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Telstra's High Court Challenge - Context and Comment

Rob Neely reviews the foundations of Telstra's constitutional challenge to Part XIC of the Trade Practices Act, and outlines parallel international experiences in the US and Hong Kong.

In January 2007 Telstra launched a High Court challenge to the validity of the telecommunications industry access regime contained in Part XIC of the *Trade Practices Act 1974 (TPA)*. Telstra commenced the case because it believes that the TPA does not provide Telstra shareholders with what Telstra considers is their constitutionally guaranteed right to 'just terms' compensation for an acquisition of property.¹

The appeal relates specifically to the application of Part XIC to the line sharing service (**LSS**) and unconditioned local loop service (**ULLS**), both of which are based on use of the Telstra copper network which links premises with the local Telstra exchange. With the ULLS, the access seeker effectively rents the copper line from the exchange to the premises, disconnecting the line from Telstra's equipment at the exchange and connecting it to its own equipment. Telstra no longer charges the end user for line rental and the access seeker can use the line to provide a broadband service and a standard telephone service to the premises. With the LSS, the access seeker only gets to use that part of the electromagnetic spectrum travelling over the line which is used to provide data services. The line remains connected to the Telstra network and Telstra continues to charge the user a line rental (as well as, in most cases, continuing to provide a standard telephone service).

The LSS and ULLS are both declared services under Part XIC.² This means that Telstra is required to supply these services to access seekers upon request. If Telstra and

an access seeker are unable to agree on the terms of access (including price), either may refer the dispute to the Australian Competition and Consumer Commission (**ACCC**) for arbitration. The ACCC is then able to determine the terms of supply.

The 'proximate cause' for the High Court challenge, according to Telstra's head of regulatory, Phil Burgess, was the ACCC's interim decision in December 2006 to set LSS access fees at \$3.20 per line per month (in the context of its arbitration of Telstra's LSS access disputes with Chime Communications and Request Broadband). Telstra had originally wanted around \$15 but had more recently offered \$9 per month whilst claiming that its actual costs of providing the service were \$11.75.³ The ACCC's reasoning was that, as the user continued to be charged a monthly line rental which covered most of Telstra's cost of providing the line to the premises, it would be double-dipping to allow Telstra to charge an LSS access seeker more than the direct cost of implementing the line sharing.

The interim determination in the Chime and Request Broadband disputes was the last in a line of ACCC decisions on ULLS and LSS pricing with which Telstra has taken strong exception. Earlier last year, the ACCC had rejected a Telstra undertaking to provide ULLS access for \$30 a month on a nationally averaged basis, instead setting a price for four categories of geographical area including \$7.20 per month in inner-city areas and \$17.70 per month in the suburbs.⁴

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As at the date of writing, it has not been possible to obtain access to the application filed in the High Court but it would appear that Telstra's claim is not for compensation but for a declaration from the Court that the Part XIC regime is itself unconstitutional in its application to the ULLS and LSS.

Telstra has been talking about a constitutional challenge for a year or more, and there have been various references to experience overseas where owners of legacy copper networks had successfully challenged the validity of access regulation. Telstra CEO Sol Trujillo himself has had direct experience of such matters when he was CEO for US West Communications. Of course, Telstra's challenge in the High Court will be decided under Australian law, and in the particular context of the Australian Constitution, so overseas experience will not be directly relevant. However, given the common policy considerations, it is instructive to review the experience in the United States and in Hong Kong where the actions of the incumbents did lead ultimately to a more acceptable outcome for them.

In the remainder of this article, it is proposed to set out briefly the law in Australia as it might apply in the Telstra application and then to consider the experience of Verizon and PCCW in the United States and Hong Kong, respectively.

Commonwealth Constitution

Section 51 of the Constitution provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws (emphasis added)

With a few possible exceptions not relevant here, the Commonwealth's sole power for legislating with respect to the acquisition of property is contained in paragraph 51(xxxi) and laws enacted under that power (that is, providing for the acquisition of property), in order to be valid, must provide for just terms.⁵ This is the basis of Telstra's claim.

It is not proposed to discuss in any detail the law on paragraph 51(xxxi). However, some of the more important points decided by the High Court are:

1. 'Property' in this context is to be given a wide meaning⁶ and includes 'the assumption and indefinite continu-

ance of exclusive possession and control for the purposes of the Commonwealth of any subject property'⁷

2. The relevant acquisition need not be by the Commonwealth itself provided the acquisition is made by virtue of a Commonwealth law⁸ and for a purpose in respect of which the Commonwealth has power to make laws.⁹
3. Generally speaking, the requirement of just terms refers to the provision of an adequate price (emphasis added) for the acquisition.¹⁰
4. The assessment of the terms of an acquisition may be entrusted to an administrative agency, so long as that agency's determination is subject to judicial review.¹¹

Part XIC of the TPA was clearly drafted with paragraph 51(xxxi) of the Constitution in mind. 152EB of the TPA provides that, if an ACCC arbitration determination results in an acquisition of a person's property and 'the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated', the Commonwealth must pay that person a reasonable amount of compensation, agreed between the parties or as determined by a court.

There are several points to make about section 152EB. First, it is notable that the drafters of Part XIC expressly contemplated that an access determination by the ACCC under Part XIC might involve an 'acquisition of property' within the meaning of paragraph 51(xxi) of the Constitution, even though it is clear from section 152CQ(1)(e) that such a determination cannot involve the access seeker becoming an owner of a relevant facility. It is also notable that it was contemplated that an ACCC determination, which must be made by reference to the matters in section 152CR (including the access provider's investments in facilities and direct costs of providing access), could result in an access provider not being sufficiently compensated.

However, the main issue with section 152EB is that it is difficult to see how it could ever apply. This is because individual determinations will not be invalid by virtue of paragraph 51(xxi); rather, paragraph 51(xxi) goes to the validity of the 'law' which permits an acquisition of property on other than just terms (Part XIC itself). If this is correct, then section 152EB will not 'save' Part XIC should the arbitration process it prescribes fail the 'just terms' test.

Telstra's Case

There may well be other matters in issue in the Telstra litigation, but at the least Telstra will need to establish that the Part XIC arbitration process firstly, involves an acquisition of property and secondly, does not provide for just terms for such an acquisition.

On the first point, there would seem to be strong support from the cases that obtaining exclusive use rights, however called, to tangible property will be an acquisition of property within the meaning of the Constitution. Under the ULLS, the access seeker does acquire exclusive use rights to the Telstra copper pair for so long as the customer elects to receive the access seeker's service. The position is less clear with regard to the LSS. Under that service, the access seeker only obtains exclusive use of part of the carrying capacity of the line. However, it would seem quite possible that obtaining such rights of use will also be an acquisition of property.

The harder point for Telstra to establish will most likely be that the process provided in Part XIC for the arbitration of access disputes by the ACCC does not meet the 'just terms' test. The cases suggest that the legislature is to be given some latitude in determining the process for compensation and that it will be sufficient that the law 'amounts to a true attempt to provide

fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country.'¹² It will not be enough that Telstra can show that in a particular case the access rates determined by the ACCC were not adequate. Conversely, it will not be sufficient for the Commonwealth to establish that no determinations to date have resulted in inadequate access fees. It is the process overall which must be considered.

There are various aspects of the arbitration process under Subdivision C of Part XIC which are clearly intended to provide both procedural and substantive fairness to the parties, including the facility owner. These include the process of interim determinations, the restrictions on access determinations (section 152CQ) and the matters that the ACCC must take into account in making a final determination on the terms of access (section 152 CR). In the words of Starke CJ in the *Grace Bros case*, is the High Court likely to find these arrangements to be 'so unreasonable as to terms that it cannot find justification in the minds of reasonable men?'¹³

Turning now to the overseas experience, the US and Hong Kong are just two of the jurisdictions where network owners have fiercely resisted the power of the regulator to force access to unconditioned (or 'unbundled') network elements.

The US Experience

Bell Atlantic (now part of Verizon), with others, waged an aggressive campaign against requirements under the US *Telecommunications Act 1996* for incumbent carriers to provide access to 'unbundled network elements' or UNEs. After several high profile court challenges¹⁴, and intense political pressure, the Federal Communications Commission (FCC) in 2003 significantly revised its rules concerning competitive access.¹⁵

Section 251 of the US *Telecommunications Act 1996* requires 'incumbent local exchange carriers' (ILECs), amongst other things, to lease to competitors combinations of unbundled network elements. Provision of these network elements must be on 'rates, terms and conditions that are reasonable and non-discriminatory.' The FCC may decide which particular UNEs must be made available, based on which elements are necessary for the competitor to provide a service and the absence of which would impair the competitors ability to provide the service (the so-called 'necessary and impair rule')¹⁶.

There were various grounds upon which the FCC determinations under section 251 were challenged. There were some constitutional grounds but none that have any relevance outside the US. Other grounds related to the application of the necessary and impair rule (in particular whether the FCC should make a blanket ruling for a particular type of UNE or decide on a market by market basis) and the access pricing methodology it employed (the FCC used a formula called TELRIC for Total Element Long Run Incremental Cost).

Amongst other things, the FCC 2003 review removed high speed, broadband network elements from the unbundling requirement and provided that high capacity loops serving business customers would not be subject to unbundling unless a state regulator determined that unbundling was necessary in the particular market. The FCC removed line sharing from the list of network elements to which access must be given but decided that ILECs must continue to provide unbundled access to copper loops (ie. ULLs). Interestingly, it also provided that no copper loops could be retired without permission from the relevant state regulator.

These US developments do not provide any direct support for Telstra's constitutional arguments. However, they do demonstrate that a determined and wide-ranging legal attack on access regulation and the activities of the regulator can yield dividends. No doubt some of the findings of the courts and the FCC in relation to the economics of telecommunications markets will also have relevance to Australia.

In a separate development, a competitor brought an action against Verizon under section 2 of the *Sherman Act*, one of the general US anti-trust statutes.¹⁷ The claim was based upon alleged discriminatory treatment in actioning requests for access to the unbundled local loop. The claims had already been the subject of a number of administrative enforcement decisions by the FCC. However, the *Telecommunications Act* expressly saves claims arising under the *Sherman Act* and other general competition laws.¹⁸

In 2004, the Supreme Court held that Verizon had not breached the *Sherman Act* as the conduct did not fall within any of the limited exceptions to the general rule that a corporation may choose to whom it provides its goods or services.¹⁹ The Court held that this was not a case where a corporation declined to engage in a profitable activity on the basis that it was seeking some long term anti-competitive result. Verizon was only granting access to its ULL because it

was forced to do so under the regulations. Therefore, the only remedies available for the aggrieved party were those under the *Telecommunications Act*.

As the decision turned on general anti-trust law principles as they have developed in the US, it does not have much relevance to Australia. However, it does beg one interesting question and that is whether a refusal by Telstra to provide a competitor with access to the ULL service would be 'anti-competitive conduct' within the meaning of section 151AJ of the TPA.

