

## Court Stems Tide of Futile 'King Canute' Order

Sophie Dawson, Ben Teeger & Tanvi Mehta take a look at a recent decision by the Supreme Court of New South Wales (Court of Criminal Appeal) which set aside a 'King Canute' order made in relation to criminal proceedings involving Fadi Ibrahim, Michael Ibrahim, and Rodney Atkinson.

This article considers the necessity and effectiveness of such orders, as well as implications for internet content hosts and search engine operators.

### In brief

On 13 June 2012, his Honour Chief Justice Bathurst and their Honours Justices Basten and Whealy of the Supreme Court of New South Wales (Court of Criminal Appeal) (**Court**), unanimously set aside a suppression order made by the District Court of New South Wales on 26 March 2012 (**Order**) on the ground that it was made beyond the power conferred by the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (**Act**).<sup>1</sup>

The decision sheds light on how Courts are likely to interpret the requirement that a suppression or non-publication order directed towards an internet content host or search engine operator (a so-called 'King Canute' order) is 'necessary to prevent prejudice to the proper administration of justice' under section 8 of the Act.

### Scope of order

The Order was made by his Honour Judge Bennett SC of the District Court in the context of criminal proceedings involving Fadi Ibrahim, Michael Ibrahim and Rodney Atkinson (the **Accused**).

The Order sought to prevent the disclosure and publication of material which contained references to other criminal proceedings in which the Accused are or were parties or witnesses, and other alleged unlawful conduct in respect of which the Accused are or were suspected to be complicit in or to have knowledge. The purpose of the Order was to prevent jurors in the criminal proceedings from accessing such material.

The appeal to the Court to set aside the Order was made by eight media companies operating in Australia (six of which operate web sites), including Fairfax, News, the Australian Broadcasting Corporation, Yahoo!7, Seven Network and Ninemsn.

### Whether order 'necessary' to prevent prejudice to administration of justice

The Court set aside the Order on the ground that it was not 'necessary to prevent prejudice to the proper administration of justice' as required by section 8(1)(a) of the Act.

In determining the meaning to be given to the term 'necessary' under the Act, the Court distinguished between orders which constrain the publication of material which:

- is disclosed in court proceedings, a suppression order in relation to which involves a constraint upon the principle of open justice and impinges the media's ability to publish what happens at trial; and

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August 2012

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<sup>1</sup> *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125.

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- has no connection with court proceedings except its capacity to affect current or future proceedings, a suppression order in relation to which does *not* involve a constraint upon the principle of open justice or impinge the media's ability to publish what happens at trial.

## Notwithstanding its adoption of the broad interpretation of the term 'necessary' referred to above, the Court held that a suppression or non-publication order will fail the necessity test if it is 'futile' or 'ineffective'.<sup>11</sup>

The Court held that where an order seeks to constrain the disclosure or publication of material falling within the second category above, the term 'necessary' is to be construed broadly, such that an order is necessary 'so long as it is reasonably appropriate and adapted to achieve its perceived purpose'.<sup>2</sup> The Court stated that although it is not sufficient for the order to be 'merely reasonable or sensible, the word "necessary" should not be given a narrow construction'.<sup>3</sup> In doing so, the Court followed its previous authority in *R v Perish*<sup>4</sup> and *R v Debs*<sup>5</sup>, which can be contrasted with the decisions of the High Court of Australia and Supreme Court of Victoria (Court of Appeal) in *Hogan v Australian Crime Commission*<sup>6</sup> and *Digital News Media Pty Ltd v Mokbel*<sup>7</sup>, respectively.

In contrast, where an order falls into the first category, it appears that the Court would adopt a narrower interpretation of 'necessary'.

### Publication of internet material

Interestingly, the Court held that for the purposes of the Act publication of material on the internet is of a 'continuing' nature, that is access is being provided to the public for so long as the material is available on the internet.<sup>8</sup> In doing so, the Court adopted the High Court of Australia's test for publication in the context of defamation, namely that material on the internet is deemed to be published each and every time, and in each place, it is downloaded.<sup>9</sup>

This approach is in contrast to that taken by the Supreme Court of Victoria in *Mokbel*, in which it was held that the test of publication for contempt purposes differs to that for defamation, such that for the purpose of contempt proceedings publication occurs when and where the material is made available to a juror or potential juror 'whether it be shown that the person accessed it or not'.<sup>10</sup>

### Futility and ineffectiveness of order

Notwithstanding its adoption of the broad interpretation of the term 'necessary' referred to above, the Court held that a suppression or non-publication order will fail the necessity test if it is 'futile' or 'ineffective'.<sup>11</sup>

In determining that the Order was not 'necessary', the Court considered that such an order would be futile as it was directed to parties who were not before the District Court, some of whom were dif-

<sup>2</sup> Ibid [51].

<sup>3</sup> Ibid [8].

<sup>4</sup> *R v Perish* [2011] NSWSC 1102.

<sup>5</sup> *R v Debs* [2011] NSWSC 1248.

<sup>6</sup> *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

<sup>7</sup> *Digital News Media Pty Ltd v Mokbel* [2010] VSCA 51.

<sup>8</sup> *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [43].

<sup>9</sup> See: *Dow Jones v Gutnick* (2002) 210 CLR 575.

<sup>10</sup> *Digital News Media Pty Ltd v Mokbel* [2010] VSCA 51 at [76].

<sup>11</sup> *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [74] and [76].

Interestingly, the Court held that for the purposes of the Act publication of material on the internet is of a 'continuing' nature, that is access is being provided to the public for so long as the material is available on the internet.<sup>8</sup>

difficult to identify and did not reside or operate in NSW (for example, persons operating web sites and search engines around the world). Basten JA stated:

*As a matter of principle, to make the orders effective, material must either be removed from any web site globally to which access can be had from New South Wales or there must be an ability to prevent access by people living in New South Wales. The evidence did not disclose that either of these was a realistic possibility.<sup>12</sup>*

The Court also held that it would be difficult to give proper notice of a suppression order, as is required under the Act, to an internet content host or search engine operator in another country and that such an order would be impracticable to enforce (particularly given that the relevant material could remain cached on innumerable web sites even when removed from the original web site to which it was uploaded). On this point, Basten JA stated:

*...the fact that it is not possible to control material on servers outside Australia demonstrates the limited value of an order seeking to control availability on servers inside the country... Given the efficiency of modern search engines, limiting the number of sources, without removing them all, is likely to be ineffective.<sup>13</sup>*

The Court made a number of other observations, including that:

- the Act does not empower a trial judge to make a pre-emptory order requiring private individuals or other entities unconnected with the administration of justice to remove material from potential access by a juror;
- an order will not necessarily be futile because material is otherwise available in cached form even after it is removed from the source page;
- an order preventing public access to existing material (including a publication on a website) clearly falls within the scope of the Act;
- the fact that a search reveals thousands of 'hits' does not of itself mean that the offending material is able to be located easily, as it will be necessary to refer to items which have been given priority in the search results; and
- the test of necessity can only be satisfied if proper consideration is given to whether a jury is likely to abide by the directions it will be given to decide a matter only by reference to the material called in evidence, and without carrying out investigations themselves.

In addition, the Court noted that the Order was ineffective because it was worded too broadly. This is because the Order sought to prevent access to the material in all States and Territories in Australia, as opposed to only the jurisdiction in which the proceedings were taking place (in this case, NSW).

## Constitutional validity of Act

The Court rejected Fairfax's argument that the Act, to the extent it empowered the order, was inconsistent with the *Broadcasting Services Act 1992* (Cth) (**BSA**) and therefore inoperative pursuant to section 109 of the *Australian Constitution*.

Under clause 91 of Schedule 5 of the BSA, internet service providers and internet content hosts (including search engines) may be protected from liability in relation to contravening material, in respect of which they have not been notified or are not aware.

The Court held that an order directed to an internet content host relating to material of which it had been made aware (assuming a Court is satisfied that the material has the tendency to prejudice the fairness of forthcoming proceedings) is not inconsistent with the Act. However, the Act does not give the Court power to make an order addressed to the world at large which, for example, covers material on internet sites of which the host is unaware.

## Other observations

In addition to setting aside the Order, the Court noted that any continued or further publication of material having a tendency to interfere with the administration of justice in respect of the criminal proceedings may constitute a contempt of court.

**The Court rejected Fairfax's argument that the Act, to the extent it empowered the order, was inconsistent with the *Broadcasting Services Act 1992* (Cth) (BSA) and therefore inoperative pursuant to section 109 of the *Australian Constitution*.**

## Implications

- A suppression or non-publication order will be less readily granted in order to prevent the publication of material disclosed in court proceedings (as opposed to material which has no connection with court proceedings except its capacity to affect current or future proceedings).
- It is likely that a suppression or non-publication order will be ineffective or futile (and therefore not 'necessary' under the Act) in circumstances where it is difficult to identify the publisher of online material (for example, where a publisher is not located or does not operate in the jurisdiction) and/or impracticable to enforce the order.
- In light of the decision, it will be interesting to see whether the Commonwealth Senate passes the Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth) which seeks to define the word 'publication' broadly so as to apply to the provision of access to material on the internet.

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<sup>12</sup> Ibid [79].

<sup>13</sup> Ibid [74].

# Senate Committee Gives a Free Kick to Anti-siphoning Reform

Victoria Wark and Maryann Muggleston provide an update on the status of anti-siphoning reforms.

The Senate is poised to continue debate on the *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* (the **Bill**) after the Senate Environment and Communications Legislation Committee recently recommended that the Bill be passed. If enacted, the Bill will overhaul the current anti-siphoning regime and will have significant consequences for broadcasters, rights-owners, and content providers of major sporting events in Australia.

## A feature of the proposed anti-siphoning regime is the widespread recourse to Ministerial determination exercised by way of legislative instrument

The key proposed changes that will impact industry players include:

- the recurrent recourse to Ministerial determinations which creates a regime that is uncertain. Together, these Ministerial powers give the Government greater control over the scheduling and televising of sporting events;
- the extension of the anti-siphoning regime to content service providers which will impact negotiations for exclusive, online sports content;
- the revision of the 'anti-hoarding' coverage obligations in the form of the 'must offer' rules and the extension of the 'must offer' rules to all anti-siphoning events. These changes, as stated in the Explanatory Memorandum, intend to provide 'every opportunity for full coverage with a preference for free-to-air.' They may, however, affect competitive bidding processes for broadcast rights. The practical operation of the 'must offer' rules will also be dependent on the commercial arrangements between rights holders and broadcasters or program suppliers; and
- the introduction of notification requirements for free-to-air broadcasters and program suppliers which will enable the ACMA to monitor compliance with the new regime.

### Background

In November 2010 the Minister for Broadband, Communications and the Digital Economy (the **Minister**) announced major changes to the current anti-siphoning regime in the *Broadcasting Services Act 1992* (Cth) (the **BSA**). Shortly after, the Minister published a

revised anti-siphoning list, the *Broadcasting Services (Events) Notice (No. 1) 2010* (the **List**) which revoked and remade the previous anti-siphoning list which had been in operation since 2004.

