In practical terms the use of comparisons to personal injury verdicts appears to be an expedient way of capping the damages awarded in defamation actions. It may be of benefit in appellate reviews of jury verdicts, but it is, for the reasons identified by Justice Levine of less benefit at a trial. It is doubtful such comparison would be made to personal injury verdicts if they were greatly in excess of defamation verdicts.

It is suggested that the real concern of media defendants, (ie: the size of defamation verdicts), should be addressed directly by the Parliament rather than the Courts by an amendment to the NSW *Defamation Act 1974*. This could outline the range of figures (subject say to CPI fluctuations) to be put to the jury and the procedure a trial judge is to adopt in putting those figures to a jury. Failing this, the Courts need to reconsider the way a trial judge should guide a jury on damages.

the plaintiff's case

A media defendant can not do much about this - all they can do is limit the evidence before the jury by objections as to admissibility and hope that their own case does not add any fuel to the fire.

In many ways Carson's record verdicts reflect the type of evidence he had been able to obtain about reaction to the articles from friends and colleagues. In the end, this perhaps more than anything else explains these verdicts, and it is in this area that a media defendant is most exposed - with no knowledge of the type of evidence a plaintiff will call in support of her/his case until that evidence, in the form of her/his testimony, is heard echoing through the Court.

That being so, the decision of a media defendant to go to trial will always be a gamble - it will always be a toss of the coin, to see just what the next jury does.

Nicholas Pullen is a Melbourne Partner with Holding Redlich and acted for former Police Commissioner Kel Glare. Paul Reidy is a Sydney Associate with Holding Redlich and instructed Counsel on behalf of Nicholas Carson in his second trial whilst he was at Blake Dawson Waldron.

narrowcasting for radio

Elizabeth Burrows tours the Australian Broadcasting Authority's discussion paper

Recently, the Australian Broadcasting Authority issued a Discussion Paper *(the Discussion Paper or Paper)* dealing with narrowcasting for radio in order to assist potential radio narrowcasters in their understanding of the category definitions.

The *Broadcasting Services Act 1992 (the Act)* provides for the regulation of subscription and open narrowcasting licences under sections 17 and 18. There is considerable uncertainty surrounding the criteria to be used in deciding whether a service is a narrowcast service. This uncertainty is compounded by inadequacies in the opinions provided by the ABA on service categories.

what are narrowcasting services?

Services may be narrowcasting services if their reception is limited by audience, location, duration, or appeal of programming, or because of some other reason.

In addition, subscription narrowcasting services must only be available on payment of subscription fees, and subscription fees must be the predominant source of revenue.

Because narrowcasting services are part of the class licence regime, and the provider need only comply with the conditions determined by the ABA and Schedule 2 Part 7 of *the Act* rather than applying for a licence, it is particularly important that the boundaries within which narrowcasting services must operate be clearly defined. The *Discussion Paper* offers little assistance in this regard.

categories of service

The *Discussion Paper* gives examples of the factors which establish service categories. The *Paper* states, not very helpfully, that the criteria in section 22 of *the Act* "are a good guide for an aspirant broadcaster in deciding whether or not a proposal would fall within the class licence regime." However the *Discussion Paper* gives little guidance beyond an interpretation of the relevant provisions of *the Act*, similar to that to be found in the Explanatory Memorandum to the Broadcasting Services Bill.

For example, the *Paper* gives as examples of limited locations, "hospitals, doctors' surgeries, shopping centres, schools, pubs and clubs...". Section 17 includes as examples "arenas or business premises", and the Explanatory Memorandum also suggests domestic dwellings in a limited area.

opinions on service categories

The *Paper* aims to assist the application by potential service providers for opinions on service categories under section 21.

Applications for opinions which have been determined by the ABA and which relate to services which have commenced operation can be inspected by arrangement with the Allocations and Renewals Section of the ABA. The ABA also publishes opinions as to service categories in the Commonwealth Gazette, but the opinions contain conclusions rather than reasoning, and the details are limited.

The ABA concluded, in one opinion published in the Gazette this year, that a proposed service fell within the category of open narrowcasting because it was targeted at a special interest group, it provided programs of limited appeal, and its comprehensibility was limited to persons speaking Italian.

The Department of the Parliamentary Reporting Staff's application in relation to a proposed service of unedited coverage of Parliament and parliamentary committees was held by the ABA to be a subscription narrowcasting service - the service would be of limited appeal and was only to be available on the payment of subscription fees. Another Government service, targeted at people with a need for or interest in particular educational and training programs, which was encrypted and required the obtaining of special equipment was held to be within the open narrowcasting category. The requirement that the audience obtain decoding equipment did not prevent it from being an open narrowcast service, but was a factor in the determination that the service was a narrowcast service, because the requirement limited the accessibility of the service.

