Comment

To market, to market: government gets a Sex/life

The first year of Australian communications deregulation brought some sharp changes in the weather. A year that began with the walls of "Regulation" tumbling down to expose the "Benefits" of competition at the Australian Telecommunications Users Group's Open Competition Ball on June 30, 1997, ended with Telstra and the ACCC settling a slugfest over Internet backbone pricing.

June 29, 1998 saw Optus pay TV's sports program supplier, Sports Vision, placed into liquidation, and Australia a step closer to a pay TV monopoly. It also saw another horror three months of quality of service performance by Telstra, apparently less than daunted by the competitive implications of providing a telephone service to many customers at something less than "world's best practice".

June 30, 1998 saw Senate demands to reduce the period of continued protection from competition for commercial TV broadcasters, which the government proposed as part of the introduction of digital terrestrial television.

And June saw the government getting very cross about the outbreak of naughty TV and radio programs like Channel 10's *Sex/life,* and promising to Do Something About It.

For Telstra and the government, the timing of the Australian Communications Authority's March quarter quality of service report - just as the Senate was about to debate legislation to privatise the rest of the national carrier - was as disastrous as the December quarter - just after the Prime Minister announced his plan to sell the remaining two-thirds of Telstra.

The government was better prepared this time, announcing that fines under the Customer Service Guarantee Scheme for breaches of "performance standards" would be quadrupled. The initial form of the scheme, which the Coalition promised at the last election would "ensure a significant improvement in the standard of service provided to customers across Australia", has effectively been acknowledged for what it was - window-dressing to get the Senate to pass the first privatisation legislation without laying a finger on Telstra's sale price. The government has also decided to accept the other recommendations of the Senate Committee which examined the Telstra legislation (see CU June 1998) which will strengthen the hands of Telstra's competitors in interconnection negotiations.

While welcome, it's disturbing that these changes have been proposed not as part of a genuine process to ensure that all Australians get decent quality telephone services at a fair price, but as part of an urgent mission to get something else the government wants - further privatisation - without any serious analysis of the costs and benefits of partial privatisation, at a time when the political landscape has been turned on its head so that politicians who've never been seen west of the Great Divide are suddenly talking lyrically about "regional Australia" as if they were the Man from Snowy River.

The reality seems to be dawning slowly. The communications business is not a club where people sort out their differences amicably and "do the right thing". It's a market. Corporations in that market, like others, generally don't hurry to do things they don't have to do. Schemes like the original customer service guarantee, designed to "provide carriage service providers with an incentive to meet performance standards", are not worth the paper they are written on.

The Opposition blamed the March quality of service numbers on Telstra's "downsizing", particularly in regional areas. Minister Richard Alston said it all started with competition, which Kim Beazley introduced in 1991. Telstra blamed the unseasonal rain which now seems to fall whatever the season.

Fortunately for Aussie supermodel Mum, Elle Macpherson, the weather has been much better in the European summer, as anyone walking past the established and very public commercial media market of an Australian newsstand in the last week of June might have noticed.

New Idea celebrated the first year of Australian communications deregulation with a cover shot and a more revealing inside spread of The Body dropping her shirt in the Mediterranean sun, far from the unseasonal rain at home.

Earlier in the month, the government demanded tightening of the commercial television industry's code of practice to stop the television equivalent of *New Idea's* scoop: programs like Channel 10's *Sex/life.* The action followed a piece in the Murdoch *Australian* newspaper highlighting the apparently accelerating wickedness of the television and radio industries which cross-media rules prevent from

... continued page 12

Victoria no closer to source protection

Hopes that the Victorian government might follow the NSW example and amend its confidential communications legislation to protect sources seem to have been dashed

Examples of journalists being found in contempt of court and jailed or fined for upholding their ethical obligation to maintain the confidentiality of their sources have been numerous in recent years. Calls for law reform to avoid this have come from journalists, members of the judiciary, law reform bodies, and parliamentary committees.

But Victoria's government appears to have ignored an opportunity to resolve this state of affairs. The *Evidence (Confidential Communications) Bill*, recently passed by the Victorian Legislative Assembly, has attracted criticism for its failure to address the protection of source confidentiality in several professional relationships.

Confidential sources of information in journalism are a vital link in the media's informing the public, particularly if it is to result in more than bland news releases. Woodward and Bernstein's reporting of the Watergate break-in, for example, made possible largely by the revelations of the source still known only as "Deep Throat", is the stuff of legend. In Australia, sources played a crucial role in the media disclosures which uncovered the corruption in Queensland leading to the Fitzgerald Inquiry, and the patient deaths at Chelmsford in Sydney.

Many sources require confidentiality because they fear repercussions from disclosure. Protection of source confidentiality is a fundamental tenet of journalism. The journalist code of ethics requires that "in all circumstances they shall respect all confidences received in the course of their calling".

This is not to suggest that reliance on confidential sources is beyond scrutiny. The relationship is often driven by self-interest on both sides. Sources do not always act from high-minded public interest motives; they may have hidden agendas or seek to distort the facts. A committee recently reviewed the MEAA (journalist union) code of ethics and recommended that journalists should consider the motive for seeking confidentiality and where possible, use attributable sources.

The arguments for source protection rest ultimately on public interest in the free flow of information. Compelled disclosure of sources in legal proceedings may result in sources becoming reluctant to provide information for fear of disclosure, making it harder for journalists to obtain facts, and thus reducing the flow of information to the public. In 1996, the European Court of Human Rights decided that an English court order requiring journalist William Goodwin to disclose his source violated the right to freedom of expression in the European Convention on Human Rights. In the U.S., where source protection is a free speech issue, many states have enacted "shield laws" which protect against compulsory disclosure.

But the law in Victoria does not recognise evidentiary privilege for journalists in relation to their sources. A journalist who is required to disclose a source of information in legal proceedings and refuses to do so is in contempt of court. Situations in which the identity of a source may be sought include defamation proceedings, criminal trials, Royal Commissions and inquiries. A spate of cases between 1989 and 1993 involving findings of contempt against Tony Barrass, Joe Budd, David Hellaby, Chris Nicholls and Deborah Cornwall, all of whom refused to disclose their sources, highlighted the need for reform. In 1997, two journalists who refused to disclose the identity of their sources to the Easton Royal Commission were found in contempt.

Law reform is required to strike a better balance between the administration of justice and protecting the free flow of information. This could be achieved by a structured judicial discretion that would enable judges to excuse journalists from answering questions about sources. This would achieve greater protection for sources while also recognising that in limited circumstances the exercise of this discretion may favour disclosure in the interest of the administration of justice. Recommendations along these lines have been made by the Law Reform Commission of Western Australia and the Senate Standing Committee on Legal and Constitutional Affairs.

