loss. (NSWLRC: Report 75 2.10) In proposing a declaration of falsity as an alternative to an action in damages, the Commission acknowledged that such a remedy would address only the first notion of reputation. However, the Commission recommended that plaintiffs choosing declaratory relief should still be entitled – 'for basic reasons of corrective justice' – to recover all economic losses which they can prove are attributable to the defamation. (2.21) Arguably, a court faced with a claim in negligence for publication of untrue, but non-disparaging, material about a plaintiff would decide that both principle and policy dictated that a remedy be available.

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1 Defamation Act 1889 (Qld) s 4(1); Defamation Act 1957 (Tas) s5(1)(b).

2 *Ratcliffe v Evans* [1892] 2 QB 524.

3 It is important to note, however, that the duty asserted by the plaintiff in *Bell-Booth* was a duty to take care not to injure reputation by the publication of *true* statements. Such a duty would clearly interfere with the balance struck by the law of defamation – by way of the defence of justification - between protection of reputation and freedom of speech. In *GS v TCN Channel Nine* the plaintiff is seeking to assert a duty not to cause mental distress by the publication of true statements in breach of a non-publication order.

4 The test set out by Lord Bridge in *Caparo v Dickman* [1990] 2 AC 605. See Swanton and McDonald: *The Reach of the Tort of Negligence* (1997) 71 ALJ 822 where it is suggested that in two recent decisions the Australian High Court has "accepted that the position in Australian law is substantially similar to that in English law as stated by the House of Lords in *Caparo Industries Plc v Dickman*."

5 For a detailed statement of what a defendant must show in order to satisfy the requirement of reasonable conduct under s 22 (1)(c) see *Morgan v John Fairfax* (no 2) (1991) 23 NSWLR 374.

6 In *Bowes v Fehlberg* (Tas SC) (1997) Aust Torts R 81-433, Crawford J held that the law of negligence 'does not recognise a simple duty to publish only accurate statements about other persons although the law did recognise a duty with regard to the publication of statements in some circumstances.'

Telecommunications Access - A View from the ACCC

At a recent ATUG conference the Director of Telecommunications at the ACCC, Rod Shogren, reflected on some of the major issues under the new telecommunications regime. This paper summarises part of that speech

As the ACCC progresses with its administration of the telecommunications provisions of the trade practices act, it recognises that the major concerns in industry are:

- access and interconnect;
- non code access;
- data access service; and
- local service local number portability ("LNP").

There have been calls from persons in the industry for the Commission to "take control" and somehow "sort out" access and interconnect arrangements through inquiry process to put negotiated outcomes in place by the end of the year. The usual concern has been that the ACCC should take "prompt and decisive action" with the implication that somehow the ACCC is not acting as quickly as it could.

It is not correct to say that the ACCC is unwilling to use its powers or that we are "sitting on our hands" as some would have it. It is important to understand what our powers are, and in particular, how our powers for dealing with anti-competitive conduct differ from our powers on access issues.

I would point out that those asking us to act on access issues as anti-competitive conduct are in fact seeking the litigation route. My first response is to ask why anyone would want to involve the courts, with their rigid rules of evidence, and go through the hoops of market definition, market power and proving the elements of substantial lessening of competition, when there is a more manageable process in Part XIC, designed specifically for the purpose. Anyone suggesting that we should immediately issue a competition notice against a carrier for demanding too high an access price is asking for exactly the same process that was followed in New Zealand, for the same conduct.

Let me now deal with the major areas of concern as indicated in my discussions with industry.

ACCESS AND INTERCONNECT

The first one is access and interconnect. By this I refer to PSTN originating and terminating access and the price Telstra charges for it. This is probably the biggest issue and the biggest irritant to service providers, though data access is a similar problem.

First of all, I should address the current state of play. Telstra provided a preliminary, or draft, access undertaking to the Commission. In addition to meeting with them, we very promptly gave them our comments. We also made it very clear that Telstra had an obligation to negotiate on access rights, now.

As everyone knows, Telstra and Optus have been negotiating on interconnect, and I am not surprised that Telstra has not lodged an undertaking with us while those negotiations are continuing. There is no obligation under the Act for them to do so.

It is a little unclear whether service providers are saying that Telstra is refusing to negotiate, in other words refusing to discuss price, or whether the price Telstra is offering is too high. Perhaps from a service provider's point of view it makes little difference. The question for the ACCC is: how can the impasse be resolved?

First, from a procedural point of view, it ought to be obvious that this is an access issue, to be dealt with under Part XIC, and that it is not a Part XIB matter, dealing with anti-competitive conduct. Some may feel it is anti-competitive conduct if Telstra is not negotiating satisfactorily over access and I would agree that it could be anti-competitive conduct if it amounted to a constructive refusal to deal. But there is no way we would want to immediately issue a competition notice to Telstra simply for not offering the price that a service provider wanted. Anyone saying the

ACCC should do so needs to read the *Trade Practices Act* and get sensible.

