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The Future of Australian Media:
Creating a 'Level Playing Field' and Supporting Local Content

By Sophie Dawson, Partner, and Rachel Baker, Lawyer, Ashurst[1]

1. Introduction

The Federal Parliament passing a range of media law reforms – covering media ownership, licence fees and taxes – coincides with a review of local content, seeking to ensure incentives and rules regarding local content keep up with the rapidly changing media landscape.

The legislative reforms seek to create a fairer regulatory environment, by removing rules that apply to traditional media but not online and streaming services. The reforms aim to allow radio, television and newspapers to structure their businesses more efficiently and achieve greater scale to adapt and compete more effectively with newer services.

To address concerns that these reforms will lead to a reduction in local content for regional areas, broadcasters in those areas will be required to increase their local content.

Separate to these changes, the Australian and Children's Screen Content Review is seeking to provide policy options in relation to how to best support Australian drama, documentary and children's content.

While the review will not cover news and current affairs, a separate Senate review into the future of public interest journalism is also underway, due to report in December 2017.

These measures come at a crucial time for Australian media. Advances in technology allow Australian consumers to access content from all over the world via their computers, phones and televisions. Global competitors have developed strong positions in the local market yet web-based services have, until now, been excluded from local media regulation. The reforms are the most significant in a generation and aim to allow the regulatory environment to keep up with the rapidly changing media landscape.

2. Screen content review

Successive governments have regulated and provided incentives to ensure that Australian television content is produced and broadcast, both here and overseas. The rationale for these measures is to ensure that Australian stories are told, which helps reflect and shape national identity, character and cultural diversity.

1 The authors gratefully acknowledge the contribution of Alex Cato, and also the time spent by various people discussing their views on these issues. They also gratefully acknowledge Robert Todd for reading over this article prior to publication. The views expressed in this article are the authors' own, and do not necessarily reflect those of the above people or of Ashurst.

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Editors' Note

As 2017 begins to wind down, and with the silly season well underway, it is worthwhile to reflect on the fascinating year that has been. Since the last edition (only in October!) industry has been kept busy with many big developments.

West Indies' cricket star, **Chris Gayle**, won his defamation claim against **Fairfax Media**, which published allegations that he flashed a female masseuse in the dressing room during a training session at the 2015 World Cup. Fairfax indicated its intention to appeal, publicly stating that it did not believe it received a fair trial. The editor of *Junkee*, **Osman Faruqi** is suing **Mark Latham** for defamation. **Stan** and **Village** have written a trade mark letter of demand against a group of men who racially abused **Sam Dastyari**, over the use of the name 'Romper Stomper'. **George Miller**, the director of **Mad Max: Fury Road** is suing **Warner Bros** in Sydney over unpaid earnings. And that's about the least scandalous thing happening right now in the entertainment industry.

Telstra is compensating 42,000 customers for slow **NBN** speeds and, speaking of broadband, the sending of intimate pictures without consent saw Richmond Tigers' premiership player **Nathan Broad** banned for 3 weeks at the beginning of the 2018 AFL season, with state "revenge porn" laws getting a fair amount of coverage.

The **ACCC** released its draft report on the communications sector and recommended that the Government "consider whether NBN Co should continue to be obliged to recover its full cost of investment through its prices." ACCC Commissioner, **Rod Sims**, who spoke at a CAMLA event a few weeks ago (see inside), has indicated that the ACCC is about to commence a study into the impact of the new digital environment on media prior to 1 December 2017. It's been action-packed at the ACCC in our space, with the Commission also recently succeeding in its Federal Court claim against **Meriton Serviced Apartments**, alleging that Meriton prevented people who it believed would write negative reviews, from using **TripAdvisor**. Apart from the upcoming ACCC inquiry, there are two other significant inquiries underway: a **House of Reps** inquiry into the TV and film industry and a **Communications Department** inquiry into children's screen content. The first studies on **piracy** in Australia since the Government's **site-blocking laws** came into effect suggests that piracy in Australia has dropped 20% year-on-year. On 5 November, **Bitcoin** was valued at $165 billion, or 1.4 times the total market capitalisation of Australia's listed property. **Canada** has a new law to protect sources. And the **USA** is considering its own media ownership regulatory reforms.

This edition, we have two interviews. The first is with **Peter Harris AO,** Chair of the Productivity Commission, discussing three recent CAMLA-relevant inquiries: into Australia's IP arrangements, the Telecommunications Universal Service Offering; and data availability. The second interview is with Emeritus Professor **Ron McCallum AO**, regarding the disability access changes to the *Copyright Act*. The ACMA's **Katherine Sessions** profiles NBCUniversal International's VP of Legal and Business Affairs **Damian McGregor** about his role. Norton Rose Fulbright's **Martyn Taylor** and **Lillie Storey** take us through the changes to the *Competition and Consumer Act*, and **Nick Abrahams** updates us on blockchain in Australia. Sydney University's **Michael Douglas** discusses the recent global injunction against Twitter issued by the Supreme Court of NSW. We have Banki Haddock Fiora's **Peter Knight** on the changes that have just been made to the *Copyright Act*, and CAMLA essay competition finalist, **Felicity Young**, talking about further changes she would like to see made to that legislation. Ashurst's **Sophie Dawson** and **Rachel Baker** walk us through law reforms regarding media content and ownership. And **Rod Sims** comments on the ACCC's regulation of the media and communications industries.

If that's not enough, we also advertise the **CAMLA AGM**, the **2018 Essay Competition**, report on the Young Lawyers' **speed-mentoring event**, and invite young lawyers to express interest in joining the CAMLA **Young Lawyers Committee**.

Lastly, we thank **Immy Yates**, editorial assistant, for her excellent contribution to the CLB this year, and bid farewell and wish good luck to all our readers for 2017. See you in 2018!

Victoria and Eli

However, it is unclear if the existing framework is best placed to achieve these goals, since the shake-up of the media landscape brought about by the entrance of streaming services, subscription video on demand and user generated video. Free-to-air broadcasters are also offering their programs on-demand. All of these changes make it difficult to measure the effectiveness of local content rules. The review is being conducted by the Australian Government, the Australian Communications and Media Authority (**ACMA**) and Screen Australia, and will seek to find the most efficient and effective support mechanisms to ensure the ongoing viability of Australian content, regardless of the platform on which it is broadcast.

The Review sought submissions from anyone with an interest in the creation, distribution and consumption of Australian content. It is considering:

(a) the economic and social value of Australian screen content to the Australian community;

(b) the current and likely future market for Australian screen content production and distribution;

(c) whether the Australian Government's current policy settings:

  (i) are relevant to current industry practice;

  (ii) appropriately target content that requires intervention;

  (iii) ensure an approach that works across a diversity of platforms;

(iv) promote a sustainable production and distribution sector; and

(v) are able to support Australian content on any platform into the future.

The regulation of local content for regional television and regional radio is outside the scope of the review.

2.2 Global competition for production work

There are aspects of media which are inherently local, like news. The market for entertainment content is however largely global and seems likely to become more so as time goes on.

From the point of view of Australian producers, audiences and regulators, it is desirable for Australia to become (or remain):

- the venue of choice for producers regardless of the nature of that content (and whether it has an Australian or other focus), as this will drive employment and nourish the local industry;
- the source of stories which are produced in Australia and also all over the world (the HBO production Big Little Lies based on Liane Moriarty's book is a recent example); and
- the home of companies and people who are successful in telling Australian and others' stories and who produce them not only in Australia but also elsewhere.

2.3 Is intervention justified?

Some might argue that subsidising or otherwise supporting local content will not promote efficiency, and that instead the market should decide where content is made.

There is some logic in this suggestion: that Australian consumers should be able to decide what content they wish to consume and how much they pay for it, which will in turn drive the decisions by suppliers as to what to produce, and how much to spend on it. This would ordinarily mean that the market would produce an efficient amount of local content.

However, this argument overlooks the benefits other than efficiency that are achieved through production of local content. These are referred to by economists as "positive externalities": benefits which accrue to people other than those who consume (and pay for) content.[2] The positive externalities are significant. Great Australian stories not only build our national sense of identity, they also build our reputation and our tourism industry and provide local jobs.

That said, there are of course many competing and worthy causes on which to spend taxpayers' money. It is therefore important to find the right size and combination of tax breaks, subsidies and other measures to give the right amount of support to television production. And, as was recognised by the Minister for Communication and the Arts,[3] it is important to ensure that support measures are efficient in the sense that they result in the production of content that consumers want to watch, and which delivers positive externalities in the right measure. Moreover, these difficult regulatory objectives must ideally be achieved without the Government obtaining control over content in any way that compromises the independence or creativity of writers and producers.

2.4 Current local content rules

Local content is regulated by the *Broadcasting Services Act* 1992 (BSA), *Australian Content Standard* (ACS) and *Television Program Standard 23 - Australian Content in Advertising*.

The BSA requires all commercial free-to-air television licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6am and midnight on their primary channel.[4] They are also required to provide at least 1460 hours of Australian programming on their non-primary channels during the same time.[5] This requirement includes sub-quotas for drama, documentary and children's content. Other measures include:

(a) a minimum expenditure requirement for each subscription drama channel;

(b) requirement that 80% of advertising be Australian produced;

(c) requiring the ABC and SBS to promote a sense of national identity and a multicultural society;

(d) funding from Screen Australia, state and territory funding agencies, and in some cases from the Australian Television Foundation for drama, documentary and children's content distributed theatrically, on television or online; and

(e) the Producer Offset, administered by Screen Australia which supports feature films (40% rebate) and non-feature documentaries, dramas or animations (20%). This does not extend to reality television, news or current affairs programs or game or variety shows.

2.5 News and current affairs

The content review does not cover news but, coincidentally, additional support for local news was secured as part of negotiations to secure the passage through the Senate of media law reforms (see below).

2 For more detail on this concept: https://www.khanacademy.org/economics-finance-domain/microeconomics/consumer-producer-surplus/externalities-topic/v/positive-externalities.

3 At https://www.communications.gov.au/sites/g/files/net301/f/factsheet_australian_and_childrens_content_review.pdf.

4 *Broadcasting Services Act 1992* (Cth) section 121G(1).

5 Ibid, section 121G(2).

There is also a Senate inquiry underway into the Future of Public Interest Journalism, which will examine and report on:

- the state of public interest journalism in Australia and around the world, including the role of government in ensuring a viable, independent and diverse service;
- the adequacy of current competition and consumer laws to deal with the market power and practices of search engines, social media aggregators and content aggregators, and their impact on the Australian media landscape;
- the impact on public interest journalism of search engines and social media internet service providers circulating "fake news", and an examination of counter measures directed at online advertisers, "click-bait" generators and other parties who benefit from disinformation;
- the future of public and community broadcasters in delivering public interest journalism, particularly in underserviced markets like regional Australia, and culturally and linguistically diverse communities;
- examination of "fake news", propaganda, and public disinformation, including sources and motivation of fake news in Australia, overseas, and the international response; and
- any related matters.[6]

The inquiry has received 71 submissions and held public hearings in Melbourne and Sydney. It is due to report by 7 December 2017.

The essential role played by journalists and the media has been recognised by the law over centuries. The principle of open justice, that courts must be open to the public and journalists free to report on proceedings, is recognised as being of constitutional significance. Exceptions are made only where necessary for the administration of justice. The reasons for this are well documented in decided court cases. Courts have observed that:

> *"Whatever (the media's) motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to the public scrutiny is the surest safeguard against any risk of the court's abusing their considerable powers."*[7]

And that:

> *"Without the publication of reports of court proceedings, the public would be ignorant of the workings of the courts whose proceedings would inevitably become the subject of the rumours, misunderstandings, exaggerations and falsehoods that are so often associated with secret decision making. The publication of fair and accurate reports of court proceedings is therefore vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice."*[8]

Freedom of speech in relation to Government and political matters has been found to be constitutionally protected for the same reasons.

The importance to our system of open justice is so great that courts have found these principles to be constitutionally protected, such that they trump any inconsistent laws.[9] The benefits extend beyond social factors: it is widely accepted amongst economists that the rule of law (of which open justice is an element) is an important contributor to economic growth, and has an effect on the wealth of countries.[10]

The media watch over our governments, institutions and courts. Private citizens do not generally have the time, sophistication or resources to make the freedom of information requests, do the research, speak to the sources and to understand what is or may be happening that investigative journalists have.

Recent events in the US and in France, and particularly the alleged Russian interference in the US election, demonstrate that social media and citizen's journalism are not adequate substitutes for quality, reputable investigative journalism. Without it, the democracy that underpins our society is at risk.

3. Legislative reforms

3.1 Media ownership

The reforms are contained in two bills: the *Broadcasting Legislation Amendment (Broadcasting Reform) Bill* (**Broadcasting Reform Bill**) and the *Commercial Broadcasting (Tax) Bill* (**Commercial Broadcasting Tax Bill**) which have both been passed by the Senate and the House of Representatives.

As part of the Broadcasting Reform Bill, the '75 per cent audience reach rule' in the *Broadcasting Services Act 1992* (Cth) (BSA) will be repealed. This rule prevents any person controlling commercial television licences in areas whose combined population exceeds 75 percent of the population of Australia. Repealing it will, subject to competition and other laws, allow mergers between metropolitan and regional broadcasters, providing for greater scale in operations and letting broadcasters compete more readily with online streaming services.

The 2 out of 3 cross-media control rule in the BSA will also be repealed.

6 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Public_Interest_Journalism/PublicInterestJournalism/Terms_of_Reference

7 R v Davis (1995) 57 FCR 512 at 513-514

8 John Fairfax & Sons Ltd v Police Tribunal (NSW) (1986) 5 NSWLR 465 at 481.

9 *McCloy v NSW* [2015) HCA 34, *Russell v Russell* (1976) 134 CLR 495.

10 See, for example: "Economics and the Rule of Law: Order in the Jungle", *The Economist,* 13 March 2008 available at http://www.economist.com/node/10849115, and

This rule prevents any individual controlling two out of three platforms (radio, television and print) in one licence area. The rule does not take into account online services, which are significant players in the media landscape.

To ensure the new rules do not reduce local content in regional areas, television broadcasters in large regional areas will be required to show extra local content if there is a change in ownership or control such that it is part of a group that reaches more than 75 percent of the Australian population. Broadcasters in smaller markets (which do not currently have local content obligations) will also be required to screen some local material.

3.2 Merger guidelines

Following the passage of the bills, the Australian Competition and Consumer Commission (**ACCC**) released updated Media Merger Guidelines. The guidelines identify the following issues which will be considered when the ACCC assesses media mergers under section 50 of the *Competition and Consumer Act 2010*:

- Competition and diversity: one important factor in competition and diversity is concentration of media ownership. A merger between media outlets which increases an entity's market share is likely to increase concentration and reduce diversity.
- Technological change: technology can introduce new competitors, increase closeness of competition and affect barriers to entry.
- Access to key content: a merger may be problematic if it increases an entity's holding or ability to acquire "key content" (ie content that draws large audiences, such as live sporting events and popular reality shows).
- Two-sided markets and network effects: these can entrench a powerful player's position in the market and create barriers to entry.
- Bundling and foreclosure: bundling refers to offering complementary products as a package. Foreclosure refers to an entity limiting access or raising prices for a product that is an input for a competitor. The ACCC is only concerned where these strategies are likely to substantially lessen competition.

