LEGISLATION

THE BROADCASTING AND TELEVISION ACT 1942-1956

The basic provisions of the recent Broadcasting and Television Act[1] have been the subject of much general discussion and are well-known. In form the Act amends the Broadcasting Act 1942-1954[2] and repeals the Television Act 1953.[3] In substance it retains the decision of the Government embodied in the latter Act that there should be both a national television service provided by the Australian Broadcasting Commission and a number of commercial television services provided by the Licensees.[4] The majority of the more detailed provisions of the Act follow the recommendations of the Royal Commission on Television which was appointed on 11th February, 1953, and after hearing evidence for some months, delivered its report on 20th February, 1954.

The Act introduces into Australia a new medium of modern communication and entertainment, capable of exercising a powerful mass influence, and its provisions, therefore, have immense social significance. This, of course, is generally recognised and as a consequence both inside and outside Parliament there has been a consistent demand for firm control over the standards of television programmes. In general, the new Act has not sought to attempt the perhaps impossible task of including in its provisions a set of prescribed general standards or tests. The formulation of standards is delegated to the Australian Broadcasting Control Board, a body composed of five members appointed for terms of up to seven years by the Governor-General on the recommendation of the Government.[5] The relevant sections of the Act merely direct compliance with such standards when formulated. Examples are:

> 60(1). A Licensee shall provide programmes and shall supervise the broadcasting or televising of programmes from his station in such manner as to ensure, as far as practicable, that the programmes are in accordance with standards determined by the Board.
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> 61(4). A Licensee shall comply with such standards as the Board

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[1] Broadcasting and Television Act 1942-1956 (Cwlth.), No. 33, 1956.

[2] Broadcasting Act 1942-1954 (Cwlth.), No. 33, 1942 as amended by No. 39, 1946; No. 64, 1948; No. 80, 1950; No. 41, 1951; No. 12, 1953; and No. 82, 1954.

[3] Television Act 1953 (Cwlth.), No. 6, 1953.

[4] During the debate on the earlier Bill, the Leader of the Opposition in the Senate (Senator McKenna) expressed the view that s.92 of the Constitution precluded any government monopoly of television along the lines of the then existing British system. During this Debate and subsequently during the Debates on the present Bill, the same Senator stated that in his opinion the field of television was *ultra vires* the powers of the Commonwealth Parliament.

In *The King* v. *Brislan ex p. Williams* (1935) 54 C.L.R. 262 the High Court (Dixon, J. dissenting) held that radio broadcasting came within the powers of the Commonwealth to legislate in respect of "postal, telegraphic, telephonic and other like services" (Constitution Act, s.51(v)). It would seem that by analogous reasoning television comes within the scope of the same power. There are obvious differences, however, and the Act may well be challenged at a later date either by a licensee whose licence is threatened with revocation or possibly even by the owner of a television receiver who has failed to pay the annual registration fee.

[5] Sections 6B and 6C of the Act.

determines in relation to the broadcasting or televising of advertisements. In addition, by s.62, the Board is given a wide power of censorship. This section provides that "Where the Board has reason to believe that any matter (including an advertisement) which it is proposed to broadcast or televise is of an objectionable nature, that matter shall be subject to such censorship as the Board determines."

The Act provides two broad methods of enforcement of these programme standards.[6] In the first place, the Minister is given power to "prohibit a Licensee from broadcasting or televising any matter, or matter of any class or character specified in the notice, or may require the licensee to refrain from broadcasting or televising any such matter".[7] A more drastic sanction is the power of the Minister to suspend or revoke a license where he is satisfied (*inter alia*)

> (b) that the Licensee has failed to comply with a provision of this Act or of the Regulations in so far as that provision is applicable to the license; (c) that a condition of the license has not been complied with; or (d) that it is advisable in the public interest, for a specified reason, to do so. (Section 50(1)).

Suspension is a temporary measure whether as a penalty itself or pending revocation which cannot be made without an open inquiry held by the Board.[8]

The Act makes a similar general approach to the question of religious and political broadcasts and television programmes. With regard to the former, s.64 provides: "A Licensee shall broadcast or televise from his station Divine Worship or other matter of a religious nature during such periods as the Board determines and, if the Board so directs, shall do so without charge". The Minister may, himself, direct licensees to broadcast or televise matters of national interest.[9] Election periods apart, however, there is no positive obligation in the Act on either the Commissioner or on Licensees to allow political parties or other interests equal opportunities for putting their particular points of view.[10]

This and other sections of the Act could be discussed at considerably more length. However, their interest is more of a general nature than purely legal. The remainder of this short Legislation Note will therefore be confined to the provisions of the new Act which are more peculiarly of interest to the lawyer.