Since December 2010 the List has been amended 23 times to remove certain sporting events and enable free-to-air broadcasters the opportunity to premiere such events on their digital multi-channels. Following widespread industry consultation, the Government introduced the highly anticipated *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* into the Senate in March 2012. The Bill was immediately referred to the Senate Environment and Communications Legislation Committee (the **Senate Committee**) which issued its report in May 2012. Subject to two modifications, the Senate Committee recommended that the Bill be passed.

The Explanatory Memorandum to the Bill makes clear that the 'general purpose of the Bill is to ensure that opportunities for free-to-air television coverage of anti-siphoning events are maximised... by [among other things] restricting the acquisition of rights to televise anti-siphoning events by subscription television licensees'.<sup>1</sup> This reflects a similar aim of the current regime, that is, to ensure that 'events of national importance and cultural significance... be received by the public free of charge'.<sup>2</sup> However, the Bill extends the complexity and reach of the current anti-siphoning regime. The key features and impacts of the Bill are outlined below.

### Increase in Ministerial discretion

A feature of the proposed anti-siphoning regime is the widespread recourse to Ministerial determination exercised by way of legislative instrument. While the new determinations will ultimately be subject to disallowance in Parliament, the Minister's powers, as currently provided for in the Bill, are unfettered.<sup>3</sup> The Minister's extensive powers include the power to determine:

- what events 'should be available free to the general public' as either a Tier A or Tier B anti-siphoning event.<sup>4</sup> Tier A events will include events of apparent national or international significance (such as the Melbourne Cup and AFL and NRL Grand Finals), while Tier B events will include domestic and international events of less significance, but still worthy of being available to the general public (such as the NRL State of Origin Series and the Olympic Games).<sup>5</sup> Tier A events must be televised with no delay or as short a delay as technically possible, while Tier B events must be televised with either no delay, a delay that is less than 4 hours as specified by the Minister (but not in the case of AFL matches) or a delay of not more than four hours.<sup>6</sup>
- that certain Tier B events of lengthy duration and involving multiple simultaneously occurring contests (such as the Australian Open tennis championships or Commonwealth

1 Explanatory Memorandum, *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* (Cth), page 3.

2 Explanatory Memorandum, *Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992* (Cth).

3 See for example the following sections of the *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* (Cth): section 115E(3) (the power to declare exemptions from interim notification requirements); section 145D(3) (the power to declare that the anti-siphoning provisions do not apply to a part of an anti-siphoning event); and section 145ZM(3) (the power to exempt an anti-siphoning event from the requirement to be broadcast on a core channel).

4 *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* (Cth), section 145E.

5 Above note 1, page 14.

6 Above note 3, sections 145B and 145H.

## the Minister also retains the discretion to declare that an event continues to be an anti-siphoning event if the Minister is satisfied that a commercial television broadcasting licensee or a national broadcaster has not had a reasonable opportunity to acquire the right to televise the event.<sup>14</sup>

Games) are to be a 'designated group' and subject to a total and daily minimum number of hours of television coverage as well as a 24 hour period in which the free-to-air broadcaster must televise the event.<sup>7</sup> Designated group events must be broadcast with no delay or with a delayed starting time of not more than 24 hours.<sup>8</sup>

- that specific Tier B events, limited at this stage to certain AFL and NRL matches, comprise a 'quota group'. Category A quota groups will be subject to a quota number determined by the Minister. That number constitutes the number of games per round that must be shown of that competition on free-to-air television. The quota number for each round cannot exceed the total number of anti-siphoning events in that quota group or the applicable cap of 4 AFL games per round and 3 NRL games per round.<sup>9</sup> Category B quota groups will be subject to a series of 'associated set conditions' (for example, that one event take place on a Friday night) as well as a quota number. The conditions (which may be 'contingent' and disregarded if the quota number and associated conditions are met) are intended to help assign an event to count towards meeting the quota number.<sup>10</sup> Quota group determinations will only apply to those rights acquired after the registration of the determination on the Register of Legislative Instruments.<sup>11</sup>
- that a free-to-air broadcaster is unconditionally or conditionally exempt from a new requirement to broadcast Tier A anti-siphoning events on its core channel.<sup>12</sup> This power means that the Minister could permit a free-to-air broadcaster to televise an event of national or international significance exclusively on one of its multi-channels (and potentially broadcast more valuable content on its primary channel) without breaching the coverage obligations of the new regime.
- that, for 'the home and away' matches in the AFL and NRL Premiership seasons, the automatic delisting period of 26 weeks (itself extended from 12 weeks under the previous regime) should be extended to up to 52 weeks.<sup>13</sup> However, under the new regime the Minister also retains the discretion to declare that an event continues to be an anti-siphoning event if the Minister is satisfied that a commercial television broadcasting licensee or a national broadcaster has not had

a reasonable opportunity to acquire the right to televise the event.<sup>14</sup>

### Impact of the increase in Ministerial discretion

Together these powers give the Government greater control over the scheduling and televising of sporting events. For example, the proposed quota mechanism means that the Government will have the ability to determine what constitutes a 'quality' AFL or NRL match to be broadcast on free-to-air television and not the sporting body who conducts the competition. The number and breadth of these powers potentially creates an uncertain environment in which to negotiate and implement sports rights arrangements. For example, while it is the intention of the Government to list events such as the Olympic Games as 'designated group' events and while the Bill requires the Minister to 'take all reasonable steps' to ensure that NRL and AFL Premiership matches are listed in a quota group, there is no guarantee that such sports will be so determined by the Minister.<sup>15</sup> Indeed, the Senate Committee acknowledged that 'ministerial discretion to make determinations under the Bill introduces uncertainty'.<sup>16</sup> The complexity and uncertainty which flows from an undefined legal setting where no meaningful limitations on Ministerial intervention exist as well as the increased compliance costs borne of the risk of government intervention may affect the competitive bidding process for broadcast rights.

While the Senate Committee noted stakeholder concern about the nature and scope of the Ministerial discretions in the new regime, the Committee concluded that no moderation of these discretions was required and that the Bill should proceed through Parliament largely unamended. Further, the Committee acknowledged the flexibility that the new regime affords rights holders and broadcasters as well as welcomed the Government's intention to involve stakeholders in the development of the legislative instruments referred to in the Bill.<sup>17</sup>

### Extension of the regime to content service providers

The Bill also extends the reach of the anti-siphoning regime to content service providers, including IPTV.<sup>18</sup> Under the proposed legislation, a person is prohibited from conferring on a content service provider the right to provide live, exclusive coverage of anti-

**The complexity and uncertainty which flows from an undefined legal setting where no meaningful limitations on Ministerial intervention exist as well as the increased compliance costs borne of the risk of government intervention may affect the competitive bidding process for broadcast rights.**

7 Above note 3, section 145F.

8 Above note 3, sections 145B(2) and 145H.

9 Above note 1, page 21.

10 Above note 1, page 23.

11 Above note 3, section 145G(6).

12 Above note 3, section 145ZM.

13 Above note 3, section 145E(6)(b)-(d).

14 Above note 3, section 145E(6)(f)-(g).

15 Above note 3, section 145G(9) – (10).

16 Above note 8, paragraph 2.53.

17 Above note 8, paragraphs 2.49- 2.54.

18 Defined to have the same meaning as under Schedule 7 of the *Broadcasting Services Act 1992* (Cth).

## The Bill also extends the reach of the anti-siphoning regime to content service providers, including IPTV.

siphoning events which occur in Australia via a content service to end-users in Australia.<sup>19</sup> This restriction only applies to acquisitions of exclusive coverage rights by content providers and will not apply where a national broadcaster or a commercial television broadcasting licensee has acquired the right. It will also not apply to body corporates (such as sporting bodies) which confer such rights on wholly owned subsidiaries.<sup>20</sup>

### Introduction of the 'Must Offer' obligations

Another important feature of the new regime is the revision of the 'anti-hoarding' coverage obligations for free-to-air broadcasters. Under the current anti-siphoning scheme, the Minister determines which anti-siphoning events will be subject to the anti-hoarding regime. By contrast, the Bill proposes that *all* anti-siphoning events will automatically be subject to the 'must offer' obligations. The proposed 'must offer' obligations will operate as an exception to the coverage obligation of free-to-air broadcasters. The exception will apply if commercial television broadcasting licensees, national broadcasters or their program suppliers have offered to transfer the right to televise the event to other commercial television broadcasting licensees, national broadcasters, or their program suppliers 120 days before the start of the event.<sup>21</sup> If this offer is not accepted, the free-to-air broadcasters or their program suppliers must offer to transfer the right to televise the event to each subscription television broadcasting licensee 90 days before the start of the event.<sup>22</sup> The offer to subscription television broadcasting licensees must remain open until immediately before the start of the event. In all cases, offers must be made for nominal consideration of \$1.

The stated intention of the 'must offer' regime is to prevent 'unwanted rights lying fallow and provides every opportunity for full coverage with a preference for free-to-air'.<sup>23</sup> However, the operation of the 'must offer' regime is dependent upon the nature of the rights held by free-to-air broadcasters and program suppliers. For example, as noted in the Explanatory Memorandum to the Bill, if a rights deal prevents free-to-air broadcasters or program suppliers from assigning or sub-licensing their rights, the 'must offer' rules will have no practical application.<sup>24</sup>

### Introduction of notification requirements

Finally, the new regime also introduces notification requirements for free-to-air broadcasters and program suppliers which would replace the interim notification requirements discussed below. Under the new regime, commercial television licensees, national broadcasters and program suppliers must notify the ACMA within 10 business days after they acquire or cease to hold the right to televise live an anti-siphoning event.<sup>25</sup> Compliance with these requirements would be a condition of a commercial television

broadcasting licence, while for program suppliers, the notification provisions would be civil penalty provisions. The Senate Committee has recommended that the Bill be amended to enable broadcasters to notify the ACMA of the expiration date of broadcast rights at the time those rights are acquired and/or upon any change to that date.<sup>26</sup>

### Review mechanism

The Bill retains a provision under which the anti-siphoning regime must be reviewed before 31 December 2014. Although the recent Convergence Review did not specifically consider the anti-siphoning regime, the final report did recommend a full review of the anti-siphoning scheme within five years.

### Commencement

The Bill is subject to a complex commencement regime. The coverage obligations (and the corresponding 'must offer' rules) will not apply to rights acquired between 25 November 2010 and the commencement date of the legislation if the event is scheduled to start 150 days (or more) after that commencement date.<sup>27</sup> In addition, the 2012-2016 AFL Premiership competition (with the exception of the grand finals of those years which will be listed as Tier A events) will not be the subject of the anti-siphoning regime.<sup>28</sup> Further, NRL Premiership matches (other than finals) may only be designated Tier B events by the Minister from 1 January 2013.<sup>29</sup> Within 10 days after the Bill receives Royal Assent, commercial television broadcasting licensees and national broadcasters must notify the ACMA of the rights (and their attributes) that they currently hold.<sup>30</sup>

**if a rights deal prevents free-to-air broadcasters or program suppliers from assigning or sub-licensing their rights, the 'must offer' rules will have no practical application.<sup>24</sup>**

### Next steps

In its current form, the Bill proposes significant and complex changes to the current anti-siphoning regime that will impact industry participants. At this stage, it is not clear whether the Government will formally respond to the Senate Committee's recommended (minor) amendments to the Bill or move the Bill in its current or an amended form through to the House of Representatives. The approach of the cross benchers and Opposition in relation to the Bill is unknown.

