Communications LAW
B•U•L•L•E•T•I•N
THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED
Print Post Approved PP: 234093/00011 EDITED BY NIRANJAN ARASARATNAM AND SHANE BARBER Vol 22 No 3 2003

Smile, You're on Mobile Phone Camera

Paul McLachlan takes a peek at the potentials for regulation of misuse of mobile phone cameras.

The media have been reporting community concerns about the use of the digital cameras in the latest generation mobile phones to take pictures of people in gym lockerrooms. Many gyms have reportedly banned mobile phones from locker rooms. The Attorneys-General are considering whether they should regulate the use of the technology.

How does the law deal with this conduct already? Depending on who the picture is of, which jurisdiction they are in, and the circumstances of how it was taken (and distributed), there may be a variety of different legal actions.

TELECOMS INTERCEPTION

The *Telecommunications (Interception) Act 1979* (Cth) deals with interceptions of communications passing over the telecommunications system. According to the Courts, the legislation intends both to protect the privacy of those communicating, as well as the technical integrity of the telecommunications system.[1]

Taking a photo with a mobile phone and simply storing the photo would not be an interception under the legislation. There is no communication that passes over the telecommunications system.[2]

Taking a photo with a mobile phone and then using the phone to send it to someone else, or upload it to the Internet, would also not breach the legislation because the Courts have interpreted the legislation such that a party to a communication cannot intercept the communication, especially when using equipment that is part of the telephone system (such as an ordinary mobile phone handset).[3] The legislation protects the privacy of the parties communicating, not of those whom the communication is about. The privacy rights protected are those of the person taking and sending the picture, not the person in the picture; in the same way as the legislation would prevent bugging of a conversation in which the parties discuss a third party's private affairs, but not the disclosure and recording of the private affairs as between the parties to the call themselves.

SURVEILLANCE DEVICES LEGISLATION

Each State and Territory has legislation dealing with civilian use of listening devices (devices that overhear or record private conversations).[4] Some have also updated their legislation to include other surveillance devices, including visual surveillance devices (devices that show or record private conduct). A mobile phone that can take still pictures or short moving pictures would be an "optical surveillance device" in those jurisdictions that regulate them (Victoria, Western Australia and the Northern Territory).

It would be an offence under the legislation in those jurisdictions to take a photo of private activity if you are not a party to the activity or have a warrant, or have obtained the consent of the person engaging in the activity. In Western Australia, there is also the ability to use the device if it is reasonably necessary to protect your lawful interests or in the public interest (which, in the case of gym locker-rooms, seems unlikely).

However, there is a question of the extent to which the legislation applies. The *Telecommunications (Interception)*

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Act 1979 (Cth) appears intended to cover the field with respect to the regulation of interception devices used in conjunction with telephone equipment.[5] If something is permitted under the Commonwealth legislation, but forbidden under the State legislation, does the State legislation apply? The Commonwealth legislation expressly allows for a person to overhear a private conversation where it is detected using equipment that is part of the telephone system. The same would apply for a videophone that allows someone to see a third party's private activity at the other end (for example, in the background behind the other party to the conversation). But, where the phone must first be used as a camera and then separately used as a telephone to transmit the picture (ie, it is not real-time transmission of the conduct), this is likely to fall outside the Commonwealth legislation. There is probably scope, then, for the State video surveillance legislation to apply. But, the device must allow the user to see or record private activity. Private activity is defined in the State Legislation as activity that the parties would reasonably have considered not capable of being seen. Unless in a private cubicle or an empty locker-room, undressing or showering in sight of strangers would not be private activity. Taking a photo secretly would most likely not be using a surveillance device to record private activity.

PRIVACY ACT

The Privacy Act 1988 (Cth) is unlikely to offer protection. A photo of a recognisable individual may be "personal information". However, the Act only binds business entities.

TORT

The High Court in *ABC v Lenah Game Meats*[6] signalled that there might be a tort of invasion of privacy in Australia. The District Court of Queensland recently found the existence of such a tort and awarded substantial damages for an invasion of privacy.[7] According to that case, the tort requires the infliction of physical harm (such as mental or emotional harm) and an invasion of privacy that a reasonable person of ordinary sensibilities would find highly offensive. The decision is currently on appeal.

It is early days yet for the development of such a tort. There certainly seems to be a high degree of community concern about the use of these camera phones in locker-rooms, but whether the invasion of privacy will cause mental or emotional harm will be difficult to show in each case.

DEFAMATION

While defamation protects a person's reputation, rather than their privacy, it is often used in cases where privacy has been invaded. There is already a precedent for someone taking action based on covert photographs in a locker-room. Andrew Ettinghausen sued when grainy black and white photographs of him taking a shower in the changing rooms after a football game were published in a magazine. That case involved grainy full-frontal naked photographs without his consent. He was awarded $100,000 damages.[8]

Using a mobile phone camera to take photos of somebody in the public eye does carry the risk of being sued for defamation if they are subsequently published. But, the difficulty is establishing how the picture defames the person; and it does not protect a person who has no substantial reputation or where the picture is taken but not published.

OTHER CLAIMS

Depending on the circumstances, there could be a case for criminal stalking, intentional infliction of (mental) harm, extortion, child pornography, or even misleading and deceptive conduct. However, few of these strike at the initial conduct of taking the photo without knowledge or permission; they deal with subsequent publication or use of the images. None of them provides blanket protection against the use of cameras in locker-rooms.

WHAT ARE THE A-GS TO DO?

The issues for the Attorneys-General to consider are broader than simply a ban on the use of these telephones in locker-rooms. It will not suffice simply to encourage all jurisdictions to extend their listening devices laws to visual surveillance devices (although that is a logical first step). Ultimately, this involves the convergence of technology and what is considered private. As technology becomes smaller, more sophisticated, easier to use and able to make an image available to millions instantly, community concern about what is considered private will grow. Rather than simply protecting what goes on in the privacy of the home or otherwise undetected behind closed doors, people are coming to expect what they do in public to be protected from surveillance and mass distribution. The community test is more likely to be whether the person expected to be photographed and have their conduct published to the world-at-large, rather than whether they expected it could be detected at all. What you may be comfortable doing in front of a small number of strangers, you may not be comfortable doing in front of millions.

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1 See R v Edelsten (1990) 21 NSWLR 542 (NSW Court of Crim Apl) T v Medical Board of SA (1992) 58 SASR 382 (SA Full Ct) and Green v R (1985) 135 ALR 81 (WA Court of Criminal Appeal).

2 Section 6(1).

3 Green v R (above); R v Evans & Doyle (1999) 152 FLR 352 (Vic Sup Ct).

4 Surveillance Devices Act 1999 (Vic), Surveillance Devices Act 1998 (WA), Surveillance Devices Act 2000 (NT), Invasion of Privacy Act 1971 (Qld), Listening Devices Act 1984 (NSW), Listening Devices Act 1991 (Tas), Listening Devices Act 1992 (ACT), Listening & Surveillance Devices Act 1972 (SA).

5 Miller v Miller (1978) 141 CLR 269; Edelsten v Investigating Committee of New South Wales (1986) 7 NSWLR 222.

6 (2001) 185 ALR 1.

7 Grosse v Purvis [2003] QDC 151 (unreported).

8 Ettinghausen v Australian Consolidated Press Ltd (1993) A Def R 51-065.

Review of Online Sales Contracts

Simon Minahan considers issues relevant to risk-managed online sales to an international market, and examines how to minimise some of the risks inherent in the multi-jurisdictional, international marketplace of the internet.

By now, the bulk of organisations who might be likely to do any significant business online are probably already there. Chances are, though, that they got there in a rush and without much input from their lawyers. Even if they did take advice about their online activities at the time of entering the world of e-commerce, there is a good chance that the experience of doing business online has not been entirely what was anticipated – both by them and their advisers.

Of course, there will always be newcomers to the online trading environment. The 'dot.com bubble' may have burst, but the functionality of the internet, the cost effectiveness of its reach and the fact that a good portion of the market is there already will see e-commerce continue to attract new players. So there is merit in reviewing legal aspects of online trading arrangements, in particular contractual and related instruments. As ever in commercial legal service, the exercise is one which is intrinsically about risk assessment and management. And as ever in risk management, one needs to make an assessment of the field of risk, identifying its characteristics and potential problem areas.

In international commerce, issues of jurisdiction and enforceability are always paramount. In online transactions, these issues can be fiendishly confounded. It can be practically impossible, if the client is trading into the market at large, to predict particular jurisdictional issues in advance, but it pays to at least try to identify the areas of possible difficulty and the best means of avoiding or limiting them.

This article considers these issues in light of the *United Nations Convention on International Sales of Goods*[1] (***CISG***) and certain local laws. For the purposes of discussion, it is assumed that the products for sale online are not controversial, in the sense of meeting the definition of 'goods' (eg software), and are thus covered by the CISG.

CONTRACT FORMATION

First, consider the architecture of your online deal-making. Is your client offering and the other party accepting? Or is your client inviting offers, and reserving the power of acceptance? Will systems for ordering and processing of orders be automatic, or will there be intermediate human review before acceptance?

Electronic communication is a valid medium for contract under the *Electronic Transaction (Victoria) Act 2000* (Vic) (***ETA***) and its Commonwealth and interstate equivalents,[2] all of which follow the UNCITRAL Model Law. (Many other countries have also used the UNCITRAL Model Law as a basis for their own electronic transactional law.) These acts seek to achieve technological neutrality in transactions. Accordingly, subject to the parties' intentions, most digital 'documents' and transactions are given the same legal status as paper documents and transactions.

