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The cellular mobile phone debate: the shape of things to come

Peter White argues that the current inquiry should focus on service type rather than technology

Austel is currently conducting an inquiry into the implications of licensing an additional operator of cellular mobile telephone services (CMTS). On the surface the inquiry can be seen as the first major debate about the introduction of competition into the supply or actual telecommunications services since the government's new telecommunications framework was legislated into being earlier this year. The government's decision to allow for competition in the cabling of buildings and in the supply of an expanded range of PABX equipment does not really impinge on the supply of telecommunications services themselves. Given this reading of the agenda, it is not surprising that the inquiry should have received submissions from a range of organizations with an ultimate interest in the supply of actual telecommunications services. And taken within this framework the debate is about the economic costs and benefits of varying forms of competition in the supply of cellular mobile telephone services.

But another reading of the CMTS inquiry sees the issues raised by this particular inquiry in a much broader context. And this broader context raises important questions about the way in which Australian telecommunications and communications policy is conceived.

One inquiry, two agendas

The broader context emerges when it becomes apparent that underpining the CMTS debate are two conflicting views of the service. And these views embody two different visions of the future development of the overall telecommunications system. These two conflicting views are embodied in the Telecom Australia's submission to the inquiry and the submission which was made by Henry Ergas and others associated with the Monash Information and Communications Technology Centre.

The Telecom submission sees an increasing proportion of standard telephone calls as having a mobile component. So that while calls which either end in, or originate from cellular mobile telephone services will remain a small but significant proportion of all telephone calls, new technology will see an increasing emphasis on a mobile handset. The second wave of innovations will make it possible to both originate and receive telephone calls from a personal mobile handset within a specified area. The long term vision of the future is the widespread use of small handheld personally owned handsets which can receive and originate calls from any location. Such a service would be able to locate subscribers no matter where they were, and charge the handset owner for the use of the services which are integrated with the standard telephone service wherever that occurred. This scenario sees the current cellular mobile telephone service as a precursor to a variety of services which are integrated with the standard telephone service which we know today. According to this view the distinction between mobile, semi-mobile and fixed telephone services will become increasingly blurred.

By contrast, Ergas argues that there is little reason to consider CMTS as a part of the public switched telephone network (PSTN). He argues from the perspective of economic theory that there is little substitution between the mobile and fixed telephone services, that the joint provision of the PSTN and CMTS does not lead to any economies, and that the CMTS is more akin to the mobile services such as paging and messaging. As a consequence, he argues that the CMTS should not be seen as a part of Telecom's monopoly reserved service.

The Trojan Horse

But why is this debate about the conceptual status of the CMTS and its successors so important? This is because the new Australian telecommunications framework grants Telecom a monopoly over the provision of the PSTN. So according to Telecom's argument, any regulatory decision on the licensing of a second CMTS operator has implications for "the orderly and efficient development of the national telecommunications system" (Ministerial Guidelines, 1989). For if there is an increasing blurring of the distinction between other forms of semimobile services and the traditional forms of access to the PSTN, the decision to license a second

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CMTS operator has consequences for Telecom's monopoly on that telephone network. While any decision to license a second cellular mobile telephone service would have little impact on Telecom's current operations, it would be seen as the Trojan Horse by which competition on the basic infrastructure would be introduced.

Should regulation be service or technology based?

It is tempting to enter the fray and discuss the merits of the arguments, but it is more interesting to see this debate as a manifestation of a more fundamental problem for Australian communications policy making. This is a problem created by the policy making and regulation which is primarily based on 'technologies' as opposed to a regime which is oriented towards 'services'. What we can see in Austel's CMTS inquiry is that it is essentially an inquiry into a particular technology which is currently being used to provide a specific service.

Even though the inquiry's terms of reference oblige Austel to consider the 'likely future development of this [CMTS] technology and the implications growth may have for the orderly and efficient development of the national telecommunications system', even this reference starts from the standpoint of 'technology' rather than the question of 'service'.

Placed within this framework it is possible to see the two positions outlined above as disputes about the relative weight which should be given to 'technologically oriented regulation' as opposed to a 'service oriented regulation'. Telecom's position that the cellular mobile telephone service should be seen as an expansion of the standard telephone service can be seen as operationally and conceptually distinct from the public switched telephone service and this distinction arises, at least in part, from the cellular telephone technology itself.

The emphasis on regulation of specific technologies varies across the Communications portfolio. For example Aussat is largely limited to the exploitation of satellite technology. Telecom employs a range of technologies to provide even its standard telephone service. These include traditional cable-based communications as well as analogue and digital radio techniques. On the other hand OTC's governing legislation focuses on the provision of a range of geographically specific services and makes it possible for the organization to make use of a range of technologies.

The transmission of television is regulated in different ways depending on whether unfettered access to the programming is allowed such as in broadcasting, or whether access is restricted by criteria such as location or the payment of a fee for that service. For example the Broadcasting Act regulates broadcast programs and some narrow-cast programs such as the Remote Commercial Television Service, while the Radiocommunications Act regulates narrow-cast television services such as Sky Channel, which are provided under the Video Audio Entertainment and Information Service regime. Here it is possible to see a mixture of technologically oriented and service orientated regulation.

"broadband communications ....will place great strains on Australia's broadcasting and telecommunications legislative framework"

So even within existing Communications portfolio legislation there is no clear path which has been followed. But can this state of afairs remain? If one looks at the rate of technological change and the rapidly changing service expectations of users, the answer would need to be no.

Regulation must take account of evolution

Essentially regulation must take account of evolution on two fronts. On the first, technologies develop and mature quite rapidly so that an appropriate technology for a given service might be less than appropriate within a relatively short time frame. This can be seen in the shift away from long distance point to point transmission via satellite in favour of optical cable. On the second front there are gradual shifts in the nature of services. So a standard telephone service becomes redefined in the eyes of subscribers in relatively short time frames. For example the availability of automatic, STD and ISD telephone facilities has come to be the expected norm in the last 15 years. It is possible that an element of mobility provided by cellular mobile telephone services and their successors will come to be seen as an essential part of what we now know as the standard telephone service in the next few years.

Given this problem, the government needs to address the issue of regulations in an area of rapidly changing technological options and expectations of telecommunications services. It also needs to ensure that regulation is only applied where it is absolutely necessary. One way this can occur would be through a regime which regulated in terms of services rather than in terms of technologies. Such a regime would provide maximum encouragement for the use of the most appropriate technologies for specific services and encourage technological and service innovation. It would also make it possible to clarify which services required ongoing regulation and which did not.

But if this was to occur the principal task of the current Austel inquiry would involve a decision on whether the cellular mobile telephone service should be seen as an integral part of the public telephone service. Such an approach would also encourage definition of Telecom's monopolies as monopolies on particular services The monopoly on the basic network and public switched telephone operations would be seen as monopolies on network and telephone services. There would be no restrictions on the technologies which could be employed to provide those services. On a broader scale such an approach would encourage a greater integration of Aussat into the multi-technology infrastructure provided by OTC internationally and Telecom domestically. A service-oriented approach would also make it possible to place technical regulatory responsibilities with one agency. For example Austel could be responsible for licensing and frequency allocation in the telecommunications and broadcasting areas. While those areas which dealt with the content of areas such as broadcasting, could be dealt with by another agency along the lines of the Australian Broadcasting Tribunal.

The development of broadband communications capabilities and services will place great strains on Australia's broadcasting and telecommunications legislative framework. The debate about the nature of the cellular mobile telephone service is likely to be repeated when the Government is faced with the introduction of a satellite-based mobile telephone service which can be provided by the next generation of Aussat satellites. Similar issues will arise with the introduction of broadband cable services, capable of delivering telecommunications, data and entertainment services. A rethinking of the regulatory boundaries with a focus on services, rather than technologies, might help to clarify a situation which is becoming increasingly complex.

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Defamation law reform in NSW

The Attorney General, John Dowd, discusses some areas in need of reform

The whole question of reform of defamation law is difficult, because it is not simply abut freedom of speech. Rather, it is about the conflict between the values, both social and democratic, in freedom of speech, and the values reflected in such concerns as the legitimate demands for the respect of individual privacy, freedom of association, careful reporting, encouraging good people into public life, and even the free speech of others. The intemperate or flippant condemnation of a play or film, for example, can have the very real effect of stifling the free speech of those involved in its production and the rights of those who might otherwise have been tempted to see it.

The recent round of high damages awards has sparked renewed calls for revision of defamation laws. There is no doubt in my mind that the very high awards of recent times cannot be justified in the absence of evidence establishing either a malevolent and calculated campaign for boosting the profits of the media organisation concerned, or proof by the plaintiff of a sizeable economic loss.

Some commentators have seen the exaggerated damages awards as an indication of community disenchantment of the more notorious reporting habits of the media in general, and, one suspects some of the journalists in particular. If this is so, one might speculate as to the reasons for this evidence of disenchantment being so uniform in Australia and England. Viewed in that light, the verdicts have come to be defended as part of the general public's revenge against the monopolistic and predatory practices of the media.

It is my contention that such a defence is untenable. No justice system can fairly put a media organisation on trial to answer for the whole of its reporting style, content and coverage in general. I would add that by the same token, no one in public life should be placed in the position of having to defend the whole of his or her private behaviour, no matter how unrelated to matters legitimately in the public domain.

Public figure defence

The adoption of a public figure test is a reform proposal which has been submitted for the government's consideration. The effect of this proposal would be that those in a position of public interest would receive less in damages than private individuals on the grounds that their public activities should be open to comment and criticism. I have considerable reservations about this proposal. I am not persuaded that the conclusions follow from the grounds advanced.

We all know that interest in the life-styles of the rich and famous sells a lot of papers and magazines. We all know, also, that the vigorous public debate upon which democracy depends often requires a canvassing of matters about the chief protagonists in the debate in question which might otherwise have remained private. Having said that, however, it must also be said that in the absence of specific provision to remedy substantial and unwarranted infringements of privacy, defamation law must serve as a passable criterion for distinguishing between the private and public arenas.

A diminution in the ability of public figures to seek redress for defamatory statements carries the very serious risk of adding yet another disincentive to good people becoming involved in public affairs at whatever level. Many people in public life already accept considerable interference with their life and leisure pursuits. However, as was pointed out in the Australian Law Reform Commission Report, there is a point at which any person should be able to seek protection against the retailing of private information which has no bearing on their public affairs. The justifications which have been given for proposing a higher threshold for public figures wanting to sue for defamation are two-fold. First, it is said that a public person has a greater opportunity to counteract false statements. Secondly, it is argued that those in governmental positions or otherwise seeking publicity, voluntarily subject themselves to closer public scrutiny. I do not fully accept these arguments, and am, moreover, of the view that people in public life are entitled to as much protection as any other citizen.

Another concern with the public figure test is the manner in which the public figure is created. One sees too often in journalistic debate the bringing together of public interest and media interest. Given the increasing frequency with which the media first constructs, and then claims to reflect, the public interest, I am naturally suspicious of how it will set about defining a person who is or has become a public figure.

A further concern is the unpredictability and impracticality of the public figure test. In the United States, where the constitutional guarantee of free speech has tipped the balance against the competing interest of individual privacy, the use of the public figure test has often descended to minor government officers, including non-government figures whose prominence may be only transient. The lives of the families of those in high profile positions are also detrimentally affected. While members of Parliament are clearly public figures, one might ask at what stage the definition ceases to apply to members of their family. Who and what will become fair game?

Criminal defamation

The government has already repealed that part of the statute law allowing privately instituted proceedings for criminal defamation.

