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 H94/3-4, 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

Censorship Board. The film came to Australia sixty years ago in 1933.

It was shipped to Australia on the SS Mariposa. It starred Gary Cooper and Helen Hayes. It was submitted to the Commonwealth Censor on 7 January 1933.

It was screened on 17 January - all 8855 feet of it and the decision was 'Total rejection considered necessary'.

The reasons given for the rejection include:

> *'Because a film might record stark truths is no reason why it should be regarded as suitable for presentation on the screen and even allowing that this film is powerfully produced, and is a true record of certain incidents connected with the war there can be no justification for the employment of the main theme (the readiness of nurses to give themselves to soldiers) to create a picture story.*
>
> *It is felt that the film would be offensive - and insulting, to the normal womanhood of this country and it is regarded in the same light as the book under the same title which has been banned by the Commonwealth Government'.*

The signature of the censor seems to be Lionel Hurley.

The second censor, Mrs Hansen, was just as frank:

> *'The story is a fine dramatic one, but its opening reels of suggestiveness and obvious immorality cause its rejection.*
>
> *'C'est la guerre' is the spirit of the plot with women sacrificing their honour to Youth.*
>
> *We uphold our War Nurses in our memories of women fine and honourable, doing wonderful work for our men folk - but this film only portrays and dwells upon their weaknesses.*
>
> *The comments of the nurses and the conversation between the 2 officers who seek entertainment from the Nurses 'just out' from home give an impression of general immorality.*
>
> *This is one aspect of the War we do not want our modern youth to dwell upon'.*

Now censors may oscillate between liberal periods and the dark ages. Importers never change. In their submission to the Appeal Censor the importers said:

> *'We conscientiously believe that from an artistic and technical viewpoint this production is a pictorial achievement and indeed a revelation in dramatic art of the screen.*
>
> *In submitting the appeal, which we do so unreservedly, we believe that the rejection of this production is indeed unwarranted and grossly unfair. By refusing to register a picture of this calibre which is tremendously appealing, we feel sure that the public will be deprived of seeing a production which is undoubtedly suitable for public exhibition'.*

Unlike today, they got done on the appeal and then set about submitting a reconstructed version.

The Chief Censor softened his flint like approach, admittedly after deleting 1553 feet from the film, but still felt it necessary to run it by the Appeal Censor before giving it the tick:

> *'After full discussion, the Board thinks that the picture might be passed with further cuts (which we have agreed upon) and also a special condition that no reference must be made in any of the publicity to its origin from the novel of the same name by Ernest Hemingway.*
>
> *We desire, however, to refer the matter to you for your views. The reference to the fact of the nurses being English has been deleted, but the desertion hero has not been modified in any way.*
>
> *It is pointed out, however, that Frederic, an American, is merely attached to the Italian Army as an ambulance man and we did not think that the desertion episode would make very much impression upon audiences'.*

The Appeal Censor replied:

> *'Chief Censor. I have no objection to the passing of this film as reconstructed, nor do I object to the hero's desertion although in the original it seemed to me somewhat offensive that he should add to the seduction of an English nurse, drinking in hospital and general swashbuckling, the desertion of his comrades'.*

Still it was not over.

The Chief Censor included on a note in the file the card of Marquis A Ferrante De Ruffano, Consul General of H M, the King of Italy.

> *'On Tuesday 20 June 1933 the Marquis A Ferrante De Ruffano, the Consul General for Italy interviewed me and stated that representations had been made to him that the above film (A Farewell to Arms) to be shown on the following day at the Prince Edward Theatre contained matter that would be offensive to Italian people instancing scenes alleged to show the Italian Army in retreat.*
>
> *I stated:*
>
> *(a) that censorship having passed the picture could not now withdraw it;*
>
> *(b) that my recollection of the war scenes was that they were so confused as to direction and personnel that the spectator would not gain any distinct impression from them.*
>
> *He subsequently communicated with the importers (Paramount) saw portion of the film and afterwards made representations to the Chief Secretary. I understand that the latter does not propose to interfere (after hearing reports from his officers regarding the matter).*
>
> *W C O'R*
> *23 6 33*

Fifty two years later, when the same film was submitted for video release, it was given a 'G' classification.

New Legislation

There are several important observations about the new legislation. The first is, as I have already said, that it is the first substantive piece of legislation that the National Parliament has passed since it began operating. Previously the laws relating to censorship have been contained in State and Territory legislation and in a variety of Ordinances and Regulations made by the Federal Parliament.

The most important enunciation of the principles affecting our classification system were made in the ACT Classification of Publications Ordinance in 1984. Briefly those principles said that adults should be free to read, see and hear what they wished provided that the material was not foist upon them.

The ACT legislation provided the basis for the uniform classification scheme. It also represented, in my view, the way most people in the community felt about these basic freedoms.

