Recent Cases

A roundup of recent cases from Australia and New Zealand

Freedom of communication

On 30 September 1992,the High Court handed down its reasons for holding that the *Political Broadcast and Political Disclosures Act* was invalid. The Act amended the *Broadcasting Act* by imposing a ban on political advertising during elections on television and radio, and forcing television stations to provide free advertising for political parties during elections. The decision, together with the *Nationwide News* case (see below), has been celebrated as a watershed in Australian constitutional history.

A majority of the High Court held that freedom of communication is essential to the system of representative government as provided for in the Constitution and therefore is necessarily implied in the Constitution. However, one judge declined to recognise the existence of an implied freedom of communication in the Constitution. Significantly, all of the judges who found it to be an implied freedom held that it was not an absolute freedom and that it would be at times necessary to weigh the competing public interests, one of which would be the public interest in freedom of communication.

Only one of the judges was prepared to go so far as to say that representative parliamentary democracy, as embodied in the Constitution, implies a fundamental right to freedom of speech.

In relation to section 92, the Court held that a law which incidentally restricts movement across State borders will not offend section 92 so long as the means adopted to achieve the real object of the law are neither inappropriate nor disproportionate. The main object of the Act was not to restrict broadcasting across State borders, this was only incidental, and therefore the Act did not offend section 92.

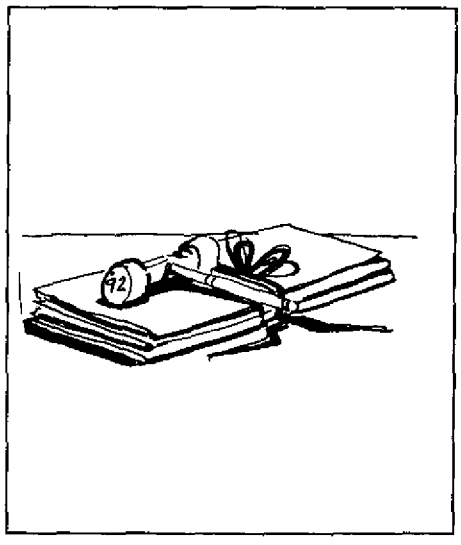
Significantly, the Court held that the advertising time which broadcasters were required to make available to political parties did not involve an acquisition of property. This aspect of the decision has potentially adverse consequences should any Government seek to enact legislation regulating advertising.

Disclosure of Journalists' Sources

In *Bacich v Australian Broadcasting Corporation* Mr Justice Brownie of the NSW Supreme Court made orders that the ABC and two of its journalists be examined in court as to the identity or description of their sources who supplied them with relevant information or documents about the plaintiffs. Orders also were made for the production of those documents which revealed the identity or description of the sources.

The ABC had telecast a program in relation to the affairs of the Bacichs' company which had previously been investigated by the Federal Police, the Health Insurance Commission and the ASC. The ABC's reporters made the details of some of those inquiries public. The plaintiffs claimed the entitlement to bring proceedings against some person or persons who they were not able to identify, in order to protect the confidentiality of certain information.

The ABC and its employees conceded that the "newspaper rule" did not apply but submitted that the Court had the discretion not to make an order for preliminary discovery. The Court held that there was a confidentiality attaching to the relevant documents and information, and that that confidentiality was breached by the wrongful conduct of the ABC and its employees. The ABC and its employees failed to establish the defence of iniquity, and so the orders were made. The proceedings have since been settled.



Fair Dealing with a Video in News Reporting

On 19 August 1992 Mr Justice White of the Supreme Court of Queensland declined to dissolve injunctions restraining television stations from broadcasting or publishing video tapes of interviews between doctors and a "vampire" murderer.

The plaintiff was convicted of murder in a case which achieved considerable notoriety in the press as a "vampire" murder. The plaintiff's public defender authorised the making of video tapes of hypnotic sessions which were conducted by a psychiatrist and a psychologist with the plaintiff, to assist in the preparation of her defence. The copyright in those tapes vested in the State of Queensland as employer of the makers of the tapes and so the State of Queensland was also plaintiff in a separate action heard with the first. The defendants were a number of television stations who sought the dissolution of injunctions granted to restrain the broadcasting or publishing of the video tapes.

The defendants submitted that the proposed use of the tapes in an upcoming television program would constitute "fair dealing" of the tape within the meaning of the *Copyright Act*. It was common ground between the parties that the playing of the tapes was an infringement of the copyright, but that it was a good defence if there has been "fair dealing" of the video tape, as defined in the *Copyright Act*. The broadcasters argued that if a reasonable defence of fair dealing was made out, then the injunction ought to be dissolved. It was submitted that the fair dealing occurred when the tapes were played before the Mental Health Tribunal.

However, the Court held that the tapes were sufficiently unpublished and that their content had not yet passed into the public domain. Therefore, the broadcasters failed to establish the defence of fair dealing.

ABT Licensing Decisions

In its last week in September 1992, the ABT handed down a number of licence decisions. These included the grant of supplementary radio licences in Cairns, Bundaberg and Albury-Wodonga. There were no appeals against these decisions. The Tribunal decided to refer an inquiry into the granting of a commercial radio licence to serve Darwin to the ABA, which commenced operation on 5 October 1992.

