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Melania Trump, Her Husband and US Defamation Law

Matthew Richardson, Barrister at Level 6 St James Chambers, and Joy Guang Yu Chen offer some insights into US defamation law as pursued by the Trump family.

> We're going to open up those libel laws, so that when the New York Times writes a hit piece ... we can sue them and win money instead of having no chance of winning because they're totally protected...
>
> We're going to open up those libel laws, folks, and we're going to have people sue you like you've never been sued before.[1]

Donald Trump, then a candidate for the Republican presidential primary, made this threat at a rally in Texas in early 2016. He further complained of the mainstream media's propensity to publish 'purposefully negative and horrible and false' articles about him. To what extent can the new President follow through on his threat to 'open up' defamation law in the US?

In the most recent round of the libel litigation that has been a feature of the new President's life for years, his wife sued Mail Online in the US, and Daily Mail and Associated Newspapers in the UK for a 20 August 2016 publication titled 'Racy photos, and troubling questions about his wife's past that could derail Trump'.[2] The article contained allegations that prior to marrying Donald Trump, Melania Trump had, in her modelling days, worked as an 'elite escort' in the 'sex business'. Interestingly, a few weeks earlier the New York Post had published an article titled 'The Ogle Office' which contained ('before she was famous') naked modelling photographs of Melania Trump from 1995. This piece of tabloid titillation had been blithely praised by the Trump campaign – '[t]hey're a celebration of the human body as art. There's nothing to be embarrassed about. She's a beautiful woman.'[3] The subsequent publication met with a very different reaction.

The legal actions in the UK and United States were commenced despite the publication of a handsome apology on 2 September 2016.[4]

For the US suit against Mail Online, Melania Trump engaged Charles Harder, the Californian attorney who

1 See video imbedded at Hadas Gold, 'Donald Trump: We're going to open up libel laws', *Politico* (online), 26 February 2016 < http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

2 The same article published on Mail Online was titled 'Naked Photoshoots, and troubling questions about visas that won't go away: The VERY racy past of Donald Trump's Slovenian wife'.

3 See Jackie Wattles, 'Trump adviser (Jason Miller): Melania nude picture "nothing to be embarrassed about"', *CNN* (online), 1 August 2016 <http://money.cnn.com/2016/07/31/media/donald-trump-melania-new-york-post/>.

4 See Daily Mail Reporter, 'Melania Trump: A Retraction', *Daily Mail* (online), 2 September 2016 <http://www.dailymail.co.uk/news/article-3769798/Melania-Trump-retraction.html>.

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famously, and successfully, sued Gawker on behalf on Hulk Hogan and bankrupted the magazine. Harder initially filed suit in Maryland but that suit was dismissed after the Court found it lacked jurisdiction because of the lack of physical connection between Mail Online and the State of Maryland.[5] Not to be deterred, the Trump legal team immediately filed the suit again in New York, where Mail Online had offices. This new filing sought damages in excess of US 150 million[6] and included this incendiary claim: '[t]he economic damage to the Plaintiff's brand…is multiple millions of dollars. Plaintiff had the unique, once-in-a-lifetime opportunity, as an extremely famous and well-known person.'[7] After a moderate (for this family) scandal, the lawsuit was refiled with that sentence omitted.

On 12 April 2017, both US and UK matters were reportedly settled in Trump's favour for around US 3 million. An apology, agreed by both parties, was read in open court before Nicol J in the Royal Courts of Justice in London.

Some thoughts on US Defamation Law

It is curious that Trump's legal team chose to sue Mail Online in the US as well as Daily Mail in the UK for the printed version of the article. Plaintiffs often pursue defamation actions outside of the US because foreign jurisdictions lack the strong protection given to free speech (especially speech concerning public figures) provided by the First Amendment. The phrase 'libel tourism' has been coined for this practice of forum shopping.

In response to this libel tourism, the US enacted the *SPEECH Act*[8] in 2010. Under the *SPEECH Act* foreign defamation judgments are unenforceable domestically, unless it is shown that the foreign jurisdiction has a similar guarantee as the First Amendment, or that the matter would have succeeded if heard in the US. In terms of legislative change to libel laws that Trump could attempt, repealing the *SPEECH Act* would be one of the only options. Outside of the *SPEECH Act*, there are no federal defamation laws for Trump to amend or repeal. Defamation laws are made by State legislatures and State libel laws are notoriously tough and defendant-friendly.[9]

Rather, at the heart of 'those libel laws', which Trump referred to in his speech, stands the 1964 US Supreme Court decision of *NY Times Co v Sullivan*[10] and its interpretation of the First Amendment. That ground-breaking judgment found that a public figure cannot succeed in establishing defamation against reporters or publishers unless there was actual malice, that is, the publication was published 'with reckless disregard of whether [information] was false or not'. Affirming the significance of the First Amendment, Justice William Brennan wrote 'debate on public issues should be uninhibited, robust, and wide-open, and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'[11]

Trump's indignation and subsequent threat to 'open up' libel laws is perhaps understandable, given the high threshold established by *NY Times Co v Sullivan* and the fact that the First Amendment has thwarted him personally in the past.

In 2005 Tim O'Brien, then New York Times journalist, published *Trump Nation, The Art of Being the Donald*. In the book (which Trump had co-operated with and which was certainly no hatchet job), O'Brien had the temerity to challenge Trump's public statements that his net wealth was in the billions, instead citing various sources that placed Trump's wealth around US 150-250 million. Incensed, Trump sued O'Brien for US 5 billion in a defamation suit that dragged on for three years. During depositions, when Trump was asked whether his public statements about his net wealth were truthful, Trump gave this memorable answer: '[m]y net worth fluctuates, and it goes up and down with markets and with attitudes and with feeling, even my own feelings, but I try [to be truthful].'[12] Unwilling to actually disclose his financial records in compliance with discovery requirements, Trump was unable to substantiate his claim that he was, in fact, worth billions and not mere millions. Further, the Court applied *NY Times Co v Sullivan* and found there was no actual malice and dismissed the matter.[13] On appeal, a bench of three appellate judges affirmed the dismissal.[14]

Trump also unsuccessfully sued Paul Gapp, Pulitzer Prize-winning architecture critic for the Chicago Tribune. In 1984 Gapp wrote a column critiquing Trump's proposal to build a 150-storey skyscraper in Manhattan, calling it 'one of the silliest things anyone could inflict on New York'. The Court found that

5 *Trump v Mail Media Inc,* (NY Sup Ct, WL 477997, 6 February 2017).

6 Trump only sought 75,000 USD in the Maryland filings.

7 See the pleadings filed by the plaintiff on 6 February 2017, available at 'Melania Trump lawsuit argues "once in a lifetime" chance to make millions', *National Public Radio* (online), 7 February 2017 <http://www.npr.org/2017/02/07/513970871/>.

8 *Securing the Protection of our Enduring and Established Constitutional Heritage ('SPEECH') Act*, 28 USC § 4102 (2015).

9 See, eg, *Libel Terrorism Protection Act,* NY CPLR § 5304 (McKinney 2008).

10 *NY Times Co v Sullivan,* 376 US 254 (1964).

11 Ibid 376.

12 Ian Tuttle, 'The Litigious and Bullying – Mr Trump', *National Review* (online), 19 February 2016 <http://www.nationalreview.com/article/431575/donald-trump-tim-obrien-courtroom-story>.

13 *Trump v O'Brien,* (NJ Sup Ct, WL 2841286, 15 July 2009).

14 *Trump v O'Brien,* 422 NJ Super 540 (App Div 2011).

Gapp was expressing his opinion, which is protected by the First Amendment.[15] Further in 2014 Blair Kamin, another architecture critic for the Chicago Tribune, called the 'Trump' sign on Chicago Tower a 'wart' on a 'handsome skyscraper'.[16] This time, Trump turned to Twitter rather than a defamation suit.

In 2013 on NBC's 'The Tonight Show', (during the midst of the furore concerning then President Obama's birthplace gripping parts of US society) host Bill Maher made viewers an 'unconditional offer' to donate US 5 million to charity if Trump provided his birth certificate so as to prove he was not 'spawn of his mother having sex with an orang-utan'.[17] Trump attempted to sue but was forced to withdraw the matter against Maher. Not dissimilarly, *Hustler Magazine v Falwell*[18] involved the publication of a joke; an advertisement parody that portrayed Falwell in a drunken incestuous rendezvous with his mother. The US Supreme Court found that no reasonable person would take the publication as representative of true events, and so the author of the publication could not be liable in defamation.

Ironically, the new President may not wish people to sue him like he's never been sued before under the more relaxed libel regime he proposes. Unsurprisingly, he has also been the defendant in defamation suits, and he has of course benefited from reliance on the First Amendment. During Trump's campaign to be the 2016 Republican presidential nominee, Trump and Cheryl Jacobus, a GOP consultant, started what a judge later described as a 'hyperbolic dispute cum schoolyard squabble', which resulted in Trump tweeting that Jacobus was a 'dummy' and 'major loser' who 'begged' Trump for a place on his campaign. Jacobus sued Trump on the basis that the accusations of unprofessional conduct damaged her reputation.

In *Jacobus v Trump*,[19] the judge considered defamation in the age of social media and commented, in what sounds like something approaching despair, that 'truth itself has been lost in the cacophony of online and Twitter verbiage to such a degree that it seems to roll off the national consciousness like water off a duck's back.'[20] In this context, the Court found that no reasonable reader would have taken Trump's tweets to be a statement of fact. Rather, following *Trump v Chicago Tribune*, the tweets were an expression of opinion protected by the First Amendment.

And so to 'open up those libel laws' Trump would be required to convince the US Supreme Court to revoke its decision in *NY Times Co v Sullivan*. As President, Trump can of course make Supreme Court nominations, however, it is unlikely any conservative judicial appointee will go soft on the First Amendment or be willing to stifle opinion and public debate.[21] Indeed, Neil Gorsuch, Trump's nominee and the latest addition to the Supreme Court bench, has a record of ruling favourably for the media in libel matters.[22]

The difficulties in finding anti free speech justices for the Supreme Court pale in comparison to the President's threat to use legislation to 'open up' libel laws, which would be a direct attack on the First Amendment itself. Constitutional amendment, under Article V of the US Constitution, provides a two-step process. First, the amendment must be proposed and accepted by both legislative Houses with a two-thirds majority. Second, the legislatures of 38 States (75% of the States) must ratify the amendment. Since federation, there has been some 11,000 proposals put to the Houses. Only 33 have made it to the second stage, and the States have ratified 27 of these. Constitutional amendment is a mammoth task and for a President who is struggling to capitalise on a Republican majority in Congress, even to secure legislation on his core promises, it seems, at least for now, distinctly improbable.

On 1 May 2017 Reince Priebus, Trump's chief of staff, revealed that the Trump administration is actively looking into changing libel laws, especially how it applies to news media. Evidently aware of the aforementioned difficulties, Priebus concluded with the proviso, 'as far as how that gets executed or whether that goes anywhere is a different story'.[23]

There does not seem to be any need for free speech warriors to panic yet. However, this administration is young – it has 45 months to run and the new President tends to defy prediction.

15 *Trump v Chicago Tribune Co,* 616 F Supp 1434 (SD NY, 1985).

16 Blair Kamin, 'Donald Trump: Giant sign on his Chicago Tower like Hollywood sign', *Chicago Tribune* (online), 5 June 2014 <http://articles.chicagotribune.com/2014-06-05/news/ct-trump-sign-kamin-met-0606-20140606_1_hollywood-sign-chicago-tower-donald-trump>.

17 Joseph Ax, 'Trump withdraws "orangutan" lawsuit against comic Bill Maher', Reuters (online), 2 April 2013 < http://www.reuters.com/article/entertainment-us-usa-trump-lawsuit-idUSBRE9310PL20130402>.

18 *Hustler Magazine v Falwell,* 485 US 46 (1988). This case is also authority for the proposition that public figures may not seek damages for the intentional infliction of emotional distress for satirical publications or parodies unless actual malice can be established.

19 *Jacobus v Trump,* 45 Media L Rep 1097 (NY Sup Ct, 2017).

20 Ibid 19.

21 As an example the unanimous bench in *Hustler Magazine v Falwell* included conservative stalwarts then Chief Justice Rehnquist and Justice Scalia.

22 'Special report on Supreme Court nominee Neil Gorsuch', *Reporters Committee for Freedom of the Press* <http://www.rcfp.org/gorsuch-report>.

23 Martin Pengelly, 'Reince Priebus says White House is looking into change to libel laws', *The Guardian* (online), 1 May 2017 <https://www.theguardian.com/media/2017/apr/30/reince-priebus-libel-law-change-media-white-house>.

Defamation, Online Communication and Serious Harm: An Alternate Approach

Tom Davey examines how the law of defamation is challenged in the online space and proposes a solution.

The internet poses significant challenges to the law of defamation. It raises new questions regarding almost all elements of the tort, from liability and identification to publication and meaning. This paper examines how the law is challenged by online communication and proposes a hybrid solution that can protect both publishers and victims online.

The Challenges of Online Communication

Online communication challenges defamation law, particularly the presumption of harm. The difficulty of ascertaining the meaning of material, particularly that authored in small and relatively niche communities, can prejudice both defendants and plaintiffs.

A. Meaning and Computer Mediated Communication

Online communication cannot fully 'replicate face-to-face cues' and thereby increases the 'chances of miscommunication, and in turn, conflict.'[1] The problem is exacerbated when online communities establish their own speech cultures and when the anonymity of online communication fosters 'a sense of impunity, loss of self-awareness, and a likelihood of acting upon normally inhibited impulses.'[2] These circumstances disrupt traditional ideas of politeness and meaning and raise the question: if this is the 'normal' type of behaviour on the internet, should the law not account for it?

B. Interpreting Meaning

What is considered defamatory changes over time. In Australia and the United Kingdom, statutory defamation laws do little to assist judges in determining what meaning is conveyed by a publication. The problem is not just that there is a presumption of damage in the tort of defamation, but that the presumption attaches as soon as the court determines that the publication is capable of containing a defamatory imputation.

Online communications can be made to groups of any size in any location. These communications may occur in the 'public sphere' or in closed groups, inhabited only by members who are aware of the particular speech culture within that group. Any social group is going to have a unique manner of communicating. The difference with online communication is the scale and disparity of cultures. Some cultures have emerged due to the anonymity afforded by the internet, others through a desire to connect with likeminded people across the globe. The impact on defamation law is that *meaning* is obscured and 'acceptable speech' or 'acceptable culture' can no longer be calculated solely in relation to the proximate peers of the defendant, plaintiff or judge.

Arguably the matter is concluded when an online publication, read by an 'ordinary' reader, contains a defamatory imputation. However, this fails to take into account the rational, ordinary reader who, while perhaps offended, will process the communication knowing that they do not understand the culture of the forum. The ordinary person may expect the meaning to evolve quickly on the internet.

Take the device '/s' , for example. These characters are often used on the popular aggregator site Reddit. It means that the preceding statement was intended to be sarcastic. How should the *courts* interpret such a statement? If the intended audience understood its purpose, should the court automatically censor or punish the publication simply because not everyone understands the intended meaning?

If we assume that most people understand sarcasm in person we could also assume that the courts would take the imputation of that comment to be sarcastic. However, in a platform as diverse and disparate as the internet, meaning and understanding is not uniform. Sites like Reddit have large groups of frequent users. Their content, however, is frequently distributed throughout the mainstream media to audiences who have not necessarily been conditioned to the use of a given site's terminology.

Furthermore, messages republished to new audiences are unlikely to be filtered in the same way a message may be filtered or reworded by a newspaper so as not to be defamatory. Online republication is a near zero cost exercise. This is a paradigm shift for publishers, and provides individuals with 'direct and usually unreviewed, means of publication.'[3] Individual publishers are not covered by traditional media guidelines nor do many everyday users have any particular training in language, semantics, publication or meaning. The issue is compounded when the words themselves are not reflective of the intended meaning.

1 Claire Hardaker, 'Trolling in asynchronous computer-mediated communications: from user discussions to academic definitions' (2010) 6 *Journal of Politeness Research* 215, 223.

2 Ibid, 224.

3 Jennifer Ireland, 'Defamation 2.0: Facebook and Twitter' (2012) 17 *Media and Arts Law Review* 53, 55.

C. The Triviality Defence

In New South Wales, the primary defence against defamatory material that is of a less serious character is the triviality defence under section 33 of the *Defamation Act 2005* (NSW). It has been argued that technology neutral laws do not necessarily provide technology-neutral outcomes. The triviality defence has little useful effect in the world of online communication.[4]

Statements on platforms like Facebook are 'developing a certain notoriety for being... [u]ninhibited, casual and ill thought out... [r]ough and ready, rapid fire... [a]kin to everyday expression.'[5] Speech culture on Facebook demonstrates the 'defamatory risk factors' that 'hail from a disinhibition born from an intimate, confidential and safe setting, which users may assume arises on Facebook.'[6] In short, Facebook is a platform conducive to a type of defamation that cannot be captured by the triviality defence. Rather, ''the triviality defence is more likely to succeed when publication is to a limited rather than wide, audience.'[7] This may indeed occur on Facebook, however, the nature of the platform means that any publication – no matter how private or contextualised it was intended to be – can often be seen by a massive audience. Kim Gould has argued that 'conventional wisdom dictates that the wider the potential reach of defamatory material, the greater the potential for harm.'[8] As a result the triviality defence is unlikely to provide much protection for online publishers.

