

# Recent Cases

A roundup of recent cases from Australia and New Zealand

## AMPS-A Spectrum

**T**he New Zealand Court of Appeal has ruled that Telecom New Zealand could acquire rights to the AMPS-A Spectrum, compatible with its existing cellular telephone network, because it was in the public interest. But the Court strongly indicated that it preferred to see a third cellular network, explicitly mentioning Broadcast Communications Ltd, take the TACS-B rights to reduce the risk of collusion in the cellular telephone market. For a full review of this case see page 12.

## Blank tape royalties

**O**n 11 March 1992, the High Court reserved its decision on the action brought by Australian Tape Manufacturers Association Limited, BASF Australia Limited and TDK (Australia) Pty Ltd against the Commonwealth of Australia, challenging the constitutional validity of *Copyright Act 1968* (Cth) Part VC (use of blank tapes for private and domestic copying) and section 153E (determination of amount of blank tape royalty by Copyright Tribunal). The applicants claimed that the provisions were beyond the legislative competence of the Commonwealth Parliament because they are not laws with respect to copyright (s51(xviii) *Constitution*), or laws with respect to taxation (s51(ii) *Constitution*), or laws effecting an acquisition of property on just terms (s521(xxxi) *Constitution*); and further, if the provisions did impose taxation, they were invalid because they did not comply with section 55 and 81 *Constitution*.

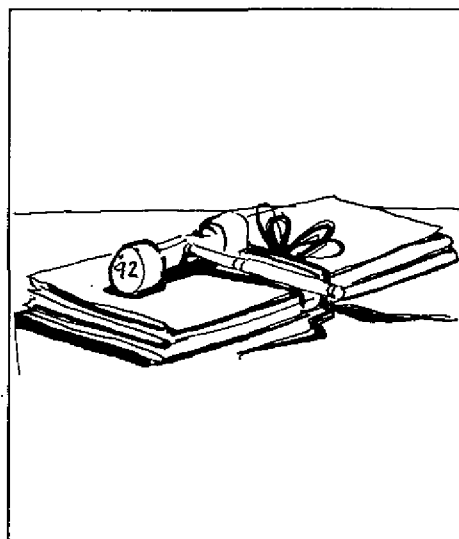
Justice Sheppard sitting as the Copyright Tribunal on the inquiry to determine the amount of blank tape royalty, has held that the inquiry be adjourned to 11 December 1992, with liberty to restore if the High Court hands down its decision in the meantime.

## Trade Practices aspects of advertising rate-cutting

**I**n *Eastern Express Pty Ltd v General Newspapers Pty Ltd*, Eastern Express appealed from the decision of Justice Wilcox that price cutting

by the proprietor of the Wentworth Courier, General Newspapers Pty Ltd, was not a misuse of market power, in contravention of section 46 of the *Trade Practices Act*. The appeal was dismissed, but the analysis of the Full Court differed significantly from that of Justice Wilcox.

The relevant market in this case was the acquisition by real estate agents of advertising services for real estate located in the Eastern suburbs of Sydney in local newspapers. When determining market power it is critical to consider barriers to entry. Other relevant factors include constraints on pricing above supply cost, other constraints imposed by competitors or potential competitors, market share and vertical integration. The Full Court found that General Newspapers at the relevant time did not have a substantial degree of market power.



Justices Lockhart and Gummow expressed concern over the use of American cases on "predatory pricing" in determining misuse of market power under section 46. In addition they held that there could be no fixed approach to the level of pricing or the practice of costing in determining whether or not price-cutting was for a prescribed purpose. The Court must look beyond profitability and consider "general human experience".

Eastern Express is appealing the decision and the Trade Practices Commission has sought leave to intervene. The High Court hearing is set down for 11 December 1992 in Sydney.

## Commercial viability

**T**he commercial viability provisions of the *Broadcasting Act* continue to provoke litigation, with the Federal Court handing down three decisions in the past few months. Although the Act will probably be repealed from 1 October 1992, these decisions will be relevant to a large number of radio licence grant inquiries which remain to be determined under the *Broadcasting Act* (see page 16).

*WREB Cooperative Ltd v Australian Broadcasting Tribunal* involved the interpretation of a definition of "commercial viability" introduced into the *Broadcasting Act* on 4 January 1992. In general terms, that definition provides that an incumbent radio service is commercially viable if it would continue to be provided. In a judgment handed down on 29 May 1992, Justice Beaumont held that a reduction in quality of service did not satisfy this definition. His Honour held that the question was one of degree, under which a change in the nature of the incumbent service could be so great that the service ceased to be provided.

In *Barrier Reef Broadcasting v Australian Broadcasting Tribunal* Justice Wilcox held that the Tribunal had erred in finding that the Court's previous decision in *Wesgo v ABT* precluded it from considering evidence regarding the relevance of depreciation to commercial viability.

