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Internet Dumping: Recent Developments

Tom Reid reports on the Federal Government's recent Direction to the ACA on the issue of internet dumping.

In an 8 April 2003 Discussion Paper,¹ the Australian Communications Authority (*the ACA*), invited public submissions on a new draft Determination for the 190 premium services industry. The draft Determination, entitled *Telecommunications Service Provider (Premium Services) Determination 2003*,² was issued pursuant to a 13 March 2003 formal Direction³ from the Minister for Communications, Information Technology and the Arts, Senator Richard Alston, and is designed to address the growing problem of 'internet dumping'. The Telecommunications Industry Ombudsman (*the TIO*), John Pinnock, received 1,994 complaints about internet dumping in 2002.⁴

INTERNET DUMPING EXPLAINED

Internet dumping occurs when a subscriber connected to the Internet through a dial-up connection is disconnected, and then reconnected through a 190 premium service or 001x international number, often without the subscriber being fully aware of what is happening. This most often occurs in relation to accessing adult content websites. Subscribers can subsequently run up bills of hundreds or even thousands of dollars, only learning of their mistake with the arrival of their next telephone bill.

Currently, most dumping complaints in Australia relate to 190 numbers. Providers of 190 services are regulated by a voluntary industry Code of Practice,⁵ administered by the Telephone Information Services Standards Council

(*TISSC*). Telstra incorporates this Code of Practice into every 190 number lease contract it makes with a service provider, so the Code is enforceable under the contract.

Section C.8 of the Code of Practice regulates internet dialler services. Some of its most important requirements are that:

- (a) service providers use their best endeavours to ensure that web links or references to internet dialler software not contain false or misleading statements in relation to the cost of using premium services;
- (b) before reconnection, a dialogue box be displayed on the subscriber's computer screen warning that the service is not free and detailing the charges;

(c) the bill payer's permission be obtained before the service commences and charging begins;

(d) where services are charged at a per-minute rate;

i. a digital clock be displayed on the subscriber's screen showing the elapsed time of the connection;

ii. a dialogue box appear every 10 minutes, requiring the subscriber to click 'OK' to maintain the connection;

(e) connections have a 5 minute idle timeout;

(f) internet diallers not activate a premium service remotely without the intervention and informed consent of the subscriber.

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According to the TIO, service providers generally comply with these requirements, but warnings to subscribers about costs are often hidden amongst bright and flashy advertising. Many complainants to the TIO had not read or understood these warnings before clicking 'OK' and being reconnected to the 190 number.⁶ While the Government is aware that the fault technically lies with the subscriber, nevertheless its March 2003 Direction is intended to further minimise the chance of subscriber mistake.

THE GOVERNMENT AND ACA RESPONSE

In a May 2002 press release, Senator Alston indicated that the Government would respond by requiring subscribers to register for 190 premium services and obtain a Personal Identification Number for access. Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) already imposes such a system where 190 services are provided as voice calls over the telephone, rather than as websites on the internet.

However, in its Direction to the ACA in March, the Government abandoned the PIN method in favour of a three-pronged approach, as detailed below.

A Cap on Monthly Fees

The main thrust of the Government's proposals is a cap on monthly fees for 190 services to residential accounts. Under clause 4 of the Direction, access to premium services through 190 numbers, but *not* through 001x international numbers, will be barred for the rest of the month if the monthly cap is reached. This is regardless of whether the 190 services are accessed via the telephone or the internet. The cap will initially apply to every account in Australia, with subscribers able to waive their cap if they wish. The ACA, in its draft Determination, has set the cap at \$250, but has expressly invited public comment on the amount.

Industry representatives have tended to criticise the proposed cap. In an interview with the online IT magazine *ZDNet Australia*, the president of the Telephone Service Provider Association of Australia (*Telspa*), Adam Rowbottom, argued that capping 190 numbers was unnecessary and discriminatory, as it is possible for subscribers to accumulate large bills when making mobile, STD and international telephone calls.⁷ However, this seems to be fairly empty criticism. It is likely that subscribers who make such telephone calls are aware of the associated charges, whereas the problem of internet dumping

stems from the fact that subscribers are (albeit through their own technical omission) unaware of the potential costs involved.

A monthly cap is a potentially effective technique, although it is perhaps doubtful whether a subscriber faced with an unexpected \$250 bill for premium services would be happy with the amount of the cap. Instead, a system of progressive caps, where subscribers could choose an appropriate level (say, \$20, \$250 and \$1,000) might be more subscriber friendly, as it would allow a distinction between occasional, regular and frequent users of premium services.⁸ The ACA also acknowledges that a number of issues remain unresolved regarding the implementation of the cap, in particular where a subscriber has more than one line – according to the current proposals, the cap would apply separately to each line, meaning that a subscriber with one line for the telephone and one for the internet could potentially face a bill of \$500 (\$250 for each line).

Informing Subscribers

Clause 4 of the Direction also directed the ACA to take steps to require service providers to inform subscribers about the dangers of internet dumping. Importantly, this information is to be

provided regardless of whether the premium services are provided through a 190 number or a 001x international number. The regime proposed by the ACA in Part 3 of its draft Determination is fairly arduous and requires service providers to supply, amongst other things:

- (a) information about the financial risks associated with premium services;
- (b) information about the action that a relevant customer may take to lessen the risk of unexpected high bills for premium services;
- (c) an explanation of how international numbers may be accessed by another service provider's override code;
- (d) an explanation of the procedure and consequences of monthly call caps; and
- (e) an explanation of the procedure and consequences of a subscriber's waiver of the monthly call caps.

The ACA has proposed that this information be disseminated by way of telephone bill inserts, as well as notices on service providers' websites.⁹ It is to be supplied as soon as the Determination takes effect, as well as when a new service is connected, when a monthly call cap is reached, and at any time on the request of a subscriber. It must also be supplied in writing at least once every two years to every subscriber, regardless of whether a monthly call cap has been reached or not.¹⁰ The ACA justifies this rigorous regime on the basis that the level of consumer awareness regarding 190 premium services was found to be relatively low in its *Consumer Awareness and Information Needs Survey 2001*.

Further Regulation?

The Government also directed the ACA to investigate and report on three further issues. The ACA has released a separate discussion paper on these issues,¹¹ which are as follows:

- (a) whether it would be 'practicable and appropriate' to require service providers to bar access to international numbers used to provide premium services;
- (b) whether requirements need to be imposed on service providers specifically in relation to internet diallers; and



- (c) whether the TISSC Code of Practice should be registered under Part 6 of the *Telecommunications Act 1997*.

Barring access to international numbers

At present there is no technical means of barring international calls to premium services, while at the same time still allowing international calls to other numbers. While the ACA has nevertheless asked for public comment on this issue, it states openly in the 5 May discussion paper that 'the fact that access to all... international destinations would be foregone may not be acceptable to a proportion of customers'. The ACA indicates that education of the public through the provision of information by service providers may be enough to reduce the problem to acceptable levels.

It is suggested that an alternative method, albeit one requiring significant technical change, would be to institute a system whereby the dialling of international numbers is barred unless the subscriber first enters a personal identification number of their own choosing. This would disallow internet dialling software from making an international connection (as each subscriber would keep their PIN

secret), but would still allow the subscriber to make international telephone calls if they wished. If the subscriber wished to be able to make an international internet connection, then internet dialling software could be modified to allow the subscriber to manually enter their PIN – a process that would alert the subscriber to the fact that an international connection was being made.

Specific requirements regarding internet diallers

As the ACA's 5 May discussion paper notes, internet diallers using 190 premium services numbers are subject to section C.8 of the TISSC Code, but diallers using international numbers are outside the ACA's reach. Other than educating the public about the danger of internet dumping, the ACA does not suggest any method of regulating internet diallers in general. However, regulation of diallers using 190 numbers could be further strengthened by registering the TISSC Code of Practice (see below).

Registration of the TISSC Code of Practice

Under section 117 of the *Telecommunications Act 1997*, the ACA

may register industry codes of practice. Registration of the TISSC Code would give the ACA power to administer it, including the ability to give remedial directions for breaches of it under section 121 of the *Telecommunications Act*. In its 5 May discussion paper, the ACA points out that the Code could not yet be registered in its current form as it has not yet met the administrative requirements for registering codes in section 117 of the *Telecommunications Act*. These requirements include consulting with the ACCC and TIO, industry, consumer representatives, and the public.

Even assuming that those requirements were met, however, it is arguable that registration would not have much effect on the problem of internet dumping. The provisions of the Code are already enforceable under Telstra's contract with the 190 service providers – although of course Telstra's impartiality in enforcing the contractual provision might be questioned in light of the fact that Telstra stands to gain from increased use of 190 numbers. But in any case, as mentioned above, the TIO reports that it is not a lack of compliance with the Code that is the problem. Rather, it is subscribers' lack of knowledge about the potential dangers of internet dumping, combined with their complacent approach to reading on-screen warnings, that is causing them to be caught.

The idea of registration has also been attacked by industry groups such as Telspa. Rowbottom argues that the voluntary industry Code of Practice, as administered by TISSC, is 'one of the best in the world', and that registration under the *Telecommunications Act* is unnecessary as the legislation itself is oriented towards self-regulation.¹² Section 4 of the *Telecommunications Act* expressly states Parliament's intention that 'telecommunications be regulated in a manner that... promotes the greatest practicable use of industry self-regulation'.

COMMENT

In November 2002, *ZDNet Australia* reported that Telstra, which makes available the 190 number system to the service providers, had cautioned against restrictive controls on 190 numbers. Telstra argued that service providers will simply move offshore and use 001x international numbers, which are much

more difficult to regulate.¹³ However, Telstra itself appears to be sending mixed messages on the issue: shortly after the Government's Direction was issued in March 2003, *The Australian* reported that Telstra had given six months' notice of a ban on the use of the 190 number system to access adult content on the internet. The TIO warned that this, too, would result in service providers moving offshore – exactly what Telstra fears will result from the Government's Direction.¹⁴

If service providers do begin to move offshore, the problem of internet dumping could potentially become worse rather than better. An international call involves a connection to an originating carrier in Australia, which passes the call through to the terminating carrier in the other country, which in turn connects the call to the service provider in the other country. The service provider earns its revenue from the terminating carrier in the form of a commission for generating telephone traffic. The subscriber in Australia is charged the applicable international call rate by their originating carrier. The service provider will be regulated by the laws of the country it operates in.¹⁵ At present, no global regulator of service providers using 001x international numbers exists.

One way, suggested in the past,¹⁶ in which the ACA might attempt to regulate overseas service providers is to require the Australian originating carriers to have provisions in their contracts with their overseas terminating carriers, under which the terminating carriers must ensure that the service providers follow rules similar to the TISSC Code of Practice outlined above. However, getting foreign terminating carriers to accept and enforce such rules would be a gruelling process, and even if successful would only result in a situation similar to the current level of regulation in Australia, which obviously has proved insufficient.

A better alternative might be the method suggested in this article, in which subscribers are required to enter a PIN before making an international call. This would render internet dialling software useless unless it was modified to allow the subscriber to enter their PIN, which would alert the subscriber to the fact that an international connection was being made. The downside of this would be the cost of implementing the technical changes required, as well as increased inconvenience for consumers.

With their forthcoming tightening of regulation, then, the Government and the ACA must perform a difficult balancing act. On the one hand, doing nothing will result in increasing numbers of dial-up subscribers faced with astronomical bills. On the other, too strict regulation risks forcing service providers out of the jurisdiction, meaning they will not be subject to the TISSC Code of Practice, and potentially requiring further regulation and technical changes to prevent subscribers being dumped onto international connections.

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1 Australian Communications Authority, *Premium Services: An ACA Discussion Paper Regarding the Development of a Service Provider Determination to Regulate Premium Services*, 8 April 2003, available at http://www.aca.gov.au/aca_home/issues_for_comment/discussion.htm.

2 Available at http://www.aca.gov.au/aca_home/issues_for_comment/discussion.htm.

3 The Australian Communications Authority (Service Provider Determination) Direction 2003 (No 1), available at http://www.aca.gov.au/aca_home/issues_for_comment/discussion.htm.

4 TIO Talks Issue 28 (March 2003), 4; TIO Talks Issue 27 (December 2002), 4.

5 Available at <http://www.tissc.com.au/code.htm>.

6 TIO website, Frequently Asked Questions page, available at http://www.tio.com.au/FAQ/int_dumping.htm.

7 James Pearce, 'Industry Rebukes Australian Internet Dumping Prevention Plan', *ZDNet Australia*, 26 November 2002, <http://www.zdnet.com.au/newstech/security/story/0,2000024985,20270205,00.htm>.

8 Note that this is explicitly considered as an option in the ACA's Discussion Paper.

9 The ACA Discussion Paper on the Service Provider Determination, above n1, 12.

10 Ibid.

11 Australian Communications Authority, *Premium Services: An ACA Discussion Paper Regarding the Need for Additional Regulatory Measures in Relation to the Supply of Premium Services*, 5 May 2003, available at http://www.aca.gov.au/aca_home/issues_for_comment/discussion/investigationpremium.pdf.

12 James Pearce and Kate Stapleton, 'Internet Dumping Burning Unsuspecting Consumers', *ZDNet Australia*, 26 November 2002, <http://www.zdnet.com.au/newstech/communications/story/0,2000024993,20270212,00.htm>.

