joined as a defendant only after he had threatened to issue a summons seeking to be made a defendant. "I remember being puzzled because I had never before heard of anyone volunteering to be a defendant in a libel action", Lord Aldington told the defence counsel, Mr. Richard Rampton Q.C.

During the trial, the defendant's counsel was reported to have clashed many times with the plaintiff during the days of cross-examination.

He told Lord Aldington when he began his cross-examination that although they were likely to agree on little, they could agree that the allegations against Lord Aldington were "as brutal as character-assassination as you are likely to see". He accused him of lying on oath about the date he gave of his return from the war zone to England - which, if accepted by the jury, meant he could not have written crucial military orders for repatriation: "You have deliberately given the jury false evidence." He suggested that the plaintiff could fairly be described as a war criminal were he proved to have forcibly repatriated 70,000 Cossack and Yugoslav prisoners, knowing he was sending them to their deaths.

The trial itself was described as Britain's first War Crimes Trial and the defence was conducted on the basis that the allegations were true.

In the end, after some two months in court, the jury returned a verdict the sterling equivalent of A$3 million for the plaintiff.

In a case where the defendant sets out to prove that a leading public figure is a war criminal, and fails, it is difficult to see why a jury verdict of this size should not stand. Of course, if limited to injury to feelings alone, a libel verdict could never exceed the highest awards for personal injuries. As for damage to reputation however, there must be circumstances where vindication of the plaintiff requires enormous damages. Aldington's was a case where the defence itself described the charges as character assassination in the first degree, accepted the challenge of proving the plaintiff was a war criminal, compared him to a Nazi butcher and failed to obtain a verdict from the jury.

It will be difficult to find informed press comment on this case which does not reflect the journalist's special vulnerability to and abhorrence of such verdicts. Moreover, it is not possible here to do justice to the wider debate about the role of juries other than to assert that the "solution" of abolishing the jury's role should be resisted. While the outcome of their deliberations may not be predictable - as to who wins or by how much - there is such general agreement among lawyers as to the innate sense of justice in most jury verdicts that the task of vindication of the plaintiff in libel actions should remain with the jury.

The "Bond amendments"

Paul Marx explains the Broadcasting Amendments Bill 1989

The Broadcasting Amendment Bill 1989 ("the Bill"), which amends the Broadcasting Act 1942 ("the Act") was introduced into the House of Representatives on 1 November 1989. In his Second Reading Speech the Minister for Transport and Communications, the Hon. Ralph Willis MP, observed that the Act "has rightly been described as a complex, unwieldy piece of legislation". The amendments proposed by the Bill, however, make the Act more complex.

The Bill seeks to amend the ownership and control provisions of the Act so as to overcome problems with the current legislation perceived by some in the course of recent inquiries by the Australian Broadcasting Tribunal, most notably its inquiry into matters concerning licensee companies controlled by Mr Alan Bond. These problems were described as follows by the Minster in his Second Reading Speech:

"At present, the Tribunal would be faced with extremely limited options if, after conducting an inquiry that it was required to hold, it were to find that a commercial licensee was no longer 'fit and proper', or no longer had the financial, technical or management capacity to provide an adequate and comprehensive service. It presently may only impose licence conditions or suspend, revoke or not renew the licence. But if the licensee's unsuitability was due to the conduct or character of a person in a position to control the licensee company or its operations, licence conditions may not be an effective remedy. This is because the conditions may not be capable of affecting the influence of the relevant person on the licensee company. The only other remedies available - suspension, revocation or refusal to renew the licence - would put the service off the air."

Supplementary and public licences

In addition to the significant changes to the ownership and control provisions, the Bill also contains amendments relating to the grant of licences for supplementary radio services in regional areas and to the nature of material which may be broadcast by the holders of public licences. In summary, those amendments:

(a) clarify the Minster's power to initiate joint inquiries into the grant of a licence for a supplementary or a so-called "independent" commercial FM radio service in a regional area. The amendments also confirm the procedures to be adopted by the Tribunal when holding such a joint inquiry;
(b) permit aspiring public broadcasters to transmit sponsorship announcements when conducting test transmissions; and
(c) permit public licensees to broadcast community promotional material.

