Communications Law BULLETIN

CAMLA

Communications & Media Law Association Incorporated

Print Post Approved PP: 100001546

Communications Policy Settings in a Time of Unprecedented Technological Change

In a speech to CAMLA members and guests on 18 September 2014, the Honourable Paul Fletcher Parliamentary Secretary to the Minister for Communications discussed the impact that unprecedented technological change is having on traditional policy assumptions in the communications sector and the policy approaches of the Federal Government to deal with these challenges.

We are living through an age of unprecedented technological change, and this has profound implications for communications policy in Australia.

To start with, I will review some indicators that we are undergoing unprecedented change; next I will point out how this is challenging many of the assumptions which have underpinned communications policy in Australia; and thirdly I will suggest some principles of policy making to deal with such change.

Unprecedented rate of change

There are numerous indicators showing of the unprecedented rate of technological change we are experiencing.

The amount of data generated in the world last year was approximately 4.4 zettabytes – about 33 times the data generated in 2005.[1]

One good case study is the rate at which successive mobile phone technologies were commercially introduced in Australia. Analogue mobile telephony came along in the eighties, GSM in the early nineties, CDMA arrived in 2000 (and exited in 2008) [2], we had 3G introduced by Hutchison in 2003[3], Telstra introduced 4G in 2011 and already there is talk of 5G.

Similarly, we have seen mobile go from being a voice to a data technology, and increasingly applications are delivered over the data layer, often by a third party rather than the network operator. For example, whereas under the GSM standard for mobiles the short messaging service—SMS—was an intrinsic part of the standard, now short message services are typically delivered by over-the-top IP applications like iMessage on iPhones or stand-alone applications like Viber.

The rate of uptake of the latest iteration of mobile technology is a further indicator of this change: in the two years to 2013 smartphone penetration has increased by around 34 per cent. Over that same period data downloads over smartphones increased by 453 per cent.[4]

1 http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm and http://www.emc.com/leadership/digital-universe/2014iview/digital-universe-of-opportunities-vernon-turner.htm

2 http://www.crn.com.au/News/109389,telstra-closes-its-cdma-network-today.aspx

3 http://www.smh.com.au/business/final-countdown-for-3-as-telstrahutchison-sharing-deal-ends-20120704-21hil.html

4 ABS (2013), Internet activity: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8153.0Chapter8December%202013

Volume 33 N°4
November 2014

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Similarly you could look at television. Black and white was commercially introduced in Australia in 1956, colour came along nearly twenty years later in 1975, digital television was introduced in 2001 and in 2014 we are seeing the introduction of the next phase: hybrid broadcast broadband TV (HbbTV).

In sector after sector, traditional analogue means of generating and disseminating content are being replaced with newer digital technologies: digital television, digital radio, digital phone technologies such as GSM replacing analogue, voice telephony being replaced by voice over IP, analogue audio tapes and records being replaced by MP3 files, even film reels being replaced by movies stored and shown as digital files.

Increasingly the high-margin products of the telcos are under threat from over the top IP-based operators such as Skype and Viber

We have also seen unprecedented changes in the economic importance of traditional industry players and newer players. Between 2003 and 2013, the market capitalisation of Fairfax and TEN fell by 80 per cent and 87 per cent respectively, while that of online jobs market Seek.com was up by 500 per cent and online real estate portal REA was up by 900 per cent.[5]

Challenging Many Assumptions

The unprecedented rate of change is challenging many of the assumptions upon which communications policy settings have traditionally been based.

The first assumption is that government can regulate all services that citizens in its own jurisdiction are able to receive.

Until the mid-nineties, it was virtually impossible for an Australian consumer to access content which was not generated or disseminated by an Australian-based company. You got your radio and television from broadcasters based in Australia; you read newspapers published in Australia; you read books or magazines which, even if published overseas, were distributed within Australia by companies with a local presence – hence it was a fairly straightforward process to regulate for matters such as content.

But today this basic assumption does not hold. Thanks to the internet, Australians can access content which could be generated by a party anywhere in the world.

Another traditional assumption was that only a few parties had the capacity to generate and disseminate content to large numbers of people, because it was very expensive to do so.

Today, almost anybody can generate content which can be seen or read by millions on YouTube, Twitter, or a blog. This presents a massively more challenging exercise for governments seeking to regulate content. Of course, regulating content does not necessarily have a sinister meaning; one good example is classification of content into age appropriate categories.

A second assumption now under challenge is that government can provide a valuable right, such as the right to broadcast radio or television signals, and because the economics of the businesses which use that right are compellingly attractive, you can justify imposing expensive regulatory obligations on those businesses.