13 James Pearce, 'Industry Rebukes Australian Internet Dumping Prevention Plan', *ZDNet Australia*, 26 November 2002, <http://www.zdnet.com.au/newstech/security/story/0,2000024985,20270205,00.htm>.

14 Selina Mitchell, 'Telstra Tackles Net Porn Scam', *The Australian*, 15 March 2003, <http://australianit.news.com.au/articles/0,7204,6129114%5e15306%5e%5enbv%5e,00.html>.

15 For further information see John Corker, 'Internet Dumping and Regulation of the Audiotex Industry', (2001) 20(4) *Communications Law Bulletin* 15, 17-18.

16 Ibid 19.

Malice, Qualified Privilege and Lange

In this article Glen Sauer examines the High Court's decision in *Roberts v Bass* on the issue of malice, and how it applies to the defamation defence of qualified privilege, as well as the *Lange* extended qualified privilege defence.

The recent High Court decision of *Roberts v Bass* [2002] HCA 57 (12 December 2002) significantly affects the interpretation of the common law relating to malice as it applies to defeat a defence of qualified privilege in relation to defamatory publications. A majority of the High Court has held that, at least in cases involving government or political communication, authority which has developed from *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, that a lack of honest belief would defeat the defence of qualified privilege (and presumably comment), is in error.

The High Court took a practical, rather than overly technical, approach to the law of qualified privilege. The decision confirms that qualified privilege is a robust defence of great utility for defendants other than the mass media.

It remains to be seen whether a similarly robust approach will now be applied to the "extended" qualified privilege defence as formulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, particularly with respect to the requirement of reasonableness by a publisher seeking to rely on this defence.

The comments of Justice Kirby may provide some comfort to those who might read this case:

"In Chakravarti v Advertiser Newspapers Ltd, I remarked that the law of defamation was unnecessarily complicated. The present case, reduced to its essentials, should have been relatively straightforward. Unfortunately, it did not prove to be so." (at para 126, per Kirby J).

THE DEFENCE OF QUALIFIED PRIVILEGE AND THE LANGE EXTENDED DEFENCE

The defence of qualified privilege is available at common law in all States except Queensland and Tasmania. In those States, a similar defence is created

by statute. The essential elements of the defence are as follows:

- (a) The publisher must have a duty (legal, social or moral) to publish the material;
- (b) The person to whom the publication is made has a reciprocal duty to receive or an interest in receiving the information;
- (c) The publisher must have an honest belief in the truth of the material; and
- (d) The publication is made without malice.

An additional defence of qualified privilege is available under s22 of the *Defamation Act* in NSW, in circumstances where a report is on a matter of public interest, published to people who have an interest in knowing about the matter, and the conduct of the publisher in publishing the material is reasonable.

The principle behind the defence is that there are occasions when it is in the public interest that people be able to speak freely when it is their duty to do so without fear of liability. Occasions covered by the defence include where an employer discloses information about an employee to a business partner in order to protect his property, or about the employee's competence to a new employer. A person may respond to a published attack, though the response must relate to the subject matter of the attack and not be disproportionate to it.

The defence has been notoriously difficult for the media to establish. Generally, the courts do not accept that mass media organisations have a duty to provide the information they do and that the mass audience has a reciprocal duty to receive it. The author's and the publisher's honest belief in the truth of the material and reasonable behaviour in publishing it will be carefully scrutinised.

A person researching a story must at least:

- (a) Contact or make conscientious attempts to contact the person or company referred to in any defamatory report and put any allegation to be made in the story to them;
- (b) If they comment on those allegations, their comments should be published;
- (c) Take care to use reliable sources and each available source of information; and
- (d) Check the accuracy and authenticity of any material contained in any report against other independent sources.

As a result of the High Court's decision in *Lange*, the categories of information which attract qualified privilege now include "a communication made to the public on a government or political matter".

THE RELEVANT FACTS

Bass was, at the time of publication of the matters complained of, a South Australian Member of Parliament. The appellants, Roberts and Case, opposed Bass' re-election and were involved with the production and distribution of three publications:

1. a postcard which stated: "Dear Taxpayer, This is the postcard your politician Sam Bass should have sent you from the Pacific island paradise where he is enjoying a winter break at your expense. Geoff Roberts. Clean Government Coalition. P.S. When you vote, put Sam Bass last." (the "postcard");
2. a pamphlet containing several pages, including a caricature of Bass and a false "Ansett Australia Frequent Flyer Activity Statement", amongst other things (the "pamphlet"); and
3. a mock how to vote card stating "When you vote, PUT SAM BASS LAST." (the "how to vote card").

Each publication was created by Roberts. Case was connected only with the third publication, which he handed out to electors as they came to cast their votes at a polling station.

Bass lost his seat at the election by a narrow margin and then commenced proceedings for defamation against Roberts and Case in the District Court of South Australia.

With respect to the postcard, Bass pleaded the following imputations:

- (a) That [Bass] had taken a holiday trip to Nauru at the expense of the taxpayers of the seat of Florey;
- (b) That [Bass'] holiday at Nauru was for his own enjoyment, at the expense of the taxpayers of the seat of Florey, and not in the proper pursuit of his duties as a member of Parliament and as the member of the seat of Florey."

Bass pleaded the following imputations in relation to the pamphlet:

- (a) That [Bass] had corruptly used his position as a member of Parliament to obtain a holiday at Nauru for his own benefit;
- (b) That [Bass] whilst attending the Nauru Resort was neglecting his responsibilities to his constituents in the seat of Florey in Parliament;
- (c) That [Bass] had taken advantage of his position as a member of Parliament to obtain a free holiday for his own purposes;
- (d) That [Bass] had used his position as the member of Parliament to accrue Frequent Flyer Points for his own use and for the use of the members of his family;
- (e) That [Bass] had on numerous occasions used his position as a member of Parliament to accrue Frequent Flyer Points for his own benefit and for the benefit of the member of his family; and
- (f) That overseas trips taken by [Bass] in the course of his Parliamentary duties were in fact undertaken not in pursuit of his duties as a member of Parliament and the interests of his constituents in the seat of Florey but for his own interests and recreational pursuits."

In relation to the how to vote card, Bass pleaded the following imputations:

- (a) That [Bass] had spent \$32,000.00 of taxpayers' money on overseas travel;
- (b) That [Bass] had spent \$32,000.00 of taxpayers' money for overseas travel for the purpose of his own enjoyment and not for the proper purpose of such travel, namely to enhance the [respondent's] knowledge of issues relevant to the better performance of his role as a member of Parliament;
- (c) That [Bass] had taken numerous overseas trips for his own benefit and enjoyment at the taxpayer's expense;
- (d) That [Bass] had taken numerous overseas trips for his own benefit and enjoyment and not for the intended purpose of such trips, namely to enable him to better serve the interests of the Parliament of South Australia and the members of this electorate;
- (e) Contrary to his responsibility as the member of Parliament for Florey [Bass had] failed to take appropriate steps to prevent clandestine arrangements being put in place in respect of the management of the Modbury Hospital, contrary to the interests of the members of the electorate of Florey and the public of South Australia generally;
- (f) That [Bass] had put the rights of those interested in the rights to possess and utilise guns ahead of the safety of members of ordinary families;
- (g) That [Bass] had not spent sufficient time in his electorate to properly discharge his duties as the member of the seat of Florey;
- (h) That [Bass] was not spending sufficient time in the electorate of Florey to enable him to adequately fulfil his duties as the member of Florey; and
- (i) That if [Bass] was elected to the member of Florey and then subsequently elected as Speaker of the House of Assembly then he would spend less time than the time that he was currently spending in the electorate."

In their respective defences in the District Court, Roberts and Case denied that the imputations were conveyed, and, in the alternative, relied on the defences of truth, fair comment and qualified privilege.

Roberts and Case did not raise two separate defences of common law (or "traditional" or "ordinary" as Justice Kirby put it) qualified privilege and "extended" or "constitutional" qualified privilege. Roberts and Case simply pleaded that the matters complained of were "published on occasions of qualified privilege". Their respective defences went on to say that each publication was on "a matter concerning government and political matters affecting the electors... and the choice for electors at an election." (at para 132 per Kirby J).

Bass in reply contested the reasonableness of Roberts' and Case's conduct and belief as to the truth of their publications and alleged actual malice against them.

AT FIRST INSTANCE IN THE DISTRICT COURT

District Court Justice Lowrie found that the pleaded imputations were conveyed and were defamatory of Bass. His Honour held that the defences of fair comment and common law qualified privilege pleaded by Roberts and Case failed.

His Honour applied the English Court of Appeal decision in *Braddock v Bevin* [1948] 1 KB 580, which established that communications between candidates and electors were privileged occasions, to find that Roberts' and Case's publications were made on occasions of privilege. However, Justice Lowrie held that this defence of common law qualified privilege was defeated by malice on the part of Roberts and Case. His Honour noted that:

"the conduct of [Roberts] was tantamount to using any area of apparent criticism of [Bass] to injure his reputation and cause him to lose office. This purpose is not a proper motive" (at para 54, as quoted by Gaudron, McHugh and Gummow JJ).

Similarly Case's "dominant motive was to injure [Bass'] reputation and remove him from office, and, as such, it was an improper motive" (at para 55, as quoted by Gaudron, McHugh and Gummow JJ). Justice Lowrie thus viewed the conduct of Roberts and Case as malicious.

His Honour considered that, while Roberts and Case's respective defences raised the defence of *Lange* qualified privilege, this defence was not available because their actions had not been reasonable.

APPEAL TO THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

Roberts and Case appealed the decision of Justice Lowrie to the Full Court of the Supreme Court of South Australia. Interestingly, Bass did not challenge that Roberts and Case's publications were made on occasions of common law qualified privilege, and Roberts and Case did not plead the defence of *Lange* qualified privilege. Roberts and Case challenged Judge Lowrie's decision principally on the issue of malice.

The Full Court upheld the verdicts in favour of Bass, but differed from Justice Lowrie in relation to the issues of motive and purpose.

Justices Prior and Martin held (in separate judgments) that the evidence was sufficient to justify the conclusion reached by Justice Lowrie that Roberts had an improper motive and lacked an honest belief in the truth of his publications, while Case was recklessly indifferent to the truth (at para 56 and 60 per Gaudron, McHugh and Gummow JJ).

Justice Williams, on the other hand, found that Roberts and Case lacked an honest belief in the truth of their publications but was unable to identify an improper purpose beyond the legitimate purposes of "becoming over-enthusiastic in the support of their electoral cause" and injuring Bass' prospects of re-election (at para 59, per Gaudron, McHugh and Gummow JJ).

APPEAL TO THE HIGH COURT

Issues before the High Court

Roberts and Case challenged the Full Court's finding of malice.

A preliminary issue arose as to whether the parties could depart from the positions that they adopted in the Full Court on the question as to whether the publications were made on occasions of qualified privilege. In the Full Court, Bass did not appeal against the trial judge's findings that the occasions were privileged, while before the High Court Bass argued that the occasions were not privileged. Likewise, in the Full Court Roberts did not appeal, and Case did not

press his appeal, against the trial judge's findings that the publications were not protected by the extended defence of qualified privilege recognised by the High Court in *Lange*, while before the High Court they both sought to rely on the *Lange* defence (at para 49 per Gaudron, McHugh and Gummow JJ).

A majority of the High Court (Kirby J dissenting) found that Roberts and Case could not rely on the *Lange* extended defence. In a joint judgment, Justices Gaudron, McHugh and Gummow opined that the parties could not depart from their cases as pleaded but observed that neither party would suffer any prejudice as a result of this decision (at para 72 per Gaudron, McHugh and Gummow JJ). In separate judgments, Chief Justice Gleeson, Justice Hayne and Justice Callinan also concluded that the parties were bound by their cases as pleaded. However, Justice Kirby noted a lack of procedural unfairness, that the constitutional issue had been adequately notified and argued, that resolution of the constitutional issue was a matter of general legal importance, and that it was imperative that the High Court should clarify the scope and operation of the "common law" privilege in light of *Lange* constitutional qualified privilege. His Honour expressed sympathy for the parties, noting that:

"it is unsurprising that the parties, and the courts below, should have experienced a measure of difficulty in identifying the legal principles that were applicable to the case. The same problems have arisen in this Court. As I approach these appeals, this Court has the duty to clarify the applicable law – not only for the resolution of the present dispute but also to afford guidance for cases that will present similar questions in the future." (at para 125 per Kirby J).

However, it was the majority's opinion that it need only consider the substantive issue of the application of the defence of qualified privilege to the matters found to be defamatory.

However, the High Court also considered, by way of *obiter*, the application of the constitutional implication of freedom of communication on political matters as expressed in *Lange*.

The High Court's decision

A majority of the High Court rejected the

finding by the Full Court of the Supreme Court of South Australia of malice against Roberts and Case, which had defeated Roberts' and Case's defence of qualified privilege. Gaudron, McHugh, Gummow and Kirby JJ upheld the appeals of both Roberts and Bass, Gleeson CJ and Hayne J dismissed the appeal of Roberts but upheld the appeal of Case, while Callinan J, dissenting, dismissed both appeals.

When does malice destroy a (common law) qualified privilege defence?

The High Court considered in detail the application of the defence of common law qualified privilege to the matters found to be defamatory, and in particular, when malice will destroy a qualified privilege defence.