The amendments relating to the grant of supplementary/independent commercial FM licences are as a consequence of the changed approach to the planning of such services announced by the then Minister of Communications, Michael Duffy, on 24 February 1987. Under that approach to planning, the Minister forms a prima facie view as to whether an area or market is able to support a new, competing service. Where the Minister is in doubt as to the viability of a new "independent" service the Tribunal considers simultaneously relevant supplementary licence applications and applications lodged with the Tribunal for the grant of a new licence. The original provisions of the Principal Act containing criteria for the grant of supplementary licences were drafted at a time when it was contemplated that supplementary licence applications would be considered by the Tribunal prior to a determination of any relevant "independent" licence applications. In amending the Act to reflect such changed planning procedures the Bill provides that the amendments are not to be taken to imply either that a power conferred on the Minister or the Tribunal by the amendments was not previously possessed by the Minister or the Tribunal.

Suitability requirements

Central to the amendments to the ownership and control provisions is a definition of the term "suitability requirements" which is inserted in s.4 of the Act. The holder of a commercial licence fails to meet the suitability requirements that apply to a licence if the licensee is no longer a fit and proper person to hold the licence or no longer has the financial, technical and management capabilities necessary to provide an adequate and comprehensive service pursuant to the licence. Similar "suitability requirements" apply in respect of applications for approval of relevant share transactions involving licensee companies.

Renewal of commercial licences

The nature and extent of the new powers conferred on the Tribunal by the Bill can be

summarized conveniently by reference to the provisions relating to the renewal of commercial licences. Similar provisions are inserted in the Act in relation to the suspension and revocation of licences and the approval of share transactions.

As regards licence renewals, the Bill inserts a new s.86AAA in the Act following the existing s.86AA, which latter section contains the criteria for renewal of such licences. The new s.86AAA empowers the Tribunal to do any one or more of the following where it is satisfied that the holder of a commercial licence has failed to meet the "suitability requirements" that apply to the licence:

(a) revoke, vary or impose conditions on the licence;
(b) give directions under s.92M(1A); or
(c) give directions under s.92N(2A).

Directions under sections 92M and 92N

The Bill expands the nature of directions which may be given by the Tribunal in circumstances in which the Tribunal is satisfied that the holder of a commercial licence has failed to meet the "suitability requirements". A new subsection (1A) is inserted in s.92M of the Act under which the Tribunal may give a person directions for the purposes of:

(a) enabling or requiring the licensee to meet the "suitability requirements" that apply to the licence; or
(b) preventing the person from doing an act or thing that is likely to have an adverse effect on a number of matters such as the licensee's operations in providing the relevant service and the selection or provision of programs to be broadcast.

Directions may be given to a wide class of persons in addition to the relevant licensee. Such persons include a person who is in a position to exercise control of the licence and a person whose conduct, character or capacity gives rise to, or contributes to the licensee's failure to meet the "suitability requirements". The directions may be given to a servant or agent of such a person or, where the relevant person is a company, a director of that company.

It is conceivable that it would be open to the Tribunal to give directions under s.92M to persons such as bankers and program suppliers should it be of the view that their conduct or capacity gave rise, for example, to a licensee's failure to possess the requisite financial capability to provide an adequate and comprehensive service pursuant to a licence.

Similarly, the provisions for divestiture of interests in a company are expanded as a consequence of amendments made by the Bill to s.92N of the Act. In circumstances in which the Tribunal is satisfied that the holder of a commercial licence has failed to meet the "suitability requirements" and that the holding by a person of particular interests in a company gives rise to or contributes to the licensee's failure to meet the "suitability requirements" directions may be given requiring the relevant person to divest the particular interests. The Tribunal also may give directions to prevent that person disposing of the interests to a specified person or persons included in a specified class of persons.

Amendments to section 86AA

In addition to the amendments referred to above, the Bill amends s.86AA of the Act by inserting after subsection (4) the following subsection:

(4A) In determining whether it is advisable in the public interest to refuse to renew a commercial licence under paragraph 4(b), the Tribunal is to have regard to:
(a) the existence of the powers referred to in section 86AAA; and
(b) *such other matters as the Tribunal considers relevant."* (emphasis added).