3.3 Anti-siphoning

Anti-siphoning rules will be relaxed, giving subscription television and multi-channels a greater ability to broadcast listed events. The anti-siphoning scheme in the BSA allows the Minister for Communications to specify a list of events that should be available on free-to-air television, and prevents a subscription broadcaster acquiring a right to televise an event until a free-to-air broadcaster has had a chance to obtain that right. Currently, an event is delisted 12 weeks before it happens, because free-to-air broadcasters would be taken not to be interested in acquiring a right if they have not done so by then. This period will be extended to 26 weeks. Another restriction, known as the 'multi-channelling rule', will be removed. This rule prevents a free-to-air broadcaster premiering a listed event on a multichannel (eg ONE, GEM, 7Mate). This rule aimed to prevent viewers with analog television being disenfranchised but, following the digital switchover in 2013, this rule is now redundant.

3.4 Licence fees and taxes

The Commercial Broadcasting Tax Bill will permanently abolish broadcasting licence fees, datacasting charges and apparatus licence fees. It is argued by broadcasters that these fees are no longer warranted or sustainable, particularly given that online and on-demand services face no such fees.

A new transmitter licence tax will instead be introduced. The amount of the tax will be determined by the Communications Minister, but must not exceed the cap specified in the Bill. The government says the new tax will more accurately reflect the use of broadcast spectrum.

The Bill requires the ACMA to review broadcasting pricing arrangements by 2022.

3.5 Amendments

Passage through the Senate was secured after the Government reached a deal with Senator Nick Xenophon, who agreed to vote for the reforms in exchange for increased support for regional and small media companies and their recruits. An innovation fund, worth $60 million over three years, will provide grants to help publishers who produce "civic journalism" (ie journalism with a focus on public interest issues) transition, innovate and compete. There will also be 200 journalism cadetships and 60 journalism scholarships, to encourage young people to train and work in regional media.

The Government reached a deal with One Nation, in exchange for its support for the Bills, to force the Australian Broadcasting Corporation and Special Broadcasting Corporation to publish the wages of employees earning more than $200,000, and legislative changes requiring that the ABC be "fair and balanced". These changes will require amendment to the ABC Act. Other parties including the Nick Xenophon team have indicated they will not support the changes. One Nation also negotiated a $12 million subsidy for community radio.

The Broadcasting Reform and Commercial Broadcasting Tax Bills were opposed by the Opposition and the Greens.

Conclusion

There will no doubt be disagreement about the merit and effectiveness of the various measures taken as part of these law reforms and reviews but, after a decade of rapid change in the industry, it is likely that many players and consumers will welcome the fact that regulation has changed. The reforms will not remove the need for media organisations to compete in an open market, but may allow companies greater freedom to navigate through the dynamic and highly competitive landscape.

Interview: Emeritus Professor Ron McCallum AO

Eli Fisher, co-editor, sits down with Emeritus Professor Ron McCallum AO, former Dean of Sydney Law School and consultant to HWL Ebsworth, to discuss Australia's implementation of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* in the *Copyright Act* (Marrakesh Treaty), by way of the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Amendment Act).

Professor McCallum, who lost his eyesight at birth, has been a fierce advocate for the rights of people with disabilities for many decades. He is an expert in labour law and among the most acclaimed legal academics in Australia. He is the first totally blind person to be appointed to a full professorship in any subject at any university in Australia or New Zealand, and was also the first to become a Dean of Law in those countries. Professor McCallum was an inaugural member of the UN Committee on the Rights of Persons with Disabilities from 2009 to 2014, and he served as its Chair from 2010 to 2013. The Committee, which meets in Geneva, monitors signatory nations' compliance with the *Convention on the Rights of Persons with Disabilities.* Ron served on the Board of Vision Australia from 2006 to 2015, and he is a current member of the Board of Ability First Australia. He has also been a Don't DIS my ABILITY ambassador since 2010. In 2011, Professor McCallum was named the Senior Australian of the Year.

ELI FISHER: Ron, on behalf of our readers, thank you so much for your time discussing the recent amendments to the *Copyright Act* and the other work in which you have recently been involved. The *Copyright Act* was amended in June this year, following the passage of the Amendment Act. The Amendment Act came about following Australia's ratification of the Marrakesh Treaty on 10 December 2015. Can you tell us about your involvement?

RON McCALLUM: My work on the UN Committee better exposed me to the plight of people with disabilities around the world, which obviously is in many respects different from the plight of people with disabilities in Sydney. Most people with print disabilities are poor and live in developing countries. Even in Australia, we still need to do a great deal to increase the workforce participation of people with disabilities. But most people in developing countries don't have access to books or basic education. In 2016, the World Blind Union estimated that less than 10% of published works are made into accessible formats in developed countries, noting that "millions of people, including children and students, are being denied access to books and printed materials". But the situation is even worse in developing countries, where less than 1% of books are ever made into accessible formats. As the World Blind Union noted: "In places like India, the country with the highest number of people who are blind or partially sighted, over half of all children with a visual disability are out of school. This global lack of accessible published materials is known as the 'book famine'."

There are, according to World Health Organization estimates, 253 million people living with vision impairment in the world, 36 million of whom are blind. Of those living with vision impairment, 19 million are children - that is, under the age of 15. Keeping in mind that 80% of vision impairment can be prevented or cured, much of the prevalence of vision impairment takes place in the developing world. When we talked to governments from the developing world, they would often say that they have enough trouble catering for the able-bodied, and they considered that people with disabilities are most appropriately left to the domain of charity.

Our UN committee was and is a strong supporter of the Marrakesh Treaty. When countries would report to us about their compliance with the *Convention on the Rights of Persons with Disabilities*, we made an effort to question them about whether they intended to support the Marrakesh Treaty. The UN Committee argued in written submissions and in its constructive dialogues with reporting countries, for all nations to ratify the Marrakesh Treaty. I am delighted that Australia has now done so, and has implemented corresponding legislation.

I'm quite fortunate, to live where I live and in my circumstances I can take advantage of various technological resources that are not available to everyone. But more can be done for people with vision impairments in Australia and *much* more can be done for those with vision impairment in the developing world - and the Marrakesh Treaty is a great example of this.

FISHER: So, talk us through the issue. Where does copyright come into the picture?

McCALLUM: People with print disabilities need to be able to access content that is usually stored in print form in order to participate in society to the fullest extent possible. Ordinarily, copyright will prevent a person from taking text and making copies of it, or adapting it, without permission. Often, therefore, copyright restrictions can mean that people with print disabilities have difficulty obtaining texts in a format that is accessible to them. So, quite helpfully, there have for

many years been exceptions in the Copyright Act to allow organisations like Vision Australia to reproduce books in accessible formats, such as in braille or in digital formats. There is a format-shifting exception that allows a book, photo or video to be copied into another format, such as an accessible format digital file, subject to various restrictions. There is an exception at section 200AB(4) that provided that individuals with disabilities, and people who assist them, do not infringe copyright in certain circumstances. That provision will be replaced a broader fair dealing provision on 22 December 2017. There was a statutory licence, which permitted declared institutions assisting people with a print disability to reproduce and communicate literary and dramatic works in other accessible formats. A specifically licensed radio station is entitled to broadcast certain copyright works, including newspaper articles or scripts from plays.

Those exceptions operate within the boundaries of Australia. And similar exceptions exist in Britain and the United States. But there were no exceptions to allow an accessible format copy that has been prepared, for example, in the United States to be used by blind people in Australia. That means that when a book such as the Harry Potter books were put in accessible formats, there had to be separate accessible format copies created in Canada, Britain, Australia and the United States - which is terribly wasteful of resources, especially in circumstances where resources can be put to better and more efficient use. Personally, there are accessible format copies of law books by foreign publishers, which are available in the United States, but which I cannot access legally in Australia. This applies also in respect of recent novels, which were not available on Kindle in Australia, but were in American blind libraries. There are a couple of book libraries, for example Bookshare in the United States, which has put (at current figures) almost 580,000 titles into an accessible format. In Australia, I can only gain access to a quarter of those books, because there were no provisions for such works crossing borders.

But this challenge is far more pronounced in the developing world, and it is here where the importance of the Marrakesh Treaty is most keenly felt. Particularly in the developing world, there is no way to allow books created in Australia to go overseas. And we are able to be of great assistance to the developing world in exporting English-language books. Another example is Spain, which has quite a large Spanish-language library of accessible works, but which cannot get content across to parts of South America without infringing copyright law. To allow this sort of exchange countries had to amend their laws.

FISHER: So what did the Treaty seek to achieve?

McCALLUM: Essentially, the Treaty required signatories to legislate for exceptions to their national copyright law that permitted people with a print disability and certain organisations that assist people with print disabilities to make accessible format copies, and transfer accessible format copies between other signatory countries without the permission of the rights holder. It removes that obstacle to access. It should be noted that the obligations in the Treaty apply not only in respect of blind people, but those who have a visual impairment or a perceptual or reading disability which cannot be improved but which means that the person cannot read printed works to the same degree as a person without such an impairment, and also to those who are unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading. The Amendment Act takes it even further: "a person with a disability" means a person with an impairment that causes the person difficulty in reading, viewing, hearing or comprehending material in a particular form. Thus, it applies as much for those with hearing and other impairments as those with vision impairments, which was the focus of the Marrakesh Treaty.

There is an important exception to this provision. The Treaty provides that at the domestic level countries are entitled to limit the protection so that it does not extend to dealings with works that can be "obtained commercially under reasonable terms for beneficiary persons in that market." That is, one can only rely on the protection if there is no commercially available accessible format copy already in existence. And this is what Australia has done. The new fair dealing exception at section 113E of the Act provides that a *fair* dealing with copyright material does not infringe copyright in the material if the dealing is for the purpose of one or more persons with a disability having access to copyright material. The matters to which regard must be had in determining whether the dealing is a fair dealing for the purposes of that provision include the purpose and character of the dealing, the nature of the copyright material, the effect of the dealing on the potential market for, or value of, the material and the amount and substantiality of the part dealt with. Likewise, the provision at section 113F which provides organisations assisting persons with a disability with protection from infringement, does so only where the organisation is satisfied that the material cannot be obtained in that format within a reasonable time at an ordinary commercial price.

Last month, Nigeria and Costa Rica ratified the Treaty, taking the number of countries that have ratified the Treaty to 34, following many others in the developing world, including Burkina Faso, Malawi, Kenya, Kyrgyzstan, Honduras, Panama, Liberia, Sri Lanka, Botswana, Tunisia, Saint Vincent and the Grenadines, Guatemala, Ecuador and El Salvador. India, which was referred to specifically in the World Blind Union quote earlier, was the first to ratify the treaty. Developed

countries, such as Australia, Canada, Israel, Argentina and South Korea have also ratified the treaty - but we are eagerly hoping for the UK and the US to ratify the treaty, as that will free up a lot of works, especially in the English language.

FISHER: Do you consider that there is, or should be, a human right to access information?

I don't think that there is a human right to access all information for free. I write, and so I consider copyright to be very valuable. But equally, I think that the law should not discriminate against the print handicapped. In that sense, you can understand why the provisions of the Treaty which permit an accessible format copy to be made are very important, but you can also understand why the exception regarding commercial availability is there too.

These provisions are not about people with disabilities not having to pay to access works like other people would, or publishers giving charity to the print-handicapped. They are really about fair access. The idea is to increase the amount of the accessible books available.

FISHER: Changes to copyright legislation can sometimes be fraught. Was there significant resistance to the changes, either at an international level, or locally?

McCALLUM: I wasn't involved in the negotiations directly. Much commendation should go to the head of the World Intellectual Property Organisation - Frances Gurry, an Australian of whom we should be very proud - for the manner in which he handled the negotiations. There was a lot of understanding and goodwill from the West - US, Canada, Australia - when it came to exceptions for accessibility. There was generally a level of comfort among rights holders about agreeing to reasonable exceptions for assisting the print handicapped. These countries had exceptions already in place. But this was about moving these arrangements from a national level to an international level. This was a big step, and there were complicated negotiations. Publishers said, at some point, that they were prepared to provide access on a voluntary basis, and consult with various organisations as to the most appropriate way to do so, for example the Canadian National Institute for the Blind and Vision Australia. But the developing nations pushed for a treaty, which was understandable.

I am loath to put book publishers in a bad light, as they have always been very decent and accommodating in respect of accessibility. Personally, my experiences with publishers have been very positive. Many law book publishers have provided me with accessible resources upon request, and they should be commended. But we want to make more and more books accessible. Why can't all print books be made accessible on programs such as EPUB, using whatever protection methods deemed necessary, to make books accessible to people with print disabilities?

If I seem a bit soft on publishers, you have to keep in mind that publishing in Australia is a difficult business. And we add significantly to their cost. They have to compete with international online services, such as Amazon. And it is a tough industry. But we can find a way to encourage better access.

I also note that publishers, authors and other members of the rights holder community are actively engaged in ongoing fruitful discussions with disability associations, government and accessible format providers, through the Marrakesh Treaty Forum, to exchange ideas about how to make published material accessible to people with print disabilities. One of the projects of the Marrakesh Treaty Forum is to develop "Born Accessible" Australian standards and pitch those standards to the Accessible Book Consortium. Born accessible books are books that are usable directly from the publisher both by people with print disabilities and those without print disabilities. The Accessible Book Consortium is another initiative being led by WIPO, and includes organisations such as the World Blind Union, libraries for the blind and the publishing community.

FISHER: Did the changes go far enough, or is there more yet to do?

McCALLUM: The Treaty does not force publishers to make books accessible; it only gives organisations rights to make accessible copies, and for accessible copies to go across borders. But beyond the Treaty, we should be thinking within our own domestic framework how to encourage publishers to make texts accessible as a matter of course. Not free of charge, but virtually automatically. My intention would not be to impose upon publishers; but we should be looking for ways to help publishers enable better access for people with disabilities - say, by way of a subsidy or some other legal encouragement - particularly for textbooks for students beginning at kindergarten and going all the way through to university.

Some younger advocates for people with disabilities think that there should be laws forcing automatic accessibility. I'm not so fervent. I want to continue dialogue with publishers and government. There is a lot of goodwill there. Marrakesh is a good example of what can be achieved when people get together and each community - those with print disabilities, publishers, etc - understands the difficulties that the other faces.

FISHER: You recently launched your latest book, *The Legal Protection of Refugees with Disabilities,* with your co-authors Professor Mary Crock, Professor Ben Saul and Laura Smith-Kahn. The book follows the investigative field work the four of you undertook over three years to explore the intersection between the Convention on the Rights of Persons with Disabilities and the Convention relating to the Status of Refugees.

In particular, you were looking at the treatment of refugees with disabilities in six countries hosting refugees in a variety of contexts - Malaysia, Indonesia, Pakistan, Uganda, Jordan and Turkey. What are some of the key findings of your work?

