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- 24 Section 38 Copyright Act 1968 (Cth).
- 25 *ibid.* s.103.
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- 28 S. 30A (3), Copyright Act 1968 as amended by Copyright (World Trade Organization Amendments) Act 1994 (Cth).
- 29 S. 30A (4), Copyright Act 1968 as amended by Copyright (World Trade Organization Amendments) Act 1994 (Cth).
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- 31 *ibid.* p.268, para. 14.53.
- 32 *ibid.* p.269, para. 14.53.
- 33 "Berne Convention Protocol: Second Round" in *Rights*, Vol. 6.No.1,p.12.
- 34 Simpson, S., *Review of Copyright Collecting Societies*, 1995, p.21.

Telecommunications and the Disability Discrimination Act

Rachel Francois examines the recent decision of the Human Rights & Equal Opportunity Commission (the 'Commission') under the Disability Discrimination Act.

The telecommunications industry has felt the first sting of the *Disability Discrimination Act 1992* (Cth) (the 'Act'). In June this year Sir Ronald Wilson, president of the Human Rights and Equal Opportunities Commission (the Commission) and former High Court judge ruled that Telstra Corporation Ltd ('Telstra') discriminated unlawfully against Australians with profound hearing loss by refusing to supply them with telephone typewriters (TTYs)¹.

The case is the first in relation to telecommunications to be decided under the Act. The decision is a landmark for the rights of people with profound hearing loss and will not only affect Telstra, but will act as a strong precedent to Optus if they extend their service to supplying telephones. The decision is also a warning to all broadcasters, both free to air and pay TV, of their potential liability under the Act if they do not address the need for program captioning.

Case Background

The case against Telstra was brought by an individual, Mr. Geoffrey Scott, and by Disabled People's International (Australia) on behalf of all Australians with profound hearing loss, an estimated 21,000 people.

The complaints alleged that Telstra discriminated unlawfully in that Telstra provided hearing people with a standard handset so that they could access the telecommunications network, but refused to provide people with profound hearing loss a TTY which would enable them to access the network in a similar manner².

The complaint was lodged under section 24 of the Act. Section 24 makes it unlawful to discriminate against a person on the basis of their disability in the provision of goods, services and facilities. The definition of

'services' includes 'services relating to telecommunications'.

Issues

There were 3 main issues to be decided by the Commission: first, the nature of the 'service' Telstra provided; secondly, whether or not Telstra discriminated in the manner in which they provided the services; and finally, whether providing the service in a non-discriminatory manner would impose an 'unjustifiable hardship' on Telstra.

Telstra's 'services'

The complainants contended that Telstra's service was providing 'access to the telecommunications network'. Telstra's case was that their service was simply providing the network, the telephone lines and a standard handset (the T200). It submitted that providing TTYs would be a new service and that while the Act may oblige a party to change the manner in which it provides a service it cannot require it to provide a new or different service.

Sir Ronald Wilson accepted that the Act cannot require a party to provide a new or different service. However, he found in favour of the complainant as 'it is unreal for the respondent to say that the services are the provision of the products (that is the network, telephone lines and T200) it supplies, rather than the purpose for which the products are supplied, that is, communication over the network'³. Sir Ronald also adverted to the definition of 'services' under the Act which includes telecommunications services, as showing a clear legislative intention that the services provided by Telstra be covered by the Act.

Indirect Discrimination

Sir Ronald Wilson then found that Telstra's refusal to supply TTY's constituted indirect discrimination against people with profound hearing loss. Indirect discrimination occurs when an apparently neutral requirement or condition impacts disproportionately and to the disadvantage of a certain group of people. In this case the requirement imposed by Telstra was that customers be able to use a standard telephone to access the telecommunications network. The test for indirect discrimination is three-fold and requires a complainant to show that the requirement or condition is one:

- (a) with which a substantially higher proportion of people without the disability are able to comply; and
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the complainant is not able to comply.

The requirement imposed by Telstra clearly satisfied (a) and (c). In relation to (b) Sir Ronald Wilson found that Telstra's blanket refusal to supply TTYs without any attempt to research the matter made the requirements they imposed unreasonable, especially in light of Telstra's universal service obligation that their service be 'reasonably accessible to all people in Australia on an equitable basis'⁴.

Unjustifiable Hardship

The defence of 'unjustifiable hardship' is in section 11 of the Act and involves balancing, among other things, the benefits to complainant of a non-discriminatory service and financial cost to the respondent. The evidence before the Commission was that the loss Telstra would suffer by renting TTYs to the complainants would be 0.04% of its annual billings. Sir Ronald Wilson found that this loss, in light of the benefits that TTYs would bring to 21,000 Australians by providing them the same spontaneous, interactive and confidential access to social relationships which hearing persons have when using a telephone, would not impose an unjustifiable hardship.

Conclusion

Sir Ronald Wilson's ruling makes it clear that the right of access for people with disabilities must be considered when providing telecommunications services. His decision also highlights that even if the means of access is costly, a service provider may not be able to make out a defence of unjustifiable hardship as the cost will be judged relative to the income or profit of the service provider and the extent of the benefit received by the complainants.

Rachel Francois worked for Michelle Hannon, the Solicitor at the NSW Disability Discrimination Legal Centre who acted on behalf of DPI(A).

- 1 *Disabled People's International Australia Limited v Telstra Corporation Limited*, No H94/34, Reasons for Decision of the President Sir Ronald Wilson Inquiry Commissioner on the Question of Liability dated 19 June 1995
- 2 A TTY operates by converting keystrokes on the TTY keyboard into tone signals which are transmitted along standard telephone lines and which the receiving TTY then re-converts back into text.
- 3 *DPI v Telstra*, op cit, page 12.
- 4 *Telecommunications Act 1992* (Cth), section 3(a)(ii)

After the First Hundred Years

**An address to the Communications and Media Law Association by the Chief Censor Mr John Dickie
Sydney 20 July 1995**

Thank you for asking me to speak to you today.

It is appropriate that in the year when we are reviewing the first 100 years of cinema, we are also considering how we will cope with technological changes which will have a far greater impact than the cinematograph film when it made its first appearance.

It is also a year of great significance for my organisation, the Office of Film and Literature Classification, because it marks the demise of the Chief Censor and the Film Censorship Board. A new Act of Parliament, the first substantive piece of legislation dealing with censorship and classification matters to be passed in the Federal

Parliament since Federation, has been approved by both Houses and will come into effect early next year.

The proposed date has not yet been settled but we are sufficiently optimistic about 1 January to refer to that as the starting date.

This new Act recognises the changes that have been made both by governments and by regulatory agencies dealing with film and video since Don Chipp introduced the 'R' classification in 1971. Until then, governments were quite prepared to intervene to prohibit material in Australia which was available elsewhere with no real avenues of address for those who considered such interventions as entirely unwarranted.

In our Office we have records going back to the early 1930's when censorship, not only of films but of all classifiable items which were uncovered by Customs, was a fact of life.

I don't wish to be critical of my predecessors because I have no doubt that in a couple of decades time people will look back on some of the decisions my Board has made and find them ill- advised, out of step with the community and almost inexplicable by the current standards when the judgment is being made.

A reasonably stark example of this is the way that the book by Ernest Hemingway 'A Farewell to Arms' was dealt with and the treatment that the film based on the book subsequently received from the Film