Report

A report on seminars conducted by The Centre for Media and Telecommunications Law and Policy at the University of Melbourne

The first seminar, held on 30 October 1993, examined legal and policy options necessary to deal with developments in the delivery of audiovisual and film material and new and planned services including Pay TV, narrowcasting, MDS, cable and global satellite services. The Seminar also examined the impact of these developments upon program material and production.

Prepared by Martin Cooper

Australian content: new rules and policies?

The Seminar produced much of the usual reiteration of fixed positions by the Networks, the Australian Broadcasting Authority and the various interest groups but was notable for its lack of any of the fiery exchanges which have marked meetings of this kind in the past.

Perhaps this was due to a remarkable absence of any serious debate of the reasons behind Australian Content Policies. There seemed a general acceptance of the notion that the cultural justifications for Australian Content quotas and related policies no longer needed defence and have become a given in the debate.

Perhaps the lack of heat also reflected the one-sided nature of the debate; there was no representation from the unions, cultural bodies or fringe groups, such as the narrowcast/pay television lobby.

Brian Johns

Brian Johns, Chairman of the Australian Broadcasting Authority ("ABA") reiterated his visionary, even inspirational, theme of previous public statements that "The real issue for broadcasting policy will always be programs, because programs talk to people about their concerns and relationships. What we all are about is identity".

The audience is now there, he said. The issue is how to provide Australian programming to it economically. His answer is to turn to regional and global markets which are emerging - the "frontierless markets". In Asia, he suggests, we have a natural market in which we do not have to establish our credentials as Australian producers must do in Europe.

Johns' message is that Producers should seek co-production arrangements in the Asia/Pacific region to overcome our "forbidding cultural trade imbalance". "In buying we should also be selling" and to do so we must be looking at the whole gamut of film and television production funding program to ensure that they pull together with energy and innovation without the need for prescriptive quotas and formulas.

However, in answer to a question, Johns confirmed his view that transmission quotas will be in place for "quite a long time - but as a safety net leaving us free to take risks".

Commenting on the section 102 Pay TV quota, Johns seemed confident that the draft guidelines published by the ABA will be sufficient to ensure that the spirit of a 10% of drama being Australian produced quota will be achieved.

Deborah Richards

Deborah Richards of the ABA then launched two recent publications of the ABA entitled *"Trends and Issues No.2"* and *"No.3"*.

She pointed out that the statistical material contained in Issue No.2 entitled *"Australian Content on Television 1990-1992"* indicates that the top 10 programs in all key television markets in 1992 were Australian made. Noting that each of the commercial networks complied with its Australian content requirements pursuant to Television Program Standard 14 in each of the years under survey, she demonstrated that the policy as set out in TPS14 has been implemented with a degree of flexibility.

Part 3 of the survey shows the drama/diversity score for a large number of particular programs and illustrates with some clarity the distortions and imprecisions which inevitably arise from a program classification system based on general definitions. For example, the fact that a motion picture called "Sebastian and the Sparrow" can earn 21DDS points whilst a 6 x 30 minute children's drama program of the quality of "Kaboodle" can earn 5.25 points would seem to raise some questions.

The second paper (No.3) is entitled *"Viewing Australia"* and consists of the results of an in depth polling carried out by the independent research organisation, ANOP Research Services Pty Limited. The research produced little or no surprising outcomes, finding that the most popular type of Australian programming is serials (27%) and that women are more likely to prefer this type of programming.

Current affairs programming is the second most popular programming type but heavy commercial television viewers were almost twice as likely to prefer serials to current affairs programming. Again, people in the 18-24 year old age group are much less likely to nominate documentaries and infotainment programming than people older than 55 years. Mini-series, movies and the news were all considered to be the best type of Australian programming by 70% of respondents with ABC viewers giving these a heavier weighting than commercial viewers.

The demand for Australian programming is apparently strong and in all program categories except information programs and serials and soaps, the view is that there is "not enough" of such programming.

