

A number of actions have been threatened in the United States, such as in the case of Tone-Loc for his claimed use of Van Halen's "Jamie's Cryin" and the British act Beats International for use of the Clash's "Guns of Brixton". However, these and many other matters have not found their way into the legal system because both sides are afraid of setting a benchmark for "substantiality" which could open the floodgates or close them completely, depending on the particular side's point of view. What is happening is that artists, companies and users of samples are entering into agreements to regulate the use

of sampled recordings. The record company or song writer grants a licence to the sampler in exchange for a royalty payment (the details of which are not common knowledge). Of course it is unlikely, at this time, that the amount of royalty payment for this use represents a commercial level of royalty and adequate return to the creator (unless of course the sample is so significant that it represents a clear infringement of copyright) but it does, where undertaken, nevertheless legitimise sampling as a concept and to some extent rewards the creators of the sampled copyright material or works.

Sampling has not yet become a major issue in the Australian music industry primarily because the type of music that lends itself to sampling is not widespread in this country at the moment. It is, however, inevitable that an increase in the use of sampling will happen in the near future. It will be interesting to see how Australian artists and record companies react.

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## Book reviews

**Sheila McGregor reviews "Telecommunications Reporter", the latest loose-leaf service on telecommunications law by Diana Sharpe, Gerald Wakefield and Mark McDonnell**

**T**he Law Book Company's *Telecommunications Reporter* is the first loose-leaf publication dedicated to providing a collection of materials on Australian telecommunications law and policy. The absence until now of a collection of such materials has required diligence on the part of practitioners in the area to assemble and keep up to date their own set of the materials. So the *Reporter* should be very useful for them and the editors are to be commended for their industry in producing it.

The *Reporter* contains the full text of the *Telecommunications Act 1989*, the *Australian Telecommunications Corporation Act 1989 (Telecom Act)*, the *Radiocommunications Act 1983*, the *OTC Act 1946*, the *AUSSAT Act 1984* and extracts from the *Trade Practices Act* as well as the VAEIS Guidelines and all of the AUSTEL forms, guidelines and reports. The AUSTEL documentation which is not readily available (other than from AUSTEL) will probably be the most useful section of the *Reporter*. It's surprising that AUSTEL itself has not established a system for distributing its documentation - OFTEL for example has a very efficient distribution system. This may come with the increased resources which AUSTEL will acquire with the implementation of the government's reforms. AUSTEL has also announced that it will shortly be opening shop front offices around Australia.

The *Reporter* contains a discussion of government policy and strategy in both telecommunications and other areas which impact on the telecommunications industry such as the Industry Development Arrangements and Information Industry Strategy. In doing so it puts into context the role of the Department of Transport and Communications and the Department of Industry, Technology and Commerce (DITAC). This information is useful particularly in relation to

DITAC because it can be difficult for practitioners to keep up to date with changes in government policy and strategy. This section needs to be kept very up-to-date if it is to retain its usefulness - for example, the government is apparently considering at the moment changes to the Australian Civil Offsets program and the Partnerships for Development Scheme.

The telecommunications industry's use of acronyms to refer to technologies as well as to describe the industry associations is well known - the *Reporter's* two and a half pages of abbreviations give some indication of this. The first section of the *Reporter* entitled *Telecommunications Industry Profile* which includes some background material on the associations is therefore a particularly useful reference. It will be especially so for newcomers to the area who will come across references to ACSI, ATUG, or AEEMA but may not really have a clear idea of the various associations' memberships and objectives. This section of the *Reporter* also sets out a useful summary of the rights and obligations of the carriers as specified in the *Telecommunications Act*, the *Telecom Act*, the *AUSSAT Act* and the *OTC Act*.

In the section on the Trade Practices Commission the editors comment briefly on some of the restrictive trade practices provisions (Part IV) in the *Trade Practices Act 1974*. Given the *Reporter's* discussion of the statutory monopolies conferred on the carriers under the *Telecommunications Act* it is noteworthy that the editors have not reproduced the *Trade Practices (Telecommunications Exemptions) Regulations*. These regulations contain important exemptions from some of the conduct prohibited under Part IV of the *Trade Practices Act*. Several of the exemptions cease to be effective as of 30 June 1989 or 31 December 1988. A number of the

exemptions should remain applicable until implementation of the government's recent reforms.