In 1997, NSW grasped the law reform mettle and amended its *Evidence Act* by creating a professional confidential relations privilege. The legislation does not specify which professional relationships are protected but would clearly apply to journalists' ethical obligation of confidentiality to their sources. It enables a court to exclude evidence that would disclose a

... continued page 12

Once were Anzacs

Writer, producer and Kiwi Roger Simpson argues for the Australian production industry in a speech delivered to the True Blue rally at the Sydney Opera House on June 21

I'm a Kiwi. I still barrack for the All Blacks although I've been in Australia now for 27 years. I'm a complete and utter Kiwiphile with a beauty-bonza bias. I like New Zealand carpets, New Zealand honey and white wine from Marlborough. And I could not contain my mirth when the lights went out in Auckland - deluding myself, like everyone else, that it was all because of privatisation and that it couldn't happen here...

Apart from the Kiwis' ingenuity with cricket (not an easy game to play in tramping boots and Swanee) the New Zealander is almost identical to the Australian. The two major cities hate each other, the welfare system is in slow collapse, farmers are marginalised, teachers devalued, bankers unregulated and QCs (in the name of justice, mind) are all obscenely rich. Medical specialists gorge themselves on a healthcare system in the last throes of life while only 1.5 corporate criminals are in jail for the obscenities of the 1980s. It's almost impossible to tell the two countries apart.

Except for one significant and defining difference. Australia has quotas for television and New Zealand hasn't.

I arrived in Australia in 1971 to write cop shows for Hector Crawford and found myself in the midst of a campaign that was marching in the streets. "TV Make It Australia" they called it and make it Australia we did. (How quickly the Kiwi adapts). This was the birth of the modern renaissance, Gorton and Gough in bipartisan union, the beginnings of government support for film. The ABC was in its ascendance, the Film School was born, Father Phillip Adams was our spiritual leader and Don Dunstan gave us the first of the State Corporations.

Wake In Fright and *The Adventures of Barry Mackenzie, Sunday Too Far Away* and *Picnic At Hanging Rock, Power Without Glory* and *Rush and Marion*, and on the commercial networks, the first of our mini-series - *Against The Wind.* A careful mix of government subsidy and incentive and quotas without which there would be no Bruce Beresford or Reg Grundy or Geoffrey Rush.

So why, after all that has been achieved, am I so incensed by the High Court decision to give New Zealanders access to Australian quota? Not anger with the legal system, for the rarefied debate is really beside the point, but anger and disappointment with my former countrymen for seeking to appropriate from us what they have failed to achieve for themselves - a viable film and television industry with a national voice and an international reputation.

The entire commercial television industry in Australia is underpinned by quotas. Quotas make the channels buy locally for many times the cost of foreign. They provide jobs and foreign exchange and a national voice. Quotas support an industry that is truly international. Our soaps are the best in the world, our cinematographers an export commodity. Judy Davis starred in a mini-series, *Water Under The Bridge,* that would not have happened without quotas. And Peter Weir wouldn't have got to direct *Luke's Kingdom* if quotas had not been in place. Marcus Graham would not be in the U.S. now making a pilot for American television had it not been for quotas and Kylie Minogue would never have been noticed without the quotas that launched her career.

Meanwhile, across the ditch in Godzone, as we Kiwis once fondly called it, there are no quotas and nothing to crow about. The largest employers are *Hercules* and *Xena*, American offshore productions that sop up the last of the talent that hasn't followed Jane Campion to Oz. The national broadcaster no longer has a drama department and has recently sold its production arm to private enterprise. The industry, if we can call it that, is on its knees.

So what do the Kiwis do? Copy Australian experience and introduce incentives? No. Establish a definition of New Zealandness (to mirror our own Australianness definition) to give local programs a fighting chance against dumped foreign product? No. Build and nurture a strong local industry to reflect a nations sensibilities? No. They try to piggyback on ours.

By seeking to access Australian quota, the New Zealanders admit defeat. Their cause is lost, the Americans have landed, their industry is no longer worth the struggle. So much energy, so many lawyers' bills, so much heat and dust has been expended on CER, the Closer Economic Relations Treaty that declares anything New Zealand as Australian - and vice versa (at last my Australian born sons can play for the All Blacks) - that the Kiwis have forgotten what they were fighting for; not a piece of our industry - but one of their own.

Roger Simpson is a multi-award winning writer and producer and the creator of the *Hallfax f.p.* series of telemovies and the series *Good Guys, Bad Guys*

TVNZ posts results of a "watershed" year

Greater competition for advertising, and the bearing of costs associated with streamlining its operations made 1997 a difficult year for New Zealand's state broadcaster

Television New Zealand's (TVNZ) results for the 12 months to December 31, 1997 reflected a difficult operating environment, in particular a soft advertising and retail market in which the broadcaster suffered. Increased competition, resurgent newspaper and radio advertising sectors, and a flat economy all meant that TVNZ had to fight hard for the advertising dollar.

Chairman Rosanne Meo described 1997 as a watershed year for the company as it repositioned itself to face the increasing pace of change in broadcast technology and combat the demands of a competitive free-to-air and pay television industry.

Though TVNZ recorded the second highest operating profit in its history, at NZ$77 million, the effect of major internal restructuring was to reduce net profit after taxation to NZ$30 million compared with NZ$61 million in 1996.

Non-recurring items of NZ$36 million included the costs of eliminating obsolete programming accumulated over several years as well as previously capitalised costs and other costs associated with the closure of regional network Horizon Pacific TV.

Partly offsetting these costs were the sales of 80 per cent of TVNZ Natural History and a minor sell-down of the broadcaster's investment in cable operator Sky Network Television to 12.61 per cent. The U.S.-based Rupert Murdoch-owned Twentieth Century Fox bought the 80% stake in TVNZ Natural History. The remaining 20 per cent stake was retained by TVNZ and is now known as Natural History New Zealand Ltd.

The final dividend to shareholders was NZ$21 million for the full year.

"We are satisfied that TVNZ is now in a position to build on its evident strengths, unencumbered by legacy cost burdens. We already see improved performance by our channels, both in ratings and financially, and an increase in overall viewer numbers in what continues to be a difficult market. Our focus is now on preparing TVNZ for the exciting future proferred by digital technology and build on our brand strengths and solid New Zealand image," said Meo.

A primary focus of the company in 1997 was the Great New Zealand Television Project. TVNZ needed to emphasise good New Zealand television onscreen because New Zealand-made programs are ratings winners for the network. Accordingly, TVNZ's local content production increased by 10 per cent (from 4,122 hours in 1996 to 4,506 hours in 1997) and included the introduction of breakfast television.

