standards of education and commercial experience) their comparative bargaining positions (including whether the contract was a standard form one or whether its terms were negotiated by the parties) and the representations or undertakings made by the various parties at the time the contracts was entered into.

The Commission will not set aside contracts which are on their face unfair, but operate fairly, or where unforeseen events render the contract unfair. Nor will the Commission use its discretion to interfere with bargains freely made by a person who is under no constraint or inequality, or has made a bargain on even terms with which he or she is now disgruntled, or who has taken an unsuccessful business risk.

Advantages of Section 88F

Section 88F has the following advantages over the scheme for review in the *Entertainment Industry Act*:

1. It extends to arrangements of understandings and conditions and collateral arrangements - not just "contracts".
2. Section 88F applies whether contracts are "executed" or not.
3. The applicant under Section 88F need not worry about falling within the precise definition of an "employment industry contract" - as long as the contract relates to work being performed in any industry, the Commission has jurisdiction.
4. The Industrial Commission under Section 88F is able to look not only at the terms of the contract, and the way it was made, but also the way that it operates in practice.
5. The Commission may order contracts void in whole or in part or vary a contract in whole or in part either from the time it was entered into of from some other time.
6. Under Section 88F the Commission also has jurisdiction to review contracts which are against the public interest, for example, contracts which would be an unreasonable restraint or trade (as considered in A *Schroeder Music Publishing Co Limited* v. *Macauley*).
7. Under Section 88F the Commission has broad powers to make compensatory orders in favour of an applicant. By comparison, under the *Entertainment Industry Act* the Complaints Committee's only power to make the orders for the payment of money seems to be where the order relates to the failure by one of the parties to pay an amount owing under the contract.
8. The Complaints Committee has no general power under the Act to award costs.
9. The Industrial Commissioners are skilled in the determination of the issues before them in Section 88F cases - expertise which the Complaints Committee members will no doubt quickly acquire, but may not initially possess.

To be fair, the stated objective of the *Entertainment Industry Act* was not to replace other forums for hearing disputes, rather to provide an additional and speedy, effective and cheap means for resolving complaints. It should be noted, however, that the Industrial Commission is a relatively cheap and speedy forum for the resolution of disputes relating to industrial contacts and provides many additional advantages. Perhaps the main functions of the Complaints Committee under the *Entertainment Industry Act* will be to deal with complaints about misconduct by entertainment industry representatives, entertainment industry employers or performers (in the case of which the Complaints Committee has the very real and relevant power to suspend, cancel or vary the condition of the licence held by those persons under the Act), and to make orders for the payment of money owing to entertainment industry representatives, entertainment industry employers and performers where the complainant chooses not to bring proceedings in the courts.

Therese Burke is a Senior Associate of the Sydney office of the firm Phillips Fox, Solicitors.

New Zealand broadcaster's "Double Jeopardy"

Chris Turver discusses a recent victory by New Zealand broadcasters in overturning a 1989 amendment to the Broadcasting Act which subjected them to the risk of double jeopardy

Justice has prevailed after a year of "double jeopardy" under which New Zealand broadcasters faced a guilty verdict in one forum - and then a court action for damages on the basis of that verdict.

The issue centered on the outcome of tough statutory formal complaints procedures which broadcasters must comply with.

New Zealand broadcasters have been required since 1977 to deal with formal complaints under the *Broadcasting Act* in a formal way. Dissatisfaction with the outcome entitled the complainant to refer the complaint to the Broadcasting Tribunal. But they had to make a declaration that they would not also take legal action through the courts if they used this procedure. The Justice Department considered this deprived complainants of their legal rights and the *Broadcasting Act 1989* deleted the restriction when the Tribunal was abolished and a new Standards Authority was set up.

Under the new regime, viewers and listeners have the right to complain to the new Broadcasting Standards Authority to ensure compliance with performance standards. The Authority's rulings must be publicly announced. However, a previous provision which recognised the "double jeopardy" factor was removed against the protests of the broadcasters.

Broadcasters warned during the passage of the 1989 Act that removing the requirement that a complainant either lodge a formal complaint against a broadcaster or take that broadcaster direct to court - but not both - would lead complainants (some of whom are becoming increasingly sophisticated in "milking" the system) to use a formal complaints verdict in a subsequent court action for damages.

Over the last year, several attempts were made by broadcasters, led by Radio New Zealand, to seek renewed protection on the grounds that where a formal complaint was upheld against a broadcaster:

- the ability of a broadcaster to defend any subsequent legal action would be compromised from the start by the evidence produced from a formal complaint hearing.
- a significant breach in the normal impartiality of a court hearing would occur.
- prejudicing a court case in this matter would influence a jury in awarding any damages.

In evidence to a parliamentary select committee reviewing the *Broadcasting Act* in August 1990, the broadcasters illustrated their concern by disclosing several current cases where a formal complaint had been lodged, and parallel notice had been served of court action. The select committee rejected their submissions.

Radio New Zealand pursued the issue

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the CRTC, told the Canadian cable TV conference in 1984: "If two years ago we had been asked to draw up a plan of how to kill an industry, we could not have been more creative."