Hong Kong Review

In 2003 the Hong Kong government initiated a review of its policy in relation to forced access to the incumbent carrier's copper based customer access network (in Hong Kong called 'Type II interconnection'). Under sections 36A and 36AA of the Hong Kong *Telecommunications Act*, the Telecommunications Authority has power to determine the terms and conditions of interconnection between networks, including access to any element of a network on an unbundled basis at any point that is technically feasible.

In its response to the review, PCCW, the incumbent, raised 'deprivation of property' arguments under article 105 of Hong Kong's Basic Law (effectively, Hong Kong's constitution).

Article 105 of the Hong Kong Basic Law provides as follows:

The Hong Kong Special Administrative Region shall, in accordance with law, protect the rights of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

PCCW argued strongly that the forced provision of ULL access was a 'deprivation of property' within the meaning of Article 105, that the Authority should only exercise its discretion to determine terms for Type II interconnection if there was a strong public policy reason for doing so and, if the Authority was to make such a determination, the determination must provide for compensation for the 'real value' of the unbundled local loop to PCCW.²⁰ PCCW argued that in the context of the Hong Kong telecommunications market there was no strong public policy reason for mandating ULL access and the Authority should decline to intervene in access dis-

putes involving Type II interconnection.

In response to PCCW's submission, the Authority argued that Type II interconnection was not a deprivation of property as it was not permanent and was dictated solely by end customers who chose an alternate service provider.²¹ The Authority further argued that the provisions which provided for access 'on reasonable commercial terms' were adequate in the circumstances and were consistent with the Basic Law. Unfortunately, PCCW's arguments have never been tested in any court or tribunal.

Whether as a result of PCCW's submissions or not, the Hong Kong Executive Council on 6 July 2004 decided to implement a staged withdrawal of the current Type II interconnection policy, to be completed by 30 June 2008.²² The withdrawal is to be on a building-by-building basis. After 2008, the only buildings for which Type II interconnection will continue to be mandated will be those meeting the 'essential facilities' criterion, such that mandatory interconnection was justified in the consumer interest.

Conclusion

What the actions of Verizon in the US and PCCW in Hong Kong do show is that resistance by incumbents to access regulation has been strongest in relation to unbundled network elements, such as the ULL, and that attacks on the validity of the access regime, on constitutional and public policy grounds, can lead to a more acceptable outcome for the incumbent.

Telstra's High Court challenge will present some interesting legal issues and, should Telstra be successful, will have significant ramifications for Telstra's competitors. In the short term, the case will also create regulatory uncertainty which may result in some competitors delaying their investment in broadband infrastructure. This, it must be said, is a poor outcome for competition and the consumer.

For Telstra, the appeal will take on a greater significance if the Federal Government reaches agreement with the so-called 'G9' consortium, led by Optus, in relation to its fibre-to-the-node proposal as such a build would depend on wide-spread regulated access to the last section (from the node to the home) of the Telstra local loop.²³

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(Footnotes)

¹ Telstra Corporation ASX Announcement - 24 January 2007

² In December 2006, the ACCC re-declared the ULLS for a further three years and is required to determine by October 2007 whether to re-declare the LSS. The ACCC has also decided to hold a public inquiry under subsection 152AL of the TPA to determine whether it should vary its service declaration for the ULLS, in response to a request from the G9 consortium of companies (which is proposing a fibre-to-the-node development), to ensure that sub-loop access would fall within the description.

³ Telstra Corporation ASX Announcement - 25 January 2007

⁴ Telstra appealed that decision to the Australian Competition Tribunal but the ACT on 17 May 2007 confirmed the ACCC's decision and its reasoning.

⁵ *Johnson Fear & Offset Printing Co v Commonwealth* (1923) 33 CLR 1

⁶ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261

⁷ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, Dixon CJ at 349

⁸ see *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 401 per Latham CJ

⁹ *Johnson Fear & Offset Printing Co v Commonwealth*

¹⁰ see *Nelungaloo Pty Ltd v Commonwealth* (1949) 80 CLR at 397

¹¹ see *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 99

¹² *Grace Bros v Commonwealth* (1946) 72 CLR 269, Dixon J at 290

¹³ *Grace Bros v Commonwealth* (1946) 72 CLR 269 at 285

¹⁴ *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (C.A.D.C., 2000),

WorldCom, Inc. v. FCC, 288 F.3d 429 (C.A.D.C., 2002)

Verizon Comm., Inc. v FCC, 535 U.S. 467, 517-518 (2002)

¹⁵ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implement of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 03-36 (2003)

¹⁶ Section 251(d)(2) of the US Telecommunications Act 1996

¹⁷ *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d 89, 95 (2d Cir) 2002

¹⁸ Telecommunications Act 1996 s601(d)(1)

¹⁹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²⁰ PCCW Review of the Regulatory Policy for Type II Interconnection, Comments on the Consultation Paper, 22 August 2003, paras 40-44

²¹ Review of the Regulatory Policy for Type II Interconnection, Analysis of Comments Received, Preliminary Conclusions and Further Consultation, 16 December 2003, Annex 1, para 16

²² Hong Kong Legislative Council Brief, Review of Type II Interconnection Policy, 6 July 2004, CTB/T 56/2/1(04)

²³ See note 2 above regarding the ACCC's review of the ULLS specification.

Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation

David Rolph discusses the intersection between defamation law and privacy protection following the introduction of Uniform Defamation Legislation.

Introduction

Last year saw perhaps the most important event in the history of Australian defamation law: the introduction of uniform, national defamation legislation.¹ Prior to 1 January 2006, Australia had eight different defamation jurisdictions. The differences between them should not be underestimated. They were real and substantial and led, on occasion, to different outcomes in respect of the publication of the same matter.² The introduction of uniform, national defamation laws may be properly viewed as a significant victory for commonsense and efficiency.

This is not to say their introduction has been without controversy. One of the contentious aspects of the recent defamation law reforms is the nationwide adoption of truth alone as a complete defence to defamation. Prior to 1 January 2006, four Australian jurisdictions required proof of a public interest or a public benefit in addition to proof of the substantial truth of a defamatory matter before the defence of justification could be established. Some commentators have suggested the removal of the element of public interest or benefit will allow the media to invade privacy with greater impunity. Other commentators have been swift to reject this predicted consequence of the reform.

This article seeks to examine this debate. It argues that the removal of the requirement of public interest or benefit will not lead to a more invasive media for a number of reasons. Ultimately, it suggests that defamation law should not be used as a *de facto* privacy protection; that defamation and privacy protect conceptually distinct interests; and that the time has come to address directly the need for effective privacy protection in Australian law.

The Defence of Justification at Common Law and under Statute

At common law, truth is a complete defence to defamation. The rationale for this legal

principle is explained by Street ACJ (as his Honour then was) in *Rofe v Smith's Newspapers Ltd*:

...[A]s the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it.³

As Patrick George has recently observed, '[a] truthful statement defines reputation rather than damages it.'⁴ Prior to 1 January 2006, the common law defence of justification applied in the Northern Territory, South Australia, Victoria and Western Australia.

The uniform, national defamation legislation provides a statutory form of the common law defence of truth alone. Under the new laws, a defendant need only demonstrate that the defamatory matter is substantially true in order to establish the defence of justification.⁵ The introduction of the statutory defence of truth therefore did not bring about a substantive change to the applicable law in the Northern Territory, South Australia, Victoria and Western Australia.

It did, however, bring about a substantive change in the law of the remaining four jurisdictions. Prior to 1 January 2006, the statutory defence of justification in New South Wales required that a defendant prove that a defamatory imputation was not only substantially true but that it also related to a matter of public interest or was published on an occasion of qualified privilege.⁶ Likewise, in the Australian Capital Territory, Queensland and Tasmania, a defendant needed to prove that a defamatory matter was substantially true and was published for the public benefit.⁷ The introduction of the uniform provision in these jurisdictions appeared to make it easier for defendants to establish a defence of justification, requiring as it did one less element to be proven.

The Current Controversy

In an episode of *Media Watch* broadcast in mid-April 2006, presenter, Monica Attard, analysed the potential impact of the abandonment of a public interest or benefit element of the defence of justification. She suggested that this element ensured a level of privacy protection for individuals, citing cricketer, Greg Chappell's defamation litigation against Channel Nine in the 1980s⁸ and the more recent proceedings brought by socialite, Shari-Lea Hitchcock, against John Fairfax Publications Pty Ltd as examples.⁹ Attard further suggested that the loss of this element could lead to an increasingly intrusive media in Australia with a concomitant decline in journalistic standards. The potential nadir was represented by the recent exposé by *The News of the World* of the love life of British Conservative parliamentarian and former editor of *The Spectator* magazine, Boris Johnson. Attard expressed the view that the statutory defence of justification allows privacy protection '[to go] by the board' and that the new defamation laws overall favour media organisations at the expense of individuals' privacy.¹⁰ Attard has recently repeated her views in an interview with *The Australian* newspaper.¹¹

Attard's views provoked responses from two newspaper columnists. In his regular column in the 'Media' section of *The Australian* newspaper, Mark Day argued that, under the previous defamation laws, the public interest or benefit element was a 'hurdle to justice'. However, according to Day, the real difficulty was not proving public interest or benefit but proving, in a courtroom, the substantial truth of the defamatory matter. He also took issue with Attard's characterisation of the new defamation laws as too favourable to the media. According to Day, the new defamation laws had the effect of correcting the balance which, for too long, had unduly favoured the protection of plaintiffs' reputations. He also disagreed with Attard's prediction, as paraphrased by Day, that 'newspapers and television programs would soon be filled with the antics of bonking politicians and...naughty vicars'.¹²

The legal affairs editor of *The Australian* newspaper, Chris Merritt, was equally critical of Attard's views on truth, defamation

and privacy. His principal criticisms were that Attard's analysis was superficial and provided only partial solutions. Attard claimed views expressed by the retired Defamation List judge of the Supreme Court of New South Wales, David Levine, supported her position. However, Merritt reproduced previously unpublished remarks by Levine, in which Levine stated that the public interest element of the defence of justification was a largely irrelevant and ineffective form of privacy protection. Merritt also criticised Attard's endorsement of 'British-style privacy laws', noting that, in the United Kingdom, the introduction of a statutory right of privacy was accompanied by the introduction of a countervailing statutory right of freedom of expression, about which Attard had expressed no view. He further suggested that Attard had overlooked important common law and law reform developments in Australia in relation to privacy protection.¹³

Does Truth Alone Jeopardise Privacy?

There are a number of ways in which one can test the proposition that the removal of the public interest or benefit element from the defence of justification in defamation allows the media to invade privacy with impunity.