Broadcasters for example are required to meet local content quotas, adhere to classification and advertising regulations, and pay licence fees. Increasingly this traditional bargain is being disrupted, because competitors using alternative internet-based distribution mechanisms are making the traditional business models of the broadcasters less attractive.

5 Fairfax's share price has risen this year so currently it is around 70 per cent down on 2003 levels.

There is no Australian content requirement that Netflix has to meet – even though Netflix is competing with traditional broadcasters and already some 200,000 Australians are estimated to have Netflix accounts.

The same trends are affecting telecommunications network operators. The traditional regulatory assumption has been that running telecommunications networks is lucrative, and hence imposing expensive burdens like the universal service obligation can be justified.

But increasingly the high-margin products of the telcos are under threat from over the top IP-based operators such as Skype and Viber. The risk is that the returns captured by the party which incurred the capital cost to build the physical network may become so low that there is no longer an incentive to maintain or expand the network.

Another assumption under challenge is that we can readily differentiate between a basic product and a premium product. For example, much of the regulatory framework in telecommunications assumes that the fixed line service is the basic service which everybody uses and mobile is the luxury option which is a nice-to-have but is not ubiquitous.

Whether those assumptions remain valid is very much a live question. After all, the mobile network is now the default network over which many Australians make their phone calls—fixed-line is what you use if you cannot get a mobile service. By December 2013 only 75 per cent of Australian adults had a fixed-line in the home, a fall of 13 per cent in four years.[6]

Another traditional assumption is that different networks and technologies deliver different services – an assumption reflected in the three key pieces of legislation regulating the sector (the *Telecommunications Act 1997,* the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992*).

Today, when every newspaper has a website which also carries video and is competing against websites from around the world, how valid are detailed regulatory constructs which divide media businesses into different categories of print, radio and television?

If the end result to the consumer looks the same regardless of how it is delivered, the traditional assumption that different regulatory frameworks apply to these three different services is increasingly hard to justify.

Policy making principles that make sense

The very rapid change in technology clearly creates significant challenges for communications policymakers. There are no easy answers – but there are at least some key principles of regulation that it makes sense to apply.

The first principle is to regulate in a way which is technology-neutral.

This is an easy thing to say and not necessarily an easy outcome to navigate to, particularly given that the starting point is a set of industry and technology specific regulatory frameworks. For example, we have one approach to regulating spectrum for broadcasters and another for every other spectrum user.

The government is not likely any time soon to abandon the framework which applies to broadcasting spectrum, but it is looking at ways to provide greater flexibility in the way spectrum is allocated to and used by broadcasters.

This follows a global trend towards a more flexible approach to spectrum, as the chairman of the United States Federal Communications Commission Tom Wheeler recently noted:

> Slavishly sticking to analog age concepts of spectrum allocation can become, in the digital age, a government-imposed chokepoint that burdens competition and innovation by creating unnecessary and artificial scarcity of this essential resource.[7]

The next principle of regulation is global alignment: in a technology-rich area like communications, it is important to align regulatory settings in Australia with those in other jurisdictions.

Again, spectrum regulation provides a good example of this. By aligning Australia's usage of spectrum bands with other countries we can unlock greater economies of scale for mobile handset manufacturers, delivering lower prices to consumers.

Another example is content classification. Consider for example content on the Apple iTunes platform, widely consumed by Australians. The Australian government has legislated a system of classification for film and TV content. Apple classifies content using its own system, which is essentially an amalgam of the classification systems in the US and Europe. Does this mean that national content regulation systems like Australia's will have increasingly less work to do?

The flip side of global alignment is that governments in the internet age need to recognise their limitations.

A wise government will have a bias towards less regulation rather than more; to facilitating competition and a level playing field

An example of this is the Abbott Government's policy to enhance online safety for children, where we are legislating to provide regulations which will apply to 'large social media sites'. In other words, we are seeking to apply the legislation to companies that are sufficiently large, and that have a sufficient degree of activity in Australia – including employees and advertising revenue – such that we can have a degree of confidence that for both purely legal and also corporate reputational reasons they will comply.

Conversely, we are not purporting to cover the field and regulate for social media sites regardless of size and regardless of where in the world they may be located – this would be a futile exercise.

Finally, an important principle is to have a regulatory bias towards encouraging innovation, flexibility and new entry, rather than towards protecting incumbents.

When consumers rush to take up a new digitally-based product or service, that is strong evidence of the value that new product brings.