The extent of the information provided by the ABA reached a particularly low point with the opinion in relation to Montamar Pty Ltd trading as Perpetual Motion Pictures. The ABA stated that the matters considered in reaching the opinion that the service fell within the open narrowcast service category included that "the service will be limited because it provides programs of limited appeal."

need for information on service categories

Service providers cannot obtain enough information about service categories. This is unacceptable because an opinion effectively licences the service, if it does not change substantially, for five years. Once the ABA provides an opinion, no Government agency is able to take action against the service provider on the basis that the service falls into a different category. Better information about the categories of narrowcasting is needed not only for the purposes of prospective narrowcasters, but also for the purposes of commercial broadcasters who may be targeting the same region or audience and who have no input into the process of the ABA's determination.

The ABA points out in the *Discussion Paper* that it is not bound to follow its own precedents in relation to opinions and can determine additional criteria or clarify the existing criteria for determining the category of services under s.19 of *the Act* (it has not yet done so). Service providers are warned not to treat opinions as precedents. This diminishes considerably the commercial certainty which the provision of opinions is intended to create. The assistance provided by the opinions is also limited by the lack of detail. Although commercial confidentiality needs to be protected, it seems reasonable to expect more details about the nature of the service, given that the ABA cannot publish the opinion until the service to which it relates has commenced operation.

ownership and control

The *Paper* does not discuss issues of ownership and control of subscription and open narrowcast radio services.

Because licences are not allocated to narrowcasters there is no ABA control over candidates for them. There are no restrictions under *the Act* on their ownership or control. This means that owners of commercial broadcasting licences are not prohibited by *the Act* from operating narrowcast services.

It was stated in the Explanatory Memorandum that concentration in ownership and control of narrowcast services was to be regulated by the provisions of the *Trade Practices Act 1974*. However, it would be difficult for the TPC to monitor any such concentration because of the lack of individual licensing which might assist to identify providers. While those services using the radio spectrum must at least obtain transmitter licences under the *Radiocommunications Act*, as the *Paper* points out a narrowcasting service may be delivered by cable, optical fibre, satellite, or other means as well as by broadcasting services bands or other radio spectrum.

conclusions

The *Discussion Paper* leaves many questions about narrowcasting services unanswered, as have the published opinions. The *Paper* does not discuss issues of ownership and control, and adds little to the information already available under *the Act* and the Explanatory Memorandum as to which services will be considered to be narrowcast services. This is particularly unacceptable given that the ABA itself considers that the provisions of section 21 are intended to give certainty to service providers.

Elizabeth Burrows.
Solicitor, Blake Dawson Waldron.

Distinctly New Zealand

Dr Ruth Harley discusses New Zealand's broadcasting regime

Up until the major deregulatory changes to the broadcasting regime in New Zealand in the late '80s, broadcasting, like a great many other facets of life in New Zealand, was characterised by a heavy measure of State control.

State broadcasting, and that's the only kind there was for decades, grew up under the influence of the Reithian concept of public broadcasting - broadcasting as an influence on our society directed to particular ends - educational, political, social and cultural.

Successive governments and their broadcasters fought to prevent new stations being created and they exterminated every one that did raise its head. The containment of television was equally determined. In 1949 the government set up an inter-departmental committee to consider the introduction of television. Eight years later it reported and decided we should have it!

By the mid '80s the regulated structures were collapsing. There were a number of factors which created the climate for the changes of the late '80s. Telecommunications and broadcasting were just a part of the picture.

key factors for change

Firstly, in the drive for a more internationally competitive economy, all regulated industries came under intensive scrutiny. Secondly, regulatory (public sector) reform focused on those industries in which Government trading enterprises operated. Government dominated the broadcasting industry. By mid 1987 the Government had adopted a new framework for Government enterprises.

They were to be placed on a more commercial, competitive footing with managers held accountable for performance. There was to be a competitive neutrality with the private sector, ie Government-owned enterprises were not to have any disadvantage or advantages vis a vis private broadcasters. Policy advice and regulatory responsibilities were to be seperated from commercial activities. And, the delivery of social objectives was to be separated and transparently contracted and not mixed with commercial objectives.

Thirdly, there was dissatisfaction with the degree of choice in broadcasting services. Broadcasting was dominated by the state broadcaster, Broadcasting Corporation of New Zealand (BCNZ) and its predecessors. Frustration had built up with the restrictions on entry for the private sector into radio and television broadcasting.

Fourthly, the broadcasting warrant system administered under a quasi-judicial tribunal system was seen as cumbersome, time consuming and not able to keep pace with technological change. The BCNZ itself faced a range of restrictions on its commercial operations and wanted flexibility. Television especially would increasingly have to operate in a global environment in which international partnerships needed to be formed.

Fifthly, demands for greater diversity of programming, including programming reflecting our own society, were not being fully satisfied. Yet the public broadcasting fee was controlled by the BCNZ and it had conflicting objectives. Relevant social objectives were also obscured by Reithian doctrines that were out of touch with the modern consumer service environment.