

Roles for Lawyers in Broadcasting

The role of the lawyer in the regulation of broadcasting raises two fundamental questions. The first is that lawyers should, or will, have a role and secondly that there will continue to be regulation of broadcasting.

It is my view that there will always be regulation, the form of the regulation will obviously change and this, I believe, represents one of the big challenges for lawyers. The regulation will really fall into two categories — government or statutory regulation and what's known as self-regulation.

I think it's fair to say that the moves and the endeavours should be towards self-regulation as distinct from statutory regulation. I think this was well expressed by the Federal Communications Commission in the United States when they came forward with a substantial recommendation of deregulation of radio in that country and what the Chairman of the FCC said was, "we are not selling out to the commercial interests, we are not letting down the public or the public interest groups, this move is proper and reasonable for the simple reason that the public interest can be achieved in this way". In other words it is not necessary to have detailed statutory regulation to ensure that the radio industry operates in the public interest.

The Chairman of the Australian Broadcasting Tribunal, Mr David Jones, addressed an Australasian Communications Law Association (ACLA) luncheon in Sydney on 24th April, 1981. His topic: The Role of Lawyers in the Regulation of Broadcasting.

Market place and other forces, bearing in mind the way in which the industry has developed, will achieve that. And this, I think represents the challenge to all those involved in this particular area, to achieve the balance between what is necessary in the public interest by way of statutory regulation and where the public interest can be achieved by leaving the regulation to the people who are involved in the market place.

The development of new technology in this medium must have an impact on present and future regulation and that again represents a challenge to all those involved in this area; to work out how the new technology can be fitted in to our country, into our lifestyle, and to adjust our thinking to accommodate that new technology. We cannot continue to automatically assume that the issues that are presently posed and need to be addressed in a regulatory system remain the same with these advances. A good example is cable television. It must raise the question that if cable television is injected into the present system, what degree of

regulation is necessary for the current system and the new system bearing in mind that cable may open up considerable opportunity for diversity in the ownership and control of the electronic medium and in the provision of programs and other material to the public through that medium.

In a report by the staff of the FCC on this subject, they have taken the position that the best way to proceed in regulating their broadcasting industry is not to try to increase the regulation that exists in the present industry and adapt it to new systems, but to free up the opportunity for new systems to develop and in that way expand the market place, expand the opportunity for diversity etc., which will bring about in itself, its own form of additional competition which the regulation was designed to achieve.

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Cable Inquiry Submissions

The Australian Broadcasting Tribunal has reported that the public hearings of the Cable and Subscription Television Services Inquiry are expected to commence in mid-September.

No firm dates or venues have been set for the commencement but it is expected that the hearings will be held in Sydney and Melbourne only.

The hearings will be conducted by the Chairman, Mr David Jones, Mr Keith Moremon and Mr Ken Archer, Tribunal Members, and Mr Jim Wilkinson and Dr Donald Gibson, Associate Members.

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The National Communications Satellite System — Issues for Advertisers

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These are questions which strike at the basis of the broadcasting system as we know it in Australia today. In looking at them, we must realise that the issue of regional control and identity for television stations is complex. There is a demand for more television channels by viewers in regional areas. But this has to be balanced against the critical need to ensure diversity in ownership and control of this very powerful communications medium — a principle which is recognised in the present Broadcasting and Television Act.

I have discussed the potential of a three-satellite system. It is possible, in the first generation satellite to have four or even five satellites. With a "four satellite" package, this would mean 2 operational in orbit; one spare in orbit and one on the ground.

If there were a 4 satellite system, this would mean we would have 4 extra 30 watt or high power transponders as well as the extra 15 watt transponders. It would thus be possible to have a second HACBSS or direct broadcasting service covering the whole of Australia through the 4 zones which I have described.

There are various ways in which a second HACBSS could be used:

- a commercial service licensed to an existing licensee on a national basis, or licensed to 4 separate existing licensees on a zone by zone basis;
- a commercial service licensed to a new licensee on a national basis, or 4

new licensees on a zone by zone basis, providing alternative programming to the existing terrestrial commercial services;

- a nation-wide subscription television service, licensed to private enterprise or operated by the ABC;
- a second ABC television network;
- a national multicultural television network;
- an educational television network, perhaps also incorporating other forms of special purpose television;
- and various combinations of the above.