Apart from obvious policy objectives, the new section 53B of the Act raises interesting questions in the field of company law. For this section prescribes as a condition in the license of any operating commercial television company that 80% of the issued capital will be beneficially owned by Australian residents[11] (including companies controlled by such residents), that no non-Australian resident will beneficially own more than 15% of the issued capital and that no "substantial changes" will take place in either the beneficial ownership of shares or in the company's memorandum and articles of association without the consent of the Minister.

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[6] As a result of conferences with commercial licensees the Board has already formulated and published "Television Programme Standards". Under these standards, for example, no programme may contain any matter which is "(i) blasphemous, indecent, obscene, vulgar or suggestive; (ii) likely to encourage crime or public disorder; (iii) likely to be injurious to community well-being or morality". One other provision requires that "the use of foreign languages should be kept to a minimum."

[7] S.60(3).

[8] S.51.

[9] S.65.

[10] The Labour Opposition in both Houses was critical of the failure to re-enact the provision of the previous s.6K whereby it was one of the functions of the Board to ensure "that facilities are provided on an equitable basis for the broadcasting of political or controversial matter."

[11] No definition of resident is included in the Act. For this reason, a mere notification by a shareholder of his change of address to one outside Australia can place the secretary of the Company in a quandary. Where the overseas shareholding has already reached its maximum of 15%, the shareholder may well be obliged to relinquish his shares. The application and transfer forms of Television Corporation Ltd. contain a declaration by the shareholder that he is "normally resident" in Australia.

As the duty of policing such obligations is placed on the directors of the company, it is obvious that special provisions will be needed in the articles of commercial television companies and that some of the usual Stock Exchange requirements for public listing will have to be waived in the case of these companies.[12] An example from the Articles of Television Corporation Limited, the only Sydney licensee whose shares are listed on the Stock Exchange, is quoted in the footnote below.[13]

Probably this section makes no major change in the substantive law. Certainly, the fact of the existence of a trust should still be kept from the

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[12] For instance, the Official List Requirements of the Sydney Stock Exchange contains a provision that there shall be no restriction on the transfer of paid-up shares in the case of a limited liability company. Section 53B obviously precludes compliance with this requirement by a public company holding a commercial television licence.

[13] "CONDITIONS AS TO THE OWNERSHIP OF SHARES

26A. Whereas the Company has received an assurance from the Postmaster-General of the Commonwealth that he is prepared to grant to it a licence for a commercial television station in accordance with the provisions of the Television Act, 1953 subject to the following (amongst other) general conditions:

(a) not less than eighty per centum (80%) of the issued capital of a licensee company shall be held by Australian residents or companies controlled by Australian residents;

(b) not more than fifteen per centum (15%) of the issued capital of a licensee company shall be held by any person who is not an Australian resident or by any company which is controlled, directly or indirectly, by persons other than Australian residents;

and the following (amongst other) particular stipulations:

(i) not more than twenty per centum (20%) of the issued capital of the Company shall be held by Associated Newspapers Limited (England), Philips Electrical Industries Pty. Ltd., and Paramount Film Service Pty. Limited;

(ii) not more than fifteen per centum (15%) of the issued capital of the Company shall be held by any one of the shareholders mentioned in stipulation (i);

now the following provisions shall apply notwithstanding anything in these Articles, namely:

(1) The Directors may decline to allot any shares or to register any transfer or transmission of shares if in their opinion the allotment or registration thereof would or might result in any of the said general conditions or particular stipulations being infringed.

(2) The Directors may require that every application for shares and every instrument of transfer and transmission notice shall include or be accompanied by a declaration in a form prescribed by the Directors as to all or any of the following matters, namely

(a) whether the applicant, transferee or transmittee will hold the shares comprised therein on his own behalf or as trustee or nominee for some other person

(b) whether the applicant, transferee or transmittee (if an individual) is a person ordinarily resident in Australia

(c) whether the applicant, transferee or transmittee (if a company) is a company controlled by persons normally resident in Australia

(d) whether the principal (if any) for whom the applicant, transferee or transmittee will hold the said shares is a person normally resident in Australia, or, if a company is controlled by persons normally resident in Australia.

(3) The Directors before or at any time after allotting any shares or approving or rejecting any transfer or transmission of shares may by notice in writing to the applicant, transferee or transmittee require him to furnish to them such information or evidence as is therein specified and as they consider likely to assist them in determining whether or not the allotment or the registration of the transfer or transmission would or might have or has had the result mentioned in provision (1).

(4) If the Directors are satisfied that any of the said general conditions or particular stipulations is being infringed, they may by notice in writing to any member who or which is not an Australian resident or a company controlled by Australian residents require that a number specified in such notice of the shares held by that member shall within a time specified in such notice be disposed of by sale upon any Australian Stock Exchange.