In practice, it appears that in NSW the triviality clause has been rarely argued successfully. Whilst the courts have denied that the clause is redundant,[9] its lack of use suggests that something is amiss.

A Three Step Solution

This paper proposes a three-step solution to address the tension that exists between meaning and protection, online.

A. Serious Harm

Recent reforms to the United Kingdom's *Defamation Act*[10] were influenced by the high costs of defamation action, libel tourism and the impact of the *Human Rights Act 1998* (UK).[11] One of the most significant changes was the introduction of a serious harm test.[12]

At the time of the reforms, the United Kingdom's Justice Minister, Shailesh Vara, said that because of the new laws 'anyone expressing views and engaging in public debate can do so in the knowledge that the law offers them stronger protection against unjust and unfair threats of legal action...to ensure a fair balance is struck between the right to freedom of expression and people's ability to protect their reputation.'[13]

At its core, this is exactly what section 1 of the UK act does. It requires 'proof that the statement complained of did in fact cause serious harm, or is likely to cause serious harm, to the claimant's reputation.'[14] The test 'represents a crucial modernisation of defamation law, giving better regard to free speech considerations and the efficient use of court and party resources.'[15] In contrast, it has been argued that Australia's triviality defence 'is inadequate in protecting defendants, primarily through the onerous burden to disprove the existence of any harm, and the defence's failure to give consideration to pre-litigation dispute resolution.'[16] A serious harm test 'would be a welcome reform in Australia, particularly given its potential utility in addressing challenges associated with online communication.'[17]

However, the UK reforms were developed without extensive consideration of online communication. If Australia were to reform its defamation law in a similar fashion, it would be an ideal opportunity to further refine the law for modern times.

B. Sectional Community Perspectives

A serious harm defence would also provide protection for publishers within small communities from inaccurate interpretations of their content. It would require the plaintiff to prove harm. However, it would also reduce the protection afforded to victims of defamation within those same communities.

A potential solution may be found in the coupling of a more nuanced presumption of harm with a requirement for serious harm. Such a system could provide suitable protection for both publishers and the defamed.

4 Kim Gould, 'The statutory triviality defence and the challenge of discouraging trivial defamation claims on Facebook' (2014) 19 *Media and Arts Law Review* 113.

5 Ibid, 119.

6 Ibid.

7 Ibid, 132.

8 Ibid.

9 *Enders v Erbas & Associates Pty Ltd* [2014] NSWCA 70, [108] (Tobias AJA).

10 *Defamation Act 2013* (UK).

11 Phoebe J Galbally, 'A 'serious' response to trivial defamation claims: An examination of s 1(1) of the Defamation Act 2013 (UK) from an Australian perspective' (2015) 20(3) *Media and Arts Law Review* 213, 215-32.

12 *Defamation Act 2013* (UK) s 1.

13 Galbally, above n 20, 222.

14 Ibid, 229.

15 Ibid, 250.

16 Ibid.

17 Ibid.

Gary Chan examines the divide between defamatory potential determined from 'sectional community perspectives' and 'general societal perspectives.'[18] Existing law adopts the latter, which 'protects the defendant in that the statements he publishes would not be regarded as defamatory unless the right thinking members of society generally or ordinary reasonable persons view them as lowering the reputation of the plaintiff.'[19] What it does not do is 'take into consideration at the time of publication the views of all the disparate sub communities or enclaves to whom the publication is communicated.'[20] This is what Chan calls the 'sectional community' perspective.

Chan acknowledges that 'reputation itself is dependent on social relationships,'[21] and that in society, social relationships are diverse, intertwining and not wholly integrated.[22] He examines the English case of *Arab News Network v Al Khazen*, where a court held that modern society is 'much more diverse than in the past…. The reputation of a person within his own racial or religious community may be damaged by a statement which would not be regarded as damaging by society at large.'[23] Whilst the application was to a relatively large segment of society, the court essentially adopted a sectional community perspective to determine the defamatory meaning of the statement.

The decision in *Arab News Network* is an anomaly but reveals that 'the argument for adopting the sectional community perspective... [remains] as, if not more, relevant today in this internet age.'[24]Such an approach is not wholly out of step with Australian law. Chan notes that already 'the general society perspective does not refer to a consensus view that is shared by all members of the society.'[25] Rather, it looks to the views of a representative few in the form of a jury.

In Australia, the sectional view of the community has been adopted during the calculation of damages. In 2014, in *Nicholas Polias v Tobin Ryall*, Justice Rothman went as far to suggest that the communal and confided nature of the online poker community enhanced the damage to Mr. Polias' reputation.

Chan suggests a three tiered approach to determining whether or not a communication is defamatory. Step one is the default approach used by the law today; step two, adopted if the plaintiff cannot satisfy step one, considers a relevant sectional view; and step three is the application of standards by the courts to curtail the previous two in light of policy considerations.[26]

These tests essentially lower the bar for the plaintiff, allowing them to argue that they were defamed in relation to only a small portion of the community, a portion that the majority of society may not relate too. However, the steps above do not protect defendants whose communications are improperly interpreted. To protect them, a fourth step should be introduced. That is, a requirement that the harm suffered must be serious. Such an approach would rebalance the law. It would protect the publisher from claims where publications have ambiguous meaning, but also provide protection in situations where harm has clearly been caused.

Conclusion

Defamation law is an important protector of human dignity and free speech. It is, however, challenged by modern forms of communication and speech culture. This paper argued that online communities are divergent and disrupt traditional communication norms. It proposed a three step process for filtering potential defamation actions. These steps consider the nature of online communication and the remedial qualities inherent in the internet to provide balanced protection for both publishers and the defamed.

Tom Davey is a Graduate at Jones Day and was a finalist in the 2017 CAMLA Young Lawyers Essay Competition with an earlier version of this paper.

Editor's Note

Aspects of this article may change as the law develops following the decision of McCallum J in Bleyer v Google Inc [2014] NSWSC 897. As Katherine Giles discusses in the following article, her Honour permanently stayed a defamation claim against Google Inc on the basis that the legal costs and court resources required for the claim to proceed were out of all proportion to the plaintiff's interest at stake. To be clear, the defendant did not rely on the defence of triviality. Rather, it argued that the plaintiff's interest in bringing the claim was trivial, given he acknowledged that any judgment in his favour would not be enforceable against the foreign defendant, and the audience to the publication was limited to three people. Nevertheless, there is a clear relationship between the triviality defence, and the Court's power to stay proceedings as an abuse of process based on the disproportion between the likely costs of the trial and the potential benefit available to the plaintiff.

18 Ibid.
19 Ibid, 62.
20 Ibid.
21 Ibid, 59.
22 Ibid, 59.
23 *Arab News Network v Al Khazen* [2001] EQCA Civ 118, [30].
24 Chan, above n 29, 60.
25 Ibid, 56.
26 See eg,., ibid, 77.

Tell Them They're Dreaming

Media Defendants and the Defence of Triviality

Katherine Giles looks at the defence of triviality, and whether much has changed in the 40 years since Morosi v Mirror Newspapers Ltd

It has been 40 years since the case of *Morosi v Mirror Newspapers Ltd*[1] ('*Morosi*') and the succinct thirty word defence of triviality, whilst interesting, is still of little comfort to media defendants:

> 'It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.'[2]

In *Morosi*, the media defendant, Mirror Newspapers, relied on the statutory defence of triviality when sued by Juni Morosi for publishing the claim that she had a 'romantic attachment' with the Treasurer, Dr Jim Cairns.[3] The court held that the statutory defence of triviality 'is concerned with "the circumstances of the publication" and the likelihood of harm.'[4] The circumstances of publication are the circumstances at the time of publication, and the likelihood of harm arising means the absence of a real chance or real possibility of harm, and not whether the harm did actually arise.[5]

It was held to be a defence to trivial actions for defamation, and was limited to publications made to a small group rather than 'a vast number of unknown people'. The court noted: 'It would be particularly applicable to publications of limited extent, as, for example, where a slightly defamatory statement is made in jocular circumstances to a few people in a private home.'[6] It would not be very helpful to a media defendant publishing to the public at large, even where a publication is made in jocular circumstances, and where it is unlikely that any harm to reputation would arise from the publication.

In addition to examining the circumstances at the time of publication and considering the likelihood of harm, the triviality must relate to the 'circumstances of the publication' and not the reputation of the person defamed—or any pre-existing 'bad' reputation.[7] The circumstances of publication include: the publication itself; the occasion and surrounding of circumstances of the defamatory statements; the extent of the publication; and the number and identity of the recipients and any knowledge that they had of the plaintiff such that the plaintiff would be unlikely to suffer any harm.[8]

Media defendants have continued to have little success relying on the defence of triviality. This was demonstrated in *Cornes v Ten Group Pty Ltd*[9], where the defence of triviality had limited application; even when comedy (as argued by the defendants) was involved. During a live interview in the Channel Ten television program *Before the Game*, the comedian Mick Molloy made what he argued was a joke about Nicole Cornes, and the bounds of her relationship with an AFL player. Cornes sued Molloy and Channel Ten for defamation, and was successful.

The defendants argued that it was joke, that did not contain a defamatory imputation, and an ordinary reasonable viewer would not have understood the joke as defamatory. They also relied on the defence of triviality. Peek J fleetingly dismissed the defence of triviality, stating that it was 'quite obvious that this defence cannot be made out in this case.'[10] Noting that the serious nature of the defamatory comment and the circumstances were both relevant, Peek J stated:

> 'I can understand that what might appear on its face to be a relatively serious defamatory comment might possibly qualify for this defence in quite different circumstances, say, of a very limited publication to a few persons in a room in circumstances where each of such persons believed that the statement was not true. Such statement would still be defamatory but might be rendered trivial by the fact that it could positively be established that it had very little deleterious effect. The present is not such as

1 [1977] 2 NSWLR 749 ('Morosi').

2 Section 33, *Defamation Act 2005* (NSW), (VIC), (QLD), (TAS), (WA), (VIC); section 139D, *Civil Law (Wrongs) Act 2002* (ACT); section 30, *Defamation Act 2005* (NT); and section 31, *Defamation Act 2005* (SA).

3 Section 13, *Defamation Act 1974* (NSW).

4 Morosi, 799.

5 Ibid. With reference to *Parker v Falkiner* (1889) 10 LR (NSW) 7, 10; 5 WN 57, 61. See also *Chappell v Mirror Newspapers Ltd* (1984) Aus Torts Reports 80-691, 68,947 ('Chappell'); *Jones v Sutton* (2004) 61 NSWLR 614, 624 ('Jones'); and *Barrow v Bolt* [2015] VSCA 107, [34] ('Barrow').

6 [1977] 2 NSWLR 749, 800.

7 Chappell, 68, 947.

8 Morosi, 800.

9 [2011] SASC 104.

10 Ibid, [113].

case for any number of obvious reasons.'[11]

The limited nature of the defence is also demonstrated by *Barrow v Bolt,*[12] where a journalist was able to rely on the defence of triviality; but only because the defamatory imputations were 'mild' defamatory imputations about a complainant to the Australian Press Council and were published to a small audience of two people (being the journalist's employer and an Australian Press Council officer) via an intra-office email. Further, the defendant proved that the plaintiff was unlikely to suffer any harm to his reputation. The relevant circumstances were referred to as follows:

> '… In particular, I refer to the following circumstances. The impugned email went only to two persons. I consider that the tenor of the email makes it clear that the author was expressing his personal opinion, rather than saying that the plaintiff has been declared to be a vexatious litigant. Although the email did not contain the factual foundation for the opinion, its recipients, Mr Armsden and Mr Herman were aware of at least some of it, and I consider that it is likely they would have seen the opinion for what (in my view) it was. It is also clear that the defendants were responding to one of many complaints made by Mr Barrow to the APC. There is no evidence of any "grapevine effect" or the likelihood of same at the time of publication. The only "leakage" of the impugned email was caused by the plaintiff himself who published it on his website.'[13]

Beyond the references to opinion, it is clear that the circumstances will ultimately depend on the facts, and the wider the publication the more unlikely the defence will be available. Where relevant the circumstances will also include the chance of republication — including the 'grapevine effect,' where the allegation is repeated from person to person and to a potentially larger group of people.[14] Although, any subsequent media focus on pleadings filed in court in public documents and the subsequent legal proceedings is not relevant.[15]

In recent years there has been speculation that the defence of triviality has scope for application to internet and other social media publications, where 'circumstances of publication' and 'harm' can be interpreted to reflect the, sometimes, limited nature of social media publications, and the different character of these publications.[16] In *Prefumo v Bradely,*[17] Corboy J noted that internet and social media publications lacked 'formality and consideration… often in a language that is blunt in its message and attenuated in its form. That will affect what is regarded as defamatory and the potential for harm.'[18] The opposite argument could be made for the circumstances of publication via the internet or social media, when the internet provides global and limitless publication, and social media posts can spread quickly. Again, even if the circumstances of a social media publication can be characterised accordingly (and as yet, this is not the case), this of little application to media defendants more generally. Indeed, writing extrajudicially, Judith Gibson notes that this is yet to be tested, and will hopefully be the subject of legislative reform including a test for serious harm.[19] Judge Gibson argues that, the defence of triviality, 'remains a defence of very limited ambit, particularly since the ambiguity as to what any harm at all means remains a bone of contention.'[20] Further, a test for serious harm may also provide reprieve for media defendants seeking to rely on the defence of triviality.

As demonstrated in *Bleyer v Google*[21] ('*Bleyer*'), serious harm is not yet a hurdle and as interesting as the defence of triviality is, it is only a defence. In *Bleyer*, a case before McCallum J in the Supreme Court of NSW, the plaintiff commenced defamation proceedings against the defendant Google on the basis of seven publications comprising two kinds of defamatory matter allegedly published by Google: firstly, in a snippet of a web page in a search result; and secondly, in a full web page hyperlinked and identified in a search. The plaintiff was only able to demonstrate that these publications had been accessed by three people. By notice of motion, Google sought an order to stay permanently or to dismiss summarily the defamation proceedings on the basis that the costs and resources involved in litigation would be an abuse of process and wholly disproportionate to the vindication of the plaintiff's reputation. Much of the argument focussed on the application of the decision of the English Court of Appeal in *Jameel (Yousef) v Dow Jones & Co Inc*[22] ('*Yousef*'), where it was held that an insignificant level of publication meant that there was not

11 Ibid.
12 [2013] VSC 599.
13 Ibid, [71].
14 Jones, [60].
15 Ibid, [54]. See also *Smith v Lucht* [2015] QDC 289, [52] ('Smith No.1').
16 Kim Gould, 'The statutory triviality defence and the challenge of discouraging trivial defamation claims on Facebook', 19(2) *Media Arts Law Review* 113.
17 [2011] WASC 251, [43].
18 Ibid.
19 Judith C Gibson, 'From McLibel to e-Libel: Recent issues and recurrent problems in defamation law', *State Legal Convention* (30 March 2015), 14-17.
20 Ibid, 17.
21 [2014] NSWSC 897 ('Bleyer').
22 [2005] EWCA Civ 75; [2005] QB 946.

a real and substantial tort. McCallum J examined Australian decisions relying on or considering *Jameel*, concluding that whilst useful none provided a basis for determining the issue of staying or dismissing a defamation action as an abuse of process and proportionality.[23] In particular, McCallum J considered the case of *Bristow v Adams,*[24] where Basten JA did not consider that leave should be given to rouse a novel point contingent on *Jameel* for the first time on appeal, and made reference to the defence of triviality.[25] On the availability of the defence of triviality, McCallum J stated:

> 'In *Bristow*, Basten JA said that account might need to taken of the separate defence provided by s 33 of the *Defamation Act 2005* (NSW), described as the defence of "triviality", and its relationship to the power to stay for abuse of process based on a disproportion between the likely costs of the trail and the possible outcome. Google Inc noted that the defence is unlikely to apply to internet or media organisations: see *Morosi*... I do not think the potential weakness of the defence deals with the point to which Basten JA was referring in *Bristow*. As I understand his Honour's remarks, they are directed to the issue whether a power to stay an action on grounds amounting in effect to a complaint of triviality can comfortably sit alongside the defence of that name.

I do not think the existence of the statutory defence undermined or is inconsistent with the existence of a power to stay proceedings on that basis. The source of the power to stay proceedings as an abuse of process is the institutional authority of the court. Defences protect defendants. The existence of a defence to the action is to little avail to the court in protecting the integrity of its own processes (assuming, as I think I should, that includes the fair and just allocation of finite resources).'[26]

McCallum J ultimately concluded that the court has the power to stay or dismiss an action on the basis of abuse of process, and the proceedings were stayed pursuant to the *Civil Procedure Act 2005* (NSW). However beyond the other considerations raised, with regards to triviality the words '[d]efences protect defendants', illustrate the limitations of the defence of triviality as applicable only after the plaintiff has established a defendant's liability for defamation.

