newspaper became aw are that the articlew as or may be defamatory of the plaintiff was in February 1989, rather than in August 1988 or earlier. The offer being put on shortly after that time as therefore made by the newspaper "as soon as practicable after becoming aware".

The trial judge ruled that the offers complied as a matter of law with the formalities required by the Act and left them to the jury in regard to all three publications.

The judge also directed the jury that Mr. Brennan was not entitled to damages in respect of avoidable loss, that is, loss which by the exercise of reasonable steps on his own behalf he might have avoided. Therefore, he could not recover damages resulting from the failure of the newspaper to publish a correction and apology until almost a year after publication of the original articles, as the plaintiff could have reduced the harm suffered by bringing to the newspaper's attention the fact that there were two persons known as John Brennan within the HIC.

In respect of the first and second articles sued upon, the jury found in favour of the newspaper. The jury found each of those publications were innocent in relation to the plaintiff and the offer of amends was made as soon as reasonably practicable after the defendant had become aware of the true facts.

In relation to the republication in *New South Wales Doctor Magazine*, the jury found that the matter complained of w as not innocent in relation to the plaintiff. The basis of that answer was a finding by the jury that the newspaper had not exercised reasonable care in allowing republication of an article upon which a statement of claim had already been issued. The jury awarded the plaintiff in respect of the third article $10,000 damages.

Jillian Anderson is a solicitor in the Sydney Office of Blake Dawson, Waldron. David Casperson is a Sydney barrister.

The Bond amendments

from p7

of licence renewal inquiries and transaction inquiries. It should not be long before the practical implementation by the Tribunal of the amendments contemplated by the Bill will be seen.

In his Second Reading Speech the Minister stated that the Bill "represents the first stage of legislation to reform the operation of broadcasting regulation." We await the "further reforms" which are to be contained in amendments to be introduced in the Autumn and Budget Sittings of Parliament in 1990.

Paul Marx is a Partner with the Sydney Legal firm of Boyd, House and Partners.

The Newspaper Rule

Grant Hattam examines the development of this rule and its recent application in Victoria.

Background

What is told to journalists is not rated in law with the same importance as what is told to priests, doctors or lawyers. The latter three professions have an absolute privilege. They do not have to reveal under any circumstances what has been told to them. Journalists don't have that privilege. What I'm told as a lawyer will never be revealed. A journalist, however, if ordered by a court to do so, must reveal his or her source or face the consequences.

That does not mean, of course, that a journalist will necessarily reveal the identity of the source, even though ordered by a court. He or she may refuse to do so thereby abiding by the journalists' code of ethics. As a result, there can be a conviction for contempt which may mean gaol.

That will only happen if a court in the first place refuses to apply what is known as "the newspaper rule".

Recently, the Supreme Court of Victoria did apply the newspaper rule and refused an application by the Guide Dog Owners and Friends Association (the Lady Nell School) for the journalists who wrote a story in *The Melbourne Herald* to disclose their sources.

Cynics say that the rule has evolved simply because some judges could not bear the adverse publicity of sending journalists to gaol for refusing to divulge their sources until absolutely necessary. In other words, a sort of semi-privilege has been afforded to journalists that has evolved as a matter of practice.

The Conjuangco Case

To understand the Cojuangco case is to understand the newspaper rule.

In an article in *The Sydney Morning Herald*, a man called Cojuangco was allegedly defamed. The article concerned his affairs in the Philippines and the allegation that he was corrupt. He felt sufficiently aggrieved to want to issue proceedings in Australia for defamation. But who could he sue? In New South Wales, there is a statutory defence available to a newspaper. Cojuangco was unlikely to succeed if he sued the newspaper because of this defence.

Therefore, what could he do in order to have his reputation, as he saw it, restored? As the article itself placed great reliance on the sources mentioned in the article for the information relied on, Cojuangco made application that the journalist concerned should reveal his sources. Indeed, the whole article had the striking feature of being based on statements from leading and senior figures. The court, whose ruling was upheld in subsequent appeals, agreed with Cojuangco's application.

The courts significantly found that there is such a thing as "the newspaper rule" which protects journalists from revealing sources. But that rule will not apply if justice demands that it should not.

Justice in the Cojuangco case did make such a demand. The courts felt that he would have been prejudiced without such disclosure. Cojuangco did not have any successful prospects of an action against the paper because of the special defence available to the newspaper. Such a defence, however, was not available to the sources. It was only by having the sources as defendants that Cojuangco could endeavour to restore his reputation. The court made it clear, however, that if he had had a reasonable action against the newspaper the journalist, at least until the trial of the action, would not have to reveal the identity of the source.

The Sydney Morning Herald was faced with the prospect of its journalist having to reveal his sources. It is not surprising that a very logical step then took place, The newspaper simply stated to the court that it would not rely upon the statutory defence. It would simply rely on other defences such as truth. It stopped itself from being in any better position of defending an action than any source would be.

Accordingly, the newspaper rule was applied upon the undertaking by *The Sydney Morning Herald* to abandon its statutory defence and the journalist did not have to disclose his sources. Cojuangco, in other words, was left with an action against *The Sydney Morning Herald* which was in no better position to defend that action that any source would be.