Under the ETA, if the parties consent (expressly or implicitly), there is no impediment to forming a contract by electronic communication. Note, too, that the ETA also provides some default rules as to the time and place of offer and acceptance. Notably, the place of a party's server will not be relevant to the analysis. However, the ETA does not specify the rule to be applied in determining the question of the actual place of formation of a contract. Further, while the ETA may desire technological neutrality, the rules as to offer and acceptance are not technologically neutral – the rule for acceptance by post is different from that for acceptance by 'instantaneous communication', the former being ruled by the time and place of dispatch, and the latter by receipt.[3]

In this regard it is submitted that the 'instantaneous communication' rule, rather than the postal rule, is applicable within Australia. This means that the contract is formed where the acceptance is received. In view of this, it is obviously desirable – if local jurisdiction is desired with respect to the governing law of the contract – to have purchasers cast in the role of accepting your client's offer.[4]

The ETA provides that assent will be effective if:[5]

(a) a method is used to identify the assenting person's signature and to indicate that person's approval of the information communicated;

(b) the method is reliable (note that reliability will be assessed in the context of the technology available at the time); and

(c) the person to whom the signature is required to be given consents to that method.

Note, though, that the onus of proving assent is on the party seeking to enforce the contract, and in the standard computing environment there will always be (for the foreseeable future) evidentiary issues surrounding non-repudiation of online contracts.

Article 14 of the CISG defines 'offer' as having to be addressed to a specific person or persons and sufficiently definite as to the goods in question and their price. It must evince an intention to be binding upon acceptance. The same principle applies, *mutatis mutandis*, for 'acceptance'.

Article 24 of the CISG provides that:

> 'an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence'.

This is in essence a 'reception' regime. Clearly, email was not in the minds of the drafters of the CISG. Equally clearly, however, the CISG was intended to cover all cases. Reading together the personal delivery requirement of this Article with s 13 of ETA, it seems tolerably clear that any offer will be sent when it leaves a party's information system and will be deemed to be personally delivered when it enters the recipient's information system.[6] It is therefore submitted that the CISG and Australian law are complementary.

However, there has been some divergence under the CISG regarding the situation where the buyer and the seller each stipulate mutually incompatible terms in their communications. Accordingly, it is as well to specify (in pre-contract or contract documents, as the case may be) what will be treated as an offer and how acceptance is to be communicated, to avoid arguments about first versus last 'shots' or the cancelling out of terms.

Note further that Articles 12 and 13 of the CISG, which discuss the requirement of writing in contracts, do not contemplate electronic data as writing – but the ETA or the contract itself are capable of addressing this deficiency. As noted above, under the ETA, a digital signature will be effective if its reliability is 'appropriate for the purposes for which the information was communicated'.[7] The precise meaning of this statement remains to be defined; it does not, for example, preclude a 'click-wrap' assent from being effective, but it does not secure the effectiveness of such assent either. If assent is to be by way of 'click-wrap', then care needs to be taken to satisfy the principles in the 'ticket' cases – still the best authority to the likely direction of Australian law in the absence of a specific 'click-wrap' decision. US decisions such as *Specht*[8] and *Verio*[9] also give good indications of the likely (and common sense) requirements such as prominently displaying terms and conditions online and making sure that no 'click' indication of assent can be given without the customer seeing the relevant terms and conditions. Note also that this can be an issue for enforceability of given terms, as well as for the formation of the contract as a whole.

As a corollary to this, it is important to make sure that your client's identity is clearly made known online – a lot of companies seem to regard their formal identity and location as some kind of secret once they start doing business on the internet. Don't let them jeopardise sales with such 'coyness'!

WARRANTIES

Be aware of the operation of local statutes – especially the *Trade Practices Act 1974* (Cth) – even though it is an international online transaction that is in issue. Pay special attention to this if it is intended to select local law as the applicable law of the contract. Under the CISG, limitation and exclusion of liability is possible, and the CISG ought to be considered, and particular limitations or exclusions specified, in the sale terms.

PAYMENT

Obviously, international online sales may have to deal with a number of complexities concerning payment and delivery. Currency and method of payment need to be considered and stipulated. Methods may include credit card, SWIFT or CHAPS electronic transfers, letters of credit, bank transfers and various form of digital cash, such as Paypal.

Tax is potentially tricky for all concerned – even the tax authorities themselves! The general rule of thumb is that goods are taxed at the place of purchase/ delivery, and services at the supplier's location. However, this is still being debated with respect to electronic taxation and there are real dangers of multiple taxation events. Specialist advice and careful drafting is strongly recommended in this regard. That said, a change from tried and true payment arrangements will not generally be necessary.

The amount and manner of payment need to be stipulated, as do whether payment is to be made before or on delivery, and the usual terms of payment and delivery such as FOB (note the varied definitions under the CISG). Also, while the CISG does provide for interest if a payment is late, it does not specify a default rate of interest – this should be done expressly in the contract to avoid adding the long list of litigants under the CISG who have argued this point.

DISPUTE RESOLUTION

If your client opts for arbitration, try to ensure that the other party's home country is a signatory to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,[10] in order to secure recovery. Aside from this, one needs to meet the usual issues in contracting for arbitration such as compliance with local statute requirements, and ensuring that 'click-wrap' assent (if applicable) is informed and therefore good.

CHOICE OF LAW

Any choice of law or forum clause needs to be reasonable to be enforceable. This means it should have a reasonable nexus to the transaction. Generally, stipulating the supplier's jurisdiction is regarded as reasonable, whereas selecting a deliberately inconvenient jurisdiction is not.

Note, however, that many jurisdictions have differing views as to jurisdiction and the nomination of choice of law. For instance, US 'long arm' statutes and the 'purposeful availment test'[11] differ from Australian rules regarding service out of the jurisdiction, which require a nexus, as well as analogous authority such as *Gutnick*.[12] Note also the need in online agreements to make any particular clauses concerning dispute resolution clear and the subject of informed assent, in order to ensure enforcement.

Under the CISG, the matter of acceptance is not relevant to the determination of operative legal jurisdiction; rather, it is the location of performance which governs the contract. Articles 31 and 57 point to this being the business location of the seller – but again it is not sensible to leave this to default operation of the CISG or any other law. Both the applicable law and forum should be stated expressly. At the very least, if the CISG is being left to apply by default, your client's place of business should be stated in the contract.

CONCLUSION

Review of online contracting needs, and proper documentation in light of the CISG and the relevant Australian law, will repay the initial effort involved by avoiding a lot of potential pitfalls that come with online international selling. Of course, the proof of success will be in the absence of problems, a quality sometimes mistaken by clients as an indication that there were no problems in the first place. Consolation lies in the fact that it is (in this context at least) better to be misunderstood than to misunderstand!

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1 [1988] ATS 32.

2 *Electronic Transactions Act 1999* (Cth), *Electronic Transactions Act 2000* (NSW), *Electronic Transactions (Queensland) Act 2001* (Qld), *Electronic Transactions Act 2003* (WA), *Electronic Transactions Act 2000* (SA), *Electronic Transactions Act 2001* (ACT), *Electronic Transactions (Northern Territory) Act 2000* (NT), *Electronic Transactions Act 2000* (Tas).

3 See the ETA s 13.

4 However, this leaves the purchasers with the last word, which is not always for the best and may present issues under the CISG. Ideally, the contract documentation needs to include a choice of law clause. This matter is in the hands of the parties, since they may provide any rule they like on this point.

5 ETA s 9(1).

6 Note though that Part III of the CISG constitutes a variation of the reception regime, by allowing sending parties to rely on an interrupted communication. This is nearer the 'dispatch theory', and should be specifically considered and modified if desired.

7 ETA s 9(1)(b).

8 *Specht & Ors v Netscape Communications Corp & Anor* 306 F 3d 17.

9 *Register.com, Inc v Verio, Inc* 126 F Supp 2d 238.

10 [1975] ATS 25. See www.uncitral.org/english/status/index.htm for a list of member states.

11 See eg *International Shoe Co v Washington* (1945) 360 US 310 and *State v Granite Gate Resorts, Inc* (1997) 568 NW 716.

12 *Dow Jones & Company v Gutnick* (2002) 194 ALR 433.

You Can't Stop the Music

Peter Mulligan examines music piracy and parallel importation issues in the context of the recent case *Universal Music Australia v ACCC.*

The rise of the internet and globalisation of markets means that the recording industry in Australia is facing new and challenging threats to its existence. The ability to parallel import CDs and other sound recordings as well as the growth in music piracy through use of file-sharing networks are just some of the challenges the industry is learning to deal with.

At the time of the changes to Australian copyright law permitting parallel imports of sound recordings, the recording industry responded aggressively. While the industry claimed that its actions were intended to discourage music piracy and free-riding on local investment, the Federal Court recently found the conduct of two record companies to be in breach of the *Trade Practices Act* 1974 (***Act***) and imposed heavy penalties both on the companies and their executives.

The case is *Universal Music Australia v Australian Competition and Consumer Commission*[1] and concerned the conduct of Universal Music, Warner Music (the ***Record Companies***) and their senior executives. The Record Companies were each fined $1 million and the executives $45,000.

PARALLEL IMPORTATION OF SOUND RECORDINGS

In July 1998 the *Copyright Act* 1968 (***Copyright Act***) was amended by the *Copyright Amendment Act (No 2)* 1998 (***Amendment Act***) to remove the prohibition on the importation of sound recordings without the consent of Australian copyright owners or licensees. This enabled Australian wholesalers and retailers of CDs and other sound recordings to import stock from overseas provided the manufacture of the overseas recordings had not infringed copyright law in the overseas country and had been carried out with the consent of the copyright owner.

The effect of the change in laws was to open up to international competition the wholesale market for the supply of CDs in Australia.