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19 Above note 3, section 145ZO.

20 Above note 3, section 145ZO(6).

21 Above note 3, sections 145H(3)(a), 145J(3)(a), 145N(3)(a), 145P(3)(a), 145L and 145R.

22 Above note 3, sections 145H(3)(b), 145J(3)(b), 145N(3)(b), 145P(3)(b), 145M and 145S.

23 Second reading speech for the Broadcasting Services Amendment (Anti-siphoning) Bill 2012, Senator Jacinta Collins (22 March 2012) page 2571.

24 Above note 1, page 29.

25 Above note 3, sections 145ZQ - 145ZU.

26 Above note 8, Recommendation 2, paragraph 2.48

27 Above note 3, item 28(1) and (2).

28 Above note 3, item 28(5); above note 1 page 49.

29 Above note 3, section 145G(10).

30 Above note 3, sections 115B(1) and 115C(1). This requirement will extend to Program Suppliers on the commencement of sections 145ZR and 145ZT.

# Copyright Issues in a Converging Media Environment

John Fairbairn examines the impact of media convergence on copyright law and considers some options for reform.

## Introduction

On 29 June 2012, the Attorney General released the much anticipated final Terms of Reference for the Australian Law Reform Commission (**ALRC**) inquiry into the operation of copyright exceptions in the digital environment.

The inquiry, which will not be completed until 2013, follows the Convergence Review, which proposed changes to Australia's media and communications regulation in response to 'the convergence of older technologies such as television with the internet'.<sup>1</sup> Copyright was not the focus of the Convergence Review and, other than in references to retransmission, was not mentioned in the Final Report issued in March 2012.

This is unfortunate because, as has been exposed in two recent Federal Court disputes,<sup>2</sup> many of the so called 'broken concepts' that are the focus of potential communications and media law reform are also embedded in the *Copyright Act 1968* (Cth) (**Copyright Act**). Copyright is also critical to a number of the principles of the Convergence Review. For example, Principle 8 provides that 'Australians should have access to the broadest possible range of content across platforms, services and devices'. This cannot be achieved without considering copyright as it has a direct effect on the ability to exploit and protect content across different platforms. On the one hand, copyright provides the legal means of commercialising that content and, on the other, it can create significant barriers to entry and innovation.

This paper seeks to assemble some of the copyright law issues created by developments in content delivery and analyse them from a perspective of technological neutrality. While it is not taken as a given that technological neutrality should be an overriding consideration in copyright reform, it is an approach that can address a number of anomalies arising from media convergence.

## Convergence

While there is understandably a lot of interest in media convergence at the business level, this paper is focused on technological convergence. Developments in content formats, telecommunications networks and devices means that any form of content (whether print, music, film or broadcast) can be accessed in many different ways, cutting across traditional vertical, sector specific distribution channels. By way of example, the Australian public can enjoy an audio visual program by watching:

- (a) a broadcast of it over broadcasting services bands (**BSB**), via satellite or cable networks received by a television or set top unit;
- (b) a recording of the broadcast made on a personal video recorder (eg. using TiVo or iQ);
- (c) an on-demand stream via a subscription network, website, mobile portal or App (eg. FOXTEL On Demand, ABC iView or Apple TV);
- (d) a download of the program (temporary or permanent) (eg. using iTunes);

- (e) a live or simulcast stream via a website, mobile portal or App (eg. ABC live on Optus' Mobile TV);
- (f) a recording of the broadcast made in the 'cloud' and transmitted to their mobile phone (eg. Optus TV NOW); or
- (g) a DVD recording of the program purchased from a retail outlet.

Owners of iPads or internet connected TVs can effectively do all or most of these things using the one device.

While each of the services referred to above can deliver the same content to a consumer, copyright law interacts with each of them in different ways. As is explained further below, this creates different licensing requirements and risk profiles for the different forms of distribution, which has the potential to distort markets, as operators may seek to avoid some forms of distribution with heightened risks of infringement or prefer those that have the benefit of statutory licences or exceptions.

## The technical act of making a copy of content onto a server in order to facilitate its distribution should not alter the characterisation of the retailer as being indirectly involved in any infringement

### Liability for online supply

The Copyright Act treats the sale of hard copy and electronic content differently. A manifestation of this is that the liability for the sale of infringing hard copy material (eg. a book, a print newspaper or DVD) is different to that for the sale of the same content in electronic form online.

Assuming the hard copy retailer is not also the content creator, its liability is determined by reference to the 'indirect' infringement provisions. For example, section 38 of the Copyright Act provides that the offering for sale or sale of the article will only infringe copyright if the person 'knew, or ought reasonably to have known, that the making of the article constituted an infringement of the copyright or, in the case of an imported article, would, if the article had been made in Australia by the importer, have constituted an infringement.' In other words, liability depends on the copyright owner discharging their onus of proving that the retailer knew (through actual or constructive knowledge) that it was dealing in infringing articles. For reputable retailers, this will not arise until a notice of infringement is received.

By contrast, sale of the same item in electronic form will require the retailer to make a copy of it on a server and, in the case of downloads, authorise the making of a further copy on the customer's device. In such cases, the retailer is treated in the same way as the content creator; liability is direct as the copyright work, or other

<sup>1</sup> Convergence Review Emerging Issues Paper, 6 July 2011, 4.

<sup>2</sup> *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited* (2012) 94 IPR 585; *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (2012) 94 IPR 1 and, on appeal, *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 95 IPR 321 (**TV Now case**).

subject matter, will be reproduced in electronic form by or on behalf of the retailer. Knowledge that the act was infringing is not necessary to establish liability for direct primary infringement. Instead, the retailer will be liable and it can only rely on the so called 'innocent infringer' defence in section 115(3) of the Copyright Act to limit its financial liability to an account of profits. To establish the defence, the retailer has the onus of proving that, at the time of the infringing act, it was not aware, and had no reasonable grounds for suspecting, that the relevant act was an infringement of copyright.

This can be a significant issue for online services that offer third party content from a large number of suppliers, such as YouTube and App Stores, particularly given the narrow application of the 'safe harbour' provisions discussed below. If technological neutrality is to be applied, it is difficult to justify differing liability for the act of selling content depending on whether the content is sold in hard copy or in electronic form. The technical act of making a copy of content onto a server in order to facilitate its distribution should not alter the characterisation of the retailer as being indirectly involved in any infringement. If the distinction is to be maintained for hard copy items, then technological neutrality suggests it should also apply to online retailers.

## While there are policy considerations that underpin the protection of broadcasts as opposed to other forms of transmission, the approach of excluding the 'Internet' per se is leading to absurd results.

### Liability of intermediaries

As one commentator remarked '*[a]t a time when the Federal Parliament endeavours to address media and communications convergence through new legislation, it is appropriate to also seek a converged approach to liability of internet intermediaries.*'<sup>3</sup>

The law with respect to the liability of intermediaries for copyright infringement is in an unsatisfactory state. Amongst other things, the provisions in the Copyright Act dealing with this issue are disjointed and inconsistent, being the result of:

- (a) legislative reform in 2000 that sought to codify, at least in part, liability for authorising copyright infringement;<sup>4</sup>
- (b) a particular and narrow 'exemption' to authorisation liability for providers of communications facilities (including carriers or carriage service providers) who merely provide facilities that are used by others to infringe copyright;<sup>5</sup> and
- (c) subsequent legislative reform resulting from the Australia-United States Free Trade Agreement, which entered into force on 1 January 2005, creating conditional safe harbours for the benefit of carriage service providers.<sup>6</sup>

There is also uncertainty as to how the provisions in the Copyright Act apply in practice as evidenced by the recent dispute involving a prominent Internet service provider (*ISP*), iiNet,<sup>7</sup> which was only resolved following protracted litigation resulting in an unsuccessful appeal to the High Court.

So called 'safe harbour' provisions (Part V Division 2AA of the Copyright Act), which provide an immunity from monetary relief if certain conditions are met, are narrow in application. In particular, the only beneficiaries of the immunity are '*carriage service providers*' ie. ISPs. The vast majority of online services, including Google, YouTube, Facebook and App Stores fall outside of the provisions. As discussed above, these services, now a ubiquitous part of modern Australian life, are deprived of this extra layer of protection from litigation arising out of third party content.

On 12 October 2011, then Commonwealth Attorney General, the Hon. Robert McClelland MP, launched a public consultation paper proposing amendments to the safe harbour provisions to make them more '*technologically neutral*'.<sup>8</sup> However, the changes have not been implemented and it is questionable whether the proposed changes would achieve their stated goal given the narrow scope of activities covered by the safe harbours.

### Exclusion of Internet transmissions

Content made available online has to fall within an established species of copyright to enjoy copyright protection. If, prior to transmission, the content is embodied in a pre-existing file, then depending on the nature of the content, it would generally be protected as either a work, a sound recording or a cinematograph film. In such cases, the copyright owner will enjoy exclusive rights to copy the content and communicate it to the public.<sup>9</sup>

However, a pre-existing file may not always be made prior to, or used for, the transmission of content. An example is live transmissions either from direct coverage of a sporting event, or using a dedicated live feed of coverage from a third party. Even if such pre-recording existed, only the owner or exclusive licensee of the copyright in the content can prevent unauthorised use of it. This may not be the case for many content service providers.

The only form of transmission that is protected by copyright is a 'broadcast'. Consequently, understanding whether a transmission constitutes a 'broadcast' is critical.

'Broadcast' is defined in section 10 of the Copyright Act to mean '*a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992 (Cth) (BSA).*' Under section 6(1) of the BSA, the following are expressly excluded from the definition of 'broadcasting service':

- (b) a service that makes programs available on demand on a point to point basis, including a dial up service; or
- (c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.'

In relation to (c), on 12 September 2000, a Ministerial Determination under the BSA was made on the following terms (**Determination**):

'A service that makes available television programs or radio programs using the Internet (other than a service that delivers television programs and radio programs using the broadcasting services bands) does not fall within the definition of a broadcasting service.'

However, it is not clear what constitutes use of the Internet in these contexts. The term is not defined in the Determination, the Copyright Act, the BSA or the *Telecommunications Act 1997 (Cth) (Telco*

3 Peter Leonard, 'Building Safe Harbours in Choppy Waters – Towards a Sensible Approach to Liability of Internet Intermediaries in Australia', (Paper presented at the Communications Policy and Research Forum, Sydney, 15-16 November 2010).

4 See sections 36(1A) and 101(1A), Copyright Act.

5 See sections 39B and 112E, Copyright Act.

6 See Part V, Division 2AA, Copyright Act.

7 See *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 95 IPR 29.

8 Attorney General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme'* - Consultation Paper, (2011), 5.

9 See sections 31, 85 and 86, Copyright Act. The communication right is discussed further below.



**Act**) and has not been the subject of judicial consideration. Dictionary definitions define the 'Internet' by reference to its interconnecting networks and global coverage (see for example the Macquarie Dictionary, which defines it as *'the communications system created by the interconnecting networks of computers around the world'*). Australian courts have considered the term in other contexts and have defined it in a similar way.<sup>10</sup>

As stated by The Centre for Telecommunications and Information Networking in its 2002 report to the Australian Broadcasting Authority (the **ABA**):

'a lower case internet could be any network of networks. The upper case Internet is a global network of networks, fundamentally different because it has ubiquity of access via a public Internet carriage service and over a medium such as the public switched telephone network (known often simply as the PSTN). By comparison, a lower case internet is not global and access is limited to fewer points and fewer people.