The High Court found that a purpose of defeating someone in an election is not improper. This makes very good sense because otherwise qualified privilege would offer no real protection to competing politicians and lobby groups.

Chief Justice Gleeson noted that a "motive of injuring a candidate by diminishing his or her prospects of election does not constitute malice; that would be repugnant to the very basis of the privilege in electoral contest". Indeed, "targeting" an election candidate is not improper (at para 39 per Gleeson CJ). However, "it would be wrong to think that, because such a motive does not constitute malice, it negates malice. If it were so, electoral contests would for practical purposes constitute a defamation-free zone." (at para 12 per Gleeson CJ).

Chief Justice Gleeson noted that "mere absence of a positive belief" in the truth of what is said does not constitute malice" (at para 15 per Gleeson CJ). However, his Honour considered that a qualified privilege defence would not be available where the defendant published the defamatory material, knowing it to be false, or not caring whether it was true or false, noting that this state of mind is sometimes described as "recklessness" (at para 13 per Gleeson CJ). Justice Hayne agreed with the conclusions reached by Chief Justice Gleeson (at para 230 per Hayne J).

Justice Callinan took a similar approach as Chief Justice Gleeson and Justice Hayne. His Honour appeared to consider that utter indifference or recklessness

with respect to the truth or falsity of defamatory matter constituted malice (at para 303 and 305, per Callinan J). His Honour further considered that the content and tone of the language used in the defamatory publications went at least some way towards establishing malice, citing the "dogmatic, categorical and unpleasant tone and content" of the documents (at para 289 per Callinan J). Justice Callinan also noted that in order to defeat a defence of qualified privilege it will "suffice for the plaintiff to demonstrate that the publication was not made out of a non-malicious motive, or motives: the presence of a malicious motive will colour and inescapably taint the conduct of a publisher" (at para 292 per Callinan J).

In a joint judgment, Justices Gaudron, McHugh and Gummow, however, did not endorse the Chief Justice's finding that "recklessness" destroys the defence of qualified privilege. Their Honours defined malice as:

"a motive for, or a purpose of, defaming the plaintiff that is inconsistent with the duty or interest that protects the occasion of the publication". (at para 79 per Gaudron, McHugh and Gummow JJ).

Their Honours noted that an improper motive should not be confused with the defendant's "ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice or any other motive than duty or interest for making the publication" (at para 76 per Gaudron, McHugh and Gummow JJ).

However, the joint judgment noted that, generally, proof that a defendant knew that his or her statements were untrue was "almost conclusive evidence" of malice (at para 76 per Gaudron, McHugh and Gummow JJ). However, even knowledge that the defamatory statement was false will not destroy qualified privilege if the defendant was under a legal duty to make the communication. As their Honours noted, "a police officer who is bound to report statements concerning other officers to a superior will not lose the protection of the privilege even though he or she knows or believes that the statement is false and defamatory unless the officer falsified the information" (at para 76 per Gaudron, McHugh and Gummow JJ).

Crucially, the joint judgment rejected the authority of Justice Hunt in *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 and Justice Clarke in *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 102-103 that a defendant's lack of honest belief in the truth of a publication constitutes a separate basis for finding malice, independent of any improper motive (at para 78 per Gaudron, McHugh and Gummow JJ).

Their Honours emphasised that knowledge of falsity is not equivalent to malice, and that it is the motive or purpose of the publication and not the defendant's belief in the truth of the publication which determines whether a defence of qualified privilege is available.

The joint judgment also held that "mere lack of belief in the truth of the communication is not to be treated as if it was equivalent to knowledge of the falsity of the communication and therefore as almost conclusive proof of malice" (at para 87 per Gaudron, McHugh and Gummow JJ).

Their Honours further noted that malice is not proved merely because a person does not intend and therefore does not believe in a defamatory meaning found by the judge or jury (at para 89 per Gaudron, McHugh and Gummow JJ).

The joint judgment also considered that the burden of proof in relation to the negating of a presumption of honesty of belief on behalf of the defendant rests on the plaintiff (at para 97 per Gaudron, McHugh and Gummow JJ).

Justice Kirby generally agreed with the reasons of the joint judgment, so far as such principles applied to the context of malice at common law in circumstances attracting the protection of the constitutional freedom of political communication (at para 185 per Kirby J).

The Lange extended qualified privilege defence with respect to government and political matters

Despite six of the seven High Court justices finding that Roberts and Case could not seek to rely on the Lange "extended" qualified privilege defence, the High Court made some interesting observations on the interrelationship of the constitutional implication of freedom of communication on political matters (as

expressed in *Lange*) with the common law rules relating to qualified privilege, and with respect to the *Lange* defence generally.

Gaudron, McHugh and Gummow JJ noted that the law of defamation by providing for damages for defamatory publications has a chilling effect on freedom of communication on political matters. Their Honours further noted that if, contrary to their view summarised above, the common law made a positive belief in the truth of electoral statements a condition of the defence of qualified privilege, such a rule would be inconsistent with the Constitution and would need to be developed to accord with the Constitution's requirements (at para 102 per Gaudron, McHugh and Gummow JJ).

The joint judgment noted that *Lange* dealt with publications to the general public by the general media concerning "government and political matters" and that it was not concerned with the type of publication in the present case (ie. statements to a more limited group of electors with respect to a State member of parliament seeking re-election). However, their Honours noted that such statements as were made in the present proceedings were "at the heart of the freedom of communication protected by the Constitution" (at para 73 per Gaudron, McHugh and Gummow JJ). As such the *Lange* defence would not appear to be restricted to only general publications to the general public – defendants who have published in a more restricted fashion can also avail themselves of the defence.

Justice Callinan repeated the observations which he made in the case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 in relation to *Lange*:

"With respect generally to the Lange defence I would adhere to the opinions I expressed in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd. It is unnecessary, however, for me to decide whether I am bound to, or should apply it, in this appeal for a number of reasons. But I would add this to what I said in Lenah. Freedom of speech is no more under threat today than it was when the Constitution was drafted. That

situation owes nothing to *Lange*. It is a situation that has existed throughout at least the last 40 years. Indeed, if anything, the contrary is the case. This has explicitly recently been recognised in the United States and the United Kingdom by practitioners and academic observers of the art of journalism. Australia is not unique in this respect. The same trends are readily apparent here. The expression "chilling effect [upon political discourse]" is no more than a metaphor, and, like many metaphors, an extravagantly inaccurate one. And, if proof be needed of the undesirability of the importation, after more than 90 years, into the Constitution of an hitherto undetected judicial implication, this case provides it. It will take years, years of uncertainty and diverse opinion for the court to reach a settled view of the elements of the defence and the way in which it is to be applied. *Lange* certainly does not exhaustively define its impact on the law of defamation. I doubt whether any case, or series of cases will ever do so, and, as defamation is not a head of federal constitutional power, legislation can never be enacted to resolve the recurrent uncertainties to which it gives rise." (at para 285 per Callinan J).

Justice Kirby strongly rebutted Justice Callinan's criticisms of the *Lange* defence:

"In his reasons, Callinan J complains that the constitutional implication, detected in the cases culminating in *Lange*, took more than 90 years to be perceived. That is true. But it is the nature of the elucidation of a written constitution. It took more than 50 years for the implication relating to judicial power to be detected in the *Boilermakers' Case*. It took nearly 100 years for the implication governing the independence of the State judiciary to be detected in *Kable v Director of Public Prosecutions* (NSW). Some implications, such as that of due process in judicial proceedings, are still in the course of evolution. Others have only just begun their journey to acceptance.

If it takes years and diverse opinions in this court to throw light on the requirements of the constitutional implication of free speech, that is not a reason to reject the duty to state the law as it stands. Inconvenience has never been a reason for refusing to

give effect to the Constitution. If it had been, the *Bank Nationalisation Case*, the *Communist Party Case* and the *Cross-Vesting Case* would have been differently decided. When the Constitution speaks, this court must give it effect. The fact that it causes some adjustments to the previous common law of qualified privilege or that it may take time to be fully elucidated is scarcely a reason for the court to stay its hand. In the eye of the Constitution, which speaks to centuries, that is neither here nor there." (at para 145 and 146 per Kirby J).

Justice Kirby further considered the defence of "constitutional" qualified privilege found in *Lange* (his Honour considered that this issue could properly be raised by the parties before the High Court). His Honour considered that the requirement of reasonableness only arises when the constitutional defence is invoked to "protect a publication that would otherwise be held to have been made to too wide an audience" (para 161 per Kirby J, quoting *Lange* at 573). Justice Kirby noted that, because the trial judge, the Full Court and the parties agreed that the publications were not made to "too wide an audience" the *Lange* requirement of reasonableness did not arise in this appeal. Justice Kirby was clearly of the opinion that "the decision in *Lange* did not therefore establish a general requirement of reasonableness applicable to every situation of publication regarding governmental or political matters." (at para 162).

Implications of the decision

Roberts v Bass is a good reminder of the strength of traditional, pre-*Lange* qualified privilege in relation to elections. The Court was applying the old defence, rather than the extended *Lange* defence, which meant that it was not necessary to show that the publisher acted reasonably. It was important that the flyers were only distributed to voters in the relevant election. If the publication was in a mass media publication, such as a newspaper, in the lead up to an election, the traditional defence would probably not apply. It would probably be necessary to resort to the extended defence.

The High Court sensibly found that a plaintiff cannot defeat a defence of qualified privilege by showing only that the defendant did not have a positive

belief in the truth of the imputations that arise from the publication. This is important because:

- sometimes a person will be passing on third party information in relation to which they have no belief as to truth or otherwise (for example, a person may report to the police that another person had told them that a third person had committed a crime, where the person reporting the information have no idea whether their informant was lying or not);
- sometimes (in New South Wales in particular, where imputations are the cause of action, not the matter complained of) the imputations found to be conveyed will be different from those which the publisher intended to convey. A plaintiff cannot now defeat a defence of qualified privilege by pleading imputations so as not to reflect the defendant's intentions, then interrogating to show the defendant did not believe those imputations to be true.

This decision by the High Court does not mean a person can publish things he or she knows to be false under the protection of qualified privilege. Evidence of knowledge of falsity or recklessness as to truth or falsity will normally be almost conclusive proof that the publication was malicious. A court will normally infer malice in such circumstances even if it is unclear what the improper, malicious, purpose is.

It seems evident that the High Court took a practical rather than an overly technical approach to the law of qualified privilege and malice, and by doing so, have confirmed that qualified privilege remains a robust defence of great utility for defendant's other than media organisations.

Unfortunately the manner in which the cases of the respective parties were conducted in the South Australian courts prevented any further development by the High Court of the "extended" *Lange* qualified privilege defence. However, as shown by the judgment of Justice Kirby in relation to the requirement (or otherwise) of reasonableness, and the criticisms raised by Justice Callinan, there may be scope for further development of that defence.

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When the Boot is on the Other Leg

With a corporation's right to an action for defamation in NSW removed, John Corker and Jessica Morath examine the alternative tort of injurious falsehood in the light of the recent High Court decision of *Roberts v Bass*.

New section 8A of the *Defamation Amendment Act 1974* (NSW) denies corporations with ten or more employees a right of action in defamation. It commenced operation on 17 February 2003.

This article examines the possibilities and difficulties associated with a defamed corporation taking an action for the alternative tort of injurious falsehood of which malice is a key element.

Malice in defamation law has been recently examined by the High Court in the decision of *Roberts v Bass* [2002] HCA 57 and is a common component of the law of defamation and injurious falsehood. In *Spring v Guardian Assurance plc* [1993] 2 All ER 273 at 288, the English Court of Appeal stated: "In our judgment, the test of what constitutes malice in the tort of malicious falsehood is the same as the test in relation to the torts of libel and slander."

INJURIOUS OR MALICIOUS FALSEHOOD

The actionable wrong of injurious or malicious falsehood is the publication of a false statement made maliciously, and resulting in actual damage to the plaintiff (Tobin & Sexton, *Australian Defamation Law and Practice*).

However, an action in injurious falsehood is very different to an action in defamation law:

"These two actions must be kept distinct. They have very different consequences. In libel the law presumes everything against the writer: the words are presumed to be false and malicious: and it is for the writer to prove, if he can, that the words were true and the comment was fair, or otherwise make good his defence. But in

malicious falsehood the boot is on the other leg. The writer is presumed to be acting honestly and without malice: and it is for the plaintiff to prove, if he can, that the words were written by the defendant falsely and maliciously and were calculated to damage the plaintiff in his calling" (*Drummond-Jackson v British Medical Association* [1970] 1 WLR 689 at 694) [our emphasis].

Unlike defamation, injurious falsehood is concerned with disparagement of the plaintiff's property, the plaintiff's title to property and the plaintiff's financial or business interests, and not reputation.

Also, unlike defamation, the false statement may be made about a third party. In *Sungrature Pty Ltd v Middle East Airlines Airliban SAL* (1976) 134 CLR 1 at 23, Mason J gave the example of a newspaper report that a particular model of car was unsafe. His Honour said that such a report was "likely to injure the distributors of the car in their business" as well as the car manufacturer. The statement, if untrue and made maliciously, would be actionable in injurious falsehood by the distributors, independent of the car manufacturers, if they could prove actual loss.