The project began mid-1997 and has already seen the introduction of several initiatives aimed at refocusing the business and reforming the company's processes. It now places significant emphasis on key brands - channels TV1 and TV2 - supporting them as separate but complementary businesses. The two channels share resources where appropriate - sales, marketing, program acquisition and commissioning.

One of the strongest signals of the fact that TVNZ had to rise to the challenges of the competitive and changing media environment was the gains made by newspaper and radio advertising which saw the 1997 percentage growth in spending on other advertising exceed that for television for the first time in many years.

In addition to the channel branding and production activities, TVNZ's 100 per cent-owned subsidiary Broadcast Communications Ltd also began positioning for the introduction of digital technology, completing a successful trial in 1997. It will use the frequencies previously set aside for MTV in TVNZ's licensing deal with the music television network (an arrangement which ended on June 7, 1998 due to lacklustre viewing figures) for digital broadcasting trials from August 1998.

Last year, TVNZ also began the process (which was completed in January 1998) of selling its production arm South Pacific Pictures to a New Zealand-led consortium comprising Force Corporation (the Village Roadshow exhibition and distribution joint venture), local company Endeavour Productions Ltd and the U.K. distribution and production company Chrysalis Group.

The broadcaster retained its 25 per cent stake in New Zealand telecoms company CLEAR Communications but is known to be reassessing its involvement in the business which rests rather awkwardly outside its stated core focus on television.

Karen Winton

Community broadcasting: the growth paradox

A new funding model and $1.5 million infrastructure package is intended by the government to make community broadcasters more self-sufficient and independent but, writes David Barlow, it is viewed with suspicion by some who regard it as the first step in the withdrawal of government support

As community broadcasters approach the new millennium, they do so with feelings of optimism and apprehension. The optimism stems from continuing growth of a sector which currently includes more than 210 radio stations (including the 83 Broadcasting for Remote Aboriginal Communities Scheme stations), 11 television organisations and 170-plus aspirant broadcasting groups, of whom 100 or more are expected to acquire a licence by 2000. The apprehension emanates from the Coalition's commitment "to develop a comprehensive longterm community broadcasting strategy".This was interpreted by Michael Thompson. head of the Community Broadcasting Association of Australia (CBAA), as the commencement of significant rationalisation of the community sector in his article "Expansion of the sector: How to proceed?" in the association's August 1997 newsletter

A recent discussion paper, *A New Funding Model and Future Strategy for the Community Broadcasting Sector*, Department of Communications and the Arts, Canberra, 1997, provides the opening salvo in an attempt to create a more self-sufficient and independent community broadcasting sector.

This is to be achieved by introducing a new funding model and encouraging community broadcasters to maximise the potential of a new infrastructure package delivered by the Coalition since its election. The proposed and now partly implemented package involves a grant of $1.5 million over three years to develop a Community Access Network, Community Broadcasting Database and to upgrade the current community broadcasting satellite, ComRadSat. Although unfunded, there was also a commitment to assist community broadcasters to migrate to Digital Radio Broadcasting (DRB).

Peter Westerway, director of the Community Broadcasting Foundation (CBF), declared the Community Access Network and Community Broadcasting Database projects as "the most significant innovations in the history" of the sector. But although generally welcomed by most community broadcasters, some detractors have suggested it is the first step in a government agenda to reduce the sector's funding in the longer term. This scepticism is based on a view that the infrastructure package has been awarded explicitly for the purpose of encouraging and enabling the sector to generate more of its own income and become financially self-reliant, thereby providing a rationale for the gradual withdrawal of government support.

Together with advice that the community sector should spend the infrastructure funding "appropriately, efficiently and effectively", the government considers this investment an opportunity for community broadcasting to "shape its own destiny" and "establish a role in the new communications environment".

The Community Broadcasting Database will enable online access to management, marketing, training, audience survey and technical resource information while the Commuinty Access Network will allow community broadcasters access to the Database, a multimedia capacity and the ability to provide community information services. While the funds provided are expected to equip all licensed community stations with the hardware and software to enable Internet access, this is not expected to extend to aspirant groups or the BRACS stations, a situation that caused some disquiet at the 1997 CBAA annual conference.

While the Network and Database are seen by the government as a means of enabling community broadcasters to "do their core business better", the predominant expectation is that the sector will use the new infrastructure to expand its area of operations and develop mutually beneficial cooperative ventures in order to generate additional revenue. To assist with this process, community broadcasters are encouraged to consider and put into operation concepts such as a "value chain", "linkages" and "leverage". Links with industry groups are considered a means of value-adding as well as providing scope for leveraging additional resources from governments and the private sector, the intention being that these new ventures will provide community broadcasting

... continued next page >

... continued from previous page

with a "longterm sustainable future".

Although protocols are yet to be decided, the Database is expected to be a valuable and versatile acquisition. In addition to its ability to generate a range of information for broadcasters and government policy makers, it is envisaged as a significant management and marketing tool and has been hailed by the Department of Communications and the Arts as a potential "launching pad for the marketing of community broadcasting".

Together with advice that the community sector should spend the infrastructure funding "appropriately, efficiently and effectively", the government considers this investment an opportunity for community broadcasting to "shape its own destiny" and "establish a role in the new communications environment"

Such a facility will be welcomed by those in government and the sector who believe that more accurate and verifiable data will help increase sponsorship opportunities. But others will see it as a catalyst for an even greater commercialisation of the community broadcasting sector.

Likely to be more controversial are plans regarding the future role of an upgraded ComRadSat. The government seems to view the satellite as a means of rationalising the growing number of aspirant broadcasting groups, suggesting that where possible such groups should merge or act as consortia and use a more sophisticated "'seamless' program service" as a substitute and supplement to local programming. The CBAA has also proposed a new role for the satellite, suggesting ComRadSat be used as a way of reserving spectrum space for a community broadcasting licensee in areas where a local group is expected to materialise but is yet to emerge.

By means of a temporary licence allocated to local government, a community broadcasting service would be provided by ComRadSat. Once the local station becomes fully operative, the satellite service would revert from "program supplier" to "program augmenter". The encouragement for aspiring broadcasters to form consortia is also ominous given the government's concerns about the size of the sector and that the introduction of DRB requires a consortia of stations to share transmission infrastructure.

It could be construed as an irony that the same government facilitating the sector's growth is also seeking to ultimately make it self-sufficient. It was, however, a Coalition government-inspired amendment to the Broadcasting Services Act 1992 that introduced a Temporary Community Broadcasting Licence. This has simplified and quickened the process faced by aspirant groups in getting "to air" and eased the logjam created by the lack of such a provision in the original Act. As the Australian Broadcasting Authority planning process reaches its conclusion, more permanent community broadcasting licences are also being issued. But in recognising that the community sector could almost double in size, the government has indicated that it cannot maintain average per station support.