Most recently, we saw the defence of triviality successfully engaged (however, only as a defence), in *Smith v Lucht*[27], otherwise known as *The Castle* case. In this case the District Court of Queensland dismissed the plaintiff's claim for defamation based on an imputation conveyed when the defendant referred to the plaintiff, who was also a solicitor, as a 'Dennis Denuto'. As Moynihan DCJ explained:

> 'Dennis Denuto is a central character in the popular Australian film *The Castle,* which relates to the fictional story of Dale Kerrigan and his family's fight against the compulsory acquisition of their home. Dennis Denuto is the Kerrigan's solicitor. He is portrayed as likeable and well-intentioned, but inexperienced in the matters of constitutional law... His appearance in the Federal Court portrayed him as unprepared, lacking in knowledge and judgment, incompetent and unprofessional. His submission concerning 'the vibe' is a well-known line from the film.'[28]

The relationship and family connections between the plaintiff and the defendant, and the imputations arising from the words 'Dennis Denuto' are, although both extraordinary and perhaps amusing, not relevant to any examination of the defence of triviality. With reference to the defence, Moynihan DCJ concluded:

> 'the defendant has proved, that at the time of the publication of the defamatory matter, the circumstances of publication were such that the plaintiff was unlikely to sustain any harm to his reputation as the statements were confined to two members of his family with whom the defendant was in dispute, and they were able to make their own assessment of the imputation.'[29]

The circumstances of the publication were such that the plaintiff was unlikely to sustain any harm, and any harm was confined to harm to reputation.[30] This again demonstrates the limited application of this defence for media defendants when the 'circumstances of publication' are so limited. Not surprisingly, not much has changed since *Morosi*, and the triviality defence continues to be a defence of very limited application, particularly for media defendants.

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23 *Grizonic v Suttor* [2008] NSWSC 914; *Bristow v Adams* [2012] NSWCA 166; *Manefield v Child Care NSW* [2010] NSWSC 1420; *Barach v University of New South Wales* [2011] NSWSC 431.

24 [2012] NSWCA 166 ('Bristow').

25 Bleyer, [40]-[41]; Bristow, [41].

26 Ibid, [58]-59].

27 Smith No.1. Appeal dismissed in *Smith v Lucht* [2016] QCA 267 ('Smith No 2').

28 Ibid, [17].

29 Ibid, [42].

30 Smith No.2.

Profile: Larina Mullins, Senior Litigation Counsel at News Corp Australia

CAMLA Young Lawyers representative, Katherine Sessions, caught up with Larina Mullins, Senior Litigation Counsel at News Corp Australia to discuss working in-house at a major Australian news organisation.

KATHERINE SESSIONS: Where do you work, and what is your role in the organisation?

LARINA MULLINS: I am Senior Litigation Counsel at News Corp Australia. I act for a wide range of publications from The Australian, The Daily Telegraph, The Courier-Mail and our newspapers across the country, for our digital team at news.com.au, and our magazines including Vogue Australia.

I advise journalists and editors on their stories before publication, and handle complaints and litigation afterwards. This mostly involves defamation but often raises other areas of law such as copyright, contempt of court, statutory restrictions on publication, freedom of information, contract law and criminal procedure.

After more than a decade as a fee-earner in private practice, I was worried that moving in-house meant I would no longer be valued. Would I be just another expense to the business? A roadblock for the reporters to get around? Thankfully, I don't get that sense here at all. I work collaboratively with the passionate and driven journalists, editors, photographers, marketers, printers and executives who make up this massive organisation. And when it comes to our newspapers, for the first time in my career I make something tangible. I can hand an edition to my son and say "Mummy helped make this today". I am very proud of that. (He will usually draw on it or cut it up but that's okay, he's only five!)

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

MULLINS: To start at the beginning, I did combined Law and Arts degrees at the University of Queensland. I majored in media studies, as I have always had an interest in the media industry.

After graduation I was an associate in the Federal Court, which established my love for litigation. I realise that some people don't like it – I have a couple of lawyer friends who break out in hives at the thought of speaking in a courtroom – but I adore everything about it. The pressure that intensely focuses your mind. The surprises that can be terrifying but also make you think quickly, improvise and do some of your best work. I especially enjoy the theatricality of the courtroom: the dramatic entrances of the Judges from backstage, the wigs and gowns, and the nuanced performances of counsel.

I moved to London and progressively landed jobs at the litigation department of the BBC, the music litigation team at Hamlins, and then the boutique West End firm Schillings. Schillings specialises in defamation and privacy, and I was fortunate to be there when super injunctions were at the height of their infamy. I acted for music legends, Hollywood movie stars, British footballers, Russian oligarchs and European royalty. I would love to name drop but my excellent work in obtaining those watertight injunctions makes it unlawful for me to do so.

When I came back to Australia, Sydney beckoned and I heard about this role at News Corp through a friend. It was a perfect fit … once the business was willing to overlook my shameful past of being a plaintiff lawyer who won cases against their UK newspapers. I am now the very definition of a 'poacher turned gamekeeper'.

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

MULLINS: Advocacy is the most interesting part of my role at News Corp. I appear in defamation litigation on imputations arguments, interlocutory applications and directions hearings. I also do a lot of court appearances to oppose suppression orders: more than 100 in the past two years. This is particularly rewarding as I am advocating for open justice and the public's right to know, and often see the story on the front page the next day.

However, it can be challenging too as I usually get a frosty reception from opposing counsel and even the judiciary. Recently when I announced my appearance for The Daily Telegraph, a District Court Judge

launched into a 20 minute tirade about their failings in covering his previous trials. But by the end of it, his Honour thanked me for the cathartic experience, saying he felt much better after getting all that off his chest. For a split second I was going to say I would bill him for the therapy but thankfully I thought better of it, and got on with my application (which I won).

SESSIONS: Social media technology is changing the way that we absorb and respond to media. 'Fake News' is a term that didn't exist a year ago - though now resonates with the way many prominent figures and the general public may perceive the news provided through social media. What role do you believe defamation law will play in responding to 'fake news'?

MULLINS: I don't believe defamation law is going to provide the silver bullet for this problem. Even relatively simple claims can take at least two years to get to trial. I am reminded of the adage "a lie gets halfway around the world before the truth has a chance to get its pants on".

It would be comforting to think that defamation law could result in the bankruptcy of fake news peddlers. We have seen Hulk Hogan's privacy award of $140 million result in the bankruptcy of Gawker. However, fake news does not come from a few identifiable media companies operating in the same country as their victims. It is pouring in from small operators around the world that cannot be identified, cannot be served or would not come to court in any event.

There is no way to entirely prevent fake news, just as there is no way to stop people telling lies online. I just hope that the social media platforms come through on their promises to take action when their own technology is being abused in this way. I also have faith in the general public: that we will get better at recognising fake news, we will fight the urge to take the click-bait, and we will continue to support professional journalism.

SESSIONS: What do you consider to be the most interesting defamation case law that Australia has faced?

MULLINS: I found Joe Hockey's case against Fairfax fascinating. There were fireworks with the editors' emails. Suspense as privilege was waived over the in-house lawyer's pre-publication advice on the story. And the rollercoaster of a judgment where the articles were not defamatory but the poster and tweets were, then the plot twist of the costs award. If you proposed it as an episode of the TV show 'Rake', it would be thrown out as too unbelievable.

SESSIONS: What are some tips for young lawyers looking to work in defamation law?

MULLINS: Come along to CAMLA events! Most of the solicitors and barristers working in defamation law will be there. I despise the word 'networking' but that's precisely what it is and it can be helpful.

I also recommend watching a defamation hearing. It can be very hard to find the time to do this but I promise it will be worth your while. In Sydney, anyone can watch the defamation lists on Thursdays in the District Court and on Fridays in the Supreme Court. You can see how defamation law actually operates, and put faces to the Judges' and barristers' names that you read in all the judgments.

Katherine Sessions
Regulatory Affairs, ACMA and CAMLA Young Lawyers representative

Journalism, The Arts and Data Protection:
The Potential Reach of the Privacy Act

Sally McCausland considers the application of data protection laws to media and arts content in Australia and the United Kingdom. She raises the possibility that a person aggrieved by the use of their personal information in media, artistic or literary content may seek relief under the Australian Privacy Act.

In the United Kingdom, newspapers, biographers and other content producers and creators have been sued for breach of privacy by the subjects of their work. While many of these claims are based in the common law tort of invasion of privacy, increasingly, claimants are seeking relief under the United Kingdom's Data Protection Act 1998 ("UK DPA").

Australia does not yet have a common law tort of invasion of privacy. However, it does have a local equivalent of the UK DPA; the *Privacy Act* 1988 (Cth) (the "Act"). The Act was originally introduced to regulate the handling of individuals' personal information by Commonwealth government and agencies. (State legislation[1] regulates state government agencies along similar lines).

The scope of the Act has significantly expanded since its introduction. It now covers medium to large Australian businesses[2] and overseas operators carrying on business or collecting personal information in Australia.[3] Consequently, there are many more producers and publishers of "media", or journalism, and of the "arts" (including literary, dramatic, digital and visual arts) operating in Australia who are potentially subject to the Act.

It is commonly assumed that the Act has no application to media or the arts. This assumption is outdated, if ever it was true. To date there have been no successful claims under the Privacy Act involving this kind of content. However, if potential claimants begin to successfully use data protection laws as they have in the UK, then we may see the Act being cited by persons whose personal information is used in media and artistic content. This would seem to be an inadvertent, rather than intentional, outcome of the parliamentary drafters.[4] However, unlike in the UK, the Act has no broad public interest exception for media and the arts. Further, remedies under the Act have been strengthened, and it is now established that a breach of the Act can ground a claimant's right to seek direct injunctive relief in the Federal Court of Australia.

This article briefly compares data protection laws and their application to media and arts content in Australia and the United Kingdom. It then explores the possibility that a person aggrieved by the use of their personal information in media or artistic content may potentially seek relief under the Privacy Act, with consequences for freedom of expression.

1. Application of the Act to media and arts producers and publishers

While individual journalists, writers and other artists are generally not subject to the Act, many entities which produce or publish their work are. The public broadcasters, and various Commonwealth museums and arts bodies are covered, as are larger media publishers, production companies, galleries and distributors.

An entity which is subject to the Act is an "APP entity" and amongst other things must display a compliant privacy policy on its website.

Whether global content companies such as Netflix are APP entities depends on whether they have an "Australian link" as defined in section 5B of the Act. Despite numerous opportunities for legislative refinement, the geographical and jurisdictional nexus provisions of the Act can still be described as "sketchy" and difficult to interpret.[5] There is also a further question as to whether international content aggregators, such as Facebook and Google, are APP entities, or relevantly to this paper, are "media organisations" engaged in "journalism".

APP entities must comply with the "Australian Privacy Principles" ("APPs").[6] The APPs govern the collection, use, storage and publication of "personal information" about natural living individuals. Breach of an APP is deemed to be an interference with the privacy of an individual.

"Personal information" is now defined in section 6 of the Act as:

> *information or an opinion about an identified individual, or an individual who is reasonably identifiable:*
>
> *(a) Whether the information or opinion is true or not; and*
>
> *(b) Whether the information or opinion is recorded in a material form or not.*

1 Eg in New South Wales, the *Privacy and Personal Information Protection Act* 1998 (NSW).

2 Privacy Act, ss6C, 6D, 6DA (inserted by *Privacy Amendment (Private Sector) Act* 2000) provides that that a range of Australian business entities are defined as "organisations", but excludes businesses with an annual turnover of less than $3 million.

3 Privacy Act 1988 (Cth), section 5B(3) inserted by *Privacy Amendment (Private Sector) Act* 2000 ("2000 Amendment"), See also amended by Act no. 49, 2004; no 197, 2012.

4 It appears that the media exemption in section 7B of the Act, introduced by the 2000 Amendment, was intended to exempt "journalism" as practiced by traditional media organisations at the time. However, the impact of the Act on artistic or literary freedom of expression appears not to have been considered.

5 Leonard, Peter, "An Overview of Privacy Law in Australia: Part 1" 33(1) [2014] *Communication Law Bulletin* 1.

6 The APPs are set out in Schedule 1 of the Act.

This definition is broad. Personal information can include a photograph taken in public or a person's date of birth or address. There is no qualification that personal information must be private (eg not previously published or in the public domain).

Under APPs 3 and 6 an APP entity may collect and publish personal information with consent. In the case of personal information excluding "sensitive information", discussed below, it may also do so if it is "reasonably necessary" for its functions or activities. In one early decision of the Privacy Commissioner, a newspaper successfully argued that its collection and publication of an individual's residential address in an article was reasonably necessary for its journalistic purposes, and did not require consent.[7]

However, there is a mandatory consent requirement where personal information is "sensitive information". "Sensitive information" includes information about matters such as a person's racial or ethnic origin, political and religious opinions and affiliations, sexual orientation and practices, criminal record and health information. In the media and artistic context, this is potentially problematic. It may not be editorially or practically feasible to obtain consent from an identifiable person. It also may not be editorially feasible to de-identify the person. Producers and publishers of media and arts content often use the "sensitive personal information" of identifiable persons without consent. Examples could include an unauthorised biopic or biography discussing a person's religious or political views; works of art, literature or journalism based on true crime; an autobiographical play or song discussing ex partner relationships; or an article which canvasses expert opinions on the health of a public figure.

Some of the other APPs might also pose practical problems in these contexts. For example:

- APP 5, requires notification of the collection to the individual;
- APP 8, governs cross border disclosure of personal information; and
- APP 12, gives individuals a right to access their personal information.

If a content producer or publisher is bound by the Act, it will need to obtain consent to collect, use or disclose sensitive personal information and otherwise comply with the APPs unless a specific exception applies.

The "journalism exemption"

The so called "journalism exemption", introduced in 2000 when the Act extended to private companies,[8] was designed to cover "traditional" media outlets existing at the time. It provides that certain journalistic activities by "media organisations" do not need to comply with the APPs. Section 7B(4) of the Act provides that an act or practice of a "media organisation" is exempt if done "in the course of journalism" and provided the media organisation is "publicly committed" to standards dealing with privacy.

The scope of the journalism exception is fairly narrow and somewhat unclear. It only covers organisations whose activities include the collection or dissemination of "material having the character of news, current affairs, information or a documentary" or of commentary or opinion on such material. "Journalism" is not defined. This leaves uncertain whether scripted content such as biopics, literary works such as biographies, or artworks such as satirical cartoons, are covered.

As noted above the journalism exception also does not apply unless the media organisation has publicly adopted standards dealing with privacy "in the course of journalism".[9] The broadcasters are covered by codes regulated by the Australian Communications & Media Authority.[10] Many print and emerging "online print" media organisations have in recent times signed up to industry codes of practice.[11] But no "standards" currently exist for entities such as larger, vertically integrated international content producers or online distributors now operating in Australia. Unless one of these entities has published its own "standards" dealing with privacy in relation to its media activities, or publicly adheres to the code of an industry body, it is not covered by the journalism exemption.

No exception for the arts or literature

There is no specific exception under the Act for organisations who are APP entities and who produce or disseminate artistic content (including literature). If the activities of these APP entities do not fall within the "journalism" exemption they are not otherwise exempted from the operation of the APPs.[12]

2. Implications of the Privacy Act for publishers and content makers

While there have to date been few legal challenges to the journalism exemption, and apparently none concerning the arts, given the trends in this area, and developments in the United Kingdom, it must be anticipated that an action against a producer or publisher for breach of the Privacy Act is possible in coming years.

The Privacy Commissioner has various powers to investigate and conciliate complaints and to award damages and other relief.[13] These powers, which have been enhanced in recent years, may be of interest to claimants seeking a low cost resolution of complaints.

7 *U v Newspaper Publisher* [2007] *PrivCmrA* 23.

8 2000 Amendment, Id note 3.

9 See U v A Newspaper; id note 7.

10 See also Australian Media & Communications Authority, "Privacy Guidelines for Broadcasters" (current to September 2016), available at www.acma.gov.au .

11 See Australian Press Council Standards of Practice, available at www.presscouncil.org.au; Independent Media Council Code of Conduct for Print and Online Print Media Publishers, available at www.independentmediacouncil.com.au.

12 It is also unclear whether an APP entity which produces both journalistic as well as artistic or literary content would have the benefit of the s 7B exemption for all its content, or only journalism.

However, perhaps of most concern to publishers is the possibility of a claimant taking direct action to restrain a potential breach of privacy. Under section 98 of the Act the Federal Court may grant an injunction to the Commissioner or "any person" to restrain a third person from engaging in conduct, or proposing to engage in conduct, which would constitute a contravention of the Act. There appears to be only one reported case concerning an attempt to injunct media activities using section 98.[14] However, the applicant in this case was unrepresented and the case was struck out for want of proper pleadings. There may be a number of reasons why section 98 injunctions are rare. First, an applicant may not be aware of a publication in time. Second, the journalism exemption will often apply. And third, an injunction application is an expensive exercise. However, some recent cases in other contexts have shown that a section 98 injunction is a potentially powerful tool in the hands of claimants.[15]

Section 98 could also potentially be invoked after publication of content.[16] For example, if no exception applies a complainant might seek orders that a producer or publisher disclose what personal information is held by it; correct inaccurate personal information in the content before further distribution, delete sensitive personal information obtained without consent, or to prevent any further distribution of it at all – a de facto "right to be forgotten".[17] It is unclear how journalists' source protections might apply in this context.