When industry after industry is being disrupted by new entrants with a better business model using superior digital technology, it is not surprising that there will be political pressures generated by existing businesses. But a wise government will have a bias towards less regulation rather than more; to facilitating competition and a level playing field rather than maintaining cosy arrangements which favour existing players; and to letting the market decide whether a new technology-based way of serving a consumer need is superior to the existing ways of doing it.

Conclusion

The pace of technological change clearly creates significant challenges for communications policymakers. There are no easy answers – but there are some key principles of regulation that it makes sense to apply.

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6 ACMA, 'Older Australians resist cutting the cord' – Fewer fixed-line telephones, more mobiles heading (web article), and 'Figure 1: Change in use of fixed-line telephone and mobile phone' (excel document), http://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Older-Australians-resist-cutting-the-cord

7 Wheeler, T., (2014), "FCC Chairman Tom Wheeler Remarks at the Computer History Museum", http://www.fcc.gov/document/fcc-chairman-tom-wheeler-remarks-computer-history-museum

Keeping it in Proportion: Recent Cases on the Implied Freedom of Speech

The implied constitutional freedom of political communication has been continually considered in a range of Australian courts, shifting the consideration of the test established in Lange. Sophie Dawson and Rose Sanderson provide an overview of these developments through an analysis of recent case law.

Introduction

The implied constitutional freedom of speech is alive and well, and is continuing to play an important part in shaping Australian laws. There have been more than 15 significant cases involving the implied freedom in the last 4 years. 2013 was a bumper year, with 7 significant cases.

These cases have all affirmed key principles at the core of the implied freedom. Unlike the Constitution of the United States, the Commonwealth of Australia's Constitution does not expressly protect 'freedom of speech'.[1]

Rather, the courts have recognised an implied freedom of communication, specific to political and government issues.[2] The implied freedom of communication extends to communication relating to government and political matters. Unlike the freedom of speech in the United States[3] (and indeed that in Canada), the implied freedom does not confer any individual right. Rather, it is 'a freedom from laws that effectively prevent members of the Australian community from communicating with each other about political and government matters.'[4]

The 'reasonably appropriate and adapted' aspect of the second limb of the Lange test is commensurate with, and can be expressed as, a judgement as to 'proportionality'

Recent cases have confirmed that the implied freedom extends to state and local political and government matters.[5] They have also confirmed that a law which directly imposes a burden on communication about government or political matters is more likely to be invalid than those which do so incidentally.[6]

The key development is confirmation that the 'reasonably appropriate and adapted' aspect of the second limb of the Lange test is commensurate with, and can be expressed as, a judgement as to 'proportionality'.

This article first considers the two High Court decisions concerning the implied freedom which were delivered together on 27 February 2013, and a further High Court decision delivered on 18 December 2013. It then considers some decisions in other Australian courts which further illustrate the approach taken by the High Court in the last couple of years.

The Lange Test

Before embarking on a review of some recent cases, it is useful to revisit the core principles. The High Court of Australia in *Lange v Australian Broadcasting Corporation* upheld the view that the Constitution gives rise to an implied freedom of political communication to protect the discussion of 'government and political matters.'[7]

To determine whether legislation is inconsistent with the implied freedom of political communication in the Constitution, the *Lange* test, as modified by *Coleman v Power*[8] has traditionally been applied. The test has two limbs and asks the following questions:

- Does the law effectively burden the freedom of political communication about government or political matters, either in its terms, operation or effect?
- If the answer is yes, is the law reasonably appropriate and adapted to serve a legitimate end, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Some recent cases

High Court: Ban on preaching on roads

In *Attorney-General for the State of South Australia v Adelaide City Corporation and Others*,[9] the High Court considered Adelaide's preaching ban. Council By-Law No 4 provides that no person shall, without permission, on any road:

- preach, canvass, harangue, tout for business or conduct any survey or opinion poll; or
- give out or distribute to any bystander or passer-by any handbill, book, notice or other printed matter.

The first limb was decided without issue.

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1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

2 *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Hogan v Hinch* (2011) 243 CLR 506; *Wotton v Queensland* (2012) 246 CLR 1.

3 *United States Constitution* amend I.

4 *Levy v Victoria* (1997) 189 CLR 579, 622 (McHugh J).

5 *Unions New South Wales & Ors v New South Wales* (2013) 304 ALR 266.

6 *Hogan v Hinch* (2011) 243 CLR 506.

7 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

9 (2013) 249 CLR 1.