Neither does government consider the current funding model adequately flexible to support the technological and service changes being expected of the sector. Rather than continue the current practice of tagging the majority of funding to the print handicapped, ethnic and Aboriginal sub-sectors, distributing the balance among the remaining generic stations, the suggestion is for "safety net" funding for the three designated groupings with the remainder to be made available for special projects, innovations and "start-up funding" for new stations. While there will be some support for this initiative, the CBAA has deemed it a controversial proposal, even though it acknowledges that current funding arrangements have long been a centre of tension.

Irrespective of the final funding formula, the government is only likely to continue funding the sector's basic requirements, leaving individual stations and the sector as a whole to generate whatever additional funding is required. This, in a climate where community broadcasters face:

rising costs as government utilities such as the National Transmission Authority become privatised and users are required to pay commercial rates;

more competition for sponsors as the number of commercial broadcasting and narrowcasting services rise; and

greater rivalry at the community level for the fundraising dollar.

With the sector keen to migrate to DRB and the Digital Radio Advisory Committee estimating each operator's new hardware transmission costs at anywhere between $50,000 to $150,000, funding pressures are likelly to be accentuated. Both the government and the CBAA recognisse that these developments have the potential to fragment a community broadcasting sector allready contemplating an uncertain future.

David Barlow is a PhD studdent in the Department of Media Studies, Faculty of Humanities at La Trobe University in Melbourne

The telecoms regulators, one year on

What happened to the key regulatory telecommunications bodies in the aftermath of the 1997 Telecommunications Act, asks Alasdair Grant, manager, Regulatory, at AAPT

Name changing, regime swapping, self-rule and the prevention of anti-competitive behaviour. The 1997 regulatory environment emphasised self-regulation and commercially negotiated outcomes in which the key regulatory bodies to emerge after July 1, 1997, were the ACCC (Australian Competition and Consumer Commission), the ACA (Australian Communications Authority) and ACIF (the Australian Communications Industry Forum).

ACCC

The primary functions of the ACCC in the new regulatory environment are to administer the access regime set out in Part XIC of the *Trade Practices Act* and to prevent anti-competitive conduct in accordance with Part XIB.

Under the access regime, the ACCC may "declare" that a provider of a specified service that is an essential input to a wholesale or retail carriage service and is under bottleneck control must supply the service to any carriage service provider on demand. The access regime is a cornerstone of the new environment because under market conditions of open competition and legislative conditions of restricted powers and immunities to install infrastructure, it is the only means by which effective, sustainable competition can develop in telecommunications services.

Late last year, the ACCC declined to declare "intercarrier roaming" which would have enabled new entrants in mobile services to offer ubiquitous geographic coverage by arranging for their customers to access competitors' mobile networks in areas where the new entrants did not have a network.

More recently, the ACCC has issued draft declarations of ISDN, DDAS (digital data access service) and intercapital transmission for public comment. A final decision is expected soon. Declaration of the former services will promote competition in markets for data services, corporate markets for frame relay/ATM services as well as in residential markets for standard (or "basic rate") 64 kbps ISDN services.

The ACCC's current inquiry into the declaration of local calls and local interconnection is the most important yet, not only in terms of market size and profitability but also in terms of the range of end-users who will benefit from competition in local calls. The local services inquiry is examining the issue of access to Telstra's customer access network (or "local loop"), i.e. the network of some 9.5 million lines connecting each customer to Telstra's nearest local switch or exchange. Many access seekers, including AAPT, consider that access to this part of Telstra's network (or "local loop unbundling")) is essential to the promotion and development of effective competition in telecommunications services.

In the U.S., the U.K. and other jurisdictions, the success of the prevailing regulatory regime has been measured by the extent to which competitors have been able to obtain access to the local loops of incumbent former monopolists. This will be the case in Australia. The ACCC intends to issue its draft findings in July.

But the declaration of a service does no more than bring the supply of the relevant service within the regulatory framework. Generally, this means that any service provider that supplies the declared service to itself or another service provider (an "access provider") must enter into commercial negotiations to supply the service to any other service provider (or "access seeker") on request. If commercial negotiations fail, then the ACCC may be required to act as arbiter.

Since the regulatory framework emphasises the primacy of commercial negotiations in the resolution of access issues, the declaration of a service does not, in itself, indicate that the access regime is working effectively. The ability of an access seeker to negotiate fair terms and conditions of supply of a declared service (including the price) is largely dependent on the information the access seeker has to scrutinise any offers made by the access provider.

This is one of the reasons why AAPT and other service providers have advocated legislative change to the *Trade Practices Act* in order to require Telstra, as a vertically integrated and dominant carrier, to disclose information relating to its costs of providing declared services, and to make more transparent the transfer of costs between the various business divisions of its operations (especially between wholesale and retail). These amendments, if accepted by parliament, would form part of the Telstra Bill. At the time of writing, neither the fate of the proposed amendments nor of the Telstra Bill was known.

Anti-competitive conduct

The Competition Notice regime set out in Part XIB was widely proclaimed as a

... continued next page

... continued from previous page

means by which the ACCC could move quickly to prevent anti-competitive conduct. But this rhetoric disguised the fact that before issuing a Competition Notice the ACCC must satisfy nearly all elements of anti-competitive conduct under Part IV of the *Trade Practices Act;* excepting the need to provide anti-competitive "purpose", which is largely inferred from a party's conduct.

This requirement reflects the fact that competition in telecommunications is now regulated under the *Trade Practices Act* rather than the *Telecommunications Act.* This is fundamentally different to AUSTEL's more interventionist powers under the *Telecommunications Act* 1991 and possibly not as expeditious as the legislature anticipated or the industry may wish.

At press time, the ACCC had issued one Competition Notice under Part XIB of the *Trade Practices Act.* It was issued to Telstra in May in relation to the exchange of Internet data but was revoked a month later after Telstra announced agreements for reciprocal interconnection of Internet backbone networks with Optus.

Some industry members had expected the ACCC to have been more active. But it is also incumbent on the industry to frame any Part XIB complaints effectively. A Part XIB complaint should have the character of a legal pleading which addresses all elements the ACCC is obliged to satisfy in finding a breach of the Competition Rule. The ACCC can only instigate an investigation if it has a "reason to suspect" that the Competition Rule has been breached, and a well drafted submission is important in enabling this threshold to be met. Once an investigation begins, ongoing information will be essential not only to assist the ACCC in developing a substantive case but also in counteracting any contradictory information provided by the subject of the investigation.