The Amendment Act was introduced to give effect to the recommendations of the Prices Surveillance Authority report, "Inquiry into the Prices of Sound Recordings".[2] The report had concluded that the prices paid by Australian consumers for sound recordings was too high. One of the recommendations was the repeal of the parallel importation provisions of the Copyright Act in relation to recordings made in countries providing levels of protection for musical works and sound recordings comparable to those in Australia.[3]

The policy behind the legislation was explained at the time in the Second Reading Speech of the Attorney General:

> "The Bill will exempt the importation of non-pirate copies of a sound recording from infringement of copyright in either the sound recording or the works recorded on the recording. It will thereby remove the ability of copyright owners to control the market for each imported copy of a sound recording."[4]

Under the amendments, it is now permitted to import, sell and commercially deal with "non-infringing copies" of sound recordings. A "non-infringing copy" is defined (in a new section 10AA of the Copyright Act) as, essentially, a copy that has been made:

(i) without infringing any law of the country in which it was made that protected copyright in any musical or other work used in the sound recording; and

(ii) with the consent of the producer of the original sound recording, or other person who was the copyright owner.

THE ACTION AGAINST THE RECORD COMPANIES

Around the time of the parallel importation amendments, the Record Companies began to step up the lobbying of their CD retailers. There were visits by senior executives of the Record Companies to many of the large retailers as well as some of the smaller ones.

In July 1998 the Chairman of Warner Music sent a letter to all retailers referring to the changes in the law and the benefits to retailers of Warner's support such as promotion teams, cooperative advertising, return privileges, favourable credit terms, provision of point of sale material, television, print and radio advertising and promotional visits. The letter continued:

> "With our market now further exposed to the threat of piracy, it is important you be aware of not only our future intentions, but also the large downside should you wish to alter your source of supply. Such a move will result in us being unable to provide any of the aforementioned trading benefits and will also result in a substantially reduced marketing and advertising spends [sic]."

The conduct of Universal was a little more cloudy. While there was no "smoking gun" letter from Universal to its retailers, there was evidence that senior executives had told a number of retailers that they may lose their current trading terms if they imported CDs directly from overseas.

Upon discovering that a number of smaller retailers were importing CDs from overseas, the Record Companies responded by suspending the accounts of the guilty retailers, starving them of local product and support.

The ACCC commenced proceedings against the Record Companies alleging, among other things, that the Record Companies' conduct was in breach of sections 46 and 47 of the Act. At first instance, Justice Hill found that the Record Companies had taken advantage of their market power for an anti-competitive purpose contrary to section 46 and had engaged in exclusive dealing in contravention of section 47.[5] The Record Companies appealed to the Full Court of the Federal Court.

MISUSE OF MARKET POWER

Section 46 of the Act is concerned with misuse of market power. Relevantly, it provides that a corporation with a substantial degree of power in a market must not take advantage of that power with the purpose of:

(a) eliminating or substantially damaging a competitor;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct.

Section 46(3) provides that, in determining whether a corporation has a substantial degree of power in a market, the Court must have regard to the extent to which the conduct of the corporation is constrained by the conduct of its competitors, potential competitors, customers and suppliers.

In applying these provisions, the Court considered the recent decision of the High Court in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[6] (***Boral***). The High Court in Boral emphasised the centrality of section 46(3) to a determination of whether a corporation has a substantial degree of power in a market. Applied to that decision it was found that the ability of customers to drive Boral's prices "down and down" was evidence of constraint that fell squarely within the terms of section 46(3) and the absence of substantial market power.

In a similar vein, the Record Companies were also found to lack a substantial degree of market power. On the question of market definition, it was not disputed that the relevant market was the wholesale market for recorded music in Australia.

The Court based its decision regarding the lack of substantial market power on a finding that:

(i) each of the Record Companies possessed a market share of only about one-sixth of the market;

(ii) with the passage of the Amendment Act, retailers could obtain the Record Companies' products from elsewhere; and

(iii) there was no evidence that the actions of the Record Companies prevented the entry into the market of legitimate competitors.

This was enough to dispose of the section 46 case.

Importantly, however, the Court emphasised that it is wrong to adopt an upside-down approach to section 46. In particular, an instance of abuse of market power by a corporation is not determinative of whether the corporation possessed substantial market power. Rather, whether a corporation possesses a substantial degree of market power requires a consideration of the whole of the evidence relating to the market and the conduct of its participants.

EXCLUSIVE DEALING

Section 47 of the Act is concerned with the practice of "exclusive dealing". Relevantly, it provides that a corporation shall not:

(a) supply or offer to supply goods or services on the condition that a person does not acquire goods or services from a competitor of the supplier; or

(b) refuse to supply goods or services for the reason that a person has acquired goods or services from a competitor of the supplier.

Section 47(10) provides that a corporation will not be in breach of the exclusive dealing provisions unless its conduct has the purpose, or likely effect, of substantially lessening competition in a market.

The Court had little difficulty in finding that each of the Record Companies had engaged in the practice of exclusive dealing. Instances of exclusive dealing were:

(i) the refusal of the Record Companies to supply a handful of smaller retailers because they had acquired parallel imported copies of CDs;

(ii) the Record Companies offering to reinstate the supply to some of the smaller retailers on the condition that they would not in the future acquire parallel imported copies of CDs; and

(iii) the Record Companies offering to supply goods, being CDs, and services, being favourable trading terms, to the other retailers on condition that they would not acquire parallel imported copies of CDs.

However, the more difficult question was whether the exclusive dealing was engaged in with the purpose, or likely effect, of substantially lessening competition in the market for recorded music in Australia.

The issue of "purpose" in section 47(10) has not been the subject of many decided cases, with the focus generally being on the effect of the relevant conduct. However, in the present case, the Court was called upon to determine whether the exclusive dealing conduct had been engaged in with the requisite purpose, separately from a consideration of the effect of the conduct. The Court preferred to analyse the case on the basis of purpose because it did not want to rely on future conduct to base a finding of anticompetitive effect. Presumably, because there was no certainty as to whether the conduct of the Record Companies would continue, the Court felt it could not infer an effect or likely effect of substantially lessening competition.

The Court considered whether the purpose referred to in section 47(10) was either an objective or subjective purpose. On a consideration of authority and the language of the Act it was found that what needs to be proved is the actual purpose of the corporation engaging in the exclusive dealing conduct.

However, the Court emphasised that a determination of purpose will often be more difficult than simply looking at the statements of the officers of the company and their evidence before the Court. Often there will not be any direct admission of purpose. Accordingly, the purpose may need to be inferred from all of the circumstances on the balance of probabilities. Where this is the case, objective circumstances may be considered and there will be an inevitable blurring between the subjective and the objective.

In the circumstances, there was no direct admission of unlawful purpose by the Record Companies. However, the Court found there was ample evidence from which purpose may be inferred. The closure of the smaller retailers' accounts was found to be for the purpose of making an example of them and to fortify a general warning to all retailers not to import CDs from overseas. Further, it was found that the purpose was to deter all retail account holders from purchasing parallel imports. In the language of section 47(10), this purpose was to substantially lessen competition. The fact that the Record Companies did not have substantial market power was no defence.

As a result, the Record Companies were each fined $1,000,000 for exclusive dealing. It is significant that a number of senior executives were found to be accessories and were also fined. For their part, the senior executives were ordered to pay $45,000 each.

COMMENTS

The decision is interesting for a number of reasons. In a purely legal sense, it is a welcome addition to the body of case law on sections 46 and 47 of the Act. Following on from the Boral decision, the case reinforces the centrality of section 46(3) in determining whether there is a substantial degree of market power in a section 46 action. In relation to section 47, the case provides some valuable insights into the relationship between purpose and exclusive dealing.

The case is also indicative of the aggressive steps being adopted by the recording industry in defending their traditional markets from new avenues of competition. The industry has moved on since the late 1990s (when the conduct in question took place) and the parallel importation of CDs seems now to be taken for granted. The new battleground is downloadable music and file-sharing networks.

In the recent decision of *Sony Music Entertainment (Australia) Limited v University of Tasmania*[7] record companies were granted preliminary discovery against a number of Australian universities for the purpose of determining whether there was evidence of copyright infringement by students downloading music. The discovery extended to records stored on CD ROMs and backup tapes. Whether the record companies will discover evidence of infringement in that case and take action against those found to have used the university networks to infringe copyright in downloadable music remains to be seen.

However, in what might be a sign of things to come, the Record Industry Association of America recently filed lawsuits against 261 consumers for using Kazaa and other music file-sharing networks. Similar action in Australia this year includes the criminal case brought by the Commonwealth Director of Public Prosecutions against the three students, Peter Tran, Tommy Le and Charles Ng for operating an illegal Napster-style site for downloading music. The students have pleaded guilty and will be sentenced in November.

Whether action such as this will have any effect on the erosion of the profits of the record companies remains to be seen. It is unlikely that the recording industry will bring a stop to music piracy and if there is any justification for such costly litigation it must be for its value as a deterrent. However, public education about the damage caused by music piracy to artists and the industry is likely to be much more effective than expensive litigation. In the battle to win the hearts and minds of consumers, it is also more likely to draw a sympathetic response.

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1 *Universal Music Australia v Australian Competition and Consumer Commission* [2003] FCAFC 193.

2 Prices Surveillance Authority, Report No 35- *"Inquiry into the Prices of Sound Recordings"* (1990).

3 Prices Surveillance Authority, Report No 35- *"Inquiry into the Prices of Sound Recordings"* (1990) at 160.

4 Parl Deb H of R, 20 November 1997 at 10972.

5 see *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* [2001] FCA 1800 and *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd (No 2)* [2002] FCA 192.