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Contempt of Court

The NSW Court of Appeal recently handed down two decisions finding that 2UE Sydney Pty Ltd and Mr Alan Jones had committed contempt of court. The first two proceedings related to two separate broadcasts which were said to amount to contempt of court for the broadcasting of matter which was likely or calculated or had a tendency to interfere with the administration of justice in connection with the trial of a Mr Killen. The New South Wales Court of Appeal held that Mr Jones had been unaware of the pendency of the trial. However, it considered that contempt of court is committed when publication creates a real risk of interference with the administration of justice, regardless of a lack of intention. On the evidence it was held that both broadcasts created a real risk of interference with the administration of justice and therefore were in contempt of court.

Review of Ad Time Standard

On 30 September 1992, Mr Justice French of the Federal Court dismissed applications by the Seven and Nine Television Networks seeking judicial review of the ABT's decision to make a television program standard imposing advertising restrictions.

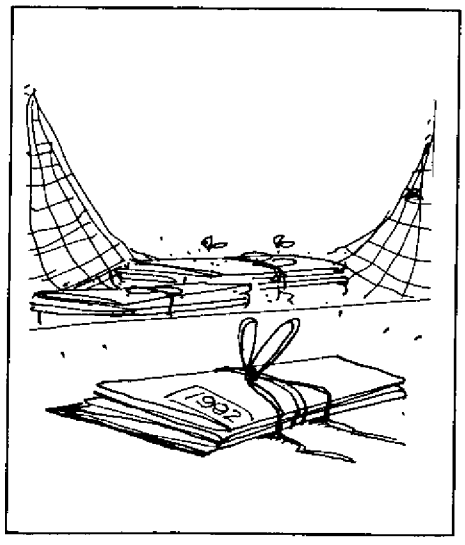
The applicants alleged that the Tribunal's published reasons of its decision in introducing the standard were inadequate and incomplete and in breach of the Tribunal's statutory duty to give reasons for its decision. In particular, they submitted that the Tribunal failed to properly consider the financial impact of the standard on commercial television licensees. They also contended that there were elements of irrationality and unreasonableness in the decision, and that the Tribunal failed to observe procedural fairness as required by the rules of natural justice. Various factual findings of the Tribunal were also attacked on the basis that they reflected or constituted a failure to take into account relevant considerations or the taking into account of irrelevant considerations.

Mr Justice French found that the Tribunal had discharged its duty of carrying out a thorough investigation of all matters relevant to the inquiry, as well as its duty to consult with representatives of the licensees. He also held that the Tribunal demonstrated a rational basis for its conclusions even though they involved elements of evaluative and normative judgment. He regarded the reasons for the decision published by the Tribunal to be sufficient and certain. He concluded that the applicants sought to attack the Tribunal's decision on an essentially factual basis. Further, they could not succeed without involving the Court in a process of review on the merits of the findings of a specialist Tribunal in areas in which the Tribunal has the relevant expertise. The applications were dismissed.

The Nationwide News Case

On 28 August 1992, the Full High Court of Australia made orders in relation to section 299(1)(d)(ii) of the *Industrial Relations Act 1988*, and held that it was constitutionally invalid. The section provides that it is an offence to use, by writing or speech, "words calculated...to bring a member of the Commission or the Commission into disrepute, however justified and true".

The applicant, Nationwide News Pty Limited, is the proprietor and publisher of The Australian newspaper. An article published by it contained *"a virulent attack on the integrity and independence of the Arbitration Commission and its members"*. This was argued to be a reference to the Australian Industrial Relations Commission and its members under the present Act.



Several judges considered the existence of an implied guarantee of freedom of communication in the Constitution. Brennan J considered that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege. It is inherent in the idea of a representative democracy. He held that no law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose. Therefore, the right of freedom of speech may be constrained to the extent necessary to protect other legitimate interests. However, it could not substantially impair the capacity of, or opportunity for, Australian people to form the political judgments required for the exercise of their constitutional function. Mr Justice Brennan considered that the balancing of the protection of other interests (such as the interests of justice, personal reputation or the community's sense of decency) against the freedom to discuss governments and political matters is, under the Constitution, a matter for the Parliament to determine and for the Courts to supervise.

Mr Justices Deane and Toohey also discussed the implication of freedom of communication in the Constitution. They held that, in the Constitution, which incorporates the doctrine of representative government, there can be found an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealths.

They held that a prohibition on the communication of well-founded and relevant criticism of a governmental instrumentality or tribunal cannot be justified as being in the public interest merely because it is calculated to bring the instrumentality or tribunal or its members into disrepute. Rather, if the criticism is well founded and relevant, the publication should be supported rather than suppressed.

Madam Justice Gaudron also considered that the representative parliamentary democracy embodied in the Constitution does not authorise laws which impair or curtail freedom of political discourse, although she said that that freedom is not an absolute one.

This case, together with the freedom of communication case, has been hailed as a major development of Australian constitutional law. A fuller analysis of the freedom of communication case appears at page 16.

This edition of Recent Cases was prepared by Gillian Saville, a solicitor of Blake Dawson Waldron. Contributions to Recent Cases may be submitted to the Editor.