Section 50 of the NSW Defamation Act provides that it is an offence to publish defamatory material without lawful excuse. The offence is not committed unless the publisher intended to cause serious harm to a person or knew that it was probable that serious harm would be caused. Some have suggested that a criminal defamation offence is unnecessary. However, the view of my government has been that the law of criminal defamation should be retained, but with the requirement that the Attorney General's consent be obtained prior to the commencement of proceedings.

In practice, this prosecutorial discretion is exercised by the Director of Public Prosecutions on my behalf. This delegation of authority imposes a very necessary controlling factor which will prevent the abuse of this type of prosecution. Limitation on free speech by way of criminal prosecution can be justified only if invoked for the protection of the community as a whole, and not for reasons of personal or political interest in suppressing criticism or dissent. While I expect that these provisions will be used only rarely, there will be circumstances where a prosecution may be appropriate. These include cases where there is a tendency to create a breach of the peace; where unfounded abuse is repeated by a person of no financial substance against whom civil proceedings would be ineffective; or where the defamation has the tendency to destroy confidence in a public office.

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Defamation law reform

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Limitation period

The government is also assessing the need for a six-year limitation period in bringing proceedings for defamation. Where a person's reputation has been impugned, it could be expected that the maligned person would wish to clear his or her reputation at the earliest possible opportunity. The government is considering reducing the six-year period, possibly to as little as six months. This would mean that people wishing to sue for defamation would be required to commence proceedings within the six month period after learning of the publication.

Truth and public benefit

Some commentators have urged the adoption of truth being a defence in itself. Four jurisdictions in Australia currently provide a defence of truth and public benefit. In Victoria, South Australia and the Northern Territory, no statutory provisions apply, and accordingly the common law applies. In New South Wales there is a defence when an imputation is a matter of substantial truth and the imputation either relates to a matter of continuing public interest, or is published under qualified privilege. The New South Wales statute also provides that it is for the court to determine what constitutes a matter of public interest.

I am opposed to the idea of introducing any stricter test to the definition of public interest than those currently applying. But the government has yet to be convinced that the community will be better served by abolishing the requirement that the defence of truth also include an element of public benefit. In saying this, I am not repudiating the fundamental importance of free spe[illegible] in a democratic society. It is simply that to make truth an ultimate value in preference to an individual's privacy and reputation, without any requirement that it be in the public interest, is to tip the balance unfairly.

The common law rule, which applies in some jurisdictions, is that it is defamatory to publish material which exposes a person to hatred, ridicule or contempt, or which will cause him or her to be shunned or avoided by others. Where truth alone is a defence, material which leads to such a result can be published without adverse legal consequences. Statements which are true, but unnecessary and cruel, have exposed to ridicule people such as the intellectually an physical disabled, people of non-English speaking backgrounds, and other minority groups. Society's respect for the truth is an insufficient justification for publication of purely private matters of no real public interest, but of gratuitous cruelty, which are not and should not be the subject of publicity without consent.

The amount of damages

Recent record verdicts, both in New South Wales and elsewhere, have drawn much criticism regarding the availability of monetary damages. There are several issues involved here.

One option which is worth considering is the legislative establishment of deductibles and caps for damages for non-economic loss. Proven financial loss which can be quantified should always be recoverable. But damages for wounded feelings are qualitatively different, and it may be that we should set a limit on them.

I am of the view that victims who have suffered unwarranted damage to their reputations should be entitled to financial compensation, even though they may be unable to prove economic loss. An individual's reputation is extremely important to his or her self perception and social standing. As a civilised community, we must maintain our commitment to the protection of an individual's sense of dignity and self esteem, and also to the recognition of the importance to individuals of their ability to socialise.

There might, however, be a case for setting a threshold requirement before damages for non-economic loss can be awarded. The very real, but temporary, hurt of no lasting consequence might have to be regarded as being out balanced by other, more pressing, claims upon court time.

There has also been considerable criticism of late of spectacularly high verdicts for non-economic loss, where the implication seems to be that injury to reputation can fetch more in damages than very significant bodily injury as a result of a motor accident. Just as in motor accidents, my government has set a ceiling or cap on damages for non-economic loss, it might be worth considering setting a cap upon damages for non-economic loss in defamation actions. If this were done, it might be quantified as a percentage of the cap for non-pecuniary loss for physical injury thus establishing an order of priority between the physical and the reputation injuries.

Judge and jury

The defamation jury is extremely important. But some of the criticisms of recent awards have focussed on the wide variations which can be expected in the size of an award as computed by a jury. There might be a case for redefining the relationship between the judge and the jury with a view to bringing a greater sense of predictability in defamation awards.

In criminal matters, the jury determines liability while the judge determines the sentence. It might be appropriate, particularly in these days of increasingly disproportionate verdicts, to give the judge the task of assessing damages in defamation cases. The only guidelines that juries have when assessing these damages are the well publicised reports of large verdicts in previous cases. Such reports must naturally have an inflationary impact upon the general level of defamation damages, as juries will tend to consider the larger and therefore reported, verdicts as the norm.

Judges are in a far better position to assess where a particular case falls within the whole spectrum of civil damages cases, and also to be aware of the other end of the defamation scale, at which most cases settle for an apology and little more than costs. Judges are also better placed to take account of mitigating factors and the relevance of costs.

To move responsibility for the assessment of damages to the judge should lead to greater consistency and thus predictability in defamation awards. This in turn should encourage more out of court settlements. It may also reduce the incidence of appeals in these matters. The appeal mechanism is a less cost-effective way of controlling flagrantly inappropriate damages assessments.

Retractions

The case for a mandatory retraction or apology in lieu of a damages award has been much pressed of late. While it is an option worth considering, I must confess to some initial hesitancy on how it might work. How, for example, would an order for cost operate where a retraction order is the only remedy granted? How would one distinguish, in costs terms, between the derisory and the compensatory award? The costs consequences of a verdict for one cent are obvious. Not so the costs implications of a verdict requiring a retraction. And where would the retraction be placed? On page 1, or page 27? Would it be given a prominence equal to that of the defamatory article? Even if there were to be a legislative requirement of equal prominence, would that be effective to eradicate or negate the original defamation? How, for example, does one withdraw an imputation that a minister is a child molester? With a front page disclaimer?

At common law, the making of an apology by a defendant in the defamation action can be taken into account in calculating the extent of liability for damages. There has been statutory recognition of this fact in all Australian jurisdictions except New South Wales,

and it is likely that this anomaly will be redressed when amendments to the Act are finalised.

Qualified privilege

The government is also committed to examining the provisions relating to the reasonable conduct of the publisher, one element of the defence of qualified privilege as established under the New South Wales Act.

The operation of the defence of qualified privilege has recently received judicial consideration in the New South WalesSupreme Court decision of Morgan v John Fairfax. This matter concerned an editorial written by Mr Paddy Mc Guiness, which strongly criticised a paper written by the plaintiff as being, in effect, unprofessional. The defences of truth and fair comment failed, but the newspaper succeeded with its defence of statutory qualified privilege under s.22 of the Defamation Act. Justice Matthews upheld the s.22 defence on the basis that the publisher's conduct was reasonable in the circumstances. She took into consideration factors such as the editorial writer's expertise and extensive experience, the material on which he was commenting, the grounds for the writer's belief in the logic of his viewpoint, and the reasonableness of that belief given the information which was properly available to the publisher at the time of publication. Another factor influencing the decision appears to have been the very great importance of the subject matter, Aussat Communications.

Justice Matthews further stated that in the circumstances, the newspaper's failure to check every element of the report was not unreasonable. It would be imposing an unfair and unrealistic burden on publishers to suggest that exhaustive inquiries should always be made.

The Morgan decision has naturally been welcomed by the media, and is in line with the government's intention to review s.22 generally to emphasise the need for consideration of all the surrounding circumstances when determining reasonableness of publication. It should be pointed out that the case is still subject to appeal.

Conclusion

I would like to conclude by acknowledging the need for revision of the law of defamation, whilst emphatically denying the need for partial or total abolition. There are no easy solutions.

This article is an edited version of a paper delivered by Mr Dowd to an Australia Press Council Seminar on 27 October 1989.

Lawyers respond to Dowd speech

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Public figure defence

This is well travelled ground. The media in general are supportive of the introduction of such a defence. If one analyses the nature of the majority of defamation claims which reach litigation, one cannot but sympathise with the media's view. The bulk are by people who would clearly pass the United States public figure test and who are often in the position of being able to respond in kind to what has been said about them.

Unfortunately, Mr. Dowd is vague as to how the submission on a public figure defence will be treated by the government, apart from a general statement that he has "considerable reservations" about the proposal. The pros and cons have been amply and publicly debated for many years. What the government must decide now is whether it considers there should be freedom of speech and discussion about persons involved in public life at the expense of those few cases where there should be restrictions on discussion however public the figure is. Unfortunately, it is the politicians who stand to lose most if a public figure defence is introduced. It is those same politicians who will have to take the decision to introduce the defence.

Criminal Defamation

I agree, that if the offence of criminal defamation is to remain, proceedings should require the Attorney General's fiat. However, I am concerned that Mr. Dowd envisages criminal proceedings being commenced where, for instance, civil proceedings would be ineffective against a person of no financial substance or where the defamation has a tendency to destroy confidence in a public office. Thus, defamatory publications would be elevated to criminal offences which would not hitherto have attracted criminal sanction. There is considerable scope for misuse if those are the sorts of factors to be taken into account. Indeed, this could result in a marked increase in the number of cases of criminal defamation coming before the court rather than a decrease.

Limitation period

If a person considers he or she has been defamed, there should be an obligation to sue immediately or not at all. I would welcome a reduction in the limitation period from six years to six months. Too often plaintiffs sue many months or even years after the event when witnesses and vital documents have long disappeared, thus making it impossible to hold a fair trial. Indeed, I believe an even shorter period is warranted - three months at the most.

Truth and public benefit

I agree with the Attorney General that the furthest the legislation should go is to require that the defamatory imputation is true and should relate to a matter of public interest. However, I believe that the truth of the matter complained of should be sufficient to establish a defence for a defendant. The Attorney General refers to the usual arguments for restricting the truth defence. However, I believe the requirements of freedom of speech outweigh the risk of an invasion of privacy in a small number of cases. It cannot be suggested that the press in Victoria, South Australia or the Northern Territory is guilty of more invasion of privacy than the other States because of the availability of the truth alone defence. I am also not sure that the requirement of a public interest element in the defence prevents the ridiculing of "minority groups". The requirement in the defence is for the imputation to "relate" to a matter of public interest not for that imputation to be published "in the public interest".

Damages

I agree with the Attorney General's apparent view that damages awards are out of control. Often there is simply no apparent basis for a jury's award. One suspects that

too much weight is given to a newspaper's circulation at the expense of a reasoned evaluation of actual damage to reputation suffered within the community. The obvious solution is for the jury to make a finding for or against the plaintiff and for the judge to assess damages, as suggested by Mr. Dowd.

Retractions

I agree with Mr. Dowd's reservations in relation to mandatory retractions or apologies except that I believe his hesitancy should be more than "initial". It would be completely impractical for the many reasons enumerated by Mr. Dowd for a judge to decide when a retraction should be published. Very often whether or not a retraction and apology is warranted in particular circumstances requires a subjective decision on the limited facts available at the time. Often a judge would be called upon to make a rapid decision based on incomplete material and information. At present, a newspaper has to make that decision and, if it is the wrong one, no doubt it will suffer in the future in the form of a proper damages award. Certainly, newspapers make serious errors of fact and those errors should be corrected. However, generally speaking a newspaper will be ready to make such a correction and there is no need for judicial intervention.

One small point - the Attorney General appears to suggest that an apology cannot be taken into account in calculating damages in New South Wales. That is not so. Apologies are often pleaded in mitigation of damages in New South Wales actions. In other words, the common law on this point applies in New South Wales.

