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Issues of interest to CAMLA members include:

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

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

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

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

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Media Ownership Laws: The Forecast is for Change

Carolyn Lidgerwood analyses the Australian Governments recent announcements indicating a long anticipated shift in policy direction.

Introduction

On Tuesday 14 March 2006, the Minister for Communications, Information Technology and the Arts announced proposals for changes to laws regulating media ownership and control (**media ownership laws**).

Previous attempts to change the existing cross-media rules and the foreign ownership rules (eg in 2002-2003) were made in isolation from other changes to the regulatory regime for broadcasting. However, the Minister's latest proposals are presented as part of a "bundle" of proposed changes.

Beyond the proposals for changes to media ownership laws are a wide range of proposals that are either directly or indirectly related to the digital television conversion process (**digital proposals**).

Specifically, the Government proposes to release a "Digital Action Plan" during 2006 to expedite digital conversion and to bring the analog/digital simulcast period to an end. It is also proposing to change some of the existing restrictions on how the digital spectrum may be used by the free to air television broadcasters. Other proposals are directed at "enabling" new services (both in the broadcasting services bands and beyond) and at clarifying the Government's policy about further commercial television licences. The Minister has described this as being to

> *"ensure that Australia will not be left behind as the world converts to digital".*[1]

This article focuses on how the media ownership and control proposals can be expected to be implemented, if the Government confirms the framework that was announced in March. It focuses on "what's going", "what's staying", and "what's new" (by reference to the *Broadcasting Services Act* 1992(**Act**)). It also considers the possible practical effects of the proposals.

Some brief observations about the digital proposals are also made at the end of this article. At this time, these are limited to observations that may be of interest to either potential "new entrants" to the broadcasting industry, or existing broadcasters who are not free to air television broadcasters.

Proposals, not policy

At the outset, it needs to be emphasised that what the Minister announced were only "proposals". These proposals do not (yet) represent settle Government policy and have not been incorporated into draft legislation. The Minister's announcement signalled the start of another consultation process only, albeit one that is expected to be short.

The proposals announced by the Minister are contained in the Discussion Paper on Media Reform Options titled "Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age" (**Discussion Paper**). Submissions to the Discussion Paper close on 18 April 2006.

In this article, references to "proposals" are to those "preferred options" identi-

Volume 24 Nº 4
May 2006

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Communications Law Bulletin
Editors: Shane Barber & Page Henty
Printing & Distribution: BEE Printmail
Website: www.camla.org.au

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fied in the Discussion Paper.

Timing

It also needs to be emphasised that the Government has not yet committed to a timetable for introducing the cross media and foreign ownership reforms that are discussed below. This is because they are still proposals only (as indicated above). Also, timing may depend on what the Government decides about the digital proposals.

The Discussion Paper indicates that the cross media and foreign ownership reforms could commence when licences for new types of digital services are issued for those parts of the broadcasting services bands (**BSB**) that are currently set aside for datacasting (see further discussion below). The Discussion Paper states that this is expected to be in 2007.

The other alternative is to delay the proposed media ownership reforms until the end of the analog/digital simulcast period for free to air television. Exactly when that period will end is another matter addressed by the Discussion Paper. Presently, the analog/digital simulcast period is due to expire 8 years from the date that digital broadcasting commenced in each licence area (8 years from 1 January 2001 for the five mainland state capital cities – ie 31 December 2008). The Discussion Paper indicates that the Government is considering extending this period until 2010 (or 2012 for regional markets, which commenced digital television simulcasts later than major metropolitan markets). The scope of the extensions are important matters for the public consultation process.

This demonstrates that there remains ongoing uncertainty about when the cross media and foreign ownership laws may change. Nevertheless, as it is possible that the changes could be introduced from next year, it is important to focus on the possible practical implications now.

Media Ownership and Control

The Discussion Paper states that the Government is considering "*options for implementing reforms*" to the media ownership laws within the framework that is outlined below. The following discussion illustrates what will occur if the Government confirms this framework at the end of the current public consultation process.

What's Going from the BSA

(a) BSA cross-media ownership and control restrictions

Most of the cross-media rules in Part 5 of the BSA will be removed.

Section 60 of the BSA currently provides that a person can not be in a position to exercise control of:

- a commercial television licence and a commercial radio licence in the same licence area;
- a commercial television licence and a newspaper that is "associated" with the licence area of that television licence (that is, a newspaper that is in English, published at least 4 days per week, has 50% or more of its circulation by way of sale, and 50% or more of its circulation is within the relevant licence area); or
- a commercial radio licence and a newspaper that is "associated" with the licence area of that television licence.

Similar restrictions apply to "cross media directorships" under section 61.

highlighted by the increasing use of the Internet in relation to many illegal activities. An example of this was Operation Falcon, a major US investigation into Internet child pornography announced on 16 January 2004 which required the assistance of law enforcement agencies in a number of other countries including France, Spain and Belarus and was the catalyst for Operation Auxin in Australia concerning the same credit card fraud and pornography ring.

In 2001, amendments to the *Crimes Act 1900 (NSW)* were enacted through the *Crimes Amendment (Computer Offences) Act 2001*.

The amendments are designed to tighten the penalties for prohibited acts relating to computers, with specific provisions relation to viruses and hacking. The new provisions prohibit:

- any unauthorised access to data held in any computer;
- any unauthorised modification of data held in any computer;
- any unauthorised impairment of electronic communication to or from any computer;
- the possession or control of data with the intention of committing a serious computer offence or with the intention of facilitating the commission of a serious computer offence; and
- producing, supplying or obtaining data with the intention of committing a serious computer offence or with the intention of facilitating the commission of a serious computer offence.

The Federal Government has also introduced significant amendments to the *Criminal Code 1995* by way of the *Crimes Legislation Amendments (Telecommunications Offences and other Measures) Act (No. 2) 2004* (**Crimes Amendments Act**) which came into effect on 28 September 2004.

The *Crimes Amendments Act* repeals some of telecommunications offences in the *Crimes Act 1914* and replaces them with new and updated telecommunications offences in Part 10.6 of the *Criminal Code*. Significantly, the *Crimes Amendments Act* creates new offences concerning the access, production, supply and obtaining of child pornography and child abuse material using new technological tools, such as the Internet. The legislation also targets online 'grooming' activities by sexual predators. The offences established under the new laws will allow Australia-wide prosecution of internet pornography offenders and include tough penalties of up to 10 years imprisonment.

The *Crimes Amendments Act* also creates "Financial Information Offences" in Part 10.8 of the *Criminal Code*. These amendments criminalise dishonestly obtaining, or dealing in, personal financial information without the consent of the person to whom the information relates and also criminalises possession, control or importation of a thing with the intention that the thing be used to commit the offence of dishonestly obtaining or dealing in personal financial information.

The introductions of the "Financial Information Offences" are a response to the Model Criminal Code Officers' Committee's (**MCCOC**) March 2004 discussion paper on credit card skimming offences. Credit card skimming is the process by which legitimate credit card data is illicitly captured or copied, usually by electronic means.

Certain aspects of cyber crime have also been the subject of reports released by a number of Australian agencies. The Australian Institute of Criminology's (**AIC**) report *Online Credit Card Fraud Against Small Businesses* released in 24 February 2004 which revealed that less than one third of incidents uncovered by the survey were reported to police. In contrast to over-the-counter credit card transactions, where businesses are generally not liable for fraudulent purchases, online traders are responsible for recouping losses associated with online credit card fraud. This national survey of small businesses found:

- one third of online traders have been a victim of online fraud;
- over half of those businesses hit became repeat targets of fraudsters; and,
- average losses ranged from $100 to $3,500.

On 1 September 2005, the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, launched *Taking Care of Spyware*, a guide to help Australians protect themselves against spyware on the Internet. The Minister also released submissions received in response to a recent Government review on spyware.

The Minister reported that:

> *"The feedback we received from members of the public and industry stakeholders highlighted a need for the public to be aware of the threat of spyware.* The Taking Care of Spyware *brochure tells consumers how they can identify spyware on their computers and remove it, or protect their computers against it."*

The Government will now follow up on courses of action identified in the consultation process.

> *"This will include things like working with e-security companies and law enforcement agencies to target spyware,"* Senator Coonan said. *"The Government will also continue to work with the Internet industry to ensure that consumers know what is installed on their computers and what information they are making available online to others."*

Spam

Both Australia and the United States have introduced substantial legislation prohibiting the dissemination of spam. However, countries such as China and Russia risk becoming havens for creators of Spam due to an absence of legislation in those countries.

In Australia, Spam in now regulated by the *Spam Act 2003* (Cth) which seeks to combat spammers and the techniques they use. The Spam Act has been examines in detail elsewhere and is beyond the scope of this article.

A public consultation version of a *Draft Spam Code* (**Draft Code**) applying to Internet and Email Service Providers was released on 26 July 2004. The Draft Code is designed to compliment the *Spam Act*.

The Draft Code seeks to define best practice standards for ISPs and email service providers (**ESPs**) in their spam management, as well as assisting their customers to exercise greater control as users.

On 11 August 2004 the *eMarketing Code of Practice* was released by the Australian Direct Marketing Association (**ADMA**). On 16 March 2005, the former ACA registered the code under section 117 of the *Telecommunications Act 1997* with the effect that compliance with the code is mandatory and enforceable by ACMA.

The *e-Marketing Code of Practice* establishes comprehensive, industry-wide rules and guidelines for the sending of commercial electronic messages in compliance with the *Spam Act 2003*. The Code provides detailed guidance about acceptable eMarketing practice, particularly with respect to issues such as consent and viral marketing. The Code also provides a framework by which industry can handle complaints about Spam and monitor industry compliance with code provisions.

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ieontrial.com which related to that relationship. Macquarie Bank sought to restrain the publication of that material. The court was satisfied that the material and the site conveyed imputations defamatory to Macquarie Bank. The court presumed that the material had been prepared, or had been facilitated, by Mr Berg who was not physically present in New South Wales (the natural jurisdiction of the court), it being presumed that he was located in the United States.

The court was satisfied that it was empowered to restrain conduct occurring or expected to occur outside the territorial boundaries of its jurisdiction and it could exercise this power in its discretion. That discretion involved consideration of the potential enforceability of any orders made and whether another court was a more appropriate forum. The court could only enforce any order if the defendant voluntarily returned to New South Wales and the court could not compel him to do so. The court however was concerned about exercising its discretion in circumstances where the order's effectiveness was solely dependent upon the voluntary presence, at the time of his selection, of Mr Berg.

Moreover, the court was troubled by the nature of the internet, given that information on the internet can be received by anybody anywhere. The order sought by Macquarie Bank could have the effect of restraining publication of all the material then presently contained on the website in any place in the world. It was not possible to simply ensure that the information could not be seen within New South Wales. The court held:

> *"An injunction to restrain defamation in New South Wales is designed to ensure compliance with the laws of New South Wales and to protect the rights of plaintiffs as those rights are defined by the law of New South Wales. Such an injunction is not designed to superimpose the law of New South Wales relating to defamation on every other state, territory and country of the world ..."*

It should be noted, however, that the decisions of the Federal Court in 1999 in *Australian Securities and Investments Commission v Matthews* [1999] FCA 164 and *Australian Securities and Investments Commission v Matthews* [2000] NSWSC 390 proffered a different result from a similar facts and circumstance.

(b) **Gutnick v Dow Jones & Co Inc [2001] VSC 305**

Dow Jones is the publisher of the *Wall Street Journal*, and another magazine called Barrons. In late 2000, *Barrons* published a story relating to Mr Joseph Gutnick's business affairs to which Mr Gutnick took objection. Mr Gutnick is primarily resident in Victoria although he conducted some affairs in the United States where *Barrons* is published. *Barrons* was also published online, with the server hosting the website being located in New Jersey. The court was satisfied that Victorian readers downloaded the relevant article.

In its defence, the publishers of *Barrons* proffered that the article was published in New Jersey, the place of location of the server, and not in Victoria and was therefore beyond the jurisdiction of Victorian courts.

The court was of the view that the law in defamation cases has been for centuries that publication takes place where and when the contents of the publication, oral or spoken, are seen and heard and comprehended by the reader or hearer. On that basis the court was of the view that publication of the relevant article occurred in Victoria when it was downloaded by the Dow Jones subscribers who had met Dow Jones' payment and performance conditions and by the use of their passwords. The court did not support the argument that the publication occurred when and where the material was uploaded in New Jersey.

In relation to arguments advanced by Mr Berg's Counsel, the court held that:

> *"Counsel was free to say what he chose when deploring the possibility that the court should reach a conclusion that threw a cordon sanitare around the country to prevent its citizens from receiving information available everywhere else. But this claim is an overstatement. About these relatively self indulgent submissions, the court says nothing, having neither the power or inclination to censor anything. The point simply is that if you do publish a libel justiciable in another country with its own laws ... then you may be liable to pay damages for indulging that freedom."*

(c) **ACCC v Worldplay Series Pty Limited (2004) FCA 113**

In Australian Competition and Consumer Commission v Worldplay Services Pty Ltd [2004] FCA 1138 the ACCC alleged that, among other things, Worldplay Services Pty Ltd (**Worldplay**) had breached section 65AAC(1) of the *Trade Practices Act 1974* (Cth) by participating in a global online business that was in fact a pyramid selling scheme. The business in question provided gaming services in over 50 countries, trading under the name World Games Inc. (**World Games**).

However, Worldplay argued that as the scheme could not be accessed using an internet connection provided by an Australian ISP, the scheme operated outside the territorial boundaries of Australia and was therefore beyond the application of the *Trade Practices Act*. This raised the question of the extent to which operators of internet-based pyramid selling schemes could use Australia as a haven (either wholly or partially) in circumstances where the Australian public cannot gain internet access to such schemes through Australian ISPs.

Justice Finn held that the case essentially involved the application of Australian law to an Australian registered company engaging in conduct within Australia and that, as the relevant conduct occurred at Worldplay's Queensland office, Worldplay was participating in a pyramid selling scheme in contravention of the *Trade Practices Act*.

Cybercrime

Broadly speaking, there are three distinct types of criminal activity to which the online environment is often subject, being:

- Targeting other computers – this occurs when computers are used for the creation and proliferation of computer viruses, worms, Trojans or other programs designed to cause damage to computers or for hacking into other systems;
- Ancillary purposes – such as storing information concerning other criminal activities like the pirating of software or pornography; and
- Committing an offence – credit card fraud and the distribution of child pornography are commonly cited examples.

The need for co-operation between the law agencies of multiple jurisdictions has been

If the proposals are confirmed and implemented, sections 60 and 61 of the BSA will no longer be required, as they will be replaced with a "diversity test" to be administered by the Australian Communications and Media Authority (**ACMA**) – see discussion under **"What's New"** below. The Minister has explained that this new approach will contain "safeguards to ensure there is no undue concentration of ownership of Australia's media entities".[2]

It should be noted that there are also cross-media ownership limits that prevent a person who controls a commercial television licence from controlling a datacasting transmitter licence in the same licence area (see sections 54A and 56A of the BSA). It appears that these restrictions are to be retained (either in this form, or in a different form).

