The 'Not So Neat' Treaty Provision

John Corker examines the effect of section 160(d) of the *Broadcasting Services Act* in the light of the *Project Blue Sky* decision.

INTRODUCTION

One of the key messages that should be taken from the High Court's *Blue Sky* judgment is not only that great care needs to be taken by Australia when signing treaties[1] but also that great care should be taken when drafting the provisions that incorporate Australia's international obligations into domestic law. There are three quite different formulations for taking into account Australia's international obligations just within Australia's communications Acts, the *Broadcasting Services Act 1992* (**'the BSA'**), the *Telecommunications Act 1991* and the *Radiocommunications Act 1992*.

I have searched all the Commonwealth Consolidated Acts and have not found any provision which is as sweeping as s.160 (d) of the BSA in imposing on a government agency a direct requirement to comply with all of Australia's international obligations. Other Commonwealth Acts require the relevant government agency to simply 'have regard to' Australia's obligations[2] and specify the actual agreements which are to be had regard to[3], or give power to a Minister to make regulations[4] which allow specified international agreements to be incorporated into domestic law.

Section 160 (d) of the BSA requires the ABA:

> *when performing any of its functions, to perform them in a manner consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.*

In this way all Australia's obligations pursuant to these agreements are imposed directly on the ABA. This can be contrasted with the situation under the *Radiocommunications Act 1992* where the Australian Communications Authority (ACA) has to only have regard to international obligations when carrying out its functions.

To highlight the difficulty of the task faced by the ABA, the following passages from the High Court *Blue Sky* majority judgment are illustrative.

> *"Even those with experience in public international law sometimes find it difficult to ascertain the extent of Australia's obligations under agreements with other countries."*[5]

> *"While the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language and often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed."*[6]

However, it is not as if the ABA has been idle in trying to ascertain which of the 900 odd treaties and agreements to which Australia is a party have any direct bearing on its functions. Arguably there are a number. But ascertaining what that obligation might be and how the ABA should exercise its function in a manner consistent with that obligation can be complex.

When the ABA issued its planning priorities for new television and radio services in Australia in 1993, six agreements and conventions were cited as having been observed. On the planning and technical side, the provisions of such international agreements are relatively clear and can be observed.

However, on the content regulation side it is much more complex. For example, the often-quoted Article 19(2) of the *International Convention on Civil and Political Rights* (ICCPR) provides:

> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or **through any other media of his choice.** [Emphasis added].*

The ICCPR recognises that this right may be subject to domestic laws necessary for the respect of the rights or reputations of others, or for the protection of national security, public order, health or morals, but not otherwise.

QUESTIONS RAISED BY S160(D)

What then of the ABA's obligation in registering industry codes of practice or determining standards for 'promoting accuracy and fairness in news and current affairs programs'[7]? Should the ABA refuse to register codes of practice that don't specifically provide for rights of reply, rights of freedom of expression to persons who are the subjects of news and current affairs programs? Should the ABA make standards to require such avenues of freedom of expression so as to carry out its function of 'assisting broadcasting service providers to develop codes of practice' or 'to develop program standards relating to broadcasting in Australia' in a manner consistent with Australia's international obligations pursuant to Article 19 of the ICCPR[8]?

These are just some of the difficult questions that s.160(d) of the BSA raises and, I think one can confidently say, not questions that would have been within the contemplation of those who drafted the BSA in 1992 nor within the contemplation of Parliament or the Minister for Communications and the Arts at the time, Senator Bob Collins.

What was within the contemplation of the Minister and those who drafted the BSA was a desire to have the ABA comply with the *Closer Economic Relationship Trade in Services Protocol* with New Zealand in setting the *Australian Content Standard* for commercial television. The letter from the Minister to then chairman of the ABA, Mr Brian Johns, evidences this. Brennan J cited this letter in his judgment. The Minister had written:

> *"Having consulted with the Minister for Trade and Overseas Development, I am aware that Australia's present treatment of New Zealand produced*

programming in Australian Content Standard TPS14 may be in breach of Australia's Services Protocol obligations. I would hope that the ABA can quickly reconsider the Australian Content Standard."

The ABA argued in the Federal and High Courts that this intention had not been adequately translated to law. The Full Federal Court agreed but the High Court did not.

