

## Why three into two won't go - The Death of the Galaxy/Foxtel Merger

**Alistair Little examines the ACCC's opposition to the proposed Galaxy/Foxtel merger, and its consequences, in the light of competition law principles and policy**

It is with great trepidation that anyone ever tries to set out the current state of play in the pay TV industry in Australia because there is a real risk that between the time of drafting an article and having it printed, the situation will have changed so much that the final form of the article will be as out of date as cuneiform writing. Acknowledging this fact, this is the current situation (at least late in 1997):

The merger between Galaxy and Foxtel was formally terminated on 20 November 1997.

Galaxy is now under such severe financial pressure that its draft corporate epitaph must be on the desk of financial journalists all over the country. Indeed, if those journalists are to be believed, Galaxy will be under some form of insolvency administration by the time you read this article. Foxtel hopes that Galaxy's demise will allow it to re-do the expensive movie deal with the Hollywood studios which Galaxy did and which Foxtel piggybacks on (at its substantial cost) in order to be able to provide movies to subscribers.

Galaxy's possible demise has led to Foxtel and Optus talking about the creation of the euphemistically-named 'Content Co'. This is a company to be owned by Foxtel and Optus that would buy all programming for their pay TV networks. The ACCC has been reported in the press recently as having given 'tacit approval' to such an arrangement.<sup>1</sup>

This situation has arisen primarily because of the decision of the Australian Competition & Consumer Commission ("ACCC") to take steps to block the Galaxy/Foxtel merger. This article analyses the law behind the decision and the considerations which the ACCC apparently took into account in attempting to stop the merger. Hopefully, it also shows that the application of perfectly reasonable economic theory (which is the basis of the *Trade Practices Act*) can produce strange results in comparatively small markets such as those in Australia.

### SECTION 50 TRADE PRACTICES ACT

In short, Section 50 of the Act prohibits acquisitions or mergers that would result in a substantial lessening of competition in any major market for goods or services in Australia - a prohibition aimed at protecting consumers from the lack of competition which is inherent in a

monopolised market or which almost always occurs in markets controlled by oligopolies.

Section 50 prevents corporations from acquiring shares or acquiring assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. If a company breaches the section, then the court can impose pecuniary penalties pursuant to Section 76 of the Act or take other steps such as making divestiture orders pursuant to Section 81 of the Act. Since a divestiture order could have a catastrophic effect upon a merged business, it is generally thought wise to approach the ACCC prior to the conclusion of any important merger in order to seek an authorisation pursuant to Part VII of the Act. In this particular case, the ACCC was well aware of the proposal to merge Galaxy and Foxtel before it was ever formalised and indeed an earlier version of the merger was blocked by the ACCC's refusal to authorise it earlier this year.

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## THE MERGER AND THE LITIGATION

A heads of agreement between Foxtel and Galaxy's parent company (Australis Media Limited) dated 25 July 1997 provided for an effective merger of the two businesses. Australis was to acquire all of the shares and the securities in the companies carrying on the Foxtel business in consideration for Australis issuing securities and options to the Foxtel partners so that the Foxtel partners held at least 60.5% of all of the Australis shares and convertible notes. The Foxtel partners would then be entitled to appoint a majority of the Board of Directors of Australis and to appoint the Company's CEO.

The ACCC commenced proceedings opposing the proposed merger, relying upon Section 50 of the Act, on 14 October 1997. It sought an injunction restraining Foxtel from acquiring any shares in or assets of Australis and restraining Australis from acquiring or offering to acquire any shares in or assets of Foxtel. The ACCC also sought to restrain all the parties from implementing the heads of agreement dated 25 July 1997.

The first part of the ACCC's case was that the merger would have resulted in a substantial lessening of competition in the pay TV market by removing Foxtel as an independent competitor of Galaxy and Optus. Importantly, it was also alleged that the merger would have had the likely effect of precluding Optus from operating a viable local call telephone service. The basis of this allegation was, apparently, evidence filed by Optus personnel to the effect that Optus was looking to pay TV to 'pull through' its telephone service, ie, Optus hoped that once people took its pay TV service then they would also use the cable connection to take its local call telephone service.

Whilst much of the material contained in the affidavits of the Optus employees is the subject of confidentiality orders, a report in The Australian on 18 November 1997 refers to an affidavit of an Optus employee who is paraphrased as saying that if the merger was to proceed, the merged entity would be so dominant in the pay TV market that:

*'... Optus will fold its tent and quit pay TV and local telephony ...'*

If this is what Optus had actually threatened to do, it would have been a strange step to take, bearing in mind the fact that Optus has already spent several hundred million dollars setting up its cable network.

No matter what the merits of the case were, the important thing to note is that Section 50 provides that there needs to be an effect on competition in a market and not necessarily the market in which all of the particular players operate. Hence the ACCC could seek to support its position by making allegations about the potential lessening of competition in the market for telephone services, notwithstanding Galaxy's non-involvement in telephony.

## THE OUTCOME AND THE FALLOUT

The initial result of the ACCC's decision to oppose the Foxtel/Galaxy merger was to bring the merger to an end, since the litigation meant that it could not be safely completed within the time frame provided for by the heads of agreement. The

longer-term effect may well be to bring Galaxy's operations to an end and allow for the setting up of a single content provider for all pay TV services.

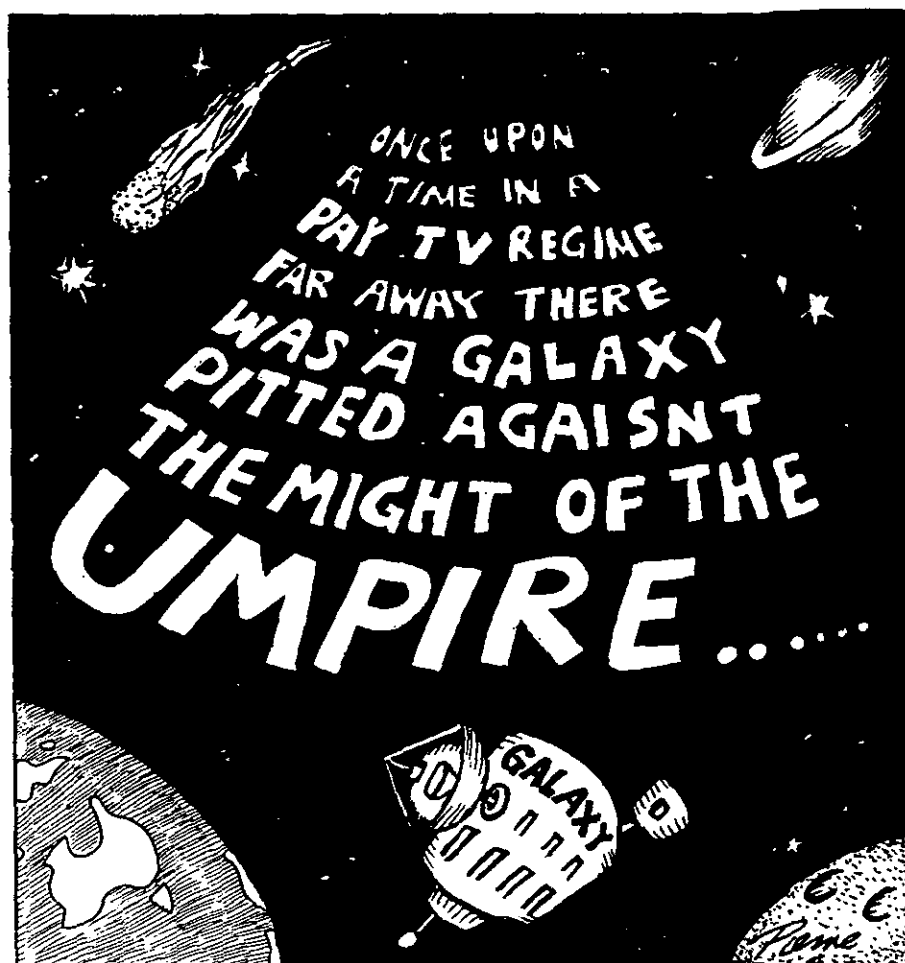
Galaxy will no doubt feel aggrieved about the decision. A number of commentators have observed that the adding of Galaxy's approximately 110,000 subscribers to Foxtel's approximately 250,000 subscribers would not make much difference to Optus Vision's attempts to add to its approximately 180,000 subscribers.<sup>1</sup>

It has also been observed that there is no good reason why Optus could not compete with the satellite services which Galaxy would have brought to the merger with Foxtel since Optus owns its own satellite and Galaxy actually makes use of that satellite to deliver some of its services. Consequently, it is arguable that the merger would have had no real effect on competition in the pay TV market.

The bitter irony is that Galaxy may eventually disappear from Australia's pay TV screens primarily because of the state of competition in the local telephone market - a market in which it has never competed and has never sought to compete. There is no question that with current take-up rates for pay TV being low and churn rates being high, the telephone market is more important to Australia's economy than the pay TV market. However there is still something inherently illogical in making a decision which will cause a pay TV company to go to the wall so as to give as much of an opportunity as possible to the new player in the local telephony market - notwithstanding the fact that the relevant legislation is cast widely enough to justify the decision.

This effect of the ACCC's decision is remarkable enough, but if it is true that the ACCC is happy to allow the creation of Content Co, then, oddly, there will effectively be no competition in the pay TV market - at least in terms of content. Price competition between the members of a duopoly would be the only competition in the market and on the basis of the experience of that sort of thing around the world, it is unlikely to be much competition at all.