(b) BSA foreign ownership and control restrictions

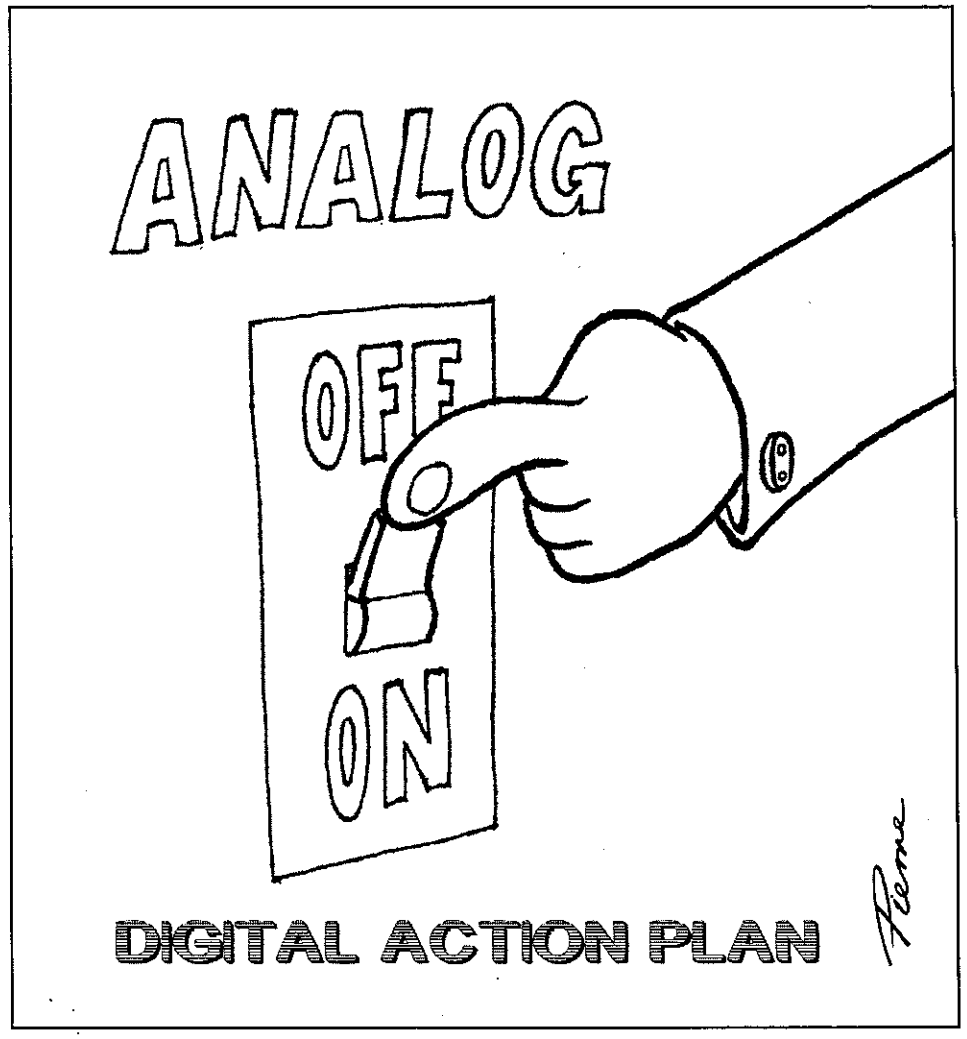
If the proposals are confirmed and implemented, the foreign ownership and control rules in Part 5 of the BSA (relating to commercial television licensees), and the foreign ownership rules in Part 7 of the BSA (relating to subscription television broadcasting licensees) will be removed.

Section 57 of the BSA currently provides that:

- a foreign person cannot be in a position to exercise control of a commercial television broadcasting licence (whether this is because they hold more than 15% of the company interests in the licensee, or because they are in control for some other reason); and
- foreign persons must not have company interests in a commercial television broadcasting licence that exceed 20%.

There are also limitations on foreign directorships of commercial television broadcasting licensees under section 58, as no more than 20% of directors can be foreign persons.

In addition, section 109 of the BSA currently imposes foreign ownership (but not control) restrictions on subscription television broadcasting licences. Under section 109:



- a foreign person must not have company interests of more than 20% in a subscription television broadcasting licence; and
- combined foreign interests in a subscription television broadcasting licence must not exceed 35%.

All of these BSA foreign ownership and control restrictions will be removed if the Government's proposals are implemented, meaning that foreign investment in commercial television businesses and subscription television businesses will be able to be made in a manner that is consistent with foreign investment in commercial radio. No foreign ownership restrictions apply to commercial radio under the BSA.

Specifically, there will no longer be a need for foreign investors to attempt to structure their investments in commercial television licensees to ensure that they are not in a position to exercise control (contrast the previous experience of CanWest, as illustrated by the three Australian Broadcasting Authority investigations from 1995 to 1998).[3]

It also means that the peculiar foreign ownership provisions that apply to subscription television licences will also be removed. In the absence of a corresponding restriction on foreign control, it has long been difficult to see the purpose of these restrictions.

Regulation of foreign ownership will then be limited to the scheme under the *Foreign Acquisitions and Takeovers Act 1975*. The Discussion Paper indicates that the media sector will remain a "sensitive sector" for the purposes of the *Foreign Investment Policy*[4] meaning that foreign investments in the media sector will continue to be subject to approval by the Treasurer. However, the newspaper-specific provisions will be removed from that policy.

What's Staying in the BSA

Under the Discussion Paper, there are no proposals to remove or amend the existing ownership limits in the BSA, comprising:

- the "two to a market" rule that applies to commercial radio

licences (under sections 54 and 56 of the BSA);

- the "one to a market" rule that applies to commercial television licences (under sections 53 and 55 of the BSA).

Also, the "75% audience reach limit" that applies to commercial television licences under sections 53 and 55 of the BSA will be retained. This means that the development of (truly) national television networks with common ownership and control will continue to be prohibited.

The proposal to retain these limits on ownership means that there continues to be a role for the tests of control contained in Schedule 1 of the BSA. In addition, the existing control tests will also be relevant to assessing whether particular businesses form part of the same "commercial media group" (as explained below).

What's New to the BSA

The most important new proposal for changing the cross media rules in the BSA relates to the proposed introduction of a "diversity test" (also called a "minimum number of media groups" test).

Cross media ownership acquisitions will be permitted if and only if there remain a "minimum number of commercial media groups" in the relevant licence area after the transaction is completed.

The Discussion Paper indicates that a "commercial media group" can be comprised of one or more of a commercial television licensee, a commercial radio licensee or associated newspaper, where these entities have "common control" (under the BSA control tests).

In other words, the proposed definition of "commercial media groups" will be limited to those categories that are presently regulated under the cross media rules. Ownership of open narrowcasting licences or community licences will not be considered in this context.

The minimum numbers of commercial media groups that are being proposed are:

- Five (5) commercial media groups in "mainland state capital" licence areas – ie Adelaide, Brisbane, Melbourne, Perth and Sydney; and
- Four (4) commercial media groups in "regional" licence areas (which are assumed to include Hobart, Darwin and Canberra).

Since the Minister's announcement, there has been much media commentary about what this may mean, but little in the way of practical illustration. Three examples are set out below to assist in a consideration of this issue.

(c) Example 1 – Small regional market

In the Wangaratta (Victoria) radio licence area,[5] North East Broadcasters Pty Limited (an independent commercial radio operator) owns two commercial radio licences, which provide the 3NE 1566 AM service, and the Edge 102.1 FM service.

The Wangaratta radio licence area is contained within the aggregated Victorian commercial television licence area (Regional Victoria TV1), so people in Wangaratta also receive the commercial television services provided by WIN, Prime and Southern Cross.

The *Wangaratta Chronicle* is the local newspaper, but it is only published three days per week,[6] so would not be an "associated newspaper" for the purposes of the existing cross media rules, or for the purposes of forming a "commercial media group".

On this basis, in Wangaratta there are presently only four (4) "commercial media groups". This means that no cross media acquisitions would be permitted (under the BSA) in that market.

(d) Example 2 – Larger regional market

In the Cairns (Queensland) radio licence area,[7] there are four (4) commercial radio licences. Two of these are provided by Macquarie Regional Radioworks (HOT FM 103.5 and SEA FM 99.5), one is provided by Prime Radio (Cairns) Pty Limited (4CA FM), and the fourth is provided by Elmie Investments Pty Limited (4EL/Easymix).

The Cairns radio licence area is contained within the aggregated regional Queensland television licence area (Regional Queensland TV1), so receives commercial television services from Southern Cross, Seven Queensland and WIN. Note that this is not a Prime Television market, which explains why Prime was able to acquire the 4CA commercial radio licence.

The *Cairns Post* is the local newspaper, published 6 days per week by News Limited. The other local newspapers (the *Cairns Sun* and the *Northern News*) are free newspapers, so would not be considered to be "associated newspapers".

On this basis, in Cairns there are seven (7) "commercial media groups". This could reduce to four (4) under the proposals, subject to compliance with the relevant ownership restrictions (ie the "one to a market" television rule and the "two to a market" radio rule), and to Australian Competition and Consumer Commission ("**ACCC**") approval (discussed below at section 2.4).

(e) Example 3 – Major metropolitan market

In the Sydney radio licence area, there are seven (7) commercial radio operators providing commercial radio services in the broadcasting services bands. These are:

- Macquarie Radio Network (2GB, 2CH);
- Austereo (2DAY, MMM);
- APN News and Media (WSFM, MIX 106.5);
- DMG (NOVA, VEGA);
- Southern Cross Broadcasting (2UE);
- Sky Channel (2KY);
- Broadcast Operations (2SM).

The Sydney radio licence area boundaries[8] are within the Sydney television licence area (Sydney TV1).[9] This means that people living in the Sydney radio licence area are also served by the Seven, Nine and Ten commercial television services.

In addition, *The Daily Telegraph* (published by News Limited) and *The Sydney Morning Herald* (published by John Fairfax Holdings) are newspapers associated with the Sydney licence area.

On this basis, in Sydney there are twelve (12) "commercial media groups". In

Section	Title	Effect of Provision
Section 15	Attribution of Electronic Communications	This provision provides that, for the purposes of Commonwealth law, unless the parties agree otherwise, the purported originator of an electronic communication is bound by that communication only if the communication was sent by that purported originator or with its authority. Section 15 then states that this general principle is not intended to affect the operation of general principles of agency law regarding actual and ostensible authority.
Section 14	Time and Place of dispatch and receipt of electronic communications	To inject certainty into electronic transactions, this provision provides that the time of dispatch, unless otherwise agreed, occurs when the electronic communication enters the single information system outside the control of the originator or, if it enters successively two or more systems outside the control of the originator, when it enters the first of those systems. The time of receipt will either be: (a) if the addressee of an electronic communication has designated an information system for the purpose of receiving the communication, when it first enters that system; or (b) where the addressee has not designated such a system, when it first "comes to the attention of the addressee". Unless the parties otherwise agree, the place of dispatch and receipt will be the place where the originator has its place of business (in the case of dispatch) and where the receiver has its place of business (in the case of receipt). Where there are multiple places of business of their originator or receiver, then the place of business that "has closer relationship to the underlying transaction" will be the relevant place. If that analysis does not work with the relevant transaction, then the originator or a receiver's principal place of business will be the relevant place. In circumstances where the originator and the receiver or the receiver don't have a place of business, then their ordinary residence will suffice.

(**Convention**).

The Convention aims to remove obstacles to the use of electronic communications in international contracting (as opposed to domestic contracting which is the focus of ETA) by increasing certainty where electronic communications are used in international contracts, for example by establishing rules to determine a party's location in an electronic environment and the time and place of dispatch and receipt of messages, clarifying the use of automated message systems for contract formation and providing guidance on electronic authentication methods.

The Convention is subject to ratification, acceptance or approval by the signatory states, with a signatory event expected to take place in New York from 19 June to 7 July 2006.

On 17 March 2006, the Australian Government published its updating replacement of the 2000 Model *The Australian Guidelines for Electronic Commerce* (**Guidelines**). Accompanying the Guidelines was a *Check List for Business to Consumer E-Commerce in Australia.*

The new Guidelines are designed to enhance consumer confidence in electronic commerce by providing guidance to businesses on how to deal with consumers when engaging in business to consumer e-commerce. While the principles set out in the Guidelines are not mandatory, compliance with them is strongly encouraged. The Guidelines seek to address those areas of e-commerce which may be different to the consumer's experience face to face. It covers issues such as security of payments, privacy of personal information and access to their address. The Guidelines provide guidance to:

- fair business practices;
- accessibility and disability access;
- advertising and marketing;
- engaging with minors;
- disclosures of businesses' identity and location;
- disclosures of contracts terms and conditions;
- the implementation of mechanisms for concluding contracts;
- adopting privacy principles;
- using and disclosing information about payment, security and authentication mechanisms;
- the establishment of fair and effective procedures for handling complaints and resolving disputes; and
- law and forum for the resolution of contractual disputes.

The Guidelines, among other things, reinforce general contractual principles in relation to ensuring consumers can access a clear and complete text of a transaction's terms and conditions both easily and in a printable forms. This is a particular reminder to legal advisers of companies undertaking online transactions given the common insistence by clients to "remove all the legal stuff" from relevant page set ups.

A full copy of the Guidelines is available at www.treasury.gov.au.

Jurisdiction

The nature of the problem

It is trite to say that one of the key legal issues with which courts around the world have been grappling in recent years is the analysis of their scope and derivation of power to hear particular disputes regarding online transactions and to compel those people involved to obey its commands.

This issue is exacerbated online as participants may not even be aware of the location of the person with whom they are dealing. Much of the law regarding jurisdiction is invalid in an environment which also lacks physical boundaries and communities.

Australian Case Development

(a) **Macquarie Bank Limited & Anor v Berg [1999] NSWSC 526**

In this case, Macquarie Bank Limited and Mr Berg were in dispute in relation to a number of matters arising from Mr Berg's employment (or consultancy) arrangement with the bank.

During 1999, material started appearing on a website at www.macquar-

Section	Title	Effect of Provision
Section 5	Definitions	The term "electronic communications" as used in the ETA means: (a) a communication of information in the form of data, text or images by means of guided and/or unguided electro magnetic energy; or (b) a communication of information in the form of speech by means of guided and/or unguided electro magnetic energy where the speech is processed at its destination by an automated voice recognition system.
Section 3	Object	The ETA cites its objects as being to: (a) recognise the importance of the information economy to the future economic and social prosperity of Australia; (b) facilitate the use of electronic transactions; (c) promote business and community confidence in the use of electronic transactions; and (d) enable business and the community to use electronic communications in their dealings with governments.
Section 8	Validity of Electronic Transactions	This key clause provides that a transaction is not invalid simply because it took place wholly or partly by means of electronic communications.
Section 9	Writing	If a Commonwealth law requires someone to give information in writing, that obligation has been performed if the person gives the information by means of electronic communications where certain conditions are met. Examples are: (a) whether information will be readily accessible for subsequent reference; (b) if the requirements of a particular Commonwealth entity are met; (c) if the verification requirements of any particular Commonwealth entity are met; and (d) where the information is not being given to a Commonwealth entity, where the person to whom the information is required to be given consents to the information being given by way of electronic communication. Examples of "giving information" include making applications, lodging claims, sending notifications, lodging returns, making a request, making a declaration, lodging an objection etc.
Section 11	Production of Documents	If a Commonwealth law requires you to produce a document in paper form, that obligation is performed if it is provided in electronic form where certain conditions are met, including: (a) the method of generating the electronic form of the document is a reliable means of assuring the maintenance of the "integrity" of the information contained in the document; (b) if, when it was sent, it was reasonable to expect the information contained in the electronic form of the document could be readily accessible so as to be usable for subsequent reference; and (c) similar constraints as referred to in section 9 above if the information is required to be given to a Commonwealth entity. The "integrity" of information contained in the document will be considered to be maintained if the information has remained complete and unaltered apart from the inclusion of any endorsement or immaterial change which arises in the normal course of communications, storage or display. If any other law of the Commonwealth requires a more specific method of producing a document then that law will prevail.
Section 12	Retention	If a law of the Commonwealth requires you to retain information, that obligation is met where it is reasonable to expect that the information could be readily accessible so as to be later usable, and where any specific regulations have been met. There are also some specific rules regarding retention of otherwise written documents in electronic form and the retention of documents which were otherwise always in electronic form.

theory, this could reduce to five (5) "commercial media groups" under the proposals. Again, this would be subject to compliance with the relevant ownership restrictions (ie the "one to a market" television rule and the "two to a market" radio rule), and to ACCC approval.