To establish injurious falsehood, a plaintiff must prove that a published matter:

- was false;
- was malicious; and
- caused actual loss.

Falsity

The plaintiff must prove that the statement made by the defendant was false. Exaggeration, puffery or

hyperbole, for example, by means of an advertising campaign in favour of a defendant's products over a plaintiff's products, does not necessarily give rise to a cause of action in injurious falsehood.

Malice

The plaintiff must prove that the statement made by the defendant was malicious. Malice has been repeatedly defined over the years to include the following.

"Malice...means any corrupt motive, any wrong motive, or any departure from duty." (*Turnbull v Bird* (1861) 2 F & F 508 per Earl CJ at 524; 175 ER 1163).

"Malice means making use of the occasion for some indirect purpose." (*Browne v Dunn* (1893) 6 R 67 per Lord Herschell at 72).

"Malice in common acceptance, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse." (*Bromage v Prosser* (1825) 4 B & C 255; 107 ER 1051 per Bayley J, cited in *Clark v Molyneux* (1877) 3 QBD 237 per Brett LJ at 247).

"Any indirect motive, other than a sense of duty, is what the law calls malice." (*Dickson v Earl of Wilton* (1859) 1 F & F 419 per Lord Campbell at 427; 175 ER 790).

Tobin and Sexton, in *Australian Defamation Law and Practice*, note four common states of mind relevant to an understanding of malice:

- knowledge that the statement is untrue;
- recklessness as to its truth;

- honest belief as to its truth; or
- intention to injure the plaintiff's business.

Honest belief in the truth of a statement will rebut an inference of malice in almost all circumstances. However, Lord Diplock noted, in *Horrocks v Lowe* [1975] AC 135 at 150, that where it can be proved that the defendant's dominant motive is to "give vent to his personal spite or ill-will", then even the honest belief in the truth of what is published may not be sufficient to negate a finding of malice.

ROBERTS V BASS

The latest interpretation of malice by the High Court in *Roberts v Bass* rejects the long-established principle that a statement made with knowledge of falsity is malicious. Their Honours held that it is the motive or purpose that is ultimately decisive, not the defendant's belief in the truth of the matter.

Departing from earlier authorities, such as *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 51 and *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 102-103, ill-will, knowledge of falsity and recklessness are not different kinds of malice and thus conclusive in and of themselves. Instead, they are all evidence which goes towards proving that publication of the false statement was actuated by an improper motive.

Difficulties in proving malice

Take the example of a journalist who publishes an article disparaging a corporation's business practices. To establish malice for injurious falsehood, the corporation must prove that the journalist was actuated by an improper motive in publishing the article. To prove the existence of an improper motive, consideration may be given to whether there was any ill-will, bias, prejudice, knowledge of falsity or recklessness on the part of the journalist. If it could be proved that the publication of the false statement was actuated by the journalist's ill-will, bias or prejudice, this is likely to suggest the existence of an improper motive. However, it may be difficult to establish evidence of ill-

will, bias or prejudice motivating the publication of that particular false statement. Alternatively, if it could be proved that the journalist knew the statement was false, this would almost certainly infer the existence an improper motive. Such a finding would be consistent with the requirement that the conduct of a publisher in the media industry, in defamation law, must be reasonable. The Privy Council, in *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 360, stated:

"A newspaper with a wide circulation that publishes defamatory comments on untrue facts will in the ordinary course of events have no light task to satisfy a judge that it was reasonable to do so. Those in public life must have broad backs and be prepared to accept harsh criticism but they are at least entitled to expect that care should be taken to check that the facts upon which such criticism is based are true."

Therefore, if knowledge of falsity could be proved, it would be very difficult for the journalist to rebut the inference of an improper motive. However, it is likely to be very difficult for the corporation to prove that the journalist knew the statement was false. Alternatively, if it could be proved that the journalist was reckless as to the truth of the statement, this, in combination with other circumstances, may provide enough evidence to establish the existence of an improper motive.

Actual Loss

To be successful, the plaintiff must also prove that actual loss was the natural and probable consequence of the publication of the false statement. The most obvious example of actual loss is loss of money. Actual loss may also include general loss of business (*Ratcliffe v Evans* [1892] QB 524), yet does not include damages for injury to feelings.

Actual loss must be specifically proved. In *Ratcliffe v Evans*, the English Court of Appeal stated (at 533):

"As much certainty and particularity must be insisted on,

both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done."

However, the fact that a plaintiff can not assess the loss with certainty does not mean that he or she cannot prove actual damage. That is, provided actual loss can be proved, it is not essential for the plaintiff to point to a particular customer or the loss of a particular contract or order to prove that loss.

CONCLUSION

As of 17 February 2003, only corporations with fewer than 10 employees and no subsidiaries have a right of action in defamation in NSW. Corporations which do not satisfy this description may still take action in other Australian States and Territories for defamation. Individual directors may still take actions for defamation if personally libelled but if injunctive action in NSW is required corporations may have to consider turning to the tort of injurious falsehood.

An action in injurious falsehood is very different to an action in defamation. The primary obstacle for corporations bringing an action in injurious falsehood is onus of proof. It is the corporation's burden to prove that the statement was published, was false, was malicious and caused actual damage. Having regard to the recent statement of the law from the High Court in *Roberts v Bass* that it is the motive or purpose that is ultimately decisive of whether malice is made out, it is likely to be rather difficult for a corporation to provide evidence of a defendant's improper motive or malicious state of mind. Invariably the evidence of such a motive is inferential at best. A secondary obstacle is, of course, the need to prove actual loss.

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David v Goliath – The Slingshot is Loaded. Decision of the High Court on the Special Leave Application.

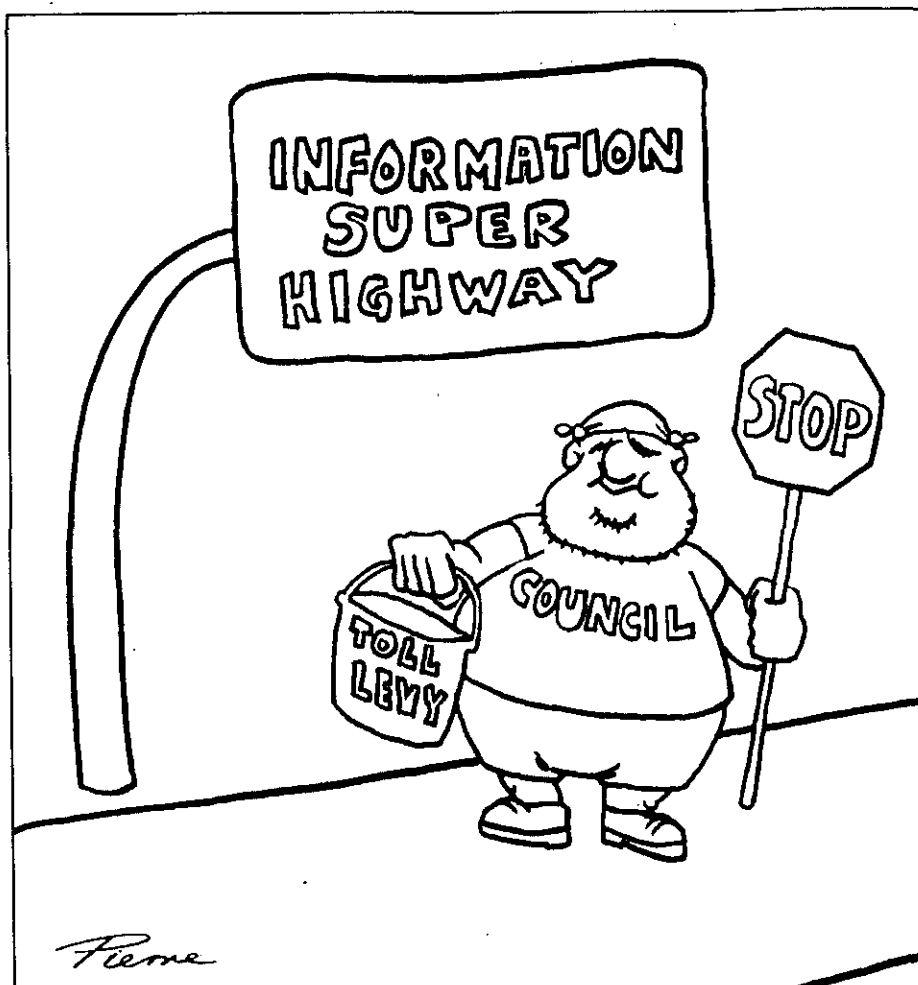
Angela Brewer updates the progress of this watershed case regarding telecommunications infrastructure.

In March 2003, the High Court determined to grant special leave to the New South Wales and Victorian Councils to appeal against the Full Federal Court's finding that section 611 discriminates against telecommunications carriers. The granting of special leave is significant as the case involves issues of public importance including the question of construction of the interrelationship between Commonwealth and State laws, the manner in which section 109 of the Constitution operates, and the use of public lands in New South Wales and Victoria.

In April 2002 the Full Federal Court delivered its decision reversing the earlier decision of Justice Wilcox, who had found that telecommunications carriers were subject to local government charges under Section 611 of the *Local Government Act* 1993, with respect to telecommunications infrastructure they had installed over and under public land. The judgment of Justice Wilcox was seen as a great success for the Councils in upholding charges and rates in respect of cables by Councils throughout New South Wales and Victoria.

The Full Federal Court found in favour of the carriers on only one ground of appeal which relates to clause 44 of Schedule 3 of the *Telecommunications Act* 1997. The Full Federal Court held that Section 611, to the extent that it authorised Councils to levy and recover charges in respect of cables erected or placed on, under or over a public place, was discriminatory and therefore invalid pursuant to Clause 109 of the Constitution. The Court relied upon a dissenting judgment of Justice Stevens in a United States Supreme Court decision of *Department of Revenue of Oregon v ACF Industries* 501US 332 (1994) to support its finding.

The Full Federal Court declined to determine the question of whether



charges under Section 611 were an excise, contrary to Section 90 of the Constitution. In relation to the question of whether the charges were levied by the Councils for an improper or extraneous purpose, the Full Federal Court stated that they agreed with Justice Wilcox, finding that the purposes alleged to be extraneous were not in fact extraneous.

The High Court will now determine whether the Full Federal Court erred in finding that Section 611 of the *Local Government Act* 1993 (New South Wales), to the extent that it authorises the councils to levy and recover from the carriers charges in respect of the possession, occupation and enjoyment of telecommunications cables erected on,

under or over a public place, discriminates or has the effect (whether direct or indirect) of discriminating against a carrier or carriers generally, within Clause 44(1) of Schedule 3 to the *Telecommunications Act* 1997 (Commonwealth) and is to that extent inconsistent with Clause 44(1) and invalid pursuant to Section 109 of the Constitution.

We anticipate this matter will be determined by the High Court later this year.

Angela Brewer is a Solicitor at the Sydney Office at Deacons who is acting for all the NSW local councils in the proceedings currently before the High Court.

If Video Killed the Radio Star... What's the Internet Doing to the Corpse?

In this article, Nick Abrahams and Rob Brown look at recent Australian developments in regard to the licensing of music transmitted via the internet.

Last year alone, it is reported that over \$4 million of pirated music was accessed on the internet.

The internet is the ideal distribution channel for music - frictionless conveyance of IP at virtually no incidental cost. Unfortunately for the owners of the music copyrights consumers have found the benefits before the copyright owners have found the business models to control and exploit distribution. Consequently, copyright owners have waged a war on the companies seeking to profit from their IP and it looks like the battle lines have been extended to include not only peer-to-peer software providers (like Grokster and Napster) but also consumers who flagrantly disregard the laws of copyright. This article examines the nature of copyright in songs, music licensing in Australia and the problems associated with music licensing regimes and the internet.

COPYRIGHT IN SONGS

The Works

The protection offered by the *Copyright Act 1968* (Cth) ("**Copyright Act**") ordinarily consists of what are sometimes referred to as the "songwriter's copyright" and the "performer's copyright". The former is made up of the lyrics and the music as literary and musical works respectively (section 31, Copyright Act). The latter is made up of the sound recording of the particular literary and musical work (section 85, Copyright Act). Generally the songwriter's copyright is owned by the writer of the music and lyrics but assigned to a music publishing company. The performer's copyright is generally owned by the record label which produces the recording.

To take one example, The Presidents of the United States of America recorded a cover of the Buggles' song "Video Killed the Radio Star" in the late 1990's. The lyrics are a literary work, the score a musical work, and both the Buggles' and The Presidents of the United States of America's versions as recorded are sound

recordings. The owner of the sound recording in the later version is the music company Sony Music, and the literary and musical work is owned jointly by music publishers, Warner Chappell (50%) and Universal Music (50%). Universal Music owns the sound recording of the original Buggles' version of the song.

The Rights

Permission needs to be obtained from the relevant copyright owners to do anything in relation to the work or sound recording that is exclusively reserved to the copyright owner, subject to certain exceptions. Copyright in relation to literary and musical works, and sound recordings, under sections 31 and 85 of the Copyright Act respectively, consists of the exclusive right to:

- (1) reproduce the work in material form or make a copy of the work ("**reproduction right**");
- (2) perform the work or cause the work to be heard in public ("**performance right**"); and
- (3) communicate the work to the public ("**communication right**").

