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New Commercial Television Industry Code of Practice

Clare O'Neil provides an overview of the new commercial television industry code.

In November 2015 the Australian Communications and Media Authority (ACMA) registered the new Commercial Television Industry Code of Practice (Code). The Code commenced on 1 December 2015 and applies to all commercial free-to-air broadcasting services.

The Code retains key information tools and safeguards, while providing Australian viewers with greater choice of programming. It covers key areas such as classification, restrictions on advertising for certain products, disclosure of commercial arrangements, privacy, and accuracy and fairness in news and current affairs. Under the Code, commercial free-to-air television remains the most regulated media platform in Australia.

This article sets out some background, context, and some key information about the rules in the new Code.

FRAMEWORK

The Code is developed by Free TV Australia (Free TV) on behalf of the commercial free-to-air television broadcasters under section 123 of the *Broadcasting Services Act 1992* (BSA).

The BSA establishes a co-regulatory framework for broadcasters in Australia. When the BSA was introduced, the Explanatory Memorandum to the Bill noted:

> …It is expected that relevant broadcasting service industry groups will appreciate that it is in their interests to ensure that an appropriate balance is struck between the public interest in maintaining community standards of taste and decency, and licensees' desire to provide competitive services - such groups will be aware that the ABA will have the power to impose program standards… where it considers that codes of practice have failed or have not been developed.[1]

However, the BSA does require the Code to be developed in consultation with the ACMA, and taking account of any relevant research conducted by the ACMA.[2] So

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1 Explanatory Memorandum, Broadcasting Services Bill 1992 (Cth), 66-67.

2 *Broadcasting Services Act 1992 (Cth)* s 123(1).

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> while industry groups develop the Codes and manage the various processes required, the ACMA is still very influential in the safeguards that are incorporated in the Codes. In particular, a Code of Practice cannot be registered unless the ACMA is satisfied that it provides "appropriate community safeguards".[3]

Under the Code, commercial free-to-air television remains the most regulated media platform in Australia.

The BSA also specifies a number of matters which a Code "may" relate to, including accuracy and fairness in news and current affairs,[4] and the amount of broadcasting time devoted to advertising.[5]

This co-regulatory system set up in Part 9 of the BSA only applies to services that use the broadcasting services bands. It does not apply to online services (such as a live stream) or other catch up services including those provided by a broadcaster. That is, broadcasters' streaming services are treated the same as any other online content provider, because of the determination made by the then Minister Richard Alston in 2000 that "broadcasting" under the BSA did not include a service that makes available television programs or radio programs using the Internet.[6]

CONTEXT

The media market today is rapidly evolving. When the Code was last reviewed in 2009, iPads hadn't been released in Australia. The diversity of services and platforms available now was simply not envisaged at the time of that review – let alone in 1992 when the BSA and the co-regulatory Code system was legislated.

Free TV members are delivering more services to Australians using less spectrum, as well as innovating and investing in new technology and content delivery mechanisms. At the same time, new entrants are flooding into the market driven by new technology, business models and consumer behaviour. This is generating significant competition.

The Code had not been the subject of a full scale review since it was established under the BSA – indeed, many of the provisions in the previous iterations of the Code were carried over from the rules developed by the Australian Broadcasting Tribunal.

The goal of the industry was therefore to develop and register a new, simplified Code that maintained key community safeguards, while reflecting changes in audience behaviour and technology.

REVIEWS

There have been a number of reviews in the last few years in response to the changing media industry. The two most directly relevant to the Code review process are the ACMA's *Contemporary Community Safeguards Inquiry* (CCSi) in 2014, and the Australian Law Reform Commission's (ALRC) *Classification—Content Regulation and Convergent Media* 2012 Review, headed by Professor Terry Flew.

Back in 2012, the ALRC found that a gradual phasing out of time zone restrictions was appropriate, noting developments in content delivery such as the proliferation of online, on-demand and catch-up services, pay TV, dedicated children's channels and the widespread availability of parental locks and EPGs.[7]

The ACMA'S CCSi commenced in 2013 and was finalised in March 2014. It was a comprehensive examination of the safeguards that have historically formed part of the various industry Codes, and included a series of public fora (Citizen Conversations), a call for written submissions, and extensive quantitative and qualitative research. The findings of the CCSi underpinned a number of changes in the Code, including the revised classification zones and the removal of some older rules (such as the prohibition on programs containing hypnosis and subliminal messaging).

CODE REVIEW PROCESS

In accordance with the process set out in section 123 of the BSA, Free TV developed the Code and conducted an extensive public consultation process over 8 weeks, from February to April 2015.

A revised version of the Code and all submissions were then provided to the ACMA. Following the consultation and ACMA review, Free TV made a number of changes to the proposed draft, including the addition of a range of special protections to accommodate family viewing in the updated classification zones.

3 Ibid s 123(4)(b)(i).

4 Ibid s 123(2)(d).

5 Ibid s 123(2)(f).

6 *Broadcasting Services Act 1992* (Cth), Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000).

7 Australian Law Reform Commission, *Classification, Content Regulation and Convergent Media Report*, Report No 118 (2012), p 196 [8.76] -[8.78].

The ACMA registered the Code in November 2015, being satisfied that the revised Code provided appropriate community safeguards for the matters that it covered, and that the public had been given an opportunity to comment on the Code.[8]

CLASSIFICATION AND ASSOCIATED CONTENT SAFEGUARDS

All material broadcast (except news, current affairs and sports) must be classified and the classification must be prominently displayed at the start of the program, after program breaks and during program promotions.[9]

The most significant and publicised changes (and the most obvious for viewers) are the revised classification zones:[10]

CLASSIFICATION	TIME PERMITTED
P, C	Any time
G	Any time
PG	Any time
M	7.30 pm – 6.00 am 12 noon – 3 pm on School Days
MA	8.30 pm – 5.00 am

These classification zones bring Free TV more closely in line with the ABC, SBS and other competitors. They give broadcasters greater scheduling flexibility across their services, providing more choice for viewers while maintaining key community safeguards. The incremental nature of these changes is in line with ALRC recommendations and the findings of the CCSi.

The Code contains a number of special protections to ensure that children are not exposed to unsuitable content when they are watching TV in the new M classification zone:

- No M classified advertisements or promotions can be shown between 7.30 pm and 8.30 pm during Sports programs, G programs and PG programs. This rule lasts to 9.30 pm for movies and sports.[11]
- An M program shown between 7.30 pm and 8.30 pm must have prominent and legible consumer advice at the start about the content of the program.[12]
- No alcohol ads between 7.30 pm and 8.30 pm (unless during a Sports program on a weekend or public holiday).[13]

The Code also contains a range of additional protections across the day (5.00 am to 8.30 pm):

- No promotions for M or MA15+ shows allowed during a G classified program directed to children;[14]
- No gambling advertising allowed in any program directed to children, or G programs at certain times of day – as well as extensive restrictions during live sporting events;[15]
- No alcohol advertising, except during sports on weekends and public holidays (and between 12-3 on school days);[16]
- No advertising for R18+ movies (except between 12-3 on school days);[17] and
- No advertisements for contraceptives in any G program at any time, and no advertisements for adult services permitted between 5.00 am and 11.00 pm.[18]

Broadcasters are still required to exercise care in selecting material for classification exempt programming (news, current affairs and sports) having regard to the likely audience and any identifiable public interest.[19]

Restrictions also remain on the broadcast of certain material such as material likely to provoke or perpetuate intense dislike, serious contempt or severe ridicule on the basis of certain characteristics.[20]

ADVERTISING RULES

There are no changes to advertising limits in the Code, which aims for reasonable balance between program and non-program matter.