3. The UK journalism exemption compared

The UK DPA contains privacy provisions broadly similar to the APPs. The equivalent of an APP entity is a "data processor". However, its equivalent journalism exception is quite differently structured. Where "personal data" is "processed" solely for new material to be published for "journalism, artistic purposes and literary purposes", the "data processor" need not comply with a privacy principle if it "reasonably believes" that publication would be in the public interest and incompatible with compliance. [18]

Adherence to a code of practice concerning privacy is relevant to the question of the publisher's reasonable belief that publication will be in the public interest.[19]

A distinction is drawn between "journalism" which is for the primary purpose of information and analysis, and, in the television context, "entertainment programmes", such as arts, programmes, comedy, satire or dramas [which] refer to real events and people"[20] which are categorised as literary or artistic content.[21]

Cases in this developing area of law have established that damages can be claimed against the media for breach of the DPA in relation to the publication of personal information, including a photograph.[22] A DPA claim can be brought alongside a defamation claim arising out of the same publication.[23]

However, prior restraint injunctive relief is restricted under the DPA in the interests of freedom of expression. Prepublication injunctions cannot be obtained to prevent a prospective breach of the DPA in relation to new material to be published solely for the purposes of journalism, literature or art.[24] This is in stark contrast to the position in Australia as discussed above.

Conclusion

Privacy law in Australia is moving relatively slowly compared to other jurisdictions, in particular the UK. However, this may change.

If a claim is made under the Act against a media or arts publication it is far from clear how a court would balance freedom of expression and privacy interests. If the Act is further reformed, the scope of exceptions for both current and emerging forms of media and artistic and literary content should be considered to ensure that an appropriate balance is struck between these interests. Meanwhile, media and arts organisations bound by the Act who use the personal information of identifiable living persons for journalistic, artistic and literary purposes should ensure that they are compliant with the APPs or applicable codes.

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13 See eg s 52 of the Act, which permits the Commissioner to issue orders requiring a person to cease the offending conduct, to pay damages or apologise. For principles applicable to assessment of damages, see *Rummery & Federal Privacy Commissioner* [2004] AATA 1121.

14 *Rivera v ABC* [2005} FCA 661.

15 See *Seven Network (Operations) Limited v MEAA* [2004] FCA 637; *Smallbone v New South Wales Bar Association* [2011] FCA 1145.

16 Cf the orders obtained in *Smallbone, ibid.*

17 Cf, in the European Union, the so called "right to be forgotten" outlined in the *Google Spain* decision (2014) C-131/12.

18 Data Protection Act 1998 (UK) ("UK DPA") s 32(1). For a recent case discussing this exception and its balancing of privacy and freedom of expression interests in accordance with EU law see *Stunt v Associated Newspapers Limited* [2017] EWHC 695.

19 UK DPA, s 32(3).

20 Lord Williams of Mostyn, second reading speech for bill introducing UK DPA, (Hansard (HL Debates) Fifth Series Vol DLXXXV, 2 February 1998, cols 441-2_cited in *Stunt*, Id note 21 at 47.

21 See further the "Top Gear" example given by Lord Walker in *Sugar (dec) v BBC* [2012] UKSC 4 at 70; cited in Information Commissioner's Office, "Data Protection and journalism: a guide for the media" (version 1.0 4 September 2014).See in the UK context, such as Top Gear tending to fall into the "ffairs program (journalism) and moved to an entertainment form e in the UK context, such as Top Gear tending to fall into the "ffairs program (journalism) and moved to an entertainment form

22 *Campbell v MGN* [2004] 2 AC 457.

23 *HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco v Elaph Publishing* [2017] EWCA Civ 29.

24 DPA, s 32(2).

Free Speech Developments in the US

Professor Robert C. Post, Dean of Yale Law School, is widely regarded as one of the foremost scholars on the First Amendment and US constitutional law, legal history and equal protection. His writings are frequently cited in judgments, including by the Supreme Court, and the books he has authored, including the recent Citizens Divided: A Constitutional Theory of Campaign Finance Reform (2014), have had tremendous impact on free speech discourse in the United States. Dean Post sits down with co-editor, Eli Fisher, to discuss recent developments in free speech, especially in light of a new administration and newly constituted Supreme Court.

ELI FISHER: Dean Post, thank you so much for your time. We, in Australia, have a keen eye on what is happening in the United States – politically and legally. And as media and communications lawyers, we are acutely aware that developments there often precede or set the tone for similar developments here, so we are very grateful for your insights.

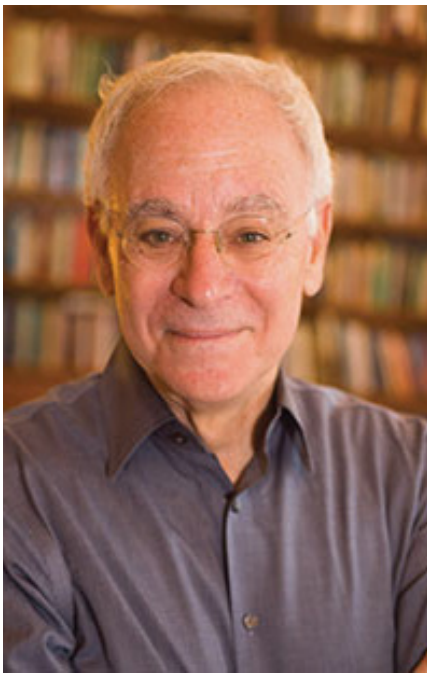
Yale Law School alumni include three current Justices of the Supreme Court (Thomas, Alito and Sotomayor) and a couple of Presidents (Ford and Clinton). Numerous US Attorneys General, Solicitors General, prominent legislators, judges, various heads of foreign states and even fictional favourites (Bruce Wayne, Josh Lyman and Rory Gilmore, if you're playing at home). In fact, the Clintons met in the Yale Law School library.

It does not seem hyperbolic to remark that the Dean of Yale Law School presides over the legal education of young women and men who will, in no small part, help to fashion the future of US civil rights and free speech. Could you tell us a little bit about your role as Dean of such an institution, and the responsibility that comes with it?

ROBERT C. POST: It is a tremendous privilege and responsibility to steward a treasured national institution like the Yale Law School. I should say that it is a little intimidating to lead a School that has been ranked #1 in the past many decades; after all, there is only one way left to move in the rankings. It requires constant attention to innovation and improvement. It requires rooting out all traces of complacency. We are continuously on the search for superb academic talent, and we are always seeking to improve our curriculum and pedagogical atmosphere. The Dean must set the agenda in these matters. As Dean, I am responsible for the fiscal management of the School. We are a self-support school, which means that we must live largely on the income we can pull together. Tuition pays for only about a third of our expenses. A little more than half comes from endowment. And my fund-raising must provide most of the remainder.

FISHER: One of the common threads throughout your scholarship is that the text of the First Amendment must be read in light of the sometimes-unwritten values inhering throughout the constitution, including individualism. Could you elaborate on what you mean by that?

POST: The First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech." These words are hardly self-interpreting. At the time of its ratification, the Amendment was read primarily to prohibit prior restraints – that is, pre-publication licensing regimes imposed by the Federal government. Beginning in the 1930s, however, the Supreme Court began to apply the Amendment to subsequent punishments – that is, to the ordinary criminal law or to civil law penalties like defamation. It also began to apply the First Amendment to the states. The Court uniformly applied the Amendment to what we would now call political speech, what in my writing I have called



Professor Robert C. Post

"public discourse," which refers to efforts to change the nature of public opinion (but which may also include art and literature). Beginning in 1976, the Amendment was applied also to commercial speech, and now the scope of its application has been expanded to include vast stretches of expression, ranging from doctors/patient communication to symbolic acts like cross burning. This has caused something of a crisis in First Amendment doctrine. Communication is everywhere, yet everything cannot be converted into an issue of constitutional law. Every medical malpractice case that occurs through speech cannot be a constitutional question. It is therefore plain that we must determine the purposes we wish the First Amendment to serve, and then determine the scope of the Amendment's proper application

on the basis of those purposes. The most convincing purpose of the Amendment is to allow freedom of speech in order to operationalize democratic self-governance. The basic idea is that if we are free to participate in the formation of public opinion, and if we construct a form of government that is responsive to public opinion, we can believe that government is potentially responsive to us. The value of democratic legitimation applies to individual, natural persons, and so the vast majority of our First Amendment decisions protecting public discourse have expressed a rather deep-seated individualism.

FISHER: As you say, the relevant portion of the First Amendment restricts Congress from making a law abridging the freedom of speech. But that passage does not specify whose freedom. The Courts have, over time, created a hierarchy of First Amendment values that gives stronger protection to the free speech of a human than the free speech of a corporation. But companies are still understood to enjoy the protections of the First Amendment, including because of the value of the informational function of advertising. Does the protection of companies' speech go too far, in your opinion? What developments of late cause you particular concern?

POST: If one accepts that the purpose of First Amendment rights is to protect the communications necessary for democratic self-governance, it follows that there are two fundamentally distinct kinds of First Amendment rights. The first are speakers' rights. These rights protect the ability of individuals to participate in the formation of public opinion. Speakers' rights are deemed supremely precious and are safeguarded even from government actions that might "chill" them. The second are listeners' rights. Because we must vote for our representatives, we have the right to receive the information necessary to perform this democratic obligation. The greatest theorist of listeners' rights was Alexander Meiklejohn. Commercial corporations cannot claim speakers' rights, because they are not natural persons and hence cannot experience the good of democratic legitimation. But they can nevertheless assert the First Amendment rights necessary to transmit information to listeners. There are great doctrinal differences between speakers' rights and listeners' rights. For example, compelled speech is inappropriate with regard to the former, but not the latter. Content discrimination is inappropriate with regard to the former, but not the latter. And so on.

FISHER: Connected to the issue of a company's exercise of First Amendment rights, the regulation of campaign finance seems always to have posed problems from a First Amendment perspective. The Citizens United v Federal Election Commission case before the Supreme Court in 2010 seems to have heightened the concerns of many who are concerned about campaign finance. What is your view, and do you consider there to be a tension between democratic participation and a functioning system of representation?

POST: Self-government in the United States has taken different forms over the past two centuries. At the beginning, we were a representative republic. In the *Federalist Papers* Madison boasts of having designed a form of governance that entirely excludes the people from governmental decision-making. By the beginning of the twentieth century, during the progressive era, we imagined ourselves as a democracy, in which the people participated directly in governance. Campaign finance advocates have almost always couched their arguments for reform in terms that make sense in the context of a *representative* system. They generalize from the equality of voting, for example, to the conclusion that everyone should be able to make only "equal" financial contributions to candidates. They argue that elections should be conducted in a way that doesn't "distort" the will of the electorate. They contend that representatives should not be "corrupt," meaning that voters should exert "undue influence" on their decision-making. The First Amendment, however, does not protect speech in order to insure a representative republic. It instead imagines a democratic government in which all can participate in the formation of a public opinion that is continuously evolving and never fixed. The value of democratic legitimation means that all can participate as much or as little as they wish, because democratic legitimation refers to the subjective beliefs of each person. In ordinary First Amendment doctrine, therefore, the doctrine of equality has no place. I cannot be limited in my speech because I desire to express myself more than you, or more persuasively than you. Similarly, the doctrine of "distortion" has no place, because we know only the processes of making public opinion that are sanctioned by the First Amendment and have no objective measure by which "distortion" can be determined. From the point of view of the First Amendment, the whole point of participation in public discourse is to make government responsive, so the very concept of "undue influence" is alien. For these reasons, the justifications of campaign finance reform advocates were seriously deficient within the context of ordinary and accepted First Amendment doctrine. The Supreme Court therefore used the First Amendment to continuously strike down efforts to enact campaign finance reform. My own work is an effort to argue that the Supreme Court has been far too quick. That campaign finance reform advocates have historically used poor arguments to support their legislation does not mean that better justifications are not available. Roughly speaking, if we protect speech in order to guarantee democratic legitimation, and if democratic legitimation arises because we believe that government is responsive to the public opinion, the purpose of First Amendment rights is undercut if we lose faith that government is indeed acting in response to public opinion. If we believe that our government is

instead responsive to those who can provide campaign contributions, the very rationale for protecting freedom of speech is undermined. My work is an attempt to explicate the constitutional implications of this logic.

FISHER: Your book, *Citizens Divided*, was published in 2014. Has the recent Presidential campaign changed any aspect of your view on that matter?

POST: The 2016 election was strange, because Trump managed to gather public attention without large campaign donations. He did so because he was already a celebrity and because he combined entertainment with politics more completely than any previous politician. I hope that the Trump phenomenon is a one-off.

FISHER: While on the topic of President Trump, you published a piece earlier this year with Martha Minow, Dean of Harvard Law School, in the Boston Globe, in response to the President's tweeted attack on a judge. The tweet followed that judge staying the President's executive order banning travel for individuals from seven predominantly Muslim countries. What is different about this Administration's relationship with the legal system that prompted your and Dean Minow's concern?

POST: I have the strong sense that President Trump has little or no respect for the independence of the federal judiciary or for the rule of law. He is used to the world of business, in which managers can control those within the firm in ways that are largely unimpeded by such annoying restraints. His tendency to lash out at courts and legality is very worrisome to me.

FISHER: Speaking of Twitter, has the disintermediation between speaker and audience been positive for participatory democracy and free speech, or does an audience fundamentally require media to make sense of, or fact-check, what is said by the speaker? And is the First Amendment, now more than 225 years old, equipped to deal with such a change?

POST: You raise one of the most profound questions to arise out of the 2016 election. Democracy has always been associated with metaphors like deliberation and dialogue. But the direct relationship between electorate and candidate created by the Twitter culture undercuts these metaphors, and it seems more appropriate to populism than to democracy. Ultimately democracy depends upon a respect for difference. The value of freedom of speech also depends upon this respect. But the present culture of extreme partisanship and polarization, which seems to have consumed our public life, is antithetical to such respect. I do not know if the loss of pluralism is caused by the new Twitter culture, but it is certainly a question I would like to investigate.

FISHER: One of the features of social or digital media, and the attendant global reach of a person who wants to communicate on such platforms, is that a message can be broadcast globally to people with local sensitivities. Some particularly catastrophic incidents in recent years include the reaction by some to Innocence of Muslims and the pictorial depiction of the Prophet Muhammad in publications including Charlie Hebdo. Are certain types of speech so intrinsically harmful as to fall within a First Amendment exception?

POST: There are two kinds of harm that speech might cause. The first is contingent harm, which is harm that may or may not occur. Speech might cause a contingent harm by inciting to violence or by releasing the formula for chemical weapons. In its very earliest cases in 1919, the Supreme Court held that speech could be suppressed if it merely had the tendency to create a harm that might otherwise be forbidden. On this ground it approved the censorship of political speech opposed to the conduct of World War I. It became quickly evident that such a lax connection between speech and harm could easily be abused, and so the Court created the clear and present danger test, which requires a very tight nexus between speech and contingent harm. The second kind of harm is what you seem to allude to, "intrinsic" harm. The Court has defined "fighting words," for example, as words which "by their very utterance inflict injury." It is a puzzle how the mere utterance of words can cause harm, but the best possible explanation is that human beings are socialized by norms, the violation of which can damage personality. Speech that violates essential norms can thus by its very utterance inflict harm. All such social norms, however, are relative to specific communities. In the United States, First Amendment jurisprudence is generally understood to distinguish between the public and any particular community. Our First Amendment jurisprudence consistently forbids the enforcement in public discourse of the norms of any particular community, because to do so would be hegemonically to impose the norms of that community on a very culturally heterogeneous population. If we do not permit offensive or outrageous speech to be regulated in the United States, I very much doubt that we would or should allow the regulation of such speech to protect the sensibilities of those abroad.

FISHER: Thank you so much for your time, Dean Post. I can say with complete certainty that your comments will be valued greatly by our readers. On their behalf, thank you, and we wish you all the best.

Does the Border Force Act Inhibit Free Speech and Media Communication?

2017 CAMLA Essay Competition Winner, Jade Standaloft considers the restrictions on free expression imposed on the refugee regime in Australia under the Border Force Act 2015 (Cth) and how they may be reduced.

Since the return to offshore processing in 2012, the Australian refugee regime has been an area of increasing tension, where an influx of domestic legislation and policy changes frequently conflict with international obligations. Despite this, refugee issues continue to thrive in an environment where refugee policy has simultaneously been hyper-mediated as a key election issue and changeable policy tool, and the subject of escalating secrecy regarding the ways the processing regime is managed.

The *Border Force Act 2015* (Cth) (*BFA*) imposes strict secrecy provisions upon employees working in offshore detention centres including potential criminal sanctions for the communication of concerns to the media. The media is a key figure in the operation of representative democracy,[1] and plays a fundamental role in influencing public opinion. Restrictions such as those in the BFA threaten this role.

The essay will first consider the role of media in shaping democratic decisions. Secondly, it will examine domestic restrictions on media and free expression within the present refugee regime, through the *BFA*. Finally, it will examine how the influence of restrictions might be lessened or completely subverted, by the role of whistle-blower legislation or the application of the implied freedom of political communication.

1. Role of the media and current restrictions

The media plays a key role in connecting the public to the government, acting as important sources of information, entertainment and education. It therefore wields enormous power in the modern democracy.[2]

Further, the media is a valuable tool in providing decision makers with access to their constituents. It is a significant avenue along which community standards or expectations can be ascertained.[3] Representative democracy is intended, in its best form, to comply with the will of the majority and legislate in accordance with societal values.