As well as the more obvious reproduction where a direct copy is made, under section 21 of the Copyright Act, the lyrics and score are reproduced if a sound recording is made of the work. The literary and musical work and sound recording would also be reproduced if converted into or from a digital or other electronic machine-readable form.

Section 27(2) of the Copyright Act provides that "communication" of a work or sound recording does not constitute "performance" or "causing...sounds to be heard", so that where the communication right is being exercised, the performance right does not apply. Accordingly, where one is considering online licensing, it is only necessary to consider the communication and reproduction rights.

The communication right is a technology neutral right of communication to the public. Communication is defined, under

section 10 of the Copyright Act, to mean "electronically transmit" or "make available online". The right will include active communication (eg webcasting) and passive communication (eg downloading of audio files on request). "To the public" is defined to mean the public within or outside Australia, potentially catching both foreign websites providing access to songs to Australians, as well as Australian websites providing access to songs to foreigners, although it will not catch wholly foreign activities.

The Infringements

In determining whether there has been an infringement of copyright it is necessary to ascertain where the activity which constitutes the infringement has taken place. Sections 36 and 101, in relation to literary and musical works, and sound recordings, respectively, provide that copyright is infringed by a person who, not being the owner of the copyright, does in Australia, or authorises the doing in Australia of an act comprised in the copyright. Consequently, it will be necessary to ascertain whether an act constituting an infringement has occurred in Australia. Obviously, determining whether an act occurs in Australia is particularly problematic in relation to the internet where many acts are cross-jurisdictional depending on the location of the host server, proxy servers and the user's computer.

In considering whether there has been an authorisation of an act comprised in the copyright, sections 36(1A) and 101(1A) list a number of factors to be taken into account. These include:

- (1) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (2) the nature of any relationship existing between the person and the person who did the act concerned; and
- (3) whether the person took any reasonable steps to prevent or avoid the doing of the act, including

whether the person complied with any relevant industry codes of practice.

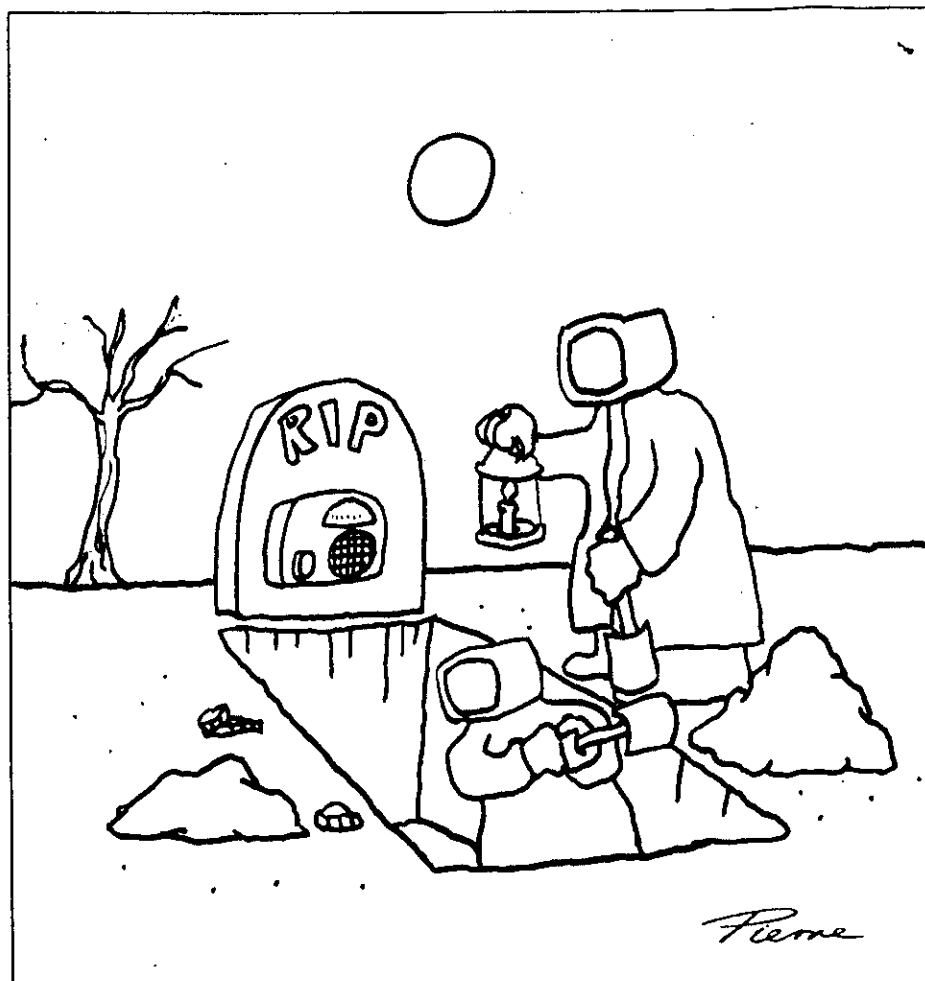
Despite the above provisions, the authorisation issue remains important for content providers and content conduits, who must consider what their users are able to do and whether they have the power to stop their users infringing copyright.

MUSIC LICENSING AND THE INTERNET

The internet allows songs to be copied by individuals and organisations into digital form, authorised or otherwise, and then accessed by any internet user via file share, download or stream (where no reproducible copy is stored on the end-user's personal computer). In a bid to stop the pirating of music via the internet recording companies commenced proceedings against software companies such as Grokster and Napster which developed file swapping software. The recent failure of one such high profile case in the United States against Grokster and Streamcast has resulted in some indications from recording companies that they intend to target individuals next. While this seems a drastic step, it should be said that the recording companies are not taking a purely defensive approach to licensing music on the internet. The difficult issue is that a business model for licensing music on the internet is not only technically difficult but is also legally complex.

The licensing of music on the internet is made legally complex as a result of the multiple copyrights contained in each song. For example, if a company was going to make the Buggles version of "Video Killed the Radio Star" available via the internet, they need the permission of the owners of the literary and musical works (Warner Chappell and Universal Music) and also the owner of the sound recording (Universal Music). To clear the rights for every song individually would be an administrative nightmare, so copyright permission and royalties are dealt with by collecting societies.

Traditionally, collecting societies have given permission and collected copyright royalties on behalf of copyright owners for both offline and online use. In Australia, the relevant collection societies for the licensing of copyright are the Australasian Mechanical Copyright Owners Society Limited ("AMCOS"); the Australasian Performing Right Association Limited ("APRA") and the Phonographic Performance Company of Australia ("PPCA"). APRA licenses the



right to perform/communicate musical and literary works to the public and AMCOS licenses the right to reproduce musical and literary works. Any complication that arises from this distinction is ameliorated by the fact that APRA acts as an agent for AMCOS and actually grants licences that are specific to an activity, such as operating a radio station or playing music in a pub, which cover the performance/communication and reproduction rights to both the musical and literary works contained in a song. The PPCA represents the owners of copyright in the sound recordings and licenses the performance/communication right in the sound recording.

Internet Licences

APRA/AMCOS have developed a large number of licence types to cover the different types of ways that songs are used on the internet. The licences cover, amongst other things, the following types of internet based song use by websites:

- preview clips of songs;
- looped background music;
- on-demand clips and works; and
- streamed radio services.

APRA/AMCOS have also indicated that

they are willing to arrange licences for copyright use not currently covered by one of their licences. At this time PPCA has not developed blanket licences for the communication and reproduction of copyright in sound recordings on the internet. Consequently, it is necessary for the user to obtain a specific licence directly from the owner of each sound recording made available on the internet.

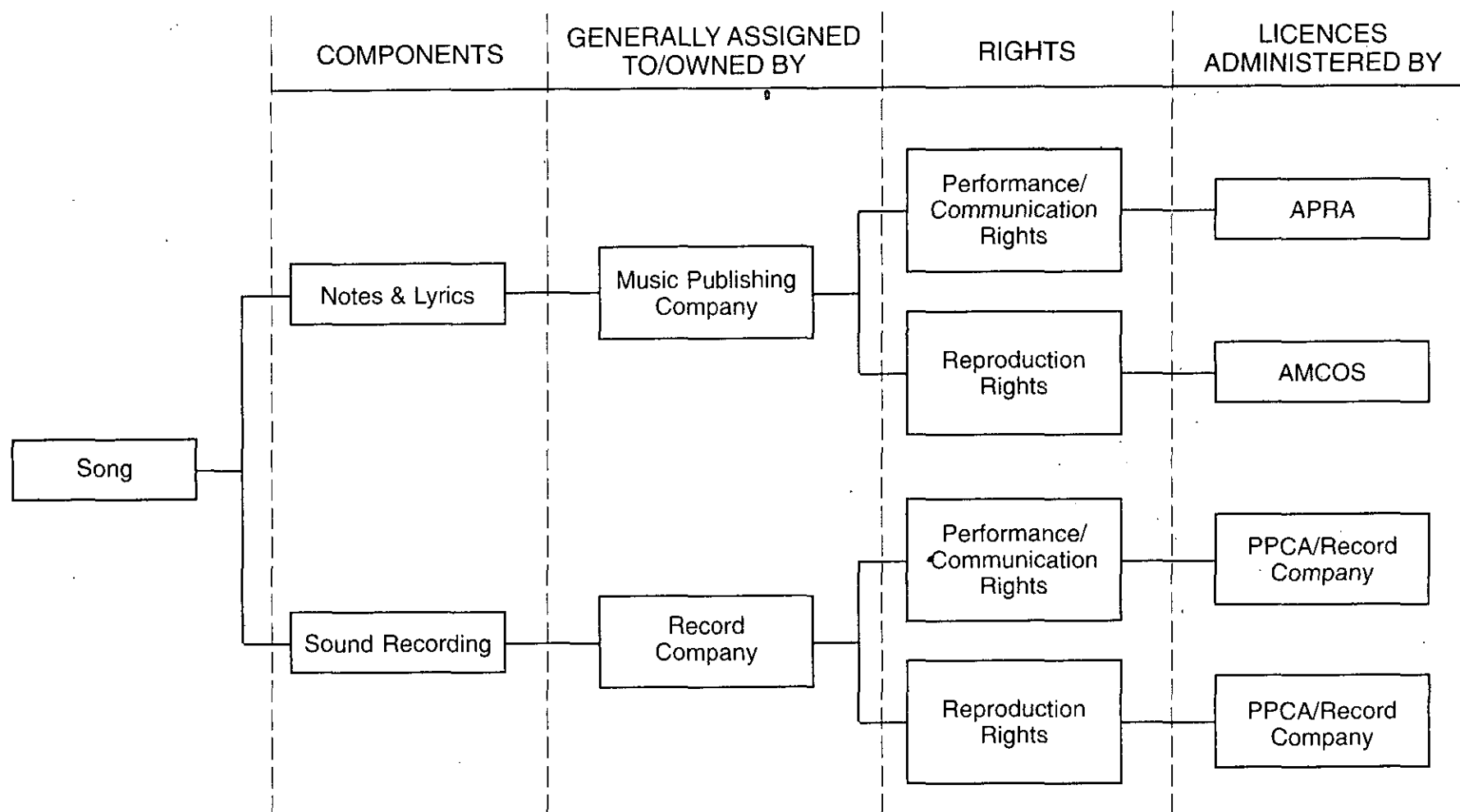
Website operators wanting to use music on their sites will therefore need a blanket licence from APRA/AMCOS for all songs used and an individual licence for each song from the owner of the sound recording (generally the record labels directly).

CONCLUSION

While it may take some time, we can be certain that the music industry will weather this storm as it has weathered so many others in the past (blank tapes, pirate CDs etc.) and will emerge with a workable business model balancing user experience with economic benefits.

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MUSIC RIGHTS IN AUSTRALIA



Metro Goldwyn Mayer Studios v Grokster Ltd and Streamcast Networks Inc

In this article, Clare Cunliffe examines the United States District Court of Central California decision in *Metro Goldwyn Mayer Studios v Grokster Ltd and Streamcast Networks Inc*.

INTRODUCTION

The development of copyright law is a record of changing technology and the judicial policy of attempting to balance existing copyright against the potential for new innovation. In the context of the law on contributory copyright infringement, case law in Australia and overseas has demonstrated judicial recognition of the need to encourage the development of new technology where technology which is used for infringing purposes also has substantial non-infringing uses, present or potential.

To paraphrase the Supreme Court in *Sony Betamax* case,¹ major technological innovations alter the market for copyrighted materials, and raise permutations of competing interests that are inevitably implicated by this technology:

*"In a case ... [where the legislature] has not plainly marked our course, [courts] must be circumspect in construing the scope of rights created by a legislative enactment which never calculated such a calculus of interests."*²

The impact of the internet and simultaneously developing digital technologies on copyright law has posed a whole new series of issues for the judiciary, intellectual property lawyers and academics. In *A & M Records v Napster Inc* (*A & M Records v Napster Inc*) (114 F Supp 2d 896 (ND Cal 2000)), the District Court held that the defendants were liable for contributory infringement for their provision of an innovative software. The software enabled file sharing between users' computers, but was used predominantly to exchange compressed music files (MP3s) which infringed the plaintiffs' copyright. The decision was affirmed on appeal in *A & M Records v Napster Inc* (*Napster*) (239 F 3d 1004).