So, how can the ACCC approach the issue?

First of all, the TAF access code is still not complete, and the TAF needs to move quickly to finalise the code and submit it to the ACCC. Second, even if we had model terms and conditions in a TAF code, the issue of negotiating over prices would remain.

The Commission has played a part by publishing Access Pricing Principles, and if Telstra (and Optus) submit access undertakings, the ACCC will have to assess the undertakings using a public inquiry process. If the undertakings contain proposed price lists, the assessment will inevitably take somewhat longer. Once we approve prices in an undertaking, that would leave very little room for negotiation between access providers and access seekers, but as we have repeatedly said, lodging an undertaking does not remove the obligation to negotiate.

Can the ACCC force parties to enter into meaningful negotiations?

Well, not exactly. Obviously we can't force an access provider to offer a price that an access seeker will agree is acceptable. If an access seeker disagrees with the price offered, ultimately the only place to go is to arbitration. But that is the final step. There are important steps before that.

First, a service provider can seek mediation. That is not a matter in which the ACCC can be actively involved. We have no mediation powers and the matter could come to us at a later date for arbitration. Therefore we would have to remain aloof from the mediation, or risk tainting our subsequent arbitration and thus opening it up to legal challenge. Nevertheless, we do strongly support the use of mediation and the establishment of an industry mediation capacity, for example, through the Australian Communications Industry Forum ("**ACIF**").

So, the questions I would put to access seekers are:

Have you sought mediation?

Are you supporting industry mediation procedures?

Are you asking the ACCC to resolve the issue before even trying industry mediation procedures?

Are you being realistic in claiming that Telstra should have by now given you an acceptable access deal?

OK, suppose attempts at mediation fail; and at this stage I am yet to be convinced they have even been tried.

The ACCC can be called upon to issue a direction to the parties to negotiate in good faith. However, we can only do that after we have been formally notified of a dispute, and no one has done that so far. Doing so potentially puts the dispute on the path to arbitration. Accordingly, I would ask an access seeker whether it was sure that was what it wanted before notifying a dispute. It should be obvious that for such an important step, the procedures in the Act need to be followed. We can't go issuing good faith negotiating directions on the basis of an informal complaint.

In short, I suggest that service providers have a hard think about whether they have done everything possible to negotiate with Telstra, including going through mediation, short of seeking an arbitration from the ACCC. If they have, they could then consider whether to formally notify us of a dispute.

In that case we could, after due process, require good faith negotiations. I note that we have considerable powers to issue procedural directions about parties supplying each other with information. We are more than willing to consider going down that route but we can only do it if we are formally asked. There is no sense in complaining that we haven't done so when we haven't been formally asked.

Having said that, I would note that the ACCC is concerned about an apparent lack of progress in access negotiations. We have made our concerns clear to Telstra and I would welcome the formal lodging of access undertakings. The undertakings would be assessed as expeditiously as possible. Nevertheless, I anticipate the assessment would take more than a few weeks. In the interim, I would hope that negotiations would be proceeding.

It may be that the only way to get some faster progress is by bringing the arbitration provisions of the Act into play. But it would be a shame if that were to occur too early in the new regime and before mediation has really been tested.

DATA ACCESS SERVICES

Another important issue concerns data access services.

Recall that on basic access I said we could not use a competition notice to force negotiations over terms and conditions to take place. The data service area is another access issue. However, the data access area is one where there have perhaps been plausible allegations of anti-competitive conduct and, therefore, where the issue of a competition notice is not out of the question. We are investigating the allegations. However, I trust no one would suggest that we should issue a competition notice without a very careful look at the conduct involved. We owe that to all the parties and to ourselves.

I should add that I would hope it doesn't come to a competition notice.

Access to data services is, of course, also an access issue. And despite the remedies that may be available for anti-competitive conduct, I believe that industry wide problems can only be robustly solved under Part XIC.

A data service has been deemed under the transitional provisions and is therefore a declared service. Standard access obligations therefore apply, but there are limitations on that service, which the TAF is looking at. I expect that data access services will need to be taken up through a public inquiry into further service declaration, where the long term interest of end users test will be applied. In the meantime, we acknowledge the desirability of finding an interim solution if one is available.

CONCLUSION

Non code access (preselection) has also been a troublesome area but I believe satisfactory progress is now being made. Local number portability is also a very important issue. Our recent directions to the ACA, together with the Minister's intervention on terms and conditions, which was arranged in consultation with the ACCC, have provided a relevant framework for handling number portability in both the short and longer term.

