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Is It Really All About You?

Privacy Commissioner v Telstra Corporation Limited [2017] FCAFC 4

Introduction

On 19 January 2017, the Federal Court of Australia determined that the definition of "personal information" in the *Privacy Act 1988* (Cth) (**Act**) is confined to information *"about"* an individual. The effect of the decision is to confirm that the scope of the Act will not extend to all information which can be linked to an individual unless the information is also about that individual.

The decision considered the definition of "personal information" prior to the 2014 amendments to the Act but is relevant as the definition of "personal information" in the current version of the Act still contains the words construed by the Court.

This judgment puts to rest (for the moment at least) the ongoing saga commenced in 2013 by then Fairfax journalist, Mr Ben Grubb (**Grubb**).

Background

On 15 June 2013, Mr Grubb sent Telstra Corporation Limited (**Telstra**) a request for "all the metadata information Telstra has stored" about him in relation to his mobile phone service, including cell tower logs, inbound call and text details, duration of data sessions and telephone calls, and the Uniform Resource Locators (**URLs**) of websites visited.

On 16 July 2013, Telstra notified Grubb that he could access outbound mobile call details and the duration of data sessions via the online billing system. Otherwise, Telstra declined to provide the additional information, which it referred to as "mobile network data" citing privacy laws and advised that Grubb would need a subpoena for the remainder of the information to be disclosed.

On 8 August 2013, Grubb lodged a complaint with the Office of the Australian Information Commissioner (the **OAIC**) under section 36 of the Act, seeking a declaration that Telstra meet its access obligations under the Act. The OAIC then investigated the complaint.

On 1 May 2015, the Privacy Commissioner made a determination that **Telstra** had breached the **Act** by failing to provide Grubb with access to the mobile network data on the basis that it was his personal information.

Telstra appealed the determination of the Privacy Commissioner to the Administrative Appeals Tribunal (**AAT**). The AAT subsequently held that the mobile network data held by Telstra was not "personal information" for the purposes of the Act. This was because the mobile network data was not information "about an individual" as required by the Act.

The Privacy Commissioner appealed the decision of the AAT to the Federal Court of Australia.

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Outcome

The Federal Court considered that the real issue on appeal was a very narrow question of statutory construction.

"Personal information" was defined as "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, **about an individual** whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

The issue for determination by the court was whether in the phrase "information ....about an individual whose identity is apparent or can reasonably be ascertained" the words "about an individual" were, as submitted by the Privacy Commissioner, redundant.

That issue is pertinent to determining whether or not National Privacy Principle 6.1 (since replaced by Australian Privacy Principle 12) has been complied with. Relevantly, NPP 6.1 requires that "If an organisation holds *personal information* about an individual, it must provide the individual with access to the information on request by the individual, except to the extent that..."

In this case, the Privacy Commissioner alleged that Telstra had failed to comply with NPP 6.1 when it did not provide Grubb with access to the mobile network data he requested.

The Court acknowledged that what might be considered to be "personal information" to which an organisation must provide an individual with access is very broad. The concept is though limited by requirements that the personal information must be (1) held by an organisation (in this case Telstra), (2) must be "about" the individual who requests access (in this case Grubb) and (3) about an individual (again, Grubb) whose identity is apparent or can reasonably be ascertained.

Importantly, the Court noted that NPP 6.1 includes the expression "about an individual" separately from the definition of personal information used in that NPP. Accordingly, if the full text of the definition of personal information is substituted into NPP 6.1 it reads as follows: "If an organisation holds [personal information] information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, **about an individual** whose identity is apparent, or can reasonably be ascertained, from the information or opinion **about an individual**, it must provide the individual with access to the information on request by the individual, except to the extent that:..."

The Court stated that: "Even if the words "about an individual" could be ignored in the definition so that the definition of "personal information" was concerned only with "information or an opinion ... from which a person's identity is apparent ...", the words are repeated separately in the remainder of NPP 6.1. The repetition of the words means that they cannot be ignored."

Accordingly, the Court did not need to decide whether the words "about an individual" were redundant when used in the definition of "personal information". However, the Court did refer to the decision of McHugh *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26; (2005) 221 CLR 568, 574-575 [12], referring to his earlier decision in *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at 253.

In *Kelly v The Queen*, it was made clear that when construing a statute the correct approach is to read the words of the definition into the substantive enactment and then

Contributions & Comments

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construe the substantive enactment. Therefore, the correct approach to construing the definition of personal information is not to consider the words "about an individual" as redundant.

As a consequence, information held by an organisation from which an individual's identity could reasonably be ascertained may not always be "personal information about an individual". For information to fall within the remit of NPP 6.1 it must be information "about an individual".

The words "about an individual" direct attention to the need for the individual to be a subject matter of the information or opinion. The court noted that this requirement might not be difficult to satisfy because:

- information and opinions can have multiple subject matters;
- even if a single piece of information is not "about an individual" it might be about the individual when combined with other information;
- an evaluative conclusion is required, depending upon the facts of each individual case; and
- whether information is "about an individual" might depend upon the breadth that is given to the expression ''from the information or opinion". In other words, the looser the causal connection required by the word "from", the greater the amount of information which could potentially be "personal information" and the more likely it will be that the words "about an individual" will exclude some of that information from being personal information.

In this case, Mr Grubb needed to be the subject matter of the information. For example, the Court found that information about the colour of Mr Grubb's mobile phone and his network type (3G) was not information "about" him.

Ultimately, the Court held that it did not need to consider:

- whether or not the mobile network data was "personal information"; or
- whether the mobile network data requested by Grubb was "about" Grubb,

because the Privacy Commissioner had not appealed the decision of the AAT on the grounds that the mobile network data was not information about Grubb.

As such, the appeal by the Privacy Commissioner was dismissed and the decision of the AAT stands.

Amici Curiae

Prior to the hearing of the appeal, with leave, the Australian Privacy Foundation and the New South Wales Council for Civil Liberties filed an application to appear as amici curiae. The purpose was to put before the court a range of international materials. The Court cited a number of difficulties in taking these international materials into account, one of the main issues being each relevant overseas law is worded differently, based on different context and background even though it is ultimately derived from the same broadly worded international instruments. The application by the amici curiae was dismissed.

Looking forward

The decision of the Federal Court may be less helpful than some commentators might have previously foreshadowed. Given that the Court was not asked to decide whether the particular information Grubb sought was information "about" him, there are no new guiding principles to be applied when considering whether information constitutes "personal information".

The Federal Court did however provide some *guidance* on how to determine if information is *about* an individual, being:

- information can have multiple subject matters;
- whether information is about an individual may be determined by other available information; and
- each case will need to be considered on its own facts.

The effect of this decision will only become clear over time as it is implemented.

The decision has at least clarified the importance of the words "about an individual" in the context of the application of NPP 6.1 and, by doing so, clarified the application of the current APP 12, and provided some guidance in the scope of what constitutes personal information.

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Telecommunications - A Regulatory Stocktake...

Dr Martyn Taylor provides an overview of developments in telecommunications regulation in 2016 and what we can expect in the remainder of 2017.

Telecommunications is a sector of the Australian economy in a perpetual state of regulatory reform. This is not surprising given the dynamic nature of the sector and its critical socio-economic importance. Many interesting developments occurred during 2016. Many of these will continue during 2017.

Regulatory Framework

Australia's telecommunications regulatory framework has eight key components, as outlined in the table to the right:

This framework is also supplemented from time-to-time by a range of government policy initiatives (as well as continuing policy reviews) led primarily by the Commonwealth Department of Communications and the Arts (**DCA**).

The question arises: what have been the key developments in this regulatory framework during 2016 and what can we expect for 2017?

Competition and access regulation	Parts XIB and XIC of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) provide greater powers to the Australian Competition and Consumer Commission (**ACCC**) to maintain competition in telecommunications markets, including by sectoral competition laws and access regulation.
Licensing of infrastructure and services	Telecommunications licensing obligations are set out principally in the *Telecommunications Act 1997 (Cth)*. Licensing is used as a vehicle for a wide range of regulatory obligations that are administrated principally by Australian Communications and Media Authority (**ACMA**).
Social policy obligations	Various social objectives are achieved by the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), including the provision of universal basic telecommunications services and emergency call services.
Radiocommunications and spectrum management	Radiofrequency management and licensing is achieved by the *Radiocommunications Act 1997* (Cth); again, administrated by the ACMA.
National Broadband Network	The *National Broadband Network Companies Act 2011* (Cth) provides for initial Commonwealth ownership of the National Broadband Network (**NBN**) and restricts the scope of the NBN, among other matters.
Telstra Corporation	With the full privatisation of Telstra, many of the historic obligations in the *Telstra Corporation Act 1991 (Cth)* were removed, but remaining obligations include restrictions on the foreign ownership of Telstra.
ACMA	The *Australian Communications and Media Authority Act 2005 (Cth)* created the ACMA as a converged regulator in 2005 and sets out the powers and functions of the ACMA as regulator.
Miscellaneous	Various other regulatory obligations are set out in a range of mostly Commonwealth legislation, including the *Telecommunications (Interception and Access) Act 1979 (Cth)*.

ACCC – Promoting Competition

The ACCC was particularly active in telecommunications during 2016 and will continue to be active during 2017:

•**Market study:** In September 2016, the ACCC announced a formal 'market study' into the communications sector. The ACCC will identify current trends and issues that may affect competition, including the impact of innovation and structural change. The market study will assist the ACCC's understanding of market dynamics so that the ACCC can recalibrate its regulatory focus for the coming years. A final report is due in November 2017.

Repeal of Part XIB: A key development in 2016 that may be implemented in 2017 is the repeal of the sectoral competition laws in Part XIB of the CCA. Part XIB contains an 'effects test' for misuse of market power in telecommunications markets and also enables the ACCC to issue a form of cease-and-desist notice, known as a 'competition notice'. As the Government is more generally including an effects test for misuse of market power into the CCA, the provisions in Part XIB were regarded as superfluous. This is debatable. A Bill to achieve the repeal of Part XIB is currently before Parliament as at March 2017.

Part XIC declaration renewals: The telecommunications access regime in Part XIC only applies to services that have been 'declared'. Some 13 wholesale services are currently declared. Most of these declarations expire after a period of 5 years, resulting in inquiries, from time to time, as to whether the ACCC should continue any declaration. During 2016, the ACCC extended the declaration for the Wholesale ADSL service to February 2022.

Part XIC declaration inquiries: During 2016, the ACCC declared the superfast broadband access service (**SBAS**), applying to certain fibre and copper services competitive with the NBN over the 'last mile' into the home. The ACCC decided declaration was necessary given the bottleneck and natural monopoly characteristics of these services.

During 2016, the ACCC commenced an inquiry whether to declare a domestic mobile roaming service in Australia. Such a service would enable Vodafone and Optus to more effectively compete with Telstra to supply mobile services in regional Australia. Such a declaration would enable all mobile customers to access the 60% of the mobile coverage area in Australia that is a Telstra monopoly and prohibitively costly to replicate. A decision will be made in 2017.

Part XIC access determinations: Once a service is declared under Part XIC, the ACCC has the ability to set default terms and conditions (including pricing) that apply if commercial negotiations fail. During

2016, the ACCC set new default terms for the supply of domestic transmission capacity, resulting in a substantial decrease in transmission prices. The ACCC is currently undertaking consultation on a proposed access determination for the SBAS.

The ACCC remains involved in monitoring and enforcing the various NBN arrangements, including NBN Co's special access undertaking (setting out the terms for supply of wholesale services by the NBN) (**SAU**) and Telstra migration arrangements. During 2016, the SAU was amended to incorporate additional technologies, namely fibre-to-the-node, fibre-to-the-basement and hybrid fibre-coaxial. The ACCC is also involved in various consumer protection initiatives, including concerns regarding broadband speed claims.

ACMA – Major Reforms Due

Following the retirement of ACMA chair Chris Chapman in early 2016, Richard Bean has been the acting Chair of the ACMA. Major reforms are expected in 2017:

Review of the ACMA: In June 2015, the DCA commenced a review of the ACMA. The review was supported by a reference group of international communications regulatory experts. The review has examined the objectives, functions, structure, and governance of the ACMA to ensure it remains fit-for-purpose, given the dramatic changes in communications markets over the last decade. While a draft report was published in May 2016, the final report has not been publicly released as at March 2017.

The draft report recommended the Government commence a regulatory reform programme to build a contemporary framework for the regulation of the communications sector. The draft report proposed clarifying the remit of the ACMA to cover all layers of the communications 'stack', including infrastructure, transport, devices, and content and applications. The review also proposed shifting some of the ACMA's non-core functions to more specialised agencies, such as revenue collection to the Australian Taxation Office.

Radiocommunications law reform: In 2015, the Government agreed to implement the recommendations of the Spectrum Review. One recommendation was to replace the *Radiocommunications Act 1992* with new legislation that adopted a simpler, more efficient and more flexible framework. Consultation on the form of the legislation occurring during 2016. The new legislation will streamline regulatory processes, bring broadcasting spectrum into the general framework, and simplify regulatory structures for planning, licensing, and equipment regulation. As at March 2017, the draft legislation has not yet been released into the public domain.

Unsold 700MHz spectrum: During 2016, public consultation occurred on a draft Ministerial direction to allow Vodafone to acquire unused 700MHz spectrum. Vodafone had approached the Minister with a formal proposal. The spectrum was unallocated from the 700MHz spectrum auction in 2013. Following consultation, the Government decided not to allocate the spectrum to Vodafone and the spectrum will instead be auctioned. The ACCC subsequently set spectrum ownership limits that precluded Telstra's participation in the auction. The auction will occur in April 2017.

DCA – Reforms to NBN Funding

The DCA has been active during 2016 under the leadership of Dr Heather Smith:

Telecommunications Reform Package: In December 2016, the Government released proposed reforms to the regulatory regime for superfast broadband services. The reforms were contemplated by the Government's historic response to the independent NBN policy reviews. The reforms will take effect from 1 July 2017 and have three parts.

First, the so-called 'level playing field' rules for the NBN will be amended. The 'wholesale only' structural separation obligations for superfast networks supplying residential will be clarified. The ACCC may authorise functional separation instead of structural separation and may exempt networks with fewer than 2,000 customers. The 'must supply' obligation for Layer 2 bitstream services will also be removed and replaced with the ACCC's declaration of SBAS under Part XIC of the CCA, as mentioned above.

Second, a 'provider of last resort' obligation will be created. NBN Co Limited (**nbn**), and in certain circumstances, other carriers, will be required to connect infrastructure and supply wholesale services on reasonable request from a retail service provider. In this manner, all premises will be guaranteed an infrastructure connection and retail service providers will have mandated access to wholesale services supplied on that infrastructure.