Metro Goldwyn Mayer Studios v Grokster Ltd and Streamcast Networks Inc (US District Court of Central California 25 April 2003) (*Grokster*) also considered the issue of contributory copyright infringement in the context of file sharing software made available by the defendants and widely used by end users for infringing purposes. However, important technological developments between *Napster* and *Grokster* which differentiated the software which was

the subject of the proceedings led to a finding in *Grokster* that the defendants were not liable for contributory or vicarious infringement (although it is likely that this decision will be appealed by the plaintiffs).

In light of these developments to the law of contributory infringement, this article will consider:

- The development of the law of contributory infringement in the United States;
- The likely outcome if *Grokster* were litigated in Australia; and
- The possible ramifications, legal and otherwise, of *Grokster*.

BACKGROUND: THE US STORY SO FAR

The so called 'staple article of commerce' doctrine, developed in *Sony Corp v Universal City Studios Inc* 464 US 417 (*Sony Betamax*), can be seen as consonant with copyright's underlying objective of 'Promot[ing] the progress of Science and Useful Arts'.³ The doctrine applies in cases where contributory infringement is alleged.

Generally, a finding of contributory, material or vicarious infringement under US law will be made only where:

- A third party is found to directly infringe⁴; and
- In the case of contributory infringement: a defendant, who knows or has reason to know of the infringing activity, induces, causes or materially contributes⁵ to the infringing conduct.⁶

In *Sony Betamax*, the US Supreme Court (*the Supreme Court*) rejected contributory infringement claims brought by movie studios against the manufacturers and distributors of the Sony Betamax video tape recorder. The video tape recorder allowed users to record movies from television. The Supreme Court found that the video tape recorder was used in order to facilitate 'time-shifting' (recording now to watch later, which was found to be a non-infringing use) and as a method of archiving movies (which was accepted to be an infringing use).

The Supreme Court held that there was no precedent for the applicant's attempt to impose copyright liability upon the

distributors of copying equipment, nor for the imposition of vicarious liability on the basis that manufacturers and distributors sold the technology with the *constructive* knowledge that customers could use the equipment to make unauthorised copies of authorised material.

The Supreme Court held that the exercise of copyright rights did not justify limitations on the distribution of technology which might facilitate copyright infringement, since relief of this kind 'would enlarge the scope of the respondent's statutory monopoly to encompass control over an article of commerce that is not the subject of copyright protection'.⁷ Where an article is capable of substantial non-infringing uses, sale of that article will not be contributory infringement (*the Sony Betamax doctrine*).

The *Sony Betamax* doctrine, which is borrowed from patent law, has been applied particularly to new technologies. It can be seen as a kind of extension to the general principle, articulated throughout intellectual property law, that in the absence of clear legislative guidance courts will be cautious before finding that protection of existing intellectual property rights should be favoured at the expense of innovation tomorrow. The importance of future uses and development of technology is a principle reflected by the fact that the doctrine will protect even those technologies which are 'merely' capable of substantial non-infringing use.⁸

However, an important limitation to the *Sony Betamax* doctrine was articulated in *A & M Records v Napster Inc*. The defendant in *A & M Records v Napster Inc* offered a set of interrelated services. In combination, the services offered 'peer to peer' digital transfer of compressed musical files, or MP3s, between users over the internet. It did so by providing users with a free download of Napster software, which enabled individual users to indicate MP3 files they were willing to share with other users. This information and user details were uploaded into Napster's databases. The databases were constantly updated as users logged on and off to reflect those users on the Napster network at any given time. All users could access all available MP3 files on the database. Users could identify MP3 files held by host users by use of a proprietary search engine or by use of a hotlist. Users would then 'request' MP3s from a host user holding the relevant MP3.

the Napster network would identify the internet protocol address of the host user, and forward through the details to the requesting user. The requesting user's software used this information to establish a direct connection with the host user and download the MP3. That is, Napster acted as a dispatcher, introducing a person looking for a song to the person with that song available. Once the introduction was made, the actual transfer of the song was handled directly between users.

Napster was sued by eighteen record companies, including A&M Records, for contributory and vicarious copyright infringement. The plaintiffs sought an interlocutory injunction preventing Napster from engaging or facilitating others in copying, downloading, uploading, transmitting or distributing the plaintiff's copyrighted works. The plaintiffs were successful at first instance (before the District Court) and Napster appealed to the Ninth Circuit.

Importantly, the Ninth Circuit also held that the *Sony Betamax* doctrine could not apply because Napster, unlike the defendants in the *Sony Betamax*, exercised ongoing control over its services. The Court held that Napster had actual knowledge of direct infringement by reason of a notification by the plaintiffs⁹, and by providing the site and facilities (ie the network, proprietary software, search engine, servers, and means of establishing a connection between computers) for the infringement,¹⁰ materially contributed to the infringement. In failing to prevent the unauthorised trading of copyright music, the District Court held that Napster facilitated infringement. It was significant that Napster had actual and not merely constructive knowledge of direct infringement *at a time* during which the defendant materially contributed to the infringement.¹¹ A finding of contributory infringement against Napster therefore had real ramifications for the direct infringers using the service, since, as the court in *Grokster* noted, 'Napster ... served as the axis of the file-sharing network's wheel. When Napster closed down, the Napster file-sharing network disappeared with it.'¹²

The decision in *Napster* turned on the finding that the defendant exercised ongoing control over the services it offered. *Napster* left open the possibility that provision of a similar peer to peer file sharing service, which did not rely on a centralised database and which could therefore not be controlled with the same ease by a software provider, would not constitute contributory infringement. This possibility was litigated in *Grokster*.

THE EVOLUTION OF PEER TO PEER: GROKSTER

In *Grokster*, both defendants distributed free software, which could be downloaded by users free of charge and which enabled the free exchange of copyrighted music, movies, and other digital media over the internet.¹³ It

was also accepted by the court that the software was used to locate and transfer a variety of non-copyrighted material.¹⁴ The plaintiffs argued that the defendants were liable for contributory and vicarious copyright infringement by reason of their provision of software.

Although the different defendants used different software platforms, there were some important similarities between the services offered by all defendants and the services offered by Napster. In particular, users could download software from servers operated by the defendants. Once installed, users could elect to share files (not limited to MP3 files) located on the user's computer. When the downloaded software was launched, users were automatically connected to a peer to peer network and their nominated files made available to any other users on the network. Users could then search the pool of shared files by various means. Users could request specific files from other users who 'host' that file, by clicking on a file and initiating a direct transfer of those files between the host computer and the requesting computer.

However, there were also important distinguishing factors between the package of services offered by the defendant in *Napster* and those at issue in *Grokster*. In particular, whereas Napster hosted a central list of files available on each users' computer 'and thus served as the axis of the file sharing network's wheel', *Grokster* did not operate any centralised file sharing network. Rather, users' access to files occurred by means of connection to a 'supernode', or endpoint on the Internet, typically a user's computer. Individual users' computers would automatically self select a supernode, which might change from day to day. After connection to a network, a user's queries would be relayed among supernodes, maximising the breadth of the search. While Napster searches all utilised a single 'supernode' owned and operated by Napster, users of *Grokster* software could search for and initiate transfers of files without any information being transmitted through *Grokster*'s computers. In the case of the defendant *Streamcast*, the network was even more decentralised. Each users' computers would connect by identifying another peer-to-peer network user by means of a public directory (which was not operated by *Streamcast*), and connecting to the other user. Search requests would be passed from user to user, until a match was found or the search expired. File transfer would take place directly between the requesting user's computer and the host user's computer.

On the basis of the information flow and the method of file transfer, the Court did not implicate the defendant proprietors of *Grokster* and *Streamcast* as materially involved in infringement, since neither facilitated the exchange of files as Napster did:

If either Defendant closed their doors and deactivated all computers within their control, users of their product could continue sharing files with little or no interruption ... [by comparison,] If Napsier deactivated its computers, users would no longer be able to share files through the Napster network.¹⁵

The District Court also rejected an argument that the defendants were vicariously liable for infringement, since it found that there was no evidence indicating that the Defendants had the ability to supervise and control the infringing conduct (all of which occurred after the product had passed to end users). The Court rejected an argument by the plaintiffs that the defendants should be liable because the software could have been designed so as to be less susceptible to unlawful use.¹⁶

HOW WOULD GROKSTER BE DECIDED IN AUSTRALIA?

Under the *Copyright Act 1968* (Cth) (*The Copyright Act*), owners of copyright works (literary, dramatic, artistic and musical works) and other subject matter (sound recordings, films and broadcasts) have an exclusive right to communicate to the public¹⁷. 'The public' is a broad term which will encompass individuals in private circumstances, or small groups of people, where the facility would be available to the public if they chose to avail themselves.¹⁸ Communicate is defined broadly as:

"make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter."¹⁹

Section 22(6) of the Copyright Act specifies that it is the person responsible for determining the content of the communication who is responsible for making the communication.

On the basis of section 22(6), it is unlikely that Australian Courts would find that *Grokster* and *Streamcast* themselves are responsible for infringement by way of unauthorised communication, since it is the users of the software who select the content of files which are made available for transfer. However, it is likely that Australian Courts would find that users of the *Grokster* and *Streamcast* services who make copyrighted material available online to other users without the authorisation of the copyright owner are communicating within the meaning of the Copyright Act, and thus infringing the copyright owner's exclusive rights.

Sections 36 and 101, in relation to literary and musical works and sound recordings, respectively, provide that copyright is infringed by a person who, not being the owner of the copyright, does in Australia, or authorises the doing in Australia of an act

comprised in the copyright.²⁰ In considering whether there has been an authorisation of an act comprised in the copyright, sections 36(1A) and 101(1A) list a number of factors to be taken into account. These include:

- (1) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (2) the nature of any relationship existing between the person and the person who did the act concerned; and
- (3) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Although the application of these factors (which are a codification of principles articulated by pre-existing case law) will be at the discretion of the Court, it is clear that where a party is aware of a clear likelihood of infringement, and adequate steps are not taken to limit or avoid this likelihood, the party's inactivity may be found to constitute authorisation.²¹

However, this test is clearly dependent on the extent of the alleged infringer's power to prevent the doing of the infringing act. It has been held that some degree of connection or control must exist between the alleged contributory infringer and the direct infringer.²² While Australian courts have refrained from speculating what degree of control must exist for authorisation to be found, it has been noted that there may be a distinction between infringement on the defendant's premises and that undertaken elsewhere.²³ If Australian Courts were to adopt analogous reasoning to that of the District Court in *Grokster*, it would clearly be open to the Court to find that although the defendants in *Grokster* were aware of the potential for infringement, the design of the peer-to-peer sharing system (unlike the design of the Napster network) was such that they did not have the requisite power to prevent unauthorised usage of copyright materials, and therefore that no action in authorisation could be sustained. This conclusion would be supported by the facts found by the District Court in *Grokster*, that the Defendants undertook efforts to avoid assisting users who were using the software for improper purposes,²⁴ although it could be argued that the defendant should be required to inform users of their obligations under copyright law in order to fulfil all 'reasonable steps to prevent or avoid the doing of the act'.

In summary, there is a probability that the decentralised design of the specific peer to peer filing systems at issue in *Grokster* would mean that Australian Courts would, by a process of reasoning analogous to that adopted by the District Court in *Grokster*, conclude that authorisation of infringement was not made out.

This raises the issue of how copyright owners can protect their copyright in the face of new technological innovations. The options are canvassed below.

PUTTING THE GENIE BACK IN THE BOTTLE: HOW THE ANTI-PIRACY BATTLE IS BEING FOUGHT

In some senses, the evolution of peer-to-peer file sharing systems to a more decentralised model might be seen as an inevitable concomitant of the *Napster* decision. As the District Court in *Grokster* stated:

*"The Court is not blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares. While the Court need not decide whether steps could be taken to reduce the susceptibility of such software to unlawful use, assuming such steps could be taken, additional legislative guidance may be well-counseled."*²⁵

It may be that the decision in *Grokster* will spark legislative reform aimed at ensuring that software designers and manufacturers undertake all necessary steps to minimise the possibility of copyright infringement by users.

In the meantime, a move towards prosecution of direct infringers - ie the users of software systems - is emerging in Australia and internationally. In April, three Australians were arrested on criminal charges for online music piracy.²⁶ The recording industry in America has made similar moves to identify and prosecute users who are engaging in piracy.²⁷ Music industry representatives have suggest that high profile prosecutions of infringing users may have a deterrent effect on would-be infringers.²⁸

Finally, it has been suggested that the development of the law will lead to a non legal resolution of the issues, as copyright holders are spurred to adopt and adapt technological mechanisms so as to either invest more in the development and technological mechanisms to stop copyright infringement from occurring,²⁹ or to enable accessible and inexpensive authorised online access to copyright materials.³⁰ If this materialises, innovation may beget innovation, as copyright holders take the opportunity to control their copyrighted materials through technological rather judicial means.

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- 1 Sony Corp v Universal City Studios Inc 464 US 417
- 2 Sony Betamax 431
- 3 US Constitution, Article 1, 8, clause 8
- 4 Sony Betamax at 464

5 Material contribution will be found where it would be difficult for infringing activity to take place without the support services provided by the defendant: *Cable/Home Communication Corp*. 902 F 2d, 846; *Sega Enter Ltd v MAPHIA* 948 F. Supp 923, 933.

