takeovers, or the value of those companies of television licences.

They found that the cumulative effect of information that could be gained from the ABT 12's, if disclosed and placed with other information would be considerable and could be made available to other licensees or other organisations who were either directly competing with licensees or who were otherwise involved in the fields of business in question. They also considered that there be a considerable value in making year by year comparisons. The information from the ABT 12's together with other information would enable competitors to determine accurately specific cost structures department by department, which would provide valuable information as to efficiency or otherwise and would be indicative of excessive monetary expenditure by licensees.

In interpreting s43 the AAT said that it was necessary to weigh the competing principles of public and private interest. Such interpretation had the support of Deputy president A.N. Hall in Chandra and the Department of Immigration and Ethnic Affairs (1984) ADMN 92-027.

In summary, the Tribunal said that the information gained by disclosure of ABT 12's would be likely to advantage a licensee in selling advertising time and other activities to the detriment of its competitors. Those competitors would include not only other licensees, but also other components of the media industry seeking funds available for advertising, such as magazines and radio. Other broadcasters competing for advertising revenue would be able to obtain a better picture for selling strategies adopted by one particular licensee. They also accepted that the dangers to a licensee would exist where licensees were in a market as buyers of rights to telecast local and overseas productions. The same considerations applied in respect of the part of the licensees' business which concerned the hire of production facilities.

Overall, they considered that what was fundamental was the likely ability of the competitor, once given the ABT 12 information, in conjunction with all other available information, to tip the scales of knowledge in relation to the opponent's costs in his share of the market. It seemed to the AAT almost axiomatic that the effects which were outlined would be unreasonable.

(Cont'd PAGE 23)

RECENT CASES

Copyright Tribunal Sets Photocopying Rate

On 20 March, 1985 the President of the Copyright Tribunal, Mr Justice Sheppard gave his judgment in the case of Copyright Agency Limited v. The Department of Education of New South Wales & Ors.

This was the test case in relating to the assessment of the royalty payable to the owners of copyright in works under s53B of Copyright Act 1968 ("the Act"). The statutory licence in s35B provides for multiple copying of reasonable portions of works and articles in periodicals for the teaching purposes of educational institutions. As far as is material, the section provides as follows:-

> "(1) Subject to this section, the copyright in an article contained in a periodical publication is not infringed by the making of copies of the whole or a part of that article, by or on behalf of the body administering an educational institution for the teaching purposes of that or other educational institution.
>
> (2) Subject to this section, the copyright in a work (other than an article in a periodical publication) is not infringed by the making of copies of the whole or a part of that work, by or on behalf of the body administering an educational institution, for the teaching purposes of that or another educational institution.
>
> (3) Without limiting the generality of sub-section (1) or (2), a copy of the whole or a part of a work shall be taken to have been made for the teaching purposes of an educational institution if:-
>
> (a) it is made in connection with a particular course of instruction provided by that institution; or
>
> (b) it is made for the purpose of inclusion in the collection of a library of that institution.
>
> (4) Sub-section (1) does not apply in relation to copies of, or of parts of, 2 or more articles contained in

the same periodical publication unless the articles related to the same subject matter.

(5) Sub-section (2) does not apply in relation to copies of, or of more than a reasonable portion of, a work that has been separately published unless the person who makes the copies, or causes the copies to be made, for or on behalf of the body administering the educational institution, is satisfied, after reasonable investigation, that copies (not being second-hand copies) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(6) Sub-section (1) does not apply to copies of the whole or of part of an article contained in a periodical publication, being copies made, by or on behalf of the body administering an educational institution, for the teaching purposes of an educational institution, unless there is made, by or on behalf of that body, as soon as practicable after the making of those copies, a record of the copying setting out:-

(a) if the International Standard Serial Number in respect of the periodical publication is recorded in the periodical publication - that number;

(b) if the International Standard Serial Number in respect of the publication is not so recorded - the name of the periodical publication;

(c) the title or description of the article;

(d) the name of the author of the article (if that name is known);

(e) the volume, or volume and number, as the case requires, of the periodical publication containing the article;

(f) the page numbers of the pages in that volume, or in that number of that volume, that have been copied, or, in a case where a page so copied does not bear a page number, such description of the page as will enable it to be identified;

(g) the date on which those copies have been made;

(h) the number of copies made; and

(i) particulars of such matters as are prescribed.