Internet services are a subset of Online services. Whereas the Internet requires ubiquitous, public access, other Online services use a dedicated access medium which allows for restricted user access. Hence, while anyone can access the Internet through any Internet Service Provider or other Internet carriage service, Online services which are not the Internet are generally available only to closed user groups.<sup>11</sup>

In this context, does the Internet exclusion apply to content:

- (a) delivered using internet protocols and any infrastructure that comprises the Internet;
- (b) accessed using an internet carriage service<sup>12</sup> (ie. the term *'Internet'* is synonymous with *'online'*); or
- (c) that is publicly available to anyone once connected to the global networks of networks that is the Internet?<sup>13</sup>

The latter approach is consistent with the language of the Determination and its Explanatory Statement, which in contrast to other parts of the BSA specifically refers to capital 'I' 'Internet'. As Associate Professor Brennan stated:

'As the programming content transmitted by Pay services (sharing its transmission infrastructure with cable broadband) and under the IPTV service paradigm (sharing its transmission infrastructure with telephony ADSL) does not originate 'from the Internet', but rather from Pay services or the IPTV service, each seems to fall outside the intended operation of the exclusion [in the Determination], and for the same reason.<sup>14</sup>

The purpose of this discussion is to highlight how different means of delivery of the same content can be characterised differently. For example:

- (a) downloads and video on demand services will not be broadcasts as they are transmissions made on an on demand point-to-point basis; and

- (b) streams available on the world wide web will not be broadcasts but
- (c) the same content could be a broadcast if:
  - (i) transmitted by mobile telephone operators to mobile phones;
  - (ii) it is a simulcast by a broadcaster of a broadcast using the BSB;<sup>15</sup> or
  - (iii) transmitted online, but via a dedicated connection with subscribers (eg. where an ISP transmits content to its customers).<sup>16</sup>

This analysis is not only relevant to copyright subsistence, but also whether additional rights are available including:

- (a) the right to reproduce works and other subject matter for the purpose of broadcasting (see sections 47 and 107 of the Copyright Act);
- (b) rights in respect of unauthorised access to encoded broadcasts (see Part VAA of the Copyright Act);
- (c) the right to retransmit free-to-air broadcasts (see Part VC of the Copyright Act), which also expressly excludes retransmissions that take place *'over the Internet'*;<sup>17</sup> and
- (d) compulsory licences in respect of the broadcast of sound recordings (see section 152 of the Copyright Act).

## Why, as a matter of policy, should it be legal to record a television program on a personal video recorder, but illegal, without permission from all rights owners, to record webcast of the same program or use a remote storage service?

The Australian Copyright Council, in its submission to the Convergence Review, submitted that *'this platform-specific legislation clearly produces inconsistent outcomes. We understand, for example, that in the case of the new subscription services Fetch TV and Telstra T-Box, one falls into the "retransmission over the Internet definition" and the other does not, although both deliver a similar service to the customer'*<sup>18</sup> (depending on how the term 'Internet' is construed, an alternative argument is that neither of those subscription services fall within the Internet exception).

Clearly, technological neutrality has been undermined by the importation of BSA concepts into the Copyright Act. While there are policy considerations that underpin the protection of broadcasts as opposed to other forms of transmission, the approach of excluding the 'Internet' per se is leading to absurd results. The problem will be starker if traditional broadcasting services are made available on the national broadband network (**NBN**).

10 See for example *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 and *Nominet UK v Diverse Internet Pty Ltd & Ors* (2004) 63 IPR 543.

11 Dr Paul Chapman, Jordan Pritchard and Dr Matthew Sorell, *Media Streaming and Broadband in Australia* (Report to the Australian Broadcasting Authority, The Centre of Telecommunications and Information Networking, 2002), 15.

12 See Schedule 5 of the BSA, which defines *'internet content'* by reference to, amongst other things, whether the content *'is accessed, or available for access, using an internet carriage service.'* '[I]nternet carriage service' is defined in the Telco Act to mean *'a listed carriage service that enables end-users to access the internet'*.

13 See David Brennan 'Is IPTV an internet service under the Australian Broadcasting and copyright law?' (2010) 60(2) *Telecommunications Journal of Australia* at 26.1.

14 *Ibid*, 26.7.

15 See *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited* (2012) 94 IPR 585 (note that the matter is on appeal).

16 See David Brennan's comments in relation to IPTV services, above n 13, 26.3.

17 See section 135ZZJA, Copyright Act.

18 Australian Copyright Council, Submission to the Convergence Review, October 2011, 7.

## Copyright clearance

Ensuring that all of the copyright subsisting in content is cleared prior to it being transmitted can be a substantial barrier to entry. The problem is particularly acute for audio visual content as it embodies a number of elements, the copyright in which is separately controlled. This may include broadcast copyright, film copyright, literary or dramatic work copyright, sound recording copyright and musical works copyright.

Potentially, a web of licences needs to be negotiated. If any one of the copyright owners declines to grant a licence, the content cannot be made available without the risk of infringement. The problem is exacerbated by the fact that the service provider usually will not be the producer of the program and, at the time the program was produced, the underlying copyright clearances may not have expressly covered modern forms of content delivery. Further, certain rights are usually excluded from content deals.<sup>19</sup>

The practical consequence of this is that the content service provider bears the burden of obtaining the relevant copyright clearances. The national broadcaster, the ABC, has stated publicly that underlying licences (most notably music) are an impediment to it making archive content available online.<sup>20</sup>

## Changes to the Copyright Act need to protect the interests of content owners without creating unnecessary barriers to new forms of content distribution and use

The Copyright Act does provide some exemptions to these licensing requirements, but they are narrow in application and are not technologically neutral. By way of example:

- (a) as referred to above, sections 47 and 107 of the Copyright Act create free licences, subject to restrictions to reproduce works and other subject matter for the purpose of broadcasting; and
- (b) section 111 of the Copyright Act permits, subject to restrictions, a person to record a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.

Consequently, it is possible to avoid the need for reproduction licences for copies of programs made for the purpose of broadcast (sections 47 and 107) and by viewers of those broadcasts (section 111).

However, those provisions only apply to 'broadcasts' (see discussion above). Further, as recent litigation has shown, even in relation to broadcasts, section 111 may not apply to new forms of content storage and delivery such as remote storage services.<sup>21</sup> From the consumer's perspective, they are interested in being able to view a program at the time of their choice on the device of their choice. Why, as a matter of policy, should it be legal to record a television program on a personal video recorder, but illegal, without permission from all rights owners, to record webcast of the same program or use a remote storage service?

A further example, is the operation of statutory licences. Mechanisms exist in the Copyright Act to lift the burden on service providers in terms of copyright clearances while ensuring that adequate royalties are paid. Under section 212 of the BSA and Part VC of the Copyright Act, Australian broadcasts can be retransmitted without licence from any of the copyright owners subject to the payment of licence fees, (determined by the Copyright Tribunal), to a collecting society (Screenrights).

Again, the scheme is narrow in its application. Section 212 principally applies to re-transmissions of programs transmitted by the national broadcasting service or a commercial broadcasting licensee within a licence area or outside the licence area with the permission of the Australian Communications and Media Authority (ACMA). As discussed above, Part VC expressly excludes retransmissions that take place 'over the Internet'.<sup>22</sup>

The problem is not alleviated by the availability of voluntary licence schemes. At the time of writing, a scheme exists for the reproduction and communication of underlying musical works in respect of music download services. There are no licence schemes for sound recording copyright (digital download services have to obtain licences from each recording company) or for audio visual content other than musical works. Further, developing these schemes often results in protracted and costly litigation in the Copyright Tribunal.

## Loss of control

While new media provides enormous opportunities, it also has the potential to undermine existing revenue streams caused by a loss of practical control in the licensing and enforcement of exclusive rights.

Copyright owners enjoy broad exclusive rights including the right to control reproductions and 'communications to the public' under the Copyright Act. Sophisticated copyright owners have traditionally sought to maximise royalties by segmenting rights, offering exclusivity by territory and platform including via different release windows.

These practices have been affected by 'illegal' transmissions and downloads as consumers are able to bypass authorised distribution platforms and obtain content via unauthorised sources. Even putting piracy to one side:

- (a) Exclusive territorial rights can be undermined by the inability to impose cross-border restraints due to competition law.<sup>23</sup>
- (b) Convergence makes it increasingly difficult to segment rights between platforms. For example, an iPad may receive content via the Internet (using a wi-fi connection) or via a 3G mobile network. Where a licensor seeks to grant separate mobile and online rights, exclusivity becomes illusory or at least creates difficulties in defining the scope of the rights. A further example is the controversy surrounding the Optus TV Now service, which, depending on the ultimate outcome of the TV Now case, could allow Optus customers to access content on mobile devices via free-to-air broadcasts where Telstra sought to acquire exclusive mobile rights.
- (c) The control over release windows has been eroded by convergence as copies are made available online either because of an earlier legal release in another territory or the availability of illegal copies.

19 For example, public performance or communication of musical works.

20 Australian Broadcasting Corporation, Submission to Department of Broadband, Communications and the Digital Economy in response to the consultation paper 'Digital Economy Future Directions', February 2009.

21 See *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (2012) 94 IPR 1 and, on appeal, *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 95 IPR 321.

22 See section 135ZJA, Copyright Act.

23 *Joined Cases C-403/08 and C-429/08, FA Premier League et al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services*, Judgment of the Court of Justice of the European Union (Grand Chamber) 4 October 2011.

## Potential reform

Changes to the Copyright Act to deal with the above issues need to protect the interests of content owners without creating unnecessary barriers to new forms of content distribution and use. The need for balance is particularly acute for broadcasters, as they are generally both creators (owners) and users (licensees) of copyright and are increasingly making their programs available on multiple platforms. The issues raised above highlight the need for a technologically neutral approach.<sup>24</sup>

### (a) A layered approach

In considering approaches to media regulation, the Convergence Review focused on a converged structure based on 'layers', namely:

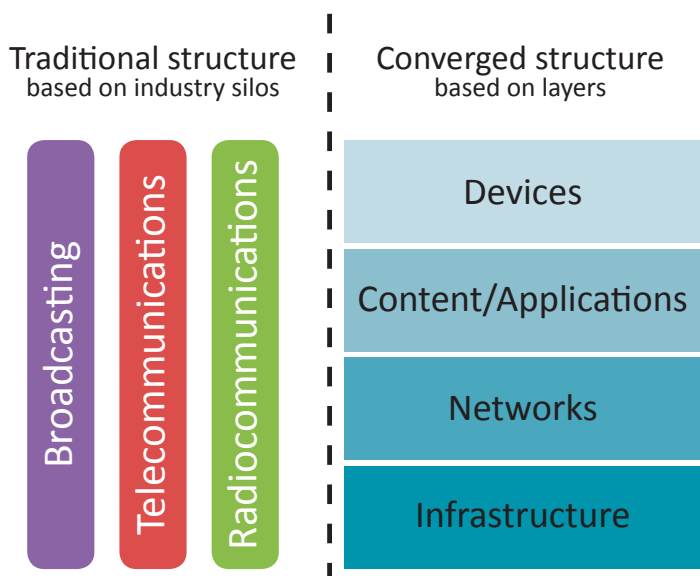


Figure 1: Comparing traditional industry silos with a layered structure likely under convergence.