Advertising pays for the programming on commercial free-to-air television, but this must be balanced against viewers' preference for uncluttered program presentation. Consequently, there are limits on the amount of commercial and promotional matter that can be scheduled in any hour, with lower overall limits applying between 6:00pm and midnight.[21]

The Code also now contains disclosure rules for factual programs that endorse or feature products or services as part of a commercial arrangement. Disclosures can be made in-program, in credits, on the program's website, or in some

8 In accordance with s123(4) BSA. The Code is publicly available at: http://www.freetv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2015.pdf.
9 Commercial Television Industry Code of Practice (2015), cls 2.1.1 and 2.5.2.
10 Ibid cl 2.2.
11 Ibid cl 2.4.1.
12 Ibid cl 2.5.1.
13 Ibid, cl 6.2.1.
14 Ibid cl 2.4.4.
15 Ibid cl 6.5.1 and Appendix 3.
16 Ibid cl 6.2.1.
17 Ibid cl 6.4.2.
18 Ibid cl 6.3.
19 Ibid cl 2.3.3.
20 Ibid cl 2.6.
21 Ibid cl 5.

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other way that adequately alerts viewers to the arrangement. For childrens' programs, any products or services subject to a commercial arrangement must be presented as a discrete segment with sponsorship clearly disclosed.[22]

As noted above, there are time and classification-based restrictions on advertising certain products and services, including alcohol, betting and gambling, contraceptives and adult services (e.g. telephone sex lines and similar services), and X18+/R18+ rated films or video games.[23]

Advertisers are also expected to comply with relevant platform-neutral Codes which cover the content of advertising, such as the *Code of Ethics* and the *Code for Advertising and Marketing to Children* administered by the Australian Association of National Advertisers, and the ABAC *Responsible Alcohol Marketing Code*.[24] A number of rules about advertising content have not been retained in the 2015 Code, in favour of these industry-wide rules.

NEWS AND CURRENT AFFAIRS

News and current affairs remain some of the most popular programs on commercial free-to-air television. The Code contains a range of newly streamlined provisions to support the ongoing integrity of these programs including:

- Factual matters must be presented accurately, and broadcasters cannot misrepresent viewpoints.[25]
- News must be fair and impartial. However, current affairs programs may continue to take a particular stance on issues.[26]
- Material which invades an individual's privacy cannot be broadcast without consent, unless justified by public interest. Special care must be taken before broadcasting material relating to a child's personal or private affairs.[27]
- Material that is likely to distress or offend a substantial number of viewers is not permitted, unless justified by public interest.[28]
- Broadcasters must observe special sensitivity and care requirements in relation to suicide, images or interviews with witnesses or traumatic incidents and images or dead or seriously wounded people.[29]
- Broadcasters must make reasonable efforts to correct or clarify significant errors of fact, which may be done during a later episode of the program or an appropriate website.[30]

COMPLAINTS HANDLING

Section 7 of the Code relates to feedback and complaints.

Broadcasters must investigate and respond in writing to valid complaints made about matters covered by the Code that are received within 30 days of the relevant broadcast, subject to some exceptions.[31] In line with the national broadcasters, standing is required for complaints about privacy matters.[32]

If a complainant does not receive a response within 60 days of making the complaint or is dissatisfied with the response received, they can refer the matter to the ACMA.

WHERE TO NOW?

Broadcasters will be running an education campaign for viewers, including a new on-air Community Service Announcement about the changes to the Code. There are also a series of fact sheets for viewers available on the Free TV website, including in relation to parental locks, and protections for children. It will be interesting to see how the response to these changes develops over time.

There was some commentary on the new classification zones, and in particular the change to allow M classified content from 7.30 pm. As a result, the Minister for Communications, Senator Fifield, has asked the ACMA to provide a report on this issue after the first twelve months of the Code's operation.

The media industry will continue to develop at a rapid rate. The 2015 Code equips commercial free-to-air broadcasters with the additional flexibility they need to compete more fairly, while maintaining the key safeguards that viewers rely on.

CLARE O'NEIL is the Director of Legal & Broadcasting Policy at Free TV Australia.

22 Ibid cl 4.
23 Ibid cl 6.
24 Ibid cl 5.7.1.
25 Ibid cl 3.3.1.
26 Ibid cl 3.4.
27 Ibid cl 3.5.
28 Ibid cl 3.2.1(a).
29 Ibid cls 3.2.1(c), (d) and (e).
30 Ibid cl 3.3.3.
31 Ibid cl 7.3.1.
32 Ibid cl 7.2.4(a).

If A Contract Granting an Intellectual Property Licence is Terminated, Can the Licensee Continue to Use the IP?

Timothy Webb provides some helpful tips for businesses and their lawyers negotiating IP licences including that parties should consider clearly documenting in the agreement what should happen to an IP licence if the agreement is terminated.

The licensing of intellectual property – whether it be an invention, copyright material, a trade mark, design or plant variety – is critical to the commercial success of almost all businesses. For both licensee and licensor, it is important that the scope of IP licences are clear. A key element of each licence is the length of its term. It may be a fixed period or perpetual. But what happens if the agreement containing the IP licence is terminated prior to the expiration of the licence? Does the licence continue or also terminate?

Some would assume that if the agreement terminates, then the licence granted by that agreement must terminate also. But as a recent case illustrates, that is not necessarily the case.

THE PINK LADY CASE

Apple and Pear Australia Limited (**APAL**) is the peak representative body in Australia for commercial apple and pear growers. It is the registered owner of PINK LADY trade marks in many countries around the world, but had repeatedly failed to register the mark in Chile. Chile had become a substantial producer and exporter of pink lady branded apple varieties such that this failure significantly impeded the effective management of the brand.

Pink Lady America LLC (PLA) applied to register in Chile certain PINK LADY trade marks for use with the trade in apples. APAL and PLA entered into an Option Deed, under which PLA agreed to grant to APAL an option to acquire ownership of any trade marks that might ultimately issue in Chile. If the option were exercised, APAL would grant to PLA an exclusive, perpetual and royalty free licence to use those marks in respect of trade between Chile and North America. The licence was terminable only on specific quality control conditions.

In *Apple & Pear Australia Ltd v Pink Lady America LLC* [2015] VSC 617, the Victorian Supreme Court considered a range of issues in dispute between the parties, including, if the Option Deed had been terminated and APAL was entitled to retain the trade marks, whether the licence to PLA continues.

PAL argued that when a contract is terminated for breach or on acceptance of a repudiation, only future obligations are discharged and accrued rights (such as the trade mark licence) continue. APAL argued that a perpetual licence is not an accrued right, such as a right to payment, fully formed regardless of whether the contract from which it derives continues to subsist. It is, by contrast, it submitted, a permission, which subsists only for so long as the contract which governs it continues to subsist.

Croft J noted that the question of whether a right is accrued such that it survives termination is a matter of construction of the contract concerned. In this respect, the words of the licence were very important: *"this licence… will last in perpetuity subject only to the quality control provisions contained herein"*. His Honour held that this indicated that the parties' intention was that, once enlivened, the licence could not be brought to an end, except in that one circumstance. Consequently, as a matter of construction, the licence survived termination of the Option Deed.

Expressly addressing the issue… in a termination clause, will ensure that there is no doubt as to the parties' intentions, and minimise the risk of subsequent dispute

LESSONS FOR BUSINESS AND THEIR LAWYERS

This decision is a reminder to those negotiating IP licences to actively consider what should happen to a licence if the agreement is terminated, and ensure the contract reflects that intention. This is particularly important in the case of perpetual licences, and any licence expressed to be operative subject to certain conditions. Expressly addressing the issue, for example in a termination clause, will ensure that there is no doubt as to the parties' intentions, and minimise the risk of subsequent dispute.

TIMOTHY WEBB is a partner at Clayton Utz in Sydney.

Thanks, Farewell and Welcome

For nearly 5 years, VALESKA BLOCH has provided great dedication and insight as an editor of the Bulletin. She has worked tirelessly to source and edit a wide range of articles and provide insight and advice to many contributors as well as thoughtful editorial changes. CAMLA thanks Valeska for her years of service to CAMLA and looks forward to staying in touch as she continues her career as a Managing Associate at Allens in Sydney.

PAGE HENTY recently completed two busy and successful years as CAMLA President.

As President, Page brought great energy, insight and a desire to continually improve CAMLA's offering to members. Under Page's leadership CAMLA delivered numerous interesting functions for members including a unique series on National Security.