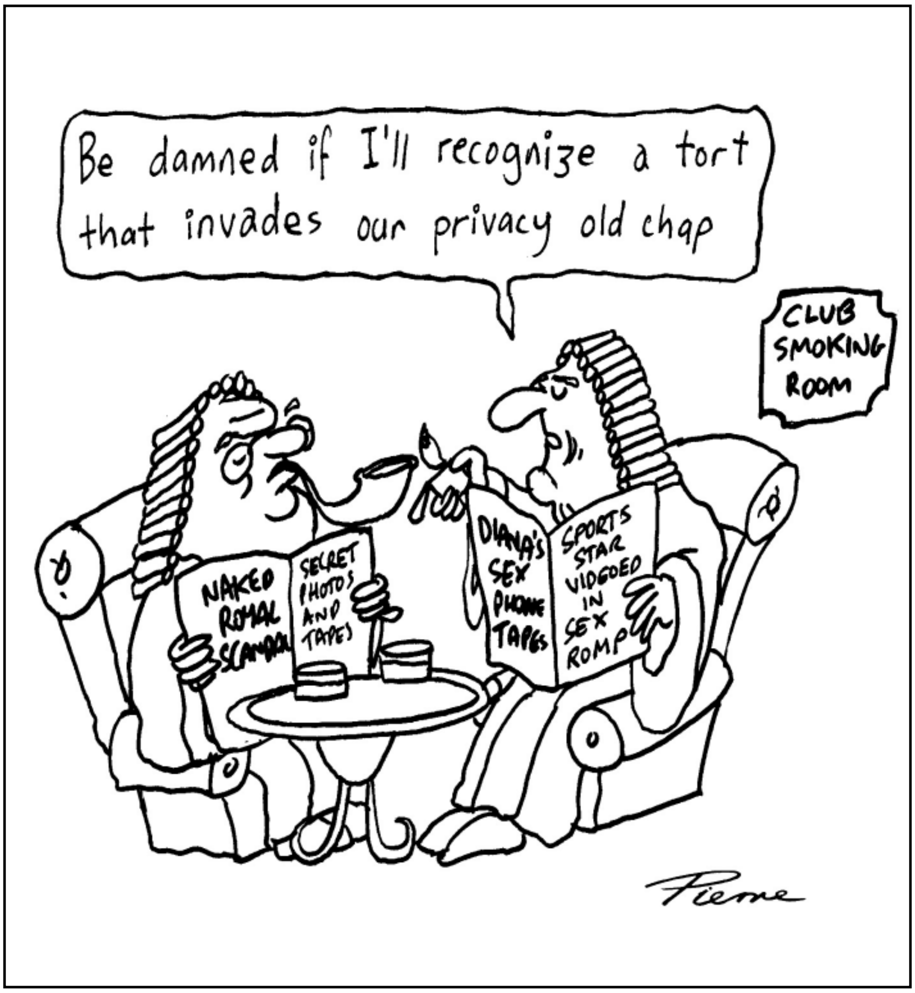
6 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) HCA 5.

7 see *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 532, *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 724, *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 805 and *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 929.

Privacy Tort, Where Art Thou?

Gayle Hill compares the recent UK rejection of a tort of privacy with Australian developments in the area.

In a development that may be contrasted with the Queensland District Court case of *Grosse v Purvis*[1], the House of Lords in the United Kingdom has refused to recognise a specific tort of invasion of privacy.



Unlike the Australian case which involved a factual scenario in which the defendant's conduct was likened to stalking, the UK case of *Wainwright and another v Home Office*[2] which was decided on 16 October 2003 was brought by relatives of a person being held in custody pending trial. On a visit to the prison, the mother and brother of the accused were strip searched. The searches were not conducted in accordance with the prison's rules:

- both were asked to uncover all of their bodies at once (not expose the upper half then the lower);
- consent forms were not given until after the strip search had been performed;
- the room used to search Mrs Wainwright had an uncurtained window through which she was able to be seen from the street; and
- Alan Wainwright's armpits and genitals were examined by prison officers contrary to the prison rules for strip searches.

Mrs Wainwright suffered emotional distress but no recognised psychiatric illness. Alan, who had physical and learning difficulties, was so severely affected that he suffered post-traumatic stress disorder. Counsel for the defendant conceded that touching Alan's genitals, namely pulling the foreskin of his penis back ostensibly to search for drugs, was a battery.

The Judge at first instance held that the searches could not be justified as a proper exercise of statutory power because the searches were an invasion of privacy in excess of what was necessary and proportionate and because the prison authorities had failed to abide by their own rules. Although agreeing with the second but not the first reason, the Court of Appeal confirmed that the searches were not protected by statutory authority. However, in order to be successful in their claim, the Wainwrights needed to establish a cause of action.

The Judge held there were two such causes of action based on trespass. His Honour reasoned in part that the law of tort should provide a remedy for distress caused by an infringement of the right of privacy protected by Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the ***Convention***), even though the UK *Human Rights Act 1998* had not come into force at the time of the strip searches. The Court of Appeal did not agree and set aside the decision except in relation to the battery against Alan Wainwright.

In considering the proposition that there is a tort of invasion of privacy, the House of Lords reviewed the development of the jurisprudence of privacy in the United States of America into four loosely linked privacy torts and, on that basis, questioned its value because it is such a high level generalisation.

The invitation to declare that since 1950, at the latest, there has been a previously unknown tort of invasion of privacy was rejected. Lord Hoffmann differentiated between identifying privacy as a value underpinning the law and privacy as a legal principle in itself. Freedom of speech was given as another example of a value, rather than a legal principle, which is not capable of 'sufficient definition to enable one to deduce specific rules to be applied in concrete cases'.[3]

The House of Lords considered a number of previous cases in which individuals' privacy was alleged to have been violated. According to Lord Hoffmann, the difficulty was not so much in formulating general propositions prohibiting, for example, telephone interception, surveillance, taking and publication of photographs, use of film from CCTV cameras, publication of private marital and medical information, but in articulating the circumstances in which such intrusions ought to be permissible. Because this weighing of competing public interests required detailed rules and not broad common law principles, the legislature and not the courts should provide the remedy – just as the legislature had done following a number of other cases in which the law had provided no remedy.

The House of Lords refused to interpret the comments of Sedley LJ in the recent case involving the unauthorised publication of wedding photographs of Catherine Zeta-Jones and Michael Douglas (*Douglas v Hello! Ltd)* as advocating the creation of a high level principle of invasion of privacy. Nor was the adoption of a high level principle of privacy necessary to comply with article 8 of the Convention. Furthermore, the coming into force of the *Human Rights Act* was regarded as weakening the argument in support of such a principle because of the statutory remedies subsequently provided by that Act.

Lord Scott of Foscote, who delivered a separate judgement, agreed fully with Lord Hoffman but also indicated that he would have been receptive to an argument that the Judge's original award of damages to Alan Wainwright should not have been reduced and that the aggravated damages was 'distinctly on the low side'[4]. Clearly, Lord Scott was disturbed by the nature of the search endured by Alan Wainwright which he said 'constituted as gross an indignity as can be imagined'[5] and the absence of any possible justification 'allows the inference to be drawn that it was a form of bullying, done with the intention to humiliate'[6].

Regardless, the Lords held as a matter of principle that the unjustified infliction of humiliation and distress does not, without more, constitute a tort at common law. The Lords noted that prior to the enactment of the *Protection from Harassment Act 1997*, there was no tort of intentional harassment giving a remedy for anything less than physical or psychiatric injury.

Although various remedies may have been developed for situations in which claimants are allegedly aggrieved by an invasion of what they regard as their privacy (for example, misuse of confidential information, certain types of trespass and nuisance), the House of Lords was unanimous that the common law in the UK has not developed an overall remedy for the invasion of privacy. Lord Scott left open the question whether the conduct inflicted on Mrs Wainwright, which did not involve a battery, should be regarded as tortious had it occurred now that the UK Human Rights Act is in operation. That question will have to be decided if, or when, such a case arises.

It seems curious that the House of Lords would have found it too difficult to frame broad common law principles for a tort of privacy. Senior Judge Tony Skoien of the Queensland District Court managed quite comfortably to do so in *Grosse v Purvis*. Had the appeal in *Grosse v Purvis* proceeded rather than being discontinued, there is much in the House of Lords decision that could have provided bases for further legal argument.

Judge Skoien held that an individual can recover damages for mental, psychological or emotional harm, including embarrassment, hurt, distress and post traumatic stress disorder where 'a willed act of another intrudes on their privacy or seclusion in a manner which would be considered highly offensive to a reasonable person'[7]. He also held that damages could be awarded for any enforced changes of lifestyle caused by such an intrusion upon a person's privacy or seclusion. His Honour was quite comfortable in holding that a defence of public interest should be available but, as no such concept arose from the facts of *Grosse v Purvis*, the articulation of that defence was left to be developed in subsequent cases.

Judge Skoien also stated that, separate and distinct from the tort of invasion of privacy, an action for 'harassment' is a possible developing tort in Australia. Lord Hoffmann, on the other hand, took the view that:

> 'In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation.'[8]

As a result of the House of Lords decision in *The Wainwrights' case*, the public in the UK have been left without much prospect of a tort of privacy being recognised by the courts. That position is in stark contrast to the developments occurring in other Commonwealth countries such as Australia, New Zealand and Canada. Hopes of further developments in the law of privacy were dealt a double blow by the release on the day preceding the decision in *Wainwright* of the UK Government's response to the *Fifth Report of the Culture, Media and Sport Select Committee on Privacy and Media Intrusion*.[9]

In its response, the UK Government declined to accept many of that report's recommendations, instead taking the view that current legislation is adequate to protect the privacy of individuals and that self regulation is the preferred approach. Rather than the report providing an impetus for some action on its behalf, the UK Government's response is to view the report as opening the debate on how the regulatory system could be improved. The UK Government believes that 'such debate is healthy and constructive, and that it should lead to a positive outcome'.[10] Privacy advocates, practitioners and the hapless public are left to wonder how endless debate without resolution can remain 'healthy and constructive'.