The Lady Nell Case

In the recent Victorian Lady Nell case, the Full Court of the Supreme Court believed that justice would not be denied to the plaintiffs if the newspaper rule was applied. The defendants in that case already had an

existing action against *The Melbourne Herald*. How could justice demand that the plaintiffs know the sources of the information as well? The paper was in no better position to defend the case than any source would be. As a matter of fact, the paper abandoned its defences of qualified privilege and fair comment and simply said that it would rely on the defence of truth. That being so the paper could not be in any better position to defend the action that what any source would be. Further, as the paper was in a position to pay any damages that may be awarded to the plaintiffs in the case it was simply unnecessary to have any sources added as defendants.

The newspaper rule has produced an extraordinarily bizarre situation. If a plaintiff seeks preliminary disclosure of a journalist's source, he will not obtain that order if he has an effective remedy against the newspaper. Where it appears, however, that the newspaper may have a stronger defence than the source, then disclosure may be ordered in favour of the plaintiff in the interest of justice. Accordingly, a court hearing an application for disclosure of a source must take into account the merits of the newspaper's defence. If follows, therefore, that it is in the plaintiff's interest to demonstrate to a court, as far as she/he can, when making an application for disclosure, that she/he does not have an effective right of action against the newspaper. It also follows that it is in the newspaper's interests to demonstrate to a court that the plaintiff already has an effective action against it. It is a curious situation when the parties to an action try to demonstrate the weaknesses of their case to the court. Indeed , if a newspaper defendant's defence is looking better than what the source's defence might be, then the newspaper, as in the Cojuangco case will probably wish to weaken its case by abandoning defences that are not available to the source.

The implications of the rule

The recent Lady Neil decision is indeed important. Imagine if a paper was faced with a source application every time a plaintiff issued a defamation proceeding against it. The newspaper, regardless of the merit of the plaintiff's defamation case, would in many cases feel the pressure not to reveal the source, because to do so would be to breach the undertaking of a journalist. Accordingly, in an effort to resist disclosure, the newspaper may offer money to the plaintiff in order for the plaintiff not to proceed with the application for disclosure of sources. This will be particularly painful and against the public interest because the plaintiff's defamation action may have no merit at all.

Alternatively, the paper could adopt the stance of instructing its journalists to say to sources that, if called upon by a court, they will have to reveal the sources' identity. If this policy was adopted by the newspapers, it could mean an end of news as the public knows it today. Sources would simply dry up. The collection of news , in many cases, involves leaks from unidentified members of parliament, government bureaucracies, major corporations and many different organisations. In many cases, the most terrible wrongs in society might not be brought to the public's attention but the anonymity of the source of the information provided. This is a fact of life. If is, after all, the media which accepts the responsibility and liability for the matters that are published.

The decision in the Lady Neil case does not mean that the newspaper rule will automatically be applied by a court to protect journalists from revealing sources. It does mean, however, that it will be applied unless the plaintiff can demonstrate that his or her case may be prejudiced unless an order for disclosure is made. As Mr Justice Hunt said in the initial Cojuangco decision, the existence of an effective right of action by a plaintiff against a newspaper would seem to him to be a sufficient answer to an application for disclosure. He also said, "It is difficult to see how the pursuit of a merely personal satisfaction could be in the interests of justice". Accordingly, the onus rests upon the plaintiff to demonstrate that justice requires disclosure.

The rule's applications should be extended

It is submitted that the operation of the newspaper rule should be extended to the actual trial of the action itself as well as the pre-trial process. After all, the High Court in Cojuangco stated that the existence of the rule is a factor to be taken into account in the exercise of judicial discretion pursuant to the Supreme Court discovery rules in Victoria and New South Wales. Why not extend the rule to the actual trial?

The same principles that justify the existence of the newspaper rule in the pre-trial process should also justify its existence in the actual trial itself. It is often, after all, the newspaper that suffers by not calling its source at the trial to give evidence.

This, in effect, has been recognised in the United Kingdom through S. 10 of the Contempt of Court Act 1981. That section provides in general terms that no court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established that disclosure is necessary in the interest of justice, national security or for prevention of disorder or crime. It can be seen that the effect of this section is to extend the newspaper rule to the actual trial of the action.

The courts over the last 100 years have carefully weighed the competing principles and have come to the conclusion that the proper flow in dissemination of the information would be significantly hampered if the newspaper rule and the principles which support it were not given significant weight. For these reasons, the newspaper rule should be maintained, strictly enforced and extended.

Grant Hattam is a lawyer in the Melbourne office of Corrs, Solicitors

TELEVISION 2000 - CHOICES AND CHALLENGES

Ros Kelly, Minister for Telecommunications, discusses the government's agenda for reform of the Broadcasting Act

Since coming to this portfolio earlier this year, I have been greatly impressed by two things.

The first is the rapid pace of change in communications. The second is the growing inter-relationship between telecommunications, radiocommunications, and broadcasting.

I see several fundamental questions. What sort of broadcasting system do we want in the year 2000? What will technology permit us to do? What will we be able to afford? What will be the role of government? Will the industry we now know undergo further substantial change?

These questions are important for the government, the public, and the industry.

High definition television

I want to make particular mention of one aspect of technological change - high defini-