Further, Page was also directly responsible for bringing about greater interaction between the CAMLA board and CAMLA young lawyers including through the development of a terms of reference for young lawyers committee, inclusion of young lawyers at Board meetings and an increase in young lawyer functions. Page continues to contribute actively to CAMLA as a board member and as Secretary.

ELI FISHER joins Victoria Wark as a new editor of the Communications Law Bulletin. Eli is a lawyer at Banki Haddock Fiora. Eli's focus is primarily on copyright, media and privacy law. He regularly advises collecting societies, news organisations, publishers and broadcasters. Eli is a member of the Copyright Society of Australia Management Committee and the CAMLA Young Lawyers Committee.

More details about CAMLA's new president, GEOFF HOFFMAN can be found in this edition's "Profile" on page 7.

CAMLA Young Lawyers Networking Event

On 2 March 2016 CAMLA held its Young Lawyers Networking event at the offices of Corrs Chambers Westgarth. The event was proudly organised by the CAMLA Young Lawyers Committee.

Almost 100 young lawyers with an interest in a career in communications and media industries attended the event. The event provided an excellent opportunity for young lawyers to gain valuable insights into a number of career paths within media and communications industries from a panel of accomplished and inspiring speakers. The event also provided an opportunity for networking at the conclusion of the panel presentation. The winners of CAMLA's annual essay writing competition were also announced at the event.

The diverse and experienced panel of speakers included Sue Chrysanthou (Barrister, Blackstone Chambers); Grant McAvaney (Senior Lawyer, Australian Broadcasting Corporation); Jeannette Scott (Director of Legal and Regulatory Affairs, Association for Data-driven Marketing & Advertising); and Alison Jones (Senior Associate, Corrs Chambers Westgarth). The event was moderated by Daniel Thompson (Senior Associate, Corrs Chambers Westgarth). The speakers discussed their career paths and candidly recounted their professional highlights and challenges.

The event also provided an opportunity to celebrate the CAMLA essay competition winners. CAMLA Committee Member, Larina Mullins of News Corp presented awards to Joel Parsons of UNSW for his essay "Publication and Constructive Knowledge: Jurisdictional Divergence in Australia"; Adrian Dean (Deakin) for his essay "After Dallas Buyers Club: Can Piracy Be Curbed outside of the Court?"; and Rachel Baker (Ashurst) for her essay "How Australia's Second and Third Estates are undermining the Fourth". The winning essay by Joel Parsons appears in this issue of the Communications Law Bulletin, on page 12. The essays by Adrian Dean and Rachel Baker will appear in upcoming issues of the Communications Law Bulletin.

Report by DANIELLE SLIMNICANOVSKI, Solicitor, Gadens, and CAMLA Young Lawyers Committee member.

Profile: Geoff Hoffman

Partner at Clayton Utz and CAMLA President

CAMLA Young Lawyers representative, Alexandra Gilbert, recently caught up with Geoff Hoffman, to discuss his role as Partner in Charge of Clayton Utz Sydney and his visions for CAMLA.

Where do you work, and can you tell us a little bit about your role in the organisation?

I am a partner at Clayton Utz. Together with a team of 4 partners and about 10 lawyers, a large part of my practice involves working with companies in the telecommunications and media industry. As we all know it is a sector undergoing continuous structural, technological and legal change (which is what makes it so interesting!)

As a corporate lawyer my work also covers securities law and M&A, fundraising, foreign investment and a range of corporate and commercial agreements.

In addition to the client legal work I am the Partner in Charge of the Sydney office of Clayton Utz. The office has 75 partners and 725 staff, making it the largest law firm office in the country. Thankfully it is full of highly motivated and capable people, so my management role mostly involves channelling resources and trying to identify and remove any roadblocks that might prevent or discourage them from doing what they do best.

What led you to your current role?

I was a telco and media lawyer first, beginning with the work we did with AAPT when it first floated (before being taken over by Telecom NZ). It was a start-up company that listed and then grew to have over 1,500 staff in a matter of years. It was a very exciting time for the sector and the company - with the first national high-speed data networks rolling out, and the demand for connectivity that is now ubiquitous still in its infancy. Since that time I have been lucky to work with a range of clients in the telco sector including Seven, Optus and NBN.

As often happens in a law firm environment, at the same time as working in the telco and media sector I was fortunate to develop my expertise and experience across a range of M&A, fundraising, and commercial deals - in other industries, including financial services and retail.

What do you consider to be some of the most interest and challenging aspects of your role?

I know this sounds trite, but the most interesting aspect of my role really is working on new projects with my clients - especially if they involve something novel or difficult. As a mentor of mine once said, "If it was simple or standard, they wouldn't be asking us to help" - and it is the constant supply of new challenges that keeps me interested.

What are some tips for young lawyers looking to work in Merges & Acquisitions?

Again, this sounds trite, but you should always take pride in your work - no matter how big or small the job. Whether you are working on a multi-billion dollar deal which is on the front page or helping someone sell a small family business - whether your role is leading a team of 20 lawyers on a large project or drafting a single letter, pride in your work makes work more enjoyable, and is the one thing that you can do that will always help your career.

At what stage in your career did you complete your MBA at London Business School? Do you believe the MBA has been helpful in your career? How so?

I completed my MBA when I was a relatively new partner. Like many, I had spent many years focussed on developing deep expertise in the law, working with businesses in a small country. While we often work with overseas clients, we are essentially wedded to our jurisdiction (because that is where we can actually add the most value). I therefore did the MBA for two reasons. First, I saw the MBA as a way of equipping myself with corporate finance, accounting, strategy and management skills that I had only previously developed by accident. Secondly, and just as importantly, it was a way of giving me a more developed international perspective from within a global city like London.

The London Business School delivered on both fronts. I learned an enormous amount and it completely shifted my perspective of where Australia sits in the world.

Like most life experiences, there's no obvious connection between my MBA experience and specific milestones in my career since. But with the personal development it provided I do know that when I come to the end of my career that I will have been able to achieve a lot more with it than without it.

Do clients have increasing expectations that their legal advisors will possess 'non-legal' commercial skills?

It really very much depends on the client. Some clients want their lawyers to bring broad experience and skills to the table - and appreciate input on a number of levels. Others take a more siloed approach with their advisers - confining management consultants for marketing, product and delivery strategy advice; investment bankers for M&A strategy advice; lawyers for legal advice and accountants for almost anything. These clients will naturally see their lawyers as adding most value to the mix by performing a narrower legal role. Like most lawyers I'm happy to adjust my role to the client's needs. That said, clients will always want legal advisors who at least are alive to the commercial context in which their legal advice is being provided.

What qualities do you look for in young lawyers you are recruiting to your team?

We do ask for a lot. First we're looking for the core skills - someone who is highly analytical, interested in learning (which I still am!) and with exceptional written and spoken communication skills.

Then it's a matter of fit. Our team is pretty eclectic, but those that are happy here and succeed have a personality that is a balance between being fairly driven, and at the same time having a sense of humour that always helps keep the challenges in perspective.

You are the new President of CAMLA, how did you initially get involved in CAMLA and how would you like to see CAMLA develop under your presidency?

I was initially involved in CAMLA as a member, attending their events and reading the CLB. Then I became involved as a board member and am now President.

Throughout that period I have always been very grateful for the important work that CAMLA does - providing a platform for exploring industry issues that I don't believe has any equivalent in the country. CAMLA has over 350 individual members representing over 100 different organisations (including large and small Australian and global telecommunications and media companies, government owned broadcasters, industry organisations, lawyers, barristers and regulators).

As a member of the board and now as president I have always seen CAMLA as a great educator - a place for sharing understanding of the continuous structural, technological and legal changes affecting the industry. I want to make sure we are maximising the benefits to our members by running lots of great events of that kind. Of course those events also provide enjoyable networking opportunities too!

To ensure the CAMLA membership remains vibrant we also need to keep educating the next generation of lawyers about the benefits of CAMLA - and I want to see the CAMLA Young Lawyers keeping up their great work in that regard.

Finally, but very importantly, we need to maintain our investment in the CLB and ensure that it remains a valuable high quality resource for our members.

If not a partner in a law firm, what would you do for work?

I haven't seen it yet.

What is something interesting about you that is not on your resume?

