CAMLA COMMUNICATIONS LAW
BULLETIN
Communications & Media Law Association Incorporated
Volume 37, No 4. December 2018
Disruptor Edition

Defamation Trials: Why Plaintiffs are Rush(ing) to File in the Federal Court

Richard Leder (Partner), Sanjay Schrapel (Senior Associate) & Conor O'Beirne (Law Graduate), Corrs Chambers Westgarth consider developments in defamation practice in Australia following the decision in *Crosby v Kelly*[1] (*Crosby*) where the Federal Court of Australia decided that it has jurisdiction to hear defamation matters. A number of early advantages for plaintiffs may exist.

Principally, a plaintiff in a defamation matter can—by closely considering whether to file in the Federal Court or a Superior Court of a State or Territory—effectively elect whether they wish to have a trial by judge or jury.

This advantage is likely an unexpected consequence that flows from the decision in *Crosby*, and is one, which is increasingly being taken up by plaintiffs who choose to file in the Federal Court. This advantage is, in most cases, unable to be recouped elsewhere by a defendant – the proposition of running a trial in front of a group of jurors, whose values, beliefs and attitudes are representative of the community at large, is a fundamentally different proposition to presenting a case before a judge.

It is an advantage which is, on its face, contrary to the legislative intent that underpins s.21 of the *Defamation Acts* as enacted in all States and Territories bar South Australia (**Uniform Acts**).

The more recent decision of the Full Federal Court in *Wing v Fairfax*[2] (***Wing***) cements this restriction on defendants invoking their right under the *Uniform Acts* to have the matter tried by a jury after the issuing of proceedings in the Federal Court, In this context, this article examines the legal landscape surrounding the use of juries in defamation trials, and looks at how a plaintiff can elect whether their claim will be heard by a jury simply by choosing whether to bring their claim in the Federal Court or a State/Territory Superior Court.

Ultimately, while there are other strategic imperatives that might otherwise inform the decision to issue proceedings in a particular jurisdiction, depriving defendants of the chance to have their matter decided by members of the public is arguably not in keeping with the ethos of the *Uniform Acts*, and presents a potential unfair advantage to plaintiffs.

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1 [2012] FCAFC 96.
2 [2017] FCAFC 191.

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Editors' Note

And just like that, we're here. The final edition of the *Communications Law Bulletin* for 2018.

It's been a game-changing year in our areas of law, and we have labelled this edition a special "**disruptor**" edition. In keeping with that theme, we have spoken with and received contributions from some of our best and brightest - and most disruptive - young lawyers. CAMLA President, **Martyn Taylor** interviews CAMLA Young Lawyers Chair **Katherine Sessions** about #younglawyerperspectivesaboutthelegalprofession. **Immy Yates** interviews young barrister **Maddie Hall** about her experience recently moving to the media bar. **Erika Ly**, President of The Legal Frontier NSW, comments on how disruptive technologies are likely to change the profession. And we catch-up with an old friend, former Young Lawyers Chair **Sophie Ciufo**, in-house at Viacom NYC, about young lawyers travelling abroad early in their careers.

We publish **Anna Belgiorno-Nettis's** article which won the CAMLA Young Lawyer essay competition, in which she asks whether the *Broadcasting Reform Act* gives up on democracy. Minters' **Karla Nader** discusses EU antitrust actions against **Google** and **Amazon**, and her colleague **Kosta Hountalas** comments on the EU Directive for Copyright in the Digital Single Market. Our friends at Corrs, **Richard Leder** and **Sanjay Schrapel** write about the right to privacy in light of **Sir Cliff Richard's** claim against the **BBC**, as well as litigating **defamation claims in the Federal Court**. We have a piece from former CLB-editor **Valeska Bloch** and her colleagues at Allens about the right to hack back. **Kate Simpson** considers international non-compete clauses within employment contracts, and Ashurst's **Julie Cheeseman** reports on the **Wagner** judgment.

Just since the last edition, so much has happened in this space. **Geoffrey Rush**'s defamation claim against **The Daily Telegraph**'s publisher, Nationwide News was heard in Sydney's Federal Court. **Rebel Wilson**'s application for special leave to appeal the 90% reduction in her award of damages was rejected, meaning that the Court of Appeal's decision that forced the actress to repay $4.1 million worth of damages is upheld. And **Chris Gayle** was awarded $300,000 in defamation damages. This all, as NSW Attorney-General Mark Speakman releases the terms of reference to guide the national **defamation reform** process.

The ACCC and then **Fairfax**'s shareholders approved the **Nine** merger, meaning the end of the publisher's 177-year-old history as an independent entity. It is expected that the new company, called Nine, will begin operations on 10 December 2018.

Meanwhile in the USA, the **White House** revoked press credentials for **CNN's Jim Acosta** after a tense exchange at a news conference, causing CNN to seek emergency restraining orders, effectively reinstating the correspondent's access. **Fox News**, **NBC**, **The New York Times**, **The Washington Post**, and the **Associated Press** filed an amicus brief in support of CNN. The Judge ruled in support of CNN, temporarily restoring access, with further hearings to continue.

SCOTUS discussed the issue of cy pres awards in an internet privacy case involving **Google**. Essentially, class action lawsuits that would involve negligible awards for each member of the class sometimes direct the not-negligible total award to third parties that act in the class's interests, for example a charity. In this case, the $8.5 million settlement was proposed to be directed in large part to organisations that promote internet privacy, rather than to millions of Google users whom the plaintiffs were to have represented in the class action.

Speaking of class actions, **Maurice Blackburn** is launching a case against **Uber** on behalf of more than a thousand taxi and hire car drivers, operators and licence holders, in the Victorian Supreme Court.

Britain referred **Facebook** to Ireland's **Data Protection Commission**, regarding Facebook's targeting functions and techniques that are used to monitor individuals' browsing habits, interactions and behaviour across the internet and different devices.

Data privacy in Australia has recently focused on the controversial online medical records system. Australians had until 15 November 2018 to opt out of the **My Health Record** system, but the opt-out period was extended until 31 January 2019, following several issues on the website. And then there's the **encryption laws**.

With all that happening in the background, it's perhaps no surprise that we've been busy here at CAMLA. We had our **AGM** on 27 November 2018 at Baker McKenzie, and we're open for entries for the 2019 **CAMLA Essay Competition** (details inside). Enjoy your summer, and we look forward to seeing you in 2019!

Victoria and Eli

Federal Court jurisdiction to hear defamation claims

Section 19 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) establishes when the Federal Court is vested with original jurisdiction to hear a matter. It is a superior court of record and a court of law and equity,[3] and by virtue of Section 39B of the *Judiciary Act 1903* (Cth), the Federal Court is seen as a court of general jurisdiction in civil matters.[4]

The decision in *Crosby* confirmed that the Federal Court has jurisdiction in 'pure' defamation matters. In a paper, delivered in 2006 , Justice Rares flagged that the Federal Court has jurisdiction to hear any pure defamation matter in circumstances where:

- the publication involves, and the defence raises, the implied constitutional freedom of communication on government and political matter; or
- there is an interstate (or international) publication, (there is an argument that s 11(5) of the Uniform Acts engages s 118 of the Constitution, such as

3 Section 5(2), *Federal Court of Australia Act 1976* (Cth).

4 Justice Steven Rares, 'Defamation and the Uniform Code' (Speech at the Media Law Conference, Marriott Hotel Sydney, 26 October 2006).

to enable each jurisdiction to 'apply the provisions of s. 11 of the Uniform Acts as substantive modifications of the laws of each jurisdiction and the common law of Australia'.)[5]

The Federal Court in *Crosby* determined the jurisdictional issue along similar, but ultimately different, lines. It was recognised that if the defendant filed a defence relying on an implied freedom of political communication,[6] then the matter would more clearly fall within the jurisdiction of the Federal Court.[7] However, despite being given leave to file a defence relying on the implied freedom of political communications, the defendant failed to do so. The question for the court then became whether, by virtue of the cross-vesting legislation acts and their interplay with the Constitution, the Federal Court had jurisdiction.

By relying on s 9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth), the Federal Court concluded that it had the jurisdiction to hear and determine those matters which were within the jurisdiction of the ACT Supreme Court.

Since *Crosby* and the subsequent decision in *Hockey v Fairfax Media Publications Pty Limited*[8] (which was the first time the Federal Court awarded damages in a pure defamation matter), the Federal Court has held that the publication in a territory (amongst other places) endows the Federal Court with jurisdiction to hear the matter[9] and apply the law of the jurisdiction with the closest connection to the harm occasioned.[10]

The consequence is that plaintiffs are now confidently, readily and increasingly filing defamation actions in the Federal Court.

The Uniform Acts

In 2004, under threat of a draft Commonwealth Defamation Act proposed by then Attorney-General Phillip Ruddock, the States and Territories agreed on a draft Defamation Bill to be enacted in each State and Territory, which became the *Uniform Acts*.

Section 21 of the *Uniform Acts* provides that the default position in defamation actions is that, unless ordered otherwise by the judge, either party can elect for there to be a trial by jury. The strict parameters within which a judge may otherwise order a trial to proceed by judge alone are indicative of the uniform parliamentary intent between all States and Territories[11] to preserve the rights of either party to have their case tried by a jury.

In conjunction with addressing the 'miscellany' of previous state-based legislation, this supposed legislative intent is displayed by the relevant explanatory memoranda which describe the section as continuing to preserve the use of juries in defamation proceedings.[12]

While the default position of s 21 is for (upon either party's request) a jury trial, judicial discretion has been ascribed to ensure that those disputes which are inappropriate for a jury are heard by a judge alone. Specifically, these are trials that are expected to:

- require a 'prolonged examination of records'[13]; or
- involve 'any technical, scientific or other issue' not convenient for consideration by a jury,[14]

and are therefore an exception to the default position.

The Supreme Court of Queensland recently applied s 22 in *Wagners v Harbour Radio Pty Ltd*.[15] In that case Applegarth J held that, because of the volume and complexity of material to be considered, as well as the need to consider complex expert evidence about the causes of the failure of the Wagner embankment during the 2011 Grantham floods, 'a jury trial in this matter will take longer and be more expensive than a trial without a jury'.[16]

Section 22 of the *Uniform Acts* further bolsters this goal. By clearly delineating between the respective roles and responsibilities of juries and judges in defamation proceedings, the *Uniform Acts* evince an intention for the questions of whether:

- a publication is defamatory;
- any aggravating circumstances are made out; and
- any defences apply,

to be determined by juries, as a representation of the broader community.

This accords with the overarching goals of the *Uniform Acts*, which are to ensure that, so far as possible, decisions about conclusions that an 'ordinary reasonable reader' may make are made by those members of the community who form the pool of 'ordinary reasonable readers'.

5 *Ibid*, 2-3.
6 *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199
7 *Crosby*, above n 1, [11].
8 [2015] FCA 652.
9 *Wing, above n 2,* [13].
10 Uniform Act, s 11.
11 Save for South Australia, where civil jury trials have been abolished: *Juries Act 1927* (SA) s 5.
12 Explanatory Memorandum, Defamation Bill, 10.
13 *Defamation Act 2005* (Vic) s 21(3)(a).
14 *Defamation Act 2005* (Vic) s 21(3)(b).
15 Partner Mark Wilks and Special Counsel Jim Micallef acted for the Wagner family in this matter.
16 [2017] QSC 222 at [75].

Juries in the Federal Court

There is a tension between s 21 of the *Uniform Acts* and s 39 of the *Federal Court Act*.

While the default position of the *Uniform Acts* is for defamation actions to be tried by jury, s 39 of the *Federal Court Act* provides for the opposite: unless ordered otherwise, civil trials in the Federal Court shall be by a judge without a jury.

Further, section 40 of the *Federal Court Act* provides the threshold for when a jury trial may be ordered: where 'the ends of justice appear to render it expedient to do so'.

The Federal Court first dealt with this legislative tension in *Ra v Nationwide News Pty Ltd* (***Ra***),[17] when Rares J granted an application by the publisher defendant for a jury trial in defamation proceedings that were issued by a Sydney brothel owner. In describing the parliamentary intent behind Section 39 of the *Federal Court Act* as being policy which 'informs but does not overwhelm the exercise of the discretion',[18] his Honour's decision appears to have been predicated on the notion that as the matter raised questions about the social and moral values of the community, it was appropriate to order a jury.[19]

However, despite Rares J's assessment of s 21 of the *Uniform Acts* and its interaction with s 39 of the *Federal Court Act* in *Ra*, this proposition was rejected by the Full Federal Court (on which Rares J sat) in *Wing*. In *Wing*, the Court held that s 109 of the Constitution regulates the inconsistency between the *Uniform Acts* and the *Federal Court Act*.[20] In that case, it was put to the Court that despite the inconsistency, the Court should still have regard to ss 21 and 22 of the *Uniform Acts* in determining any application for a jury.

Allsop CJ and Besanko J rejected this submission on the basis that the discretion would be exercised inconsistently.

While agreeing with Allsop CJ and Besanko J, Justice Rares' judgement in *Wing* is more critical of the apparent intent behind sections 39 and 40 of the *Federal Court Act*. He notes that as his decision in *Ra* is the first and only time a jury trial has been ordered in the Federal Court's 40 year history, the 'application of the discretion, and litigants' perception of its application, has not been what the Parliament intended'.[21]

Bearing this in mind, framing the question around the 'expedience' of having a jury hear a matter is somewhat self-defeating for a defamation matter. The decision of Allsop CJ and Besanko J in *Wing* notes that judges do not infrequently assess conduct by reference to the standards of the community, or more specifically, a section of the community such as the commercial community.[22]

This very idea that judges are equipped to deal with such questions goes to the heart of answering the expedience question – for if judges see themselves as already considering such issues, it is unlikely that they will find that a trial by a jury would be 'expedient'. Accordingly, while Rares J accepted that the main issue to be considered in *Wing* was the defence of qualified privilege, a matter the *Uniform Acts* reserve for judges,[23] he noted that 'where fundamental community values, namely the right to reputation and the freedom of speech or opinion, clash, it often will be the case that the ends of justice render expedient that a trial of a defamation action be by jury'.[24] The sheer lack of jury trials in the Federal Court suggests that this focus on expedience weighs heavily on Federal Court judges considering whether or not to depart from the ordinary mode of trial prescribed by section 39 of the *Federal Court Act*.

Oral vs. affidavit evidence

As the bulk of evidence in the Federal Court is given via affidavit,[25] initiating defamation proceedings in the Federal Court allows a plaintiff to more closely control not just the narrative of their dispute, but the issues that may arise during trial.

While there are a number of procedural and practical benefits to affidavit evidence, its main pitfall is that enables defamation plaintiffs to better tailor the evidence-in-chief of the witnesses to be called on behalf of their clients. In comparison, as noted by Callinan J in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*,[26] oral evidence 'retains a spontaneity and genuineness often lacking in pre-prepared written material'.

The distinction between a trial proceeding by way of affidavit or by *viva voce* evidence is significant in a defamation trial, where often so much rests on the court's impression of the witnesses and their demeanour. Often, a court will be called upon to make findings as

17 (2009) 182 FCR 148.

18 *Ibid*, [23]. This decision was also informed by the plurality's decision in *Reader's Digest Services Pty Limited v Lamb* (1982) 50 CLR at 505-506.

19 *Ibid*, [19].

20 Wing, above n 2, [21], [28].

21 *Ibid*, [59].

22 *Ibid*, [44]. Their Honours cited *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 321 ALR 584 and *Commonwealth Bank of Australia v Kojic* (2016) 341 ALR 572 as examples of cases in which they have considered conduct by reference to the standards of the commercial community.

23 Although there remains complex, and unresolved, questions as to which parts of the qualified privilege defence are to be determined by the trial judge, and the jury: see *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [31] to [35] (Dixon J).

24 Wing, above n 2, [56]. Here, Rares J refers back to the decision of Brennan J in *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505-506, being a decision he relied heavily on in Ra.

25 Justice Alan Robertson, 'Affidavit Evidence' (Speech delivered at the College of Law Judges' Series, 26 February 2014).

26 (2006) 229 CLR 577 at [175].

to the credibility of witnesses who will present diametrically opposed positions as to a particular state of affairs – as is currently playing out in Geoffrey Rush's defamation claim, a claim brought in the Federal Court.

Other procedural benefits of litigating in the Federal Court

There are other benefits for plaintiffs associated with the Federal Court finding it has jurisdiction in defamation matters. For one, the Federal Court's docket system, whereby a number of cases are assigned to a single judge who then oversees, and makes directions with respect to, all interlocutory matters before hearing that case.

When accompanied with the time and cost-based benefits of affidavit evidence, it is apparent that in the Federal Court, trials are often shorter, and judgments are obtained more quickly.

Looking forward

While there are a number of practical benefits associated with filing in the Federal Court, the reluctance of that Court to try matters before a jury creates a potentially unfair advantage to plaintiffs in defamation matters.

The very essence of a defamation dispute – being the reputation of the plaintiff in the eyes and estimation of others – is likely to give rise to questions about moral and social values of the community. Through ss 21 and 22 of the *Uniform Acts,* State and Territory parliaments have evinced an intention for such matters to be determined by a jury, and despite the Federal Court's position that it has jurisdiction to hear 'pure' defamation matters, it is clear that the *Uniform Acts* have been drafted with the State and Territory Courts in mind as the ordinary forum for such disputes.

While ss 39 and 40 of the *Federal Court Act* provide an opportunity for defendants to put forward their case that a jury is the most appropriate trier of fact in their case, the fact that no jury has ever been conducted in the Federal Court speaks to the irreconcilability of the intent behind the *Uniform Acts* and the *Federal Court Act*.

The separate benefit to plaintiffs conferred by the Federal Court, being that evidence is generally led in that Court by way of affidavit rather than oral evidence, presents further tactical advantages for a plaintiff, and potentially shields plaintiffs and their witnesses from the bruising effects of going 'off script' in evidence-in-chief. The inverse to this position is that the right to cross-examination remains, and defendants may have better opportunities to find inconsistencies and tensions in a plaintiff's evidence when it is presented to them, months before trial, in a written form.

The tension created between section 21 of the *Uniform Acts* and s 39 of the *Federal Court Act* is likely to persist, and will continue to benefit defamation plaintiffs seeking to avoid a jury trial. On top of the myriad issues that arise in defamation litigation as a consequence of the digital era, this may need to be added to the growing list of reforms to be considered for the next review of defamation law and practice in Australia.

Richard Leder is a partner, **Sanjay Schrapel** a Senior Associate, and **Conor O'Beirne** a Law Graduate, at Corrs Chambers Westgarth in the Commercial Litigation and Technology, Media and Telecommunications practice groups.

For seven years, **VICTORIA WARK** has provided great dedication and insight as an editor of the *Communications Law Bulletin*. She has worked tirelessly to source and edit a wide range of articles and provide insight and advice to many contributors as well as thoughtful editorial changes. CAMLA thanks Victoria for her years of service to CAMLA, including three on CAMLA's Board, and wishes her all the best for the future.

ASHLEIGH FEHRENBACH joins Eli Fisher as co-editor of the *Communications Law Bulletin*. Ashleigh is a Senior Associate at MinterEllison. Ashleigh's focus is primarily on technology, intellectual property and privacy law. She has been a member of the CAMLA Young Lawyers Committee for two years and is a regular contributor to the *Communications Law Bulletin*. Ashleigh has a passion for media law and journalism and is also the Co-Vice Chair of the NSW Young Lawyers Communications, Entertainment and Technology Committee.

Questions for Madeline Hall, Banco Chambers Communications Law Bulletin

IMOGEN YATES: First of all, thank you Madeline taking the time to participate in this interview. The purpose of today is to get to know a little bit about you and your legal background, and to pick your brains about some of the challenges budding barristers may face as they transition from life as a solicitor to life at the bar.

You went to the bar in 2016. Can you tell us a bit about what you did before that? Did you always know that you wanted to be a barrister?

MADELINE HALL: All throughout university, I knew I wanted to go to the bar but I was never really sure when I would take the plunge. Prior to going to the bar, I worked as a paralegal and then solicitor at various firms. I did a clerkship and worked at Allen & Overy and immediately prior to going to the bar I worked at Corrs Chambers Westgarth. I also worked at the Supreme Court as Tipstaff and then Researcher to the Chief Justice, T F Bathurst AC.

IY: I've heard that applying for readership positions in chambers is extremely competitive. What can you do to stand out in the application process? Do you think, for example, it's now desirable (or perhaps even necessary) to have a Masters degree? What makes a good CV?

MH: Obviously the process is unique for each chambers. Generally speaking, however, I think advocacy experience can really assist in distinguishing you from the crowd. In terms of academics, I think there is a perception that a Masters degree is almost mandatory these days. I myself do not have one though, so although it clearly can assist, it is not necessary! I think a good CV is a short CV – and again I'd emphasise the need to focus on advocacy experience whenever possible.

IY: What's involved in setting up chambers? How do you know which chambers is the best fit for you?