McCALLUM: The most important aspect of our findings was debunking myths that had been allowed to exist and, in some respects, hinder the development of appropriate national policies. There was a big myth that refugees did not have disabilities, because it was perceived that disabled people could not travel. For example, we were initially told that UNHCR had oversight of more than 100,000 refugees in Malaysia, but that UNHCR had identified only 202 as having any form of disability. We began questioning the refugees, using the Washington Group approach to identifying disability using 'functionality' questions. And sure enough we found the prevalence of disability in the refugee community roughly mirrored that of the non-refugee community: about 15%. If you ask a refugee whether they are disabled, we found that they tend to deny that label. But you have to ask the right questions: Do you have trouble seeing? Do you have what you need to correct your poor vision?

Blind people are pretty conspicuous. Those who are confined to a wheelchair are also pretty obviously disabled. But with people with hearing difficulties, for example, it can be difficult to determine just from looking. Their appearance does not necessarily give you any indication. So you have to ask functional questions. Do you need a hearing aid? Do you have a hearing aid? Disability is not just about impairment. It is about the obstacles created for people with impairments that prevent their participation in society. Likewise, mental illness will only become apparent if questions are asked about cognitive functioning. Of course PTSD is common among refugees.

In many countries, where refugees are not allowed to work - Malaysia and Indonesia are examples - they end up working, but doing degrading and dangerous jobs. There is quite a high prevalence of refugees *becoming* disabled as a result of injuries related to their displacement.

One of our key findings was that we need to develop new ways of identifying and managing disabilities within refugee camps. In Uganda we came across a settlement where people with disabilities were all housed together. But this was problematic, for two reasons. First, where people with disabilities live within the general population of a camp, their able-bodied neighbours can assist with various aspects of their daily activities. The concentration of disabled people threw the burden of care and accommodation on to the camp authorities (including UNHCR). There needs to be a workable ratio of disabled people to those without disabilities living together so to assist those with disabilities. Second, we found that women with disabilities, including cognitive disabilities, were particularly susceptible to sexual assault. Again, in Uganda we found examples of good practice where this reality was recognised in the careful placement of particularly vulnerable women and children. So we were able to make recommendations based on the negative things we saw, but also based on the many positive things we observed.

FISHER: Your upcoming memoir, *Born at the Right Time,* tells of some of the difficulties you have faced in your life, but also how certain challenges have been overcome in recent years with various technological developments. Could you give us some examples, and tell us how certain technologies may have been stifled by an intellectual property law not sensitive to the needs of people with disabilities?

McCALLUM: A lot of technologies have worked amazingly well, and I am lucky to be able to use them - hence the name of the memoir. There is a constant battle to get accessible books, because I am often looking for rare and esoteric books. Additionally, blind people would like to be able to *borrow* accessible format copies from vision impaired libraries, as opposed to purchasing them, in the way that those without vision impairment can borrow ordinary books from a local library. But apart from access to printed works - particularly in countries where provisions for people with disabilities did or do not exist - intellectual property law has not had a significant stifling effect in regards to technologies assisting people with disabilities, to my knowledge.

Some examples that come to mind in respect of technologies that have assisted people with disabilities, and me in particular, are audible traffic lights, which came into use in Australia in the 1990s. You have no idea the stress that that has taken out of my life. It was like playing Russian roulette each time I crossed the road. There are ATMs with braille, which have made things much easier for me (and relieved my children from having to take me to use an ATM). These days, if you look closely at an ATM, you'll see an earphone jack. I often carry earphones with me, and I plug it in and the machine talks me through the transaction.

The blind community is now very concerned by silent electric cars. We have been arguing at the UN level about regulating electric cars to have a noise, to avoid unfortunate accidents. I have been an avid radio listener since I was in diapers, and podcasts have become an exhilarating new medium for the spoken-word format, one that I hadn't anticipated.

Other areas, like films, have become and are becoming more accessible to people with disabilities. All films have to have Audio Description in the United States - essentially an audio narration of what the characters on the screen are doing, that visually impaired members of the

audience are able to access through headphones. Now, you can also get Audio Description from an app through your phone. Likewise, if you are playing Netflix on your computer, you can turn on Audio Description. The ABC has trialled Audio Description on some of its programs on iView. Some theatres are working on captioning for individual seats for the hearing impaired.

Technology has been tremendously helpful in increasing participation, and not just for those with vision impairments. I remember when fax first emerged, and the impact that it had on my deaf brothers and sisters who could not use a phone. All the more so with emails now. And there are apps that enable deaf colleagues to sign to one another over their phones.

When I grew up, there were braille works, but no braille printing press. That meant that you would have people - mostly old women in their own homes - transcribing works into braille one dot at a time. So you can imagine how limited was the range of available accessible books. Then there were long-playing records. Over the years, technological developments changed that landscape. But over the last 10 years in particular, it has changed so significantly for the better. For example, if you take out your iPhone now, and click on Settings, and then Accessibility, you can see a range of features that are installed in smartphones to which you may not have turned your mind, which help those with disabilities make use of technology and thereby participate in society in ways that were inconceivable when I was growing up.

FISHER: Thank you Ron. Once again, we are grateful for the work you do, and for your time discussing it with us.

CAMLA Young Lawyers Speed Mentoring

On 26 October 2017 CAMLA held its Young Lawyers Speed Mentoring networking event at Baker & McKenzie. The event was proudly organised by the CAMLA Young Lawyers Committee, with key addresses by Nicholas Kraegen (Baker& McKenzie and CAMLA Young Lawyers Committee) and Sophie Ciufo (Viacom and CAMLA Young Lawyers Committee).

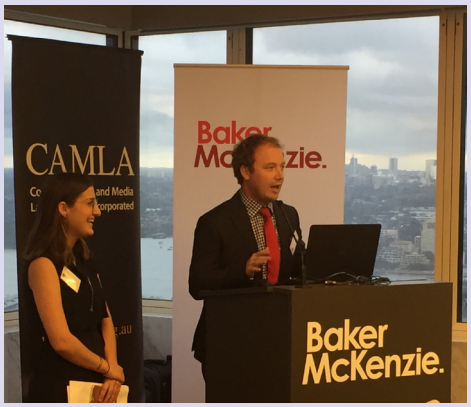
The Speed Mentoring evening provided an excellent opportunity for law students and young lawyers to gain valuable insights into a number of career paths within media and communications industries from a variety of accomplished and inspiring speakers. The event also provided an opportunity to announce the CAMLA essay competition (further details in this Bulletin).

The evening adopted a light-hearted circuit format, with mentors including Dr Fady Aoun (The University of Sydney Law School), Michelle Caredes (Network Ten), Michael Coonan (SBS), Emma German (Stan), Katherine Giles (MinterEllison), Adrian Goss (Bauer Media), Ryan Grant (Baker McKenzie), Rebecca Lindhout (HWL Ebsworth), Grant McAvaney (ABC), Rebecca Sandel (Universal Music), Linda Taylor (Practical Law) and Rebecca White (Ninth Floor Selborne Chambers). The mentors provided the mentees with fascinating insights into their career journeys so far, candidly recounted their professional highlights and challenges and provided advice to young lawyers as to where their law degrees and experience may take them.

By all reports the speed mentoring (and of course the lavish refreshments) were enjoyed by all. Particular thanks must go to each of the mentors for their time, insights and advice, Cath Hill and to Baker & McKenzie for hosting the event.

Stay in touch with CAMLA via our website (www.camla.org.au) and LinkedIn page for news on upcoming CAMLA events, the bulletin and membership information.

Report by **Katherine Sessions,** Australian Communications and Media Authority and CAMLA Young Lawyers Committee.



The Exorbitant Injunction in *X v Twitter* [2017] NSWSC 1300

The Supreme Court of New South Wales has issued a global injunction enjoining overseas defendants to remove tweets of a corporate leaker...

By Michael Douglas

On 28 September 2017, the Supreme Court of New South Wales awarded a final injunction with global reach, directed towards the California-based Twitter Inc and its Irish counterpart, Twitter International Company.[1]

When I became aware of this case, I was midway through writing an article dealing with the same set of facts. On 8 September 2017, in *X v Y & Z*,[2] the Court continued and expanded an interlocutory injunction against anonymised defendants. It turns out that Y + Z = Twitter.

X v Twitter deals with an increasingly familiar problem: how can private individuals have content removed from the global internet through procedures of domestic courts?

Background

The plaintiff is an anonymous partnership, plagued by an anonymous troll with a vendetta. Unfortunately for the plaintiff, this person has access to some of the plaintiff's financial records.

In May, the troll began tweeting under a handle that adopted the name of the plaintiff's CEO. The tweets disclosed confidential financial information. The plaintiff was swift in bringing a complaint; Twitter removed the content for violation of its terms of service.

The plaintiff also requested that Twitter disclose information relating to the identity of this person, flagging a potential action against that person for breach of confidence. Twitter refused, appealing to its privacy policy.

The dodgy tweets continued. When the troll impersonated another officer of the plaintiff, Twitter removed the account. But when the troll took on a *nom de plume* that did not involve impersonation, Twitter refused to comply. The covert campaign of leaks continued into September.

In desperation, on 6 September, the plaintiff commenced these proceedings. That day, Stevenson J granted an interlocutory injunction restraining the publication of the offending material, causing the material to be removed from Twitter, and suspending the relevant Twitter accounts. On 8 September, at an *ex parte* hearing, Pembroke J extended those orders.

The final injunction went even further. It requires the ongoing removal of any accounts held by the anonymous troll(s). The Court also made suppression orders, and a *Norwich* order compelling Twitter to reveal identifying details, including IP addresses, of the anonymous leaker.

The exorbitant jurisdiction

The defendants refused to appear in the proceedings. On 8 September, they sent an email objecting to the Court's jurisdiction and the substance of the orders made.

There was an issue whether the court possessed jurisdiction *in personam*: the authority to bind the defendants personally. At common law, in the absence of the defendants' submission, jurisdiction is territorial.[3] Pembroke J may have considered that the defendants were not present. If so, respectfully, that may have been a mistake. At common law, a foreign corporation may be present by carrying on business in the forum.[4] Recently, in the *Google v Equustek* litigation, the Court of Appeal for British Columbia held that Google had carried on business in the forum by collecting data, providing search services, and mining AdWords revenue.[5] The court had jurisdiction as a natural consequence of the global scale of Google's business.[6] The finding was not disturbed by the Supreme Court of Canada[7] (noted by Hugh Tomlinson QC).[8]

In any event, if the defendants' email spoke to the merits of the injunction, that may have been a submission.[9]

Jurisdiction *in personam* may also be founded on long-arm provisions authorising service outside of the jurisdiction.[10] For NSW, those provisions are contained in the recently-amended UCPR Part 11 and

1 *X v Twitter Inc* [2017] NSWSC 1300.
2 *X v Y & Z* [2017] NSWSC 1214.
3 *Gosper v Sawyer* (1985) 160 CLR 548, 564 (Mason and Deane JJ).
4 *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156, 165 (Holland J).
5 *Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224.
6 *Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224, 247 [56] (Groberman JA, Frankel and Harris JJA agreeing).
7 *Google Inc v Equustek Solutions Inc* 2017 SCC 34.
8 Hugh Tomlinson, 'Supreme Court of Canada upholds worldwide Google blocking injunction', *Gazette of Law & Journalism* (5 July 2017) <http://glj.com.au/2885-article>.
9 *Vertzyas v Singapore Airlines Ltd* (2000) 50 NSWLR 1, 23 [109] (Knight DCJ).
10 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 521 [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

Schedule 6.[11] Service is permitted where the claim has a prescribed connection to the forum.

Pembroke J accepted that the Court possessed *in personam* jurisdiction with appeal to the heads of Schedule 6, holding that '[a]mong other things, the injunction sought to compel or restrain the performance of certain conduct by the defendants everywhere in the world. That necessarily includes Australia'.[12]

If that proposition is accepted around the world, then every court would have jurisdiction to remove anything from the global internet. The *Equustek* case, and the expansion of the 'right to be forgotten',[13] are recent examples of a trend in that direction.

Not so long ago, this would have been lamented as involving 'exorbitant' jurisdiction.[14] The more modern view is that a court's long-arm jurisdiction is not objectionable *per se*, but the exorbitant *exercise* of jurisdiction may be objectionable.[15]

The exercise of discretion

It was uncontroversial that the defendants could owe an obligation of confidence to the plaintiff: it was held that the equitable principle extends to social networking services which facilitate the posting of confidential information.

Further, it was uncontroversial that, provided that a court of equity has jurisdiction *in personam*, conduct outside of the territorial jurisdiction may be enjoined.

The issue was whether it was proper for the court to exercise its discretion to make the award.

In its email of protest, Twitter argued that the injunction sought exceeded the proper limits of the use of the Court's powers. It appealed to *Macquarie Bank v Berg*,[16] where an injunction to restrain online defamation was refused, partly because defamation law is not uniform around the world. *Berg* was distinguished; however, the Court did not consider comparative laws of confidence. In contrast to the Supreme Court in *Google v Equustek*,[17] discussion of comity[18] was conspicuously absent.

Quite appropriately, the Court considered the utility of the order. Equity does not act in vain.[19] Extraterritorial enforcement of the injunction could not be guaranteed, but Twitter's commercial interests suggested voluntary compliance. It is likely that the global injunction will be implemented, albeit begrudgingly, for the sake of Twitter's standing in the Australian market. Rolph predicts that this 'soft effect of hard law is something I think we're going to see more of in the future'.[20]

Conclusion

When you attend a bar late at night, you may pass a large bouncer. That bouncer could crush your skull. He does possess that power. But just because he *can* do that does not mean that he *should* do that. Just because the court has authority to do X does not justify X. In my view, it may be questioned whether X was justified in *X v Twitter*.

I'm yet to be convinced that domestic courts should be so inclined to flex their muscles over the entire internet. Australian courts might protect corporate confidences, but then Chinese courts might protect CPC accounts of the Tiananmen Square Massacre. It is a slippery slope argument, but we ought to be cognisant of the role of reciprocity in private international law.

Michael Douglas lectures in private international law at Sydney Law School. He is currently researching cross-border media law issues. This comment first appeared in the Gazette of Law & Journalism on 29 September 2017.

11 See Michael Douglas and Vivienne Bath, 'A new approach to service outside the jurisdiction and outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

12 *X v Y & Z* [2017] NSWSC 1214, [11]; *X v Twitter Inc* [2017] NSWSC 1300, [20].

13 See Alex Hurn, 'ECJ to rule on whether 'right to be forgotten' can stretch beyond EU', *The Guardian* (online) 20 July 2017 <https://www.theguardian.com/technology/2017/jul/20/ecj-ruling-google-right-to-be-forgotten-beyond-eu-france-data-removed>.

14 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65 (Lord Diplock).

15 *Abela v Baadarani* [2013] 1 WLR 2043, 2062–3 [53] (Lord Sumption).

16 *Macquarie Bank Limited v Berg* [1999] NSWSC 526, [13]–[14] (Simpson J).

17 *Google Inc v Equustek Solutions Inc* 2017 SCC 34, [44]–[48] (Abella J, McLachlin CJ, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ agreeing), [80] (Côté and Rowe JJ).

18 See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 395–6 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

19 See Norman Witzleb, 'Equity does not act in vain': An analysis of futility arguments in claims for injunctions' (2010) 32(3) *Sydney Law* Review 503.

20 David Marin-Guzman, 'Twitter ordered to take action against mysterious corporate leaker', *Financial Review* (online) 28 September 2017 < http://www.afr.com/leadership/company-culture/twitter-ordered-to-take-action-against-mysterious-corporate-leaker-20170928-gyqi42>.