Whether the public interest or benefit element of the defence of justification ever operated as an effective privacy protection is questionable. Few cases in practice turned on whether or not a publication concerned a matter of public interest or was for the public benefit, as Levine observed.¹⁴ In many cases, public interest or benefit was conceded by plaintiffs.¹⁵ In cases where it was contested, courts did not adopt an unduly narrow approach to the characterisation of the public interest or benefit.¹⁶

Grech v Illawarra Newspaper Holdings Pty Ltd and *Hitchcock v John Fairfax Publications Pty Ltd* are two recent, and rare, examples of cases in which the defence of justification turned not upon proof of substantial truth but proof of a matter of public interest. In *Grech v Illawarra Newspaper Holdings*, a Dapto man sued *The Illawarra Mercury* for reporting that he had been admitted to Wollongong Hospital following the explosion of a firecracker 'between the cheeks of his buttocks'. The article detailed the consequences of what it surmised was a Jackass-style stunt gone wrong, being a fractured pelvis, burnt genitals, sexual dysfunction and the need for a colostomy and a catheter.¹⁷ It is understood that the plain-

tiff's objection to the article was not that it was not substantially true, but rather that there was no public interest in the publication of such matter.¹⁸

In *Hitchcock v Fairfax*, Nicholas J found that the reporting in *The Sun-Herald* of 'impromptu solo dirty dancing' by Sydney socialite, Shari-Lea Hitchcock, followed by 'a nauseating display' with a married television executive, at the launch of the reality television programme, *Rock Star: INXS*, did not relate to a matter of public interest, with the result that Fairfax's pleaded defences of justification, contextual truth and comment all failed on this ground.¹⁹ The fact that proof of public interest or benefit was rarely the major obstacle confronted by media defendants in establishing a defence of justification suggests that the public interest or benefit element was not, in and of itself, an effective privacy protection for plaintiffs.

The real difficulty with the defence of justification has always been the proof of substantial truth, rather than the proof of any public interest or benefit in publication. Two recent cases amply demonstrate this point. In *Craftsman Homes Australia Pty Ltd v TCN Channel Nine Pty Ltd*, Smart AJ had to traverse a vast amount of evidence in relation to four residential building contracts in order to establish the truth of the imputations of shoddy building practices and unfitness to conduct a building business levelled against the plaintiff builders.²⁰ His Honour's judgment was in excess of a thousand paragraphs. Likewise, in *Li v Herald & Weekly Times Pty Ltd*, Gillard J took almost four hundred paragraphs to find that eight newspaper articles, reporting allegations that the plaintiff conducted an illegal brothel under the guise of a legitimate Chinese herbal medicine practice and issued false receipts to allow her clients to make claims from their private health insurance providers, was completely justified.²¹

In both of these cases, the defendants ultimately succeeded with their defences of justification. These cases illustrate an important point about the defence of justification. The proof of substantial truth can be complex and, as a consequence, costly. Moreover, this complexity and cost is common to jurisdictions with and without a public interest or benefit element in the defence of justification.

It is debatable whether the inclusion of a public interest or benefit element in the defence of justification in at least four jurisdictions affected media practices so as to operate as an effective check on an intru-

sive media prior to 1 January 2006. Prior to the introduction of the national, uniform defamation laws, the media, on occasion, engaged in conduct that could reasonably be viewed as an invasion of privacy. For example, in mid-April 2005, *The Daily Telegraph* published an article which itemised the contents of former NRMA president, Ross Turnbull's rooms at two Sydney motels. The motel operators retained Turnbull's personal property as security for his unpaid accommodation bills.²² In the same month, *The Daily Telegraph* also published photographs of Rodney and Lyndi Adler going for their morning walk, taken by photographers who had followed them for the purpose of obtaining such photographs. The photographs were accompanied by a story alleging that Rodney Adler offered to consent to having his photograph taken in return for a favourable editorial position being adopted by the newspaper prior to his sentencing on four criminal charges arising out of his involvement with failed company, HIH Insurance.²³ The presence of a public interest requirement in the defence of justification did not stop *The Daily Telegraph* from publishing either of these stories. It would be difficult to demonstrate, quantitatively or qualitatively, that the media has become more invasive in their practices before and after the introduction of the national, uniform defamation laws.

If the public interest or benefit requirement were an effective privacy protection, one might have expected to find a more invasive media in those jurisdictions without it. However, the media in those jurisdictions have not been noticeably more intrusive than the media in jurisdictions with a public interest or benefit requirement. It would be difficult to argue that, prior to 1 January 2006, the media in Victoria, for instance, were more invasive of personal privacy than the media in New South Wales. Moreover, the absence of such an element in four jurisdictions has not been the stimulus for increased privacy protection in those jurisdictions that might have been expected to combat the more intrusive media that the absence of such an element is supposed to create. Australian courts and legislatures have been uniformly slow to identify and address the need for direct privacy protection.

Reputation and Privacy

There is a more fundamental reason why it is flawed to suggest that the removal of the public interest element of the defence of justification in defamation law might allow more intrusive media practices to occur. It is axiomatic that the principal legal interest

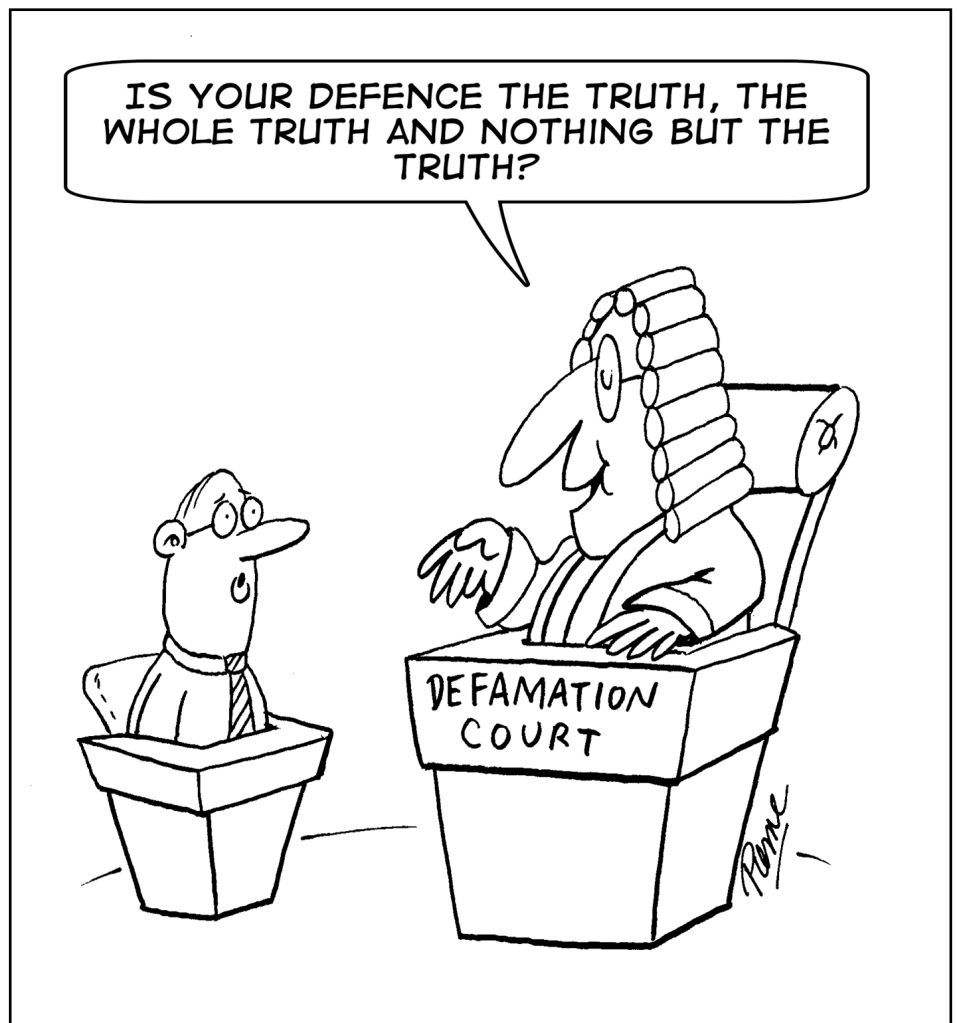
protected by defamation law is reputation, not privacy.²⁴ To the extent that defamation law defines reputation – a concept comparatively undertheorised in defamation jurisprudence – it is taken to mean ‘what other people think [the plaintiff] is’ and is contrasted with character, being ‘what [the plaintiff] in fact is’.²⁵ Consequently, reputation is inherently public. Defamation law is therefore principally concerned with the protection of the plaintiff’s public face. This understanding of the purpose of defamation law underpins Street ACJ’s statement of the rationale of the common law defence of justification. Unsurprisingly, in contrast to reputation, privacy is inherently private. Although they are both founded upon the personality of the plaintiff, reputation and privacy are conceptually distinct legal interests.

Because its principles are designed to protect a fundamentally different legal interest, reputation, defamation law does not readily accommodate privacy protection as one of its aims or rationales. Defamation law should prevent people making false and disparaging statements about others in public; privacy law should allow individuals to control what true, but private, information about themselves is disseminated in public and what remains private. Any privacy protection afforded by defamation law has been or should be incidental or indirect at best. The fact that recent reforms have arguably reduced or removed privacy protections from defamation law does not mean that the principles of defamation law as they now stand under the national, uniform defamation laws are somehow deficient. Properly understood, it is not the function of defamation law to protect a plaintiff’s privacy.

Australian Developments in Direct Privacy Protection

If there is a deficiency in Australian law in relation to privacy protection, it is preferable to address that deficiency by engaging with privacy as an interest worthy of direct legal protection, rather than seeking to deploy defamation law to provide an indirect remedy. Until recently, Australian courts and legislatures have been unwilling to engage with this complex issue.

For several decades, it was assumed that the High Court’s decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*²⁶ prevented the recognition of a common law cause of action for invasion of privacy. However, in *Australian Broadcasting Corporation v Lenah Game Meats Pty*



Ltd,²⁷ Gummow and Hayne JJ stated that, properly understood, this case did not act as an obstacle to the development of direct privacy protection.²⁸ A number of judges in *ABC v Lenah Game Meats* expressed the view that a tort of invasion of privacy might be recognised as part of the common law of Australia, but such a cause of action, if recognised, would not be for the benefit of artificial entities, such as *Lenah Game Meats Pty Ltd*, privacy being an incident of the innate dignity of natural persons.²⁹ In *Grosse v Purvis*, Skoein DCJ of the District Court of Queensland awarded damages to the plaintiff for invasion of privacy, following *dicta* from *ABC v Lenah Game Meats* to fashion a new tort.³⁰ However, the correctness of this decision was doubted in the Supreme Court of Victoria in *Giller v Procopets*³¹ and by the Full Federal Court in *Kalaba v Commonwealth*.³² Until recently, it appeared the process of developing direct privacy protection as part of the Australian common law had stalled.

The seemingly arrested development of direct privacy protection in Australian law may be usefully contrasted with the significant developments in New Zealand and the

United Kingdom. In New Zealand, the New Zealand Court of Appeal has recognised a limited form of the tort of invasion of privacy, being confined to the public disclosure of private facts.³³ This decision was the culmination of a judicial trend, represented by a series of first-instance judgments, towards the recognition of this tort.³⁴ In the United Kingdom, the equitable cause of action for breach of confidence has been fashioned to provide a remedy for the misuse of private information. The case law is already substantial – and growing.³⁵ Direct privacy protection in New Zealand and United Kingdom law is therefore more advanced than that in Australian law.