Worse still, for suppliers of content, there would be absolutely no competition. Content Co would be the only entity with which you could deal, and if you did not like their proposed purchase price, your only alternative is to not sell your



products to pay TV. Such a situation cannot be good for consumers of pay TV.

And what does all this say about the local call telephone market? If a cable pay TV business is an essential way in for a competitor in the local call telephone market, then it would appear that Optus and Telstra will operate a duopoly in that market as well. Bad news for consumers once again.

The final fallout from this decision, and from the way in which the ACCC has conducted itself, is that the ACCC has lost some credibility. Professor Fels, the Chairman of the ACCC, has suffered trenchant criticism in the press with calls for his resignation<sup>4</sup> and a comparison with Dr Kevorkian (the American mercy-death doctor) in his determination to prevent Galaxy from being thrown a lifeline by way of a merger with Foxtel.<sup>5</sup> He was also criticised during a hearing by the Parliamentary Committee on Financial Institutions and Public Administration on Thursday 20 November 1997 for his hiring of two lawyers who were being paid for by Optus to work for the ACCC on the merger case.

Strangely then, at the end of the day, the ACCC and the consumers that it is supposed to protect may well end up being the big losers out of the ACCC's decision. The ACCC may well suffer a further loss of credibility and consumers may end up with a duopolistic pay TV market which is almost bereft of competition. It is an odd outcome from the use of a piece of legislation that has at its heart the aim of protecting competition and not of protecting competitors.

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<sup>1</sup> Clive Mathieson, 'Blount verifies a News - Optus deal', *The Australian*, Friday 21 November 1997.

<sup>2</sup> Mark Westfield, 'Investors Ignore Perilous Sea Ahead', *The Australian*, Tuesday 18 November 1997.

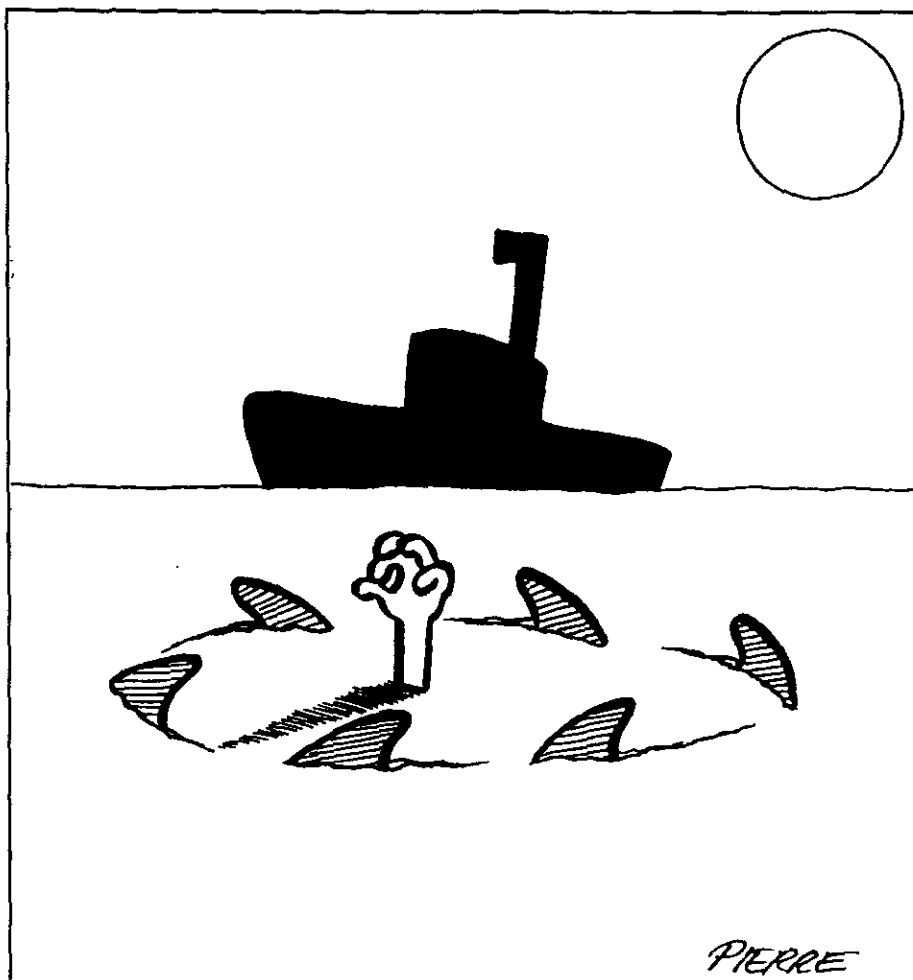
<sup>3</sup> These were the figures published by Australian Pay TV News as at October 1997. The figures quoted were for the end of July for Galaxy; the end of September for Foxtel; and an unstated date for Optus Vision.

<sup>4</sup> Mark Westfield 'Fels' Molehills Turn into Mountains', *The Australian*, Friday 21 November 1997.

<sup>5</sup> Terry McCrann 'ACCC's Prof Kevorkian has his Pay-TV Wires Crossed', *The Daily Telegraph*, Wednesday 19 November 1997.

# Time and Prejudice

**Ross Duncan looks at the media reporting of "Dolly" Dunn's discovery and arrest in Honduras and considers when the right to a fair trial begins for the purposes of Australian contempt law**



Recent media coverage of the arrest of alleged pedophile, Robert 'Dolly' Dunn, in Honduras has highlighted yet another uncertainty in the law of contempt. Simply, when a person wanted in relation to serious criminal charges in an Australian jurisdiction is apprehended outside the jurisdiction and faces extradition proceedings, at what point does the matter become sub judice in the Australian jurisdiction? The answer to this question is unclear although the facts of one NSW case suggest media reports after Dunn was apprehended may well have been in contempt.

In November, Australian authorities, with a little help from a 60 Minutes crew, finally caught up with alleged pedophile, Robert 'Dolly' Dunn in Honduras. A total of 91 warrants had been issued since October 1996 for his arrest in relation to alleged sex offences against children.

Dunn was deported from Honduras to the United States where, at the time of writing, he was facing an application for his extradition to Australia.

For the most part, the media considered itself unrestrained in its reporting of this story. Pictures of Dunn were published on the front pages of newspapers and in television news and current affairs programmes. Material which had been presented to the NSW Police Royal Commission concerning Dunn was referred to, and the moment of his apprehension in Honduras was caught on videotape and featured in an episode of 60 Minutes. John Westacott, 60 Minutes executive producer, confidently informed Radio National's Peter Thompson that the programme's legal advice was that there was no sub judice question until Dunn had been formally charged - that is, until he returned to Australia. In contrast, Attorney General Daryl Williams

managed to duck some hard questions about the Australian authorities efforts to locate Dunn, claiming that the extradition proceedings were sub judice!

## OPERATION OF SUB JUDICE RULES

The sub judice rules which form part of the general law of contempt operate to restrict the publication of material which is intended or has a tendency to interfere with the administration of justice: *Attorney General for New South Wales - v- TCN Channel Nine P/L* (1992) 20 NSWLR 368 at 379-80 ("Mason case").

Material which has been found to be likely to interfere with the administration of justice by prejudicing an accused's right to a fair trial in criminal cases includes:

- a photograph of an accused person if identity may be an issue at the trial.
- material which prejudices the guilt of a person.
- criminal record or bad character of an accused person.

However, the sub judice rules only restrict publication of material in relation to 'pending proceedings'. As the Court of Appeal acknowledged in the Mason case:

*'In the case of criminal proceedings, the problem is one of identifying the point from which there can be said to be proceedings which are pending'. (at 375)*

## WHEN ARE PROCEEDINGS 'PENDING'?

It is clear that criminal proceedings are pending from the time a person is arrested and charged (*James -v- Robinson* (1963) 109 CLR 593) and, in New South Wales at least, they are pending from the moment a person is arrested. In the Mason case the court explained that arrest was the relevant time because:

*'That was the time of initiation of criminal proceedings against him [Mason]. That was the time the criminal law was set in motion. From that time there was an obligation to bring him before a court as soon as*

reasonably practical. From that time he was to use the language of Hall 'under the care and protection of the court' (at 378).

Given that the Mason case identifies arrest as the starting point, it would seem to follow that any steps in the criminal process prior to that time such as the issuing of a warrant for arrest do not trigger the sub judice period. Certainly, the court showed little interest in the English common law notion of 'imminent' as opposed to 'pending' proceedings. The court did however, note that the *Contempt of Court Act 1981*, which now governs contempt law in the United Kingdom, related liability to the time proceedings are 'active' and that proceedings were active from the time of arrest without warrant, yet no mention was made of the fact that, under that Act, proceedings also become active upon 'the issue...of a warrant for arrest.'

While the effect under Australian contempt law of the issuing of a warrant remains uncertain, an even more complex question arises in circumstances such as those of 'Dolly' Dunn. Not only had the media coverage commenced after warrants for his arrest had been issued, it continued after he was apprehended and then brought before a court to face extradition proceedings.

As mentioned, 60 Minutes took the view that it was open season until Dunn had been charged. While Westacott may not have been explaining his legal advice with precision, certainly the notion that criminal proceedings aren't pending until a person is charged is at odds with the Mason case.