Qualified privilege

The future of the statutory defence of qualified privilege (S. 22 of the Defamation Act NSW) will depend on the final outcome of the Morgan v Fairfax case [ed: this case was reported in the last issue of the CLB and is currently set down for appeal before the Court of Appeal in March 1990]. Section 22, which was initially thought by many to have provided newspapers with a qualified privilege defence for mass publication has been a great disappointment for the media. Judges have always managed to find something wrong with a newspaper's or television station's treatment of a defamatory story instead of considering the matter at a more general level. They have tended to take a very analytical and technical approach which has invariably resulted in a finding against the media defendant. Perhaps the answer is to give the jury the task of deciding if a publication is reasonable in all the circumstances.

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Defamation damages have recently reached new heights both in the amount awarded and the type of article attacked, prompting some of the victims to appeal for a change of rules. John Dowd's proposed reforms offer little hope to publishers echoing only the usual placatory noises made previously for reform in this area. The three significant proposals tilted at by Mr Dowd of a six month limitation period, sealing on damages and a public figure defence have little chance of reaching first base in New South Wales or of being adopted in other states.

Limitation period

A six month limitation period for commencement of actions does have some merit. The main head of damages for a defamatory publication is the hurt to the plaintiff's feelings. If, after six months, the plaintiff is unaware of or unconcerned about a publication s/he realistically cannot complain of such hurt and should not be free to sue at a later date for other financial advantage. A plaintiff who is genuinely unaware of the publication yet feels great hurt and damage to his or her reputation as a result should always be at liberty to apply for an extension of the period under the existing provisions of the Limitation Act.

Ceiling on damages

A ceiling on damages may become a signpost to a jury resulting in most awards at the top of that range. This seems a dangerous departure from the general principles of compensatory damages applicable in tort. Assessment of damages by the trial judge would be preferable. Another option would be to dispense completely with a jury. A quadriplegic and a whip-lash victim should not be subject to the same ceiling on damages neither should a bank manager accused in the national press of involvement in a heroin ring be limited to the same damages as a hairdresser slandered at a Darling Point dinner party.

Public figure defence

The public figure defence is the proposal least likely to fly particularly with politicians at the controls. Many public figures are the creation of the media and intense media interest alone should not amount to a defence. On this proposal Mr Dowd candidly concedes little interest or enthusiasm. While it may have some merit as adopted in other countries, particularly the United States, the media in Australia should still be compelled to make all reasonable attempts for accuracy in reporting on public figures and of course would then have a defence of qualified privilege or at worst substantial truth. If the media properly perform their function a public figure defence should be superfluous to those already available.

Terry Tobin, Q.C., argues that Mr.Dowd's proposals confuse "hurt feelings" with "damaged reputation" and illustrates his point with the recent Lord Aldington case.

The Attorney-General makes two proposals to deal with what he described as recent unjustifiably high awards of damages in defamation trials: impose a limit on the amount which can be awarded for non-economic loss; and take away from juries the function of assessing damages and give it to judges.

The idea of a cap on non-economic loss to reputation and injury to feelings overlooks the central social function of such damages, namely the vindication of the plaintiff's reputation.

This is well-illustrated by the recent action brought by Lord Aldington (the former Brigadier Toby Low) against Count Nikolai Tolstoy over a pamphlet concerning his role in the enforced repatriation of Cossacks and Yugoslavs by the British Army at the end of the European war. The pamphlet was written by the epigonous Count Tolstoy and distributed by Mr. Nigel Watts, a property developer who is said to have harboured a personal grudge against Lord Aldington.

Tolstoy wrote that "the man who issued every order and arranged every detail of the lying and brutality which resulted in these massacres was Brigadier Toby Low". He described the conduct of the then Brigadier Low as comparable to the "worst butchers of Nazi Germany or the Soviet Union". The defendants pleaded justification and conducted the trial as a stage upon which the allegations against the British military in general and Lord Aldington in particular would be paraded and justified. Tolstoy was

joined as a defendant only after he had threatened to issue a summons seeking to be made a defendant. "I remember being puzzled because I had never before heard of anyone volunteering to be a defendant in a libel action", Lord Aldington told the defence counsel, Mr. Richard Rampton Q.C.

During the trial, the defendant's counsel was reported to have clashed many times with the plaintiff during the days of cross-examination.

He told Lord Aldington when he began his cross-examination that although they were likely to agree on little, they could agree that the allegations against Lord Aldington were "as brutal as character-assassination as you are likely to see". He accused him of lying on oath about the date he gave of his return from the war zone to England - which, if accepted by the jury, meant he could not have written crucial military orders for repatriation: "You have deliberately given the jury false evidence." He suggested that the plaintiff could fairly be described as a war criminal were he proved to have forcibly repatriated 70,000 Cossack and Yugoslav prisoners, knowing he was sending them to their deaths.

The trial itself was described as Britain's first War Crimes Trial and the defence was conducted on the basis that the allegations were true.

In the end, after some two months in court, the jury returned a verdict the sterling equivalent of A$3 million for the plaintiff.

In a case where the defendant sets out to prove that a leading public figure is a war criminal, and fails, it is difficult to see why a jury verdict of this size should not stand. Of course, if limited to injury to feelings alone, a libel verdict could never exceed the highest awards for personal injuries. As for damage to reputation however, there must be circumstances where vindication of the plaintiff requires enormous damages. Aldington's was a case where the defence itself described the charges as character assassination in the first degree, accepted the challenge of proving the plaintiff was a war criminal, compared him to a Nazi butcher and failed to obtain a verdict from the jury.

It will be difficult to find informed press comment on this case which does not reflect the journalist's special vulnerability to and abhorrence of such verdicts. Moreover, it is not possible here to do justice to the wider debate about the role of juries other than to assert that the "solution" of abolishing the jury's role should be resisted. While the outcome of their deliberations may not be predictable - as to who wins or by how much - there is such general agreement among lawyers as to the innate sense of justice in most jury verdicts that the task of vindication of the plaintiff in libel actions should remain with the jury.

The "Bond amendments"

Paul Marx explains the Broadcasting Amendments Bill 1989

The Broadcasting Amendment Bill 1989 ("the Bill"), which amends the Broadcasting Act 1942 ("the Act") was introduced into the House of Representatives on 1 November 1989. In his Second Reading Speech the Minister for Transport and Communications, the Hon. Ralph Willis MP, observed that the Act "has rightly been described as a complex, unwieldy piece of legislation". The amendments proposed by the Bill, however, make the Act more complex.

The Bill seeks to amend the ownership and control provisions of the Act so as to overcome problems with the current legislation perceived by some in the course of recent inquiries by the Australian Broadcasting Tribunal, most notably its inquiry into matters concerning licensee companies controlled by Mr Alan Bond. These problems were described as follows by the Minster in his Second Reading Speech:

"At present, the Tribunal would be faced with extremely limited options if, after conducting an inquiry that it was required to hold, it were to find that a commercial licensee was no longer 'fit and proper', or no longer had the financial, technical or management capacity to provide an adequate and comprehensive service. It presently may only impose licence conditions or suspend, revoke or not renew the licence. But if the licensee's unsuitability was due to the conduct or character of a person in a position to control the licensee company or its operations, licence conditions may not be an effective remedy. This is because the conditions may not be capable of affecting the influence of the relevant person on the licensee company. The only other remedies available - suspension, revocation or refusal to renew the licence - would put the service off the air."

Supplementary and public licences

In addition to the significant changes to the ownership and control provisions, the Bill also contains amendments relating to the grant of licences for supplementary radio services in regional areas and to the nature of material which may be broadcast by the holders of public licences. In summary, those amendments:

(a) clarify the Minster's power to initiate joint inquiries into the grant of a licence for a supplementary or a so-called "independent" commercial FM radio service in a regional area. The amendments also confirm the procedures to be adopted by the Tribunal when holding such a joint inquiry;
(b) permit aspiring public broadcasters to transmit sponsorship announcements when conducting test transmissions; and
(c) permit public licensees to broadcast community promotional material.

The amendments relating to the grant of supplementary/independent commercial FM licences are as a consequence of the changed approach to the planning of such services announced by the then Minister of Communications, Michael Duffy, on 24 February 1987. Under that approach to planning, the Minister forms a prima facie view as to whether an area or market is able to support a new, competing service. Where the Minister is in doubt as to the viability of a new "independent" service the Tribunal considers simultaneously relevant supplementary licence applications and applications lodged with the Tribunal for the grant of a new licence. The original provisions of the Principal Act containing criteria for the grant of supplementary licences were drafted at a time when it was contemplated that supplementary licence applications would be considered by the Tribunal prior to a determination of any relevant "independent" licence applications. In amending the Act to reflect such changed planning procedures the Bill provides that the amendments are not to be taken to imply either that a power conferred on the Minister or the Tribunal by the amendments was not previously possessed by the Minister or the Tribunal.

Suitability requirements

Central to the amendments to the ownership and control provisions is a definition of the term "suitability requirements" which is inserted in s.4 of the Act. The holder of a commercial licence fails to meet the suitability requirements that apply to a licence if the licensee is no longer a fit and proper person to hold the licence or no longer has the financial, technical and management capabilities necessary to provide an adequate and comprehensive service pursuant to the licence. Similar "suitability requirements" apply in respect of applications for approval of relevant share transactions involving licensee companies.

Renewal of commercial licences

The nature and extent of the new powers conferred on the Tribunal by the Bill can be

summarized conveniently by reference to the provisions relating to the renewal of commercial licences. Similar provisions are inserted in the Act in relation to the suspension and revocation of licences and the approval of share transactions.

As regards licence renewals, the Bill inserts a new s.86AAA in the Act following the existing s.86AA, which latter section contains the criteria for renewal of such licences. The new s.86AAA empowers the Tribunal to do any one or more of the following where it is satisfied that the holder of a commercial licence has failed to meet the "suitability requirements" that apply to the licence:

(a) revoke, vary or impose conditions on the licence;
(b) give directions under s.92M(1A); or
(c) give directions under s.92N(2A).

Directions under sections 92M and 92N

The Bill expands the nature of directions which may be given by the Tribunal in circumstances in which the Tribunal is satisfied that the holder of a commercial licence has failed to meet the "suitability requirements". A new subsection (1A) is inserted in s.92M of the Act under which the Tribunal may give a person directions for the purposes of:

(a) enabling or requiring the licensee to meet the "suitability requirements" that apply to the licence; or
(b) preventing the person from doing an act or thing that is likely to have an adverse effect on a number of matters such as the licensee's operations in providing the relevant service and the selection or provision of programs to be broadcast.

Directions may be given to a wide class of persons in addition to the relevant licensee. Such persons include a person who is in a position to exercise control of the licensee and a person whose conduct, character or capacity gives rise to, or contributes to the licensee's failure to meet the "suitability requirements". The directions may be given to a servant or agent of such a person or, where the relevant person is a company, a director of that company.

It is conceivable that it would be open to the Tribunal to give directions under s.92M to persons such as bankers and program suppliers should it be of the view that their conduct or capacity gave rise, for example, to a licensee's failure to possess the requisite financial capability to provide an adequate and comprehensive service pursuant to a licence.

Similarly, the provisions for divestiture of interests in a company are expanded as a consequence of amendments made by the Bill to s.92N of the Act. In circumstances in which the Tribunal is satisfied that the holder of a commercial licence has failed to meet the "suitability requirements" and that the holding by a person of particular interests in a company gives rise to or contributes to the licensee's failure to meet the "suitability requirements" directions may be given requiring the relevant person to divest the particular interests. The Tribunal also may give directions to prevent that person disposing of the interests to a specified person or persons included in a specified class of persons.