Third, the reform package recognises that nbn's fixed wireless and satellite services are loss-making to the level of $9.8 billion over the next 30 years. The reforms will establish a Regional Broadband Scheme (**RBS**) through an industry levy on superfast fixed-line (nbn-comparable) broadband providers. Regional supply by the nbn will be funded by the RBS.

Universal Service Obligation (USO): In June 2016, the Government asked the Productivity Commission to undertake an inquiry into the future direction of the telecommunications USO. The final report is expected to be handed down in April 2017. The draft report was critical of the existing USO, commenting, for example, that it was anachronistic in the digital age in its focus on basic telephones and payphones.

The Productivity Commission recommended in favour of a more transparent framework (complementing the NBN) that would provide a minimum broadband service to all premises in Australia, subject to accessibility and affordability, once NBN infrastructure is fully rolled out. The establishment of the RBS mentioned above should provide a basis for the Government to give effect to the Productivity Commission's recommendations.

The various developments identified above will make for another interesting year in telecommunications regulation in 2017.

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Disclosing Privileged Documents to Regulators

Alex Cuthbertson, Partner, Monisha Sequeira, Senior Associate, and Alex Lee, Lawyer, report on the Cantor v Audi decision.

In *Cantor v Audi Australia Pty Limited* [2016] FCA 1391, the Federal Court denied Australian class action plaintiffs access to documents exchanged between Volkswagen AG and a foreign regulator. The case provides insights into what you should consider before providing privileged documents to a regulator. This is critical in an era of increasing regulatory action and class actions in which plaintiffs seek to piggy back off global regulatory investigations and proceedings.

How does this decision affect you?

Regulators have broad investigative and information-gathering power. However, in Australia, regulators cannot compel the production of privileged communications.[1] Nevertheless, sometimes it is advantageous to disclose such documents. Before doing so you should consider the following:

- Are there proceedings on foot or likely to arise in which third parties will seek to obtain those documents? This is increasingly taking place across jurisdictions.
- Before providing any documents to a regulator, obtain appropriate legal advice to determine the legal framework under which the materials are provided, particularly the level of confidentiality that applies to dealings with the regulator. This may require obtaining foreign law advice.
- If there is any concern about the level of confidentiality that applies to dealings with the regulator, consider with your legal advisers whether the benefits of providing the regulator with privileged communications outweigh the risks.
- Ensure that in correspondence with the regulator it is made clear that all material is provided on a confidential basis. If any privileged material is provided, consider making it clear that the limited disclosure of that material is made solely for the purpose of the regulator performing its regulatory functions and no broader waiver of privilege is intended. All privileged materials should be clearly marked confidential and privileged.
- Prior to the provision of any privileged documents, if practicable, consider whether it is appropriate and would be effective to reach agreement with the regulator that your communications are to remain confidential and that the privileged material will not be provided or disclosed, in whole or in part, to third parties.

Background

The German regulator for motor transport, the KBA, investigated whether Volkswagen AG and its related group companies (***VW Group Companies***) had implemented 'defeat devices'[2] in their diesel cars and whether any technical changes to those cars were necessary to bring the cars into conformity with applicable regulations and original KBA 'type approvals'. In response to a request for information in that investigation, Volkswagen AG provided the KBA with legal advice that it had obtained from its German lawyers (the ***advice***) along with a covering letter referring to that advice. The KBA subsequently reproduced parts of the advice in 'ordinances' sent to certain VW Group Companies, specifying necessary remedial action.

Purchasers and lessees of VW Group Companies' cars brought five parallel class action proceedings against companies within the Volkswagen group who manufactured, imported, sold and/or distributed the relevant cars in Australia. The judgment involved an application brought by the class action plaintiffs to access the advice and the parts of redacted documents referring to the advice. Specifically, the class action plaintiffs sought discovery of the advice, the cover letter and the ordinances exchanged in the KBA investigation. Volkswagen AG claimed that the advice was privileged and redacted parts of the other communications on the grounds of privilege.

The privilege dispute focused on three issues:

- Did privilege attach to the communications of the advice, cover letter and ordinances?
- Was there an implied waiver of the privilege when the advice was provided to the KBA or when parts of the advice were reproduced in the cover letter and ordinances?
- Was there a waiver of the privilege when, as the plaintiffs contended, the VW Group Companies relied on communications with the KBA in their pleadings?

The decision

Justice Bromwich upheld the claims of privilege in relation to each of the communications, and further held that there was no waiver of privilege either as a result of the initial communication of the advice and cover letter to the KBA, or the subsequent reproduction of parts of the advice in the KBA ordinances.[3]

His Honour considered the relevant German legal framework with respect

1 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543. Absent clear legislative intent to the contrary, in Australia there is no obligation to provide regulators with privileged communications because legal professional privilege is a fundamental common law immunity.

2 A 'defeat device' is software which can detect when a car is under testing conditions and can alter car performance to effect emissions.

to confidentiality as important context for both the privilege and waiver claims.[4]

Privilege issue

His Honour outlined the conditions for the test for privilege under Australian common law:[5]

- the communications passed between the client and their lawyer;
- the relevant communications were confidential; and
- the communications were for the 'dominant purpose' of giving or receiving legal advice.

Justice Bromwich held that legal professional privilege attached to the communication of the advice based on the form, context and contents of the advice. The advice was not a submission in disguise. The cover letter referring to and attaching the advice 'came under the umbrella of privilege' of the advice. The parts of the ordinances referring to the advice were privileged communications because they were not 'fresh communications' and had occurred in circumstances protecting the confidence of those communications, including that they were not sent beyond the VW Group Companies.

The waiver issue

The more interesting part of the judgment concerned waiver and whether the limited disclosure of the advice to the KBA (and the other communications referring to the advice exchanged between the parties) resulted in an implied waiver as against the rest of the world.

His Honour applied the test for waiver of privilege under Australian law, according to which privilege is waived if the privilege-holder engages in conduct 'inconsistent' with the maintenance of the confidentiality which the privilege protects.[6] Whether limited disclosure of advice will amount to a waiver will turn on the facts and circumstances of a case. Justice Bromwich noted that,

> in any third party communication, [it is important to take] steps to maintain confidentiality to preserve privilege, which may be achieved by the face of the document constituting the communication, the means and circumstances in which it occurs, and the factual and legal context.[7]

Justice Bromwich held that the disclosure of the advice to the KBA resulted in only a limited waiver of privilege. Specifically, and having regard to the relevant German law, his Honour found that, since the advice was provided to the KBA in circumstances of confidentiality,[8] Volkswagen AG's conduct in handing over the advice resulted in a limited waiver in favour of the KBA only, and only for the purposes of the KBA performing its regulatory functions. Therefore, although there was limited waiver of privilege by Volkswagen AG's conduct, that waiver did not apply to the whole world (and, in particular, did not apply to the class action plaintiffs). He found that the communications between Volkswagen AG and the KBA occurred in a legal context which placed the public interest in candid disclosure to the KBA above any other general public interest in further disclosure.

Justice Bromwich also noted that while the KBA's request was not in the nature of a compulsory process with civil penalty or criminal sanctions, it was 'less than truly voluntary' given the practical and commercial consequences of non-compliance. However, he did not treat the presence or absence of compulsion as having a 'determinative role' in the privilege dispute.

His Honour held there was no implied waiver by providing the advice to the KBA because the mere fact of disclosure by Volkswagen AG to the German regulator (given the applicable statutory confidentiality regime) was not inconsistent with it seeking to maintain confidentiality of the advice as against the Australian class action plaintiffs. Demonstrating inconsistency in the relevant sense required pointing to specific aspects of Volkswagen AG's conduct of the Australian proceedings which were inconsistent with the maintenance of confidentiality rather than pointing to the mere fact of disclosure to a third party, without more.[9]

The Court further held that Volkswagen AG had not impliedly waived the privilege by referring to its correspondence with the KBA in the Australian proceedings because the respondents' pleadings in those proceedings (including Volkswagen AG's pleadings) merely relied on the technical solutions it had proposed to the KBA and not on any legal advice received by Volkswagen AG from its German law firm as to whether the devices were properly characterised as 'defeat devices'. His Honour did note, however, that waiver could have been found if Volkswagen AG sought to selectively deploy its correspondence with the KBA on a key substantive matter in the class action proceedings and a 'fresh question of waiver' could arise if Volkswagen AG seeks to do so in the future.

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3 *Cantor v Audi* [2016] FCA 1391 (22 November 2016) (***Cantor***).

4 In considering the German confidentiality regime that applied to the KBA investigation, his Honour took into account German statutory provisions concerning the KBA's role and third party access rights, German legislation and case law and a KBA administrative decision denying an environmental NGO access to the VW investigation materials.

5 As the privilege dispute concerned pre-trial discovery proceedings, the court applied common law, not the *Evidence Act 1995* (Cth). *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 at 59.

6 *Mann v Carnell* (1999) 201 CLR 1.

7 *Cantor* [74].

8 There was no indication in the judgment that Volkswagen AG and the KBA had reached an express agreement to keep all communications between them confidential. However, the absence of an express agreement was not fatal. Volkswagen AG relied on affidavit evidence that the documents were given to the KBA on the basis that they were being provided, 'within the bounds of a confidential German administrative procedure.' [46(5)(c)(iii)].

9 In reaching this conclusion, Justice Bromwich noted that the facts of *Goldberg v Ng* (1995) 185 CLR 83, were limited and unique and were not to be read more expansively. The central notion is that disclosure to a third party for a limited and specific purpose does not of itself result in a loss of privilege as against another party in litigation.

An Update on the Activities of the Australian Press Council

Antonia Rosen, a media lawyer at Banki Haddock Fiora, sits down with Professor David Weisbrot, Chair of the Australian Press Council, to discuss developments in the regulation of Australian media.

ANTONIA ROSEN: David, on behalf of the readers of the Communications Law Bulletin, and CAMLA, thank you for this contribution. Can you tell us a little bit about the role the Australian Press Council plays in regulating Australian media, and the role you play in particular?

DAVID WEISBROT: The Press Council was set up 40 years ago in order to provide some level of commitment to the public that there was scrutiny of the media but to avoid the problem of government intervening in free speech and press freedom. ACMA covers anything for which you need a licence (Radio and TV). We do print and online, so we cover almost all the newspapers in Australia. We have 900 mastheads that are part of the Press Council and they cover about 95% of circulation. The *West Australian* for example is one of the few major newspapers that isn't part of the Press Council. It has its own set up. We do all the magazines and then we cover online only news services such as *Crikey*, *Mumbrella*, *Huffington Post* and so on.

We are not strictly speaking a regulator. Although we are involved in regulation, we are not a public regulator and we are not established under statute. It's self-regulation or co-regulation.

We do three things basically: we set standards that the press adheres to, we receive complaints and we advocate for free speech and press freedom. We try to feed the complaints back into the standards setting, so if we know we are getting complaints about a lot of similar things in a year we think well maybe we need a new standard to address it, or some industry education or an advisory guideline.

The bulk of what we do day-to-day is handle complaints. We get about 500 to 600 complaints a year from members of the public and that covers about several thousand complainants, because some of the high profile complaints can each get many hundreds of complainants attached to it. We have a process for analysing them in house and then we try to get remedies for the complainants wherever possible.

The Council has a majority of non-media people on it. I am an independent chair and there are currently 10 slots that are for the major media contributors and then there are 10 corresponding public members. The public members are people like former Chief Justice of South Australia, John Doyle, as well as a retired head master, a veterinarian, a psychiatric social worker, a retired finance industry executive, a community legal centre director, and others.

ROSEN: The online aspect must be growing. Do new members approach the Press Council directly?

WEISBROT: Well it's a mix. Some come to us. *Huffington Post* came to us very early on and said we are thinking of setting up in Australia, we are in a joint venture with Fairfax, and Fairfax and our lawyers say it is a great idea. Otherwise, we seek publications that are not members but who we think should be, and then we approach them about membership.

ROSEN: March 2015 does not seem like a long time ago in the scheme of things, but have you observed significant changes in the media, and its regulation, since you commenced as Chair?

WEISBROT: Not so much in respect of regulation, but we are continually refining our processes, we are expanding membership, and we are developing new standards to try to accommodate public concerns. Last year we focussed primarily on family violence. This year we are focussing on reporting on children because we received a lot of complaints, especially about children's privacy. We have cases about children being interviewed without an adult present or material being taken from children's Facebook pages on public settings and published, or children being shown in a photo illustrating a story that is not about them, such as where a parent is charged with a crime.

We pick up on those kinds of issues. We have talked about doing something on LGBTI reporting, particularly in relation to transgender people. It seems that as a society we have gotten much better, thankfully, in reporting respectfully on gay and lesbian issues – so we receive far fewer complaints in that respect. But there seems to be a lot more work that can be done in respect of reporting on transgender and intersex issues.

We are also working with Griffith University, which has a major grant from the federal government on 'Reporting Islam'. We are represented on the board of that project, and we may feed some of the results of that project back into our standards and educational materials.

ROSEN: Having served as the President of the Australian Law Reform Commission for ten years, it would come as little surprise that your role also involves advocacy, on behalf of the media industry, for reform in the way law restricts the freedom of the press. Among many other inquiries, you presided over the inquiries into privacy and sedition. But you have also been outspoken about the state of defamation law, diminishing FOI rights, and metadata retention.

Could you tell us a little more about your role as an advocate for a free press, and which laws most urgently warrant reform?

WEISBROT: It's a bit sad at the moment. You would have thought it was going to get better, but I think since we live in fraught and difficult times, it has definitely gotten more repressive. Defamation is the biggest problem because it presents a hugely expensive problem, whereby a newspaper can be litigated into oblivion or editors forced into self-censorship. The newspaper may think it has an important story to tell, and it's sure the facts are true, but nevertheless it just can't risk or afford expensive and lengthy defamation proceedings. The Press Council plays an important role in helping complainants resolve their complaints without proceeding to litigation, in many cases. So that assists, somewhat. We won't be used as a de facto discovery mechanism, so if complainants say they are not contemplating litigation, then we will handle the matter for free and we will determine whether they were or were not treated appropriately by the media, that the story that was written was or wasn't factual, balanced, fair and so on. The problem with Australian defamation law is solvable. If you look at the UK *Defamation Act 2014*, it's a huge improvement on what we have in Australia. It's modern, it takes into account electronic communications and the use of the internet. The only impediment to reform, really, is the lack of political will. And the fact is the average person does not sue in defamation. The average person might come to us, they might even be too timid or unaware to do that. But really, powerful people are the ones by and large who use defamation, whether it's big business people or government officials or celebrities and so on, and that's why we can't get a change: because there are powerful lobbies to keep the present regime in place. But we will keep fighting for that because I think it is definitely a high priority for free speech advocates. If you ask any newspaper editor what the number one problem is, they will say defamation law is stifling free speech and investigative reporting of the sort that we really want newspapers to do. That is their key role in society.