Sean O'Halloran

The material contained in the *"Viewing Australia"* report contrasts to some extent with the research material reported by Sean O'Halloran of the Seven Network supported by Bruce Gyngell, Chairman of the Nine Network that indicates that Australian audiences are turning away from soaps and serial drama towards infotainment programming. This research was suggested to be the reason for the recent cancellation by the Seven Network of *"A Country Practice"*.

O'Halloran repeated the often heard commercial Network position that quotas are an unnecessary rigidity in the programming system which has not resulted in any greater Australian content on commercial television.

The standard network position that the rise of Australian drama occurred as a result of natural growth of audience demand, which demand was instantly and spontaneously met by the Network, does not sit comfortably with the facts but is vigorously maintained and deeply believed.

Given that quotas are a fact of life for "political reasons", O'Halloran proposed a number of substantial amendments to the present system set out in TPS14. In summery, he suggested:-

- the elimination of the overall transmission quota (that is the 50/50 requirement);
- a reduction of the drama quota from 850 points to about 400;
- an elimination of quality factors from the equation altogether;
- the elimination of the diversity quota which, in his view "reflects the cultural arrogance that underlies program quotas"; and
- the Australian factor should be substantially re-worked to ensure that certain anomalies that the Network believes exists are eliminated - e.g. a film should not lose its Australian content points because its musical track is composed and recorded in another country.

Asked whether the effect of these amendments would not be to render the quota system completely valueless, O'Halloran replied that the Networks "will accept an increase in the overall quota depending on how the mathematics turn out".

Bruce Gyngell and David Hill

A lively debate took place between Bruce Gyngell and David Hill, Managing Director of the ABC, on the merits and virtues of Pay Television and the speed with which new technologies will become a fact of life in Australia.

Gyngell is of the view that commentators and policy makers have got their "time frame wrong by at least 10 years" and that new technologies will not be a fact of life until well into the next century. Hill challenged this view vigorously and argued that the proliferation of satellites, the cabling of Sydney for the Olympics and the attendant requirement for equality for other capital cities and the arrival of Pay Television will all dramatically change the means and nature of the delivery of audio visual entertainment in this country "within two years".

Hill warned of the new international services "which will have little regard for frontiers, little regard for national regulation and little regard for Australian content". He is firmly of the view that Australian programs will be acceptable to Asians despite the differences in culture although Gyngell, and Elizabeth Jacka of Macquarie University, vigorously argued that "indigenous programs is what it is all about".

However, David Hill does see Asia as just another window for Australian programming rather than a new major market. He maintained the standard ABC line that the new international television service and the ABC's excursion into Pay Television will not deny free-to-air viewers of the ABC any program material and that the additional programming demands can be met from within the existing resources of the ABC which are, apparently, so under utilised that they can produce material for two 24 hour a day services without additional cost. He assured the audience that "there is a bloody big fence around free-to-air television".

Bob Weiss and Chris Lovell

The programming interests were represented by Bob Weiss, President of the Screen Producer's Association of Australia and Chris Lovell, Chairman of the Film Finance Corporation. Both acknowledged that programming cannot be forced onto an audience but expressed concern that programming should not be determined entirely by economics.

Weiss's point is that it does not matter *why* Australian programming is produced but that it is. Weiss's concern is that policy in Canberra is being driven by economic rationalists rather than the cultural argument - "we want to be able to make our own mistakes" - and expressed the concern that there is not enough discussion about end results of policy and too much analysis of "who gets what, when and how".

Lovell's concern is that there is a very real disparity between the requirements of an Australian certification of a film for 10BA of the *Income Tax Assessment Act* purposes and what scores well under TPS14. Seeing this disparity as entirely undesirable he advocates that the Division 10BA test should be reflected in TPS14. This is because, in his view, 10BA reflects cultural and economic reality but TPS14 "is rooted four square in culture - it does not require production here (as does the 10BA "wholly or substantially" test) and leads to production going off-shore, particularly to New Zealand. Lovell points out the absurdity of a program such as "Stark" being given half points as an Australian drama because it was written by a non-Australian notwithstanding that it was so Australian in every other respect.