Amendments to section 86AA

In addition to the amendments referred to above, the Bill amends s.86AA of the Act by inserting after subsection (4) the following subsection:

(4A) In determining whether it is advisable in the public interest to refuse to renew a commercial licence under paragraph 4(b), the Tribunal is to have regard to:
(a) the existence of the powers referred to in section 86AAA; and
(b) *such other matters as the Tribunal considers relevant."* (emphasis added).

On first reading, the provisions contained in the new s.86AA(4A)(b) could be taken to restore the Tribunal to the position that prevailed prior to the 1981 amendments to the Act in which it had full discretion to refuse to renew a licence rather than the current limited discretion having regard to criteria enumerated in the Act. However, that apparently was not the intention of those responsible for drafting the Bill.

Although little guidance can be obtained from either the Minister's Second Reading Speech or the explanatory memorandum it would seem that the new s.86AA(4A)(b) of the Act is designed to make it clear that in determining whether it is in the public interest to refuse to renew a commercial licence in a situation in which a licensee fails to meet the "suitability requirements" the tribunal continues to have a wide discretion, limited only by the scope and purpose of the Act. Any confusion caused by the drafting of the new s.86AA(4A) probably is a result of "grafting" the new provisions onto the existing legislation rather than making a fundamental change to the scheme of the Act. A similar approach has been adopted in relation to the amendments made to the Act in respect of the suspension and revocations of commercial licences [see the new s.88(2A)(b)].

Nevertheless, the amendments made by the Bill evince a clear legislative intention that the Tribunal should have regard to the other available remedies in the public interest before refusing to renew or suspending or revoking a commercial licence in circumstances where the holder of a licence fails to meet "the suitability requirements" applying to that licence.

Time limits for divestiture of interests

As stated above, s.92N gives the Tribunal expanded powers requiring persons to divest interests in licensee companies. S.92N(2A)(c) provides that the Tribunal in the relevant circumstances may "...give such directions as it thinks necessary to ensure that the person ceases, before the end of the period for 6 months commencing on the day on which the direction is given, to hold specified interests in the company ..."

It is inconceivable that any direction would be authorized under s.92N(2A)(c) unless it was one which required the divestiture of interests within the period of six months. Indeed, in his Second Reading Speech the Minister stated:

"If a relevant interest is directed to be divested a strict six month deadline will apply. This is because by then it would have been fully established by the Tribunal, if necessary through court and Administrative Appeals Tribunal avenues, that the licensee failed to meet the suitability requirements and that divestment was the appropriate remedy."

Similar amendments are made to ss 90JA and 92FAA of the Act, which sections deal with the approval of various share and other transactions. In circumstances where the Tribunal refuses to approve such transactions because the relevant applicant has failed to meet the "suitability requirements" that apply to the licence, the Bill provides that the Tribunal is not to grant an extension of the period of six months for divestiture.

It is arguable that the lack of flexibility in respect of the time period allowed for divestiture could be contrary to the public interest in some circumstances. There may be good reasons which (but for the amendments contemplated by the Bill) would lead the Tribunal to conclude that it would be in the public interest to permit a person longer than six months to divest. For example, for reasonable commercial reasons it may not be possible to complete a sale and purchase of a relevant interest prior to seven or eight months after a direction to divest has been received from the Tribunal. The option to permit a vendor such an indulgence in the public interest is removed by the Bill in its present form. It remains to be seen whether the Bill will be amended.

As at the date of writing, the Bill is still in the Senate having been adjourned at the Second Reading stage. Consequently, the final form of the amendments to be made to the Act is yet to be settled. Nevertheless, in the current economic climate the "suitability requirements" (particularly financial and management capabilities) will come under close scrutiny by the Tribunal in the course

Offer of amends defence succeeds: Brennan v Nationwide News

Jillian Anderson and David Casperson

report on the first successful reliance on the apology defence in NSW

Background

In a recent defamation trial before Justice Badgery-Parker and a jury in the New South Wales Supreme Court, the offer of amends defence provided in Division 8 of the Defamation Act, 1974 (NS) as successfully raised by the publisher of *The Australian* newspaper. The defence provides that, in certain circumstances, an offer to publish an apology and pay costs is a defence to a claim for damages for defamation. It is rarely pleaded, and never successfully.

The first article complained of by Mr. Brennan, "Casualties of the MediFraud War", as published in *The Australian* on 23 March 1988. *The Australian* published a follow -up article on 26-27 March 1988 in the *Weekend Australian* which as also sued upon. Both the articles concerned an investigation of Dr. Frank Summers, a Newcastle general practitioner, by officers of the Health Insurance Commission. The articles described activities of the HIC's Investigation Unit "led by Mr. John Brennan" and referred in detail to his activities in the course of that investigation. The article reported interviews with several of Dr. Summers' patients, all of whom complained about the activities of the officer who carried out the investigations in Newcastle.

In May 1988, a statement of claim was served on the publisher of *The Australian* The plaintiff was described as John Brennan. Therew as no request, prior to the issue of the statement of claim, for an apology or correction to be published.

In September 1988, its acting chief of staff authorised republication of the original article in "New South W ales Doctor", the journal of the New South Wales branch of the Australian Medical Association. In November 1988, Mr. Brennan amended his statement of claim to include this republication.

Mistaken identity

During the months following the service of the statement of claim, the newspaper's solicitors, made enquiries and investigations concerning the matters raised in the articles and subsequently in October 1988 the newspaper filed a defence of truth and qualified privilege.

On 3 February 1989, in a conversation at the Defamation List, Mr. Brennan's counsel, Mr. Evatt, made the newspaper's solicitor aware for the first time of the fact that there were two persons known as John Brennan employed in the New South Wales HIC Investigations Branch. The solicitor found out that the plaintiff as the manager of the Branch and had not conducted the investigation referred to in the article, which as conducted by an investigations officer also called John Brennan. At the Defamation List, the newspaper's solicitor obtained leave to file an amended defence withdrawing the defences of truth and qualified privilege.

The offer of amends

On 17 February 1989, the newspaper made an offer of amends to Mr. Brennan pursuant to Part 3 Division 8 of the Defamation Act 1974 (NS). The offer was not accepted and on 3 March 1989 the newspaper obtained leave to file, and subsequently filed, a defence pleading the making of that offer. The newspaper also published an apology to Mr. Brennan, even though the offer had not been accepted.

In order to comply with the provisions of the Act, the newspaper had to establish that the publication of the articles as innocent. When an article is published and it may be defamatory of a person, the article is innocent only if at and before publication the publisher and the servants and agents concerned with its publication:

(a) exercised reasonable care in relation to the article and its publication;
(b) did not intend the article to be defamatory of that person; and
(c) did not know of circumstances by reason of which it may be defamatory of that person.

When the offer is made and not accepted, it is a defence to proceedings brought in respect of the article that:

(a) its publication was innocent in relation to the plaintiff;
(b) the offeror made the offer as soon as practicable after becoming aware that the matter in question is or may be defamatory of the plaintiff;
(c) the newspaper was ready and willing to perform any agreement arising by the acceptance of its offer before the commencement of the trial; and
(d) the author of the article was not motivated by ill will.

The paper proves its case

To prove its case, the newspaper called the journalist who wrote the articles, Mark McEvoy. He gave evidence of the extensive inquiries which he had made prior to writing the articles. He had spoken to each of the persons mentioned in the articles, and had copies of written statements from some of those persons. He had also attempted to contact the investigator, John Brennan, at the HIC but had been told that he as unavailable. The journalist's evidence was that he was not made aw are by anyone at the HIC that there was more than one John Brennan employed there, or that the Manager (Investigations) of the HIC's New South Wales branch went by the name of John Brennan. He was completely unaware of the plaintiff's existence. This evidence was accepted by the jury.

The editor of *The Australian* at the time the articles were published, Alan Farrelly, and the editor-in-chief of the newspaper at the time, Les Hollings, also gave evidence of procedures adopted by the newspaper and of their role in the preparation and publication of the articles. Neither of them were aware prior to publication of the existence of the second John Brennan.

The newspaper's solicitor gave evidence that she believed the John Brennan described as the plaintiff in the statement of claim to be the same person described in the articles, and she was not aware until the conversation with Mr. Evatt on 3 February 1989 that the plaintiff was in fact a different person to the person to whom the article intended to refer. This as despite inquiries which she had undertaken in about August 1988 which provided some evidence that there was some information available to the newspaper and its legal advisers at that time suggesting that another John Brennan had conducted the patient interviews in Newcastle.

The trial Judge held, in a ruling during the trial, that the knowledge referred to in S. 43(1)(b) of the Defamation Act meant actual knowledge, not constructive knowledge. For this reason, the relevant time when the

newspaper became aw are that the articlew as or may be defamatory of the plaintiff was in February 1989, rather than in August 1988 or earlier. The offer being put on shortly after that time as therefore made by the newspaper "as soon as practicable after becoming aware".

The trial judge ruled that the offers complied as a matter of law with the formalities required by the Act and left them to the jury in regard to all three publications.

The judge also directed the jury that Mr. Brennan was not entitled to damages in respect of avoidable loss, that is, loss which by the exercise of reasonable steps on his own behalf he might have avoided. Therefore, he could not recover damages resulting from the failure of the newspaper to publish a correction and apology until almost a year after publication of the original articles, as the plaintiff could have reduced the harm suffered by bringing to the newspaper's attention the fact that there were two persons known as John Brennan within the HIC.

In respect of the first and second articles sued upon, the jury found in favour of the newspaper. The jury found each of those publications were innocent in relation to the plaintiff and the offer of amends was made as soon as reasonably practicable after the defendant had become aware of the true facts.

In relation to the republication in *New South Wales Doctor Magazine*, the jury found that the matter complained of w as not innocent in relation to the plaintiff. The basis of that answer was a finding by the jury that the newspaper had not exercised reasonable care in allowing republication of an article upon which a statement of claim had already been issued. The jury awarded the plaintiff in respect of the third article $10,000 damages.

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The Bond amendments

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of licence renewal inquiries and transaction inquiries. It should not be long before the practical implementation by the Tribunal of the amendments contemplated by the Bill will be seen.

In his Second Reading Speech the Minister stated that the Bill "represents the first stage of legislation to reform the operation of broadcasting regulation." We await the "further reforms" which are to be contained in amendments to be introduced in the Autumn and Budget Sittings of Parliament in 1990.

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The Newspaper Rule

Grant Hattam examines the development of this rule and its recent application in Victoria.

Background

What is told to journalists is not rated in law with the same importance as what is told to priests, doctors or lawyers. The latter three professions have an absolute privilege. They do not have to reveal under any circumstances what has been told to them. Journalists don't have that privilege. What I'm told as a lawyer will never be revealed. A journalist, however, if ordered by a court to do so, must reveal his or her source or face the consequences.

That does not mean, of course, that a journalist will necessarily reveal the identity of the source, even though ordered by a court. He or she may refuse to do so thereby abiding by the journalists' code of ethics. As a result, there can be a conviction for contempt which may mean gaol.

That will only happen if a court in the first place refuses to apply what is known as "the newspaper rule".

Recently, the Supreme Court of Victoria did apply the newspaper rule and refused an application by the Guide Dog Owners and Friends Association (the Lady Nell School) for the journalists who wrote a story in *The Melbourne Herald* to disclose their sources.

Cynics say that the rule has evolved simply because some judges could not bear the adverse publicity of sending journalists to gaol for refusing to divulge their sources until absolutely necessary. In other words, a sort of semi-privilege has been afforded to journalists that has evolved as a matter of practice.

The Conjuangco Case

To understand the Cojuangco case is to understand the newspaper rule.