There were 6 judges sitting and 5 separate judgments, with each taking a slightly different approach to the second limb. All but one of the judges (Heydon J) found that the laws under consideration were valid, and each took into account practical considerations as to ensuring roads and other areas the subject of the challenged law were free of obstruction.

A key issue which arises from the judgments in this matter and in Monis v The Queen[10] is whether the second limb of the Lange test includes a proportionality test. In *Lange* the idea of proportionality was mentioned as follows:

> Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts.[11]

In *Coleman v Power* Kirby J preferred the 'proportionality' approach to the 'reasonably appropriate and adapted' test on the basis that the latter incorrectly suggests that the Court is concerned with the 'appropriateness' of legislation.[12] However, prior to this case, a 'proportionality' test had not been adopted by a majority of the High Court.

It is important to note that if any concept of proportionality applies, then it is not necessarily the same as the proportionality test applying in other jurisdictions. In *Becker v City of Onkaparinga*[13] in 2010, the Full Court of the South Australian Supreme Court rejected the notion that the Canadian concept of 'proportionality' might apply, and emphasised the differences between the implied freedom and the relevant principles in Canada, finding that the Canadian law developed 'in a fundamentally different context'.[14]

In *Attorney-General for the State of South Australia v Adelaide City Corporation and Others*,[15] Crennan and Kiefel JJ considered the question in the second limb of the *Lange* test as one of proportionality and treated this as having two distinct parts:

- *Is the law proportionate to its object?* This, of course, requires a consideration of the object of the law. Their Honours asked the question of whether there were other, less drastic means available.
- *Is the law proportionate in its effects on the system of representative government, which is the objective of the implied freedom?* Their Honours referred to *Monis v The Queen*,[16] where the court explained that this question involves an assessment of the extent to which the law is likely to restrict political communication.

Their honours answered each of these questions in the affirmative.

French CJ also considered and applied a proportionality test. Hayne, Heydon and Bell JJ did not discuss any proportionality test in their judgements in this case. However, Hayne J did comment on this issue in the *Monis* case, discussed below, which was delivered on the same day. In particular, Hayne J said that when answering the second *Lange* question, the court must make a judgment which '… may be assisted by adopting the distinctive tripartite analysis that has found favour in other legal systems. On this analysis, separate consideration is given to questions of suitability, necessity and strict proportionality. But whatever structure is used for the analysis, it is necessary to consider the legal and practical effect of the impugned law.'[17]

Likewise, Bell J expressed support for a proportionality test in her joint judgment with Crennan and Kiefel JJ in *Monis*.[18] Thus, the judgements together made it clear that a 'proportionality' approach had the support of a majority of the Court. The court considered that 'proportionate' had the same effect in this context as 'reasonably appropriate and adapted.'[19] Crennan, Kiefel and Bell JJ considered whether the *Lange* test should now be changed to replace 'reasonably appropriate and adapted' with the proportionality test, and expressed the view that the concept of 'proportionality' is clearer.[20]

A key issue which arises from the judgments in this matter and in Monis v The Queen[10] is whether the second limb of the Lange test includes a proportionality test

In his dissenting judgement, Heydon J pointed out the importance of freedom of speech, quoting Lord Steyn in *R v Secretary for Home Department; Ex parte Simms*[21] at 126:

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.[22] Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[23]

However, in *Monis*, discussed below, Heydon J doubted whether the implied constitutional freedom should continue at all.[24]

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10 [2013] 249 CLR 92.

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.

12 *Coleman v Power* (2004) 220 CLR 1, [235].

13 *Becker and Another v City of Onkaparinkga and Another* (2010) 108 SASR 163.

14 *Becker and Another v City of Onkaparinkga and Another* (2010) 108 SASR 163.

15 (2013) 249 CLR 1.

16 (2013) 249 CLR 92.

17 *Monis v The Queen* (2013) 249 CLR 92, [144] to [145].

18 *Monis v The Queen* (2013) 249 CLR 92, [278] to [283].

19 *Monis v The Queen* (2013) 249 CLR 92, [283].

20 *Monis v The Queen* (2013) 249 CLR 92, [344] to [346].

21 [2000] 2 AC 115.

22 Abrams v United States [1919] USSC 206; 250 US 616 at 630 (1919) (Holmes J dissenting).

23 *Attorney-General for the State of South Australia v Adelaide City Corporation and Others* (2013) 249 CLR 1, [151].

24 *Monis v The Queen* (2013) 249 CLR 92, [251].