Telstra's Undertaking

The ACCC has also been conducting several projects assessing Telstra's Undertaking for PSTN, GSM and AMPS Originating and Terminating Access services. These were all "deemed" to be declared services at the commencement of the new regulatory environment. Under the access regime, an access provider may submit to the ACCC a *pro forma* agreement for the supply of a declared service which, if judged reasonable by the ACCC, it may offer to any access seeker on a "take it or leave it" basis.

Telstra's Undertaking was lodged in November 1997. The ACCC has since conducted several projects assessing all aspects of the Undertaking, including the price at which Telstra wishes to supply these services. The projects include international comparisons of prices for similar access services, "bottom-up" cost modelling and comparison of Telstra's access charges with its wholesale and retail prices. All these projects are nearing fruition. The results will provide the ACCC with crucial knowledge about the costs associated with Telstra's fixed and mobile networks, the network itself and how Telstra's business, and the telecommunications business generally, operate.

ACA

The ACA is the general industry regulator, being largely responsible for the administration of the *Telecommunications Act 1997* (Act) and relevant provisions of the *Radiocommunications Act 1992.* Though it is often described as the regulator of consumer and technical issues, its responsibility is much broader. Its functions include:

- administration of the USO scheme;
- monitoring the performance of carriers and CSPs, including compliance with the Customer Service Guarantee scheme;
- development and administration of the Numbering Plan;
- administration of pro-competition issues such as local number portability (LNP) and preselection;
- administration of radiocommunications licensing, including the spectrum auctions;
- registration of industry codes developed by ACIF;
- general interpretation of the Act.

Over the past year, the ACA has issued a Numbering Plan, declared implementation dates for LNP, and conducted spectrum auctions in the 800 MHz and 1.8 GHz bands (which will probably be used for wireless local loop technologies). It is now considering whether to declare that calls made from fixed networks to mobile networks are preselectable, i.e. a customer can use a particular carrier without having to dial an override code first.

Many of the matters administered by the ACA require industry cooperation for their development and implementation. It is therefore vital that the body maintains active presence in ACIF in order to assist these processes and monitor their effectiveness.

ACIF

The self-regulatory industry forum ACIF has been responsible for the development of industry codes of practice relating to consumer issues, network, operational and technical issues.

To date, more than 40 codes have been or are in the process of being developed by all sections of the industry from service and equipment providers to consumer and other public interest groups, the TIO, ACCC and the ACA.

ACIF was established to deal with issues which are generally in the industry's common interest to resolve. Its processes are therefore based on consensus rather than compulsion. Because of this, they are liable to falter where the outcome of the issue being considered is not mutually beneficial to all participants. Hence codes associated with such issues have developed much more slowly than many may have wished.

Alasdair Grant, manager, Regulatory, AAPT

Telstra moves to please the country

In advance of the July 31 deadline set for the Australian Communications Authority report into the analogue AMPS service, Telstra has agreed to upgrade its analogue AMPS mobile network to a new generation mobile technology known as CDMA (Code Division Multiple Access).

According to Telstra, the decision means that areas of Australia which currently receive mobile phone coverage from the Telstra analogue AMPS network will continue to receive the same coverage when the network is upgraded, and follows the government's allocation of additional spectrum earlier this year. It also means that after 2000 when the AMPS system will be phased out, mobile phone users in rural areas will no longer have to choose between having an AMPS mobile phone that gives coverage in the country, or a GSM mobile phone that gives coverage in urban areas.

Areas of regional Australia which now get AMPS coverage will be upgraded to receive CDMA coverage. Ultimately, the service is intended to also cover urban areas and all other areas which currently use the AMPS network. It is anticipated that third party resellers will get wholesale access to the new network.

More than $400 million will be invested in CDMA which will use the 800 Mhz spectrum recently acquired by Telstra in the mass spectrum sell-off by the government.

CDMA is a digital technology like the GSM system already in operation in Australia but it has a similar range to the AMPS system, its coverage from each base station being roughly equivalent to that of AMPS. According to Telstra, CDMA allows multiple phone calls to be carried on a single frequency by "encrypting" each conversation. The signal drops out at the end of its range. Like GSM, CDMA provides high security and can carry large quantities of data which allow users to access the Internet, data transfer, voicemail and other messaging systems and services.

AMPS users will need to buy a new "dual mode" handset , allowing users with a CDMA handset to access the old AMPS network for as long as it remains operational. The handset is expected to cost roughly the same as existing GSM handsets once the technology is in place.

The CDMA network should be in place in those areas where the AMPS network is scheduled to close at midnight on December 31, 1999.

Communications and Arts transfer to DoCA

The Communications and the Arts branch of the former Bureau of Transport and Communications Economics (BTCE) will transfer to the Department of Communications and the Arts (DoCA) this month.

The branch had remained in the BTCE as part of the then Department of Transport when the Department of Transport and Communications was split in late 1993. It continued research on a range of communications issues working closely with DoCA but the recent move by the department from Civic to Forrest in Canberra has made close contact between the two agencies more difficult.

All positions in the former BTCE branch will transfer to DoCA. The branch will be renamed the Communications Research Unit (CRU) and will reside in the Telecommunications Industry Division. The unit will continue to be led by David Luck who will report to Fay Holthuyzen.

Secretary of the department, Mr Stevens, has indicated that the unit will continue to undertake independent research and retain its current level of budget funding. Its research will cover a wide range of communications issues of interest to all areas of the portfolio. One of the benefits of co-location will be the additional opportunities available to employ the recognised research skills of the unit on current policy issues.

The CRU will also be able to bid for some fee-for-service consultancy work such as that recently undertaken for the Working Group on Putting Cables Underground.

The unit will be encouraged to continue publishing the results of its major research projects and will remain a focus for the communications research community. An important task will be to continue to organise the annual Communications Research Forum which will again be held in Canberra, from September 24-25, 1998 at Old Parliament House.

For the latest information and details on how to register for the forum, visit the CRF website at www.dca.gov.au/crf or contact Adrian Walker at the BTCE on ph: 02 6274 7242, fax: 02 6274 6816, or email Bseminar@email.dot.gov.au

David Luck, research manager, Communications Research Unit

Victorian sources

... continued from page 4

confidential communication made to a person acting in a professional capacity. The court is required to take into account issues such as the probative value and importance of the evidence, the availability of other evidence and the likely effect of the giving of such evidence.

The NSW legislation provides a model for reform. The Victorian Scrutiny of Acts and Regulations Committee reviewed the *Evidence Act* and thought so too. It endorsed the NSW approach (as outlined in a 1996 discussion paper by the NSW Attorney-General's department) as a "workable and conceptually sound method" and recommended adopting similar legislation. Unfortunately, the Victorian government, without explanation, has produced narrower legislation. It has failed to grasp an opportunity to resolve the unsatisfactory clash of justice and free speech and should reconsider the bill in the light of this and other criticisms.