In my spare time I sail boats and build things!

Alexandra Gilbert is Corporate Counsel at Bauer Media Group

Security Law Watchdog Recommends Relaxing Secrecy Provisions for Journalists

Adam Zwi considers a report looking at the impact on journalists of section 35P of the ASIO Act.

If you haven't heard of the Independent National Security Legislation Monitor (INSLM), you're probably not alone. The somewhat obscure office - which was established 2010 - is charged with reviewing the:

> "operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis. This includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary."[1]

Bret Walker SC was appointed to the position in 2011. According to one commentator, his reports were:

> "routinely ignored by the Abbott government and, when his term ended in 2014, the government tried to abolish the position altogether."[2]

However, at least one of Mr Walker's reports *did* leave an impression - his March 2014 report[3] provided the genesis for the citizenship stripping law that passed last December.[4] Mr Walker insisted that he never suggested that the government should be able to strip a person's citizenship in the absence of a criminal conviction.[5] He even demanded an apology from the Prime Minister for adopting that interpretation.[6]

The Hon Roger Gyles AO QC, a former judge, replaced Mr Walker at the end of 2014. Mr Gyles' first assignment was intimately related to media law. He was asked to review the impact that section 35P of the *ASIO Act* has on journalists.[7] This task required balancing competing interests in national security and freedom of expression.

Mr Gyles' report was released on 2 February 2016.[8] He concluded that section 35P is not proportionate to the threat to national security, and recommended additional safeguards for protecting the rights of individuals.[9] *"If these recommendations are implemented,"* he wrote, *"freedom of expression would be inhibited only to a reasonable minimum."*[10] And surprisingly - given the chequered history of INSLM reports - the government has adopted all of his recommendations.

WHAT IS SECTION 35P?

Section 35P prohibits the disclosure of information relating to a "special intelligence operation" (**SIO**). An SIO is "special" in the sense that it grants ASIO officers immunity from prosecution for things they do in the course of the operation. In other words, it allows ASIO officers to break the law.[11]

Section 35P actually contains two offences – a basic offence and an aggravated offence. The basic offence has two elements:

1) the person disclosed information; and
2) the information related to an SIO.

The fault element for the second element is recklessness. This means that the second element will be satisfied if:

1 Department of Prime Minister and Cabinet, Independent National Security Monitor, <https://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>.

2 Michael Bradley, 'Here's a security law change we can cheer for,' ABC The Drum, 4 February 2016 < http://www.abc.net.au/news/2016-02-04/bradley-here's-a-security-law-change-we-can-cheer-for/7138632>.

3 Independent National Security Legislation Monitor (Bret Walker), Annual Report, 28 March 2014, <http://www.dpmc.gov.au/sites/default/files/publications/INSLM_Annual_Report_20140328.pdf>.

4 *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth).

5 Lenore Taylor, 'Government misquoting my report to defend revoking citizenship, says Bret Walker,' *The Guardian (AU)* (online), 16 June 2015 <http://www.theguardian.com/australia-news/2015/jun/16/government-misquoting-my-report-to-defend-revoking-citizenship-says-bret-walker>.

6 David Wroe and Mark Kenny, 'Former terrorism law watchdog Bret Walker demands apology from Tony Abbott,' *Sydney Morning Herald* (online), 18 June 2015, <http://www.smh.com.au/federal-politics/political-news/furious-terrorism-watchdog-demands-apology-from-pm-20150618-ghrmv4.html>.

7 *Australian Security Intelligence Organisation Act 1979* (Cth).

8 Independent National Security Legislation Monitor (Roger Gyles), Report on the impact on journalists of section 35P of the ASIO Act, October 2015, <https://www.dpmc.gov.au/sites/default/files/publications/inslm_report_impact_s35p_journalists.pdf> (Report).

9 Report, [44].

10 Report, [56].

11 Report, [13].

- a person was aware of a substantial risk that the information related to a special intelligence operation; and
- it was unjustifiable to take that risk.[12]

The aggravated offence is identical to the basic offence except for an additional harm requirement, which itself is comprised of two alternatives. They are:

1) the person *intended* to endanger the health or safety of a person or prejudice the effective conduct of an SIO (***intentional harm requirement***); or
2) the disclosure *would* endanger the health of safety of any person or prejudice the effective conduct of an SIO (***non-intentional harm requirement***).[13]

Recklessness is the fault element for the non-intentional harm requirement.[14]

The legislation does not define 'information,' 'discloses' and 'relates to.' Therefore, there is considerable latitude in interpreting section 35P. A broad interpretation may mean that a person would be guilty of the offence if they disclose information that is already in the public domain.[15] They may also be guilty of the offence if they disclose information which was not, in fact, received by anyone.[16]

It is worth noting that section 35P does not distinguish between 'insiders' (ASIO staff) and 'outsiders' (everyone else, including journalists). It applies to all people equally.

IS SECTION 35P JUSTIFIED?

Mr Gyles accepted that the SIO scheme is appropriate.[17] He also thought that it is appropriate for the scheme to have a secrecy provision.[18]

However, he said that the *form* of that secrecy provision was not appropriate.[19] He pointed out that the objective of the provision is to ensure the effective conduct of SIOs and the safety of participants in them.[20] He accepted that there is a risk that disclosures of information could jeopardise that legitimate objective. However:

> "[i]t does not follow that the same risks will be inherent in relation to all SIOs for all time."[21]

If preventing harm is the objective, then harm should be an ingredient in the offence – at least for outsiders. As it stands, there is no such harm requirement in the basic offence.

Mr Gyles said that section 35P has two negative impacts on journalists.[22] First, it creates uncertainty about what a journalist can and cannot publish. Journalists have no means to verify whether information relates to an SIO. If ASIO refuses to comment, would a journalist be reckless as to whether the information relates to an SIO? If ASIO says the information *does* relate to an SIO, a journalist could not verify that assertion - yet publishing would almost certainly be considered reckless. Mr Gyles said that:

> "…reporting on ASIO activities is something of a lottery…The uncertainty at the point of possible publication could well have a chilling effect on dissemination of material about security and ASIO's conduct with no relevant connection to an SIO."[23]

The second impact is that:

> "…journalists are prohibited from publishing anywhere, at any time, any information relating to an SIO, regardless of whether it has any, or any continuing, operational significance and even if there was reprehensible conduct by ASIO employees or affiliates."[24]

WHAT RECOMMENDATIONS WERE MADE?

Mr Gyles' recommendations are summarised in the table on page 11.[25]

REACTIONS

The government accepted all of Mr Gyles' recommendations.[26] It is fair to speculate that, in doing so, the

12 Applying the definition of recklessness contained in the *Criminal Code* (Cth) s 5.4.

13 Emphasis added.

14 *ASIO Act 1979* (Cth) s 35P(2).

15 Report, [9].

16 Report, [10].

17 Report, [37]-[38].

18 Report, [39].

19 Report, [40]-[43].

20 Explanatory Memorandum to the National Security Legislation Amendment Bill (No 1) 2014 (Cth), [569], [573].

21 Report, [41] (my emphasis).

22 Report, [17]-[28].

23 Report, [20].

24 Report, [22].

25 Extrapolated from Report, [46]-[48].

26 Attorney-General for Australia, Government response to INSLM report on the impact on journalists of section 35P of the ASIO Act 1979, 2 February 2016, < https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FirstQuarter/2-Feburary-2016-Government-response-to-INSLM-report-on-the-impact-on-journalists-of-section-35P-of-the-ASIO-Act-1979.aspx> (Government Response).

MR GYLES' RECOMMENDATIONS

	BASIC OFFENCE	AGGRAVATED OFFENCE
Insiders	No change.	No change.
Outsiders	- **Additional harm requirement** (i.e. that the disclosure of information will endanger the health or safety of any person, or prejudice the effective conduct of an SIO). - **Fault element for the new harm requirement will be recklessness.**	- **Knowledge, rather than recklessness, will be the fault element for the non-intentional harm requirement** (that disclosure will endanger the health or safety of any person, or prejudice the effective conduct of an SIO).
	Defence of prior publication if the following are satisfied: - the information had been previously published; - the person was not involved in the first publication; and - the person had reasonable grounds to believe that the second publication would not be damaging.	

government may have been motivated by Mr Gyles' argument (contained in an appendix) that section 35P infringes the implied constitutional freedom of political communication.[27] In order to ward off a constitutional challenge which, in the view of at least one senior judge, might be successful, the government's acceptance of the recommendations may be more expedient than principled.