High Court: Prohibition on offensive communications

In *Monis v The Queen*,[25] the High Court considered whether a provision in the Criminal Code which prohibits using a postal or similar service in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive' is consistent with the implied freedom of political communication. A Sydney man had been found guilty of the offence for having sent letters to relatives of people who had died in Afghanistan which were highly critical of Australia's involvement in the region and which the Courts below had found made derogatory statements about the relatives who had died.

All six judges held unanimously that the provision in question burdened political communication.[26] Hayne J found that 'effectively burden' means no more than 'prohibit, or put some limitation on, the making or the content of political communications'.[27] Crennan, Kiefel and Bell JJ noted, however, that an 'effect upon political communication which is so slight as to be inconsequential may not require an affirmative answer to the first limb enquiry'.[28]

The recent decisions made in 2013 support a broad approach to the first limb of the Lange test

However, the Court was split evenly on the second limb of the *Lange* test. As a result, the finding of the Court of Appeal that the provision was valid was affirmed. Crennan, Kiefel and Bell JJ construed the provision narrowly so that it only applied to 'seriously' offensive communications and found that, so construed, it was valid. French CJ, Heydon J and Hayne J held that the purpose of s 417.12 is simply to prevent the use of postal services in a way which is capable of being offensive. For slightly different reasons, they held that this is not a legitimate purpose with respect to the *Lange* test. Hayne J described it as an attempt to 'regulate the civility of discourse'. French CJ and Heydon J found that it was appropriate to find the law invalid rather than reading it down because there were multiple ways in which it could have been limited and there is no reason based on the law to choose one over another.

High Court: Political donations

The High Court again considered the implied freedom in its December 2013 judgment in *Unions New South Wales & Ors v New South Wales*.[29] The High Court confirmed that political communication at a state level is included in the protection of the implied freedom, and that political communication at a state level may have a federal dimension. The majority also confirmed that it is appropriate to take a 'proportionality' approach, though they did not abandon the 'reasonably appropriate and adapted' test. In a joint judgment, French CJ, Hayne, Crennan, Kiefel and Bell JJ found that:

> Where a statutory provision effectively burdens the freedom, the second limb of the *Lange* test, upon which the validity of s 96D may be seen to depend, asks whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government.[30]

The High Court had to consider whether a law restricting political donations imposed a burden on political communication.[31] The majority applied *Levy v Victoria*,[32] and found that the restriction does impose such a burden.[33]

The court reiterated that the implied freedom is not a personal right, but rather, a protection from interference.[34] As a result, non-electors as well as electors are entitled to the protection.[35]

The *Unions New South Wales & Ors v New South Wales* case is one of the few in which the law in question failed to meet the requirements of the second limb of the *Lange* test.

Under the provision in question, certain sources of political donations were treated differently from others. The majority found that it was not evident, 'even by a process approaching speculation', what the provision in question sought to achieve by 'effectively preventing all persons not enrolled as electors, and all corporations and other entities, from making political donations' and found that in those circumstances, the provision failed the second limb of the *Lange* test.[36] Keane J in a separate judgment similarly found that the effect of the differential treatment in the law was to 'distort the free flow of political communication' by favouring particular categories of entities, and agreed that the law was invalid.[37]

Federal Court: Restriction activities affecting protests

Protests in 2013 in Sydney and Melbourne led to two Federal Court judgments dealing with the validity of laws which, like the law considered in the *Adelaide City Corporation* case above, had the effect of restricting activities in certain public places. Consistently with *Adelaide City Corporation*, the Federal Court found in each case that the law in question did impose a burden on political communication as it affected the ability of protesters to put their message forward in the way that they considered most effective, and also found that it was reasonably appropriate and adapted to a legitimate end. Both of the relevant laws were therefore found to be valid.

The first of these decisions related to the 'Occupy Sydney' protests. The City of Sydney erected signs prohibiting staying overnight in Martin Place pursuant the *Local Government Act 1993* (NSW).[38] Mr O'Flaherty, a protestor, sought a declaration that the prohibition be struck down as unconstitutional in light of the implied freedom. In

25 (2013) 249 CLR 92.

26 *Criminal Code 1995* (Cth) s 471.12.

27 *Monis v The Queen* (2013) 249 CLR 92, [108].

28 *Monis v The Queen* (2013) 249 CLR 92, [343].

29 (2013) 304 ALR 266.

30 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [44].

31 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [51] to [60].

32 (1997) 189 CLR 579.

33 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [97].

34 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [109] to [119].

35 *Unions New South Wales & Ors v New South Wales* 304 ALR 266.

36 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [32].

37 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [164] to [168].

