cerned, it is enough to say that it is based on the particular circumstances of a few, high-profile cases - cases such as Lionel Murphy and Lindy Chamberlain. While debates as to the legitimacy of sub judice restrictions should undoubtedly take account of such special cases, they should be primarily concerned with the much more normal situation where the defendant does not have significant access to the media and where it is all too easy for the media, relying on information supplied by police or prosecution authorities, to depict the circumstances of the case in a manner which is prejudicial to the defendant.

As the Ananda Marga case so strikingly demonstrated, and as has occurred all too often in the southern states of the U.S.A., such prejudice to the rights of defendants in a criminal trial can all too easily be reinforced by, and can reinforce, pre-existing community prejudices based on such factors as religion or race. The imbalance between prosecution and defence as regards influencing media attitudes in those circumstances is quite overwhelming.

Even with sub-judice restrictions applying, the defendant may still get a raw deal because the prosecution authorities do not want to be seen to be coming to the rescue of any person who the media have branded as "public enemy number one". With no sub-judice restrictions, the situation would be even worse.

On this basis, a sub-judice law seeking to prohibit the publication of material influencing a jury, a witness or even a judge or magistrate does not have to be justified in terms of preservation of the system of the administration of justice. It is entirely desirable out of concern for the rights of those individuals who are parties to the relevant legal proceedings – notably, defendants in criminal proceedings.

Some of the arguments just outlined apply also to another species of media contempt – that is, breaches of suppression orders made with a view to averting prejudice to trials. While I fully subscribe in general terms to the principle of "open justice", it is clear that inquests, committal proceedings, Royal Commissions and the like receive evidence in public which would not be admissible in a forthcoming or current trial, which if reported to the public, would be highly prejudicial to the defendant in such a trial. Limited inroads on the publication of such evidence by means of suppression orders seem a necessary qualification to the "open justice" principle.

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The Northern Territory government and aboriginal community take on Telecom

Paul Nicols examines a challenge to the decision by Telecom not to supply standard telephone services to remote Aboriginal communities in the Northern Territory

Telecom's failure to provide basic telephone services to remote Aboriginal communities in the Northern Territory has provided the basis for the first legal action under the recently enacted **Australian Telecommunications Corporation Act 1989.**

The Northern Territory Government, on behalf of a number of affected communities, has commenced legal proceedings in the Federal Court against Telecom based on the provisions of the new Act.

The affected communities currently rely on unreliable high frequency radio links.

Telecom plans to link the communities by means of the land-based Digital Radio Concentrator System. However, the timetable for completion of the introduction of DRCS has been delayed - first from 1990 to 1992 and now, possibly even further into the future.

Telecom has, however, offered to supply several of the remote communitites with a standard telephone service on an interim basis using the satellite-based Iterra service (normally marketed to mining companies and other business users) at normal commercial rates.

Telecom's Community Service Obligations

The Northern Territory Government's action is based principally on s.27 of the new Act which sets out the Community Service Obligations Telecom must address. These are:

"(1) Telecom shall supply a standard telephone service between places within Australia.

(2) The public switched telephone service shall be the standard telephone service.

(3) Telecom shall supply the standard telephone service as efficiently and economically as practicable.

(4) Telecom shall ensure:

(a) that, in view of the social importance of the standard telephone service, the service is reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and

(b) that the performance standards for the standard telephone service reasonably meet the social, industrial and commercial needs of the Australian community."

The communities argue that s.27 imposes an enforceable statutory duty on Telecom to supply a standard telephone service that is reasonably accessible to each of them on an equitable basis.

This proposition throws up at least three major issues for determination:

1. Can the community service obligations contained in s.27 of the new Act be enforced by the communities?
2. What is meant by "reasonably accessible"?
3. What is an "equitable basis"?

Section 6 of the Telecommunications Act 1975 (the old Act) provided as follows:

"(1) The Commission shall perform its functions in such a manner as will best meet the social, industrial and commercial needs of the Australian people for telecommunications services and shall, insofar as it is, in its opinion, reasonably practicable to do so, make its telecommunications services available throughout Australia for all people who reasonably require those services."

Sub-section 6(2) (b) provided that in performing these functions, Telecom should have regard to:

"(i) the desirability of improving and extending its telecommunication services in the light of developemtns in the field of communications;

(ii) the need to operate its services as

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Telecom challenge

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efficiently and economically as practicable; and

(iii) the special needs for telecommunication services of Australian people who reside or carry on business outside the cities."