However, the government has indicated that it will make one change to the recommended amendments. It will not adopt the defence of prior publication in the recommended form. To enliven the defence, the government will require subsequent publishers to:

> *"…take reasonable steps to ensure the proposed publication is not likely to cause harm."*[28]

Michael Bradley points out that this:

> *"…turns a passive requirement of reasonable grounds for belief into a positive obligation to make sure that no harm will occur."*[29]

However, Mr Bradley overstates the standard which journalists will need to meet. They will not need to *make sure* that their publication *will not cause* harm. That would be practically impossible. Rather, they need only to *take reasonable steps* to ensure that it is *not likely to cause* harm. Nevertheless, Mr Bradley is correct to point out that the government response is more onerous than Mr Gyles' recommendation.

Other organisations, such as Electronic Frontiers Australia (EFA) and the Media Entertainment Arts Alliance (MEAA), said the recommendations did not go far enough. The EFA said there should be protections for whistleblowing insiders.[30] The MEAA derided the public interest defence on the basis that it creates a "game of chicken" as to who will publish first, and lamented the possibility that any journalist should face imprisonment for doing their job.[31] Others expressed disappointment that Mr Gyles had not recommended a general public interest exemption.[32]

The government has not indicated when it will make the amendments to section 35P, although practitioners should keenly watch this space.

ADAM ZWI is a solicitor at Swaab Attorneys and a member of the CAMLA Young Lawyers committee. He contributed to the Joint Civil Liberties Councils' submission to the review of the impact on journalists of section 35P of the ASIO Act.

27 Report, Appendix J.

28 Government Response, response to recommendation 6.

29 Bradley, above.

30 Electronic Frontiers Australia, EFA welcomes proposed amendments to section 35P, 4 February 2016, <https://www.efa.org.au/main/wp-content/uploads/2016/02/Section-35P-release-160204.pdf>.

31 MEAA, Journalists still face jail under ASIO Act changes, 3 February 2016, <https://www.meaa.org/mediaroom/asio-redraft-signals-need-for-rethink/>.

32 Keiran Hardy, 'Despite changes, terror law will still curb press freedom,' The Conversation, <http://theconversation.com/despite-changes-terror-law-will-still-curb-press-freedom-54122>.

Publication and Constructive Knowledge: Jurisdictional Divergence in Australia

CAMLA Essay Competition Winner, Joel Parsons considers innocent dissemination, the different judicial treatment of constructive knowledge and the implications for social media users.

1. INTRODUCTION

Unwitting disseminators of defamatory material, such as the news vendor who sells a newspaper containing a defamatory article,[1] have challenged Courts for years. While such individuals have not authored the defamatory content, "publication" is determined by reference to the defendant's participation in the circulation of the defamatory material,[2] rather than composition, and so prima facie, they have published it. To mitigate the "hardship"[3] caused by this result, the common law developed the notion of "innocent dissemination". This allows an innocent disseminator to escape liability by proving that they did not know, or that they ought not to have known (that is they did not have "constructive knowledge") of the matter about which a complaint has arisen.[4]

The development of innocent dissemination has entailed a juridical struggle spanning many years. In 1900, Romer LJ said that the decisions on the subject were not "…altogether logical or satisfactory on principle".[5] One question that has persisted is whether constructive knowledge of defamatory material is sufficient to render someone liable as a publisher, with the issue arising in two decisions of late last year.

On 27 October 2015 Blue J of the South Australian Supreme Court delivered judgment in *Google v Duffy*.[6] Three days later, Dixon J delivered judgment in *Von Marburg v Aldred*.[7] Each judgment dealt with defamation on the internet. Despite this common theme, on the question of constructive knowledge, the decisions may be at odds.

In the first part of this essay I consider the history of common law innocent dissemination and publication by omission. I then consider *Duffy* and *Von Marburg* and the different approaches to constructive knowledge taken in those cases. Finally, I will look at the implications of these authorities for users of social media.

2. DEVELOPMENT OF INNOCENT DISSEMINATION

The common law defence of innocent dissemination is said[8] to have its origins in *Emmens v Pottle*.[9] In *Emmens*, the Court considered whether a news vendor who sold copies of a newspaper containing the matter complained of was a publisher.[10] The news vendor had merely disseminated that which contained the libel, but did not compose, write or print it. Lord Esher MR stated that "…the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel."[11] Accordingly the defendant could not escape liability by showing that they merely did not know of the matter complained of – they needed to also show that they ought not to have known of it by reference to reasonable care.

The idea that an innocent disseminator of defamatory material is liable for it if they "ought to have known" of it persisted in subsequent judgments. The Court referred to *Emmens* in *Vizetelly v Mudie's Select Library Limited*,[12] where a library lent and sold copies of a book that contained passages allegedly defaming the plaintiff. Romer LJ expressed the view that a "subordinate publisher" will not be found to have published the libel, if they published in the ordinary way of their business[13] and if they established

1 As in *Emmens v Pottle* (1885) 16 QBD 354.
2 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276, 288 (Dixon J).
3 *Vizetelly v Mudie's Select Library Limited* [1900] 2 QB 170, 179 (Romer LJ).
4 David Rolph, *Defamation Law* (Thomson Reuters), 2015, 292.
5 Above, n 3.
6 [2015] SASC 170.
7 [2015] VSC 467.
8 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 618 (Gummow J).
9 (1885) 16 QBD 354.
10 Ibid 357.
11 Ibid.
12 [1900] 2 QB 170.
13 Ibid, 179.

> (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel.[14]

In *Vizetelly* the Court considered these principles as determinative of whether there had been publication rather than constituting elements of a standalone defence. Courts have since then had differing views as to how the principles should be framed.

A number of decisions took up the reasoning in *Emmens* and *Vizetelly*. In *Sun Life Assurance Co of Canada v W H Smith & Son Ltd*[15] Scrutton LJ expressed the test as whether the disseminator knew or ought to have known it had published the matter complained of.[16] In *Lee v Wilson & MacKinnon*[17] Dixon J stated that:

> …publication made in the ordinary course of business such as that of bookseller or news vendor, which the defendant shows to have been made in circumstances where the defendant did not know or suspect and, using reasonable diligence, would not have known or suspected was defamatory, will be held not to amount to publication of a libel.[18]

The subject came before the High Court in *Thompson v Australian Capital Television Pty Ltd*.[19] In *Thompson*, Channel 7 broadcast live a current affairs program produced by another television station containing the matter complained of, and argued it was merely a subordinate disseminator and had innocently disseminated the defamatory material. Brennan CJ, Dawson J, and Toohey J considered *Emmens* and *Vizetelly* to be the "somewhat muddied origins"[20] of the defence of innocent dissemination. The judgment then proceeded on the basis that constructive knowledge would preclude a subordinate publisher from establishing the defence of innocent dissemination.[21] The High Court later spoke on the matter in *Dow Jones & Company Inc v Gutnick*,[22] in which the High Court majority adopted Dixon J's statement of the relevant principles in *Lee*.[23]

3. PUBLISHERS BY OMISSION[24]

Emerging concurrently with the above principles were rules in respect of individuals who have ownership or control over property, which, by the act of third party, becomes the conduit for defamatory material.

In *Byrne v Deane*,[25] the proprietor of a golf club became aware of defamatory material that had been affixed to the club's notice board by a third party. Was the proprietor a publisher of the material? Greene LJ stated that the key question in such circumstances was whether, having regard to all the facts, the proper inference was that the defendant really had made themselves responsible for its continued existence. Because the club proprietors were able to remove the material without difficulty, and knowing that the material would be seen by club members, the inference could be made that they had accepted responsibility for the material, and were accordingly parties to its publication.