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1 [2003] QDC 151.
2 [2003] UKHL 53.
3 [2003] UKHL 53 at paragraph 31.
4 [2003] UKHL 53 at paragraph 61.
5 [2003] UKHL 53 at paragraph 59.
6 [2003] UKHL 53 at paragraph 61.
7 [2003] QDC 151 at para 444.
8 [2003] UKHL 53 at para 46.
9 TSO Ref HC 458-1.
10 Government's response at paragraph 5.1.

Casenote: *Cullen v White*

Kerin Forstmanis looks at a recent damages award for defamation on the internet.

A journalism lecturer at Edith Cowan University in Perth has recently been awarded AUD$95,000 damages for defamation by the Supreme Court of Western Australia against Los Angeles resident, Bill White (the defendant). The case, *Cullen v White*,[1] concerned publication on the internet.

Dr Trevor Cullen (the plaintiff) and Bill White were former colleagues at the Divine Word University (***DWU***) in Papua New Guinea, although they had little contact. According to Dr Cullen, Mr White was dismissed from his employment at DWU in February 1997. Eighteen months later, Dr Cullen was researching HIV/AIDS in the Pacific when he came across an internet discussion forum which contained a number of derogatory postings in relation to DWU and its staff.

Dr Cullen sent the webmaster a letter complaining about Mr White's postings. That letter was published on the discussion forum web page. According to Dr Cullen, within days he started receiving emails from Mr White alleging that he was an academic fraud. Shortly after, Mr White created an internet website for his attacks on Dr Cullen. Subsequently, Mr White started 'bombarding' Dr Cullen's colleagues with false allegations about him, and publishing similar allegations on the website.

Dr Trevor Cullen commenced proceedings in the Supreme Court of Western Australia in 2002 claiming damages for defamation against Mr White in relation to the emails and articles on the website. Dr Cullen alleged that four specific publications contained imputations that he was a paedophile; had committed academic fraud; had falsified his credentials; was a dangerous felon; had committed blackmail; and that he had falsely pretended to be a priest.

Leave was granted to serve the writ outside of the jurisdiction of the State of Western Australia. Mr White was served but did not file an appearance and judgment in default was entered against him.

Master Newnes of the Supreme Court of Western Australia subsequently heard the plaintiff's application for an assessment of damages. Once again, the defendant made no appearance. Master Newnes accepted that the words complained of conveyed the alleged imputations. He commented that the fact that the publications were disseminated over the Internet 'was plainly designed to maximise their detrimental effect'.

On the question of what damages should be awarded, Master Newnes awarded $70,000 in compensatory damages and $25,000 by way of exemplary damages. He held that the defamatory publications were likely to have a 'very harmful effect' upon the plaintiff's reputation and standing as an academic, and that he had suffered a great deal of personal distress and anguish. In awarding exemplary damages, Master Newnes said that the defendant's conduct 'can be attributed to a conscious desire on his part to cause the plaintiff the maximum amount of damage, hurt and embarrassment by what amounts to a campaign of deliberate offensive vilification'.

Although decisions of masters (who are not judges) of the state supreme courts carry little weight as precedents, Master Newnes' judgement suggests that the fact of publication on the Internet may increase the amount of damages which might otherwise be awarded as that avenue of publication suggests an intention to cause as much harm as possible to the subject of the defamatory material.

Dr Cullen may have difficulties trying to enforce the judgment against Mr White, however, the publicity which has surrounded the award of damages has gone a long way towards restoring his reputation.

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1 *Cullen v White* [2003] WASC 153 (3 September 2003).

Local Advertising on Regional Television

In this edited version of her paper presented at the Communications Research Forum 2003, Helen Wilson looks at the state of regional television, and the contrast between local news content on the one hand, and local advertising content on the other.

Historically, localism has been the basis for ownership restrictions and for distinguishing between different types of service: what the Australian Broadcasting Authority (***ABA***) calls 'capital city' and 'non-capital city' licensees. The former are in Sydney, Melbourne, Brisbane, Adelaide and Perth, and jointly operate as networks negotiating program supply and national advertising. They are centred in Sydney and exercise dominance over the rest of the system, a cause of regulatory anxiety. I refer to them as the metro networks. The non-capital city licensees are an assortment of arrangements in smaller markets, including the licensees in the 'aggregated markets' of Queensland, Northern NSW, Southern NSW and Victoria; a few markets with one or two licensees (such as Tasmania, Darwin, Mildura) and the licensees of the remote satellite services in Central Australia and Western Australia.

The metro networks take large risks in the field of program decisions and the regional licensees pay an affiliation fee, a proportion of revenue, which entitles them to broadcast the network signal. Although now consisting almost entirely of network programming, regional television is still distinctive in its varying attempts to match news and information to the spatial location of viewers, and in its advertising's insistence on versions of that location.

The Northern Rivers and Wollongong were originally solus markets until the policy of aggregation was introduced in the late 1980s and are now parts of the aggregated markets (***AM***) of Northern and Southern NSW respectively. They function as one of a number of submarkets, 'splits' or 'windows' within the AM, with a certain amount of distinct content. The complexity of this distribution system allowing the insertion of separate content for a number of areas is an aspect of regional television that the metro networks do not deal with. It involves offices and branches with varying functions throughout the licence area as well as a formidable technical infrastructure.

The way regional broadcasters operate was, however, addressed by the ABA in the report of its inquiry into the adequacy of news on regional television (2002) following the closure of a number of regional newsrooms. The ABA found that the news services offered by many licensees were not adequately local, and that the previous service areas prior to aggregation remained significant. The resulting new licence condition specifies a large number of 'local areas' within each AM which the licensees will have to provide with local news and information. This finding indicated that the ABA recognised that the AMs had, by and large, not worked as vehicles for ensuring localism in news and information programming. We await with interest the new local content, although compliance will not be monitored until 2004.

THE PLAYERS

Although aggregation, introduced in the late 1980s, was planned to create equally sized markets of about a million people, these differ in terms of geography, size, the presence and location of sizeable cities, and whether the AM coincides with state boundaries. In the case of Victoria and Tasmania this is so and this creates a stronger social basis for AM identity than the arbitrary NSW divisions. Though all originating as local broadcasters, regional and remote television is now almost entirely run by a few companies, as shown in Table 1.

Nationally, the major players are WIN Television (Nine affiliate in most markets), Prime Television (allied to the Seven network) and Southern Cross Broadcasting (now branded as Ten Southern Cross). However, instead of WIN, the Nine affiliate in Northern NSW is NBN, the original Newcastle station. WIN is a private company still headquartered in Wollongong, where, like NBN in Newcastle, it is a prominent corporate presence. The company is the only one to provide local news in all its markets. All three major players are in fact national networks of a distinctive regional type; they operate as single entities with respect to metro network affiliation, a small amount of program production, some advertising sales, and increasingly presentation and 'playout'. In the process the aggregated market licence areas are becoming redundant.

Table 1: Ownership of Regional and Remote Television Services

Market	Operators		
Queensland	WIN	Southern Cross	Seven
Northern NSW	NBN	Southern Cross	Prime
Southern NSW	WIN	Southern Cross	Prime
Victoria	WIN	Southern Cross	Prime
Western Australia	WIN		Prime
Central/South Australia	Imparja	Southern Cross	
Tasmania	WIN	Southern Cross	New combined licence

In view of the transition to digital broadcasting, Prime and Southern Cross are currently restructuring to become relatively centralised operations headquartered in Canberra. Prime has gone further than Southern Cross in relocating its functions from the various regions, leaving many people redundant and many facilities unused. Its new digital centre allows all input for its 17 splits (generally the commercial breaks) to be inserted in Canberra. Southern Cross, on the other hand, has offices covering sales, engineering and production in both Canberra and Coffs Harbour (for Northern NSW), but accounting, 'traffic' (scheduling of inserts) and operations are directed from Canberra. Southern Cross had analog playout centres in Townsville, Coffs Harbour, Canberra and Bendigo, for each of its AMs, but the functions are being combined in Canberra, from where playout of the 22 distinct signals began from mid 2003. Despite the centralisation, both companies maintain a presence in as many localities as possible, but these are basically sales offices. WIN is a rather different operation, still a large employer and much less centralised.

Apart from the anomalies of NBN and the Aboriginal owned Imparja, there are then basically three regional television companies, operating, like the metro networks, across the country to distribute content to their far-flung audiences. Just as the capital city licensees are also metro networks with a command and control structure, so are regional and remote licensees also regional networks. They are a B team of broadcasters and like the A team or metro networks, are prevented from expansion by ownership legislation.

THE ADVERTISING BUSINESS

Although news is the most high profile and controversial area of local content, all regional stations feature local advertising. It is in general easily recognisable and strikingly modest in comparison to the excesses of national campaigns. It is also odd for a city dweller to see local businesses so prominently advertised on television, an unusual phenomenon on all but perhaps late night city television. But what is local in this context? Many questions arise. Does it correspond to the AM or is it aimed at a submarket, or an even smaller locality within that? What is the proportion of local to national advertising and how consistent is it over time and between markets? What is its economic value? How are ads for local outlets of national chains produced, where is the money raised and how are they to be classified?

