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# Media Standards: Some Challenges and Opportunities

**On 4 February 2015, the Chair of the Australian Press Council, Prof Julian Disney AO provided the following address to the National Press Club.**

Thank you for the opportunity to address the Press Club. I will begin with some background about the Press Council and its recent progress. Then I will make some comments about current media standards – concentrating, as the Council does, on print and online media. I will finish by suggesting some priorities for preserving and strengthening those standards, and for preserving and strengthening genuine freedom of speech for all and freedom of the press.

## THE PRESS COUNCIL

### 1. INTRODUCTION

#### 1.1 Establishment and coverage

The Council was established in 1976 by the major journalists' union and association of publishers, fearing that widespread public dissatisfaction with the press was putting its freedom at risk of statutory regulation.

Fairfax did not join for the first six years, saying that the Council could not meet the public's expectations of it. News was very reluctant to join and soon withdrew for almost a decade. The media union, having played such a key founding role, withdrew for almost two decades.

The only major newspaper now outside the Council is *The West Australian*, which withdrew when the other publishers agreed to strengthen the Council. Since then, however, a number of digital-only publishers have joined, including ninemsn, crikey, New Matilda and The New Daily.

#### 1.2 Main roles

The Council's main role has always been to receive complaints about publications and say whether it thought they were justified – the object was described by the inaugural Chair, former High Court justice Sir Frank Kitto, as being:

> by constant insistence upon high ethical principles in journalism to raise the general standard of performance in exercising the freedom which the law allows to the Press and by so doing to preserve public regard for that freedom, for the sake of the Press of course, but ultimately and most importantly for the people.

The Council's second role involves drawing up, disseminating and reviewing the Standards of Practice which it applies when deciding

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> whether particular complaints should be upheld. Sometimes this has included retrospective monitoring of a particular publication's compliance with the Standards.

The Council's third role is making public statements on policy issues, especially about freedom of speech, public access to information and freedom of the press. A recent and very important example of this work was the Council's intensive, two-year campaign against proposals that a statutory authority be set up to regulate the press.

**1.3 Self-regulation?**

The Council system is often described as self-regulation, but neither "self" nor "regulation" is really accurate.

*a potential benefit of digital publishing is to compensate substantially for Australia's unusual lack of diversity in newspaper ownership*

First, its constitution establishes it as an independent body. The publishers usually provide all the funding, but they appoint less than 40% of the governing body (which then appoints all the other members – including the Chair, public members and independent journalists – as well as setting the Standards of Practice). They appoint none of the Adjudication Panel members, and the majority of those members must be from outside the industry.

Second, it cannot really be called a regulator – let alone a censor as is sometimes alleged. It cannot enforce its decisions except to require that they be published. Its power, like that of most Ombudsmen, is merely to express a view. Unlike the Independent Press Standards Organisation (***IPSO***) – its new industry-established counterpart in the UK – it cannot require a correction to be published or impose a fine.

**2. STRENGTHENING EFFECTIVENESS**

In 2009, the publishers sharply reduced the Council's already modest funding and range of activities. Shortly afterwards I was invited to join the Council as Chair. An extensive program was developed to strengthen its effectiveness and the publishers agreed to restore the lost funding.

A year later, facing strong criticism from the Finkelstein Inquiry into media regulation, the publishers agreed to further substantial funding increase for the Council and to setting future funding levels at least three years in advance. They also agreed that withdrawal from the Council should be subject to four years notice, and they should no longer be represented on the Adjudication Panel for deciding complaints.

The design and implementation of the Council's strengthening program has been helped by consultations involving more than one hundred community leaders, editors and journalists. The News Corp representative on the Council played a key role in securing support from other publishers.

I shall mention briefly some of the progress which has been achieved.

**2.1 Complaints handling**

Publications must now include in each issue a standard notice about the Council's complaints-handling role. This partly explains why the number of complaints has risen by over 50%. Some complaints are made by a number of separate complainants and during the last six months of 2014 the total number of new complainants exceeded 3000.

Complaints-handling processes are clearer, fairer and more rigorous. About 5-10% lead to an adjudication; another 15-20% are remedied by agreement; and in a number of other cases a new Letter of Advice process is being applied. The letter may, for example, advise the publication that, although a particular complaint is not being referred to the Adjudication Panel, some of the publication's justifications for the material in question are borderline or invalid.

Adjudications are now made by a Panel of 5-7 members, not by unwieldy discussions amongst all 23 Council members. They are published prominently – complying with specific Council requirements about the timing, page range and positioning. Links to them are required on the publisher's home page and permanently on the digital version of the original material. These changes effectively addressed what had been a key focus of public criticism.

**2.2 Standards of Practice**

After lengthy consultation, the Council unanimously agreed last year on a revised set of the General Principles by which it assesses complaints. The new version is much clearer, briefer and more internally consistent. It provides realistic benchmarks of acceptable practice, rather than utopian aspirations.

How the General Principles apply in particular areas is being fleshed out in a series of Specific Standards. The first two focused on covering suicides and on contacting patients in hospital. Work is now being undertaken on aspects of digital publishing and on conflicts of interests, especially arising from proliferating practices like 'content marketing' or 'native advertising.'

**2.3 Policy statements**

The Council's recent policy work has been dominated by the public inquiries and debate about media regulation, including possible replacement of the Council by a new statutory regulator. Its public submissions and evidence to the inquiries, as well as the credibility of its plans to become more effective, were widely recognised as crucial to the Council's survival.

## MEDIA STANDARDS IN THE CURRENT ENVIRONMENT

I shall begin with some brief comments about impacts of digital publishing.

### 3. IMPACTS OF DIGITAL PUBLISHING

#### 3.1 Some benefits

Writers and readers have much faster and cheaper access to a broader range of information and opinion. Space is often less constrained than in newspapers; material can be corrected and updated more readily; and links improve readers' access to related material. New voices and methods have been introduced, including through readers' comment streams. Social media has enabled people to convey their knowledge and views more widely than around the barbecue.

Concern has long been expressed about lack of diversity in ownership of mainstream Australian newspapers. In 1986, the Chair of the Council, former Supreme Court Justice Hal Wootten, resigned when the Council 'decided' by a tied vote not to express concern or take any other action about News Limited's impending takeover of the Herald and Weekly Times group. He described the takeover as probably 'the greatest threat to the freedom of the press in the [then ten-year] life of the Council..

Whether or not one shares that view, a potential benefit of digital publishing is to compensate substantially for Australia's unusual lack of diversity in newspaper ownership. But this will require some digital-only publishers achieving much wider readership, and much greater influence on major newspapers and broadcasters. Indeed, the current position may worsen if Fairfax Media becomes less involved in newspaper publishing.

Some small websites and blogs may become more influential and sustainable through cooperation. For example, they could join to fight against their material being re-published instantaneously by competitors without payment or even acknowledgment. They could perhaps establish a joint portal and subscription as an additional way of accessing their websites and blogs.

#### 3.2 Some problems

Digital publishing has tended to increase the competitive pressures to publish without adequately checking for accuracy and without giving reasonable opportunities for prior correction or comment by people who are closely affected. Yet "getting it right" before publishing is even more important than in pre-digital days, especially as search engines make material much more readily and permanently accessible.

While digital material can be readily corrected, many readers are unlikely to revisit an article to see whether any corrections have been made. Also, they may have read the article when re-published by another outlet that does not notice or post the correction, and is difficult or impossible to contact and persuade to do so.

Even if the original material was accurate, its permanent availability through search engines may cause unjustified damage. For example, the laws allowing people not to disclose some long-past convictions are ineffective if the convictions remain on search engines. Also search results often list reports of an allegation much more prominently than they list reports of a subsequent denial or dismissal (if reported at all).

The speed and lack of constraint of social media often strengthens the pressure, or perceived justification, for print and digital publishers to depart from traditional practices like withholding names of accident victims until their relatives know and not publishing close-up photographs of people in distress.

It is important to emphasise, however, that while digital competition has damaged standards of accuracy, fairness and privacy in some ways, the quality of many print and online articles has benefited greatly from the wider and faster access to information and opinions which digital media has made possible.

### 4. GENERAL STANDARDS OF PRACTICE

#### 4.1 A lot of excellence

There is a lot to like in modern print and online media. Every day I admire material that is especially perceptive, courageous, fair, entertaining or challenging. Many editors and journalists make great use of digital publishing while also becoming more aware of the dangers it can present. Many work very hard to maintain quality in severely depleted newsrooms, often against less scrupulous competition.