...

(11) Where copies of the whole or a part of a work, not being copies stated in the record to be copies to which sub-section (9) or (10) applies, are made by or on behalf of the body administering an educational institution and, by virtue of this section, the making of those copies does not infringe copyright in the work, that body shall, if the owner of the copyright in the work makes a request, in writing, at any time during the prescribed period after the making of the copies, for payment for the making of the copies, pay to the owner such an amount by way of equitable remuneration for the making of those copies as is agreed upon between the owner and the body or, in default of agreement, as is determined by the Copyright Tribunal on the application of either the owner or the body.

(12) Where the Copyright Tribunal has determined the amount of equitable remuneration payable to the owner of copyright in a work by the body administering an educational institution in relation to copies of the whole or a part of that work that have been made by or on behalf of that body in reliance on this section, the owner may recover that amount from the body in a court of competent jurisdication as a debt due to him."

The applicant, Copyright Agency Limited, was a collecting society which was the agent for authors and publishers. The respondents were the Departments of Education for the States of New South Wales, Victoria, Queensland, South Australia, Western Australia, the Schools Authority of the Australian Capital Territory, The Association of Independent Schools, the Roman Catholic Archbishop of Sydney, Mac-

quarie University, the University of Sydney, The N.S.W. Institute of Technology, The South Australian College of Advanced Education and the New South Wales Department of Technical and Further Education. By agreement between the parties fifteen (15) applications were made pursuant to s53B and s149A of the Act, reflecting a range of copying instances. Section 149A is the section relating to the machinery for the holding of enquiries under s53B. At the request of the parties the Tribunal reached a single rate, although the President noted that s53B contemplated an equitable rate being fixed for each incidence of copying. The applicant argued that there was a most common fee charged by authors and publishers for permissions to copy, which was evidenced by an actuarial study produced in evidence. This was between 4 and 5 cents per copy page. It also argued that collection costs should be included in the rates.

The respondents argued that the appropriate rate was the royalty authors commonly received on the sale of their works in the form of books. They said that the applicant's most common fee approach ignored the large number of free permissions granted by authors and publishers. They pointed out that most copying was transient and was not retained by schools or pupils for long periods of time. They also said that fixing too high a rate would lessen the amount of copying and thus lower general standards of teaching.

Sheppard J set a rate of 2 cents per page for each page copied pursuant to s53B. He said that the rate should be set by analogy to the measure of damages for infringment of copyright. In doing so he referred to two earlier cases before the Copyright Tribunal, The Report of the Enquiry by the Copyright Tribunal into the Royalty Payment in respect of Records Generally (published 24 September, 1979) and WEA Records case it was said that the amount of damages from infringment of copyright otherwise the person taking a licence would pay more for acting lawfully than unlawfully. Sheppard J also referred to the judgment of the House of Lords in General Tyre and Rubber Co. v. Firestone Tyre and Rubber Co. Limited (1976) RPC 197.

In particular, he referred to the judgement of Lord Wilberforce who dealt with a case where there was no normal rate of profit or established licence royalties. In such cases he said that it was for the plaintiff to adduce evidence which would guide the Court. Such evidence might consist of practices in the relevant trade or an analagous trade, of expert opinion expressed in public or other factors on which the judge could decide the measure of loss. However, the ultimate process was one of judicial estimation. He said that the case fell within Lord Wilberforce's category of judicial estimation of the available indications. He noted that the factors which he had taken into account were, collection costs, the fact that copying would be discouraged if the rate were too high, the transient nature of the copies made, royalties authors received on the sales of their works and the value of commissions given since s53B was inserted into the Act.

He noted that he had specifically excluded the following factors; the facts of overseas comparison, the fact that some authors wrote for other than commercial reasons, comparison with conversion damages under s116 of the Act and the inability of authors to insist on attribution when their works were copied by educational institutions.

Robyn Durie

FREEDOM OF INFORMATION ...
(Cont'd from PAGE 20)

In reply to the argument put by Equity that the disclosure would lead to the common advantage of all licensees the AAT answered that the effect of acceptance would be to reduce all to the lowest common denominator. The essence of the character of the television industry was competition and in the AAT's view it was not the intended function of the FOI Act to change the character of a field of commerce by intrusion into it of the principles of disclosure which the Act laid down in relation to supply to the community of the information held by the government.

Robyn Durie