There are other problem areas that arise in respect of the new statutory framework for national security, such as Section 35P of the ASIO Act, which prohibits reporting on 'protected operations'. The metadata retention laws are terrible in that we are seeing mission creep already. It was only supposed to be about national security, but now it is already spreading into the activities of 60 agencies, including a large number that have nothing whatsoever to do with national security. This creates a situation where it puts fear into the hearts of whistle-blowers and journalists to think that almost any communication is traceable. The *New York Times*' David Barstow, whom we hosted at a press freedom conference last year and is probably the leading investigative journalist in America, said when the US metadata retention laws came in he had to begin to 'think like a drug dealer' – never carry a mobile, never use electronic communications, if you want to talk to someone don't phone them, go to their door and knock on the door. Never use a credit card, but pay cash for everything. So it's really back to a pre-industrial form of reporting. We generally need much better whistle-blower protections in Australia and maybe even rewards for people who come forward with information that is very clearly in the public interest.

With regard to FOI, Government keeps talking the right talk on these things but then we don't have an FOI commissioner anymore, it has basically been defunded at the federal level. Money has decreased, governments challenge everything and the Attorney General won't release his diary and has resorted to endless court challenges, which he has lost. We don't have a genuine commitment to the culture of FOI and that's clearly a problem. Most of that information should be out there anyway. We should have information in real time on a website about political donations. We should have access to details about the politicians whom lobbyists are meeting with in real time. It

Professor David Weisbrot

shouldn't even require an FOI request. The FOI and the privacy commissioners have had a very hard time getting funding from the federal government in recent years, so there is a real lack of commitment there which I would like to see remedied. We don't necessarily need much different legislation or even any different legislation, so long as there is a change in culture and a real commitment.

ROSEN: Even noting what you said earlier about certain online-only publications volunteering to be regulated under the Press Council's framework, with voters increasingly being informed by material available online that is not regulated, including through social media and blogs, do you fear that the Press Council's role is diminishing in importance and impact?

WEISBROT: There is the potential for the importance and impact of the Press Council's role to erode if we don't continue to bring in the major online players. There is a question about how far we go and I'm interested in exploring this at the moment. The Council is currently more or less mainstream – even if it is a new mainstream. So we regulate the *Daily Mail Online*, the *New Daily*, *Crikey* and *Huffington Post* and so on, but they have a mainstream mentality even if they are online only. One of the things we are thinking about is whether we should offer membership to


Antonia Rosen, Banki Haddock Fiora

anyone who writes a blog regularly. I would personally be in favour of that. If the blogger joins the Press Council then they are contractually bound by the standards of practice set by the Council and are willing for the Press Council to handle and adjudicate complaints against them if they arguably fall short of those standards. In New Zealand, there was a court case about whether a blog is a 'publication'. The NZ Supreme Court found in the affirmative so long as they publish regularly and it's not just somebody telling jokes or not publishing anything for a year. If they look like a media outlet and they act like a media outlet, then they are a media outlet. Accordingly, the New Zealand Press Council has begun to admit blogger members. I would like to see us get more active in exploring that area. Also, we've become increasingly active in trying to reach out to the non-English speaking communities in Australia. We just signed up the *Koori Mail*, but we're now totally committed to doing more in that area. We have a Filipino paper, we're talking with the Chinese community press, I'd love to bring in the Arabic language press and others – the Hindi press, Korean press, Vietnamese press, Italian, Greek and so on. I think we must diversify in that way to reflect the whole community and the diverse press outlets that serve it.

The next issue is the distinction between what is news and what is pubic relations. When I went to meet the editors at one publication for the first time, they said "sorry if we seem a bit disorganised and if we're looking a bit depressed, it is because we have just farewelled our 200th employee recently, who was made redundant." Not long thereafter we went to visit with AFL Media and they said "sorry it's all so disorganised and there is construction everywhere, but we have just hired 200 people." It's going in that direction. Is BlueNotes, an excellent online newsletter published by ANZ Bank, journalism or PR? It's run by a very respected journalist, who takes his role as editor very seriously. What about Cricket Australia's extensive media publications, which are now run by Andrew Holden, formerly the editor in chief of *The Age*? So of all of the young journalists we are producing from J Schools, some will get jobs at *The Sydney Morning Herald, The Australian, Huffington Post* online, and so on - but a lot of them are going into PR or "proprietary journalism", where they will use all their journalistic skills. The question for us is do these entities have the appropriate journalistic culture and independence? If it's a PR operation, then we don't want them to be members and they probably don't want to be members of the Press Council. However, if they are really doing journalism but in a slightly different way, then maybe they should be members and it would good for society in general if they are bound by our Standards of Practice. And maybe it is also in the interests of the AFL Media, which competes with *The Age* and the *Herald Sun* and others for the heart and soul of AFL football fans, maybe it is worth it to them to say "look we respect journalism, we respect our readers, we don't dictate what our journalists write, we don't tell them what *not* to write and it is a real journalistic operation." If that is the case, then people may be more likely to subscribe to it than if it is seen as just a PR mouthpiece.

ROSEN: Looking forward 20 years, what is your gravest concern about the media in Australia, and what is your biggest hope?

WEISBROT: It's hard to look ahead 20 years! The generational change in media these days is more like two years. For example, twenty years ago there was no Google or Facebook or internet news services. My hope is we will still get high quality independent investigative journalism and that we will not lapse into becoming a surveillance state. I hope we will still have serious journalism in 20 years. Technology may increase diversity. Previously, it would have been near to impossible for an individual to start a newspaper. It is now pretty easy for someone to start a blog or another serious news operation. So I hope that will continue to play out. I am worried in the short term and medium term about the financial side of it, about newsrooms being hollowed out, about advertising going to Facebook and Google, about the dominance of Facebook and Google to the extent that a changed algorithm can decimate readership and put a newspaper out of business.

I think that the media organisations, including the big and sophisticated ones, have been slow to anticipate the change and to react creatively. I think they are starting to now. It has been a rough ten years. We have seen that with our members reporting losses and declines in advertising revenues, and we have seen it evidenced by much smaller newsrooms. I hope that it will right itself.

I was very heartened when we had David Barstow from the *New York Times* here last May; they now have over a million paid subscribers to their newspaper, including me. His view is that this proves there is a hunger for quality journalism and people are willing to pay for it. They pay for Foxtel, Stan, Netflix and other content. Barstow argues – and I agree with him – that the media should take the high road and not become the "Kardashian Weekly" in an attempt to hunt for subscribers; they should go high and produce the high quality, value-added kind of investigative journalism and the sophisticated analysis that people will pay for.

The Hare or the Tortoise

Is the Law Keeping Up with the Telecommunication Sector's Blistering Pace of Change?

Thomas Jones and Michael Joffe of Corrs Chambers Westgarth take a look.

Rapid advancements in technology are constantly transforming the way in which we communicate. While this creates new opportunities for network operators, it presents real challenges for telecommunications law which must balance the desire for certainty with the need to be flexible and adaptable to changing trends and technology. In light of the overarching objectives of telecommunications regulation and recent developments within the industry, there is a real question as to whether the telecommunications regulatory regime is 'keeping up' with the sector's rapid pace of change.

Rapid pace of industry change

The telecommunications industry has undergone significant structural change in a relatively short period of time, largely prompted by a revolution in technology and the changes in demand it is driving. Only a few years ago the lines between separate industry sectors were relatively definable – now they are rapidly merging into one. Recently, we have seen network builders and operators acquire cloud computing and business service providers, like Superloop's acquisition of BigAir. We have seen the industry consolidate through acquisitions by players such as TPG and Vocus Communications. We have seen network operators starting to offer their own OTT content, like Optus' offering of the English Premier League. We have also, and most significantly, seen the shift away from a vertically integrated Telstra to a wholesale only nbn.

Technological improvements are also narrowing the gap between the capabilities of fixed and wireless services. There are numerous carriers focussing on developing wireless solutions as alternatives to fixed networks. Most recently, Telstra, in partnership with Ericsson, Qualcomm and Netgear, has tested an LTE network that is reportedly capable of supporting 1Gbps peak download speeds and peak upload speeds of 150Mbps – rivalling many of the current fixed line offerings.[1] With the rollout of 5G networks only a few years away, it's likely that wireless services will compete even more fiercely with fixed line services.

This revolution has resulted in an explosion in data use, as consumer demand for on-the-go multimedia, data-intensive services such as Netflix and Stan has skyrocketed. In fact, the ACCC telecommunications report 2015-16 found that data download volumes increased by 52% overall, with mobile downloads increasing by a whopping 69%.

Against this backdrop, it is timely to consider whether current telecommunications regulation is meeting its broader policy objectives and, in turn, 'keeping up'.

What is the purpose of telecommunications regulation?

To assess whether telecommunications regulation is keeping up with changes in technology and industry structure, we must consider what government is seeking to achieve through regulation.

The character of telecommunications as an essential service (some have called it a basic human right), means that these objectives are extremely varied and include public safety, national security, equity and consumer access, efficient use of scarce resources and the promotion of competition.

If these objectives are characterised as "positive" objectives, there is equally a set of "negative" objectives which should guide decisions about regulation. Regulation should be kept to a minimum, avoid discouraging investment and to let innovation flourish. Ideally, it should also be platform and technology agnostic to avoid inefficient investment. Picking technology "winners" rarely makes consumers better off.

That the Australian regulatory framework continues to deliver in many areas, especially in terms of public safety and universal access, is probably uncontroversial. However, when it comes to matters of efficiency and competition, the picture is more mixed. In some instances, economic regulation has produced perverse investment incentives and there are real questions about the efficiency of the mechanisms that currently deliver universal access to telecommunications services.

A couple of examples of this are considered in more detail below.

The out-dated Universal Service Obligation

The telecommunications Universal Service Obligation (**USO**) was introduced in the 1990s when the main means of communication was standard fixed-line telephones. The USO was introduced to ensure that all Australians had 'reasonable access' to a standard telephone

1 Communications Day, 'Gigabit LTE arrives in east coast capitals' (1 February 2017).

service (**STS**) and payphones on an 'equitable' basis, regardless of their location. This was a laudable and entirely appropriate objective at the time.

The legislative regime designates Telstra as the universal service provider and the Telstra USO Performance Agreement[2] sets out the terms on which Telstra receives payment from the Government for fulfilling this obligation. Significantly, this regime is to apply until 2032.

While there is a sound policy rationale for aiming to ensure communication services are reasonably accessible to all Australians, by focussing on payphones and the STS, the USO fails to comprehend how we communicate today. According to the Productivity Commission's Draft Report on the USO (**Draft Report**), 99.3% of the population are covered by at least one mobile network and approximately 33% of Australian adults now rely solely on mobile phones for voice services. These figures highlight the ever-decreasing reliance by Australians on payphones and STS. Given that the payment Telstra receives from the Government is funded by a telecommunications industry levy (a significant $3 billion in net present value over 20 years), end-users are ultimately footing the bill for the provision of these underutilised services.

It follows that the current USO regime is not in the long-term interests of end-users. End-user needs are increasingly being met by a wide range of digital technologies and applications that offer greater functionality than payphones and STS. For example, end-user demand has skyrocketed for VoIP services like Skype and OTT platforms such as Netflix and Stan – all of which are accessible on mobile devices.

Furthermore, the USO framework runs counter to the efficient use of scarce resources and promoting competition. The Productivity Commission concluded in its Draft Report that "as a non-contestable obligation given to one provider and partly funded by other providers, it effectively stymies competition" and has "adverse impacts on the efficiency of the telecommunications sector more broadly".[3] In particular, Telstra's copper continuity obligation (which requires Telstra to maintain its existing copper network in areas outside of nbn's fixed footprint until 2032) and the proposed additional $7 levy to help pay for nbn's fixed wireless and satellite services sees end-users (via the levies on their retail service providers) subsidising two networks in the same regional and remote areas.

At the same time, the Government is investing in a 'Mobile Black Spot Program', which aims to improve mobile coverage in regional and remote Australia. This is likely to further encourage regional Australians to take up mobile services over payphones and STS, thereby rendering the USO an even more inefficient allocation of resources.

Finally, the proposed wholesale Statutory Infrastructure Provider regime[4] is likely to result in a further inefficient duplication of resources. If this is implemented, it would effectively shift a substantial portion of Telstra's obligations under the USO to nbn, whilst simultaneously maintaining Telstra's funding for it.

These issues raise serious questions about the efficiency of the USO regime and, as the Draft Report correctly points out, whether the USO should be phased out. They also raise questions about whether telecommunications policy and regulation is being delivered in a holistic manner, rather than responding to particular political or commercial imperatives.

Fixed line regulation for a wireless and mobile industry

There are a number of regulatory instruments that are predicated on the assumption that wireless and mobile services are not substitutable for fixed services and are incapable of supplying superfast broadband speeds – an assumption that is becoming increasingly questioned. These include the 'level playing field' provisions in Parts 7 and 8 of the *Telecommunications Act 1997* (Cth) (**Telco Act**) and the Local Bitstream Access Service (**LBAS**) and Superfast Broadband Access Service (**SBAS**) declarations.

Whether or not one agrees with the philosophical underpinnings of the 'level playing field' regime, Parts 7 and 8 of the Telco Act make an artificial distinction between fixed and wireless based services. Subject to some limited exemptions, Parts 7 and 8 require *fixed-line* networks, built or upgraded after 1 January 2011, and used to provide a superfast carriage service (**SFCS**) principally to residential and small business purposes to be wholesale only, as well as offering a Layer 2 bit-stream service. These provisions are intended to ensure that non-nbn networks capable of supplying a SFCS operate on a similar basis to the nbn™ network.

However, by focusing on fixed-line networks and defining SFCS as being a "carriage service supplied using a *line to premises* occupied or used by an end-user"[5], third parties can bypass these 'level playing field provisions' by using alternative technologies, such as mobile, wireless and networks that use wireless for the 'last mile'. There are numerous industry players that have already moved in this direction. Superloop,

2 The Telstra USO Performance Agreement was formed between the Australian Government and Telstra in 2011 and commenced in 2012.

3 *Productivity Commission,* 'Telecommunications Universal Service Obligation: Draft Report' (November 2016), pages 7 and 260.

