climate in which misconduct has flourished. Fitting in with the system and associating with and developing a mutual interdependence with those in power have had obvious benefits.

"The complementary techniques of secrecy and news management allow governments to exercise substantial and often disproportionate influence on what is published in the media.

Leaks: scoops or manipulation

"The media is able to be used by politicians, police officers and other public officials who wish to put out propaganda to advance their own interests and harm their enemies. A hunger for 'leaks' and 'scoops' (which sometimes precipitates the events which they predict) and some journalists' relationships with the sources who provide them with informatin, can make it difficult for the media to maintain its independence and a critical stance. Searches for motivation, and even checks for accuracy, may suffer as a result.

"In Queensland, Government reports and information are invariably 'leaked' to selected journalists who are able to delude themselves that they are not being used, but on the contrary are establishing and maintaining contacts which help them in their appointed task of discovering information and communicating it to the public. Should these journalists ever 'bite the hand that feeds them', the flow of information would presumably dry up, or be diverted to a rival media outlet or colleague.

"Instead of 'leaks' becoming an alternative to officeial information, they become a way of making the media act as a mouthpiece for factions within the Government.

"This places an extra responsibility on the journalist. Both the journalist and the source have a mutual intreest: both want a headline. Yet if the journalist is so undiscriminating that the perspecitive taken serves the purpose of the source, then true independence is lost, and with it the right to the special privileges and considerations which are usually claimed by the media because of its claimed independence and 'watchdog' role.

If the independence and the role are lost, so is the claim to special considerations.

"It is legitimate and necessary for Government Ministers, departments and instrumentalities to employ staff to help ensure the public is kept informed.

Government media units

"Media units can also be used, however, to control and manipulate the information obtained by the media and disseminated to the public.

"Although most Government-generated publicity will unavoidably and neccessarily be politically advantageous, there is no legitimate justification for taxpayers' money to be spent on politically motivated propaganda.

"The only justification for press secretaries and media units is that they lead to a community better informed about Government and departmental activities. If they fail to do this, then their existence is a misuse of public funds, and likely to help misconduct to flourish.

Abuse of defamation proceedings

Commissioner Fitzgerald was particularly critical of the political use of defamation actions.

"The right to voice dissent from the opinion of the Government and its manner of decision-making are no less important for the established Opposition party or parties.

"A parliamentarian's role to review and constructively criticize Governmental activity could be hampered by being inhibited from speaking out publicly by threats of claims for damages. This is particularly so if the defamation actions which result are funded out of the public purse.

"The use of public resources at any time or in any way to inhibit or suppress the expression of opposing political opinion or a criticism of any administration is wholly objectionable. Those in public life must accept the risk of criticism even if it is, at times, unfair, unfounded or even mischievous and couched in unflattering or abusive language. While personal abuse and wrong allegations are to be condemned, they do not jusitify the use of public resources to provide legal redress for individual memebers.

"There are ample opportunities for criticism or allegations to be addressed at a political level, in the parliament and by public statement. An elected representative's response to, or treatment of, wrong or unfair allegaitons is itself a yardstick for that representative's suitability and aptitude for the role.

"If politicians' public statements are wrong or misconceived or mischievous or malevolent, that should be demonstrated in public exchange. The politicians and their party will suffer the political consequences. That is the only detriment which should normally be involved (criminal offences excepted).

"If members of parliament (including Ministers) choose to resort to legal redress, it should be at their own cost just as any damages recovered would be to their personal material gain."

The law and media contempt: what should it protect?

Professor Michael Chesterman, Australian Law Reform Commissioner,

examines the policy assumptions underlying the law of contempt and argues for reform based on a refocus of such policies.

The law of contempt has been with us for some 700 years. Being a creature of judge-made law it has never been prone to sudden and dramatic change. This will remain the case unless of course sudden and dramatic change occurs as a result of legislative action by one or more of the parliaments of Australia.

What is media contempt?

There is no precise definition of media contempt. But for the purposes of this paper, I will take it to mean conduct by a media corporation, or by some individual working in the media, which attracts criminal penalties because it falls within one or more of the following categories of contempt of court:

