Recent Cases

A round up of some recent case law

Penalty for contempt

The decision on penalty handed down in *Attorney General v Radio 2UE Pty Ltd* by the New South Wales Court of Appeal dealt with two broadcasts made on Radio 2UE on 9 July 1990 ("the first contempt") and 10 July 1990 ("the second contempt") involving Mr Alan Jones. In a joint judgment, Justices Priestley, Clarke and Handley found that the contempts committed were of a serious nature. Moreover, they were found to pose a real risk to the proper conduct of the trial in progress which was the subject of the broadcast matter.

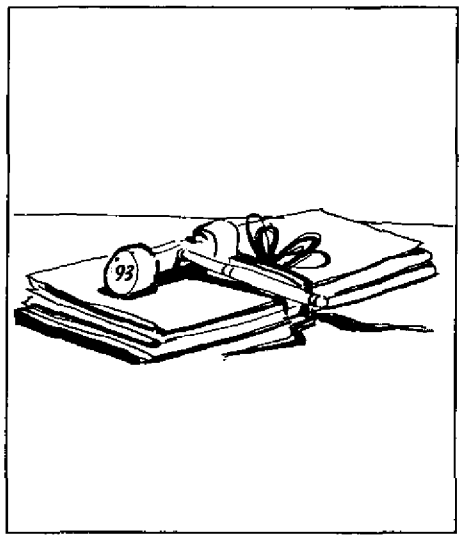
The Court found that at the time of the broadcasts, 2UE "had no systematic procedures in operation designed to minimise the risk of contempts being committed". The Court observed that 2UE was obviously employing Mr Jones, with the hope of attracting large audiences "and must have been taken to be fully aware of the kind of program which he conducted, which involved him stating his opinion on matters of current affairs, including the administration of justice". It was in this context that the Court stated that the importance of making clear its "intention to punish publications which come before it which have a distinct and significant tendency to interfere with the proper administration of criminal justice and that it is also important that the court take firm steps towards deterrence of such publications".

The Court rejected the submission that any fine imposed would not affect those who were owners of 2UE at the time of the statements and would be detrimental to the interests of the new owners. To do so, the Court stated, would be to deny the existence of the of the company as a legal entity.

Despite evidence which indicated that the station had taken measures to prevent the occurrence of contemptuous statements since the broadcasts in question, the Court was not satisfied that this was more than a "beginning" towards implementing satisfactory procedures which would prevent a repetition. The Court did, however, give weight to the hitherto unblemished record of 2UE in the realm of contempt, and the action of 2UE pleading guilty to the charges and its expressions of regret. It fined the radio station $35,000 for the first contempt, and $40,000 for the second, and awarded costs against.

Mr Jones was considered by the Court to be an experienced and knowledgable broadcaster, who in the circumstances should have checked whether or not proceedings were pending in respect of the subject matter of the broadcast.

The Court accepted that while Mr Jones was not aware of the proceedings when he commenced the broadcast which contained the second contempt, comments made during the broadcast by another party should have alerted him. Mr Jones was ordered to pay the costs of the Attorney General in respect of both contempts, and fined $2000 for the second contempt.



Austereo Trade Practices Case

In a recent decision of Mr Justice Northrop in the Federal Court, the apparent conflict between section 77 of the *Broadcasting Services Act* ("the BSA") and the *Trade Practices Act* ("the TPA") was examined.

Austereo Limited, the licensee of six commercial FM radio licences around Australia, sought a declaration that its proposed acquisition of four licences from FM Australia did not contravene section 50 of the TPA. FM Australia's licences included licences to serve Sydney, Melbourne and Brisbane, which were also served by licences held by Austereo. Section 50 of the TPA in general terms prohibits a merger or acquisition likely to substantially lessen competition in a market for goods or services.

Section 77 of the BAS provides that "the provisions of this Part (Part 5 of the BSA) have effect notwithstanding the *Trade Practices Act*". Part 5 deals with ownership and control of commercial broadcasting licences.

Counsel for Austereo submitted that section 77 displaced the operation of the TPA. Counsel for the Trade Practices Commission contended that section 77 neither abrogated the operation of the TPA, nor permitted conduct proscribed by the TPA. Rather the section rendered the TPA inoperative only to the extent that the provisions of Part 5 could have no effect if the TPA were applied.

Counsel for the applicant submitted that the proposed acquisition of licences from FM Australia was being made within the permissive framework of section 54 of the BSA. Section 54 provides that *"A person must not be in a position to exercise control of more than 2 commercial radio broadcasting licences in the same area"*. Counsel further submitted that even if the acquisition could substantially lessen competition, section 77 acted as an ousting provision.

Mr Justice Northrop found that it was central to the applicant's case that section 54 of the BSA gave rise to "an implied permission" to lawfully control up to two licences in the same licence area. The implied permission was necessary for the operation of the "ousting" provision of section 77. Mr Justice Northrop rejected the implication of this implied permission, stating that section 54 operated only to impose a prohibition, not to give rise to the operation of an implied permission. In this sense, there was nothing upon which section 77 could operate.

Although Mr Justice Northrop found that it was not necessary to give any definitive meaning to section 77 of the BSA, he went on to state that "(i)t is sufficient to say that, in my opinion and for the reasons given, the section cannot operate to protect the licensee or any other person exercising control of a licence, who, by that conduct, engages in a contravention" of the TPA.

An appeal against Mr Justice Northrop's decision has been heard by the Full Federal Court. However, its outcome is now largely academic, because the Receiver to the FM Australia Network announced the acquisition of the shares in its licensee companies by the Village Road-show group, with effect from 1 July, 1993.