(5) If the requirements of such notice are not complied with by such member within the time so specified, the Directors may

(a) cause the number of the shares held by such member which was specified in such notice or any less number to be sold upon any Australian Stock Exchange;

(b) If the shares so sold are registered on a branch register other than

register of shareholders,[14] even although other records may need to be kept of changes in the beneficial ownership of shares. Probably, too, the general rule remains that a company, by obtaining notice of the fact of a trust, is not by that alone affected with constructive notice of the terms and conditions of the trust instrument.[15] However, the section may give rise to some interesting questions of interpretation, especially where there is a chain of interlocking company holdings.

Following the recommendation of Lord Porter's Committee on the Law of Defamation and the provisions of the Defamation Act, 1952 (Eng.), s.95A of the new Act brings all defamatory words or gestures broadcast or televised within the field of libel rather than slander. It provides that "for the purposes of the law of defamation, the transmission of words or other matter by a broadcasting station or a television station shall be deemed to be publication in permanent form."

This section is not of great significance in New South Wales where the Defamation Act, 1912, has largely abolished the practical distinction between libel and slander. However, in States such as Victoria and South Australia, where the common law distinction remains of practical moment, the section makes a real improvement in a subject surrounded by confusion and doubt. The generally accepted view, if it could be called such, was that a defamatory broadcast amounted to libel if read from a written script and to slander if spoken *extempore*. On the other hand, in the much criticised case of *Meldrum* v. *Australian Broadcasting Co. Ltd.*,[16] the Victorian Full Court had held that defamatory broadcast statements, even when read from previously written material, constituted slander, not libel. Whatever the position was, the distinction was indefensible. Only law faculty examiners deprived of a fruitful field of problem questions will regret the passing of the distinction.

Possibly no provision of the new Act received as much attention both inside and outside Parliament as that relating to the televising of sporting fixtures. The Bill as originally drafted contained no reference at all to this matter. Subsequently, after two alternative amendments had been debated in the House of Representatives, and after discussion with representatives of sporting bodies, the Government introduced the present s.88A during the Committee Stage of the Senate's consideration of the Bill. The section is as follows:

> 88A. The Commission or the holder of a licence for a commercial television station shall not televise, either directly, or by means of any recording, film or other material or device or otherwise, the whole or a part of a sporting event or other entertainment held in Australia, after the commencement of this section, in a place to which a charge is made for admission, if the images of the sporting event or other entertainment originate from the use of equipment outside that place.

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the principal or Victorian Register, cause such shares to be transmitted to the principal or Melbourne register without any request or consent from such member;

(c) appoint a person to execute on behalf of such member the transfer of such shares and to receive and give a good discharge for the purchase money;

(d) register the transfer notwithstanding that the certificate of title to such shares may not have been delivered to the Company, and issue a new certificate to the transferee.

The purchase money less the expenses of sale shall be paid to the member by whom the shares so sold were held, provided that he has delivered to the Company for cancellation the certificate of title in which such shares were comprised. Failing such delivery, the Company may sue such member in an action in detinue for the recovery of the certificate of title in which such shares were comprised, and the member shall not in such action deny or dispute the Company's ownership and right to possession of such certificate."

[14] "No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the Registrar-General" (Companies Act, 1936, s.84).

[15] *Simpson* v. *Molson's Bank* (1895) A.C. 218; *Grundy* v. *Briggs* (1910) 1 Ch. 449.

[16] (1932) V.L.R. 425.

The common law on this topic, at least as finally settled for Australia, is found in the majority judgments of the High Court in *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor*.[17] In that case it will be remembered the plaintiff company sought an injunction against the proprietors of a radio station and its announcer who, from a specially constructed tower on private land outside the racecourse, broadcast such graphic descriptions of horse-races on the course that many people who would otherwise have paid for admission preferred to stay at home by their radio sets. The High Court, by a majority of three to two, decided that no breach of any right known to the law had been committed and consequently refused the application. Application for special leave to appeal was subsequently refused by the Privy Council.

The law as stated in the *Victoria Park Case* remains unchanged by the present Act in the case of broadcasts of sporting events. Radio stations may still, without the consent of the organisers of such functions, broadcast contemporaneous descriptions from points of vantage outside the arenas. They will no doubt do so whenever the cost of such outside broadcasting becomes less than fees sought to be levied by sporting organisers on broadcasts from inside the spectators' stands.

There can be little doubt that the principles laid down in the *Victoria Park Case* apply also to the new medium of television. In their judgments the minority, (Evatt and Rich, JJ.) arguing largely from the United States authority, sought to enunciate a right of privacy which would be infringed by unrestricted "exposure" to broadcasting and television.[18] Equally clearly, the majority Judges denied the existence of such a right. In the case of the televising of sporting events s.88A now recognises an analogous right. It does so, however, in a rather curious way. Television from outside the sporting arena is specifically prohibited. No legislative provision, however, is made for inside television. The grant of inside television rights, of course, is within the control of the organisers as lessors of the ground and except where television may add to attendances by stimulating an interest in a particular sport, such organisers may be expected to charge heavily for the privilege.

