Commercial viability: is it rational to be radical?

Bob Peters argues that the commercial viability criterion should be retained in broadcasting legislation

The last edition of the Communications Law Bulletin (Vol. 11, No. 4) contained an article entitled "Commercial Viability Under The Microscope", which was based upon a report entitled Economic Aspects of Broadcasting Regulation published in 1991 by the Bureau of Transport and Communications Economics ("BTCE").

In its report, the BTCE proposed that the commercial viability criteria should cease to be a factor in the establishment of either new broadcasting services or other services which may compete with them. These proposals subsequently were incorporated into the draft Broadcasting Services Bill ("BSB") which was released for public review and comment in late November 1991.

Major shortcomings

There are four major shortcomings associated with the BTCE's proposal to abandon the commercial viability criterion. These are:

- an unquestioning acceptance of untested economic assumptions concerning increased competition in the local broadcasting industry;
- an almost complete lack of regard for the commercial consequences of moving suddenly from a highly regulated to a highly deregulated broadcasting regime;
- an apparent, and extremely disturbing, anti-profit sentiment; and
- the absence of any conclusive quantitative evidence in support of the BTCE's theoretical assertions.

The above shortcomings would not be of such concern, were the BTCE's views only one of many inputs taken into account in drafting the BSB. But, unfortunately, it appears that the BTCE's views were the only views taken into account.

Untested and simplified economic assumptions

There are a number of critical but untested and overly simplified economic assumptions which underlie the BTCE's proposal to abandon the commercial viability criterion. Of these, the following are of particular concern:

- The local commercial radio and television industries are inefficient and require increased competition to eliminate those inefficiencies.
- An increase in the quantity of broadcasting services is of paramount importance to local consumers, even if they have to pay directly for such increased services.
- The quantity of local broadcasting services can be increased without having an adverse impact on the overall quality of available broadcasting services.
- There is an unlimited supply of quality programming, the price of which will not be increased by an increase in the quantity of broadcasting services.
- There is sufficient local audience demand and advertiser revenues to support increased broadcasting services.

In this writer's view, none of the above assumptions should be taken as given and the BTCE should be required to prove each of them.

Disregard for commercial consequences

With more than 11,500 employees and funds invested in excess of $5.8 billion, commercial broadcasting is one of Australia's largest and most influential service industries. However, despite the obvious importance of commercial broadcasting to the continuing development of the nation, no quantitative assessment has been provided by the BTCE of the likely consequence of abandoning commercial viability.

Existing commercial broadcasters strongly argue that rapid increases in competition will dramatically reduce individual operator revenues, profits and service quality. They cite the experience both overseas and in a number of local regional radio and television markets which recently have experienced increased commercial competition.

However, the BTCE is curiously silent on such matters. Instead, it chooses to focus exclusively on expanding the quantity of broadcasting services which it implies, without substantiation, are of paramount importance to local consumers. It makes no attempt to predict the effect which the potentially massive increases in competition which it advocates will have on industry employment, investment or service levels.

Anti-profit sentiment

Another major shortcoming of the BTCE's proposal to abandon the commercial viability criterion is that it appears to be based, at least in part, upon a very strong anti-profit sentiment.

Rather than acknowledging that strong profit potential and growth are necessary pre-requisites for industry employment and investment growth, the BTCE instead seems to be obsessed with recouping non-existent super-normal profits and keeping operating profits low through the use of ever-increasing programming standards.

Driven by a desire to maximise competition, the BTCE appears to be saying that industry profits need to be kept low in order to make commercial broadcasting a relatively easy industry for new players to enter. What the BTCE does not explain is why it thinks that new operators will wish to enter, or indeed why existing operators will wish to remain in, an industry with perennially poor profit prospects.

Nor does the BTCE explain how the local radio and television industries, whose profit margins have averaged only 12 per cent and 11 per cent respectively over the past 14 years, will be able to continue to maintain high quality programming standards when faced with significantly increased competition for audience numbers and advertiser revenues.

If 46 per cent of all radio stations and 39 per cent of all television stations already are operating at a loss, how many more commercial broadcasting stations will be made unprofitable if unfettered increases in competition occur in the near future?