4 Telco Act, Part 19, as proposed by the Exposure Draft of the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017.*

5 Telco Act, s 141(10).

6 http://www.afr.com/technology/superloop-to-be-nbn-challenger-for-business-20160913-grfsiz

through its acquisition of BigAir, has revealed an intention to scale up to a gigabit wireless end-user service that would bypass these provisions.[6] Last year, TPG purchased 2x10MHz of nationwide 2.5GHz spectrum and regional 1800MHz band, with TPG CEO David Teoh stating that "fixed line broadband has to-date been the backbone of our growth but we believe that wireless connectivity will play an increasing role in the future needs of Australian telecommunications consumers".[7] Not to mention Telstra's testing of a 1Gbps peak download speed LTE network.

Despite some carriers (entirely rationally) pursuing a strategy that would enable them to avoid these provisions, amendments to Parts 7 and 8 in the Telecommunications Reform Package released by the Government in December last year do not address these developments. While Part 7 is proposed to be repealed, Part 8 will continue to, subject to certain exemptions, only impose the wholesale-only obligation on *lines* coming into existence, or altered or upgraded, after 1 July 2017.

In relation to the LBAS and SBAS declarations, each apply in relation to the supply of SFCS, similarly defined as being a carriage service supplied using a *line to premises* occupied or used by an end-user. The LBAS declaration is targeted at telecommunications networks that supply Layer 2 bit-stream services and SFCS to residential or small business customers, and therefore does not apply to services supplied using fixed wireless for the 'last mile'. The SBAS covers SFCS that are not covered by the LBAS declaration (also including Fibre Access Broadband services) which are similarly defined as carriage services supplied via *a line*. This is not a criticism of the ACCC, which is simply performing the functions entrusted to it under the Telco Act. Rather it calls into question whether, at a policy level, government is taking a sufficiently holistic view of telecommunications regulation.

Where does this leave us?

There is clearly a mismatch between the way in which telecommunications regulation is currently framed and the rapidly evolving telecommunications sector. The current regulatory regime needs to shift away from a regulatory theory that is rooted in a static model of the telecommunications industry and towards forward-looking regulation that is adaptable to changing technologies. Rather than focussing on the mode of delivery, regulation should be framed in terms of functionality. This will ensure that it is more adaptable to changing technologies. Acknowledging that this is a difficult task, the efficacy of such a regime will depend on consistent and regular evaluation. A dynamic view of regulation that places renewed emphasis on being adaptable to innovation can be an important tool in improving performance of the telecommunications sector and bring closer the achievement of the regulatory objectives.

Thomas Jones is a partner and **Michael Joffe** is a lawyer in the Competition and Regulatory team at Corrs Chambers Westgarth.

7 https://www.tpg.com.au/about_pdfs/ASX-Media%20Release%20re%20SpectrumFINAL.pdf

Site Blocking Case Handed Down:

Roadshow Films Pty Ltd v Telstra Corporation Ltd [2016] FCA 1503

Simone Blackadder and Andrew Stewart report on the recent site blocking decision of the Federal Court of Australia in *Roadshow Films v Telstra.*

In a landmark decision for media content owners in Australia, on 15 December 2016 the Federal Court of Australia ruled that Internet Service Providers (**ISPs**) must take reasonable steps to disable access to a number of overseas websites that infringe or facilitate the infringement of copyright.

The decision is the first successful application of s 115A of the Copyright Act (Act). The application made by Village Roadshow and the US movie studios was heard together with a similar application by Foxtel. Baker McKenzie acted for Village Roadshow and the US movie studios.

This decision follows a number of other site blocking decisions in overseas jurisdictions, including the UK, Singapore and Italy and signifies how s 115A will operate in future site blocking applications.

Summary

- The Court ordered ISPs to take reasonable steps to disable access to a number of online locations within 15 business days of the orders. Village Roadshow and the US movie studios were successful against the online location, SolarMovie. Foxtel was successful against the online locations, The Pirate Bay, IsoHunt and Torrentz.
- While the orders indicate a number of methods of blocking that the ISPs may apply, the ISPs have indicated that they will use Domain Name System (**DNS**) blocking.
- If any of the online locations are accessible from different domain names, IP addresses or URLs, content owners may follow a streamlined process to extend the blocking orders to those new access paths.
- Content owners must contribute $50 per domain name to the ISPs' costs of implementing the blocks.
- In April 2016, music rights holders filed a further s 115A application to disable access to the online location, KickAss Torrents. The hearing was heard in October and is currently awaiting judgment.

Site blocking legislation in Australia

On 27 June 2015, the *Copyright Amendment (Online Infringement) Act 2015* (Cth) commenced, introducing s 115A of the Act. Section 115A allows a copyright owner or exclusive licensee to apply to the Federal Court of Australia for an injunction requiring a carriage service provider (i.e. ISP) to "take reasonable steps to disable access to an online location".

An injunction will only be granted where:

- a carriage service provider provides access to an online location **outside Australia**;
- the online location **infringes**, or **facilitates the infringement** of, copyright; and
- the **primary purpose** of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not that infringement occurs in Australia).

In granting the injunction the Court may take a number of matters into account, including the flagrancy of infringement and whether the online location has been disabled by orders of a court in another country.

The Proceedings

On 18 February 2016, Village Roadshow and the US movie studios filed an application under section 115A of the Act, seeking orders to disable access to SolarMovie. That same day, Foxtel commenced similar proceedings. Both applications were heard together and dealt with in the same judgment.

At the hearing, conducted in June 2016, the ISPs did not contend whether the content owners were entitled to the orders. They took the position that it was a matter for the Court to be satisfied that the content owners had satisfied the elements of s 115A(1). Accordingly, the arguments focused on the form of the ancillary orders.

The target online locations in the proceedings were SolarMovie in the Village Roadshow/ US movie studios application and The Pirate Bay, Torrentz, TorrentHound and IsoHunt in the case of the Foxtel application (**Target Online Locations**).

On 15 December 2016, the Court granted the applications and held that the content owners had established that:

- the Target Online Locations were outside Australia; and
- the primary purpose of the Target Online Locations was to infringe, or facilitate the infringement, of copyright (e.g. the Court was satisfied that SolarMovie "was designed and operated to facilitate easy and free access to cinematograph films made available online").

While the orders indicate a number of methods of blocking that the ISPs may apply, including DNS blocking, IP Address blocking, or URL blocking, the ISPs have indicated that they will use DNS blocking. In determining whether to grant the injunction, the Court considered the discretionary factors set out in s 115A(5). In particular it noted that SolarMovie encouraged copyright infringement on a "widespread scale", showed a flagrant disregard for copyright, and that blocking orders had already been made in other jurisdictions (including Singapore, UK and Italy).

The fact that at the time of judgment SolarMovie and a number of sites subject to Foxtel's application were, or appeared to be offline, was held to be relevant in the exercise of discretion, but the Court was satisfied that there is a substantial risk that the inactivity was merely temporary and did not warrant refusing the content owners relief. The Court stated that the granting of the orders would guard against the possibility that the currently inactive sites may be re-activated at some time in the near future.

Variations to existing injunctions

A key issue in the proceedings surrounded what would happen if a new domain name, IP address or URL provided access to a Target Online Location in the future.

The Court heard evidence from the content owners that Target Online Locations are not always stable, and have previously changed domain names, IP addresses and URLs in an attempt to circumvent siteblocking orders in other jurisdictions. Accordingly, the content owners sought a simple notification regime, similar to that in the UK, whereby a Target Online Location would include domain names, IP addresses or URLs as notified in writing by the content owners to the ISPs. For example in *Twentieth Century Fox and others v British Telecommunication plc* [2011] EWHC 2714 (Ch), site blocking orders included "any other IP address or URL whose sole or predominant purpose is to enable or facilitate access to the Newzbin website".

However, the Court disagreed with this approach and held that any variation to existing injunctions to include new domain names, IP addresses or URLs must be considered by the Court. The Court implemented a streamlined notification process requiring the content owners to file and serve an affidavit identifying the different domain name, IP address or URL and propose orders to add the new access point(s) to the definition of a Target Online Location. ISPs will then have seven business days to notify the content owners if they object to the proposed orders, otherwise the orders will be made (unless the Court relists the matter).

Implementation of the Orders

The effect of the implementation of the orders will be that users attempting to access the Target Online Locations will not be served the relevant webpage. Usually the user would receive an error message. The content owners sought an order that the ISPs must redirect such users to another webpage, which the Court granted.

Accordingly, any ISP user attempting to access one of the Target Online Locations will be redirected to a landing page informing them that "access to the website has been disabled because this Court has determined that it infringes or facilitates the infringement of copyright".

Compliance Costs

All of the ISPs sought an order that the content owners pay their costs of complying with the blocking orders. In the case of two of the ISPs, the costs sought extended to the costs of configuring the system to implement the orders (i.e. set-up costs). The Court rejected this argument and held that set-up costs had already been incurred by the ISPs and were simply a "cost of carrying on business" that the ISPs would have had to incur at some point, irrespective of the content owners' applications.

Further, each ISP sought "compliance costs" that they estimated reflected the amount spent on ensuring the Target Online Locations were blocked. The ISPs argued they were to be "treated as innocent parties against whom relief is sought not by reason of any wrongdoing on their part". While the content owners argued the ISPs received a commercial benefit from the use of their services by users accessing those infringing websites, the Court agreed with the ISPs. Noting that the ISPs were all undertaking DNS blocking, the Court decided that a uniform figure of $50 per domain name was appropriate. The Court held that while this figure was below some of the ISPs' estimates for compliance costs, all parties will know precisely how much they are required to pay or receive in any future applications.

What's next?

Following this initial decision, copyright owners and exclusive licensees have a workable mechanism to obtain site blocking orders against overseas websites and other online locations laid out by the Courts. In our view, future applications that follow the blueprint of this decision will likely proceed largely unopposed.

When the legislation originally passed through parliament, the then Minister for Communications, now Prime Minister Turnbull, noted that a review of the legislation would occur 18 months after its introduction. We understand that the review is currently set for June 2017, by which the decision in the application by the music industry will likely have been handed down.

Simone Blackadder is an Associate at Baker McKenzie and **Andrew Stewart** is a Partner at Baker McKenzie.

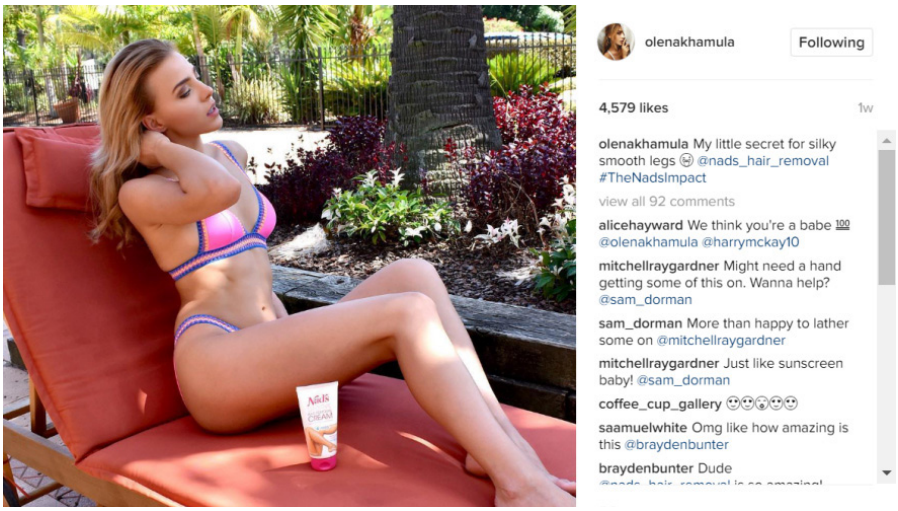
Selling on Social

Emma Dowsett, Lawyer, and Rebecca Dunn, Special Counsel, Gilbert + Tobin

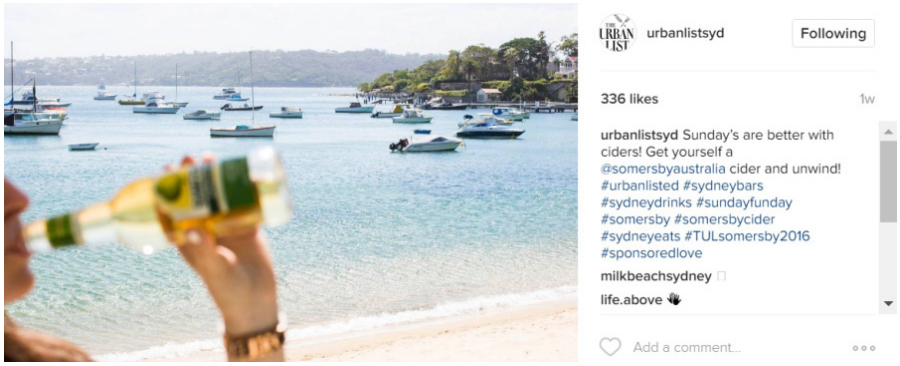
How do advertising and social media currently coexist?

A scantily clad, blonde ex-Bachelor contestant lies sprawled on a day bed, seductively tousling her locks and averting her gaze from the lens of the camera. A bottle of Nads hair removal cream sits conspicuously on the day bed beside her, seemingly placed in the centre of the image for full impact. "My little secret for silky smooth legs," the caption of the Instagram photo reads "@nads_hair_removal #The NadsImpact". You could be forgiven for confusing the social media photo with a professional advertising campaign; the image is perfectly airbrushed and the reality TV star looks as alluring as any cover model would. The post prompts confusion: is this Olena *the person* promoting Nads hair removal cream? Or Olena the *savvy brand influencer*, *businesswoman* or *commercially shrewd model*? The problem is that this post appears among an array of personal photographs posted by the starlet, blurring the lines between product endorsement and reality.

Social media has become a platform of choice for brands, businesses and beautiful citizens alike to promote products, places and other people. Businesses can pay to have sponsored posts appear in Instagram or Facebook newsfeeds, but more often than not companies target individuals with significant "followings" to spruik products that are compatible with the



"lifestyle" these individuals espouse. According to the social-media analytics firm Captiv8, in 2015 brands were spending over $100million per month on social influencer advertising on Instagram alone, underscoring the prevalence of this form of online advertising.[1] This type of advertising can be inherently confusing for an undiscerning consumer mindlessly scrolling the Instagram feed; images posted by friends and celebrities seamlessly blur into one another and the distinction between the commercial and the personal is eroded. For a marketer, this is the benefit of advertising on social media; product placement and endorsements by influential posters seem more authentic and appealing to followers who relate to their particular personal brand.