There have, however, been indications that Australian law might also address the need for privacy protection directly. In late January 2006, the Commonwealth Attorney-General, Philip Ruddock, provided the Australian Law Reform Commission with terms of reference to inquire into privacy protection in Australian law. Thus far, the ALRC has produced an issues paper and, under its terms of reference, is due to report at the end of March 2008.³⁶ Similarly, in mid-April 2006, the then New South Wales

Attorney-General, Bob Debus, provided the New South Wales Law Reform Commission with terms of reference to inquire broadly into the same matter.³⁷ Finally, in early April 2007, Judge Hampel of the County Court of Victoria awarded damages to a sexual assault victim who had been named in media reports in breach of the statutory prohibition protecting the anonymity of such victims, in part on the express basis of a tort of invasion of privacy.³⁸ This decision may be subject to an appeal. Nevertheless, cumulatively, these three recent developments suggest that Australian courts and legislatures alike are renewing their interest in direct privacy protection – without the need for reference to defamation law.

Conclusion

It should not be a matter of concern that public interest or benefit element has been removed from defence of justification in defamation law. Because defamation law is designed to protect reputation, in essence the public self of the plaintiff, not privacy, it has always been difficult to accommodate both reputation and privacy satisfactorily within the principles of defamation law. What should be a matter of greater concern is the lack of progress towards developing direct privacy protection in Australian law. Indeed, it will be a desirable outcome of this narrow, but crucial, aspect of the recent defamation law reforms if it provides further stimulus for the development of some form of direct privacy protection, whether it be a statutory cause of action or a judicially recognised tort.

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(Footnotes)

¹ For an overview of the new, national, uniform defamation laws, see David Rolph, 'Uniform At Last? An overview of uniform, national defamation laws' (2006) 76 *Precedent* 35.

² See, for example, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6; *Cawley v Australian Consolidated Press Ltd* [1981] 1 NSWLR 225.

³ (1924) 25 SR(NSW) 4 at 21-22.

⁴ Patrick George, *Defamation Law in Australia*, LexisNexis Butterworths, Chatswood (NSW), 2006, [19.1].

⁵ *Civil Law (Wrongs) Act* 2002 (ACT) s 135; *Defamation Act* 2005 (NSW) s 25; *Defamation Act* 2006 (NT) s 22; *Defamation Act* 2005 (Qld) s 25; *Defamation Act* 2005 (SA) s 23;

Defamation Act 2005 (Tas) s 25; *Defamation Act* 2005 (Vic) s 25; *Defamation Act* 2005 (WA) s 25.

⁶ *Defamation Act* 1974 (NSW) s 15(2)(b) (repealed).

⁷ *Civil Law (Wrongs) Act* 2002 (ACT) s 127 (repealed); *Defamation Act* 1889 (Qld) s 15 (repealed); *Defamation Act* 1957 (Tas) s 15 (repealed).

⁸ *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.

⁹ *Hitchcock v John Fairfax Publications Pty Ltd* [2007] NSWSC 7.

¹⁰ For the transcript of the relevant *Media Watch* episode, see <http://www.abc.net.au/mediawatch/transcripts/s1613045.htm> (last visited 2 May 2007). Attard's arguments were foreshadowed by an article by the legal affairs editor of *The Sydney Morning Herald*, Michael Pelly. See Michael Pelly, 'If the truth be told...', *The Sydney Morning Herald*, 20 January 2006, 13.

¹¹ Chris Merritt, 'Privacy law to hit press freedom', 'Media', *The Australian*, 22 March 2007, 13 at 14.

¹² Mark Day, 'Freedom of speech undefined', 'Media', *The Australian*, 12 April 2006, 12.

¹³ Chris Merritt, 'Complete picture about a little matter of privacy', *The Australian*, 20 April 2006, 16.

¹⁴ Chris Merritt, 'Complete picture about a little matter of privacy', *The Australian*, 20 April 2006, 16.

¹⁵ See, for example, *Dennison v Refshauge* [2003] NSWSC 78 at [8] per Cripps AJ; *Cotter v John Fairfax Publications Pty Ltd* [2003] NSWSC 503 at [43] per Simpson J.

¹⁶ See, for example, *Millane v Nationwide News Pty Ltd t/as Cumberland Newspaper Group* [2004] NSWSC 853 at [117]-[124] per Hoeben J; *Craftsman Homes Australia Pty Ltd v TCN Channel Nine Pty Ltd* [2006] NSWSC 519 at [823]-[826] per Smart AJ (television programme concerned building services marketed to public and building standards generally matter of public interest, rather than purely private contractual matters).

¹⁷ Megan Levy, 'Surgeon's grim warning after firecracker tragedy', *The Illawarra Mercury*, 3 September 2003, 1, 5.

¹⁸ As to the facts of the case and the pleaded imputations, see *Grech v Illawarra Newspaper Holdings Pty Ltd t/as Illawarra Mercury* (2005) 2 DCLR(NSW) 69.

¹⁹ *Hitchcock v John Fairfax Publications Pty Ltd* [2007] NSWSC 7 at [18]-[23].

²⁰ [2006] NSWSC 519.

²¹ [2007] VSC 109.

²² Peter Gosnell, 'Final indignity – He lost his girlfriend, he lost his job. And now Ross Turnbull has lost the shirt off his back...', *The Daily Telegraph*, 12 April 2005, 3.

²³ Peter Gosnell, 'Snaps for comment – Adler offers to pose for photos but wants a good light', *The Daily Telegraph*, 14 April 2005, 1, 9.

²⁴ See, for example, Ray Watterson, 'What Is Defamatory Today?' (1993) 67 *Australian Law Journal* 811 at 812-13; Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 *Current Legal Problems* 110 at 112-14; Huw Beverley-Smith, *The commercial appropriation of personality*, Cambridge University Press, Cambridge, 2002, 249-50; W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 16th ed., Sweet & Maxwell, London, 2002, [12.1].

²⁵ This classic statement of the distinction between reputation and character is taken from *Plato Films Ltd v Speidel* [1961] AC 1090 at 1138 per Lord Denning MR.

²⁶ (1937) 58 CLR 479.

²⁷ (2001) 208 CLR 199.

²⁸ *Ibid* at 248-50. See also *ibid* at 320-23 per Callinan J.

²⁹ *Ibid* at 250, 256-58 per Gummow and Hayne JJ. Gaudron J broadly agreed with the reasons given by Gummow and Hayne JJ. See *ibid* at 231-33. However, see also *ibid* at 326-27 per Callinan J.

³⁰ (2003) Aust Torts Reports ¶181-706 at 64,183-64,187 (as to liability), at 64,189-64,191 (as to assessment of damages).

³¹ [2004] VSC 113 at [187]-[189] per Gillard J.

³² [2004] FCAFC 326 at [6]-[9] per Tamberlin, North and Dowsett JJ, dismissing an application for leave to appeal against the decision of Heerey J at first instance. As to Heerey J's reasoning, see *Kalaba v Commonwealth* [2004] FCA 763 at [6].

³³ *Hosking v Runting* [2005] 1 NZLR 1.

³⁴ See, for example, *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR 591.

³⁵ See, for example, a representative selection of the most recent and most significant cases: *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457; *McKennitt v Ash* [2006] EMLR 113; *HRH Prince of Wales v Associated Newspapers Ltd* [2007] 2 All ER 139; *Browne v Associated Newspapers Ltd* [2007] EWHC 202 (QB); [2007] EWCA Civ 295; *Douglas v Hello! Ltd* [2007] UKHL 21.

³⁶ Australian Law Reform Commission, *Review of Privacy*, Issues Paper 31, <http://www.austlii.edu.au/au/other/alrc/publications/issues/31/> (last accessed 5 May 2007).

³⁷ As to the terms of reference, see http://www.agd.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_cref113 (last accessed 5 May 2007).

³⁸ *Jane Doe v Australian Broadcasting Corporation* (unreported, County Court of Victoria, Judge Hampel, Case No CI-03-07657, 3 April 2007).

Future Looking Clearer for Community Television

Shane Barber maps the progress of Community Television into a digital broadcasting environment, considering the recommendations of a recent House of Representatives Standing Committee on Communications Information Technology and the Arts report on the subject.

Over the last ten years, the phenomenon that is community television in Australia has seen some significant growth. Channel 31 in Melbourne, Perth, Brisbane and Adelaide, along with Television Sydney and stations established in regional centres like Lismore and Mt Gambia, continue to attract surprisingly strong audiences despite the proliferation of content on free to air TV, pay TV and the internet.

Despite growing acceptance of community television, the industry has been concerned for its future as the transition from analogue to digital television in Australia progresses. Despite promises, no clear plan for digitisation has yet been implemented by the Australian Government. The industry has also been concerned to ensure that, when such plans do eventuate, it too receives the benefits of a simulcast period enjoyed by free to air television. The concern extends to how it will fund these simulcasts and the transition to digital.

House of Representatives Report

In mid February 2007, the House of Representatives Standing Committee on Communications, Information Technology and the Arts (**Committee**) delivered its report '*Community Television: Options for Digital Broadcasting*' (**Report**) dealing with many of these concerns.

While the Committee is undertaking a broader enquiry into community broadcasting, it felt obliged to issue the Report on one aspect of its enquiry, being digital broadcasting, in order to ensure that some of its key recommendations could be actioned by the Government as part of its current process regarding the allocation of two additional television channels for new digital services being:

- a free to air digital only service that will be able to be received on ordinary home televisions, likely to have the capacity to broadcast up to eight new channels providing datacasting and narrowcasting services (known as **Channel A**); and
- a service which could include the delivery of television content over a hand held mobile television device, carrying as many as thirty new channel streams of mobile television (known as **Channel B**).

A detailed report covering the full range of issues being considered by the Committee is due to be released later in the year.

Why Community Television?

In an age when Australians are the beneficiaries of large amounts of visual content, including on free to air television, pay television, the internet, and 3G mobile services, the question arises as to why the Australian Government places importance on accommodating the wishes of the community television industry and, more importantly, potentially allocating tax payer dollars to ensure its sustainability.

In its submissions to the Committee, the peak industry group the Community Broadcasting Association of Australia (**CBA**), provided detailed information regarding the background of the community broadcasting industry in Australia and the benefits that it provides to the broadcasting industry and the community generally.

According to the CBA, the community television industry traces its origins to the

early 1970's with the establishment of video access production centres by the Australia Council. The first time community style television became mainstream in Australia was in the late 1980s when the Impaja Television Network, based in Alice Springs, was established as an indigenous public television station operating under a commercial licence.

The now dominant community television station, C31 in Melbourne, undertook its first test transmissions in 1987.

In 1994 community television trial transmissions began on the last available analogue high powered television channel, the so called 'sixth channel', on the basis that that channel was made available until such time as a decision was made about the permanent use of the channel.

Community Television (**CTV**) services were initially licensed under the open narrowcast 'class licence' on a trial basis. These trials led to the establishment of a consortia of public television producers which together became known as Channel 31 in the five metropolitan and the regional areas referred to above.

In 2002, the *Broadcasting Legislation Amendment Bill (No. 2)* was introduced to provide new licensing arrangements for these CTV services and provide for permanent CTV licences.