Strong expressions of interest have been registered in this second HACBSS from various quarters. These are being considered very carefully because the concept of a second HACBSS raises a number of major broadcasting policy issues.

Bearing in mind that, in a 4-satellite package, there can only be 2 HACBSS services — one for the ABC and a second for another purpose — the second HACBSS gives rise to a number of interesting questions:

- what should it be used for?
- in the case of a commercial or subscription service, to which organisation should it be allocated?
- what impact will a second HACBSS have on the operation of the existing broadcasting system, and the viability of existing licensees, bearing in mind the direct broadcasting capability of the second HACBSS?

Coupled with these issues will be the need for financial, operating and pricing judgements associated with the provision of a second HACBSS.

These and all of the related issues will be considered carefully by the Government when it reaches a decision, later this year, whether our first generation satellite system should comprise a "3-satellite" package or a "4-satellite" package.

Whatever the decision, there can be no doubt the availability of a national communications satellite system will open up fresh opportunities for national advertisers in the use of broadcasting.

To sum up

A national communications satellite system will have a profound impact on Australian communications services.

It will not replace existing terrestrial communications services, but will supplement and complement them.

For national advertisers, it will provide opportunity to make more effective use of broadcasting as an advertising medium.

For the organisations you represent, it has the capability to provide a wide range of information and data transmission services.

It will bring efficient communication services to those people in remote areas who are currently denied such services.

It will be an important step in the application of satellite technology to Australia's communication requirements — the first step in what probably will be a series of satellite systems designed to meet our country's special needs.

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That is an interesting concept and obviously one, for example, we will have to address in the cable inquiry. It is also raised by the possibility of a communications satellite, and subscription television. They could all add to the spectrum, to the existing systems and offer the opportunity for additional diversity in all senses of the word.

Now where does our lawyer stand in all this? In my view, the role of the lawyer in this field will very much depend upon lawyers themselves and whether they really want to have a role. If they're not prepared to find out what the communications area is all about in all its aspects, and I mean not

just in the strict legal sense, and if they're not prepared to show a willingness to adapt their thinking and their approaches to accommodate a new technology, new developments, they may find that they don't have a very great role at all because the advice and assistance they are able to provide to the people working within the broadcasting industry will not be helpful and therefore will not be utilised. Those people will tend to turn to other advisers who may be prepared to learn, who may be prepared to be constructive, etc.

I think that would be unfortunate not only for lawyers, but for the public and for the development of com-

munications in this country, because in my view, lawyers with the expertise, knowledge and approach have a very big and expanding role to play in the development, operation and regulation of the broadcasting industry.

But that is going to require a willingness to understand not only the law but the way in which the industry operates, to understand the existing technology without being experts, and to try to understand the future technology because unless that is done it is unlikely that any advice proffered will be of real assistance to the people who are working within the industry.

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It also needs a positive rather than a negative approach, because we are dealing with a very fluid situation, things change almost daily mainly because the technology is changing so rapidly and we have to adjust. The lawyer needs to be adjustable and be able to bring to bear on the problems the talents and skills that can be very valuable. I mean by those not just the knowledge of the law or how to find out what the law is, but the training in being disciplined in thinking, being able to assimilate and evaluate material, articulate and analyse issues and solutions to issues and recommendations.

Those skills a good lawyer can use to great advantage because what this is about is finding out or determining the issues that are arising as a result primarily of the new technology. And then how should those issues be solved, what is the best way to solve them?

Issues

The issues aren't really whether someone goes three seconds over in an advertisement or transgresses in the scheduling of a particular program. They are not real issues as far as the regulation of broadcasting is concerned. What is a real issue is the extent to which programs should contain material relating to violence, sex, other matters that are of concern to the community. The extent to which advertisements should depict, and if so in what way, the advertising of alcohol and drugs and things of this nature. And then who should own and control the existing medium, and the new medium, and how the existing medium should be linked to the new medium. They're the sorts of issues we have to address in terms of regulation — and lawyers who are prepared to understand these issues and use their skills in applying the technology will be very valuable.