In Australia, there are no specific consumer laws or regulations that govern advertising and product endorsement on social media and many social influencers don't disclose that their posts are sponsored. This means that a post like the above is not subject to any actual regulations that would require the poster to disclose a commercial relationship or sponsorship agreement with Nads. The primary issue resulting from the lack of regulation of advertising on social media is the ambiguity that is generated for the consumer. This problem is articulated by Peggy Kern, Senior Lecturer at the Centre for Positive Psychology, Melbourne Graduate School of Education, who highlights the hypocrisy that underscores the absence of a legal regime to govern social media advertising; "traditional media outlets are legally required to differentiate between editorial and advertisements or advertorials, and with social platforms becoming just as popular as print and digital media (if not more), particularly with the younger population, more clarity is desperately needed around paid endorsements."[2]

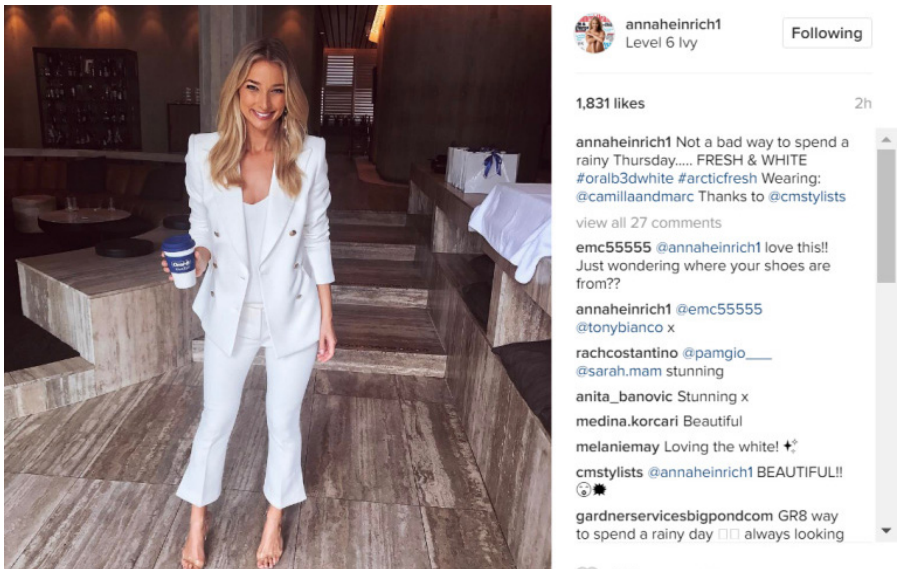
Presently, "social influencers" can self-regulate their posts by adding #sponsored or a similar variation

1 Captiv8, *The State of Influencer Marketing* (2015) <https://captiv8.io/2015-Influencer-Report>.

2 Leigh Campbell, *Current Laws and Moral Responsibility Around Social Media Product Endorsements* (15 July 2016) The Huffington Post <http://www.huffingtonpost.com.au/2015/11/16/social-media-endorsements_n_8578328.html>.

to explicitly disclose that a post has been paid for. However, this practice is not legally required and tends only to be utilised by accounts with a particularly large following, more likely to draw the attention of the ACCC for potential misleading or deceptive conduct. For example, online media company "Urban List Sydney" (which has 110K followers on Instagram), self regulates by using the hashtag #sponsoredlove for posts that have been paid for by cafes, restaurants or food vendors. Due to the size of its following, Urban List Sydney has an incentive to limit its liability and protect against any accusation of misleading conduct.

By contrast, ex-Bachelor contestant-come-social media figure, Anna Heinrich has 264K followers, but readily promotes an array of products without any sponsorship disclosure. These examples highlight the discrepancies that exist within the sphere of social media advertising and endorsements. Even when hashtags are used to disclose sponsorship they can often do so in an ambiguous way. Some celebrities utilise #sp, #spon or #ad (abbreviated versions of sponsored post, sponsored and advertisement, respectively) however these can be insufficient and obfuscate meaning. Sharyn Smith, CEO of Social Soup, a social media marketing agency, described the shortcomings of this approach by stating that "the average consumer would miss these short abbreviated labels… what we



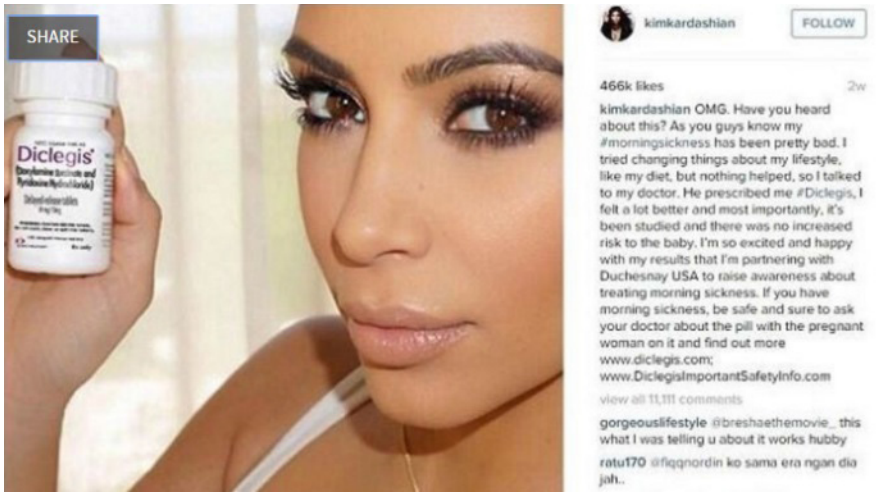
are looking at is the collision between advertising and authenticity as brands try to leverage the *genuineness of influencers*."[3]

What are the current Australian regulations of social media advertising?

The ACCC publishes an online "Guide on Social Media" that explains the prohibition of false or misleading claims in advertising, as per ss 18 and 29 of the Australian Consumer Law (ACL).[4] For those utilising social media accounts, a prohibition on misleading or deceptive conduct extends to posts or comments made by third parties, placing an obligation on companies and brand representatives to monitor the content that's generated by their posts. This obligation was confirmed by the Court in *ACCC v Allergy Pathway Pty Ltd and Anor*:[5]

Due to the unique nature of social media, ss 18 and 29 of the ACL are unlikely to provide an effective remedy against misleading and deceptive conduct occurring on social media – including by reason of paid posts which are not identified as such. Unlike a protracted, months-long traditional media campaign for a product on television or in print media that can be halted or forcibly altered to rectify a breach of the ACL, social media advertising is ubiquitous, transient and can be targeted to specific and small markets. Consequently, a reactive penalty may be an inadequate measure to prevent misleading or deceptive conduct before it impacts upon an audience.

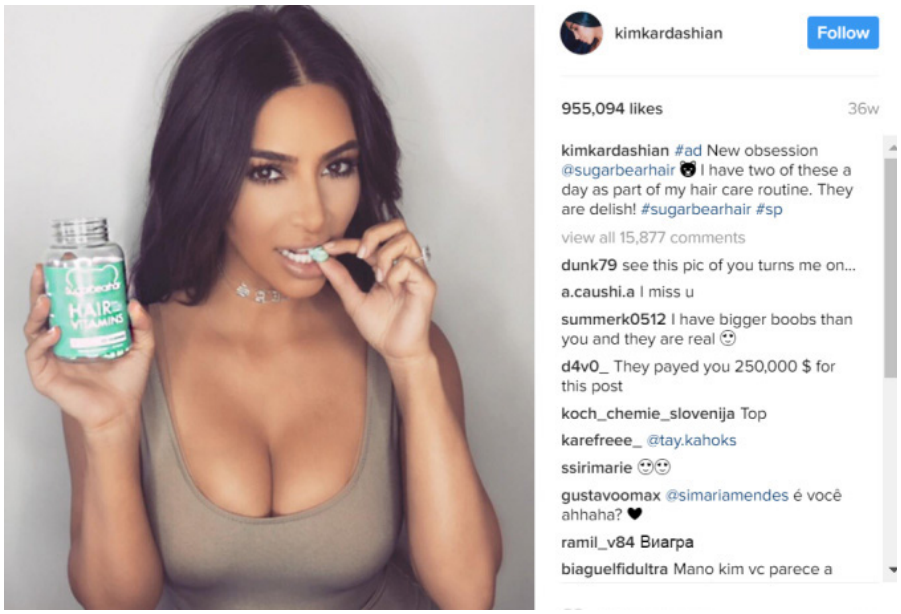
Identification of concerning conduct is also an issue. The ACCC relies on individual "whistle blowers" to specifically report conduct which they suspect is misleading or deceptive. Individual brand influencers who receive one-off payments for product endorsements on a Facebook or Instagram post may be too innocuous and are likely to be too numerous to come to the attention of the ACCC. Moreover, the nature of social media is such that loyal "followers" often feel a connection to the individuals whom they follow and are potentially more



3 Bennett, above n 1.

4 *Competition and Consumer Act 2010* (Cth) sch 2, ss 18-20.

5 (No 2) [2011] FCA 74.



likely to be interested in interacting with a post of an influencer that they admire, than querying whether or not a post is sponsored. The onus should not be on individuals to report potentially misleading or deceptive conduct on social media, rather the law should regulate this space by placing a positive obligation on brands and their representatives to disclose sponsorship and commercial incentives attached to posts from the outset.

The most high profile example of the ACCC criticising a company for its use of advertising on social media occurred in December 2014 when Australia Post used social media influencers to promote its services in the lead up to Christmas.[6] In that instance proceedings were not initiated.

Outside of the ACCC, media regulation in Australia occurs through the Australian Communications and Media Authority (**ACMA**) and the Advertising Standards Bureau (**ASB**). The ACMA regulates television and radio advertising and the ASB provides various industry codes of practice to help regulate the industry.

The relevant ASB guideline for social media platforms is *AANA Best Practice Guideline: Responsible Marketing Communications in the Digital Space*.[7] This guideline provides recommendations to encourage best practice for advertising or marketing material appearing on digital platforms. The AANA recommends strategies to manage consumer interactions and moderate user-generated comments in the digital space. Additionally, the AANA provides guidance for advertisers when marketing using advergames, apps, blogs, vlogs, tweets and reviews, and explains how to promote transparency, data protection and privacy and appropriate commercial electronic messaging. Ultimately however, the guideline is only a blueprint for best practice and does not impose any obligations on marketers and individual social influencers. Codifying the guideline would be an appropriate step in facilitating more effective regulation of digital platforms.

How can the law adapt?

The unique nature of social media advertising necessitates specific legal solutions. It is clear that regulation of advertising on social media platforms is required to protect consumers and ensure that those marketing on social media are held to the same standards as those on traditional platforms. Australia could consider applying a form of the current US model, where the Federal Trade Commission (**FTC**) has established an Endorsement Guide that applies to social media endorsements; and the not-for-profit group Truth in Advertising acts as a watchdog for those failing to comply with the FTC guidelines.

The Endorsement Guide provides guidelines to help marketers and "social influencers" ensure that their promotions on social media are truthful and not misleading. For example, the Guide mandates that endorsers should not discuss their experience with a product if they have not used it. Importantly, the Guide actively requires disclosure of factors, such as payment, that could affect a person's assessment of the endorsement. The FTC enforces these truth in advertising laws and has the potential to file actions in the Federal District Court to prevent further misleading or deceptive conduct.

Additionally, the Truth in Advertising body monitors non-compliance with FTC guidelines. Although they do not have the ability to pursue charges, they are empowered to alert the FTC of contraventions. Kim Kardashian, one of the most influential celebrities on Instagram with a cool 94.2 million followers, came under fire in 2015 for promoting a morning sickness pill without disclosing her post's sponsorship. This post, and approximately 100 similar others, caught the attention of the Truth in Advertising body who warned Kardashian that failure to remove the posts would result in an FTC investigation.[8] Since then, Kim Kardashian and her equally famous sisters have adjusted their posts and hashtags to reflect their status as advertisements.

Like the US, Australia could benefit from having a codified legislative instrument to provide clear guidelines and corresponding penalties for brands and "social influencers" alike. Doing so would bring some much-needed legal clarity to a murky, largely unregulated, yet increasingly important part of the media industry.

6 Nic Christensen, *Australia Post caught out over use of paid Instagrammer endorsements* (24 December 2014) Mumbrella <https://mumbrella.com.au/australia-post-caught-use-paid-instagrammer-endorsements-269324>.

7 *Best Practice Guideline – Responsible Marketing Communications in the Digital Space* (September 2015) Advertising Standards Bureau <https://www.iabaustralia.com.au/uploads/uploads/2016-01/1452214800_409ec2c8d44785fef8fee644c14ba8fc.pdf>.

8 *Kardashian/Jenner Database* (23 August 2016) Truth In Advertising <https://www.truthinadvertising.org/kardashianjenner-database/>

Profile: Ed Santow, Human Rights Commissioner, Australian Human Rights Commission

CAMLA Young Lawyers Committee Chair, Sophie Ciufo, caught up with Ed Santow, Human Rights Commissioner at the Australian Human Rights Commission, to discuss his views on key human rights issues such as freedom of speech and communication.

SOPHIE CIUFO: Where do you work, and can you tell us a little bit about your role in the organisation?

ED SANTOW: I work at the Australian Human Rights Commission where I am the Human Rights Commissioner. The Commission has a President and seven Commissioners. Together, we work alongside an incredibly expert and diligent group of staff to advance human rights in Australia. Where the other Commissioners are responsible for very specific areas, for example, race, age, disability, my role is more general. I work with the President across areas that aren't specifically covered by the other Commissioners, such as human rights issues affecting LGBTI Australians, freedom of speech and expression (amongst other issues).

CIUFO: Where have you worked previously, and what led you to your current role?

SANTOW: Immediately prior to the Commission, I was chief executive of the Public Interest Advocacy Centre (PIAC). PIAC is a non-profit, social justice organisation focused on the basic rights of people. PIAC works at a systemic level to promote human rights, and in my role at PIAC I engaged in strategic or public interest litigation that would have a wider public impact beyond the individual client. At PIAC I also collaborated with the Government and Australian civil society to improve how our laws and policies protect people and their rights.

Prior to PIAC I was an academic at UNSW Law School; prior to that, a solicitor at what is now King & Wood Mallesons and prior to that, an Associate to Justice Heydon when he was a Justice of the High Court of Australia.

I never had a really clear career trajectory in mind that ultimately led me to my current position. Rather, I had a really clear sense that I was interested in making our laws and policies operate as fairly as possible, as well as protecting the basic rights of Australians.

My past experience includes both helping individuals and also working at a systemic level, identifying ways in which I can make a broader impact, such as changing laws and policies. In my current role, these experiences intersect and I interact with individuals and hear their issues, but then I also have direct access to the Australian government to try and implement more far-reaching change.

CIUFO: What do you consider to be some of the most interesting and challenging aspects of your role?