On first reading, the provisions contained in the new s.86AA(4A)(b) could be taken to restore the Tribunal to the position that prevailed prior to the 1981 amendments to the Act in which it had full discretion to refuse to renew a licence rather than the current limited discretion having regard to criteria enumerated in the Act. However, that apparently was not the intention of those responsible for drafting the Bill.

Although little guidance can be obtained from either the Minister's Second Reading Speech or the explanatory memorandum it would seem that the new s.86AA(4A)(b) of the Act is designed to make it clear that in determining whether it is in the public interest to refuse to renew a commercial licence in a situation in which a licensee fails to meet the "suitability requirements" the tribunal continues to have a wide discretion, limited only by the scope and purpose of the Act. Any confusion caused by the drafting of the new s.86AA(4A) probably is a result of "grafting" the new provisions onto the existing legislation rather than making a fundamental change to the scheme of the Act. A similar approach has been adopted in relation to the amendments made to the Act in respect of the suspension and revocations of commercial licences [see the new s.88(2A)(b)].

Nevertheless, the amendments made by the Bill evince a clear legislative intention that the Tribunal should have regard to the other available remedies in the public interest before refusing to renew or suspending or revoking a commercial licence in circumstances where the holder of a licence fails to meet "the suitability requirements" applying to that licence.

Time limits for divestiture of interests

As stated above, s.92N gives the Tribunal expanded powers requiring persons to divest interests in licensee companies. S.92N(2A)(c) provides that the Tribunal in the relevant circumstances may "...give such directions as it thinks necessary to ensure that the person ceases, before the end of the period for 6 months commencing on the day on which the direction is given, to hold specified interests in the company ..."

It is inconceivable that any direction would be authorized under s.92N(2A)(c) unless it was one which required the divestiture of interests within the period of six months. Indeed, in his Second Reading Speech the Minister stated:

"If a relevant interest is directed to be divested a strict six month deadline will apply. This is because by then it would have been fully established by the Tribunal, if necessary through court and Administrative Appeals Tribunal avenues, that the licensee failed to meet the suitability requirements and that divestment was the appropriate remedy."

Similar amendments are made to ss 90JA and 92FAA of the Act, which sections deal with the approval of various share and other transactions. In circumstances where the Tribunal refuses to approve such transactions because the relevant applicant has failed to meet the "suitability requirements" that apply to the licence, the Bill provides that the Tribunal is not to grant an extension of the period of six months for divestiture.

It is arguable that the lack of flexibility in respect of the time period allowed for divestiture could be contrary to the public interest in some circumstances. There may be good reasons which (but for the amendments contemplated by the Bill) would lead the Tribunal to conclude that it would be in the public interest to permit a person longer than six months to divest. For example, for reasonable commercial reasons it may not be possible to complete a sale and purchase of a relevant interest prior to seven or eight months after a direction to divest has been received from the Tribunal. The option to permit a vendor such an indulgence in the public interest is removed by the Bill in its present form. It remains to be seen whether the Bill will be amended.

As at the date of writing, the Bill is still in the Senate having been adjourned at the Second Reading stage. Consequently, the final form of the amendments to be made to the Act is yet to be settled. Nevertheless, in the current economic climate the "suitability requirements" (particularly financial and management capabilities) will come under close scrutiny by the Tribunal in the course

newspaper became aw are that the articlew as or may be defamatory of the plaintiff was in February 1989, rather than in August 1988 or earlier. The offer being put on shortly after that time as therefore made by the newspaper "as soon as practicable after becoming aware".

The trial judge ruled that the offers complied as a matter of law with the formalities required by the Act and left them to the jury in regard to all three publications.

The judge also directed the jury that Mr. Brennan was not entitled to damages in respect of avoidable loss, that is, loss which by the exercise of reasonable steps on his own behalf he might have avoided. Therefore, he could not recover damages resulting from the failure of the newspaper to publish a correction and apology until almost a year after publication of the original articles, as the plaintiff could have reduced the harm suffered by bringing to the newspaper's attention the fact that there were two persons known as John Brennan within the HIC.

In respect of the first and second articles sued upon, the jury found in favour of the newspaper. The jury found each of those publications were innocent in relation to the plaintiff and the offer of amends was made as soon as reasonably practicable after the defendant had become aware of the true facts.