In an article in *The Sydney Morning Herald*, a man called Cojuangco was allegedly defamed. The article concerned his affairs in the Philippines and the allegation that he was corrupt. He felt sufficiently aggrieved to want to issue proceedings in Australia for defamation. But who could he sue? In New South Wales, there is a statutory defence available to a newspaper. Cojuangco was unlikely to succeed if he sued the newspaper because of this defence.

Therefore, what could he do in order to have his reputation, as he saw it, restored? As the article itself placed great reliance on the sources mentioned in the article for the information relied on, Cojuangco made application that the journalist concerned should reveal his sources. Indeed, the whole article had the striking feature of being based on statements from leading and senior figures. The court, whose ruling was upheld in subsequent appeals, agreed with Cojuangco's application.

The courts significantly found that there is such a thing as "the newspaper rule" which protects journalists from revealing sources. But that rule will not apply if justice demands that it should not.

Justice in the Cojuangco case did make such a demand. The courts felt that he would have been prejudiced without such disclosure. Cojuangco did not have any successful prospects of an action against the paper because of the special defence available to the newspaper. Such a defence, however, was not available to the sources. It was only by having the sources as defendants that Cojuangco could endeavour to restore his reputation. The court made it clear, however, that if he had had a reasonable action against the newspaper the journalist, at least until the trial of the action, would not have to reveal the identity of the source.

The Sydney Morning Herald was faced with the prospect of its journalist having to reveal his sources. It is not surprising that a very logical step then took place, The newspaper simply stated to the court that it would not rely upon the statutory defence. It would simply rely on other defences such as truth. It stopped itself from being in any better position of defending an action than any source would be.

Accordingly, the newspaper rule was applied upon the undertaking by *The Sydney Morning Herald* to abandon its statutory defence and the journalist did not have to disclose his sources. Cojuangco, in other words, was left with an action against *The Sydney Morning Herald* which was in no better position to defend that action that any source would be.

The Lady Nell Case

In the recent Victorian Lady Nell case, the Full Court of the Supreme Court believed that justice would not be denied to the plaintiffs if the newspaper rule was applied. The defendants in that case already had an

existing action against *The Melbourne Herald*. How could justice demand that the plaintiffs know the sources of the information as well? The paper was in no better position to defend the case than any source would be. As a matter of fact, the paper abandoned its defences of qualified privilege and fair comment and simply said that it would rely on the defence of truth. That being so the paper could not be in any better position to defend the action that what any source would be. Further, as the paper was in a position to pay any damages that may be awarded to the plaintiffs in the case it was simply unnecessary to have any sources added as defendants.

The newspaper rule has produced an extraordinarily bizarre situation. If a plaintiff seeks preliminary disclosure of a journalist's source, he will not obtain that order if he has an effective remedy against the newspaper. Where it appears, however, that the newspaper may have a stronger defence than the source, then disclosure may be ordered in favour of the plaintiff in the interest of justice. Accordingly, a court hearing an application for disclosure of a source must take into account the merits of the newspaper's defence. If follows, therefore, that it is in the plaintiff's interest to demonstrate to a court, as far as she/he can, when making an application for disclosure, that she/he does not have an effective right of action against the newspaper. It also follows that it is in the newspaper's interests to demonstrate to a court that the plaintiff already has an effective action against it. It is a curious situation when the parties to an action try to demonstrate the weaknesses of their case to the court. Indeed , if a newspaper defendant's defence is looking better than what the source's defence might be, then the newspaper, as in the Cojuangco case will probably wish to weaken its case by abandoning defences that are not available to the source.

The implications of the rule

The recent Lady Neil decision is indeed important. Imagine if a paper was faced with a source application every time a plaintiff issued a defamation proceeding against it. The newspaper, regardless of the merit of the plaintiff's defamation case, would in many cases feel the pressure not to reveal the source, because to do so would be to breach the undertaking of a journalist. Accordingly, in an effort to resist disclosure, the newspaper may offer money to the plaintiff in order for the plaintiff not to proceed with the application for disclosure of sources. This will be particularly painful and against the public interest because the plaintiff's defamation action may have no merit at all.

Alternatively, the paper could adopt the stance of instructing its journalists to say to sources that, if called upon by a court, they will have to reveal the sources' identity. If this policy was adopted by the newspapers, it could mean an end of news as the public knows it today. Sources would simply dry up. The collection of news , in many cases, involves leaks from unidentified members of parliament, government bureaucracies, major corporations and many different organisations. In many cases, the most terrible wrongs in society might not be brought to the public's attention but the anonymity of the source of the information provided. This is a fact of life. If is, after all, the media which accepts the responsibility and liability for the matters that are published.

The decision in the Lady Neil case does not mean that the newspaper rule will automatically be applied by a court to protect journalists from revealing sources. It does mean, however, that it will be applied unless the plaintiff can demonstrate that his or her case may be prejudiced unless an order for disclosure is made. As Mr Justice Hunt said in the initial Cojuangco decision, the existence of an effective right of action by a plaintiff against a newspaper would seem to him to be a sufficient answer to an application for disclosure. He also said, "It is difficult to see how the pursuit of a merely personal satisfaction could be in the interests of justice". Accordingly, the onus rests upon the plaintiff to demonstrate that justice requires disclosure.

The rule's applications should be extended

It is submitted that the operation of the newspaper rule should be extended to the actual trial of the action itself as well as the pre-trial process. After all, the High Court in Cojuangco stated that the existence of the rule is a factor to be taken into account in the exercise of judicial discretion pursuant to the Supreme Court discovery rules in Victoria and New South Wales. Why not extend the rule to the actual trial?

The same principles that justify the existence of the newspaper rule in the pre-trial process should also justify its existence in the actual trial itself. It is often, after all, the newspaper that suffers by not calling its source at the trial to give evidence.

This, in effect, has been recognised in the United Kingdom through S. 10 of the Contempt of Court Act 1981. That section provides in general terms that no court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established that disclosure is necessary in the interest of justice, national security or for prevention of disorder or crime. It can be seen that the effect of this section is to extend the newspaper rule to the actual trial of the action.

The courts over the last 100 years have carefully weighed the competing principles and have come to the conclusion that the proper flow in dissemination of the information would be significantly hampered if the newspaper rule and the principles which support it were not given significant weight. For these reasons, the newspaper rule should be maintained, strictly enforced and extended.

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TELEVISION 2000 - CHOICES AND CHALLENGES

Ros Kelly, Minister for Telecommunications, discusses the government's agenda for reform of the Broadcasting Act

Since coming to this portfolio earlier this year, I have been greatly impressed by two things.

The first is the rapid pace of change in communications. The second is the growing inter-relationship between telecommunications, radiocommunications, and broadcasting.

I see several fundamental questions. What sort of broadcasting system do we want in the year 2000? What will technology permit us to do? What will we be able to afford? What will be the role of government? Will the industry we now know undergo further substantial change?

These questions are important for the government, the public, and the industry.

High definition television

I want to make particular mention of one aspect of technological change - high defini-

tion television (HDTV).

The government's concerns are twofold. Firstly, we wish to ensure that the development of international standards for HDTV avoids the mistakes of the past and that we properly respond to Australia's future requirements.

I believe we would be best served by a single worldwide production standard for HDTV. This would enhance international program exchange, and recognise the advantages of equipment compatibility.

Secondly, when assessing the options presented by HDTV and other developments in television technology, the government will be looking to systems that give the maximum benefit to consumers at an affordable cost.

We will also consider the interests of the broadcasting, program production, and manufacturing industries.

The choices and challengers

Change in broadcasting presents choices and challenges: choices which must be made and challenges which must be met.

Change is by its nature difficult to predict. The government is concerned that the interests of Australian audiences are safeguarded, and that licencees continue to meet their obligations to provide quality services that comply with prevailing standards.

Their obligations are not discretionary. They are a condition of the licences. They need to be met, just as much as financial obligations need to be met, if the present licensees are to remain in business. Leaving aside current problems, pressing though they are, broadcasters, public interest groups and government should welcome social and technological change and work co-operatively to structure a system that serves all Australians.

I have often heard it said that we in Australia have one of the best broadcasting systems in the world. Unless we rise to the challenge of change our system will become inferior to those in the rest of the world.

The government accepts the responsibility to ensure that the regulation of broadcasting is set at an appropriate level. We are faced with making choices which affect the sincerely held views of different groups. These are difficult issues which require careful consideration. We only have limited opportunities to get the answers right. In fulfilling our responsibilities, we will be looking to the industry and public interest groups for support and co-operation.

The government expects all groups in the broadcasting industry to look beyond their immediate self-interest or concerns, while recognising the operators' right to make a fair return on investment. All interest groups should also consider whether existing regulation arrangements remain the best way to achieve our various goals including high quality and diversity in programming.

The reform agenda

The government intends to bring forward in the autumn sittings of 1990 a package of measures to improve the efficiency of the ownership and control scheme. We will also be looking to streamline the Australian Broadcasting Tribunal's public inquiry processes.

While we are taking these immediate actions, we remain conscious of the need to examine the wider perspective of broadcasting regulation.

It is fair to say that this remains a complex task. Those who would pursue simplistic solutions based on either naive deregulatory approaches or on heavy-handed prescriptive regulation fail to appreciate this complexity. They fail to appreciate the changing technological, community and economic environment within which this industry will need to operate.

Our basic premise is that future legislation must more clearly serve explicit policy objectives, and that the industry is subject only to the minimum regulation necessary.

The government has already made it clear that full deregulation of broadcasting is not be appropriate. People recognise that broadcasting is different in many ways from other industries, as it involves so many important public interest issues. This means that we will still need a proper regime of licensing and standards, as well as rules relating to ownership. The regulations that remain must be capable of efficient administration, while providing certainty, appropriate public access and natural justice.

These objectives do not mean that the government plans the abolition of the Australian Broadcasting Tribunal, the abolition or amendment of the ownership levels, the relaxation of foreign ownership rules, or to allow self-regulation in areas such as the Australian content and children's program requirements.

The key issues

In the context of the overall review the government has an open mind and will be addressing seven key areas:

- how future broadcasting legislation can best serve the government's explicit policy objectives including the aim that there be no more regulation of industry than is necessary to support stated objectives;
- the regulatory implications of the interactions between existing and emerging communications services and the needs of the legislation that governs them;
- the re-structuring of communications planning processes to provide greater scope for broadcasters to take the initiative while also providing for proper accountability through a more transparent process;
- aspects of the ownership and control scheme in broadcasting;
- the need for a more efficient and rational approach to licence allocation, review, and renewal;
- examination of the regulation of programming standards to ensure that quality is maintained in the broadcasting system under any new arrangements; and
- re-examination of the nature, responsibilities and method of operation of the regulatory agencies and the division of responsibilities between them and the government.

These are difficult and important issues. We intend this to be a genuinely wide-ranging review that is free to explore all options and test them against the political, community and economic context before the government makes any decisions.

We will be providing opportunities for consultation, and hope that the debate, which will no doubt be robust, will also be objective and constructive. We should remember that the Australian Broadcasting Tribunal has carried out a difficult task over the past few years. Indeed, some would argue that it has had an impossible task.

The Tribunal has had to carry out its statutory responsibilities in a rapidly changing social and technological environment. It has had to do so within a legislative framework that is far from satisfactory.

This is an edited version of the opening speech by the Honourable Ros Kelly, MP, given in her capacity as then Acting Minister for Transport and Communications to the Australian Broadcasting Tribunal conference "Television 2000 - Choices and Challenges" on 16 November 1989.

The role of Austel in deregulation

Judy Stack, of Bond Communications argues that deregulation must be anchored in vigorous regulation by Austel.

