Importation of foreign actors

Martin Cooper discusses the background to recent changes to the Migration Regulations

and argues the amendments will prove a laborious and arbitrary fetter upon Australian producers

The importation of actors to appear in film and television productions has been a matter of vexed dispute between the film and television production industries and the various unions involved, particularly Actors Equity, for many years.

In an attempt to lower the level of dispute, in April 1988, a voluntary agreement was entered into between the producers and Actors Equity pursuant to which the terms and conditions of entry of foreign actors was regulated subject to usual immigration formalities.

After experiencing the agreement in action for some time, the producers perceived that the importation of actors pursuant to this Agreement was unnecessarily inhibiting and in December, 1990 gave notice that it proposed to terminate that agreement on 22 February, 1991.

Employment benefit test

From that date applications for the importation of actors were dealt with by the Department of Immigration, Local Government, and Ethnic Affairs ('DILGEA') in accordance with Regulation 62(1) of the Regulations made under the *Immigration Act, 1958*.

This Regulation made the essence of the importation requirements prior to the Agreement law and applied the so-called 'net employment benefit' test which provides:

"The entry of each overseas artist or non-performing creative or administrative professional taking part in an Australian production... will result in the employment of at least one additional Australian resident within the entertainment industry. Sponsors need to show that the entry of the overseas entertainer will generate more employment than a local entertainer would generate, if a local entertainer were to undertake the same activity."

The guidelines issued by DILGEA required that consultations take place with the relevant Australian unions on the employment or engagement of the foreign applicant in Australia.

This test of importation was perceived by the unions as giving an unacceptable flexibility to producers. Under pressure from the unions, the Department of Arts, Sport, the Environment, Tourism and Territories ('DASETT') undertook an extensive review of the guidelines relating to the importation of foreign actors and, in absence of any consensus between the producers and the unions, Section 62 of the *Migration Regulations* were substantially amended with effect from 17 September, 1991.

The New Test

The effect of these amendments is to introduce a relatively objective set of tests to apply to the importation of actors, much along the lines of the voluntary agreement abandoned in February.

These tests divide productions into two categories:

1. Government subsidised productions, i.e., productions having any form of Government subsidy other than development funding and tax concessions ordinarily available under Division 10B or 10BA of the *Income Tax Assessment Act;* and
2. Non-Government subsidised productions.

With Government subsidised productions, the test which is applied is primarily one of permitting various numbers of imports depending upon the size of the budget of the film production and the nature of that production. The various categories are detailed and relatively arbitrary.

So far as non-Government subsidised productions are concerned, the only requirement is that there be proof of a reasonable opportunity having been provided to Australian actors to participate in all levels of the production and that there is a clear need for the foreign actor whose fee must be more than met by foreign investment in the production.

These new regulations use the word "consultation" in relation to union input but practice seems to indicate that if the union is opposed to the importation of an actor the chances of importing that actor are very slim.

Very extensive guidelines have been issued by DASETT as to what constitutes giving a reasonable opportunity to Australians to play the role in question. These "casting guidelines" effectively require that professional auditions are carried out such that an actor has every reasonable opportunity to show his capacity for the role. Again experience shows that unless actors' agents show great discrimination in the persons they send to such casting sessions, the process will be very lengthy and laborious.

Finally, the Regulation details a set of guidelines as to the method and process by which consultation with Equity is to occur. These guidelines require the Producer to reveal a considerable amount of detail about the financing and production of his film in order to be said to have consulted with the unions.

Laborious & Arbitrary

While the new Regulation has not been in force long enough to permit any real experience of the way in which it will work in practical terms to be obtained, early experience would seem to indicate that producers have had imposed upon them a laborious and tedious process even if they fall within the arbitrary categories of permitted imports. Such a method of determining when importation can occur is understandable given the reluctance of bureaucrats to become involved in qualitative decisions about whether an importation is justifiable, but in the context of the internationalisation of the film and television production industries it seems a somewhat arcane if not unrealistic process.

Of course, the Government finds itself caught in the dilemma of balancing the need to ensure that Australian tax payer's money is used in this area to promote Australian culture but in such a way as not to profit any reasonable economic return being made from the production of such "culture". The simple realities of the international film and television market place appear to be that if foreign actors are not used in many types of Australia produced films, international commercial success cannot reasonably be expected. There will always be exceptional films which are very "culturally exact" and which attract a substantial international audience, but as a general rule experience shows the two are mutually exclusive.

Whatever the dilemma the question becomes whether it is an appropriate thing for organisations such as unions to be determining immigration policy or for Australian producers to be burdened with commercially unrealistic casting if they are to obtain access to any form of Government subsidy. The extent of the

Continued on p18

At common law a statement will attract qualified privilege if the material was published in the performance of a legal, moral or social duty, to a person who had duty to receive it. It has been virtually impossible for the media successfully to plead the defence.