Jock Given

Jock Given, Policy Adviser at the Australian Film Commission outlined the impact of Australia's foreign treaty obligations upon cultural policy particularly as it applies to program content quotas. He pointed out that under a variety of international arrangements including the GATT round, the CER treaty with New Zealand, various international co-production agreements and the APEC agreements, Australia may find itself very vulnerable in the interantional market for cultural programming which resembles "less a dog eat dog environment, than a T-Rex eats puppies world". He exhorted the conference that "we must be clever in our use of our international agreements to achieve our cultural goals".

Helen Mills

Helen Mills, Director of the Communications Law Centre, expressed her concern that the conference had not considered cultural policy and Australian content on radio and wondered if this was because it was considered to be narrowcasting or simply a mature market. She is concerned that on radio, Australian composed music quotas have been replaced by "Australian performed" quotas.

Discussing the retreat from regulatory policy in relation to Australian content, Mills noted the implications of section 128 of the Broadcasting Services Act with its capacity for Parliament to override program standards.

Finally, she expressed the view that Pay Television Services should have the same Australian content requirements applied to them as applied to commercial television.

Conclusion

While the conference overall was a useful one, one could not escape the conviction that many of those involved had not grasped the fact that very shortly technology will prevent traditional mechanisms of cultural policy from being effective to achieve Australian content.

The second seminar held on 31 October 1993, examined law reform proposals and developments in case law, human rights and the practice of journalism. The focus was upon defamation law and journalists' sources. Prepared by Martin Cooper.

The right to investigate and report

Defamation law reform was prominent on the speakers' agenda, no doubt stimulated by the recently published New South Wales Law Reform Commission Report(Discussion Paper 32 of August 1993), as was the topical debate about "shield laws" for the protection of journalists' confidential sources. The highlight, however, was the inaugural lecture by the newly appointed Hearne Professor, Sally Walker.

The voice of the Judiciary

In introducing the session, Justice Michael Kirby appealed for both legislative and executive branches to play their role in defamation law reform, the history of which he described as "melancholic". He pointed out that it is now more than 16 years since the ground breaking Australian Law Reform Commission Report on privacy and defamation law but none of its recommendations have yet been implemented.

Chairman of the NSW Law Reform Commission, former Justice Gordon Samuels Q.C, spoke about the Commission's report on defamation law reform, referring to its examination of the role of juries in defamation trials. He expressed the view that either jury trials in defamation cases should be abolished entirely or the role of juries should be confined to determining whether pleaded imputations are conveyed and are defamatory. Mr Samuels also said that he was firmly in favour of a system of retraction and apology and spoke favourably of the Annenburg proposals in the United States which require a retraction or reply choice for publishers within 30 days of publication of defamatory material. He emphasised, however, that "you have to give both sides something if these types of solutions are to work- the carrot and the goad".

Ruskin and Littlemore

One of the more lively sessions of the conference featured a paper on the right to publish and defamation law by Victorian barrister, Jeremy Ruskin and some reactionary views on the need for defamation law reform from Stuart Littlemore QC.

Ruskin dealt briefly with the obligation upon the plaintiff to spell out all the imputations which he/she contends reasonably arise from the words complained of and the extent to which the plaintiff is entitled to restrict from consideration by the jury those imputations to which there may be a good defence. Noting that the imputations must reasonably arise from the article or program, Ruskin also noted that the defendant is restricted to justifying only meanings which are reasonably open. But how, he asked, does a defendant confront the situation in which the plaintiff seeks to restrict the proceedings to only part of the article or the program?

He commented on the recently decided Victorian case of *Curran -v- Herald & Weekly Times Limited (1993)* in which Sir James Gobbo reviewed the authorities in relation to broadening the imputations. Justice Gobbo says the decision in *Polly Peck (Holdings) -v- Trelford (1986)* UK High Court is good law and the defendant can look at the whole article to show the whole meaning and justify that meaning.

Ruskin referred to the decision in the UK case of *Kashoggi* which effectively determines that the fact that a statement may be defamatory and not capable of justification in one particular extreme factual situation does not render the whole article defamatory if there are many other meanings which are true and not defamatory arising from the same facts.