*Richmond Rivers v Australian Broadcasting Tribunal* involved consideration of a preliminary view by the Tribunal that the incumbent service in the Lismore market would remain commercially viable upon the introduction of a competitive service. Justice Wilcox rejected an application by the incumbent for the ABT member conducting the inquiry to be replaced, on the ground that the preliminary findings involved pre-determination of the issues and, therefore, bias. Ultimately, that ABT member reversed his preliminary findings and decided not to grant a competitive commercial FM licence, finding that the incumbent service would not remain commercially viable.

## Television advertising standards

**O**n 24 June 1992 the Federal Court rejected various procedural grounds of challenge to the Australian Broad-

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# The National Transmission Agency - The New Force in Broadcasting

Richard Lee and Phillip Edwards describe the rise of the NTA

**W**ith the ABC celebrating its sixtieth birthday, it is topical to consider a birth in one often overlooked aspect of the broadcasting sector. Just how do *Four Corners* and *Radio National's Daybreak* reach us? The answer is via one of the nation's best-kept secrets: the National Transmission Network. From 1 July 1992, this strategically vital asset was vested in a new body called the National Transmission Agency (NTA).

The network consists of over 500 transmitter sites in all parts of the country. Although it is primarily used to transmit the programs of the national broadcasters, the ABC (including Radio Australia) and the SBS, its facilities are also used by many commercial broadcasters, especially since the equalisation policy, and a variety of radio communication users such as emergency services.

Planning, constructing, maintaining and operating this huge network are functions that were until recently administered by the National Broadcasting Branch of the Department of Transport and Communications (DOTAC). However, much of the actual work of construction and maintenance and the day to day operation of the network is carried out by the AOTC's Broadcasting Division (referred to as TBD), acting as contractors to the Department.

Both AOTC and the National Broadcasting Branch (through their respective predecessors) have been associated with the network since the first ABC broadcasts. Both have therefore played a vital role in the development of Australia and in providing a much needed channel of communication to urban, regional and remote communities alike.

## Birth of the NTA

**T**he birth of the NTA can be traced to a Government review which was completed in late 1991. The review recommended that the management of the assets of the network should be transferred to a new body, which was later named the National Transmission Agency, and that the new body should operate as far as possible along commercial lines.

The Federal Government agreed with

the overall thrust of the review. Specifically, the Government decided that:

- the NTA would be set up as a separate cost centre within DOTAC with effect from 1 July 1992;
- the position of the NTA would be reviewed within 18 months to determine whether it should become a government business enterprise;
- the NTA would introduce competitive tendering for services related to the construction, maintenance and operation of the transmission facilities;
- the costs associated with delivering the national broadcasting services would be made transparent.

Some options were rejected. For example, there is no requirement that the NTA should earn a commercial rate of return on the network assets, nor was any decision made to provide the ABC and the SBS with funds to purchase transmission services from the NTA. This latter point will be reviewed once the NTA is up and running. For the time being, the Commonwealth will fund the NTA directly.

## Strategic planning for the NTA

**I**n early 1992, DOTAC commissioned Deloitte Ross Tohmatsu Management Consultants to develop a strategic plan for the NTA. Specifically the aims of the strategic review were to set the direction for the NTA, to document its strategic goals and objectives, to determine what its relationship should be with the national broadcasters and to draw up an action plan to transform the National Broadcasting Branch into the NTA.

The overall aims of the NTA are:

- to provide the services and facilities needed to broadcast the programs of the ABC and the SBS to as many Australians as possible, in a reliable, high quality and cost-effective manner, and
- to be a vital communications organisation through:
  - (a) becoming more responsive and sensitive to clients and their needs;
  - (b) developing a strong service culture;
  - (c) satisfying clients' needs by constant attention to quality;
  - (d) exploring commercial opportunities; and

- (e) seeking ways to improve the return on investment for the NTA's assets.

One of the key issues for the strategic review was whether a customer/supplier relationship existed between the NTA and the national broadcasters. After very careful consideration it was concluded that the conditions of a contestable market do not exist. In practice, the ABC and the SBS are substantially tied to the NTA. There is no real alternative supplier. The other side of the coin is that without the ABC and SBS, the NTA has little reason to exist. The reality is that these organisations are all instruments of government broadcasting policy. Instead of customer/supplier, the concept of partnering was introduced in the strategic plan, under which the NTA and the national broadcasters will work closely together in delivering the broadcasters' programs to the Australian public.

Nevertheless, the NTA has been given a firm objective to exploit commercial opportunities to use any excess capacity, although with a firm emphasis that meeting the needs of the ABC and the SBS are paramount.

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## Recent Cases continued

casting Tribunal's standard limiting the amount of non-program matter broadcast on commercial television. Argument on the remaining grounds of challenge was heard on 31 August 1992.

## Pre-action discovery

**A**ithen v Neville Jeffress Pidler involved an application for pre-action discovery by 295 journalists who apprehended that NJP, a media monitoring service, had infringed copyright in the journalists' works. Gummow J in the Federal Court ordered that NJP produce various documents for inspection, in order for the journalists to determine if they had a cause of action for infringement of copyright.

*Contributions to Recent Cases may be sent to the Editor.*