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ACMA Chairman, Chris Chapman has made similar suggestions based on two or three layers stating that it provides a very useful tool for thinking and planning how to address convergence, albeit with limitations.<sup>25</sup>

A similar approach could be adopted for copyright reform to ensure consistency in relation to protection, liability, exceptions and statutory licences. The 'layers' could comprise content creators, content providers (including online retailers), applications, networks and infrastructure. Authorisation liability could be refined in relation to each 'layer' to give greater certainty.

As part of this layered approach and in light of technological developments, the exclusion of the Internet from the definition of 'broadcast' and the retransmission right could be reconsidered.

### (b) Expanded role for statutory licences

The retransmission regime in Part VC of the Copyright Act provides a statutory licensing structure, albeit one of narrow application, allowing content to be re-used without having to re-clear underlying rights.

Consideration should be given to the merits of expanding or adopting this type of licence to allow content, not just free-to-air broadcasts, to be re-used on different platforms. For example, if the controller of the film copyright (usually the producer) in a program wishes to licence it for distribution online, the service provider should not have to re-clear all underlying copyright. They should have the option of paying a predetermined royalty, which could subsequently be divided up amongst the relevant copyright owners eg. in accordance with the existing Screenrights royalty splits. Depending on price, this could reduce the barriers faced by content service providers and leave the complex issue of tariff distribution to specialised organisations, such as collecting societies.

### (c) Practical means of enforcement and compensation

Dealing with the problem of online infringement requires legislative reform and international co-operation. It is a complex and controversial issue, but approaches other than litigation need to be considered.

Within our region, New Zealand has enacted the Copyright (Infringing File Sharing) Amendment Act 2011, which came into effect on 1 September 2011 putting in place a notice regime in relation to online infringement. The Communications Alliance has put forward a more moderate proposal for Australia. Under the proposal, which has been endorsed by Telstra, Optus and iiNet amongst others, users would receive an education notice if suspected of online infringement. Repeat infringers could attract up to three warning notices within a 12 month period, after which their details could be passed on to copyright holders to allow for legal action.

There are other approaches being advocated. For example, the CEO of APRA|AMCOS (Brett Cottle) has discussed a model whereby users are charged (via an ISP) a flat fee for a blanket licence. To work, this model would also require legislative changes. The model raises a number of difficult issues including, whether such a legislative scheme would be constitutional, whether all copyright owners (or at least aggregators) would agree to such a scheme and how it would be administered in terms of royalty distribution.

In conclusion, given the role that copyright plays in determining how content can be exploited across platforms, it must be reformed to operate effectively in the face of media convergence, particularly if the Government wants to encourage innovation in online services as the NBN develops. The upcoming ALRC inquiry can only focus on a sub-set of the issues raised in this paper. Clearly, it would be preferable if the Government took a more holistic approach to copyright reform. Historically, piecemeal and reactive amendments have tended to exacerbate rather than address many of the anomalies in the Copyright Act.

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<sup>24</sup> After this paper was written, the Supreme Court of Canada handed down five cases (*SOCAN v Bell* 2012 SCC 36; *ESA/C v SOCAN* 2012 SCC 34; *Rogers v SOCAN* 2012 SCC 35; *Re:Sound v MPTAC* 2012 SCC 38; *Alberta v Access Copyright* 2012 SCC 37) in which the notion of "technological neutrality" played a central role in the interpretation of the Canadian Copyright Act. That approach creates a significant divergence between Canadian and Australia copyright law.

<sup>25</sup> Chris Chapman, 'The "Convergence Phenomena" from a Regulator's Perspective' (2011) 30(1) *Communications Law Bulletin* 1, 13.

# Changes to Interactive Gambling Regulation? It is Anyone's Bet

Niranjan Arasaratnam and a team of lawyers from the Allens TMT practice group take a look at proposed changes to interactive gambling laws.

The interactive gambling industry will face significant regulatory changes if the Federal Government adopts the recommendations of the Department of Broadband, Communications and the Digital Economy's *Interim Report on the Interactive Gambling Act 2001* (the **Report**).<sup>1</sup>

The Interactive Gambling Act 2001 (Cth) (the **Act**) currently prohibits most forms of online gambling. Despite these prohibitions, as many as 30 per cent of Australians over the age of 16 use illegal offshore gambling services, losing an estimated \$1 billion each year.<sup>2</sup> The online gambling industry is also growing at an estimated rate of between 10 to 20 per cent each year.<sup>3</sup>

**The Report proposes to streamline the Act's enforcement provisions, increase awareness of the Act amongst directors and principals of prohibited IGS services and relevant overseas authorities, and restrict access to prohibited IGS**<sup>29</sup>

Since its release on 29 May 2012, the Report has received mixed responses from industry stakeholders.<sup>4</sup> The Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, however, appears committed to reforming interactive wagering and gaming. On 29 June 2012 Senator Conroy announced that the Government had agreed with broadcasters to ban the promotion of live betting odds during sports games.<sup>5</sup> These reforms are expected to come into effect in 2013 and would complement the changes recommended in the Report.

Part 1 and 2 of this article describe the current regime and the key reforms proposed in the Report. Part 3 considers the likely impact of the proposed reforms on various stakeholders and participants in the interactive gambling sector including, gambling and online poker operators, sports wagering operators, sports bodies, broadcasters, search engines, international gambling operators and financial institutions.

If adopted, the recommendations would change how gaming and wagering operators conduct business in Australia, and alter the

obligations on broadcasters, financial institutions, internet service operators (**ISPs**) and search engines.

The Report follows a series of inquiries and reports about the gambling industry, namely the Productivity Commission's Inquiry Report on Gambling in 2010 (the **Productivity Commission's Report**)<sup>6</sup> and the Second Report of the Parliamentary Select Committee on Gambling Reforms Inquiry into online gambling and gambling advertising (the **Select Committee Report**) in 2011.<sup>7</sup>

As part of the Federal Government's review into interactive gambling, stakeholders have had the opportunity to make submissions on the Report and on the Department of Broadband, Communications and the Digital Economy's *Interactive Gambling Act 2001 Discussion Paper – call for submissions* (the **Discussion Paper**).

The reforms proposed in the Report (and earlier reports) are dependant on implementing legislation being introduced into and passed by Parliament.

## PART 1: The Act's Existing Provisions

The Act aims to minimise problem gambling amongst Australians by limiting the provision of online gambling services.<sup>8</sup> The Act creates numerous offences, key among them, the provision and advertising of prohibited interactive gambling services (**IGS**).

Section 15 of the Act prohibits the provision of prohibited IGS to customers present in Australia. Prohibited IGS include services for betting, conducting lotteries or supplying lottery tickets and services for games of chance and games which are a mixture of chance and skill.<sup>9</sup>

However, the provision does not prohibit:

- telephone betting;
- wagering on horse, harness or greyhound races;
- wagering on sporting events or other events or contingencies;
- online lotteries, provided they are not highly repetitive, instantaneous or frequently drawn;
- gaming services provided to customers in a public place (for example poker machines in a club or casino); or
- services that have a designated broadcasting or data-casting link (for example television shows that involve viewers voting in order to win prizes).<sup>10</sup>

1 Department of Broadband, Communications and the Digital Economy (Cth) *Review of the Interactive Gambling Act 2001- Interim report for consultation* (2012) (the **Report**).

2 Department of Broadband, Communications and the Digital Economy (Cth) *Review of the Interactive Gambling Act 2001 Discussion paper – call for submissions* (24 August 2011) (the **Discussion Paper**).

3 Ibid.

4 Submissions received by the Department of Broadband, Communications and the Digital Economy in response to the DBCDE Interim Report are available at: [http://www.dbcde.gov.au/broadband/online\\_gambling/2011\\_review\\_of\\_the\\_interactive\\_gambling\\_act\\_2001/submissions\\_received\\_for\\_the\\_iga\\_review](http://www.dbcde.gov.au/broadband/online_gambling/2011_review_of_the_interactive_gambling_act_2001/submissions_received_for_the_iga_review).

5 Minister for Broadband, Communications and the Digital Economy (Cth), 'Government achieves agreement to reduce the promotion of live odds in sports broadcasts' (Media Release, 29 June 2012).

6 Productivity Commission, *Inquiry Report on Gambling (2010)*, Report No 50 (2010).

7 Joint Select Committee on Gambling Reform, Parliament of Australia, *Second Report on Interactive and online gambling and advertising* (2011).

8 Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth).

9 *Interactive Gambling Act 2001* (Cth), ss 4, 5, 6.

10 *Interactive Gambling Act 2001* (Cth), ss 6(3), 8A, 8B.

The offence of providing IGS applies to operators of those services based in Australia and offshore and the maximum *daily* penalty is \$220,000 for an individual and \$1.1 million for a corporation. The Act also prohibits the supply of IGS from Australia to countries designated by the Minister.<sup>11</sup> Individuals are not, however, prohibited from accessing or using a prohibited IGS.

Section 61EA of the Act makes it an offence to publish or broadcast an advertisement of a prohibited IGS in Australia. This offence covers all forms of advertising, including electronic and print media, broadcast services and billboards and carries a maximum penalty of \$13,200 for individuals and \$66,000 for corporations. However, there is an exception for accidental or incidental publications or broadcasts of a prohibited IGS.

The Australian Communications and Media Authority (the **ACMA**) enforces the Act. It investigates complaints about prohibited content hosted overseas. If the content is prohibited by the Act, the ACMA will notify approved PC filter vendors under the Internet Industry Association Code. Where the complaint relates to Australian-based content, the ACMA may refer the matter to the Australian Federal Police (the **AFP**) for further investigation.

## **PART 2: The Report's Key Recommendations**

### **National standard of harm minimisation and consumer protection**

The Report proposes a new national standard for harm minimisation and consumer protection. The standard would include:

- the implementation of limits on the types of inducements that consumers may be offered and the third party arrangements (such as commissions) that service operators are entitled to use to attract consumers;
- inclusion of prominent responsible and problem gambling messages on online gambling sites and other advertising;
- protection against IGS operators misappropriating consumer funds, failing to payout funds and failing to remit funds to consumers after account inactivity; and
- selfexclusion provisions to enable consumers to suspend themselves from one or more IGS websites or all IGS.<sup>12</sup>

These requirements would apply to all gaming operators legally permitted or licensed (under the proposed poker licensing scheme) to offer IGS to Australians.