Vic Marles

Self-regulation: does it deliver the goods?

On April 27, 1998 the Centre for Media Communications and Information Technology Law held a conference entitled "Self-regulation: does it deliver the goods?" This conference continued the dialogue begun in September 1997 between industry, regulators and academics when the Centre held a conference called "Dispute resolution in a deregulated telecommunications environment".

A range of perspectives was represented both by those attending and by the speakers. Regulators, telecommunications carriage service providers, consumers and academics spoke. The event was satisfying in that there was much constructive discussion between the speakers and the audience throughout the day.

A key theme to emerge was that of access to the infrastructure by providers other than Telstra. The question was raised as to whether self-regulation was up to the task of dealing with the market power which Telstra has, and of making the idea of competition meaningful. And are the regulators' sanctions big enough?

Further to the theme of access, there was discussion about whether the self-regulatory process could be used by vested interests to stymie change. It was suggested that this could occur by matters being dealt with sequentially and in consultative forums where the interests of the participants are divergent.

It was suggested that self-regulation may be more problematic in the area of access than in the area of consumer codes.

Another clear theme of the day was the level of resources required to service the self-regulatory process.

The Centre intends to continue the process of dialogue about and appraisal of self-regulation by holding another conference on the topic next year.

Vic Marles

BLEC seminar

.... continued from page 17

obtained under FOI legislation helped a plaintiff identify the person who leaked the document : in Gibson's view, it may not be covered which means that the source could be identified and sued for defamation.

Fairfax lawyer Mark Polden took the group through some fascinating (and cautionary) defamation case studies showing where media stories go awry. Kevin Andronos of Gilbert & Tobin traced out the elements of contempt, examining the difficult issues for the media in deciding whether or not to publish. Richard Potter of Phillips Fox reviewed the *Lange v ABC* defence and John Corker of the Australian Broadcasting Authority reviewed in detail the ins and outs of soaps, sex, sport, advertising and other content regulation.

Julie Eisenberg

Comment

... continued from page 3

being controlled by upstanding newspaper owners. In the context of a sensitive Parliamentary debate about whether commercial television stations or other media players should get new spectrum for digital transmission, 10 capitulated and canned the program.

The speed and strength of the government's same-day response to the *Australian* story might have surprised those who'd been arguing the flimsiness of the customer service guarantee since the idea was first drafted into legislation, or waiting since 1996 for the TV industry's code of practice to be reviewed, or who'd passed a newsstand, or a beach, or listened to Australians talking to each other lately.

Commercial media markets produce a wide range of outputs. Some of them matter a lot; some of them don't. Governments need to be able to tell the difference. Hopefully, year two of communications deregulation might see a more sophisticated, mature and realistic set of priorities about what's important in Australian communications.

Jock Given

Disabling consultation? A report card from the disability sector

Wins for consumers with disability under the 1997 Telecommunications Act have been overshadowed by the industry's failure to take further steps toward equitable participation, reports Christopher Newell

The telecommunications industry is churning out report cards. Minister for Communications, Senator Alston, published his "Report Card on the New Telecommunications Regime", and was followed by ATUG's (Australian Telecommunications Users Group) rather disparaging report card which gave the telecoms industry 12 ticks out of a possible 22. The theme was even taken up by the chairman of the Australian Communications Industry Forum (ACIF) in the latest issue of its newsletter.

But what do report cards have to do with the Australian telecommunications industry's work regarding people with disability? Well, one year down the track from re-regulation and despite much promise, the industry scores only a "D" on its report card for its work regarding people with disability, i.e. it needs to work harder at understanding the issues and ensuring equitable participation.

The *Telecommunications Act 1997* saw big wins for consumers with disability. In particular, the 800 pages of legislation included a standard telephone service which moved beyond a voice telephony carriage service to the requirement for an equivalent carriage service that would comply with the Disability Discrimination Act 1992 (DDA). This followed lobbying by the disability sector, and the outcome of the landmark Human Rights and Equal Opportunity Commission case Scott & DPI v Telecom (now Telstra). These developments sit alongside the National Relay Service for people who are deaf and those with hearing or speech impairments, a service achieved by years of pushing the issues.

The promises of the new regulatory regime suggest rich potential for a high scoring report card by the telecommunications industry. So why does it get such a poor mark? And why are consumers with disability dissatisfied?

Perhaps the biggest reason for dissatisfaction is to be found in the difficulties of new structures and players becoming acquainted with the broader requirements of re-regulation, let alone disability needs and obligations. It would also appear that in an environment where industry players are responsible for their own behaviour disability needs are still seen by many as an expensive distraction rather than an integral part of telecommunications provision. This is slowly changing.

A significant issue for consumers in general has been the complexity of the changing telecommunications environment and the difficulties of networking. The role of the Consumers' Telecommunications Network (CTN) has been crucial in seeking to support consumers' representation. This under-funded consumer organisation also seems to have done a lot with a little, especially in seeking to auspice consumer representation on the growing number of ACIF working committees.

And yet, a constant complaint of consumers with disability in dealing with ACIF and other industry players is that non-disabled norms and world views are used rather than starting consultation from the perspective of representatives with disability. After all, one of the major problems in telecommunications has been that the narrow norms used have resulted in a requirement for expensive add-ons for minorities such as people with disability, rather than design which incorporates such realities from the R&D stage onwards.

Certainly, when ACIF held a "Disability Forum" regarding its work early this year it started with non-disabled perspectives instead of hosting a day where disability representatives presented their needs and aspirations to the industry.

Such a situation is in marked contrast to the National Relay Service which provides telecommunications access for deaf people and those who have hearing or speech impairments (included in the statutory universal service obligations from July 1, 1998). The contract for the NRS was recently renewed with the Australian Communication Exchange (ACE), a consumer controlled, community based, non-profit company with a board comprised largely of Australians who are deaf or have hearing or speech disability. This

... continued next page

Disabling consultation

... continued from previous page

service has been highly effective with the deaf population in Australia. The ACE is currently seeking to address the under-utilisation of its service by speech impaired people, for whom telecommunications access is a continuing issue.

To their credit, corporations such as Telstra and Optus have broadly-based consultative processes which incorporate disability perspectives. But many industry players seem to have failed to undertake a proper review of what has already been done in Australian telecommunications with regard to people with disability. This includes a thorough knowledge of consumer networks and a thorough review of the literature and research on telecommunications and disability, and disability anti-discrimination regimes.