As the editors point out in the *International* section, the May 1988 Statement touched only lightly on international policy issues. However, this section of the *Reporter* contains an interesting discussion of the relationship between those issues and the domestic telecommunications services framework.

Updates to the *Reporter* may clarify the focus of the *Case Law* section of the *Reporter*. There are decisions other than the two summarised which are relevant to the industry but which have not been included, for example the Tytel-Telecom decisions. These may have been excluded because the editors decided to concentrate on very recent decisions. One of the case summarised, the ASX-Pont Data decision, has been appealed against by the ASX and the Full Federal Court has heard the appeal. In future updates it will be necessary to include editorial comment on the cases summarised if this section of the *Reporter* is to have an ongoing purpose.

Since the publication of the *Reporter* in September the government has announced major reforms to introduce network competition. These include the merger of Telecom and OTC, the sale of AUSSAT and the grant of three cellular mobile telephone licences. The government has said that the "reforms in telecommunications represent the most radical restructuring of this key industry ever undertaken in Australia". The reforms mean major amendments to the *Telecommunications Act* and to other legislation - a draft bill to amend the *AUSSAT Act* has already been tabled in Parliament. The reforms mean a substantial rewrite of most sections of the *Reporter* will be required as the reforms are implemented. One of the reforms - the

abolition of appeals from decisions of AUSTEL to the Administrative Appeals Tribunal (AAT) on the merits - means the *Reporter's* section on the Administrative Appeals Tribunal will no longer be applicable to the decisions of AUSTEL under the *Telecommunications Act*. However Ministerial decisions under the *Radiocommunications Act* (in particular in relation to licensing) will presumably still be reviewable by the AAT.

The immediate challenge facing the editors over the next 12 to 18 months will be keeping the *Reporter* up to date with amendments to legislation and other developments as a result of the government's reforms - this is a challenge with any loose-leaf service. Where the full text of amendments or other developments is not promptly available brief

and timely summaries in the form of one or two page bulletins of developments are essential if the *Reporter* is to continue to be useful as a reliable collection of the current materials.

As the focus of the industry changes from policy development, which has characterised the past five years, to policy implementation, commentary on new legislation and the ramifications of the policies will need to be developed if the *Reporter* is to keep a permanent place on practitioners' shelves.

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**Nathalie Curtis reviews the second edition of Volume II of the AFA's: "A Practical Guide to Marketing and Advertising Laws and Regulations, Volume 2, Source Materials"**

**T**he second edition of the *Advertising Federation of Australia's Guide to Marketing and Advertising Laws and Regulations* updates Volume 2 of the previous 1986 edition of the same name. It is intended as a "hands on guide" for those involved in the commissioning and preparation of advertisements, their evaluation and placement and serves as a companion to Volume 1 (1986).

The book is essentially a compilation of various texts and regulations relating to advertising and marketing of products on all media, including various industry guidelines, The Media Council of Australia (MCA) voluntary codes and extracts of relevant legislation in a number of areas such as the pharmaceutical industry and the tobacco industry. The extensive range of material covered in this edition will come as no surprise to those with the arduous task of reviewing and classifying advertising material.

The book begins with a brief description of the Australian media and advertising industry, pinpointing the relative functions of the councils, committees and bodies involved in the co-regulatory structure adopted by the industry. Each has a common stated aim of vetting the publication of misleading or offensive advertising. These first chapters provide the reader with useful practical information such as contact points for various industry association clearance bodies and a valuable outline of the complaints procedure and relevant penalties. The reader is reminded that failure to obtain a clearance number from the appropriate clearance body constitutes a breach of the advertising code of the Media Council of Australia.

The success of the self-regulatory system requires strict adherence by advertisers to

the MCA codes. These codes are reproduced in the next few chapters which provide the reference points for the reader actively involved in ensuring that commercials achieve approved industry standards. They include the Advertising Code of Ethics, the codes for advertising of therapeutic goods, alcoholic beverages, cigarettes and the slimming codes.

Another chapter contains extracts of legislation and agreements relating to tobacco advertising. The appendix on the size and appearance of health warnings on outdoor advertisements is particularly handy.