### **Online gaming - licensed online poker trial**

The Report proposes that for a five year 'trial period', the Act would permit online gaming sites to be licensed in Australia on the condition that the licensed operators:

- cease offering high-risk gaming services (such as online poker machines) to Australians;
- only offer online tournament poker; and
- adopt the harm minimisation and consumer protection measures proposed in the Report, which are discussed above.<sup>13</sup>

Deregulating the provision of online poker is one of the Report's most significant and controversial proposals. The Report's recommendation in respect of online poker resonates with international trends in gambling regulation.<sup>14</sup> The Report noted the recent inquiries in South Africa and Canada which determined that because prohibition does not extinguish demand, gambling should be regulated 'so as to accrue economic benefits and to better ensure player protection'.<sup>15</sup> In France online operators are licensed. Ninety-five per cent of French poker players access online gaming through these licensed operators.<sup>16</sup>

The Productivity Commission had earlier also proposed a 'managed liberalisation' of online gaming, beginning with online poker. However, in response to that report the Government, in 2010, said it was 'not convinced that liberalising online gaming would have benefits for the Australian community which would outweigh the risks of an increased incidence of problem gambling'.<sup>17</sup> The Select Committee Report recommended against liberalisation.

## **Some operators may have to significantly overhaul their business operations to comply with the proposed requirements placing them at a competitive disadvantage to offshore operators**

### **Sports wagering – some 'in-play' wagering but no micro-betting**

Under the current Act 'in-play' bets made online during the course of an event are prohibited, but the same bets are permitted when made in person or on the telephone.<sup>18</sup> The Report showed some support for relaxing the existing prohibition under the ACT for 'simple bets', such as betting on the outcome of an event. It noted that any such reform would resonate with the principle of platform neutrality in the regulation of in-play betting, potentially reduce compliance costs for gambling service operators and educate consumers.<sup>19</sup>

By contrast the Report also recommended retaining the restriction on 'exotic' in-play betting, namely 'micro' betting' and the extension of this prohibition to wagering services provided through other devices and technologies, namely apps and interactive television.<sup>20</sup> The Report distinguishes micro-betting as the betting on near future contingencies, for example ball-to-ball betting in cricket or point-to-point betting in tennis. The Report lists a number of circumstances which constitute 'micro-betting', including that the betting opportunity is repetitive, high frequency and that bets are placed on one of a limited number of outcomes (for example that the next serve will be a fault). The Report also recommended that the Minister for Sport be empowered to make regulations to specify particular bets as 'micro-bets'.

11 *Interactive Gambling Act 2001* (Cth), s 15A. Under the Act, the Minister can declare a country to be 'designated' for the purposes of the Act. Currently, no countries have been designated.

12 Report, above n 1, p 53.

13 *Ibid*, pp 53-4, Recommendations 1-3.

14 *Ibid*, p 99.

15 Joint Select Committee on Gambling Reform, above n 7, p 49.

16 Report, above n 1, p 100.

17 Assistant Treasurer (Cth), 'Government Response to Productivity Commission Report into Gambling' (Media Release, No. 138, 23 June 2010)

18 In play' wagering involves placing bets during an event on the outcome of a game, or better on particular contingencies (for example who scores the next goal or wins the next point).

19 Report, above n 1, p 108 -113.

20 *Ibid*, p 114, Recommendation 25.

The Report's recommendation on micro-betting means that previously legal micro-bets made in person at sports venues or on the phone would now be prohibited. The reform also somewhat addresses concerns that in-play wagering undermines the integrity of sport by encouraging match-fixing.<sup>21</sup>

### Regulation of sports wagering by state/territory sports bodies

The Report follows the Select Committee Report's recommendation that State, Territory and National sports governing bodies be responsible for determining what categories of sports wagering are permitted for sporting events in the relevant jurisdiction.<sup>22</sup> The Report also recommends that where the sports event is based overseas, the decision to allow sports betting should lie with the relevant Australian sports governing body for that sport.<sup>23</sup>

## The increased compliance burdens required to obtain a licence may undermine the effectiveness of the regime if it fails to provide sufficient incentives for IGS operators to become licensed.

### New advertising restrictions and penalties

To address ambiguities in the current regime on advertising a prohibited IGS, the Report proposes to amend the definition of an 'accidental or incidental' advertisement in the Act.<sup>24</sup> Broadcasters would fall outside the prohibition where they rebroadcast an overseas event where prohibited IGS advertisements are present at the venue. Civil penalties would apply (in addition to the existing criminal penalties) for advertising breaches.<sup>25</sup>

The Report followed the Select Committee Report's recommendation to amend the Act to clarify that links to practice sites or 'free-play' services that are associated with prohibited 'for money' sites be prohibited (because they promote prohibited IGS).<sup>26</sup> Further, the Report also proposed that advertising permitted online gaming services only be allowed during televised coverage of poker tournaments.<sup>27</sup>

### Expansion of enforcement tools and penalties

While the Act contains punitive provisions targeted at offshore gambling operators, the Department of Broadband, Communications and the Digital Economy (the *DBCDE*) has acknowledged that 'there is limited practical scope for Australian law enforcement agencies to pursue, with any prospect of success, international based opera-

tors'.<sup>28</sup> The Report proposes to streamline the Act's enforcement provisions, increase awareness of the Act amongst directors and principals of prohibited IGS services and relevant overseas authorities, and restrict access to prohibited IGS.<sup>29</sup>

The Report also proposes to amend the Act to make the directors or principals of prohibited IGS operators liable for the company's activities.<sup>30</sup> Where the ACMA determines that an IGS operator is offering prohibited IGS, the Report recommends that it should refer the matter to the AFP and that the directors or principals of the offending organisation be placed on the Movement Alert List.<sup>31</sup>

The ACMA would be responsible for administering the new civil penalty provisions (by issuing infringement notices); be able to issue 'take down' notices to IGS operators of Australian-hosted content; and be able to apply to the Federal Court for injunctive relief against contraventions of the Act by Australian-based IGS operators.<sup>32</sup> The Report also recommends that the ACMA monitor IGS operators that have been identified as offering potentially prohibited IGS, and publish a list of these operators on its website.<sup>33</sup>

### Restricting financial transactions

The Report proposes blocking financial transactions between Australian consumers and unlicensed IGS operators. The Reports recommends amending the Act to provide a 'safe-harbour' for financial institutions that establish and adopt policies to block transactions between Australians and unlicensed, illegal online gambling services operators.<sup>34</sup> In making this recommendation, the DBCDE noted the approach in the United States. The US:

- criminalises the act of gambling operators knowingly accepting US-based payments that are connected to unlawful internet gambling; and
- prohibits US financial transaction operators from processing transfers of funds to unlawful online gambling businesses.<sup>35</sup>

### Website listing and URL blocking

The Report recommends that online IGS operators offering prohibited IGS should continue to be included on the ACMA's list of prohibited URLs and websites that are blocked vendors of PC filters on the Internet Industry Association's family-friendly filter scheme.<sup>36</sup> This proposal does not materially change the obligations of ISPs.

## PART 3: The Impact of key proposed reforms

### National standard of harm minimisation and consumer protection

Stakeholder submissions to the Report have largely supported the introduction of a national standard for harm minimisation. There are concerns, however, that the recommendations are impracticable

21 Ibid, p 111.

22 Ibid, p 114.

23 Ibid, p 115, Recommendation 27.

24 Ibid, p 90, Recommendation 18.

25 Ibid, p 87, Recommendation 17.

26 Ibid, p 92, Recommendation 19.

27 Ibid, p 103.

28 Discussion Paper, above n 2, p 12.

29 Report, above n 2, p 58.

30 Ibid, p 61, Recommendation 4.

31 The Movement Alert list is a computer database administered by the Department of Immigration and Citizenship and that stores identity information and travel documents.

32 Report, above n 1, p 61, Recommendation 6.

33 Ibid, p 62, Recommendation 7.

34 Ibid, p 65.

35 Ibid, p 65.

36 Ibid, p 77, Recommendation 11.

and unduly onerous on gambling operators.<sup>37</sup> Some operators may have to significantly overhaul their business operations to comply with the proposed requirements placing them at a competitive disadvantage to offshore operators.

Other submissions emphasised ambiguities in the Report's harm minimisation regime. For example, the Report is unclear on how the betting limitations (such as time or bet limits) would be implemented.<sup>38</sup> The bookmakers' industry is concerned that the Report is ambiguous as to whether the harm minimisation requirements would apply to bookmakers' activities in the racing industry.<sup>39</sup> A significant feature of wagering in the racing industry includes the ability for bookmakers to extend to their customers a line of credit, which the DBCDE proposes to ban.<sup>40</sup>

The harm minimisation proposals also increase obligations on operators to actively support consumer awareness of problem gambling, provide links to gambling help-lines and implement 'dynamic warning messages'. As the Report acknowledges, implementing these recommendations is dependent on compatibility with operators' software, which may currently block such pop-up messages.<sup>41</sup>

One stakeholder also called for clarification on the Report's proposal for 'significantly more prominent' responsible gambling messages. It argued instead that the alcohol industry's standard of legible responsible drinking messages be applied to the gambling industry.<sup>42</sup> Radio broadcasters expressed concern about the practical complications of implementing mandatory responsible gambling messages on radio and the negative impact on advertising revenues.<sup>43</sup>

#### Licensed online poker trial

The proposed licensed online poker trial will be conditional on IGS operators complying with the proposed harm minimisation and consumer protection measures. As a result, businesses are likely to face increased compliance costs to participate in the regulated trial, potentially reducing their ability to compete with unlicensed offshore operators.

Consumers may therefore choose to use offshore IGS operators who can offer a potentially greater range of gaming and gambling services. Further because a licensed poker operator will be prohibited from also offering 'higher risk' gaming services (for example online 'cash games'), offshore IGS operators looking to legally enter the Australian market would be required to divest or separate their existing operations. The increased compliance burdens required to obtain a licence may undermine the effectiveness of the regime if it fails to provide sufficient incentives for IGS operators to become licensed.

The five-year sunset clause on the poker trial may mean licensed operators could be prohibited from offering online poker to Australians, where the Government of the day decides not to extend the pilot. Given the costs of establishing and running an online poker business and the uncertainty of future business prospects following the trial period, operators may be reluctant to obtain licensing.

#### Sports wagering: implications for wagering operators and sports governing bodies

The Report uses the principle of platform neutrality in the context of gambling reforms in sports wagering to justify the deregulation of 'simple' in-play betting and the expansion of restrictions on micro-betting. Consequently for wagering operators and sporting bodies, the practical implications of any future regulation of in-play betting remain uncertain.

### The Report recommends that a five-minute gap between placing a bet and knowing the outcome is sufficient to constitute a 'micro' bet.<sup>44</sup> This definition appears out of step with industry perceptions.

In particular, it is not clear which in-play bets will be classified as 'micro' and therefore prohibited under the proposed regime. The Report recommends that a five-minute gap between placing a bet and knowing the outcome is sufficient to constitute a 'micro' bet.<sup>44</sup> This definition appears out of step with industry perceptions. Various wagering organisations suggested that given that five minutes is the typical duration of, for example, a game of tennis or an over of cricket, betting on the outcome of these contingencies should be classified as in-play rather than 'micro' betting.<sup>45</sup> In addition, horse-racing wagering operators have expressed concerns that the recommendations would now prohibit 'in run' bets, which are currently a popular and legal form of wagering.<sup>46</sup>

The Report's recommendations also establish an unwieldy mechanism which requires operators to apply to the Minister for a determination of whether a bet is 'micro' (and prohibited) or merely in-play (and allowed). The Report does not make clear how the Minister for Sport's ability to determine what constitutes a 'micro' bet, interacts with the ability for sporting bodies to determine permissible forms of sports wagering. Similarly, wagering organisations have questioned the authority of Australian sporting bodies to determine what is a suitable bet for an offshore sport event.<sup>47</sup>

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37 See, for example Betfair, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*; bet365 Group Limited, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

38 Bwin.Party Digital Entertainment plc, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

39 Australian Bookmakers' Association Pty Ltd, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

40 Ibid.

41 Report, above n 1, p 52.

42 Betfair and bet365 Group Limited, above n 37.

43 Commercial Radio Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, 25 June 2012.

44 Report, above n 1, p 115.

45 See, for example Betfair and bet365 Group Limited's submissions, above n 37.

46 Australian Bookmakers' Association Pty Ltd, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, 25 June 2012.; Harness Racing Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, June 2012.

