A PROJECT APPROACH TO A NEW COMMUNICATIONS LAW

The views in this talk are purely personal ones, and in no way attributable to any organisation such as the Broadcasting Tribunal.

There has already been much discussion of the serious problems which have arisen in communications law in the last few years. There is no dispute that these problems call for reform of the law. The most important issues are about how to reform, not whether. The conventional approach to such a project is to work from problems to solutions. This short talk follows the opposite approach.

What Kind of Reform?

People will never agree on what our communications laws should say, on what the rules should be. There are natural and healthy differences between different constitutencies, such as: existing operators vs. new challengers; mature vs. youthful technologies; commercial vs. government funding; local vs. international services. We usually see these differences, and others, as negative. It is better to see them as part of the diversity which gives our system the opportunity to develop and grow.

People can agree about how our communications should lay down the rules. This contrasts with the disagreement about what the rules should be. They can agree about the 'carriage' of communications laws but not about their 'content'. In public and private discussions over the last few years there has been clear agreement about the need for reform, and about the broad direction which the reform should take. The result is that there is a clear path to reform of the laws, provided it skirts around disagreements about content. Luckily, the worst problems are about the 'carriage' of the laws, their form and content.

A more serious problem is the difficulty of promoting reform which does not relate to the content of the law. All governments are reluctant to face the legislative obstacle course unless there will be some tangible benefit to show at the end. It is not easy to show in concrete terms how any particular person, licensee, will benefit from revision of the structure or form of communications laws.

The benefits are most easily described in abstract terms like simplicity, efficient administration, and removal of jurisdictional obstacles. Lawyers and decision-makers may know the enormous benefits to the community of laws which are better written, but those benefits are not easily turned into concrete examples or tangible political objectives.

The Hierarchy of Legislation

At the constitutional level, we have a very fortunate situation. Although the words of s51(v) of the constitution were written in the last century, their history shows that it was no accident that the words "or other like services" were added at the end of the reference to 'telegraphic and telephonic' services. No other section of the constitution carries with it such a built-in reminder of the need to allow for new technology. The High Court in R v Brislan (1935), Jones (1965), and the Herald & Weekly Times case (1966) left little doubt about Commonwealth power in any area of communications for which law reform is proposed.

The Trade and National Economic Management Committee of the Constitutional Commission has just surveyed this power in its June 1987 report. Although the Committee did not point to any outstanding deficiencies, it is nevertheless recommended that s51(v) be amended to take account not only of all existing forms of communication (including television, broadcast, and other like media) but also of new, projected, and even unforeseen developments in all fields of communication (p46). Against this, it can be argued that s51(v) serves all the purposes indicated by the Committee. The only redrafting would appear to be to replacement of 'telegraphic' with a more modern expression. Such a stylistic gain would be small compared with the

Pandora's box which might be opened if any change were made. When a section of the constitution is not broken, I would prefer not to fix it.

The legacy of a clear national constitutional power in a federal system is a very fortunate one. Anyone who doubts this might like to study the division of legislative powers over broadcast communications which operates in the Federal Republic of Germany, or cable communications in the United States.

The next tier of legislation after the grant of constitutional power is a Bill of Rights. Much of the complexity of US communications law flows from the First Amendment. Many laymen, and a few lawyers, see Bills of Rights as instruments for directly increasing the rights which the citizen enjoys in practice. Would that such a simple solution were possible! In Australia a Bill of Rights might or might not improve the position of the citizen; but it most certainly would effect a transfer of decision-making power from the parliament to the courts. In other words, the bench would take over more of the decisions which the citizen influences through the ballot box.

In an era when government policy favours conduct of public communications services by privately-owned corporations, it should be remembered that Bills of Rights generally offer protection only against public power, not private power. Such a Bill could in the long run discriminate against public bodies. A more effective place to recognise freedom of speech is in the Communications Act itself.

The third tier of legislation consists of statutes enacted by the Parliament. It is here that nearly all our current problems lie, including the overlapping and underlapping jurisdictions and terminologies of a number of Acts. The main Acts concerned are:

- Australian Broadcasting Corporation Act, 1983
- Broadcasting Act, 1942
- Overseas Telecommunications Act, 1946
- Postal Services Act, 1975
- Radio Licence Fees Act, 1964
- Radiocommunications Act, 1983
- Satellite Communications Act, 1984
- Telecommunications Act, 1975
- Telecommunications (Interception) Act, 1979
- Television Licence Fees Act, 1964

All should be united into one document, which can in turn be divided into separate parts or chapters. The exceptions are the Licence Fees Acts (although both could conveniently be merged into one) and the Postal Services Act. Postal services are now using more electronic transmission, and they have a considerable economic connection with electronic communications services.

There should be one set of common definitions in the new Act, and common provisions for all the 'housekeeping' matters like service of documents and conduct of hearings. There should be one package of licences to cover all communications services. At present we have a multitude of different ways for permission to be given. These include licences bearing various titles, including warrants, permits and authorities. To each different form of licence attaches a different method of grant and a different regulatory regime. Other examples of unnecessary differences in terminology and detail could be given by most lawyers who work in this area.