The media therefore has the power to dictate public focus through the presentation of some topics as concerns and others as irrelevant, giving it immense power in shaping the political agendas of the public.[4] This means that restriction on content available to the media inevitably influences the way in which it shapes views of the public, and by extension, the communication of the public with its representative government.[5] While it is clear that access to all information will not necessarily make certain topics – such as offshore processing – immediately part of the political agenda, without this access there are no avenues through which the information can be presented meaningfully to the public. Therefore, a scheme of immense secrecy may directly restrict public capacity to make an informed decision about what constitutes acceptable government behaviour.

1.1 Border Force Act 2015

The most prominent restriction on the dissemination of refugee processing information is the introduction of the *BFA*. This legislation imposes strict obligations on all employees working within offshore detention centres in what are the strictest secrecy provisions of the refugee regime to date. For example, section 42 makes it an offence for an 'entrusted person' to make a record or disclose 'protected information'.[6] An 'entrusted person' is defined as any employee, consultant or contractor of the Department, as well as public service employees or anyone else making their services available to the Department.[7] 'Protected information' is widely defined to include any information obtained in the course of employment.[8]

It also specifically outlaws the recording any information unless it is part of an entrusted person's job, or is authorised by law or by

1 David Rolph, Matt Vitins and Judith Bannisher, *Media Law: Cases, Material and Commentary* (Australia Oxford University Press, 2015) 21.

2 Tamara Pallos, 'The effect of the Mass Media on the Practice of Australian Democracy' (1999) 9(1) *Polemic,* 42 43.

3 Fay Lomax Cook et al. 'Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policy Makers and Policy' (1983) 47(1) *The Public Opinion Quarterly*, 16, 32.

4 Above n 2.

5 Sharon Rodrick, 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2010) 36(2) *Monash University Law Review* 123, 128.

6 *Australian Border Force Act 2015* (Cth), s 42.

7 Ibid s 4.

8 Ibid s 4.

an order or direction of a court or tribunal.[9] Violation of these provisions can result in up to two years' imprisonment.[10] Additionally, journalists who request information or records from an entrusted person can be charged with aiding and abetting the commission of the offence under the federal criminal code.[11] While the BFA is silent on any rationale for the secrecy provisions, government officials have cited a desire prevent the leaking of classified information that may comprise the operational security of Border Force officers.[12]

There are some exceptions to the restrictions created by the *BFA*. Disclosure of protected information is allowed if authorised by the Secretary of the Department, if required for work within the Department, or if required by law or court order.[13] Additionally, individuals will not be liable if information has already been made public,[14] or if disclosure for the purposes of preventing or lessening a serious threat to the life or health of an individual.[15] However, the onus for proving these circumstances is on the disclosing individual. Further, these exceptions do not permit disclosure about general conditions within the centre.

2. Exceptions to speech and media restrictions

It has been suggested that the secrecy provisions could be circumvented in two ways by the media; through whistle-blower protection legislation, and through the implied constitutional freedom of political communication.

2.1 Public Interest Disclosure Act 2013 (Cth)

The *Public Interest Disclosure Act 2013* (Cth) (*PIDA*) seeks to protect whistle-blowers from adverse outcomes resulting from disclosure of information. The Australian government has previously said that individuals making disclosures will be protected under the PIDA.[16] Moreover both the Government and the Opposition have argued that the PIDA protections offset any potential risk to safety or integrity of the system under the BFA.[17]

Section 26 of the PIDA permits individuals to make disclosures to authorised representatives of Government concerning matters of suspected or probable illegal conduct or wrongdoing.[18] After such disclosure individuals are authorised to make wider disclosures but only if the internal disclosure has not been adequately dealt with, and only if such disclosure would satisfy public interest requirements. Disclosure is not restricted to internal departments if there is a substantial or imminent danger to health and safety. Finally, the PIDA authorises any disclosure to Australian legal practitioners in relation to section 26.

Therefore, the only avenue for public disclosure (including via the media) under the PIDA is when it is in the public interest and only after disclosure to an authorised representative of Government has failed to address the issue or where there is substantial or immediate danger to health and safety. As some issues within detention centres are long-standing or on-going, it is not clear whether they would qualify as a 'substantial or immediate' risk pursuant to section 26. Mere disagreement with the course of action following internal disclosure is insufficient grounds for public disclosure.[19] It must be a failure to adequately deal with the internal disclosure, not merely a concern for the chosen course of action. It is also restricted to illegal conduct or wrongdoing, which excludes problematic systemic behaviour from the scope of section 26.

Finally, individuals are not permitted to publicly disclose 'intelligence information', which is widely defined in the *PIDA* as including information 'reasonably likely to prejudice Australia's law enforcement interests'.[20] It is likely that the majority of conduct within offshore detentions would fall within the classification of 'sensitive law enforcement' information and could not be disclosed under this exception.

Therefore, the *PIDA*, despite Government assertions, only really has the effect of allowing internal disclosures to authorised persons, and even then, only regarding illegal conduct or similar wrongdoings. This does not appear to provide significant recourse outside the parameters set by the *BFA*, and therefore would not facilitate access to the media, nor even the general public.

2.2 Implied right to freedom of communication about government matters

While Australia does not have a constitutionally enshrined right to free speech, it is nonetheless

9 Ibid s 42.

10 Khanh Hoang, 'Migration law: Of Secrecy and Enforcement: Australian Border Force Act' (2015) 14 *Law Society of NSW Journal*, 78, 78.

11 Ibid 79.

12 *Doorstop Interview with Australian Border Force Commissioner, Roman Quaedvlieg* (1 July 2015) Newsroom <http://newsroom.border.gov.au/releases/d0e3ab05-52b6-47ce-addd-762791fddbfc>.

13 Above n 7, s 44 – 46.

14 Ibid s 49.

15 Ibid s 48.

16 Above n 11, 79.

17 Peter Dutton, 'Inaccurate Media Statements on the ABF ACT', (Media Release, 1 July 2015) 1 < http://www.abc.net.au/mediawatch/transcripts/1524_statement.pdf>

18 *Public Interest Disclosure Act 2013* (Cth) s 26.

19 Ibid s 31.

20 Ibid s 41.

accepted that freedom of speech is essential to the effective operation of representative democracy. Therefore, some limited freedoms have been recognised with regard to governmental matters, and implied into clause 24 of the *Constitution*.[21] Following the High Court decision of *Lange*,[22] this freedom is now well enshrined in Australian law – however, the scope and extent of the implied freedom still requires elaboration.[23]

For the *BFA* to fall within the scope of this implied freedom, it would have to satisfy the two-limb test first set out in *Lange*. First, the law must effectively burden freedom of communication about government or political matters. Secondly, if the law does burden that freedom, is the law reasonably appropriate and adapted to serve a legitimate end which is consistent with the maintenance of representative government?

Regarding the first limb, it would be necessary to establish whether statements regarding conditions in offshore detention would be classified as communication about government or political matters. While there has been some argument for a broad understanding of political content,[24] this wide scope has not been recognised by the High Court. Even without an expansive definition, it is possible that it would be regarded as political communication for two reasons. First, refugee arrivals in Australia have been an ongoing topic of significant legislative intervention and reform in recent years, including three major Acts and five privately sponsored Bills in 2012-2013 alone.[25] Secondly, offshore detention continues to be a major focus of both major political parties. Most recently, in the 2016 election, the boat arrivals were utilised by Labour,[26] Liberal[27] and the Greens[28] as a significant election platform.

The next requirement is whether the *BFA* burdens communication. At its broadest, any law likely be a deterrent to political communication may satisfy this test.[29] Given the *BFA* prevents particular individuals from communicating about these matters with anyone, it is likely that its provisions fall within the first limb of the *Lange* test. It would not be sufficient that employees agreed to the restrictions; freedom of political communication is not an individual right, but rather, a legislative bar, and therefore is not defeated by individual consent.[30] Further, the High Court has recognised that the protection extends to communications relating to international obligations binding on Australia.[31] As a result the limb may be satisfied by discussions of whether the circumstances in offshore detention conform with the expectations on Australia under the Refugee Convention.

Finally, courts have previously construed legislation which imposes criminal liability, and legislation which requires registration or government approval before a person can speak as effectively burdening the implied freedom;[32] both of which the *BFA* does. Therefore, the bar on communications by individuals working within the centres would likely qualify the first test.

The second limb of the test, as modified in *Coleman*,[33] requires that the law be reasonably appropriate and adapted to serve a legitimate end compatible with the maintenance of a representative and responsible government. The inclusion of 'compatible ends' is intended to encourage parliament to expressly identify the object of legislation, and to constrain the pursuit of burdens on the freedom of communication.[34] In the *BFA*, no specific object is expressed beyond the regulation of persons performing work for the Department. Further, it can be evinced from the provisions that there is an intention to prevent disclosures of protected information by entrusted persons. It would therefore be for the court to determine whether this intention is compatible with the maintenance of a representative and responsible government. The claim that the laws are enacted for the purposes of maintaining national security may therefore be relevant.

The complete ban on external communication potentially fails to meet the 'reasonably adapted' test, because of the blanket restriction that it imposes. In *Levy*,

21 *Commonwealth of Australia Constitution Act 1901* (Cth) cl 24.

22 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

23 Richard Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28 *Federal Law Review* 41, 41.

24 *Hogan v Hinch*, (2011) 243 CLR 506, 543-4.

25 Elibritt Karlsen et al, 'Developments in Australian Refugee Law and Policy (2012 to August 2013)' (Research Paper Series, 2014 – 2015, Parliamentary Library, Parliament of Australia, 2015).

26 Bill Shorten, *It's Time for change of direction on immigration policies* (25 July 2015) Labor Herald <https://www.laborherald.com.au/politics/its-time-for-change-of-direction-on-immigration-policies-shorten-speech/>.

27 Caitlyn Gribbin, *Election 2016: Turnbull in damage control after Barnaby Joyce links Asylum Seekers to live exports* (26 May 2016) ABC News <http://www.abc.net.au/news/2016-05-26/barnaby-joyce-downplays-asylum-seeker-live-cattle-comments/7447076>.

28 Rachel Baxendale, *Federal Election 2016: Greens Refugee Policy to Cost 7bn, Dutton's Office Says* (18 May 2016) The Australian <http://www.theaustralian.com.au/federal-election-2016/federal-election-2016-greens-refugee-policy-to-cost-7bn-duttons-office-says/news-story/8f45775d4a5b3efc8d77ec62a5e77f75>.

29 *Monis v The Queen* (2013) 295 ALR 259, 340, 344 – 5.

30 *AA v BB* (2013) 296 ALR 353, 375.

31 *Levy v Victoria* (1997) 189 CLR 576.

32 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 130.

33 *Coleman v Power* (2004) 220 CLR 1.

34 George Williams and David Hume, *Human Rights Under the Australian Constitution,* (Oxford University Press, 2nd ed, 2013) 202.

a distinction was made between direct and indirect restrictions on communication. It was also noted that law aimed at restricting political communication would only be valid if such law was necessary for the attainment of an overriding public purpose.[35] Again the court would need to decide if factors such as national security justified the restrictions imposed on members of the public. It is possible that the exceptions articulated in sections 44 to 49 of the BFA are sufficiently adapted to justify the restrictions they imposed.

3. Conclusion

The media has a fundamental role in disseminating information to the public and facilitating active participation in representative democracy. The media is a powerful tool; restricting the information available to it will limit the information provided to the public, and restrict citizen agency to instigate change. In a climate where governmental policy is often controversial and potentially at odds with broader international obligations and norms, any attempt to restrict the potential for change should be viewed with alarm.

It must be recognized, however, that the media is also driven largely by profit, not simply by its apparent role as the fourth estate,[36] nor by mere benevolence. The treatment of refugees in Australia was inconsistent with international obligations long before these restrictions were placed on public disclosure, with little opposition in the public sphere; certainly not enough opposition to incite meaningful change to the regime. Further, in an age of developing new media, sustaining public interest for extended periods of time – such as may be necessary to invoke meaningful change of current governmental policies imposed on refugees – is increasingly difficult.[37]

Furthermore, the BFA has not yet been exhaustively tested, and a challenge under existing law, such as the implied freedom of governmental communication may yet establish that its restrictions are invalid. It is also important to note that modifications have been made to exclude doctors from the restrictions, and yet have not led to a rise in media reporting about conditions in detention.

Secrecy provisions such as those employed in the *BFA* further a culturally embedded atmosphere in which it is acceptable for Australia to flagrantly breach its international obligations, so long as the Australian public is not aware that it is doing so. Allowing media access and open communication about incidents occurring in offshore processing centres may not solve the issues with the current regime, but it would mean the Government is held to account and not able to hide behind a veil of self-imposed secrecy.

Jade Standaloft is a law graduate at the University of Tasmania. An earlier version of this paper won the 2017 CAMLA Young Lawyers Essay Competition.

35 Above n 31.

36 Jacqueline Ewart, Mark Pearson and Joshua Lessing, 'Anti-Terror Laws and the News Media in Australia since 2001: How Free Expression and National Security Compete in a Liberal Democracy' (2016) 5(1) *Journal of Media Law* 104, 105.

37 Katherine Gelber, 'Freedom of speech and Australian political culture' (2011) 30(1) *University of Queensland Law Journal* 135, 141.

Contributions & Comments

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

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at clbeditors@gmail.com

Honest Opinions - Are They Still Defensible?

Richard Potter, barrister at Ground Floor Wentworth Chambers, considers the defence of Honest Opinion.

It has not gone unnoticed amongst those who practise in the area of defamation, that the High Court has not determined a defamation case since 2012.[1] Prior to that there had been a fairly rich seam of cases every year or two and one wonders whether that had anything to do with the former practices of certain members of the High Court which would have included defamation work.[2]

What has this to do with the defence of honest opinion? Only that one of the last decisions of the High Court in this area of the law, concerned this defence, namely *Channel Seven Adelaide v Manock* (2007) 232 CLR 245. This case was prior to the commencement of the national uniform state and territory defamation laws in 2005 and so was determined under the common law.[3]

However, the case remains very relevant today as the common law defence has not been ousted by the statutory defence of honest opinion[4] and various issues under the statutory defence remain to be decided through historical fair comment authorities. Examples are the determination of the distinction between statements of fact and expressions of opinion[5] and whether the true facts upon which the opinion is based must be stated in the publication or notorious.[6]

Before examining this and other recent cases, it is worth recapping the essentials of this defence. The 2005 Act cured a perceived problem with the defence in the 1974 Act, namely that the 1974 comment defence could be hamstrung by the plaintiff deliberately drafting an imputation which could not be taken as an expression of opinion (rather than statement of fact). Under that Act, the cause of action was the imputation itself,[7] so the comment/opinion had to be the imputation itself as opposed to the words of the publication giving rise to the imputation).[8]

A colourful example of this phenomenon was *Meskenas v Capon* (1993) 1 MLR 5 (District Ct, 28 September 1993) where the artist Vladas Meskenas sued the director of the Art Gallery of NSW, for describing his portrait of Rene Rivkin as 'Yuk'. Capon raised the defence of comment, but in cross-examination admitted that he did not intend to convey the imputations pleaded by the plaintiff (which related to the plaintiff's competence as an artist). Justice was eventually served by a derisory award of damages to the plaintiff but the problem continued until 2005.

Under the 2005 Act, the cause of action is the publication of 'defamatory matter'[9] and the opinion (following the principles of common law) is now to be found in the words of the publication giving rise to the imputation.[10]

Another issue yet to be tested under the 2005 Act is whether the common law notion of 'fair' comment is imported into the 2005 Act when deciding whether the opinion is based on 'proper material' (as very generally defined in section 31(5)). The usual basis of an opinion (constituting proper material) is a series of true facts which are contained or referred to in the publication or alternatively are notorious.[11]

Under the common law defence there is an objective test (after determining (a) whether it is comment and not fact, and (b) the subject matter is one of public interest). There is a wealth of authority in Australia and overseas[12] to the effect that the objective part of the test for fair comment is not just whether a fair minded person could be capable of basing this opinion from the facts, but a fair minded person who may also be *biased or prejudiced*. In other words the opinion of a crank is equally defensible.[13]

1 The last one was *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534 on the issue of common law qualified privilege.

2 Examples which come to mind are McHugh J, Gleeson CJ and Callinan J, but it should be mentioned that current Justice Gageler, was junior counsel for the ABC in *Lange v ABC* (1997) 189 CLR 520.

3 South Australia was a common law state for defamation prior to 2005.

4 Sections 6 and 24 make this clear.

5 *Harbour Radio v Ahmed* (2015) 90 NSWLR 695 per the Court at [37].

6 Ibid at [41].

7 Section 9, *Defamation Act 1974*.

8 Confirmed by the Privy Council in *Lloyd v David Syme* (1985) 3 NSWLR 728 at 735-736.

9 Sections 8 and 31, *Defamation Act 2005*.

10 *Harbour Radio* at [44].

11 *Manock* at [5] and *Harbour Radio* at [41]-[42]. Proper material also includes material published under qualified privilege or fair report (section 31(5)).