The emergence of the Internet challenges Courts to extend these principles to novel scenarios

In *Urbanchich v Drummoyne Municipal Council*[26] Hunt J held that it would be possible for a transport authority to be a considered a publisher of a defamatory statement affixed to its bus shelters by a third party, if the plaintiff established "…that the defendant…in some way ratified, the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it".[27] Ratification could be inferred where the defendant knew of the material and failed to remove it.[28]

4. THE INTERNET AGE

The emergence of the Internet challenges Courts to extend these principles to novel scenarios. For example, by analogy to the notice

>

14 Ibid.

15 (1933) 150 LT 211.

16 Ibid 212.

17 (1934) 51 CLR 276.

18 Ibid 288.

19 (1996) 186 CLR 574.

20 Ibid 586.

21 Ibid, 593.

22 (2002) 210 CLR 575.

23 Ibid, 600.

24 So-called due to the apparent failure of the alleged publisher to take action to remove the defamatory material – see Joachim Dietrich, 'Clarifying the meaning of 'publication' of defamatory matter in the age of the internet', *Media and Arts Law Review*, (2013) 18, 96.

25 [1937] 1 KB 818

26 (1991) Aust Torts reports 81-127; *BC8801175*.

27 Ibid, 7.

28 Ibid.

Publication and Constructive Knowledge [CONT'D]

> board considered in Byrne liability for publication has been extended to search engines. For example, in *Tamiz v Google Inc*[29] Google was held liable as a publisher of content hosted on its Blogger platform, once it had notice of is existence and failed to remove it within a reasonable timeframe.[30]

A commenter might be considered to have had constructive knowledge of the defamatory material contained in the post, and their "active" involvement in the dissemination of the matter would be sufficient to render them a publisher, under the Duffy line of reasoning

A. Murray v Wishart

In *Murray v Wishart*,[31] The defendant, Mr Murray, made an application to strike out the plaintiff's statement of claim, which alleged inter alia, that he was, as an administrator of a Facebook page, a publisher of defamatory comments posted on that page by third parties.[32]

At first instance, Courtney J found that this was arguable, deciding that Facebook page administrators will be regarded as publishers of posts on their page not only where they receive notice of the offending content and fail to remove it, but also where "… they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory."[33] Referring to Lord Esher's statement in *Emmens*, Courtney J stated that in addition to an absence of actual knowledge of the matter complained of, the subordinate publisher must have "…no reason to think it likely that the material being published contains such a statement".[34]

The Court of Appeal disagreed stating that *Emmens* is "…not authority for the proposition that a person may be found to have published a defamatory statement on the ground that they ought to have known of its existence".[35] Accordingly, the Court determined that there was no precedent requiring it to adopt the "ought-to-know test" to determine the question of publication.[36]

The Court of Appeal took a pragmatic approach, exploring the unjust and unreasonable outcomes that would otherwise result. For instance, if constructive knowledge was sufficient, a Facebook page administrator with only constructive knowledge of the defamatory comment (their being a publisher the moment the comment is posted)[37] would be in a worse position than a person who had actual knowledge of defamatory material,[38] because the *Byrne* line of reasoning, allows a reasonable time for the disseminator to remove the material. These issues, in part, led the Court of Appeal to conclude that the "…actual knowledge test should be the only test to determine whether a Facebook page host is a publisher".[39]

B. Google v Duffy

In *Google v Duffy*[40] the plaintiff sued Google for allegedly defamatory snippets returned by its search engine and auto text suggestions that appeared in Google's search box. Blue J of the South Australian Supreme Court found that the position espoused in *Murray*, that constructive knowledge was not a component of determining publication, could not apply in Australia.

> In Murray v Wishart, the New Zealand Court of Appeal held that an actual knowledge test and not a constructive knowledge test should be applied to determine whether a website forum host – in that case a Facebook page host – is a secondary publisher in respect of third party postings. As a matter of principle, I do not consider that a different test should apply to a publisher of internet material from that applying to a publisher of physical, broadcast or televised material. In any event, as a matter of authority the approach of the New Zealand Court of Appeal is not open in Australia given the High Court's endorsement of the constructive knowledge test in the case of secondary participants.[41]

29 [2013] 1 WLR 2151.
30 Ibid 2165.
31 [2014] NZCA 461.
32 Ibid [9].
33 *Wishart v Murray* [2013] NZHC 540, [117].
34 Above n 39, [94].
35 Ibid [96].
36 Ibid [137].
37 Ibid [138].
38 Ibid.
39 Ibid [143].
40 [2015] SASC 170.
41 Ibid 44.

Blue J was of the view (preferring the view that the principles were determinative of publication, rather than constituting the standalone defence of innocent dissemination) that:[42]

> Under the secondary publisher doctrine, a secondary participant is not liable for a publication if he or she did not know, and could not with the exercise of reasonable diligence have known, of the defamatory matter. The onus of proof lies on the secondary publisher to prove no actual or constructive knowledge of the defamatory matter.[43]

Google referred to the line of authority stemming from *Byrne* in argument. While accepting that the test in those authorities was apposite where the defamatory matter is physically attached to the defendant's property, Blue J stated that the test derived from those authorities was inconsistent with the innocent dissemination doctrine.[44]

C. Von Marburg v Aldred[45]

In *Von Marburg*, a judgment post-dating *Duffy* by three days, Dixon J of the Victorian Supreme Court, contrary to Blue J's position in *Duffy*, endorsed the approach taken by the New Zealand Court of Appeal in *Murray*. Dixon J was required to determine whether the first defendant, an administrator of a Facebook page, on which the allegedly defamatory was posted (being a "sponsor" of that content), was a publisher of that post. Dixon J's statement of the test is unambiguous.

> To allege a subordinate publication, a plaintiff should allege that the defendant acquired knowledge of the existence of the impugned publication. An awareness of the existence of the impugned material is a precondition before an internet intermediary such as an administrator or sponsor of a Facebook page will be held to be a publisher. I prefer the approach of the England and Wales Court of Appeal in Tamiz and the New Zealand Court of Appeal in Murray that applied the analogy of the pre-internet cases…When a relevant party communicates a defamatory statement by the use of an internet platform, such as Facebook, through a medium such as a comment button or other invitation to post a communication to the platform, the internet intermediately [sic] is not the publisher of it if not aware of its existence. (Knowledge factor).[46]

Given the express endorsement of the approach taken in *Murray*, the "knowledge factor" unambiguously precludes constructive knowledge.

5. IMPLICATIONS

Do the decisions in *Duffy* and *Von Marburg* conflict? Certainly, Blue J's statement that the approach in *Murray* is not open in Australia as a matter of authority, and the endorsement of that approach in *Von Marburg* would prima facie suggest a divergence. These authorities highlight tensions which have been unresolved since the co-existence of *Emmens* and *Byrne*. It is clear that *Duffy* and *Von Marburg* each proffer a different view as to whether a secondary participant's constructive knowledge of defamatory material is sufficient to make them a publisher of it. It is not difficult to anticipate a different outcome in the *Von Marburg* scenario if the reasoning in *Duffy* is instead applied – essentially this is the difference of approach between Courtney J at first instance, and the Court of Appeal in *Murray*.

The decisions are perhaps reconciled by reference to the defendant's degree of participation in the act of dissemination. For example in *Duffy*, Google's automated systems were found to have generated and communicated the defamatory search result snippets, whereas as Dixon J stated, "…the automated function of a search engine is, mostly, not replicated in the publishing role associated with [a] Facebook page".[47]

Is this satisfactory? If the degree of participation were the distinguishing feature, increasingly complex online platforms may require detailed consideration before a user could ascertain their potential liability and peculiar outcomes may result. Consider for instance (the admittedly improbable) scenario of a Facebook user who comments on a Facebook post that has already received many comments created by third parties, one of which is defamatory. Could that Facebook user be considered to have published the defamatory material? When a user comments on a Facebook post they do in fact contribute to its dissemination because this activity suggests to Facebook's algorithms that such content should be more broadly circulated in the Facebook News Feed,[48] and the user's friends will

The operation of varying knowledge tests in the context of social media means that unassuming users of platforms such as Facebook could be drawn into defamation litigation, on the basis that they "ought to have known" of the relevant defamatory material

42 Ibid.
43 Ibid [237].
44 Ibid 184.
45 [2015] VSC 467.
46 Ibid 13.
47 Ibid, 35.

> see that the user has commented on the post, pushing it to an increasing number of users. Accordingly, that user's behaviour is properly described as "active" rather than "passive". An inflammatory, albeit not defamatory post, could be said to constitute reason enough to suspect that some of the ensuing comments were defamatory. In such circumstances, a commenter might be considered to have had constructive knowledge of the defamatory material contained in the post, and their "active" involvement in the dissemination of the matter would be sufficient to render them a publisher, under the Duffy line of reasoning.