Notably, it is not proposed that there be an express prohibition on a commercial media group controlling "three out of three" of the regulated media outlets in a market (ie commercial television, commercial radio and an associated newspaper). This was an issue that was incorporated into previous draft legislation relating to media ownership reform (but this was not enacted, as noted).

Also, the Discussion Paper proposes that the existing local content requirements applying to commercial television licensees in aggregated regional television markets (except Tasmania) are to be retained, and will be extended to Tasmania. These requirements are presently imposed as a condition of licence. The Discussion Paper indicates that the ACMA and the Government will monitor the provision of local content in other regional television licence areas and also on digital radio, and will "consider extending licence conditions relating to levels of local content to those markets if local content levels decline materially". However, that this could impact upon the viability of regional broadcasters is also noted as a balancing factor. Whether these kinds of proposals will be sufficient to satisfy the "minor parties" remains to be seen.

Regulatory approvals

In addition to regulatory approvals for foreign investment in the media sector that are required under the Foreign Acquisitions and Takeovers Act 1975, each of the ACMA and the ACCC will have ongoing roles when media mergers and acquisitions are being contemplated.

(f) ACMA

The Discussion Paper indicates that the ACMA would need to monitor cross media consolidations to ensure that the "diversity test" was complied with (and that acquisitions did not result in there being less than four (4) commercial media groups in regional areas, and five (5) commercial media groups in mainland capital cities). This would be in addition to the ACMA's existing obligations to monitor compliance with the ownership and reach limits in the BSA.

However, this should be a more straightforward for the ACMA than what was proposed previously, as the ACMA will not need to assess whether requirements relating to "editorial separation" are being met.[10]

If the proposals are implemented and cross media mergers follow, on-air "disclosure requirements" will apply when one part of a commercial media group reports on the activities of another entity within that group. While not clear from the Discussion Paper, it is assumed that this will be limited to news and current affairs programs. It is possible that it could also apply to cross-promotions. This will be another area to be administered by the ACMA.

(g) ACCC

Importantly, the merger provisions in the *Trade Practices Act* 1974 will continue to apply, and the ACCC will need to assess the competitive impacts of proposed media industry mergers and acquisitions.

The Discussion Paper indicates that the ACCC will be

> "*asked to articulate its proposed approach to media mergers, particularly in relation to those factors that will affect its definition of media markets*" once the Government's media reform framework has been settled.

Since 2004, the Chairman of the ACCC, Graeme Samuel, has made a number of public statements about the ACCC's possible approach if there are changes of the existing cross media rules in the BSA, including an acknowledgement that "convergence is now starting to blur traditional lines of market definition".[11] However, press commentary about the current proposals has observed that the media industry appears unsure about how the ACCC will approach media mergers and acquisitions.[12].

The Chairman of the ACCC has been reported as saying that he will answer media groups' calls for more clarity through a speech or discussion paper if cross media ownership restrictions were removed in 2007. He has stressed that this will constitute "guidance, not guidelines", and cautioned that the ACCC will not be "pre-defining" markets.[13] Mr Samuel has also indicated that "the best guidance is often obtained through confidential discussions with the Commission by parties proposing a merger".[14]

Digital Broadcasting Reforms

As outlined at the beginning of this article, the proposals in the Discussion Paper also include a wider range of proposals relating to digital broadcasting and the Government's response to issues that arise under the BSA in 2007.

The media release issued by the Minister on 14 March 2006 contains a comprehensive list of the key proposals that are being made in that area (and this is repeated in the Discussion Paper). These include proposals relating to multichannelling, the use of HDTV, the duration of the analog/digital simulcast period, and small changes to the anti-siphoning regime. It is not proposed to repeat those proposals here.

However, from the perspective of organisations that do not currently hold a commercial television broadcasting licence, but are interested in becoming a provider of digital audio visual services, the most important points to note are:

- There is unlikely to be a new "fourth commercial television network" in the BSB any time soon. While the BSA moratorium on the issue of fourth commercial television licences will end on 31 December 2006 (under section 28 of the BSA), the Government proposes to amend the BSA so that the power to issue such licences resides with the Government (presumably with the Minister), rather than with the ACMA;
- It may be possible to acquire a non-BSB licence to provide a com-

mercial television service in the future. Non-BSB licences have previously been issued by the ACMA's predecessor (the ABA) for commercial radio services (under section 40 of the BSA), but the section 28 BSA moratorium has prevented this from occurring for commercial television services (ie in those markets which are already served by three commercial television services). This means that persons who presently provide audio-visual content that is likely to be categorised as a "broadcasting service" for the purposes of the BSA have needed to ensure that they only make such services available on a subscription basis, or that such services fall within the narrowcasting criteria in the BSA. Once the powers to allocate new commercial television licences are transferred to the Government (ie away from the ACMA, as noted above) and the section 28 moratorium ends, the Discussion Paper indicates that the Government may consider the issue of non-BSB commercial television licences. However, this would be subject to the application of a "public interest test" (yet to be defined with precision);

- When the digital BSB spectrum was planned (for digital television conversion), in most licence areas two 7MHz channels of spectrum were set aside for digital "datacasting". Datacasting transmitter licences were originally proposed to be auctioned by the Australian Communications Authority (as it then was), but these auctions never eventuated (due to a lack of industry interest as a result of the restrictive content rules that apply to datacasting services under Schedule 6 of the BSA). The Government is now considering whether these channels should be allocated for other new types of services. Specifically, the Government is no longer confining consideration of this issue to "datacasting" as defined in Schedule 6 of the BSA. However, as indicated by the Discussion Paper , the Government is still drawing the line at this spectrum being used for services that look like traditional television services, and so the "datacasting spectrum" won't be able to be used to provide anything like a fourth commercial network. Services being proposed include the kinds of mobile content services presently being trialled as DVB-H services (eg short video services, news headlines, and other "made for mobile" content), narrowcasting services and subscription services. The Government is also proposing that existing free to air television broadcasters will not be able to acquire this spectrum.

What's Next?

After the consultation period ends, formal policies are expected to be announced. If the proposals outlined above are adopted, there will be a range of amendments required to be made to the BSA.

Also, and as noted at the outset, the Government has indicated that it will release a "Digital Action Plan" during 2006 that is focussed on getting Australian television audiences converted to digital.

In the meantime, the ACMA has indicated that it will shortly issue a further discussion paper considering options for how the two "datacasting channels" should be allocated (from a technical and licence allocation perspective). For instance, the ACMA paper is expected to discuss whether the channels should be sold separately and whether they should be allocated on a licence area by licence area basis. It is expected that there will be much demand for these channels, and the ACMA's recommendations on this issue are awaited with interest.

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[1] Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts: Address to CEDA : "*Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age*", 14 March 2006.

[2] Speech to CEDA, 14 March 2006, ibid.

[3] Copies of the ABA's reports of investigation into CanWest's investment in the Ten Network are available at: http://www.acma.gov.au/ACMAINTER.65640:STANDARD:1978925624:pc=PC_91719

[4] See summary at http://www.firb.gov.au/content/_downloads/General_Policy_Summary.pdf.

[5] http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_437.pdf; http://www.edgefm.com.au/area.html

[6] http://www.vcpa.com.au/Vic/wangaratta_chronicle.html. As noted above, a newspaper needs, among other things, to be published at least 4 days per week in order to be considered an "associated newspaper".

[7] http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_507.pdf

[8] http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_542.pdf

[9] http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_305.pdf

[10] See summary of previous proposals in the article by the author: "*Towards Princes of Print Being Queens of Screen and Regents of Radio*", 28 March 2002, at http://www.gtlaw.com.au/gt/site/articleIDs/27522749DD579C45CA256DEF00007B8A?open&ui=dom&template=domGT

[11] ABC AM program, 24 October 2004. . For previous analysis of the approach that the ACCC may take, see the article by Liza Carver & Kate Horrocks, "Competing Visions", in *Lawyers Weekly*, 18 February 2005 at http://www.lawyersweekly.com.au/articles/40/0C02CB40.asp?Type=55&Category=909

[12] For example, see comments in "Coonan's Hard Line on Media", *The Australian Financial Review*, "15 March 2006 at page 14.

[13] "Samuel wary of ownership limits", *The Australian*, 16 March 2005, at http://www.theaustralian.news.com.au/common/story_page/0,5744,18480430%255E7582,00.html

[14] "ACCC to advise media groups on reforms", *The Sydney Morning Herald*, 16 March 2005, at http://www.smh.com.au/news/National/ACCC-to-advise-media-groups-on-reforms/2006/03/16/1142098556455.html

moters went about the business of promoting both vertical (industry specific) and horizontal (cross-industry) e-market lines. E-markets typically integrate the e-sale and the procurement systems of all parties creating a single digital standard for transacting business. E-markets enable the minute to minute connectivity required to exploit the efficiencies created by early e-sales and procurement systems, while allowing companies and their suppliers to begin creating integrated industry wide supply chains. For example, assuming 10,000 suppliers deal with 1,000 manufacturers who deal with 10,000 retailers, in an each to each system 100 billion electronic data interface connections may be required. Where 1 hub is used acting as a central conduit, this is reduced to 21,000 electronic data interface connections.

As an example of recent e-market activity, on 12 May 2005, the Australian Competition and Consumer Commission (**ACCC**) announced its draft determination on changes to the *National Electricity Code* concerning business-to-business (**B2B**) communications. The features of the proposed changes include:

- the creation of a new central B2B electronic hub to handle all the relevant customer and site information;
- the standardisation and automation of B2B activity to address jurisdictional inconsistencies including protocols and mechanisms intended to support the information requirements and transactions of retail competition;
- the creation of an Information Exchange Committee to act as a governing body and provide clearer management and direction;
- the enforcement of participation through the creation of obligations by replacing the state-based jurisdictional arrangements.

At the time the changes were proposed, B2B communications involved manual processes such as telephone, email and manual file transfer. The changes are designed to address perceived inefficiencies in the current processes at the time, including:

- inefficiencies and inconsistencies arising from different specifications and information exchange protocols that existed between different jurisdictions for the same or similar B2B communications;
- limited enforceability as compliance with B2B arrangements was voluntary in all states except Victoria;
- inadequate management and direction arising from an arrangement whereby the national B2B working group developed national B2B specifications and jurisdictional B2B specifications that were in turn considered by state-based committees.

The ACCC issued its final determination on changes to the National Electricity Code relating to B2B communications on 22 June 2005. The ACCC determined that net public benefits were likely to flow from the implementation of the new B2B governance arrangements.

Continuing Co-ordination

The Office for the Information Economy in the Department of Communications, Information Technology and the Arts (**DOCITA**) plays a major role in the uptake of e-commerce in Australia by facilitating a wide range of projects aimed at developing e-commerce in Australia with a key emphasis on B2B e-commerce .

On 13 July 2004 the Commonwealth Government released "*Australia's Strategic Framework for the Information Economy 2004-06*" (**Strategic Framework**).

The Strategic Framework identifies four key priorities to ensure the ongoing development of Australia's information economy, as follows:

- ensuring that all Australians have the capabilities, networks and tools to participate in the benefits of the information economy;
- ensuring the security and interoperability of Australia's information infrastructure, and support confidence in digital services;
- developing Australia's innovation system as a platform for productivity growth and industry transformation; and
- raising Australian public sector productivity, collaboration and accessibility through the effective use of information, knowledge and information and communications technology.

The Strategic Framework aims to ensure the ongoing and effective delivery of public sector services and information across all tiers of government.

Electronic Contracts

Electronic Transactions Act

The *Electronic Transactions Act, 1999* (Cth) (**ETA**) (which is mirrored by legislations in states and territories) governs electronic transactions in Australia and provides for contracts transacted electronically to be legally enforceable as a written contracts.

The ETA is largely based on the *United Nations Commission on International Trade Law's Model Law on Electronic Commerce (UNCITRAL Model Law)* which was drafted in 1996 to assist countries in the framing of legislation which would enable and facilitate electronic contracting and eliminate the need for trading partner agreements.

The ETA, like the UNCITRAL Model Law, is not intended to govern every aspect of e-commerce, rather it provides general procedures and principles for electronic contracting.

In addition to Australia, many countries have adopted the UNCTRAL Model Law as the basis for their electronic transaction legislation, particularly the countries in the European Union and in Southeast Asia.

A high level analysis of the *Electronic Transactions Act's* key provisions is contained in the table on pages 24 and 25.

While the ETA provides considerable clarification, what can be seen is that the normal rules of contracting and doing business (subject to the jurisdictional issues discussed below) will continue to apply.

For instance, if the transactions involved relevant individuals then the consumer protection provisions found in legislation such as the *Trade Practices Act 1974* (Cth) will apply. The Australian government has recognised particular challenges which may apply for businesses conducting transactions online in complying with the *Trade Practices Act* and in May 2000 published *"Building Consumer Sovereignty in Electronic Commerce: Best Practice Model for Business"* (**2000 Model**).

In addition, the *Vienna Convention on the International Sale of Goods* (**CISG**) signed in 1980, automatically applies to international sales contract involving Australian companies unless it is contractually excluded.

Current Activities

On 19 March 2004, the Working Group on Electronic Commerce of UNCITRAL, the chief United Nations body overseeing international trade law policies, announced that it had adopted draft text that would create a unified legal regime for worldwide electronic commerce, removing barriers and lowering costs for companies using the Internet to conduct business and overcome the perceived shortcomings in the CISG and the UNCITRAL Model Law.

On 23 November 2005 the United Nations General Assembly adopted the resulting *Convention on the Use of Electronic Communications in International Contracting*

Fair Trading Laws in Victoria" held on 13 May 2005 with the speaker being Dr Elizabeth Lanyon and presentation notes accessible from www.consumer.vic.gov.au.

[4] Registered under the *Telecommunications Act* in May 2005; it can be located at http://www.acif.org.au/documents_and_lists/codes/C620.

[5] http://www.consumer.vic.gov.au/CA256F2B00224F55/page/Publications-Reports+%26+Guidelines?OpenDocument&1=80-Publications~&2=955-Reports+%26+Guidelines~&3=~.

[6] "Preventing unfair terms in consumer contracts - Preliminary guidelines for suppliers (November 2003), page 4, accessible at http://www.consumer.vic.gov.au/CA256F2B00224F55/page/Publications-Reports+%26+Guidelines?OpenDocument&1=80-Publications~&2=955-Reports+%26+Guidelines~&3=~.

[7] *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481.

[8] According to this decision "good faith" includes an assessment of the form of a contract. The relevancy of the presentation of the contract with respect to what is an unfair term is reflected in section 163(3) of the FTA which provides that a consumer document must be easily legible, a minimum of 10 point font generally and clearly expressed. Section 163(3) is not part of the unfair contracts provisions but nonetheless it was introduced as another relevant aspect in protecting consumers with respect to fair contractual terms.

[9] Footnote 7 at [17].

[10] Footnote 7 at [17].

[11] Footnote 6 at page 17.

[12] Footnote 6 at page 20.

[13] Footnote 6 at page 14.