Those 3 principles, along with another which I shall mention in a moment, have now been included in a Federal Act of Parliament. It should provide a buffer and a guide for all those involved in making regulatory decisions.

The new Act also includes another general principle to be taken into account when making classification decisions. That requires classifying authorities to take account of community concerns about depictions that condone or incite violence, particularly sexual violence and the portrayal of persons in a demeaning manner.

A second major advance in the new legislation is that the myriad of Federal, State and Territory pieces of legislation, all dealing with classification and classification criteria, have now been consolidated into a National Code. That Code has been agreed to by all of the States and Territories as well as the Federal Parliament and it will mean for us that from now on we have one set of rules to deal with.

The Code can only be changed by a unanimous decision of the Censorship Ministers.

The final major advance in the legislation is one which I referred to earlier. The Film Censorship Board will disappear and be replaced by the Classification Board. The Chief Censor and the Deputy Chief Censor will also both disappear and be reincarnated as the Director and the Deputy Director of the Classification Board. The significance of this is that it recognises the reality of the process of regulation of material submitted to us.

There are still some materials which are proscribed in the legislation - child sexual abuse, sexual violence and instructions about how to construct home made bombs and other dangerous materials of that kind. There is generally not much disagreement in the community about the kind of material which remains proscribed.

But apart from this, films, videos, publications and computer games are allowed into Australia for people to make up their own mind about whether they wish to hire or buy the material and for parents to make appropriate decisions by looking at the consumer advice that we supply.

We do not cut films any more. We give films a classification and if the distributor wishes to seek a lower classification, the distributor can either appeal to the Film Board of Review or seek the reasons from us for a classification decision and then decide whether to edit the film and resubmit it.

The best contribution which I think we have made in recent years is to provide additional information to viewers so that they can make an informed choice about what they wish to see. We found, for instance, once consumer protection became widespread, particularly on videos, that the number of complaints we were receiving at the OFLC dropped by more than half.

Another positive step to assist people to make informed choices was the introduction of the single classification scheme announced by the Prime Minister in 1992.

Before this, people who might all be watching the same set in their lounge room would have to make up their minds about which classification system they were using - for TV or for film or video.

Asking people to be familiar with 2 systems of classification, let alone make discriminatory decisions based on a classification system that they were not all familiar with, in my view, was a very big ask. In 1992 however, the Prime Minister announced that there would be a common classification system for film and videos on the one hand and TV on the other.

In my view, this was made doubly effective when the Australian Broadcasting Authority announced that programmes on TV would also be accompanied by the consumer advice - a service that the OFLC had been providing since 1989.

The fact that this information is currently appearing on TV is having an extremely supportive role for the classification decisions that we give as well as providing the information to parents to allow them to make a selection of their children's viewing.

Research

It is enormously important for an organisation like mine to make every effort it can to keep in touch with the community to try to find what current community standards and attitudes are. In the last few years we have come to the realisation that this cannot be done without some means of formal research to test out what those attitudes are.

We have therefore engaged in a series of research projects both on our own and with the Australian Broadcasting Authority to try to find what troubles the community about material on film and video and what the community's tolerances are like in matters of sex, violence, language and other topics such as drug abuse.

Now it may seem that our concern about language may be a bit over zealous compared with the other topics. It would be a mistake however to underestimate the concern the community has about the use of coarse language in films.

We have done several projects with the Australian Broadcasting Authority and at the moment we are engaged in a lengthy study with them about how Australians spend their leisure time and what part the electronic media plays in it.

We are also doing, this time in conjunction with the States and Territories, research into computer games to look at whether things like violence in the games actually is a turn-on or whether it is a medium merely for measuring skills by the young people engaged in the game.

One of the more important advances I think in recent years has been the use of focus groups to give us immediate feedback on our classification decisions. These groups are selected from cinema going audiences who are brought in to view a film already classified by the OFLC but not yet shown publicly. This allows us to obtain the view of the people undergoing the research without having their views coloured by reviews or other prior knowledge of the film.

It is quite clear that there are changes from time to time in the community in relation to their attitudes. A film like 'Straw Dogs', for instance, while given a restricted classification in the 1970's might now have difficulty in getting through unscathed because of the sexual violence.

And while there may have been a change in community standards to allow such films as the 'Honeymoon Killers' which in the 1970's was banned outright to be resubmitted and classified 'M', films like 'The Conformist' which feature suggestions of child sexual abuse have been notched up a slot from 'M' to 'MA' because of community sensitivity in this matter.

It is therefore not all one way traffic. There are definite changes in community standards and it is up to the OFLC to make sure that we reflect those changes when we are making the classification decisions.

Internet

The Government has wrested for some time with the problems created by the Internet and Bulletin Boards. Initially the conventional wisdom was that not much could be done to regulate the Net because of its world wide spread of activity, the free wheeling nature of the Net itself and its users and because of the sophisticated equipment.