1. **Breach of the Sub Judice Doctrine** – publication of material which has a 'real and definite tendency', as a matter of 'practical reality', to 'prejudice or embarrass' current or forthcoming legal proceedings, whether by exerting influence on one or more of the participants in the proceedings (in particular, the jury or a witness) or merely be pre-judging the outcome of the proceedings without actually exerting any appreciable influence on a participant. Some important exceptions exist, notably for fair and accurate reports of legal or parliamentary proceedings and publications relating to general matters of "public interest". The most important sphere of operation of the sub judice doctrine is the criminal jury trial.
2. **Breach of Suppression Order or Injunction** – publishing material in breach of a court order prohibiting or restricting the reporting of proceedings (a "suppression order"), or in breach of an injunction which either specifically binds the person making the publication or has been granted to preserve the confidentiality of information.
3. **Scandalising the Court** – publishing material which tends to undermine public confidence in the administration of justice, because it unwarrantedly imputes bias or corrupt behaviour to a judge or a court, or suggests that a judge or court acts or has acted in deference to an outside pressure group or institution, or constitutes "scurrilous abuse" of a judge or court.
4. **Breaching Jury Secrecy** – publishing accounts of the deliberations of a jury in such a way as "to interfere with the administration of justice". In Victoria , this vague common law criterion as to whether or not the publication of jury deliberations constitutes contempt has been supplanted by legislation. Elsewhere it survives.
5. **Using Cameras or Sound Recording Equipment in Court** – unless the judge or magistrate orders otherwise, it is a contempt of court for a journalist or any other person to take films, photographs or video tapes of court proceedings, or to record any part of the proceedings on a tape recorder, even though there is no significant disruption of the proceedings.
6. **Refusal to Answer Questions** – any witness, including a journalist, who refuses to answer questions in the witness box for any reason and is not protected by privilege risks being punished by the court for contempt.

Impact on the freedom of the media

The combined impact of these various prohibitions and restrictions on freedom of expression is of course substantial. Not surprisingly, the laws of media contempt are routinely criticised by the media and others as being unacceptably vague and uncertain, unacceptably broad in their scope, grossly unsympathetic to the problems of the working journalist who must prepare copy for publication under considerable pressure from deadlines, unduly repressive and, overall, exerting a chilling effect on freedom of publication in Australia.

On the other hand, it is asserted by many judges, practising lawyers and others that the inroads made by contempt law upon freedom of the media are essential in our society to protect values that must rank higher than freedom of expression. Specifically, these are (1) the proper workings of the system of administration of justice by the courts, and (2) the rights and legitimate expectations of all those citizens who are involved in court proceedings, whether as prosecutors or defendants in criminal cases, litigants in civil proceedings or in other capacities.

It is the relative emphasis placed respectively on these two broad justifications for media contempt laws that I wish to address.

Orientation of contempt law

In order to understand media contempt properly, one must have some general familiarity with the broader concept of contempt in the law. Contempt of court is a broad-ranging doctrine of the common law, empowering judges to impose criminal penalties on any person whose conduct constitutes " interference with the administration of justice".

Three important categories of contempt of court which fall (generally speaking) outside the description " media contempt" are (1) disrupting court proceedings, by such conduct as casting insults or missiles at the presiding judge or magistrate or conducting political demonstrations in court ; (2) disobeying a court order (as is regrettably common in contested family law cases, in particular); and (3) secretly attempting to influence the outcome of a trial by such tactics as threats or offers of bribes directed at judges, jurors or witnesses.

This brief description of the general concept of contempt of court is enough to show that, at least in the rhetoric of contempt, it is the first of the two justifications for media contempt outlined earlier - protection of the administration of justice - that receives most emphasis. Except perhaps in the category of disobedience of court orders ("civil contempt"), the primary question asked by the courts when they are confronted with cases of alleged

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contempt is not " what individual or group of individuals might be prejudiced if we do not punish this conduct?" but rather " does this conduct constitute a threat to the administration of justice? Even in cases of disobedience of court orders - the latter question is never far from the judges ' lips. Disobedience of a court order, particularly when it is overt, defiant and calculated to attract publicity, is viewed as a wrong to the administration of justice and to the court which made the order, as well as a wrong to the individual in whose favour the order was made.

Reversing the order of priorities

So far as media contempt is concerned, any redraft of the laws of contempt in Australia should start on the basis that the order of importance of the two justifications which I have identified here. That is to say, the primary emphasis should be on the protection of the rights and legitimate expectations of defendants in criminal trials, other parties to legal proceedings, witnesses, jurors and indeed individual judges or magistrates, rather than protection of "the system".

There is no inevitable reason why the specific issues addressed by the laws of media contempt - influence on juries and other participants in trials, jury secrecy, protection of judicial reputation etc - should all be dealt with under special judge-made laws and procedures whose overriding concern is with "the system".

Media contempt and individual rights

What would happen to the prohibitions and restrictions imposed by the law of media contempt if this fundamental shift of emphasis in this branch of the law were to take place?

First, some important specific prohibitions would disappear, or at least would be in serious jeopardy. One is the "prejudgement principle", that is, the principle that it is a form of sub judice contempt to publish material which prejudices the outcome of current or forthcoming proceedings, even though there is no significant risk of influence upon any of the participants in those proceedings. The only argument in terms of individual rights which the House of Lords put forward in the **Sunday Times v United Kingdom** (1979) case to justify this principle was that prejudgement of the outcome of present proceedings might deter future would-be litigants from going to court. But no evidence was offered in support of this assertion, and frankly the argument that people who are prepared to invest the necessary money, time and nervous energy into litigating will, in any significant number of cases, be put off from going ahead with it solely because of the possibility of media prejudgement of the outcome is pretty unconvincing.