6 *Gershwin Publishing Corporation v Columbia Artists Management Inc* 443 F 2d 1159, 1162; *Fonovisa Inc v Cherry Auction Inc* 76 F 3d 259, 264 (9th cir 1996).

7 Sony Betamax at 421

8 Sony Betamax at 442.

9 *Napster* (9th cir) 1020

10 *Napster* (9th cir) 1022. This provision of virtual space was considered to be analogous to providing space, parking, advertising utilities, plumbing and customers for a swap meet where counterfeit goods are sold (see *Fonovisa Inc v Cherry Auction Inc* 76 F 3d 259, 264).

11 *Napster* at 1020 to 1022.

12 *Grokster* at 18-19.

13 *Grokster* at 9-10.

14 *Grokster* at 11.

15 *Grokster* at 24

16 *Grokster* at 33

17 'To the public' is defined to mean the public within or outside Australia, potentially catching both foreign websites providing access to songs to Australians, as well as Australian websites providing access to songs to foreigners, although it will not catch wholly foreign activities.

18 See, in the context of performance and broadcast rights (which were replaced by the technology neutral broadcasting right) *Telstra Corp Ltd v Australasian Performing Right Association* (1997) 191 CLR 140 at 155-156.

19 Copyright Act 1968, Section 10

20 Although determining whether an act occurs in Australia is particularly problematic in relation to the internet where many acts are cross-jurisdictional. However, the implications of the *Gutnick* decision has widened the jurisdiction of Australian Courts over cross jurisdictional acts on the internet. *Gutnick v Dow Jones & Co Inc* [2002] HCA 56) (cf the US Supreme Court case *Young v New Haven Advocate*, (List 538 US), May 19 2003)).

21 See *UNSW v Moorehouse* [1975] 133 CLR 1

22 English case law on the issue of authorisation emphasises that whether inactivity will amount to indirect infringement will depend in part on whether a party has the power to prevent infringement. For example, mere manufacture of a twin tape recording deck which is capable of infringing copyright will not be taken to infringe copyright. Manufacture is not encouragement of infringement: *BCS Songs v Amstrad Consumer Electronics Plc* [1988] AC 1013

23 see *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274 at 286-287

24 *Grokster* at 25

25 *Grokster* at 33.

26 'Piracy Arrests 'First In World' Australian Financial Review, 28 April 2003.

27 'Justice Sides With Record Industry' Australian Financial Review, 22 April 2003.

28 'Entertainment Industry Loses In Web Case', New York Times, 26 April 2003

29 Terence Lau, 'Australia v Napster: how would Australian Courts Respond?' 14(10) Australian Intellectual Property Law Bulletin (2002) 121 at 130.

30 'Entertainment Industry Loses In Web Case' Part II, New York Times, 26 April 2003

Telecommunications Networks - Carrier Powers Confirmed

Shane Barber reviews a recent decision of the Land and Environment Court in New South Wales in *Hurstville City Council v Hutchison 3G Australia Pty Ltd* which confirms the sometimes controversial powers of telecommunications carriers when rolling out their networks.

At the time of deregulation of the telecommunications industry in Australia in 1997, the extensive network rollout powers enjoyed by the then two landline telecommunications carriers (Telstra and Optus Networks) and the three mobile carriers (Telstra, Optus Mobile and Vodafone) were significantly curtailed. At the time a political debate was raging in Australia following Optus' controversial decision to roll out its fibre optic cable network aerially and the resultant concern in many communities of the anticipated visual pollution it would create. At the same time, significant concern was also raised about the visual pollution then created by the proliferation of mobile phone infrastructure, especially towers, and the potential for even greater visual pollution following de-regulation.

The current powers of telecommunications carriers are contained in Schedule 3 to the *Telecommunications Act, 1997* ("Act"), the associated *Telecommunications Code of Practice, 1997* ("Code") and the *Telecommunications (Low Impact Facilities) Determination, 1997* ("Determination"), as amended in 1999.

While Schedule 3 to the Act gives certain powers to carriers to inspect land, to install facilities (especially low impact facilities as defined in the Determination) and, importantly, to maintain facilities, those powers do not extend to, among other things:

- rolling out aerial cable;
- installing new telecommunications towers and poles; and
- except in certain circumstances, installing other facilities which are not specifically listed in the Schedule to the Determination,

Provided the carriers comply with the strict requirements of the Act, Code and Determination, clause 37 of Schedule 3 to the Act exempts them from the requirement to comply with many State and Territory laws when rolling out their networks.

Some 1999 amendments to the Determination confirmed the general policy adopted by the Act, being the encouragement of the co-location of facilities on existing towers and on public utility infrastructure, provided that co-location was within certain limits.

In addition to these restrictions, the Code provides some strict guidelines regarding the manner of notifying owners and occupiers of land of these limited permitted activities and details a prescriptive objection regime, in first instance to the Telecommunications Industry Ombudsman.

The fundamental difficulty faced by carriers under the current regime is that while they are encouraged to co-locate their facilities on other telecommunications or public utility infrastructure (or otherwise attach their facilities to existing buildings in a manner prescribed by the Determination), public utilities, particularly local councils, and other land owners have aggressively sought to repel the carrier's efforts to do same.

Hutchison 3G Australia Pty Limited ("H3GA"), a licensed telecommunications carrier currently rolling out its revolutionary third generation network, has like many other carriers entered into negotiations with local councils who are confronted by their inability to regulate the carriers in the rollout of their networks if the carriers are complying with the Act, Code and Determination.

In March 2003, Hurstville City Council ("Council") brought an application in the Land and Environment Court of New South Wales ("Court") against H3GA to test much of the scope of the carrier's powers and immunities in the Act, Code and Determination. *Pain J*, in a judgment which no doubt will be the subject of much discussion in the industry, provided much needed clarity in relation to those powers, in all circumstances re-enforcing the views of the carriers.

FACTS

In the case before the Court, H3GA, after examining a large number of sites in the area, determined that a sports light pole located in Oatley Park, Oatley New South Wales was the appropriate location for some panel antennas and a parabolic dish to be used as part of its proposed 3G network. H3GA proposed to install a "low impact" telecommunications facility on top of the light pole and, as a result, issued to the owners and occupiers of the land, including Council, the relevant notices required by the Act and the Code.

As permitted by the Code, the Notice contained 2 parts. The first made reference to a maintenance activity under clause 7 of the Schedule 3 to the Act pursuant to which H3GA would remove Council's existing pole and replace it with another pole to be owned by Council which was stronger and able to support the proposed telecommunications facility to be installed at the top of that light pole.

In accordance with clause 7 of Schedule 3 to the Act, the replacement pole was the same height as the existing pole, with the same apparent volume and was to be located in the same location. The new pole would remain owned by Council.

The second aspect of the Notice was an installation activity pursuant to which H3GA proposed to install a parabolic antenna and 3 panel antennas on the new pole, along with the construction of the associated brick equipment shelter in another location in the park.

While Council did not formally object to the activity in the time required by the Code, H3GA agreed to hold off construction for a certain period, without prejudice to any of its rights under the Notice, to enable some further consultation with Council and some concerned local residents.

Towards the end of the agreed consultation period Council removed the existing light pole at the site, saying that the existing light pole was required for another venue.

H3GA then called off the consultation process and began work at the site, making excavations for the footings of the new light pole where the existing light pole had been removed by Council. Council then served a stop work order on H3GA under the relevant New South Wales local government and environment and planning legislation.

H3GA then advised the Council that pursuant to the Act, particularly clause 37 referred to above, such stop work order was not effective and that H3GA proposed to continue with the construction. Council then commenced the proceedings in the Court.

THE ARGUMENTS

In its application before the Court, Council argued essentially four grounds as to why H3GA should be prevented from continuing with its work at the site. These grounds were as follows:

- the Hurstville Local Environmental Plan 1994 ("LEP") prohibited the works that H3GA was undertaking at Oatley Park;
- the Notice given by H3GA to the Council was defective and did not contain all the relevant detail required by the Act and Code and, further, it was beyond the power of H3GA to give such a Notice to Council;
- it was not possible for H3GA to swap out a pole under the maintenance power in clause 7 of Schedule 3 to the Act, particularly given that the installation of a tower or a pole was expressly prohibited by the installation power found in clause 6 of Schedule 3 to the Act; and
- even if H3GA could use the maintenance power to swap out the pole, the proposed installation at the top of the pole did not fit within the low impact requirements for antenna installations pursuant to the Act and the Determination as it protruded too far from the pole (Council arguing that the maximum protrusion including the panels was 3 metres rather than up to 5.8 metres).

In relation to the use of the maintenance power, there were essentially 2 key arguments. Firstly, pursuant to clause 7 of Schedule 3 of the Act, before maintenance can be undertaken, the thing being maintained, in this case the pole, had to be a "facility" for the purposes of the Act. While "facility" is defined in section 7 of the Act to mean, among other things,

"any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with the telecommunications network" [our emphasis].

Council argued that, in this case, unless the pole was intended by Council to be used as part of a telecommunications network, it could not otherwise be considered to be "for use".

Secondly, even if the pole could somehow be determined to be a facility, Council argued that it was not possible to remove and replace that pole for a number of reasons, including noting that, if it was not possible to install a new pole under the installation powers, how could same effectively be done under the maintenance powers?

A complicating factor in the case was that the Council had already removed the pole which made H3GA's activities, in Council's submission, look more like the installation of a pole in any event.

H3GA addressed all of Council's grounds as follows:

- In relation to the view of Council that the LEP, created under State legislation, prevailed over any powers that H3GA had under the Act, H3GA pointed to the express provisions contained at clause 37 of schedule 3 to the Act which exempted the carrier from having to obtain development consent under such State laws provided H3GA otherwise complied with the Act, Code and the Determination. H3GA stated that this was one such case.
- In relation to the invalidity of the Notice for lack of detail, H3GA pointed not only to the detail contained within its lengthy 5 page Notice, but also to the detailed drawings attached to the Notice. It noted that those drawings were all drawn to scale and contained significant notations detailing which activities were the maintenance activities referred to in the Notice and which were the installation activities. H3GA argued that the combination of the detailed Notice and the drawings was sufficient to meet the requirements of the Code (which at clause 4.27 expressly requires details).
- In relation to whether or not the pole (ignoring the fact that it had been removed) was a facility for the

purposes of the Act, H3GA argued that the use of the words "for use" in the definition of "facility" simply meant that provided the carrier (and not the Council) had formed the intention to use that particular pole in its telecommunications network, that was sufficient.

In this regard H3GA noted that pursuant to the Code it had an obligation to seek to use public utility structures. If H3GA's interpretation of "for use" was not correct it argued that in many instances it would be impossible for it to comply with this obligation.

Presuming the Council's pole was a "facility" for the purposes of the Act, H3GA argued that it was clearly intended by the Commonwealth legislature that such poles could be swapped out under the maintenance power, irrespective of the fact that new towers could not be installed under the installation power. In this regard, among other things, H3GA pointed to the express wording of Schedule 3 to the Act, relevantly clause 7(3), which provided that reference to maintenance of a facility includes a reference to, among other things,:

... "removal ... of the original facility and ... the replacement of the whole or part of the original facility in its original location where the conditions specified in sub-clause 5 are satisfied".

Sub-clause 7(5), among other things, expressly provides that where the original facility is a tower (which in this case includes a pole), then certain pre-conditions regarding the height and apparent volume of the tower must be met. H3GA argued that if the legislature had expressly referred to towers and poles in the context of replacement of a whole of the original facility, it questioned how there can be any argument that swapping out a tower or pole was not permitted.

- Finally, in relation to whether the total protrusion of the antennas and their mount could be 5.8 metres rather than 3 metres from the top of the tower, H3GA argued that the intention was 5.8 metres. While there was ambiguity in the language of the Determination in this regard (the language working easily for horizontal protrusion but not vertical protrusion), it referred both to the South Australian case of *Telstra*

Corporation Limited v City of Onkaparinga [2001] SAERDC 55 and some guidelines published by the Australian Communications Authority. Both of these references made it clear that the best interpretation of the protrusion issue was that when the protrusion was vertical, the length of the mount could be up to 3 metres and the length of the antenna could be up to 2.8 metres from the top of that 3 metre protrusion.

THE FINDINGS

Ground 1

In relation to whether H3GA could be prevented from exercising its maintenance and installation powers because of the existing requirements of the relevant LEP, the Court effectively found that the provisions of clause 37 of Schedule 3 of the Act were wide enough to ensure that the LEP would not regulate the activities of H3GA, rather it would be regulated by the Commonwealth regime set out in the Act, Code and the Determination.