Delegated Legislation

The fourth tier of legislation is that delegated by Parliament to the Governor-General or other authorities to make. There is much detail in the Acts mentioned earlier which one would expect to appear in delegated legislation, and not in a document as important as an Act of Parliament. There are many reasons for failure to use delegated legislation. One is a concern that the Senate Standing Commit-

tee on Regulations and Ordinances may take the view that delegated legislation unduly trespasses on individual rights and liberties, or otherwise infringes the standards applied by the Committee. Another reason is the complex path draft regulations must take before being made by the Governor-General. This leads some to believe that it is just as easy to include the material in question in an Act of Parliament itself, despite the resulting congestion of parliamentary process and cluttering of the statute book.

The difficulties are sometimes exaggerated. It should not be assumed that there would be objections from the Senate Committee or administrative delays if there was a fully considered and explained scheme of communications regulations and rules to replace the host of orders, by-laws, standards and other instruments which exist at present. Indeed, there could be increased opportunity to protect individual liberties if the role of the delegated legislation was defined to ensure that rights and principles were affected by Acts alone. Furthermore, some subordinate legislation which does not come before the Parliament could be subjected to tabling requirements, thus increasing the range of scrutiny.

It is not necessary that there should be one, unified set of regulations and rules. It is at the detailed, subordinate level that the different requirements of postal services, cellular radio, test broadcast transmissions or whatever subject-matter should be allowed for. The existence of a single Act, from which all subordinate legislation flowed, should be a sufficient unifying factor.

The Foolish Testator

There is another method for handling detail, which is used by every capable manager and administrator in the country. That is to leave it out altogether. The unnecessary inclusion of detail (which dates more quickly than statements of principle) is one of the greatest difficulties which the current Acts present. Detailed amendments generate a need for further detailed amendments, sometimes within a year or two. They also convert a question of administration of principle into a question of legal interpretation. In recent years those who make decisions about communications in the public and private sectors have been spending less time looking for the best solution to the problems; and more time sitting with lawyers asking what is the correct interpretation of the relevant law.

If the relevant Act did contain built-in solutions to future problems, the substitution of legal interpretation for decision-making would not be so serious. However, the process of legal interpretation is no substitute for a wise decision about the kind of communications service which should be given to a community, who should provide that service, or how. It is based on textual analysis, not on administrative problem-solving. The communications laws increasingly resemble the product of a foolish testator who rejects the advice of his or her lawyer that it is impossible to rule the family from beyond the grave. The result is a long and complicated will which tries to govern the finances, residence, education, religion and lifestyle of the grandchildren.

Objects of the Act

The Communications Act should begin with a statement of objectives. There are already statements in the Telecom Act and the ABC Act, but not in the Radiocommunications Act or the Broadcasting Act. Just as detailed prescription is dangerous in communications laws, so are broad statements of objectives important. It is possible to be clear about the functional objectives we require from the communications system without being limited by details of the technology. Furthermore, a statement of objectives can help to integrate the different components of legislation and aid legal interpretation through the ever-increasing communications litigation in the federal courts. The objects expressed in the Act should cover the following areas:

Statement of the services to be provided to the community, including the material now contained in s6(1) of the Telecom Act and s6 of the ABC Act.

Encouragement of complementary, integrated services. The need for integration has been recognised only recently, but can now be seen as urgent.

Encouragement of Australian industry and culture. Again, the critical importance of encouraging industry in communications planning, hardware and software has been publicly recognised only recently. There are many decisions on the large and small scale which should be made with express regard to this objective. The need to encourage Australian culture has received piecemeal recognition in earlier broadcasting legislation. It should be recognised as an overall objective, not as a point mentioned in some contexts but not in others.

Recognition of freedom of speech. The advantages of recognising this freedom as something to be taken into account in interpreting and applying communications laws are beyond dispute.

The Public Gatekeepers

The government exercises its control over communications through a ramshackle structure of powers and rights, ranging from holding shares in AUSSAT, approving Telecom rentals and charges, directly granting radiocommunications licences, and making plans for broadcasting after consultation. There are some inconsistencies. For example, even minor broadcasting licences are issued by an independent tribunal after public inquiry; but more valuable radiocommunications licences are issued by the Minister without an express obligation to hear the applicant.

The government should continue to have the power and responsibility for overall planning and spectrum allocation. That is part of national economic planning, and it is not something which lends itself to a process of hearing in particular cases. In the United States this planning is carried out by the FCC, but that occurs in a very different constitutional system where separate agencies must perform the work of the Australian governments.

Decisions about individual communications licences, permits, authorities or warrants are less appropriate for government. There is a legitimate concern for democratic principles when the elected government disburses rights on which communications media depend. There are very few democratic countries which allow such proximity between governments and communications media. Furthermore, governments are rarely equipped with time or resources to offer a form of hearing, oral or written. Yet basic fairness requires a form of hearing where the prize is a valuable one, particularly if there are competing applicants. Lastly, modern administrative law is increasingly demanding a hearing process before decisions affecting individual rights are made, as well as allowing individual decisions to be challenged in the courts.