38 *O'Flaherty v City of Sydney Council* [2014] FCAFC 56.

the primary decision, which was affirmed on appeal, Katzmann J found that the non-verbal act of staying overnight constituted political communication.[39]

In a judgement delivered on 15 April 2013, Katzman J in the Federal Court found that the relevant law was valid as it was reasonably appropriate and adapted to its legitimate aim of protecting public health, safety and amenity in a busy public place where members of the public accessed the railway station.

The 'Occupy Melbourne' protests similarly triggered litigation which considered the implied freedom. In *Muldoon and Another v Melbourne City Council and Others*,[40] North J considered whether the implied freedom of political communication was infringed when protestors were served with notices to comply with by-laws which prohibited camping in a temporary structure, such as a tent, and erecting signage in a public place without a permit. In a judgement delivered on 1 October 2013, North J held that the by-laws did burden the implied freedom of political communication, as the tents and signs were essential in expressing the protestors' views on democracy and government in Australia. North J found that the term 'effective' burden operates as a low-level filter so that plainly inconsequential impediments will not needlessly require an examination of the more complex inquiries involved in answering the second *Lange* question.[41] In relation to the second element of the *Lange* test, North J found that the by-laws were valid, as they were reasonably appropriate and adapted to the legitimate end of preserving the public space and allowing access to public transport and amenities.

Victorian Supreme Court: Family Court intervention orders

In the 2013 case of *AA v BB*,[42] Bell J in the Victorian Supreme Court considered whether an intervention order made under the *Family Violence Protection Act 2008* (Vic) and the Act itself were invalid by reason of the implied freedom of political communication. The protected person was a candidate for federal parliament in an upcoming election. The intervention order prohibited the person's former spouse from publishing statements about the personal, family or professional life of the candidate.

When considering whether personal, family and professional suitability matters of a candidate running for election as a member of federal parliament is a matter concerning government and politics, Bell J cited *Theophanous v Herald & Weekly Times Ltd*,[43] before finding that these matters do concern government and politics:

> Criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office, particularly when an election is in the offing, is at the very centre of the freedom of political discussion.[44]

In finding that the answer to the first limb of the *Lange* test was yes, Bell J found that the provisions of the Act which were at issue did not directly authorise the imposition of burdens on the implied freedom of communication about government or political matters. However, the provisions indirectly imposed a burden as they had the capacity to authorise the making of intervention orders which would, if authorised, impose such a burden.[45]

Bell J found that the law and the orders made under it were valid. Her honour stated that significant factors in the decision included that the orders did not preclude any comment on the candidate's policies and the history of the particular matters.

Conclusion

The implied freedom of government and political speech is an important check on the power of Australian legislators. The recent decisions made in 2013 support a broad approach to the first limb of the Lange test. A variety of laws were found to impose a direct or indirect burden on political speech.

The decisions of the High Court discussed in this paper also make it clear that a proportionality approach should now be applied to the second limb of the *Lange* test. Thus, following these cases, the test is properly expressed as follows:

- Does the law effectively burden the freedom of political communication about government or political matters, either in its terms, operation or effect?
- If the answer is yes, is the law reasonably appropriate and adapted, or proportionate, to serve a legitimate end, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

It is clear from the number of cases and from their subject matter than the implied freedom still has an important role in determining the extent to which legislatures can restrict freedom of communication in Australia. It is likely to continue to do so in future.

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39 *O'Flaherty v City of Sydney Council* [2014] FCAFC 56. 40 (2013) 217 FCR 450.

41 (2013) 217 FCR 450, [369].

42 [2013] VSC 120.

43 (1994) 182 CLR 104.

44 *AA v BB* (2013) 296 ALR 353, [115].

45 *AA v BB* (2013) 296 ALR 353, [121], [122].

The New Privacy Act: Six Months On

Nikki Macor Heath gives an update on the activities of the Office of the Australian Information Commissioner (OAIC) and Privacy Commissioner and enforcement of the Privacy Act since the commencement of the reformed legislation.

Just over six months ago, on 12 March 2014, substantial changes to the Privacy Act 1988 (Cth) came into effect. The changes included a new set of Australian Privacy Principles and a complete overhaul of the credit reporting regime. So what, if anything, has been the effect of these changes? Has the regulator capitalized on the significant promotion of privacy law that came along with the reform process? Or has the new regime, so far, proved an anti-climax?

There has as yet been no opportunity for the Privacy Commissioner to flex his new enforcement muscles, so it is fair to say the early impact of the reforms has fallen a bit flat. It is also likely that the restructuring and relocation resulting from the disbanding of the OAIC announced in the recent Federal budget will hamper the Commissioner's efforts in the coming months. However, it is clear that the changes have made an impact on at least some organisations, which have sought permission to do certain activities strictly in breach of the Privacy Act, or admitted to breaches from several years ago. There are also continuing efforts to explain and refine the operation of the new provisions through rules and guidance.