Converging Interests:
Competition in a Revolutionary Age

Rod Sims, Chairman of the ACCC.

This is an edited extract of the speech ACCC Chairman Rod Sims delivered at a CAMLA event on 31 October 2017.

1. Media mergers

In 2006, the ACCC was asked by the Government to develop guidelines regarding our approach to assessing media mergers. Looking back at those guidelines is like stepping back in time given the significant changes to the way media is delivered and consumed over the past decade, and the way these changes have altered the nature of competition in media markets.

Significantly, changes to Australia's media control and ownership laws were passed by the Parliament in October 2017. These reforms will create potential for new merger proposals in the Australian media sector between players who had been prevented from merging under the '2 out of 3 rule' and the '75% reach rule'.

While technology and platforms have significantly changed the competitive landscape, the ACCC's approach to merger assessments is not sector specific. The key acronym and concept to keep in mind is SLC – 'substantial lessening of competition'. The SLC test and the analytical framework we apply is the same regardless of the industry or sector under review. However, there are features of the media sector that give rise to some particular issues that are relevant to our analysis.

In order to assist prospective merger parties' awareness of the general issues likely to be of interest to the ACCC when assessing a media merger, the ACCC has revised its Media Merger Guidelines. The revised guidelines reflect the impact of new technology on the media sector and the changes to Australia's media control and ownership rules and explore competition issues associated with:

- mergers that reduce the number of media rivals, and the potential impact on media diversity
- the impact of technological change and media innovation, and
- the role of premium content.

These have been relevant factors in our recent review of Lachlan Murdoch and Bruce Gordon's proposed acquisition of the Ten Network. The ACCC focussed on how the transaction would result in an expansion of Murdoch interests in Australian media when they already have a significant influence through newspapers, Foxtel, radio stations and television production.

Some of the key issues the ACCC considered included the impact on competition on the supply of news content to consumers, competition from other platforms and the impact on the level of diversity across the Australian media landscape. It is important to reiterate that a reduction in diversity is not the test the ACCC applies; rather, it's the SLC test.

The ACCC looks at diversity from the competition perspective in much the same way that a reduction in choice can be relevant to non-media merger assessments including concentration, closeness of competition and establishing what competitive constraints would be lost if a merger proceeds.

In reviewing the Ten Network matter, the ACCC found that Ten's offering was not unique and there were a range of news and current affairs choices open to consumers which would continue to offer some competitive constraint on Ten, including online news sites.

In the UK, the Competition and Markets Authority is examining 21st Century Fox's proposal to increase its ownership of Sky from 39 per cent to 100 per cent. The CMA is examining whether the merger will give Rupert Murdoch control or influence over the editorial and commercial decisions of Sky, reduce the range of viewpoints and result in too much influence over public opinion or the political agenda.

Closer to home, the New Zealand Commerce Commission declined to authorise the Fairfax NZME merger. The NZCC found that the merged entity would have direct control of the largest network of journalists in New Zealand, employing more editorial staff than the next three largest mainstream media organisations combined.

In declining authorisation the NZCC said that:

> … the merger would be likely to reduce 'external plurality' – plurality between organisations – through concentrating media ownership and influence to an unprecedented extent for a well-established modern liberal democracy.[1]

1 https://www.comcom.govt.nz/dmsdocument/15400

The NZCC considered the merger under a public benefit test which gave it a broader mandate to consider plurality issues. The decision is under appeal.

2. Platform Inquiry

As recently reported in the press, Nick Xenophon has called for the ACCC to conduct an inquiry into platform services and the impact of their growth on competition in media and advertising markets. This has come about as a consequence of negotiations between the government and Nick Xenophon regarding the passage of the media ownership reforms.

For some, the increasing growth by large digital platforms like Google and Facebook into digital advertising is likely to be regarded simply as technology evolution, raising no issues. However, there is a growing perception that the current market position of these platforms in digital advertising is significantly and adversely impacting traditional media, especially its ability to fund the development of content from advertising revenue. Ultimately, the concern is that, with declining revenues, journalistic content and new local content production will be compromised to the detriment of consumer choice.

These are potentially serious issues that warrant a detailed assessment of how these platforms operate to determine whether they are exercising their influence in a manner that is negatively affecting competition for content, advertising and consumer selection and choice.

The objective and value of an inquiry would be to closely examine the rapid changes in technology and interrelationships between players in the industry and the longer-term trends in order to assess and understand the impact of these platforms on the state of competition in media and advertising markets. It would also take into account the choice and quality of news and journalistic content available to consumers. An inquiry may also find challenges facing traditional media that may not be directly associated with the ACCC's mandate.

While the Australian media industry is relatively concentrated with few large mainstream media outlets, there are many content creators, smaller media operators, platform intermediaries, advertisers, journalists, and consumer and small business interest groups that are likely to be relevant to the inquiry. Consequently, an inquiry would rely on hearing views from across a wide range of these stakeholders.

An inquiry would pose its own particular challenges given the highly technical nature of the architecture and functions underpinning online search and aggregation, and need to assess qualitative factors such as the impact on diversity of voices and the economic evaluation of complex, multi-sided platform markets.

3. Communications market study + NBN speeds

On 31 October 2017 the ACCC released the *Communications Sector Market Study Draft Report*. The market study is an important and timely inquiry into a sector that is undergoing fundamental change: we are at the midway point of the rollout of the National Broadband Network; service providers are expanding into new markets, offering consumers both fixed and mobile services; and consumers are using traditional services in new ways, seeking ubiquitous and on-the-go connectivity.

Some of the key findings include:

- That the nature of competition is evolving, and where there used to be a focus on disparate access networks – fixed and mobile – these networks are now converging with increased competition from over-the-top services. As a consequence, service providers are moving towards greater horizontal integration offering both fixed and mobile services to consumers.
- That there is strong price competition in voice and broadband services on fixed and mobile networks, but we do have some concerns about the current extent of non-price competition on the NBN, particularly around speed and service quality.
- That there is currently significant new investment in data centres, content delivery networks and new networks to support the internet of things that will support the future use of broadband services.
- That the ACCC continues to watch how competition for these services progresses to ensure that the long-term benefits of competition are realised.

The inquiry also examined how well competition has been delivering benefits to consumers. While we are seeing evidence of lower prices and some product differentiation, there does not appear to be significant switching between service providers. This suggests consumers may not be able to take advantage of the choice available and may face a number of potential barriers when looking to change their service provider, including inadequate information to make informed purchasing decisions.

Consumers have strong expectations that the NBN will bring better services for little or no extra cost, in part due to marketing and service providers' tendency to put consumers on 'nbn ready' plans and a strong level of price competition within the retail broadband market during the migration period.

If left unresolved, this clash of expectations may have severe consequences for longterm competition and consumer outcomes, including disgruntled consumers as TIO NBN-related complaints already indicate. In particular, there are coordination issues arising from new supply chains, as well as new processes, systems, technologies and devices that need to be bedded down.

While the ACCC may have a role to play in working with industry to resolve these issues, we do have a role in ensuring consumers are not adversely impacted and are able to benefit from competition in this new market. For the first time, consumers are able to access a network that is capable of delivering a broad range of different speeds, which brings a new aspect of choice and questions for the consumer, such as: what speeds do they need and how to select a plan speed that meets these needs? And, can they have confidence that their service provider will deliver the speeds advertised and expected by the consumer?

Consumers now face a potential dilemma: do they get the 'cheap and cheerful' speed plan or do they try out the more expensive, faster, Rolls Royce plans?

While it's great that consumers have more choice, our role is to ensure they have sufficient information and easily accessible tools to help them understand how to make the best choice for their needs as these services are quite technically complex. Consequently, there has never been a greater need for service providers, and others that engage with the public on broadband speeds, to provide consumers with clear information and guidance to help them identify the plans that meet their needs and expectations.

While we think this is principally the role of service providers, the ACCC has a significant role to play to help steer service providers in the right direction and to that extent we have developed, and already started to implement, a three-part strategy, encompassing broadband speed monitoring, an update on broadband monitoring rollout and enforcement investigations.

Broadband speed guidance

In August 2017, the ACCC released our *Broadband Speed Claims: Industry Guidance* to provide retailers clear guidance on how we think they can provide meaningful, accurate information in a way that complies with Australian Consumer Law. This includes guidance on how to give consumers information on fixed-line next generation broadband services that, in our view, meets this pre-existing legal standard. Retailers should also move away from unhelpful statements like 'up to', 'boost' and 'fast', and from advertising theoretical maximum speeds that are based only on wholesale product specifications. Instead, consumers should be presented with information based on the realistic speeds they can expect to experience, particularly during busy periods.

Some changes can already be observed and consumers should expect further improvements ahead of the Guide's implementation period expiring in late November.

The second of our three strategies relates to broadband monitoring.

Update on broadband monitoring rollout

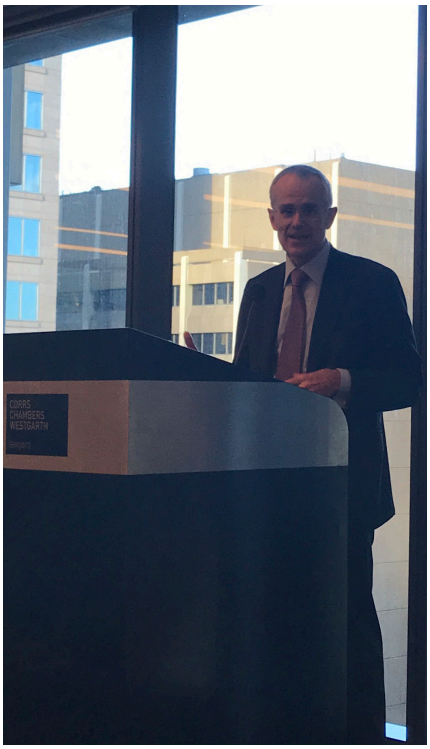
Since we called for volunteers for broadband monitoring on 19 June we have received just over 8000 expressions of interest from members of the public. The number of responses and comments we've received demonstrates that Australians are interested in more information about their broadband performance.

We will be reporting on the most popular plans on the most popular brands, while also monitoring the performance of smaller internet service providers and some legacy technologies. We expect to begin collecting data within the coming months.

The third strategy relates to enforcement.

Update on enforcement investigations

In 2017, the ACCC began investigating matters relating to misleading conduct around broadband speeds, including practices that fail to meet the consumer guarantees provided by the Australian Consumer Law.



This is a priority activity of the agency and we anticipate being able to discuss some matters publicly in the near future.

If we get the competition parameters right, Australia will benefit significantly from the forthcoming telecommunications revolution. If you thought the past decade was exciting, buckle up for the next one.

Profile: Damian McGregor

Vice President Legal & Business Affairs NBCUniversal International (Distribution & Networks)

Katherine Sessions caught up with Damian McGregor, Vice President Legal & Business Affairs NBCUniversal International (Distribution & Networks), to discuss working in-house at a major international media organisation.

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

DAMIAN McGREGOR: I work with NBCUniversal International, as Vice President of Legal & Business Affairs. I manage legal and business affairs for our content services distributed in Australia and New Zealand – for our subscription television channels, including Universal Channel, Syfy and E!; for Hayu, a direct-to-consumer reality SVOD offer; and for our free-to-air channel Bravo, which we operate as joint-venture with MediaWorks in New Zealand. I am the Company Secretary for our New Zealand joint-venture company. I also oversee legal and business affairs for NBCUniversal's licensing activities across Australia, New Zealand, India, and parts of South East Asia. NBCUniversal has a number of other divisions locally in Australia and New Zealand, and I provide ad hoc legal support to those divisions too, as and when it's needed.

It's a busy role, and legal support requirements are extremely varied – including complex deal negotiations and contracting, regulatory compliance, corporate governance and risk management, and general legal support and advice across financial, advertising, marketing, creative, program acquisitions and productions, IT and technical, HR, property and business strategy divisions. I'm supported by an impressively competent lawyer who joined us in September, and we draw on support from our various international legal teams to ensure that we're able to deliver comprehensive legal support to our various teams.

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

McGREGOR: I started my legal career with Allens in Melbourne (Arthur Robinson and Hedderwicks, as it was known then), completing my articles in the firm's intellectual property/information technology group. I then worked for a stint with Davies Collison Cave, in Melbourne, with their very impressive IP, patent and trade mark teams, before deciding to make a move in-house to La Trobe University. I stayed with their in-house team for a couple of years, covering a wide range of general commercial and intellectual property matters, before moving to London in 2005, which is where my career took a turn towards media. I worked with the BBC's World News channel for a couple of years, and then took a role at NBCUniversal in London, initially with the "Scifi" channel, as it was known then, just prior to a round of large-scale mergers and acquisitions which saw NBCUniversal's international business undergo a rapid period of growth and expansion. I oversaw legal affairs for NBCUniversal's UK and Western Europe channels for a few years, before moving back to Australia in 2013 to take up my current role. I've been with NBCUniversal for well over ten years now, and I've been very lucky to be able to grow my career between divisions and regions during my time here.

SESSIONS: What do you wish you had known about the legal profession before becoming a lawyer?

McGREGOR: In my experience, I've found that building a career as an in-house lawyer requires a strong set of general business and management skills. When I completed my training as a lawyer, those rather essential tools didn't feature in formal legal education, nor in practical legal training, at all. I do think it would be helpful for lawyers starting out in the profession to have a much clearer sense of those skills requirements, and options to receive training in those areas.

SESSIONS: What is a typical day at the office like for you at NBCUniversal International?

McGREGOR: Given the breadth of work and territories that we cover, there don't tend to be many typical days at the office, which is a virtue of working in this role.

Most days will commence with triage – reprioritising work after receiving new overnight developments and instructions, and ensuring that we attend to most urgent business needs first. We'll then spend a large part of the day working with commercial teams directly

to address high priority matters, and to help steer new business initiatives in the right direction, before hopefully finding some time to attend to bread-and-butter legal review, negotiating and drafting work.

Also, because we support multiple territories, the structure of our days tends to be dictated by the time zones we support – so, early mornings will begin with calls to U.S. colleagues, late mornings for local Sydney and Auckland matters, afternoons for Singapore and Mumbai, and evenings for London. Scheduling meetings has become rather a constant challenge, and the World Clock feature on my iPhone has become my most treasured resource!

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

McGREGOR: The media industry is in a state of rapid change, and that makes it a fundamentally interesting and challenging space to work in right now. As a lawyer, supporting a business which is at the cutting edge of change, and which places extremely high value on robust compliance practices and risk management – as NBCUniversal does – really does stretch your skills, in a most rewarding way.

NBCUniversal has engaged in some really interesting and complex initiatives in recent times, and supporting those transactions has been hugely satisfying – our launch of Hayu in Australia last year, which was a significant international team effort, requiring very detailed local guidance and oversight, is one which springs to mind; and our quite complex joint-venture negotiation with MediaWorks is another, with our eventual launch of Bravo in New Zealand, and our development of a local version of Real Housewives with our colleagues at Matchbox, presenting some very unique challenges and rewards. We also work closely with our various content and distribution partners in local markets, and working with their legal teams to support their own businesses' requirements, ambitions and challenges is always rewarding.