MH: There are lots of little things involved in setting up chambers and it's probably easy to start writing a seemingly never ending list of to-dos and things to get. When it comes down to it though, leaving aside your actual practising certificate and insurance, you need a computer and a chair! To be honest, the bar course is very good at preparing you for practice and getting you to think of all the essentials, including accounting software so I wouldn't worry too much about planning business cards until you are quite close to coming to the bar. Obviously you do need to be mindful of the financial side of things and that there is always a bit of a lead time before payment for your work starts rolling in.

In terms of figuring out which chambers – this can be a very difficult process. It is certainly not the same process as looking at law firms. That said, despite the unique situation of chambers, as with most things, talking to as many people as possible, both on and off the floor in question is probably the best way to work out if you will fit in with the type of chambers. Obviously being very aware of the areas of law the chambers' members specialise in is a key factor.

IY: Could you tell us a little bit about how you got your first brief? As a young barrister new to practice, what can you do to ensure you get enough work?

MH: How I got my first brief was perhaps a bit unusual. A close friend, mentor and barrister wasn't able to attend court so he gave me all his matters that were in for directions on my very first day. So technically my first brief was around 15 matters in a Monday list! I think people should not worry *too* much about where the work will come from and how to get it – although I appreciate that is very easy to say and harder to do when you are starting out. I think though you need to remember that as a reader, members of the floor look out for you and will try and get you involved whenever they can in matters. The collegiality of the profession is not fading away and is something you can count on!

I think the simplest and most effective thing you can do to ensure you get enough work is to tell as many people as possible (solicitors and barristers) that you are open to work and the types of work you will take on (if you wish to specialise from the outset). Something as simple as that can mean you are soon inundated!

IY: Do you think that there are any unique challenges for young women wanting to go to the bar?

MH: There are no doubt unique challenges facing young women, although I would say not so much to go to the bar as in staying there long term. That said, for each of these instances, I think you can find a countervailing instance, say where a member of the profession goes out of their way to try and support junior female members of the bar so I don't think young women should be deterred from the profession just because of their gender.

IY: I know that you have quite a broad practice, but that you are also briefed for quite a lot of media and defamation work. Do you think it's important to specialise at the beginning of your practice? Or is it better to start by establishing a good general commercial practice before honing in on something a bit more niche?

MH: I think it really depends on your professional history and how certain you are that you want to specialise. If you have been a solicitor for a long period before coming to the bar and have already specialised, I can see why on coming to the bar you may specialise straight away in the sense of continuing what you have already specialised in. If that's not the case, I think one of the great things about the bar is that it is so easy to have a diverse practice and work on as broad a range of matters.

IY: Three things you find most satisfying about your job. Go!

MH: First and foremost I'd have to say the oral advocacy. That component of persuasion is what drew me to the bar and is something I enjoy every time. Next I think I'd say the flexibility and independence that comes from running your own practice. Once you get a taste of this I think it would be very hard to go back! Third, I'd say the intellectual challenge. I've been surprised a number of times how a seemingly "small" motion in one of the lower courts can throw up some difficult questions.

IY: I think a lot of young lawyers aspiring to go to the bar think that they need to have ticked certain boxes before they take the leap (for example, spending some number of years in a firm with litigation practice, having saved a certain amount of money, making sure family and home life is settled and established). When is the right time to go to the bar? How do you know when you're ready? Should anyone thinking about going make the jump sooner rather than later?

MH: Everyone has a different answer to this question! I think when is 'too soon' or 'late' is incredibly tied up with personal circumstances, so I'd just say that in some ways there is never a right time to go – you will always be able to come up with an argument for or against. There is no magic age or circumstances to attain. When you can't wait any longer, you'll know and that's when you should go.

IY: Do you have a mentor who has guided you through your first couple of years at the bar? Is that something you think helps the transition into practice?

MH: Like, every reader I had two tutors who act as formal mentors for the first year at the bar. I've also got, and I think it also really helps, to know or form a relationship with barristers one-three years ahead of you, who still remember what it was like to be a junior barrister. They definitely help the transition into practice and can provide invaluable tips and tricks.

IY: Thanks again Madeline for taking the time to let us into your life at the bar and for your invaluable advice. All the best to you.

Imogen Yates is Tipstaff to the Honourable Justice Slattery in the Equity Division of the Supreme Court of New South Wales.

The Hack Back: The Legality of Retaliatory Hacking

Valeska Bloch, Sophie Peach and Lachlan Peake consider whether organisations in Australia and abroad have a right to 'hack back' in response to a cyber attack.

Today, the cyber battlefield is just as important as the physical one. However, in circumstances where government departments and law enforcement agencies are unable or unwilling to effectively respond to cybercrime, organisations are increasingly questioning whether or not they have (or ought to have) a right to 'hack back' as an offensive retaliatory measure. This article looks at how this debate is evolving at home and abroad.

What does it mean to 'hack back'?

Hacking back generally refers to the proactive steps taken by the victim of a cyberattack to turn the tables on its assailant in order to:[6]

- identify the source of an attack, including by probing a cybercriminal's infrastructure for weaknesses or snippets of information that could reveal who is behind an attack;
- thwart or stop the crime, including by disabling the hacker's malware, or launching distributed-denial-of-service (DDoS) attacks;[7] or
- destroy or steal back what was taken, including by remotely breaking into a target's servers and wiping any data including stolen information or intellectual property.[8]

Developments in Australia

The legal position

The Cybercrime Act prohibits the unauthorised access to, or modification or impairment of, data held on a computer.[9] Although these laws do not draw a distinction between hacking and hacking back, 'depending how it is done, [hacking back] may not be illegal.'[10] One possible legal argument is that 'computerised counter attack' is an example of self-defence.[11] Some academics believe self-defence should permit hacking back in particular circumstances. The law recognises a right to engage in active 'self-help' in certain circumstances, for example, 'the right of restraint and self-help eviction remedies in landlord-tenant relations' and the right of self-defence in criminal law to protect personal safety or property.[12] This is the basis on which some argue that, in principle, the law could similarly allow active self-help against cybercrime, subject to certain limitations such as necessity and proportionality.[13]

Dr Alana Maurushat advocates for legislation that permits hacking back provided it meets certain conditions – in particular, that a party can sufficiently attribute the source of the hacking to minimise the likelihood of retaliatory measures being taken against the wrong target, and that the counter-hacking is reasonable, proportionate and necessary when considered against the harm sustained by the victim.[14]

While the position in Australia might seem slightly more opaque than elsewhere, it is likely that hacking back is an offence under Commonwealth law. Speaking to the Australian Strategic Policy Institute on 29 October 2018, ASD Chief Mike Burgess issued a strong warning to Australian businesses contemplating 'hacking back'.[15] Burgess unequivocally stated hacking back is illegal in Australia and should not form part of any organisation's cyber strategy.[16] He expressed particular concern that cyber attacks launched by Australian businesses, or at their behest, 'risk misattribution and an escalation in malicious activity'.[17] Further, privately initiated attacks risk that attack being misinterpreted as a state sanctioned attack, which could have significant negative consequences.[18]

1 Nicholas Schmidle, *The digital vigilantes who hack back, The New Yorker* (7 May 2018).
2 Ibid.
3 Melissa Riofrio, *Hacking back: digital revenge is sweet but risky, PC World* (9 May 2013).
4 Tom Kulik, *Why the Active Defense Certainty Act is a bad idea,* Above the Law (29 January 2018).
5 TimeBase, *The legality of defensive hacking* (30 September 2013).
6 Dan Lohrmann, Can 'hacking back' be an effective cyber answer? *Government Technology* (13 February 2016).
7 Joseph Cox, *Revenge hacking is hitting the big time, Daily Beast* (19 September 2017).
8 Liam Tung, Is hacking in self-defence legal? *Sydney Morning Herald* (27 September 2013).
9 *Cybercrime Act 2001* (Cth) ss 477.1 – 477.
10 Alana Maurushat, senior lecturer at UNSW Faculty of Law (see Liam Tung, *Is hacking in self-defence legal? Sydney Morning Herald* (27 September 2013)).
11 Ibid.
12 Jay P Kesan and Ruperto P Majuca, 'Hacking Back: Optimal Use of Self-Defense in Cyberspace', Oxford Research Paper, p1.
13 Ibid pp 20–24.
14 Alana Maurushat, senior lecturer at UNSW Faculty of Law (see Liam Tung, *Is hacking in self-defence legal? Sydney Morning Herald* (27 September 2013)).
15 Mike Burgess, Director-General ASD, *Speech to ASPI National Security Dinner* (29 October 2018).
16 Ibid.
17 Julian Bajkowski, *Australia's cyber spy chief slams corporates contemplating 'hacking back', IT News* (30 October 2018).
18 Ibid.

The industry position

A 2017 Commbank Report found that Australian industry is split on active defence and referred to a survey by the Australian Strategic Policy Institute which said only 10% of respondents were in favour of a right to hack back. In Australia, more than 70% of data breaches are detected by law enforcement agencies or third parties and less than 20% by companies' internal security teams.[19] This may be one reason why the preference among the business and broader community appears to be for increased law enforcement competencies (both legal and technical) to respond to identified cyber intrusions, rather than legal permission for victims to hack back themselves. Nevertheless, hacking back is 'reasonably common' in Australia,[20] suggesting there is some degree of frustration among the business community at perceived ineffectiveness of formal legal responses to hacking.

The Government's approach

In July 2017, the Australian Government established the Information Warfare Division (***IWD***) within the Department of Defence, headed by the Deputy Chief (Information Warfare), Major-General Marcus Thompson. This unit is tasked with 'defending the country's critical infrastructure against cyberattacks and launching offensive cyber strikes on foreign actors.'[21] The former Minister for Cybersecurity, Dan Tehan, explained that the focus of this unit is on 'military cyber operations, military intelligence, joint electronic warfare, information operations and [the] military's space operations.'[22] Thus, the Division is mostly concerned with the defence implications of state-to-state cyber warfare.

At the same time that the IWD was established, former Prime Minister Malcolm Turnbull also unveiled plans for the ASD to be given increased powers to respond to overseas cyber criminals, stating that '[o]ur response to criminal cyber threats should not just be defensive. We must take the fight to the criminals.'[23] At the time, Opposition Leader Bill Shorten remarked that the protective focus should not be limited to the 'military establishment' and 'big banks' but also smaller and medium-sized businesses, other organisations, and the health system.[24] If the ASD's new competencies are focused mainly on protecting government departments and the largest private organisations, then many sectors of the Australian economy could continue to exist in a kind of regulatory gap, where active defence against cybercriminals will either be self-initiated, or not occur at all.

Global Developments

The US's Active Cyber Defense Certainty Bill

As in Australia, the criminal prohibition in the US[25] does not draw a distinction between hacking and counter-hacking, but simply provides that using a computer to intrude upon or steal something from another computer is illegal.

The Active Cyber Defense Certainty (***ACDC***) Bill[26], introduced in 2017, would lift the restriction on hacking back. The long title of the Bill states its purpose is 'to provide a defense to prosecution for fraud and related activity in connection with computers for persons defending against unauthorized intrusions into their computers'. Interestingly, the Bill expressly recognises that the nature of cybercrime makes it 'very difficult for law enforcement to respond to and prosecute [it] in a timely manner'.[27]

To give effect to its purpose, the ACDC Bill would make limited hacking back legal by allowing organisations defending their networks to:

- destroy any stolen data;[28] and
- go outside those networks to access the servers being used to conduct the attacks to gather information in order to:
    - deploy technology to identify the physical locations of the hackers;
    - disrupt those servers to interrupt the attack; and
    - monitor the behaviour of an attacker to assist in preventing future attacks.[29]

The Bill also imposes the following safeguards:

- The Bill provides that hacking back, or 'active defense', be restricted to computers in the US. The difficulty with this, however, is that domestic hacking can be routed via overseas servers, thus circumventing the application of the ACDC Bill. As cybercrime is truly borderless, a geographic limitation on hacking is of limited utility.
- The Bill contains a liability provision making organisations financially responsible for any damage caused to innocent computer users.

19 Commonwealth Bank, *Signals: quarterly security assessment* (Q1 2017).

20 TimeBase, *The legality of defensive hacking* (30 September 2013); and Liam Tung, *Is hacking in self-defence legal? Sydney Morning Herald* (27 September 2013).

21 Australian Government Department of Defence, *Information Warfare Division.*

22 James Elton-Pym, *'New Australian military unit will specialise in cyber warfare', SBS News* (30 June 2017).

23 Ibid.

24 Ibid.

25 Computer Fraud and Abuse Act (1984) Title 18, Sec. 1030.

26 ACDC Bill 2017.

27 ACDC Bill 2017 s2(2).

28 ACDC Bill 2017 s3.

29 ACDC Bill 2017 s4.

Key Takeaways

- As the frequency and severity of cybercrime continues to increase, a debate has emerged as to whether or not companies should be allowed to exercise a kind of 'digital vigilantism'[1] by taking active steps to prevent or respond to cyber incidents. There tends to be two key schools of thought:
    - Those that reject hacking-back note that the risks associated with hacking back are significant and that hacking back can have unintended consequences. First, there is considerable difficulty associated with identifying the perpetrator and, even if the hack works, a victim may simply have invited further retaliation.[2] Second, counter-attacks can also damage hijacked computers belonging to innocent third parties.[3] Third, most companies don't have the skillset internally to effectively take affirmative countermeasures against cyber criminals. Companies are finding it hard enough to implement defence mechanisms to prevent attacks in the first place – arming staff with the skillset to effectively 'hack back' takes this to an unprecedented level.[4] Nevertheless, or perhaps precisely for that reason, a 'new breed of security company' has emerged which offers to aid companies in implementing active defence measures.[5]
    - Hacking back proponents tend to argue that provided that the cybercrime can be accurately attributed and that any response is reasonable and proportionate, in the absence of greater government involvement, hacking back is the only realistic solution.
- In Australia, computer intrusion and unauthorised access to or modification of data (including data destruction) are offences under the *Cybercrime Act 2001* (Cth) (the ***Cybercrime Act***). Hacking the hacker outside your network therefore runs the risk of committing a criminal offence.
- We are seeing a fascinating development in the US: on the one hand, legislative moves to sanction private entities to engage in active defence, a kind of 'cyber vigilantism'; and on the other, pressure from security and defence agencies for an increased political appetite to operate aggressively in response to foreign hacking.
- The approach taken by German legislators has been to expand the powers and responsibilities of state agencies. This culminated in the creation of a new army command responsible for responding to malicious attacks.

- The Bill would require counter-hackers to give prior notice to the FBI's National Cyber Investigative Joint Task Force so that it can check for any extra-territorial impact and interference with national security operations.
- The legislation will have a sunset date of two years after passage and the US Justice Department is obliged to report to Congress once a year on activity carried out under the ACDC regime.

The question becomes: is a measure such as that introduced by the ACDC Bill 'a necessary tool for companies to protect their valuable information assets' or is it 'cyber-vigilantism'?[30] While members of the internet security industry in the US have suggested that many companies and large organisations already have in place measures for defending against cyber-intrusion that may amount to hacking back,[31] it appears that 'most companies and cybersecurity experts' in the US are *against* legally permitting counter-hacking by non-state victims of cyberattacks.[32]

To the extent that there is support for the reform in the US, it would seem to be founded on the same justification expressly identified by the ACDC Bill[33] – that is, although it would be preferable that law enforcement and government agencies had the sole remit and responsibility for responding to cybercrime, the logistical enormity of that task, coupled with the vital importance of cybersecurity in the modern world, may justify an exception to the general principle against justice being meted out by victims.

The ACDC Bill was referred to the Congressional Subcommittee on Crime, Terrorism, Homeland Security, and Investigations on 1 November 2017. It can be expected the debate will continue whatever view the Committee forms on the measure.

Germany

Unsurprisingly, this issue is also occupying the attention of policymakers in Europe. In Germany, intelligence officials are advocating for greater legal authority to hack back in the event of cyberattacks from foreign powers and overseas criminals.[34] The legal complication there is centred on which of Germany's 'more than three dozen security agencies' will be responsible for hacking back, and what the scope of their powers would be.[35] Front of mind for German legislators when considering this issue is the weeks-long intrusion by foreign-based hackers into the networks of

30 Tom Kulik, '*Why the Active Defense Certainty Act is a bad idea,' Above the Law* (29 January 2018).
31 Nicholas Schmidle, *'The digital vigilantes who hack back,' The New Yorker* (7 May 2018).
32 Josephine Wolff, 'When companies get hacked, should they be allowed to hack back?' *The Atlantic* (14 July 2017).
33 ACDC Bill 2017 s2.
34 Andrea Shalal, 'German spy agencies want right to destroy stolen data and 'hack back',' *Thompson Reuters* (6 October 2017).
35 Janosch Delcker, 'A hacked-off Germany hacks back,' *Politico* (28 January 2018).

the Bundestag, Germany's Lower House, in 2015. This precipitated the creation of a new German army command comprising 13,500 'cyber soldiers' and contractors in 2017, before prompting this most recent agitation for increased security powers. The new army command 'protects military intelligence, communications, and geographic-information systems' and 'currently consists largely of military personnel with backgrounds in IT.'[36] The incorporation of this new capacity within traditional defence structures was metaphorically described by the unit's head, Lieutenant Colonel Marco Krempel, as 'tuning a driving car.'[37]

This state-oriented approach, focusing on augmenting the powers and diversifying the capacities of traditional security and law enforcement agencies, provides an interesting contrast to the ACDC Bill in the US. The sponsors of the proposed German legislation clearly do not share the view of their American counterparts that it is overly difficult to guarantee timely and effective responses by a nation's agencies to the dynamic and fast moving problem of malicious hacking.

The US Military View

Nevertheless, the view that defence and intelligence capabilities must be reorganised and augmented to deal with the threat of cyberwarfare is stirring in the US. In testimony before the Senate Armed Services Committee, outgoing head of US Cyber Command (***USCYBERCOM***) and the NSA, Admiral Michael Rogers, identified his 'greatest concern' to be 'state-sponsored malicious cyber actors and the states behind them', as 'many states now seek to integrate cyberspace operations with … their traditional military capabilities.'[38] Indeed, several have mounted sustained campaigns to scout and access [the US's] key enabling technologies, capabilities, platforms and systems'.[39] Admiral Rogers explained that the problem in defending against cyberattacks on US infrastructure and systems from state, state-sponsored and non-state actors alike, is that these attacks occur at a level that is 'below the threshold of the use of force and outside of the context of armed conflict, but cumulatively accrue[s] strategic gains to our adversaries'.[40]

One implication from the Admiral's comments is that a sophisticated response from defence, security and intelligence agencies will need to occur at the same level – something above intelligence gathering and espionage, but below the use of force. The intention behind such a strategic shift will be to prompt rethinking by perpetrators: a key challenge which USCYBERCOM has faced in responding to network intrusions by 'Russian actors' is that nothing has been done by the US to force perpetrators to 'change their calculus.'[41] However, Admiral Rogers was guarded and, under questioning from Senators, quickly pointed out that such a shift is a shift in policy, stating: 'I'm not going to tell the president what he should do or not do … I'm an operational commander, not a policymaker.'[42]

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36 Ibid.

37 Sumi Somaskanda, 'Cyberattacks are "ticking time bombs" for Germany', *The Atlantic* (4 June 2018).

38 Admiral Michael S Rogers, Commander: United States Cyber Command, Statement before the Senate Committee on Armed Services (27 February 2018) p4.

39 Ibid.

40 Ibid p 12

41 Sean Gallagher, 'Why US "cyber-warriors" can't do anything about Russian "cyber-meddling"', *ars Technica*, 1 March 2018.

42 Ibid.

A Flood of Damages for Defamation: The Dam Breaks in *Wagners v Harbour Radio*

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1. Introduction

In the recent case of *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, radio broadcaster Alan Jones and the licensees of 2GB (Sydney) and 4BC (Brisbane) radio stations were ordered to pay over $3.7M in damages to four brothers who conduct a quarry, stone masonry and earthmoving business in Toowoomba, Queensland. The case reminds publishers and their advisers that the publication of serious and unfounded allegations, coupled with the offer of an inadequate apology and aggravating conduct during the course of the proceedings can result in a hefty damages award for loss of reputation and hurt feelings.

Also of note was the ordering of permanent injunctions to prevent each of Mr Jones, 2BG and 4BC from publishing or broadcasting the same or similar defamatory material about the Wagners in the future.

2. Background

In January 2011, flash floods swept through the Lockyer Valley in Queensland. The flooding in and around the town of Grantham tragically claimed the lives of 12 people, including young children. The Grantham floods occurred in the context of wider disastrous flooding across Queensland. This led to the establishment of a Queensland Government Inquiry in January 2011 and a second Inquiry in May 2015.

Between October 2014 and August 2015, Sydney radio host Alan Jones published 32 broadcasts regarding the Grantham floods and the Inquiries.[1] A key theme of those broadcasts was the (false) suggestion that a quarry, owned and operated by the Wagner brothers, was an exacerbating factor in the 12 deaths. A second theme was the legality and propriety of the approval process undertaken by the Wagner brothers in developing an airport at Wellcamp.

Prior to the broadcasts, each of the Wagner brothers held positive reputational standing in business and community circles. The repeated verbal attacks prompted the brothers to bring an action in defamation against Harbour Radio Pty Limited (**Harbour Radio**), Mr Jones, and Radio 4BC Brisbane Pty Ltd (**4BC**) and Nicholas Cater (a journalist and occasional guest on Mr Jones' radio program), in the Supreme Court of Queensland.