[14] Section 32Y(1) of the Fair Trading Act 1999 (Vic) (**FTA**).

[15] Section 32Y(3) of the FTA.

[16] Section 32ZA(1) of the FTA.

[17] Section 32ZA(4) of the FTA.

[18] Section 32Y(2) of the FTA.

[19] Section 32Z(1) of the FTA.

[20] section 32Z(2) of the FTA.

[21] Media release dated 14 December 2004 "AAPT taken to court on mobile phone contracts" accessible at www.dpc.seek.gov.au.

[22] ACIF C620:2005 Consumer Contracts accessible at www.acif.org.au/documents_and_lists/Codes/C620 (**Code**)

[23] The Code at 6.2(b)(i). Specific exceptions can be found at 6.3.

E-Commerce Developments

Shane Barber and Bridget Edghill review the current trends and developments in relation to regulation of e-commerce in Australia.

Introduction

This article briefly canvasses the existing law regulating e-commerce in Australia and looks at the current trends and legislative developments occurring in this field of law. The article coincides with the new E-Commerce guidelines issued in March 2006 by the Australian Government.

As recently as the late 1990s much of the law described below was in its embryonic state, with legislatures and regulatory bodies around the world scrambling to keep up with emerging technologies for communication and doing business. While the last 5 years has seen many of the gaps and uncertainties filled and addressed, e-commerce law is ever evolving to match the continuing change in technology.

This article updates activities in Australia over the last 18 months in 4 areas of law in particular which relate to e-commerce as follows:

(a) electronic contracts;
(b) jurisdiction issues;
(c) cybercrime; and
(d) spam.

Current Trends

In a little over a decade, use of the Internet has increased significantly.

In 1993 there were about 15 million Internet users. Ten years later, in 2003, there were 723 million. Six months ago there were 840 million. Today there are approximately one billion online users, three times as many as at the beginning of the decade.

What's significant is the remarkable potential for still further expansion as although the Internet's global reach is immense, only about 15% of the world's population is online.

On 12 August 2005, The Australian Bureau of Statistics released its latest *Internet Activity Survey* (**IAS**). The IAS is a census which collects details on aspects of Internet access services provided by internet service providers (**ISPs**) in Australia. The IAS contains results from all identified ISPs operating in Australia as at 31 March 2005. The next survey is currently underway.

The IAS identified, among other things, the following:

- While the total Internet subscribers in Australia increased during the period September 2004 to March 2005 by 4%, growth had slowed following a 10% increase recorded for the six months to the end of September 2004.
- The increase in overall subscriber numbers was again driven by growth in non dial-up subscribers with non dial-up subscribers representing 30% of total Internet subscribers in Australia at the end of March 2005 compared with almost 23% at the end of September 2004.
- Most of the growth for non dial-up was in the household subscriber sector with an increase of 42% in household non dial-up subscribers from the number recorded at the end of September 2004.

The platform for e-commerce then, continues to expand, demanding constant legal and regulatory attention.

What is E-Commerce?

E-commerce simply refers to use of the expanding infrastructure referred to above to conduct business. Electronic communications networks are no longer limited to the internet but may include other third generation technologies typically operated by mobile telecommunications companies.

Typically, e-commerce transactions are categorised in four ways being:

(a) consumer to consumer transactions;
(b) business to consumer transactions;
(c) business to business transactions; and
(d) many to many transactions (e-markets or exchanges).

In the early 2000s, there was a rapid appreciation of the potential of e-commerce transactions to create efficiencies for business, resulting in a frenzy of activity in all of the above areas, but particularly in relation to e-markets. As many anticipated at that time, there has been a rapid rationalisation with many e-markets, often promoted by third parties, simply not getting off the ground. While many e-markets still exist, they have not replaced the bilateral transactions referred to in (a) to (c) above to the extent anticipated.

At the height of the frenzy, third party pro-

Defamation and Satire - Drawing the Line

Christina Moloney, in this 2005 CAMLA Essay Prize winning paper asks, is the line between legitimate satire and defamation drawn in the right place or is satire stifled to an unacceptable extent?

Introduction

As perhaps "the most important form of public humour",[1] satire is fundamental to freedom of speech in a democracy, by making society "examine itself critically and confront its deficiencies".[2] Defamation occurs when material is published 'which has the effect or tendency of damaging the reputation of another'.[3] However, the current structure of defamation law, in claim and defence, ignores satire. Political satire aims to make

> "*a political opponent look ridiculous, pricking pomposity, reducing authority by encouraging laughter, or by reminding readers or audience of a politician's less pleasant aspects*".[4]

Not only is satire "'*clever critique', but also a medium for the public representation of opposing and dissident voices.*"[5]

The limited case law on satire suggests satirical subjects are either averse to litigation publicity, perhaps perceive the communication is defensible under 'fair comment',[6] or may believe the "ordinary, reasonable person" would not acknowledge a defamatory imputation. Judges appear reluctant to imbue the ordinary reasonable person with the ability to identify satire, thereby stifling otherwise perhaps legitimate commentary, possibly contributing to the "chill effect" on the media. Current proposals for uniform national defamation laws, should include a specific statutory provision acknowledging satire and its "typically ironic or exaggerated message'"'.[7]

A Difficult Balance: Freedom Of Speech And Protecting Reputation

Freedom of speech enhances autonomy, promotes truth and enhances democracy through debate and criticism.[8] Defamation law represents an inherent tension in a liberal democracy: balancing individual autonomy and freedom with the state's protective role by reference to communal standards of expression. While "freedom of the press is considered a cornerstone of democracy"[9] providing space to challenge powerful institutions, the media itself "represent concentrated power",[10] influencing society's opinions and understandings. Defamation laws recognise that democracy is harmed by careless, malicious, racist, sexist, untrue or commercially-driven reporting.[11] Without a bill of rights,[12] the Australian Constitution[13] protects individual liberty and freedom of speech through our democratic system of representative, responsible government.[14]

By protecting individual dignity, defamation law purports to protect individuals' integration into community membership while concurrently defining "the boundaries and nature of the general community".[15] Post argues defamation law plays a central role in identifying "rules of civility"' which govern society.[16] Severely restricting satire via defamation laws potentially restricts a free flow of ideas and information so vital to a healthy democratic society.

Elements of Defamation

What are the imputations?

An imputation is "an act or condition attributed to a person"[17]. Handsley and Davis argue "defamation law tends to assume that words published are to be taken at face value."[18] For example, in *Hanson v Australian Broadcasting Corporation*[19] (**Hanson**), Pauline Hanson, ex-leader of the One Nation political party, obtained an interlocutory injunction against further broadcasting of the song 'Back Door Man'.[20] Ms Hanson's own words were cut and pasted into song format. The imputations pleaded by Ms Hanson included that she was a homosexual, prostitute, man or transvestite, engaged in unnatural sexual practices and associated with the Ku Klux Klan.[21] The song is clearly satire:

> "*[w]hen the language of another is reproduced in a way that accents its otherness, the act of report turns or returns to satire.*"[22]

Ambrose J, at first instance, held that

> *"I can't imagine anybody... listening to that production... would not conclude that Pauline Hanson was... a homosexual and rejoiced in the fact".*[23]

It appears, with respect, that there is little acknowledgment of the mode and circumstances of publication.[24] The cutting and pasting indicated

> *"that references to... sexuality, were not literal, but rather 'alluding in a satirical or ironic sense' to Hanson's conservative political views".*[25]

Commentators have criticised Hanson as implying that "ordinary Australian listeners can't be trusted to pick up subtext."[26]

Prior to each broadcast of the Hanson song, a disclaimer announced the song "was satirical and not to be taken seriously".[27] Along with the choppy phrases and "retro-disco backing track",[28] this constituted the broadcast's context, which is essential to obtaining the publication's meanings according to *Charleston v Newsgroup Newspapers*.[29] Justice Michael Kirby criticised this as unrealistic according to people's ordinary casual or superficial interaction with media and that it overlooked defamation law's purpose: "to provide redress when reputations are damaged in fact".[30] Perhaps a "grab" of this song could have led listeners to perceive that Ms Hanson had consented to or participated in the song's production.[31] However, this highlights defamation law's inadequate approach to satire as a genre. As Chesterman argues, courts

> "*should recognise that seemingly factual statements made in a satirical publication are unlikely to be taken literally by [audiences]*",[32]

but instead interpreted as expressing critique of a political attitude. Suggesting Pauline Hanson was a homosexual, prostitute or transvestite was ridiculous considering her extremely conservative political stance. Imputations should be assessed at a deeper level. A possible imputation could have been that she was too conservative and her policies did not reflect significant Australian groups. The court seems willing to take literally imputations which are

> *"so extravagant and improbable that they are clearly conveyed for the purpose of ridicule rather than to be believed".*[33]

This reflects the English approach.[34]

While acknowledging the defendant's intention does not address the underlying object of restoring reputation, perhaps satirical intention could be assessed when the publisher's intentions are so clear that they

> *"'colour' the meaning the reasonable reader or viewer would derive."*[35]

Are the imputations defamatory?

Whether an imputation is defamatory is judged according to the ordinary, reasonable person: someone 'of fair, average intelligence... who is neither perverse... nor morbid or suspicious of mind... nor avid for scandal'.[36] Applying this standard in Hanson, the Queensland Court of Appeal felt the ordinary person would have held Ms Hanson in "contempt or ridicule".[37] The criticism of Hanson largely relates to with the judges' reasoning that the song inevitably conveyed a defamatory meaning - there is no apparent acknowledgment of satire.

Ambrose J in Hanson held that 0.5 to 5 per cent of the community were homosexual thus

> *"there's a significant percentage of [heterosexuals]... who hold homosexuals in contempt",*[38]

therefore publishing assertions that a politician was homosexual would generate "ridicule and contempt that would have a significant effect on that person's acceptability as a political candidate".[39] In drawing literal imputations, the Hanson case applied the High Court's approach in *Hepburn v TCN Channel Nine Pty Ltd*[40] ("**Hepburn**") whereby "reasonable" equates to "an appreciable and reputable section of the community".[41] Baker argues

> *"Hepburn greatly extends the range of material that can be deemed defamatory."*[42]

Whether or not the Court's assessment of community attitudes to homosexuality in Hanson was accurate, it demonstrates the Courts' restrictive application of the 'ordinary person' standard in assessing satire. Ordinary persons "are taken to share a moral or social standard"[43]. If defamation prescribes the "rules of civility",[44] a narrow 'ordinary, reasonable person' standard will limit the extent of open discourse in our society.

Numerous cartoons fill Australian daily newspapers depicting politicians and public figures with oversized, grotesque features or animal characteristics. These ask audiences to critique or question persons or their policies. Satirical commentary aims to "push boundaries" and challenge assumptions unconventionally. 'Ridicule' is now recognised as a fourth basis for defamation[45] (for example, in *Boyd v Mirror Newspapers Ltd*[46] and *Ettingshausen v Australian Consolidated Press*[47], *Brander v Ryan*[48] ("**Brander**")[49]). Ridicule is a tool of satire, encouraging challenge to assumptions and the status quo. Defamation law recognises that community standards change over time,[50] thus should recognise ridicule as a tool of satire.

Defamation law's assumptions regarding the 'ordinary, reasonable person' overlook satire's analytical and challenging function. Satire should be positively acknowledged in an area of law whose inherent role is to establish moral and ethical boundaries in reporting by encouraging both humour and humility:

> *"... a more relaxed self-perspective can undo much of the damage [of defamation], and even improve one's self image."*[51]

Levine J's common jury direction[52] in the New South Wales Supreme Court was:

> *"The ordinary reasonable reader is no-one in this courtroom, and that includes you. The ordinary reasonable reader is a hypothetical person."*[53]

This approach may set up a "third-person effect" whereby 'individuals tend to perceive the adverse effect of a communication on themselves as less than that on others exposed to the same communication.'[54] United States research supports the argument that such an effect means 'perceived societal intolerance may become increasingly exaggerated'[55]. Even if left to the jury, the judge's direction as to the imputations and their effects will be influential. Most importantly, Magnusson warns that 'courts should be careful, in accepting a plaintiff's imputations, not to penalise satirical comment merely because it falls outside their own middle-class horizon.'[56]

Defences

The most useful defences to satire are fair comment and the extended qualified privilege regarding political communication.

Fair Comment

This defence protects legitimate criticism and expression of diverse opinions, recognising 'an important aspect of freedom of speech'.[57] A satirical publication cannot personally attack individuals, rather it must address general public profile or policies. Furthermore, '[t]o allow public debate to descend to the levels of the gutter is not in the public interest, however amusing it may be'.[58] *Herald and Weekly Times v Popovic*[59] ("**Popovic**") confirmed the objective test in assessing the comment's 'fairness': the defendant need not prove that they actually held the opinion, merely that it was an opinion that an ordinary reasonable person could have held 'however prejudiced he might be... however exaggerated or obstinate his views.'[60] Non-acknowledgment of satiric subtext delimits such assessments. The Commonwealth's proposals are more limiting than current common law or code law, by protecting only comments which are "fair and reasonable" and rejecting grossly exaggerated, biased or prejudiced opinions.[61] To remain effective in protecting satire, the objective element must retained but given wider interpretation.

Qualified Privilege

While satire may be protected if relating to government and political matters according to the implied freedom of political communication, the strict approach adopted by Lange v Australian Broadcasting Corporation[62] may unduly constrain political satire.[63]

The Lange High Court defined "political speech" as

> *"[the ability of] 'the people' to communicate with each other with respect to matters that could affect their choice in federal elections or*

The action against AAPT

The stated approach of CAV to compliance with the unfair contracts provisions is to first seek the co-operation of suppliers before exercising its enforcement powers under the FTA.

This was the approach taken by CAV prior to it taking action against AAPT. In August 2004, CAV wrote to AAPT, Telstra, Optus, Voda phone, 3, Orange, Virgin and SIM-PLUS requesting that they review their mobile phone contracts, remove any unfair terms or seek to discuss their compliance with the FTA with CAV. These companies were given until the end of 2004 to notify the Government of progress in ensuring that their contracts complied with the FTA.[21] All the organisations but for AAPT agreed to review the terms of their mobile phone contracts or engage in discussions with CAV. CAV considered AAPT's response as a refusal to co-operate with its request, and therefore decided in December 2004 to take enforcement action.

The action against AAPT claims that 11 clauses in AAPT's mobile phone service Standard Form of Agreement and 7 clauses in its pre-paid SFOA are unfair. The terms alleged to be unfair include those which:

- permit AAPT to unilaterally change the contract;
- permit AAPT to suspend services without notice but later charge a reconnection fee;
- impose a confidentiality clause on the customer preventing the customer from discussing AAPT's charges or discounts;
- permit AAPT to assign the contract to another mobile phone services supplier without the customer's consent and irrespective of the quality or adequacy of services offered by the other supplier;
- permit AAPT to charge interest on outstanding amounts without clearly informing the customer of the interest rate that will be applied in respect of that;
- permit AAPT to refuse to give a prepaid mobile phone customer a refund of the call credits under any circumstances including even if the good or service is not fit for purpose; and
- limit AAPTs potential liability to the customer to an unreasonably excessive degree and in a way not permitted by law.

CAV is seeking a declaration from VCAT that the clauses are void and an injunction which prevents AAPT from using those clauses or similar ones in its customer contracts.

VCAT is yet to issue its decision. The action has been held out by commentators and interest groups as likely to provide important guidance on the practical application of the unfair contracts provisions.