***Some small websites and blogs may become more influential and sustainable through cooperation. They could join to fight against their material being re-published instantaneously without payment or even acknowledgment***

From the vast array of examples of the importance of press scrutiny, one could just mention almost at random the Australian Wheat Board, the detention of Dr Hanif, the exploits of Eddie Obeid, the Catholic Church, the Health Services Union and the Commonwealth Bank.

Nevertheless, as in most if not all areas of human endeavour, some significant weaknesses need to be recognised and addressed.

#### 4.2 Serious inaccuracy and misrepresentation

Indisputable errors or misrepresentations are too common. A perceived need to beat competitors does not justify inadequate checking of facts, especially because, as I have mentioned, it is often impossible to fully rectify the impact of errors – even if corrected online within minutes.

Many of the worst misrepresentations occur on prominent pages, often in headlines or opening paragraphs. Sometimes they may reflect editors' commercial or political concerns rather than the perspectives of the relevant journalist and article.

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# Media Standards [CONT'D]

> News reports are too often distorted by writers' opinions, especially through the use of loaded language (is a person a "freedom fighter" or a "terrorist"?) or by omission of key facts. Some prominent columnists can adeptly express strong opinions in ways which are highly likely to be read as indisputable facts yet are indisputably inaccurate or misleading.

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Some publishers are very reluctant to correct significant errors promptly, clearly and prominently. Digital-only publishers may tend to be more willing to do so than newspapers. But the rush to publish first, even if by only a few seconds, can make them more prone to error.

**4.3 Unfairness and undue harm**

Unfairness arises too often from failing to contact a person who is going to be strongly criticised in an article, or not publishing their response in a reasonable and timely manner. Publishing a later letter does not necessarily provide sufficient opportunity for them to correct or comment on prominent and seriously damaging articles – especially if the letter is unreasonably edited or obscurely positioned.

The Council has long expressed concern about the unfairness of headlines and opening sentences which strongly assert facts or opinions that are not supported by the accompanying text but are likely to be left as the lasting impressions in the minds of many readers. This practice remains too common – indeed, it may have become more frequent in some publications.

The Council does not expect all articles or issues of a publication to be entirely fair or balanced, especially if different perspectives are also given reasonable exposure at some other time. That is reflected in the fact that the overwhelming majority of complaints to the Council on those grounds are not upheld.

From its earliest days, the Council emphasised what it called:

> the duty, which must be accepted if freedom of the Press is to retain the support of the public, to respect the right of the general reader to be informed of the arguments on each side of a public debate upon which a paper has expressed its own views.

The current Standard of Practice says that publications must take reasonable steps to ensure factual material (which includes reporting the opinions of others) is presented with reasonable fairness and balance. This does not preclude particular publications, or individual journalists and columnists, from running vigorous and sustained campaigns. Some recent examples have been powerful and effective without being misleading or grossly unfair. But there have also been instances where distorted reporting of facts and opinions has gone beyond acceptable limits.

The Council gives such weight to the public interest in free speech that it rarely upholds complaints about offensive material, unless it is likely to cause substantial distress, prejudice, or risks to health or safety. This does not mean the Council necessarily regarded the material in question as being fair or conducive to genuine democracy, whether it was presented in text or graphic form. Indeed, the Council been concerned from its inception that this kind of material can significantly weaken public support for press freedom.

**4.4 Unjustified intrusions on privacy**

Digital publishing has increased the opportunities and pressures to intrude on reasonable expectations of privacy. This includes widely re-publishing social media material that clearly was not intended to be used in the different context or had been posted by someone else without due regard for the person's privacy and safety.

Some social media providers contribute to these problems with privacy settings that are complex or largely ineffective. But newspapers and other re-publishers also have responsibilities not to make intrusive use of the material, especially if a deceased person or vulnerable people like children or grieving relatives are involved.

There is a common belief in the media that if a photograph is taken in or from a place to which the public has access, there is necessarily no breach of privacy. But the true test is whether the relevant place and activity meant that the person had a reasonable expectation of privacy from the intrusion or subsequent publication (for example, perhaps, when visiting a gravesite). The same applies to comments that have been surreptitiously overheard or recorded.

It must be strongly emphasised, however, that some intrusions are justifiable in the public interest (though not merely because the public is interested). This can apply, for example, to intrusions which help to expose serious malpractice, whether in government, business or elsewhere. Indeed, some intrusions may be ethically justifiable on this ground even though they are illegal.

**4.5 Some possible trends**

Many experienced journalists and some editors have told me that standards of accuracy and fairness are generally lower than a couple of decades ago. One

said, with both sadness and anger, that at the newspaper in which he has a senior position, the editorial approach has changed from "go and find out what the story is" to being "go and find a source who will say this is the story".

Whether or not these assessments are entirely correct, misrepresentations, serious unfairness, personal abuse and failures to publish adequate corrections or responses seem to have become more common in some quarters in recent years.

## THE WAY AHEAD

I come now to the final part of my remarks today, with some suggestions about the way ahead for the Press Council, and some comments about media standards, free speech and press freedom.

## 5. THE PRESS COUNCIL

Despite recent progress, much work remains if the Press Council is to fulfil its responsibilities adequately. I shall briefly suggest some key priorities for action.

### 5.1 Promulgating and monitoring Standards of Practice

The new General Principles and Specific Standards – approved by all Council members - need to become well-known across the industry, and the series of Specific Standards needs to be developed further.

New information and training materials about these Standards of Practice are being prepared, and publishers will be asked to cooperate by posting them on their intranets and inviting Council representatives to internal training and refresher sessions.

An already agreed priority for the Council is to regularly monitor the extent to which the Standards are being observed. It commissioned independent monitoring a decade or so ago, looking retrospectively at coverage of particular events and topics.

The purpose of this strategy is not to adjudicate on particular material, but rather to assess whether the Standards of Practice need to be amended and/or further action taken to emphasise the need to comply with them. The strategy was re-endorsed by the Council in its submission to the Finkelstein inquiry (and approved in the News Corp submission). It needs now to be taken forward.

### 5.2 Handling complaints promptly and informally

Further efforts need to be made to fast-track the Council's handling of complaints where delay can greatly weaken the prospects of an appropriate remedy or, on the other hand, greatly disadvantage a publication.

Some recent changes in structures and processes have laid the foundation for improvements. But they have been hampered by the Council's own transitional delays as well as by excessive legalism and obstruction from some publications and complainants.

Further changes seem necessary to emphasise that the Council is more like an Ombudsman than a tribunal. After all, like an Ombudsman, it can only express an opinion, not enforce compliance. This should not lead, however, to the Council's opinions being expressed less forthrightly. Indeed, they may already have become less forthright than in some of its earliest years.

### 5.3 Considering complaints by general readers

The Council needs to continue strengthening the effectiveness of its responses to complaints and concerns expressed by people who are not directly affected by the material in question (sometimes misleadingly called "third party complaints").

All publisher members of the Council hold themselves out to their readers as complying with its Standards, and the Council has always said that readers can ask it to determine whether the Standards have been observed in a particular case. Last year it made significant changes aimed at streamlining the handling of these matters, including preventing them from straying beyond consideration of possible breaches of its Standards of Practice.

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Very recently, as in earlier times, the Council has firmly rejected attempts to impose unreasonable constraints on its handling of these complaints. It is essential that the Council continues to do so and to refute recent misrepresentations of its improved processes.

### 5.4 Considering possible breaches without a complaint

The Council's long experience indisputably demonstrates many reasons why complaints are not made to it despite there being a very clear, or at least highly probable, breach of its Standards.

Even where a person has been directly and badly affected by the material in question, they may believe – often on entirely reasonable grounds – that complaining will lead to retribution or to further airing of the objectionable material.

Even if they wish to pursue a complaint, they may be unable to do so because of financial or work constraints, limited education or confidence, serious illness, or deep grief from loss of a family member in the incident being reported upon.

Some people may have benefited from the publication of inaccurate or unfair material, and rather than bring a complaint may prefer that the material is left unexamined.

In many other cases, the material may not directly affect any particular person but nevertheless be of considerable significance to many readers, some of whose subsequent actions may be affected by it.