The claim against Mr Cater, which only related to one matter, was ultimately dismissed (with costs) because the Court found that the imputations claimed to have been made by him were only conveyed by 2GB and Mr Jones. The claim against Mr Cater is not further discussed in this case note.

2.1 The Matters Complained Of

Between 28 October 2014 and 20 August 2015, the defendants variously published 32 broadcasts which included serious and highly controversial allegations concerning the plaintiffs. These broadcasts were found to convey 80 imputations, the sting of which can be grouped into the following categories:

- **Category 1**: the plaintiffs bore some responsibility for the flooding that caused the deaths of residents in Grantham because the levee bank constructed at their quarry collapsed, sending a surge of water into Grantham;
- **Category 2**: the plaintiffs engaged in conduct designed to cover up the role played by them (and the quarry) in the flood event;
- **Category 3**: the plaintiffs were involved in bullying and intimidation;
- **Category 4**: the plaintiffs constructed and operated the Wellcamp Airport in breach of all the rules; and
- **Category 5**: the plaintiffs are self-interested and greedy.

3. The Issues

The proceeding was tried without a jury due to the complexity of the issues and the need to hear each of the matters complained of separately as distinct causes of action.[2]

3.1 Of and concerning the plaintiffs

The defendants disputed whether eight of the matters were of and concerning the plaintiffs.[3] The primary basis of this dispute was that those matters made reference to the Wagner business, or corporate entity, rather the individual plaintiffs.

The Court held that references in the various matters including to: "the quarry owned by Wagners", "Does that make Wagner untouchable", "the Wagners Sand Plant", "Wagners dam" and "the Wagner airport", identified each of the plaintiffs to the ordinary reasonable listener. Justice Flanagan stated:

1 The 32 matters complained of were all radio broadcasts with one exception, being an excerpt from Sky News in the course of the Richo + Jones Program which was published to the 2GB website at www.2gb.com.

2 The plaintiffs' application for the proceeding to be tried without a jury was heard by Applegarth J, who case managed the proceedings as part of the Supervised Case List. See *Wagners & Ors v Harbour Radio Pty Ltd & Ors* [2017] QSC 222.

3 The defendants contested identification in relation to the Second, Third, Eighth, Fourteenth, Fifteenth, Twenty-First, Twenty-Second and Thirty-Fourth Matters.

> *"An ordinary reasonable listener would not necessarily understand the words used by Mr Jones as a reference to a business only and not to individuals. Mr Jones, for example, in referring to "Wagners" uses the personal third person pronoun "they". Similarly he refers to "the Wagners Sand Plant", not "Wagners Sand Plant". In posing the rhetorical question "Does that make Wagner untouchable?" Mr Jones uses the name "Wagner" rather than "Wagners".*[4]

In relation to the Fifteenth Matter, specific reference was made to Mr Wagner: "up stepped one Mr Wagner". Justice Flanagan accepted that this reference identified the plaintiffs by name and although the reference was to a single "Mr Wagner", his Honour found that a listener could draw the inference that Mr Jones was referring to all (or any one of) the plaintiffs.[5]

3.2 Are the imputations capable of being conveyed

The question of whether the imputations were conveyed was in issue for all of the matters complained of. When determining if the matters conveyed imputations of and concerning the Wagners to the ordinary reasonable listener, the Court took into consideration the sensationalist tone of the vast majority of Mr Jones' broadcasts and the fact that listeners of a radio program do not necessarily have the opportunity to read over the communication the way that someone would with a written article. His Honour said that in determining whether the imputations were conveyed, he "remained mindful"[6] of the danger identified by Chaney J in *Rayney v The State of Western Australia [No 9]* where his Honour said:[7]

> *"I am mindful that that process of analysis creates a real danger of departing from the task of assessing the meaning of the words in a way that a reasonable person, receiving the information for the first time, would understand them according to their ordinary and natural meaning. It also tends to lead to the risk of analysis as a lawyer and of overlooking the 'important reminder for judges' that ordinary readers and listeners draw implications much more freely, especially when they are derogatory."*

His Honour also took into account the tone of Mr Jones' delivery of many of the broadcasts. For example, in relation to the Seventeenth Matter, his Honour stated that:

> *"[i]n determining whether the pleaded imputations are conveyed, the importance of listening to these broadcasts and how they are delivered by Mr Jones cannot be over-emphasised. In this broadcast in particular, Mr Jones' delivery is compelling. He speaks with great confidence and conviction. The listener is left with the overwhelming impression that the true cause of the Grantham Flood event which resulted in 12 deaths has been the subject of a massive cover-up".*

3.3 Were the pleaded imputations defamatory?

The defendants disputed whether some of the pleaded imputations were defamatory.[8] Justice Flanagan applied the reasonableness test from *Radio 2UE v Chesterton* (2009) 238 CLR 460 which asks whether the published matter is likely to lead an ordinary person to think less of the plaintiff. His Honour commented: "an imputation is simply a distillation of the defamatory meaning that the plaintiffs contend was conveyed by the publication. It takes its colour from the matter complained of that gives rise to it".[9]

4. Defences

The defendants did not seek to defend a number of imputations. They properly conceded that there must be an award in the plaintiffs' favour, as damage is presumed. Justice Flanagan described some of these imputations as "very serious" and said that they "warrant in themselves a substantial award of damages".[10]

In relation to the balance of the imputations, the defendants variously relied on defences under s 25 (substantial truth), s 26 (contextual truth), s 29 (fair report) and s 18 (failure to accept reasonable offer of amends) of the Defamation Act 2005 (Qld) (the **Act**). As discussed below, all of these defences failed.

4.1 Substantial truth

For the purpose of addressing the truth defence, the parties classified the imputations into the five categories mentioned above. His Honour dealt with the truth defence in his judgment by reference to these categories. The evidence relied on by the parties and the Court's findings in relation to each category is summarised in the table on page 14:

4.2 Fair report

In relation to the defence of fair report, both parties accepted that the 2015 Inquiry was a proceeding of public concern. The issues to be decided were therefore whether 10 matters were fair reports of

Continued on page 15 >

4 [2018] QSC 201 at [49] (findings in relation to the Second Matter Complained Of). Similar findings were made in relation to the Third Matter at [66],

5 See [2018] QSC 201 at [221], his Honour citing *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 per Dixon J at 292.

6 [2018] QSC 201 at [36]-[37].

7 [2017] WASC 367 at [87].

8 The defendants disputed this issue at least in relation to the following matters: Sixth (re imputation (b)), Eighth (re imputation (a)), Ninth (re imputation (a)), Tenth (re imputation (b)), Eleventh (re imputation (c)), Fourteenth (re imputation (a)), Eighteenth (re imputation (a)), Twenty-Fifth (re imputation (b)), Twenty-Ninth (re imputation (a)), Thirty-Second (re imputation (a)).

9 [2018] QSC 201 at [103].

10 [2018] QSC 201 at [436].

Category of Sting	Evidence Relied On	Assessment of Evidence
Category 1: the plaintiffs bore some responsibility for the flooding that caused the deaths of residents in Grantham because the levee bank constructed at their quarry collapsed, sending a surge of water into Grantham	**Defendants:** Three experts: (Dr Smart, engineer and hydrologist; Dr Maroulis, fluvial geomorphologist; and Mr Dam, numerical modeller and civil engineer) A number of eye witnesses **Plaintiffs:** Dr Newton (hydrologist)	Dr Smart's evidence did not include any actual modelling of the Grantham floods. He did not identify reliable evidence of a surge which emanated from the quarry. Justice Flanagan "reluctantly" formed the view that Dr Smart adopted the role of being an advocate for the defendants. Dr Maroulis' evidence did not establish any causal link between the collapse of the bund at the quarry and the deaths of 12 people at Grantham. Mr Dam's reports were inadmissible (he did not expose the reasons why he adopted a particular opinion, contrary to rule 482(2)(e)) of the UCPR, or alternatively, his reports were of no weight. Dr Newton created a two dimensional model which sought to recreate the Grantham floods, by reference to real world data which included eyewitness accounts and contemporaneous photographs and video evidence. This was "compelling evidence" which supported Dr Newton's conclusion that the breach of the quarry bund did not cause a surge in floodwaters between the quarry and Grantham sufficient to have any material effect on damage to property or risk to persons. Dr Newton was a "demonstrably candid" witness and his evidence was to be preferred to Dr Smart's evidence. 15 witnesses who were resident in Grantham and witnessed the flooding recounted events that were both harrowing and distressing. To better understand their evidence, the Court undertook a view of key locations in Grantham. Justice Flanagan accepted their evidence of what they observed on the day. Their evidence was consistent with an unprecedented volume of floodwater flowing down the Lockyer Valley, across the floodplain at Grantham, but did not support the existence of a devastating surge caused by breaching of the bund. Accordingly, 2GB and Mr Jones failed to establish the substantial truth of the Category 1 imputations.
Category 2: the plaintiffs engaged in conduct designed to cover up the role played by them (and the quarry) in the flood event	**Defendants:** A number of articles containing public statements made by the first plaintiff, Denis Wagner (who was responsible for the operation and management of the Grantham quarry and for dealing with the scrutiny following the flood) Submissions made to the Inquiry Evidence of Denis Wagner	The defendants invited the Court to reject the evidence of Denis Wagner. He maintained under extensive cross-examination that the quarry wall and the embankment were natural (not man-made) and that the quarry mitigated the effects of the flood. Justice Flanagan found him to be "a straightforward and credible witness" and accepted that he was honest. 2GB and Mr Jones failed to establish the substantial truth of the Category 2 imputations.
Category 3: the plaintiffs were involved in bullying and intimidation	**Defendants:** Evidence of Heather Brown and David Pascoe (who were the alleged subjects of bullying and intimidation by the plaintiffs). **Plaintiffs:** Reply evidence by the second plaintiff, John Wagner and Chris Barham	The evidence did not establish any intentional conduct on the part of the plaintiffs to bully or intimidate Ms Brown or Dr Pascoe. 2GB and Mr Jones failed to establish the substantial truth of the Category 3 imputations.
Category 4: the plaintiffs constructed and operated the Wellcamp Airport in breach of all the rules	**Defendants:** Evidence of Dr Pascoe and Ms Brown. Objections lodged with Toowoomba Regional Council in respect of the proposed airport development. Expert: Mr Ovenden, town planner **Plaintiffs:** Expert: Mr Schomburgk, town planner	The evidence from Dr Pascoe and Ms Brown did not establish a breach of environmental protection and biodiversity conservation rules, nor that approval was required under those rules. The fact of the objections did not prove the substantial truth of imputations that the airport was constructed having broken all the rules. The experts' evidence, which was limited, did not assist the defendants in proving the substantial truth of any of the imputations. Accordingly, the defendants failed to establish the substantial truth of the Category 4 imputations.
Category 5: the plaintiffs are self-interested and greedy	**Defendants:** Evidence of Ms Brown and Dr Pascoe Extract of a video featuring John Wagner responding to a question about environmental matters, where he says words to the effect that Wagners had already knocked down everything for the purpose of constructing the airport and that the airport was nowhere near the Great Barrier Reef. Evidence of Neil Wagner pleading guilty to a change of undertaking a prohibited activity under local council laws (unlawfully landing a helicopter at Downey Park in Brisbane).	The defendants sought to justify the "self-interest" aspect only by identifying conduct on the part of the second and third plaintiffs. That evidence relied on by the defendants did not prove "self-interest". The defendants failed to establish the substantial truth of the Category 5 imputation.

the 2015 Inquiry and if so, were they published honestly for the information of the public?

The defendants' submissions regarding the 10 matters did not assist the Court as they merely asserted conclusions and, because the defendants did not tender evidence of the transcripts of the 2015 Inquiry, the Court could not overcome this problem by comparing the relevant matters with a transcript of what was said to be reported. Accordingly, there was no "evidentiary basis for the Court to engage in the task of assessing whether the relevant matters are truly fair reports".[11]

Notwithstanding that no such assessment could be undertaken, Flanagan J considered that each of the 10 matters was not a fair report of the 2015 Inquiry. The Court found that a number of the broadcasts intermingled extraneous material and conveyed Mr Jones' opinion that the 2015 Inquiry would ultimately conclude that the plaintiffs had illegally constructed a levee which collapsed, resulting in the deaths of 12 people.

4.3 Contextual truth

The defendants relied on the defence of contextual truth under s 26 of the Act in respect of four matters complained of which conveyed the following imputations:

(a) Ninth Matter: that the plaintiff was a callous and selfish person in that he built an airport without an environmental impact statement, a health impact statement, a community impact statement, a water impact statement, and without any compensation for people living in hopeless proximity to the airport;

(b) Tenth Matter: the plaintiff built an airport without seeking approvals which he knew were required with disgraceful disregard for the interests of the community;

(c) Eleventh Matter: that the plaintiff built the infamous Wellcamp Airport in disregard of the interests of the community without first obtaining, as he was required to do, an environmental impact statement, a health impact statement, a community impact statement or a water impact statement, or paying the compensation owing to those adversely affected because they lived in close proximity to the airport;

(d) Twenty-Seventh Matter: that the plaintiff is a person who thought he could get away with building an airport at Toowoomba without seeking proper approvals, and without having to pay for a national asset, the airspace over Oakey.

The defendants claimed that in addition to these imputations, each matter carried the following contextual imputations:

(a) the plaintiffs conduct business on their own terms, with disregard for the laws that regulate them;

(b) the plaintiffs conduct business on their own terms, with disregard for the impact operations have on the broader community.

Justice Flanagan found that the defendants failed to establish the substantial truth of the contextual imputations. Further, his Honour considered that the sting of the contextual imputations was identical to plaintiffs' imputations and thus, they did not differ in substance. This conclusion was demonstrated by the fact that the defendants sought to justify the contextual imputations by reference to the same pleaded true facts as the plaintiffs' defamatory imputations.

4.4 Failure to accept reasonable offer of amends

Lastly, in relation to the defence under s 18 of the Act, the defendants relied on an offer of amends dated 27 November 2015. The defendants offered to broadcast an apology and retraction, pay the legal expenses of the Wagners and pay each brother the sum of $50,000. The issue was whether, in all the circumstances, this offer was reasonable.

Justice Flanagan determined that the offer of amends was not reasonable and thus the defence failed. The matters conveyed "very serious" defamatory imputations and in that context, the offer of $50,000 for each plaintiff was "grossly inadequate".

The proposed apology was also inadequate – it did not contain an expression of regret by the defendants for the publications, nor did it contain an unqualified acknowledgment of the falsity of the defamations and a withdrawal of them. His Honour accepted the plaintiffs' submission that the proposed apology "sought to subordinate the gross defamation of the Wagner family to mere matters that the family have 'asserted' and 'believe'".

5. Damages

The Court awarded each plaintiff compensatory relief in the form of damages and aggravated damages of $750,000 each (excluding interest) in respect of the 27 matters complained of published by 2GB and Mr Jones.

The Court awarded each plaintiff damages and aggravated damages of $100,000 each (excluding interest) in respect of the two matters published by 4BC and Mr Jones.

Although some of the imputations conveyed were only of and concerning the first or second plaintiffs, none of the parties submitted that in assessing damages the Court should seek to distinguish between individual plaintiffs on this basis.

5.1 Aggravated damages

The Court's award of aggravated damages is noteworthy. Ordinarily a defendant's state of mind is not considered when awarding

11 [2018] QSC 201 at [705].

damages but aggravated damages can be awarded if it is found that a defendant has acted in an unjustifiable way that has increased the harm to the plaintiff.

Justice Flanagan found that Mr Jones, for whose conduct 2GB and 4BC are vicariously liable:

(a) engaged in unjustifiable conduct; and

(b) was motivated by a desire to injure the plaintiffs reputations,

which conduct and motivation increased the harm to the plaintiffs' feelings and to their reputations.[12] Examples of the unjustifiable conduct include:

(a) The circumstances of the publications:

  (i) Mr Jones was wilfully blind as to the truth or falsity of the defamatory imputations. For example, Mr Jones' understanding of the Grantham floods was based on what he had been told by eyewitnesses. That understanding, without further research, investigation or hydrological evidence "constituted a wholly inadequate basis for the broadcasting of grave accusations concerning the plaintiffs";[13]

  (ii) Mr Jones used vicious and spiteful language to describe the plaintiffs. He variously described them as "selfish, insensitive grubs", "stealing airspace", "as knowing only two things, bullying and self-interest", "hypocrites of the year", and as being of "Wagner infamy";

  (iii) The plaintiffs' knowledge of the falsity of the allegations;

  (iv) Mr Jones failed to make any inquiry of the plaintiffs, to ascertain responses or to inform the plaintiffs in circumstances where he aired on national radio very serious accusations concerning them over a period of 10 months;

(b) The conduct of the proceedings:

  (i) The defendants refused to retract any of the defamatory imputations or to apologise;

  (ii) Mr Jones gratuitously repeating a number of defamatory assertions in the course of his evidence, often in answers that bore no connection with the questions that he was asked;[14]

(c) Increased harm to the plaintiffs' feeling and reputations caused by the cumulative effect of the aggravating conduct described above.

Although Flanagan J found that the defences of substantial truth and contextual truth failed, his Honour did not accept that the pleading and running of them constituted unjustifiable conduct. While the defences "may properly be viewed as weak and unmeritorious", they were the subject of evidence from a number of witnesses, including experts, as well as reply evidence.[15]

The finding that Mr Jones was motivated to injure the plaintiffs' reputation was supported by a number of considerations, including:

(a) the vicious and spiteful wording used, Mr Jones' wilful blindness as to the truth or falsity of the allegations and his failure to inform the plaintiffs of his intention to publish the matters or to allow them any opportunity to respond to the allegations; and

(b) the fact that the matters were part of a "campaign of vilification against each of the plaintiffs" when considered in the context of previous broadcasts made by Mr Jones.[16]

5.2 Mitigation

The defendants relied on two facts in mitigation of damages:

(a) that the plaintiffs had recovered damages from The Spectator (1828) Ltd and Mr Cater in relation to the publication of matter having the same meaning or effect as the matters in this case; and

(b) the plaintiffs' defamation proceedings against Nine Network Australia (Ltd) and Mr Cater in relation to the publication of a *60 Minutes* program having the same meaning or effect as the matters in this case.

The Court held that the effects of these other proceedings were of insignificant weight in mitigation of the plaintiffs' damages.

6. Injunction

In addition to the compensatory relief awarded, the plaintiffs were also granted a permanent injunction which restrains Mr Jones, 2GB and 4BC from publishing or broadcasting the same or similar words defamatory of them.

The Court considered this unusual step necessary after Mr Jones had continued to attack the plaintiffs' reputations during the course of the trial while giving evidence.

7. Costs

A separate decision, *Wagner v Harbour Radio Pty Ltd (No 2)* [2018] QSC 267, recently dealt with the question of costs.

The plaintiffs sought their costs of the entire action to be assessed on

12 [2018] QSC 201 at [816].
13 Ibid at [821].
14 Ibid at [853].
15 Ibid at [850]-[851].
16 Ibid at [858].

the indemnity basis and no order as to costs in respect of Mr Cater. The plaintiffs submitted that the order for indemnity costs should be made in accordance with s 40 of the Act, or because the case presented special circumstances which warranted the Court exercising its discretion under rule 703 of Queensland's UCPR.

Harbour Radio, Mr Jones and 4BC accepted that they ought to pay the plaintiffs' costs of the proceedings on the standard basis but opposed an indemnity costs order. Mr Cater submitted that there was no proper justification for denying his costs on the standard basis.

The Court found that aspects of the defendants' conduct justified the assessment of the plaintiffs' costs (as against Harbour Radio, Mr Jones and 4BC) to be assessed on the indemnity basis up to the first day of trial and on a standard basis thereafter. This apportionment was appropriate because the defendants' conduct caused the plaintiffs to incur unnecessary and wasted costs in preparing for a trial.

The plaintiffs were ordered to pay Mr Cater's costs on the ordinary basis.

7.1 Section 40 of the Act

Section 40 of the Act provides:

*"**Costs in defamation proceedings***

(1) In awarding costs in defamation proceedings, the court may have regard to—

(a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and

(b) any other matters that the court considers relevant.

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise)—

(a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff; or

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

(3) In this section—

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made."

The Court considered evidence of various settlement offers that had been exchanged both prior to and during trial in relation to the application of the two limbs of s 40(2)(a): first, that the defendant unreasonably failed to make a settlement offer; and second, that the defendant unreasonably failed to agree to a settlement offer proposed by the plaintiff.

In relation to the first limb, the Court found that the defendants had made genuine attempts to settle the action prior to the commencement of the trial and prior to Mr Jones giving his evidence. Both offers provided for judgment for the plaintiffs. The mere fact that the defendants' offers either did not include an apology, or included an inadequate apology, did not mean that those offers were not reasonable at the time they were made. Accordingly, the first limb of s 40(2)(a) was not engaged.