Section 22 of the New South Wales Defamation Act 1974 was aimed at giving the media greater access to the defence. However, narrow interpretations by the courts of the 'reasonableness' requirement has effectively denied the availability of qualified privilege as a defence for the media.

The current bills retain the common law qualified privilege defences and the present statutory defences in New South Wales and Queensland, and provide a new defence, so long as the defendant proves that a statement related to a matter of public interest, was made in good faith and was made after reasonable inquiries.

Even though the reform is touted as a significant move toward opening the availability of qualified privilege to the media, it may turn out that this defence will not make much difference to the present interpretation of s22 of the New South Wales Act.

It is difficult to see how the media can succeed in the new defence, unless they are prepared to disclose their sources. The defence will however be useful where sources are not in issue.

Correction statements

Court-recommended correction statements would be a novelty to all jurisdictions in Australia. As pointed out by the Attorneys-General, their introduction is based on the belief that they "may be very effective in partially, or even in some cases fully, restoring reputation and assuaging damaged feelings."

A prompt and well placed apology is viewed by the Attorneys-General as often the most appropriate remedy to restore a person's reputation.

Monetary damages have traditionally been the main compensatory tool for damaged reputations. However their status as the main remedy has been said to be more historical than practical. The Australian Law Reform Commission was similarly not enthused about damages when it reported that "not merely are damages inappropriate to vindicate reputation, the link between liability and damages has prejudiced plaintiffs".

However, the proposal in the bills contains practical and administrative problems. The creation of this new remedy will impose additional legal expense on both parties. There will be a need for at least two appearances before the Court. An application for a correction statement will be dealt with on an interlocutory basis if defamation proceedings have been commenced. Will the application be by oral evidence or affidavit material? If by affidavit, what does the mediator do if the defendant simply swears that it stands by the story and will plead justification.

Variation in the standard of proof and the admission of evidence between interlocutory proceedings and trials can also be of importance. For instance, hearsay evidence is admissible at interlocutory proceedings but is inadmissible at trial. The standard of proof at interlocutory proceedings is the balance of convenience, whereas at trial it is based on the balance of probabilities.

The bills also omits to define the way in which correction statements are to be labelled. If the correction was labelled 'court ordered' or 'court recommended' then the public could be deceived in thinking that the matter had been fully settled, while if it appeared that the defendant published it at his or her own volition, subsequent success at trial by the defendant would confuse the public.

In terms of vindicating a person's reputation, a correction order would need to be obtained quickly. The Attorneys-General believed that "to be effective, it is imperative that this system be a 'fast track' procedure." For defendants, normally media groups, the 'fast track' procedure may not provide sufficient time for a proper assessment of the matter. If the Attorneys-General believe that court involvement in this area is justified, which is open to some doubt, a system of compulsory pre-trial conferences, immediately after the issue of the proceedings, would be preferable.

The role of juries

In New South Wales all defamation actions are heard by juries. In the Australian Capital Territory they are all heard by a judge sitting alone. In Victoria both the plaintiff and the defendant can elect to have the case heard by a jury, otherwise the case is head by a judge sitting alone. If the case is being heard by a jury, the jury would determine both whether the publication was defamatory, and if so, the level of damages.

There will be no alteration to the present law in Victoria. New South Wales and Queensland will allow the jury still to decide whether the publication is defamatory, but the judge will decide quantum. The Australian Capital Territory Bill follows the New South Wales Bill, but it is not clear whether that envisages the introduction of juries into the Australian Capital Territory.

This is an area in which there will not be uniformity between the various states. This is unfortunate. A preferable course is to allow the jury to continue to assess damages, with the judge providing some guidance, a system recently accepted by the High Court. Without recounting all the arguments for the retention of the juries, it is still widely accepted that a jury has the capacity to reflect wide sectional community values. In this sense, the value placed on a person's reputation by a jury is more representative of the social morals. In addition, there is some doubt that the Attorneys'-General view that judges deciding quantum will lead to lower verdicts, is accurate.

Limitation periods

The bills propose that actions in defamation be brought within six months from the date upon which the plaintiff first learned of the publication, with an absolute limitation period of three years.

If forum shopping is to be avoided then proposed changes to the limitation period need to be uniform. When limitation periods differ between jurisdictions, plaintiffs whose actions are barred by jurisdiction have the opportunity to sue in another jurisdiction where the limitation period is longer.

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Continued from p15

anticipated union involvement in the immigration aspects of the importation of artists is borne out by the fact that Actors Equity has now advertised for the appointment of a full-time employee to be known as the "Imported Artists Officer". Finally, we must ask the question of whether it is not appropriate that Australian actors should attain their professional status and acceptance solely through talent rather than through artificial barriers to competition. In a climate where such barriers are removed for all manufacturing and secondary industries we must ask whether they should not also be removed for the so-called 'cultural industries'.

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