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# Media Standards [CONT'D]

> These problems partially explain why an eminent editor, David Bowman, reflected on the first ten years of the Council that its record shows:

> a good many peccadilloes [have] become the subject of public complaint against the press while nearly all the big crimes go unremarked. This confirms that the [C]ouncil may well try to make more use of its right to lay complaints itself. One would hope that a series of exemplary cases would result.

The Council decided a few years before I became Chair that it would investigate some possible breaches of its Standards even if it had not yet received a formal complaint. The Council now needs to implement that decision more effectively.

*Consideration will also need to be given to further interaction between the Council and the Advertising Standards Board especially as digital competition is further blurring the line between advertising and the kind of material which falls within the Council's ambit.*

It should also be willing to consider matters where there has been no complaint but it is especially important to clarify publicly whether certain material exemplifies a serious breach of a particular Standard of Practice. This approach should be used sparingly and, where feasible, after consulting any person who is directly affected by the material in question.

Some special safeguards should apply, as they do to a somewhat analogous process of the broadcasting regulator, the Australian Communications and Media Authority (***ACMA***). Also, it would be important to ensure strict observance of the general Council practice that people who refer a matter for adjudication are not involved in the adjudication itself.

This slightly expanded approach would still be much narrower than the UK industry has authorised for its new press council, IPSO, involving extensive and systemic investigations of broad aspects of a publication's conduct, rather than only of a particular instance.

But unless it is willing to move cautiously in this direction, the Council's public explanation and application of its Standards of Practice will remain heavily dependent on the happenstance of appropriate complaints being made on key issues – and its ability to promote good media standards on issues of considerable importance will remain seriously deficient.

**5.5 Some other priorities**

A few other priorities for Council action can be suggested briefly:

- recruit more digital-only publishers (perhaps through a collective membership, as currently applies to country and suburban papers);
- implement the Council's earlier in-principle decision to establish an independent process for adjudicating on complaints about coverage of the Council itself;
- develop further the regular program of Round Table consultations and other meetings with community leaders and front-line journalists across Australia;
- prescribe and monitor benchmarks for publications' own complaints-handling processes, including analysis of the statistics that publishers have undertaken to provide to the Council each quarter.

The Council will also need to keep at least a watching brief on the continuing trend towards convergence between print, digital and broadcast media. Its detailed proposals for a new Independent Standards Organisation to take over the Council's role and those of bodies such as ACMA were broadly endorsed by the official Convergence Review in 2012. The proposed body was to be sufficiently independent of both government and the media to command public confidence.

Consideration will also need to be given to further interaction between the Council and the Advertising Standards Board especially as digital competition is further blurring the line between advertising and the kind of material which falls within the Council's ambit.

**5.6 Independence and integrity**

Above all, the Council must not be diverted from meeting the responsibilities that it, including its major publisher members, has solemnly assured the public it will fulfil. If honouring these commitments meets fierce attack from a powerful voice or voices in the industry, the Council will need to continue standing firm.

Potential estrangement or loss of a dissident publisher, no matter how powerful, cannot justify deceiving the public and disadvantaging the other publishers who will continue to respect Council processes and decisions, even when not agreeing with them. Moreover, the Council would retain the option of considering complaints against non-members – the failings of which, as Sir Frank Kitto pointed out, can endanger the general freedom of the press.

## 6. FREEDOM OF THE PRESS AND FREEDOM OF SPEECH

Finally, some brief comments on freedom of the press and its relationship with freedom of speech.

**6.1 Press freedom**

The Council's main and unique contribution to the cause of press freedom is its core work of developing standards of media practice and responding to

complaints about possible breaches. This role necessarily consumes the dominant share of the Council's resources. So it is not usually appropriate or feasible to become heavily involved in particular campaigns to which major media outlets or other powerful organisations can devote much greater resources and influence.

The Council may be able to contribute on some occasions, provided that its resources are not diverted by having to handle some publications' unreasonable obstruction and misrepresentation. In that eventuality, prime contenders for its attention might include the major intrusions on press freedom caused by government restraints on coverage of security, police and so-called "border control" activities.

There are, however, some other areas in which substantially chilling effects on press freedom may occur but which are getting much less public attention. They include:

- a government repeatedly giving a closely-aligned publication advance access to key information and policies, ahead of other media and the general public;
- a government leaking details of an impending announcement to a particular publication on condition that the initial report does not include prior comment from anyone else;
- a major non-media organisation recruiting its own staff journalists and giving them sole or privileged access to key information and facilities to report on the organisation's activities;
- a publication's financial difficulties making it especially vulnerable to demands for favourable coverage in return for advertising or other support.

It is important that the Council's statements on issues of press freedom avoid seeming to be docile echoes of publishers' views rather than fairly conveying the views of its diverse members. This independent credibility was especially important in resisting the recent proposals for a new statutory regulator.

**6.2 Freedom of speech**

A community does not enjoy genuine freedom of speech unless the freedom is realistically exercisable by as broad a range of people as possible. The freedom should not be largely the preserve of powerful interests in government, business or the ranks of publishers. These powerful interests also should not use their freedom of speech to gravely damage – even destroy - other people's freedom of speech.

It is especially important that freedom of the press is not abused in this way. For example, a publication can gravely damage or deny other people's freedom of speech by:

- repeatedly and seriously misrepresenting what a person has said - especially if it also denies the person a reasonable opportunity to correct the misrepresentation by a letter to the editor or otherwise; or
- repeatedly abusing or intimidating a person with whose views it disagrees, and repeatedly allowing – perhaps encouraging - its letters and comments sections to be used at length for those purposes; or
- breaching without good cause the confidentiality of a person who wished to exercise their freedom of speech in private, not in public; or
- publishing seriously false or misleading information on the basis of which some of its readers exercise their own freedom of speech to unwittingly express views they would not have held if accurately informed.

If a publication repeatedly and flagrantly engages in these kinds of practices, can it credibly portray itself as a supporter of free speech? Or is it only a supporter of free speech for people with whom it agrees or from whom it seeks support?

Indeed, can a Press Council credibly portray itself in that way if it quietly acquiesces in the publication's practices? And should other publications turn a blind eye?

***The Council's main and unique contribution to the cause of press freedom is its core work of developing standards of media practice and responding to complaints about possible breaches***

Some of the greatest obstacles to achieving and sustaining genuine freedoms are extremism and hypocrisy by people who prominently propound them and have privileged opportunities to exercise them. This applies especially to freedom of speech and of the press, which are far too important to be put at risk in this way.

PROFESSOR JULIAN DISNEY AO has been the Chair of the Press Council since December 2009. He is a Professor of Law at the University of New South Wales, founder and National Chair of Anti-Poverty Week, and Chair of the NSW Energy and Water Ombudsman. He is also a member of the Board of Governors of the Committee for the Economic Development of Australia, and of the Asialink Advisory Council. Prof Disney has held a number of significant roles including with the Sydney Welfare Rights Centre as President of the Australian Council of Social Service, President of the International Council on Social Welfare and as a Law Reform Commissioner in New South Wales for seven years and a member of the Australian Government's Economic Planning Advisory Council. A full biography of Professor Disney is available at http://www.presscouncil.org.au/uploads/52321/ufiles/Chair_of_the_Council_updated_22_September_2014.pdf

# Case Update: Seven Network Ltd v Commissioner of Taxation

**Martin Ross and Mark Lebbon review a recent decision of the Federal Court of Australia which considered whether copyright exists in audio-visual signals of major sporting events.**

## THE CASE

On 22 December 2014 Justice Bennett of the Federal Court of Australia delivered her judgment in Seven Network Limited v Commissioner of Taxation.[1]

*there had been no embodiment of the data stream so as to enable the showing of a moving picture prior to receipt of the signal at the receiver*

The proceeding was brought by Seven Network Limited (***Seven***) seeking declarations that it did not have to withhold tax on certain payments it made to the International Olympic Committee (***IOC***) under agreements relating to the use of the audio-visual feed of events and competitions in the Olympic Games.

A key consideration in Bennett J's judgment is whether copyright exists in specific signals transmitted by the IOC to Seven for use in connection with Seven's broadcast of the 2004, 2006 and 2008 Olympic Games.