47 Betfair and bet365 Group Limited, above n 37; Australian Bookmakers' Association, above n 47.

## Advertising: implications for broadcasters and search engines

While the Report seeks to clarify the obligations of advertisers and broadcasters of IGS, the recommendations have the potential to increase regulatory burdens and confusion in these industries. FreeTV Australia, the representative body for Australian free-to-air broadcasters, has noted that the introduction of civil penalties for breaches of the Act's advertising prohibitions adds unnecessarily to the regulation of broadcasters.<sup>48</sup> Currently, the ACMA has a broad range of powers to enforce a breach of the Act's advertising offences by a broadcaster, including seeking criminal penalties, suspension or cancellation of a broadcasting licence, or issuing a remediation direction under the *Broadcasting Services Act 1992* (Cth). There is also likely to be inconsistency between the proposed reforms and the *Commercial Television Industry Code of Practice* in respect of when and where gambling may be advertised.

## Under a US-style system, financial institutions would be required to identify and block transactions to prohibited IGS operators. The inherent difficulty is trying to differentiate between and separate lawful and unlawful transactions, and the costs associated with doing so.

The Report's recommendations leave open the question as to the liability of search engine operators for paid links. It is common for search engines to display paid advertising links associated with relevant keywords, in response to keyword searches.<sup>49</sup> The Report recommends that links to 'free play' services constitute a contravention of section 61EA of the Act, and says that 'it is likely that an advertisement on an Australian-specific search engine or news site with an Australian focus would be prohibited'.<sup>50</sup>

### Enforcement against international offenders

While the Report acknowledges the limitations in seeking to enforce the Act against overseas offenders, it offers only fleeting comments on how these obstacles could be overcome. Enforcing the proposed new offences against directors and principals of companies that offer prohibited IGS to Australians will still face significant jurisdictional hurdles.<sup>51</sup> This has been a continuing problem for the Act, and in the absence of any significant enforcement case history in Australia against overseas offenders, it remains to be seen how this issue would be overcome in the future.

### Financial Institutions

The recommendation to permit restrictions on financial transactions has various implications for banking and financial institutions. Of primary concern is that, in order for the 'safe harbour' to operate successfully, financial institutions voluntarily undertaking to restrict or block transactions would need assurances from the Government

that the safe harbour protects the institution from legal action by local and offshore illegal gambling operators.<sup>52</sup>

Whether the mechanism is voluntary or mandatory, financial institutions would face considerable compliance costs. Under a US-style system, financial institutions would be required to identify and block transactions to prohibited IGS operators. The inherent difficulty is trying to differentiate between and separate lawful and unlawful transactions, and the costs associated with doing so. This model was rejected by the Joint Senate Committee Report.<sup>53</sup>

Alternatively, financial institutions could block financial transactions to prohibited gambling operators that are featured on a central 'black list'. The Report suggests that this list could be based on the ACMA's list of prohibited IGS operators.<sup>54</sup> However, even if the list is regularly updated, this system could be circumvented, for example by operators operating under multiple company names, using mirroring sites and providing different banking details to different groups of customers.

Various submissions in response to the Report highlighted that blocking financial transactions through banks or other intermediaries (for example PayPal) will not prevent Australians from accessing illegal IGS. This has been the experience in the US, where despite the implementation of a transaction blocking system, illegal online gambling persists, through the use of alternative electronic funds transfer products.<sup>55</sup>

## Conclusion

The Report recommends substantial changes to the regulation of IGS in Australia. If the recommendations are adopted, the operations of gaming and wagering businesses in Australia may be significantly affected. Broadcasters and financial institutions may also face increased costs and challenges. While some enhancement of the ACMA's enforcement tools has been recommended, the challenges of trans-border enforcement may continue to undermine the perceived and actual effectiveness of the Act.

The extent and timing of any reforms is anyone's guess; the DBCDE was expected to provide its final report to the government by the middle of this year. It is not clear whether the final report will result in implementing legislation. In the meantime, on-going discussion of the short-comings and potential to reform Australia's interactive gambling regulatory landscape is, however, a sure bet.

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48 Free TV Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, 25 June 2012.

49 Brian Fitzgerald et al, *Internet and E-Commerce Law, Business and Policy* (2011), p 1128.

50 Report, above n 1, p 86.

51 Christina Franngard, 'Issues of jurisdiction and enforcement in internet gambling' (2007) 10(7) *Internet Law Bulletin* 83 p 86.

52 Sportsbet and Sportingbet Group Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

53 Joint Select Committee on Gambling Reform, above n 7, p 148.

54 Ibid, p 73.

55 Report, above n 1, p 70.



# Tamiz v Google – Graffiti on the Wall

A case note on publication liability in UK defamation law for ISPs hosting defamatory content, by Henry Fraser.

## 1. Introduction

### 1.1 Background

*Tamiz v Google* is a UK libel case, decided in March this year.<sup>1</sup> Payam Tamiz, a Tory Muslim Council candidate in the UK, sued both Google Inc (**Google**) and Google UK Ltd (**Google UK**) in relation to eight comments that he claimed were defamatory of him. The comments were posted on Blogger, a blogging site hosted by Google, in response to a blog entry. Mr Tamiz complained to Google, and after a considerable delay, Google passed the complaint on to the author of the blog, who took down the offending material. Mr Tamiz did not sue the author of the original blog, nor did he seek to take action against the anonymous authors of the comments.

This case is factually similar to the current dispute between Joshua Meggitt and Twitter. Mr Meggitt is suing Twitter for publishing defamatory remarks about him. The popular author and television personality, Marieke Hardy, posted a defamatory tweet and a link to a defamatory blog on her Twitter feed. The *Tamiz* case may provide guidance on the question of whether Twitter is a publisher of its users' defamatory comments.

### 1.2 Issues

The decision actually concerned a procedural question: whether an order permitting originating service on Google Inc in the USA should be set aside. It turned on whether there was a real and substantial tort - a libel - from which the plaintiff had incurred damage within the UK jurisdiction. That issue ultimately came down to whether Google Inc could be regarded as the publisher of the libellous comments, and if so, whether it was entitled to any exemption from liability.

This article focuses on the issue of responsibility for publication, rather than on the defences and exemptions to publication liability, which are specific to the UK and EU's statutory context. The latter are considered only briefly.

## 2. Summary and Key points

### 2.1 Summary

Mr Justice Eady, the judge in this case, held that Google Inc was not the publisher of the libellous comments. His Honour also found that, if Google Inc were properly seen as the publisher of the comments, it would still have been exempt from liability either under section 1 of the UK Defamation Act 1996 or under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002.

### 2.2 Key points

- (a) In the UK the question of whether an ISP should be considered a publisher of defamatory or otherwise unlawful material will be a matter of fact to be decided on a case by case basis.
- (b) In the UK, an ISP that acquiesces in or authorises the publication of defamatory material is likely to be considered a publisher of that material. This is similar to the Australian position that, in defamation law, a person will be treated as a publisher of a defamatory statement if he or she consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of the statement on his or

her property so that persons other than the plaintiff may continue to read it. A plaintiff must establish an acceptance by the defendant of a responsibility for the continued publication of the statement.

- (c) In the UK, even when an ISP has been notified of defamatory material that it hosts, and has the technical capacity to take it down, it is not necessarily considered to have acquiesced in or authorised the publication.

This article offers some analysis of these key issues and their relation to the Australian legal context in section 4 below.

**in defamation law, a person will be treated as a publisher of a defamatory statement if he or she consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of the statement on his or her property so that persons other than the plaintiff may continue to read it.**

## 3. Is Google a publisher?

### 3.1 Google's arguments

Google put forward a number of arguments as to why it should not be considered a publisher. They included the following:

- Google is merely a service provider providing a publishing platform;
- Google does not control what is posted on blogs that it hosts;
- Google has no way of knowing if comments posted on blogs that it hosts are true, or not, or whether they are subject to a legal defence;
- given the volume of material published, Google cannot reasonably be expected to investigate to determine truth or falsity of material published on its platform, or the legal status of the material; and
- Google has a well-known policy that it does not remove offending material, for the reasons above.

### 3.2 Additional considerations

Mr Justice Eady, acknowledged in his reasons the difficulty of tracking down the authors of comments posted on blogs. His Honour also acknowledged how difficult it would be for Google to exercise editorial control over the contents of the blog, given that there are more than half a trillion words published on the blogging platform altogether, with 250,000 words added every day.

<sup>1</sup> *Tamiz v Google Inc Google UK Ltd* [2012] EWHC 449 (QB)

<sup>2</sup> *Davison v Habeeb* [2011] EWHC 3031 (QB); *Godfrey v Demon Internet Ltd* [2001] QB 201.

### 3.3 Cases and comparison

Mr Justice Eady reviewed a number of relevant English cases. This included two cases in which it was held considered that ISPs could be liable for defamatory material that they hosted, at least where the ISPs had been notified of the offending material and asked to remove it.<sup>2</sup>

His Honour also considered two cases where ISPs were absolved of responsibility for publication. In *Bunt v Tilley* [2007] 1 WLR 1243, a claim was struck out against three separate ISPs on the basis that “... persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers”. Similarly, in *Metropolitan International Schools Ltd v Design Technica Corp*n [2011] 1 WLR 1743 Google was held not to be responsible for the publication of defamatory “snippets” shown on the results page in response to Google searches. The court held that the search process is automated and the searches are framed by those making the enquiry, without any human input from Google. Consequently the court in *Design Technica* held that the mental element in responsibility for publication at common law was absent.

## His Honour drew an analogy between Google and the owner of a wall that had been ‘festooned, overnight, with defamatory graffiti’

### 3.4 Consideration

Mr Justice Eady noted that the role of ISPs in the law of defamation in the UK is not yet settled. His Honour considered that liability of ISPs as publishers of defamatory material may be fact sensitive. It may depend on:

- the extent to which the relevant ISP entity has knowledge of the words complained of, and of their illegality or potential illegality; and
- the extent to which the ISP has control over publication.

In forming a view as to Google’s degree of knowledge and control, his Honour gave weight to Google’s policy not to remove allegedly defamatory material (discussed in 3.1 above). His Honour also noted the undesirability of imposing legal liability in restraint of free speech as enshrined in Art 10 of the European Convention on Human Rights and Fundamental Freedoms. Finally, his Honour observed that the difficulty in identifying anonymous or pseudonymous bloggers is not of itself a reason to attribute to Google the qualities of a publisher of the defamatory material.