Furthermore, even if it can be argued that Dunn's arrest in Honduras was not an arrest as part of the criminal law process in New South Wales, such an argument would seem to sit uneasily with the outcome of *Attorney General for NSW - v- Mirror Newspapers Limited* (1962) NSWLR 857 ("Bradley case"). In that case, which related to the infamous kidnapping and murder of schoolboy Graeme Thorne, a warrant for the arrest of Stephen Bradley had issued in New South Wales. Police in Ceylon (now Sri Lanka) detained Bradley at the request of New South Wales police. On the day of his arrest, the Daily Mirror published a photograph of Bradley with a caption stating that he had been arrested at Colombo on a warrant charging him with murder. Bradley was remanded in custody pending proceedings for his return to New South Wales. Mirror

Newspapers was convicted of contempt on the ground that identity was likely to be an issue in Bradley's trial and the photograph was therefore prejudicial. While the Full Court considered only the likely prejudicial effect of the photograph and seems simply to have assumed that the matter was sub judice at the time, the factual situation appears largely indistinguishable from that surrounding Dunn's apprehension in Honduras.<sup>1</sup>

### POSSIBLE OUTCOMES

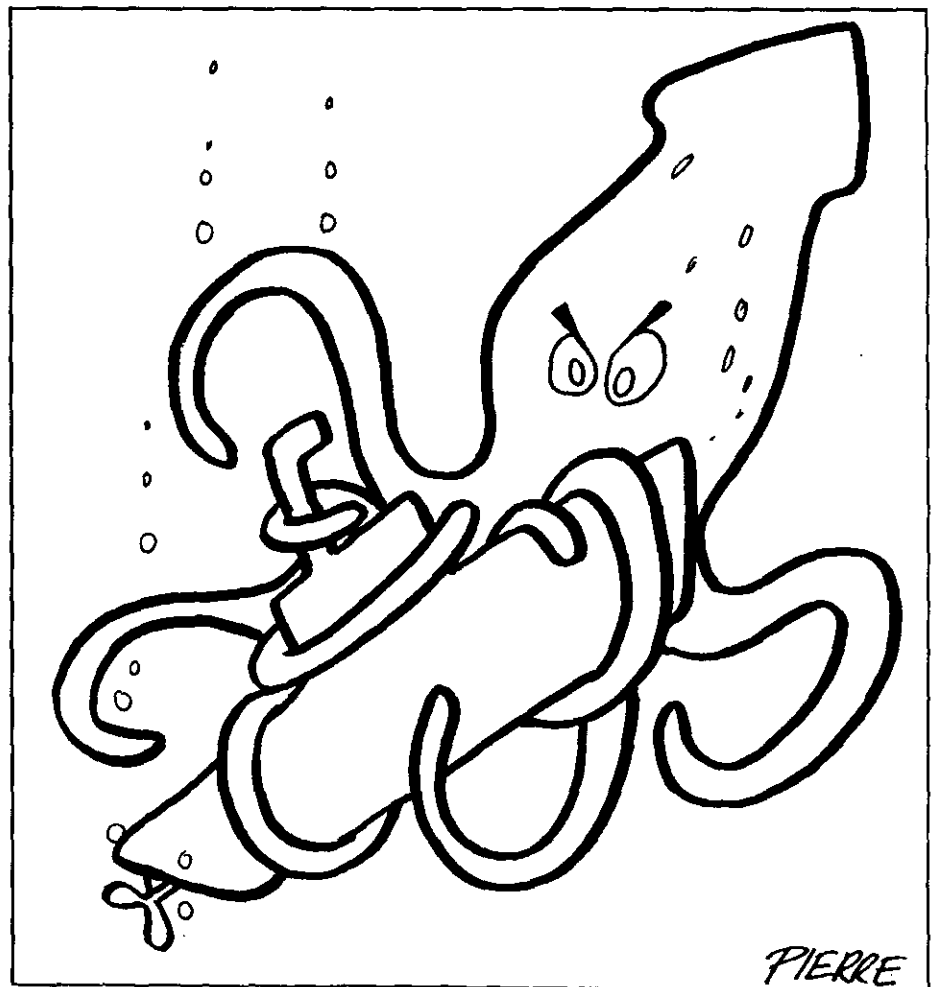
In the absence of clear authority it is only possible to speculate about the point at which the sub judice period commences where a person wanted in an Australian jurisdiction to face criminal charges is apprehended outside the jurisdiction and subsequently becomes the subject of extradition proceedings. It seems at least arguable that the matter becomes sub judice at any one of the following points in time:

- when the person is apprehended by authorities in the foreign jurisdiction and a request for extradition is made.
- when extradition proceedings commence in the foreign jurisdiction.

- when extradition is ordered and the person is surrendered to the Australian authorities.
- when the person physically returns to the Australian jurisdiction.
- when the person is formally charged in the Australian jurisdiction upon his return.

Arrest in the foreign jurisdiction accords with the circumstances in the Bradley case and is arguably consistent with the 'time of arrest' nominated in the Mason case. Query, however, whether that event can reasonably be considered the moment when, as the court put it in Mason's case, 'the criminal law is set in motion'. On one view, extradition is simply the extraterritorial dimension of the local criminal law. On the other hand, it can be argued that the relevant criminal law process is that of the Australian jurisdiction and that is not set in motion at least until an order for extradition has been made and possibly not until the person is returned to Australia.

As pointed out in Borrie and Lowe, 'The difficulty, as always, is to balance the protection of trials from prejudice with upholding freedom of speech. Too early a starting point unduly restricts freedom



of speech but uncertainty too long has an inhibiting effect.' (Law of Contempt, 3<sup>rd</sup> ed. 236). It is submitted that the appropriate trigger point should be the moment when extradition is ordered and the person is surrendered to the Australian authorities. It is that moment which seems most closely to approximate the arrest of a person in the Australian jurisdiction. It is only at that time that the wheels of the criminal process in the Australian jurisdiction inevitably begin to roll, that the person is certain to be brought before the courts in the place

where the charges must be answered. The issuing of a warrant seems too early and would, as in the case of Christopher Skase, result in public comment being unduly stifled when there is next to no chance of the person ever returning to Australia.

Courts, of course, will generally be more concerned to protect the criminal justice process than free speech and, if asked the question in relation to circumstances such as Dunn's, are likely to settle upon an earlier rather than later time. Whatever

the correct legal position may be, it seems unlikely that the authorities in New South Wales will be going out of their way to ensure the fair trial of an alleged pedophile, - at least, that is, until he sets foot back on Australian soil.

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<sup>1</sup>see also *R -v- Clarke, ex parte Crippen* [1908-1910] All ER 915 at 921 per Coleridge J for obiter statement that the English common law considers proceedings pending from the issue of a warrant.

## Moral Rights - Beware the Waiver Mongers

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**Simon Lake of the Australian Writers' Guild examines the current proposed amendments to the Copyright Act to introduce moral rights in Australia and argues that the inclusion of waiver provisions is theoretically and operationally flawed**

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At the end of each episode of *the Simpsons*, the production company logo emerges with an invisible child's voice saying "I made that".

Innocent as it sounds, the claim of authorship has been one of the most contentious copyright and creative issues in the audio visual world. In Australia, the stage on which this battle has been fought is the legislation on moral rights<sup>1</sup> which is currently before the Senate.

The Senate Committee in its report on the Bill which was released in October, said that writers should be included along with directors and (unfortunately in our view) producers as an "author" or "maker" of a film.

We understand that the Bill is due to be debated in March 1998.

The Australian Writers' Guild ("AWG") has received overwhelming support for its view that the writer should be considered along with the director as being an author of the film. Space does not permit me to explore the authorship debate to the degree that it deserves.

Those that make films know the reality and centrality of the writers role and they have supported our position. Needless to say we are grateful to the Senators, particularly the Coalition Senators, who also supported our view.

In this article I want to concentrate however, on a debate which has not attracted the same degree of publicity as

authorship. That is, the objection of writers and directors to the waiver provisions in the bill and recent developments in forging an industry consent clause to replace the application of blanket waivers.

Some members of the legal profession have warned that moral rights will stop production and investment. Not since the introduction of the Mabo legislation, when suburban free-hold backyards were supposedly being threatened, has there been such self serving rhetoric from sectors of the legal profession.

I hope to put those fears in context and put forward an argument that Australia should embrace moral rights as an important step in confirming our respect for artists and their contribution to society.

These goals of respect and investment certainty can co-exist. The production industry has made considerable positive progress in creating a better solution with an industry consent clause and will continue to do so. That is, unless the "waiver-mongers" get their way.

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### WHY THE AUSTRALIAN WRITERS' GUILD OBJECTS TO WAIVER

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Waiver treats moral rights as an economic right subject to contractual negotiation, as opposed to an inalienable personal right, such as the right to vote or the integrity of the body.

Although the legislation recognises moral rights as a personal right to the extent that moral rights cannot be assigned, it does in its present form, allow an artist to waive their moral rights in works already in existence.

In our submission to the Senate Committee we argued that a waiver is effectively a relinquishment of one's rights.

What a waiver is saying in effect is that there are no circumstances, in the present or in the future, under which you can protect your work from gross distortion or mutilation. And there is no aspect of consultation or negotiation implicit in a waiver.

Moreover, the reality for writers and directors is that they are in a weak bargaining position and will be forced to waive their rights. This is the experience in all countries with waiver provisions. In England the Writers' Guild and the Directors' Guild have confirmed that the waiver is uniformly enforced.

In Australia many production companies are insisting on waiver as a condition of signing the contract. Australian writers and directors are already losing work if they refuse to sign waiver clauses.

Our French counterparts find the insistence on a waiver very baffling, driven more by ideology than actual experience. Given that they have a 50 year

history with moral rights, and manage to have a thriving film and television industry, they cannot see how a waiver can be justified.