In relation to the second limb of s 40(2)(a), the Court found that the defendants did not unreasonably fail to agree to a settlement offer proposed by the plaintiff. First, the plaintiffs' offer under consideration was directed to all defendants, including Mr Cater, and was not obviously capable of being accepted only by Harbour Radio, Mr Jones and 4BC. Secondly, the evidence indicated that the defendants did not reject the offer outright. Rather, the defendants were willing to accept both the suggested monetary and costs order, but sought a reworded apology. The fact that the parties could not ultimately agree on the wording of the apology did not render unreasonable the defendants' failure to accept the offer.

7.2 Section 40(1) of the Act and Rule 703 UCPR (Qld)

Justice Flanagan said that the relevant principles underlying an award of indemnity costs are well-established, with the relevant question being whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs, other than on a party and party basis. There needs to be some special or unusual feature in the case to justify a court departing from the ordinary practice.

Justice Flanagan found that certain aspects of the defendants' conduct of the proceedings justified the assessment of the plaintiffs' costs (as against Harbour Radio, Mr Jones and 4BC) on the indemnity basis up to the first day of trial and on a standard basis thereafter. Those aspects included:

- substantial changes on the first day of the trial to the number and nature of the defences raised and to some of the particulars relied on in relation to the truth defence;
- the defendants' position in relation to whether the 32 matters conveyed the pleaded imputations, were defamatory

and were of and concerning the plaintiffs was a "moving feast" and was only clarified in a schedule to the defendants' final written submissions;

- the actual truth defences run at trial were "weak and unmeritorious" (but were not "unjustifiable conduct" for the purposes of aggravated damages);
- in relation to the defence of fair reporting the defendants failed to make submissions as to why the matters were fair reports and moreover, failed to tender transcripts of the 2015 Inquiry.

The plaintiffs also relied on matters upon which the Court's finding of aggravated damages was based. However, Flanagan J did not take those matters into account in relation to indemnity costs because the purpose of an award of indemnity costs is not to punish a party and aspects of Mr Jones' conduct had already been reflected in the Court's assessment of general damages, which included aggravated damages.

8. Key Takeaways

This case reminds publishers and their advisers that despite the cap on non-economic loss under s 35 of the Act, a plaintiff may obtain a far more significant damages award if there is aggravating conduct on the part of the defendant. A defendant's conduct prior to publication, as well as conduct during the proceedings may be relevant to this question.

When considering whether a broadcast is defamatory, the overall impression created by the matter is key. It is not only the meaning of the spoken words that is important but also the tone in which they are delivered, and the presence of insinuation or suggestion which may guide a listener/viewer to adopt a suspicious approach.

When drafting an offer of amends, consideration should be given to the seriousness of the imputations of concern, and the potential difficulty a defendant might have in establishing any defences. If appropriate, in addition to the matters prescribed under s 15 of the Act, an offer should contain an unqualified acknowledgment of the falsity of the defamation and a withdrawal.

If an expert does not properly set out in their report all of the reasoning upon which their opinions or conclusions are based, the report may not be admissible or their evidence may be attributed no weight.

Interview with Katherine Sessions

Dr Martyn Taylor, sits down with Katherine Sessions, Senior Investigations and Compliance Officer at the ACMA and Chair of the CAMLA Young Lawyers Committee to discuss the communications and media industry from a young lawyer's perspective.

TAYLOR: What made you decide to become a lawyer? What is your current role?

SESSIONS: It was something that I thought would provide for an interesting career.

In my current position I am working with the ACMA in implementing the recently enacted Online Content Service Provider Rules - restricting gambling advertising during live streamed sport. This picks up a nice mix of my prior experience in the Interactive Gambling Taskforce at the ACMA and knowledge gained whilst working on the Digital Platforms Inquiry with the ACCC. It is an innovative area of the law that can have some exceptional outcomes.

TAYLOR: What is the most exciting thing that you've worked on in the last year and since you were admitted?

SESSIONS: Without doubt the answer to both is working as a secondee to the ACCC's Digital Platforms Inquiry. The interim report is almost out, so I won't go into too much granularity, though the Inquiry is unlike anything the Australian government has undertaken previously. The Inquiry is looking at the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising markets. In addition to the incredible subject matter, it was such a privilege to work with the Inquiry team.

I've also thoroughly enjoyed my work in the Interactive Gambling Taskforce at the ACMA. It was a great team and the outputs have a broad reach of public good. We received Australia Day Awards for our efforts, which is an accolade that I never thought I would be a recipient of.

Reflecting on these pursuits, I think it's safe to say that I thrive when working in innovative areas, and there are so many areas like this to do with media and communications content.

TAYLOR: What inspired you to get involved with the Young Lawyers' Committee at CAMLA? What are your objectives for the Committee?

SESSIONS: I had been involved with CAMLA for a few years prior to joining the Young Lawyers Committee. I was always drawn to the fantastic events that the CAMLA team puts on for young lawyers looking to work in the communications, media, telecommunications and creative spaces. I had networked, gained MCLEs in relevant areas and I was enthusiastic about getting more involved.

My objective for the Committee is to engage a diverse team and create a forum that encourages younger lawyers to reach out and get involved. For many young lawyers, particularly in house, government and in start-up roles there is a certain degree of isolation. CAMLA provides a vibrant forum for young lawyers to engage with peers across the industry, that may be outside of their day-to-day activities.

TAYLOR: What do you consider to be some of the most interesting and challenging aspects of your role as Chair of the Young Lawyers' Committee at CAMLA?

SESSIONS: Being Chair of the Young Lawyers Committee is a privilege that I certainly don't take for granted. The key challenge of the role is juggling commitments, though I am an organiser at heart and so for me it is pretty amazing! Being Chair also provides me an opportunity to give back, to contribute by organising events and networking activities, to work with a team of amazing young lawyers and build wonderful relationships with the CAMLA Board.

TAYLOR: Looking back on your career and studies, what do you wish you had known about the legal profession before becoming a lawyer?

SESSIONS: I am a creative, and so I wish that I had known that there are plenty of other creative minded lateral thinking lawyers out there! I would encourage law students to engage in electives at university that

inspire you. There are also a lot of opportunities that might not be on the traditional career path that can build your legal skillset. For me, this was gaining experience working with Baker McKenzie in Berlin. As a student I also volunteered, undertook internships and summer clerkships within the media and arts law sectors – the projects included everything from seeking approvals for Australia's first fashion 'flash mob' across Flinders Street to working with the L'Oreal Fashion Festival team. I also spent some time working with the Arts Law Centre of Australia, which provides free or low cost specialised legal advice, education and resources to Australian artists and arts organisations across all art forms, on a wide range of arts related legal and business matters. There are opportunities to gain experience in areas of interest if you explore the sector.

TAYLOR: You've spent some time overseas on an international exchange program. What is your take on gaining international experience as a young lawyer?

SESSIONS: During my studies I undertook a law exchange program in Sweden and later worked in Berlin with Baker McKenzie. Both experiences were incredible and allowed me to gain insights and grow professionally in ways that I most likely wouldn't have otherwise. As an example, I was able to learn about the EU and then later apply that knowledge in practice.

If you are interested in working abroad I would encourage you to look outside the box, seek out opportunities and be willing to be flexible. Seize opportunities - don't wait for them to find you, be persistent.

TAYLOR: What do you work towards in your free time? What advice would you give to newly admitted lawyers about work life balance?

SESSIONS: I am an aficionado for the arts, so you will often find me wandering around a gallery in my free time. In terms of work life balance, it is about finding what works for you, your natural preferences and an activity that you can engage with consistently. Some great advice that I was given once was to simply take ten minutes for yourself every day – this could be as simple as taking a different route on the walk to work and appreciating the architecture or trying a new coffee place. For me, living and working in Pyrmont is great, though I recharge best when I take the time to go for a walk around the wharves after work.

TAYLOR: How do you think things are different for the current generation of young lawyers than those who were Young Lawyers a decade or two ago?

SESSIONS: Practically, we live in a digital environment. All aspects of our profession are undertaken on device or online with relatively paperless desks. The concept of the law firm or workplace is also rapidly changing - a recent example being Corrs CEO Gavin MacLaren 'dumping' billable hours and adding one week of leave to "create a sense of humanity in a law firm". A bold step, yes, though one which I think has been well received. We are all working to more flexible time frames and in flexible environments. My office is in Sydney, though technology allows me the capability to work from anywhere at any time of day. Despite some current ambivalence in some workplaces, I think it is certainly the way of the future.

TAYLOR: What would you say to the CLB readership about the importance of mentoring Young Lawyers?

SESSIONS: I've been fortunate enough to have some amazing mentors in my time. Shane Simpson is one such mentor, who despite his personal success, has always been so incredibly humble and supportive of my aspirations. I would encourage the CLB readership to take five minutes to check in with younger lawyers and team members. A little advice can go a long way when starting out. I would also advise younger lawyers to also actively seek out advice from those they aspire to be like.

TAYLOR: How do you think the internet and modern technology has influenced the legal profession and the role of lawyers?

SESSIONS: I am a techno-optimist. Without doubt the advancements in technology have created efficiencies and changed legal practice in a multitude of ways. All aspects of the profession are migrating online - searching case law, court listings, filing documents, Skype calls and drop box. In many ways this technology is also rapidly becoming redundant, if not entirely obsolete, as we engage with an imminent future founded on blockchain and AI technologies. That said, we shouldn't fall into a mindedness of technological determinism, in supposing the future is fixed, though it will be game changing.

TAYLOR: If you could take on the role of a fictional character (movie, TV show or books) who would it be, and why?

SESSIONS: Jo Stockton (Audrey Hepburn's character in Funny Face) – I'd love to travel the world dancing with Fred Astaire.

TAYLOR: If you were given a one-minute ad slot during the Super Bowl, what would you fill it with?

SESSIONS: That's a tough one. I'm not sure what I would fill it with. I did see the recent Super Bowl advertisement 'Alexa has lost her voice' which I thought was a very well-done and a good laugh. That said, I'm cognisant that the American accent Alexa can be quite humorous (think Kanye / Kan-yee), though perhaps not as humorous as Rebel Wilson may be if she were indeed the voice of Alexa as in the recent Super Bowl ad – non-stop laughs.

Dr Martyn Taylor is a Partner at Norton Rose Fulbright and President of CAMLA

Proposed Changes to EU Copyright Law – Implications for Rights Holders in the News and Media Industries

Kosta Hountalas, Lawyer, MinterEllison discusses some of the implications of the proposed EU Directive for Copyright in the Digital Single Market for the news and media industries

Introduction

The European Union (**EU**) Directive for Copyright in the Digital Single Market (**DSM Directive**) is a proposed European Directive forming part of a legislative package presented by the European Commission (**EC**), with the stated purpose of modernising EU copyright laws.[1]

The DSM Directive was first presented by the EC on 14 September 2016, before being introduced by the EP Committee on Legal Affairs on 20 June 2018. The DSM Directive was approved by the European Parliament (**EP**) on 12 September 2018.

The DSM Directive will now be the subject of formal 'trilogue' discussions (between the EC, EP and the Council of the EU), expected to conclude in January 2019. If it is formalised, each of the EU's member countries will then need to enact or amend current copyright laws giving effect to the DSM Directive.

Since its introduction, the proposed DSM Directive has been the subject of controversy, causing a strong divide amongst stakeholders and academics. Media headlines such as '*New EU copyright filtering law threatens the internet as we knew* [sic] *it*'[2] and criticisms from prominent media and technology figures (including the inventor of the World Wide Web, Tim Berners-Lee and Jimmy Wales, the founder of Wikipedia),[3] have presented the DSM Directive in a largely cynical light.

Key issues

Much of the debate has centred on three key issues:

- the proposed establishment of a new right that would expand the rights of content producers such as publishers of press publications to be compensated for the online use of their publications (**Press Right**);[4]

Since its introduction, the proposed DSM Directive has been the subject of controversy, causing a strong divide amongst stakeholders and academics

- the proposed requirement that online content sharing service providers (such as YouTube, Facebook, Twitter, Amazon, eBay and Instagram) (**Service Providers**) implement new systems by which they will monetise and control online content distribution (**Monitoring Requirement**); and
- the creation of a new exception to copyright infringement for the use of text and data mining techniques in the EU, for research organisations acting for a research purpose (such as a tertiary education staff member scanning and analysing scientific articles).

This article will focus on the Press Right and Monitoring Requirement and, in particular, how these issues may impact the news and media industries.

Press Right

Article 11, which deals with the Press Right, provides the following:

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC so that they may obtain fair and proportionate remuneration for the digital use of their press publications by information society service providers.

1a. The rights referred to in paragraph 1 shall not prevent legitimate private and non-commercial use of press publications by individual users.

2. [...]

2a. The rights referred to in paragraph 1 shall not extend to mere hyperlinks which are accompanied by individual words.

3. [...]

4. [...]

1 European Parliament, 'Copyright in the digital single market' (July 2018) *Briefing – EU Legislation in Progress* <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593564/EPRS_BRI(2016)593564_EN.pdf>.

2 Sarah Jeong, 'New EU copyright filtering law threatens the internet as we knew it', *The Verge* (dated 19 June 2018) <https://www.theverge.com/2018/6/19/17480344/eu-european-union-parliament-copyright-article-13-upload-filter>.

3 'Article 13 of the EU Copyright Directive Threatens the Internet', open letter to Antonio Tajani MEP, President of the European Parliament, 12 June 2018 <https://www.eff.org/files/2018/06/13/article13letter.pdf>.

4 Article 11, DSM Directive.

4a. Member States shall ensure that authors receive an appropriate share of the additional revenues press publishers receive for the use of a press publication by information society service providers.

Effectively, the proposed Press Right in the DSM Directive introduces a right for publishers of press publications to authorise the digital use of their press publications where such use is not covered by existing 'communication to the public' rights. For example, the publisher of press publications will have the right to authorise Facebook's display of a snippet of a news story as part of its news aggregating service.

To date, the display of these snippets has not been captured by the exclusive rights currently provided to copyright owners.[5] The publishers of press publications claim that they are losing revenue due to these snippets of news being read by platform users (such as Facebook users), who then do not click through and proceed to the publisher website to read the full article.

The 'ancillary' Press Right proposed by the DSM Directive has already been implemented in two Member States so far:

- **Germany**: In 2013 the German Copyright Act was amended to provide that publishers of press publications are paid a fee for 'ancillary copyright' when searches engines and news aggregators display digital excerpts from newspaper articles.[6] Notably, this right does not apply to 'single words or small text excerpts' which can be shown without gaining permission from the publisher. In practice, however, many major publishers decided to waive their ancillary rights after Google declined to enter into licence negotiations with them.
- **Spain**: The Spanish Copyright Act was amended to limit the quotation exception and institute the payment of a copyright fee to online news aggregators and publishers for linking to their content. Publishers cannot opt out of receiving this fee, and as a result, the Spanish amendments make it mandatory to pay the copyright fees to publishers.

from the perspective of a publisher of press publications, the proposed Press Right may be a double-edged sword. On the one hand, it will provide copyright owners with an additional remuneration stream. On the other hand, it may cause friction between search engines or news aggregators, and publishers.

On 11 December 2014, Google announced that due to the introduction of the ancillary right fees, it had removed Spanish publishers from Google News and closed the Spanish version of Google News.[7] Academics and commentators have generally been very critical of the Spanish legislation. A study commissioned by Spanish publishers concluded that the introduction of the ancillary right fees had resulted in a negative impact on the publishing sector overall.[8]

As can be seen, from the perspective of a publisher of press publications, the proposed Press Right may be a double-edged sword. On the one hand, it will provide copyright owners with an additional remuneration stream. On the other hand, it may cause friction between search engines or news aggregators, and publishers.

Monitoring Requirement

The DSM Directive deals with the Monitoring Requirement in the proposed Article 13. After the last round of negotiations, Article 13 relevantly provides:

1. Without prejudice to Article 3(1) and (2) of Directive 2001/29/EC, online content sharing service providers perform an act of communication to the public. They shall therefore conclude fair and appropriate licensing agreements with right holders.
2. Licensing agreements which are concluded by online content sharing service providers with right holders for the acts of communication referred to in paragraph 1, shall cover the liability for works uploaded by the users of such online content sharing services in line with the terms and conditions set out in the licensing agreement, provided that such users do not act for commercial purposes.

2a. Member States shall provide that where right holders do not wish to conclude licensing agreements, online content sharing service providers and right holders shall cooperate in good faith in order to ensure that unauthorised protected

5 See Articles 2 and 3(2) of Directive 2001/29/EC.

6 Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 1 September 2017 (Federal Law Gazette I p. 3346) <https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html>.

7 'An update on Google News in Spain', *Google Europe Blog*, 11 December 2014 <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html>.

8 Nera Economic Consulting, 'Impact of the New Article 32.2 of the Spanish Intellectual Property Act' (2015 study commissioned by the Spanish Association of Publishers of Periodicals AEEPP) <https://www.copyrightevidence.org/evidence-wiki/index.php/Nera_Economic_Consulting_(2015)>.

works or other subject matter are not available on their services. Cooperation between online content service providers and right holders shall not lead to preventing the availability of non-infringing works or other protected subject matter, including those covered by an exception or limitation to copyright.

2b. Member States shall ensure that online content sharing service providers referred to in paragraph 1 put in place effective and expeditious complaints and redress mechanisms that are available to users in case the cooperation referred to in paragraph 2a leads to unjustified removals of their content. Any complaint filed under such mechanisms shall be processed without undue delay and be subject to human review. […]

3. […]

It should be noted that Article 13 underwent a significant transformation before it reached its final form on 12 September 2018. One of the critical points was the proposed requirement that Service Providers include 'appropriate and proportionate content recognition technologies' in their formulation of a best practice approach, to ensure that right holders were being adequately compensated, particularly as there was evidence to suggest that such technology – where it was being used – was unreliable.

Further, the previous incarnation of Article 13 went on to state that in order for Service Providers to avoid liability for acts of communication to the public or making available to the public within the meaning of Article 13, they would need to demonstrate the measures they had in place to prevent access to works or subject matter identified by rights holders.

In relation to the Monitoring Requirement, on balance, and notwithstanding the removal of the reference to 'content recognition technologies', Article 13 (in its amended form, as of 12 September 2018), has implications for the issue of liability. Under current law, Service Providers are not liable when their users infringe copyright so long as they do not have knowledge (actual or constructive) of the infringement, and, once they are informed, they act quickly to remove it.

The proposed Article 13 would see Service Providers inherit a much larger proportion of the cost and responsibility for monitoring and policing copyright infringement, as they will be expected to proactively police what is being uploaded on their servers.

Whilst not quite a perfect mechanism, the general consensus has been that under the current system, the cost of copyright infringement is spread across the three main players – rights holders, Service Providers and users. Rights holders such as news and media companies and publishers of press publications inform the platforms of infringing content. The Service Providers then take action once they are notified, and users are mindful that they are ultimately responsible for what they do and say on the Internet.

The proposed Article 13 would see Service Providers inherit a much larger proportion of the cost and responsibility for monitoring and policing copyright infringement, as they will be expected to proactively police what is being uploaded on their servers. Effectively, the locus of Service Provider liability would shift from one based on actual or constructive knowledge of copyright infringement (such as the current 'notice and takedown' system) to liability based on a failure to have preventative measures in place to stop the publication of infringing content. This, in turn, would mean that platforms will have strong incentives to be overly restrictive so as to avoid being held liable and fined. It follows that Service Providers may also seek to recoup those extra costs by revising their subscription packages or increasing their ad content.

Conclusion

It is unclear what the DSM Directive will look like in its final, approved form, or how it will be implemented at a national level and then interpreted by the judiciary. Despite this, news and media organisations will need to be cognisant of the potential challenges it may raise. Based on the experience in Germany and Spain, the negotiations arising out of the Press Right will not be straightforward and will likely be contentious.

On the Monitoring Requirement, this could potentially lead to increased revenue for content producers, particularly the less established press players that may have seen their content uploads slip through the cracks. However, it is yet to be seen whether the practical issues of technological implementation can be overcome in the short term.

In any event, it may be some time before the effects of the DSM Directive are fully felt – with the 'trilogue' discussions concluding in January 2019, and the process of implementing corresponding legislation in each EU member country to follow.

Kosta Hountalas is a lawyer in the Intellectual Property practice at MinterEllison.

Profile: Sophie Ciufo

Counsel Business and Legal Affairs at Viacom International Media Networks, a division of Viacom International Inc.

CAMLA Young Lawyers Committee Member, Marie Karykis, caught up with Sophie Ciufo, Counsel at Viacom International Media Networks in New York to discuss her experience living and working overseas as an Australian lawyer.

MARIE KARYKIS: Can you tell me a little about your role at Viacom? What does a typical day look like for you?

SOPHIE CIUFO: I work with Viacom International Media Networks ('VIMN'), a division of Viacom International Inc., as Counsel, Business and Legal Affairs. VIMN operates Viacom's multimedia brands and platforms outside of the U.S., including MTV, Nickelodeon, Nick Jr., BET, and Comedy Central.