Also working across Asia Pacific – and I'm thinking principally of India when I say that, due to some recent and rather complex work we've been engaged in out there – always presents challenges as a lawyer, as we will often need to develop a very thorough knowledge of unique local legal requirements and challenges in a very short space of time.

SESSIONS: Item on your desk or in your drawer you can't live without?

McGREGOR: It's rather a prosaic one actually – an adjustable desk pedestal, so that I can stand at my desk for the working day. I'm a relatively recent convert to standing desks, but I've become totally evangelical about the physical and the psychological benefits of it now, and I can't imagine going back to a fully seated work arrangement. For any of your readers who haven't made the change yet – consider that a ringing endorsement!

SESSIONS: Favourite NBCUniversal show or character?

McGREGOR: NBCUniversal has been producing some really strong and diverse shows in recent years, so picking just one is difficult. I'll go for my three current TV obsessions – Mr Robot, by our USA Network (the third season, just underway, is a dark and thrilling watch); the Expanse, a Syfy U.S. space opera show, a slick production and utterly riveting story; and Glitch, by our local team at Matchbox, which really is world-class genre television. And for my all-time favourite TV character, I'd have to go with Hiro Nakamura from Heroes – I'm quite a fan of comic books, and the first season of Heroes, with Hiro as a down-beaten office administrator transformed into a time-travelling, katana-sword wielding planetary saviour, mixed with comic book references, Japanese subtitles and a rich sci-fi mythology, really can't be beaten.

SESSIONS: Biggest game changer for broadcasting in the future?

McGREGOR: We're in the midst of a technological revolution that is reshaping the broadcasting, film and television industry, and I think we've got quite some way to go yet before the dust settles. I think those technological changes will continue to drive major challenges, and present major opportunities, well into the next decade – challenging traditional models of television viewing and distribution, challenging traditional funding and financing models, reshaping consumer habits and expectations, and presenting a myriad of new possibilities and opportunities for consumers, and for the businesses that cater for them.

For lawyers working in our industry, I think it's fundamental that we're aware of potential challenges and developments well before they become market realities. We can be instrumental in helping our businesses to prepare for, and to navigate through, any such changes. We can also play a key role in helping to shape regulatory developments, and in encouraging broader legal and industry initiatives, to enable our markets to be better equipped to meet changes head-on, and to address potential risks (a really great and recent example of this is the introduction of Section 115A to the *Copyright Act 1968*, and the injunctions obtained against major content piracy sites under that provision, directly as a result of local industry action).

It is an oft-repeated cliché, but it's actually quite true that working in this industry is genuinely exciting, and immensely rewarding, due to the scale and pace of market and regulatory changes. It's one of my primary motivations for continuing to work in the industry.

SESSIONS: What are some tips for young lawyers looking to work in this area of law?

McGREGOR: The best piece of advice I was given as a junior lawyer, and which I'd encourage young lawyers to follow regardless of their specific ambitions, is to focus on building a solid foundation of core legal skills in your early years of legal training, and to be patient in building up those skills before looking to jump into a specialised role. Those skills will set you in good stead, wherever you choose to take your career.

And as a tip for finding a path into the media industry, if that's where you're headed, I'd recommend looking for volunteer placements or internship opportunities as a starter, if those options are available to you – NBCUniversal do offer those roles from time-to-time, and I know of a number of other media organisations who regularly do the same. Good luck!

Katherine Sessions
Regulatory Affairs,
ACMA and CAMLA Young Lawyers representative

CAMLA

Communications and Media Law Association

CAMLA YOUNG LAWYERS
CALL FOR 2018 COMMITTEE MEMBERS

Dear CAMLA Members,

The Communications and Media Law Association's (CAMLA) Young Lawyers committee is calling for expressions of interest to join them in 2018.

CAMLA Young Lawyers is an official sub-committee of CAMLA of up to 15 young lawyers who represent the interests of young lawyers working in, or who have an interest in, communications and media law in Australia. CAMLA Young Lawyers also assists the CAMLA Board with fulfilling its objectives.

The CAMLA Young Lawyers committee aims to be representative of all sectors of communications and media law including private practice, in-house, government/regulatory, academia and persons with a genuine interest in the area, including students.

The CAMLA Young Lawyers committee is 'hands-on' and voluntary and all members are called on to actively participate and contribute.

Committee members are asked to attend monthly meetings (in Sydney) and are required to participate in organising events and contribute to the *Communications Law Bulletin.*

If you would like to nominate to become a 2018 CAMLA Young Lawyers committee member, please send us a brief CV and explanation as to why you would like to be part of CAMLA Young Lawyers for 2018.

Please email your expression of interest to camla@tpg.com.au with your name and organisation in the subject line **by Friday 1st December 2017**.

You must be an existing member of CAMLA to apply (or arrange your membership through the CAMLA website: www.camla.org.au prior to submitting your application).

Successful applicants will be notified by email.

Interview: Peter Harris AO

In light of the recently completed inquiries into Australia's intellectual property arrangements, telecommunications universal service obligation, and data availability and use, the Chairman of Australia's Productivity Commission, Peter Harris AO, sat down with *Communications Law Bulletin* co-editor, Eli Fisher, for a discussion about proposed changes to IP, telecommunications and data law.

ELI FISHER: Peter, thank you so much for your time. On behalf of the Communications and Media Law Association, and the readers of the *Communications Law Bulletin*, we really appreciate your comments on the recent inquiries. Could you please tell us a little bit about the Productivity Commission, its role in advising the Federal Government, and your role within the Commission?

PETER HARRIS: The Commission has been Australia's primary independent economic and social policy design group since 1998, when it was assembled by then Treasurer Peter Costello. The new body combined the Industry Commission (itself a successor to Tariff Board, responsible for much of Australia's transition from a protectionist economy to a successful international trading nation) and the Inter-State Commission, a body established in the Constitution with two other smaller Commonwealth research agencies.

The term 'independent' I just used is often taken pretty loosely, but the Commission has over a long period now demonstrated that if the Government asks it to review a subject, the result will be what the evidence, the data and the analytical input of submissions make it. We don't deliver a preconceived outcome.

FISHER: Your background is in economics, as are the respective backgrounds of the Deputy Chair and many of the Commissioners. How does that, in your opinion, differentiate the Productivity Commission's service to the Government from that of, say, the Australian Law Reform Commission and other advisory bodies?

HARRIS: We have Commissioners with legal qualifications, social policy qualifications, science qualifications and in business disciplines. But with so much of public policy today founded in the language of economics, it's not too surprising that this is a common qualification in a body like ours.

This lingua franca of economics is particularly apt for taking a national prosperity-oriented perspective to the accepted wisdom and accreted regulatory structure of policy across many social and environmental topics - almost all of which would similarly say they are specialised in some way.

So when you read that the PC rather than a specialist body has been asked to do a report, it should be obvious thee Government is asking for an assessment of a policy in the widest economic and social context. In our Act, we are obliged to aim at improving the overall economic performance and via that to achieve improved living standards for all Australians.

Add to that we have a good track record in diverse circumstances: widely-respected inquiries on the record into highly diverse topics like Gambling, Child Care, the Australian car industry, Aged Care, the NDIS or even as sweeping a question of Access to Justice. We specialise in this sort of work.

FISHER: Let's turn first to the inquiry into Australia's intellectual property arrangements, whose final report was made public on 20 December 2016. Given the scope of the inquiry, it represents perhaps the most wide-ranging analysis of Australia's IP laws in many years. The motivation for the inquiry was to empower government to promote innovation and to encourage an appropriate balance between access to ideas and product, on the one hand, and investment and production of creative and valuable work, on the other. Could you comment on what you consider to be the most important proposals arising out of the inquiry?

HARRIS: IP is at its most basic an agreement between society and an innovator that, in return for access to the idea or the art, a right to exclusive use is offered by regulation for a period.

It surely is an economic model, since it creates an incentive to deliver an item in return for a right to extract payment. And our critics generally have to accept this, since most of the adverse comment made has also been couched in exactly those terms - the language of such transactions.

The question that is posed in a review like ours is then: is this system adding the value it could do to overall economic performance and the prosperity of all Australians?

And as we can see in the rise of patent trolls, innovation may be impeded as well as enhanced under the IP system. So it becomes a vital question *for governments* in an era of demonstrably slowing productivity, where mostly productivity is driven by spread of knowledge, technology and the rate of application of change, are we impeding or enhancing these key inputs via our regulatory system?

We tend not to say X is more important than Y once we have published a report. It can support cherry-picking of ideas and more often than not the ideas travel best together.

FISHER: Intellectual property can be an area that elicits quite heated debate. Was this inquiry different in nature and in politics to others over which you have presided?

HARRIS: We get politics a lot. Think of Workplace Relations or Motor Vehicles.

Context matters to how we handle that. Both IP and Data were significant elements of the Harper Review of national competition policy, a 2015 inquiry that sought to reinvigorate this policy field, twenty years after Fred Hilmer's landmark effort that demonstrably added significantly to national prosperity. Both major parties express strong support national competition policy, most of the time.

The Harper process recommended to the Government that the Productivity Commission undertake thorough reconsideration of policy in IP and in Data, driven by a strong view that a digitally-based competitive environment is the probable future for much of the Australian economy and thus policy structures should accordingly be fit for purpose to such a future. All political parties will eventually have to face this; I don't think any are unaware of that outlook.

So the Data and the IP inquires weren't really subject to the politics of the major party kind, and I think both will pay close attention to the arguments and the strategic shift in the reports.

There has been some effort to apply a political lever of the deep self-interest kind. But when it comes to private interest versus public interest, playing the political card is just part of the tactical playbook. Our better political leaders are pretty familiar with this playbook, it dates back to the 1980s.

FISHER: What has been the response of Government since the report was handed to it on 23 September 2016, and what continuing role, if any, does the Productivity Commission play in law reform discussions going forward?

The Government released a response to the IP report on 25 August 2017. The full response is available on the Department of Industry's website, and is worth considering in light of what we said in our report.

We are asked to speak at times on our reports by various groups and our Act envisages a role for us in communicating with the public on industry policy and productivity. There is usually so much on the record by the time an inquiry is finished that interested journalists or commentators can keep the debate going for a fair number of months after an inquiry is finished. But where an inquiry is left to languish without response for years, we do speak out on that from time to time. The public does deserve a result, even a negative one, for the effort invested.

FISHER: Let's turn next to the inquiry into the Telecommunications Universal Service Obligation, the final report of which was publicly released on 19 June 2017. The USO has been a consumer safeguard ensuring access to telecommunications services – such as standard telephone services and payphones – to all Australians on reasonable request. But there are suggestions that the obligation is becoming less and less necessary. What has triggered the recent inquiry, and what in your view are some of the most important revelations from the Productivity Commission's research?

HARRIS: Well, with the advent of the NBN and the predominance today of mobile telephony in the hands of Australians – who are amongst the world's quickest adopters of new technology, when given the chance – the concept of a fixed line telephone as a universal service is no longer a reflection of reality. We now have far more mobile phone subscribers than we have people in Australia; and we've had more than 2 million fixed line services disappear in the last decade. When reality shifts, policy should shift too; and that's particularly true when current phone users and taxpayers are paying to maintain a subsidy scheme in excess of $300 million per annum.

But in fact it isn't the money that is the greater negative consequence of this policy. It is, rather, that broadband has become the new community expectation of an indispensable service. So we may not even be buying the right thing. Telephony today is cheap and fast due to digital transmission, it's very clear there's no going back from that and a new standard should take this into account. If it doesn't, ultimately as fixed line services come up for replacement in the normal cycle of maintaining infrastructure or as the NBN replaces them, we will have a USO policy insisting on preserving something that isn't efficient – but even worse, isn't what people increasingly and demonstrably expect.

FISHER: What do you expect might be the next steps taken in relation to the USO?

HARRIS: While we do the redesign of policy according to what the facts and analysis tell us will be the most effective and efficient way to meet a new technological paradigm, a community engagement process run by the government itself usually follows. We are like the architect, the government and community though are the client.

That means the government gets a clear look at what first best design looks like, but in the implementation phase the judgment will have to be made about what is equitable and how far the community wants to go in ensuring those with least access retain an assurance of service.

FISHER: The inquiry into data availability and use was completed on 8 May 2017. It set out to investigate ways to improve the availability and use of public and private sector data, while also protecting individual privacy and control over data use. What are some of the most interesting developments to arise out of that inquiry?

HARRIS: The most startling thing isn't all the fascination with the amount of data being generated, sexy as that may seem to be. Or even the astonishing imputed results we can get today from intelligent algorithms that can detect a better car insurance risk between people who buy red meat and purchase petrol during the day versus those that don't.

Rather, it's that all this data is being basically created for or by consumers, including businesses as consumers of business-to-business services, and yet there is almost no way for them to access or control their data for subsequent re-use.

Yet re-use is what is creating all these new services and disruptions of business models.

Unlike the paper-based stuff, digital data is almost costless to re-use and many people can simultaneously be doing just that. Thus firms across the globe are aggregating and analysing data to create services that we all apparently aspire to have. So when one user doesn't impede another user and even better when a big variety of simultaneous users don't wear the asset out, you have a uniquely interesting resource.

Yet when those who create it, and often as well are paying to see it created by buying a service in the first place, nevertheless don't own it nor do they get to re-use it, there's something seriously awry in the incentives at work here.

FISHER: An interesting comment on the final report was that the proposed "comprehensive right" for individuals or small businesses to access, correct and transfer data about themselves held by third parties "frames personal information as a commodity rather than as an inviolable attribute of our identity. It encourages us to share and sell it, rather than guard and protect it. It envisages individuals as walking data compilations (Jessica Lake, in *The Conversation*)" What are your thoughts about that?

HARRIS: We received that view from a number of the privacy regulators around the country in submissions to us. They perceive privacy as a basic human right and the trading of something that carries such a label as being in some way lesser or tacky. We don't disagree with the former but the latter is more a form of moralising.

Worse, for policy there are two problems with that approach. First, it's a bit late now. That data is being traded by corporations and social media sites continuously and despite advice to the contrary most of us are willingly signing up for the services, and whether we know it or not we *are* trading our data. So it's the same point as the USO: reality is mugging perception.

Second, nothing in what we have proposed will require people to do more than they are today – there is no forced trading. We propose that you have a right which self-evidently will be a of value to some, but with no cost to others.

Thus should you wish to get a better insurance deal, and your data shows you are good risk, under our proposal you can choose to order your current data holder to send your data to a new data holder and seek a better deal. Similarly for banks and mortgages; or your smart meter data in electricity. Or send your medical records to your new GP.

These services actually exist in other countries, albeit in ad hoc forms. We say, bundle up that right – along with better ability to know what your current provider is doing with your data – and apply it universally to all the entities that today collect your data. You and they then have a joint right to this data that you and they jointly created.

FISHER: There were important changes to the proposed nature of the "comprehensive right" between the draft and final reports. What made them necessary?

HARRIS: We had proposed the two angles to your consumer data – the right to order transfer and right to know who else is trading in your data – along with three other rights: the right to review of automated decision-making, the right to obtain a copy of your data and the right to propose a correction to an error in your data. The latter two were to replicate for *consumer* data what is already available for personal information under privacy legislation. And they remain recommended rights.