The French are not alone in this regard. Countries as diverse as Austria, Brazil, Denmark, Italy, Japan, Mexico, Portugal, Norway, the Netherlands, Spain and Sweden, all regard moral rights as being inalienable.

The only purpose of moral rights is to protect artists and their rights yet the legislation provides the means, via a waiver, to undermine this very purpose.

As Jan Sardi, the award winning writer of *Shine*, puts it:

*"If they're allowing people to waive their rights to artistic integrity, why have the legislation? It's a Clayton's law otherwise, it's nonsense. It's the law you have when you don't want to have a law".*

### **DO WE NEED WAIVERS?**

Let's be blunt.

The only interest that many lawyers have in moral rights is in getting rid of them through 'waiver'. It is both an unfortunate and unnecessary mind set. Moral rights do not and cannot affect the production of a film, because under proposed legislation they do not come into existence until a film is in existence.

The application of blanket waiver undermines the legislation. Writers and directors are told that they must sign waivers as a condition of signing their contract. It is a situation which both the AWG and the Australian Screen Directors Association ("ASDA") believe is unconscionable.

The Minister for Communications and the Arts, Senator Richard Alston, certainly appears to agree. When asked by Senator Kate Lundy about his attitude to a mandatory waiver of moral rights in the Senate Estimates Committee on 21 August, he said:

*"My immediate reaction is that that would be contrary to the spirit of a waiver because it ought to be a judgement freely exercised by the rights holder. So an across-the-board approach irrespective of the merits seems to be contrary to that. I will check and see if there is anything in the legislation that outlaws it."*

Senator Alston's assertion that "blanket waivers" are against the spirit of the

legislation has helped redefine the debate in Australia and has provided the opportunity for a negotiated solution.

Those that drafted the Bill were obviously mindful of the fact that writers and directors would be put under inordinate amounts of pressure and for this reason, we suspect, they only allowed for waiver in future works. Whilst we welcome the sentiment behind this, we believe that there is a better solution.

### **THE MISPLACED VIEW OF THE WRITER AND DIRECTOR AS ECONOMIC VANDAL**

There is a hidden and unspoken fear that a waiver is necessary because artists, at their core, might be considered to be economic vandals. The insistence on waiver suggests that artists cannot be trusted with the protections afforded to them by the legislation.

The Attorney-General, Daryl Williams, in introducing the legislation, argued that in order for the Act to be workable a waiver needs to be a central element. In the joint press release on 4 May 1997 Williams and Senator Alston stated that:

*"To ensure the continued viability of cultural industries, artists will be able to waive their rights in writing. In addition, the reforms will prescribe standards of reasonableness and normal industry practice as conditions for moral rights to apply."*

*"These measures will ensure that people who use artistic works, such as broadcasters and publishers, continue to have a reasonable degree of certainty. And at the same time, creators will have greater protection for their professional standing and identification with their works."*

### **TO BE 'WORKABLE' MEANS THE PROTECTIONS GIVEN TO ARTISTS HAVE TO BE TAKEN AWAY FROM THEM. WHERE IS THE EVIDENCE FOR THIS VIEW?**

There are a handful of cases around the world and none of them provide evidence of films being held up. The "waiver mongers" are operating on the grounds of untested assertion and they are certainly not making reference to the legislation in Australia, which has a

number of strong protections against a successful moral rights action.

Writers and directors in the audio-visual medium make their money from the exploitation of their works. So they have an obvious and strong economic interest in having their works broadcast across any medium. It should be noted that under standard industry contracts writers and directors have the right to withdraw their name from the work, and in these situations the production is completed anyway.

The vast majority of writers and directors are not able to afford the court fees let alone the lawyers to run an action. It is difficult to envisage a situation where writers are in the Federal Court bringing unjustified actions.

Moreover, in an industry which is completely founded on reputation, it would be professional suicide for a writer or director to bring an unfounded claim. The expression "you'll never work in this town again" did not come out of an accountants conference. It came from the entertainment industry and it continues to have great force in inhibiting behaviour which could potentially threaten production.

It should also be noted that there are a number of "padlocks" on the door to any successful action including reference to industry practice and reasonableness. I imagine these provisions could only be read broadly and it would have to be an extreme act of, to use the words of the legislation, "gross treatment" or "mutilation", before any claim was upheld.

So why should artists be in a position where they have to waive their rights when a case has not yet been properly made for a blanket waiver?

### **AN ALTERNATIVE - CONSENT INSTEAD OF WAIVER**

In the Senate Committee the AWG and ASDA argued for the removal of the waiver clause and for a negotiated consent clause to replace waiver.

The Senate committee was split on the issue with the majority recommending that the waiver remain and apply to future works and the Labor Party and the Democrats recommending the deletion of the waiver clause. Given the finely balanced nature of the Senate it would be difficult to predict how a vote would go on this issue.





Senator Alston's statement on 21 August however proved to be a timely and productive intervention in the debate on waiver.

A series of meetings on a possible consent clause were initiated and chaired by the First Assistant Secretary of the Department of Communication and the Arts, Alan Stretton. Participants in those meetings were the AWG, ASDA, the Screen Producers Association of Australia ("SPAA"), the Australian Film Finance Corporation ("FFC"), Village, Southern Star (representing Sales Agents) and the Federation of Commercial Television Stations.

The meetings were held at the offices of the FFC which we believe was symbolically important in that they are the principal investors in film and television in Australia.

The AWG and ASDA gave a lot of ground because we think it is important that this issue be resolved harmoniously and not in a spirit of acrimony.

In those discussions we argued that if there is a waiver there is not an effective

moral rights regime from a writer and director's perspective. If you have a consent clause, writers and directors have an opportunity to protect their reputation and their work against the rare cases of, using the words of the Act, "gross mutilation and distortion".

The consent clause spells out "industry practice" and provides a mechanism for producers to protect themselves from any potential actions. It allows writers and directors to consent to specific uses. We have defined these and they include such uses as cutting for the purposes of insertion of commercials. The AWG and ASDA sought to accommodate every issue which was raised in these negotiations in the consent clause.

If a use goes beyond those broad consents, the producer will have to contact the writer or director and ask them for their permission. This permission cannot be unreasonably withheld.

It is a system used by the American Director's Guild in their standard agreement as part of their creative rights, and it does not appear to have caused any problems for distributors or producers.

The consent clause creates industrial and investment certainty and meets all of the concerns raised by producers and investors in the negotiations.

The majority of the Senate Committee strongly supported our efforts to reach an agreed consent clause. In the minority report, the Labor and Democrat Senators said:

*"We believe that such negotiated solutions are vastly superior to legislatively determined ones. Labor and the Australian Democrats congratulate all the parties to the agreement on their initiative and encourages other parties seeking to pursue moral rights to adopt similar negotiated solutions."*

### WHAT IS THE STATUS OF THE CONSENT CLAUSE?

None of the parties sought to have the consent clause incorporated into legislation. We all felt that this would be too restrictive. So the status of the clause is that it is a recommended industry standard.

By having all of the major players at the table operating in an atmosphere of good will and compromise we believe that we have forged a solution which the production industry can be proud of.

The boards of the AWG, ASDA and SPAA have endorsed the consent clause. It is the view of the ASDA and the AWG that the consent clause should apply to all forms of audio visual work including series and serials.

SPAA has endorsed the use of the consent clause for feature films, long form dramas, tele-movies and mini series. It has written to all of its members recommending that they use the consent clause for the above mentioned forms. ASDA and the AWG are advising members to use the clause for all forms. The FFC have moved away from their policy of blanket waiver. We expect that they, along with the AFC, will be making policy statements on these issues in industry briefings which will be held in December.

Whilst the AWG will continue to oppose waiver we believe that the consent clause has shown that the industry can act positively together to respond to real concerns. Parliament will be passing an act which confers rights to artists and we want these to be exercised in an



environment which respects those rights, but does not inhibit investment or production.

The negotiation of the consent clause shows that the Australian production industry does not have to follow the pattern of antagonism and resentment which has marred the debate in other common law countries.

We are confident that we have forged a better path than that.

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### **INDUSTRY ACCORD ON PROVISIONS WHICH BY CONSENT MAY BE INCORPORATED IN CONTRACTS**

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(Terms beginning with capitals are as defined in the *Copyright Act*)

The Producer recognises that the Author(s) has Moral Rights in the Cinematograph Film. The Author(s) consents to material alterations to the Cinematograph Film, for the benefit of the producer its licensees and its assignees, subject to reasonableness and industry practice for the following purposes:

#### **A. Consents**

1. To edit a Cinematograph Film to meet TV time slots.

2. To incorporate advertisements into a Cinematograph Film to be broadcast on television or transmitted on a diffusion service

3. To meet the legal requirements of broadcasting authorities.

4. To ensure that the proposed program meets any legal requirements or classification requirements or to avoid a breach of law.

5. To make foreign language versions by way of dubbing or subtitling the cinematograph film.

6. To make inflight versions of the Cinematograph Film.

7. To use excerpts of the Cinematograph Film for the purpose of promotion of the cinematograph film including by way of, teasers, advertisements and excerpts for promotion of copies.

#### **B. Consent to material alterations not described in clause A**

In the event that consents (which shall not be withheld unreasonably) are required to any material alterations other than those referred to in Clause A:

1. The producer will contact the Author(s) to seek consent by making every reasonable effort in writing to contact the Author(s) to inform them that

a request is being made for material alterations possibly outside Clause A;

2. To assist in contacting the Author(s) a copy of the notification will be lodged at the Australian Writers' Guild or the Australian Screen Directors Association.