ACIF Consumer Contracts Code

The CC Code (registered under section 117 of the *Telecommunications Act, 1997* in May 2005) provides some industry specific guidance on what might be considered an unfair contract term. As noted above, the central requirement of the CC Code is in virtually identical terms to section 32W of the FTA and was consciously modelled on it. It is likely that decisions on the legislation will inform decisions on the code and vice versa.

The stated objective of the CC Code is to address aspects of consumer detriment arising from the imbalance in bargaining power between service providers and their residential and small business customers. The code covers mass-market contracts used by residential and small business users, including Standard Forms of Agreement (**SFOAs**) registered under Part 23 of the *Telecommunications Act, 1997*.

The CC Code is binding on industry participants, however a breach does create any right of action by the customer, nor is a contract term which is in breach of the code made void. ACMA or the ACCC can bring penalty proceedings in the Federal Court, with penalties up to $250,000 for each contravention. ACMA can also accept undertakings from suppliers which may be enforced in the Federal Court.

The Code promotes itself as providing industry specific examples and rules to identify when contract terms would be considered unfair.[22]

Relevant to whether or not a contract would be considered unfair under the Code includes consideration of the circumstances in respect of which the supplier and customer entered into the contract including whether the term was individually negotiated. The Code also deems as relevant whether or not the parties have acted in good faith. All of the above are consistent with the provisions in the FTA.

The Code provides assistance to applying the unfair contracts provisions by it specifying the types of terms which may be considered unfair and certain specific exceptions to that. For example, the Code identifies that a term may permit the supplier to avoid or limit its performance of certain obligations under the contract to the detriment of the consumer but may not be an unfair term if it relates to the suspension of the services or goods for a reasonable period of time due to maintenance or repair reasons.[23]

Implications

Clearly, suppliers of telecommunications, media and internet services are transacting in a regulatory environment which increasingly seeks to protect consumers from both procedural and substantive unfairness.

The unfair contracts provisions in the FTA are the current high water mark in terms of fairness in consumer contracts. The CC Code applies the same general rules but also provides greater guidance in the context of telecommunications and internet services.

Evident from the AAPT case, CAV has been active in ensuring that suppliers of telephony services are in compliance with the FTA. Internet service providers are one current focus of CAV and compliance action can be expected in that quarter as well.

Although it has been more then two years since the amendments to the FTA, there is not perhaps the degree of awareness that might be expected of the provisions and their effect on contracts entered into with Victorian consumers. Companies, including telcos and ISPs, which use standard form agreements across the various States and Territories, need to be aware of the provisions and ensure that their customer agreements comply. Suppliers may find themselves bound to contracts which lack necessary protections if an offending term is made void and this can have serious financial consequences.

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[1] In April 2005, the Ministerial Council on Consumer Affairs agreed to further as a matter of urgency a national regulatory response to unfair contract terms with its preference being a response which is consistent for each State and Territory and corresponds to the unfair contracts provisions. See http://www.consumer.gov.au/html/joint_communique/jointcommunique_April2005.htm.

[2] http://www.acif.org.au/documents_and_lists/codes/C620.

[3] Fair Trading Compliance Conference "Changed

Moreover, the CC Code provides specific examples and rules identifying contract terms which are likely to be unfair in the context of the telecommunications industry.

What constitutes an unfair term?

The FTA provisions provide that a term in a consumer contract will be unfair if:

> "*contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.*"

The FTA defines a "consumer contract" to mean

> *"an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services"*

(picking up similar language in the consumer warranties provisions of the *Trade Practices Act*).

The elements to be made out are that:

- the term is contrary to the requirements of good faith;
- in all the circumstances the presence of the term causes a significant imbalance in rights and obligations between the parties; and
- that imbalance is likely to cause detriment to the consumer.

No definition for "good faith" is given in the FTA. The guideline released by CAV "*Preventing unfair terms in consumer contracts - Preliminary guidelines for suppliers* (November 2003)"[5] suggests the following definition for "good faith":

> "*A principal of fair and open dealing; that is "playing fair", especially when one party is in a position of dominance over a consumer who is vulnerable relative to that dominance or power.*"[6]

Unfortunately, this definition does not provide much practical assistance to suppliers in understanding what "good faith" means in the context of section 32W, although it does suggest that "good faith" is to be interpreted broadly.

The meaning of "good faith" under the UK Regulations was clarified by the House of Lords in the leading case *Director General of Fair Trading v First National Bank plc.* [7] The House of Lords considered that the requirement of good faith was to be assessed on the substance and form[8] of the agreement:

> "*The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in…the regulations.*"[9]

As to the element of section 32W that the term "causes a significant imbalance in the party's rights and obligations arising under the contract to the detriment of the consumer", this expression was commented on in a UK decision applying the former version of the UK Regulations:

> "*The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.*"[10]

Section 32X of the FTA sets out a non-exhaustive list of matters that a tribunal may have regard to in determining if a term is unfair. The tribunal may consider the context of the contract (in particular, whether or not a term was individually negotiated) and the object or effect of the term itself. In relation to the latter, section 32X identifies terms which have the object or effect of:

- not giving reciprocal rights or obligations between the parties. For example "*this contract is not subject to cancellation by the customer … the company reserves the right to cancel or refuse acceptance of any order at any time by refunding all monies paid less an administrative charge*",[11]
- not giving the consumer the right of response in circumstances where the supplier may exercise some discretion on how it fulfils its obligations under the contract. For example "*any dispute or difference which may arise in regard to the interpretation of the rules shall be determined by the management, whose decision shall be final*";[12] or
- winds back the consumers' right to hold the supplier liable under the contract. For example "*times quoted are estimated times only and shall not be binding on the company and the company shall not accept any loss or liability whatsoever arising out of any failure to adhere to the times and dates quoted and nor shall any failure be deemed to be a breach of this contract*".[13]

If a term of a contract is in breach of the unfair contracts provisions then that term will be void.[14] If the contract can continue although the unfair term is excluded then the contract will still bind the parties.[15] In other words, a supplier may be contractually bound to continue supplying its goods or services without the benefit of the excluded term.

Furthermore, the provisions give the Director of CAV the power to apply to VCAT for an injunction against a supplier who uses or recommends the use of an unfair term.[16] The injunction can cover not just that specific term but apply to stop the use by the supplier of any similar term or term which has the effect of the unfair term.[17] Section 32Z creates a number of offences, although these offences only relate to use of terms which have been prescribed as unfair by regulation.

Relevancy to Standard Form Contracts

In addition to the general prohibition against unfair terms in consumer contracts, the unfair contracts provisions deal specifically with the use of "prescribed unfair terms" (terms identified in regulations under the FTA as unfair) in standard form contracts.

A "standard form contract" is defined in the unfair contracts provisions to mean a consumer contract which is intended to be used for "general use in a particular industry, whether or not the contract differs from other contracts used in that industry".

A prescribed unfair term in a standard form contract is void.[18] The Director of CAV has the power to apply to VCAT for an injunction against a supplier who uses or recommends the use of a prescribed unfair term.[19] Moreover, it is an offence for a person to attempt to enforce a prescribed unfair term in a standard form contract irrespective of whether the term became a prescribed term before or after the contract was entered into.[20]

At present, no terms have been "prescribed". However, given the serious consequences of using such a term in a standard form contract, suppliers would do well to monitor developments in this area.

> *constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government…*"

Political speech has thus far been interpreted widely. [64] Yet Lange emphasised that 'the freedom of communication… the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.[65]

Lange imposed a further requirement: the defendant's conduct in publishing the material must have been reasonable.[66] In considering reasonableness, courts recognise the media's inherent power for good and ill,[67] therefore aiming to deter what courts have described as 'slipshod' journalism.[68] This presumably includes misrepresentation of facts and lack of context, as in Popovic. "Reasonableness" requires the defendant to: believe the imputation was true, take steps to verify the truth of the imputation, seek a response from the plaintiff and publish this if feasible.[69] In Popovic,[70] Winneke ACJ and Warren J acknowledged that satisfying reasonableness will depend on all the circumstances, the nature of the publication and the published matter. The reasonableness factors above seem particularly restrictive of political satire and seeming to protect only 'sober, dispassionate dissemination of evidence of impropriety'[71] by a political figure.

A conservative interpretation of a satirical publication is unlikely to be protected. Chesterman argues that the courts' unwillingness to grant the defence in the Hanson and Brander[72] (on first appeal) does not conform to 'the spirit of the implied freedom of political communication, so as to specifically provide greater freedom for political satire'.[73] Brander concerned a satirical article on a politician in South Australia. On appeal, the imputations of effeminacy and homosexuality were held not to be defamatory in the context of the entire article. However, the imputations that Brander did not hold his political beliefs sincerely, did not hold credible views on immigration or was motivated by juvenile attention-seeking were upheld. They were ultimately not deemed defamatory as the defendants had sought to verify their truth and had reasonable grounds for believing they were true.[74] The Full Court of the Court of Appeal upheld the defence of extended qualified privilege, adopting a more relaxed approach to the defence requirements, in order to reach the most appropriate overall result.[75] However, this approach lacks sufficient certainty.

England offers greater protection to satire: qualified privilege has been extended to communications concerning matters of "public concern", not just political discussion. Whereas Lange was guided strictly by the Constitution, English decisions take a wider frame of reference including 'freedom of expression' provisions in international treaties and the media's fundamental role in communicating matters of public interest.[76] This approach recognises that every issue which resonates with the public is 'potentially relevant to democratic self-governance, and hence potentially of public concern'.[77] Distinguishing political from non-political is not "neutral" or "value free"[78] and will result in divergence of opinion,[79] as demonstrated in Popovic where three judges differed as to what they considered 'political'. This makes the state of the common law in Australia unclear, especially for those publishing satire on issues of public concern or current affairs which may be indirectly political. This uncertainty may translate into an over-cautious approach by publishers, thereby stifling legitimate criticism and debate. Both Queensland and Tasmania provide a defence for publications concerning subjects of public interest, where discussion is for the public benefit.[80] The national legislation might adopt this provision to provide greater certainty.

Conclusion

The ubiquitous nature of the Australian media necessitates protection of people's reputation because of the media's powerful discourse-shaping role. Furthermore, everyone, regardless of occupation or social status, is entitled to preservation of their reputation. However, freedom of speech implies protection of diverse opinions and open discourse on matters of public concern. Currently, the defamation action and defences fail to protect this by ignoring satire. The national defamation legislation should provide specifically for satire in the action by imbuing the ordinary person with a broader capacity to interpret this genre. This protects diver-

sity of expression and accountability of those in power, while retaining the strict approach to defences acknowledges the media's potential for unscrupulousness or malice.

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[1] Justice Tony Fitzgerald *"Telling the truth, laughing" 92 (1999) Media International Australia incorporating Culture and Policy*, 11, 14.

[2] Fitzgerald, above n 1, 14.

[3] Des Butler and Sharon Rodrick, *Australian Media Law* (2004), 25.

[4] David Robertson, *Routledge Dictionary of Politics* (2004) 436.

[5] Roger S Magnusson, "Freedom of speech in Australian defamation law: Ridicule, satire and other challenges" (2001) 9 *Torts Law Journal*, 269, 290.

[6] Elizabeth Handsley and Gary Davis "Defamation and satire: *Hanson v Australian Broadcasting Corporation* (2001) 9 *Torts Law Journal*, 1, 1.

[7] Ibid.

[8] Lawrence McNamara, "Free Speech" in Butler and Rodrick, above n 3, 6-11.

[9] Friedrich in Dean Alger "Whose Media; Media for Whom? Ownership of the Media, Regulation, Law, and the Access Issue" *The Media and Politics*, (1989) 74.

[10] Rodney Tiffen Scandals: *Media, Politics and Corruption in Contemporary Australia* (1999) 219.

[11] Other accepted restrictions on freedom of speech which are thought to preserve democracy include laws prohibiting racial vilification, sex discrimination, commercially misleading and deceptive speech and obscenity: see Dan Meagher, "What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication" (2004) 28 *Melbourne University Law Review*, 438, 442.

[12] The US First Amendment confers 'private rights' on individuals by guaranteeing freedom of speech.

[13] *Commonwealth of Australia Constitution Act 1900* (UK).

[14] Dan Meagher, above n 11, 453.

[15] Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California Law Review* 691, 715.

[16] Post, above n 15, 712.

[17] Sally Walker, *Media Law: Commentary and Materials* (2000) 120.

[18] Handsley and Davis, above n 6, 1.

[19] Unreported, Queensland Supreme Court, 1 September 1997.

[20] The injunction was affirmed by the Queensland Court of Appeal in *Australian Broadcasting Corporation v Hanson* (Unreported, 28 September 1998), and subsequently the Australian Broadcasting Corporation were refused leave to appeal to the High Court in *Australian Broadcasting Corporation v Hanson* (B40/1998, 24 June 1999).

[21] Handsley and Davis, above n 6, 2.

[22] Stewart Justman, *The Springs of Liberty: The Satiric Tradition and Freedom of Speech* (1999) 10.

[23] Cited in Handsley and Davis, above n 6, 5.

[24] Butler and Rodrick, above n 3, 38.

[25] Julie Eisenberg "The Perils of Pauline" 148 (1998) *Communications Update*, 18, 18.

[26] Ibid, 19.

[27] Fitzgerald, above n 1, 12.

[28] Handsley and Davis, above n 6, 2.

[29] *Charleston v Newsgroup Newspapers Ltd* [1995] 2 AC 65.

[30] *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 574-575 (Kirby).

[31] Ambrose J, at trial, and Jersey CJ, on appeal, alluded to this as another reason why the imputations were reasonable.

[32] Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 151.

[33] Ibid, 150.

[34] *Berkoff v Burchill* [1996] 4 All ER 1008, 1018 (Millett LJ)

[35] Magnusson, above n 5, 290.

[36] *Farquhar v Bottom* [1980] 2 NSWLR 380, 386 (Hunt). The High Court of Australia appears to have confirmed this 'reasonable person' test in *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 573 (Kirby).

[37] Eisenberg, above n 25, 18.

[38] Handsley and Davis, above n 6, 5.

[39] Handsley and Davis, above n 6, 5.

[40] [1983] 2 NSWLR 682. In *Hepburn v TCN Channel Nine Pty Ltd*, the term 'abortionist' was held to be defamatory.

[41] *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, 694 (Glass).

[42] Roy Baker, "Defining the Moral Community: The 'Ordinary Reasonable Person' in Defamation Law", *Submission for the Communications Research Forum 2003*, Communications Law Centre, 12.

[43] *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505-506 (Brennan).

[44] Robert Post, above n 15, 712.

[45] Ray Watterson, "What is Defamatory Today?" (1993) 67 *Australian Law Journal* 811, 819.

[46] [1980] 2 NSWLR 449.

[47] (1991) 23 NSWLR 449.

[48] (2000) 78 SASR 234, 245.

[49] However, in this case the satirical material was protected by extended qualified privilege.

[50] *Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488.

[51] Fitzgerald, above n 1, 11.

[52] Levine J hears the majority of defamation actions in the NSW Supreme Court: see Roy Baker, "Defining the Moral Community: The 'Ordinary Reasonable Person' in Defamation Law", Submission for the Communications Research Forum 2003, Communications Law Centre. Accessed:<http://www.dcita.gov.au/crf/papers/03/bakerpaperdefamation18final.pdf> at 18 September 2005, 16.

[53] *Heggie v Nationwide News Pty Ltd*, unreported, NSW Supreme Court, 27 May 2002.

[54] Roy Baker, above n 51, 17.

[55] Ibid.

[56] Magnusson, above n 5, 291.

[57] Butler and Rodrick, above n 3, 92.

[58] *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 51 (Higgins).

[59] [2003] VSCA 161 (21 November 2003).