The primary ground of the decision in the Sunday Times case is in fact a form of judicial power-play against the media. It is an ideological pronouncement that the media must not be allowed to "usurp" the role of courts in society by purporting to reach decision on matters currently before the courts. It is precisely this type of argument that should in my view be usefully and properly rejected in favour of free speech considerations.

Another important branch of media contempt law which would at least be "at risk" is the law of scandalising. This is expressly designed to protect the system of administration of justice by punishing the public utterance of statements which might undermine public confidence in the way justice is administered.

If the primary role of media contempt were taken to be the protection of individual rights, there might still be a place for an offence akin to scandalising. This would be on the ground that judges have a legitimate interest in the protection of their individual reputations, rather than the imposition of criminal penalties under laws such as contempt or criminal libel.

The third aspect of media contempt which would be abolished or severely curtailed is the prohibition on using tape recorders in a courtroom. Modern recording equipment is so quiet and unobtrusive that this activity causes no real disruption of court proceedings. There seems little doubt that the continuing judicial reluctance to permit recording in the courtroom springs instead from fear that it will jeopardise the judge's control over the recording of proceedings and thereby create the potential for the public image of the courts to be tarnished in some way.

This is a weak contention, compared with the counter-argument that, as the judges themselves recognise on occasions, there is a clear public interest in having court proceedings recorded fairly and accurately by the media for the purposes of reporting them to the public.

There are however, other categories of media contempt in which an enhanced emphasis on protection of the rights of individuals rather than of the system of the administration of justice by the courts would do nothing to diminish, and might in fact reinforce, the case for imposing prohibitions and restrictions.

This is particularly the case with the sub judice doctrine, except for that part of it which I have called the "prejudgement principle". Although in the current law of contempt it is phrased as a rule designed to protect the integrity of legal proceedings, it is the rights and expectations of the parties to those proceedings - in particular, defendants in criminal trials - which are chiefly in jeopardy when media publicity exerts influence on a participant in the proceedings.

Criminal jury trials

In this particular context, I disagree with proponents of "free speech at all costs" when they seek to show that the fairness of criminal jury trials would not be put at risk by the removal of all restrictions on media coverage and commentary. The argument for this extreme proposition would seem to be based on two contentions: first, that nobody has ever proved conclusively that juries are influenced by media publicity when reaching their verdict, and secondly, that in any event defendants have ample opportunity, which they usually exploit, to generate counter-publicity. Both these arguments can be rebutted.

In relation to the first of them, a major function of the sub judice restrictions is to prevent the jury being informed, not of impressions or opinions of media writers (which may or may not count for too much in their minds), but of allegations or indeed incontrovertible facts which, out of concern to maintain the presumption of innocence and the criminal standard of proof, are normally withheld from the jury in the courtroom under the laws of evidence and criminal procedure. These include such material as an allegation that the defendant has confessed to the crime being charged or is of generally bad character, or particulars of his or her criminal record.

It is absurd to argue that such revelations of fact, or alleged fact, will not influence a juror - it is quite logical that they should influence any person making a decision as to guilt or innocence. Since our system of criminal trial conceals such material from the jury out of concern to preserve the presumption of innocence and the requirement that guilt be proved beyond reasonable doubt, there is ample justification, in terms of the rights of the accused rather than the "preservation of the integrity of proceedings", for sub judice restrictions to continue to apply to them.

So far as the second argument is con-

cerned, it is enough to say that it is based on the particular circumstances of a few, high-profile cases - cases such as Lionel Murphy and Lindy Chamberlain. While debates as to the legitimacy of sub judice restrictions should undoubtedly take account of such special cases, they should be primarily concerned with the much more normal situation where the defendant does not have significant access to the media and where it is all too easy for the media, relying on information supplied by police or prosecution authorities, to depict the circumstances of the case in a manner which is prejudicial to the defendant.

As the Ananda Marga case so strikingly demonstrated, and as has occurred all too often in the southern states of the U.S.A., such prejudice to the rights of defendants in a criminal trial can all too easily be reinforced by, and can reinforce, pre-existing community prejudices based on such factors as religion or race. The imbalance between prosecution and defence as regards influencing media attitudes in those circumstances is quite overwhelming.

Even with sub-judice restrictions applying, the defendant may still get a raw deal because the prosecution authorities do not want to be seen to be coming to the rescue of any person who the media have branded as "public enemy number one". With no sub-judice restrictions, the situation would be even worse.