CONCLUSION

It is particularly appropriate that the regulation of broadcasting has regard to Australia's international obligations because broadcasting is a globalized industry. For example, for the ABA to have regard to the number of international agreements that address the use of satellites for international communication is entirely appropriate, but to be instructed to carry out a diverse range of functions in a manner consistent with 900 odd treaties is not.

A considerable period of time and effort has been invested over the past five years in determining a matter that could have been clearly spelt out in legislation. The Protocol to the CER could have been mentioned or a regulation power put in place which allowed treaties to be specified which the ABA had to either observe or have regard to. Then again, if it had been, the provision may not have made it through the Parliament because the real effect of the provision may have been clear. But this is entirely the point. Parliament should be able to clearly know the implications of laws that it considers passing. The implications of the effect of s.160 (d) of the BSA were not capable of being known in advance. Section 160 (d) of the BSA is a swingeing provision the implications of which are yet to be fully explored. It will continue to be a fertile ground for lawyers.

The High Court decision provides an opportunity for Government to amend s.160 (d) to bring it into line with the way Australia's international obligations are dealt with in other Commonwealth legislation. In future, it is hoped that our draftsmen and women, when incorporating Australia's international obligations into domestic legislation, do so in a more measured and specific way than was done by inserting s.160 (d) into the BSA.

1 Angela Bowne, Barrister, 'Treaties can transform local law', *AFR*, 1 May 1998, pp.30 and 31 and Professor David Flint, Chairman, Australian Broadcasting Authority, *AFR*, 1 May 1998, p.31 both make this point.

2 S.580 *Telecommunications Act 1997* requires ACA to have regard only to those agreements notified by the Minister. S.299 of the *Radiocommunications Act 1992* requires the ACA to have regard only to those agreements that relate to radio emission. S.70(2) of the *Nuclear Non Proliferation (Safeguards) Act 1987* requires a person exercising powers under the Act to have regard to specified agreements and indicates that decisions made inconsistent with Australia's obligations have no effect.

3 The *Civil Aviation Authority Act* is an Act that requires the CAA to act in a manner consistent with agreements but restricts these to any agreement relating to *the safety of air navigation.*

4 S.69 of the National Parks and Wildlife Conservation Act 1975 gives power to make regulations giving effect to a specified agreement.

5 High Court judgment, para. 98

6 Ibid. para. 96

7 S.123(2)(d) of the BSA - a matter for a code of practice to address, or a standard if a code is not operating to provide appropriate community safeguards.

8 S.158 (h) and (j), which set out the ABA functions in these areas.

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First Impressions - Lessons From Chakravarti

How do ordinary people 'read' the media? How is meaning construed by the reasonable reader or viewer? Anne Flahvin considers some recent judicial pronouncements which offer an insight into how judges think this process works, and detects an increasing willingness to hold the media responsible for harm to reputation caused by the audience jumping to hasty conclusions.

In its attempt to tread a tightrope between protection of reputation and freedom of the press, the law of defamation has tended to imagine the ordinary person as a fair minded individual, unlikely to jump to conclusions without reading the whole of an article, and not inclined to conclude that the laying of criminal charges necessarily suggests a likelihood of guilt. Those more jaundiced observers of human nature might have concluded that this was less a reflection of reality than a recognition that a free and robust press must be given some latitude if it is not to be chilled unduly.

That recognition was reflected in two principles of defamation law which, in practice if not in theory, would seem to be under attack.

The first, which came under the spotlight in the High Court earlier this year in *Chakravarti v Advertiser Newspapers Ltd* (unreported, High Court 20 May 1998) is that the ordinary reader is taken to read material as a whole - not just a headline, for example - before forming a view about its meaning. The second principle is that a media report that charges have been laid does not, without more, give rise to an imputation of guilt. Ordinary readers or viewers are taken to eschew the 'where there is smoke there is fire' view of the world in favour of the presumption of innocence. To hold otherwise would, of course, severely restrict media reporting of the criminal justice system.

MATERIAL TAKEN AS A WHOLE

The principle, confirmed by the High Court in *Mirror Newspapers v World Hosts Pty Ltd* (1979) 141 CLR 632, that in assessing whether material carries a defamatory meaning it is taken to have been read, heard or listened to as a whole, is an illustration of the fiction on which defamation law is based. As with many other areas of the law, the law of defamation is to a large extent normative. Whether or not 'ordinary' people are likely to jump to conclusions on the barest glance at a headline, the law has operated on the assumption that they take a little more care than this. So while account is able to be taken of the likely impact of a sensational headline in forming a view