3. The Author(s) have 5 working days from receipt of the producer's notification to notify the producer in writing that the Author desires to be consulted with reference to the proposed use or material alteration.

4. After receiving notice from the Author(s) within the notice period specified in clause 3, the producer will nominate a time and place for such consultation at which the Author may express views with regard to the proposed use or material alteration.

5. The Author(s) services for the consultation will be provided at no cost to the producer.

*Simon Lake is the Executive Director of The Australian Writers' Guild.*

1. Moral rights have three elements. The right of attribution, the right against false attribution and the right to protect the integrity of the work. They are founded on the idea that both an artist's reputation and an artist's work are valuable. Since artists rarely own the copyright in their work they need some other form of protection that floats above copyright ownership. In 67 countries that protection is moral rights.

## **Building a Better Internet: Things to Look for in a "Killer Application"**

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**John Collette pinpoints the 3 attributes which contribute to a successful application - media, networking and processing**

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In the last two issues of the CLB I have discussed the difficulty of creating a new creative culture around the engineering base of the internet, and the reasons why "video on the net" is a bad value proposition for the foreseeable future. In this issue I would like to address some of the things to plan for in a good internet application.

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### **OLD MODELS ON THE NEW MEDIA**

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The case of video on the internet is a good place to start, because it typifies the

imposition of "old media" models on the new media. People are slow to adapt to new ideas, and in the quest for the killer application that will turn the streams of data into a stream of revenue, the urge to understand what is new in the light of what has gone before extends so far as to turn a networked media environment into a replication of the "dumb terminal" model that is the broadcast receiver. While people may argue that the provision of video as a media type extends the capabilities of the network, the limitations with bandwidth and quality pale into the background behind the big

question of who will choose to put video on the net, instead of one of the existing high quality distribution formats - broadcast, cassette and even CD ROM which has, at worst, a bandwidth 100 times that of a modem connection.

The recent rush of hyperbole about "push" technology arose from the same type of thinking - that computers would ultimately function as a "screen" for content that was pre-packaged. After downloading Pointcast, and overcoming the initial gee whiz factor at the graphic quality, all you are left with is a computer

which becomes a moving billboard as soon as it starts the Pointcast screensaver. The idea that a user's choice in the provision of content is diminished to the simple yes or no binarisms of selecting stock quotes, sports and news options offers a minimal rehash of a number of existing media models under the guise of "tailored" content.

Imagine if a telecommunications company was so prescriptive about the traffic carried on a voice network - who would use it?

The dichotomy here is between two ways of looking at the network - broadcasting and broadgathering. The broadcasting model "edits" content for delivery to an audience, usually over a given terrestrial footprint. Even print media follows this model to some extent, where the media has to be put into contact with the audience, in a top down relationship. Broadgathering, by contrast, acknowledges the agency of the user as an active determinant in the collection of content from different sources, without terrestrial boundaries. The fact that a user moves to content on the internet through a constant process of editing, choice and negotiation is the opposite of the media-to-user model of broadcasting.

This is the fundamental difference in the way that publishing might be approached in the new media - the idea that the user engages with the totality of the network, rather than a single location - is a more profound form of "interactivity" than the point and click requests for feedback from a single site that are often used to define the term. Beyond publishing, there are completely unique forms of mediated experience that the network offers - such as chatrooms, newsgroups, and MUDs and MOOs which offer something which has its antecedents in other aspects of telecommunications, but extend the possibilities in novel ways.

Similarly, the ability to query databases remotely and on demand is a unique attribute that computers bring to the idea of media.

With this in mind, there are three attributes that contribute to a successful

application. They are media, networking and processing.

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## MEDIA

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Media is the first and most obvious attribute, as it underpins the very nature of telecommunications. Voice traffic is a form of audio media, facsimile a basic form of imaging, and even data streams of proprietary networks need to be resolved into useful media - text, images or even machine code. Digitisation has incorporated all known media types - text, sounds, still and moving images (as well as the creation of three dimensional representations which are inherently digital), and this has established the computer as the Esperanto of media - a device which can utilise, store and manipulate the substance of communication. This has led to the invention of the term "multimedia" which signifies in the main nothing that does not mimic existing media such as books, games or linear media re-presented in digital form. While there are new genres emerging through digital representation, consider games, where beyond the idea of "interactivity" and "immersion" the metaphor underlying most examples is developed around navigation through space or the contact between a cursor and a point in space - essentially nothing that can't be found in chess, billycars or table tennis.

We have always had different types of "multimedia", and the rapidly disappearing novelty associated with digitisation of media means the we could call it simply "media".

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## NETWORKING

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Added to media is networking, and this is where the possibilities expand. Networking underpins the accepted utility of telecommunications - the fact that you can talk to someone almost "on demand" across the world, even by cellular communications, is still pretty amazing when you stop to think about it. The extension of this by the internet so that the sharing of media can be simultaneous through multiple users and can potentially accommodate different types of media extends the possibilities greatly.

The creation of communities of dispersed yet specific members through chatrooms and newsgroups allows both distance and time to be shifted aside in the pursuit of the exchange of ideas, and moreover, ideas which are generated by the users of the network. Voice telephony depends on the users for content - and is successful because of it. The support networks for people with rare diseases, the specialist interest groups that "meet" online, online romances - all of these are ways in which the network extends even simple media like text into being relevant and often irreplaceable experiences which are specific to and compelling on an individual basis.

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## PROCESSING

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The last aspect, processing, is the ability of computers to manage and sort data - often large amounts of it - through intelligently querying databases, or by processing media through specialist algorithms. This is a quality that doesn't exist in the "dumb terminal" model, where media "appears" in a given form. The fact that your host on the network might be able to query a massive database to provide a requested response, or that data sent to your terminal can be arranged into a useful form at the user end, and that the ability to do this can be updated through the addition of software components, separates computer based networks from their broadcasting antecedents.

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## CONCLUSION

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If an application can contain these three elements to some extent, it becomes a better utilisation of the technology available than something that doesn't. Sure, it might have been called "multimedia" but what does that term really mean? The time is here when we simply accept it as media, with a culture of its own and reasons why it is broadgathered rather than broadcast.

*John Collette is the Head of Digital Media at the Australian Film, Television and Radio School.*

# Sattin and the Spectre of Media Liability for Negligence

Anne Flahvin looks at recent claims in negligence against the media and suggests that even if plaintiffs claiming damage to reputation are confined by Australian courts to an action in defamation, an action in negligence may still be allowed in respect of untrue communications which are not defamatory but cause a plaintiff economic loss

## INTRODUCTION

Recent claims in negligence against the media have raised the question of the extent to which, if at all, the media owes a duty of care in relation to material it publishes. A decision of the House of Lords, *Spring v Guardian Assurance* (a non-media case), which allowed the subject of an inaccurate and unfavourable reference to sue the giver of the reference in negligence - despite there being a good defence in defamation - raised concern in the media that courts would impose a duty of care not to publish untrue statements. There was a collective sigh of relief when in NSW, Levine J declined to follow *Spring*, holding that for policy reasons the law of negligence and the law of defamation should be tightly demarcated. But we have not heard the last of negligence claims against media. Two long awaited reserved judgments by Levine J (*GS v TCN Channel Nine* and *GS v News Ltd and Scott*) will further explore the limits of the media's liability in negligence - in this case the liability of the media for the publication in breach of a non-publication order of true material, about the plaintiff, which causes the plaintiff to suffer mental distress. It is submitted that even if plaintiffs claiming damage to reputation are confined by Australian courts to an action in defamation, the English approach of allowing an action in negligence might be followed in respect of untrue communications which are not defamatory but cause a plaintiff to suffer economic loss.

## UNTRUE PUBLICATIONS WHICH CAUSE A PLAINTIFF TO SUFFER FINANCIAL LOSS

At common law, it is not enough to ground a cause of action in defamation that a publication concerning the plaintiff be both untrue and likely to cause loss. It must also be defamatory, and generally speaking, this requires that there be some disparagement of reputation.

The position is different in Queensland and Tasmania.<sup>1</sup> In these Code States, an imputation concerning a person by which he or she is likely to be injured in his or her profession or trade is defamatory, without any requirement of disparagement. A false report that the plaintiff had ceased doing business, for example, would give rise to an action in defamation, thereby providing a remedy for loss suffered as a result of such a publication in circumstances where no remedy might be available for publication in other States. While reputation is often said to be the touchstone of defamation, and that which distinguishes defamation and injurious falsehood, the Code definition of defamatory matter - which also applied in NSW until 1974 - is wider than at common law. In its 1979 Report *Unfair Publication: Defamation and Privacy*, the Australian Law Reform Commission suggested it was 'right in principle' that the maker of an untrue statement about a person which causes that person loss should be liable to make good the loss, and recommended a right of action in defamation for such a publication.

At common law, however, the requirement of disparagement means that a factually inaccurate media report concerning a plaintiff which causes economic loss without disparaging reputation is, generally speaking, not actionable as defamation. It has been suggested that the 'shun and avoid' test of defamatory matter might be employed to prise defamation from its reputational moorings and provide a remedy where harm is caused simply because the media gets its facts wrong. This test of defamatory matter was applied most famously in *Youssouf v Metro-Goldwyn-Mayer Pictures* (1934) 50 TLR 581 to hold that a suggestion that a woman had been raped - while not imputing any blameworthy conduct - was nevertheless defamatory on the basis that it tended to make people 'shun and avoid' her. In an interesting exploration of possible future directions in defamation, Ray Watterson suggests that the shun and

avoid test - hitherto applied only to 'imputations of insanity, rape and infectious disease' - could be used to seek a remedy in defamation for untrue statements which lead to a loss of business. (Watterson: *What is Defamatory Today?* (1993) 67 ALJ 811) But unless and until this novel argument is tried and tested, the only remedy available against the media in respect of a publication of the nature under consideration in States other than Tasmania or Queensland is the tort of injurious falsehood, with the onerous requirement of having to prove both malicious publication and actual damage.<sup>2</sup>

Might an Australian court allow a plaintiff injured financially by such a publication, but unable to show that the publication was actuated by malice, sue in negligence? Do the media owe a duty of care not to cause financial loss by publishing false material about a person? It will be suggested that such a development would not impose any greater burden on the media's freedom to publish than that imposed by the law of defamation. What's more, it could be said to reflect a judicial tendency to demand 'reasonable' conduct from the media in return for protection from liability for publications causing harm.