Consumer representatives on ACIF's Disability Standards Working Party also talk about the way in which the business of ACIF has not been particularly consumer friendly. One consumer representative spoke recently about an initial expectation that all business will be done via email - but that person doesn't have email! The alternative is the faxing of documents but this is not satisfactory for someone with a physical disability who finds slippery fax sheets difficult to handle and is on such a low income that the cost of reams of fax paper is prohibitive.

Consumer representatives also tell of papers obtained at the last minute, the domination of disability committees by non-disabled industry interests, and the lack of resourcing of consumers effectively to participate in such activities. As one consumer representative put it recently: "The industry players are paid big dollars to participate on these committees but I can't even get sitting fees and it costs me money to participate - money I don't have".

Perhaps the biggest issue that the telecommunications sector has to address is ensuring equitable, efficient, coordinated and resourced participation in its activities. The industry has to face up to the issues associated with the inherent power imbalance between consumers and providers in its forums. It also needs to address issues to do with supporting consumers with disabilities and their involvement across the industry. Of course, this transcends disability representation to the whole of consumer participation in the re-regulated telecommunications industry.

As part of such a coordinated approach, the industry urgently needs to consider a coordinated and forward looking approach to the supply of equipment to meet the needs of people with disability across the telecommunications industry. While Telstra has certainly been reviewing its provision in light of its regulatory responsibility, the industry in general needs a coordinated approach which has people with disability, their needs and aspirations as the focus. The current focus by some influential players on legal minimums as opposed to moral maximums needs to be addressed, while also providing for a coordinated scheme which acknowledges and meets the needs of the diverse industry, and consumers with all sorts of disability.

So, the telecommunications industry has a "D" on its report card and needs to aim for an "A: International Best Practice in respectful and resourced consumer consultation". This is not impossible but in order to achieve it, the Australian telecommunications industry needs urgently to address issues of resourcing people with disabilities to participate in articulating needs and aspirations across the industry. This will entail the industry coming together with consumers to address common issues from different perspectives, with the immediate priority being a coordinated approach to equipment and service provision, which has consumer representation at the highest levels of governance. It remains to be seen whether funding allocated by the Minister for consumers will be used in this way

It seems likely that the TIO model of seeking to ensure the participation of stakeholders, including consumers, in setting policy via a council which is distinct from a business oriented board is a useful model to explore. Further, the multi-billion dollar telecommunications industry will ultimately have to explore the provision of sitting fees and adequate reimbursement of the expenses of consumers if it is to have high quality and equitable consumer participation.

The recent announcement of disability standards regulations under the *Telecommunications Act 1997* was a welcome initiative, for example, but still raises the importance of consumer participation in order to ensure that the regulations meet consumer needs and aspirations for access today and tomorrow.

Of course, all this is about different perceptions of quality and rights. In the end, the instigation of quality and performance indicators which are informed by the perspective of people with disability will be vital to ensuring that quality of service is a lived reality for all consumers in Australia, with or without disability.

Christopher Newell, PhD, is senior lecturer in the School of Health Science at the University of Tasmania, and a private consultant in Human Services and Ethics. He has a research interest in telecommunications policy and residential consumers, and represents people with disability on various telecommunications and other committees. He is also consumer co-chair of the Telstra Consumer Consultative Council

Australia and the UK: following and leading

Australia's experience is becoming a benchmark overseas for telecommunications liberalisation

Australia drew extensively on the experience of telecommunications liberalisation in other countries when it began the process of liberalisation in 1991. It sought to avoid the problems caused in New Zealand by the absence of any sector-specific regulation, and those encountered in the U.S. by the institutionalisation and entrenchment of regulation. The middle path adopted in the U.K., of transitional sector-specific regulation was used as the model for Australian regulation, and regulatory developments in Australia from 1991 to 1996 largely mirrored the broad pattern of development in the U.K. from 1984 to 1996.

This all changed with the enactment of the new regulatory regime in Australia in 1997 whereby the process of deregulation has been taken to its logical conclusion by dismantling industry-specific regulation and devolving economic regulatory functions in telecommunications to the national competition regulator. The U.K. is headed in the same general direction but it will be years before it reaches the same stage of development. The Australian regime has become a model for the U.K. regime it was based on.

1997 regime

Using the U.K. regime as a model enabled Australia to learn from the experience of liberalisation in the U.K. - which began seven years before liberalisation in Australia - and to adopt a planned approach to the introduction of competition. The plan was for progressive introduction of competition between 1991 and 1996 and for opening of the market to full competition in 1997.

The main features of the new regime introduced in 1997 were:

- Dismantling of some industry-specific regulation;
- Replacement of one sector-specific regulator, AUSTEL, by the Australian Communications Authority which is responsible for licensing and technical issues;
- Devolution of economic regulatory functions in telecommunications to the national competition regulator, the ACCC;
- Enactment of a new Telecommunications Act 1997;
- Removal of prescriptive regulatory controls in favour of general competition law with additional legislative safeguards in the form of Parts XIB (anti-competitive behaviour) and Part XIC (access) of the Trade Practices Act 1974; and
- Increased reliance on industry self-regulation and increased emphasis on industry codes developed through industry forums.

These reforms have resulted in a largely deregulated telecommunications market in Australia, condensing some 14 years of incremental reform in the U.K. into seven years of planned reform in Australia. The result is one of the most open and liberalised telecommunications markets in the world.

U.K. developments

An analysis of recent developments in the U.K. shows that it is headed in the same general direction as Australia but because the U.K. continues to follow an incremental approach to reform, it is likely to be many years before it reaches the same stage of development.

The most significant recent changes in UK regulation have been:

Deregulation. OFTEL has pursued a clear deregulatory agenda over the past four years. It has withdrawn from detailed regulation as competition has established itself in various sectors of the market and assumed the role of an industry specific competition authority. OFTEL anticipates that there will eventually be no need for sector specific regulation at all and that general competition law can take over. This is consistent with the Hilmer principle of applying general competition law to all sectors of the economy. But the incremental approach to deregulation in the U.K. means that OFTEL will remain a feature of the regulatory landscape for some time.

Control of anti-competitive behaviour. OFTEL's ability to act against anti-competitive behaviour depended, until recently, on whether the behaviour offended one of a large number of highly prescriptive licence conditions. If it did not, OFTEL was powerless to act, and had to modify licences to cover that form of anti-competitive behaviour. Introduction of the effects-based Fair Trading

... continued next page

Australia and the UK

... continued from previous page

Condition (FTC), modelled on Articles 85 and 86 of the Treaty of Rome, has mitigated this problem by giving the regulator power to act against any behaviour that is anti-competitive in effect, regardless of its commercial or legal form. The FTC is expected to be a key tool in the transition to an open market regulated by general competition law. Australia never experienced a similar problem because unlike the U.K., the regulator always had recourse to the effects-based restrictive trade practices provisions of the *Trade Practices Act 1974*.