In my role, I provide practical and commercially-focused legal advice and support to VIMN's business teams across most of our brands and platforms, including: marketing and communications; content production; acquisition and distribution; game and app development and distribution; multiplatform and technology operations; and more! I also project manage legal aspects of global initiatives, liaising with our legal teams in local markets to ensure compliance with local laws and regulations, including: Europe; the Middle East; North Africa; and Asia Pacific. I work together with my direct manager, VIMN's Senior Counsel, and VIMN's General Counsel on a day-to-day basis and I also do some ad hoc work with our Viacom U.S.-focused colleagues.

As such, a typical day is a day that is never typical! Whilst most days will start with an assessment of my day ahead, including my meeting schedule and planned to-do list for that day, I'll often have to reprioritise based on requests/developments that have come through overnight or simply from a colleague in the elevator. I spend a large part of my day drafting, negotiating, and advising on a range of commercial deals and initiatives related to all of the aforementioned business areas. I'll often work with the business to determine how to tackle legal aspects of novel or intricate deals and how to best draft the narrative of a deal into an agreement. Sometimes my day will involve deal negotiations with third parties, legal or regulatory research, and just plain old detective work to get to the bottom of a matter.

KARYKIS: Where have you worked previously, and what led you to making the big move overseas?

CIUFO: Prior to moving to VIMN in New York, I worked for VIMN's Australian & New Zealand business ('VIMN ANZ') for over 5 years: part-time as their Legal Intern and then Legal Assistant during my final semester of University and College of Law; full-time as their Junior Legal Counsel, when I was admitted to practice, and then as Legal Counsel. While I worked part-time at VIMN ANZ, I also worked part-time at Chris Chow Creative Lawyers as a Paralegal and Assistant.

Some fortunate timing and a few* (**many*) conversations about my goal to live and work in New York led to my move. I had been to New York on vacation a few times to visit my sister, who also lives here, and I always took the opportunity to visit the VIMN office and say hello to the team I now work in. It was a great way to put faces to email signatures and to opportunistically vocalise my desire to move (well, let's face it, I would tell anyone that would listen!). When the Counsel position in the VIMN team became vacant, I had made the connections I needed to be noticed when I threw my hat in the ring and ultimately be offered an internal transfer, an offer I couldn't turn down. To have the opportunity as a young in-house counsel to work at the heart of a corporation like Viacom, to learn how it operates at its HQ-level, was going to be (and has been) invaluable experience to not only develop my legal skills but also to develop my business acumen. So, I took the role and moved!

KARYKIS: What has been the highlight of your time in New York?

CIUFO: Personally, it would definitely have to be seeing Bruce Springsteen's show on Broadway! He really is The Boss!

Professionally, working out of VIMN's Times Square headquarters has been pretty amazing. Whilst battling the tourist crowds every evening to get to the subway isn't necessarily fun, stepping out of the office into the middle of all the lights of Times Square is definitely a surreal feeling that I still haven't gotten used to one year in.

Also, as part of my role at VIMN, I was placed in a leadership program run by an organisation called the Leadership Council on Legal Diversity. The program focused on providing young lawyers with tools for developing and leveraging leadership skills and career development strategies. Aside from the professional benefits, the program introduced me to young lawyers from all over the U.S. who work across an all of areas of law and for all kinds of firms and companies. That insight into the U.S. legal profession gave me the chance to recognise the pros, cons, differences, and similarities against the Australian legal profession, and gaining that insight was definitely a highlight of my time here.

KARYKIS: What advice do you have for other young lawyers looking to move overseas?

CIUFO: Ask questions! You'll never know what opportunities are out there if you don't ask and seek them out. The best career advice I've ever received is simple: the person that cares the most about your career is you. So, these opportunities aren't going to land on your desk without pro-activeness on your part.

If you're looking to transfer internally, my advice is to find out what offices and teams your company has globally. Then, make connections with colleagues in these offices, drop-in and visit them if you're on vacation, and volunteer for cross-territory projects. Also, becoming a respected and valuable asset to your company is ultimately what will be your resume, cover letter, interview, skills assessment and, most importantly, your character reference if you're transferring internally. So, always keep this in mind in your day-to-day work and relationships. You're an investment to your employer and your knowledge of their company is the asset they're investing in, it is invaluable to them no matter what location you are working in and it is in their interests to retain you.

If you're looking to move overseas without an internal transfer, I would go on vacation and do a reconnaissance. Scope out the city, the industry, the firms/companies operating there and then when you eventually make the move, plot out a plan of action. I would ask colleagues and friends for introductions, reach out to people on LinkedIn, and tap into the resource of Australians overseas, because let's face it, we're everywhere! You'd be surprised how willing people are to have a coffee, offer advice, and even just talk you through their own experience to give you some idea of what to expect with a move of your own.

KARYKIS: What steps did you have to take in order to practise in New York? Were your Australian legal qualifications transferable?

CIUFO: Yes, my Australian qualifications were transferable to practise as in-house counsel in New York. People admitted in a jurisdiction outside of the U.S. are permitted to register and practise as in-house counsel in New York State (for those readers playing at home, it is it is Part 522 (b) (2) of the Rules for the Registration of In-House Counsel as directed by the New York State Court of Appeals). Certain obligations apply, including that I must maintain my New South Wales practising certificate.

KARYKIS: What do you wish you knew before moving?

CIUFO: How cold and long the winters are here! Whilst the snow is definitely novel and beautiful, come April, winter has definitely overstayed its welcome.

KARYKIS: What do you think are the biggest challenges facing the media industry?

CIUFO: The media and content industry is a very interesting and challenging space to work in right now, there are many factors disrupting the ordinary course of business and for a lawyer working in this space there is a requirement of adept and innovative thinking, malleability, and risk-tolerance (and calculation!).

There are the are obvious 'disruptors', such as technology and the entry of new players into the market. But I believe the real disrupter is choice. Consumers are armed with the power of choice more than ever before and businesses need to innovate and develop ways to ensure they are chosen. With consumer choice comes a variety of challenges and things companies in the media industry have to think about that they may not have had to in the past: smaller subscription fees and alternate subscription structures; the impact of piracy; multiple viewing devices and associated technology; ad-blocking technology; and a demand for more instantaneous consumption (for example, the expectation of series-stacking which reduces the longevity of a property).

As a lawyer in this environment, it is more important than ever to keep abreast of not only legal and regulatory changes, but industry and audience trends, technological developments, and moves your company or client's competitors are making so you're as informed as possible to deliver the most competitive legal and commercial services to either your company or your client.

I truly believe that disruption and challenges can be positive. I believe that with each challenge, comes an opportunity to disrupt the ordinary, the average, and discover new business opportunities, new ways of thinking and doing, and, as a lawyer, an opportunity to be creative and innovative in a profession that hasn't traditionally asked those things of you.

KARYKIS: What was your favourite part about being on the CAMLA YL Committee?

CIUFO: Oh, I loved everything about being on the CAMLA Young Lawyers Committee! The network of people the Committee introduced me to was definitely a highlight. Being in-house counsel from basically the start of my career meant that I didn't have an immediate network of legal colleagues, so joining organisations like CAMLA and the NSW Young Lawyers committees was a great way to meet other lawyers working in a similar space to me, including peers with a similar level of experience as well as more experienced professionals. Another highlight was the rewarding opportunity of organising and hosting networking and professional events for other young lawyers and law students, such as the Committee's inaugural CPD session on Defamation Law in 2017 and, of course, the star event that is the Committee's Speed Mentoring evening.

KARYKIS: I grew up watching Nickelodeon shows as a kid. What is your favourite Viacom show?

CIUFO: Viacom has such strong, diverse, and entertaining slate of content (past, present, and upcoming), which makes that a difficult question to answer! Growing up, I was obsessed with Rugrats, Hey Arnold!, and Daria. More recently, I thoroughly enjoy the Comedy Central Roasts and I watch Broad City religiously, I'm really excited to see what Abbi Jacobson and Ilana Glazer do next now they've wrapped filming on the final season.

Marie Karykis is Legal Counsel at Foxtel and member of the CAMLA Young Lawyers Committee.

Disruption in Legal Practice

Erika Ly, NSW President of The Legal Forecast, discusses disruption in the legal practice, especially as a result of AI technology.

"If I question the adequacy of legal practice, it is not to serve us individually as legal practitioners. It is to serve the profession so that it may better serve the ends of justice, for the furtherance of which all in our profession are commissioned."[1]

"I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism...I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind...But one may criticise even what one reveres."[2]

Arriving on the waves of increased computational capacity, the legal profession is confronting something of an existential crisis with the emergence of artificial intelligence (AI) becoming a reality in legal practice. Since the 1980s, literature on AI and the law has focused on scholars addressing the technology from a largely regulatory perspective: dealing with issues of liability arising from expert systems;[3] the prevention of discrimination and bias in automated systems;[4] the tensions within big data and privacy;[5] and machine ethics.[6] For those few scholars writing on the legal profession, Macfarlane writes that legal practitioners may evolve into 'legal coaching roles.'[7] Others such as Alarie, Niblett and Yoon observe that predictive analytics will not only have the capacity to tell us what the law is but can also inform us to what the law should be,[8] and McGinnis and Pearce have warned that the 'great disruption'[9] is imminent.

It is not my place to don the headdress of the futurist and divine where these changes in artificial intelligence will lead. Instead, I hope to speak to you on a much more urgent and personal note. I hope to suggest problems and raise doubts, to disturb thought, rather than to resolve confusion. Whatever the more distant future holds, my present and much more deeply felt concern is this: "What does our own future look like in this rapidly changing profession in the next century? And are we doing enough to prepare legal practitioners entering the profession for the challenges of the future?"

As applied to law, predictive algorithms to an extent, embed what lawyers already intuitively do.[10] That is, to code the ability to estimate the likelihood of legal outcomes and remedies available for clients. In areas of litigation, predictive technologies have already been able to outperform humans in e-discovery,[11] determining court decisions,[12] uncovering legal strategies and analysing types of arguments to win over specific judges,[13] and to some success, predict likely winners of cases even before trial.[14] Lawyers generally create such assessments drawing from their technical expertise and knowledge of the law, reasoned judgement, training and intuition.[15] While senior and expert lawyers have a heightened sense to make accurate predictions from their sharpened experience, it is a reality that no lawyer has complete knowledge of all the relevant data. This is where the promise of artificial intelligence reveals its potential and also from where many of the imaginatively threatening headlines draw their inspiration.

On comparing notes with now established practitioners, it strikes me as odd that my experiences progressing through law school today remain largely unchanged from those graduating a decade ago - especially in the context of this AI empowered landscape, notwithstanding the fact that academics have been reflecting on its use in the law since the 1980s. Moreover, it appears to me that the bulk of the profession and our educational institutions are

1 Marvin Frankel, 'The Search for Truth: An Umpireal View' (1975) 123 University of Pennsylvania Law Review 1031

2 Oliver Wendell Holmes, 'The Path of the law', Collected Legal Papers (1920), pp 167, 194.

3 Janet Zeide and Jay Liebowitz, 'Using expert systems: the legal perspective' (1987) 108(8) *IEEE Expert* 19; Philipp Leith, 'The rise and fall of the legal expert system' *European Journal of Law and Technology* (2010) 1.

4 Laura Carmichael, Sophie Stalla-Bourdillon and Steffan Staab, 'Data Mining and Automated Discrimination: A Mixed Legal/Technical Perspective' (2016) 31(6) *IEEE Intelligent Systems* 51; Solon Barocas and Andrew Selbst, 'Big Data's Disparate Impact' (2016) 104(3) *California Law Review* 671.

5 Woodrow Hartzog et al, 'Inefficiently Automated Law Enforcement' (2015) 1(5) *Michigan State Law Review* 1763; Elizabeth Joh, 'The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing' (2016) 10(1) *Harvard Law & Policy Review* 15; Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Penguin Books, 2016).

6 Anthony Casey and Anthony Niblett, 'The Death of Rules and Standards' (2017) 92(5) *Indiana Law Review* 1401; Burkhard Schafer et al, 'A fourth law of robotics? Copyright and the law and ethics of machine co-production' (2015) 23(3) *Artificial Intelligence and The Law 217*.

7 Julie Macfarlane, 'The New Lawyer: How Clients Are Transforming the Practice of Law' (University of British Columbia Press, 2017) 120.

8 Benjamin Alarie, Anthony Niblett and Albert Yoon, 'How artificial intelligence will affect the practice of law' (2018) 68(1) University of Toronto Law Journal 106, 5.

9 John McGinnis and Russell Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services' (2014) 82 Fordham Law Review 3041

10 Harry Surden,'Machine learning and law' (2014) 89 Washington Law Review 87, 103-104.

11 *Da Silva Moore v Publicis Groupe*, 287 FRD 182 (SD NY, 2012); *Rio Tinto Plc v Vale SA*, 306 FRD 125 (SD NY, 2015); *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch).

12 Daniel Katz, Michael Bommarito and Josh Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States', (2017) 12(4) PLoS ONE 1; see also Theodore Ruger et al, 'The Supreme Court Forecasting Project: Legal an Political Science Approaches to Predicting Supreme Court Decision Making' (2004) 104 *Columbia Law Review* 1150.

13 Lex Machina, *What We Do* <https://lexmachina.com/what-we-do>.

14 Premonition, *Legal Analytics* <https://premonition.ai/legal_analytics/>.

15 Surden, above n 10, 102.

dismissive of or simply ignoring these broader technological changes in the hope that they will leave the legal profession untouched. While there are exceptions and certainly pockets of excellence to develop this area, much more awareness needs to be driven across the whole profession.

After we hear the diagnoses of futurists and technologists, it is not unnatural to ask two broader questions: "Can anyone really predict the future? Can anything be done about it anyway?"

The first question is easily dispensed with. Future forecasting is, in one characterisation, a series of thoughtful hunches reflecting global trends at best. The exercise takes into account the multiplier effect of all areas across society and examines their total sum impact. Its true value however, lies in providing us a reference point to cast our gaze ahead. The art of the long view alerts us to the changes occurring at a grand scale and provides context for the role that we might have as individual lawyers within society. Importantly, it shifts our perspective from the here and now, to what may be.

As to the second question, I have come to believe that the answer is affirmative. We live in a time when innovator-entrepreneurs are not only building brilliant new enterprises but are swiftly changing the expectations of what society demands from technology. Especially given the speed at which information travels, deep and rapid changes of markets are possible, and so too are significant changes to social norms. In such circumstances, our role as lawyers and law students in this exercise is to be responsive to our social and technological fabric, to look at where the future may lead, and work (with others) towards building our preferred vision of it which embeds our expertise, training and knowledge of the law as well as its foundational principles.

The ways in which artificial intelligence and more broadly, technology, can and ought to be applied in the legal profession are fruitful topics for wide discussion. Yet as we have observed in recent years, it is often the case that creators of such applications and programs have vastly different priorities and concerns from those that we, as lawyers would have. They have done so at the risk of throwing ethics, and in recent cases, democracy out the door. This is a much greater concern when it comes to legal applications. While there is great potential in combining vast volumes of private client data with public judicial and legislative records, for example, to leverage strategic business advice and legal counsel,[16] when you create the ship - you also create the shipwreck.

Critically (albeit, dangerously) - as Lessig's famous thesis postulates - code can become law.[17] Taken further, predictive technologies may create a scenario where ex post adjudication evolves into ex ante regulation.[18] While Justice Oliver Wendell Holmes was not speaking with AI in mind, he once defined law to be: "prophecies of what the courts will do in fact." While the limitations of biased code and data have been discussed by scholars and commentators extensively,[19] it is crucial to keep lawyers front and centre, especially in the creation of legal applications relying on artificial intelligence.

What will be uncomfortable is for those in our profession to work with 'non-lawyers'[20] and to be proactive in engaging on projects that may be perceived as antithetical to our immediate billable interests and often with outcomes that may very well cannibalise the way that we currently practise law. Such a direct plug into another discipline can be awkward but requires acting in the interests of long-term thinking of the legal system and its function as a whole. "Technologies focused on human outcomes," as Carroll writes, requires "the inclusion of people in the processes of developing, implementing, and regulating technology, directly and through agents under their control."[21] If we intend to maintain or attempt to enhance our ability to practise law, we must be confident in working with interdisciplinary teams and constantly assessing and modifying the ways in which we perform our role as lawyers.

Even as technology marches on, I am optimistic that the essential functions of lawyering remain. Embedded here are the tasks of creating social order, safeguarding relationships, increasing access to justice, upholding bargains, and advocating client interests -- no matter what the format. We are still close enough in this current wave of legal technology expansion to look at the history of the present to interpret it with first-hand experience. Our contribution in actively creating the legal technology systems of the future is important as well as practical. As the rapid transformation of the legal industry unfolds in its transformation, perhaps it is our role - if not obligation - to also narrate it and safeguard its future.

I have no doubt that we will find that opportunities abound if we choose to look, and that there will be no shortage of not only intellectual challenges but also moral and ethical ones. We must be sure not to let them slip away. As lawyers, our imperial confidence in the law and the vital role that we serve demands us to engage with the world around us. In working towards our preferred vision of the legal profession, we must be attentive, self-aware and conscious of the water in which we are immersed. In the absence of deliberate choice, the alternative is unconsciousness, a passive default and autonomous setting -- which may very well be a stroke of bad luck not only for our profession and our clients, but the whole of society as well.

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16 Joe Daysart, 'The dawn of Big Data' (2013) 99(5) ABA Journal, 42-45, 47; Alex Smith, 'Big Data Technology, Evolving Knowledge Skills and Emerging Roles' (2016) 16(4) *Legal Information Management* 219.

17 See generally, Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books: 1999).

18 Benjamin Alarie, Anthony Niblett and Albert Yoon, 'How artificial intelligence will affect the practice of law' (2018) 68(1) *University of Toronto Law Journal* 106, 5.

19 Linda Skitka, Kathleen Mosier and Mark Burdick, 'Does automation bias decision-making?' (1999) 51 *International Journal Human Computer Studies* 991; Juliane Reichenbach, Linda Onnasch and Dietrich Manzey, 'Misuse of Automation: The Impact of System Experience on Complacency and Automation Bias in Interaction with Automated Aids' (2010) 54(4) *Proceedings of the Human Factors and Ergonomics Society Annual Meeting* 374.

20 a term that this author loathes.

21 James D Carroll, "Participatory Technology," *Science* 171 (February 19, 1971) pp 647-653.

Establishing a Right to Privacy in Australia: What Would it Look Like, and How Would it Work?

By Richard Leder (Partner) and Sanjay Schrapel (Senior Associate) Corrs Chambers Westgarth.

Sir Cliff Richard's overwhelming success in his recent battle with the BBC and the South Yorkshire Police in the High Court of England and Wales (*Richard v British Broadcasting Corporation* [2018] EWHC 1837(Ch)) (*Richard v BBC*) indicates that recognising a tort of privacy in Australia could have potentially troubling consequences.

On 14 August 2014, the BBC commissioned a helicopter to hover over Sir Cliff Richard's home in Sunningdale, Berkshire. It recorded what would turn out to be a highly publicised raid and search of his home by the South Yorkshire Police (**SYP**) in relation to allegations against Sir Cliff relating to an incident of child sexual abuse at a Billy Graham rally in the 1980s.

How the BBC came to know the time and location of the raid, and its decision to record and publicise it in such a prominent way, has been the subject of a 454-paragraph decision by his Honour Mann J in the High Court of England and Wales, handed down on 18 July 2018.

In his decision, Mann J roundly criticised nearly every aspect of the BBC's conduct in the lead-up to and following its report of the raid, and made some concerning conclusions about how the operation of the tort of privacy — which exists as part of the common law of the United Kingdom pursuant to the European Convention on Human Rights and the *Human Rights Act 1998* (UK) — might affect press reporting of criminal investigations in the future.

In this article, we take an in-depth look at the judgment itself and the novel conclusion that it makes in relation to whether information about a person being the subject of a criminal investigation would ordinarily be covered by the tort. We also look at what the concerning consequences of that conclusion are, both in the United Kingdom, and, if a tort of privacy were to be developed here, in Australia.

Richard v BBC: A closer look

How the BBC learned of the investigation and the raid

Justice Mann found that, in June 2014, BBC journalist Daniel Johnson received an anonymous tip-off about a police investigation into Sir Cliff arising from Operation Yewtree, the name given to a group of investigations of historic child sex abuse being conducted by the Metropolitan Police.

Following the tip-off, Mr Johnson approached SYP media officer Carrie Goodwin and explained to her that he knew SYP was investigating Sir Cliff. Then, in circumstances that were hotly contested between the BBC and SYP, the SYP agreed to provide Mr Johnson with certain information about its investigations, including when and where it would be conducting a raid of Sir Cliff's home.

The BBC's decision to publish

Armed with this information, the BBC commissioned a helicopter and recorded vision of SYP officers entering the premises and searching it, including by capturing footage, using a telephoto lens, of officers in the process of rifling through Sir Cliff's belongings.

The BBC then published 44 television broadcast stories which identified that Sir Cliff was the subject of the investigation and detailed that the investigation related to allegations of child sexual abuse which were said to have occurred during a Billy Graham rally. Many of the broadcasts included either the helicopter footage or footage of a BBC reporter stationed near Sir Cliff's vineyard in Portugal, where the BBC believed he was located at the time. The BBC also broadcast headlines confirming that Sir Cliff was the subject of a historical sexual abuse investigation in its rolling 'news ticker' on its television news channels across the UK.