## THE ITVR SIGNAL

The IOC is the owner of the broadcast rights to the Olympic Games and grants media companies around the world the rights to broadcast events and competitions at the Olympic Games. Since the 2008 Olympic Games, the IOC, through its Olympic Broadcasting Services agency, has operated as the host broadcaster and is responsible for delivering the pictures and sounds of the Olympic Games through the transmission of the international television and radio signals (ITVR Signal) for use by its licensees. Prior to 2008 Olympic Games, the local organising committee was responsible for host broadcasting and often undertook this activity via a third party broadcaster.

The ITVR Signal transmitted by the IOC to Seven for use in connection with Seven's broadcast of the relevant Olympic Games was an international signal of events at the Olympic Games. This feed was produced and provided to the authorised media companies and incorporated into their broadcasts.

Bennett J's judgment sets out in some detail the technical aspects and nature of the ITVR Signal. These matters were important to the reasoning in her Honour's decision.

The nature of the ITVR Signal and how Seven received that signal can be summarised as follows:

the ITVR Signal comprised an international television and international radio signal produced by the IOC's host broadcaster which was combined and transmitted live to the International Broadcast Centre (***IBC***) for distribution to Seven, and the IOC's other authorised Olympic broadcasters;

Seven received the ITVR Signal on a copper coaxial cable and there was no picture, image or sound recorded or permanently stored in the copper coaxial cable that transmitted the signal;

- the process of transmitting the ITVR Signal from the host broadcaster to Seven did not involve any recording or storage of the ITVR Signal;
- the data transported in the ITVR Signal by electromotive force through the copper coaxial cable could be converted into television coverage (i.e. visual images and sounds) only by use of a receiving device;
- no picture, image or sound could be recorded or permanently stored in the ITVR Signal and the ITVR Signal was not tangible and did not give physical form to an image or sound;
- visual images and sounds could not be reproduced from the ITVR Signal; and
- the ITVR Signal was not suitable for broadcast in its raw form and Seven could use or alter the ITVR Signal to create its broadcast signal.

## KEY QUESTION TO BE DETERMINED

Seven made a number of payments to the Swiss based IOC in connection with the broadcast of the 2004, 2006 and 2008 Olympic Games. One of these payments was for an amount of $97,742,609 for use of the ITVR Signal ***(Payment***).

1 [2014] FCA 1411.

The Commissioner of Taxation (***Commissioner***) argued that the Payment should be considered a royalty within the meaning of the Australia-Switzerland Double Tax Treaty (***Swiss Treaty***).[2] If the Payment was characterised this way then Seven was required, pursuant to section 12-280 of Schedule 1 of the Taxation Administration Act 1953 (Cth), to withhold tax and remit it to the Commissioner on behalf of the IOC (which was the relevant taxpayer).

The Payment could only be taxed in Australia to the extent it was a royalty for the purposes of the Swiss Treaty. Article 12(3) of the Swiss Treaty provides that a payment will be a royalty if it is consideration for the use of, or the right to use, any copyright or other like property or right. Seven argued that the Payment was not for the use of copyright because the ITVR Signal was not of itself a sound recording or cinematograph film.

The critical matter for determination in the proceeding was whether the ITVR Signal could be considered a cinematograph film in which copyright subsists.[3]

For the ITVR Signal to be a cinematograph film, the Commissioner had to establish that visual images which made up the ITVR Signal were 'embodied in an article or thing'.[4] This necessarily required that the visual images be capable, with or without the aid of another device, of being reproduced from the relevant article or thing.[5]

## FEDERAL COURT DECISION

Bennett J found that the aggregate of the visual images were not embodied in any article or thing when they were transmitted by the ITVR Signal to Seven at the IBC. Rather, the visual images were first embodied in an article or thing only after the data stream was converted by a receiving device, such as a television receiver in Australia.[6]

In Bennett J's opinion, the consideration the IOC provided to Seven in return for the Payment was the right to receive the data stream of the ITVR Signal at the IBC and access to the stream of data at the IBC. The fact that the data could then be seen on a receiving television screen in Australia may have established that it could be produced from the data stream however it did not establish that it was capable of being reproduced.[7]

Her Honour distinguished the facts in this case from those in *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd*[8], which held that a computer game was a cinematograph film, on the basis that there had been no embodiment of the data stream so as to enable the showing of a moving picture prior to receipt of the signal at the receiver.[9] In contrast, a computer game was capable of reproducing the visual images which had been aggregated within it.

Bennett J stated:

> The signal is more in the nature of the fleeting use of a medium of communication than an aggregate of sounds and visual images that may convey a cinematograph film of the Olympic event to the viewer.[10]

Her Honour also held that the words 'other like property or right' referred to in Article 12(3) of the Swiss Treaty was limited only to Australian statutory rights (ie - copyright) and was not to be given some broader meaning.[11]

In finding for Seven, Bennett J held that the subject matter of the Payment is not a cinematograph film, and is not a copyright 'or other like property or right'. Therefore, the Payment was not a royalty under the Swiss Treaty, and Seven was not obliged to withhold and remit to the Commissioner any tax from the Payment.

***'the subject matter of the Payment is not a cinematograph film, and is not a copyright 'or other like property or right'***

## COMMENTS

This case illustrates the complicated and technical nature of copyright in audio visual signals, recordings and broadcasts of major sporting events. Organisations dealing in such material, particularly when acquiring or licensing rights internationally, need to ensure their agreements accurately reflect the rights intended to be granted and are drafted in a manner mindful of any taxation consequences.

Businesses must always consider the withholding tax implications if any payments are made to, or by, a foreign party for the use of intellectual property. Without careful drafting and structuring, withholding tax can become an unrecovered cost in doing business. The case also reminds us that it is important to bear in mind that a royalty can arise whether the payment for the use of the intellectual property is comprised of a lump sum or a series of payments. Moreover, the courts will always look beyond the label that the parties have used in the contract to determine the substance of the payment(s).

The Commissioner has appealed the decision.

MARTIN ROSS is a Partner and MARK LEBBON a lawyer at Hall & Wilcox.

2 *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income* [1981] ATS 5.
3 It was not disputed that the question of whether copyright exists in the ITVR Signal was to be decided under Australian law.
4 See the definition of 'cinematograph film' in section 10 of the *Copyright Act 1968* (Cth).
5 Section 24 of the *Copyright Act 1968* (Cth).
6 [2014] FCA 1411, 122.
7 [2014] FCA 1411, 121, 124.
8 (1997) 75 FCR 8.
9 [2014] FCA 1411, 127.
10 [2014] FCA 1411, 127.
11 [2014] FCA 1411, 139.

# Enhancing Online Security for Children

**Claudia Hall provides an overview of the Enhancing Online Safety for Children Bill and its implications for those services that might be caught in its regulatory net.**

On 4 March 2015, the Enhancing Online Safety for Children Bill (the ***Bill***) passed the Senate with strong bipartisan support. The Bill attempted to create a coherent framework for dealing with cyber-bullying and remedy gaps in the pre-existing legislation. Advances in technology and an increasing prevalence of computers and smartphones has led to a rise in access to the internet and social media services amongst children, the latter being used by 90 percent of Australian 12 to 17 year olds.[1] This has created an environment where it is easy to make, widely distribute and access cyber-bullying materials, but where removing the same materials is often difficult. The ability to perpetrate cyber-bullying anonymously, and to bully at a distance and remain unaware of the impact on the victim, also contributes to rising instances of cyber-bullying, with one in five Australian 8 to 17 year olds reporting being cyber-bullied in 2014.[2]

*framing a case to fall within prohibited behaviour as defined by the Criminal Code Act and bringing a claim often takes too long to effectively prevent dissemination of the material*

## CURRENT FRAMEWORK

The current cyber-bullying framework is contained in a range of Federal and State legislation covering issues such as stalking, harassment, defamation, criminal incitement of suicide and criminal use of telecommunications services,[3] as well as industry protocols like the 2013 Cooperative Arrangement for Complaints Handling on Social Networking Sites. This piecemeal approach makes it difficult to assess the effectiveness of these laws in preventing cyber-bullying activities, as liability in each case is tied to the particular offence provision and not based on the act of cyber-bullying itself.