According to the foreword to the Report, Channel 31 in Melbourne has over three million viewers and, together with the other community television channels:

...demonstrate the phenomenon of increasingly diverse media. This diversity is akin to that found online through sites such as You-Tube, which presents a wide range of content from the community.

In its submissions to the Committee, CBA discussed the role of CTV as follows:

Community television is founded upon and governed upon the principles of open access, diversity, localism and independence. It has

survived and strengthened over the past decade despite facing an uncertain regulatory future and receiving no regular government funding.

CBAA further submitted that the significant benefits of CTV to the community as a whole include:

- providing much needed diversity in content;
- providing a platform for locally produced content focusing on local issues;
- acting as a significant training platform for both front of camera and behind camera talent (citing the likes of Rove McManus, Peter Hellier, Hamish Blake and Any Lee as graduates from CTV); and
- acting as an incubator for new programming for the commercial sector.

Why Digitisation is an Issue?

CTV currently only broadcasts in analogue. With twenty percent of Australians having purchased digital receivers, potentially twenty percent of the market has been closed to the community television sector.

As the Report forwardly observes,

The logical conclusion of this scenario is that by the time ninety percent of Australians have bought digital receivers, and analogue is switched off, no-one will be watching community television. Without the opportunity to simulcast, the sector will have to start its growth again some time after 2012, when analogue Channel 31 – the only spectrum left, switches to digital.'

As the sector relies heavily on the sponsorship dollar, in addition to financial support from governments and philanthropic agencies, the industry is concerned that those sponsors will cease to support the industry if the audience reach is increasingly limited due to these technical constraints.

In its submissions to the Committee, C31 Melbourne observed that, while it had been a long standing commitment of the government that CTV would get free access to digital spectrum, no plan had yet been put in place to achieve this and

no financial support had been offered. All this was occurring at a time when the commercial television sector had already begun its transition to digital television.

The *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth) required that a review be conducted into the regulatory arrangements that should apply to the digital transmission of CTV using spectrum and the broadcasting services bands and how access to spectrum should be provided free of charge. However, when the Department of Communications and Technology and the Arts conducted a review of this situation in 2001 (producing its final report in June 2002), it concluded that an immediate or short term transition to digital transmission for the CTV sector was not necessary.

CTV finally received permanency of licence through the passing of the Broadcasting Legislation Amendment Bill (No. 2) 2002.

In its 2004 election policy, the Federal Coalition reaffirmed its commitment to the inclusion of community broadcasters in the digital environment. This policy was reaffirmed in November 2006 when the Australian Government released 'Ready, Get Set, Go Digital – A Digital Action Plan for Australia'. While the plan reaffirmed the Government's commitment to working with the CTV industry in its transition to digital it failed to give any definite series of steps to enable this to happen.

Options Considered by the Committee

As outlined in a submission to the Committee from Broadcast Australia, the Committee considered three principal options for the digitalisation of CTV, being:

- *conversion on the same basis as a free to air broadcaster, i.e. the allocation of a full digital channel (7 MHz) with a phasing simulcasting period of eight years (or until free to air analogue switch off, whichever is the sooner);*
- *conversion utilising a simulcasting period in conjunction with the allocation of part of a new digital/datacasting channel for community television use. In this situation the allocation of a datacasting channel would include a 'must carry' obligation on the licensee; and*

- *direct conversion of the community analogue services to digital without the benefit of a simulcast period at an appropriate point in the overall digital television take-up cycle'*

While the Committee acknowledged that the community television sector wished to have its own full 7 MHz channel, it ultimately considered that the allocation of same following analogue switch off was unlikely to occur. This was notwithstanding the fact that the Australian Government had, in 1998, promised the CTV sector a dedicated standard definition digital channel.

The Committee did, however, feel that there was a need for an interim arrangement to ensure simulcast broadcasts for the CTV sector leading up to analogue switch off and secondly, there was a need for options for CTV digital broadcasts in the long term to be considered.

As a result, the Committee recommended the reservation of a 7 MHz spectrum band known as Channel 31 for CTV.

A full 7 MHz channel would provide enough spectrum for current broadcasters, new aspirants, the NITV services [National Indigenous Television] and other community uses that will develop in the future.

The Committee was also of the opinion that a direct switch from analogue to digital without the benefit of a simulcast period would substantially disadvantage CTV and should not be considered as an option. It accepted the industry's view that the absence of a simulcast period would see a considerable loss of audience and revenue stream from CTV broadcasts given that, in the interim period, less and less audience participants would be able to see community television as they continued to switch to digital. It was noted that by September 2006 the estimated home take up or penetration of free to view digital television had reached a new mark of 1.8 million, or around twenty three percent of Australia's 7.6 million homes.

The issue then arising is how the simulcasts would occur. The three options considered were:

- Either SBS or the ABC being required to carry CTV, however the Committee recognised that these national broadcasters had already developed their own additional content and

multi-channelling plans and capabilities and placing such an obligation upon them would have a serious impact on the same;

- Having CTV carried temporarily by subscription television providers such as Foxtel, however the Committee recognised the difficulties facing the sector in negotiating carriage agreements with subscription television providers. Further, the Committee was of the view that it would not be appropriate for the Government to attempt a 'must carry' requirement on an already established commercial operation.
- The final option was that either the ultimate licensee of Licence A or Licence B be required to carry the simulcast.

This final option explains why the Committee felt it was important to issue this preliminary report regarding either digitisation of CTV now, rather than wait until the publication of the full community television report later in the year.

With the Government currently considering the process for the issue of Licence A and Licence B, it would be open to the Government to require a single standard definition channel carried by the Licence A licensee be made available as the most appropriate option for the simulcast carriage for digital television.

Recommendations

Ultimately the recommendations of the Committee in relation to the digitisation of CTV can be seen in the table below:

Industry Response

On the same day that the Report was released, Anthony Bryan, CBAA's Vice President of community television said:

"The timing of community television's move to digital is crucial, so the Committee's recommendation for a must carry provision by 2008 is very encouraging. The other recommendations are also most welcome and will also provide a great benefit to the community television sector."

Shane Barber is a Partner in the Sydney office of corporate and communications law firm. Truman Hoyle.

Recommendation 1: The Committee recommends that the Australian Government sell the unreserved channel known as Licence A, with an obligation to be placed on the new licensee to carry community television during the simulcast period.

Additionally the Committee recommends that:

- carriage would be at no cost to the community television sector during the simulcast period;
- the terms of licence for Licence A would include a condition to simulcast community television by 1 January 2008, otherwise penalties on the new licensee will apply; and
- such penalties must be sufficient to ensure that community television is carried by 1 January 2008.

Recommendation 2: The Committee recommends that, if Licence A does not sell before the end of 2007 with a 'must carry community television' obligation, the Australian Government:

- temporarily allocates sufficient spectrum from Licence A to a National Broadcaster in order for it to carry community television during the simulcast period; and
- allocate sufficient funding for that National Broadcaster to cover the costs of digital community television transmission during the simulcast period.

Recommendation 3: The Committee recommends that the Australian Government, at analogue switch off:

- convert the spectrum bands known as Channel 31 to digital; and
- permanently allocate it to current and future community broadcasters.

Recommendation 4: The Committee recommends that the Australian Government provide funding of \$6 million to the community television sector for the conversion of broadcast equipment to digital, and recommends that this funding be made available immediately after a simulcast arrangement has been made.

Recommendation 5: The Committee recommends that the Australian Government provides funding of \$1.7 million per year to the community television sector for each year of simulcast.

Launch of the Do Not Call Register

Matthew McMillan and Amity Arena provide an update on recent developments in relation to the Do Not Call Register.

The Do Not Call Register (**Register**) was launched on 3 May 2007 much to the relief of many Australians. The Register allows individuals to register their Australian fixed line and mobile numbers in order to opt out of receiving unsolicited telemarketing calls.

In the first day of operation alone, over 200,000 fixed and mobile telephone numbers had been listed on the Register.¹ As at the date this article was written, this statistic had leapt to 730,580 registrations.² Registration is available to individuals online at www.donotcall.gov.au or by telephone or post.

Since 31 May 2007, it is illegal for a telemarketer to make telemarketing calls to numbers listed on the Register (subject to certain exemptions).³

The Register is established under the Federal *Do Not Call Register Act 2006 (Act)* and *Do Not Call Register (Consequential Amendments) Act 2006*. A detailed explanation and analysis of the legislation, and what it means for telemarketers, can be found in an article by Matthew McMillan in the September 2006 edition of this Bulletin.

There have been several developments since the legislation came into operation, and in the lead up to the Register's launch, including:

- the introduction of the *Do Not Call Register Regulations 2006 (Regulations)*;
- the release of the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2006 (Telemarketing Standard)*;
- the release of the Do Not Call Register (Access to Register) Determination 2007 (**Access to Register Determination**); and
- the release of the *Do Not Call Register (Administration and Operation) Determination 2007 (Administration and Operation Determination)*; and
- the release of the *Do Not Call Register (Access Fees) Determination 2007 (Access Fees Determination)*.

This article addresses each of these developments.

Introduction of the Regulations

On 13 December 2006, the Governor-General introduced the Regulations. The Regulations define:

- the types of voice calls that are not 'telemarketing calls' (and are, therefore, not subject to the prohibition on making telemarketing calls to numbers listed on the Register); and
- the circumstances where a person is taken to be a nominee for the purpose of consent.

Voice Calls That are not 'Telemarketing Calls'

According to the Regulations, a voice call is not considered to be a 'telemarketing call' if the primary purpose of the call is to:

- inform a customer who has bought or otherwise obtained goods that the goods have been recalled by the manufacturer;
- inform a customer of a fault with the goods or services;
- reschedule a customer's appointment;
- remind a customer of an existing appointment;
- discuss payment for goods or services ordered by or supplied to a customer; or
- follow up on an enquiry made by a customer for goods or services.⁴

This is so even if a secondary purpose of the call is one of the purposes falling within the definition of 'telemarketing call' in section 5 of the Act. These purposes include:

- to offer to supply goods or services or land or an interest in land;
- to offer to provide a business opportunity or investment opportunity;

- to advertise or promote goods or services, or land or an interest in land or a business opportunity or investment opportunity;
- to advertise or promote a supplier (or prospective supplier) of goods or services or land or an interest in land;
- to advertise or promote a provider (or prospective provider) of a business opportunity or investment opportunity; or
- to solicit donations.⁵

This approach appears justified as each of the primary purposes above envisage a 'customer service' call being made, and presupposes an already existing relationship between the customer and the supplier of goods or a service.

Nominee for the Purpose of Consent

Under the Act, the prohibition on telemarketing calls does not apply if an individual, or a nominee of an individual, consents to the call.