Before publishing its stories, the BBC approached Sir Cliff's PR team for comment, but apparently did not provide them with sufficient details to enable the PR team to decide whether or not to respond. Sir Cliff's chief PR consultant, Philip Hall, gave evidence to say that he did not want to communicate with the BBC because he believed they were trying to coax information out of him to support its story. Had the BBC told him that the raid was about to occur, or about the involvement of SYP more broadly, Mr Hall claimed he would have taken a different tack.

Immediately following the BBC's initial coverage, the story was published by other news providers both within the UK and across the world.

The SYP ultimately decided not to charge Sir Cliff with any offences relating to the investigation the subject of the raid and the BBC coverage in June 2016.

What is the UK tort of privacy?

The tort of privacy exists in the United Kingdom by virtue of the European Convention on Human Rights (the **Convention**), which itself has been ratified into the law of the United Kingdom in the *Human Rights Act 1998.*

Following the landmark decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457, the Human Rights Act has created an actionable tort of privacy with the following elements:

- Pursuant to Article 8 of the Convention, did the claimant have a legitimate expectation of privacy in relation to the information that was disseminated by the respondent?
- If so, pursuant to Article 10 of the Convention, was the party responsible for breaching that legitimate expectation of privacy justified in doing so by virtue of its right to freedom of expression?

If the answer to the first question is yes, and the second is no, then damages, (and potentially injunctive relief), follow.

This requires the Court to undertake a 'balancing exercise' between the competing rights of the holder of the privacy right, and the party seeking to breach that right (usually, but not always, a media organisation).

The application of principles to Sir Cliff's claim

Crucially, in *Richard v BBC*, Justice Mann held that Sir Cliff did have a legitimate expectation of privacy in relation to:

- the fact that SYP were investigating him for historical child sex offences and planning a raid on his home; and
- SYP's conduct of the raid itself.

As a consequence, his Honour was then required to determine whether, by naming Sir Cliff as the subject of the investigation and by broadcasting the helicopter footage of the raid into his home, the BBC was justified in so publishing by virtue of its right to freedom of expression.

Mann J held that the BBC was not so justified. Central to his Honour's reasoning was a finding that, except in 'exceptional and clearly defined circumstances', the identification of the subject of a criminal investigation would amount to a breach of that subject's legitimate expectation of privacy and that breach would not be 'balanced' by the publisher's Article 10 right to freedom of expression.

Justice Mann did not, however, identify what those exceptional and clearly defined circumstances might be.

Having made this finding, Mann J went on to rule that the BBC's invasion of Sir Cliff's privacy rights was exacerbated by the 'sensationalist' nature of its reporting, which included stationing a reporter in Portugal and commissioning and broadcasting the helicopter footage of the search itself. Justice Mann held that the BBC's reporting exacerbated both the harm to Sir Cliff's feelings, and the damage to his reputation. Justice Mann also took into account the BBC's failure to provide Sir Cliff's PR team with the full story to enable an informed decision about whether to issue a response to the BBC's proposed story, or seek injunctive relief.

In conducting the 'balancing act', Mann J also opined that the BBC were more concerned with 'scooping' its rival news broadcasters than respecting Sir Cliff's privacy rights, which weighed against a finding that the BBC's Article 10 rights outweighed Sir Cliff's Article 8 rights. Importantly, Mann J held that, even without the sensationalistic reporting, a mere report of the investigation which named Sir Cliff would have amounted to an unjustified breach of Sir Cliff's privacy rights.[1]

Justice Mann was also unimpressed with the BBC's conduct vis-à-vis SYP. The BBC maintained that the SYP had volunteered the details of the investigation to the BBC to assist the SYP to obtain publicity about it. The SYP, on the other hand, contended that it only provided the BBC with the information because it believed that it needed to ensure the BBC would not run a story which may jeopardise the investigation, and that the provision of the information would help SYP keep the BBC from doing so. Justice Mann found in favour of SYP on this point, and decided that this formed another basis to conclude that the BBC's conduct weighed against a finding that the balancing act fell in the BBC's favour.

Damages for the UK tort of privacy

The English tort of privacy operates similarly to the tort of defamation, in that damages can be awarded for a "*per se*" breach of the tort. That is, actual loss does not need to be proved before a Court is entitled to award substantial damages for the breach.

In so doing, Mann J ruled that a Court is entitled to take into account hurt to feelings and harm to reputation – a question that was previously a relatively unsettled matter in English law. In so ruling, Mann J assessed Sir Cliff's general damages at £190,000.

Justice Mann then ruled that the BBC was liable to pay a further £20,000 for aggravated damages, on account of its decision to submit the story for the Royal Television Society's 'Scoop of the Year' award, and refusing to withdraw it upon a request being made by Sir Cliff's solicitors.[2]

Justice Mann also found that a number of heads of specific loss, or 'special damage' were made out by Sir Cliff in respect of legal fees incurred dealing with the fallout from the BBC publications, and the loss of an agreement to republish his book *My Life, My Way* to coincide with his 75th birthday.

Establishing a tort of privacy in Australia: What are the potential consequences of *Richard v BBC?*

Despite sputtered efforts by first-instance courts[3] to find a tort of privacy in Australia, no appellate Court has found that such a cause of action exists as part of the common law of Australia.

1 [318].

2 [365].

3 *Grosse v Purvis* [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

Notwithstanding the Australian Law Reform Commission's Report *Serious Invasions of Privacy in the Digital Era* published on 31 March 2014,[4] which recommended the introduction of a statutory tort of privacy in terms similar to the UK, no Australian jurisdiction has sought to move on the issue.

If an Australian parliament was to establish a statutory tort, or an appellate Court was to find the existence of such a tort as part of the common law, it is likely that the consequences of Mann J's judgment would apply directly to Australian publishers. Two such consequences are explored below.

1. The tort would prohibit the identification of subjects of criminal investigations

The traditional position in Australia is that reporting about the subject of an investigation is constrained only by:

- the principles of defamation law (requiring reports to ensure that they make clear that the person is being investigated in relation to offences, and not that they are guilty of those offences); and
- journalistic standards (which, while not enforceable, may require media publishers to consider whether the reporting of an investigation might prejudice that investigation).

Once charges are laid, reporting is then also subject to the laws of contempt, such that any reporting on the crime the subject of the charge which might create a 'real and definite tendency'[5] to prejudice the fair trial of that person (including by, commonly, tainting the minds of a potential jury pool) may be punishable at the court's discretion.

By contrast, the immediate and most startling consequence of Mann J's ruling in *Richard v BBC* is that - at least in jurisdictions where a tort of privacy exists — it would appear to be no longer appropriate to identify the subjects of criminal investigations in the UK, either at all or at least until the point where they are charged (Mann J did not opine on this). Prior to his Honour's ruling, the kinds of information that would usually be protected by the tort of privacy were limited to information about a person's health, personal relationships or finances.

In reaching his conclusion on this question, Mann J identified that reporting on criminal investigations can irreparably damage the reputations and lives of the subjects of those investigations, whether or not charges are laid or convictions obtained, and that this risk is particularly acute in relation to prominent public figures accused of historical child sex offences. Justice Mann also considered that the risk of harm to such public figures is also exacerbated by the proliferation of false and unsubstantiated complaints that tend to flow on the internet about such persons once it is revealed that they are the subject of such an investigation.

Countering the position reached by Mann J is the fact that (so long as they are responsibly reported) the reporting of allegations of sexual offending is important, both as:

- a function of evidence-gathering in respect of a field of crime that is notoriously under-reported (including by encouraging further complainants to come forward): and
- a function of ensuring that the public remains informed about allegations made against prominent public people. People who might otherwise have been given unfettered access to children, to encourage vigilance and ongoing reporting of witnessed wrongdoing.[6]

The BBC ran these arguments against Sir Cliff, and was unsuccessful in maintaining them. Particularly in relation to the second argument, Mann J considered that the public interest in Sir Cliff's case extended only to reporting on the investigation, and not to identifying Sir Cliff himself.[7]

2. The tort of privacy does not contain the safeguards of the tort of defamation

One of the more troubling aspects of the tort of privacy as it exists in the United Kingdom is that it contains none of the defences available to a defendant in a defamation action. For example, so long as a claimant can prove that he had a legitimate expectation of privacy in relation to the information published about him, it does not matter whether the private information published by a defendant is itself true, contained expressions of the publisher's honest opinion, or were otherwise published on an occasion of qualified privilege. In defence of a privacy claim, all that matters is whether a claimant's legitimate expectation that certain information about him remains private outweighs a defendant's right of 'freedom of expression'. This requires a court to conduct a 'balancing act', which is a more opaque process.

It is also potentially telling that Sir Cliff did not bring his claim in defamation, primarily because the BBC were careful to only convey the imputation that Sir Cliff was under investigation for child sex offences (which was true), rather than the imputation that Sir Cliff was actually guilty of those offences. There was evidence in the case to the effect that the BBC took the defamation risk issues seriously, and crafted its publications to abide by them.[8]

4 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era,* Discussion Paper No 80 (2014), accessible at https://www.alrc.gov.au/publications/serious-invasions-privacy-dp-80.

5 *DPP v Johnson & Yahoo!7* [2016] VSC 699, [24].

6 The BBC made reference to its 'duty' to report on similar allegations made against, and investigations into, persons such as Rolf Harris and Jimmy Savile in this context.

7 [317].

8 [111], [113].

The Australian High Court has previously ruled that a claimant who has a claim in defamation cannot re-fashion that claim as a negligence claim, because the tort of defamation, and its defences, create a sufficient platform on which to consider a claim for damage to reputation.[9] In light of Mann J's ruling that **both** defamation and breach of privacy can provide remedies for damage to reputation, this issue would need to be addressed if a tort of privacy were established or found to exist in Australia.

Also significant is that, in England and Wales,[10] a claimant only has one year from the date of the first publication of defamatory matter to bring proceedings for defamation. Sir Cliff brought his claim for breach of privacy in 2016, two years after the BBC's publications and one year after the expiry of the limitation period for defamation. By contrast, s 2 of the *Limitation Act* provides claimants in England and Wales six years from the date the breach of privacy occurred to bring a claim. In its Report,[11] the ALRC recommended that the limitation period for a breach of privacy claim should be 3 years, which would mean that a claimant who is out of time to bring a defamation action in Australia, may still be able to bring a claim in privacy to obtain compensation for harm to reputation.[12] A tort of privacy in Australia may therefore deprive defendants of the benefits provided by the shorter limitation period that applies to defamation claims.

The ability for a claimant to bring an action in privacy to circumvent some of the difficulties that a defamation claim would face is therefore another troubling consequence of the recognition of a tort of privacy in Australia.

Why, then, does the tort of privacy serve to provide Sir Cliff with damages for harm to his reputation caused by the true reporting of the fact that he was under investigation for historical child sex offences, when the tort of defamation would have given no such remedy?

Unfortunately, shortly after announcing that it would appeal Mann J's decision,[13] the BBC consequently decided it would not.[14] The resolution of these questions will therefore needs to await a new vehicle.

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9 *Sullivan v Moody* (2001) 207 CLR 562. Note that the High Court's position is contrary to the view reached by the UK House of Lords on the same question in *Spring v Guardian Assurance plc* [1995] 2 AC 296.

10 *Limitation Act 1980* (UK), s 4A. Both the 'single publication' rule and the one-year limitation period do not apply in Scotland and Northern Ireland as the *Defamation Act 2013* and the *Limitation Act 1980* do not apply in those jurisdictions.

11 Above n 4.

12 A one-year limitation period also applies to defamation actions brought in Australia, although the operation of the limitation period differs between Australia and England and Wales because the 'multiple publication' rule applies in Australia: see *Google Inc v Duffy* [2017] SASCFC 130, [359].

13 https://www.bbc.com/news/uk-44961556

14 https://www.theguardian.com/media/2018/aug/15/bbc-will-not-appeal-against-cliff-richard-privacy-victory

The Broadcasting Reform Act and Getting the Media We Need

CAMLA Young Lawyer Essay Competition Winner, Anna Belgiorno-Nettis, (Graduate, Gilbert + Tobin) takes a look at the economic and democratic questions around our latest media reforms.[1]

1. Introduction

On 27 November 2018, the Federal Court of Australia approved the first transaction under Australia's newest media reforms: the Nine – Fairfax merger.[2] The announcement, which came after parties had gained approval of shareholders and the Australian Competition and Consumer Commission (**ACCC**), is more than two and half years after those reforms were first introduced to Parliament on 2 March 2016.[3]. Although largely unchanged from its original form,[4] Parliament took a year and a half to pass the *Broadcasting Legislation Amendment (Broadcasting Reform) Act* 2017 (Cth) (**Broadcasting Reform Act**); and only after it underwent every stage of debate available to a proposed Australian law.[5] These facts allude to the challenge that governments face when determining how to regulate media industries.

Numerous politicians[6] and journalists[7] commenting on the Broadcasting Reform Act say that the challenge stems from the media's unique, fourth estate role of ensuring that a society has news that helps keep in check the power of the other "estates": the government, the judiciary, the legislature and beyond.[8] Through the Act, Parliament has used a competition law lens to approach this challenge, aiming to address "the sustainability of Australia's free-to-air broadcasting sector"[9] so that "Australian media companies will now be better placed to compete with the big online media companies from overseas."[10] The ACCC's Digital Platforms Inquiry into how these overseas companies are affecting Australia's journalism similarly focuses on the economic viability of the country's media producers through a competition law lens.[11]

The importance of the media sector's economic viability is, of course, essential. There is not much point in arguing for democratic Australian media companies if there are no companies at all. However, questioning how the Broadcasting Reform Act affects the industry's public interest role described above is also essential, since some competition law approaches to markets risk downplaying the negative effect that ownership concentration can have on media's important position in a democracy. A focus on market power over product price can lead to a lack of consideration of other forms of power over, for example, public opinion and political manipulation of citizens.[12]

With reference to the framework articulated by Edwin Baker,[13] this article looks at whether the Broadcasting Reform Act adopts four assumptions that risk prioritising economic concerns at the expense of democratic ones: unbounded faith in the market; maintaining competition as the key or only policy concern; a willingness to find competition from more numerous directions; and prioritisation of an industry's profit-maximising interests.[14]

1 The opinions presented in this article are personal to the author and do not represent the views of any organisation or client.

2 D. Chau, "Nine's takeover of Fairfax approved by Federal Court, but decision could be appealed", *ABC News* (online article) 27 November 2018 https://www.abc.net.au/news/2018-11-27/nine-fairfax-merger-approved-by-federal-court/10558578.

3 *Broadcasting Legislation Amendment (Media Reform) Bill 2016* (15 April 2016) Parliament of Australia https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5635.

4 Environment and Communications Committee, Senate, *Broadcasting Legislation Amendment (Media Reform) Bill [Provisions]* (2016),1.9.

5 *Making a Law* (2017) Parliamentary Education Office https://www.peo.gov.au/learning/fact-sheets/making-a-law.html.

6 Commonwealth, *Parliamentary Debates,* House of Representatives, 30 November 2016 (Rebekha Sharkie) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fof8db77b-d8d3-4de1-958b-18847b30d0e2%2F0039%22; Commonwealth, *Parliamentary Debates,* House of Representatives, 30 November 2016 (Pat Conroy) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fof8db77b-d8d3-4de1-958b-18847b30d0e2%2F0041%22; Commonwealth, *Parliamentary Debates,* House of Representatives, 30 November 2016 (Adam Bandt) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fof8db77b-d8d3-4de1-958b-18847b30d0e2%2F0049%22.

7 Tim Dwyer, 'Media owners steer government away from reform in the public interest', *The Conversation* (online article) 14 September 2016 https://theconversation.com/media-owners-steer-government-away-from-reform-in-the-public-interest-65031; Ben Eltham, "The Clayton's Inquiry: the 'Media Reform' you have when you're not having a media reform" *New Matilda* https://newmatilda.com/2017/09/20/the-claytons-inquiry-the-media-reform-you-have-when-youre-not-having-media-reform/; Ian Audsley, 'Media Reform', *Bunbury Mail* (online article) 7 March 2017 http://www.bunburymail.com.au/story/4514024/ian-audsley-media-reform/?cs=281.

8 Edwin Baker, 'Media Concentration: Giving up on Democracy' 2002 *Florida Law Review* 54(5) 839, 890-891.

9 Explanatory Memorandum, *Broadcasting Reform Act*, 2017 (Cth) 2.

10 Prime Minister and Minister for Communications, "A new era for Australia's media" (joint media release) 15 September 2017 http://www.minister.communications.gov.au/mitch_fifield/news/a_new_era_for_australias_media#.WlGIs5P1Wi4.

11 *Digital Platforms Inquiry* (4 December 2017) The ACCC https://www.accc.gov.au/about-us/inquiries/digital-platforms-inquiry.

12 Baker, above n 7, 880.

13 Ibid.

14 Baker, above n 7, 870.

Since there will likely be other mergers under the Broadcasting Reform Act,[15] it is important that media professionals understand the economic and competition law elements underlying Australia's newest media regulation. This will help them determine whether any current and future media reforms emphasise "power and profits [without] providing the media needed by the…people either in their role as consumers or as citizens".[16] Only after this determination can societies decide whether further safeguards to the media's democratic role are needed.

2. Does The Act Place Unprobed Faith in Market Forces?

It is important that the Broadcasting Reform Act does not lead to a regulatory approach that assumes the market's competitive forces in isolation will ensure that concentrated firms provide varied media content. This is a risk if the ACCC, who the Act designates as the media industry regulator, does not adequately prioritise the importance of varied media opinions. The Act removed the rule prohibiting media owners from controlling more than two regulated media platforms in one commercial radio licence area (**2/3 Rule**),[17] and implied the Rule's role could be fulfilled by the ACCC's regulatory oversight.[18] The Senate Committee reporting on the Act similarly cited the ACCC's regulatory scheme as a viable alternative to the 2/3 Rule.[19]

Since the ACCC is a competition authority, the question must be asked whether it is as suited to regulating to protect the media's democratic role as the specialised Australian media authority that administered the 2/3 Rule: the Australian Communications and Media Authority (**ACMA**). The ACCC focuses on market competition, which usually means market concentration is only relevant if it impacts competition, rather than if it impacts diversity of media opinions. The regulator's focus on barriers to entry ameliorating concentration issues further highlights its concern with product price. This does not account for democratic media diversity since although threat of entry likely prevents media owners from raising prices, it does not necessarily prevent them from voicing the same ideology.[20]

The ACCC is aiming to focus more extensively on diversity concerns when regulating media markets. It has published new guidelines for media mergers since the Broadcasting Reform Act was introduced to Parliament, which arguably place greater emphasis on evaluating these mergers according to factors such as consumer choice and media quality.[21] However, these factors were also considered in the ACCC's earlier media merger guidelines, which stressed, "media diversity is primarily protected by the restrictions on cross-media mergers in the *Broadcasting Services Act*".[22] The 2/3 Rule was the Broadcasting Services Act's only rule that directly restricts cross-media mergers.[23] By abolishing the 2/3 Rule the Broadcasting Reform Act has removed that media diversity protection, without introducing new cross-media regulation.

Other evidence of the ACCC's increasing concern with safeguarding democratic media can be seen in the previously mentioned Digital Platforms Inquiry. The ACCC is actively seeking a greater understanding of the level of choice and quality of Australian news content.[24] The ACCC has acknowledged that the Inquiry has been a learning process, and that media quality concerns are new grounds for the regulator.[25] Therefore there was merit to the Media, Entertainment & Arts Alliance's recommendation that the ACCC wait until it finished the Inquiry before determining whether to approve the Nine-Fairfax merger.[26] In any case, the Act's reliance on the ACCC means that, to avoid an approach that places excessive faith in market forces, then either the regulator must be all the more focused on protecting the media's democratic function. Or, given ACCC Chair Rod Sims' recent confirmation that public interest considerations such as media diversity are not at the core of what the ACCC aims to achieve, other public policy instruments, as Sims himself says, are needed.[27]

15 See, eg, ACCC, *Media Merger Guidelines,* 2017, 1; and P, Chambers, "ACCC's Rod Sims on the shifting media landscape and future mergers" (Sims online interview) *AdNews* 18 September 2018 http://www.adnews.com.au/news/accc-s-rod-sims-on-the-shifting-media-landscape-and-future-mergers.

16 Ibid 871.

17 Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) sch 2.

18 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth)18.

19 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth)18; Environment and Communications Legislation Committee, above n 2, 6-5.

20 ACCC, *Merger Guidelines,* 11/10, November 2008 updated November 2017, 36-38.

21 ACCC, *Media Merger Guidelines,* 2017, 7.

22 ACCC, *Media Merger Guidelines,* August 2006, 5, 44.

23 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 6-7.

24 *Digital Platforms Inquiry: Terms of Reference,* 4 December 2017.

25 R. Sims, "Gilbert + Tobin seminar: the data economy" (conference) 15 October 2018, https://www.accc.gov.au/speech/gilbert-tobin-seminar-the-data-economy; ACCC, "ACCC seeking views on news and digital platforms inquiry" (media release) 26 February 2018, https://www.accc.gov.au/media-release/accc-seeking-views-on-news-and-digital-platforms-inquiry.