The limited application of current legislation to cyber-bullying circumstances became apparent in 2010, with the first successful Australian prosecution of cyber-bullying. In the case, a 21-year-old pled guilty to stalking charges and received only an 18-month community-based order in relation to over 300 SMS and internet messages sent to a 17-year-old who subsequently committed suicide.[4]

Currently, the *Criminal Code Act 1995* (Cth) (***Criminal Code Act***)[5] provides for imprisonment for up to three years for end-users who engage in menacing, harassing or offensive behaviours through a carriage service, but does not extend liability to those who disseminate such material. Further, framing a case to fall within prohibited behaviour as defined by the Criminal Code Act and bringing a claim often takes too long to effectively prevent dissemination of the material. Likewise, the *Broadcasting Service Act 1992* (Cth)[6] imposes criminal liability on Internet Content Hosts (ICH) or Internet Service Providers if they are aware of offensive content hosted on their websites or servers and do not take it down. However, the BSA will provide no legal remedy against an ICH located overseas.

## OUTLINE OF THE BILL

The Bill defines cyber-bullying material as material a reasonable person would conclude was likely to have been intended to have the effect of seriously threatening, intimidating, harassing or humiliating a particular Australian child, whether that effect was direct or indirect, for example as a result of the material being shared with third parties.[7]

1 Australian Communications and Media Authority, 'Click and connect: Young Australians' use of online social media' (Quantitative Research Report No 2, Commonwealth of Australia, July 2009) 8.

2 Ilena Katz et al, 'Research on youth exposure to, and management of, cyberbullying incidents in Australia' (Synthesis Report, Social Policy Research Centre, Department of Communications, June 2014) 2. <http://www.communications.gov.au/publications/cyberbullying>.

3 See, eg, *Crimes Act 1900* (NSW) ss 60E, 529, 545B(2); *Crimes Act 1900* (ACT) s 439; *Criminal Code 1983* (NT) s 204; *Criminal Code 1899* (Qld) ss 320A, 365; *Criminal Law Consolidation Act 1935* (SA) s 257; *Criminal Code Act 1924* (Tas) s 196; *Crimes Act 1958* (Vic) s 21A(2); *Criminal Code 1913* (WA) s 345.

4 'Magistrate slams cyber bullies', *The Sydney Morning Herald* (online), 8 April 2010 http://news.smh.com.au/breaking-news-national/magistrate-slams-cyber-bullies-20100408-ru23.html; Alison Caldwell 'Parents welcome ruling on bullying victim's suicide', *ABC* (online), 31 May 2011 http://www.abc.net.au/news/stories/2011/05/30/3231123.htm?site=melbourne.

5 s 474.17, Criminal Code Act. See also: ss 474.14-474.16.

6 s 91.21, BSA.

7 Enhancing Online Safety for Children Bill 2014 (Cth) cl 5(1)-(2).

The Bill governs three main groups: end-users, relevant electronic services and social media services. End-users are individuals who have posted material on relevant electronic or social media services.[8] Relevant electronic services are set out in the Bill and include SMS and MMS, email, instant messaging and chat services. In contrast, a social media service is defined as an electronic service whose primary purpose is to enable online social interaction, that is the sharing of material for social purposes[9] between two or more end-users or the posting of material and which allows end-users to link to or interact with some other end-users.[10]

Part 2 of the Online Safety Bill creates the Children's e-Safety Commissioner (the ***Commissioner***) and sets out their functions and powers. The Commissioner will be an independent statutory office within the Australian Communications and Media Authority (***ACMA***), acting as an accessible, centralised point of contact for online safety issues for industry, Australian children and those charged with their welfare.[11] The Commissioner's key functions, will be administering the proposed complaints system in part 3 and the scheme for the removal of cyber-bullying material from large social media sites in part 4, as well as promoting education about cyber-bullying and coordinating existing initiatives tackling cyber-bullying.[12] The Commissioner would also administer the online content scheme in schedules 5 and 7 of the BSA, previously administered by the ACMA.[13]

Part 3 of the Bill establishes a complaints system for cyber-bullying material targeted at an Australian child, whether through a relevant electronic service or a social media service. Complaints can be made to the Commissioner by the child, by their parent or by other authorised persons.[14] The Commissioner will have the power to investigate complaints and conduct such investigations as they see fit.[15] However, the Commissioner can only request or require that a social media service remove the material if the child can provide evidence it was already the subject of a complaint under the service's complaints scheme.[16]

Part 5 of the Bill gives the Commissioner the ability to issue end-user notices if satisfied the material is cyber-bullying material targeted at an Australian child posted on a relevant electronic or social media service by that end-user.[17] End-user notices can require the removal of the material from the service, refraining from posting cyber-bullying material targeting that child or apologising.[18] These notices are enforceable by injunctions but not by penalty provisions.[19]

## THE TWO-TIERED SCHEME

The Bill creates a two-tiered voluntary scheme in relation to notice and compliance requirements for large social media services.

Becoming a tier 1 service is voluntary and as long as social media services meet basic safety requirements by including a statement against cyber-bullying in their terms of service, creating a complaints system and ensuring they have a designated contact person for the purposes of the Bill,[20] the Commissioner cannot refuse their application to become a tier 1 service. In contrast, while a social media service can volunteer to be a tier 2 service, they can also be declared a tier 2 by the Commissioner in certain circumstances.[21]

***the Commissioner can only request or require that a social media service remove the material if the child can provide evidence it was already the subject of a complaint under the service's complaints scheme***

Both tier 1 and tier 2 services may receive notices requesting them to remove cyber-bullying material provided on their service in the next 48 hours, if the affected child has already made a complaint about the material through the service's complaint scheme and the material was not removed within 48 hours of that complaint.[22] However, such notices only bind tier 2 services, which will be subject to injunctions, enforceable undertakings or civil penalties of up to $17,000 a day if they do not comply with the notice to the extent they are capable of doing so.[23] Tier 1 services, or any service that is not 'large', can ignore these requests without legal ramifications.[24]

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8 Ibid cl 4 (definition of 'relevant electronic service').
9 Ibid cl 9(2).
10 Ibid cl 9.
11 Explanatory Memorandum, Enhancing Online Safety for Children Bill 2014 (Cth) 3.
12 Enhancing Online Safety for Children Bill 2014 (Cth) cl 15.
13 Ibid cl 15(1)(a)(ii).
14 Ibid cl 18(1), (2).
15 Ibid cl 19.
16 Ibid cl 18(4), (5).
17 Ibid cl 42.
18 Ibid cl 42(1)(e)-(g).
19 Ibid cls 43, 48.
20 Ibid cl 23.
21 Ibid cl 30.
22 Ibid cls 29, 35.
23 Ibid cl 36.
24 Ibid cls 31(3)(a), 35-36.

# Enhancing Online Security for Children [CONT'D]

> While requesting instead of requiring removal of material seems inadequate, it is likely that this is an attempt to circumvent the enforcement issues that arise when trying to hold overseas services liable for breaches of Australian legislation.[25]

***The Bill creates a two-tiered voluntary scheme in relation to notice and compliance requirements for large social media services.***

Thus, as the impact of being a tier 2 service is significant, it is important to understand the mechanisms through which a social media service can be declared a tier 2 service.

A social media service that has not signed up for the scheme can be declared a tier 2 if:

- the service is a large social media service;
- within the last 28 days the Commissioner gave the service provider a written invitation to apply to be a tier 1 service, and they did not apply; and
- the Commissioner believes the service does not comply with the basic online safety requirements.[26]

A social media service that was formerly a tier 1 service can be declared a tier 2 service if:

- its tier 1 status is revoked, which requires that:
  - the social media service has been a tier 1 service for more than 12 months; and
  - in the last 12 months, they have repeatedly failed to comply with the Commissioner's notice requests; or
- the Commissioner is satisfied the service does not comply with the basic online safety requirements;[27]
- the service is a large social media service; and
- the Commissioner believes the service should be declared a tier 2 service, considering their compliance with basic online safety requirements, the revoking of their tier 1 status and any other relevant matters.[28]

Therefore, if a service believes they could be large and thus be covered by the Bill's enforceable provisions, volunteering to be a tier 1 service provides a number of benefits.

First, if the service has complied with basic online safety requirements, volunteering to be a tier 1 service allows a 12-month period during which the service will be exempt from being subject to penalty provisions if it fails to comply with the Bill.[29] Secondly, if a service volunteers to be a tier 1 service it has the option of having its definition of cyber-bullying material (found in their terms of use) replace the Bill's definition for the purpose of the Commissioner's assessment of whether particular material is cyber-bullying material.[30] This allows the tier 1 service to shape their own liability and reduce any ambiguity about what will and will not constitute cyber-bullying on their site.