Two basic models

From these overseas experiences we can identify two basic models for the regulation of pay TV. The first is the broadcasting model, meaning that similar specific program standards would apply to pay TV as apply to broadcasting. In this context, it is perhaps worth reminding ourselves that this model is highly interventionist and not necessarily the choice one would expect in a democratic society.

The second is the publishing model, which assumes that pay TV should be regulated in essentially the same way as most other industries. That is, inasmuch as we would have program standards, they would be those based on the common law which also applies to non-electronic media and cover obscenity, blasphemy and sedition, defamation and so on.

When the government finally designs a regulatory framework for pay TV it will in effect choose between variants of these two basic models. However, the actual arguments, the arguments which catch public attention and have the potential to escalate into political causes, will not be pursued in terms of analytical models. The debate will revolve around the following issues.

Quality

The broadcasting model requires a program regulator, such as the Australian Broadcasting Tribunal, to establish and enforce quality standards. As the Saunderson Committee enquiry into pay TV rationalised this approach: the public resources utilised by licensees in order to provide their services are scarce; licensees therefore are privileged; accordingly, they bear a reciprocal obligation to enrich the moral, emotional and cultural life of our society. This view was recently endorsed (in another context) by the High Court in the Bond case.

It can confidently be expected that groups associated with the production industry and public interest groups generally will argue for quality standards, while those interested in providing services will argue that they would be redundant, if not counterproductive.

Those wanting maximum freedom for pay TV providers emphasise the special nature of the relationship between pay TV providers and their subscribers: pay television is a discretionary service and subscribers make a decision whether or not to view each of the programs available at any particular time.

But even when they claim to recognise

Peter Westerway

the validity of this argument, it is very difficult for people who regard pay TV as basically a variant of broadcast television to accept the logic of it. They tend to acknowledge that the services are different, but because some programs do look the same, in the next sentence they insist that they are comparing 'like with like'.

Australian content and children's programming

When we consider whether there should be standards for pay TV relating to Australian content it is pertinent to note that, while we might agree with a case putting the merits of supporting Australian artists or Australian production houses, that case is only relevant if it addresses the critical question of consumer sovereignty. If we do not allow the consumers to choose, we may create some other very attractive system, but it will not be pay TV.

The same persistent need to recognise consumer sovereignty as the essence of pay TV will dog those who seek simply to transfer broadcasting standards regarding children's programs to this very different industry. As it happens, there are pay TV channels in North America which offer quality "family" and children's programs; eg Nickelodeon or Disney Channel. But how are we to argue, as the Saunderson Committee did, "that program standards for pay TV family viewing and children's presentations should be identical with those for free-to-air television". No pay TV service (as distinct from some of the programs which appear on pay TV) is "similar to" a broadcasting service. They all require subscribers to make a deliberate choice once a month.

Localism and siphoning

Again, with regard to localism, which despite obvious difficulties still remains in the authorised list of objectives for broadcasting policy, the differences between the two industries make it impossible simply to transfer broadcasting thinking to pay TV, particularly if the government chooses to initiate the system using national satellite delivery.

As most people here will know, 'siphoning' refers to pay TV operators buying programs which would otherwise have been shown on broadcast television. Even as we speak cable and broadcasting companies are lobbying congressmen in the USA regarding the use of exclusive contracts and the FCC is trying to apply a 'blackout' policy, which seeks to stop cable systems from showing programs to which broadcasters in the same area have bought rights.

I do not want to canvass the issues involved, such as whether there is a general public right to view certain material, or whether broadcasters should be protected, but it did seem appropriate to end a paper which has constantly raised problems without offering solutions by referring you to a very prominent broadcaster, the president of NBC, Mr Robert Wright. Early last year Wright spoke to a group of editors and writers about pay TV. The USA, he told them, has already "switched over to pay TV". Many people who had been in television for years were sad to see the golden age disappear, but he disagreed. It was exactly why NBC had moved into pay, he said, and "It's not bad or good - just different."

Peter Westerway is the Acting Chairman of the Australian Broadcasting Tribunal. This is an edited version of a paper he gave to the AIC conference "Pay TV - A Forum for the Future" in Sydney in August 1990.

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with the Government and, after researching all relevant legislation, found a precedent for the broadcaster's case. It discovered that the *Police Complaints Authority Act* recognised a comparable example of "double jeopardy" by specifying that no evidence or findings from that Authority could be used in any subsequent court hearing on the same issue.

The then Communications Minister, Jonathan Hunt, agreed on 21 August that "a convincing case was put up by broadcasters" and the 1989 *Broadcasting Act* was subsequently amended to overcome the "double jeopardy" factor.

The outcome? The *Broadcasting and Radiocommunications Reform Act* specifies that no response made by a broadcaster to any complaint, nor any statement made or answer given by any person, nor any decision of the Broadcasting Standards Authority, nor any decision made by the High Court on appeal, can be admissible in evidence in any court or in any inquiry or other proceeding.

Chris Turver is Controller, Corporate Affairs for Radio New Zealand Limited