In relation to the republication in *New South Wales Doctor Magazine*, the jury found that the matter complained of w as not innocent in relation to the plaintiff. The basis of that answer was a finding by the jury that the newspaper had not exercised reasonable care in allowing republication of an article upon which a statement of claim had already been issued. The jury awarded the plaintiff in respect of the third article $10,000 damages.

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The Bond amendments

from p7

of licence renewal inquiries and transaction inquiries. It should not be long before the practical implementation by the Tribunal of the amendments contemplated by the Bill will be seen.

In his Second Reading Speech the Minister stated that the Bill "represents the first stage of legislation to reform the operation of broadcasting regulation." We await the "further reforms" which are to be contained in amendments to be introduced in the Autumn and Budget Sittings of Parliament in 1990.

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The Newspaper Rule

Grant Hattam examines the development of this rule and its recent application in Victoria.

Background

What is told to journalists is not rated in law with the same importance as what is told to priests, doctors or lawyers. The latter three professions have an absolute privilege. They do not have to reveal under any circumstances what has been told to them. Journalists don't have that privilege. What I'm told as a lawyer will never be revealed. A journalist, however, if ordered by a court to do so, must reveal his or her source or face the consequences.

That does not mean, of course, that a journalist will necessarily reveal the identity of the source, even though ordered by a court. He or she may refuse to do so thereby abiding by the journalists' code of ethics. As a result, there can be a conviction for contempt which may mean gaol.

That will only happen if a court in the first place refuses to apply what is known as "the newspaper rule".

Recently, the Supreme Court of Victoria did apply the newspaper rule and refused an application by the Guide Dog Owners and Friends Association (the Lady Nell School) for the journalists who wrote a story in *The Melbourne Herald* to disclose their sources.

Cynics say that the rule has evolved simply because some judges could not bear the adverse publicity of sending journalists to gaol for refusing to divulge their sources until absolutely necessary. In other words, a sort of semi-privilege has been afforded to journalists that has evolved as a matter of practice.

The Conjuangco Case

To understand the Cojuangco case is to understand the newspaper rule.

In an article in *The Sydney Morning Herald*, a man called Cojuangco was allegedly defamed. The article concerned his affairs in the Philippines and the allegation that he was corrupt. He felt sufficiently aggrieved to want to issue proceedings in Australia for defamation. But who could he sue? In New South Wales, there is a statutory defence available to a newspaper. Cojuangco was unlikely to succeed if he sued the newspaper because of this defence.

Therefore, what could he do in order to have his reputation, as he saw it, restored? As the article itself placed great reliance on the sources mentioned in the article for the information relied on, Cojuangco made application that the journalist concerned should reveal his sources. Indeed, the whole article had the striking feature of being based on statements from leading and senior figures. The court, whose ruling was upheld in subsequent appeals, agreed with Cojuangco's application.

The courts significantly found that there is such a thing as "the newspaper rule" which protects journalists from revealing sources. But that rule will not apply if justice demands that it should not.

Justice in the Cojuangco case did make such a demand. The courts felt that he would have been prejudiced without such disclosure. Cojuangco did not have any successful prospects of an action against the paper because of the special defence available to the newspaper. Such a defence, however, was not available to the sources. It was only by having the sources as defendants that Cojuangco could endeavour to restore his reputation. The court made it clear, however, that if he had had a reasonable action against the newspaper the journalist, at least until the trial of the action, would not have to reveal the identity of the source.

The Sydney Morning Herald was faced with the prospect of its journalist having to reveal his sources. It is not surprising that a very logical step then took place, The newspaper simply stated to the court that it would not rely upon the statutory defence. It would simply rely on other defences such as truth. It stopped itself from being in any better position of defending an action than any source would be.

Accordingly, the newspaper rule was applied upon the undertaking by *The Sydney Morning Herald* to abandon its statutory defence and the journalist did not have to disclose his sources. Cojuangco, in other words, was left with an action against *The Sydney Morning Herald* which was in no better position to defend that action that any source would be.

The Lady Nell Case

In the recent Victorian Lady Nell case, the Full Court of the Supreme Court believed that justice would not be denied to the plaintiffs if the newspaper rule was applied. The defendants in that case already had an