There are a number of different organisations or different roles lawyers may follow within our total system.

Looking at the regulatory body itself, the Australian Broadcasting Tribunal. It's interesting that the previous regulatory model the Control Board, as I understand it, didn't have lawyers involved on the Board and initially the Tribunal didn't have

lawyers involved. I think there was a view that with the new concept of public involvement and public accountability the presence of lawyers may be in conflict with those concepts. The appointments of Catharine Weigall and I are, I think, some indication that experience showed that that was not necessarily correct. You will be aware that lawyers are very much present in other similar regulatory bodies such as the FCC or the CRTC. My view is, and it is shared by the rest of the Members of the Tribunal, that at least one member of the regulatory body needs to be a lawyer and that's the view also of the Administrative Review Council and was a view expressed in most of the submissions to that Council. The reason for that is that many of the matters that need to be dealt with by the Tribunal have some legal content or form of ramification which requires the background, training and experience of a lawyer. Clearly, it would be contrary to the concept of the Tribunal to have it completely composed of lawyers, because the concept of the Tribunal is a specialist body involved in this area which can bring various points of view to bear on the problem. I think there is no doubt that there is a role for a lawyer to play as a part of that specialist body.

What about the staff of the particular organisation? Unlike the FCC and the CRTC the Tribunal at this stage doesn't have any lawyers on its staff although it has the ability to call on outside legal assistance. It's not good enough in my view to say, "Well if you've got a lawyer on the Tribunal you don't need any lawyers on the staff because the lawyers on the Tribunal can handle legal problems or issues which arise". Lawyers are not appointed to the Tribunal to be the counsel or the legal advisor to the Tribunal. They may use their legal experience in dealing with matters that arise but in my view, and we've put this proposition forward to people like the ARC, some staff lawyer involvement is important because there are many things that need to be done such as the preparation of standards, regulations and other documents and the examination of legal type problems which require the attention of someone who can concentrate on them alone. I would hope that in the not too distant future we'll find that we have a lawyer performing this role at the Tribunal, that is as a staff member of the Tribunal. And we may be able to use that person in the role, for example, to assist at hearings.

It has been suggested that an organisation like the Broadcasting Information Office should provide legal assistance to people appearing at hearings. That's a matter that I don't want to debate at this stage but I think that there is a role, on some occasions at least, for the use of a staff lawyer not only to assist in the preparation for a hearing but also in the hearing itself.

Another important role for lawyers is in the area of government policy and planning, and by that I mean, for example, in the Department of Communications. There are some lawyers operating in that Department but it is clear to me that the skills of a lawyer that I mentioned before can be very valuable in making planning and policy decisions within the existing legislation and system and also in considering and developing new proposals which often involve extremely complex issues. Again we're not so much talking about a knowledge of the law but rather these other skills that a good lawyer possesses of being able to be analytical, to evaluate and to articulate. One of the most valuable roles I see in that capacity is the link between the Department, representing its Minister, and parliamentary counsel, who have to frame legislation. The translation of the policy and the philosophy is absolutely crucial to the outcome of the legislation.

Policy

If the issues and the policy are not properly translated it is likely that the legislation that ultimately follows will not be satisfactory and particularly will not represent the policy that has been decided. I think lawyers can have a very valuable role in this regard and it is an example of the use of lawyers in the public sector that can be very valuable.

I was disappointed to read recently that the experiment that the Government has been conducting of lawyers coming from the public sector to the private sector and vice versa has been disappointing in that although many lawyers have moved from the public sector few lawyers have come from the private sector. I think the broadcasting area is an area which would benefit both in the public sector and the private sector from lawyers working in both, in other words exchanging their positions.

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Another very important role for lawyers is the representation of the various business interests that are involved in the communications area. In my view, there is no doubt that as the technology advances, as the amounts of money become larger and the issues become more difficult the need for the right type of lawyers will increase.