SANTOW: One of the most challenging and interesting aspects is engaging individuals to get involved. Individuals are integral to bringing human rights issues to the forefront in order to bring about change. As lawyers we have the easy part, we are able to call on our professional skills and apply those to an issue at hand to bring about an outcome. For individuals, there is often much more at stake and if it is a human rights issue at hand, it is often very personal to them and it is therefore a big ask for an individual to be the face of a larger issue or problem.

In my current role, I am now working with a much broader canvas than I have previously. As a conventional lawyer, you're there to help your client as an individual. You have a well-understood set of tools you have to deploy to help – litigation, negotiation, mediation etc. and you often know when you have achieved a good outcome. However the broader canvas of the Commission means I need to have greater imagination to see how I am really able to impact a broader group of people and I no longer have a well understood set of tools to help, rather I really only have one tool and that is the power of persuasion. Whilst this is a challenging aspect of my role at the Commission, it is also fundamental to what we're trying to achieve and goes to the heart of human rights, as what you really want to do is persuade people to agree to change and agree to do the right thing by their own accord,

rather than being forced to, as they're more likely to internalise new behaviours as the norm.

CIUFO: You have achieved some remarkable results in the course of your career. What do you consider to be the most satisfying so far?

SANTOW: A big focus of my work over a number of years has been the basic rights of people who are detained, including in prisons, mental health facilities and detention centres (there are a broad range of detainment settings in any country in which people are detained). A real challenge in this area is championing the basic rights of people in detention, as they are often people that are not always well respected in a community and they don't always garner sympathy. During my career, I ran test cases in this area that led to some really good improvements, which was a satisfying achievement.

More recently, and something that has been a big focus of mine that came to fruition only recently, is the announcement by the Australian Government that it intends to ratify and implement the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**). OPCAT has the potential to be the most positive human rights protection initiative of this Australian Government over the past four years. Under OPCAT, Australia will have a better regime of independent inspection of all places of detention with the hope of identifying and addressing human rights issues before they've been violated.

My role in this process was working closely with the Government and Attorney-General George Brandis (who played an integral role in the process) to work through the practical issues of what ratifying the treaty would look like and how to make the treaty as effective as possible.

CIUFO: Was working across such a variety of sectors – private practice, academia, non-profit and now Government – always an ambition? Do you have any advice for young lawyers wanting to follow a similar path?

SANTOW: It was not a direct ambition to work across a variety of sectors, rather I was pragmatic in my approach more than anything else. I followed a path that was more likely to have the most positive impact. The benefit of gaining experience in various sectors, is that I was able to see how a variety of different people in different organisations approached problems, which led me to understand what levers need to be pulled to get something positive done.

If you are looking to follow a similar path, the key is to have 'intellectual ballast'. Find something you're going to be really strong at, develop an area of expertise. For me that was law. In the earlier part of my career, I worked really hard to build my skills in public law, which was really important and ultimately stood me in a good stead when moving between sectors. It is easier to come at a new sector with core, specialised skills as your foundation. Whilst generic skills are good, intellectual ballast and an area of expertise is what will set you apart and help you move through a path of varied positions and sectors.

CIUFO: Freedom of speech and privacy seem to be the most obvious intersections of human rights law and media and communications law. Do you expect those rights to be a major focus of your role at the Commission?

SANTOW: Whilst I am very interested in privacy, I am conscious that we have the Office of the Australian Information Commissioner, which is separate to the Commission and the central agency responsible for privacy in Australia.

Freedom of speech, on the other hand, is very important and will certainly be part of my role at the Commission. Together with the President, I am looking at a range of areas where freedom of speech is under threat and looking at what the Commission can do to ensure freedom of speech is properly protected.

CIUFO: Do you consider that some people place more importance on freedom of speech than on other human rights? Do you consider there to be a hierarchy of human rights, where, when different rights conflict, some are simply and always more important than others?

SANTOW: All human rights are important, so it is dangerous to speak of a 'hierarchy'. However, there are some rights that are central, the right to life for example. Other human rights are meaningless without the ability to protect someone's life. Rather than a hierarchy, think of human rights as intersecting spokes of a wheel.

Working out how different rights interact and what to do if they come into conflict is a crucial part of my role and the role of the Commission in general. We need to be clear-eyed and principled in how we deal with those conflicts. International law provides what is known as a 'proportionality approach', which sets out how to deal with rights that come into conflict.

Freedom of speech, specifically, is a fundamentally important right for a couple of reasons. Firstly,

freedom of speech is central to our existence as humans. We are social animals, we need to be able to communicate with each other and where people are detained, that freedom of speech or an inhibition on one's ability to communicate freely can be one of the things that is most punishing (even more so in instances of isolation and seclusion). So, central to our life as humans is that we are able to communicate freely.

Secondly, a liberal democracy would not function properly without freedom of speech. People would not be able to make considered decisions about our society, including about voting, politics and policy decisions.

CIUFO: As you say, the right of the press to communicate freely is profoundly connected to enabling citizens to meaningfully engage with politics & policies. However, the rise of algorithms used by online platforms to influence the communication of information and ideas to the public has added significant complexity to such engagement. In your opinion, is the unencumbered and unregulated freedom of communication by these platforms having an adverse effect on a citizen's ability to profoundly engage in this discourse?

SANTOW: Well, there is no easy answer to that, but in short, yes, to an extent.

One of the great things about the Internet age is that people can communicate, in a sense, more freely. They can speak more and they can listen more and they can do so with and to people from all over the globe. However, this also leads to a great cacophony of noise and it becomes hard to discern what messages people will find most useful and what messages are truthful, enriching to a person and valuable to us as humans.

So the issue, partly, is one of curation. Take news, for example. We were previously able to identify news leaders – often leading newspapers or media organisations – that would curate a smaller cacophony of noise down to key truths. Now, those leaders are dissipating and whilst this can have a democratising effect in that we are relying less on fewer authoritative voices, it also makes it much harder for individuals to know what to listen to.

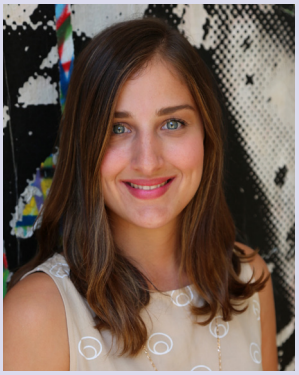
Alongside the dissipation of news leaders, social media is also replacing the human curation of material with machine-led algorithmic curation. Whilst this means that there is less subjectivity, selectivity and prejudice being brought by a select few leaders and individuals to issues, algorithms are still set by individuals, or companies, in some capacity. So prejudice can still exist and the algorithms can reflect pre-existing power structures and give additional weight to people not based on the value, truth or beauty of what they're saying but on the strength of their microphone. These algorithms can divide a broader community into lots of subsets and you can have an entirely internal conversation with a subset of your own immediate community and as a result find it difficult to understand people from different subsets.

CIUFO: Lastly, what advice do you have to the young lawyer who wants to promote human rights?

SANTOW: This is some advice I was once given myself. If you're interested in human rights, there is no question that you already have a good heart. However, coming at something with just a good heart is not always helpful. The challenge is determining how you think you're going to have the most impact. And you're only going to be able to help if you have well-developed skills. Which comes back to what I was saying before about having 'intellectual ballast', having an area of expertise. So, work really really hard to develop skills that you know can add value. There are various skills that can and do add value to human rights – public and administrative law, the intersection of law and social work, political skills, are just a few examples.

It is always such a missed opportunity when someone has all of the energy, bright eyes and desire to get into human rights work but hasn't yet worked out what their value will be. So, my advice in short, is to work out what your value can and will be, and then work hard to hone the expertise and skills you need to be able to add that value.

CIUFO: Thank you for taking the time to speak with us, Ed. You have provided such an interesting insight into your role as Human Rights Commissioner at the Australian Human Rights Commission and we look forward to following your achievements over the next few years.



Sophie Ciufo is Legal Counsel at Viacom International Media Networks Australia & New Zealand, and Chair of the CAMLA Young Lawyers Committee.

OPINION: Law Reform Should Protect, Not Harm, Creators

In light of the recently released report into Australia's intellectual property arrangements by the Productivity Commission, Eli Fisher argues that copyright law reform should protect, not harm, creators.

The recently released report of the Productivity Commission into Australia's intellectual property arrangements[1] contains some of the most divisive policy recommendations ever made in respect of Australian copyright law. But the most unsettling thing about the report is the shallowness of its analysis. Copyright law is simply too important to Australia's economy, its international standing, and the lives of creators, for shallow analysis to guide any proposed reform.

In relation to copyright law reform, the Commission found that the current duration of copyright protection (for works, 70 years from the death of the author) is too long, and recommended that the Government amend the *Copyright Act 1968* (Cth) to make unenforceable any part of an agreement restricting or preventing a use permitted by a copyright exception; permit consumers to circumvent technological protection measures for legitimate uses of copyright material; clarify that circumventing geoblocking technology is not an infringement; repeal import restrictions for books; strengthen the governance and transparency arrangements for collecting societies; implement a Fair Use regime in Australia; and limit liability for the use of orphan works.

The recommendations uniformly are to weaken, as opposed to strengthen, copyright protection given to Australian creators. Some, to be sure, are not without justification. There are very few people who would oppose a reasonable provision that better facilitated the use of orphan works – those works whose owners cannot be identified after a diligent search.

But other recommendations, and the reasoning by which the Commission arrives at making them, are so misguided that they are liable to discredit the remainder of the Report. Taking two examples – the duration of copyright protection, and implementing a Fair Use defence – it becomes clear that the report reflects a bias that should not be present in serious discussions about copyright law reform.

The finding that the duration of copyright is too lengthy is made on the assumption that copyright protection is granted to an author only to incentivise her or him to create items of value to the public. For the Commission, copyright protection should be just enough to motivate the creator to create, and no more.

The premise is fundamentally questionable. Property rights, for example in a home or in a tennis ball, usually do not expire. You worked for it, you invested in owning it, therefore you can keep it, or bequeath it to your children and they to theirs in perpetuity, no matter what benefit the public might obtain in your property becoming its property. There are very few rights more essential to human dignity than this. As Mark Twain said in relation to a 1906 Copyright Bill: "I am quite unable to guess why there should be a limit at all to the possession of the product of a man's labor. There is no limit to real estate." That intellectual property has a limited term at all is a compromise that was already made in favour of consumers.

But the Commission constructs its argument that the copyright term is excessive on the basis that most works cease to have any real commercial value after a few years.

The Commission considers that the commercial value of songs lasts from between 2 and 5 years following release, between 3.3 and 6 years for movies, between 1.4 and 5 years for literary works, and for 2 years for visual art. The Commission argues that given there is little commercial value for creators in having protection beyond that period of time, there is little justification for the lengthy copyright term.

Anyone who thinks critically about the Commission's point here must surely ask: "if there is no-one wanting to listen to a song, or watch a movie, beyond a couple of years from release, then who cares whether copyright extends beyond that period?" That consumers do care tends to support the view that there is in fact a market for those works beyond that stated timeframe.

But the issue here is that which is often overlooked in copyright debates – and completely overlooked in the Report. Copyright law is not about preventing people from enjoying works. It is about designating who should pay, and who should be paid, when a work is enjoyed. For that minuscule fraction of works whose commercial relevance survives the duration of its copyright protection, entry into the public domain does not necessarily mean that the work becomes freely available. Various other suppliers – publishers, digital platforms – will still charge consumers to access what has essentially become "their" copy of someone else's works. And even if the works are made available free of charge to consumers, we are still observing a political decision about who should pay and who should be paid for the enjoyment of someone's

1 Productivity Commission, Intellectual Property Arrangements, 20 December 2016, accessible at http://www.pc.gov.au/inquiries/completed/intellectual-property/report.

work. Reformers should not be misled into believing that a significantly reduced term is only about promoting access and knowledge; it is largely about supporting the interests of the masses over those of creators. And that is a populist political decision about which a principled person is entitled to be concerned.

As regards the defences in the copyright law, the current system permits activities that would otherwise be a copyright infringement if they are done for one of a number of specific purposes, including for research, study, criticism, review, parody, satire, reporting news, or giving professional advice. There are numerous other protections in the legislation that give preferential treatment to bodies that are deemed to warrant it: for example, educational institutions and libraries.

Again, keep in mind that the current law already reflects a compromise. Property rights usually do not have carve-outs for even the worthiest of causes. Trespass is trespass, even if you want to host a charity for sick puppies in a stranger's private living room.

The Commission's proposal is to replace the current scheme with one that is not limited to specific purposes. A use is defensible if it is "fair". When people dispute who owes what to whom, and the guidance given by the law is uncertain by design, those people are quickly to head to Court.

And that point brings us to the most troubling claim made by the Commission and those who lobbied for the findings of the Report. The recommendations made are purported to promote innovation, even though they may well achieve the opposite. A pretty good way to stifle innovation and repel investors is to have unclear and ambiguous terms governing the creation of new works, and tying up new products in years of litigation.

Peter Martin reports that the Commission's recommended changes would "[allow] Australia to innovate as quickly as competitors in Israel, South Korea and the United States."[2] But that claim just does not seem plausible. Is it really believable that a more specific scheme of defences to copyright law is what is holding Australia back from innovating as quickly as those countries? It would rather seem that the abilities of those countries to innovate quickly might be more connected to the way those countries treat education, or calibrate their tax laws, or promote a culture of innovation. For example, it is probably more relevant that South Korea spends a higher proportion of GDP on R&D than any other country on the planet, having in the last few years overtaken Israel (now in second place) and the United States (in fourth place).[3]

The far more sensible inquiry into the UK's intellectual property arrangements, the Hargreaves Report of 2011, addressed this very point. When that Review visited Silicon Valley prior to finalising its report, they met with companies such as Google, Facebook and Yahoo, as well as with investors, bankers, lawyers and academics. There, they learned of some of the benefits that Fair Use had in the American innovation scene. The Review wrote: "Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law."[4]

That isn't to say that copyright law cannot be reformed to promote innovation; it can. It also isn't to say that Fair Use won't provide some benefit to tech companies who may be exploring exciting new technologies; it might. The fundamental question here, though, is: *who should be making the money from consumers enjoying someone's work?* People will disagree, but the society I want to live in designates consumers as responsible for compensating those who work to create that which they enjoy.

What does that mean in real terms? It means precisely the opposite of every recommendation the Commission has made: that copyright law should be designed to promote commercialising creative works through licensing. Licensing, that is compensating creators, may be an obstacle to innovating quickly and cheaply, but it is a reasonable one.

What's more is that the Commission was given the task of evaluating Australia's copyright laws, and in an environment where authors, musicians and artists are struggling to make a dignified income due to the impact of piracy on their businesses, the Commission did not see it fit to make even one recommendation that protected creators.