### 3.5 Ratio – Publication Liability

Mr Justice Eady concluded that Google should not be seen as the publisher of the defamatory comments on the blog it hosted. His Honour held that Google could not be seen to have authorised, or acquiesced in, publishing the comments.

His Honour drew an analogy between between Google and the owner of a wall that had been ‘festooned, overnight, with defamatory graffiti’. Though the owner of the wall could delete the graffiti with whitewash, that did not mean the owner must be considered a publisher of the graffiti until the wall had been whitewashed. Likewise, Google’s awareness of the defamatory material and technical capacity to take it down did not, in the circumstances, arrogate responsibility for the publication to Google.

### 3.6 Ratio – Defences and Exceptions

Mr Justice Eady also considered whether statutory defences in the UK *Defamation Act 1996* and the *Electronic Commerce (EC Directive) Regulations 2002* would have applied, had he decided that Google was a publisher of the defamatory material.

The *Defamation Act* defence is broadly similar to the statutory and common law innocent dissemination defences in Australian jurisdictions. Section 1 provides a defence where the defendant:

- was not the author, editor or publisher of the statement complained of;
- took reasonable care in relation to its publication; and
- did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a defamatory statement.

His Honour held that Google would have been able to avail itself of this defence.

Regulation 19 of the Electronic Commerce (EC Directive) Regulations provides a similar exemption for liability for ‘information society services’ who provide store information, and who:

- do not have knowledge of unlawful activity or information; and
- act expeditiously upon obtaining such knowledge to remove or disable access to the relevant information.

An information society service is “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”.

His Honour held that Google could have relied on this exemption from liability had it been a publisher of the defamatory material. Mr Tamiz’ notice to Google of the allegedly defamatory material was not sufficiently precise or substantial to give Google knowledge of the unlawful activity. Based on the information in Mr Tamiz’ notice, Google would still have had to consider further the validity or strength of any defences to defamation that might apply to the material in question, in order to determine whether the material in question was unlawful or not.

## 4. Analysis – Publication Liability

On the one hand, the ‘bulletin board’ authorities, and the High Court’s approach to authorisation liability in copyright law, suggest that Australian courts might follow *Tamiz* on similar facts. On the other hand, it is conceivable, based on the court’s approach to contempt by publication, and misleading and deceptive conduct in particular, that an Australian court would reach the opposite conclusion, on the same facts. Before embarking on an analysis of the factors weighing in favour of each position, it is pertinent briefly to set out some of the relevant principles of Australian defamation law.

### 4.1 Relevant principles of Australian defamation law

In Australia, as in the UK, the publisher of defamatory material is a joint tortfeasor in respect of the publication along with the writer, printer and distributor.<sup>3</sup>

Two key ‘bulletin board’ cases dealing with publication liability in circumstances referable to those in *Tamiz* are *Byrne v Deane* (an English case) and *Urbanchich v Drummoyne Municipal Council* (1991).<sup>4</sup>

<sup>3</sup> *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 581.

<sup>4</sup> *Byrne v Deane Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81-127; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81-127.

In *Byrne v Deane* an unknown person stuck an allegedly defamatory piece of paper on the wall of a club. The proprietors of the club, knowing of the paper and its contents, and its likely effect on people seeing it, did not remove it. Green LJ (at 838) articulated the test for publication liability as follows: “[H]aving regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?” In this case, the proper inference was that the proprietors made themselves responsible for the continued presence of the defamatory paper.

*Urbanchich v Drummoynne Municipal Council* concerned defamatory posters put up by an unknown person in council controlled bus shelters. The court held that, in order to attribute liability to the council for publication of defamatory posters, it was necessary to show more than ‘mere knowledge’ and the opportunity to remove on the part of the council. The court held that “the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of the statement on his property so that persons other than the plaintiff may continue to read it – in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of the statement”. Such an acceptance may in some circumstances be established by inference: and what will amount to acceptance is to be decided on a case by case basis.

#### 4.2 Factors indicating that Australian courts would follow *Tamiz*

Mr Justice Eady’s ratio in *Tamiz* is broadly consistent with the principles in *Byrne* and *Urbanchich*. His Honour, in finding that Google did not in the circumstances ‘authorise or acquiesce’ in the publication of the defamatory material, effectively concluded that Google did not consent to, approve of, adopt, promote or ratify the continued presence of the defamatory material on the blog. His Honour was at pains to distinguish between Google’s knowledge of the defamatory material, and technical capacity to take it down, and knowledge and control of the kind that would indicate actual acceptance of responsibility for its continued publication.

Mr Justice Eady’s analogy of the wall covered in graffiti might appear similar to the circumstances in *Byrne*, and thus to require an inference that the owners of the wall (Google) are responsible for the continued presence of the defamatory graffiti. However, there is a key distinction between the defamatory paper in *Byrne* and the wall example (and also the circumstances in *Tamiz* itself). In *Byrne* the defendants had direct control of their premises, and could identify, consider and take down material easily. The defendants had direct knowledge and absolute control. By contrast, deleting defamatory graffiti on a wall would require the application of whitewash. The owner of the wall would have knowledge only when they saw the graffiti, and less control over the defamatory as the defendants in *Byrne* because of the difficulty and expense of removing the material. As for the real facts of *Tamiz*, it would be more onerous still to identify, ascertain the legal status of, and take down defamatory material on a blog site containing billions of words. The extent of control and knowledge is much less than in *Byrne*.

Another reason why Australian courts might follow *Tamiz* is that the decision appears to accord with the Australian High Court’s attitude to ISP liability in copyright law. The High Court’s decision in *Roadshow Films Pty Ltd v iiNet Ltd* bespeaks an unwillingness to impose onerous obligations on ISPs in relation to user generated material over which ISPs do not exercise day to day control. The

court held that iiNet had not ‘authorised’ the copyright infringing acts of its users.<sup>5</sup> Even though iiNet had the capacity to terminate infringing users’ accounts, and had received complaints about infringing material, the court held that it had not failed to take ‘reasonable steps’ to prevent the infringement. It would not have been reasonable for iiNet to go to the difficulty and expense of investigating insufficiently detailed complaints of copyright infringement.

Applying similar reasoning to the Meggit and Twitter dispute in Australia: the difficulty of monitoring and determining the legal status of trillions of words worth of material, and the lack of day to day control of material, would bear against an inference that Twitter accepted responsibility for the publication of defamatory statements on its platform.

These considerations suggest that an Australian court, like Mr Justice Eady, might not infer that Google’s failure to remove the defamatory material amounted to an acceptance of responsibility for the continued publication of it.

### These considerations suggest that an Australian court, like Mr Justice Eady, might not infer that Google’s failure to remove the defamatory material amounted to an acceptance of responsibility for the continued publication of it

Authorisation of copyright infringement belongs, of course, to a different area of law to defamation. Ultimately, though, both areas of law are faced with similar questions about secondary liability of ISPs for the communication of unlawful material by their users.

#### 4.3 Factors indicating Australian courts would not follow *Tamiz*

There are, however, cogent reasons why Australian courts might take the opposite approach to the question of ISP responsibility for publication of hosted material. A number of cases indicate that courts may attribute responsibility for publication to entities that might at first glance appear to be neutral conduits rather than active publishers.

In *Dow Jones v Gutnick*, the High Court of Australia held that publication occurs when and where the reader or viewer comprehends the contents of the publication.<sup>6</sup> Arguably, that principle opens the door conceptually, to attributing responsibility for publication, to a party whose role in making the contents of the publication comprehensible is at first glance passive.

In *ACCC v Allergy Pathway Pty Ltd and Anor*, Finkelstein J of the Federal Court held that Allergy Pathway’s failure to remove misleading third party posts on its Facebook page meant that it took responsibility for the continued publication of the misleading statements.<sup>7</sup> Allergy Pathways was held to be in contempt of court for breach of a court order not to publish such statements.

The circumstances in *Tamiz*, and in the dispute between Joshua Meggit and Twitter are arguably distinguishable from *Allergy Pathways* because Allergy Pathways was dealing with only a few comments rather than billions of words; and because Allergy Pathways had day to day control over its Facebook page.

5 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16.

6 *Dow Jones & Company Inc. v Gutnick*, [2002] HCA 56.

7 *ACCC v Allergy Pathway Pty Ltd and Anor* (No 2) [2011] FCA 74

8 *Trkulja v Yahoo! Inc LLC and Yahoo!7 Pty Ltd* [2012] VSC 88.

More directly applicable are cases where responsibility for publication is attributed to entities providing information in response to searches. In *Trkulja v Yahoo!*, Yahoo admitted that it was responsible as a publisher of defamatory material appearing on a web page appearing in the results of a search on its search engine.<sup>9</sup> Since Yahoo admitted publication, the issue did not arise for consideration by the court.

## Tamiz provides a useful and persuasive, though not binding, precedent for Australian courts

A similar issue arose, however, in the context of a misleading and deceptive conduct case. In *ACCC v Google*, the Full Federal Court held that Google was not a mere conduit for misleading statements appearing in sponsored links in Google search results.<sup>9</sup> The court, considering Google's conduct as a whole, held that Google was in fact responsible for the statements. That was because the misleading statements and links appeared in results to a search. The results to a search, the court said, are determined solely by Google, by way of response to the searcher's query, through the algorithms that Google chooses to apply to searches.

The ratio in *ACCC v Google* is basically the opposite of the ratio in *Metropolitan International Schools Ltd v Designtecnica Corpn*: one of the cases that Mr Justice Eady followed in *Tamiz* (discussed in section 3.3 above). In *Designtecnica*, it was held that the Google search process is automated and searches are framed by those making the enquiry, without any human input from Google.

*Trkulja* and *ACCC v Google*, and even *Allergy Pathways*, might suggest that Australian courts could perceive Google's role in hosting material as less neutral than did Mr Justice Eady. If Google is seen,

in the context of misleading and deceptive conduct, as actively responding to searches for information and presenting results, then arguably it is responsible for any defamatory material that appears in response to a search.<sup>10</sup>

## 5. Conclusion

It is not the intention of this article to predict how Australian courts will deal with the liability of ISPs for publication of defamatory (or indeed otherwise unlawful) material on their platforms. It merely explores some of the issues raised by the case.

*Tamiz* provides a useful and persuasive, though not binding, precedent for Australian courts. Regardless of whether Australian courts follow the UK judgment, they are likely to be guided by Mr Justice Eady's reasoning that the liability of ISPs as publishers of defamatory material may be fact sensitive. Since the law in this area is in the early stages of its evolution, bright line rules may not be helpful. Whether an ISP may properly be inferred to have taken responsibility for the publication of material that is available through its service will need to be determined on the facts of each case.

However, *Tamiz* does provide provides guidance by identifying key elements underlying such an inference: the extent to which the relevant ISP entity has knowledge of the words complained of, and of their illegality or potential illegality; the extent to which the ISP has control over publication of the words; and the various aspects of an ISP's service and policies that may bear on the knowledge and control attributable to the ISP.

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<sup>9</sup> *Australian Competition and Consumer Commission v Google Inc* [2012] FCAFC 49.

<sup>10</sup> *Trkulja v Yahoo!Inc LLC and Yahoo!7 Pty Ltd* [2012] VSC 88.



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