There has as yet been no opportunity for the Privacy Commissioner to flex his new enforcement muscles, so it is fair to say the early impact of the reforms has fallen a bit flat

Disbanding and relocating

In its 2014 budget, the Australian government announced its intention to disband the OAIC by 1 January 2015 in order to achieve savings of $10.2 million.[1]

The Privacy Commissioner, along with his support staff, will continue to regulate the Privacy Act from new premises, taking an independent statutory position within the Australian Human Rights Commission. This comes only four years after the OAIC was established and with the completion of the transition of the Privacy Commissioner's website from privacy.com.au to oaic.gov.au still very recent memory.

It is difficult to identify from the public budget papers what the specific funding impact on the Privacy Commissioner will be, as forward funding is only listed for the Australian Human Rights Commission as a whole. Given the general tone of cost cutting in the budget, it is likely that funding will take a hit. However, even assuming the Privacy Commissioner's resources remain unaffected, the administrative burden associated with the disbanding and relocation is likely to have an effect on substantive operations over the short to medium term.

Organisations seeking permission

Throughout the privacy reform process, the banking sector and in particular the Australia and New Zealand Banking Group Limited (ANZ), consistently expressed concerns regarding the reshaped cross-border disclosure principle and its potential impact on banks' international operations. Having seen the final form of APP 8, ANZ and, later, the Reserve Bank of Australia, applied to the Privacy Commissioner for public interest determinations to 'allow them and other authorized deposit taking institutions to disclose the personal information of a beneficiary of an international money transfer (IMT) to an overseas financial institution when processing an IMT without breaching' the APPs.[2] The concern was that, as a result of the complicated international transfer system and the practices of certain overseas financial institutions and regulatory bodies, personal information may need to be disclosed beyond what would be permissible under APP 8.

The Commissioner made two temporary public interest determinations, one specifically for ANZ, the other generalizing to the broader industry, in response to the ANZ's application. The Privacy (International Money Transfers) Temporary Public Interest Determination 2014 (No. 1) and Privacy (International Money Transfers) Generalising Determination 2014 (No. 1) commenced on 12 March 2014 and 'have the effect that ANZ and all other ADIs are taken not to breach APP 8.1 when disclosing personal information of the beneficiary of an IMT to an overseas financial institution for the purpose of remitting the relevant funds to the beneficiary's financial institution for payment'. The ADI will also not be held responsible for APP breaches (other than of APP 1) by an overseas financial institution in relation to that personal information. A consultation process regarding the issuing of permanent determinations closed for comment on 4 August 2014.

Organisations begging forgiveness

Shopping deals website Catch of the Day confessed in June 2014 to a data breach which occurred in 2011 and which had not previously been notified to the Privacy Commissioner.[3] With the Commissioner having asked for more information, it is unclear at this stage whether Catch of the Day has just discovered the breach, or has known about it for some time and was inspired by the publicity around privacy law or the new enforcement regime to proactively notify the Commissioner in an attempt to minimise the regulatory action it may face.

Organisations getting caught

No specific post-commencement breaches have yet been identified; however the Privacy Commissioner published several reports in relation to data breaches occurring prior to commencement of

1 Budget Paper No. 2: Budget Measures, http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-05.htm.

2 'Consultation paper: International money transfers public interest determination applications', June 2014, http://www.oaic.gov.au/images/documents/privacy/engaging-with-you/pdf/consultation-paper-international-money-transfers-pid-applications.pdf.

3 Catch of the Day data breach — statement, 21 July 2014, http://www.oaic.gov.au/news-and-events/statements/privacy-statements/catch-of-the-day-data-breach/catch-of-the-day-data-breach-statement.

the Privacy Act reforms, which remain subject to the National Privacy Principles (NPPs). These included own motion investigation reports into data breaches involving a hacking attack on online dating service provider Cupid Media Pty Ltd[4] and publication on search engines of records held by security authentication company Multicard Pty Ltd.[5] Both were found to have contravened NPP 4 requiring organisations to take reasonable steps to protect personal information. Cupid Media stored passwords in unencrypted plain text files, and Multicard had insufficient restrictions in place to prevent access to its files by automated search robots. Due to the cooperation and responsiveness of the company in each case, the Commissioner closed its investigation without taking further action.