But we dropped the idea of a right to review automated decision-making. The reasons for this vary – first off, we often use a draft report to try to get advice on the seriousness of an issue that on first principles looks important. In response to the draft, we got limited evidence offered to us of issues with automated decision-making in Australia, although we know it has been a problem in some other jurisdictions.

That lack of responses alone wouldn't have stopped us recommending it, but we also struggled to put a universal right of appeal into a practical form in this case. There are a lot of machine-assisted decisions today involving a combination of human and automated judgment. Drawing the line is very tricky. And beyond that, there are some automated decisions which are simply desirable in their own right and would become impractical if appealed. In medical science, robots appear to do better than humans in judging some test results. In human resources, algorithms simplify bulk recruitment tasks. If these things and others like them became appealable automatically, it would add cost or slow productivity, or both.

Individually, each of these objections would probably not have swayed us. But together, they do.

FISHER: Peter, thank you so much for your insights. It's truly been a pleasure discussing these significant inquiries with you.

Competition Law Reforms 2017

Relevance to the Telecoms and Media Sector

Dr Martyn Taylor, Partner, Norton Rose Fulbright and Lillie Storey, Associate, Norton Rose Fulbright identify the relevance of the competition law reforms for the telecommunications and media sector.

Background to the Reforms

In December 2013, the Commonwealth Government announced it would undertake a fundamental 'root and branch' review of Australian competition policy. The subsequent review was chaired by Professor Ian Harper and was the most comprehensive review of Australia's competition and regulatory framework in 20 years. The report of the Harper review committee was released in March 2015, containing some 56 recommendations. All but 12 of these recommendations were accepted in whole or part by the Government.

During 2016 and 2017, the Government introduced two bills into Parliament to amend the *Competition and Consumer Act 2010 (Cth)* (**CCA**) to give effect to various reforms. Both Bills have now been passed into law, namely the:

(a) *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (**MMP Act**); and

(b) *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (**CPR Act**).

Both Acts commenced as from 6 November 2017 so are now operative. This article explores the relevance of the reforms within the MMP Act and CPR Act to the telecommunications and media sector.

Overview of the Reforms

The following diagram provides an overview of the various reforms implemented by the MMP Act and the CPR Act and the implications of those reforms.

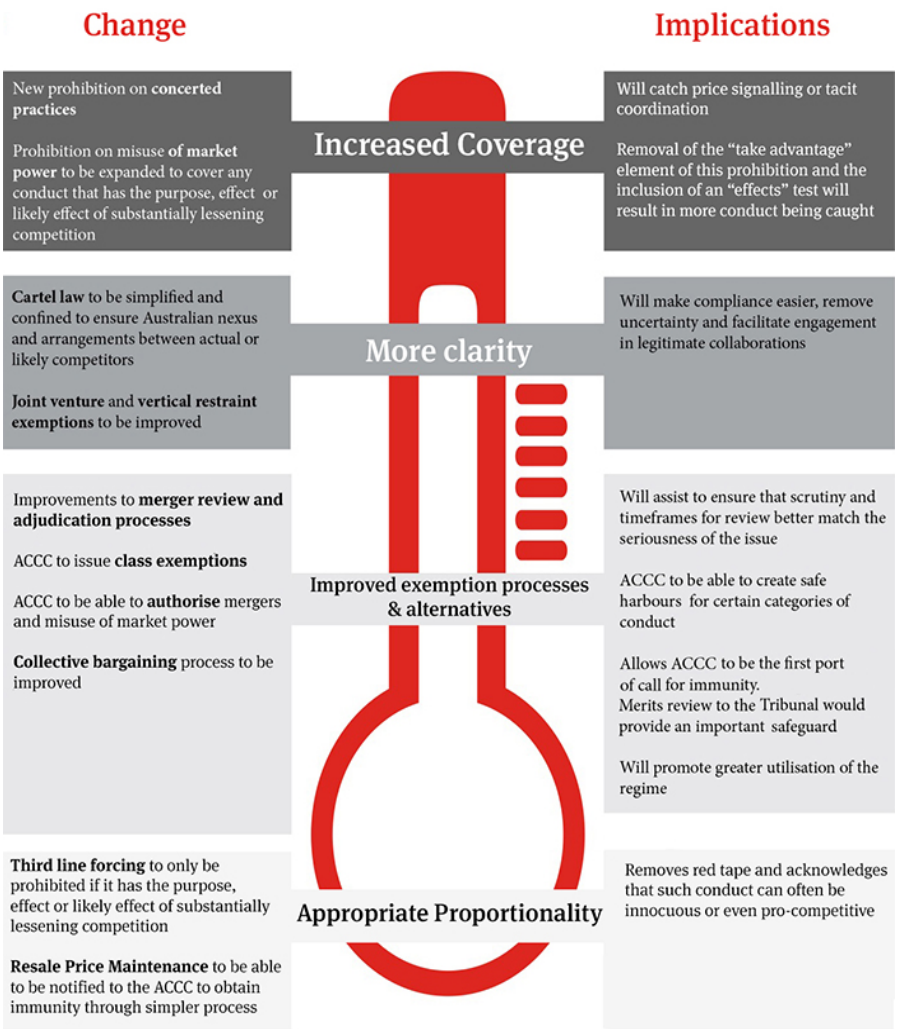
The reforms led to increased coverage, particularly in relation to unilateral conduct (misuse of market power) and concerted practices. The reforms provide more clarity in Australian competition law, particularly in relation to the treatment of joint ventures. A range of improvements has been made to exemption and authorisation processes. Some of the unnecessarily severe application of our competition laws has been made more proportionate to the mischief being regulated.

The most important of the reforms are discussed in further detail below.

Unilateral Conduct

The most controversial of the various competition law reforms is the amendment to section 46 that is implemented by the MMP Act. Section 46 is Australia's 'unilateral conduct' provision and has historically prohibited a firm with a 'substantial degree of market power' (**SMP**) from 'taking advantage' of that SMP with a proscribed anti-competitive purpose.

As from 6 November, the law has now changed. The new section 46 prohibits a firm with SMP from engaging in conduct that has the



purpose, effect or likely effect of substantially lessening competition in a market (**SLC**). The new provision therefore removes the historical concept of 'taking advantage'. The new provision also requires a focus on market effect. These changes are dramatic and broaden the scope of the prohibition.

In a telecoms context, section 46 is supplemented by the telecommunications competition regime in Part XIB of the CCA. Section 151AJ(2) prohibits a carrier or carriage service provider (**C/CSP**) with SMP in a telecoms market from taking advantage of that SMP with the effect or likely effect of SLC in that or any other telecoms market. If the ACCC has a reason to suspect a contravention of this provision, the ACCC may issue a 'competition notice' that can provide a basis for subsequent enforcement.

The Government's attempt during 2017 to repeal Part XIB was unsuccessful. This means that the telecommunications sector is now regulated by two different 'misuse of market power' provisions with different wording, but both focussed on market effects.

Those firms that have market power in telecommunications or media markets will need to take greater care that their conduct does not inadvertently contravene the new section 46. Significant uncertainty now exists as to how the new section 46 will be interpreted by the courts. A much more granular analysis of market effects will be required, making the legal analysis more fact-specific and complex. Carriers and carriage service providers with SMP also continue to be subject to regulation under the historic Part XIB regime administered by the ACCC.

Concerted Practices

Australian law now has a 'concerted practices' prohibition, echoing the concept used in jurisdictions such as the European Union. A concerted practice is (surprisingly) not defined in the CCA, but is relevantly described in the Explanatory Memorandum as "*any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition*". Whether this definition will be adopted by Australian courts remains to be seen.

The amendment is not intended to capture innocent parallel conduct or conduct which would enhance competition, such as public disclosure of pricing information. However, it is intended to capture a broader array of coordinated conduct than the current law. The current law has required evidence of a contract, arrangement or understanding before collusion can be found, whereas the intent of the new provision is to capture any form of co-operation between firms that reduces competition.

In essence, if a firm co-ordinates with another firm with the purpose, effect or likely effect of SLC, this may be illegal. The most risky conduct will involve communication of confidential information between competitors where this could lead one or both of the competitors to alter their behaviour towards greater co-operation.

In the telecommunications and media sectors, firms will need to be particularly wary of any communications with competitors that could lead to consistent pricing, particularly in concentrated markets with only a few competitors.

Joint Ventures

Joint ventures are a common feature of the technology sector. In a fast-moving industry, joint ventures enable expertise and resources to be pooled and shared between different entities for a co-operative endeavour without full economic integration. Joint ventures are normally permitted between competitors if the joint venture is of a beneficial nature and not detrimental to competition overall. The extent to which joint ventures have been permitted has been regulated by the joint venture 'exception' or 'defence'.

The new reforms expand the joint venture exception to allow entities in to develop and implement legitimate collaborations between competitors more readily. Specifically, the CPR Act broadens the joint venture exemption, by allowing the exemption to apply to:

- arrangements or understandings (in addition to contracts); and
- joint ventures for the acquisition of goods and services (in addition to the production of goods and services).

However, the exception applies only to provisions for the purpose of, and reasonably necessary for, undertaking the joint venture. Therefore, any ancillary restraints in the context of joint ventures must still have an appropriate nexus to the purpose and activity of the joint venture. In this manner, while the scope of the joint venture defence has expanded, the circumstances in which it may be applied have changed slightly. Some care may be required if relying on historic advice.

As with the existing joint venture exception, the relevant joint venture provision cannot have the purpose, effect or likely effect of substantially lessening competition, otherwise it may contravene other provisions of the CCA. If a joint venture were to substantially lessen competition, but has a net public benefit, then a public benefit authorisation from the ACCC will continue to be possible.

Merger Clearances

Under section 50 of the CCA, any share or asset acquisition is prohibited where it has the effect or is likely to have the effect of substantially lessening competition in a market. The reforms do not change the substantive law.

Where an acquisition could breach section 50, it has been possible to seek 'authorisation' which confers a statutory immunity from the application of section 50.

An authorisation has historically been provided where the likely public benefit from the acquisition outweighs the likely public detriment, including any lessening of competition. From 2007, an application could be made directly to the Australian Competition Tribunal for authorisation, bypassing the ACCC.

The new reforms have now removed this so-called 'direct route to the Tribunal' following concerns that that merger parties could potentially apply to the Tribunal without giving sufficient time for the ACCC to gather evidence and contradict the application. Applications for authorisation must now be made first to the ACCC. An appeal to the Tribunal would then be possible.

Currently, almost all M&A transactions that are reviewed by the ACCC are reviewed outside the statutory framework of the CCA in a process known as an 'informal clearance'. This process is unique to Australia and provides an unusually high degree of flexibility to negotiate solutions with the ACCC to address any competition concerns.

Due to concerns that the ACCC was not subject to any accountability by way of merits or judicial review, a so-called 'formal clearance' process was introduced from 2007. However, the 'formal clearance' process was regarded as too inflexible by practitioners and has never been used. The ACCC also improved its informal clearance process to address industry concerns. The new reforms now consolidate the 'formal clearance' process into the authorisation process, so it is possible to obtain an authorisation if the proposed acquisition would not result in a substantial lessening of competition.

The net effect of these reforms is that most M&A will continue to be assessed under the informal clearance process by the ACCC. However, if an M&A transaction provides significant public benefits that outweigh the anti-competitive effects, it will be open for the acquirer to make a formal application to the ACCC for a public benefit authorisation. If the ACCC declines to grant authorisation, an appeal to the Tribunal may occur. This was the situation that existed in Australia prior to 2007.

Given the highly concentrated nature of markets in the telecoms and media sectors, as well as the potential for significant wider public benefits from M&A transactions in the sector, the new authorisation route will remain relevant. However, an application for authorisation to the ACCC is a less flexible process and does involve some trade-offs. The media sector also remains subject to the various rules on media cross-ownership set out in the *Broadcasting Act 1992 (Cth),* as recently amended, noting the ACCC has now issued new guidelines as to how it will assess M&A activity in the media sector.

Other Notable Reforms

While the four reforms identified above are the most important of the various reforms, there are also a range of other changes that are relevant to the media and telecoms sectors:

Exclusionary provisions: The CPR Act has repealed the prohibition against exclusionary provisions, as currently defined in section 4D of the CCA. Instead, vertical exclusionary conduct will now be regulated under the cartel provisions. This change is long overdue and will bring Australian competition law in line with international best practice.

Resale price maintenance: We now have a simplified notification process for seeking immunity from a potential breach of the prohibition against resale price maintenance. This amendment acknowledges that it is not always detrimental to consumers for a supplier to seek to maintain resale prices or prevent discounting. The new route of notification to the ACCC will often be simpler, quicker and less resource-intensive than going through the in-depth authorisation process.

Third line forcing: Third line forcing is no longer prohibited outright. Third line forcing is now only illegal if it has the purpose, or would have or be likely to have the effect, of substantially lessening competition. The historical third line forcing provisions had become increasingly problematic in the telecoms and media sector given their application to situations of bundling by different legal entities. The new reforms result in a more sensible approach consistent with international best practice.

Class exemption powers: The ACCC now has a class-exemption power. The ACCC can pre-judge certain types of arrangements and deem them to be immune from the CCA. Accordingly, the ACCC may create a safe harbour for certain categories of conduct unlikely to raise competition concerns.

Access: There have been substantial revisions and clarifications to the criteria and processes for declaring access to nationally significant infrastructure in Part IIIA of the CCA. However, telecommunications has traditionally been regulated instead under the telecoms access regime in Part XIC, which has not been amended in the current round of reforms.

Conclusions

The changes to Australia's competition laws present both risks and opportunities. Some of the risks arise for firms with substantial market power. Other risks arise in the context of communications between competitors. Opportunities arise for more flexible structuring of joint venture arrangements. Opportunities also arise for ACCC consideration of public benefits in merger clearances.

These changes to Australia's competition laws update and streamline our laws, ensuring they are more suitable for economic activity in the 21st Century. From a media and telecommunications perspective, the changes are to be welcomed.

The Reality of blockchain in Australia

Lots of Plans but Waiting for Big Hit

Nick Abrahams tells us where blockchain is up to in Australia.

The truth is the only people making any money out of blockchain at present are conference producers.

The country is awash with blockchain conferences but the technology itself is still stuck in the 'proof of concept' starting blocks. However, there is cause for hope as Australia has a leading position globally with various projects, including the ASX's CHESS replacement, AgriDigital's supply chain provenance solution and Webjet's travel industry blockchain.

The predictions about the impact of the technology make it hard to ignore. The World Economic Forum believes 10 per cent of global GDP will be stored on blockchain by 2027.

Jeff Schumacher of BCG Digital Ventures says blockchain will end up being more disruptive than electricity. According to PwC, well over $US1.4 billion ($1.8 billion) has been invested into the tech globally.

Even government is in on the act. Treasurer Scott Morrison is a fan saying it will deliver 'significant productivity, security and efficiency gains' for the Australian economy.

It has even caused an outbreak of bipartisanship with Labor senator Sam Dastyari and Liberal senator Jane Hume co-convening a new 'Parliamentary Friends of Blockchain' group.

In essence blockchain is a secure set of databases that automatically synchronise to become an unalterable record of transactions between parties. This allows parties to do business securely without intermediaries such as clearing houses, custodians and, potentially, banks.