Would the user who created the original post be in the same position as the commenter above? The original poster's action (assuming this individual has made no further comments) was to create the post to which the defamatory material was "affixed". This type of involvement seems to be publication by omission, and akin to that of a notice board proprietor or Facebook wall administrator. Accordingly, if such an analogy is made, the reasoning in *Von Marburg* would suggest that they would only be liable with actual knowledge of the defamatory comment attached to their post.

6. CONCLUSION

Duffy and *Von Marburg* are not harmonious and appear to have crystallised a variance in the defamation law of South Australia and Victoria. However, as outlined above, this divergence merely reflects a controversy that has developed since *Emmens* and *Byrne*, and has evolved through the search engine cases. As the New Zealand Court of Appeal observed in *Murray*, the operation of varying knowledge tests in the context of social media means that unassuming users of platforms such as Facebook could be drawn into defamation litigation, on the basis that they "ought to have known" of the relevant defamatory material. Further judicial consideration is needed and perhaps the High Court will eventually provide an authoritative statement on the correct approach. However, there is a risk that differing expressions of the relevant knowledge test in the context of different online platforms will see the proliferation of platform specific rules, which on any account is undesirable given the pace of technological development. [49]

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48 Victor Luckerson, 'Here's How Facebook's News Feed Actually Works', *Time*, 9 July 2015, accessed from http://time.com/3950525/facebook-news-feed-algorithm/.

49 See generally, above n 28, 631.

What Changes to Australia's Media Ownership Laws are Being Proposed?

Associate Professor Timothy Dwyer, University of Sydney provides an overview of the recently proposed changes to Australia's media laws.

Communications Minister Mitch Fifield has announced a shake-up of Australia's media ownership laws.[1] So, what rules are being scrapped? And how might their axing affect Australia's media sector?

THE RULES

On the chopping block are the "75% reach" and "two out of three" rules.

The 75% audience reach rule[2] began life in 1987 – before the internet – as a 60% audience reach rule. It meant that the population of the licence areas controlled by one person or company could not exceed 60% of the total Australian population.

Subsequent adjustments made in 1992 extended the rule to 75% of the national audience. This rule's practical outcome was to create commercial metropolitan (Seven, Nine and Ten) and regional (Prime, WIN, Southern Cross Austereo) television networks.

The two-out-of-three rule was introduced in 2006. Its purpose is to prevent a single person or company from controlling more than two out of three media platforms – commercial radio, commercial television and newspaper – in the same radio licence area.

These rules – together with the "one to a market" rule for TV, the "two to a market" rule for radio, and the minimum independently controlled media voices of five in a metro area or four in a regional area (the "5/4" rule) – have the effect of providing a safety net for voice diversity.

There is abundant evidence that online streaming[3] has made the 75% reach rule redundant. However, the two-out-of-three rule – and the other existing rules limiting market dominance – do still effectively maintain voice diversity, even if digital convergence allows these traditional media platforms to undertake cross-media production activities.

WHAT MIGHT CHANGE MEAN?

Anticipating the changes, APN News and Media have already put their regional print division, Australian Regional Media, on the market.[4] News Corp, which already owns 14.99% of APN News and Media,[5] may be interested in acquiring a slew of daily and community newspapers in regional Queensland and NSW, and 30 online news sites.

News Corp thus could stand to subsume titles such as the The Queensland Times, Warwick Daily News, The Northern Star (Lismore), The Daily Examiner (Grafton) and The Chronicle (Toowoomba). Each has its own particular local perspectives.

Mergers between regional and metropolitan television networks are certain.[6] Cross-media marriages, such as between Fairfax Media and Nine Entertainment,[7] are also a strong possibility.

Media owners, who are facing increasing pressures from the shift to online advertising and desperately want to expand across audience platforms, are likely to be the main beneficiaries of Fifield's changes. The Coalition government, which in an election year can't afford to have to deal with disaffected news media, also stands to gain.

The public, and in particular people in rural and regional Australia, do not even get a look-in. Even those living in smaller cities such as Adelaide, Darwin or Hobart, who already only have just a News Corporation daily to read, are facing the prospect

There is abundant evidence that online streaming[3] has made the 75% reach rule redundant. However, the two-out-of-three rule – and the other existing rules limiting market dominance – do still effectively maintain voice diversity,

1 Department of Communications and the Arts, 'Updating Australia's Media Laws', accessible at https://www.communications.gov.au/what-we-do/television/media/updating-australias-media-laws.

2 *Broadcasting Services Act 1992* (Cth), s 53.

3 For example, see 7Live accessible at https://7live.com.au.

4 Hugh Martin, 'End of an Era in Regional Publishing as APN Puts Papers up for Sale', *The Conversation* (26 February 2016), accessible at https://theconversation.com/end-of-an-era-in-regional-publishing-as-apn-puts-papers-up-for-sale-55382.

5 Dominic White and Sarah Thompson, 'Rupert Murdoch's News Corp Takes 14.9% Stake in APN as Independent News & Media Exits', *Sydney Morning Herald*, (20 March 2015), accessible at http://www.smh.com.au/business/media-and-marketing/rupert-murdochs-news-corp-takes-149-stake-in-apn-as-independent-news--media-exits-20150319-1m2sxh.html.

6 Dominic White, 'Nine and WIN in $1.8bn Merger Talks', *Sydney Morning Herald*, (23 December 2015), accessible at http://www.smh.com.au/business/media-and-marketing/nine-and-win-in-merger-talks-20151223-glu4rc.html.

7 Dominic White, 'Dream Deals: A Three-Way Merger Between Fairfax Media, Nine Entertainment Co and Southern Cross Media', *Australian Financial Review,* (4 January 2016), accessible at http://www.afr.com/business/media-and-marketing/dream-deals-a-threeway-merger-between-fairfax-media-nine-entertainment-co-and-southern-cross-media-20151224-glul88.

> of fewer alternative voices if News Corp were to merge with, for example, Network Ten.[8]

Media owners, who are facing increasing pressures from the shift to online advertising and desperately want to expand across audience platforms, are likely to be the main beneficiaries

Australian media ownership, and print media in particular, is among the most concentrated in the world.[9] A steady trend to fewer owners over the last century is the well-documented pattern. But print media and their online successors are fundamental to news and information diversity and pluralism in democratic societies.

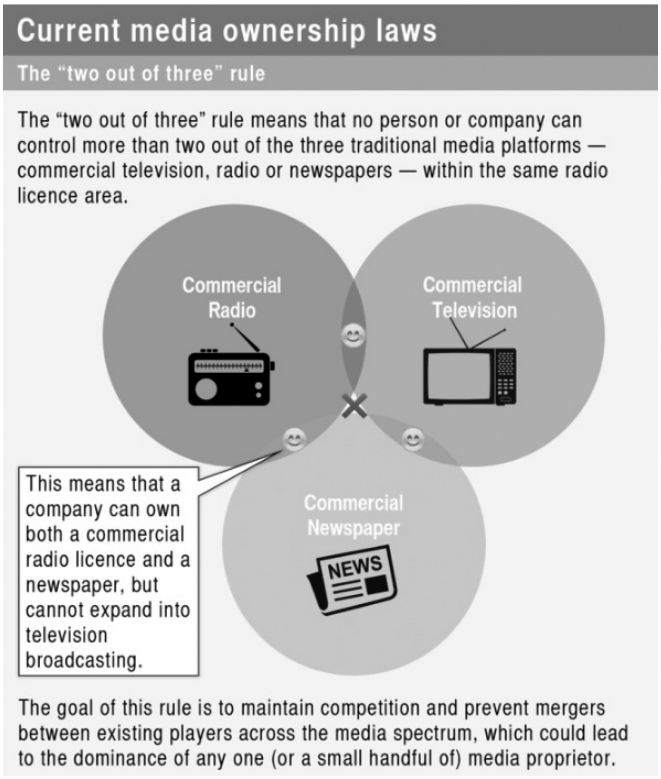
Responsible policymaking in the public interest needs to assume that media concentration will continue to be a problem in the online digital world. Research indicates there are clear economic and audience usage reasons for this, despite the rise of online streaming and multi-screening.[10] Counter-arguments put forward[11] based on the conventional wisdom of "internet abundance" are misguided and self-serving.