## DO THE MEDIA OWE A DUTY OF CARE TO PUBLISH THE TRUTH?

The question of whether the media owes a duty of care to publish the truth arose for consideration in NSW in *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32. It was only a matter of time before such a case was brought following the decision of the House of Lords in *Spring*. While *Spring* was a reference case not involving the media, the holding of the House of Lords that public policy did not negative the finding of an enforceable duty to exercise due skill and care in the provision of a reference was bound to lead to plaintiffs seeking to impose such a duty on the media in respect of its publications.

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## SPRING

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Spring was an insurance sales director who was dismissed from his job without explanation. His former employer forwarded a reference to a prospective new employer which was so unfavourable as to be described by one of the judges hearing the case as "the kiss of death". The reference described Spring as a "man of little or no integrity (who) could not be regarded as honest." Not surprisingly, he was hardly rushed with job offers. On finding himself unable to obtain employment selling insurance, Spring commenced proceedings against Guardian Assurance alleging malicious falsehood, breach of contract and negligence. He sought damages for the economic loss he claimed he suffered as a result of the negligently prepared reference. The actions in contract and malicious falsehood failed, but the trial judge allowed the action in negligence and found that Spring's former employer had breached a duty owed to him to take reasonable care that what it wrote about him was true. The decision was reversed by the English Court of Appeal, which adopted the approach of Cooke P in *Bell-Booth Group Ltd v Attorney General* [1989] 3 NZLR 148, in which the New Zealand judge held that "the law as to injury to reputation and freedom of speech is a field of its own", and that the imposition on the mass media of a duty to 'get a publication right' would distort the balance between free speech and protection of reputation struck by the law of defamation.<sup>3</sup>

A majority of the House of Lords (Lord Keith dissenting) overturned the Court of Appeal. While Lord Goff based his reasoning on the assumption of responsibility assumed by an employer towards his or her employees (a *Hedley Byrne v Heller* argument which would be difficult to apply to the media) the broader reasoning of the other majority judges - that a duty of care arose because it was foreseeable that harm would occur, the parties were in sufficient proximity and it was 'fair, just and reasonable' to impose the duty<sup>4</sup> - might provide a basis from which a plaintiff who had been injured in his or her business or trade by an untrue publication could seek to recover in negligence. (For a detailed discussion of the House of Lords decision see Tobin: *Negligence a Resurgence? Spring v Guardian Assurance in the House of Lords* (1994) NZ Law J 320).

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## SATTIN

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*Sattin* involved the publication of a photograph of a man and woman who were described, falsely, as being married to each other. The woman, who was in fact married to someone else, sued in defamation, pleading that the material conveyed as true innuendo the imputations that she was a bigamist, or, alternatively an irresponsible person who lied to a newspaper photographer about her marital status. The only substantive defence pleaded by the defendant was that it had made an offer of amends as provided for by s 43 of the *Defamation Act 1974* (NSW).

For reasons which are not entirely clear, the plaintiff sought leave to amend her statement of claim to include a claim in negligence, with the particulars including the publication of the photograph without first ascertaining Mrs Sattin's marital status. In deciding the application, a question for Levine J was whether in the circumstances of the case a duty of care was imposed on the newspaper defendant in the publication of the matter complained of, or whether the plaintiff's remedy must be found in defamation. While Levine J declined to allow Mrs Sattin to amend her pleadings on the ground that they failed to formulate the duty of care which she claimed the defendant owed, the judgment explores the broader question of whether publication of false matter which is damaging to a plaintiff's reputation and therefore actionable as defamation can also give rise to an action in negligence.

Recent High Court decisions considering the imposition of a duty of care in novel fact situations suggest that that policy considerations will play a central role. (*Hill v Van Erp* (1997) 71 ALJR 487; *Bryan v Moloney* (1995) 182 CLR 609.) In his approach to the task in *Sattin*, Levine J openly acknowledged the policy considerations. He followed the dissenting judge in *Spring*, Lord Keith of Kinkell, as well as the New Zealand Court of Appeal, in holding that 'the law of negligence has a limited role to play in the matter of communications.' (*Sattin*: 44-45) The courts should be slow to develop novel categories of negligence, and do so by analogy with established categories. Levine J's reasoning was founded largely on the argument that public policy - as articulated in the balance struck by the defences to defamation between protection of reputation and freedom of speech - "should logically transcend mere forms of action." (*Sattin*: 38) To apply the approach of the House of Lords in *Spring* would clearly frustrate the policy reflected in the law of defamation.

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## FUTURE DIRECTIONS

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Can this reasoning be distinguished in relation to non-defamatory publications concerning a plaintiff which cause the plaintiff loss in his or her business or trade? Do the same policy arguments which have been advanced in favour of quarantining negligence from defamation apply to deny a remedy in negligence for non-defamatory publications?

While Levine J took the opportunity in *Sattin* to consider in detail the policy arguments for demarcating the torts of defamation and negligence, he did not give much consideration in his judgment to the question of how the court begins to determine whether a duty of care should be imposed in a novel fact situation. The traditional reluctance of courts to impose a duty to avoid purely economic loss flows largely from a concern to avoid the imposition of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'. (*Ultramares Corporation v Touche* (1931) 174 NE 441 per Cardozo CJ) However, as will be argued below, a finding that a duty was owed to an individual about whom untrue material was published would not raise this 'indeterminacy' problem. Further, as has been noted above, in finding that a duty of care was owed in *Spring*, a majority of the House of Lords proceeded on a broader basis than the principle in *Hedley Byrne*, with its strict approach to liability for negligent misstatements. Arguably, a duty could be grounded in the reasonable foreseeability that an untrue statement would cause loss, the close nexus between a publisher and a particular individual about whom material is published and - on the basis of the arguments to be explored below - that it was 'fair, just and reasonable' to impose a duty of care.

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## FAIR, JUST AND REASONABLE

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Leopold has argued that there are strong grounds for suggesting that "even where a publication has no impact on reputation, the law of negligence provides no basis for any claim, at least in the case of media publications." (Leopold: 16) Certainly in *Sattin*, Levine J refers with approval to the comment of Cooke P in *Bell-Booth Group Ltd* that "the common law rules...regarding defamation and injurious falsehood represent compromises gradually worked out by the courts over the years, with some legislative adjustments, between competing values. Personal reputation

and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other." (*Sattin*: 36 my emphasis) The view expressed by Leopold and Levine J - that it would be against public policy to interfere with the delicate balance struck between these competing interests - is highly persuasive. Levine J refers to the High Court's recent free speech jurisprudence and suggests it reflects a 'trend in this country to prevent the inhibition of freedom of speech in instruments of mass communication.' (*Sattin*: 44) This approach is also reflected in s 65A of the Trade Practices Act (and the Fair Trading Act equivalents) which strictly circumscribes the application of s 52 of the TPA to media organisations.

It is certainly arguable, though, that to allow a remedy in negligence for non-malicious publication of untrue material concerning a plaintiff which conveys no defamatory imputations but nevertheless causes actual damage would simply bring liability for such material in line with that imposed on the media for publication of defamatory material. For all practical purposes, the standard imposed on the media by the law of defamation - in circumstances where neither the justification nor comment defences are available (neither of which is relevant to a complaint about an untrue statement of fact) - is a negligence standard. Until recently, qualified privilege was almost never available to the mass media, and the new 'extended' qualified privilege defence available in respect of communications to a wide audience on matters of government and politics requires the defendant to show that publication was reasonable in all the circumstances of the case. (*Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818) Similarly, s 22 of the NSW Defamation Act requires the defendant to show it acted reasonably in publishing.<sup>5</sup>

In the defamation context, to the extent that the standard of 'reasonable publication' differs from the *Donoghue v Stevenson* standard of a failure to exercise due care, the difference would seem to advantage the defamation plaintiff. For example, while the onus under *Lange*-'extended' common law qualified privilege and s 22 of the NSW Defamation Act is on the defendant to show that it acted reasonably in publishing, a plaintiff suing in negligence would have the onus of establishing the elements of the tort. Similarly, proof of damage would be required for an action in negligence.

It is also arguable that the test for determining the negligence standard of care would operate more favourably for media defendants than the reasonableness test as it has been interpreted. The negligence standard would be the standard of care expected of a reasonable journalist in the circumstances.

While ultimately the standard of care to be met is a question of law to be decided by the court (*F v R* (1983) 33 SASR 189) the practices of the defendant's profession are relevant in deciding whether the standard has been met. A court determining whether a journalist had acted negligently in publishing untrue material would likely hear evidence from other working journalists about the usual steps taken to verify the accuracy of material in the particular circumstances under which journalists operate. While some commentators have criticised the development of a 'responsible publishers' standard, arguing that publishers with an 'unpopular philosophy, unorthodox journalistic style or limited resources' should have their conduct measured against the standards of similar publishers (Anderson, *Libel and Press Self-Censorship* (1975) 53 Texas Law Review 422), a standard which took into account the evidence of working journalists about journalistic practices and imperatives would be far more media-friendly than the present judicially imposed standard of 'reasonableness' which media defendants must meet in a defamation action.