## INTERPRETATION ISSUES

A number of issues arise when considering how the provisions of the Bill as they currently stand would be applied in practice.

Firstly, the Bill does not make it clear exactly what constitutes a social media service. The explanatory memorandum refers to services such as Facebook, Google, Yahoo7! and Microsoft as social media services.[31] However, a 2014 study found that 11% of cyber-bullying was carried out on Snapchat, 10% on Ask.fm and 5% on Skype.[32] It is arguable that the primary purpose of these services is to enable online social interaction between two or more end-users, making them social media services, despite the fact that they are more likely to only involve interaction between two users. Further, it is possible the definition could extend to include user forums such as those on Yahoo7! Answers. As such, the Bill's wide drafting makes it difficult to determine what services will be caught by its provisions, further complicating compliance.

This leads to the second issue of why only social media services, as distinct from relevant electronic services, are subject to the Bill's enforceable penalty provisions. If a service like Skype is held to be a social

25 Explanatory Memorandum, Enhancing Online Safety for Children Bill 2014 (Cth) 42, 82. This issue also arises under the BSA s 91.
26 Enhancing Online Safety for Children Bill 2014 (Cth) cls 23, 31(4).
27 Ibid cl 25.
28 Ibid cl 31.
29 Explanatory Memorandum, Enhancing Online Safety for Children Bill 2014 (Cth) 4.
30 Enhancing Online Safety for Children Bill 2014 (Cth) cls 23(3), 29(2).
31 Explanatory Memorandum, Enhancing Online Safety for Children Bill 2014 (Cth) 32.
32 Ibid 17.

media service under the Bill then it is unclear why services like iMessage or FaceTime, which also enable social interaction between two end-users should be treated differently, merely because they fall under the categories of instant messaging or chat services which the Bill deems to be relevant electronic services. Recent studies have suggested that cyber-bullying by phone, such as that in the Melbourne case discussed above, or on instant messaging services is just as serious as that undertaken on social media services.[33] The Bill's arbitrary distinction between social media and relevant electronic services is even more confusing given that the Bill governs the latter in other clauses.

While it is arguable relevant electronic services would be more difficult to police under the scheme, as materials posted on them and their complaints schemes are often less public, the Bill only requires that social media services create a complaints system and include a statement against cyber-bullying in their terms. Thus, similar requirements could be imposed on relevant electronic services, especially email and instant messenger services, with minimal difficulty.

Lastly, what constitutes a *large* social media service is not defined. Instead, the determination is left at the Commissioner's discretion, as long as he has regard to the number of users who are Australian residents and Australian children.[34] This makes it difficult for social media services to determine whether they could be subject to the Bill's tier scheme and penalty provisions, and therefore whether they should sign up to the Bill's scheme at all, as if they are not large the obligations imposed by the Bill are unenforceable. While it is possible the ambiguity was intended to incentivise electronic services to uphold the Bill's provisions in case they are found to be large and in breach, given the significant penalties it is preferable there be clarity as to which services are likely to be covered.

## COMPARISON TO OTHER JURISDICTIONS

Cyber-bullying is dealt with in various ways in the international context. In the USA, while electronic harassment is governed in 48 states, in the context of cyber-bullying liability is almost always dependent on the effect the behaviour has on a student's ability to participate at school.[35] The UK model is similar to the Australian status quo, dealing with cyber-bullying not through specific laws but through laws governing harassing, menacing and threatening communications.[36]

The most relevant international comparison is New Zealand, which in 2013 proposed the Harmful Digital Communications Bill, which has not yet been enacted, but looks set to pass in 2015.

The Bills are similar in a number of ways, such as their requirement that an informal resolution be attempted,[37] and their inclusion of safe harbour provisions for content hosts that are not notified of a complaint.[38] However, the New Zealand Bill differs from the Australian Bill in its application, the range of available orders, and in its clarity of expression.

***if a service believes they could be large and thus be covered by the Bill's enforceable provisions, volunteering to be a tier 1 service provides a number of benefits***

The New Zealand Bill's application extends beyond minors and cyber-bullying[39] to Internet Protocol Address Providers (IPAP), such as Vodafone.[40] The New Zealand Bill also provides for a larger range of orders such as taking down cyber-bullying material, posting a correction or forcing an IPAP to release the identity of an anonymous communications author.[41]

The New Zealand Bill also sets out a balancing act for use when making discretionary orders clarifying when orders might be made against an ICH, allowing them to assess the adequacy of their cyber-safety policies against tangible criteria. This balancing act considers: the content and level of harm caused; whether the communication was intended to cause harm; the context and subject matter of communication; the extent to which the communication has spread beyond the original parties;

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33 Barbara Spears et al, 'Research on youth exposure to, and management of, cyberbullying incidents in Australia. Part A: Literature review (Research Report, Social Policy Research Centre, UNSW, Department of Communications, June 2014) 23; Amy Barnes et al, (2012) 22(2) *Australian Journal of Guidance and Counselling* 206, 215; Yoshito Kawabata et al, 'Forms of aggression, social-psychological adjustment, and peer victimization in a Japanese sample: The moderating role of positive and negative friendship quality' (2010) 38 *Journal of Abnormal Child Psychology* 471; Justin W Patchin and Sameer Hinduja, 'Bullies move beyond the schoolyard: A preliminary look at cyberbullying' (2006) 4 *Youth Violence and Juvenile Justice* 148.

34 Enhancing Online Safety for Children Bill 2014 (Cth) cl 31(8).

35 See: http://www.stopbullying.gov/laws.

36 *Harassment Act 1997* (UK), *Malicious Communications Act 1988* (UK), *Communications Act 2003* (UK) s 127, *Public Order Act 1986* (UK), *Obscene Publications Act 1959* (UK); *Education and Inspections Act 2006* (UK); Magdalena Marczak and Iain Coyne, 'Cyberbullying at School: Good Practice and Legal Aspects in the United Kingdom' (2010) 20(2) *Australian Journal of Guidance & Counselling* 182, 188.

37 Harmful Digital Communications Bill 2013 (NZ) cls 11(1), 12(2)(a); Enhancing Online Safety for Children Bill 2014 (Cth) cl 19(4)-(5).

38 Harmful Digital Communications Bill 2013 (NZ) cl 20(1)(b)(i); Enhancing Online Safety for Children Bill 2014 (Cth) cls 29, 35.

39 Harmful Digital Communications Bill 2013 (NZ) cl 4 (definition of 'digital communication').

40 Ibid cl 17(2A).

41 Ibid cl 17(1)-(2A).

# Enhancing Online Security for Children [CONT'D]

the age of the affected individual and the technical practicalities of an order.[42]

Therefore when considering the two Bills, the failure of the Australian Bill to address cyber-bullying attacks perpetrated by phone or instant messaging services; and to set out criteria for use by the Commissioner when deciding whether, and what kind of, order should be made, are significant oversights.

## CONCLUSION

While the attempt to create a coherent framework to tackle cyber-bullying is admirable, the Bill arguably manages to overreach in its scope and definitions, and be toothless in its actual application, especially in relation to its enforcement provisions. The Bill also suffers from a number of interpretational issues that limit its usefulness, beyond merely being a signal of the Australian public's intolerance for cyber-bullying. In that regard, the Bill would benefit from a clearer indication of what services exactly it covers, what factors the Commissioner will use when determining whether content is cyber-bullying material and what orders will be used to counteract it, as well as by an expansion of its tier system to include relevant electronic services.

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42 Ibid cl 17(4).

# CAMLA Young Lawyer Event and Essay Winners – Report by Alexandra Gilbert

For the third time in as many years, CAMLA held its Young Lawyers Networking Event which was proudly organised by the CAMLA Young Lawyers Committee. The winners of CAMLA's annual essay writing competition were also announced. The event was held on 17 February 2015 at Clayton Utz in Sydney and was attended by approximately 100 aspiring young lawyers with a keen interest in communications and media law. It was an inspiring and informative night culminating in relaxed networking drinks overlooking Sydney Harbour.

The CAMLA Young Lawyers Committee gathered a diverse panel of speakers to discuss their career progression and provide personal and professional insights from life in the industry. The panel comprised Michael Cameron (National Editorial Counsel, News Corporation Australia), Fiona Lang (Chief Operating Officer, BBC Worldwide ANZ), Leanne Norman (Partner, Banki Haddock Fiora) and Matthew Lewis (Barrister, 5 Wentworth Chambers) and was moderated by Hugh Brolsma (Senior Associate, Clayton Utz).