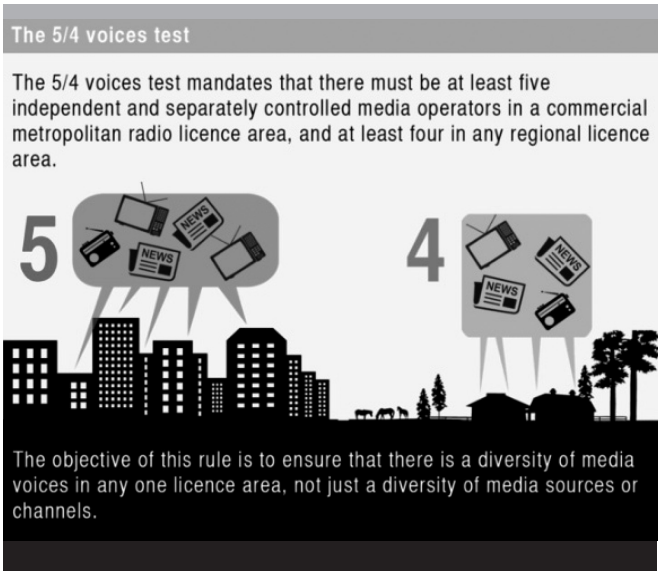
A NEW SET OF DIVERSITY RULES

These rules, with the exception of the 75% audience reach rule, maintain limits on any one person or company from dominating with their "ownership voice" in a licence area or market. The government should consider what rules would maintain news voice diversity and be fit for the 21st-century media landscape.

The business model for regional media is a major concern for news audiences in those areas. Ideas for policy transfer from overseas jurisdictions are sorely needed. These may include a news content industry fund or levy, or other forms of tax breaks or public service subsidies, in addition to the existing local content scheme.

The proposed changes to the existing points scheme – which would require more local content in the wake of a "trigger event", including more news content – is closing the gate well after the horse has bolted.





8 ACMA, 'Media Interests Snapshot', accessible at http://www.acma.gov.au/theACMA/media-interests-snapshot.

9 Terry Flew, 'FactCheck: Does Murdoch Own 70% of Newspapers in Australia?', *The Conversation*, (8 August 2013), accessible at https://theconversation.com/factcheck-does-murdoch-own-70-of-newspapers-in-australia-16812/.

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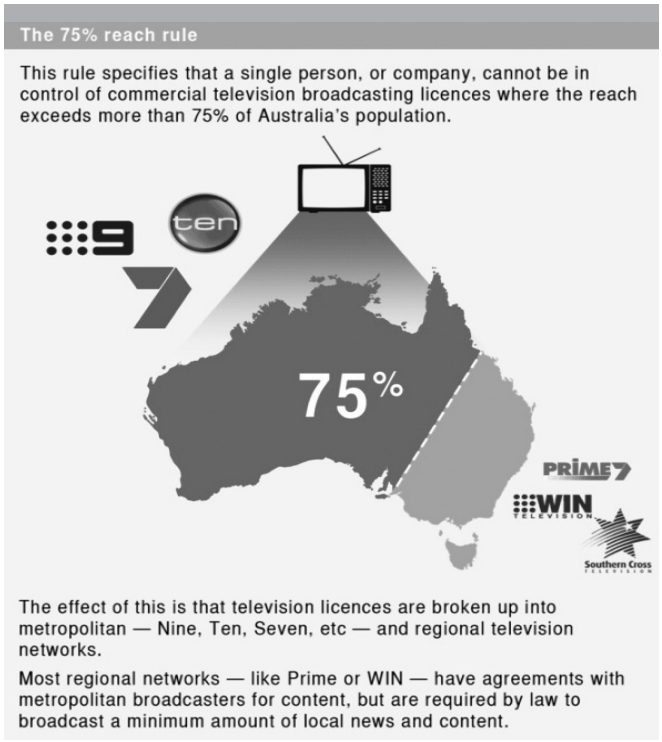
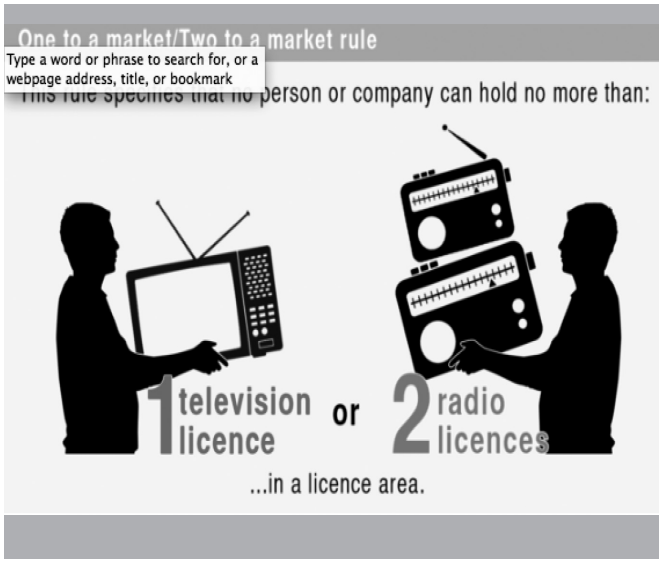
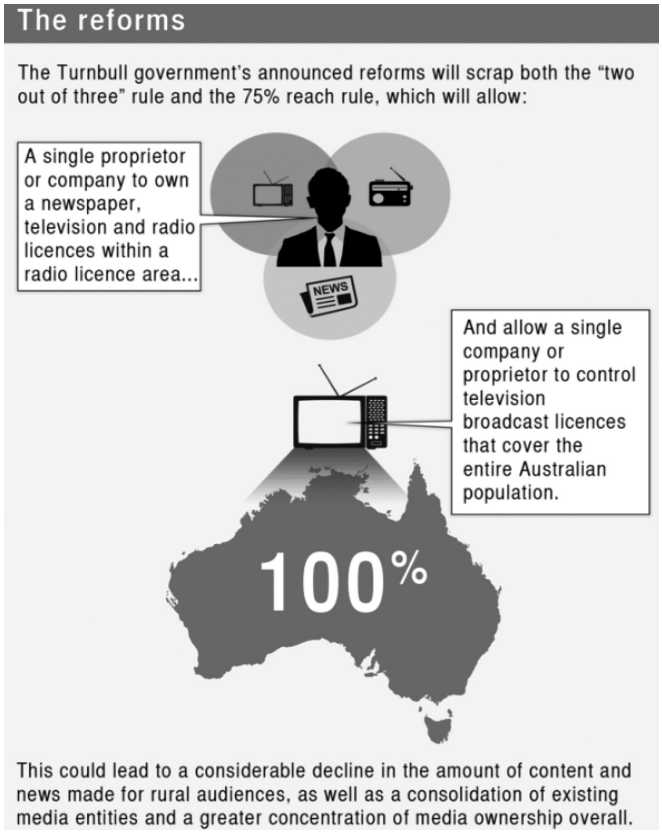




There is a pressing need to rethink policy and regulation in light of the ongoing transformations surrounding digital convergence. Traditional sector-based approaches to media policy are being challenged. But diversity and pluralism remain policies of high consequence because they are directed at maintaining an informed population.

It remains to be seen whether these amendments will survive a Senate committee, let alone be passed some time before the coming election.



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THE CONVERSATION

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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.

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