Detailed economic information distinguishing different markets is hard to find, and like the media sector generally, the advertising industry is city (and Sydney)-centric. So, evidently, are large advertisers, for many 'national' campaigns do not get beyond the large cities. This is a situation regional broadcasters are keen to address in the

face of a stubborn lack of fit between regional population numbers (35% of the nation) and advertising revenue (22% of national television advertising revenue), both little changed since the advent of aggregation. *The Australian* (14 August 2003) reported that regional television operators are acting together to jointly attract advertisers, to establish that regional populations are similar in consumption patterns to those of the smaller cities and to counter the preconceptions of media buyers that regional populations are 'less savvy, poorer and lacking in audience numbers'.

In its *Commercial Television Industry 1978/9 to 1998/9* study (2001), the ABA presents revenue and expenditure in different licence categories in such aggregate form. In terms of revenue, capital city stations' total revenue is over three times that of non-capital city services, with a lower proportion of revenue attributed to advertising, which for regional services is more like 90% of revenue. This is a significant difference, for metro networks have other income streams including the affiliation fees of the regionals, and therefore are perhaps less dependent on general economic conditions that impact directly on advertising expenditure.

The ABA distinguishes between agency advertising (generally national and subject to discounts on the basis of bulk sales) and non-agency advertising, generally local and not subject to such discounts. Not surprisingly, the proportion of agency advertising for non capital licensees was much lower in 1998/9 (68.1% as against 93.7% for capital city licensees).

It is clear that regional services have both a greater dependence on advertising and carry a greater variety of types including a significant grass roots component. The scattered and roving ground force of 'hunters and gatherers' selling advertising time to businesses of varying local provenance with small advertising budgets is then a distinctive aspect of regional television and contrasts with other centralising tendencies. There are still copywriters and camera people in all the regional offices of Prime, for example, almost all of which are solely sales offices.

Managers operate in terms of the distinction between local and national advertising in accounting for their revenue, corresponding to two levels of negotiations: those conducted by the regional network and those by their own sales staff. National sales are done by organisations such as 7 Affiliate Sales, which is 75% owned by Prime. This organisation has offices in all metro centres and its head office will stay in North Sydney. The other 25% is owned by the Seven Network, which operates in regional Queensland. Southern Cross has national sales offices in all the capital cities to deal with the large advertising agencies. WIN and NBN also have a combined operation to sell for Nine affiliates.

Workers in the traffic section of the Prime broadcast operation schedule the ads in terms of those going to the entire aggregated market (usually national ads) and those going to particular windows. Prime has a fairly standard pattern of ad breaks consisting of a program promotion followed by two national ads, then two local ads and another national one. This may be an emerging pattern for all the regionals. Clearly the move to centralised playout means a more standard structure for advertising breaks, which will mean pressure to equalise the amount of local advertising in terms of time. On the other hand, WIN and NBN, being separate companies contracted to the Nine network, will not necessarily follow the same pattern either in terms of the structure of ad breaks, the proportions of local to national advertising or the relative income derived. Despite the ABA aggregated industry figures, the relative proportions of revenue from national and local advertising cited by managers vary considerably. Figures between 50 and 70% are given as the norm for the national component, with fluctuations of 5% cited as common.

For a high rating service (traditionally the Nine affiliates), national advertisers tend to book there first, and buy fewer slots at higher rates than on other services. Nine affiliates cite national revenue at around 50%. Prime's Doug Edwards says that for his network, on the other hand, levels of national advertising involve more slots at lower rates, with the result that its revenue is 65-70% from national advertising. The only way to increase the proportions for local areas is through local sales, which may come from the service's particular profile and connectedness to its local areas.

FINDING THE LOCAL

In investigating the nature of local advertising, then, there are three measures to look at: the ad's revenue source, its content, and its placement in the ad break sequence. The first is not apparent to a viewer, although the production values usually make locally sourced ads readily recognisable. Place in the break is only consistent for Prime, as WIN and Ten Southern Cross appear to run sequences of entirely local or entirely national items. Many ads on regional television are local in one way or another, but from the viewer's point of view it's a roving kind of localism, only sporadically bringing their own locality into focus. In extreme cases such as the remote service in WA, ads for local businesses in Broome are seen in Esperance, for there are only two splits in that service.

Perhaps most advertisers aim to reach beyond particular localities and address audiences that don't primarily identify themselves geographically. We all know how similar shopping malls are and these retailers are heavy advertisers. Does it matter then if they don't tell us where the local dealer is? Sometimes they do, sometimes not, and it takes some concentration to pick it up. The commercials for national chains such as K-Mart typically have a standard generic form, but are sometimes tagged with the location of particular outlets, usually in the final shot or by pull through. But the listings may be more or less extensive, covering just a local window or a larger agglomeration. It is not always possible to tell whether the revenue for these is raised locally or nationally.

In our study of the advertising on Lismore services in December January 2002/3, we found a greater prominence of ads originating in the narrower Northern Rivers area, as against a wider (or longer) North Coast region, especially on NBN. What is striking, however, is the lack of ads customised for the entire aggregated market. One could imagine advertisers wanting to target specific windows only (Canberra, Wollongong and Newcastle, for example) rather than both entire AMs. The present system militates against such a choice, which advertisers might prefer to including Adelaide in the schedule, for example.

As in the case of news, a close look at current practice shows the irrelevance of the category of the aggregated market as any sort of 'space of identity' for viewers. This may be less so in the case of Victoria and Tasmania, where we have the situation of the AM being coextensive with the state, creating a similar structure to that of the ABC, which broadcasts regional radio programs across states. We might expect the state identity and state politics to give the AM clear and distinctive news, talk or sport programming, and certainly state-based advertising. This is the case to some degree, particularly in Tasmania, which has a strong community of interest and is excluded from the mainland capital city loop, but less so in Victoria, where Melbourne and its capital city links dominate.

CONCLUSION

We can see three layers of the spatial reach of commercial television. Firstly, there is a predominance of national networked programs and national (and frequently global) advertising. Like the ABC, the commercial networks also run state based news programs which are intensely city-centric in orientation. But a viewer of, say, Ten in Sydney or Melbourne will not be able to locate themselves as readily with reference to the advertising on these channels as with reference to the news or (even more tellingly) the weather and traffic information given. In Wollongong , for example, the situation is reversed: the news (except for half an hour on WIN) tells where we're not, but the ads tell us (roughly) where we are.

I see this division in Australia's television system as an example of the growing tendency towards a binary divide in the relationship between metro and regional networks, as both take on network structures and respond to the digital imperative by putting resources into technological development. I term this the A team/B team situation. The A team decides what programs to make and show, and sells these to the B team and others. It provides some city-specific program content amidst generally national advertising. The B team transfers resources from its branches to its centres, sets up an elaborate infrastructure to broadcast the A team's programs and some of its advertising, and grows its ground force of hunters and gatherers as the only means available to increase its revenue. The situation clearly suits the A team, which has no need of such a ground force, well.

So localism in the cities means some place-specific news, sport and weather information, but in the country it means a greater mixture of advertising styles and sources, many of which are outside the ABA's designated 'local areas', which are proposed as the basis of a revived localism in news. There are no longer local stations, but different kinds of branch operations or hubs of large and diffused networks. The category of 'local area' may enliven the regional policy landscape, but at present the only essential local presence in all the regional offices is a sales team, with news production the exception rather than the rule. But when the ads are produced and programmed at a distance, is it possible that advertisers would prefer to use a medium with a stronger local identity, such as the press? Why do we need local television advertising in the regions when city businesses by and large don't use it?

Aggregation created no real increase in revenue, but it did give regional viewers the sense of being included in the national mediascape, so there is no going back. The pace of going forward in the digital future is at issue however, and it is possible that the changes being made are so drastic as to undermine the rationale for having a separate category of regional television.

The present requirement to turn off the analog signal is seeing the regional broadcasters re-inventing themselves as national organisations centred outside Sydney, so aggregation is becoming redundant even faster with digital broadcasting. Unless the new licence condition can deliver local news and information that is of real value to audiences, I suggest that we abandon the pretence that unsubsidised commercial television is an effective local medium in most places, and regulate accordingly.

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Casenote: *ATECO Automotive Pty Ltd V Business Bytes Pty Ltd*

Nick Abrahams and Liong Lim review a recent decision of the New South Wales Supreme Court which provides some valuable insights for technology customers.

On 31 March 2003, Justice McClellan of the New South Wales Supreme Court handed down his judgement in *Ateco Automotive Pty Ltd v Business Bytes Pty Ltd* [2003] NSW SC197. Although the case involves relatively common contractual claims for breach and non-payment of invoices, the facts of the case and the Court's statements are instructive for technology suppliers and their customers.

The Court's holding in the case was that Business Bytes Pty Ltd (***Business Bytes***) was entitled to recover amounts totalling $222,552 in respect of unpaid bills plus legal costs. Although the system delivered by Business Bytes proved to be faulty, Justice McClellan found that the loss suffered by Ateco Automotive Pty Ltd (***Ateco***) was caused primarily by its failure to communicate its needs to Business Bytes.