Littlemore said he does not understand the need for any cap on damages and applauds the notion that damages are a means of punishing the media for irresponsibility. However, in view of the recent decision in *Meskenas -v- Capon* he is in favour of some "clearer statement of what is comment" so that the situation which confronted his client in that case, namely that because he did not believe that Meskenas was a bad artist prevented the defendant from relying upon the defence of comment if Meskenas was able to convince the jury that the defendant's remarks could carry the imputation that he was a poor artist.

Reputation, truth and privacy

The seminar concluded with a most thoughtful inaugural lecture by Professor Sally Walker. The Professor examined the relationship between "reputation", "truth" and "privacy" with a view to critically evaluating recent proposals for reforming the law of defamation.

In her view a major defect with current proposals for reform is their failure to address the question of the role of defamation law. If the objectives of the policy are not examined then the reforms now proposed may yet again fail to arrive at a system which balances the vital conflicting rights of the public's right to know against the individual right to privacy. She argued that any law of defamation must:-

- be justified in the public interest;
- go no further than is necessary to protect the private right; and
- be sufficiently clear to determine what the various parties rights are.

In Professor Walker's view, reputation is not one's character but rather what people think is your character. Accordingly, defamation law should not be used to protect people from publications which do not go to reputation but merely cause people to be shunned, for example, allegations of mental illness or identifying the victim of a rape allegation.

She also argued strongly against any reversal of the onus of proof, as in Irish law, because the plaintiff may not be able to prove vague allegations. Only in cases where there is detailed or specific information as to time and place should the plaintiff be under any burden of proof.

In Professor Walker's view privacy should be dealt with by a separate law but she is firmly in favour of immediate reform. In this respect she points to the injustice of *Kayes* case in the UK where an actor grievously injured had his photograph taken by a tabloid photographer who illegally gained access to the hospital in which the actor lay gravely ill. He was obliged to rely upon malicious falsehood to stop publication of the photographs which she said was an entirely inappropriate way to protect what is really an issue of privacy.

Professor Walker's paper will be published and will make an important contribution to the academic debate about the very foundation of defamation law.

Shield Laws

The fact that they both have jobs as presenters of ABC television programs is about the only thing, it seems, which Quentin Dempster and Stuart Littlemore have in common on the issue of shield laws to protect journalists from having to disclose confidential sources in court.

In a spirited defence of the traditional journalist's view of the obligation to disclose sources, Dempster argued for a more inquisitive press which, he said can only come if private sources are relied upon. Private sources will only come forward if they obtain absolute protection from disclosure. Dempster is in favour of absolute privilege for journalists along with that for doctors, lawyers and others.

Littlemore, on the other hand, takes the view that shield laws are mostly a shield to journalists' own incompetence and foolishness. Often, he argued, journalists claim secrecy for their sources simply because they regard it as "better to be a martyr than a mug".

A more moderate view was put forward by Neil McPhee QC arguing that the "principle of necessity" should be applied; that is, disclosure of sources should only be compelled if it is necessary for justice to be done, if that evidence is relevant and material. He conceded that one of the difficulties with this is that often only the journalist will know if there is a source, if the source is tainted by malice and if the journalist's conduct is "reasonable" for the purposes of a defence under section 22 of the *Defamation Act (NSW)*.

McPhee finally proposed that section 10 of the *United Kingdom Contempt Act* which imposes an onus on the applicant for disclosure to overturn the presumption in

favour of the public interest in protection of sources as a better solution.

Andrew Robson, a Melbourne solicitor, also raised the interesting and somewhat alarming new practice being used by Federal authorities to force disclosure of sources by threatening journalists with a charge of "aiding and abetting the commission of a crime" under section 5 of the *Commonwealth Crimes Act.*

Free speech

Professor Cheryl Saunders of Melbourne University delivered a comprehensive paper on High Court decisions on constitutional reform in relation to the recognition of media rights. This paper was complimented by one by Professor Mark Armstrong and Vanessa Holiday of the same university. These papers raised a number of questions including:-

1. what are the freedoms which are inherent in the freedom of political expression which has been established by the High Court in the *Nationwide News -v- Australian Capital Television* cases?;
2. what are Australia's obligations under international treaties to which it is a party particularly the International Covenant on Civil and Political Rights ("ICCPR"), the first optional protocol to which Australia ratified in 1991.