As you all know there has been a lot of media comment about the Net and the need for some kind of regulation to be put in place so that offensive material will not be available on it. The Government has been considering the matter for some time.

In late 1993 a Joint Task Force was appointed to examine the question of Bulletin Boards. It reported back to the Attorney General and the Minister for Communications in November 1994. The recommendations it made were considered by the Censorship Ministers and also by the Minister for Communications. A comprehensive scheme to deal with the Net has now been proposed by the Minister for Communications and the Arts and the Attorney General in a paper released late last week. Essentially what they propose is that the self regulatory ethos which has always been claimed to exist by Net users will be the basis of the scheme.

Australian service providers will be asked to draw up a code of conduct to be approved by the Censorship Ministers. The

service providers will establish a complaints body which can ask an independent organisation, perhaps like the OFLC, to investigate the complaints and make a report. The service providers association can take remedial action as set out in the Code if the Code itself is found to be breached.

This is not an extraordinary radical proposal. It has been employed by the service providers on the 0055 and 0051 numbers with considerable success and there is confidence that the new scheme will be able to work effectively in this way.

If there are however service providers who wish to ignore the code of conduct and any breaches which may occur under it, they will quickly find themselves on the wrong end of State and Territory legislation which will be enacted to pick up those who do not wish to abide by the self regulatory part of the scheme.

But let's not concentrate too much on the gloomy side either of film and video or on the amazing new technologies. Top films are still top films and they are being made in a much greater quantity than ever before.

The new technologies are stretching our imaginations and intellect and showing us the way of the future. Regulation of the content is only a small part of these great new advances.

We must remember to keep it in perspective.

Thank you for asking me to come here today. It has been a pleasure talking to you

Pay TV Regulatory Challenges - A Sports Perspective

Dene Moore discusses anti-siphoning rules and other Pay TV issues from the perspective of the sports industry.

The Confederation of Australian Sport is the peak umbrella body for national sporting organisations. It was established in 1976 in response to cuts in Government funding at the time and a realisation by the Australian sporting community that it needed to speak with a united voice if it was to impress upon Government the need for assistance to an industry which contributes economic, social and health benefits to the Australian community.

The Confederation believes that the arrival of Pay TV will provide significant opportunities for many sports to receive coverage. While Australian television has traditionally had a reputation for good sports coverage, the fact is that this has generally extended only to a relatively few of the higher profile sports. The majority of sports have received little air-time.

We are also keen about the potential for generic programs on sport, including administration, coaching, sports medicine, introductory programs on new sports, sports history, major events and so on, which we believe will be of interest to significant numbers of potential viewers.

Despite significant improvements in the quality of sports administration in recent years, most sports administrators have struggled to come to grips with the degree of government regulation involved in the implementation of pay television services and have had difficulty in grasping an ever changing scene with a number of key players.

In fact, the first regulatory difficulty which sport has faced has been the blocking of the introduction of pay television for so many years when it has been a fact of life in most other developed western economies.

The Confederation is not concerned to side with the pay television industry against free-to-air operators or vice-versa. Its major concerns are in promoting maximum exposure for sporting bodies on television and the potential, therefore, for those sports not only to promote their sports but to have opportunities to approach potential sponsors.

Research undertaken so far by the Confederation indicates that Australians want to see more Australian sport on television, particularly more quality women's sport and would be receptive to more generic programs about the sporting industry. We believe it unlikely that cheap fillers from overseas will be attractive to potential subscribers to pay TV services. Certainly they will do nothing to promote Australian sport.

In view of Australia's current push into Asia it is worth noting in this context that, in many significant sports, Australia is part of the Asian zone and regularly plays qualifying and other tournaments with major countries in this region.

We believe there are a number of misconceptions regarding pay television coverage. These include:

1. Australian sport receives good coverage now - this applies only to a chosen few.
2. The public has a 'right' to see traditional events. Why? Do the public all have a right to enter major sporting events free?
3. Free-to-air television is really 'free' - surely viewers pay through the advertising dollar.
4. Pay television will potentially steal all major events if it has a chance - our observations of overseas experience do not support this contention.

The main regulatory aspect of the *Australian Broadcasting Act 1992* relates to section 115 which contains the anti-siphoning provisions.

The Confederation is particularly concerned at the lack of consultation with sports in drawing up the list of sports and events which would be included on this list. Some at first may have seen it as some sort of 'badge of honour' but the penny dropped when they realised that potentially they are disadvantaged by having free-to-air operators have first access to their events.

In submissions to the Government (through the Australian Broadcasting Authority) the Confederation had argued for a system of dual-rights whereby the event organiser/promoter would be required to offer dual-rights for each of free-to-air and pay TV but could not offer either exclusively. It would then be a matter for each television sector to decide whether to avail itself of the rights available and operators would be answerable to their viewers and subscribers. Rights in each