Lack of conclusive supporting evidence

It is not sufficient, as the BTCE has done to date, to justify its proposal by citing qualitative hypothetical outcomes. Before the Government

Continued p12

the right of electors to vote in a fair election untrammelled by false statements. The protection of these rights is all the more crucial when the section specifies that the offence may be committed after public notice has been given but before closing of the voting. Within this time frame candidates may have no opportunity to correct untrue statements or to clear their names before the election. The public interest therefore clearly requires that every effort be made to ensure that any information published about candidates at such a time is accurate. It will be seen that the object of this section squarely involves the public welfare."

And later:

"Whether or not a statement is defamatory is a question for objective determination on the ordinary meaning of the word. In both these two latter cases (Re Waimairi County Election Petitions, Re The Election of the Mayor of Cambridge) the meaning of 'defamatory' adopted was the ordinary civil meaning, that is an imputation which would tend to lower the plaintiff in the estimation of right thinking members of society generally. It is equally clear however, that the civil test is only relevant to the definition of the word 'defamatory' — the civil defences are irrelevant to a charge brought under the section (Krafter v Webster and Guscott (No. 2))."

Mr. Rennie had submitted that for a statement to be defamatory it would necessarily have to be made in relation to the "personal character or conduct of a candidate" but in addition to affecting reputation in that way, it must meet the normal test for a defamatory statement. His submission was that issues of personal political policy do not meet that test.

However, Judge Morris adopted the test formulated by Mr. Justice Barker.

Findings

Turning to the first group, the judge found that both statements 1 and 4 were untrue. The first statement connotes a positive act by the complainant which was untrue, he said. (The closing of the hospital was apparently a decision of the Auckland Area Health Board).

The defendant had the right to show that on the balance of probabilities reasonable care was taken to ensure the truth of the statements published. Insofar as the closing of St. Helens was concerned, the judge's view was that the defendant took "no care at all in regard to this statement, and with regard to the waiting list, he dismisses the item in the pamphlet as rhetoric in his statement to the police." The judge found on the basis of the appropriate test the defendant had not made out a defence to statements 1 and 4 and he was convicted in respect of those statements.

As to whether the statements were defamatory, the judge found that the first one held the Minister as responsible for an act she had not performed and that she did not have the welfare of women and parents in her electorate at heart and was an unfit person to represent the electorate.

As far as statement 4 was concerned, the complainant saw this as a portrayal that she had suggested to people that they should sit at the end of the waiting list until they died. This portrayal of her was of an entirely heartless person, a callous person who had no concern for the welfare of her people regarding surgery.

A fine was imposed.

Implications for Publishers

In the normal course of election reporting there are probably many statements published by the media in respect of which prosecutions for offences under the *Electoral Act* could be brought.

Mr. Justice Barker addressed this problem in *Starkey* where he had ruled:

"Strict liability attaches to the phrase 'containing any untrue statement'; the defendant may exculpate himself by proving on the balance of probabilities that he took reasonable care to ensure that what was published was true."

Mr. Justice Barker had rejected absolute liability on the one hand and proof of mens rea on the other.

Absolute liability would unduly deter publishers from printing relevant material about election candidates which they reasonably believed to be true. The public had an interest in knowing the background and reputations of candidates for election, Mr. Justice Barker said.

No publisher could guarantee the absolute truth of what was printed — all he or she could do was to make all reasonable enquiries. The imposition of absolute liability would defeat the public right to know about the election candidates; categorising the section as a full mens rea offence would defeat the public right to full and fair elections.

"Only strict liability with respect to the truth of the statements, will strike a balance between the competing rights, by requiring a publisher to prove that reasonable care has been taken to ensure the truth of statements published."

In the absence of any other civil defence The greatest care has to be taken by publishers at election time to ensure that reasonable enquiries are made in respect of potentially defamatory statements about a candidate's personal character and conduct.

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From p10

allows real jobs, real dollars and real services to be threatened, the BTCE should be required to produce some very convincing quantitative assessments which demonstrate that the potential rewards of the proposed change far outweigh the potential risks. Hard statistical evidence relating to the financial impact of new commercial competition is emerging from both local and overseas markets and the BTCE should be required to objectively analyse such data.

Conclusion

The BSB, and any other future legislation which affects the commercial broadcasting industry, must continue to take into the account the financial health of the industry as a whole, and not be allowed to focus on a single objective such as maximising the quantity of available services.

If the Government wants to continue to foster the growth and development of the commercial broadcasting sector, then commercial sensibility rather than radical theoretical purity needs to be the predominant feature of any future broadcasting regulations.

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