Exciting tech companies are dominating the global economy, and technological innovation must still be further promoted. But there are more effective tools that can be used to promote innovation, and which would have a less devastating impact on Australia's creators – and those tools are not being used. At this time, when creators around the world are suffering from the evisceration of their businesses by said exciting new technologies – those exciting new ways of making it easier to reproduce and distribute content illegally, and with no compensation to creators or their investors – reformers of copyright law would do better to devise methods of protecting, rather than weakening, Australia's creative community.

Eli Fisher is a Senior Associate in the copyright team at Banki Haddock Fiora, and a co-editor of the Communications Law Bulletin. These views are his own.

2 Peter Martin, 'Intellectual Property: Copyright Rules Make Us Break the Law 80 Times a Day, says Productivity Commission' *The Age* (20 December 2016), accessible at http://www.theage.com.au/federal-politics/political-news/intellectual-property-copyright-rules-make-us-break-the-law-80-times-a-day-says-productivity-commission-20161220-gtf6io.html.

3 OECD Science, Technology and Industry Scoreboard 2015: Innovation for Growth and Society, accessible at http://www.oecd-ilibrary.org/science-and-technology/oecd-science-technology-and-industry-scoreboard-2015_sti_scoreboard-2015-en#.

4 Ian Hargreaves, 'Digital Opportunity: review of intellectual property and growth'; accessible at https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth.

Challenges in Media Regulation

On 9 November, Richard Bean, Acting Chairman of ACMA spoke to CAMLA members and guests in Sydney about some of the challenges in media regulation.

Introduction

A free and open public discourse is vital to a well-functioning democracy, but in no democracy is that freedom unlimited. All societies draw lines between what is and what is not permissible.

And in a well-functioning democracy, the government of the day helps to identify and enforce these lines with the broad consent of society as a whole.

Historically the independent electronic media in Australia have both benefited from and been constrained by a high level of government regulation.

First then, a brief reminder of some of the ACMA's roles in regulation of content and regulation of its delivery mechanism or platform.

As to the content that is being delivered to citizens – the ACMA regulates the broadcasting sector in Australia, including commercial and community radio, and free-to-air and subscription television.

We register codes of conduct developed by commercial broadcasters and typically investigate code complaints first made to broadcasters, when the complainant remains dissatisfied with the broadcaster's response.

The codes cover concepts like impartiality, accuracy and, in one form or another, decency.

So, it is a co-regulatory regime, given the ongoing and collaborative work with the industry.

And of course while regulation of news and comment for radio and TV is overseen by the ACMA, the Australian Press Council, an industry self-regulatory body without any statutory element, manages this function for print media and associated Internet publications.

It's also worth remembering the MEAA's Journalist Code of Ethics, in particular regarding conduct in newsgathering, an area the codes are sometimes criticised for inadequately covering.

The ACMA of course also administers a regulatory framework for the mechanism by which content is delivered, that is, the analogue and digital platforms which Australians get their content on.

Most relevantly for tonight's discussion, we do this through our licensing activity.

This evening I want to reflect on various shifts occurring in the media content environment that are changing the way that news and opinion are created, distributed, curated and consumed in Australia, and thank CAMLA for the opportunity to do that.

I want to consider what these developments mean for media regulation, in particular how we assess media influence and diversity of voices, and diversity of content.

I'll invite you to reflect on whether some of our underlying assumptions and regulatory foundations can or should endure in light of what we think is going on.

And I'm going to do it pretty discursively, so I hope you will tolerate that reasonably well.

Key concepts in media regulation

I am going to focus on some inter-related regulatory concepts that help explain why we have the form of regulation that exists today, and look at some elements of the regulatory framework that are affected by change, and some elements that continue to give expression to important social and cultural values.

My main focus this evening is on media influence, its role in our current system, and whether and how we can or should continue to rely on it as a foundational concept.

'Influence' was enshrined as a key framing concept in Australian content regulation in the *Broadcasting Services Act* in 1992.

In marked contrast to the current vogue for platform neutrality, in drafting and passing the 1992 Act the Parliament explicitly intended that regulation apply differentially to different service types according to the degree of influence they exercise.

This reflects the view held at the time that some categories of service exercise a particularly important role in shaping public opinion and Australian cultural identity.

The Explanatory Memorandum notes that commercial broadcasting services are considered to exert a strong influence in shaping community views, given that they provide programs of broad appeal to the general public.[1]

Typically, policy makers and regulators have focused on the role news and current affairs programs play in supporting the participation of an informed citizenry in our democracy.

'Pluralism' is a related concept, often cited as being fundamental to western liberal democracy — the idea that more than one perspective has validity, and there is social and

1 *Broadcasting Services Act 1992* (Cth) s 14.

political value in people expressing, and engaging with, these differing perspectives.

The rationale for regulating for pluralism is that in the absence of intervention, media and communications markets (or other interests) may consolidate perspectives or favour certain opinions at the expense of others.

Put another way, diversity operates as a check on the exercise of media influence.

'Diversity of voices' is reflected in legislative controls on what forms of media may be owned and in what combination, and the geographical area in which they may operate. A 'voice' within the meaning ascribed by media legislation, is a proxy for a locus of 'influence'.

'Diversity of content' is given effect in regulation in a few ways, including the competitive provision of content over different distribution networks by different licensees, and through the promotion of particular forms of content, such as through the Australian Content Standard and Children's Television Standard.

A third concept that is less common in other jurisdictions, but one that continues to be an important feature in Australian media regulation, is **localism**.

'Localism' embodies the idea that citizens should have access to media and communications services that enable them to participate meaningfully in their local community.

Among other things, localism obligations also serve as a mechanism to manage the influence of, say, nationally networked voices.

The Act gives explicit expression to matters relevant to influence, diversity and localism, in a couple of important ways.

- First, the categories of services which exert the greatest influence on community views are subject to the highest level of regulatory control. This is done by describing different licence types for different services with different rights, obligations and enforcement regimes.
- Secondly, the legislative scheme aims to ensure that services provided to the community reflect accepted community standards through co-regulatory codes of practice. Of particular relevance to today's topic are the safeguards placed around the presentation of news and current affairs, including obligations relating to accuracy, impartiality and the representation of viewpoints

There is a small, quite clear set of principal regulatory mechanisms at play here.

- First we see rules designed to preserve diversity of ownership and control of certain commercial media outlets. The key elements relate broadly to:
    - The geographic reach of television networks – the reach rule;
    - Ownership and control of television and radio broadcasting licences in prescribed areas – the one- or two-to-a-market rules;
    - Cross-media holdings of television, radio and newspapers services in the same licence areas; and
    - The diversity – or rather number - of voices in metropolitan and regional markets.
- Second we see government funding to maintain the national broadcasters;
- Third, the regime enables the competitive provision of content over alternative networks like satellite and subscription television and the promotion of particular forms of content like children's television programming.

All focussing regulatory attention on particular media types that are considered **influential** — free-to-air television and radio broadcasting, and newspapers.

Now let me make a few observations about the current arrangements.

In their favour, the rules are relatively simple to apply and are well understood, at least by the regulated industries. And they probably **do** capture the most 'influential' media voices even today.

But these rules and measures were devised when the internet barely existed.

In particular, they apply by reference to geography – the radio licence areas – when the internet has made geography all but irrelevant to citizens' access to content.

The 1992 Act also in effect created a walled garden that both protected and promoted particular forms of content for distribution over particular platforms and into specific areas of Australia.

A 2000 ministerial determination sought to maintain the walls when it determined that services making television or radio programming available using the internet, were not captured within the definition of a broadcasting service.

This model worked very effectively for a time, but those hard boundaries continue to erode as Australians source news and content in different ways.

Geography does obviously have some concrete appeal. We might conceive of news and political debate occurring at international, national, state or territory, and local levels – but can question whether radio licence areas the best way to focus on media ownership, diversity and influence.

Pressures challenging media regulatory frameworks

Now as we monitor the media environment, we observe a range of sometimes competing forces that are testing the relative simplicity of the available quantitative measures that are used to assess and manage influential media.

Let's look at some of these pressures and take some time to consider whether they can usefully inform our thinking about adapting regulation to the current media environment.

New influences vs established voices

The most obvious example of competing forces is new versus established voices.

We now have an environment in which citizens are engaging with audio-visual content in a much greater variety of ways in widely varying degrees of what you might call intensity – from listening carefully to Background Briefing on ABC radio to glancing at a tweet from an international gossip columnist – and furthermore also acting as content creators engaged in the production of news and opinion.

But I don't want to overstate the effects of digital disruption – after all, broadcast free to air television continues to be the main form of home entertainment in Australian households.

Watching free-to-air television still represents the largest share (some 61 per cent) of the weekly average time spent watching video content (excluding DVDs) among Australian adults.

Although overall time spent watching free-to-air television as it is broadcast has been declining slowly over recent years, broadcast television still remains the main source of news, with 36 per cent of adult Australians frequently accessing news on TV.[2]

Television also has the highest weekly news **reach** with 65 per cent, ahead of radio with 40 per cent and print with 38 per cent.[3]

But let's look at what else is going on.

Print newspaper subscriptions are declining as new audiences appear to be moving to online sources.

Some 13 million adult Australians now access online news sites.[4]

We are seeing international news brands such as the *Huffington Post*, *BuzzFeed*, *The Guardian* and *Daily Mail* launch Australian versions of their websites, with *the New York Times* apparently coming soon.[5]

Online platforms like Facebook and Twitter are increasingly acting as a source of news in analogues to both print and broadcasting.

Industry research indicates that 29 per cent of Australians aged 14 to 32 use social media as their primary source of news, compared to 18 per cent watching television news.[6]

18 per cent of Australians list social media as their **primary source** of news, putting Australia ahead of the US at 17 per cent.[7]

So we see persistent strength in some media distribution platforms, although demographic differences in the way that news is accessed - and we are seeing new news brands in the Australian market.

In recognition of the move online, Fairfax has announced a likely move away from a six day a week printing schedule for its main mastheads.[8]

And this is an interesting example of what a move online might do to current rules.

The change of the *SMH* or *The Age* to a weekend newspaper – remembering Monday to Friday would still exist, just online - would mean that they are no longer 'newspapers' for the purposes of the BSA, which requires publication on at least four days a week.

There would be no change to media diversity points – the count of voices – in either Melbourne or Sydney because in each city the masthead is already in a group with radio services counting as one voice, so that even if the masthead no longer meets the definition of 'newspaper' in the Act then there would still be one group.

Under the current 2 out of 3 rule – it would free up Fairfax to control a commercial television service in each city - though if it acquired an ungrouped commercial TV licence, then there would be a reduction in voices.

Consider also two recent changes in the Sydney radio market – the sale of 2CH currently under way and the change of format of 2UE from news/talk – you might say an influential format – to advertorial. The sale of 2CH may or may not create a new voice, depending on the purchaser, but the change in format of 2UE will not alter the voice count – both because it is already grouped, and because format is irrelevant.

Fragmentation vs stability

Another observable contrast is between media **fragmentation** occurring at the same time as apparent **stability** in the sources of news Australians habitually turn to.

Fragmentation itself has a number of different dimensions - the growth of new delivery platforms, and the growth of choices within particular media technologies such as multiple television channels or websites.

For example, on television we have the regular news programming of commercial broadcasters, the dedicated news channel of ABC24, as well as subscription television's Sky news and international news channels.

2 Deloitte, Media Consumer Survey 2016—Australian media and digital preferences, 5th edition.
3 Reuters Institute, 'Reuters Institute Digital News Report 2016'
4 ACMA-commissioned surveys, May 2015 and May 2016
5 Deloitte, Media Consumer Survey 2015—Australian media and digital preferences, 4th edition
6 Deloitte, Media Consumer Survey 2016—Australian media and digital preferences, 5th edition.
7 Deloitte, Media Consumer Survey 2016—Australian media and digital preferences, 5th edition
8 White, D and Mason, M. 'Greg Hywood flags future print changes as Fairfax embraces 24/7 digital,' *The Sydney Morning Herald,* 6 May 2016.

But the growth of new platforms is much more widely observed.

The internet has supported the entry of reputable global news brands into Australia as well as online-only ventures. Social media are redefining what many consider to be news content, as well as providing curated services.

At the same time, and despite all that, we continue to see evidence of relative stability in consumption of news from Australia's traditional media players.

The top 3 most popular news sites as at June this year were *news.com.au*, followed by *ABC News* websites and *smh.com.au* in third place - all long established news brands in the Australian market.

More recently, international news brands have been edging up the list, with *Daily Mail Australia*, *The Guardian* and the *BBC* in fourth, sixth and seventh place respectively.[9]

Even as revenues collapse and the whole question of the survival of the great mastheads as businesses becomes very real, their influence remains immensely strong, both as primary sources and as agenda-setters – although some observe social media usurping that role in the daily news cycle, now moving from newspapers-to-radio-to-TV to twitter-to-radio-to-TV.

Diversity of opinion vs personalising news

Another set of countervailing pressures pits the growing diversity of sources of news against technology which both permits users and aggregators to curate or personalise news feeds, commentary and other content and enables users to browse across multiple sources to select and compare.

Of course access to more sources of news and information may not be equivalent to access to a diversity of views and opinion.

Paul Resnick and colleagues at the University of Michigan's School of Information recently noted that social filters, ranging from online news gathering algorithms to the filters of what our friends, family and peers discuss will isolate us in information bubbles, sometimes only partly of our own choosing.

According to Amy Mitchell, the director of journalism research at the Pew Research Center in the United States, "nearly half (47 percent) of those with consistently conservative political views and about a third (32 percent) of consistent liberals say that the posts they see are nearly always or mostly in line with their own views."

As with the familiar phenomenon known as "confirmation bias", both human and technological choices have the ability to reduce our access to a diverse set of opinions.

But is that any different from choosing to read *The Guardian*, or *The Australian*, or watch *MSNBC* or *Fox News*? It may be in one important respect – the transparency of the process.

Which brings me to the question of trust and familiarity vs the rise of algorithms.

Some might say that an individual has always had the ability to select what he or she reads or hears, but technology now assists the selection of "trusted" sources of news and opinion in new ways that it's important we understand.

And trust in reliable 'sources of truth' has always been an important consideration in understanding how influence may be exercised.

Is the influence of well recognised and trusted brands – mastheads or individual respected journalists or commentators – reinforced or diminished as alternative sources of news and commentary become more readily available? I think that is an open question.

In the online environment, with a ready availability of news sources, reliable sources of news may become increasingly differentiated and highly valued.

In its 2011 Digital Australians research, the ACMA found that the perceived trustworthiness or credibility, and fairness, of online news sites depended on whether or not the source was an established brand.