Reform of competition law. U.K. competition law has always been handicapped by the absence of purpose and effects-based tests of the type familiar in Australia. The new Labour Government has therefore introduced a competition bill, enacting domestic equivalents of Articles 85 and 86 of the Treaty of Rome, which it hopes to have in force by the middle of 1998. This will further improve the position for OFTEL because, although the FTC has mitigated problems caused by lack of an effects-based test in the licensing regime, it did not improve the enforcement powers at OFTEL's disposal. Enforcement powers under the FTC remained tied to the limited powers available under the Telecommunications Act 1984. But under the competition bill OFTEL would have strong investigatory powers, interim order making powers and the ability to impose a fine of up to 10 per cent of the U.K. turnover of the group to which the licensee belongs. Effects-based provisions, and enforcement powers similar to those proposed in the U.K., are central to the Australian telecommunications regime and have always been a central component of Australian competition law. Australia will be a useful case-study as OFTEL and the U.K. regulatory authorities generally learn to deal with these new provisions and powers.

Regulatory structure. The U.K. government has indicated that it intends to overhaul the structure of communications regulation. The basic idea is to disentangle existing structures by having one body, an office of communications (OFCOM), to deal with economic regulation of the wider communications market and another body, the Independent Television Commission or its successor, to deal with content issues. The U.K. therefore seems likely to adopt a transitional phase of general communications regulation along the path to total deregulation of the market. Australia bypassed this stage and moved straight to deregulation. It is doubtful that a transitional stage is necessary or desirable. It is unnecessary because convergence is unlikely to increase the regulatory burden such as to require the creation of a general communications regulator. The regulatory burden is likely to remain constant and then diminish over time. It is undesirable because it will perpetuate government intervention and could impede eventual deregulation of the market. A regulator whose function is to administer transitional regulatory rules and resolve competition disputes will always be necessary because, even after the need for transitional regulatory rules has gone, there will always be disputes requiring resolution. It was therefore clearly preferable for Australia to proceed directly to deregulation.

Licensing. OFTEL has adapted the licensing framework as far as possible within current constraints more adequately to address the needs of an increasingly competitive industry. OFTEL has been reviewing restrictions and privileges in the U.K. licensing regime with a view to removing those that are no longer justified or necessary. All licences are being reviewed to bring them more into line with the regulatory principles underlying "slim line" PTO licences. The industry is being encouraged to take on more responsibility for itself through an increased self-regulation. Increasing use is being made of class licences, guidelines and industry codes of practice in all areas of the regulatory framework. It seems increasingly likely that, in due course, there could be a single standard licence for different areas of activity, with different regulatory obligations being triggered by the acquisition of different degrees of market power. The key components of the Australian regime have always been contained in legislation, rather than licences, and new legislation has been introduced at each stage of the reform process. The U.K. is only just beginning the process of moving away from a licence-based regime.

These developments are driving the U.K. regime in the direction of eventual deregulation and abolition of sector-specific regulation. But reform continues to be incremental, and there is likely to be a period under a general communications regulator. Accordingly, it will probably be some time before deregulation is achieved to the same extent as in Australia. So, it is likely that the Australian regime will serve as a useful model as the U.K. continues the transition to a fully deregulated market.

Tristan Gilbertson, Senior Solicitor, Competition Law Group, Mallesons Stephen Jaques, Sydney

Media content law: conference report

At a recent Media Law and Practice seminar media lawyers reviewed the current state of a wide range of content laws, from contempt through to confidentiality, defamation, censorship and privacy

The Business Law Education Centre's conference about media intrusion, privacy and the protection of journalists' sources involved several media lawyers. Patrick George, a Minter Ellison partner, tackled privacy issues. He noted that the International Covenant on Civil and Political Rights 1966 dealing with privacy was ratified by Australia in 1980 and had a "powerful influence", as suggested in the *Mabo* case and reflected in the 1988 Commonwealth Privacy Act (which does not apply to the media).

Despite this, the government had backed away from proposals for broader privacy legislation in the private sector, favouring voluntary codes of conduct. An unresolved issue was how this lack of broader legislation will sit with the European Union's requirement from 1998 that member states not transfer personal data to a "third country" unless that country ensures an adequate level of data protection.

Though Australia has no recognised right to privacy, laws such as trespass, nuisance, defamation and, perhaps, negligence can protect people from media intrusion. In the interesting recent case of *GS v News Limited*, a newspaper had breached a Medical Tribunal order suppressing the identity of a woman who had had an affair with her psychiatrist.

The court found there could be an "arguable case" that the newspaper had contravened its duty of care to her by breaching the order. Because GS was about publication of true material, the approach differed from the *Sattin v Nationwide News Limited* finding that for policy reasons, the tort of negligence should not be extended to publication of false material which is covered by defamation law. But the GS case was not regarded by the court as an "appropriate vehicle" for resolving whether there could be a right of action for "breach of the human right to privacy".

The media deals with privacy issues through its self regulated codes of conduct. Citing the Communications Law Centre's research paper "Privacy and the Media", George noted that adjudication of complaints of invasion of privacy in effect repeats the invasion. Recommendations for improvement included better ethics training for journalists. He concluded that while the community and the media accept rights of privacy, the debate is about what privacy should be protected and the remedies which should be available to compensate breaches.

Judith Gibson, barrister, considered how far the 1998 amendments to the NSW *Evidence Act 1995* will protect journalists from having to disclose their sources in court proceedings. The new provisions are designed specifically for sexual assault counsellors and protect communications where information was provided confidentially to a confidant "acting in a professional capacity". The provisions are likely to apply to the media.

The longstanding rule of practice known as the "Newspaper Rule" has meant courts will generally not require journalists to disclose their sources unless it is necessary in the interest of justice.

The new section treats as a "protected confidence" a situation where the confidant was under an express or implied obligation to the confider not to disclose their identity. Parliamentary debate on the Bill suggested the test would be strong and in Gibson's view, "in real terms [the section] may provide little assistance to journalists or their sources."

If the media wanted to assert the Newspaper Rule, it was usually done informally, for example, by a letter to the plaintiff's lawyers. Under the new provisions, courts may require that journalists attend court and be cross-examined about the confidential relationship before they can rely on the statutory protection.

Gibson also looked at whether freedom of information legislation could be used to get around journalist confidentiality in "whistleblower" cases. While people may be able to access information about documents obtained by the journalist, the *Freedom of Information Act* prevents defamation actions based on that information. There was an "interesting question" about whether the provision covers the situation where the document or information

... continued on page 12