The ASX, in addition to being the world's most profitable exchange, is also leading the way globally on blockchain. The CHESS replacement project could see equity trades settle almost instantaneously rather than two days after trade.

At this stage it is a trial and a final decision on deployment is due before the end of the year.

The ASX must be reasonably confident, as it has invested $30 million in the US vendor doing the project, Digital Asset Holdings.

The equities business is a focus for blockchain projects with the Sydney Stock Exchange announcing a move into the tech and Computershare announcing a relationship with blockchain start-up SETL.

Banks scared into action

Another leader is Sydney start-up AgriDigital, which last year successfully did the world's first live blockchain settlement of a physical commodity trade, in wheat. It has just announced a pilot to trace oats through the supply chain.

CSIRO's Data61 has said that proving provenance is one of the most promising applications of blockchain. This is especially important to our food exporters who can derive more income by proving Australian origin. Also in the supply chain space, BHP is trialling blockchain to track rock samples.

Blockchain requires an ecosystem to work and in the last two years there have been 25 industry-based global consortiums formed, 13 of those in financial services. Fearing blockchain as an existential threat, financial institutions have been the busiest blockchainers.

CBA and Westpac have joined 40 global banks investing a combined $US107 million into the R3 consortium, which is developing tech to help banks cut costs. NAB and Macquarie dropped out of R3 last year, though Macquarie is still involved in the R3 research lab.

Transferring money in real time between banks is one of the main opportunities. Currently this is done on a time-delayed process via SWIFT, a co-operative of 11,000 banks. However, CBA, Westpac, NAB and ANZ are all making progress on a potential alternative solution using US start-up, Ripple.

Ripe for change

Letters of credit have been around for more than 2000 years. In fact when answering the question 'what have the Romans ever done for for us?', you can add trade finance to roads and aqueducts.

Trade finance is ripe for change and it looks like blockchain may be the answer. CBA executed an impressive trial involving the export of 88 cotton bales.

Once the cargo ship entered port in China this automatically triggered transfer of ownership and payment via a smart (ie. self executing) contract built on a blockchain.

CBA had a win with a successful trial of a virtual cryptobond issue for Queensland Treasury Corporation showing opportunities to use the tech for trading relatively illiquid debt instruments. It also joined with Colonial First State to showcase how blockchain can be used for the real time trading and settlement of units, thus streamlining inefficiencies in the administration of managed funds.

Proving yourself

One of the key hurdles to blockchain take up is verification of the identity of parties transacting digitally. Australia Post has been investing in its own blockchain-enabled biometric digital identity solution.

In May, it announced it will partner with the federal government's $40 million digital ID project, GovPass.

Australia's love affair with property also gets a look in, with Scentre working with ANZ and Westpac to trial a blockchain solution to the paper-bound process of obtaining bank guarantees for commercial leases.

Also look out for newbie, BlochExchange, looking to make a play in fractional property investment.

According to KPMG, there are 579 fintech companies in Australia and more than $675 million has been invested into the sector. Much of this has been channelled into new solutions in areas such as lending, wealthtech, payments and personal finance management.

There has not been a significant amount of funding of Australian start-ups in the blockchain space.

The reason is that blockchains require the support of an eco-system of participants who are prepared to transact on the agreed platform. Note in this regard the proliferation of global consortiums of incumbent players mentioned above.

The opportunities for start-ups will truly grow once the big players, like the ASX and R3, build their platforms. The start-ups can then build their solutions on top of that infrastructure.

Having said that, there have been some Australian start-ups making moves, including Identitii and Kyckr in the identity space, Digital X in payments, Othera in alternative asset trading and Veredictum in anti-piracy.

AGL has partnered with WA-based Power Ledger to use blockchain for consumers to trade solar energy.

The hype is high but before blockchain can be rolled out it needs to be proven to be secure.

While blockchain has certain advantages in terms of security, high profile hacks of cryptocurrencies built on blockchain architecture (such as Bitcoin and ether) give cause for concern.

In July alone there was $US39 million of ether stolen in two separate attacks. Before deploying their blockchain solutions, banks and others will need to give consumers and regulators comfort they are robust and safe.

Now you will have to excuse me, a blockchain conference producer is calling on the other line.

Nick Abrahams is a corporate speaker on innovation and the future. He leads the APAC Innovation Practice for global law firm Norton Rose Fulbright. He is a co-founder of legal disrupter, LawPath and is on the board of ASX-listed software company, Integrated Research. He is the author of the book Digital Disruption in Australia.

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CAMLA members are invited to the 2017 Communications and Media Law Association Annual General Meeting and end of year drinks event

CAMLA Board nomination and proxy forms can be found at www.camla.org

THURSDAY 30TH NOVEMBER

5:45 pm Annual General Meeting

6:30 pm End of year drinks

Kindly hosted by:

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RSVP to camla@tpg.com.au or (02) 4294 8059 by Thursday 23rd November.

Please also indicate whether you will be also attending the Annual General Meeting and if you have any dietary requirements.

We look forward to seeing you there!

Copyright in Millions of Unpublished Works, Films and Sound Recordings to be Snuffed Out on 1 January 2019

Peter Knight, Banki Haddock Fiora, Sydney

- New rules regarding copyright duration come into effect on 1 January 2019
- The new rules are retrospective – there are no transitional provisions other than in the rules themselves
- The new rules eliminate 'perpetual' copyright in respect of unpublished copyright material
- After 1 January 2019, the duration of copyright will be affected by a new expression, 'making public', which may affect the duration all copyright in all copyright material made public before that date (other than artistic works and computer programs) and films and sound recording after that date
- The effect of the new rules will be to snuff out copyright in literary works (other than computer programs), dramatic and musical works made before 1948 that have not been made public
- The effect of the new rules will be to foreshorten copyright in sound recordings made before 1955 that have not been made public as at 1 January 2019 and may have an effect on the duration of copyright in films not made public before 1 January 2019
- Steps can be taken before 1 January 2019 to ensure that copyright lasts longer after the new rules come into effect

From 1 January 2019, a new way of calculating the term of copyright comes into force, as a result of which the indefinite period of copyright in respect of unpublished works and other subject matter is abolished and the duration of copyright in works *made public* after the death of the author and in films and sound recordings *made public* more than 50 years after being made is foreshortened. One effect of the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) Schedule 2 (**Disability Act**) will be that the copyright in millions of unpublished works, sound recordings and films subsisting as at the effective date will be snuffed out or foreshortened overnight unless something is done before that date to protect them.[1]

1. The general rule in respect of material the author or maker of which is generally known – ss 33 and 93

Works

In respect of works 'made public' after 1 January 2019, the author of which is 'generally known', the term of copyright will be 70 years from the end of the year in which the author dies, regardless of the date of being made public. The effect of this is to eliminate the extended period of copyright in respect of literary works (other than computer programs), dramatic and musical works and engravings published after the death of their respective authors, as well as indefinite copyright in respect of unpublished works. No distinction is made between the different types of works.[2]

After the Disability Act takes effect, works made public before 1 January 2019 have substantially the same copyright duration as under the law as before this amendment takes effect, except that the term of protection in respect of literary works (other than computer programs), dramatic and musical works not made public until after the author's death is measured from the date the work is made public, instead of by reference to when the work or an adaptation of the work was published, first performed in public, broadcast or records of the work or an adaptation are offered or exposed for sale to the public.[3]

A discussion of what the newly defined expressions "made public" and "generally known" mean follows below.

Films and sound recordings

In respect of films and sound recordings made public after 1 January 2019, provided that the film or sound recording is first made public within 50 years after the end of the year in which it was made, the term of copyright will be 70 years from the end of the year in which the film or sound recording is first made public or, if not made public within 50 years from the date made, then 70 years after the date made.[4]

Again, after the Disability Act takes effect, films and sound recordings made public before 1 January 2019

1 The commencement date of the new rules is prescribed by the Disability Act, s 2(1) item 3.

2 Disability Act Schedule 2 s 4, which will repeal the existing ss 33 and 34 and introduces a new s 33; see the new s 33(3).

3 Disability Act Schedule 2 s 4, which will repeal the existing ss 33 and 34 and introduces a new s 33; see the new s 33(2).

4 Disability Act Schedule 2 s 9, which will repeal the existing ss 93 and 94 and introduces a new s 93; see the new s 93(3).

have the substantially the same copyright duration as under the law before this amendment takes effect, except that the term of protection is measured from the date the film or sound recording was 'made public', instead of by reference to when the work or an adaptation of the work was published.[5]

Works, films and sound recordings not made public before 1 January 2019

The effect of these new provisions is that, if any work has not been made public before 1 January 2019, and the author died before 1 January 1948, copyright will lapse on 1 January 2019. In the case of authors of such works who died in 1949, 1950, 1951 and so on, the copyright lapses one year, two years, three years and so on after 1 January 2019, whether made public or not.[6]

So, those wishing to publish hitherto unpublished works in this category, would be well advised to do so before 1 January 2019, or create some other 'making public' event, in order to gain the protection of copyright after that date. For example, those with a parent's war diaries or sound recordings created during the First War or Second World War might wish to arrange a reading or a playing in the local scout hall before 1 January 2019 in order to give them more time to exploit the work fully.

In respect of sound recordings made between 1955 and 1958,[7] but not made public before 1 January 2019, copyright will lapse in 2025, 2026 and 2027 and 2028, respectively, that is, 70 years after the year in which made, because they were not made public within 50 years of the year made. For those made after 1 January 1959, there will be a small window of opportunity to have the copyright extended to 70 years from the date made public.

So those wishing to commercialise sound recordings made in that period from 1955 to 1958 would be well advised to make them public in some manner before 1 January 2019 in order to gain the longer period of protection out to 2088, 70 years from the date of making public.

These provisions have the effect of forfeiting a property right belonging to many copyright owners in respect of unpublished material and foreshortening the copyright of others. As a consequence of the possibility of invalidity of these amendments on the grounds of breach of s 52 of the *Commonwealth of Australia Constitution Act* 1900 (UK) s 51(xxxi), the Disability Act Schedule 2 s 31 provides that, if the operation of these amendments would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person which, if it cannot be agreed, can be determined by the Federal Court of Australia or the Supreme Court of a State or Territory.

2. What does "made public" mean?

The new expression "made public" will be used to determine the duration of copyright, defined in respect of works, films and sound recordings by a new s 29A(1) of the *Copyright Act 1968* (Cth) (**Act**), introduced by the amending legislation.[8] This provides that, without limiting when a work is made public, it is made public when:

(1) in the case of a literary, dramatic or musical work, when the work, or an adaptation of the work, is published, performed in public, broadcast or otherwise communicated to the public or records of the work or adaptation are offered to the public (whether or not for sale) or exposed for sale to the public;[9]

(2) in the case of an artistic work, when the work is published, performed in public, broadcast or otherwise communicated to the public, exhibited in public or, if the work is included in a cinematograph film, when the film is seen in public, or records of the work are offered to the public (whether or not for sale) or exposed for sale to the public.[10] If the work is a building, the work is deemed to have been made public when the building has been constructed;[11]

(3) in the case of all subject matter other than works, when it is published or copies of the material are offered to the public (whether or not for sale) or exposed for sale to the public,[12] and specifically in the case of a sound recording, if it is heard in public or communicated to the public[13] or,

5 Disability Act Schedule 2 s 4, which will repeal the existing ss 93 and 94 and introduces a new s 93; see the new s 93(2).

6 The new provisions do not operate to backdate the lapsing of copyright in respect of works made in or before 1949 that remain unpublished as at 1 January 2019; see Disability Act Schedule 2 s 30.

7 Copyright in sound recordings made before 1955 had a duration of 50 years from the date made, slightly lengthened by the Act to 50 years after the year made. So the copyright in such sound recordings lapsed before the extension of copyright which came into effect on 1 January 2015 as a result of the *US Free Trade Agreement Implementation Act 2004* (Cth).

8 Disability Act Schedule 2 s 3.

9 see the new s 29A(1)(a)(i) and 29(d).

10 see the new s 29A(1)(a)(ii) and 29(b).

11 see the new s 29A(1)(c).

12 see the new s 29A(2)(a) and 29(d).

13 see the new s 29A(2)(b).

14 see the new s 29A(2)(c).

in the case of a film, it is seen in public (to the extent it consists of visual images), heard in public (to the extent it consists of sounds) or communicated to the public.[14]

These changes are notable in that:

1 In respect of literary works (other than computer programs), dramatic and musical works, films and sound recordings, the range of events other than publication by reference to which the duration of copyright could be measured is no longer exhaustively listed, so that the commencement of copyright could be determined by reference to a range of lesser events, including events not specified in the legislation.

2 "Publication" still remains relevant to every other aspect of copyright, including subsistence of Australian copyright in foreign works, where no other connecting factor is present, under the *Copyright (International Protection) Regulations 1969* (Cth). "Making public" can be an event less than publication. The only interesting aspect of this is that, in relation to films and sound recordings, if Australian copyright subsists by reason of first publication in Australia or in a convention country alone, its duration may be measured from an earlier date, when it was first made public in Australia, if this occurred without publication. This is the case already with literary works (other than computer programs), dramatic and musical works but under the new rules the possible earlier event is not exclusively defined.[15]

3 Section 14 of the Act is not excluded from the operation of the new s 29A, as it is in respect of publication under s 29, so the making public of a work could take place if only a substantial portion of the work or other subject matter is made public.

4 There could be a dispute as to whether an event less than 'publication' but sufficient to be 'making public' took place within the life of an author (or, in the case of works made public before 1 January 2019, after the death of the author), if those defending an alleged infringement were arguing that some minor disclosure during the life of the author had the effect of the work being 'made public' during the life of the author resulting in copyright having expired. The new provisions are very vague - there has been no judicial interpretation of the existing expressions, so it is not clear why there was felt to be a need for change.

5 Perversely, however, for those works whose authors died before 1949, it may be the copyright owner who will argue that the work, whilst not published, was 'made public' by disclosure of some kind, in order to have copyright survive a little longer after 1 January 2019. There may be a similar effect in respect of sound recordings made in or after 1959 not made public before the death of the maker and in respect of films (after 1969, except insofar as copyright subsists in respect of photographs and/or screenplay).

3. Anonymous and pseudonymous works

The Disability Act introduces with effect on 1 January 2019 a new method of calculation of the duration of copyright in respect of works where the identity of the author is "not generally known".

The expression "generally known" is defined by an insertion in section 10 of the Act that provides that "without limiting when the identity of the author of a work is generally known, the identity is generally known if it can be ascertained by reasonable enquiry."[16] This definition appears similar to the repealed provisions of the Act which referred to an author whose identity was not generally known or could not be ascertained by reasonable enquiry, but is now non-exclusive. Again, there has been no judicial interpretation of the existing expressions, so it is not clear why there was felt to be a need for change in this regard, but one must wonder what sort of knowledge of an author's identity is required; who should one ask; if the identity is well known to friends and family, or work colleagues, or friends, is that insufficient to be generally known?