12 *McGuire v Western Morning News*[1903] 2 QB 100 at 109, *Reynolds v Times Newspapers* [2001] 2 AC 127 at 193(HL), *Turner v MGM Pictures Ltd* [1950] 1 All ER 449 at 461, *Merrivale v Carson* (1887) 20 QBD 275 at 281, *O'Shaughnessy v Mirror Newspapers Ltd* (CA) (1970) 72 SR NSW 347 at 361, *Cheng v Tse Wai Chun* [2001] 57 HKCU 1, *Branson v Bower* [2002] 2 WLR 452 at 456, *John Fairfax Publications v O'Shane* [2005] NSWCA 164 at [16] and *Hawke v Tamworth Newspaper Co* [1983] 1 NSWLR 699 at 714.

13 Per Diplock J In *Silkin v Beaverbrook* [1958] 1 WLR 743 at 747.

The word 'reasonably' is not present in section 31(5) ('..an opinion is based on proper material if it is based on matter that: (a) is substantially true etc') yet is included in 31(6) which permits a defendant to still succeed even if not *all* the facts are true but the opinion is reasonably based on those facts which are true.

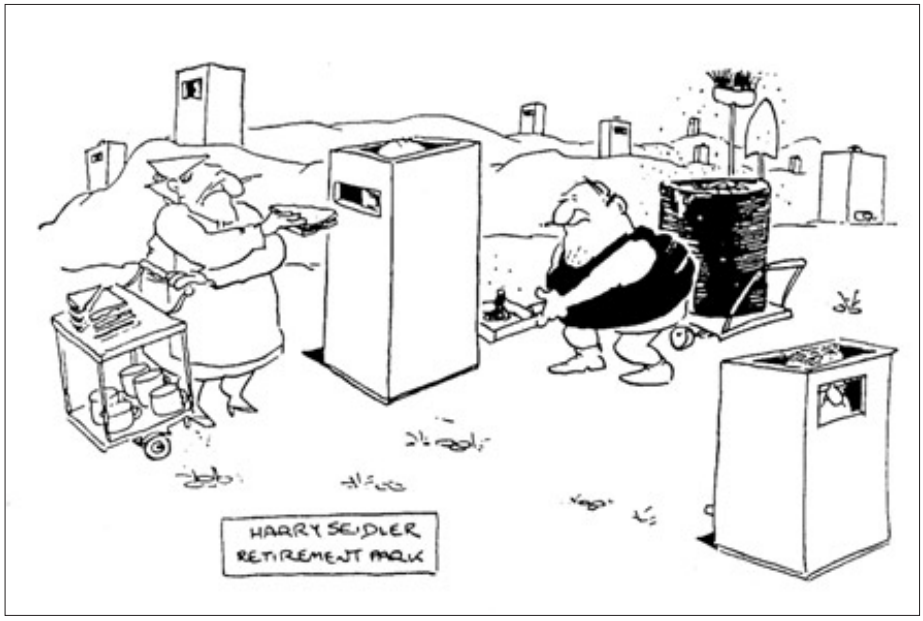
There is no decision yet which clarifies this (for example by importing the 'fair' comment notion from the common law authorities above) but it would be very difficult to determine whether an opinion is based on true facts (proper material) without an objective test being applied. In *O'Brien v ABC* [2016] NSWSC 1289, the common law defence succeeded so there was no need to consider the statutory defence in any detail. An appeal of that decision is underway and at the time of publication is being considered by McColl, Macfarlan and Leeming JJA of the NSW Court of Appeal.

Defeating honest opinion

The plaintiff still has an opportunity to establish subjectively that the opinion was not in fact honestly held by the commentator. It is tempting to consider that this equates to malice in the sense of improper motive but a commentator may have a spiteful motive but still honestly hold his or her opinion. In the words of Lord Nicholls of Birkenhead: 'Honesty of belief is the touchstone'[14]

Opinion of an employee/agent or commentator

The 2005 Act usefully extends what used to be the defence of comment of a stranger into the uniform law with a number of changes. Section 31(2) permits a defendant to rely on an opinion of an employee or agent. But the defeating section at 31(4)(b) only allows the plaintiff to defeat the defence if they can establish that the defendant (employer) did not believe that the opinion was honestly held by the employee – a virtually impossible task which now necessitates the joinder of journalists personally (whose own honest belief is put into question rather than that of their employer).



Comment and satire

Comment or honest opinion has long been the shield of the satirist or the reviewer. Patrick Cook's celebrated cartoon of the Harry Seidler retirement village (pictured above) is one such example.

In *Kemsley v Foot* (1952) AC 345, Lord Porter considered that reviews of public performances or works of art need not describe in detail the facts upon which the review is based (the nature of a review is to inform those who have not seen it and do not know this detail). The rationale is that such works are 'submitted to public criticism.'[15] The defendant in *Manock* sought to extend this argument to a television promo sued upon as there were no facts stated or referred to upon which to base an opinion. It was argued by the plaintiff that to extend existing principles beyond the requirement that the facts must be 'stated, referred to or notorious' would be a radical change to the law. In the end, the High Court concluded that there was no need to consider Lord Porter's dictum in *Kemsley* as the law in Australia remains as stated in *Pervan v North Queensland Newspapers* (1993) 178 CLR 309.[16] In other words, there must be facts expressly stated, referred to or which are publicly notorious. *Kemsley* still therefore appears to remain as a possible exception where artistic performances or exhibitions are submitted for public criticism.

Conclusion

The defence of honest opinion is still regarded as one of the central foundations of free speech in Australia. The over-used aphorism *"I disapprove of what you say, but I will defend to the death your right to say it"*[17] has no better applicability to the opinion of a biased or prejudiced person. However, the technicalities built around this defence make it difficult in practice to utilise. The necessity for the facts on which it is based to be apparent to the reader/viewer/listener and the fine line between what is opinion and what is a statement of fact continue to make this a rarely successful defence.

14 *Tse Wai Chun v Cheng* [2000] HKCFA 86 at [75].

15 (1952) AC 345 at 355.

16 per Gummow, Hayne and Heydon JJ at [71]-[72].

17 Quote by Evelyn Hall from *The Friends of Voltaire,* published 1906.

Free Speech and Protecting Journalists' Sources: Preliminary Discovery, the Newspaper Rule and the Evidence Act

Patrick George, Partner at Kennedys, considers recent developments in the protection of journalists' sources.

1. Introduction

On 3 February 2010, The Age newspaper published an article under the headline '*Fitzgibbon's $150,000 from Chinese developer – former Defence Minister cultivated over years*'. It alleged that Ms Helen Liu, whom the newspaper referred to as a Chinese Australian businesswoman, had made substantial payments to the former Defence Minister, Mr Joel Fitzgibbon, as part of '*a campaign to cultivate him as an agent of political and business influence.*'

This is the remarkable case of *Helen Liu v The Age,*[1] which involved a preliminary discovery application by Ms Liu in the Supreme Court of New South Wales to establish the identity of the sources for the article. In 2012, her Honour Justice McCallum ordered The Age and the journalists to give discovery of '*all documents that are or have been in their possession which relate to the identity or whereabouts of the sources*'.[2]

That judgment was appealed to the Court of Appeal and was dismissed;[3] a special leave application was made to the High Court and refused;[4] and the proceedings returned before McCallum J for enforcement of the preliminary discovery order.

At that stage, The Age undertook not to rely upon the defence of qualified privilege that might apply to the article. On that basis, McCallum J stayed the order[5] and made orders for costs in Ms Liu's favour of the first hearing on the ordinary basis and the second hearing on the indemnity basis[6]. Ms Liu appealed to the Court of Appeal which allowed the appeal and re-exercised the discretion and removed the stay.[7] The Age sought special leave to appeal to the High Court which was refused.[8]

As a result, the proceedings have returned in 2017 before McCallum J for enforcement of her Honour's order, made in 2012 from an article published in 2010.

By way of contrast, in *Tony Madafferi v The Age*,[9] The Age published 12 articles, between March 2014 and April 2015, concerning Tony (Antonio) Madafferi and the Calabrian community in Australia. He claimed that the publications conveyed very serious defamatory imputations against him of violent criminal conduct, including murder, extortion and drug trafficking, and alleging that he is the head of the Mafia in Melbourne.

Mr Madafferi brought proceedings in the Supreme Court of Victoria against The Age and sought disclosure of the sources. The Age claimed confidentiality over the sources on the basis that they had promised all confidential sources not to disclose their identities. In December 2015, the court refused to grant the application. The proceedings subsequently settled.

2. Competing Public Interests

The purpose, of course, behind an application for preliminary discovery is to identify the prospective defendant where the plaintiff is unable to identify the person, possibly because they have published material anonymously, which is often the case on social media, or as a confidential source, and the media refuses to disclose their identity.

In her initial judgment in *Helen Liu's* case, McCallum J observed '*the present case sits poised uncomfortably on the fault-line of strong, competing public interests*'.[10]

In essence, the public interest in the administration of justice is competing against the public interest in freedom of speech.

In *Helen Liu's* case, Her Honour noted that the argument of The Age and its journalists was that they obtained documents which revealed the making of corrupt payments by Helen Liu to a Federal Member of Parliament. They contended that the documents were obtained from sources who entertained real and substantial fear

1 *Liu v The Age Company Ltd* [2012] NSWSC 12.
2 *Liu v The Age Company Ltd* [2012] NSWSC 12 at [213].
3 *The Age Company Ltd v Liu* [2013] NSWCA 26.
4 *The Age Company Ltd v Liu* [2013] HCA Trans 205.
5 *Liu v The Age Company Ltd* [2015] NSWSC 276.
6 *Liu v The Age Company Ltd* [2015] NSWSC 605.
7 *Liu v The Age Company Ltd* [2016] NSWCA 115.
8 *The Age Company Ltd v Liu* [2016] HCA Trans 306.
9 [2015] VSC 687.
10 [2012] NSWSC 12 at [168].

of reprisal in the event that their identities were revealed, contrary to the undertakings given to them by The Age and their journalists. Accepting those contentions without qualification, her Honour said there would be a strong case for refusing the discretionary relief sought by the plaintiff.[11]

Conversely, she noted that Helen Liu's argument was that a person or persons conducting a vendetta against her had provided documents to the journalists which had been deliberately forged or falsely attributed to her. Accepting those contentions without qualification, her Honour said to refuse the relief sought would perpetuate the fraud and that would plainly be a strong reason for exercising the court's discretion in favour of the plaintiff.[12]

The determination of the preliminary discovery application in *Helen Liu's* case was complicated by the parties' conflicting factual contentions which could not satisfactorily be resolved in the course of preliminary proceedings.[13]

On appeal, the Chief Justice strongly commented that The Age's attempt to embark on an examination of the merits of the plaintiff's claim on the basis that it was a relevant matter for discretion was inappropriate. Bathurst CJ said: '*Although I would have thought it abundantly clear, let me emphasise that applications for preliminary discovery are interlocutory applications, where it is quite inappropriate for contested issues of fact between the parties to be litigated, much less decided upon.*'[14]

3. The Court Rules for Preliminary Discovery

Rule 5.2 of the Uniform Civil Procedure Rules 2005 (NSW) ('**UCPR**'), '*Discovery to ascertain prospective defendant's identity or whereabouts*', is the relevant provision.

The essential elements of this rule require the applicant to show the court:

(1) The applicant has made reasonable enquiries (R 5.2(1)(a));

(2) Having made those enquiries, the applicant is unable to sufficiently ascertain the identity or whereabouts of a person (the person concerned) for the purposes of commencing proceedings against the person (R 5.2(1)(a));

(3) The applicant has the purpose of commencing proceedings against the person (R 5.2(1)(a));

(4) Some person other than the applicant may have information or may have or have had possession of a document or thing that tends to assist in ascertaining the identity or whereabouts of the person concerned (R 5.2(1)(b)).

If satisfied, the court may make an order for examination of the person with the relevant information and/or an order that the person with the relevant information must give discovery of all documents that are or have been in that person's possession relating to the identity or whereabouts of the person concerned (R 5.2(2)).

In making inquiries, what is reasonable to satisfy the court is a question of fact in all the circumstances. The availability of other means of ascertainment, for example, the *Freedom of Information Act*, does not in itself make it unreasonable to claim an alternative remedy under this rule. The cost, delay and uncertainty of alternative measures is relevant to the '*reasonable inquiries*' component.[15] The test is an objective one and is not determined by the applicant's belief that the inquiries which were made were reasonable.[16]

To enable an objective assessment to be made on whether reasonable inquiries have been carried out, it is necessary for an applicant to disclose to the court the substance of the inquiries which have been made and the result of those inquiries. However, that does not mean that every detail of each inquiry has to be revealed. It is enough if the applicant discloses what inquiries have been made and their results.[17]

A recent example of a preliminary discovery application for the purpose of supporting an injunction occurred in *Rinehart v Nine Entertainment Co Holdings Co Ltd.*[18] The applicant sought preliminary discovery of the program '*House of Hancock*' which was scheduled to be broadcast on the Sunday following the application. The application was made under Rule 5.3 of the UCPR to enable the applicant to determine whether or not she was entitled to make a claim for relief from the court against Channel Nine.

The issue on the application was whether it was in the interests of justice to make the order sought for preliminary discovery. It was not a case of confidential sources. The court considered that there was a possibility of a serious defamation, that the applicant could not determine whether she had a claim for relief unless she saw the material, that the claim for relief upon which she relied was to be pre-publication injunction, and that her reputation was important to her business and that her business was substantial.

11 [2012] NSWSC 12 at [169].
12 [2012] NSWSC 12 at [170].
13 [2012] NSWSC 12 at [168].
14 [2013] NSWCA 26 at [102]-[105].
15 *Roads & Traffic Authority of NSW v Australian National Carparks Pty Ltd* [2007] NSWCA 114 at [14].
16 *St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360.
17 *The Age Company Limited v Liu* [2013] NSWCA 26 at [52]-[53].
18 [2015] NSWSC 239.

Channel Nine had opposed the application on the basis that the court should in exercising its discretion have regard to the importance of the principle of free speech and leaving it unfettered. The Judge was not persuaded that the right to free speech was so powerful and the order so detrimental that it was sufficient to outweigh the balance in favour of making the order.

4. The Newspaper Rule

In the course of proceedings before trial in a defamation case (and subject in New South Wales to the applicable principles set out in the Defamation List Practice Notes), parties will provide discovery by Affidavit of Documents and Answers to Interrogatories in relation to matters in issue.

However, there is a special exception in the discovery process in favour of publishers, proprietors and editors of newspapers as defendants known as the '*Newspaper Rule*'.

The Newspaper Rule operates to protect the identity of a journalist's confidential sources from disclosure in interlocutory proceedings before the trial,[19] where disclosure would be relevant to the issues for trial in the action.

The justification for the Newspaper Rule is the assumption that the responsibility of the newspaper for the republication of what is said to it by an informant is '*necessarily co-extensive*' with the responsibility of the informant for what has been published in the newspaper ('**the Coextensivity Principle**').[20] The responsibility, and therefore liability, for publication should be coextensive as between the informant and the newspaper and the courts have considered it is generally undesirable and unnecessary for plaintiffs at the interlocutory stage of the proceedings to have disclosure of the identity of the sources.[21]

The Newspaper Rule is a rule of court practice, not a rule of law or evidence and does not provide an absolute privilege or absolute protection in the confidentiality of a journalist's sources.

The Newspaper Rule does not protect the promise of confidentiality by the newspaper or its journalists to the source and the communications between them concerning the supply of the information. This material may be essential at least for the newspaper to establish the claim for protection under the Newspaper Rule.[22]

Significantly, it does not protect the information provided to the journalist unless disclosure of that information would reveal the identity of the source.[23] A practical measure in such circumstances is for the identity material to be redacted where possible.

There is a competing public interest, however, in the administration of justice which requires that cases be tried by courts on relevant and admissible evidence.[24] The Newspaper Rule places a restriction on the entitlement of a plaintiff to compel identification of the newspaper's sources prior to the trial, but is subject to the court's discretion in the circumstances of the case.

5. Effective Remedy

The court will exercise its discretion to order disclosure where it is necessary in the interests of justice.[25]

The court recognises the importance of the free flow of information to journalists, but it must balance the public interest in a free press and in freedom of information against the right of an individual to have an effective remedy in respect of defamatory imputations published in the media.[26]

In defamation proceedings against a newspaper, the rule of practice enables the court to refuse to order disclosure of sources if it appears that the applicant has an '*effective remedy*' against the newspaper or journalist without the necessity of ordering discovery.[27]

The assessment of whether the applicant has an effective remedy may be influenced by the defences pleaded by the newspaper to the claim.

In *John Fairfax & Sons Ltd v Cojuangco,*[28] an article was published in The Sydney Morning Herald newspaper under the headline '*Corruption as an Art Form*' concerning a Phillipino businessman, Eduardo Cojuangco. Mr Cojuangco sought preliminary discovery from John Fairfax and Sons Ltd ('**Fairfax**') under the then applicable court rules enabling an order for disclosure of confidential sources prior to commencement of proceedings.