26 Media, Entertainment & Arts Alliance, "Outline of Submissions opposing the Nine Entertainment Co Holding Limited with Fairfax Media Limited" 12 September 2018 file:///C:/Users/abelgior/Downloads/180912_MEAAsub-Nine-Fairfax.pdf

27 R. Sims, "Competition law should remain focused on consumer welfare" (media release) 29 November 2018 https://www.accc.gov.au/media-release/competition-law-should-remain-focused-on-consumer-welfare.

3. Is The Act Disproportionately Concerned With a Lack of Competition?

Another assumption that leads to legislation eliminating ownership restrictions and jeopardising public interest media is when lack of competition, or inefficient monopoly power, becomes the major or only policy concern.[28] There are various elements of the Broadcasting Reform Act that show it does not exclusively focus on competition without regard for the media's democratic role. One element the Act introduced is the requirement that media companies with broadcasting licences covering over 75% of Australia's population produce specific amounts of local content (**Local Programming Requirements**).[29] These Local Programming Requirements have a democratic focus as they prioritise local media products irrespective of how competitively those products are priced. Furthermore the ACMA will monitor the Requirements, which will likely encourage regulation that values the media's fourth estate function. However, although local programming facilitates media diversity, it does not ensure it. Media companies can produce local material that nevertheless promulgates the same political perspective. The Requirements also do not address media diversity in non-regional Australia. Therefore they are still a flawed alternative to the 2/3 Rule and another rule the Act abolished, which prevented media owners from having broadcasting licenses areas that cover over 75% of Australia's population (**Reach Rule**).[30]

Another measure in the Act that, according to Parliament, can "ensure preservation of existing levels of media diversity"[31] is the previously existing rule requiring at least five independent media voices in metropolitan licence areas and at least four such voices in regional areas (**Minimum Voices Rule**).[32] However, relying on the Minimum Voices Rule to protect media diversity is questionable. Legislatively, the 2/3 Rule was drafted to address media ownership concerns while the Minimum Voices Rule was drafted to address media diversity concerns.[33] Yet there is no record of the ACMA investigating a breach of the Minimum Voices Rule.[34] Instead the ACMA frequently used the 2/3 Rule to investigate concentrated media ownership.[35] The ACMA may begin using the Minimum Voices Rule more, now that the 2/3 Rule is abolished and other industry initiatives, such as Nine's pledge to agree to Fairfax's charter of editorial independence, may help maintain diversity of media voices even when media ownership concentration increases.[36] However, these possibilities are not certain safeguards for media diversity as the 2/3 Rule's way of ensuring media-specific authorities investigated concentrated media power. More certainty is arguably needed in respect of something as important as the media's role to inform the public about corruption in power.

A third element that shows the Broadcasting Reform Act's concern with democratic media values is in the supplementary policy measures that were introduced along with the Act. These measures are a $60 million Regional and Small Publishers Jobs and Innovation package, the Digital Platforms Inquiry and the Government's promise that it would legislate before the end of 2017 to establish: a public register of foreign-owned media, a community radio package, and rules to enhance the ABC's focus on rural and regional Australia, fairness, balance and transparency.[37] However, at the time of writing (November 2018), the only legislation that has been introduced is an Act to add "fair" and "balanced" to section 8 of the *Australian Broadcasting Corporation Act 1983* (Cth).[38] Therefore these supplementary measures amount to: substantial but inevitably finite financial support; an inquiry that may, not must, lead to further reform; and promises for regulation that have not yet eventuated. None of them are fixed regulation that can immediately uphold the 2/3 Rule's focus on maintaining diverse Australian media ownership, and the diverse Australian media voices that entails.

4. Does The Act Represent a Willingness to Find Increased Competition?

Another assumption that characterises antitrust-over-fourth-estate focused regulation is a legislative willingness to find competition in increasing sources. This kind of willingness can be seen in policy that, for example, describes all media as competing with each

28 cf Baker, above n 7, 871.

29 Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) sch 3.

30 *Broadcasting Services Act 1992* (Cth) s 53.

31 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 18.

32 *Broadcasting Services Act 1992* (Cth) ss s61AG-AM.

33 As Rules' headings in the *Broadcasting Services Act 1992* (Cth): ss61AG-AM 'Prohibition of transactions that result in an unacceptable media diversity', ss61AMA-AMF 'Prohibition of transactions that result in an unacceptable 3-way control.

34 No section on 'media diversity' investigation reports: *Concept of Control* (28 April 2017) ACMA <http://www.acma.gov.au/Industry/Broadcast/Media-ownership-and-control/Media-control-and-diversity-rules>; no investigation reports use 'media diversity' s 61AH: *Ownership and Control investigation Reports* (20 July 2016) ACMA <http://www.acma.gov.au/Industry/Broadcast/Media-ownership-and-control/Ownership-and-control-rules/ownership-control-investigation-reports-ownership-control-rules-acma>.

35 All reports use 2/3 Rule: Ibid.

36 T. Boyd, "Nine's challenge is to preserve Fairfax's unique journalism culture", *Australian Financial Review* (online article) 26 July 2018 https://www.afr.com/brand/chanticleer/nines-challenge-is-to-preserve-fairfaxs-unique-journalism-culture-20180725-h135kk.

37 Prime Minister and Minister for Communications, "A new era for Australia's media" (joint media release) 15 September 2017 http://www.minister.communications.gov.au/mitch_fifield/news/a_new_era_for_australias_media#.WlGIs5P1Wi4.

38 Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017 (Cth).

other, or that argues the Internet, with its potential to fragment information sources, provides all the necessary competition.[39] The Broadcasting Reform Act appears to reflect this approach since it classifies Australia's media market in terms of their form. The Act separates the media market into an audiovisual one (covering Netflix, streaming services, pay-based and free-to-air television) and an audio one (with Spotify, iTunes Radio, and broadcasted radio), while implying the problem is "significant fragmentation…with so many market players [from which] audiences have an unprecedented variety to choose".[40]

Another approach the Broadcasting Reform Act could have taken was to classify media products in terms of the different opinions (or lack thereof) that they portray. That would help determine how concentrated Australia's media opinions are. It would consequently help determine whether there are too few Australian media players; which is likely to be the case as the diversity levels in our media opinions barely reach the minimum required by the Minimum Voices Rule.[41] Such an approach would also raise questions about whether safeguards are needed to deter media owners from promulgating the same opinion across all the media platforms they may own. There would likely be various flaws with this approach to classifying media products. However – despite all the stages of parliamentary debate the Act went through – it has been critiqued for not having public interest parameters or a clear policy framework, and for not involving consultation outside the media industry itself.[42] Better practice policy-making may be required for regulation as challenging as this.

In the meantime, as highlighted above, the Local Programming Requirements, the Minimum Voices Rule and the Act's supplementary measures may not do enough to address such criticisms.

5. Does The Act Prioritise Profit-Maximising Interests?

This final regulatory assumption is about prioritising media industry profits and encouraging less government restraint on ownership concentration.[43] The Broadcasting Reform Act lessens its concern with media ownership concentration by removing the 2/3 Rule – enabling media owners to cover newspaper, television and radio platforms – and by removing the Reach Rule – enabling media owners to cover all of Australia's broadcast media consumers.

The Act's Explanatory Memorandum primarily justifies the Rules' removals because they: limited media operators' ability to respond to financial pressures; were outdated; and did not achieve their purpose of maintaining media diversity.[44] The argument of media operators' inability to profit is a legitimate concern. The argument that the Rules were outdated also has merit since, for example, the 2/3 Rule divided the market into newspaper, television and radio platforms without considering digital media. However, the argument that the Rules did not help maintain media diversity is questionable since, as seen above, ACMA frequently used the 2/3 Rule to investigate media concentration. Therefore the two less questionable reasons given for removing the Rules – media profitability and outdatedness – do not address the anti-democratic potential that any removal of media regulation risks having.

Irrespective of how successful the Rules were at facilitating a democratic media, the Broadcasting Reform Act's abolition of them necessitates revisiting how to facilitate public interest media in other ways. Removing regulation without addressing the issue that regulation aimed to solve means the issue returns. Rather than introducing regulation to address media diversity concerns, the Act either points to regulation that has not previously been used to address such concerns, or introduces non-regulatory measures that may address such concerns. It is possible that those previously unused regulations and that these new non-regulatory measures may successfully address media diversity concerns. However, is an uncertainty in how we inform ourselves of undemocratic or improper conduct by those in positions of power an uncertainty with which we are prepared to live?[45]

6. Conclusion

This article has asked whether the Broadcasting Reform Act embodies four antitrust assumptions that tend towards ignoring the negative influence of ownership concentration on democratic values. It is clear that these are challenging questions to answer, particularly since media companies must function both as businesses and as public interest entities. It is also clear that, as the industry becomes increasingly affected by regulation that is influenced by competition law and economics, media professionals need to understand these influences; so they can also understand what democratic safeguards may be necessary alongside that regulation. In this way, we may be able to maintain the media that we need; both as consumers and as citizens.

39 Ibid.

40 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 11-12.

41 Department of Communications, *Media Control and Ownership,* Policy Background Paper No. 3, June 2014, 17-18.

42 M. Lesh, "Evidence Based Policy Research Project" *Institute of Public Affairs,* October 2018, 28.

43 Baker, above n 7, 871.

44 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 8.

45 cf *NZME Limited v Commerce Commission* [2018] NSCA 389 [244].

CAMLA Young Lawyers Committee
Speed Mentoring

Report by Nicholas Kraegen

CAMLA has once again given young and aspiring communications and media lawyers the opportunity to spend some time with those a little and a long way further down the path.

In CAMLA's 2018 Speed Mentoring event, 24 mentees gathered at Baker McKenzie and got the chance to spend time with lawyers in big and boutique private practices, at broadcasters, telcos and more, and hear about how they got where they are.

The range of mentors available gave eager mentees the opportunity to peer into nearly all parts of the communications and media law industry.

Kate Andrews of Seven and Jennifer Arnup from the ABC spoke to their experience guiding major broadcasters through production and distribution of television content.

Ishan Karunanayake told mentees about his unique experience carrying out his role as general counsel for TMRW (formerly Ministry of Sound) while also running his own firm, Ishan Law. No doubt he left them inspired, and inspired quite a bit of jealousy in eavesdropping non-mentees.

On communications, mentees heard from Michael Mueller of Optus and Rochelle Schuenker from Amaysim about their career paths out of private practice and into their commercial technology and regulatory-focused roles.

The CAMLA Young Lawyers Committee would also like to thank Cath Hill and Katherine Sessions for their hard work in organising the event, and Baker McKenzie for their generosity in hosting the evening.


Baker McKenzie

Brace Yourselves: Data Portability Rights Are Coming to Australia

Sophie Dawson & Ashna Taneja BIRD & BIRD

On 15 August 2018, the Australian Government released draft legislation to introduce a data portability right in Australia, to be known as the 'Consumer Data Right' (**CDR**). The new right will give consumers the power to gain access to and direct their information to accredited businesses in a particular economic sector. Transferors of information must supply the data in a format that complies with standards to be set by the forthcoming Data Standards Body.

The scope of the CDR is wider than the 'data portability' right recently introduced by the EU's General Data Protection Regulation (**GDPR**). It is also broader than the Privacy Act in key respects, because it extends beyond information *about* a reasonably identifiable individual. The new right will apply to both individual and business consumers, with no monetary limit on the size of business consumers.

The Australian Government has already confirmed that the CDR will be introduced in the banking, telecommunications and energy sectors. The Australian Competition and Consumer Commission (**ACCC**) will be responsible for advising the Minister on any further sectors to designate.

Businesses should start thinking how this new right may affect them. In particular, one should consider what benefits may accrue from becoming an 'accredited business' that can receive CDR data, and what risks and compliance issues might arise from doing so.

Why have a CDR?

The purpose of the CDR is to give consumers better control over their data and to enhance competition. The CDR is a response to the Australian Productivity Commission's recommendations in its *'Data Availability and Use'* report released on 8 May 2017 (**Report**).

Key benefits identified in the draft legislation (the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (Cth)) and the Report include:

- Benefiting consumers by enabling them to provide data to suppliers who can then tailor products and services to meet their needs;
- Reducing the costs to consumers of switching between providers of products and services;
- Lowering barriers to entry for new entrants to markets where incumbents have data that gives them market power, and thereby expanding consumer choice;
- Promoting linked services and interoperability of technology and providing a knowledge basis for innovation;
- Making markets more efficient by addressing information imbalances.

What kinds of data will be affected by the CDR?

There are 3 broad categories of data that will be the subject of the CDR:

- Data that relates to a consumer or has been provided by a consumer;
- Data that relates to a product; and
- Data that is derived from these sources.

Data that 'relates' to a consumer is broader than the definition of 'personal information' in the *Privacy Act 1988* (Cth) in at least two ways. First, it extends to businesses as well as individuals. Second, it extends beyond information 'about' an individual. In the *Privacy Commissioner v Telstra Corporation Limited [2017] FCAFC 4*, the Federal Court found that 'personal information' in the Privacy Act is confined to information 'about' an individual. In that proceeding, a distinction was drawn between information 'about' an individual and, for example, information 'about' their car where it has been provided for repair. The CDR will apply to information about the car and its repair, and not just to information about the person who or that owns the car.

The most recent draft legislation recognises the broad nature of information that 'relates' to a consumer, and imposes limitations on the access and transfer rights for CDR data so that they will only apply to types of information that are specified in a designation instrument. This also has the effect of limiting the types of derived data captured by the CDR.

The CDR will also apply to data that is collected or generated outside of Australia if it has been commissioned by an Australian registered corporation, citizen or a permanent resident. In the context of banking, the right will therefore capture data generated through overseas transactions using Australian issued bank cards.

What will the CDR look like?

The draft CDR legislation is designed around 3 key players: data holders, CDR consumers, and accredited data recipients. Each of these players will be subject to a set of forthcoming Consumer Data Rules (**Rules**), which will operate as a binding contract between them. The Rules will be

drafted and enforced by the ACCC, and will likely cover:

- Disclosure, use, accuracy, storage, security and deletion of CDR data;
- Accreditation of data recipients;
- Reporting and record keeping; and
- Any other matters incidental to the CDR system.

Only accredited entities and individuals are able to receive CDR data. This process ensures that data recipients have met various security and privacy safeguards before receiving CDR data. The forthcoming Data Recipient Accreditor will be responsible for managing this accreditation process.

The Rules will include sectoral variances to account for the different attributes and needs of different economic sectors. The draft legislation also contemplates the classification of CDR data into different categories, with the view to imposing more rigorous data security standards on some categories than on others. The categories may also be used to establish fees in relation to the disclosure of certain categories of data to acknowledge the value-added nature of some data. This acknowledges the impact that free data may have on the incentives for businesses to collect value-added data.

Who will be responsible for regulating the CDR?

The ACCC and the Office of the Australian Information Commissioner (**OAIC**) will be jointly responsible for implementing and enforcing the CDR. The ACCC will have its existing enforcement tools at its disposal to enforce various CDR rights and obligations, including the enforcement of civil penalty provisions. Furthermore, the forthcoming Data Standards Body will be initially housed within CSIRO's Data61, and will be responsible for setting technical standards for the format, security and transmission of data.

How does the CDR interact with the Australian Privacy Principles (APPs)?

CDR data will be subject to its own set of privacy protections, to be known as the 'CDR Privacy Safeguards'. Generally, the APPs will continue to apply to data holders, who will be subject to additional requirements once a request for CDR data is made by a consumer. Accredited data recipients will be subject to the CDR Privacy Safeguards in substitution for the APPs. Each safeguard mirrors (but provides a higher standard than) each APP:

- ***Privacy Safeguard 1 (Open and transparent management of CDR data)*** –participants for CDR data must take steps to ensure compliance with the Consumer Data Rules, and must keep in place an up-to-date policy available free of charge on the management of CDR data;
- ***Privacy Safeguard 2 (Anonymity and pseudonymity)*** – any consumer that requests their CDR data must be given the option of using a pseudonym, or to not identify themselves when dealing with a holder of data;
- ***Privacy Safeguard 3 (Collecting solicited CDR data)*** – a person must not collect CDR data unless doing so is in response to a valid request for CDR data under the Consumer Data Rules, or is otherwise authorised by laws other than the APPs;
- ***Privacy Safeguard 4 (Dealing with unsolicited CDR data)*** – a person that received unsolicited CDR data must destroy it as soon as practicable;
- ***Privacy Safeguard 5 (Notifying the collection of CDR data)*** – any collection of CDR data must be made known to consumers;
- ***Privacy Safeguard 6 (Use or disclosure of CDR data)*** – data holders and accredited data recipients cannot use or disclose CDR data unless it is in accordance with the Consumer Data Rules, or authorised by laws other than the APPs;
- ***Privacy Safeguard 7 (Use or disclosure of CDR data for direct marketing by accredited data recipients)*** – collectors of CDR data must not use or disclose this data without the consent of the consumer unless it is in accordance with the Consumer Data Rules, or is otherwise authorised by laws other than the APPs;
- ***Privacy Safeguard 8 (Cross-border disclosure of CDR data)*** – cross-border disclosure must not be made unless the person receiving the CDR data is an accredited recipient, or meets certain requirements specified by the Consumer Data Rules;
- ***Privacy Safeguard 9 (Adoption or disclosure of government related identifiers)*** – a data holder or accredited data recipient must not adopt or disclose a government related identifier for a consumer unless doing so is required by laws other than the Consumer Data Rules or the APPs;
- ***Privacy Safeguard 10 (Quality of CDR data)*** – holders of CDR data must ensure that it is accurate, up to date, and complete when it is disclosed;
- ***Privacy Safeguard 11 (Security of CDR data)*** – holders of CDR data must take steps in accordance with the Consumer Data Rules to protect CDR data from misuse, interference, loss, and unauthorised access, modification or disclosure. It must also destroy any CDR data that becomes redundant; and
- ***Privacy Safeguard 12 (Correction of CDR data)*** – a data holder must correct CDR data if requested to do so by a consumer.

Each Privacy Safeguard (except for Privacy Safeguard 2) is a civil penalty provision.

Which sectors will be affected by the CDR?

The CDR will first be rolled out in the banking sector, with the energy and telecommunications sectors to follow. The ACCC's newly established Access to Data Unit is tasked with making recommendations to the Minister on any further sectors to implement the CDR.

The ACCC's timeline for implementation in the banking sector is as follows:

- **1 July 2019:** all major banks to have data available on credit and debit cards, transaction and deposit accounts;
- **1 February 2020:** all major banks to have data available on mortgages;
- **1 July 2020:** all major banks to have data available on all remaining products;
- **1 February 2021:** all Authorised Deposit-Taking Institutions (ADIs) to have data available for mortgages;
- **1 July 2021:** all ADIs to have data available for all remaining products.

These timeframes are subject to extension by the ACCC. All other banks are to be given an additional 12 months for each implementation stage. The timeframes for the energy and telecommunications sectors have yet to be announced.

Challenges in implementing the CDR

One of objectives of the CDR is to reduce the cost to consumers of comparing and switching between providers of products and services. This is to be achieved through the implementation of data standards, which seek to promote data interoperability.

However, the current design of the CDR does not place any obligations on businesses to either:

a) become accredited data recipients; or

b) use the data that is transferred to them by a consumer.

This raises questions as to the likely extent to which businesses will elect to become accredited so as to receive data. The usefulness of the CDR to consumers could be limited if take up is low. The ACCC's Rules Framework notes that since the CDR is consumer focused, it has not introduced any reciprocity requirements for data holders and accredited data recipients in its first version of the Rules.

It is worth noting that a consideration for some businesses in relation to whether to seek accreditation is that interoperability rules for data could affect data security risks through the standardisation of information storage and format. The current proposal for the banking sector includes a requirement for all data to be shared via a dedicated Application Programming Interface (**API**) that meets standards developed by the Data Standards Body.

Another challenge facing the CDR is its scope. The current draft legislation not only defines consumer to include businesses of any size, but captures all information that relates to an identifiable or reasonably identifiable individual arising out of a supply of goods or services to them or their associates. This could extend the CDR to individuals that do not necessarily have a direct customer relationship with the data holder. An example of this may be when a business enters into a contract with a telecommunications company for the provision of mobile phones for its employees. Any data relating to those employees held by the telecommunications company may also be subject to the CDR and potentially subject to requests for data by those employees. This has significant cost implications for businesses operating in the designated sectors in managing CDR requests.

Considering International Non-Compete Clauses Within Employment Contracts

With young tech lawyers increasingly chasing professional opportunities overseas, Kate Simpson, a Senior Associate at Hentys Lawyers, discusses international non-compete clauses in employment contracts.

An increasing number of Australian employees are travelling overseas to pursue opportunities, including within the technology and media industry. Non-compete clauses are commonly found within the employment contracts of this mobile workforce, and employers increasingly seek to extend the reach of restraints – even to jurisdictions in which they are not registered and have no formal business operation.