[60] *Herald and Weekly Times v Popovic* [2003] VSCA 161 (21 November 2003), 263.

[61] Angus Martyn, "The Commonwealth plan for reforming defamation law in Australia", 2004 (4) *Research Note: Information Analysis and Advice for the Parliament*, 1, 2.

[62] (1997) 189 CLR 520.

[63] The implied freedom of political communication in the Commonwealth Constitution was established by the High Court of Australia in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers* (1994) 182 CLR 211. The freedom is not a personal right in itself.

[64] David Wiseman, "Implied Political Rights and Freedoms", in Sarah Joseph and Melissa Castan, *Federal Constitutional Law* (2001) 333. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Stephens v West Australian Newspapers* (1994) 182 CLR 211.

[65] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 521.

[66] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 573.

[67] *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299, 317.

[68] *Herald and Weekly Times v Popovic* [2003] VSCA 161, para 14 (Winneke ACJ); *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299, 317.

[69] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

[70] [2003] VSCA 161, para 8 (Winneke ACJ) and paras 92-93 (Warren J).

[71] Chesterman, above n 32, 102.

[72] (2000) 76 SASR 212, 219-222.

[73] Chesterman, above n 32, 150.

[74] (2000) 78 SASR 234, 249-250.

[75] Magnusson, above n 5, 290.

[76] Roy Baker, "Extending Common Law Qualified Privilege to the Media: A Comparison of the English and Australian Approaches" (2002) 7(2) *Media and Arts Law Review*, 87, 91.

[77] Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell*" (1990) 103 *Harvard Law Review* 601, 670.

[78] Baker, above n 76, 94.

[79] Dan Meagher, above n 11, 466.

[80] *Defamation Act 1889* (Qld) s. 16(1)(h); *Defamation Act 1957* (Tas) s. 16(1)(h).

by Publication in *Attorney-General for the State of New South Wales v X* (2001) 23 *Sydney Law Review* 261 at 262

[4] S. Walker 'Freedom of Speech and Contempt of Court' at 585

[5] Ibid at 583

[6] F. Robinson '"No, No! Sentence First Î Verdict Afterwards at 263

[7] Ibid at 264

[8] *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* 91937) SR(NSW) 242 at 249. Cited in Ibid at 263

[9] Ibid at 264

[10] Ibid

[11] *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15. Per Wilson and Deane JJ at 34; Tohey J at 70. Cited in Ibid at 262

[12] (1987) 164 CLR 15 at 27-28. Cited in M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 81

[13] (1987) 164 CLR 15 Per Mason CJ at 26

[14] F. Robinson '"No, No! Sentence First Î Verdict Afterwards"at 265

[15] D. Williams 'The Courts and the Media: What Reforms Are Needed and Why?' (1999) 1 *UTS Law Review* 13 at 15

[16] Ibid

[17] (2000) 49 NSWLR 653

[18] F. Robinson '"No, No! Sentence First Î Verdict Afterwards" at 261

[19] Mason CJ's reference to 'major constitutional crisis' or 'imminent threat of nuclear disaster' at 26 is the only guidance that has been developed by the High Court to date.

[20] F. Robinson '"No, No! Sentence First Î Verdict Afterwards at 276

[21] D. Flint 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* 30 at 31

[22] M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 72

[23] DP 43 Proposal 1

[24] S. Walker 'Freedom of Speech and Contempt of Court: The Australian and English Approaches Compared' (1991) 40 *ILCQ* 583 at 606

[25] S. Walker 'Freedom of Speech and Contempt of Court' at 588

[26] *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15. Per Wilson and Deane JJ at 34; Tohey J at 70. Cited in F. Robinson '"No, No! Sentence First Î Verdict Afterwards" at 262

[27] DP 43 para 2.42

[28] DP 43 para 2.56

[29] DP 43 para 4.22

[30] M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 81

[31] DP 43 Proposal 3

[32] DP 43 Paras 2.55 Î 2.67

[33] *Attorney General (NSW) v John Fairfax Publications* [1999] NSWSC 318 at para 95 per Barr J

[34] See *Hinch* (1987)

[35] See *DPP v Wran* (1986)

[36] DP 43 para 5.8

[37] DP 43 para 5.14

[38] S. Walker 'Freedom of Speech and Contempt of Court' at 606

[39] DP 43 para 2.36

[40] DP 43 para 1.45

[41] D. Flint 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* 30 at 33

[42] DP 43 para 2.94

[43] S. Walker 'Freedom of Speech and Contempt of Court' at 585

[44] Ibid

[45] DP 43 para 1.46

[46] DP 43 para 1.46. DP 43 also recognised that ' ... the Standing Committee of Attorneys General considered, during the early 1990s, a uniform law on contempt of court or partially uniform contempt laws dealing only with publication, but it appears that there was little enthusiasm at that time for a common statutory approach by the States and Territories.' DP 43 para 1.46

Unfair Terms in Consumer Contracts - The New Benchmark

Robert Neely and Olivia Kwok take a more detailed look at new Victorian requirements

Introduction

The 'unfair terms' provisions in Victoria's *Fair Trading Act 1999* (Vic) (**FTA**) now set the benchmark in terms of consumer-friendly contracts in Australia.

The FTA provisions have particular relevance to suppliers who use standard form contracts across Australia, such as those commonly offered online by banks, telecommunications companies and internet service providers. Although the provisions have been in force since 9 October 2003, and some industry sectors have led the way in ensuring their consumer contracts comply, the implications of the provisions for suppliers generally is yet to be properly appreciated.

It is suggested that it would be pragmatic for companies supplying goods and services to consumers in Australia to adopt the FTA provisions as a standard when formulating end-user contracts and sign-up procedures. The reasons are threefold: compliance with the FTA will generally ensure compliance with other existing regulations concerning the 'fairness' of consumer contracts; it is quite likely that other States and Territories will follow Victoria and introduce similar legislation;[1] and it is generally not practicable to have different contracts and procedures for different Australian jurisdictions.

The good news for telecommunications and internet service providers is that compliance with the Australian Communications Industry Forum (**ACIF**) Consumer Contracts Code, which sets minimum standards for consumer contracts in the telecommunications industry,[2] is likely to mean compliance with the FTA provisions.

Background

The unfair contracts provisions in the FTA are based on equivalent UK regulations, the *Unfair Terms in Consumer Contracts Regulations 1999 (UK)* (**UK Regulations**), which in turn are drawn from a 1993 European Union directive. The provisions are aimed at addressing substantive, as opposed to procedural, unfairness in consumer contracts.

The provisions have obvious application to telecommunications, pay TV and internet services. When the legislation was introduced, Consumer Affairs Victoria (**CAV**) identified telecommunications contracts as one of its initial targets. After significant compliance activity in 2004, in December 2004, CAV commenced proceedings against AAPT in relation to AAPT's mobile and pre-paid mobile phone contracts. A decision by the Victorian Civil and Administrative Tribunal (**VCAT**) in that matter has been reserved (the action is discussed below). CAV recently announced that priorities for 2005/06 will include pay TV and Internet service providers' contracts.[3]

It is notable that the 2005 ACIF Consumer Contracts Code[4] (**CC Code**) drew heavily from the UK Regulations and the amendments to the FTA. Its central requirement mirrors section 32W of the FTA and prohibits unfair terms in consumer contracts.

who does not intend to interfere with the administration of justice would be liable for contempt only if the publisher can be shown to have acted recklessly. This would balance the public interest in the administration of justice and the public interest in freedom of speech and make relevant the publisher's motive for publishing the material."[38]

Another of the recommendations of DP 43 was to widen the scope for defences to sub judice contempt - the Commission proposes that where it can be shown that no one was at fault, there should be no liability for sub judice contempt.[39]

PROPOSAL 7

Legislation should provide that it is a defence to a charge of sub judice contempt, proven on the balance of probabilities, that the person or organisation charged with contempt:

(a) did not know a fact that caused the publication to breach the sub judice rule; and

(b) before the publication was made, took all reasonable steps to ascertain any fact that would cause the publication to breach the sub judice rule.

DP 43 goes further to list a number of possible defences to a charge of sub judice contempt.

PROPOSAL 8

Legislation should provide that it is a defence to a charge of sub judice contempt if the accused can show, on the balance of probabilities:

(a) that it, as well as any person for whose conduct in the matter it is responsible, had no control of the content of the publication which contains the offending material; and

(b) either:

(i) at the time of the publication, they did not know (having taken all reasonable care) that it contained such matter and had no reason to suspect that it was likely to do so;

or

(ii) they became aware of such material before publication and on becoming so aware, took such steps as were reasonably available to them to endeavour to prevent the material from being published.

Necessity of codification

Codification of these changes would be a key step towards remedying the current uncertainty in Australian sub judice law. I would recommend that such codification take place in across all Australian states and territories, through a process of "alignment" of the laws in each state. Although DP 43 did not support full codification of the sub judice rule in New South Wales[40] (which it believed would lead to confusion and variance with other Australian jurisdictions), the focus of this paper is the Australian law of sub judice contempt in Australia as a whole. I believe that codification is necessary due to the significant pervasiveness of media publications today, and their ability to cross state boundaries.[41] Given the significant interaction and interdependence of the Australian media, I believe it is a less than desirable outcome for state laws on sub judice contempt to be at variance with other jurisdictions.[42]

Such a process would accord with the recommendations of the Australian Law Reform Commission's 1987 report, which recommended that Australia's law of contempt should be in statutory form.[43] It is true that the 1987 ALRC report dealt with Australian contempt law as a whole, but I believe that its recommendation for codification is valid.

Sally Walker explains that:

> *"Owing to constitutional limitations on the Commonwealth Parliament's legislative power ... the common law regarding unintentional sub judice contempt would continue to apply in respect of proceedings conducted by the High Court and, unless the State and Territory legislatures enacted mirror legislation, the common law would continue to apply in respect of proceedings conducted by state and territory courts. The lack of uniformity which would result [if mirroring legislation was not enacted] would only add to the uncertainty in this area."*[44]

The uncertainty resulting from lack of uniformity has been recognised by DP 43[45], which also recognised that any such reform has to come about through the co-operative efforts of state and territory legislatures.[46] In my opinion, the present challenge is for Australian law-makers to recognise that the present Australian law of sub judice contempt has a number of significant flaws, and take a co-operative approach towards implementing laws based upon the recommendations discussed in this paper.

Conclusion

The law of sub judice contempt is intended to serve an important purpose, balancing the right to a fair trial with the right to free and open communication, but at present in Australia, it does not achieve this purpose in a systematic and consistent manner. There is still considerable uncertainty on when a publication will be in contempt of court, and when it can be excused from being so on the grounds of protecting a public interest. Furthermore, publishers can be found to be in contempt of this haphazard rule even if they were not aware of its operation, or even if they took reasonable steps to control publication.

The media is essentially a reactive, news-driven, time sensitive organisation where material published can often offend different interests, including the interest in preventing prejudice to legal proceedings. The only effective way to prevent this from occurring in the majority of cases is to have carefully formulated laws that balance both the interest in maintaining the right to a fair and unprejudiced trial with the interest to free and open communication.

The reforms proposed by DP 43, and other publications discussed in this paper, are a promising way of achieving certainty and consistency in the law of sub judice contempt in Australia. This would in turn result in an environment where the media can publish with the knowledge and confidence that they will not be likely to be found in contempt of court, and as a result, avoid the prospect of costly and time-consuming litigation. The challenge is for law-makers to put these recommendations into practice.

Robin Bowley is a student at the University of Sydney.

[1] For the purposes of this paper, the terms "publication" and "publish" will be construed broadly to include both written material in newspapers etc, and spoken transmissions on radio and television

[2] S. Walker *Media Law: Commentary and Materials* (2000), p. 528. Cited in F. Robinson '"No, No! Sentence First Î Verdict Afterwards": Freedom of the Press and Contempt by Publication in *Attorney-General for the State of New South Wales v X'* (2001) 23 *Sydney Law Review* 261 at 262

[3] *James v Robinson* (1963) 109 CLR 593, *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540. Cited in F. Robinson '"No, No! Sentence First Î Verdict Afterwards": Freedom of the Press and Contempt

Digital Dilemma

Dana Stewart, in this paper which received an honourable mention in the 2005 CAMLA Essay Prize, analyses the uptake of Digital Television in Australia.

Introduction

The legislative framework developed to manage the switch to digital television in Australia has not yet enabled the realisation of this technological advancement's potential and importance. A number of aspects of the framework have been criticised, and the slow uptake of digital television by consumers to date reinforcesthese arguments. It is questionable as to whether the policy and legislative decisions taken with a view to implementing this significant development have ensured Australia is 'on track to a new era in broadcasting'.

The benefits of digital technology

The above statement, made by the Productivity Commission in its Broadcasting Inquiry Report in 2000, is a bold claim as to the significance of the switch to digital terrestrial television broadcasting (**DTTB**). However, there would be few who would disagree.

> *"Digital television is superior to analog transmission. The improved technical quality of the digital television signal allows for the broadcast of clearer, sharper pictures without the interference and ghosting to which analog transmission is prone."*[1]

Because digital signals are compressed, the same amount of spectrum bandwidth can be used to deliver multiple standard definition (**SDTV**) programs simultaneously, or a high definition television (**HDTV**) program.[2] Wide screen, cinema-quality programs with surround sound, and diversity of product (such as an increased number of programs streams, interactive services and enhanced programming) are all features which can potentially be enjoyed by consumers when they purchase a new digital television or set top box.[3] The technology allows the broadcasting industry to produce programs more efficiently, and potentially derive new revenue streams resulting from additional services being provided with residual spectrum capacity, and a convergence of television and other communications services could be possible because of the ability to access and transmit digital data.[4] Also, the more efficient use of the radiofrequency spectrum could allow the government to increase revenue raised from its allocation.[5]

Initiating the adoption of digital television in Australia

The Government announced on 24 March 1998 that the new digital technology should be used primarily to enhance the standard of existing commercial and national broadcasting services.[6] The legislative basis for the scheme was provided in the *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth) (**Act**). This Act contained amendments to the *Broadcasting Services Act 1992* (Cth) (**BSA**) (which sets out the ownership and programming conditions for broadcasting licences) and the *Radiocommunications Act 1992* (Cth) (which regulates spectrum usage and licensing of transmitting apparatus). A new Schedule 4 was inserted into the BSA to establish a basic framework for the introduction of DTTB,

> *"including the allocation of spectrum, dates for commencement of digital broadcasting, periods for simulcasting and so forth".*[7]

Subsequent amendments to this Schedule were made by the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* (Cth) following a number of reviews concerning certain aspects of the scheme.