Under the Regulations, a person is taken to be a nominee of a relevant telephone account holder, for the purpose of giving consent, if:

- that person gives the telephone number to an organisation for the purpose of allowing that organisation to contact him or her (eg where a person provides a contact number to a bank on a loan application form, that person will be a deemed nominee); or
- another person (acting on behalf of the first person) gives the telephone number to an organisation for the purpose of allowing that organisation to contact the first person (eg where a person completes an online application form on behalf his or her spouse, and provides the spouse's telephone number on the form, the spouse will be a deemed nominee).⁶

Telemarketing Standard

Although the Act generally prohibits telemarketers from contacting numbers on the Register, some telemarketing calls are exempt from this prohibition. Included within this group are telemarketing calls authorised by:

- a government body, religious organisation or charity;

- a registered political party, a member of parliament or a government body, or a political candidate where the purpose (or one of the purposes) of the call is to conduct fund-raising for electoral or political purposes; or
- an educational institution where the call is made to a current or previous student's household or workplace.⁷

Telemarketing calls falling within these exemptions must comply with the Telemarketing Standard. This standard commenced on 31 May 2007 and establishes a minimum set of requirements for making telemarketing and research calls, including:

- restricting the calling hours and days for telemarketing and research calls;
- requiring provision of specific information about the caller and the source from which the caller obtained the telephone number;
- providing for the termination of calls; and
- requiring callers to enable calling line identification.

In terms of when calls can and cannot be made, the standard currently prescribes that:

- telemarketing calls will not be permitted after 8pm on weekdays;
- research calls will not be permitted after 8.30pm on weekdays; and
- no telemarketing or research calls will be permitted before 9am on any day, after 5pm on Saturdays or at any time on Sundays or public holidays.⁸

An exception applies where consent has been given in advance to receive the call.

The Australian Communication and Media Authority (**ACMA**) recently released a discussion paper entitled 'Consideration of Whether to Remove the Prohibition on Making Research Calls on Sundays' and invited public and industry comment on this issue to determine whether it should vary the standard. The closing date for submissions was 21 May 2007.

Access to Register Determination

On 26 April 2007, the ACMA used its powers under section 20 of the Act to release the Access to Register Determination.

The determination regulates:

- the manner in which a telemarketer must submit a list of telephone num-



bers for checking against the Register;

- the manner in which the operator of the Register informs the telemarketer of the results of the check; and
- the return of the telemarketer's list to the telemarketer.

Administration and Operation Determination

On the same date, the ACMA used its powers under section 18 of the Act to release the Administration and Operation Determination.

This determination regulates (among other things):

- the form and manner of applications for telephone numbers to be entered on to the Register;
- the manner in which entries are to be made on the Register; and
- the correction and removal of entries in the Register.

Access Fees Determination

The most recent determination is the Access Fee Determination. This determination was released on 1 May 2007 and sets out the fees a telemarketer must pay to access the Register.

The annual subscription fee ranges from \$0 (to check up to 500 numbers) to \$80,000 (to check up to 100 million numbers).⁹

Looking ahead

The operator of the Register began accepting the submission of telemarketing calling lists for checking against the Register on 25 May 2007.

For telemarketers who fall outside the exemptions in the Act, it would have been wise to take advantage of this window before the Register became fully operational on 31 May 2007. The onus is now on telemarketers to continue to maintain up-to-date lists of the individuals which they are prohibited from contacting. This requires telemarketers to establish and maintain sound internal processes to properly manage their calling lists.

Telemarketers who fail to take heed of the Register may find themselves subject to a range of enforcement actions, including fines of up to \$1.1 million.¹⁰

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(Footnotes)

¹ Australian Communications and Media Authority, 'Do Not Call registrations reach 200,000', 4 May 2007 at <http://www.acma.gov.au>.

gov.au/WEB/STANDARD??pc=PC_310170.

² Australian Communications and Media Authority, 18 May 2007.

³ The exemptions are set out in the *Do Not Call Register Act*, schedule 1, and are addressed later in the article.

⁴ *Do Not Call Register Regulations 2006*, reg 4, s2-7.

⁵ *Do Not Call Register Act*, s5(1)(e)-(o).

⁶ *Do Not Call Register Regulations 2006*, reg 5.

⁷ *Do Not Call Register Act*, schedule 1.

⁸ *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2006*, s5(2).

⁹ Precise details of the fees can be found at: [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/FE147C8CB78FF4FBCA2572CF001483C1/\\$file/Do+Not+Call+Register+\(Access+Fees\)+Determination+2007+FRLL.doc](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/FE147C8CB78FF4FBCA2572CF001483C1/$file/Do+Not+Call+Register+(Access+Fees)+Determination+2007+FRLL.doc).

¹⁰ *Do Not Call Register Act*, s25(5)(b)(i).

Marsden, Ethics and Defamation

Marcus Power, re-reads *Marsden v Amalgamated Television Services* in light of Uniform Defamation Legislation, and Media Codes of Ethics. This essay won the 2006 CAMLA essay competition.

No amount of money, no matter what it could be, can compensate me for the anguish, the pain, the humiliation of the past few years'

The statement above was made by John Marsden, the day he won the lengthiest defamation case in Australian legal history against the Seven network.² The case spanned some 229 days.³ Defamation law and its application presents one of the most challenging and frustrating areas for journalists. While their United States counterparts enjoy their First Amendment right to freedom of speech, Australian reporters have had to navigate a web of varying defamation laws across our states and territories. The new Uniform Defamation Acts (**UDAs**)⁴ have improved this situation somewhat by providing a degree of the standardisation suggested in their name, but defamation remains a cause for caution and even angst for journalists. As Marsden could have confirmed, it also remains a mixed blessing even for those who obtain a legal remedy.

The phrase 'High profile' is often used in media reports about Marsden, a Sydney lawyer, a member of the Order of Australia and a man well connected in New South Wales society. In the mid 1990s, two reports screened by Channel Seven current affairs programs, *Today Tonight* and *Witness*, alleged that Marsden had paid under-aged boys for sex.⁵ In Marsden's view, the programs caused immense damage to his reputation and social standing. Yet the court case itself was more harmful, with lurid details concerning the sexual habits and lifestyle of the Sydney lawyer

taking up much of the proceedings. For Channel Seven, the case was expensive and ultimately futile, Levine J ruling that their defence of qualified privilege could not be sustained under the defamation law of the time. This essay examines Marsden's case and how the new UDAs, and relevant media ethics codes would apply to it.

Background

In March 1995, *Today Tonight* screened a report by journalist Greg Quail, alleging that John Marsden had on several occasions solicited male teenage prostitutes for sex. In May 1996 another Seven current affairs program, *Witness*, aired further allegations along the same lines, despite Marsden attempting to stop the broadcast of both programs by obtaining court orders. The stories aired in the wake of the NSW Royal Commission into its police force, when, as David Brearley noted 'ranking MPs were using parliament to name alleged paedophiles, and any whisper of the subject could find a captive audience'.⁶

Marsden had openly discussed his homosexuality in previous media interviews, and was well known as a gay rights activist. He had served on the New South Wales Council for Civil Liberties for a number of years. It was against this background that Marsden claimed Channel Seven had

defamed him by naming him as a pederast. Meanwhile, Seven claimed the sources for its story were reliable, that its reporters had ensured that their stories checked out, and that as a serving member on a government board, it was in the public interest that their stories about Marsden be aired.

Relevant Codes

The actions of the Channel Seven journalists and producers responsible for the stories could potentially come under two ethical codes. The *Commercial Television Industry Code of Practice* (**CTI Code**) and the Media, Entertainment and Arts Alliance Code (**MEAA Code**).

The CTI Code

The CTI Code was developed by the commercial broadcasting industry and is administered by Free TV Australia. The Code relevantly includes provisions for the regulation of broadcast content of news and current affairs programs. Section 4.3.1 of the CTI Code states, broadcasters 'must present factual material accurately and represent viewpoints fairly'.⁷

Justice Levine was critical of *Today Tonight* executive producer Alan Hall for denying Marsden adequate opportunity to respond to claims made in that program's report. As Ackland points out, *Today Tonight's* attempt to represent Marsden's side was to give him the opportunity to view the broadcast tape at 4pm the day it aired, then interview him at 4.30pm.⁸ Though the reporter and producers could claim they gave Marsden the opportunity to reply, it was without warning of the report's exact claims, and at best only technically fulfils the requirement of the CTI Code to represent views fairly. The *Today Tonight* 'breach' is similar to a

case brought before the then Australian Broadcasting Authority (**ABA**), involving a 60 Minutes report on an insurance company and public liability. In that investigation, the ABA ruled that the accuracy requirement of the previous version of the CTI Code had been breached, because 60 Minutes had interviewed a dissatisfied customer of the company but had not sought the company's version of the story.⁹

Levine J also criticised *Today Tonight* reporters and producers for not thoroughly verifying the accuracy of the claims aired on their program. The report was largely built around the testimony of three men who alleged that Marsden had had underage sex with them. Details of the men's claims, such as locations referred to in their stories and, in the case of one man, whether or not the person he described was actually Marsden, were highly questionable, and not thoroughly substantiated by either program's story.¹⁰ Levine J noted that Hall 'was consistent in the disdain he showed when issues of this kind were raised.'¹¹

Measured against the current code, it would appear that *Today Tonight* and *Witness*, who used some of the same research material and made similar claims, did not adequately fulfill their obligation to ensure the accuracy of factual material presented.

Remedies available to a complainant under the CTI Code are limited. Complaints about broadcaster's conduct must be directed to the broadcaster of the program concerned (before, for instance, a complaint is made to the Australian Communications and Media Authority (**ACMA**)). The complainant must put their concerns in writing to the broadcaster, and the matter must be dealt with by the broadcaster within 30 days.¹² Presumably, there is some scope for broadcasters to issue apologies or other remedies to aggrieved persons, but this is not specified in the CTI Code. If the complainant is not satisfied with the response from the broadcaster, they may refer the matter to ACMA for investigation.¹³ If the authority finds the relevant code has been breached, it may impose a compliance condition on the broadcaster's license; if in turn this directive is not followed, the authority may impose heavy fines or even revoke the broadcaster's license.¹⁴

The MEAA Code

The second relevant code is that of the Media Entertainment and Arts Alliance (**MEAA**), which incorporates the Australian Journalists Association. The MEAA



Code, however, only applies to MEAA members, and Pearson has observed that membership among commercial broadcasters is 'quite weak'.¹⁵ Point 1 of the MEAA Code requires members to strive for accuracy, fairness and disclosure of relevant facts, and to do their 'utmost to give a fair opportunity for reply'.¹⁶ On this score, given the points described above, it would seem *Today Tonight* and *Witness* journalists fell somewhat short of the mark. It is worth noting that Channel Seven sought to defend its journalists' actions by claiming there was an issue of public interest in revealing Marsden's status as a pederast. The guidance clause reminds reporters that only in the rarest of circumstances, where there is 'substantial advancement of the public interest', should the points of the MEAA Code be overridden.¹⁷

Uniform Defamation Laws

According to the requirements of the new UDAs, would John Marsden have been defamed? The Defamation Acts of each state do not include a definition of defamation, so the common law definition

applies. Defamation is published material that exposes a person to hatred, contempt or ridicule; and/or causes right thinking members of society to avoid him or her; and/or tends to lower his or her reputation in the eyes of the world.¹⁸

The imputation contained in the reports was that John Marsden paid for sexual intercourse with minors. If the programs could not substantiate the truth of their claims he had engaged in such criminal activity – acts which are viewed with a particular level of contempt in the community – it could be established that, according to the above definition, the Channel Seven stories were *potentially* defamatory.