On this basis, a sub-judice law seeking to prohibit the publication of material influencing a jury, a witness or even a judge or magistrate does not have to be justified in terms of preservation of the system of the administration of justice. It is entirely desirable out of concern for the rights of those individuals who are parties to the relevant legal proceedings – notably, defendants in criminal proceedings.

Some of the arguments just outlined apply also to another species of media contempt – that is, breaches of suppression orders made with a view to averting prejudice to trials. While I fully subscribe in general terms to the principle of "open justice", it is clear that inquests, committal proceedings, Royal Commissions and the like receive evidence in public which would not be admissible in a forthcoming or current trial, which if reported to the public, would be highly prejudicial to the defendant in such a trial. Limited inroads on the publication of such evidence by means of suppression orders seem a necessary qualification to the "open justice" principle.

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The Northern Territory government and aboriginal community take on Telecom

Paul Nicols examines a challenge to the decision by Telecom not to supply standard telephone services to remote Aboriginal communities in the Northern Territory

Telecom's failure to provide basic telephone services to remote Aboriginal communities in the Northern Territory has provided the basis for the first legal action under the recently enacted **Australian Telecommunications Corporation Act 1989.**

The Northern Territory Government, on behalf of a number of affected communities, has commenced legal proceedings in the Federal Court against Telecom based on the provisions of the new Act.

The affected communities currently rely on unreliable high frequency radio links.

Telecom plans to link the communities by means of the land-based Digital Radio Concentrator System. However, the timetable for completion of the introduction of DRCS has been delayed - first from 1990 to 1992 and now, possibly even further into the future.

Telecom has, however, offered to supply several of the remote communitites with a standard telephone service on an interim basis using the satellite-based Iterra service (normally marketed to mining companies and other business users) at normal commercial rates.

Telecom's Community Service Obligations

The Northern Territory Government's action is based principally on s.27 of the new Act which sets out the Community Service Obligations Telecom must address. These are:

"(1) Telecom shall supply a standard telephone service between places within Australia.

(2) The public switched telephone service shall be the standard telephone service.

(3) Telecom shall supply the standard telephone service as efficiently and economically as practicable.

(4) Telecom shall ensure:

(a) that, in view of the social importance of the standard telephone service, the service is reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and

(b) that the performance standards for the standard telephone service reasonably meet the social, industrial and commercial needs of the Australian community."

The communities argue that s.27 imposes an enforceable statutory duty on Telecom to supply a standard telephone service that is reasonably accessible to each of them on an equitable basis.

This proposition throws up at least three major issues for determination:

1. Can the community service obligations contained in s.27 of the new Act be enforced by the communities?
2. What is meant by "reasonably accessible"?
3. What is an "equitable basis"?

Section 6 of the Telecommunications Act 1975 (the old Act) provided as follows:

"(1) The Commission shall perform its functions in such a manner as will best meet the social, industrial and commercial needs of the Australian people for telecommunications services and shall, insofar as it is, in its opinion, reasonably practicable to do so, make its telecommunications services available throughout Australia for all people who reasonably require those services."

Sub-section 6(2) (b) provided that in performing these functions, Telecom should have regard to:

"(i) the desirability of improving and extending its telecommunication services in the light of developemtns in the field of communications;

(ii) the need to operate its services as

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efficiently and economically as practicable; and

(iii) the special needs for telecommunication services of Australian people who reside or carry on business outside the cities."

Enforceability of CSO's

Sub-section 6(3) (b) of the old Act provided (relevantly) that nothing in s.6 should be taken "to impose on the Commission a duty that is enforceable by proceedings in a Court". Sub-section 6(3) (b) was interpreted in **Queensland v Australian Telecommunications Commission** (1985) and **John Fairfax v Australian Telecommunications Commission** (1977) to the effect that the sub-section precludes the enforcement of any duty which may arise under s.6 by legal proceedings: that is, no plaintiff could sue under the old Act purely by reason of a failure by Telecom to offer or provide standard telephone services.

The new Act contains no statutory bar to proceedings seeking to enforce the community service obligations contained in s.27.

One of the key issues in the case will be the weighting to be assigned to the various community service obligations imposed on Telecom under s.27 of the new Act.

"Reasonably accessible"

Section 6 of the old Act provided that Telecom would "insofar as it is, in its opinion, reasonably practicable to do so, make its telecommunications services available throughout Australia to all people who reasonably require those services."

Section 27 of the new Act provides that "Telecom shall ensure that the service is reasonably accessible to all people in Australia ... where ever they reside or carry on business."

It could be argued that to make a service "available" is a higher duty than to make it 'reasonably accessible". This may be true but it is clear that s.6 when read as a whole allowed Telecom an unfettered discretion as to whether to provide a service at all.