In respect of works made public after 1 January 2019, provided such a work has been made public within 50 years after the calendar year in which the work was made, and the authorship of the work remains not generally known throughout the period of 70 years after the year in which work was made, then the copyright in it will expire 70 years after the year of first being made. If, however, the work is first made public within that period of 50 years following the year it was made, then the work enjoys a bonus period of copyright extending to 70 years after being first made public.[17]

Such works made public before 1 January 2019 have the same copyright duration as under the law before this amendment takes effect, except that the term of protection in respect of such works is measured from the date "first made public", instead of by reference to when the work was "first published".[18]

These changes have the effect that, in respect of such works whose

15 , this only being relevant to works made public before 1 January 2019 (thereafter, it is year of death plus 70 regardless)

16 Disability Act Schedule 2 s 1

17 see new s. 33(3) item 2

authors are not generally known made in or before 1948 but not made public before 1 January 2019, copyright will lapse on that date. So, those wishing to publish hitherto unpublished works in this category would be well advised to do so before 1 January 2019, in order to gain the protection of copyright after 1 January 2019, and/or to disclose the identity of the author, to gain the benefit of a duration of copyright until 70 years after the year of death of the author.

4. Conclusion

The Disability Act also amends the duration of copyright in works and other subject matter belonging to the Crown (whether by creation of assignment), as well as such copyright material which would belong to the Crown except for the terms of an agreement under which it was created. Following the amendment, the duration will be 50 years after the year in which the copyright material is made, whether made public or not.[19] Similarly, there will be a new set of rules for the duration of copyright in copyright material belonging to a small list of international organisations.[20]

In his second reading speech to the Bill on 22 March 2017,[21] the Minister for Urban Infrastructure, the Hon Paul Fletcher MP, stated that the amendments "are aimed at aligning the terms of protection for unpublished materials with published materials ... Libraries, archives and other cultural institutions hold large volumes of unpublished materials which are an important part of Australia's cultural heritage. Setting a term of protection for unpublished materials will give these institutions greater opportunities to deal with unpublished materials. It will also improve access to important Australian historical and cultural materials that were not previously available to the public."

The Minister also noted that this amendment brings Australia into line with jurisdictions such as the United Kingdom, United States, Canada, New Zealand, Singapore and the European Union, where all works have a copyright term, whether they are published or not.[22]

18 see new s. 33(2) item 3

19 Disability Act Schedule 2 s 12, which will repeal the existing s 180 and introduces a new s 180.

20 Disability Act Schedule 2 s 4, which introduces a new s 188A, which alone governs duration. The organisations are prescribed by *Copyright Regulations 1969* (Cth), reg 26, Sch 12, which might be regarded as a surprisingly small list until it is realized that many works, films and sound recordings created or published by international organisations may be subject to Australian copyright without the application of s 187 or s 188 of the Act by virtue of their author(s) or maker(s) having a relevant connection to Australia or to a relevant member of an international copyright convention or by virtue of being first published in Australia or in a relevant member of an international copyright convention.

21 Hansard p 2753 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F7c24ae06-5284-45f0-9c0c-3e66799c0523%2F0045%22 accessed 22 August 2017

22 See also Explanatory Memorandum p 48ff (http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5832_ems_6286f247-9092-48bd-aac1-d771a2c7ee30/upload_pdf/625196.pdf;fileType=application%2Fpdf accessed 22 August 2017).

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

Changing the Focus on Originality in Part III Works - Moving from 'Authoring' to 'Undertaking the Creation or Production'

CAMLA Essay Competition Finalist, Felicity Young considers a different approach to originality under the Copyright Act.

Discussion about the requirement of originality under section 32 of the *Copyright Act 1968* (Cth) (**Copyright Act**) has been largely in abeyance in Australia since the late 1990s. Originality requires that a work covered under Part III of the Act emanates from a human author through an application of intellectual effort on his or her behalf. The current concept has struggled to adequately deal with computer-generated works, [1] and has led to heavily criticised decisions.

The originality debate has recently been enlivened as a result of the Full Court of the Federal Court's decision in *Telstra Corporation Limited v Phone Directories Company Ltd* (**Phone Directories**).[2] In three separate judgments, the court rejected the idea that copyright subsisted in directories generated by a computer system on the basis that they were not an original work emanating from an author. This paper argues that the *Phone Directories* case signals a need for the Copyright Act to be amended to adapt to the digital era. This paper suggests that the amendment should take the form of that recommended by the Copyright Law Review Committee in 1999.[3] The amendment should encompass a new concept of originality across all Part III works, not just computer generated works. The concept of originality should move from a focus on 'authoring' of the work to a focus on 'undertaking the creation or production' of the copyright material.[4]

Part I reviews the current relationship between originality and authorship in Australian Copyright Law. Part II analyses the judgments of Chief Justice Keane and Justice Perram of the Federal Court of Australia in the *Phone Directories* case. Part III proposes an amendment to the Act and includes an analysis of the *Copyright, Designs and Patents Act 1988* (UK).

Part I – Originality and Authorship

The focus of this paper is on Part III works under the Copyright Act being works which encompass literary, dramatic, musical or artistic works.[5] For copyright to exist in a Part III work, the work must be original. [6] By contrast there is no such equivalent requirement for Part IV works.[7] It is an established principle that originality does not prescribe a requirement of novelty or merit in the work.[8] Rather, a work is deemed original where it is shown that the work emanates from an author.[9] For this reason, originality and authorship have to date been seen as correlates of a single idea.[10]

The primary objective of copyright law has traditionally been to provide proprietary protection to persons who have expended effort to create an independent work.[11] It is only once this primary objective is satisfied that the Act's ancillary objectives of supporting innovation can be achieved.[12]. The intention of judges, and subsequent legislators, was to protect the value of the author's commitment to producing the work. As such, copyright protection to date has necessarily been focused on the author.[13]

What constitutes an original work has developed over time. It is generally accepted that originality requires an exercise of 'skill, labour or judgment' by an author in

1 See Anne Fitzgerald and Tim Seidenspinner, 'Copyright and Computer Generated Materials – Is it time to reboot the discussion about authorship? [2013] *Victoria University Law and Justice Journal* 47; Alexandra George, 'Reforming Australia's Copyright Law: an opportunity to address the issues of authorship and originality' (2014) 37(3) *University of New South Wales Law Journal* 939.

2 [2010] FCA 44.

3 Copyright Law Reform Commission, *Simplification of the Copyright Act: Part 2*, Report No 2 *(1999)*.

4 Copyright Law Reform Commission, *Simplification of the Copyright Act: Part 2*, Report No 2 *(1999)* [5.45].

5 *Copyright Act 1968* (Cth) pt 3.

6 *Copyright Act 1968 (Cth)* s 32(1).

7 *Copyright Act 1968* (Cth) pt 4.

8 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-9.

9 Justine Pila, 'Compilation copyright: A matter calling for a certain… sobriety' (2008) 19 *Australian Intellectual Property Journal* 231, 233.

10 Jani McCutcheon, 'When sweat turns to ice: The originality threshold for compilations following IceTV and Phone Directories' (2011) 22 *Australian Intellectual Property Journal* 87, 96 – 98.

11 *Baigent v Random House Group Ltd* (2007) 72 IPR195 [141].

12 Peter Carey & Ors, *Media Law* (Thomson Sweet & Maxwell, 4th Ed, 2007), 89.

bringing the work into existence.[14] However, how that skill, labour or judgment is measured has differed across cases. These standards were analysed by Chief Justice French, Crennan and Kiefel JJ in their joint judgment in *IceTV Pty Limited v Nine Network Australia Pty Limited*.[15] Their Honours opined that perhaps 'too much has been made of the kind of skill and labour which must be expended by an author.'[16] They opined further that standards such as 'sweat of the brow' or 'creativity' are 'kindred aspects' of the same mental process which produces a Part III work.[17] Their Honours reiterated that all that is required by the Copyright Act is that the work originate with an author from independent intellectual effort.[18]

Part II – Telstra Corporation Limited v Phone Directories Company Pty Ltd

Telstra Corporation sued producers of regional telephone directories for copyright infringement of their White and Yellow Pages directories (**Directories**). The Directories were prepared by the Genesis Computer System which imported telephone data from the Telstra system and automatically checked that data pursuant to a code. The code regulated the font, colour schemes, spacing of words and general preparation of the Directories. At first instance, it was accepted by the Trial Judge that the Directories could not be considered 'original works' because there was no human author of the work. The Respondents challenged the initial decision.

The Full Court, constituted by Chief Justice Keane, Perram and Yates JJ rejected the appeal in three independent but concurring judgments. Chief Justice Keane began by distinguishing the printed Directories from the written code underpinning the Genesis database, stating that the Part III work in this case was the Directories.[19] His Honour then focused on how the Directories were prepared, noting that for copyright to be shown to subsist in them, it must be demonstrated that the Directories originated from an individual author or authors through some intellectual effort.[20] Chief Justice Keane's decision ultimately turned on the Trial Judge's finding of fact that the Directories were not compiled by individuals but instead the automated processes of the Genesis Computer Systems or its predecessors.[21] As such, the Directories were not the result of some independent intellectual effort of a human author and therefore not original works.

While Chief Justice Keane was correct to differentiate between the printed Directories and the code underpinning the computer program, it was, in this author's opinion, incorrect to disregard the effort that went into producing the Genesis Computer System. The skill, labour and judgment used to create the program were directly linked to the production of the Directories. It is an inevitable factor of the digital age that computer programs will be employed to speed up a process that was historically time consuming.[22]

The use of computers in this manner should not detract from the skill, labour and judgment employed by an author to create a program to assist in the production of a work.

Justice Perram undertook a similar analysis in finding that the Directories were not original works. His Honour began by recognising that the purpose of copyright law was to provide proprietary protection in recognition of the investment of effort, time and skill by an author in reducing it to material form.[23] Justice Perram commented that care must be taken to direct inquiry only toward the efforts of the person in reducing the work into material form.[24] Reference was made to situations, such as weather reports, where a person operating a program was not controlling the output, or the form of the materials.[25] His Honour drew an analogy between the Genesis Computer System and a plane that is flying itself.[26]

The plane analogy highlights, for this author, the fundamental flaw in Justice Perram's judgment. It should not be said that a computer program operating automatically does so independent of human processing; automation is a direct result of human programming. While it is correct that the Genesis Computer System was producing the Directories automatically, it was programmed to act in this way by its author. It is this programming that should be seen as part of the skill, labour and judgment that are employed by the author in the

13 Thomson Reuters, *Laws of Australia,* (at 28 November 2016) 23 Intellectual Property, 23.1 Copyright [23.1.240].

14 *Ladbroke (Football) v William Hill (Football) Ltd* [1964] 1 All ER 465.

15 (2009) 239 CLR 458.

16 *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458, [47].

17 Ibid.

18 Ibid.

19 *Telstra Corporation Limited v Phone Directories Company Ltd* [2010] FCA 4, [56].

20 Ibid, [57]-[58].

21 Ibid, [90].

22 Peter Knight, 'Copyright in databases and computer programs: Why is it so hard to understand?' (2010) 23 *Australian Intellectual Property Law Journal* 118.

23 Ibid, [104] citing *Baigent v Random House Group Ltd* (2007) 72 IPR195 [141].

24 Ibid,[118].

25 Ibid.

26 Ibid.

pursuant of the work. Had analysis been made along these lines, a clear path emerges for a finding of originality in Telstra's favour.

Part III – Proposal to Amend the Copyright Act

The Copyright Law Review Committee (**CLR Committee**) foresaw the challenges in applying the Copyright Act in the *Phone Directories* case. In February 1999 the *Simplification of Copyright Act Part Two Report*, the majority of the CLRC was concerned that computer-generated works would not receive copyright protection even though those works reflected significant intellectual effort.[27] The CLRC recognised that while it was still necessary to connect a work with a human, it would be preferable to understand the connection 'not as one of "authoring" the work, but of "undertaking the creation or production of" the copyright material.'[28]

The CLRC's recommendation bears a striking similarity to Section 9(3) of the *Copyright, Design and Patents Act 1988* (UK) (**CDPA**). This section provides that where a work is computer generated, the author is taken to be the person who undertakes the arrangements necessary for the creation of the work.[29] In the case of the Genesis Computer System, the person would be the designer of the system, Telstra. A computer-generated work is defined by the CDPA as a work generated by a computer in circumstances such that there is no human author of the work.[30] 'No human author' has been taken to refer to works which are automated by the machine without a direct human input.

Section 9(3) was applied in *Nova Productions Ltd v Mazooma Games Ltd*[31] where the work in question was an electronic pool game. The game generated different artistic works (frames) as the game unfolded. Each individual frame was generated automatically by the computer. The Court held that the person who had written the code for the game had undertaken arrangements necessary for the creation of each frame. By casting originality with a focus on the efforts of the person who created the code behind the automation, the CDPA was adapted with foresight for the digital era.[32]

The key difference between the CLRC's recommendation and the CDPA provision is the breadth of application. Under the CDPA, the shift away from authorship to the steps necessary to create the work only applied to the narrow concept of computer-generated works. The CLRC recommendation, which is to be preferred, is that the broader focus on the steps necessary for the creation or production of materials should apply to all copyright subject matter, irrespective of whether they are computer generated.[33]

The CLRC's recommendation accounts for the increasing variety of works which are created with the assistance of a computer. The Committee recognised that as technology develops, it is difficult to distinguish between material created with the assistance of a computer and material created by a computer.[34] Changing the focus of originality across all works, however created, will not materially detract from the objectives of, or application of, copyright law.

The law, with its focus on the application of skill and labour already and necessarily requires an examination of the actions of an author. Amending the Act in the manner proposed simply expands the bounds of examination to the preparatory steps to the expression of an idea which are taken with the assistance of a computer. Further this expanded assessment means that works currently protected will not cease to have protection. Rather, the only effect of the change will be that computer generated work gain protection for the first time.

Part IV – Conclusion

Despite the current Federal Government's commitment to copyright law reform in the near future, there has been little reference beyond making the Copyright Act 'technology neutral.' This paper focused on the role of authorship when determining whether a work is original. As the above analysis suggests, in the author's opinion, the Court's focus on authorship led to the Phone Directories case being, incorrectly decided. To pave a path to move away from Phone Directories, this paper proposes to follow the CLRC's 1999 recommendations. To adapt to modern times the Copyright Act needs to recognise the steps undertaken by an author in creating or producing a Part III work. Until the Act is so amended, Australia will continue to be behind the eight ball in copyright protection in the digital age.

27 Copyright Law Reform Commission, *Simplification of the Copyright Act: Part 2*, Report No 2 *(1999)* [5.44].

28 Ibid, [5.45].

29 *Copyright, Design and Patents Act 1988 (UK)* s 9(3).

30 Ibid, s 178.

31 [2006] EWHC 24 CH.

32 Anne Fitzgerald and Tim Seidenspinner, 'Copyright and Computer Generated Materials – Is it time to reboot the discussion about authorship? [2013] Victoria University Law and Justice Journal 47, 55.

33 Copyright Law Reform Commission, *Simplification of the Copyright Act: Part 2*, Report No 2 *(1999)* [5.47].

34 Copyright Law Reform Commission, *Simplification of the Copyright Act: Part 2*, Report No 2 *(1999)* [5.47].

35 George Brandis, 'A practical Look at Copyright Law Reform, (Speech delivered at the Opening of the Australian Digital Alliance Fair Use for the Future, Canberra, 14 February 2014).

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