Where traditional brands also had an online presence, the same level of credibility was attached to their online content.[10]

But the rise of algorithms adds complexity to the news supply process and our assessment of the influence of the trusted brands.

Algorithms, whether based on user preference or behaviour, or upon a programmed understanding of what news is important, have an impact on the form and type of news that a citizen sees.

In the face of allegations of liberal bias, Facebook recently moved to accelerate the automation of its Trending news section, removing its editorial team. Unfortunately, a few days later Facebook promoted a patently false news item from, as *Slate* described it, "a dubious right-wing propaganda site", that *Fox News* had sacked Megan Kelly for being a "traitor".

The sacked team members were mostly New York journalists, and they were in fact replaced with other human overseers who were to check that the items that the algorithms chose were linked to the real world – but not make editorial decisions – and who failed to realise the Kelly story was bogus.

This example raises an interesting question about if and how social media platforms will change the extent to which we are exposed to diverse opinions, and more importantly, how transparent the impact of these 'filters' might be.

9 Nielsen, 'Social Media Brands Grow and Shifts in News Rankings', Media release, 27 July 2016.

10 ACMA, Digital Australians, 2011, p, 44.

I would also observe that while in the past we may have been concerned about media proprietors deliberately using their platforms to influence audiences, these algorithm-based services are not so clearly characterised in those terms. They could arguably be presented as simply being a service designed to deliver to an audience exactly what the audience wants.

If I can summarise these broad themes – they all provide evidence of pressures, pulling in different directions and with different implications for how we identify which are the influential media and how influence in news and opinion is being exercised – with consequent implications for the use of influence as a guide in applying differential regulation.

Earlier this year, the ACMA commissioned for its own use an analysis of media influence in a contemporary communications environment – and I want to thank Peter Leonard and Rob Nicholls for their contribution.

The focus of this work was to look at the market trends that are affecting where and how influence is exerted, and to consider some factors that might be brought to bear when attempting to measure it.

What emerges is the need for an approach to assessing influence that looks at how news and current affairs programs in particular exert influence over public opinion in three important ways.

- One is **the agenda setting process**: identifying what news is selected as newsworthy to be reported and where, when and how often that news is carried
- Another is **the process of framing of news**: taking account of how the news story itself is framed for consumption (for example, as factual, commentary or analysis), and finally
- What you might call **the user zone processes**: whether and if so, how, an individual citizen curates what news they choose to receive, or a provider, using data analytics or editorial choice, curates the news that a user sees.

We've just been talking about algorithms. More broadly, the use of data analytics to target audiences is obviously a significant new phenomenon, and one which may play out in a number of ways – enabling, for example, hyper-specialisation or hyper-localism.

We see pressure for localism on a number of fronts, and should consider its impact in an era of populist politics.

Now what's being done in other jurisdictions?

It is one of the features of a converged, globalised media environment, that many of the challenges experienced in Australia are being felt in other jurisdictions. It's another feature that no-one has found the magic model.

The United States has a regular process of media ownership reviews occurring every four years.

The most recent review conducted in 2014 reaffirmed the importance of local news and public interest programming and elected to retain cross media ownership rules.

Despite legal challenges to various rulings, the structured and regular review for media ownership and influence assessments seems generally well-accepted.

In the United Kingdom, Ofcom has a mandate to undertake regular three-yearly reviews of the UK's media ownership rules.

In its most recent review last year, Ofcom reaffirmed rules to protect media diversity, and recognised that with a rapidly changing news market, that there would need to be **regular reassessments** of media plurality.

Ofcom proposed new measures to assess media plurality, ones that explicitly recognise the role of online news platforms and include qualitative measures such as impartiality, trust and reliability of news sources to assess media influence.

Notice that the set of influence and diversity measures we have in Australia is directed towards assessments very much focused on quantitative measures of the supply-side of the media industry. But what do we know about how the products of the media players are consumed? Do citizens give them the weight accorded to them under the Act? And what about new sources not contemplated in 1992?

There is much we don't know about the impact of media services – for example what is the impact of simultaneous multiple platform viewing?

In this context it is interesting that Ofcom is developing a new measure – a "share of references" - which is designed to compare consumption of news across different platforms using a variety of consumption measures.

This updates previous ways of assessing influence and can now take account of the role of search engines and algorithms acting as intermediaries in the supply of news content.

I think we have something to learn from our colleagues in the UK.

So what might these developments mean for regulation in Australia?

Specific priority areas for media reform are obviously a matter for Government, and it has chosen the 75 per cent reach rule and the 2 out of 3 rule as the first cabs off the rank, and the ACMA supports, as it has long done, a program of regulatory reform.

Failing to engage with the forces I have been discussing might mean that we constrain competition and innovation without securing the 'public good' we are after – that is, ensuring meaningful diversity – especially in news and current affairs.

To be clear, the ACMA considers that the underlying policy objective of a diverse media is important and of enduring public interest – that is also what the community tells us periodically through our research.

But to be equally clear, while a policy objective may be of continuing relevance, we need to distinguish between that goal and the tools we have used to date to achieve it. Markets change, and, as a result the way we intervene, and the need to intervene at all, also change.

Good regulatory design principles evolve: a regulatory construct which assumed that legislation and the regulator determined who was in the market, what they could do and then how they should be obliged to contribute to public goods seems a quaint notion today.

Now in our response to the Department of Communications and the Arts ACMA Review draft report, the ACMA supported draft reform proposals that were directed towards a more platform-neutral approach.

That support continues.

But in applying a more platform-neutral approach, one relevant question we can ask is whether regulating media according to the influence held to adhere to different licence types continues to be an effective means of supporting a public policy objective of ensuring a diversity of news and opinion.

In fact, we might reasonably ask why we should have these different licence types at all in the future?

As we have seen, the UK is moving to a more rigorous way of reflecting the changed role of content users in media diversity assessments. In practical terms, this means we should look at what users think is important and what can be achieved, preferably in a platform-neutral way.

This would lead to a rebalancing across platforms.

This is platform-neutrality as a design principle rather than a policy goal.

How should we move forward?

It is hard for any regulatory regime not to assume a degree of stability and predictability in industry structures, technologies and distribution platforms. But what if that assumption is no longer valid?

At this point, it is unclear when or even if more stable market structures and well-established behaviours of news and opinion content creators and users will emerge.

What does such a disruptive environment mean for concepts like influence? Are the market and market dynamics doing the work that regulation previously had to?

You can make a case that the existing interventions to deliver the public policy objective of promoting diversity of content and opinion based on the influence of legacy platforms are either already or close to no longer being fit for ***purpose***. What we don't know is whether we are in a period of permanent disruption, or simply in the midst of a shift to a new, stable environment.

One of the attractions that we see in adopting the regular, structured review process in use in other jurisdictions is that it provides the opportunity to periodically test whether particular public policy objectives remain relevant and whether the market or particular regulatory interventions continue to deliver those public policy objectives.

Since we are in a world where review of current media ownership rules is appropriate, but where the need for or type of replacement arrangements is not clear, a robust, independent and regular assessment of diversity and influence would both give the Australian community confidence that their interests are being looked after and help provide an evidentiary base to assist in the design of new measures.

One thing is clear: if you are not sure if or when a new market equilibrium will emerge, reflecting industry dynamism in regulatory frameworks is a real and important regulatory design challenge.

This is an argument against attempting to pick a new set of rules in the hope you've got it right for the next twenty years or so.

It is also an argument for principles and outcomes focussed regulation and a flexible, independent, well-resourced and evidence-informed regulator.

Conclusion

So at this moment, some very important things are apparent:

the regulator should be empowered to and resourced to gather a sound evidence base on which to assess risks and detriment and respond proportionately when required;

any responses must have built in flexibility and adaptability, rather than attempting to pre-emptively establish a revised media regulatory framework that appears to be, or even is appropriate for today's circumstances, but which cannot be expected to remain appropriate for 20 years;

just as other jurisdictions are recognising, we need a more nuanced way of assessing media influence and diversity of views and content, that takes account of the dynamic digital media environment and the real consumption patterns of and impacts on citizens; and

the challenges of delivering the objectives of promoting diversity and managing influence provide an opportunity for a fundamental rethink of our whole media regulatory construct.

Thank you for that rather large amount of your time.

Report - CAMLA Seminar

"Fair Use, Flexibility, Innovation and Creativity"

Ashleigh Fehrenbach, Associate, MinterEllison

On 22 February 2017, CAMLA presented its second seminar for 2017, "Fair Use, Flexibility, Innovation and Creativity", hosted by Clayton Utz. The seminar was well-attended by those interested in hearing from the esteemed panellists, Professor Patricia Aufderheide, Professor Sean Flynn, Professor Michael Geist, Professor Peter Jaszi, and author and lawyer Bill Patry, on the Productivity's Commission's report on Intellectual Property Arrangements in Australia. The seminar was moderated by Tim Webb, Partner at Clayton Utz.

The Productivity Commission's report, released on 20 December 2016, again brought fair use and flexibility into the spotlight in the Australian copyright debate. The Commission's view is that fair use is important for productivity and innovation, whilst others believe that fair use only spells uncertainty for content creators. The panel generated an informed and well-considered discussion about how fair use and fair dealing work in practise in the United States and Canada, what Australia should consider moving forward, and why there is a global trend towards more flexibility in copyright.

Tim Webb commenced the evening's discussion with a comprehensive rundown of the fair use debate in Australia. The scene was set with a caveat that whilst the panellists were all largely in favour of fair use, the Commission's report had been received negatively by certain groups. Some sectors had deemed the Commission's recommendation for fair use to be "a creator's nightmare and a lawyer's paradise" and an "ideological attack on content".

With this topical divide in mind, the panel discussion commenced with Professor Jaszi providing the background to fair use in the US, beginning with the first fair use case dating back to 1841.[1] As case law continued to develop in the US the *Copyright Act* was introduced in 1976. The Act grants five exclusive rights to copyright holders[2], all of which are subject to certain exceptions, including s107 which is the general exception of fair use. The section includes four key factors to be considered to determine if a use is "fair", these being purpose, nature, amount, and market effect of the use. Professor Jaszi noted that after a decade of initial conservative judicial interpretation, the US courts have gradually become more open and flexible in their interpretation of fair use.

The baton was then handed to Professor Geist to provide an account of the position in Canada. Professor Geist outlined the principle idea that in order to qualify under the fair dealing exceptions found in the *Copyright Act of Canada*, the dealing must be for a listed purpose (being research, private study, criticism or review, or news reporting) and must be fair. Professor Geist explained that the long running Supreme Court case of *Cinar Corporation v. Robinson*[3] was instrumental in the development of fair dealing in Canada, and addressed important issues including the appropriate test for copyright infringement, the role of expert evidence and the assessment of damages. This case also emphasised the need for a balance between user rights and creator rights. In 2012, the Canadian *Copyright Modernization Act* amended the *Copyright Act of* Canada to include the additional listed purposes of education, parody and satire.

With the jurisdictional boundaries between the US and Canada set, the discussion moved on to the topic of innovation with one panellist remarking that copyright legislation becomes problematic when it is not future-proofed for technological developments. A member of the panel observed that Australian legislation is not as flexible as it is in the US, especially with respect to innovative technology and this could result in business owners in Australia shifting their dealings overseas to get the value of more flexible copyright legislation.

The conversation segued to the major theme of the evening: would fair use in Australia be a disincentive to Australia's innovators and the creative community? The panel shed light on this proposition by providing practical examples from their own jurisdictions. An interesting discussion commenced regarding the concerns raised by US documentary film makers in 2005, who were increasingly constrained by insurers who demanded clearances for all copyright material included in the films before they would provide insurance. The *Documentary Filmmakers' Statement of Best Practices in Fair Use* was introduced, and resulted in filmmakers being able to lower their clearance costs whilst also dealing ethically with copyright protected material. One panel member commented that the document was instrumental in demonstrating that there was no clear evidence to suggest that copyright owners were losing out as a result of the type of fair use, and that documentary filmmakers are creators too.

The discussion moved on to the 2016 PWC report[4] commissioned by Screenrights, APRA AMCOS, PPCA, Copyright Agency, Viscopy, Foxtel

1 *Folsom v. Marsh* 9. F.Cas. 342 (C.C.D. Mass. 1841).

2 Section 106 Copyright Act 1976.

3 *Cinar Corporation v. Robinson* 2013 SCC 73.

and News Corp Australia, for the purpose of conducting a cost-benefit analysis of fair use. The predominant findings of the report were firstly, that fair use would create a disincentive for content creators and secondly, that it would not assist Australia's economy. One panellist strongly warned against the results of the PWC report, which they viewed as having been "debunked". The experience in Canada was then considered and a member of the panel noted that Canadians are increasingly paying for content and this is a real generational shift from when people would simply download material. It was considered that this was because the rights of content owners had been given more attention in the last decade.

The floor was later opened to questions and comments from the audience. Once audience member raised concerns about the fear of "wholesale copying" if Australia was to adopt a fair use exception. A panel member countered this concern by explaining that there have now been a number of cases in the US regarding fair use and that no "explosions" of wholesale copying had occurred. Rather, it has led to a steady, progressive development of fair use, which has been supported by US Supreme Court decisions in which not all fair use has been found to be fair.

When asked about the advantages of fair use over fair dealing, a consensus could not be reached. However, one panel member considered that Canada has developed from having very rigid fair dealing arrangement, to a much more flexible system, and this was a positive step. In general, the panellist noted that respect for copyright in Canada has gone up and infringement has gone down, and this gradual shift has had a major impact on universities, as students are thinking about copyright and licences—and not simply downloading material as had been a trend in the past. Switching to the US, a real advantage of fair use was considered to be the way that the legislation has been

drafted to be technology-neutral, and thus adaptable to technological change. The panel pressed that because Australia has a tendency to "make changes more gradually", if it does pursue fair use, it would be important for the legislation to be future-proofed to accommodate technological changes.

As the discussion was coming to a close, Professor Aufderheide suggested that the question that should guide considerations in Australia on the question of the introduction of fair use is: what is being lost to Australian culture under the current law? An example was provided with respect to education and the inability for teachers to use social media to design programs that cater to what is in essence a vast source of information.

The seminar provided some excellent insights into how Australia might navigate its way to a doctrine of fair use. One panel member noted that it was important to remember that "fair use is not free use", "not all use is fair use", and consequently a person cannot be totally for or against fair use in every case. With this in mind, it will be interesting to observe further developments in this space, and whether fair use will become an available tool for Australian users and creators.

4 "*Understanding the Costs and Benefits of introducing a 'fair use' Exception*", PWC, published February 2016.

About CAMLA

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

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

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

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

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