Justice Hunt in the Supreme Court of New South Wales in the exercise of his discretion ordered disclosure. His Honour accepted that the court rules enabling an order for preliminary discovery prior to commencement of proceedings displaced the Newspaper Rule which therefore did not have direct operation as a rule of practice to this application. He held that the respondent newspaper, was not pursuant to the preliminary discovery application, a defendant

19 [2015] VSC 687 at [28].
20 *Liu v The Age Company Ltd* [2016] NSWCA 115 at [121].
21 *Liu v The Age Company Ltd* [2016] NSWCA 115 at [121].
22 *Liu v The Age Company Ltd* [2010] NSWSC 1176 at [45].
23 *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241 at 252-253; *Liu v The Age Company Ltd* [2016] NSWCA 115 at [122].
24 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 354.
25 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 354-355; *Liu v The Age Company Ltd* [2016] NSWCA 115 at [123].
26 *Liu v The Age Company Ltd* [2016] NSWCA 115 at [123].
27 *Madafferi v The Age Company Ltd* [2015] VSC 687 at [30].
28 [1988] HCA 54; [1998] 1998 165 CLR 346.

in defamation proceedings and the application was not an interlocutory proceeding in the action.[29]

On appeal ultimately to the High Court, the question was whether a statutory qualified privilege defence under section 22 of the *Defamation Act* 1974 (NSW) that was open to be pleaded entitled the Judge to order disclosure of the identity of the sources if the defendants did not relinquish that defence. The High Court held that it was necessary for a Judge to consider whether the plaintiff was left without an effective remedy if an order was not made. The court said that the Judge was not being called upon to decide whether the statutory defence would succeed, but '*form a conclusion that the defence might well succeed on the materials before him*'.

The focus on the statutory qualified privilege defence arose because Hunt J expressed the view that the issue was not whether the applicant was likely to succeed against the newspaper, but whether he was likely to obtain the relief to which he was entitled if he was restricted to suing the newspaper. Therefore, the applicant would have an effective right of action against the newspaper, in the sense that he was able to obtain against it all the relief to which he was entitled, even if, as a result of the truth of what was republished by the newspaper, he was likely to fail against both the newspaper and informant for that reason.[30] In contrast, the statutory qualified privilege defence was available to the newspaper separately from the sources and the Coextensivity Principle upon which the Newspaper Rule was based in that circumstance would not apply.

In principle, the preliminary discovery application is for the very purpose of seeking to establish the identity of the source so that the applicant might take proceedings against that person, whereas the Newspaper Rule operates in proceedings where the newspaper is already a defendant and because of the Coextensivity Principle, need not disclose the identity of the source until the trial.

Nevertheless, the policy considerations for the existence of the Newspaper Rule are relevant to the exercise of the judicial discretion conferred by the court rules governing preliminary discovery applications. The applicant therefore has to demonstrate that the order sought is necessary in the interests of justice rather than being precluded from the disclosure unless he or she makes out a case of special circumstances.[31]

The High Court identified two particular features of the circumstances in that case favouring disclosure. First, a striking feature of the publication was that the imputations had a solid basis of support in the views of prominent and informed but unidentified sources. The imputations were conveyed with an aura of authority and authenticity that would be lacking if they rested on no more than the assertions of the journalist. The court held that it would be incongruous and unjust that Fairfax, having derived the advantage that comes from identifying in general terms the sources of the allegations that they make against Mr Cojuangco, should seek to deny him an opportunity of identifying precisely those sources by invoking the Newspaper Rule.

Secondly, that the defamation was of a very serious kind that might gravely compromise Mr Cojuangco's reputation and as a prominent business personality, he should be given the opportunity of discovering the precise identity of the sources and deciding upon such action as he then considered appropriate.

The High Court dismissed the appeal and the proceedings returned to Justice Hunt for enforcement of the order.

However, Fairfax then applied to set aside the order as it undertook not to call the journalist to give evidence at the trial of any defamation action against it. Hunt J agreed and set aside the order on the basis that the plaintiff now had an effective remedy. He held that the practicable application of the High Court's '*might well succeed*' formulation of the test was that there was a substantial or real or good chance that the defence will succeed, regardless of whether that chance is less or more than 50%.[32] However, he held that a defence of statutory qualified privilege could not succeed if the journalist was not called and that the plaintiff had an effective remedy if he might obtain the same compensation from the newspaper as from the source.[33] He considered it was not sufficient that a plaintiff wished to vindicate his or her reputation against the source or obtain '*additional satisfaction*' by '*having the compensation paid by one rather than the other tortfeasor*'. Such matters did not lead to the plaintiff potentially suffering monetary loss.[34]

Mr Cojuangco appealed against Hunt J's order setting aside disclosure. In the Court of Appeal, Fairfax refined its undertaking and undertook not to rely upon the statutory qualified privilege defence at all. On that basis the Court of Appeal (Mahoney and Handley JJA, Kirby dissenting) held that Mr Cojuangco's appeal should be dismissed.[35]

29 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 356.

30 Reapplication of *Cojuangco* [1986] 4 NSWLR 513 at [525]; *Liu v The Age Company Ltd* [2016] NSWCA 115 at [131].

31 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 357.

32 Application of Eduardo Murphy Cojuangco (No 2) (Supreme Court) (NSW) Hunt J, 6 January 1999, unreported, LexisNexis BC8902633 at [24].

33 Application of Eduardo Murphy Cojuangco (No 2) (Supreme Court) (NSW) Hunt J, 6 January 1999, unreported, LexisNexis BC8902633 at [26].

34 Application of Eduardo Murphy Cojuangco (No 2) (Supreme Court) (NSW) Hunt J, 6 January 1999, unreported, LexisNexis BC8902633 at [25]-[26].

35 *Cojuangco v John Fairfax & Sons Ltd (No 2)* [1990] ADef R51-005.

Mahoney JA held that once Fairfax had abandoned its qualified privilege defence, the interests of justice did not require a preliminary discovery order because Mr Cojuangco had an effective remedy against Fairfax without the necessity of such an order. Handley JA held that effective remedy in this context meant a remedy against the newspaper '*no less effective*' than an action against the sources. This meant that the plaintiff in the action against the newspaper must not be faced with any defence in addition to those that would be available to the sources if they were sued.

There have been a number of decisions which have considered the meaning of effective remedy since. Importantly, it can be seen that the question of whether a preliminary discovery order should be made falls to be determined by the circumstances of each case and not necessarily on the basis of whether the newspaper undertakes not to rely upon a statutory qualified privilege defence which could not be pleaded by the sources.

In the *Herald & Weekly Times Limited v Guide Dog Owners and Friends Association,*[36] the court held that the meaning of 'effective remedy' was that if a plaintiff was able to succeed in the proceeding against an existing newspaper defendant, there would be no justice in him or her not obtaining the same judgment against another party. However, if the chance of success was put in real jeopardy by a defence not equally available to another potential defendant whose identity was not known to the plaintiff, the interests of justice would require discovery of that other party for the purpose of joinder.

In *West Australian Newspapers Limited v Bond*,[37] the court considered that if a plaintiff in pending proceedings would be left without an effective remedy against the defendant in those proceedings, or that there was a real (as distinct from a fanciful) prospect that the plaintiff would be left without such a remedy unless the defendant was ordered to disclose the identity of a confidential source, that circumstance would ordinarily be a powerful (if not the decisive) factor favouring the exercise of the court's discretion at the interlocutory stage to order disclosure.[38]

In *Hodder v Queensland Newspapers Pty Ltd,*[39] the court held that the identity of the source must be required for some reason other than '*mere relevance*' having regard to the criterion for the favourable exercise of the discretion that it be necessary in the interests of justice.

6. Potential Defences

If a defendant puts in issue the identity and integrity of its sources by way of defence, the defendant may be acting inconsistently with its entitlement to enforce the Newspaper Rule (or Journalist's Privilege under the *Evidence* Act to be considered below). For example, if the defendant positively raises the identity and integrity of its confidential source to assert, as part of a qualified privilege defence, that it had acted reasonably in its publication of the article, the weight attributable to the public interest in disclosure for the proper administration of justice may be correspondingly increased.[40]

In *Bateman v Fairfax Media Publications Pty Ltd*,[41] the defendant pleaded defences of honest opinion under Section 31(3) of the *Defamation Act 2005* and fair comment at common law. The defences were based upon comment of a stranger. The defendant refused to provide particulars identifying the persons whose opinion or comment the matter complained of was alleged to be, but at the same time invoked the Newspaper Rule. The plaintiff sought to strike out those defences while the defendants contended that the Newspaper Rule excused them for the time being up to trial from complying with the requirement to provide proper particulars of the defence. McCallum J decided that the defendants should be put to an election whether to provide the particulars required under the Rules identifying the persons whose opinion or comment the relevant matter was alleged to be, failing which there should be an order striking out the relevant parts of the defence.[42]

A similar issue arose in *Cowper v Fairfax Media Publications Pty Ltd*,[43] where an application was filed to strike out the defence and particulars of the statutory qualified privilege defence under section 30 of the *Defamation Act 2005*, where the defendant refused to provide the names of sources pursuant to section 126K of the *Evidence Act 1995*. The court refused to strike out the defence prior to the trial, but said that the absence of the sources was a matter that may be raised subject to any ruling of the trial judge with the jury, but it was not a matter which ought to give rise to the striking out of the claim for reasonableness for statutory qualified privilege.

7. Limitation Periods

A compelling consideration in terms of effective remedy is the limitation period of 12 months to commence any defamation action from the time of publication of the matter complained of.[44] Although there is

36 [1990] VR 451.
37 [2009] WASCA 127.
38 [2009] WASCA 127 at [94].
39 [1994] 1 QDR 49 at [56]-[57].
40 *Madafferi v The Age Company Ltd* [2015] VSC 687 at [67].
41 [2014] NSWSC 400.
42 [2014] NSWSC 400 at [27].
43 [2016] NSWSC 1614.
44 *Limitation Act 1969* (NSW) Section 14B.

discretion in certain circumstances to extend the limitation period up to 3 years, the practical reality is that a plaintiff generally only has 12 months to commence proceedings for defamation.

If the plaintiff does not know the identity of the source, he or she will be unable to commence those proceedings against the source before being statute barred. On the one hand that means that the only effective remedy thereafter is against the newspaper and it would be futile to order disclosure after expiry of the limitation period. However, not knowing the identity of the source may be a ground for extension of the limitation period. If no proceedings have been commenced against the newspaper within 12 months, the only effective remedy would be against the source, subject to an extension of the limitation period.

8. Helen Liu

In *Helen Liu*'s case, McCallum J held that as the newspaper did not relinquish its statutory qualified privilege defence and the common law defence of qualified privilege in respect of publication of political discussion pursuant to *Lange v ABC*[45], her Honour was satisfied that those defences might well succeed[46] and accordingly, the plaintiff may not have an effective remedy against the newspaper.[47]

It is relevant that The Age submitted in the course of the application Helen Liu had attacked the reasonableness of the journalist's conduct by reason of which she could not at the same time contend that she would not have an effective remedy against The Age and the journalists. In other words, she believed that the qualified privilege defences would not succeed.

This arose out of the fact that the journalist had changed the wording of translations obtained by The Age of two letters received from the sources and which were attributed to the plaintiff in the articles. The first article had the following quote attributed to the plaintiff: '*Joel Fitzgibbon has become a Federal MP. If the Labor Party becomes the dominant party, he will become a Cabinet Member … The money we pay him is worthwhile.*'

The letter was in the Chinese language except for the name Joel Fitzgibbon and a signature attributed to the plaintiff, both of which were in English. The Age obtained a translation of the letter and the translation said: '*Joel Fitzgibbon has become a Federal Minister.*' The journalist changed the word 'Minister' to 'MP'. There was a second letter which referred to Mr Fitzgibbon as a Federal Minister. In the article, it was changed to read Federal (MP). At the date of that letter, Mr Fitzgibbon was not even a Shadow Minister.

The journalist admitted that he knew the description of Mr Fitzgibbon in the letters was wrong, but he put it down to language difficulties or a case of the author of the letters deliberately overstating Mr Fitzgibbon's title so as to impress the recipients. Her Honour held that the decision to omit the incorrect description of Mr Fitzgibbon as a Federal Minister while informing readers that the documents had been translated by a '*nationally accredited translating firm*' would be potentially problematic in respect of the reasonableness of the conduct of the newspaper and the journalists in publishing the articles.

Her Honour made the point that the determination of whether there was an effective remedy was an objective one regardless of the plaintiff's belief that the defence would not succeed and that belief was scarcely relevant to the task let alone determinative which was for the Judge to assess prospectively without knowing what the final evidence would be or what would be revealed by further interlocutory steps such as discovery and interrogatories.[48]

Her Honour also considered that if Ms Liu was unable to identify the sources, she would in effect be left without the opportunity to pursue a remedy which would see the issue of the alleged forgery of the documents fully litigated and determined and that she would be unable to seek in vindication of her reputation to nail the lie.[49]

In the extraordinary circumstances of *Helen Liu's* case, after the first round of appeals including a special leave application to the High Court, Fairfax returned before McCallum J to seek a stay of the order on the basis that it offered an undertaking not to rely upon the defences of qualified privilege. Her Honour, noting the undertaking, and considering costs may be adequate compensation for the prejudice suffered, stayed her earlier order.

In the Court of Appeal, the court held that her Honour had fallen into error and re-exercised the discretion and refused the stay. The court held, inter alia, that given the knowledge that Fairfax had of the course taken in *Cojuangco's* case, it was important that it put its best case forward in the first interlocutory application and by not providing the undertaking at that time '*flouted the principle that a litigant should put its best case forward and had failed to discharge its duty to assist the court to further the overriding purpose of the Civil Procedure Act and the Rules to facilitate the just, quick and cheap resolution of the real issues in the proceedings*'.[50]

In McColl's JA's view, '*to entertain Fairfax's stay application and undertake in effect, the re-litigation of*

45 [1997] HCA 25.
46 [2012] NSWSC 12 at [154].
47 [2012] NSWSC 12 at [156].
48 [2012] NSWSC 12 at [140].
49 [2012] NSWSC 12 at [159]-[160]; *John Fairfax & Sons Ltd v Cojuangco* [1987] 8 NSWLR 145 at [151].
50 *Liu v The Age Company Limited* [2016] NSWCA 115 at [215].

the preliminary discovery application, albeit with the goal posts moved to suit Fairfax, countenanced an approach to litigation by Fairfax which was not in the interests of justice, and fell foul of the principles of case management.'[51]

The court also held whether, absent disclosure of documents sought to be shielded by the Newspaper Rule, a potential plaintiff has an effective remedy turns not only on the likely recovery of damages but upon any difficulty in proof occasioned by the non-disclosure. The nature of the documents Fairfax based the articles on was relevant to whether Ms Liu should have had access to the documents. By attributing the articles to documents allegedly either written by Ms Liu or sourced to her company's records, Fairfax accorded to the imputations an '*aura of verisimilitude'* which Ms Liu should be given the opportunity to test, both by confronting her accusers and having the best opportunity to demonstrate the documents they provided are forgeries.[52]

In the Court of Appeal, Helen Liu also submitted that she had a cause of action against the sources under the *Australian Consumer Law* which she did not have against the newspaper and its journalists because of the immunity which exists under that legislation in their favour as information providers. Significantly, Ms Liu would bear the onus of proof of the misleading and deceptive conduct cause of action against the sources but absent the identification of those sources, she would not have an effective remedy in respect of that cause of action because Fairfax had a complete defence which was not available to the sources. The Court of Appeal did not deal with this issue because it was not raised before McCallum J on the stay application but remains an issue of difference under the Coextensivity Principle for future cases.

9. Journalist Privilege under the Evidence Act

Under Section 126K of the *Evidence Act* 1995 (NSW) ('**Evidence Act**'), a journalist is not compellable to disclose the identity of a confidential source unless on the application of a party, the court determines that the public interest in the disclosure of the identity of the source outweighs the likely adverse effect of disclosure upon the source or others and the free flow of facts and opinion to the news media.

Section 131A of the *Evidence Act* extends the application of this privilege to the pre-trial stage of proceedings. The equivalent provisions in the Evidence Acts in other States or jurisdictions include the Commonwealth, Victoria, the Australian Capital Territory and Western Australia[53].

The protection provided by the *Evidence Act* replaces the common law's uncertainty under the Newspaper Rule with a journalist prima facie entitled to assert a statutory privilege.[54] The Act alters the emphasis in the balance that the common law had achieved in favour of protection of confidential sources only as a matter of practice.[55] The general purpose underlying the statutory privilege is the importance of the free flow of information in a democratic society.[56]

Further, the Newspaper Rule at common law generally only applies in interlocutory proceedings. Prior to the introduction of the statutory privilege, the practice was, when the identity of sources was relevant, to generally permit the plaintiff to seek disclosure during evidence at the trial if the journalist gave evidence. Now neither the journalist nor his employer is compellable to answer that question at trial and may object to do so by asserting the privilege under Section 126K(1) of the *Evidence Act* if the journalist '*has promised an informant not to disclose the informant's identity*'.

However, when the journalist does not give evidence or the privilege is successfully claimed at trial, issues may arise about whether that claim of privilege provides a sufficient basis to exclude *Jones v Dunkel*[57] reasoning because a witness has failed to give evidence that on the question of reasonableness of publication, he or she could be expected to give.[58]

The circumstances in which the court's power to override the privilege is to be exercised are defined. Section 126K(2) of the *Evidence Act* identifies the factors to be taken in to account in undertaking the balancing exercise and is only displaced on the application of the opposing party who carries the primary onus.

Section 126K(2) provides that the court may order that the privilege not apply if it is satisfied, that having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs:

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

51 [2016] NSWCA 115 at [219].

52 *Liu v The Age Company Limited* [2016] NSWCA 115 at [219], [223].