Topics covered in other chapters include legislation and regulation relevant to the pharmaceutical industry, labelling and advertising of foods, advertising guidelines for pet foods, and miscellaneous items such as the portrayal of the national flag by advertisers, representation of Australian banknotes, trade promotions and lotteries. This latter topic is a difficult area to monitor due to the differences in the State regulations. It is therefore useful to have the various State requirements consolidated in the one chapter.

I would recommend the Trade Practices Commission guidelines on trade practices aspects of advertising reproduced in Chapter 8. These guidelines cover topics such as two price advertising and commercials for motor vehicle dealers. They are written in a simple and informative style, interspersed with examples which make the information user-friendly and particularly helpful to readers who are not legal practitioners.

The final chapter lists the more relevant federal and state legislation that control advertising and is particularly valuable as a quick guide to locate whether a topic has been legislated in a particular state. This

chapter would be well worth expanding in future editions.

Does this text have a place on the shelves of lawyers and advertisers? My view is that the value of this guide as a "hands on" tool for persons commissioning and preparing advertising is restricted by the hardback cover format chosen by the AFA, which prohibits the insertion of regular updates. The material covered in this edition will, given the ever changing nature of regulations in this area, rapidly become outdated. As it stands, there are already amendments required. For example there is a new *Therapeutic Goods Code* which requires the Pharmaceutical Products Association to approve advertising of therapeutic goods. There is also a recent amendment to the tobacco advertising code which prohibits advertising tobacco in the print media. Neither of these is incorporated in the 1990 edition.

Anyone involved in advertising and marketing will be aware that the task of vetting commercials requires access to all updated regulations and legislation which cover the contents of the commercial, or the vector runs the risk of falling foul of some new regulation which requires reworking the advertisement to meet the new standard, attracting considerable additional expense to the advertiser.

I was disappointed at the lack of editorial input in this edition of Volume 2. Whilst I understand that this volume is only intended to reproduce source materials, there is scope for restructuring some of that material to avoid repetition of information, and to facilitate access to the information required. For example it would also have been helpful to have some sort of cross reference between Volume 1 and Volume 2.

All in all, as Bruce Cormack, Federal Director of the Advertising Federation of Australia notes in his forward to the guide, the manual is not intended as a legal service in a formal sense, and reliance should not be placed solely on the materials contained therein. However, the guide serves the useful function of providing background information on the current regulatory structure surrounding advertising and marketing, and consequently deserves standing as a reference tool. There is still however a market for a loose-leaf service on Marketing and Media regulations which covers material contained in both Volumes in 1 and 2 of the AFA publication updated on a regular basis. Perhaps the AFA could consider this format for their next edition. This would ensure that the book meets its stated aim to function as an accessible and practical hands-on tool for all those involved in marketing and advertising.

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**Peter Leonard reviews Peter Westerway's new primer on telecommunications: "Electronic Highways"**

**S**ix years ago, a mere terrestrial was faced with his first "asteroids and other space calamities". Study of science and "Star Trek" had equipped him with the knowledge that such calamities need not be fatal. However, advising on an AUSSAT Transponder Agreement was certainly fraught with danger: aside from its novel *force majeure* provision dealing with wayward heavenly bodies, the agreement was littered with arcane and mysterious concepts: sun transit, rain attenuation, saturation flux density service performance levels, peak deviation rates, and so on.

All of this seemed much more exciting than contracts for tin cans and string, particularly as it also involved unravelling the unfathomable mysteries of the (then) *Satellite Communications Act 1984* and a welcome relief from the mundanity of Telecom regulatory policies. Somewhere along the line, telecommunications had become complex, technological and interesting.

The difficulty then was to find out what all this was about. The law library shelves were bare: contrast today when we have two competing and comprehensive loose-leaf services covering communications law and policy. The engineering and scientific libraries were replete with arcane expositions of technology suitable only for the knowledgeable or foolhardy. However, there were few introductions to the technology, business or international comparative regulation of telecommunications.

Today there are dozens of books describing the divestiture of AT&T and introducing the technology, right down to the 8 year old's bible, *My First Book of Communications*, which I received for Christmas from my secretary (was there a hidden meaning?).