Telecom does not have this discretion under s. 27. Presumably, whether a service can be said to "reasonably accessible" is a question which can be objectively determined by a Court.

Is a telephone booth in a town 1 kilometre away "reasonably accessible"? What if the town is 100 kilometres away? Obviously, this will also be a key issue in the Northern Territory Government's action.

"Equitable basis"

Under s.11 of the old Act, Telecom was empowered, from time to time, with the approval of the Minister, to make determinations fixing or varying the rental payable for standard telephone services provided by Telecom. Sub-section 11(6) of the old Act required Telecom to publish particulars of the rentals determined by it in the Commonwealth of Australia Gazette.

In contrast, the new legislation does not contain any provision analogous to s. 11 of the old Act.

Under s.27(4) of the new legislation, Telecom is obliged to ensure that the services are readily accessible "on an equitable basis". Predictably, "Equitable basis" is not defined in the new Act.

The normal commercial rates charged for the Iterra service are significantly greater than the rates gazetted in accordance with s. 11 of the old Act.

One of the key issues in the case is, therefore, whether the provision of an interim service by means of the Interra service at normal commercial rates is "equitable".

As the services provided by means of the Iterra system are standard telephone services and as the affected communities are situated in rural and remote areas, the communities argue that an equitable rate would be the rate gazetted under s.11 of the old Act in respect of rural and remote areas.

The Yugal Mangi Proceedings

The Northern Territory Government has also commenced, on behalf of the Yugal Mangi Community Government Council, proceedings against Telecom for the recovery of charges paid to Telecom in excess of the gazetted rates referred to above.

Yugal Mangi accepted Telecom's offer of an interim Iterra service and paid the normal commerical rates for that service.

The action is based on s.11 of the old Act and the Yugal Mangi community is claiming that Telecom was not lawfully entitled to demand charges for the standard telephone service provided by the Iterra service in excess of the gazetted rates under s.11.

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Morgan v John Fairfax & Sons Limited

An editorial on a Government submission by telecommunications unions held to be defamatory but reasonable in the circumstances. John Evans discusses this leading case.

On September 1, 1989 Justice Matthews delivered a judgement which held that the conduct of a publisher, John Fairfax & Sons Limited as reasonable within the meaning of s. 22(1) (c) of the Defamation Act (NSW), 1974 and that in the absence of any evidence of malice a defence under that Section was thus made out.

Background

The plaintiff, Kevin Morgan, commenced proceedings in December 1983 complaining of an editorial written by Padraic McGuinness in The Australian Financial Review on 17 November 1983. The editorial said in part:

"Even more questionable is the role of the telecommunications unions which are determined to maintain the monopoly which they can manipulate, and hope to suppress the extension of competitive technologies, regardless of any concept of a general public interest."

"Not surprisingly, the arguments of the Telecom Unions have had a strong influence in the councils of the Government. They have been willing to produce totally phoney estimates of costs and useage of the new satellite, employing supposedly reputable and independent commentators."

The plaintiff was not named in the editorial.

The following imputations were pleaded, That the plaintiff:

(a) was not reputable (as a consultant and commentator)

(b) was dishonest (as a consultant and commentator)

(c) was unfit to be a consultant and commentator

(d) knowingly made false estimates of the costs and usages of the new satellite

(e) as a consultant and commentator, was biased and not independent

(f) did not carry out his economic researches properly

(g) as a consultant and commentator, has deliberately endeavoured to deceive and mislead the Government of Australia and others

After an abor ted first trial the second trial commenced before Justice Matthews on 6 March 1989. After 14 hearing days the jury retired to answer a number of specific questions of fact which included questions directed to the defences of truth and comment.

After more than five hours of deliberation the jury was unable to answer unanimously the questions put to them. Accordingly, to avoid the necessity of a third trial both counsel agreed to accept a majority general verdict – that is a simple verdict... that the defamation had been proved or not proved.

The jury returned a general verdict in favour of the plaintiff and awarded damages of $150,000.

Justice Matthews then heard legal argument on the defence of qualified privilege under s. 22 of the Defamation Act.

Section 22(1) of that Act provides:

"1. where in respect of matter published to any person

(a) the recipient has an interest or apparent interest in having information on some subject;

(b) the matter is published to the recipient in the course of giving to him information on that subject; and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.

There is a defence of qualified privilege for that publication."

In determining the application of s. 22 of the Act, it was conceded by Counsel for the plaintiff that the "interest" requirement of sub-sections 1(a) and (b) had been made out. The issue to be determined was whether the defendant's conduct in publishing the defamatory material was reasonable in the circumstances.