In addition to insights from the impressive panel, the event was an opportunity to celebrate the CAMLA essay competition winners which were selected from a record number of entrants. CAMLA President, Page Henty, presented awards to Sadaat Cheema of Clayton Utz, Ian Richards of The College of Law and Matthew Boyley of the University of New England. A selection of entries will appear in upcoming issues of CAMLA's Communications Law Bulletin.

### View pictures of the event here:

http://tiny.cc/7zvbux

(thank you to Mandy Chapman, Beyond International for taking these)
Report by Alexandra Gilbert, Corporate Counsel, Bauer Media

# Bank Technology Failures:
## A New Frontier for Regulatory Intervention?

**Gavin Smith and Simun Soljo examine the consequences – in the UK and Australia – of a failure by regulated institutions to have adequate systems and controls in place to prevent the occurrence of a serious IT incident.**

### INTRODUCTION

In an unprecedented and ground-breaking move, the UK's Financial Conduct Authority (***FCA***) and Prudential Regulatory Authority (***PRA***) have fined three RBS group banks a total of £56 million, over A$100 million, for failing to have adequate systems and controls to prevent the occurrence of a serious IT incident in 2012. The fines were imposed following the occurrence of widespread and well-publicised problems with RBS's IT systems affecting more than 6.5 million customers in the UK in June 2012.

The fines are the largest ever imposed in Europe for technology failures in the financial services industry and serve as a cautionary tale for Australian financial institutions. What obligations do regulated financial institutions in Australia have to put in place adequate IT systems, and what action could the Australian regulators take for similar technology failures?

The fines are the largest ever imposed in Europe for technology failures in the financial services industry and serve as a cautionary tale for Australian financial institutions. What obligations do regulated financial institutions in Australia have to put in place adequate IT systems, and what action could the Australian regulators take for similar technology failures?

### BACKGROUND TO FCA ACTION

In June 2012, the IT team at RBS in the UK implemented an upgrade to the software that processed updates to customer accounts. A simple step undertaken regularly by banks all round the world. But the upgrade didn't run to plan so the IT team uninstalled it.

What happened next was far from routine. 6.5 million customers of RBS and its subsidiaries Natwest and Ulster Bank woke up to discover they were unable to use online banking facilities or access accurate account balances at ATMs; they were unable to pay their mortgages on time and were left without cash while on vacation. The banks also found themselves unable to apply correct credit and debit interest to customer accounts or to produce accurate account statements. Some companies were unable to pay salaries to employees or finalise their accounts for audit purposes. The RBS banks were also unable to participate in the broader clearing system. Major problems continued for several weeks and the RBS banks were forced to manually update account balances.

The resulting investigation and enforcement action into the incident marks the first time that the FCA and the PRA have acted together. In its final notice to the RBS banks, the FCA found that the RBS banks breached Principle 3 of the FCA handbook. Principle 3 requires regulated institutions to take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems. In this case, the FCA found that the RBS banks did not have adequate systems and controls to identify and manage their exposure to IT risks. The FCA highlighted the following three issues in particular:

- there were inadequate testing procedures for managing changes to software;
- the risks related to the design of the software system that ran the updates to customers' accounts were not identified;
- the IT risk appetite and policy was too limited because it should have had a much greater focus on designing systems to withstand or minimise the effect of a disruptive incident.

The FCA's decision is particularly interesting because it marks a subtle but significant change in applying regulation with the purpose of ensuring banks are able to recover from disruptions, to a new focus of ensuring that banks have the resilience to be able to withstand the effect of disruptions. The FCA describes this as a shift away from 'business continuity' to 'resilience'. UK financial institutions should expect to see the latter term used considerably more in the future.

> ***the FCA found that the RBS banks did not have adequate systems and controls to identify and manage their exposure to IT risks***

Since the incident in 2012, the FCA has also used its 'Dear Chairman' function to conduct an assessment across the UK banking sector to determine how well they are managing their exposure to IT risk and the extent to which they have themselves audited their vulnerability to technology failures which might affect their retail functions. This has been a detailed and burdensome exercise for the banks.

Both the FCA and PRA reduced their fines by 30 per cent on the basis that RBS agreed to settle at an early stage. But for that action, the fines would have been even higher. Australian institutions should note that the A$100 million fine is also just part of the picture. RBS was also

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# Bank Technology Failures: [CONT'D]

> forced to make a £125 million (A$230 million) provision available to account for financial costs and expenses arising out of the incident. And the reputational damage has been enormous. A very expensive software update indeed.

## THE AUSTRALIAN CONTEXT: AN EQUIVALENT FOR AUSTRALIAN REGULATED INSTITUTIONS?

So, could a similar fate befall Australian regulated entities? The answer is yes and no.

### 1. AFS licensees

Australian financial services (***AFS***) licensees and APRA-regulated entities are subject to obligations to have in place and maintain adequate IT systems.

*The FCA's decision marks a subtle but significant shift away from 'business continuity' to 'resilience'*

Specifically, the *Corporations Act 2001* (Cth) requires AFS licensees, other than APRA regulated entities, to 'have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements'. ASIC provides guidance in Regulatory Guide 104 as to how AFS licensees may assess the adequacy of their technical resources. It advises licensees that they need to regularly review their IT systems, including to consider the IT system security, the currency of hardware and software, the quality and relevance of the applications used, and the use of legacy IT systems. Licensees are also required to 'have adequate risk management systems'.

A breach by an AFS licensee of these obligations could result in action by ASIC. It would most likely seek an enforceable undertaking from the AFS licensee requiring the licensee to take remedial action in relation to the breach, but it could also impose additional licence conditions, or suspend or cancel the licence, or seek declaratory relief from the court. Unlike the FCA and PRA, ASIC cannot impose a fine.

### 2. APRA-regulated entities

The relevant obligations of APRA-regulated entities generally arise under prudential standards issued by APRA.

For example, a registrable superannuation entity (RSE) licensee is required, under APRA Prudential Standard SPS 220 – Risk Management, to 'maintain technical resources at a level adequate for its business operations'. 'Technical resources' are defined to include 'technical systems, including adequate hardware, data quality and software' and 'technical resources to handle any significant changes or increases in size, business size or complexity that are planned, forecast or likely to occur'. Failure to put in place adequate technical systems or to plan appropriately for changing demand on systems could be a breach of the RSE licensee's obligations under the prudential standard. Of course, as is commonly the case, the RSE licensee might obtain access to technical systems by outsourcing the provision of its IT systems or services. If so, the licensee must also comply with the requirements in the Prudential Standard SPS 231 – Outsourcing.

A breach by a trustee of the obligation in the prudential standards is a breach of its licence conditions and may result in a direction from APRA to comply with the requirement (under section 29EB of the Superannuation Industry (Supervision) Act 1993 (Cth) (the SIS Act)). In an extreme case, this could result in cancellation of the RSE licence (under s29G of the SIS Act). APRA does not have the power to issue fines in relation to breaches of the licence conditions.

For ADIs, general insurers and life companies (which are also subject to APRA prudential standards), a major technology failure would most likely be addressed by the obligations in the prudential standard relating to risk management. From 1 January 2015, this will be the common Prudential Standard CPS 220. CPS 220 places a broader, but less technology specific, requirement on ADIs, insurers and life companies to manage their risks and to ensure sufficient resources are allocated to risk management. An incident such as the RBS failure in June 2012 could well attract the attention of APRA in this regard. And if the provision of technology systems or services is outsourced, these entities will also need to comply with APRA's outsourcing requirements set out in Prudential Standard CPS 231 – Outsourcing. A breach of the standard may result in APRA giving the entity a direction under the relevant legislation to comply with the requirement or take other remedial action (a failure to comply with the direction is an offence), or, in the extreme case, a revocation of the licence.

## SOME OBSERVATIONS

Although the powers available to ASIC and APRA may not currently match the severity of those available to the FCA and PRA in the UK, the imposition of specific obligations on RSE licensees and AFS licensees nonetheless highlights the need for all regulated entities to address the potential risks posed by their IT systems. If an Australian financial institution suffered the same magnitude of customer-affecting IT failure as RBS, it is highly likely that both ASIC and APRA would seek to follow the precedent set by the FCA and PRA and exercise their powers. Australian institutions should also be mindful of the FCA's shift in focus away from business continuity towards the concept of resilience. Where the UK goes, Australia may well follow.