In the Australian telecommunications arena today, "deregulation" is the buzz word, regulation is the anathema but deregulation cannot be achieved without regulation.

Regulation and free enterprise are words rarely found in the same sentence. However, free enterprise in the communications industry can only prosper if Austel actively regulates Telecom's activities. There is a tremendous imbalance in the power of those operating in the marketplace. While a monopoly of this size and power continues unchecked, effective competition from the private sector is all but impossible.

Monopolies are terrible things unless you happen to own one. In telecommunications, regulation of the monopoly is essential if deregulation is to proceed. So what then is Austel's role?

Austel's task

Austel is a lean organisation with accessible staff however its existence has set very high expectations within the industry.

Austel has three major constituencies:

- its political masters being
  - cabinet
  - minister (department)
- the telecommunications industry
  - public sector (carriers)
  - private sector (telecommunications companies)
  - unions and associations
- and of course the general public
  - the system users (corporations) and
  - basic telephone users(Mr and Mrs Average)

Austel will obviously have difficulty satisfying the interests of all three groups but if deregulation is the desired end then Austel must provide the means, and the means is found in achieving a balance between these groupings. Balance can only be found through regulation and the creation of a level playing field between the monopoly, Telecom, and the private sector.

Robin Davey, chairman of Austel, has constantly espoused Austel as a facilitator. Being a "facilitator" is fine, but being a "regulator" is essential. What is needed is a regulator to redress the imbalance in the market - Telecom has to be regulated.

The telecommunications industry has long been subjected to an intolerable farce, that is, Telecom as a commercial services provider and regulator. The 25 May 1988 Statement recognised this and sought to resolve the conflict by creating an independent regulatory authority with five major areas of responsibility: technical regulation; protecting the carriers monopoly; protecting competitors from unfair carrier practices; protecting consumers against misuse of the carriers' monopoly powers; and finally, promotion of efficiency of carriers especially in relation to the public carriers' community service obligations.

The Telecommunications Act 1989, recognises the need for a regulator role and this is clearly spelt out in ss. 18-24 - those sections dealing with the general functions of Austel. Section 24 gives it the power to carry out those functions.

If Austel is to work towards the creation of a level playing field, it must take an aggressive regulatory role to correct the imbalance in the market.

Telecom has restricted not only the private sector but also the other carriers. Assat has been brought to its knees financially because it was prevented from functioning as it was designed to do. The protection of Telecom has been at great cost to the community both financially and in limited service offerings.

A level playing field can only be achieved through reducing Telecom to the same opportunity level as the private sector; or regulation to avoid, in the words of Henry Ergas, "the incumbent's accumulated dominance from distorting the competitive process" together with the provision of compensation to the private sector, for instance, tax rebates. Telecom could also be excluded from the market for a limited period. There is a good case which can be put for baring Telecom from the non-reserved services market for 3 - 5 years.

Accounting practices

Most important is policing the relationship between carriers and competitive suppliers and the ability of Telecom to cross subsidise its commercial activities from its reserved service activities. The conflict is enormous and the potential for abuse is very tempting. Separate accounting measures included in the Telecommunications Act to assist in controlling unfair practices by carriers is not enough.

If Telecom is to be allowed to continue to operate in the non-reserved services market, Austel should require Telecom to have arms length companies where it operates in the competitive arena. This structural separation is essential to give the private sector greater confidence that monopoly abuse by Telecom will be eliminated.

Further, the accounting policies and return on investment criteria of these companies must be regularly monitored. Telecom should not be allowed to use its market and dominant financial position to enter into ventures where it will not see a commercial return just to block the successful entry of other parties.

Austel must be vigilant in policing potential unfair practices by carriers. It has the power to do so. Section 20 of the Telecommunications Act says:

"The functions of Austel include protecting the suppliers of competitive facilities and services from unfair practices of the carriers, and generally promoting fair and efficient market conduct in relation to the supply of competitive facilities and services, and for those purposes:

(a) regulating the manner in which the reserved facilities and services of carriers are made available to suppliers of competitive facilities and services; and

(b) regulating the manner in which the carriers supply competitive facilities and services."

Further reading of the Act suggests Austel not only has the power to act as a regulator, it must be a regulator whether it desires to be or not.

Community service obligations

Bond Communications initiated Freedom of Information Act requests to uncover the results of the Bureau of Transport and Communications Economics' study into the costs of Telecom's community service obligations (CSOs).

I am very glad to state that our attempts, and those of others, have now been rewarded with the publication of the Bureau's findings. As we have long suspected, the CSO's costed a mere $240 million in 1987/1988.

The CSOs have long been the bogey behind which Telecom has asserted its right to the monopoly and, in fact, this bogey forms the fundamental basis for the whole thrust of

continued on p15

The 'commercial viability criterion': Wesgo Communications & beyond

Ken Brimaud examines the development of the ABT's approach to this topical requirement in the Broadcasting Act

The recent unreported judgment of the full court of the Federal Court in ABT v Wesgo Communications (1989) provides a timely opportunity, particularly given the present happenings in the broadcasting industry, to examine just where the concept of commercial viability stands today and its likely future.

The nexus between good programs and the ability to pay for them has provided from the beginning the basis for the view that licences for new commercial stations should not be granted unless the proposed station would be financially viable. However, it was only in 1977 that amendments to the Broadcasting Act gave this concern legislative expression and the Australian Broadcasting Tribunal (ABT) was required to have "due regard" to the commercial viability of the commercial broadcasting or television stations in the relevant area served or to be served when granting or renewing a licence.

The U.S. Position

In the U.S case of FCC v Sanders Brothers Radio Station (1949) the US Supreme Court held that although the Federal Commissions Act was neither intended nor designed to protect licensees against competition, such competition is not to be disregarded entirely by the Federal Communications Commission (FCC) because in certain instances it may become so ruinous as to cause not only financial hardship to the competing station, but also an overall degradation of service to the public. In such situations, the court concluded that the effect of competition should be considered by the FCC in implementing its licensing policy.

The FCC in subsequent years adopted a licensing policy premised on the theory that competition could not be adverse to the public interest but in 1958 the Court of Appeals for the District of Columbia Circuit in Carroll Broadcasting Company v FCC definitively established the relevance of economic injury to the public interest and made it incumbent upon the FCC to consider this factor in allocating uses and wave lengths assigned for commercial broadcasting between competing uses and geographical areas to ensure the most efficient use in the public interest. The FCC was to issue a licence when the applicant could show that the grant would serve the public "interest, convenience, or necessity".

The ABT approach

In the first detailed investigations of "commercial viability" by the ABT in the Coffs Harbour Licence Grant inquiry and in its Albany Commercial Viability inquiry during 1983-84, a definition of commercial viability was decided upon which in successive years remained basically intact. The Tribunal said that the proper interpretation of commercial viability as used in the Broadcasting Act:

" means the ability of a broadcasting or television station to survive commercially while effectively operating in accordance with the conditions of its licence and providing an adequate and comprehensive service pursuant to the undertaking required to be given under the Act"

The Tribunal had regard to the FCC, its sister authority in the US, and concluded that there was "a significant similarity in the approach required to be taken by the FCC and the Tribunal". Indeed it expressly stated that in its view it had a "primary duty to act in the public interest".

The Perth Inquiry

This general approach to the interpretation and application of the commercial viability criterion continued in subsequent years. In the first metropolitan television licence grant inquiry for 20 years (for a third commercial television station to serve Perth) the Tribunal endorsed and more fully expanded upon the principles enunciated and developed in the Coffs Harbour and Albany inquiries.

It adopted the same definition of 'commercial viability', considering that criterion within the context of the public interest and saying that it would not feel constrained from making a decision which could jeopardise the commercial viability of existing stations but would "explore the degree of likelihood and balance that degree against other public interest factors".

The Tribunal in the Perth licence grant inquiry took a very practical approach to the application of the criterion equating its assessment with that made:

"of plans for other public services, such as roads, airlines, sporting grounds and universities because there is rarely one simple dominating factor. A facility which extends existing services inevitably affects existing services to some extent".

Such an approach placed the commercial viability criterion no higher than other factors to be considered in the public interest. The Tribunal rejected the use of the expression 'commercial viability' "in a special commercial or trade sense" refusing to equate it simply "with profitability or rate of return on investment, although both those elements are among useful indicators" which it must consider.

The significance of the Tribunal's decision in the Perth inquiry was its consideration of the "commercial viability" criterion in a practical, commonsense and non-legalistic manner within the context of the other statutory criteria and public interest considerations which both the Broadcasting Act and experience require the Tribunal to "have regard to".

This approach was not far removed from the approach in the United States following the decision in the Carroll case.

The 1985 amendments

The link between viability and service to the community was perhaps more positively reflected in further amendments to the Act in 1985 which introduced the service-based concept of planning and licensing. Section 83(6)(c)(iii) provided that the Tribunal should not refuse to grant the licence unless it appeared to the Tribunal that it was advisable in the public interest to refuse to do so, having regard to the need for the commercial viability of the service provided pursuant to the existing licence.

In considering the grant of a commercial licence, the Tribunal was now no longer obliged to consider the commercial viability of the broadcasting and television stations already serving the proposed area of the licence applicant, but to have regard to "the need for the commercial viability of the service or services provided pursuant to the other licence or other licences" having service areas that overlap the service area.

The first licence grant inquiry conducted by the Tribunal under the 1985 amendments

to the Broadcasting Act was in relation to a grant of a new commercial FM licence in the same area as that served by the applicant's existing AM radio station '2GO Gosford'. In that 1988 inquiry the Tribunal adopted the principles formulated and method of analysis applied in previous licence grant inquiries. In reaching its decision to grant a new commercial FM radio licence to serve the Gosford Wyong area.

In 1989, Wesgo Communications appealing the 2GO decision succeeded in its submission to the Federal Court that the Tribunal erred by considering not the commercial viability of the service provided by Wesgo, but the commercial viability of Wesgo itself, irrespective of the service it was providing pursuant to the 2GO licence (Wesgo Communications v ABT). Because the Tribunal had extensively referred to earlier decisions all made under earlier legalisation, made frequent references to commercial viability in the context of a broadcasting station's viability and failed to specifically use the expression 'commercial viability of the service' Justice Sheppard, although recognising that the Tribunal was aware of and may have considered the new legislation, concluded that the Tribunal had erred in its application of s. 83(6) (c) (iii). He appeared to have taken the view that the 1985 amendments to the Act substituting the expression 'service' for 'station' signified a substantive change.

The ABT vindicated

The matter went on appeal to the Full Court of the Federal Court which held that the 1985 amendment to s. 83(6) (c) (iii):

"was not designed to effect any relevant substantive change to the law; rather it was a consequential amendment designed to adjust the terms of the Broadcasting Act consequent upon the change of the basis of licensing from single 'stations' (which referred to physical structures) to 'service areas', that is to say, in relation to a licence, the area to be served pursuant to the licence".

The Full Court took the view that when the Parliament directed the attention of the Tribunal to the need for the commercial viability of the service or services provided pursuant to other licences "it was dealing with a practical question which turned upon the financial feasibility of the operations conducted by the relevant licensee with the respect to the relevant service". Although the 'service' comprises the programs that are broadcast, these do not stand apart from the general conduct of the operations of the licensee pursuant to the licence. The Full Court said that:

"It is too limited a reading of the expression of sub-s 83(6) 'the commercial viability of the service ..... provided pursuant to the other licence', to treat it as referring merely to the program material provided to the listening public in the service area"

Rather, what is involved is a "a practical test designed to enable the Tribunal to look at the provision of the relevant service by a particular licensee, and to consider if it is commercially viable or not in the sense of financially sustainable".