So do we need Peter Westerway's *Electronic Highways*? The writer's stated aim was to produce "a useful primer, a beginners guide to those who were starting in the field". In a mere 82 pages of text (disregarding appendices) the book could be little more, particularly as Mr Westerway ambitiously endeavours to cover history, technology, regulatory, international and economic telecommunications issues.

Inevitably, some areas must be omitted or treated in less detail than would be desirable. For example, the technology discussion concentrates on wireline technologies and makes only incidental references to satellite, cellular and public access cordless services. This is an unfortunate omission given the increasing strategic importance of those technologies for telecommunications utilities. Similarly, the discussion of regulation does not draw out the potential importance of mobile

technologies and private networks offering quasi-public services in challenging the public telecommunications carrier's wireline monopoly as a regulatory policy. The discussion of regulation reflects a regulator's perspective by emphasising the importance of the Government's social and industrial policies, while (perhaps in deference to Mr Westerway's continuing role as Acting Chairman of the Australian Broadcasting Tribunal) avoiding discussion of what are appropriate policy objectives and whether regulation is the most effective means to achieve these goals.

One shortcoming with the book was inevitable: any book on telecommunications suffers from short shelf life due to the dramatic rate of change in the industry. In particular, regulatory developments in Australia, the United Kingdom, Germany and at the supra national European Community and CCITT levels, have superseded certain of Mr Westerway's discussion in the text. That, unfortunately, is the nature of the game.

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its principal objective should be to increase diversity of choice in television services in response to viewer demand.

### **Foreign models for program regulation**

**A**lthough it is currently under review, the existing United States system is a paradigm of the free market approach with all its attendant strengths and all its weaknesses. Once a franchise to operate a cable or radiated system is granted, the pay TV provider is free to operate without substantial regulatory intervention. The only programming requirements have been to observe the usual statutory provisions regarding obscenity, blasphemy and sedition, plus any local obligations regarding community access.

Pre-1992 Europe shows considerable diversity, but the abundance of delivery pathways provided by the new telecommunications technologies has generally undermined the scarcity rationale for regulation. There is movement towards flexible regulation based on a free market philosophy and enhancing the competitiveness of new services. For example in the Netherlands, regulations directed towards the preservation of cultural identity and maintaining quality use a mix of indicative guidelines and self regulation. (Australian policy-makers may be interested in one innovative provision, whereby providers can choose whether to present local pro-

Such criticisms are, of course, mere quibbles. The book will not equip the reader to understand the complexities of resale and interconnection policy or the rationale for transferring control of the numbering plan or for pricing regulation. But the reader will be able to understand the range of players and interests involved in the telecommunications industry and appreciate why these interest groups have emerged so dramatically over the last two decades. For troops marching on to weightier tomes, Mr Westerway provides a concise reading list and assists those with fallible memories (like the reviewer) with an excellent index. In short, the book largely achieves its limited objective and is therefore to be recommended to readers entering the telecommunications field for the first time. The book would be, in particular, a very useful introductory text to school and university courses covering telecommunications. Recommended for such audiences, but snatch one quickly before it goes out of date!

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ductions or to pay for satellite carriage of their signals.) By contrast, in the UK, pay TV program standards tend to mirror broadcasting standards, with a cable authority to enforce them. There are standards regarding advertising, program categories, decency, etc. However, it is worth noting that, even in Britain, pay TV operators are not required to meet the same standards relating to range and balance of programming as broadcasters.

On the far end of the continuum, Canada provides a very useful object lesson, so far as program regulation is concerned. Pay TV policy in that country was initially driven by the same demon that drives its broadcasting policy - the overwhelming presence of the US big brother next door. However, the Canadian Radiocommunications and Television Commission (CRTC) made the fundamental error of regarding pay TV as a variant of broadcast television and required pay TV operators to provide between 30 and 50 per cent of Canadian content. The inevitable happened. As the local industry's relatively modest bank of program material was totally used up, operators were forced either to buy substandard Canadian programs or to offer endless repeats.

A well-intended policy therefore achieved exactly the opposite of its intended effect, as subscriber cancellations increased to a maelstrom and every pay TV operator made losses. Of course, the CRTC also made many other mistakes, including an excessive insistence on competition, but there can be little doubt that the CRTC's program policy was the real killer. As Andre Bureau, Chairman of