Pointing to the case of *Derbyshire County Council -v- Times Newspaper (1992)* in which the influence of international covenants on the common law is considered - in this case an EEC Directive upon the right of the Council to sue for defamation - she questioned what the High Court priorities would be in such a case. Regrettably, she said that issue was not finally resolved in that case because the Court of Appeal found that there was "no inconsistency" between the Directive and the common law.

Professor Saunders also referred briefly to the options which are available to institutionalise journalists rights as aspects of the freedom of speech right:- to institute a bill of rights; or leave the Courts to slowly define these rights.

In their paper, Professor Armstrong and Ms Holiday noted a number of areas in which the Commonwealth Parliament could, if it chose, transform the law relating to freedom of speech including:-

1. statutory recognition of freedom of speech and the need for editorial discretion and journalistic integrity, as a counter balance to objects and provisions already contained in Commonwealth law. This could apply to traditional laws and requirements for the newer self regulatory schemes;
2. enactments of specific Commonwealth shield and "whistle blower" laws; and
3. Commonwealth reform of defamation and privacy laws in whole or in part.

They then briefly analysed the alternative of a constitutional bill of rights along the lines of the United States system, a "modern" bill of rights not enshrined in the constitution, the process of rights implied by the High Court and specific legislative recognition. They then briefly referred to Article 19 of the ICCPR allowing individuals to appeal to the Humans Rights Commission once they have exhausted all avenues of appeal within their own jurisdiction.

No doubt many of the issues raised and debated at the conference will be examined closely during the course of the current Senate Standing Committee on Legal and Constitutional Affairs into the rights and obligations of the media.

Inquiry Chairman, Senator Barney Cooney spoke at the conference and , refreshingly for a politician, seemed prepared to be bipartisan and inquisitive about the sorts of issues the Inquiry will look at. He expressed his great concern at the system of rewards and punishment which exists where a journalist who writes favourable stories is rewarded with leaks and inside background briefings and a journalist who does not is denied such privileges.

He also defended politicians against allegations of gross neglect of defamation issues arguing that a politician in this sort of area must carry with him or her the weight of public opinion.

The pros and cons of various distribution methods for Narrowcast and Pay TV

Barney Blundell argues AAP's view that a regionalised system is the best method of distribution of emerging TV services.

Everyone with a vested interest will claim and explain why their method is the best and tend to play down their disadvantages. Technologist tend to talk of best technology, biggest capacity, what is best for Australian manufacturers, Telecom unions, etc. If we are not careful Australia once more could be in the position of having expensive technology waiting for a market.

I believe we need to start with what the customer wants: a range of services offering quality and affordability. The range of methods available for broadband distribution, include ADSL, satellite, cable, MDS, UHF or additional OFDM-derived channels on existing UHF transmitters; or most likely a combination of them all. However, there is no such thing as the perfect technology.

Cable Head Operators

AAP advocates the use of satellite feeds to MDS transmitter sites or local cable feeds, to provide the quickest, most cost-effective and operationally effective way to provide Pay TV to capital cities, regional cities and major country towns.

The basis of AAP's proposals has been to operate along the lines of the US Pay TV industry, which utilises "cable head operators" on a regionalised basis. These operators gather programs from a range of national, international and local sources and then feed them into local cable systems (where available) or MMDS transmitters with up to 31 channels to choose from, to cover their various service areas.

In the Australian context AAP would envisage 6 to 10 national channels being broadcast by satellite for direct reception in rural homes and into small rural communities (some of which could be cabled to share one dish).

Cablehead operators in major population centres would also receive selected programs from satellite and retransmit the signals on MDS, cable or even ADSL systems along with perhaps some directly received overseas content, plus local insertion of video tape of both English and foreign language films.

UHF

I believe this scenario could well be applicable using UHF in country areas (as is done in New Zealand) at zero cost to subscribers. However our 23 UHF channels have been allocated as high power licences to existing broadcast TV operators and it is not practical to re-use frequencies due to probable interference in other cities. From a national cost point of view, I believe it would be cheaper to