The spectacular lack of success by media defendants pleading s 22 of the NSW Defamation Act can be ascribed largely to the failure of judges to understand the dynamics of publishing news on a daily basis. It is certainly true that the High Court has recently indicated in *Rogers v Whitaker* (1992) 175 CLR 479 a willingness to find that the required standard of care has not been met no matter that the defendant can be shown to have complied with the general practice of his or her profession. However, the court acknowledged in that case that in certain circumstances the views of the relevant profession would be influential or even decisive. Greater input from the media profession in determining the standard of care required of a reasonable journalist would surely lead to a more realistic, media-friendly standard.

### BALANCING OF INTERESTS

No doubt the media would support Leopold's suggestion that proper protection of freedom of speech militates

against ever imposing a general duty of care on the media to 'get a publication right'. But as I hope I have demonstrated, the media operate under a similar - if in some respects more onerous - standard already in relation to defamatory publications. In the light of this, to deny a remedy to an individual who has suffered a particular and identifiable loss as a result of an untrue but non-defamatory publication - on the basis of a seemingly arbitrary distinction between loss caused by disparagement of reputation and loss caused by a journalist simply 'getting it wrong' - seems not to accord with principle.

As noted above, the legislature has seen fit to strictly circumscribe the circumstances in which the media can be made subject to the operation of s 52 of the Trade Practices Act. However, the protection afforded to freedom of the press by the insertion of s 65A needs to be viewed in the light of the quite open-ended liability which would have attached to the media had this amendment not been thought necessary. In contrast to this, injurious falsehood is a tort available in respect of a publication 'about or affecting' the plaintiff. (*Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 692 per Gleeson CJ) To allow a suit in negligence at the behest of an individual about whom material is published does not raise the same policy concerns as those identified by commentators who warn that imposing a duty of care on the media would expose publishers to unlimited liability for 'almost any imaginable type of journalistic faux pas.' (Drechsel: *Negligent Infliction of Emotional Stress: New Tort Problem for the Mass Media* (1985) 12 Pepperdine L Rev 889, 912)<sup>6</sup>

As Post has noted, the failure of the common law to offer redress for untrue communications which are not defamatory, 'even if they cause damage to an individual's business or credit opportunities', can be explained only by reference to a concept of reputation other than that of reputation as property. (Post: *The Social Foundations of Defamation Law: Reputation and the Constitution* (1986) 74 Cal LR 691) In its proposed reform of defamation law, the NSW Law Reform Commission acknowledged that at common law an award of damages in defamation serves to advance notions of reputation as 'honor; through the vindication of reputation, and reputation as 'dignity', through the compensation to the plaintiff for injury suffered to reputation and hurt feelings. But damages also serve to compensate for economic

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

*Anne Flahvin is a law lecturer at Macquarie University.*

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

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

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

4 The test set out by Lord Bridge in *Caparo v Dickman* [1990] 2 AC 605. See Swanton and

McDonald: *The Reach of the Tort of Negligence* (1997) 71 ALJ 822 where it is suggested that in two recent decisions the Australian High Court has “accepted that the position in Australian law is substantially similar to that in English law as stated by the House of Lords in *Caparo Industries Plc v Dickman*.”

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

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

## Telecommunications Access - A View from the ACCC

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

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

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

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

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

I would point out that those asking us to act on access issues as anti-competitive conduct are in fact seeking the litigation

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

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

### ACCESS AND INTERCONNECT

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

First of all, I should address the current state of play. Telstra provided a preliminary, or draft, access undertaking to the Commission. In addition to meeting with them, we very promptly

gave them our comments. We also made it very clear that Telstra had an obligation to negotiate on access rights, now.

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

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

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



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

So, how can the ACCC approach the issue?

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

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

Can the ACCC force parties to enter into meaningful negotiations?

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

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

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

Have you sought mediation?

Are you supporting industry mediation procedures?

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

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

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

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

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

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

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

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

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## DATA ACCESS SERVICES

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Another important issue concerns data access services.

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

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

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

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

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## CONCLUSION

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

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



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

The issue is the price of access to a bottleneck service. There is reason to believe that negotiation of such a price will not be easy. That is why the Parliament has provided for regulatory solutions. But the only way we, the regulator, can set the price is by accepting an access undertaking with prices in it or by arbitrating a dispute. Once an undertaking setting out prices was accepted, it's hard to see there would be much room for negotiation. The

obligation to supply would be on such terms and conditions as are set out in the undertaking. In either case (undertaking or arbitration) the process would take some time. Both processes leave the access provider subject to considerable uncertainty. It may be that the desire to avoid this uncertainty is, in the end, the main motivation for reaching a negotiated outcome.

*Rod Shogren is Director of Telecommunications at the ACCC.*

## Media Policy and Anti-Siphoning - Part Two

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

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

### ASSESSING EFFECTIVENESS

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

*'obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally been televised*

*by free-to-air broadcasters, such that those events could not be received by the public free of charge.'* [emphasis added]

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

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

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

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

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

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### THE COMMERCIAL CONTEXT

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

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

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

broadcast at those times. The revenue margins on sport are narrow, and a relatively small decline in the sport audience could make many sporting events commercially unattractive to the commercial networks.

Crucial to the assessment of the pay TV arguments is the fact that it is principally the 'exclusivity' of television coverage of a major event, and the mass audience which it attracts, which gives the event its commercial value. Exclusivity attracts audiences, advertisers and sponsors, and sufficiently high revenue to justify the scheduling of the event. The ability of free-to-air television to obtain exclusive all-television rights, or limited exclusive rights, to listed events is a key factor in the effectiveness of the current anti-siphoning provisions.

The splitting of rights proposal - allowing pay TV operators to directly obtain exclusive pay TV rights - means that the free-to-air networks would not be able to provide exclusive television coverage of events. Even at current pay TV penetration levels, duplicated coverage of a major listed event would divert a significant proportion of the sport audience from free-to-air TV to pay TV. As pay TV becomes more established, it will be able to divert even more of the audience. When audiences, advertising fees and sponsor interest declines, and the commercial free-to-air networks reduce their sports coverage, as they inevitably would, the obvious losers will be the majority of the population that do not subscribe to pay TV.

### **FREE ACCESS TO THE MAJORITY OF LISTED EVENTS IS ACHIEVED**

The Australian sport-loving public, even those that believe too much sport is never enough, are well served by Australian free-to-air television. FACTS believes that there is far more sporting coverage on Australian free-to-air television than on free-to-air services in any other comparable country. Sport is currently a very important part of each commercial television broadcaster's format. In 1996, commercial television broadcasters devoted around 12% of all broadcast hours to sport - as much as they did to all kinds of drama, and second only to news and current affairs.<sup>8</sup>

The combined operation of section 115, section 99 and clause 10(1)(e) of Part 6 of Schedule 2 of the BSA has successfully



ensured that sporting events specified in the anti-siphoning list have not been siphoned to pay TV and that Australian sports fans have had continued free television access to the great majority of those events.

The argument that the operation of section 115 fails to provide any benefit to consumers (including the benefit of more extensive coverage of listed events) is not supported by the evidence. Data collected by the Australian Broadcasting Authority<sup>9</sup> and FACTS reveals the inaccuracy of the assertion that the section 115 list contains many events which are not actually seen on free-to-air television.

Free-to-air television rights for each of the listed events have been acquired by either the commercial television networks or the national broadcasters since the list came into effect, with only few exceptions including the international test and one day-day cricket series in Pakistan and Sri Lanka in 1994 (which was de-listed by the Minister) and the 1995 Australian Men's Hardcourt Tennis Championship.<sup>10</sup> Not only are the rights to listed events acquired by commercial television broadcasters, they are utilised. The whole or the essential

substance of listed events for which commercial television broadcasters acquire rights are broadcast by them, and the great majority are broadcast live.

In three reports to the Minister since the list commenced<sup>11</sup>, the Australian Broadcasting Authority has determined that the coverage of listed sporting events by free-to-air television is both comprehensive and timely. In the 12 months commencing July 1995, commercial television broadcasters broadcast 1,413 hours of listed events and 1,015 hours (or 79%) of those events were broadcast live. Recent political discussion of the effectiveness of the anti-siphoning provisions was sparked by the Nine Network's non-broadcast of the first session of this year's Ashes cricket tests. Yet the coverage of international cricket on free-to-air television is extensive. From July 1994 to June 1996 there were 718 hours of international cricket matches broadcast. Eighty-six percent of these sport event hours were broadcast live. The high level of broadcast (and particularly live broadcast) of listed events by commercial TV services has continued in the period since the ABA published its last report on the operation of the anti-siphoning provisions.

The ABA has also found that delayed coverage of listed sporting events is generally no more than a few hours from the actual time of the event.<sup>12</sup> There are many reasons for delayed coverage of listed events and for free-to-air broadcasters not broadcasting the whole of an event including time zone difference for international events, contractual restrictions on live broadcast (designed to maximise attendance at local events)<sup>13</sup> and, most importantly, audience demand.

Pay TV interests have been critical of the comprehensiveness of the anti-siphoning list and in particular the inclusion on the list of 'each and every match' of multi-match events (such as the AFL, Rugby League and Wimbledon).