THE FACTS

The relevant facts are as follows:

- Business Bytes and Ateco were in an existing service relationship for the provision of technology support and maintenance services. In 1997, Ateco decided to upgrade its computer systems, prompted by two factors:
  - Ateco was alerted to the Y2K or "Millenium Bug" problem and became concerned that its existing computer systems would malfunction when the date 1 January 2000 arrived.
  - Ateco had succeeded in winning a franchise to import Alfa Romeo cars and parts throughout Australia. This contract necessitated a significant upgrading and expansion of Ateco's existing systems.
- In January 1998, Mr Maurice Villari, the principal of Business Bytes, provided Ateco with advice and recommendations with respect to the acquisition of a new hardware platform to effect the desired upgrade. In February 1998, Mr Villari's advice and recommendations were accepted by Ateco and Business Bytes was engaged to provide the desired system.
- In several discussions commencing from March 1999, Mr Villari met with the Managing Director of Ateco, Mr Neville Crichton to discuss Ateco's requirements. Business Bytes alleged that it had repeatedly requested Ateco for a Requirements Analysis in order to properly determine Ateco's technology requirements and estimated costs of meeting those requirements. Ateco's failure or unwillingness to deliver this information, according to Business Bytes, prevented the company from performing the services efficiently and cost effectively.
- Several subsequent developments required Ateco reassess its technology and system requirements:
  - around December 1999, Ateco decided to take on the franchise for the provision of parts to Kia Motor Vehicles, the franchise arrangement to take effect from 1 March 2000;
  - the Federal Government passed legislation implementing the GST, requiring businesses to be compliant by 1 July 2000; and
  - in June 2000, Ateco decided to establish a warehouse in Perth for its parts.
- Business Bytes claimed that Ateco failed to inform Business Bytes of its changing technology needs brought on by these developments.

THE CLAIMS

Justice McClellan heard two actions. The first claim was brought by Business Bytes against Ateco for breach of contract for non-payment of its fees. The second claim was an action brought by Ateco against Business Bytes claiming damages on three bases:

- for breach of contract, on the basis that Business Bytes had failed to deliver the computer system promised;
- for negligence on the basis that Business Bytes had not exercised a reasonable level of care in implementing the computer system; and
- for breach of the Trade Practices Act on the basis that Business Bytes had engaged in misleading and deceptive conduct.

Ateco's Claim

(a) *The claim that the system was inadequate*

This claim was rejected by the court. Although Justice McClellan conceded that there were problems with implementing the new system, in His Honour's view "the magnitude of the changes made this inevitable". His Honour went on to state that the system, while problematic, could not be described as inadequate. In His Honour's words:

> *"The system as implemented was Y2K compliant and performed many of the required functions in an appropriate manner. There were undoubtedly problems in relation to parts, some of which may be assumed of real concern, but I could not find that Ateco did not receive significant value for the work which was done."*

The court was careful to distinguish the facts of the case from circumstances where a customer loses the benefit of a product due to an inherent defect in the item sold. In this case, Justice McClellan accepted Business Bytes' version of the facts that many of the problems and costs associated with the system implementation could have been avoided by the application of appropriate resources by Ateco and the clear communication of its business requirements. As such, it was the lack of communication which led to many of the problems in the system, rather than the system itself.

(b) *The claims for negligence and breaches of the Trade Practices Act*

Justice McClellan based his decision on the version of the facts offered by Business Bytes and dismissed Ateco's claims that Business Bytes was negligent or that the company had breached the *Trade Practices Act*.

His Honour was of the view that, although the ultimate charges invoiced to Ateco were well in excess of original estimates, a significant part of the cost was due to Ateco's failure to provide adequate instructions and resources, particularly in light of numerous changes to Ateco's system requirements.

Business Bytes' Claim

The claim by Business Bytes was successful and the court held the company was entitled to recover amounts totalling $222,552 in respect of unpaid bills plus legal costs.

Justice McClellan accepted the version of facts put forward by Business Bytes that the work performed was reasonable given the significant new demands placed on the system. His Honour noted that the rates charged by Business Bytes for the work performed were consistent with rates previously charged by Business Bytes.

In addition, His Honour felt that if there was any unnecessary or additional work performed by Business Bytes, they were due in large part to Ateco's failure to provide Business Bytes with adequate instructions and a timely requirements analysis, particularly in the early stages of implementation.

CONCLUSION

While *Ateco Automotive Pty Ltd v Business Bytes Pty Ltd* is a useful example of a technology dispute, it is difficult to draw any overarching principle of law from the court's judgment. It is very clear from Justice McClellan's discussion that the decision turned very much on His Honour's willingness to accept Business Bytes' version of the facts.

Nonetheless, the case is an important illustration of the importance for technology customers to co-operate and communicate with their suppliers. Ateco's failure to keep Business Bytes informed of its system requirements led to increased expense and delay, the cost of which it was ultimately required to pay.

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The Spectre of Change in Spectrum Management

Tom Reid and Niranjan Arasaratnam discuss the Federal Government's proposal to merge the ACA and the ABA in light of some responses from industry and interest groups.

The next time you're watching the English Premier League highlights on your mobile phone, you might like to consider what effect they're having on your cultural identity as an Australian. Are the video clips just a fun diversion, incidental to your 3G mobile phone service, or are they more important than that? Do they warrant applying the sorts of rules that govern what you watch on television, for example?

Submissions have recently closed on the August 2003 discussion paper *Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority* (***2003 Paper***). The 2003 Paper was issued by the Department of Communications, Information Technology and the Arts (***DCITA***), and concerns the proposed merger of the Australian Communications Authority (***ACA***) and the Australian Broadcasting Authority (***ABA***). It follows on from the August 2002 discussion paper *Options for Structural Reform in Spectrum Management* (***2002 Paper***).

The proposal to merge the two regulators has been prompted largely by technological development. The 2002 Paper cites issues such as the growth in internet take-up, and (in the long term) the possible freeing-up of spectrum with the advent of digital television, as examples. To this, the 2003 Paper adds the recent launch by Hutchison 3G Australia of 3G mobile phone services, which offer the potential for broadcasting-type services direct to a user's handset. As a result, spectrum management is said to be becoming increasingly complex, resulting in a greater need for consultation and cooperation between the ACA and the ABA. This in turn results in increased transaction costs, which are passed on to industry and ultimately to consumers.

DIFFERENCES IN APPROACH

However, the proposal to merge the two authorities involves more than merely deciding where the new headquarters will be. The ABA and the ACA work from fundamentally different bases when managing spectrum, differences that principally arise out of the different objectives of the statutes under which each authority obtains its powers. Broadly speaking, while both authorities are required to manage spectrum in the public interest, the ACA does this by maximising revenue from spectrum licensing, while the ABA is more concerned with maintaining the availability, quality and diversity of broadcast content. This difference in approach may have considerable consequences for how broadcasters and telecommunications companies operate.

The ABA took over from the former Australian Broadcasting Tribunal and exercises powers under the *Broadcasting Services Act 1992* (***BSA***). It is responsible for managing spectrum in the Broadcasting Services Bands (***BSBs***), parts of the spectrum which are set aside for broadcasting under section 31 of the *Radiocommunications Act 1992* (***RA***) and referred by the Minister to the ABA for planning. The BSBs are used by both free-to-air television and AM and FM radio services. In administering BSB licences, the ABA is guided by the objects of the BSA, which emphasise the importance of considerations such as:

- diversity in content, including the coverage of matters of both public and local interest;
- quality and innovation in content, including adherence to community standards and the protection of children from exposure to harmful content;

- the development of a sense of Australian identity, character and cultural diversity; and
- the development of a responsive and efficient broadcasting industry.

The ABA uses a variety of methods to achieve these objectives, including overseeing compliance with program standards and industry codes of practice, and administering a statutory complaints scheme. It also enforces the cross-media ownership laws under the BSA.

The ACA was established under the *Australian Communications Authority Act 1997*, merging the functions of telecommunications industry regulator AUSTEL and the Spectrum Management Agency. It exercises powers under the RA and the *Telecommunications Act 1997* and is responsible for planning for all spectrum except the BSBs. Section 3 of the RA contains that Act's objects, which generally require the ACA to ensure that spectrum is used in the most efficient and equitable way possible.

The principal tool used by the ACA to ensure efficiency and equity, at least in areas of high demand (such as the capital cities), has been price. Licensees of spectrum administered by the ACA can choose what services they will offer in that spectrum, and can trade their licences on the open market. By contrast, the ABA is required to have reference to the relative demand for different types of services when allocating spectrum in the BSBs. The ABA is also required to expand the availability of services, including by subsidising broadcasters to provide services in otherwise unprofitable areas. The ACA, apart from some proposed legislative requirements relating to defence and emergency services, is not.

MAKING THE MARRIAGE WORK

The 2002 Paper outlined these differences and asked for public submissions as to whether they constitute a real obstacle to a merger. It proposed three options for reform:

1. creation of a single agency with responsibility for broadcasting, telecommunications, radiocommunications and online regulation;

2. transfer of the ABA's spectrum planning, licence allocation and enforcement functions to the ACA; or
3. transfer of only the ABA's broadcasting spectrum planning functions to the ACA.

Responses (27 in all) were mixed. The free-to-air television and radio networks categorically opposed the move, arguing that 'the question of how to "maximise … the overall public benefit derived from using the radiofrequency spectrum" is not a question about "maximising revenue"'. The implicit fear is that in a merged regulator, the ACA's agenda of auctioning spectrum to the highest bidder would win out, and broadcasters would be forced to compete for spectrum on the open market against the big telecommunications companies such as Telstra and Optus. The broadcasters made the point that telecommunications is about one-to-one information flow, whereas broadcasting is about one-to-many information flow – hence the fundamental need to take cultural and community concerns into consideration.

Conversely, the submissions of Telstra and Optus, along with those of Vodafone, Ericsson and Motorola, indicated an interest in the proposed merger and in particular the concept of opening up the BSBs to free competition. Telstra argued that the use of 'unified, technology-neutral licences' would result in further 'administrative efficiencies', which in turn would translate into cost savings to spectrum operators and consumers (although Telstra did expressly recognise the importance of the social objectives in the BSA). Vodafone submitted that the unequal treatment of different users of spectrum results in potentially harmful 'artificially competitive distortions'.