To establish whether Marsden was *actually* defamed, the following must be satisfied: defamation in theory, as outlined above, must have occurred; the plaintiff must be identified in the published material; and the material must be distributed to at least one person other than the two parties contesting the case.

The second of these criteria is relatively easy to establish. The broadcasts were both explicitly about John Marsden's alleged

sexual activities. Neither of the programs attempted to conceal his identity or simply insinuate that the allegations were about him. He was named, and was accused of being a pederast. Seven screened interviews from people who claimed they had worked as rent boys for Marsden and that they were underage at the time.

The final question is whether the defamatory material was published or broadcast? Again this is not difficult to show; the defamatory material was part of two separate *Today Tonight* and *Witness* broadcasts, which went out to statewide and national audiences respectively. The allegations had been made in front of hundreds of thousands of 'third persons' around Australia.

Qualified Privilege under the UDAs

Seven argued a defence of qualified privilege. Differences in the UDA version of this defence would be a mixed bag for Seven. However, if they were unable to support the truth of their claims, it would appear to be the only defence available to them. Traditionally, qualified privilege applied to situations where the defendant passed on defamatory information to others because of some legal or ethical imperative to do so. Pearson cites examples such as teachers writing critical student reports, and middle managers justifying decisions to dismiss employees to their superiors.¹⁹

The UDAs follow a broader definition of qualified privilege, taken largely from the repealed law in NSW. The NSW law opened the way for publishers to apply this defence, though its application was considerably narrowed in subsequent judgements. This notion of qualified privilege was based on two main conditions; that there was some demonstrable public interest in publishing the material in question, and; that the publisher's actions were reasonable in airing the story.²⁰ The UDAs' prescribed considerations for discerning reasonable action are broad, and include whether the matter is of public interest, the seriousness of defamatory information carried by the matter published, and integrity of the source involved.²¹

One possible positive in this for Channel Seven concerns another of these prescribed considerations of reasonableness. In determining reasonableness, the UDA requires that the court take into account the 'business environment' in which the

defendant works.²² As mentioned earlier, *Today Tonight's* Alan Hall came in for especially harsh criticism from Justice Levine on account of his not having adequately cross-checked the claims of the Marsden story. In his own defence, Hall said to the Judge:

*...you have understand that I am running a program with six state offices, over 120 people. I am filling a gap of 30 minutes every night. If I had 120 reporters telling me to read the fine print of every story I wouldn't get a program to air*²³

This was taken as evidence of his disregard for the truth or otherwise of his program's story, but consideration of the news industry 'environment' is an issue media commentator Mark Day believes should be given greater weight by the courts.

*Journalists write for ordinary people, not judges and lawyers playing semantic games, and do so under pressure and in conditions that those in their lofty legal eyries would never understand.*²⁴

It is possible that under the new laws, Hall's and his staff's working situations might have been given greater weight. However, most commentators, including Day, are skeptical as to whether this point will help journalists in defamation cases, or as they say is more likely, judges will interpret it very narrowly.²⁵

Another of these reasonable action 'points' relevant to Seven's defences concerns the plaintiff's performance of a public function. In the Marsden case, Seven argued qualified privilege as it was defined in *Lange v Australian Broadcasting Corporation*²⁶ (*Lange*). In *Lange*, the High court established that all Australians have an implied right to comment freely on political issues and events.²⁷

At the time of the *Today Tonight* broadcast, in 1995, John Marsden was a member of the NSW Police Board, a position he was appointed to by the NSW government.²⁸ Seven said that as a government appointed official, his fitness to hold this position was a matter of public interest. Levine, J accepted that the defence held for the *Today Tonight* story. Under the UDAs, the result would most likely be the same. However, the problem for Seven was that by the time *Witness* aired in 1996, he had resigned from this post, and thus the basis for the defence was gone. Other posts he held, such as membership of the NSW Law Society were not public

offices and so deemed outside the scope of *Lange* qualified privilege.

Perhaps the most problematic of these 'reasonableness' points for Seven involves whether the matter in question gave adequate coverage of the other person's side of the story. As described above, Levine castigated Alan Hall for not giving Marsden sufficient time or opportunity to reply to *Today Tonight's* story. *Witness* likewise only screened excerpts from a 7.30 report interview with Marsden.²⁹ On this point alone, Seven claims as to the reasonableness of its conduct would be questionable. There are then the considerations also already outlined concerning the veracity of the stories given by Marsden's alleged victims, with the integrity of sources being another key consideration. Though there may have been some potential for Channel Seven to bring itself within the scope of qualified privilege, it would have had trouble arguing the reasonableness of its conduct.

Conclusions

John Marsden's case will be remembered, mostly, as an enormously futile exercise, and another example of the excesses of defamation law in this country. As has been observed elsewhere, in order to defend his reputation, he had to destroy it. Though uniform laws appear to be a significant advance on previous arrangements, it is unlikely they will prevent a repeat of litigation such as this, where the case itself is as damaging as the matter over which it is concerned.

Marcus Power's Essay won the CAMLA Essay Competition 2006.

(Footnotes)

¹ ABC Radio, *The World Today*, 27 June 2001 at para 11. Available at <<http://www.abc.net.au/worldtoday/stories/s319864.htm>>

² *Marsden v Amalgamated Television Services Ltd* [2001] NSWSC 510

³ Id at para 1; Also see 'Reputation – Repaired or Wrecked' *Gazette of Law and Journalism* available at <www.lawpress.com.au.ezproxy.lib.deakin.edu.au/genews/ge131_M1_Intro.html>

⁴ See for example the Uniform Defamation Act 2005 as enacted in the *Defamation Act 2005* (NSW).

⁵ David Brearley, 'The Passion of John Marsden' *The Australian* (26 June 2001) at para 9.

⁶ Ibid.

⁷ *Commercial Television Industry Code of Practice* (2004) at 33.

⁸ Richard Ackland, 'Marsden v Amalgamated Television Services Pty Ltd' (2001) *Gazette of*

Law and Journalism available at <http://www.lawpress.com.au.ezproxy.lib.deakin.edu.au/genews/ge131_M5_QP.html>

⁹ Id at 337-338

¹⁰ Id at para 38 -67

¹¹ Id at para 57)

¹² *Commercial Television Industry Code of Practice* (2004) s7.10

¹³ *Commercial Television Industry Code of Practice* (2004) s7.12).

¹⁴ Mark Pearson, *The Journalists Guide to Media Law* (2004) at 337.

¹⁵ Id at 333

¹⁶ MEAA Code (2006) point 1

¹⁷ Id, guidance clause

¹⁸ Megan Ashford, *Legislation Note: Defamation Act 2005 (WA)* (2006) at para 9, Available at <https://elaw.murdoch.edu.au/issues/2006/1/eLaw_Ashford_13_2006_02.pdf>; Pearson above n13 at 169; Arts Law Centre of Australia, *The Law of Defamation – For Material Published after 1 January 2006* (2006) at para 3. Available at <<http://www.artslaw.com.au/LegalInformation/Defamation/DefamationLawsAfterJan06.asp>>

¹⁹ Pearson, above n13 at 203

²⁰ Minter Ellison Lawyers, *News Alert – New Uniform Defamation Laws* (1 February 2006), at para 16.

²¹ Paul Svilans, *The Uniform Defamation Laws* (30 March 2006), at para 39. Available at

<<http://www.gtlaw.com.au/gt/site/articleDs/C7DDE6199CC75FD4CA25714100192572?open&ui=dom&template=domGT>>

²² Ibid.

²³ Ackland above n8 at para 48.

²⁴ Mark Day, 'Freedom of Speech Undefined' *The Australian* (12 April 2006) at para 11.

²⁵ Id at paras 11, 12.

²⁶ (1997) 189 CLR 211

²⁷ Pearson, above n13 at 212.

²⁸ Ackland above n8 at para 8.

²⁹ Id at para 63)

Reasserting Technological Neutrality

Matt Vitins and Andrew Ailwood search for a technologically neutral definition of television.

While creating a dynamic media environment, the processes of convergence are highly inconvenient for regulators. Broadcasting and telecommunications are both subject to carefully considered, sector specific legislative regimes and the once clear distinctions that organise these bodies of law are under fire. As boundaries are crossed, similar media experiences are being inconsistently regulated and according to capricious criteria.

The European Commission has recently suggested an update to its *Television Without Frontiers Directive*¹ in an explicit attempt to address the 'increasingly unjustifiable differences in regulatory treatment between the various forms of distributing identical or similar media content.'² The directive goes back to first principles in updating the definitions that structure European broadcasting law. The fundamental question asked and addressed is *what media experiences are sufficiently analogous to 'television' that they should be regulated as such?*

In the foreseeable future Australian regulators will similarly have to revisit the fundamental definitions of the *Broadcasting Services Act 1992* (Cth) (**BSA**). It is argued here that the foundations of Australian broadcasting law have become unstable as the regulatory principle of technological neutrality has been steadily eroded. The piece then continues to summarise some of the key features of the European proposal.

Stable Platforms, Unstable Technology

History suggests that once a media platform becomes established it remains a permanent part of the landscape. Even while showing adolescent contempt for the territorial boundaries of traditional institutions, the metaphors that structure new media experiences tend to reflect legacy formats. This might provide a reassuring sense of stability in an industry that is more often described as dizzying, however, while platforms remain reasonably constant, the technical methods associated with them do not. Consider for example, radio is approaching its centenary (constant), but it may be delivered by analogue or digital broadcast, or in an even more 'new media' manner, could be streamed or podcast (not constant). Television is evolving along similar lines.

The current challenge for media regulators is to maintain a consistent legal response while media platforms busily evolve their devices and delivery mechanisms. With all things technical in flux, the target of media regulation is some sort of ephemeral idea or concept of a particular platform.

Technological Neutrality

In light of the above, it may be overstating the point to say that technological neutrality is the holy grail of modern media regulation – but it is certainly a very good idea.

The principle of technological neutrality states that media laws should be expressed in terms that are indifferent to the technical means by which content is delivered to a particular platform. Free-to-air television should be consistently regulated whether delivered by satellite, terrestrial broadcast or cable; internet content should be consistently regulated whether delivered by DSL, a dial up connection or a 3G network.

The BSA

The BSA was originally intended to be technologically neutral.³ The definition of 'broadcasting', for example, covers any service that 'delivers television programs' to 'equipment appropriate for receiving that service', and is thus not limited by the mode of carriage or means of reception.⁴ The BSA also adopts a regulatory structure that is platform centric. The traditional media 'silos' of print, radio, free-to-air TV and pay TV,⁵ are the organising concepts that shape the Act.

It is important to articulate the interaction between these two regulatory tenets. Technological neutrality is directed at the technical means of delivery *within* a platform – it says that similar experiences should be similarly regulated. Platform based regulation allows for different media experiences to be differently regulated. The regulatory coherence of the BSA is failing as it moves away from these foundations.