In the Explanatory Memorandum to the *Television Broadcasting Services (Digital Conversion) Bill* 1998, the Government acknowledged:

> *"The introduction of DTTB poses regulatory challenges for Government given the dynamic nature of DTTB developments internationally and the need to allocate broadcasting service bands spectrum for its introduction in Australia. It is important for the Government to put in place a framework that provides clear ground rules to all participants and ensures that the community benefits from the opportunities presented by the development and application of this technology."*[8]

Key issues considered in this initiative included: how DTTB should be used, how much control should be left with the market and what must be regulated by government.[9]

The stated objectives for the introduction of DTTB were:

- to improve the technical quality of the Australian television system in line with international technology advances;
- to allow for a smooth transition from analog to digital television broadcasting and transmission with minimal disruption to consumers;
- to maximise the use of existing transmission infrastructure;
- to introduce DTTB services within a timetable to ensure that Australia does not fall significantly behind the rest of the world;
- to increase viewer choice and diversity of product;
- to seek competitive neutrality between the commercial and national television broadcasting sector, the pay TV sector and other communications sectors;
- to provide an appropriate return to the Commonwealth for the use of television spectrum;
- to achieve spectrum efficiency gains to enable new services to be introduced;
- to encourage the use of television spectrum to provide a range of new information/data services;
- to take into account the rapidly changing commercial and technological environment;
- to protect the interests of consumers in regional areas; and
- to retain free-to-air analog television services for a period of time to ensure that the interests of consumers are protected.[10]

The legislative framework for digital broadcasting

The new Schedule 4 inserted in the BSA contains a simplified outline of the legislative framework for DTTB. It states:

- *"The ACMA [Australian Communications and Media Authority] is to formulate schemes for the conversion, over time, of the transmission of television broadcasting services from analog mode to digital mode.*
- *There is to be a simulcast period throughout which broadcasters are to transmit their television programs in both analog mode and SDTV digital mode.*
- *At the end of the simulcast period, analog transmissions are to cease.*
- *Broadcasters must meet the standards relating to quotas for the transmission of program in HDTV digital mode.*
- *Broadcasters must meet the standards relating to captioning of digital of television programs for the deaf and hearing impaired.*
- *Broadcasters will be allowed to use spare transmission capacity on digital transmission channels to provide datacasting services.*
- *Owners and operators of broadcasting transmission towers must give digital broadcasters and datacasters access to the towers for the purposes of installing or maintaining digital transmitters.*
- *There are to be reviews before specified dates of certain elements of the digital television regulatory regime."*[11]

The simulcast period was legislated to commence on 1 January 2001 and last for 8 years, or such longer period as prescribed.[12] It was designed to minimise disruption to viewers and allow time for the price of digital television sets to come down.[13] In addition to the analog and SDTV simulcast, the commercial and national broadcasters must meet the HDTV quota of 1040 hours per calendar year.[14] The commercial broadcasters must meet this quota with material that is originally produced in high definition digital video format,[15] but since the national broadcasters source much programming from Europe (where there is little HDTV production) they are permitted to meet the quota by 'upconverting' their SDTV quality programming. With some exceptions, the HDTV version of the television broadcasting service must not differ from the SDTV or analog version.[16]

To enable this 'triplecast', these broadcasters were allocated 7 MHz of additional spectrum and issued transmitter licences authorising the transmissions in digital mode. These were issued for free as a concession to the high costs that would have to be met in relation to the digital conversion.[17] When the simulcast period ceases and analog transmission is switched off, each broadcaster must transmit in digital mode using the channels allocated by ACMA under the scheme or a digital channel plan, and return the additional loaned spectrum and transmitter licences.[18] New transmitter licences will be issued for continued digital broadcasting.[19] The conversion schemes to be formulated by ACMA for executing this initiative must require the broadcasters to prepare implementation plans, and forfeiture of the digital transmitter licences would be required under the conversion schemes if the broadcaster failed to commence digital transmission on time, ceased digital transmission during the simulcast period, or failed to comply with certain standards.[20]

Exceptions to the simulcast rule

The 'simulcast rule' which requires broadcasting in both analog and digital mode during the simulcast period can be excused in certain circumstances. Advertising, sponsorship matter and television programs designated by ACMA and electronic program guides can be ignored in determining whether there has been this simultaneous broadcast.[21]

Multi-channelling may also be a limited exception to the simulcast rule.

> *"Multi-channelling is the transmission of more than one discrete stream of programming over a single television channel or carrier."*[22]

This is made possible by the compression techniques employed in digital broadcasting.[23] ACMA can ignore a particular television program transmitted using multi-channelling transmission capacity where, for example, a designated event (eg, a live sporting event) extends beyond its scheduled finishing time into a regularly scheduled news program in circumstances beyond the control of the broadcaster or any person who supplied the program to the broadcaster. The sole purpose of permitting the use of multi-channelling transmission capacity in this context is to allow viewers of the digital version of the commercial television broadcasting service to choose between viewing the regularly scheduled news program and viewing so much of the designated event as overlaps with the other television programs.[24]

The national broadcasters are permitted to provide non-commercial multi-channel services which are linked to the obligations of their charters.[25] The service has to be distinct from any other broadcasting service provided by the broadcaster and cannot be a subscription broadcasting or subscription narrowcasting service.[26] The types of television programs that can be delivered by the service are strictly limited. The ABC provided two multi-channel services pursuant to this arrangement but ceased in June 2003 due to budgetary constraints.[27]

Permitted digital program-enhancement content can also be ignored in determining commercial and national broadcasters' compliance with the simulcast rule. This is content in the form of text, data, speech, music, sounds, visual images or any combination of these, designed to enhance the main simulcast program, which is closely and directly linked to the subject matter of the primary program.[28]

These concessions at least allow broadcasters to make use of some of the innovations afforded by digital technology.[29]

Datacasting services

Datacasting services or designated teletext services can be provided by the commercial and national broadcasters using any spare transmission capacity on their digital transmission channels.[30] The Act does not specify particular types of datacasting services, but stipulates some genre conditions with reference to 'category A' and 'category B' television programs.

> *"They may include weather reports, stock prices, news and entertainment guides which would be updated throughout the day, and Internet type services."*[31]

To ensure that commercial and national broadcasters do not enjoy an unfair competitive advantage as a result of their loan of spectrum, they will be charged for their provision of datacasting services.[32] Other datacasters must obtain a datacasting licence issued under Schedule 6 of the BSA and a corresponding datacasting transmitter licence under the *Radiocommunications Act 1992* (Cth).[33]

Evaluating the legislative framework

The critical question is whether the legislative framework achieves its objectives. There is widespread opinion that the legislation has failed to help realise the potential of DTTB.[34] The significant criticisms of the scheme have been summarised as falling into two main categories:

> *"First, there were concerns about its effect on competition. It was argued that the model unfairly favoured incumbent free-to-air TV broadcasters, by allocating them additional spectrum without extra charge, and prohibiting further commercial TV competition for several years. Sec-*

DP 43 also notes that

> *"the Australian Law Reform Commission, the Phillimore Committee in Great Britain, and the Irish Law Reform Commission have all recommended a test for liability which was formulated in terms of substantial risk of prejudice, as opposed to mere tendency to prejudice."*[29]

This proposed change from tendency to substantial risk has also received support from within academia.[30]

This considerations have lead DP 43 to propose that:

> ***PROPOSAL 3***
>
> *"A publication should constitute a contempt if it creates a substantial risk, according to the circumstances at the time of publication, that:*
>
> *(a) members, or potential members, of a jury (other than a jury empanelled under s 7A of the Defamation Act 1974 (NSW)), or a witness or witnesses, or potential witness or witnesses, in legal proceedings could:*
>
> *(i) encounter the publication; and*
>
> *(ii) recall the contents of the publication at the material time; and*
>
> *(iii) by virtue of those facts, the fairness of the proceedings would be prejudiced."*[31]

I believe that this proposal would be a valid one, as the very question of whether juries actually recall and are influenced by media information, has been seriously questioned in many quarters[32], but this questioning has been dismissed by Australian courts[33]. This consideration, however, is beyond the scope of this paper.

DP 43 goes further and offers a non-exhaustive list of statements that may have the capacity to offend the sub judice rule.

> ***PROPOSAL 4***
>
> *Legislation should set out the following as an illustrative list of statements that may constitute sub judice contempt if they also comply with the requirements set out in Proposal 3:*
>
> - *A statement that suggests, or from which it could reasonably be inferred, that the accused has a previous criminal conviction, has been previously charged for committing an offence and/or previously acquitted, or been otherwise involved in other criminal activity;*
> - *A statement that suggests, or from which it could reasonably be inferred, that the accused has confessed to committing the crime in question;*
> - *A statement that suggests, or from which it could reasonably be inferred, that the accused is guilty[34] or innocent[35] of the crime for which he or she is charged, or that the jury should convict or acquit the accused;*
> - *A statement that could reasonably be regarded to incite sympathy or antipathy for the accused and/or to disparage the prosecution, or to make favourable or unfavourable references to the character or credibility of the accused or of a witness;*
> - *A photograph, sketch or other likeness of the accused, or a physical description of the accused.*

The legislation should make it clear that this list is not exhaustive and that a statement may amount to contempt even though it does not fall within one of the categories listed above.'

Fault liability for sub judice contempt, and defences to sub judice contempt

Another major shortcoming of the Australian law of sub judice contempt is that it is cast in terms of absolute, rather than strict liability. Publishers may be found in contempt even if they had no intention to prejudice the proceedings at hand.[36] DP 43 notes that since sub judice contempt imposes criminal sanctions, the strict liability approach, rather than the current absolute liability approach, should apply.[37] When present situation of absolute liability is considered alongside the current, highly generalised "tendency to prejudice" test, and secondly, the lack of guidance on what constitutes a matter of "significant public interest", the shortcomings of the haphazard Australian law of sub judice contempt become all the more apparent.

Walker proposes that:

> *"A more satisfactory way of balancing the relevant public interests would be to alter the law so that a publisher*

High Court has only provided limited examples of what issues may tilt the scales in favour of the public interest defence, namely a 'major constitutional crisis' or 'imminent threat of nuclear disaster'.[13] *Consequently, media organisations are left in a situation of uncertainty because they are unable to gauge when a court may deem a particular topic to be of sufficient public interest to escape a charge of contempt."*[14]

Nature of the media industry

The "uncertainty" that Robinson refers to above is undesirable for the media, the courts and the community in general. It must be remembered that the media is a time sensitive organisation, which survives on publicizing "newsworthy" occurrences, and as most media organisations are run to make a profit, there will frequently be considerable pressure on media staff to find and publicise such occurrences.[15] Many staff within media organisations are not legally trained[16], and without the aid of expert legal advice may not be equipped to understand the presently complicated and haphazard Australian law of sub judice contempt.

Litigation resulting from avoidable contempt situations can be costly and time-consuming, and is therefore best avoided through making sub judice law clearer, more consistent and better understood by lawyers and lay people alike.

The most recent NSW decision on sub judice contempt - *Attorney-General for the State of New South Wales v X* (2000)[17] has not finally resolved the uncertainty of what should constitute a matter of "substantial public interest", although the majority judgment is indicative of a more even balance between the right to free speech and the right to a fair trial.[18]

However, Felicity Robinson concludes that 'despite the renewed scope for freedom of speech [resulting from this decision], the media must still be extremely cautious when publishing material, especially since there are limited guidelines[19] as to what subject matter courts will deem to be of "sufficient public interest" to escape a charge of contempt.'[20] The uncertainty inherent in the Australian law of sub judice contempt has lead Professor David Flint to contend that:

> *"The assumption that a jury, properly instructed, remains more susceptible than judges or lawyers to media reporting is unjustified today if ever it was. However, it is not suggested we [disregard sub judice contempt and] introduce "trial by media" just reform of the law of contempt."*[21]

It is to this question of reforming the law of sub judice contempt that the paper will now turn.

The Case for Law Reform

There is need for greater certainty and balance in the Australian law of sub judice contempt. Since 1980, there have been more than 20 cases where allegedly prejudicial material has been published which has necessitated the discharge of the jury after it has been empanelled.[22]

DP 43 and other publications both in Australia and overseas, while recommending that the sub judice rule be retained[23], have proposed a number of solutions, which are examined below. The following discussion focuses on three main issues, namely

- what constitutes a matter of "substantial public interest"
- what factors will determine when a publication is in breach of the sub judice rule, focusing on the recommendation to change the test from a "tendency to prejudice" to depend on a "substantial risk of prejudice"
- the necessity for there to be fault liability, and defences that should be available to publishers charged with sub judice contempt

What constitutes a matter of "substantial public interest"

As noted above, Australian common law to date fails to offer useful guidance on what may constitute a matter of "significant public interest"; the two examples referred to by Mason CJ in *Hinch* (1987) offer little effective guidance. Sally Walker notes that:

> *"Hinch goes some way towards remedying [the defects in sub judice law] but it creates its own uncertainty as it leaves it open to the courts in each case to weigh the competing claims of freedom of speech and the administration of justice. This must create uncertainty in the minds of publishers, who will react either by ignoring the law or engaging in over-cautious self-censorship."*[24]

Furthermore, in this situation there is obviously considerable discretion on whether to institute contempt proceedings. Walker explains:

> *"Relying on prosecutorial discretion is not conducive to clarity or certainty; publishers should be able to know in advance whether they will be prosecuted. Furthermore, the more general reliance placed on the exercise of prosecutorial discretion, the greater the likelihood of complaints of selective prosecution."*[25]

Better guidance is therefore needed. DP 43 attempts to remedy this void by providing some guidance on the practical meaning of the term "substantial public interest".

> ***PROPOSAL 20***
>
> *Legislation should provide for a defence to a charge of sub judice contempt on the basis that the publication the subject of the charge was reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal offence. The burden of proving this should be on the defendant in contempt proceedings, to prove on the balance of probabilities.*

It appears that this proposal would provide far more effective guidance than the present common law does, and ought to be adopted.

How a publication will offend the sub judice rule: replacing the "tendency to prejudice" requirement with "substantial risk of prejudice"

As noted above, the present common law test of whether a publication will offend the sub judice rule is expressed quite generally in terms of "tendency to prejudice" the proceedings: *Hinch* (1987)[26]. DP 43 recommends that the present common law test clarify and narrow the test for sub judice liability in order to depend on a "substantial risk of prejudice", rather than the majority test of "tendency to prejudice" as held in *Hinch*.[27] As noted above, Mason CJ preferred this test, but he was in the minority.