With the 2003 Paper, however, the government has retreated from the idea of transferring any of the ABA's broadcasting spectrum planning functions to the ACA. The stated reason is that to do this would endanger the administrative viability of the ABA, by leaving it with a much reduced role. Consequently, the 2003 Paper has restricted itself to discussing a 'minimal change' version of option 1. above. The proposal currently on the table is to merge the two organisations into a single regulator, but maintain the distinction between the treatment of BSB spectrum on the one hand, and the remaining spectrum on the other.

Yet despite this shift to a less drastic, policy neutral proposal, suspicion has remained among the broadcasters that the ABA's social and cultural priorities will eventually become subordinate to technical regulation and revenue considerations, and that the barriers between the BSBs and the other areas of spectrum will be gradually chipped away. A joint submission to the 2003 Paper from broadcasting industry peak bodies Commercial Radio Australia and Commercial Television Australia said it was 'crucial that broadcasting continue to be the primary use of spectrum' in the BSBs, indicating the fear that BSB spectrum could be invaded for other uses. Telstra appeared to echo this prediction in its submission on the 'one regulator, two policy regime' model, when it argued that such a model would distort a convergent market by encouraging it to gravitate towards use of whichever licensing regime was associated with the lowest costs. Both Telstra and Optus explicitly maintained their argument that an opening up of the BSB spectrum market should be part of any merger.

On the other hand, there remain more practical, less speculative arguments in favour of the 'minimal change' proposal. Firstly, it would allow the government to be seen to be progressing the issue and, if implemented, would result in the reduced transaction costs associated with having only one regulator. Furthermore, a merged regulator would have a stronger basis from which to respond in a unified way to technological convergence, once it begins to bite in earnest. Lastly, as a matter of parliamentary reality, an attempt to push through both spectrum management and institutional reforms at the same time would most likely result in debate and delay, and little or no progress in any direction.

FUTURE DIRECTION

Overseas experiences may provide some guidance on the future of spectrum planning under a merged Australian regulator. In support of the argument for merging the ABA and the ACA, both the 2002 and 2003 Papers referred to the fact that in the UK, US and Canada, consolidation of the regulation of telecommunications and broadcasting services has already taken place. According to the 2002 Paper, both the US and the UK are now indicating an intent to move away from merit-based broadcasting spectrum allocation and towards the auctioning of spectrum.

Submissions to the 2003 Paper closed on 15 September 2003. The 2003 Paper did not set any timetable for progressing the issue, so for now the ball is in DCITA's court. Meanwhile, it seems certain that technology will continue to close the gap between telecommunications and broadcasting services at a fast pace. While it may not a solution in itself, a merger of the ACA and the ABA seems to be an important first step in formulating an appropriate regulatory response to technological convergence. From there, whether the regulatory environment can keep pace with technology remains to be seen.

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Spam Bill Almost Law

John Corker examines the new proposed model for regulating spam in Australia, and critiques some potential problems.

On 31 October 2003 the Environment, Communications, Information Technology and the Arts Legislation Senate Committee issued the report of their inquiry into the *Spam Bill 2003* and the *Spam (Consequential Amendments) Bill 2003* and recommended that the Bills be agreed to without amendment.

It seems likely that the Bill will shortly become law.

The main features of the Spam Bill are:

- a prohibition against unsolicited commercial electronic messages (***UCEM***) with an Australian link;
- electronic messages include SMS and MMDS messages sent through a telecommunications network including the Internet and by mobile phone;
- a message is commercial simply if one of its purposes is commercial in nature even if it only includes a hyperlink to a commercial website;
- UCEM is prohibited unless it is sent with a recipient's consent. Consent can be explicit or inferred, notably from what is referred to as "conspicuous publication" of an electronic address;
- a single UCEM is prohibited. It is not necessary that it be sent in bulk;
- all commercial electronic messages must contain accurate information about the messages originator;
- all commercial electronic messages must contain a functional 'unsubscribe' facility to allow people to opt-out of receiving further messages from that provider;
- software that harvests electronic addresses from the Internet for the purposes of sending UCEM is prohibited;
- governments, political parties, charities, religious organisations and educational institutions are exempt from the prohibition against sending UCEM and the requirement to include a functional "unsubscribe facility" in each message; and
- the Australian Communications Authority (***ACA***) is responsible for enforcing the scheme. There is no right for a private legal action to be taken to enforce compliance with the provisions of the Bill.

Regulations may be made to give effect to the operation of agreements and MOUs that Australia might enter into with other countries that are directed towards curbing spam.

The associated *Spam (Consequential Amendments) Bill 2003* extends the existing search and seizure powers of the ACA to permit the ACA, to obtain a warrant to enter premises and take computers to investigate a suspected breach or simply to monitor compliance with the Act.

CHILLING OF COMMERCIAL FREE SPEECH

The Bill makes unlawful the sending of a **single** UCEM rather than the sending of bulk messages which is the spam problem. The justification given for this approach is the difficulty of proving that a person is sending bulk messages and the loopholes that can be found such as changing one or two characters in each message or sending multiple address lists each one of a size just below what might be considered to be bulk.

The unfortunate effect of this approach is the potential chilling of commercial free speech and a restriction on legitimate business practices of sending some unsolicited messages that may be of interest to the recipient.

Whilst the ACA has a discretion to enforce the prohibitions, none of this changes the fact that sending a single UCEM will be unlawful. An alternative way to address this issue may have been to prohibit only bulk messaging and use anti-avoidance provisions to cover the loopholes. Similar to the anti-avoidance provisions in Schedule 6 of the *Broadcasting Services Act 1992*, the ACA could be given authority to form an opinion that a message or messages were sent for the purpose of avoiding the UCEM prohibition or determine that a particular message is UCEM. One thing most people agree on is that 'spam is hard to describe but you know it when you see it'[1] so the ACA would not have difficulty recognising a spam message.

Another approach to this problem is that suggested by the Australian Computer Society and endorsed by Labor in its minority report[2]. They suggest an explicit exception for single messages distributed by a sender with a bona fide held view that the addressees would have an interest in receiving them.

OPPORTUNITY FOR NICHE SMS MARKETING

The recipient's consent is a defence to the offence of sending UCEM. Consent can be express or reasonably inferred from the conduct and the business and other relationships of the recipient individual or organisation.

Consent may not be inferred from the mere fact of publication of an electronic address unless it is a conspicuous publication and the message sent must be relevant to the work-related business, functions or duties of an employee, director, officer, partner, office-holder or self employed individual concerned or in certain cases, the office, position, function or role concerned.

What is conspicuous is not defined but would seem to include mobile phone numbers and email addresses published in the Yellow Pages, in journals, magazines, newspapers and on business or organisation related websites and even in chat rooms.

Accordingly, the conspicuous publication exception permits intermediaries to establish lists of email addresses and mobile phone numbers from the above sources with each electronic address correlated to the work-related business functions or duties of the electronic address concerned. For example, all email addresses and mobile phone numbers of people in the building trades could be compiled into a single list and legitimately used for sending UCEM relating to building products. These lists could be legitimately used for sending unsolicited commercial emails or, more relevantly in the building trade, SMS or MMDS messages to mobile phones as most tradespersons use mobile phones as their main form of communication. Equally law firms who publish the email addresses of their partners on their websites could find themselves on lists whereby law stationers, document copiers, law book publishers, computer firms and court dress makers are regularly sending UCEM to their partners as messages from these businesses are relevant to their functions as a partner in a law firm.

The conspicuous publication exemption has the effect of legitimising niche marketing in the electronic messaging space and we should not be surprised to see some businesses taking advantage of this particularly in the highly sought after SMS marketing area. The Commonwealth Privacy Act continues to apply but with its exemptions for small business (turnover <$3m) and the fact that these lists can be de-identified for personal information, it will not prohibit this type of marketing.

The Bill provides that, if businesses and individuals publish a statement that they do not wish to receive UCEM in the same place as the publication of their electronic address, then their address can not be used in this way. Businesses and organisations would be well advised to consider including the words "No Spam" when re-subscribing to their Yellow Pages entry, reviewing the electronic addresses contained on their website or in other conspicuous publication of their contact details.

All sent messages will have to include details of a functional unsubscribe facility so for those that have the time and trust to use such a facility there will be a way of removing their address from the list.

BETTER OFF WITH A '.AU' EMAIL ADDRESS?

A further defence to the sending of UCEM is that the sender did not know and could not with reasonable diligence have ascertained that the message had an Australian link. If the message originates in Australia then it has an Australian link and there are other connections with Australia that apply. The evidential burden to show reasonable diligence rests with the sender of the message. For a spammer based outside Australia who has bought an email list from a third party, to remove all the addresses with an Australian sub-domain, would seem to be exercising reasonable diligence. This may possibly leave plenty of Australians with .com, .org, .net or hotmail addresses still on the list. It is very difficult and in most cases impossible to look behind an email address to ascertain whether the individual who can access that email account has a connection with Australia. It is hard to see what more diligence could be exercised.

Many Australian businesses in the past few years have done away with the .au Australian sub-domain for their web address and the email addresses of their staff. Australian businesses may now be well advised to go back to using a .au sub-domain for the email addresses of their staff particularly if spammers based in other countries are going to comply with international MOUs and agreements on curbing spam which are a key part of the government's overall strategy.

COMMENCEMENT AND REVIEW

The substantive provisions of the Bill don't commence until 120 days after it receives Royal Assent. The Act also provides for a Ministerial Review of its operation within 2 years of its commencement.

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1 Mr Philip Argy, Australian Computer Society, Proof Committee Hansard. p.13.

2 Labor Minority Report paragraph 21.

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