Truth

Justice Matthews considered the implications of the jury's verdict in relation to the defence of truth. As the whole thrust of the defendant's case on truth was to show that the study prepared by the plaintiff for the Australian Telecommunications Employees' Association was not only misleading and inaccurate but that it must have been deliberately so, the jury's verdict indicated that the plaintiff's assertions that the conclusions he reached in his study were honestly arrived at had been accepted and that the most serious imputations alleging dishonesty, deception, bias, not reputable as a consultant and commentator and unfitness to hold that position were false.

The judge did not, however, accept that the jury's verdict bound her to find that the imputation that the plaintiff did not carry out his economic researches properly was false. Justice Matthews described this imputation as "the relatively minor sixth imputation". It was her view that the evidence pointed overwhelmingly to the existence of a number of inaccuracies, misstatements and flawed processes in the plaintiff's study and although a number of these criticisms might not be directly attributable to any defect in the plaintiff's researches, it would be difficult to isolate the flaws in the reasoning from the flaws in the research.

This was a matter of some significance in Justice Matthews' view on the question of qualified privilege. If she was obliged to conclude, contrary to her own view of the evidence, that the jury's verdict involved the finding that the plaintiff had properly conducted his researches and, by extension, that there were no serious inaccuracies or misstatements in his study, then it would follow that Mr McGuinness could not have logically concluded, on the basis of the study alone, that its author was deliberately embarking on a process of deception. That, then would necessarily have been the end to any defence under s. 22.

Justice Matthews concluded that she was not precluded from finding that there were serious defects and flaws in the plaintiff's study by adopting the reasoning of Glass JA in **Austin v Mirror Newspapers Limited** (1984) where His Honour said "the Judge should himself determine any disputed facts save and except to the extent that they are governed by jury findings". Justice Matthews accepted that the jury's rejection of the defence of truth required her to accept that any inaccuracies or flaws as did exist in the study were honest mistakes and that the plaintiff believed that the material in the study was accurate and that he had properly and legitimately set out the arguments against the satellite. However this left open the question of whether Mr McGuinness could rationally have concluded from the study itself that it was a dishonest document.

Comment

Justice Matthews then considered the implications of the Jury's verdict in relation to the defence of comment.

There was no issue as to whether, assuming it to have been comment, it was based on proper material for comment. Both parties had accepted that it was the plaintiff's study alone which formed the basis of Mr McGuinness' observations. Thus no question arose as to the truth or otherwise of the factual basis for the comment.

Justice Matthews had no reservation in accepting Mr McGuinness' evidence that he was genuine in his criticism of the plaintiff's study and that he did hold the view that the study was a biased and dishonest document notwithstanding a pre-Austin case answer to interrogatory which said that at the time of publication the defendant did not intend the words contained in the matter complained of to convey any of the alleged defamatory imputations. Evidence was led at the trial that at the time Mr McGuinness wrote the editorial he did not know who the author of the study was. However in respect of the author or authors he believed that his criticisms were entirely justified.

This finding was extremely important on the issue of qualified privilege as a defendant will generally fail to establish reasonableness under s. 22(1) (c) without evidence of belief in the truth of what was published (**Barbaro v Amalgamated Television Services** (1989).

Justice Matthews then considered the rationality of Mr McGuinness' conclusions notwithstanding the jury's verdict had shown that his conclusions were wrong. Her Honour found that although the conclusions were wrong they were, in her view, anything but unfounded or irrational. She then considered whether Mr McGuinness' failure to seek out the palintiff prior to writing the editorial was reasonable. The failure to seek out the author of the study was explained on the basis that Mr McGuinness believed the document was such a dishonest one that he would have been wasting his time.

The jury's verdict which showed that Mr McGuinness was wrong led Justice Matthews to question whether this reflected upon the reasonableness of his conduct at the time. She took the view that although there was more than a hint of arrogance in the approach adopted by Mr McGuinness it was amply justified by the material he had before him. The requirement of reasonableness under section 22(1) (c) does not impose upon a publisher an obligation to seek out and obtain explanations from a person in all cases regardless of the strength of the adverse inferences to be drawn from that person's writings. Whether a publisher who wishes to rely upon a section 22 defence must make further enquiry will depend upon the circumstances of the case.

In assessing whether a reasonable publisher should have made further enquiry, one need only have regard to the material which was properly available to the publisher at the time of publication. The fact that a publisher's adverse conclusions are later shown to have been wrong will no doubt

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In other categories of media contempt, the proposed shift of emphasis from the protection of the administration of justice; in general to protection of individual rights does not furnish easy and immediate answers to the question of what prohibitions on publication, if any, should apply.

An example is the difficult category of reporting of jury deliberations. Yet even here, it seems to me that the most constructive approach is to analyse carefully the possible detriment to the rights of the prosecutors and defendants - in particular, in cases where jury secrecy prevents the disclosure and reporting of misconduct in the jury room - and balance them against considerations in the opposite direction for example that it may be oppressive to individual jurors, and possibly detrimental to the proper discharge of their functions, to allow the media to report indiscriminately on what happened or allegedly happened in the jury room.