53 Division 1A of Part 3.10 of the *Evidence Act* 1995 (Commonwealth); *Evidence Act* 2008 (Vic) sections 126A, 131A; *Evidence Act* 2011 (ACT) sections 126K, 131A and *Evidence Act* 1906 (WA) sections 20H-20M.

54 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [17].

55 [2012] FCA 766 at [23]; *Madafferi v The Age* [2015] VSC 687 at [39].

56 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [18].

57 *Jones v Dunkel* (1959) 101 CLR 298.

58 *Madafferi v The Age* [2015] VSC 687 at [40].

Under Section 126K(3) of the *Evidence Act*, an order requiring disclosure may be made subject to such terms and conditions (if any) as the court thinks fit.

It is clear that the statutory privilege recognises the strong public interest behind the free flow of information in a democratic society which may outweigh other public interests which apply in relation to the production of documents for the purposes of litigation.[59]

10. Tony Madafferi

Tony Madafferi's case was one of the first to seriously contest the statutory privilege. Madafferi had commenced defamation proceedings against The Age and its journalists. The defendants did not plead truth, but pleaded qualified privilege defences to which the plaintiff sought further and better particulars of those defences including details of the sources. The defendants refused to supply those particulars relying on journalist privilege pursuant to section 126K of the *Evidence Act* 2008 (Vic) and the 'Newspaper Rule'.

The plaintiff challenged the claim for journalist privilege and also sought orders for preliminary discovery pursuant to Rule 32.03(2) of the UCPR (Vic) including that the defendants attend before the court for oral examination and an order that they make discovery of all documents relating to the description of the persons concerned. The plaintiff said that the purpose in seeking the identity of the sources was to join them as defendants to the proceedings alleging that they were publishers of the articles.

Justice John Dixon considered that statutory journalist privilege may, or may not, apply in the exercise of the court's discretion after undertaking the following analysis:

(1) Identify the issues in the proceeding that determine the context of the application;

(2) Identify the public interest in disclosure, in the context of those issues in (1) above, that is advanced by the plaintiff;

(3) Assess the degree of significance or weight to be attributed to that public interest;

(4) Identify the likely adverse effect of an order for disclosure on the informant and others;

(5) Identify the public interest in a free and informed press and in investigative journalism;

(6) Assess the degree of significance or weight to be attributed to that public interest;

(7) Weigh up the competing considerations according the significance or weight attributed to them to answer whether the public interest in disclosure outweighs the other interests.[60]

The defendant bears the onus in respect of Issues (4) and (5) while the plaintiff bears the onus in respect of Issue (2).

Justice John Dixon refused disclosure of identity of the sources. In undertaking the above analysis, he considered that there were genuine fears of very serious adverse consequences if the sources were named. Further, he accepted that the journalist had fears of adverse consequences for himself, his family and his professional career if the sources were named. Some of the Italian sources would, if identified, be genuinely fearful for their personal safety or alternatively, the journalist would be adversely affected by a genuine concern that some of the Italian sources might threaten his personal safety or that of his family if the sources were identified.

There were also statements attributable to criminal justice sources and it was accepted that if their identities were revealed, either potential witnesses would be discouraged from coming forward to provide information to the authorities or it would hinder or interfere with ongoing investigations and/or identify their informants which could discourage their co-operation or expose them to serious repercussions. Accordingly, the Judge was satisfied that this consideration was deserving of significant weight against requiring the defendants to disclose their sources.

The Judge was satisfied there was significant and substantial legitimate public interest in the communication of facts and opinions on these particular matters to the public.

In terms of the public interest in disclosure, the Judge did not accept that the confidential sources were the key to the defendants qualified privilege defence. The references in the articles to confidential sources were not prominent but were a '*thread in the fabric of the qualified privilege defence along with identified sources and proven facts, assertions of careful adherence to prudent journalist practice and the ethical code and the public interest.*'[61]

51 [2016] NSWCA 115 at [219].

52 *Liu v The Age Company Limited* [2016] NSWCA 115 at [219], [223].

53 Division 1A of Part 3.10 of the *Evidence Act* 1995 (Commonwealth); *Evidence Act* 2008 (Vic) sections 126A, 131A; *Evidence Act* 2011 (ACT) sections 126K, 131A and *Evidence Act* 1906 (WA) sections 20H-20M.

54 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [17].

55 [2012] FCA 766 at [23]; *Madafferi v The Age* [2015] VSC 687 at [39].

56 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [18].

57 *Jones v Dunkel* (1959) 101 CLR 298.

58 *Madafferi v The Age* [2015] VSC 687 at [40].

59 *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290 at 174.

60 *Madafferi v The Age* [2015] VSC 687 at [44].

61 [2015] VSC 687 at [133].

The Judge was further satisfied that the identity of the sources was not the critical matter as to whether publication was reasonable in the public interest under the qualified privilege defence. There were sufficient critical matters which appeared in objectively demonstrative facts and documents which would permit an evaluation of the reasonableness of the newspaper's conduct under the qualified privilege defence which meant that the plaintiff would not be significantly disadvantaged not knowing the identity of the confidential sources.

In the circumstances, the Judge held that the capacity for a fair trial on the issue of reasonableness under the qualified privilege defence was not compromised by not identifying the sources such that the plaintiff did not have an effective remedy. He was not persuaded that the public interest in the disclosure of the identity of the sources would be compromised by non-disclosure in a manner that outweighed the likely adverse effect of disclosure on the informant and on other persons and the public interest in the communication of facts and opinion to the public by the news media.[62]

11. Exceptional Cases

Journalist statutory privilege under the Evidence Act was not available to The Age in *Helen Liu's* case. The publication took place in 2010 and the application for preliminary discovery was made shortly thereafter. In New South Wales, Journalist Privilege did not become available until amendments to the Evidence Act took effect on 21 June 2011. While section 126L provided that Journalist Privilege would apply to information given before the commencement of that amendment, it did not apply to hearings which began before commencement. The hearing began in October 2010.

Journalist Privilege is a powerful shield protecting sources in those jurisdictions where it applies. However the privilege can be disregarded in exceptional cases where the public interest in the administration of justice requires it.

Helen Liu's case was exceptional. The exceptional nature of the case involved the documents disclosed by the sources which Ms Liu alleged were fraudulently altered. McCallum J concluded that the handwritten documents '*may well have been falsely attributed to the plaintiff*' and that in respect of the handwritten list which did not purport on its face to be Ms Liu's document '*could well have been falsely or wrongly attributed to the plaintiff*'.[63] In respect of the letters, which bore a signature attributed to the plaintiff, based upon Ms Liu's evidence, the appearance of the second letter and the absence of any original documents, McCallum J concluded that it may well be that someone deliberately appended her signature to a document that was not hers.[64]

In the context of these prima facie findings, it was evident that the journalists never met or spoke to the sources. They never saw the original documents. Scientific handwriting analysis could not be carried out on the electronic copies of documents emailed to the journalists. Although the journalists sought to verify the truth of the documents by arranging to meet with the sources, the sources refused to meet and demanded money before any such meeting, up until the time the documents were sent.

In the article, the journalists claimed that the story was a result of a 10 month investigation. In fact, the emails between the journalists and the sources established that they had been negotiating for 10 months over the price to be paid for the documents. The sources wanted initially $200,000 for the documents and through this lengthy process, The Age eventually offered to pay a '*$10,000 research fee*', but no payment was ultimately made. The documents themselves were only received by the journalists 13 days before publication of the articles.

The sources represented to the journalists that the documents were in Helen Liu's handwriting. Immediately prior to publication, however, the sources requested the journalists not to use '*Helen's handwritten*' in any publication, which the journalists understood to refer to Helen's 'handwriting'. In response, the journalists asserted that there was a '*paramount public interest*' in disclosing the dishonesty. Consequently, the sources expressed their anger at the content of the articles which referred to Helen Liu's handwriting and refused to communicate further with the journalists.

In all these circumstances, the one matter that stands out is the journalists' assertion that there was a paramount public interest in disclosing dishonesty or in other words, the public knowing the truth. Given the conduct of these sources, the public interest is not one sided, but involves knowing who these sources are and knowing the truth about them.

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62 [2015] VSC 687 at [161].
63 [2012] NSWSC 12 at [188].
64 [2012] NSWSC 12 at [189].

Music Piracy Siteblocking Injunction Granted

Eli Fisher, Senior Associate at Banki Haddock Fiora and co-editor of the *Communications Law Bulletin,* comments on the recent music piracy siteblocking application.

On 28 April 2017, Justice Burley handed down the decision in *Universal Music Australia Pty Limited v TPG Internet Pty Limited* [2017] FCA 435 (**Music Industry case**). His Honour ordered that access to sites connected with Kickass Torrents be blocked by the respondent ISPs.

This latest judgment follows the judgments of Nicholas J on 15 December 2016 in the cases of *Roadshow Films Pty Limited v Telstra Corporation Limited* (**Film Industry case**)*; Foxtel Management Pty Limited v TPG Internet* (**Foxtel case**) [2016] FCA 1503.

The Film Industry case was brought by various film companies, including Village Roadshow, Disney, 20th Century Fox, Paramount, Columbia, Universal and Warner Bros against 50 ISP companies related to Telstra, Optus, TPG and M2. Foxtel brought its case against 33 ISP companies related to Telstra, Optus and TPG. The injunctions in those cases were in respect of The Pirate Bay, Torrentz, TorrentHound, IsoHunt and SolarMovie.

The judgments of Nicholas J were the first judicial interpretation of the siteblocking provision in section 115A of the *Copyright Act 1968*, which came into effect with the *Copyright Amendment (Online Infringement) Act 2015*.

The Music Industry case was brought by major players in the Australian music industry, including Universal, APRA, Australian Music Corporation, Sony and Warner.

These judgments are significant for their implementation of new, important and, in some respects, controversial new powers in the fight against piracy. But, except in relation to the costs aspect of the decision, there is nothing in the judgments that is particularly unusual or surprising.

Section 115A essentially provides that the owner of a copyright may apply to the Federal Court for an injunction, if the Court is satisfied that an ISP provides access to an "online location" outside Australia, and the online location infringes or facilitates an infringement of the copyright, and the primary purpose of the online location is to infringe, or to facilitate the infringement, of copyright. "Online location" is the broad but undefined term used to implicate websites but also capture other platforms developed in the future.

The injunction is to require the ISP to take reasonable steps to disable access to the online location.

In determining whether to grant the injunction, the Court may take any relevant matter into account, including: the flagrancy of the infringement; whether the owner or operator of the online location demonstrates a disregard for copyright generally; whether access to the online location has been disabled by orders from any court of another country due to copyright infringement; whether disabling access to the online location is a proportionate response in the circumstances; the impact of any person likely to be affected by the grant of the injunction; and the public interest.

To encourage rightsholders and ISPs to cooperate on orders, the legislation provides that the ISP is not liable for any costs in relation to the proceedings unless the ISP enters an appearance and takes part in the proceedings.

The siteblocking scheme is quite narrow in application, and it is extremely prescriptive. One can imagine interesting arguments being raised in relation to particular websites that facilitate the infringement of copyright but for whom such activity is perhaps not the "primary" purpose, or arguments in relation to what is and is not an "online location".

But those cases are not yet upon us. Nor is a case where the owner or operator of an implicated online location defends the application. Thus far, we have seen rightsholders apply to the Court to order ISPs to block the most obvious and flagrant infringers of copyright. The orders, which had already been mostly negotiated between the parties, were granted – broadly on the same terms of the earlier orders made by Nicholas J.

The orders themselves are exceedingly uncontroversial.

ISPs must within 15 days take reasonable steps to disable access to the specified online location. ISPs will be deemed to have complied with the orders by DNS blocking the nominated domain names – although other technical means of blocking access to the sites would also be acceptable. DNS blocking means a system by which any user of an ISP's service who attempts to use a DNS resolver that is operated by or on behalf of the respondent to access an infringing site is prevented from receiving a DNS response other than a redirection. And the redirection ordered must be to a "landing page" that notifies the user that access to the intended website has been disabled because the Federal Court has determined that it infringes or facilitates the infringement of copyright.

The injunction is to operate for a period of 3 years, but can be extended. If at any time, the infringing site is accessible via a domain name that is not nominated, an abbreviated application process for adding that additional domain name to the list has been set out. Essentially, the rightsholder can file and serve and affidavit and propose short minutes and, unless the ISP objects, the Court will make the orders without any further hearing. This would help alleviate any "whack-a-mole" problem that rightsholders can face in blocking access to an infringing site only for its operators to change its address to something unaffected by the orders.

So far, so sensible.

The main (although not only) area where the parties seemed to be in dispute was in relation to the costs of complying with the siteblocking scheme. As with the Film Industry case and the Foxtel case, the rightsholders are to pay the ISPs' compliance costs calculated at the rate of $50 per domain name, and must pay the ISPs' costs incidental to the preparation of evidence and written submissions, and the making of oral submissions, in relation to the compliance costs.

Awarding legal costs against the applicants might be particularly difficult for them to accept, given that while they lost on the point of compliance costs, there were other disputed aspects of the orders where they did prevail – for example, in connection with the landing page. There has been no corresponding order made that the ISPs should pay costs in connection with those submissions.

Finally, as with the previous s115A cases, the rightsholders do not have to pay the set up costs involved in the ISPs developing the infrastructure necessary to give effect to the orders.

The rightsholders argued that the ISPs should bear their own compliance costs because:

(a) these orders are simply part of a regulatory regime in which the ISPs operate, and thus should be seen as a cost of doing business. This accords with the view of Arnold J in an earlier UK siteblocking case;

(b) the respondents will also benefit from the blocking of the online location, because they too are providers of licensed copyright content and they accrue a benefit beyond that of mere bystanders or innocent third parties. Unlike in the previous s115A cases, the music industry applicants led evidence on this point. Moreover, Foxtel was one of the respondents in the Music Industry case; and

(c) the costs of the implementation are *de minimis*, and in the context of achieving a regime for blocking online locations, which is intended to be efficient and economical, it is better to avoid arguments about trivial costs.

The ISPs disagreed. They argued instead that:

(a) they are an innocent party which has not infringed any of the rightsholders' rights. The Court would usually take the position that where an innocent party against whom coercive orders are sought, and where the orders benefit another party, the benefitting party and not the innocent party pays the costs of compliance. This would be analogous to the approach taken in respect of freezing orders, subpoenas and preliminary discovery; and

(b) the injunctions are intended to serve the rightsholders' commercial interests.

Ultimately, the Court agreed with the ISPs' arguments on costs. Although $50 per domain name was less than some ISPs were seeking, and the set-up costs of the requisite siteblocking infrastructure will be paid by the ISPs, rightsholders could be expected to be disappointed with this aspect of the verdict.

Considering the impact of the judgment more broadly – that is, with reference to its efficacy in the fight against piracy – it is far too soon to know what the impact of siteblocking will be on Australians accessing pirated versus legitimate content. Many commentators have pointed to the range of easy methods of circumventing the siteblocking orders, including through the use of VPNs.

Nevertheless, some research in other jurisdictions, for example IFPI's research into the UK and Italian experiences of siteblocking, has demonstrated that educative messages, and making access to pirated content merely more inconvenient, can succeed in reducing piracy levels significantly. In the three years since The Pirate Bay and numerous other sites were blocked in the UK, there was a 45% decline (from 20.4m in April 2012 to 11.2m in April 2014) in visitors from the UK to all BitTorrent sites, whether blocked by ISPs or not. In Italy, where courts have ordered the blocking of 24 BitTorrent sites, there was a decline of 25.6% in the number of overall BitTorrent downloads in the country in the two years from January 2013.

Further evidence has suggested that changes in consumer behaviour appear, but not immediately after the first orders have been made. A critical mass of siteblocking orders against pirate sites is essential before changes in consumer behaviour are visible.

In my view, it is important to understand what section 115A is, and what it is not. No one ever suggested that it would end the fight against piracy, or that on the making of the first siteblocking orders, we would see rightsholders in some sort of *V-J Day in Times Square* kiss celebrating the end of the war. In fact, Prime Minister Turnbull stated at the time:

"There is no silver bullet to deal with internet piracy, but the Copyright Amendment (Online Infringement)

Bill 2015 provides an important part of the solution to the problem of online copyright infringement. It is vital that copyright owners have an efficient mechanism to disrupt the steady supply of infringing content to Australian internet users from overseas based websites."

It is a very useful if imperfect tool for rightsholders to reduce, if not eliminate, piracy in Australia and encourage Australian consumers to migrate from illegal platforms to legitimate ones that compensate creators. And nothing more.

For the many critics who argue that the siteblocking regime will be ineffective, and that the best method for reducing piracy is to make access to content more convenient to consumers, there is an obvious tension in their arguments. If convenient access to legitimate content is essential to consumers, then inconvenient access to illegitimate content is likely (and hopefully) to be a deterrent to consumers.

My prediction is that piracy rates will come down as a result of consumers finding it more difficult or inconvenient to access illegal content, and as a result of the law sending a clearer if long overdue message that it is unethical to access illegal content.

From the outset, the Government committed to review the operation of the regime 18 months after its commencement. That date came and went at the end of last year, and the Government has given no word as to when the review will actually take place. Industry expects the review to take place no sooner than in 2018. In the dynamic and unpredictable environment of digital technologies, it is reasonable to suspect there will be further significant developments in the area before that review is underway. Stay tuned.

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.

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