Enforceability of CSO's

Sub-section 6(3) (b) of the old Act provided (relevantly) that nothing in s.6 should be taken "to impose on the Commission a duty that is enforceable by proceedings in a Court". Sub-section 6(3) (b) was interpreted in **Queensland v Australian Telecommunications Commission** (1985) and **John Fairfax v Australian Telecommunications Commission** (1977) to the effect that the sub-section precludes the enforcement of any duty which may arise under s.6 by legal proceedings: that is, no plaintiff could sue under the old Act purely by reason of a failure by Telecom to offer or provide standard telephone services.

The new Act contains no statutory bar to proceedings seeking to enforce the community service obligations contained in s.27.

One of the key issues in the case will be the weighting to be assigned to the various community service obligations imposed on Telecom under s.27 of the new Act.

"Reasonably accessible"

Section 6 of the old Act provided that Telecom would "insofar as it is, in its opinion, reasonably practicable to do so, make its telecommunications services available throughout Australia to all people who reasonably require those services."

Section 27 of the new Act provides that "Telecom shall ensure that the service is reasonably accessible to all people in Australia ... where ever they reside or carry on business."

It could be argued that to make a service "available" is a higher duty than to make it 'reasonably accessible". This may be true but it is clear that s.6 when read as a whole allowed Telecom an unfettered discretion as to whether to provide a service at all.

Telecom does not have this discretion under s. 27. Presumably, whether a service can be said to "reasonably accessible" is a question which can be objectively determined by a Court.

Is a telephone booth in a town 1 kilometre away "reasonably accessible"? What if the town is 100 kilometres away? Obviously, this will also be a key issue in the Northern Territory Government's action.

"Equitable basis"

Under s.11 of the old Act, Telecom was empowered, from time to time, with the approval of the Minister, to make determinations fixing or varying the rental payable for standard telephone services provided by Telecom. Sub-section 11(6) of the old Act required Telecom to publish particulars of the rentals determined by it in the Commonwealth of Australia Gazette.

In contrast, the new legislation does not contain any provision analogous to s. 11 of the old Act.

Under s.27(4) of the new legislation, Telecom is obliged to ensure that the services are readily accessible "on an equitable basis". Predictably, "Equitable basis" is not defined in the new Act.

The normal commercial rates charged for the Iterra service are significantly greater than the rates gazetted in accordance with s. 11 of the old Act.

One of the key issues in the case is, therefore, whether the provision of an interim service by means of the Interra service at normal commercial rates is "equitable".

As the services provided by means of the Iterra system are standard telephone services and as the affected communities are situated in rural and remote areas, the communities argue that an equitable rate would be the rate gazetted under s.11 of the old Act in respect of rural and remote areas.

The Yugal Mangi Proceedings

The Northern Territory Government has also commenced, on behalf of the Yugal Mangi Community Government Council, proceedings against Telecom for the recovery of charges paid to Telecom in excess of the gazetted rates referred to above.

Yugal Mangi accepted Telecom's offer of an interim Iterra service and paid the normal commerical rates for that service.

The action is based on s.11 of the old Act and the Yugal Mangi community is claiming that Telecom was not lawfully entitled to demand charges for the standard telephone service provided by the Iterra service in excess of the gazetted rates under s.11.

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Morgan v John Fairfax & Sons Limited

An editorial on a Government submission by telecommunications unions held to be defamatory but reasonable in the circumstances. John Evans discusses this leading case.

On September 1, 1989 Justice Matthews delivered a judgement which held that the conduct of a publisher, John Fairfax & Sons Limited as reasonable within the meaning of s. 22(1) (c) of the Defamation Act (NSW), 1974 and that in the absence of any evidence of malice a defence under that Section was thus made out.

Background

The plaintiff, Kevin Morgan, commenced proceedings in December 1983 complaining of an editorial written by Padraic McGuinness in The Australian Financial Review on 17 November 1983. The editorial said in part:

"Even more questionable is the role of the telecommunications unions which are determined to maintain the monopoly which they can manipulate, and hope to suppress the extension of competitive technologies, regardless of any concept of a general public interest."

"Not surprisingly, the arguments of the Telecom Unions have had a strong influence in the councils of the Government. They have been willing to produce totally phoney estimates of costs and useage of the new satellite, employing supposedly reputable and independent commentators."

The plaintiff was not named in the editorial.

The following imputations were pleaded, That the plaintiff:

(a) was not reputable (as a consultant and commentator)

(b) was dishonest (as a consultant and commentator)

(c) was unfit to be a consultant and commentator