Contempt Law Reform and the Attitudes of Goverment

The Report of the Australian Law Reform Commission on Contempt, for which I took primary responsibility as Commissioner in Charge, was tabled in the Commonwealth Parliament in June 1987. Looking back on it from a distance of nearly two years, I have some regret that in its discussion of media contempt it did not draw sufficiently clearly and firmly the distinction which I have just elaborated - between protection of individual rights and protection of the system of administration of justice. But its recommendations did, on the whole, fall in line with the approach adopted in this paper.

The fate of the Report is not encouraging. Its official status within the Commonwealth Attorney-General's Department is that of being "under consideration". The Report recommendations in relation to contempt of Family Court orders, however, have been included in a Bill to amend the Family Law Act recently tabled in the Federal Parliament. There has also been some discussion at the State level in Victoria and, more recently, in New South Wales of a partial implementation of the Report but there has been no legislative changes as yet.

There are, I suppose, two main reasons why reform in this area is not attractive politically. One is that, particularly in the absence of high-profile cases such as those of Gallagher and Wran, there are not may votes to be gained from contempt reform. The other is that the majority of the members of an important, albeit muted, interest-group - the judiciary - have no wish to see their contempt powers curtailed by legislation.

Neither of these reasons is sufficient to justify perpetuation of an archaic approach, via the law of contempt, to the particular issues of media law which this paper has discussed. It is, I think, time for some renewed pressures upon Commonwealth and State governments to be exerted by media organisations and other concerned with the cause of freedom of the media and with the competing argument that such freedom should always respect the rights of individuals appearing in our courts.

This article is an edited version of a paper presented to Australian Press Council Seminar, "Australian Media in the 1990's", held in Melbourne on 30 March 1989.

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prohibit such conduct, specific provisions could be inserted in the Commonwealth Crimes Act so that the conduct can be adjudicated upon by the Federal Court rather than the ABT.

Offences to be specified

While standards compliance and service provisions are clearly of fundamental importance there is no reason why minimum requirements cannot be spelt out with precision. There may be some breaches which would warrant cancellation of a licence and these could be clearly specified.

Most contraventions, however, would be deserving of something less. It could be provided that all breaches other than those specified should be dealt with by a fine or other lesser forms of sanction.

Such an approach would make clear the consequences of particular kinds of delinquent conduct without putting a licensee in jeopardy for every transgression. If certain conduct is regarded as disqualifying a person from being a director, eg having a criminal conviction or being an undischarged bankrukpt, then the legislation should say so.

"The time has therefore come to scrap these regular rounds of morality plays and substitute a clearly specified range of offences ...."

The present provisions are little better than a charade because it is widely believed that a government conscious of viewer and employee outrage would not allow a station to go off air. But the fact that the Tribunal's punitive options are presently limited effectively to licence cancellation or a reprimand, leave open the possibility of the former, with perhaps catastrophic share price consequences in the event of a licensee being forced into a fire sale.

Irrespective of the degree of culpability attached to an individual proprietor, there is scant justice in a system which inflicts massive share losses on innocent and unsuspecting minority shareholders.

Conclusion

"Fit and proper person" inquiries have become a media circus attended by enormous publicity and damaging speculation about the ultimate outcome which, under the current cumbersome legislative minefield, are almost certain to take a number of years to resolve.

Such a broad and potentially all embracing test serves no useful purpose. Leaving high flying media proprietors to twist in the wind may gratify those seeking theatrical entertainment but it does nothing to achieve a quick and effective decision which meets legitimate community concerns and allows licence holders to get on with, or to get out of, the broadcasting business.

The time has therefore come to scrap these regular rounds of morality plays and substitute a clearly specified range of offences which are deserving of punishment by the ABT or preferably by the Federal Court. In the vast majority of cases, a fine, sometimes very hefty and perhaps geared to revenue or profits would be a more than adequate penalty as well as a significant deterrent to future unacceptable conduct.

Licence cancellation should be only a last resort imposed because of the repeated commission of serious offences.

Pay television: the case for direct broadcasting by satellite

Leighton Farrell, Corporate Relations Manager of AUSSAT puts AUSSATS's Case for the introduction of pay television and the adoption of satellite as one of the delivery technologies.

In recent years there has been considerable attention at Government policy level focussed upon television broadcasting in Australia. This attention has especially been directed toward the introduction of new and expanded services designed to extend coverage to the population who live outside our capital cities. The introduction of satellite technology with the successful launch of AUSSAT's first satellite has had a significant impact, revolutionising the traditional means of distributing broadcast services.