Although free-to air television may not be able to cover every single match of every listed multi-match event, it is an exaggeration to say that free-to-air television can broadcast 'only a fraction'<sup>14</sup> of these events.

The coverage of some of the most popular events is much more extensive than would first appear. AFL is a good example. Single football rounds are generally spread over several days enabling the broadcast of a number of matches on free-to-air television. The extensive coverage of football rounds would not be discernable to the individual viewer as commercial networks frequently broadcast different matches to different markets. AFL viewers in Sydney have live coverage of Sydney Swans matches played in Sydney, and usually live coverage of Sydney Swan matches played in other cities, and it is common for Adelaide, Brisbane and Perth viewers to have live coverage of their team's matches - live coverage which may not be available in Melbourne or in other major markets.

Furthermore the amount of coverage must be considered qualitatively, as well as quantitatively; the most significant parts of listed events - major matches, semi-final, finals, grand finals, centre court matches etc are broadcast for the benefit of the majority of Australians who would not be interested in the balance of the event.

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### **ENSURING COMPLEMENTARY AND MORE OVERALL SPORTING COVERAGE**

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The comprehensive anti-siphoning list and the inability of free-to-air television to broadcast every match of a multi-match

(or multi-session) event does not mean that those matches are unavailable to the avid sports fan. For commercial and contractual reasons, the rights to broadcast those matches (or those sessions) not broadcast on free-to-air television are usually granted to pay TV operators either by the rights owner or by the authorised free-to-air television broadcaster.

There are virtually no matches that the AFL has made available on a live basis that are not covered on either free-to air television or pay TV. Major games unavailable for live broadcast are shown on a delayed basis as soon as they are available. Similarly, the rights to Wimbledon matches not broadcast on free-to-air television are made available to pay TV and, in the case of the recent Ashes series, Optus Vision was licensed to broadcast the first session of play, so no cricket lover with the ability to pay and with access to the Optus Vision service was denied the opportunity to watch all sessions of play.

Superficially, it may seem excessive to deny pay TV exclusive rights to any match in an AFL or ARL round, but in practice the comprehensive list approach is the most effective way of sharing coverage between free-to-air and pay TV by ensuring that pay TV coverage of the event complements (rather than duplicates) free-to-air coverage. In this way, pay TV does, in fact, get what amounts to exclusive live coverage of certain matches in events such as AFL, ARL, SuperLeague and Wimbledon, but without the damaging commercial consequence of diverting and fragmenting the free-to-air television audience.

The anti-siphoning provisions do deny pay TV the opportunity 'to provide more complete coverage of listed events'<sup>15</sup> but they effectively ensure more 'complete coverage' on television overall, for the benefit of television viewers. This public benefit outweighs any 'unfairness' to pay TV.

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### **CONTROLLING SPORTING RIGHTS**

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The argument that the anti-siphoning provisions of the BSA effectively hands control of access to listed events to free-to-air operators ignores or downplays the commercial clout of the owner of the sporting rights and the extent to which companies such as News Limited, who are associated with pay TV operators,

acquire the rights to sporting events and control the licensing and exercise of those rights.

The operation of the anti-siphoning provisions ensure that subscription television broadcasting licensees cannot obtain exclusive rights to entire events on the list. It does not necessarily follow that commercial television broadcasters obtain both free-to-air and pay TV rights to events. Generally they do not, although in the case of some major Australian sports (eg the AFL) commercial networks have acquired exclusive all television rights (ie free-to-air and pay TV rights).

Where a commercial TV network has exclusive all-television rights, it cannot do what it likes with the pay TV rights. Those rights are normally granted only on the condition that the commercial network provides specified coverage to an Australian pay TV operator. Furthermore, it would make no commercial sense to acquire pay rights, and then fail to pass on the rights to broadcast at least those events it was not showing, to the extent to which it was permitted by the rights holder.

It is significant that the anti-siphoning provisions do not prevent a company related to or associated with a subscription television broadcasting licensee from acquiring exclusive television rights. The commercial television industry considers this, and the uncertainty concerning the mechanism for the listing of new events (including those of the same kind as existing listed events) as the major defects of the anti-siphoning scheme in need of remedy. These deficiencies, particularly when they operate together, provide pay TV interests with opportunities to by-pass the anti-siphoning provisions and to render them ineffective.

News Limited's approach to the exercise of its exclusive rights to the cricket tests in South Africa earlier this year clearly demonstrates how rights would be shared between free-to-air and pay television in the absence of the anti-siphoning provisions: free-to-air broadcasters would, at best, receive rights to highlights of those events.

Under the agreement between News Limited and Seven Network Limited, Seven acquired the exclusive free-to-air television rights to broadcast the three Test matches and seven one day matches, together with the exclusive free-to-air television rights to highlights on each day of the matches. But it was a condition of

the agreement that Seven must not commence its broadcast of any match earlier than three months (later reduced to seven days) after the end of the relevant match, meaning that Seven could not broadcast the matches live or within a time that made commercial sense. Foxtel was then granted 'exclusive live television rights (against free-to-air and pay TV) in the Territory [Australia] for each Test'<sup>16</sup>. A similar agreement was made with Fox Sports for the one day matches.

As the Full Federal Court states, it is obvious that the steps taken by News were intended to circumvent the anti-siphoning provisions of the Act.<sup>17</sup> The Court upheld the decision of Lockhart J at first instance that, in order to satisfy licence condition 10(1)(e), the rights acquired by the subscription broadcasting licensee must be no greater than the rights of the free-to-air broadcaster to televise the event and that, in effect, the words 'the right to televise an event' in the licence condition mean the right to televise the event live.<sup>18</sup> The Federal Court stated that 'It would make a nonsense of a provision designed to ensure public access to "important events that should be available free to the public on free-to-air television services" to hold that it was sufficient there be a right to televise the event after seven days'. The Court then added that a right limited to the broadcast of daily highlights cannot be said to be a right to televise the event.<sup>19</sup>

Brendan Moylan contends that the effect of the recent Nine Network case was the reinforcement of 'the ability of free-to-air broadcasters to act as arbiters of which events will or will not be shown on pay TV'.<sup>20</sup> Yet the *real* substantive effect of Lockhart J's and the Full Federal Court's decision in that case was to prevent deep-pocketed pay TV interests acquiring and then retaining exclusive live television

coverage of listed events by offering free-to-air television only delayed or highlights rights - thereby defeating the 'free access' purpose of the anti-siphoning provisions.

## CONCLUSION

When measured against the Government's original public policy and legislative objective, the anti-siphoning provisions can be judged as effective - there is no problem with the extent of the free television access to the listed sporting events and so no 'solution' is required. The only threat to the future effectiveness of the anti-siphoning scheme arise from the deficiencies referred to above - and amendments to close those loopholes are necessary.

The argument that the purpose of the anti-siphoning provisions could be achieved more efficiently and fairly, with a less comprehensive anti-siphoning list and a sectoral demarcation of available television rights, is fundamentally flawed by the assumption that siphoning *necessarily* requires the acquisition by pay TV of the exclusive television rights to listed events.

The commercial realities and incentives are such that siphoning can be achieved more gradually, but just as effectively, by the 'solution' proposed.

*Joanne Court is the Director of Legal and Broadcast Policy with the Federation of Australian Commercial Television Stations*

1. Moylan, B. "Media Policy and Anti-siphoning", *Communications Law Bulletin*, Vol 16 No 3 1997, pp16-18.

2. Allegations of unfairness by pay TV interests are undermined by the fact that the anti-siphoning rules were known in advance of any investment by any of the pay TV operators. They

came into the industry with their eyes open.

3. The principal anti-siphoning provision in the *Broadcasting Services Act 1992* is section 115. It operates in conjunction with section 99 and clause 10(1)(e) of Part 6 of Schedule 2 of the BSA. Brendan Moylan's article discussed the relevant provisions at pp16-17.

4. Moylan, op.cit. p19.

5. Id. p17.

6. Id. p19.

7. eg. SuperLeague or the Rugby Union Super 12 Competition.

8. Neilsen, *TV Trends* 1996, p11.

9. Australian Broadcasting Authority, *Anti-Siphoning - The Availability, Acquisition and Use of Broadcast Rights*, Report to the Minister for Communication and the Arts, July 1995; Second report to the Minister for Communications and the Arts, December 1995; Third report to the Minister for Communications and the Arts, June 1996.

10. Id. July 1995, p9, December 1995, pp 6-7, June 1996, p5. Additionally, the 1995 Australian Women's Hardcourt Championship event was not held, so no television rights were acquired (ABA, July 1995, p9). In the past year the free-to-air rights to the Hong Kong Rugby Union Sevens Tournament have not been acquired and there are currently a number of events the subject of negotiation.

11. *Supra*, Note 9.

12. ABA, op.cit., July 1995, Notes to Table 4. Subsequent reports found the extensiveness and hours of coverage were retained at the previous levels. ABA, op.cit., December 1995, p1. ABA, op. cit., July 1996, p6.

13. For example, AFL coverage in Melbourne is subject to contractual restrictions imposed by the AFL which do not permit live telecasting of Melbourne games.

14. Moylan, op.cit. p19

15. Id. p 17

16. As quoted in *Foxtel Cable Television Pty Limited v. Nine Network Australia Pty Limited and Australian Broadcasting Authority* [1997] 185 FCA (26 March 1997) p6.

17. Id. pp6-7.

18. *Nine Network Australia Pty Limited v Australian Broadcasting Authority* (1997) 143 ALR 8 at p16.

19. *Foxtel Cable v Nine Network*, op.cit. pp11-12.

20. Moylan, op. cit. p18.

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