The Full Court therefore endorsed what a long line of Tribunal decisions in licence grant inquiries, particularly in the Perth inquiry, had said about the practical nature of the task the Tribunal had to perform when applying the 'commercial viability' criterion in the particular instance: that is, that one practically has to look at the total picture - the operations being conducted by the licensee pursuant to, and in accordance with, its licence, as well as the particular market environment in which it does so.

In 1988 ss. 83 and 86 were repealed but new sections substituted which included commercial viability as a criterion for grant of licences (except limited licences), for a renewal of licences and for their variation, revocation or the imposition of new licence conditions.

The criterion under threat

In the United States the Carroll doctrine has come under attack as being contrary to the First Amendment to the U.S Constitution guaranteeing freedom of speech and of the press. The cost in time and money to both parties and to the government of requiring consideration of the Carroll issue against what many consider the relatively remote possibility of actual harm to the public interest has been another source of criticism. Indeed, in May 1987 the FCC undertook an inquiry to consider abolishing the Carroll doctrine.

Interestingly, the same reservations about the concept of commercial viability have recently emerged in Australia. The July 1989 *Discussion Paper* by the Broadcasting Review Group of the Department of Transport and Communications (DOTAC) concluded that there was a case for re-examining the role of viability in the planning and licensing process. Striking a similar note to the FCC's *Inquiry Notice*, the Review Group identified a number of "special problems" associated with the 'commercial viability' criterion. For instance, it was the concept of commercial viability as forming "a barrier to entry allowing incumbent licensees to carry on business under its protection".

The Review Group also saw a "conflict of aims" between the general objectives of the government to remove unnecessary regulation, promote free markets, provide greater competition and increase variety of programmes with the protectionism inherent in the concept. It referred to the "complexity of licensing inquiries, the cost to participants in the inquiry, the amount of related litigation and the delays in delivery of new services to the public".

The Federal Government has not stood still. Stage II of the National Metropolitan Radio Plan in which there will be allocated by tender up to two new commercial FM radio licences in each capital city, envisaged that the Tribunal, although involved in awarding these new license, "will not have regard to viability of the proposed service or the effect on the viability of existing services".

The Federation of Australia Radio Broadcasters has taken a strong stand against the reform, referring to the development as "the most significant and far reaching reversal of broadcast planning policy in the history of Australian Broadcasting".

The recent upheavals in the industry caused largely by the financial problems experienced by the major television networks (or their owners) have exposed the inadequacy of present broadcasting legislation. Comments by the Deputy Secretary of DOTAC, Mr Mike Hutchinson, advocating a reversal of certain fundamental tenets which have governed broadcasting law in Australia, and the Minister's mixed response, suggest that serious reconsideration of the basic policy doctrines of Australian broadcasting is taking place beneath the surface.

The commercial viability criterion is obviously one of the many policies being currently assessed in the light of the new types of services and the changing environment of the broadcasting industry.

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The role of Austel *from p9*

the 1989 Telecommunications Act.

I note that the Minister must also see the low cost of the CSO's as an embarrassment and we welcome his announcement yesterday that the government is bringing forward its plans to look at the structural arrangements between the three carriers.

This review must extend to a full inquiry into whether or not there is any future justification for the continued Telecom monopoly over any or all of the reserved services. Austel is the appropriate body to conduct that inquiry.

Communications is a sunrise high tech industry. Australia needs private enterprise entrepreneurial energy to ensure that we are internationally competitive in this industry that is so vital to our economic health.

This is an edited version of an address Judy Stack gave to a CAMLA Luncheon on 7 December 1989.

To pay or not to pay?

John Saunderson, MP, in presenting the report of the House of Representatives Committee on subscription television, explains its recommendations and calls on the government to make decisions

This report which deals primarily but not exclusively with pay television is the third of its kind in 7 years. I trust that it is the last. There is now a mountain of information on the subject. What is required now is not further inquiries and more mountains of information but decisions - decisions on the introduction of pay TV, decisions on its market structure and decisions on the extent of regulation and the regulatory framework.

The committee report has blazed a trail for making and taking such decisions. The report offers the government a model for the successful implementation of pay TV in Australia. This model has the following 5 major features:

1 cable/microwave multi-point distribution (MDS) - and later cable as the primary delivery mechanism for pay TV;
2 multi-channel systems operating in a large number of markets with exclusive franchises for each pay TV operator;
3 legislative requirement for each operator to provide one channel initially, for local and community programming;
4 licences awarded to the highest bidder with renewal virtually automatic; and
5 minimal regulation because of the value for money characteristics and direct subscriber/operator relationship of pay TV.

Why pay TV?

After a very thorough examination of these issues the majority of the committee supports the introduction of pay TV. This conclusion was reached after the application of two approaches - the net social value approach and the market (why not pay TV) approach. The report says that if properly managed pay TV provides net social benefits by:

- increasing diversity not only through market driven programming but also by local and community programming; and
- promoting the plurality of views in Australian society through diversity of ownership and non-commercial programming.

In other words although pay TV is a commercial product and will live or die by its commercialism, this is a once in a lifetime opportunity to achieve non-commercial objectives. These twin goals dominate the committee model.

Preferred delivery system

If these social objectives are to be achieved the choice of delivery system cannot be left to the market and there is therefore a role for government. Such objectives become criteria in the selection and the table on comparative advantages of delivery systems applies these and other criteria. Application of such selection criteria has led the committee to recommend cable/MDS with conversion to full cable when it becomes available, as the primary method of delivery for pay TV.

Direct broadcasting by satellite has been rejected as a delivery mechanism because it cannot satisfy several selection criteria. It can provide little diversity of ownership because it serves the national market and therefore there are no opportunities for local and community programming. It cannot provide for advanced television capacity. But perhaps the biggest disadvantage is cost to subscribers. Due to the cost of earthstations outside the 52 DBW contour, Aussat sees pay TV being delivered only by community ownership arrangements. This could affect adversely market penetration of pay TV in these areas, further there is the investment loss for metropolitan subscribers who switch to the bigger capacity cable technology when it becomes available.

The Committee does not support the satellite/MDS options proposed by Aussat and Independent Television Newcastle. It is clear from the table on comparative advantages of delivery systems that cable should be the pay TV delivery system in the long-term. The superiority of cable is recognised by almost everyone. Care should be taken not to put in place short-term measures which inhibit the introduction of cable. The use of indirect broadcasting by satellite with MDS as the primary method of delivery for pay TV, particularly with "soft entry" pricing and long-term contracts for satellite delivery, would inhibit the introduction of cable.

The attempt to cater for local and community programming by having a satellite/MDS delivery system in markets which can support commercially such programming, (and the extra cost of MDS) is unrealistic. It is very unlikely that the option will be taken up. Such non-commercial programming needs to be subsidised or cross-subsidised and is unlikely to survive otherwise. The experience of public radio and concern about public television underline this need. Thus market driven localism and community programming is self-defeating.

Market structure

The establishment of a particular market structure lies at the heart of policy development for pay TV and the desirable amount of regulation for that structure. The Committee's approach to market structure was influenced by three factors:

- increasing diversity of programming, both commercial and non-commercial;
- promoting diversity of ownership; and
- ensuring the commercial viability of pay TV.

In view of these, the Committee has recommended that the market structure for pay television in Australia contain the following three elements:

- multi-channel systems;
- a large number of markets based on present broadcasting areas with more than one market for each capital city; and
- exclusive franchises for each market.

It could be said that these recommendations will create "local monopolies". The monopoly argument is exaggerated. If introduced pay TV would be in competition with broadcast television and the VCR. The substitutes are not perfect but, particularly with the VCR and the pay TV movie channel, are sufficiently close to restrain the abuse of alleged monopoly power.

Interestingly, the Federal Communications Commission (FCC) in the USA uses the existence of broadcast television in its equation of effective competition. The FCC has decreed that where there is such competition there is no need for rate regulation of pay TV.

There is also the public benefit test of exclusivity. Given the characteristics of Australian industry (competition among the few), the view that the small size of the Australian market may not support more than two operators, the increase in programme diversity, and the existence of substitutes for pay TV, the Committee concludes that there would be net public benefit from exclusive franchises.

Trading in the radio spectrum: A new management rights approach

Bruce Slane examines the final legislative stage in New Zealand's program of telecommunications and broadcasting deregulation which became law this month

Introduction

As part of its reform of telecommunications including regulation of broadcasting in New Zealand, the third stage of the government's legislative programme was reached with the passage of the Radiocommunications Act. It covers both telecommunications and broadcasting and has the following purposes:

(a) to establish a management regime for the radio frequency spectrum which will facilitate the opening up of commercial telecommunications and broadcasting and the introduction of new services; and

(b) to maintain within the new management system allocation of radio frequency spectrum for non-commercial social purposes such as public safety, defence and security and for some non-commercial broadcasting services.

Background

Formerly a telecommunications monopoly was maintained by the New Zealand Post Office with some exceptions, notably for the Broadcasting Corporation of New Zealand in respect of television networks. Sound-radio and television broadcasting was licensed by the Broadcasting Tribunal. The industry was dominated by services operated by the Broadcasting Corporation which had inherited a former state monopoly. A few sound-radio services had been licensed by the former Broadcasting Authority prior to 1972 and many by the Broadcasting Tribunal since 1977.

In the first wave of deregulation the Post Office's telecommunications operations became a state owned enterprise (Telecom) and its monopoly powers were whittled away. In the second stage decisions were made to abolish the Broadcasting Tribunal and substitute a Standards Authority, a Broadcasting Commission and a spectrum management regime.

The Commission and the Authority came into being on 1 July 1989. The Commission's responsibility is to collect a public broadcasting fee paid by households using television receivers and to distribute the proceeds for the purpose of maintaining non-commercial services, services to remote areas and to subsidise indigenous television programming.

Late in 1988 the Broadcasting Corporation was split into two organisations, Television New Zealand Ltd and Radio New Zealand Ltd. Both state owned enterprises, which were given commercial objectives.

In August 1989 the Tribunal licensed a third television service. Attempts at judicial review failed and appeals were withdrawn. A modified version of the proposal approved by the Tribunal commenced transmission at the end of November 1989.

The Broadcasting Standards Authority has taken over the Broadcasting Tribunal's complaints functions but has in addition been required to set or approve industry standards in accordance with statutory requirements. It has more extensive powers to legislate as to programming standards. Its decisions on complaints are subject to an appeal to the High Court. The Authority has strong powers of enforcement including a power to close down radio and television services for up to 24 hours in respect of each complaint upheld.

The Standards Authority also has the right to award compensation of up to $5,000.00 for breach of privacy.

The present scheme of licensing is established under Part 2 of the Telecommunications Act 1987 and the Radio Regulations 1987. Licensing of broadcasting derived from decisions of the Broadcasting Tribunal which went out of existence on 31 December 1989.

The policy decision taken by the Government was that, to achieve greater efficiency, economic growth and choice, barriers to new entrants should be abolished.

The government commissioned a report from National Economic Research Associates (NERA) of London to conduct a review. It recommended spectrum management mechanisms for the new economic environment. Before the report was published the recommendations were adopted by the government.

Radiocommunications Act

The main features of the NERA report have been incorporated in the Act. It is clear however that they have been subject to considerable refinement by the officials of the Ministry of Commerce who in an extremely technical field have produced a complex piece of legislation after individual consultations with major frequency user groups but with little public debate. This legislation was passed into law in December but the text of all the changes from the Bill which was introduced into Parliament in August 1989 are not available for comment at the time of writing.

The Act is complex and detailed and not easy to absorb. In a sense it creates something comparable to a land registry for the spectrum. In particular:

1 Rights to spectrum use within defined radio engineering parameters are created in the form of management rights with an intended life of 20 years. The rights are accorded certain attributes of property under the Act including a right of transfer, aggregation or division. They may be pledged for borrowing purposes.