It is not even the short-term interest of government to devote resources to conduct a hearing process or defend administrative decisions. Defences are likely to include extensive litigation and replies to frequent public criticism from disappointed applicants. They will need to increase under the current Acts as the values of communications services affected by ministerial decisions increase. Everyone would like to be Santa Claus, but only if there are enough presents for all the children.

The detailed implementation of government plans should be carried out by an independent body which can provide a hearing process allowing all contenders to have their say in individual cases. For the sake of discussion, this body can be called the "Communications Authority". It would carry out the licensing and regulatory tasks now performed by the Minister under the Radiocommunications Act, by

Telecom under its Act, and by the Broadcasting Tribunal under its Act. There are similar discretions in some of the other Acts already mentioned.

The Telecom Act role could be expected to expand as current government plans to allow bodies other than Telecom itself to provide telecommunications services are implemented. The Davidson Report outlines a number of regulatory roles to be performed. Some reasons for having all the licences, authorities, warrants and similar rights issued by the one body have already been stated. Furthermore the old distinction between broadcasting and other telecommunications services is rapidly disappearing. There is no reason for providing super-abundant natural justice and public process to broadcast licensees, but almost none to contenders for equally valuable non-broadcast services.

This is not a proposal for a "Big Brother" organisation or for the creation of any new powers. Rather, it is a proposal to co-ordinate most existing licensing and regulatory powers currently exercised by the Minister or in his name, and then to limit them by basic hearing and publicity requirements. The major powers of the Minister to control communications planning would not be removed or changed.

This re-allocation of existing powers would allow more flexibility in administration than exists at present. For example, it would allow a single State office of the communications authority to deal with the full range of licensing and regulatory matters. At present, there are separate offices of the Department of Communications and Broadcasting Tribunal, with others requiring to be established if an authority is established along the lines of Oftel in the United Kingdom. With a distinction established between the ministerial planning/policy role on the one hand and independent licensing/administration role on the other hand, it would be easier to provide expert staff closer to where the services are provided.

How would the communications authority work? Firstly, by whatever means its administrators find most efficient within normal legal requirements, and not according to some unrealistic syllabus laid down in an Act of parliament. There is an obvious need to guarantee those affected by the authority a fair hearing. One requirement is to know what the practical, detailed rules are. Apart from the basic requirements laid down in the Act and some regulations as mentioned earlier, the existing clutter of Radiocom Act standards, Telecom by-laws, Tribunal program standards, broadcasting inquiry regulations and similar documents should be replaced by one set of subordinate legislation made by the authority. The rules should be capable of alteration after public notification of a draft, with the opportunity for comment. The procedure for standards under the Radiocom Act is a good starting point. Subordinate legislation should be in two categories: the main body of rules made by the communications authority; and a smaller body of regulations made by the government and issued by the Governor-General.

For decisions in particular cases, there is no alternative to a form of public inquiry through which those affected can be heard in full. The hearing can take place in writing or orally, depending on the circumstances. The authority should be free to apply the appropriate level of hearing to the particular case. Many applications could be decided on a postcard basis. Particularly complex or important hearings should take place orally, with the opportunity to challenge opposing evidence.

The 'party vs. party' model copied from the courts should be applied only where there is a genuine contest between opposing interests. There are no parties in the true sense involved in most decisions about communications licences. There is only an applicant and a decision-maker. Large sums have been wasted trying to convert processes which are really administrative into a kind of second-rate litigious shadow boxing, in which the applicant spars with nobody, or only the referee.

These points about legislation relate to gatekeepers or regulators. What of the licensees of various

kinds, and other service providers like Telecom, the OTC and AUSSAT? The answer is that there is no need to change their duties or modus operandi in order to reform the law in the manner outlined. They will all benefit from the simpler law, clearer statement of their own objectives in relation to others, and a more coherent and open regulatory system. The basis rules appropriate for an Act of parliament would not be changed or repealed e.g. laws about which kinds of broadcasters may advertise, the conditions under which Telecom may enter private property, the powers which can be exercised against interference with telecommunications services, and the obligations imposed on those who deliver political broadcasts. There are many changes which should be made, but they should be addressed as separate policy issues. With a better overall scheme or legislation, the policy issues will be more clearly perceived, freed from much of the legal obscurities.

Conclusion

Even in the absence of a political demand for rewriting communications law history offers many examples of quiet achievements in codification and simplification which have been a priceless resource to the whole community. Those who undertook these major reforms were all faced with a maze of intersecting laws, laid down by statute or precedent. No suggestions for reform of communications law involve more difficulty than those. All the reformers faced the inertia of public administrators and lawyers who were comfortable with the current system and feared change. There is nothing extraordinary or insuperable about the task and is one which has been addressed and completed many times in different areas of law. The title of this talk refers to 'a simple project'.

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