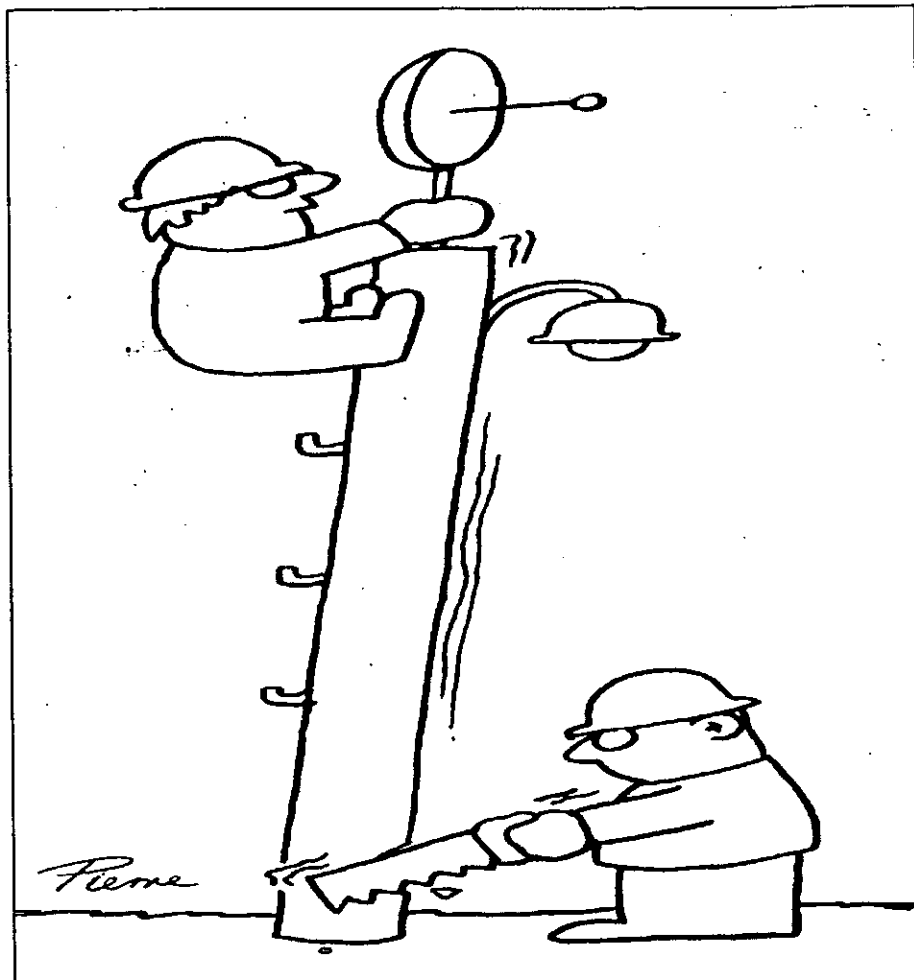
Ground 2

The Court found that the Notice given by H3GA to Council was adequate for the purposes of clause 4.27 of the Code and was not invalid. Her Honour found that while clause 4.27 required that details of the activities which the carrier expects to undertake must be given, there was no specific requirement as to the extent of those details. On the facts of the case, the Court reviewed each of the alleged inadequacies identified by the Council and found that those inadequacies were not sustained on a close examination of the Notice itself. The Court found that even if, as Council had argued, a very high level of detail was necessarily required, H3GA had met all of those requirements given the scope of details contained in both the Notice and its associated drawings.

Ground 3

In relation to the maintenance power, the Court determined that there were three issues it must consider. These were:

- whether H3GA had power to remove the pole and replace it with a new pole, relying on the maintenance power under clause 7 of Schedule 3 to the Act;
- to answer this question, it was first necessary to consider whether the pole falls within the definition of "facility" under section 7 of the Act, which involves interpreting the meaning of "for use"; and



- whether the removal of the pole by the Council prevented H3GA from relying on the maintenance power.

In relation to the use of the words "for use" in the definition of "facility" in section 7 of the Act, the Court found that those words have a plain and ordinary meaning in that they would generally be understood to mean that the structure or thing will be used in the future. In reviewing this issue further, the Court dismissed the submissions of Council which relied on sales tax exemption case decisions to indicate that the intention of "for use" rests with the Council. The Court equally dismissed the English criminal law cases used by H3GA which tended to indicate the relevant intention had to be that of a carrier.

Instead, the Court referred to other references to the words "for use" throughout the Act. For example, the Court noted that the words "is installed, ready for use or intended for use" are used in sections 20 and 21 of the Act. In this regard, the Court found:

"The fact that the words "intended for use" are not included in the definition of section 7 may be supportive of

H3GA's interpretation of "for use", that is, that facilities which when built were not intended for use in a telecommunications network can become so if the carrier identifies them for that purpose, but that is far from conclusive in this matter".

Ultimately, the Court held that H3GA's interpretation of the use of the expression "for use" was preferred given that there is a wide range of structures or things that can be used or be for use in or in connection with the telecommunications network including buildings etc. The Act anticipates that new telecommunications infrastructure will be placed on existing structures not owned by carriers and carrier would therefore need to maintain those existing structures before it could undertake some of the installation works.

Further, the Court dismissed an argument raised by the Council that the "facilities" referred to under the maintenance power had to be the same facilities that were installed under the installation power. The Court found that there was no provision in Schedule 3 of the Act linking the powers in this manner.

The Court accepted H3GA's submission that while the carrier's intention is the

relevant one. It did not need to consider the exact time when that intention manifested itself and Council's pole became a facility, suffice to say that it certainly was a facility at the time that H3GA served its Notice on the Council.

It having been determined that the light pole in Oatley Park was a facility for the purpose of the maintenance power, the Court then found that H3GA may remove and replace the original facility, in this case the pole, presumably because of the clear wording of clause 7 of Schedule 3 in this regard.

As to the effect of Council's removal of the pole before the maintenance activity was undertaken, the Court agreed with H3GA's interpretation that Council had simply undertaken the first of the two tasks that H3GA would otherwise undertake i.e. the removal of the pole. It was then possible for H3GA to erect the replacement pole (provided it was the same height, same apparent volume and in the original location as the old one) and still remain within the scope of the maintenance powers and not the installation powers.

Finally, while not a key part of the decision, the Court did put to rest an argument frequently raised by Councils when opposing use of their infrastructure for telecommunications facilities. Councils

often raise the argument that the carrier's interpretation of their maintenance and installations powers cannot be correct as the carriers, in the Council's view, assume ownership of what to that point had been a piece of Council's infrastructure. The Court found however that clause 47 of Schedule 3 of the Act provided that the pole remained in the ownership of Council notwithstanding that it is swapped out by the carrier. The Council continues to own it and is able to use that infrastructure, subject always of course to section 85ZJ of the *Crimes Act* (Cth) which places limitations on the Council's ability to interfere with certain infrastructure of telecommunications carrier placed on the top of the pole.

Ground 4

In relation to whether the mount and the antennas on the top of the new pole were low impact installations, the Court saw no reason to depart from the approach taken in the *Onkaparinga* case, noting that the literal approach to the Determination produced a result that is unlikely to be the intention of the drafters of the Determination. As a result, the Court confirmed that when installing antennas and mounts that have a vertical protrusion from the structure, the mount can extend from the top of the structure to the base of

the antenna up to 3 metres and then the antenna can rise up to 2.8 metres on top of that.

CONCLUSION

This decision of the Court is of significant importance to carriers. It may put to bed the long standing concern of Councils as to the extent of carrier's maintenance powers, re-enforcing the apparent intention of the legislature to encourage the co-location of telecommunications infrastructure on existing structures to prevent the proliferation of new towers and poles (the installation of such towers and poles still, of course, being permitted provided local government approvals are obtained).

At the time of writing, Hurstville City Council has commenced an appeal in the Court of Appeal of the Supreme Court of New South Wales which was heard in late May 2003. The appeal focussed on the "for use" arguments. A decision is pending.

The views expressed in this article are those of the author and not necessarily those of the firm or its client.

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Turning off the Television by Jock Given

A review by John Corker.

This book makes an important contribution to modern communications policy history and thinking. It does this in a well researched and entertaining way.

Primarily it is the story of how Australia has made its policy decisions to move from analogue to digital transmission of television. But it is more than that. Whilst at times the detail is painstaking in its completeness and accuracy this is what will make it a valuable reference book for many years to come.

It provides a crisp account of the rise and fall of the dotcom sector, the introduction and development of Television and Radio in Australia, the US and the UK, a fascinating story about the introduction of FM radio, an explanation of why broadcasting became something special,

a blow by blow account of the digital TV and datacasting policy and legislative decisions of the 1998 and 2000, the future of digital radio and plenty of useful views and insights for policy makers as to where the future might go and what the issues are.

It is action packed. Issues range broadly from appropriate market structures to localism in radio and TV and adequate support for Australian cultural practices and expression.

The title of the book refers to one of the key underlying assumptions made in arriving at the current digital broadcasting policy settings; that there will be a time where all analogue TVs will be turned off and the analogue spectrum returned to government for re-sale.

Given's conclusion on this issue is that:

"the introduction of digital broadcasting and the possible shut down of analogue broadcasting provide a fantasy moment for a range of analogue clear-fellers ... no-one is certain whether broadcasting's digital future is going to be a bonfire or a campfire, a revolution or an evolution ... but by the time anyone is certain, long before analogue broadcasting is turned off, there'll be another set of technologies itching to get turned on - faster or fatter or stranger than those that gripped fin de siècle [end of century] media policy".

What I like most about this book is its entertaining cartoons, quotes and quips. It is this that puts the serious tale of the evolution of digital terrestrial television in Australia in a context that allows the

reader to see the funny side and the sad side of what Given describes as "a nightmare of deals, small and large, which future observers - not a decade off, but tomorrow, next month, next year - would look at and wonder, simply, 'What were they thinking?'"

Here are some classic "Jockisms":

"Bronzed ANZACS whose heroism was supposed to have been made uniquely Australian through their drinking, smoking, gambling ways, might have found it hard to believe that by 2001, the country would outlaw both tobacco advertising (where Paul Hogan got his start) and interactive gambling services. Of the Aussie trifecta, only drinking seemed to have survived unscathed, although even that, before driving, made you a 'Bloody Idiot'."

"The people who run broadcasting may be powerful, but those who watch and listen to it will have at least as big a say in what happens to it."

and on the vast amounts paid for spectrum at auction:

"Governments in the 1990s became addicted to revenues from the sale of radiofrequency spectrum.... How much easier to sell off a bit of the ether than to raise taxes or cut spending."

"Generally governments should not be concerned about the fate of individual companies who choose to 'over-bid' for assets - there is usually some bottom-feeder around to acquire them at a more realistic price. But the fate of an entire industry with a central role in society and the economy may deserve more attention."

and as to the future of broadcasting:

"The choices to allocate spectrum and in some cases government money to fund the transition to digital TV and radio gave broadcasters a chance to stay special. But it was only a chance. The question was -and still is - what to do with it."

"The pockets of its audience are the main places TV broadcasters are likely to find new money to fund broadcasting and related electronic media services."

"What would be required to substantially reshape TV viewing or 'using' choices in Australia is a substantial new revenue stream, or significantly higher or affordable bandwidth, or a different and disruptive face in the free-to-air industry."

"It would take brave operator to try its luck with a single new free-to-air franchise in a TV market rapidly consolidating around the Foxtel partners."

and on the future of the cross-media rules:

"A first structural response might be for government to shape, and media proprietors to make a new election along the lines of the Princes of Print, Queens of the Screen, Rajahs of radio choice imposed by the cross-media laws. The choice would be to become 'Kings of Cable and Satellite' or 'Titans of Terrestrial'."

and some gems from others such as:

from Senator Bob Brown in relation to the Government's last minute decision to restrict what the national broadcasters could use their multi channels for: *"Kerry Packer could not have written this amendment better himself...I do not know what the Labor Party was given for lunch and I do not know what the government got for lunch either. But it certainly made a manifest difference to the direction this committee is going in after lunch."*

Given brings unique knowledge and experience to this text. His years as Director of the Communications Law Centre and his knowledge and history about the policy of how Australian film and television programs are nurtured and produced (from his time at the Australian Film Commission) is brought to bear on his analysis of key issues.

For example his crisp analysis of the Big Brother phenomenon demonstrates a deep understanding of the role that content plays in the digital revolution, how commercial television works and its dependence on advertising revenue.

"Big Brother ... showed how some aspects of TV broadcasting were enduring while others were declining. New revenue streams are becoming important for TV program-makers

and broadcasters, and new skills are being required to produce TV programs and their associated content and activities. However this has not condemned the social and cultural experiences and business models of free-to-air TV to overnight irrelevance."

"Big Brother would provide more television than anyone had ever dreamt of-although most of it would never make it to 'television'."

This is a valuable reference book on many layers. For example it provides the only account of the evolution of digital radio policy in this country. From an announcement by the Minister now five years ago that digital radio was just around the corner, we are still waiting for something to happen. There are very few publicly available documents explaining why this is so but now we have an account which tells this history.

The book concludes that :

"As revolutions go, broadcasting's digital transformation may be a little slower and a little less socially and economically special than promised, but its today's revolution, the media tussle of this hour. We need to make everything we can of it, while carefully preparing the ground for the next one."

This book is essential reading for all communications and media policy students but also deserves to be read widely by those who make and implement communications and media policy decisions be they politicians, bureaucrats, lawyers, broadcasters, film and TV program makers, other content producers, spectrum users, carriers, internet service providers etc. In fact anyone who wants to follow the curious path of policy decisions that now underpin Australia's transition to digital broadcasting will find some answers here.

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The Communications Law Bulletin is the journal of the Communications and Media Law Association (CAMLA) which is an independent organisation which acts as a forum for debate and discussion and welcomes the widest range of views. The views expressed in the Communications Law Bulletin and at CAMLA functions are personal views of the respective authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

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

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Communications and Media Law Association

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

Issues of interest to CAMLA members include:

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

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

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

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

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