The interesting situation reached in relation to sporting events is that the present law appears to be weighted in favour of radio stations and against television licensees. Whether the British solution of control by Ministerial regulation is preferable is a matter of opinion.[19]

During the debates on the Bill several speakers called for a review of the Copyright Act in the light of modern conditions. Suggestions that the concept of copyright be extended to the interests of promoters of sporting events arose directly out of the considerations discussed above. In other ways, too, the introduction of television seems to call for a review of copyright legislation. At present, for instance, a film produced solely for television may give rise to a multitude of separate rights of copyright. In particular circumstances the writer of the scenario, the producer, the composer of any incidental music and the owner of the film negative (whether the television company itself or not) may all have separate rights in respect of the one television film. In this aspect at least there would seem to be room for simplification of the copyright position.

These and other problems will doubtless have to be dealt with by Parliament in the future. Experience in the new medium will of necessity dictate future amendment of the Act.

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[17] (1937) 58 C.L.R. 479.

[18] "Indeed the prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognise that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life. For these reasons I am of opinion that the plaintiff's grievance, although of an unprecedented character, falls within the settled principles upon which the action for nuisance depends." Rich, J. at 505.

[19] Television Act, 1954 (Eng.), s.7.

MATRIMONIAL CAUSES ACT 1945-55 (CWLTH.)

A significant step has recently been taken in Australian divorce reform with the passing of the Matrimonial Causes Act 1955 (Cwlth.)[1] amending the Matrimonial Causes Act 1945 (Cwlth.).[2] The amending legislation introduces a new Part IIIA into the Act, the effect of which is to extend considerably the rights of the wife. Section 12A(1) provides:

> Where a woman is resident in a State or Territory and has resided there for not less than three years immediately prior to the institution of proceedings under this Part, she may institute proceedings in any matrimonial cause in the Supreme Court of that State or Territory as though she were or had been for any period required by the law of that State or Territory, domiciled in that State or Territory.

Subsection (2) invests or confers federal jurisdiction on the Supreme Court of the State or Territory respectively. Section 12B provides that such Supreme Court shall exercise jurisdiction in accordance with the law of that State or Territory. In Part IV of the Act, s.13 is amended such that any judgment, decree, order or sentence pronounced in pursuance of the Act shall have effect throughout Australia.

This legislation is very similar in form to that enacted in recent years in other common law countries. It is therefore not unique in itself, but nonetheless gives rise to certain unique situations and certain practical difficulties both as regards divorce law and private international law.

The most obvious effect of the Act is the great inroad it makes into the rule in *Le Mesurier* v. *Le Mesurier*,[3] which established that the domicile of both spouses at the institution of the suit is the sole test of jurisdiction. This rule has been greatly criticised, largely on the ground that it discriminates between the sexes in favour of the husband.[4] He may seek and obtain a divorce wherever he may be domiciled, but the wife, whose domicile is that of her husband, must necessarily pursue him to his place of domicile to obtain the same relief. Many Australian States, including New South Wales, have for some time, had legislation remedying this defect as regards deserted wives by in effect giving them a separate domicile, but the present legislation goes much further in extending relief to wives on the basis of three years' residence irrespective of domicile.

The Act in its effect places the wife in a much stronger position than formerly, in two respects. Section 12B provides that in such a suit the law to be applied is the law of the State in which the wife has resided for three years. There is nowhere in the Act any provision against resorting to the jurisdiction, such as is contained in s.16 of the Matrimonial Causes Act, 1899-1951 (N.S.W.)[5]. The effect of these two features is that there is nothing to prevent a wife from taking up residence for the prescribed time in one State to obtain the benefit of local divorce provisions not available to her in the State of domicile. Thus a wife domiciled in New South Wales, which does not recognise insanity as a ground for divorce, may resort to and take up residence for three years in Tasmania, which does recognise this ground under certain conditions,[6] and obtain a decree under s.12A(1) of the Matrimonial Causes Act, 1945-1955 (Cwlth.).[7] Further, under s.13, such a decree would have to be recognised throughout Australia.

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[1] No. 29, 1955.
[2] No. 22, 1945.
[3] (1895) A.C. 528 (P.C.).
[4] See Erwin N. Griswold "Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study" (1951) 25 *A.L.J.* 248, 249.
[5] Act No. 14, 1899—Act No. 43, 1951.
[6] Matrimonial Causes Act, 1860 (Tas.), s.9 (1) (vi).
[7] No. 22, 1945-No. 29, 1955.