If these lawyers are there then there will be no lack of work for them. I think an analysis of the fee books over the last twelve months in this area will indicate that there is no shortage of work. This will continue because the problems will get more complex and that's in keeping with our society becoming more complex. But the lawyer must be available to deliver the goods if he is to be retained by the businessman, because he is under a lot of pressure and therefore looks to his lawyer for assistance that is positive and constructive rather than negative. What I mean by that is not only being able to deal with particular problems as they arise and are referred to the lawyer. In addition, the lawyer has to be, or try to be, out in front, in other words trying to anticipate what is happening, where regulation may be heading, and advising his client accordingly. And not only advising his client on how his client may adapt his particular business to accommodate what is happening or about to happen, but endeavouring to have some input and be involved in making changes or influencing changes that may occur. I see this as another important role for lawyers in representing not only business interests, but also what I may call, public interests. This is a lobbying-type role, not in the crude sense of the word, but in the sense of assisting whoever the client is to be able to put before government and government departments, proposals, propositions, submissions on how regulation can be improved or is not working.

There is no doubt that if people are prepared to do this and do their homework and to articulate their proposals carefully and comprehensively they can have a significant influence on the way in which decisions are made and the form that regulation ultimately takes.

I believe that is a very positive role lawyers can play because they have

the skills that can be used for that purpose, but it means more than just reacting to a problem occurring or to a request for assistance. It means trying to look ahead to anticipate where things are going and to assist the particular client accordingly.

If lawyers adopt this approach and this philosophy their role will increase, as in the U.S. It will not be confined to the traditional role of appearing in court or appearing before a Tribunal whether it be the AAT or the ABT. Clearly that role will continue and probably increase, but I would like the stress the other role I have been talking about because I think there is even more scope for the lawyer in that role — that is the advising role of helping the client to develop policies and to develop submissions to government and to assist that person to articulate what those problems are.

In Washington there are at least 150 law firms who do nothing else but communications law. We won't reach that stage here, but I think the opportunity for lawyers to be involved in this important area of administrative law will increase. The extent to which they do will be very much up to them.

Q. Mr. Max Keogh: Mr. Jones the ARC has recently issued a report to the Attorney General in which there is a very strong criticism of the Tribunal's behaviour in administering tests before parties wishing to appear before it on the question of standing. Elsewhere in administrative law I think there's a trend also towards realism and away from the more archaic and less appropriate property based propriety tests that we are familiar with. Yet despite those trends and the criticism contained in the ARC's report as recently as 48-50 hours ago the Tribunal employed those discredited techniques to exclude legitimate interests with relevant evidence before a Tribunal inquiry. Those interests, I am sure they had done their homework, perhaps they had done it too well. But I would like to ask you, in view of the ARC's criticism of Tribunal procedure in this matter of standing, what is your opinion of that criticism and also what is your opinion of the very constructive recommendations the ARC has made in relation to how the Tribunal should in fact interpret standing?

A. David Jones: I don't think it is appropriate for me to comment on a matter that is currently before the Tribunal so I won't comment on the

particular example that you gave. However, I am happy to comment on the matter generally. I think the ARC recognised that the current provisions of the Act create difficulties for all concerned in deciding who has standing and who doesn't and unfortunately the High Court didn't assist when the matter went to the High Court. The Tribunal's submission to the ARC was that the Act should be amended to make the Act more certain, which it isn't at the moment. In essence I think I can say that we basically agree with the ARC's recommendations about amendments in relation to standing. As far as I am concerned since I've been Chairman of the Tribunal, and as was indicated in one of our decisions, we have attempted to administer that particular provision as broadly and as constructively as we can bearing in mind the legal constraints as we see them that are put on by the provision itself. I don't think I can say anything more than that.

• The rest of the questions and answers will appear in the next issue of the Communications Law Bulletin.

Subscriptions

This second issue of the Communications Law Bulletin has been made available to all members of the Australasian Communications Law Association. However, future issues will be restricted to financial members of ACLA and institutional subscribers.

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