Characteristics of this technology such as point to multipoint transmission and cost independent of distance has created the capability to extend genuine national networking of services throughout the entire continent. It is, of course, these same characteristics which make satellite technology highly attractive as a means of distributing pay television (that is, subscription television) services.

The public appetite for a wider range of video services is, I believe, amply demonstrated by the growth in recent years of video outlets and video recorders. In this regard Australia has one of the world's highest penetration rates of VCR's per head of population.

Pay television presents a way to extend new services on a widespread basis across Australia.

The significance of the subscription nature

In considering pay television, it should be recognised that such a service is essentially a retail service; the relationship and the revenue flow is between the service provider or operator and the end consumer, the existing parallel being the hire of video movies from the corner store.

The relationship is quite unlike that existing in the free-to-air television service, where the revenue flow is between the service provider and the advertiser. Given this recognition of pay TV as a retail service, AUSSAT's view is that the introduction of the service should be accompanied by the minimum possible regulation.

AUSSAT believes that the successful introduction of pay television into Australia will depend upon maximising subscriptions in the early stages through rapid penetration of the market place. The unique attributes of satellite technology, ie instantaneous near-nationwide coverage from day one, and the prospective availability of low-cost domestic satellite receivers make satellite broadcasting a logical choice as the primary medium for pay television delivery, at least initially.

AUSSAT's new satellites

The two AUSSAT-B satellites to be launched in 1991 and 1992 have been modified to provide a high performance beam which has the ability to transmit television signals to very small antennas suitable for direct-to-home delivery in urban areas. A particular feature of the high performance beam is that the primary coverage region includes not only the major capital cities but also the populated regions along the whole of the south-eastern seaboard and hinterland from Adelaide to Brisbane, and also extends as far north as Townsville and Cairns.

This feature ensures a very high proportion of the Australian population. Some 98%, will be able to receive television pictures delivered direct-to-home via satellite from day one of the service.

In locations where there is no direct line of sight to the satellite due to terrain or building blockage, and in areas where the signal strength is too low for a small domestic satellite antenna, the use of alternative, or secondary, delivery mechanisms (including satellite master antenna television reception system, cables or terrestrial multi-point distribution) will be necessary. The choice of second delivery system will no doubt be determined by technical and cost considerations.

Encryption options

The security of the pay television signal is a fundamental requirement for any commercial pay television service.

A number of alternatives exist for formatting and encrypting the signal and providing a means of conditional access to subscribers.

Three candidates for an Australian pay television direct broadcast transmission system could be:

- B-MAC which is currently used in the delivery of The Homestead and Community Broadcasting Satellite Service, Remote Commercial Television Service and Special Broadcasting Service and provides the necessary addressability and encryption for a pay television system. These features are already built-in to the existing Australian B-MAC system.
- D-MAC which is the format to be used by British Satellite Broadcasting Ltd in the UK when they commence service in early 1990. The D-MAC decoders have a conditional access unit added to provide the required security and receiver addressability.
- Encrypted PAL with conditional access features is proposed for the Sky Television system for the delivery of pay television services throughout the UK (and Europe). Sky Television's conditional access systems, unlike other over-the-air systems, uses smart cards as a means of payment and facilitating consumer access to programmes.

The introduction of pay television in Australia will provide an opportunity for the public to have access to a wide range of new programmes material meeting specific needs of the community in a way not possible with the present broadcasting industry structure. AUSSAT can offer a variety of approaches to both commercial and technical aspects of

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cause a court to give special and and critical scrutiny to whether those conclusions were well founded and to the process by which they were reached. If there is material which should alert a responsible and prudent publisher that an innocent explanation was possible then reasonableness will normally require that some further enquiry be made.

But the fact that later events show that a publisher was wrong does not ex post facto render unreasonable that which was reasonable at the time.

Justice Matthews said that to find otherwise would be to place an impossible burden upon publishers as newspaper proprietors require ascertainable criteria by which to measure the reasonableness of their conduct when they publish criticisms of written works and their authors. To measure the quality of reasonableness by reference to a jury's later findings in relation to other defences would not only introduce criteria which are both unascertainable and uncertain but would also deprives. 22 of any independent application in relation to literary criticisms.

An appeal has been filed.

John Evans is a solicitor with the firm Mallesons Stephen Jaques.

Contributions

From members and non-members of the Association in the form of letters, features, articles, extracts, case notes, etc. are appreciated. Members are also welcome to make suggestions on the content and format of the Bulletin.

Contributions and comments should be forwarded to:

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Communications and Media Law Association

The Communications and Media Law Association was formed early in 1988 and brings together a wide range of people interested in law and policy relating to communications and the media. The Association includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CAMLA members include:

- defamation
- broadcasting
- copyright
- advertising
- telecommunications
- contempt
- privacy
- censorship
- film law
- freedom of information

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

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The Association is also a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join the Communications and Media Law Association, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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