Most of the concerns in the industry at present (at least those expressed to us) concern delaying tactics by Telstra in negotiating access arrangements. It is useful to distinguish anti-competitive

conduct from disputes over terms and conditions. Not that these are entirely separate (as I acknowledge that delaying tactics can be anti-competitive). Nevertheless, I believe it is clear that disputes over terms and conditions of access do not lend themselves to speedy resolution through action under Part XIB. Rather, they should ideally be dealt with via the Part XIC processes. If that is correct, then some element of delay is inevitable.

The issue is the price of access to a bottleneck service. There is reason to believe that negotiation of such a price will not be easy. That is why the Parliament has provided for regulatory solutions. But the only way we, the regulator, can set the price is by accepting an access undertaking with prices in it or by arbitrating a dispute. Once an undertaking setting out prices was accepted, it's hard to see there would be much room for negotiation. The obligation to supply would be on such terms and conditions as are set out in the undertaking. In either case (undertaking or arbitration) the process would take some time. Both processes leave the access provider subject to considerable uncertainty. It may be that the desire to avoid this uncertainty is, in the end, the main motivation for reaching a negotiated outcome.

Rod Shogren is Director of Telecommunications at the ACCC.

Media Policy and Anti-Siphoning - Part Two

Joanne Court of FACTS responds to Brendan Moylan's argument in Part 1 of this series (CLB, Vol 16 No 3 1997) that the anti-siphoning provisions of the Broadcasting Services Act 'operate unfairly in favour of free-to-air broadcasters without providing any consequent benefit for consumers'

Brendan Moylan[1] makes much of the alleged 'unfairness'[2] of the current anti-siphoning scheme for pay TV operators but the 'solution' he proposes, for all its superficial attractiveness, would only undermine the central legislative purpose of the scheme. 'Fairness' between competitors must be a subsidiary consideration to the key issue of whether the anti-siphoning provisions[3] effectively ensure continued access to free television coverage of the events judged by the Minster to be events of 'national importance or cultural significance' to Australians. Naturally, self interest is at play in the anti-siphoning debate - on all sides. But ultimately it is only commercial television broadcasters (together with the national broadcasters) that can realise the legislative and public interest objective of the anti-siphoning provisions.

ASSESSING EFFECTIVENESS

According to the Explanatory Memorandum to the *Broadcasting Services Act 1992* ("**BSA**") , the legislative purpose of the anti-siphoning provisions was to 'ensure, on equity grounds, that Australians will continue to have *free access* to important events'. Siphoning was said to be the:

> *'obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally been televised by free-to-air broadcasters,* such that those events could not be received by the public free of charge.' [emphasis added]

The only question relevant to the effectiveness of the anti-siphoning provisions and the need for amendments is whether they have ensured continued free access by the Australian public to the events - all sporting events- specified in the section 115 anti-siphoning list ("listed events"). The essence of Moylan's argument is that while the current regime has prevented the siphoning of listed events by pay TV operators, free access to those events has not been delivered by free-to-air television services :

> *'The section 115 list contains many events which are not actually seen on free-to-air-television, and additionally, free-to-air television can only broadcast a fraction of these events.'*[4]

The real effect of the anti-siphoning provisions, according to Moylan, is to hand control of pay TV rights to listed events to free-to-air television, thereby preventing the 'realisation of the potential of pay TV to provide more complete coverage of listed events'.[5]

The proposed pay TV 'solution' is twofold; removing a number of events from the list, and an amendment to the BSA which would permit pay TV operators to acquire the exclusive pay TV rights to listed events.[6]

But this 'solution' is no solution; it is a Trojan horse.

THE COMMERCIAL CONTEXT

There can be no doubt that pay TV operators would be keen to convert major sporting competitions to pay TV-only events. Live, commercial free (and often exclusive) coverage of major sporting events is a major driver of subscriptions in major pay TV markets worldwide. BSkyB's success in using the Premier League as a subscription-driver in the United Kingdom is the obvious example. For pay TV, sporting coverage is entirely about attracting and retaining subscribers. Any advertising revenue will be entirely incidental. Particularly in the early roll-out years, the acquisition or creation[7] of major sporting events for high non-recoupable fees can be commercially justified as a loss-leader strategy for pay TV.

In contrast, a commercial television network will generally acquire and schedule major sporting events, if they generate enough advertising revenue to pay their way, regardless of any 'branding' value such events may have.

Sport programming is commercially attractive because of the substantial male audience it attracts, and the advertiser and sponsor interest in that audience. Most sport is scheduled outside prime-time hours and, significantly, is very expensive compared to other kinds of programming