Such restraints have traditionally been considered unenforceable. However, employees have been left wondering about their level of exposure, following the Supreme Court of Western Australia's unusual decision in *Naiad Dynamics US Ink v Vidakovic* [2017] WASC 109 (***Naiad***).

Enforcing a domestic non-compete clause in Australia

The modern doctrine of restraint is a balancing act between the individual's right to work and the former employer's right to protect its legitimate business interests. Non-compete clauses are considered prima facie void and are notoriously difficult and costly to enforce.

A breach of restraint can cause irreparable damage to a business very quickly. Given the time sensitive nature of the issue, employers generally apply to the Court to seek an interlocutory injunction prior to the matter proceeding to trial.

The principles to be considered by the Court when determining whether an interlocutory injunction should be granted are well established,[1] and include whether:

a) there has been a timely application for interlocutory relief;

b) there is evidence of breach of the restraints by the former employee;

c) the case has reasonable prospects of success;

d) the balance of convenience lies in favour of granting the injunction to the employer; and

e) damages are an adequate alternative remedy to the granting of an injunction.

The employer bears the onus of proof in establishing the above.

Enforcing an international non-compete clause in Australia – the *Naiad* example

Justice Rene Le Miere considered the enforceability of international non-compete clauses in *Naiad*, in a decision that likely caused concern to employees of businesses which operate internationally.

The Facts

Naiad Dynamics US Ink (**the Company**) was incorporated in Connecticut, USA. Its business was the design, engineering, manufacture, installation and sale of maritime stabilisation, manoeuvre and ride control systems in the global luxury yacht, commercial shipping and military shipping markets.

In 2009, Dr Vidakovic commenced employment as Global Sales Director subject to an employment contract with the Company and any affiliate companies. The contract was executed in, and subject to, the laws of Connecticut. Dr Vidakovic was required to work in various international locations, but spent substantial time in Connecticut. Along with various other restraint provisions, by way of a non-compete clause, Dr Vidakovic agreed that he would not work with a competitor for a period of 24 months from his termination date. The non-compete clause extended to specific US states and other countries including Australia.

In 2017, Dr Vidakovic's employment ceased and he returned to work in Perth at Veem Limited, a competitor of the Company.

Having been granted an interim injunction in March 2017,[2] the Company sought an interlocutory injunction in the Supreme Court of Western Australia, to prevent Dr Vidakovic breaching the terms of the restraint provisions.

Why was the matter heard in Australia?

It was common ground between the parties that the law of Connecticut governed the employment contract and should be applied to decide the enforceability of the non-compete clause. Ordinarily, the employer would have sought to enforce the clause first in Connecticut and later seek an order for enforcement in Australia.

It was apparently by agreement that the matter was heard in Australia. There were likely practical reasons for Dr Vidakovic to consent to this, specifically the difficulties and costs associated with defending the matter in Connecticut.

1 *Beecham Group Limited v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

2 *Naiad Dynamics US Inc v Vidakovic* [2017] WASC 109.

How did the Connecticut and Australian laws interact?

The restraint provisions needed to be considered in light of Connecticut law, and were assessed for reasonableness in that regard. A foreign expert in the laws of Connecticut was consulted by the Court.

The decision regarding the granting of an injunction was made in accordance with the laws of Western Australia.

Was the restraint clause reasonable?

The Connecticut legal principles applied by the Court in determining that the non-compete clause was reasonable included the following:

a) the Company's business and order cycles extended across a 24 month period;

b) the Company's customer base, which included Australians with whom Dr Vidakovic had interaction during his employment;

c) Dr Vidakovic's knowledge of the Company's customer list; and

d) Dr Vidakovic's broad range of skills, which would enable him to obtain other employment if an interlocutory injunction was granted.

Dr Vidakovic defended the action by arguing that the non-compete clause was unreasonable, and that the non-solicitation clause within the contract was enough to protect the Company's legitimate business interests. Furthermore, Dr Vidakovic submitted that granting the injunction would cause harm to him that would outweigh the benefit to the Company's legitimate business interests served by the injunction.

Reasons for granting an interlocutory injunction

Justice Le Miere balanced the interests of justice to the parties. He commented that the damage to the Company would likely be irreparable if the injunction was not granted, but the Company succeeded at trial. On the other hand, the grant of an injunction would cause loss to Dr Vidakovic, who would be required to terminate his employment with Veem Limited.

Ultimately, Le Miere J granted an interlocutory injunction, ordering mediation ahead of a trial. This was partly due to Dr Vidakovic's agreement to the restraint clause at the commencement of his employment, to which Le Miere J reasoned that he should be held "unless and until it is determined at trial that the restraint is unenforceable".

Looking forward

It is surprising that the Western Australia court accepted the jurisdiction of the contract, given that it was executed and subject to the laws of Connecticut. Employees should rest assured that there is no automatic right for the laws of other jurisdictions to be applied in Australia when considering non-compete clauses, despite the Court's decision in *Naiada*. Any challenge to the application of these laws at trial, had the matter proceeded, would likely have been successful.

Nonetheless, the apparent readiness of Australian courts to consider and provide injunctive relief in restraint matters is cause for concern for employees. This approach should be contrasted with that of the Californian system, which considers all non-compete clauses to be against the public interest and thus unenforceable. Evidently, it is this entrenched belief that has encouraged employee movement and collaboration, and which has contributed to Silicon Valley's status as the nation's capital for high-tech innovation.

Tips for employees of international businesses

Prior to signing a restraint clause, seek multi-jurisdictional legal advice if necessary.

When agreeing to a restraint clause with an employer, have regard to the employer's reputation for enforcing restraints. For example, Amazon Web Services is considered selective in its enforcement of restraints and did not seek to enforce non-compete clauses against several executives who resigned to take up employment with competitors, over recent years.

Where Australian employees have contracts with major companies such as Facebook and Google, these are generally with the Australian subsidiaries of those companies and subject to local laws.

At the time of ceasing employment, sit down with your employer and discuss the application of, and negotiate the terms of, any restraint. In practice, an employer is often satisfied to avoid litigation and instead receive an undertaking from the employee in relation to involvement with key clients, and/or the use of confidential information and intellectual property.

Where an employer attempts to enforce an international restraint clause, do not agree to accept application of the clause in an Australian court unless there are practical reasons for doing so.

Finally, even if there are legal doubts as to the enforceability of a non-compete clause, if an employer wishes to pursue it, the effect for an employee will be unchanged.

EU Antitrust Regulators Went After Google. Now They're Going After Amazon...

Karla Nader, Lawyer, MinterEllison provides an overview of the European Commission's recent competition investigations

In the past two years alone, the European Commission (**EC**) has ordered Google to pay €6.76 billion in fines for abusing its dominant market position. The EC's Competition Commissioner, Margrethe Vestager, has said that Amazon is next in line, with preliminary investigations into its use of merchant data already underway.

The EC's investigations have revealed the unique ability that these digital platforms have to influence competition in certain markets. The combination of their market power, ability to act as both host and competitor to third parties using their services, and access to user generated data, places them in a position to not only better understand the markets in which they operate, but to manipulate them, whether intentionally or not.

Google decisions

Google's search engine uses algorithms to generate results in response to user queries ranked in order of relevance. In November 2010 the EC commenced antitrust investigations into Google for allegedly abusing its dominant position as a search engine to promote its comparison shopping service (**Google Shopping**) and demote rival comparison shopping services in its search result rankings.

The EC handed down its decision in 2017, fining Google €2.42 billion for illegally abusing its market dominance, and ordering it to end its illegal conduct within 90 days or face penalty payments (**2017 Google Decision**).

In circumstances where users of the Google search engine typically only look at the top 3-5 search results, the EC found that the impact of Google's conduct was to increase online traffic to Google Shopping and decrease traffic to its competitors. Vestager described this conduct as illegal because it *'...denied other companies the chance to compete on the merits and to innovate...'*[1]

The EC's investigations have drawn attention not only to the dominance of digital platforms such as Google and Amazon, but also to their unique role as both host and competitor to third parties using their services.

In July 2018 the EC fined Google a further €4.34 billion for abusing its dominant market position in three ways:

- requiring Android mobile manufacturers to pre-install Google apps as a bundle on Android devices;
- granting device manufacturers financial incentives on the condition that they exclusively pre-install Google Search across all Android devices; and
- obstructing the development and distribution of competing Android operating systems, (**2018 Google Decision**).[2]

Amazon investigation

The EC's Competition Commissioner was recently asked about anti-trust concerns in relation to Amazon. She confirmed that a preliminary investigation into Amazon was underway, saying:

'...If you as Amazon get data from smaller merchants that you host, which can be, of course, completely legitimate because you can improve your service to these smaller merchants, do you then also use this data to do your own calculations as to what is the new big thing?...What kind of offers do [consumers] like to receive? What makes them buy things?'[3]

Whilst the investigation into Amazon is still in its early stages, Vestager's comments have highlighted the potential for vertically integrated digital platforms to use data generated by users to their own competitive advantage.

Key takeaways

The expansion of digital platforms poses a threat to competition in various markets. The 2017 and 2018 Google Decisions alone, show the diverse range of services offered by the tech giant — acting not only as a search engine (where it enjoys over 90% market share in many parts of the world including many European countries and Australia),[4] but also

1 European Commission, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (27 June 2017) http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

2 European Commission, *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine* (18 July 2018) http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

3 see Q&A on the Amazon investigation at https://ec.europa.eu/avservices/video/player.cfm?ref=I160574.

4 See European Commission above at n 1; and IBIS World report on Search Engines in Australia http://clients1.ibisworld.com.au/reports/au/industry/majorcompanies.aspx?entid=5505#MP11646

as a comparison shopping website and software developer for smart phones, among other things.

Amazon does not enjoy the same market share as Google, but has nonetheless been described as *'the titan of twenty-first century commerce'*, acting as retailer, marketing platform, payment service, credit-lender, book publisher and fashion designer, to name a few.[5]

The ability of these platforms to act across multiple markets, places them in a powerful position to influence competition. It has allowed them to play the role of both host and competitor to third parties benefiting from their services, putting them in a position to promote their own goods and services over those of competitors.

In addition to this, their role as host grants them access to the data generated by users of their platforms entering queries or making purchases. This gives them a greater understanding of the push and pull factors in relevant markets, and could be used, as is the allegation against Amazon, to their advantage when competing in those markets.

Digital platforms are further empowered by the fact that this behaviour is difficult to detect. The algorithms that dictate the functioning of online platforms are protected as confidential business information, making it difficult to determine if platforms are intentionally promoting their own services over those of third parties benefiting from their platform. It is similarly difficult to detect whether an online platform is using consumer generated data to gain a competitive advantage, as these platforms are generally quite opaque about the way in which such data is used.

The Australian Government has recently raised similar concerns about the ability of digital platforms to shape relevant markets. On 4 December 2017, then Treasurer, Scott Morrison, instructed the Australian Competition and Consumer Commission (**ACCC**) to conduct an inquiry into the impact of digital platforms on the state of competition in media and advertising markets. The Terms of Reference indicate concerns with the way that digital platforms exercise market power and affect the level of choice and quality of news content available to users. The inquiry is still underway with the preliminary report due to the Treasurer on 3 December 2018, and the final report due on 3 June 2019.

Conclusion

The EC's investigations have drawn attention not only to the dominance of digital platforms such as Google and Amazon, but also to their unique role as both host and competitor to third parties using their services. This enables them to access data generated through the use of their platforms, and use that data to their advantage.

Together, these factors place digital platforms in a powerful position to understand and manipulate certain markets. Whether or not they do so is a question of how they choose to use their power.

Karla Nader is a lawyer in the Competition and Regulatory practice at MinterEllison.

5 Khan, Lina, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710, 710.

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**

Interview with Amritha Thiyagarajan, Head of Social Ventures and Senior Lawyer at LegalVision

CAMLA Young Lawyers representative, Christian Keogh, recently caught up with Amritha Thiyagarajan to discuss her role as Head of Social Ventures and Senior Lawyer at LegalVision, and her work in the NewLaw space.

CHRISTIAN KEOGH: Amritha, thanks for your time and for agreeing to be profiled for this quarter's CLB. Can you tell us a bit about LegalVision, and what your role involves as Head of Social Ventures and Senior Lawyer at LegalVision?

AMRITHA THIYAGARAJAN: Thanks Christian. LegalVision is a commercial law firm that's all about using innovation and custom-built technology to help our lawyers provide efficient and cost-effective legal advice & support. We've been growing quickly and I think that really comes down to how we like to do things differently - both in terms of how we deliver legal work, as well as re-defining what it means to work at a law firm (we have an amazing in-house chef, Lucia, for starters!).

As Head of Social Ventures, I have the exciting responsibility of establishing our firm's pro bono practice and managing opportunities for our staff to make a difference in the community. I also sit on the management committee, to represent what our CEO has dubbed the "youf" voice in decisions around the management and running of our law firm. As a Senior Lawyer in Legal Transformation, I work with our team of talented developers and lawyers to design and lead the delivery of client-facing and internal legal transformation projects.

KEOGH: Who are the typical clients you advise at LegalVision, and what are the main issues they are facing today?

THIYAGARAJAN: I mainly work with large corporates and ASX200 companies. Through our conversations with large corporates, we often hear about pressures to keep legal spend down and a desire among in-house lawyers that they had more time to focus on strategic projects (rather than 'business as usual' work). Most of my work revolves around LegalVision's managed services model - which speaks to the main issues faced by our clients. At its core, a managed legal service packages together process design, technology and legal expertise and allows in-house legal teams to outsource work in a way that is more efficient and cost-effective than the traditional legal model.

KEOGH: What took you from a career in a traditional law firm to a NewLaw firm like LegalVision?

THIYAGARAJAN: Having spent years as a summer clerk, paralegal and graduate lawyer in a traditional practice, I witnessed first-hand the limitations - and strengths - of the conventional legal services model. I saw really clear opportunities to harness the strengths of traditional law, while at the same time innovating to address the root causes of disproportionate costs, inefficiencies and client dissatisfaction. When I came across LegalVision, I was inspired by the firm's journey since beginning as an online platform for legal documents, and was sincerely excited about what

lay ahead in disrupting the delivery of legal work. I joined LegalVision as a junior lawyer in 2016 and haven't looked back.

KEOGH: Do you have any advice for young lawyers who are considering a non-traditional legal career?

THIYAGARAJAN: Don't be afraid to try something new. If you don't like the direction you've taken your career in, you can always divert back to your original path. Nothing is forever, and every skill that you develop, and each different position you occupy, will give you some kind of transferable skill or knowledge (even if it isn't immediately obvious exactly where or when you'll need to call upon the particular skill).

I was told I was crazy for making the jump to NewLaw even before I'd properly wrapped up my graduate rotation at my previous law firm. At the time I made the leap, I honestly let the critics get inside my head a little bit and wondered if I should do the 'right' thing or the 'sensible' thing and get more years of traditional legal experience under my belt. I know now that how good you are at your job, or how quickly you can progress through the ranks, is not just about the number of years you've been working. It's also about other qualities - like being autonomous, adaptable, efficient, engaged. Those qualities can be built up in any role - it's not unique to the traditional legal position you might be in at the moment.

KEOGH: What is the greatest lesson you have learnt in your career as a lawyer so far?

THIYAGARAJAN: Don't be afraid to ask for more responsibility or new opportunities. Do you want to take some time off to volunteer overseas? Do you want to work part-time so that you can see if you can turn your side hustle into a full-time gig? The only way you'll know whether you can do these things is if you ask. I'm a firm believer in creating your own opportunities. I spent 6 months last year working part-time for LegalVision and part-time for the Refugee Advice and Casework Service when there was an urgent need for legal assistance for people seeking asylum who arrived by boat. I was incredibly nervous when I sat down with our CEO to ask if I could make the switch from full-time to part-time for a short while. I'd never heard of anyone being a part-time franchising and part-time human rights lawyer and wondered if I'd be laughed out the door, but I figured "what do I have to lose?".

KEOGH: I see that you have been very involved in access to justice work, including your work with the Refugee Advice & Casework Service and The Oaktree Foundation. How has that involvement influenced the way you go about your role as Head of Social Ventures at LegalVision?

THIYAGARAJAN: It's given me a solid practical understanding of how non-profits and human rights organisations work. I also saw just how valuable partnerships with law firms and corporates can provide much-needed in-kind and financial assistance. Private partnerships can often provide stability and certainty in the face of fluctuating funding from public sources. It makes me excited for the sheer potential of our Social Ventures initiatives, as I know just how much of a difference even one individual can make - backed by over 100 employees, I feel like LegalVision has the resources and the capacity to make a huge impact in this space.

KEOGH: What advice would you give to young lawyers about achieving and maintaining balance in their lives?

THIYAGARAJAN: When it comes to achieving balance, I think it's all about working on understanding your limits and then practising standing firm. This looks for different for everyone. I know some of my colleagues jump out of bed at 4 am to get a head-start on the day, and they smash through their to-do list so that they can leave by 5 pm and work on their side hustle or go pick up their kids. Me? I will fight anyone who tries to get me out of bed before 8 am. I work at my peak in the evening, so I keep this in mind when setting my work routine.

As for maintaining balance, do what recharges you (particularly when you're at or nearing your limits). If you haven't quite figured out the secret to re-charging, that's okay - just keep trying different things and know that the meditation app or 5k run that works for someone doesn't have to work for you. And just remember, there's nothing long with a good Netflix binge every now and then.

Christian Keogh is a commercial and regulatory lawyer at Webb Henderson.

CAMLA Young Lawyers Year in Review

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.

This year's CAMLA Young Lawyers' Committee has comprised a diverse and gregarious team of young lawyers from across the communications and media sectors, including; Jennifer Arnup (ABC), Michael Boland (Seven), Amy Campbell (HWL Ebsworth), Julie Cheeseman (Ashurst), Chris Chow (Chris Chow Creative), Ashleigh Fehrenbach (Minter Ellison), Ishan Karunanayake (TMRW), Marie Karykis (Foxtel), Nicholas Kraegen (Baker McKenzie), Christian Keogh (Webb Henderson), Eva Lu (Thomson Geer), Joel Parsons (Bird & Bird) and Calli Tsipidis (Fox Sports). We also wished Tom Griffin (Data Republic) and Maggie Chan (King & Wood Mallesons) all the best in their new opportunities in-house and abroad.

We kicked off 2018 with the CAMLA Young Lawyers' Networking Event held at King & Wood Mallesons. The event took the form of a panel discussion followed by networking for law students and young lawyers with an interest in the media and communications industries. This year the panel included Jonathan Carter (APRA/AMCOS), Matthew Lewis (5 Wentworth Chambers), Kirsty McLeod (Ten) and Cate Nagy (King & Wood Mallesons) who discussed their career paths, professional insights and some tips on successful networking. The winners of the CAMLA essay competition were also announced, with congratulations to Penelope Bristow (University of Queensland), Claudia Carr (Curtin University) and Anna Belgiorno-Nettis (Gilbert + Tobin).

In light of the recent movements in respect of privacy law and implementation of the GDPR, our mid year breakfast seminar was held at Minter Ellison with the theme of Privacy Law Essentials. Our guest speakers included Veronica Scott (Minter Ellison), Anna Johnson (Salinger Privacy), Peter Leonard (Data Synergies) who provided insights into this ever changing and challenging field.

Our most recent event, the Speed Mentoring evening was held on 25 October at Baker McKenzie with great success. Mentors this year included Kate Andrews (Seven), Sam Berry (DVM Law), Gillian Clyde (Beyond International), Michael Mueller (Optus), Courtney Scallan (Banki Haddock Fiora), Rochelle Schuenker (Amaysim) and several of the Young Lawyers. Together the mentors graciously provided mentees with anecdotal accounts and advice.

Throughout the year the Young Lawyers also reported back on CAMLA events and interviewed and profiled some prominent figures in the sector. These opportunities provided valuable introductions to the team and broader CLB readership.

Whilst the calendar year is wrapping up we are busy planning our next Networking Event to be held in early 2019, where we will also be announcing the 2019 Essay Competition winners. If you are a student or have not yet reached 5 years PQE please send your submissions our way. Entries close 18 January 2019.

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 2019. Please email your expression of interest to camla@tpg.com.au with your name and organisation in the subject line by Friday 14 December 2017.

We appreciate the exceptional support from our many supporting individuals, firms and organisations and would like to thank them for their generosity throughout the year. I would like to thank Jennifer and Ashleigh for their contributions to the Committee in their roles of co-secretary. Lastly, the Young Lawyers would like to thank the Martyn Taylor and the CAMLA Board whose advice and advocacy have been invaluable.

We look forward to seeing you all at the CAMLA AGM on 29 November 2018.

With thanks,
Katherine

Katherine Sessions
Chair CAMLA Young Lawyers' Committee
Australian Communications and Media Authority

About CAMLA

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

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

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

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

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

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The Communications Law Bulletin is the journal of the Communications and Media Law Association which is an independent organisation which acts as a forum for debate and discussion and welcomes the widest range of views. The views expressed in the Communications Law Bulletin and at CAMLA functions are personal views of the respective authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

For further information:

Visit the CAMLA website at www.camla.org.au for information about CAMLA, CAMLA seminars and events, competitions and the Communications Law Bulletin.

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