2 The holders of such management rights, called managers, may confer licences on others or on themselves for the use of the management rights within the parameters of those rights. In other words, the holder of the management rights of a frequency may confer licences on others to use that frequency in particular circumstances in particular places. The management rights are subject to statutory obligations and minimum standards designed to avoid radio interference. In addition to enforcement by the Secretary of

Commerce of statutory prohibitions against certain unlawful exercise of rights, the Act also give others a right to seek remedies.

A computerised registration scheme will be established for the recording of details of management rights and the licences as well as other transactions such as transfers, aggregations and mortgages.

The intention is that, where demand for spectrum is less than spectrum availability, allocations will largely be made as required.

To establish whether or not there is more demand than spectrum availability the Secretary will call for expressions of interest in parts of the spectrum and will then technically define the rights in accordance with perceived demands arising from the expression of interest and subsequent consultations. This planning role will have a profound effect on the future development of the use of the frequencies in the medium term. The process by which it decides how to tailor what is made available as it sees the needs of users, includes more extensive powers than any held previously by the Broadcasting Tribunal.

Following the definition of those rights a sealed bid "second price" tender arrangement will be used. The successful tenderer will be the party bidding the highest sum for the management right but the price paid will be that bid by the second highest tenderer.

The crown will be likely to retain a major role as a manager of some spectrum. The use of some frequencies will be constrained by international convention or agreement and may, in some instances, require management by the radio frequency service. Frequencies for defence, national security and public safety uses by government agencies will have to be protected and will most likely be dealt with by radio frequency service licences.

It is expected that it will take about 5 years before the commercially used spectrum is entirely moved into the new regime.

Transitional rights

All incumbent users will have the right to a minimum three year use of the frequency without rental from the date when management rights have been transferred under the tender system. Commercial broadcasters will also have incumbency rights for 20 years in return for a rental of 1.5 per cent of gross revenue. This can be discounted on favourable terms to a lump sum payment.

In the mobile telephone bands New Zealand Telecom will be treated (for the purpose of exercising transitional rights) as having management rights in the whole band. Telecom's three year incumbency right will therefore give reasonable expansion of business within the band and Telecom will also be able to match and pay any tender price that would otherwise succeed in displacing its operation after the thtree years.

The matching bid for historical reasons is not considered appropriate for the two frequency land mobiles.

"the government has retained the right to allocate specified frequencies by any means it chooses"

A real problem has occurred in relation to non-commercial broadcasting services. Some existing sound radio warrant holders, both commercial and non-commercial, have been selected by the government to be entitled to incumbency rights in respect of short-term broadcasting authorisations granted by system of licensing short-term broadcasting stations for specific events or for holiday periods or for recreational winter stations in mountain areas.

The government also licensed some student stations under this provision for ten months of each year to broadcast from usually lower powered transmitters to the student audience. The student stations filledl a minority interest market niche. A pragmatic decision to continue those rights in the Act for 20 years was controversial. A major Christian broadcaster with an expanding network acquired under the Tribunal system was excluded although it is non-commercial. Later, under electoral pressure, the broadcaster gained rent-free incumbency. Some of those obtaining incumbency rights under the special provision which will give them the use of the frequencies free of rental, accept advertising although not with profit-making motives.

"the government has retained the right to allocate specified frequencies by any means it chooses"

Significantly, the government has retained the right to allocate specified frequencies by any means it chooses. This patronage by the Minister of Broadcasting would appear to be a reversal of the previous policy over a number of years to take the government out of any direct control in relation to broadcasting and to provide for its operating independence from the government. It appears that during the "expressions of interest" period the government could assess non-commercial needs and provide for them. But in the event of competing claims no independent system for resolving conflicting interests is provided.

The previous licensing system provided a regulatory code limiting the aggregation and the ownership of stations and this has been abolished. Although the provisions of the Commerce Act and specific provision in the Broadcasting Act are intended to avoid domination of particular markets, it is likely that there will be no effective control of aggregation of ownership or control of broadcasting stations unless there is domination or market competition rules are breached. In a small country, with nearly all the daily newspaper circulation in the hands of two companies (one a multi-national news group), it might have been expected there would be concern at aggregation of ownership or control for social policy reasons.

Regulations similar to the existing code were included in earlier legislation to restrict overseas ownership which is limited to 15% in the case of television and with the consent of the Minister up to 25% in the case of soundradio.

Conclusion

The proposals are radical. They will be implemented and will be watched with interest by the communications industry, broadcasters and the lawyers who service them.

The system has been made possible partly because of New Zealand's remote location which gives it a freedom to deal with VHF and UHF spectrum without reference to other jurisdictions.

The Broadcasting Commission has a resemblance to the proposals of the Peacock Committee in Great Britain and will be watched with interest by those concerned to ensure public service elements of broadcasting continue in a commercial environment.

The legislation is interesting for lawyers because it puts into effect many of the ideas of the Torrens land title system but accepts and attempts to deal with the extraordinary complications and complexities which arise from the use of the radio spectrum which do not arise from the use of land.

Bruce Slane is a partner in Cairns Slane, Barristers & Solicitors, Auckland and was Chairman of the now defunct New Zealand Broadcasting Tribunal from its inception in 1977.

Broadcast regulation in a changing environment

Henry Geller suggests Australia can learn from the US experience.

Director of the Washington Centre for Public Policy Research at Duke University

As the century draws to a close, there is great ferment in the world's broadcasting systems, driven largely by technology and the market. Government policy must be responsive to those driving factors, and yet still be alert to insure broadcast operations are consistent with vital national interests.

I will focus here on the U.S. situation, and not just because I am familiar with that system. There are lessons to be learned from the U.S. experience. We have implemented one policy goal very well, but failed miserably in other important respects. Australia can take note of those failures and adopt different courses.

Diversity in programming

The U.S. model of a strong, wide-open system of private outlets, does seem to be on the ascendancy throughout the world. The largest benefit from this policy is the resulting much greater diversity in programming available to the public. There are now over 9000 commercial radio stations, and 1300 noncommercial ones; over 1000 commercial TV outlets and 330 noncommercial TV stations. But the strongest case for greater diversity stems from the opportunity for other technologies. There are windows of such opportunity, and several new delivery systems have become entrenched.

The VCR is now in roughly two-thirds of all U.S. TV households, and has spawned a substantial pay TV industry.

Cable television is the rising force in the U.S. video scene. Using the satellite for efficient distribution, cable (which now can deliver over 60 programming channels) is in 57% of U.S. TV households, and passes 86% of such households. Its eventual penetration rate may be close to 70%.

"the American system is still delivering chewing gum for the eyes".

It is clear, however, that cable will continue to splinter the TV audience and the trend in the U.S. is to receive TV via pay. It is also clear that cable has stymied the growth of direct broadcast satellite (DBS) operations. While several are still projected, there has been no rush to implementation.

Seventy-one percent of U.S. households now receive nine or more TV stations. Four-fifths of the cable households can tune in to 30 or more channels.

It may be argued that the numbers mean little in the way of quality: that the American system is still delivering "chewing gum for the eyes." Much of the new programming is aptly so described and necessarily so in light of the giant maw that television is today. But there has been a substantial contribution to diversity. There has been a marked increase in in-depth informational programming and cultural and educational programming as well.

Failings of the American system

What then are the failures of policy I referred to? First, even with abundance, there can be market deficiencies in meeting public interest goals. We certainly have an abundance of commercial radio stations in the U.S. But while these stations supply a great number of entertainment formats, they do not provide in-depth informational programming, children's programs, cultural fare, and similar public service presentations.

Second, government policy to insure operation by commercial broadcasters in the public interest has been a failure. The statue adopts a public trustee concept based on spectrum scarcity. Congress decided to allocate the radio spectrum to various uses and award licenses to prevent engineering chaos. In broadcasting, Congress decided upon a system of short term licenses to private entities who volunteer to serve the public interest and then at renewal of license, demonstrate to the Federal Communications Commission (FCC), that their overall operations have done so. At renewal, the public has the right to participate, and new parties can seek to displace the incumbent licensee on the ground that they will do a better job in serving the public interest - a process called comparative renewal.

The comparative renewal process has been a failure. The incumbent always wins, no matter how poor its past record has been. The FCC has long urged abandoning the process.

Worse, the ordinary renewal process has been a similar fiasco. At renewal, the licensee simply sends the FCC a postcard. The Commission is therefore renewing licenses without the least notion of what public service, if any, has been rendered.

Young children watch television a great deal. A public trustee should therefore make available not only cartoons but programming that informs and educates as well as entertains. And to reach young children, it must be age specific. The FCC gutted the requirement for age-specific educational or informational fare. The FCC Chairman stated that the Commission will not hold licensees to any duty to serve children.

A public trustee must devote time to controversial issues so as to inform the public, and must do so fairly. But the FCC has now eliminated the fairness doctrine. Station owners can feel strongly on many issues and they can now use their stations simply as propaganda operations. The Commission believes that the hands-off publishing regulatory model, rather than the broadcast model, is better policy. Indeed, the Chairman of the FCC said that "television is just a toaster with pictures."

The FCC has eliminated its policy against trafficking in station licenses. The Commission now states that getting stations to their higher valued use serves the public interest. But a trafficker by definition tries to run up the price of the station, and to do that, one doesn't present public service in the form of in-depth informational shows or educational children's fare. To get such fare, the FCC previously recognized that the broadcasters "must put profit in second place and children in first." The FCC now says the opposite, and stations are bought and sold like pork bellies.

Lessons for Australia

I turn now to the possible lessons for Australia. Do not try to hold to the limited (UK) approach in light of the strong worldwide market and technology trends. But do not immediately embrace the American disease of letting all systems go.

There are windows of opportunity for new services like pay TV. In light of its large size, its relatively sparse population, and the desirability of delivering the new services to widely scattered communities, it might be the best course for Australia to opt for DBS to deliver new pay services, and not authorize any cable TV operations at this time. Instead, it might authorize Telecom to begin not only trunking but installing fiber optic cable to the home as soon as possible and over the next decade or so, to gradually build a broadband highway to the home. Even more important, this would allow Australia early in the next century to have an ideal system: video pub-

lishing over a common carrier. This would be a wedding of the publishing and common carrier models. That is, a separation of content and conduit as in publishing, where magazines, pamphlets, etc., all move over the postal service. In the meantime, the public would be able to receive new TV services quickly and throughout the nation over high powered DBS.

"Diversification of the sources of information is vitally important to a democracy"

There is a need for objective, effective regulations to secure the public interest in free-to-air broadcasting for the next decade and into the next century.

Fortunately for Australia, unlike the U.S., this requires maintenance and refinement of existing regulation.

There is a need to promote a strong public telecommunications system, since such a system is motivated and dedicated to presenting public interest like children's educational programming. If there is effective regulation of the commercial system, the financial support for noncommercial broadcasting should come from the general treasury. If the regulatory process is weak and cannot be strengthened, I recommend further deregulation accompanied by substantial fees from the commercial system, so as to better support public telecommunications.

Multiple ownership restrictions, both on the local and national level, should be maintained. Diversification of the sources of information is vitally important to a democracy, and thus should be reflected in bestowing scarce broadcasting privileges. Both our countries face what Yeats called the "rough beast" of change. Certainly that beast challenges us and poses great problems. But it also offers the opportunity for great benefits.

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 in 1976 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.

Speakers have included Ministers, Attorneys General, judges and members of government bodies such as the Australian Broadcasting Tribunal, Telecom, the Film Censorship Board, the Australian Film Commission and overseas experts.

CAMLA also publishes a regular journal covering communications law and policy issues – the Communications Law Bulletin.

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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