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MDS litigation

In *Australian Capital Equity Pty Limited v Beale* the applicant challenged the validity of the revocation of an invitation to tender for MDS licences. The revocation was made by the Acting Secretary to the Department of Transport and Communications on 27 January 1993. The respondent contended that he had power to revoke the invitation by virtue of sub-section 33(3) of the *Acts Interpretation Act*. That sub-section provides that where an Act confers a power to make an instrument, including rules, regulations or by-laws, the power includes a power to repeal that instrument, in the absence of a contrary intention.

In a judgment handed down on 18 March 1993, Mr Justice Lee found that to fall within sub-section 33(3), an instrument must be a document of legislative character. The invitation to tender was not such an instrument, as it lacked the capacity to affect rights and obligations, was not equivalent to a promulgation binding in nature and had no continuing effect such as would render it appropriate for revocation. He therefore found that the revocation was made without power.

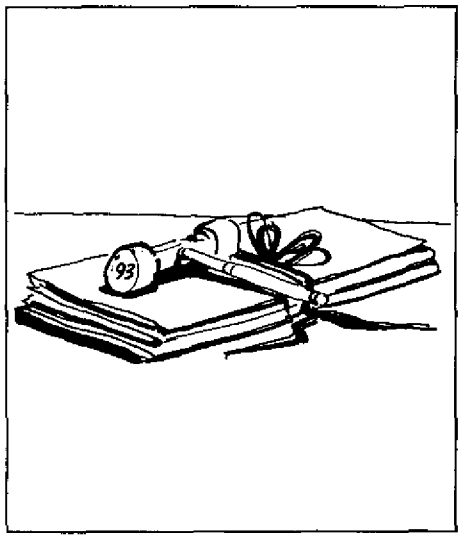
Mr Justice Lee further found that in any event, the *Radiocommunications Act* indicated an intention to displace the normal application of sub-section 33(3). He reached this view having regard to various provisions which expressly referred to the *Acts Interpretation Act* and powers in the Act which expressly included a power of revocation.

The litigation has been part of the continuing saga regarding MDS licences. Following the judgment, Mr Justice Lee made orders for a limited class of persons to tender for MDS licences by 28 May 1993. However, in a much publicised notice on 17 May 1993, the Government announced its intention to abrogate this tender, due to defects in the invitation to tender which invalidated it, but which were not brought to the Court's attention during the hearing before Mr Justice Lee. Australian Capital Equity commenced proceedings for a review of that decision, which were settled on 3 June 1993. It now appears that a fresh MDS tender will proceed in about 2-3 months.

Defamation

In *Humphries v TWT Limited* a member of the ACT Legislative Assembly commenced proceedings for damages as a result of a defamatory television news broadcast. An evening news item alleged that he and his staff had spent $17,000 on travel, which, in the circumstances, was excessive. During the same program the amount was later corrected to be $5,000. A week later an apology was broadcast on the evening news.

Mr Justice Miles, Chief Justice of the ACT Supreme Court, found that the plaintiff had a high reputation for honesty, hard work and thrift. He further found that at the time of the first broadcast, the plaintiff's reputation stood to be severely damaged. However, the correction of the relevant amount as being $5,000 amounted to a substantial withdrawal of the suggestion that the use of public funds by the plaintiff while under his control had been extravagant or wasteful. Nevertheless, there was likely to remain in the mind of an ordinary viewer who saw the correction, a suspicion or lurking doubt as to the propriety of his conduct.



Mr Justice Miles also considered the effect of the apology, but found that it was unlikely to completely eradicate the effect on the reputation of the plaintiff in the minds of every person in the community.

He considered that the plaintiff was entitled to damages, but not to aggravated damages or punitive damages. In all the circumstances, his Honour considered that the plaintiff should receive a modest sum both for damage to reputation and hurt to feelings. That sum was set at $8,000, with interest.

Cross-vesting for defamation

In *Arrowcrest Group Pty Ltd and White v Advertiser News Weekend Publishing Company Pty Ltd* the plaintiffs sued the defendant in the ACT Supreme Court for defamation. The defamation allegedly arose from an editorial in *The Sunday Mail* published in South Australia and other States and Territories. The newspaper editorial related to the closure of the first plaintiff's manufacturing business in South Australia. The editorial suggested that other courses could be pursued as alternatives to the closure. The plaintiffs alleged that the editorial imputed, amongst other things, that they were guilty of dishonesty to South Australia and had deliberately undermined Australia's economic interests.

The defendant sought to have the proceedings transferred to South Australia under cross-vesting legislation. In support of its application, the defendant demonstrated a need to call witnesses from Adelaide, which was likely to disrupt its business, and the extra cost of conducting the proceedings from Canberra rather than Adelaide. On the other hand, the plaintiffs had not shown a need to call witnesses from Canberra. Nevertheless, they relied on a forensic advantage in conducting proceedings in the ACT, due to limitations on the defences available in that jurisdiction. However, the Court rejected this submission, nothing that the High Court's decision in *McKain v R W Miller* (reported in Volume 12, CLB) had held that the Court generally should apply the substantive law of the place where the wrong occurred, irrespective of the jurisdiction where the proceedings were commenced.

The Court also noted that the trend in cross-vesting legislation was to facilitate rather than obstruct transfer. Further, the defendant bore no onus in deciding whether or not to transfer the proceedings. The Court also took into account the comparative cost of the conducting the proceedings in Adelaide and the likelihood that judges based in South Australia might be better equipped to considered allegations of disloyalty to that State, than the judges of another jurisdiction. Accordingly, the proceedings were transferred to South Australia.

Special leave for contempt

On 30 April 1993 the High Court granted special leave in *Witham v Holloway* on the issue whether the civil standard or criminal standard of proof should be applied in proceedings for contempt of Court. The plaintiff had been gaoled for one month for filing an allegedly false affidavit of his assets in proceedings for a Mareva injunction.