The principle of technological neutrality has been steadily compromised with specific territory being reserved for internet content,⁶ and for mobile devices.⁷ In addition, point-to-point services are spe-

cifically excluded from the definition of broadcasting and the most recent amendments to the BSA have actively abandoned the principle by introducing the concept of a 'domestic digital television receiver' (i.e. 'not hand held'⁸) in an effort to divide territory between Channel A and Channel B.⁹ The net effect is that the BSA is anything but technologically neutral in its operation, and there is very little clarity on where 'television', as a platform, starts and finishes.

Mobile TV

Mobile TV is a pure example of convergent media and provides an excellent case in point. There are three primary methods of delivering audiovisual content to a mobile device. Through a DVB-H point-to-multipoint broadcast (which is roughly analogous to regular television broadcasting); by way of a point-to-point communication through a 3G network; or finally, by accessing the public internet and downloading content in the usual manner. To the end user, the distinction is irrelevant. Most users will not know how the content has arrived, and if they do know, they are unlikely to care. However, each method of delivery invokes a different part of the BSA or indeed the *Telecommunications Act 1997* (Cth).¹⁰

Harmonisation could be achieved, and technological neutrality re-established if new regulatory space were created for Mobile TV as a platform in its own right. This approach is imperfectly reflected in the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005*, and industry self-regulatory schemes made pursuant to the determination.¹¹ Here again, however, the platform has been defined according to a device, that is by technical criteria, rather than a neutral understanding of the service that is being regulated. Consequently, as the internet also exists independently of mobile devices, regulators are faced with a choice of introducing device specific inconsistencies, that is, differently regulating internet content when it is accessed on a mobile phone as opposed to a PC, or of regulating according to the lowest common denominator.

The drama that arises over Mobile TV is representative of broader challenges presented by media convergence. This problem is repeated with conventional television and IPTV. When it becomes common place for the lounge room set to have a broadband connection of some descrip-

tion, it will be increasingly uncomfortable for 'broadcast content' and 'online content' to be subject to different parts of the BSA and to different regulatory conditions.

It is suggested that these issues will only be settled when a sufficiently clear line is drawn around television proper from within the field of available audiovisual media services, and a technologically neutral definition of the platform is reasserted.

Solutions

To summarise the argument this far, it can be anticipated that inconsistencies in the treatment of audiovisual material will continue to emerge in Australian broadcasting law if the basic definitions of the BSA are retained. It is further suggested that the starting point for any revision should be an understanding of the platform (television) in its conceptual, rather than its technical sense.

The fundamental questions are therefore, what is TV? and once that is answered, perhaps to ask what divides television proper from emerging audiovisual services that resemble television.

Audiovisual Media Services Without Frontiers

The European Commission's answer to these questions is contained in the proposed directive, *Audiovisual Media Services Without Frontiers*¹² (*the Directive*). The Directive was first outlined in late 2005, however, recent amendments were published by the Commission on 9 March 2007. Whispers around the EU have it that the new directive should be adopted by the European Parliament and Council towards the end of May, with implementation by the end of 2008.¹³

The New Definition of Television

The Directive adopts an almost completely technologically neutral definition of 'audio-visual media services' that would apply across all audiovisual mass media, including television, the internet or mobile devices, and whether scheduled or on demand.¹⁴

An 'audio visual media service' is defined as moving images with or without sound, with a principle purpose to inform, entertain or educate the general public, by means of an electronic communications network.¹⁵

Exceptions to the scope of this definition include any form of private correspondence; services where audiovisual material is merely ancillary to the principle purpose of the service; and any purely non-economic activities.¹⁶

Linear and non-Linear

The Directive further establishes a distinction, between 'linear', and 'non-linear' audio-visual media services. A 'linear' service, is one where the media service provider decides on the moment in time when a specific program is transmitted. A 'non-linear service' is provided on demand.¹⁷

Linear services will be subject to stricter requirements that broadly reflect the regulation of traditional television broadcasts. Non-linear services would be subject to minimum rules involving a basic tier of obligations concerning the protection of minors, incitement of hatred, and certain advertising standards.¹⁸

Comment on the Commission's Proposal

The Commission's proposed Directive is charming in its clarity and elegance. However, aesthetics have not been enough to convince the British. The Office of Communications (*Ofcom*) has argued that the definition proposed would capture all moblogs, online video games (but not offline videogames) and all user generated content posted on MySpace or YouTube.¹⁹

In response the current working draft of the AVMS Directive has limited the definition of 'audio visual media services' to those that provide 'programmes', meaning:

a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting.

These adjustments do not necessarily address Ofcom's concerns. There is considerable scope for argument over what would be considered 'comparable to the form and content of television broadcasting'. Nonetheless, it will be interesting to see how the Directive continues to evolve as it progresses through the European Parliament.

In Practice

It is important to note the role of the directives in the legislative process of EU Mem-

ber States, and their effect at the national law level. A directive creates an obligation to on Member States to pass national legislation reflecting the content of the directive. However, national authorities are left with some discretion as to the 'form and method' of implementation.²⁰

In the result, as a caution against enthusiasm, even once the terms of the Directive are settled by the European Parliament, Council and Commission, the relevant form and effect will be found in the instruments finally drafted by Member States.

The Final Word

Although a more fundamental reframing of broadcasting laws may be delayed, it is unlikely it can be avoided. The Directive marks a genuine attempt to update regulatory definitions, however, it as not yet been implemented at the EU level, let alone filtered through to legislation enacted by Member States. The real effects of the Directive won't be felt (or understood) for some time.

Returning to the two questions posed earlier. The analysis imposed by this piece suggested a search for a genuinely technologically neutral definition of television, which has ended at the not entirely satisfying resting place of something 'comparable to the form and content of television'. This is not particularly inspiring and the search therefore continues.

As to the second question, however, (what divides television proper from similar audio visual services) the Directive provides a particularly good answer. The linear/non-linear distinction provides an excellent dividing line that could allows for a higher level of regulatory attention to be imposed on legacy media and similar services, while deference to anarchy online is maintained.

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(Footnotes)

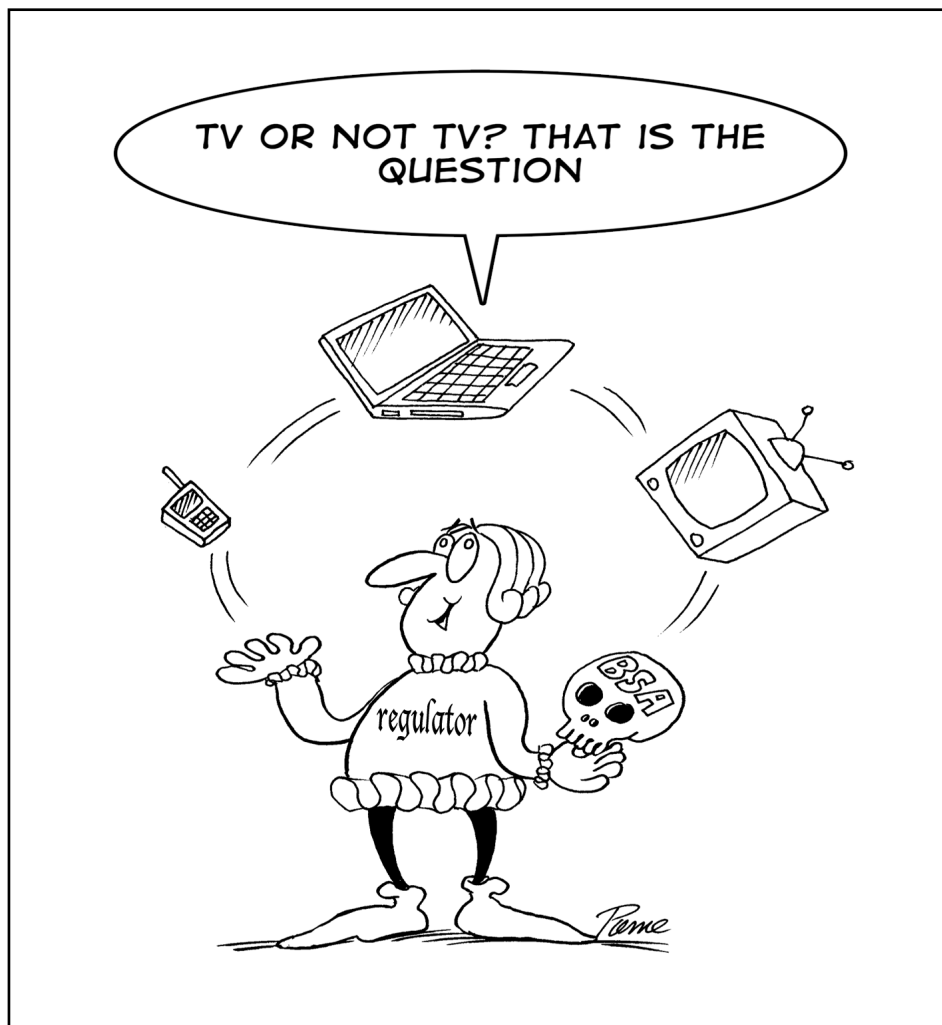
¹ Council Directive 89/552/EEC (Television Without Frontiers Directive) as amended in by Directive 97/36/EC. Also note the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) at 3.

² Ibid at Directive 89/552/EEC (2005/0260(COD))

³ Explanatory Memorandum to the *Broadcasting Services Act 1992* (Cth).

⁴ BSA s6.

⁵ The description comes from Graeme



Samuel's speech 'Grandad What's a Newspaper', delivered in May 2006. The speech is available on the ACCC's website.

⁶ Schedule 5 to the BSA.

⁷ *Telecommunications Service Provider (Mobile Premium Services) Determination 2005*, and industry self-regulatory schemes made pursuant to the determination

⁸ *Radiocommunications Act 1992* (Cth) s5

⁹ *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth)

¹⁰ There are a number of inconsistencies and definitional ambiguities surrounding the treatment of Mobile TV which are beyond the scope of this piece however. see Department of Communications Information Technology and the Arts Review of the Regulation of Content Delivered over Convergent Devices (April 2006).

¹¹ in particular the Communications Alliance Mobile Premium Services Industry Scheme (August 2006) and the ACMA Default Scheme (28 September 2006).

¹² 2005/0260 (COD)

¹³ European Commission, 'Boosting the Diversity of European TV' Press Release 9 March 2007 (IP/07/311)

¹⁴ Proposal for a Directive of the European Parliament and of the Council

amending Council Directive 89/552/EEC (2005/0260(COD)) Recital 13; Article 1(a)

¹⁵ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Article 1(a)

¹⁶ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Recital 14.

¹⁷ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Art 1(e).

¹⁸ Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) at 11; Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Arts 3b-3h;

¹⁹ Tim Suter, 'Ofcom's View' Speech delivered at the European Parliament – Public Hearing on the Audiovisual Media Services Directive (1 June 2006) available at www.ofcom.org.uk/media/speeches/2006/06/euro²⁰ *The European Community and European Union Legal and Institutional Framework* Article 249

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