GAVIN SMITH is a partner and SIMUN SOLJO is a Senior Associate at Allens.

# *Profile:* Lynette Houssarini

## *Senior Lawyer Team Leader, Disputes & Training at the ABC*

**CAMLA Young Lawyers representative, Simone Blackadder, caught up with Lynette Houssarini, a senior lawyer working at the Australian Broadcasting Corporation (ABC), to discuss her extensive role with the national broadcaster and the current challenges faced by the media industry.**

### 1. *How and where did you start your career?*

After finishing my studies at UNSW I started as a Business Affairs Manager at a music publishing company – negotiating music licences and drafting publishing agreements – before joining the Arts Law Centre as a Legal Research Officer. I was then approached by the ABC to see if I was interested in a 3 month contract role to review copyright issues, licensing arrangements and undertake clearance work. I ignored all the unsolicited professional advice I was given not to specialise too early and leapt at the opportunity. Within 18 months, I was working at the ABC's Melbourne television studios, essentially running my own little practice. Amongst other things, I provided pre-publication advice and attended and appeared before court on suppression order applications. It was a huge leap of faith in my ability by the ABC. I was definitely thrown in the deep end but, within a short period of time, I had loads of responsibility. It was a brilliant and happy time for me.

### 2. *How would you summarise the scope of your current role?*

My role at the national broadcaster is broad and diverse. I manage the disputes and training team within the legal department. I also write and present the media law training to ABC journalists and program makers across the country – sometimes in person, other times by teleconference or Skype. The media law training delivered by myself and colleagues is customised for different clients within the business, from comedy writers to investigative journalists, and is a very important element of our legal risk management. I also manage the legal internship program that is offered to graduates. Internships last from 4-6 weeks. We try to provide interns with exposure to all aspects of the business. I often bring them along to media law training or program tapings, and my colleagues will take them to court for the defamation list on Fridays. Much of my practice is in pre-publication where I advise ABC journalists and program makers on issues such as defamation, contempt of court and general newsgathering risks. In addition to general news coverage, I provide pre-publication advice on a range of programs at the ABC, and this year my primary focus is on *Four Corners* and *The Checkout*.

### 3. *What are some of the key legal issues facing the broadcasting / media industry today as you see them?*

The volume of content that is delivered to the public now is greater than ever and continues to increase. The extent to which that content is shared online can present a huge challenge to publishers as they manage their legal exposure. For example, ensuring that all traces of articles or statements have been removed online is difficult. News is now a 24 hour cycle that can be republished in moments. Coverage of criminal investigations in the current media landscape can be challenging, because the story can change from hour to hour. We need to be alert to the potential of legal risks, including inadvertently linking to old items and staying on top of any relevant court orders and legislative restrictions.

I am also interested to see how the jurisprudence develops in relation to social media and defamation. I wonder whether the courts will consider posts on social media as seriously as they do newspaper articles and long investigative pieces on programs such as *Four Corners*. Early indications are that they do.

The introduction of data retention laws, requiring telephone companies and internet service providers to collect data from their customers and store it for two years, is a major concern for journalists engaged in investigative work. Not being able to protect their sources could have a disastrous effect on the availability of whistle blowers to provide valuable information that is in the public interest. There have been promising results in some states with regard to the operation of shield laws and protection of journalists' sources, so it could represent a big step backwards. Who knows, journalists may have to go old school and just ditch their mobile phones in favour of pen and pad and a pub rendezvous.

**4.** ***As a pre-publication lawyer, what are some of the challenges of legalling comedy?***

By its very nature, comedy can be a challenge to legal, because lawyers and comedians are often doing opposing things. Lawyers try to define and nail down the meanings and work out ways in which they can be defended. Comedians play with the meanings of words and phrases.

I've asked writers to explain jokes to me, then methodically worked through a list of defamatory meanings. I appreciate why they're not always receptive to that level of analysis. But their job is to be funny, and mine is to look for the legal risks and address them. Not all comedic meanings are defamatory of course – it may just be silly or irreverent humour – or they're expressions of an honest opinion, and so would be defensible.

In Australia, legal authority that has dealt with comedy and defamation are conflicting, which makes our job when reviewing comedy programs and assessing the legal risks somewhat difficult.

You occasionally encounter contempt issues with comedy. Unfortunately, the sobriety of court reporting rules doesn't lend itself well to humour, and suggesting that a joke is slightly reworded to include the word "allegedly" isn't likely to be popular with a writer.

There can also be other legal risks associated with comedy skits, including covert recording issues, trespass, potential consumer code breaches and sometimes even criminal law.

I tell my colleagues providing pre-publication advice to comedy program makers to remember that it is not a popularity contest. You're never going to be the most fun guy in the room, but at the end of the day your job is advise the ABC on those legal risks in its best interests. Apart from all that though, and this probably says more about me, I've always loved advising on comedy here at the ABC.

**5.** ***A lot of young lawyers would see the ABC in-house role as a dream job. What are the positives and negatives of working for such an organisation?***

There are many positives to working at the ABC. First and foremost, the ABC is a respected and loved organisation. The work that ABC program makers do is so often ground breaking and innovative. Shows such as *Four Corners* address immensely important issues in the public interest, so being part of that work is a privilege. You get to work with so many talented and lovely people both on the production and the legal side of the business. There are also the unsuspecting lift rides with cricketing celebrity crushes. The ABC has been a big part of my life for so long and most of what I do now is intuitive.

Only two negatives that come to mind – the afterhours work and interruptions to your personal life while on call can be unrelenting. I might go to bed after having advised on a huge police manhunt, only to be woken at 4 am with news of an arrest and a million questions. It's a challenge to think on your feet within seconds of opening your eyes. Unfortunately, that's the reality of the work: the news cycle never stops and crime doesn't take a holiday! The second negative is that it's sometimes really difficult to watch back some of the brilliant shows I've advised on without a slight fear that I may have missed something. Some in particular can make for uncomfortable viewing. But my family always watches and looks out for the legal credits.

**6.** ***When supervising the ABC legal internship program, what are the primary skills you look for in a junior lawyer?***

As a starting point, we look at their academic record. It doesn't need to show all high distinctions, but good performance in a range of core subjects is highly valuable. It's important that the potential intern has strong research skills. Investigative skills are also a great asset for lawyers in the litigation team. We like to see a demonstrable interest in the media and broadcasting industry. During the interview, we often ask potential interns whether they read the papers and what ABC programs they watch. A keen interest in politics and sport also holds you in good stead in the media law game! Finally, to work in the ABC legal team it's important for a junior lawyer to have energy, curiosity and a robust sense of humour. The rough and tumble of a day's work isn't for the faint of heart.

**7. *What are your top tips for young lawyers wanting to work in-house?***

I have a number of tips for young lawyers.

Firstly, understand the business and your client. Know the organisation inside and out, its culture, history, and most importantly, its business objectives. Working in-house is so much more enjoyable when the business aligns with your personal values. After a while, you feel part of the bigger organisation, and identify closely with its successes and challenges within the industry. Secondly, know your subject matter. Build your skill set, whether by reading up on case law, attending seminars or sitting in on the defamation list on Fridays. Knowing the law will assist in building your confidence and prepare you for the occasional push-back you might get from your client. You need to be ready and able to hold your ground when your advice is challenged. Thirdly, never lose sight of your role which is to provide legal advice in the best interests of your client, while maintaining your legal and ethical independence as an officer of the court. Finally, be approachable, available and responsive. Always value-add in your advice; don't just identify a legal problem, suggest alternatives that won't fall foul of legal risks. Speak your client's language and support them in their work. Make the most of your role, and find the joy in what you do.

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IF YOU WOULD LIKE TO SUGGEST SOMEONE TO BE INTERVIEWED BY THE CLB, PLEASE SEND AN EMAIL TO THE EDITORS AT EDITOR@CAMLA.ORG.AU.

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Contibutions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at editor@camla.org.au or to

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**The Communications and Media Law Association Incorporated (CAMLA) brings together a wide range of people interested in law and policy relating to communications and the media. CAMLA includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants. Issues of interest to CAMLA members include:**

- defamation
- broadcasting
- copyright
- advertising
- information technology
- freedom of information
- contempt
- privacy
- censorship
- film law
- telecommunications
- the Internet & online services

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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