DP 43 argues that re-formulating the test for when a publication would offend the sub judice rule:

> *" ... would raise the threshold of liability, thereby widening the scope of material which can be published without being in contempt. It can be argued that this tipping of the scales in favour of freedom of speech allows for the counterbalance provided by applying the rule to circumstances in which there is some danger of prejudice. On this basis, retention of the sub judice rule to apply to influence on witnesses can be justified."*[28]

> *ond, there were concerns about whether the model would be attractive to consumers."*[35]

The consumer resistance experienced has been blamed on the 'irrelevant'[36] product that results from the legislative framework. Perhaps a greater emphasis on enabling the spectrum efficiencies to enhance content and consumer choice would have generated a more attractive product than has tying up spectrum with the mandate of HDTV and restricting the use of features such as multi-channelling and program enhancements. The Productivity Commission, in a report largely ignored by the Government, expressed:

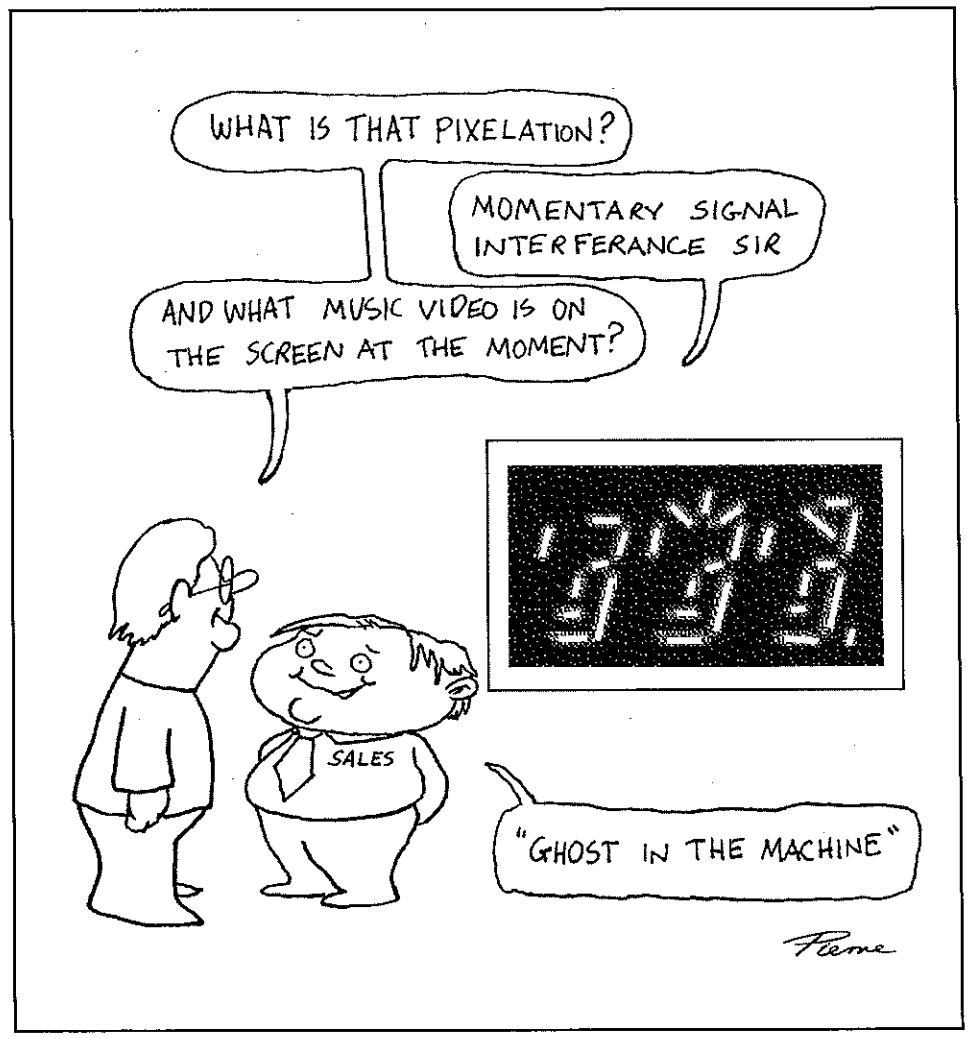
> *"While the Government's objective of ensuring a 'smooth transition' to digital broadcasting is important, excessive regulation of the format or content of new digital services jeopardizes the achievement of any sort of transition, deprives consumers of major benefits of digital television, and will also constrain the development of new services by Australian companies in this dynamic and fast growing industry. A liberal approach to regulating the new medium will be essential to a successful conversion process."*[37]

In May 2005, Digital Broadcasting Australia estimated that approximately 12 per cent of households in areas where all digital services are available owned digital receivers and take-up across all television households was around 10 per cent.[38]

> *"The retail sales tracker GfK Australia says that while sales of digital set boxes are growing, the 320,000 sold in the year to August equated to only 20 per cent of the 1.55 million television sets sold."*[39]

Other research has highlighted that digital television is poorly understood. "Forty-six per cent of the non-adopters did not know whether they could receive it and 40 per cent did not know that analog transmission would be completely replaced."[40]

Because of the slow take-up, it is likely that the analog switch off date will occur later than initially predicted. While this was indicated in an Issues Paper released in September 2005 by the Department of Communications, Information Technology and the Arts (DCITA), it was also stated that setting a firm switchover date may, of itself, be an effective way of increasing digital take-up.[41] The Australian legislation currently sets a switch-off target date that can be modified.[42] A firm date would provide greater certainty and justification for all players to further their preparation for a digital-only television transmission. For the sake of comparison, the US has legislated a criteria-based switchover of January 2006 if 85% of homes are able to receive all local station broadcasts in digital,[43] (although the US Senate has recently drafted a bill mandating digital-only signals by 7 April 2009).[44] In the UK, Ofcom has issued digital replacement licences to the free to air commercial broadcasters which commit them to an analog switch-off by the end of 2012.[45]



Senator Coonan has admitted that Australia needs a Digital Action Plan to drive digital take-up and a plan for the transition to the point where Australia will be ready to end the expensive simulcast period.

> *"In addition to direct measures to stimulate and encourage take up of digital services, there may also be technical or other barriers that need to be addressed, that act as a disincentive for consumers to make the change, or which diminish their experience of digital television".*[46]

Ideas for Improvement

Different suggestions (based on overseas experience) to drive digital take-up were presented in DCITA's September Issues Paper. These included:

- implementing incentives for broadcasters to expedite conversion (such as a licence tax on analog spectrum);
- allowing for a range of new digital services to attract viewers who do not value the picture quality of HDTV as enough incentive to convert;
- mandating digital tuners be integrated into all newly manufactured TV sets;
- requiring more detailed labeling on television reception equipment to indicate that after a certain date the television will not be able to receive broadcast programming unless connected to converter equipment;
- providing more consumer information and support;
- subsidising the price of digital receivers;
- providing for the conversion of multiple sets in a household;
- addressing reception difficulty issues for residents of multiple-unit dwellings;

- establishing a testing and conformance centre for digital television technology; and
- considering whether measures for particular groups such as people with disabilities, older or socially isolated people are necessary.[47]

Others have expressed that there may be cheaper access to digital television for consumers if the commitment to HDTV was relaxed.[48] Those who wanted the benefits of HDTV could still buy the appropriate equipment.

> *"The Seven Network spilt from its commercial TV colleagues, Nine and Ten, to support the [SDTV/HDTV simulcast] idea... , worried that the emphasis on HDTV would require it to invest a lot of money upgrading equipment without much incentive for audiences to make the investment needed to notice the improvement. The Nine and Ten Networks disliked the SDTV/HDTV simulcast idea for that reason, and also because they argued it compromised the quality of the HDTV pictures they would be able to transmit."*[49]

The Productivity Commission concurred that to facilitate consumers' adoption of digital television, a new regulatory framework should permit but no longer mandate HDTV. It also expressed that multi-channelling and the provision of interactive services by commercial and national broadcasters should be permitted.[50]

Dr Switkowski, former Telstra chief,

> *"advocated direct intervention by Canberra, including some form of subsidy of set-top boxes, to ensure the deadline was met. This could cost the budget about $400 million, he estimated. But to recoup this outlay, the Government could auction off broadcasting spectrum, raising 'multiples' of this amount."*[51] He said the *"free-to-air networks should also be free to 'multicast' new channels, allowing them to supplement traditional advertising revenues with 'pay as you go' channels"*.[52]

Conclusion

The concerns expressed as to the shortcomings of the legislative plan for implementing DTTB are valid. The scheme has so far not been able to fulfill its objectives. However, the stated objectives indicate that the Government did recognise the significance of DTTB and intended to implement this technology in pursuit of its benefits. Having tracked the progress of implementation to date, however, it is clear that the legislation has not zealously encouraged the market players to prepare for the switch off of analog transmission. DCITA's recent 'Driving Digital' Issues Paper has fortunately acknowledged that there may be shortcomings in the scheme due to the slow take-up, and is thoughtful of ways to improve the situation. This conviction to eventuate DTTB and willingness to rectify the weaknesses in the initial framework afford confidence in the expectation that the benefits of digital technology in Australia will ultimately be realised.

Dana Stewart is a Graduate Law student at the University of New South Wales

[1] Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed, 2004) 542.

[2] Ibid.

[3] Explanatory Memorandum, Television Broadcasting Services (Digital Conversion) Bill 1998, Datacasting Charge (Imposition) Bill 1998; Butler and Rodrick, above n 1.

[4] Butler and Rodrick, above n 1.

[5] Explanatory Memorandum, Television Broadcasting Services (Digital Conversion) Bill 1998, Datacasting Charge (Imposition) Bill 1998.

[6] Butler and Rodrick, above n 1.

[7] Lesley Hitchens, 'Digital Television Broadcasting – an Australian Approach', 12(4) (2001) *Ent. L.R.* 112-119.

[8] Explanatory Memorandum, Television Broadcasting Services (Digital Conversion) Bill 1998, Datacasting Charge (Imposition) Bill 1998.

[9] Ibid.

[10] Ibid.

[11] *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 1.

[12] *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 6(3).

[13] Butler and Rodrick, above n 1, 543.

[14] *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 37E(2B).

[15] *Broadcasting Services Act 1992* (Cth) Schedule 4 cl 37L.

[16] *Broadcasting Services Act 1992* (Cth) Schedule 4 cll 37E(1)(c), 37F(1)(c); Butler and Rodrick, above n 1, 545.

[17] Butler and Rodrick, above n 1, 543; *Broadcasting Services Act 1992* (Cth) Schedule 4, cll 8, 23; *Radiocommunications Act 1992* (Cth) s 102A.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] *Broadcasting Services Act 1992* (Cth) Schedule 4 cll 6(8)-(13), 19(8)-(13).

[22] Productivity Commission, *Broadcasting Inquiry Report*, Report No. 11 (2000).

[23] Ibid.

[24] *Broadcasting Services Act 1992* (Cth) Schedule 4 cll 6(8), 19(8); Butler and Rodrick, above n 1, 546.

[25] *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 5A.

[26] *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 5A.

[27] Butler and Rodrick, above n 1, 546.

[28] *Broadcasting Services Act 1992* (Cth) Schedule 4, cll 6(14), 19(14).

[29] Butler and Rodrick, above n 1, 546.

[30] *Australian Broadcasting Corporation Act 1983* (Cth) s 6A; *Special Broadcasting Service Act 1991* (Cth) s 6A; *Broadcasting Services Act 1992* (Cth) Schedule 4 cll 6(3)(k), 19(3)(k); Butler and Rodrick, above n 1, 547.

[31] *Datacasting Charge (Imposition) Act 1998* (Cth); *Broadcasting Services Act 1992* (Cth) Schedule 4, Part 6; Butler and Rodrick, above n 1, 547.

[32] Ibid.

[33] *Broadcasting Services Act 1992* (Cth) Schedule 6 cll 7-12; *Radiocommunications Act 1992* (Cth) s 102B; Butler and Rodrick, above n 1, 548.

[34] Hitchens, above n 7.

[35] Jock Given, 'More Choices: The 2000 Decisions', *Turning off the television: Broadcasting's Uncertain Future* (2003) 159-186.

[36] Professor Duane Varan, Murdoch Univerisyt Interactive Television Research Institute, quoted in Jeni Porter, 'Viewers content to leave digital out there', *Sydney Morning Herald* (Sydney), 8 October 2005.

[37] Productivity Commission, *Broadcasting Inquiry Report*, Report No. 11 (2000).

[38] Department of Communications, Information Technology and the Arts, *Driving Digital: A Review of the Duration of the Analogue/Digital Television Simulcast Period*, Issues Paper (September 2005).

[39] Jeni Porter, 'Viewers content to leave digital out there', *Sydney Morning Herald* (Sydney), 8 October 2005.

[40] Ibid.

[41] Department of Communications, Information Technology and the Arts, above n 38.

[42] Ibid; *Broadcasting Services Act 1992* (Cth) Schedule 4 cl 6(3)(c).

[43] Department of Communications, Information Technology and the Arts, above n 38.

[44] Telecom Asia Daily, 'US drafts digital TV bill', <http://telecomasia.net/telecomasia/article/articleDetail.jsp?id=187370> at 18 October 2005.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Given, above n 35.

[49] Ibid.

[50] Productivity Commission, *Broadcasting Inquiry Report*, Report No. 11 (2000).

[51] Porter, above n 39.

[52] Ibid.

Contempt and Public Interest

Robin Bowley, in this paper which received an honourable mention in the 2005 CAMLA Assay Prize, advocates clearer rules regarding sub judice contempt.

Introduction

The law of sub judice contempt strivesto balance the right to freedom of speech and discussion of matters of public interest with the right for persons facing legal proceedings to have a fair trial, unprejudiced by media comment. Striking a balance between these two interests is a difficult task, which in Australia, has been addressed by the common law over time. While a number of decisions have considered how the balance should be maintained, no authoritative guidance has yet been developed in Australia, with considerable uncertainty still surrounding the questions of when a publication[1] will offend the sub judice rule, and when the "public interest" defence will be available. The present law of sub judice contempt raises more questions than answers.

In order to provide better guidance to the media and as a result, avoid costly and time-consuming litigation, and at the same time, allow the media to publish and broadcast with greater confidence and without fear of being found to be in contempt of court, greater certainty must be created. In essence, this article considers that prevention is better than cure, and that such prevention can only be achieved through making the rules on sub judice contempt clear and readily understood by the media, courts and the community alike.

Sub Judice Contempt: An overview of its development

The Sub Judice Rule

Essentially, the law of sub judice contempt aims to safeguard the public interest in the proper administration of justice through ensuring a fair trial.[2] The rule prohibits the publication of prejudicial information about a case that is currently being heard or is pending hearing in Court.[3] The principal source of sub judice contempt law in Australia remains the common law.[4] Commentator Sally Walker explains the operation of the sub judice rule:

> *"The conflict between freedom of speech and the proper administration of justice is most likely to arise when a media organisation publishes material which may interfere with the course of particular legal proceedings. Typically, those responsible will not intend to prejudice the proceedings. They may have been motivated solely by a desire to bring to the attention of the public matters of public interest and concern. Nonetheless, [in doing so] they may be guilty of a criminal offence under that branch of law in Australia known as sub judice contempt."*[5]

Examples of publications that might offend the sub judice rule include assertions that a person facing legal proceedings was innocent of the charges: *DPP v Wran* (1986) 7 NSWLR 616, or that he/she was guilty: *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15 (**Hinch**). However as this paper will show, the question of what publications will offend the sub judice rule is far from certain.

The "Public Interest" Defence

In light of the common laws recognition that freedom of speech is a highly valued principle, the public interest defence has developed.[6] Walker explains that 'the "public interest defence" allows Australian courts to make a finding that a media publication contains information that has a "real and substantial risk" of causing prejudice to the proceedings, but does not amount to a contempt because the information relates to a matter of great public importance and interest.'[7]

The first authoritative statement on the "public interest defence" in Australian sub judice law was enunciated by Jordan CJ in *Ex parte Bread Manufacturers Ltd* (1937) 37 SR(NSW) 242 (**Breadmakers**), who held that:

> *"[d]iscussion of public affairs and the detriment of public abuses actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant ... It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason of the fact that the matter in question has become the subject of litigation."*[8]

Walker explains that until the High Court's decision in Hinch, there was considerable uncertainty regarding the practical application of the *Breadmakers* principle, with some courts viewing the principle as an inflexible rule.[9] In *Hinch* it was held that courts must engage in a "balancing exercise" between the two competing interests to satisfy themselves beyond reasonable doubt that the public interest in freedom of speech outweighs the public interest in the administration of justice.[10] However, Courts are left with little (if any) guidance on how this balancing exercise should be undertaken. The test formulated by the majority of the High Court in *Hinch* to determine if a publication is prejudicial is that the publication must:

> *" ... have a "real and definite tendency" as a "matter of practical reality" to "preclude or prejudice the fair and effective administration of justice in the relevant trial."*[11]

In the *Hinch* decision, Mason CJ differed from the majority in his preference that:

> *" ... there was a substantial risk that the published material would come to the attention of one or more members of the jury in the relevant proceedings, and through so doing, would cause real or serious prejudice to the fair conduct of those proceedings."*[12]

The "substantial risk" test is the preferable test to be applied to determine if there is sub judice contempt. This is one of the major uncertainties in the Australian law of sub judice contempt, and Felicity Robinson explains that:

> *"The question that arises from the [five separate] judgments in Hinch v Attorney General (Victoria) (1997) is what constitutes a substantial public interest. The problem with the balancing approach is that what it gains in flexibility it loses in subjectivity. The*