The Privacy Commissioner also announced its cooperation with 27 other privacy regulators around the world to examine mobile applications to identify privacy issues, with a focus on 50 of Australia's most popular applications.[6] Results of the 'app sweep' will be published later in the year.

Tweaks to the credit reporting framework

As the focus of the most substantial and substantive changes as part of the privacy reforms, and a complex area to begin with, it is not surprising that the credit reporting framework has been the subject of some further refinement post-commencement. The Privacy (Credit Reporting) Code 2014 has been varied and the Privacy Commissioner made the Privacy (Credit Related Research) Rule 2014.

Even assuming the Privacy Commissioner's resources remain unaffected, the administrative burden associated with the disbanding and relocation is likely to have an effect on substantive operations over the short to medium term

Voluntary APP code

The Association of Market and Social Research Organisations (AMSRO) was first off the blocks releasing a voluntary privacy code for consultation. The draft Privacy (Market and Social Research) Code 2014 sets out how the APPs and Privacy Act are to be applied in the context of the use of personal information in social and market research by AMSRO members.[7]

New publications

The OAIC has been busy for some time publishing new guidance to assist organisations to adjust to the reformed privacy law. Since March, new publications have included a 'Guide to developing an APP privacy policy' and a 'Guide to undertaking privacy impact assessments'. A revised 'Guide to Information Security: 'Reasonable steps' to protect personal information' has been released for consultation.

The Heartbleed bug made headlines earlier this year, and the Privacy Commissioner took the opportunity to remind organisations of their obligations to take reasonable steps to protect personal information, including reviewing their IT security measures.[8] It is not clear whether any organisations are under investigation in connection with Heartbleed-related breaches, but the Commissioner encouraged affected organisations to assist users to change passwords after putting patches in place.

The Privacy Commissioner has also released a cautious comment on the government's data retention proposal (see 'Telecommunications Data Retention: A Step in the Right Direction?' in the March 2013 edition of the CAMLA Bulletin and recent media coverage) noting the risks of retaining a large amount of data and reiterating that organisations which are required to retain the data will be expected to comply with their APP and other Privacy Act obligations.[9]

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4 'Cupid Media Pty Ltd: Own motion investigation report', June 2014, http://www.oaic.gov.au/privacy/applying-privacy-law/commissioner-initiated-investigation-reports/cupid-omi.

5 Multicard Pty Ltd: Own motion investigation report, May 2014, http://www.oaic.gov.au/privacy/applying-privacy-law/commissioner-initiated-investigation-reports/multicard-omi.

6 'Privacy Awareness Week ends, global sweep of apps begins!', 9 May 2014, http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/privacy-awareness-week-ends-global-sweep-of-apps-begins.

7 'Privacy – Market and Social Research – Code 2014', http://www.amsro.com.au/member-services/privacy/privacy-market-and-social-research-code-2014.

8 'Heartbleed bug', 11 April 2014, http://www.oaic.gov.au/news-and-events/statements/privacy-statements/heartbleed-bug/heartbleed-bug.

9 'Australian Government's data retention proposal — statement', 8 August 2014, http://www.oaic.gov.au/news-and-events/statements/privacy-statements/australian-governments-data-retention-proposal/australian-government-s-data-retention-proposal.

What's in a Name? Bloggers, Journalism, and Shield Laws

The High Court of New Zealand recently handed down a decision finding that bloggers can be legally considered as journalists and claim protection for their confidential sources. Hannah Ryan provides a summary of the Court's decision and compares it with the legislative framework in Australia.

Are bloggers journalists? Since the emergence of the internet and the development of blogs began to break down the traditional models of journalism and news media, this question has been a vexed one, consuming much judicial and academic attention and producing divergent views internationally.[1] This is unsurprising, given that the question underpinning it is notoriously difficult to answer: *what is journalism?*

By finding that a blog may be considered a 'news medium' and a blogger a 'journalist', the Court adopted a functionalist approach to defining journalism.

In law, the question arises principally in relation to shield laws. Shield laws protect journalists from being compelled to give evidence about confidential sources and are the most significant protection afforded to journalists, as distinct from other members of the public. This special treatment is justified by the important role journalism and the free flow of information play in a liberal democracy, and by journalists' foremost ethical obligation to respect confidences in all circumstances.[2] It follows that only those people producing 'journalism' should enjoy the protection of shield laws.

In a decision that will have implications for the interpretation of shield laws in Australia, the New Zealand High Court has recently expanded the protection of New Zealand's shield laws to bloggers. By finding that a blog may be considered a 'news medium' and a blogger a 'journalist', the Court adopted a functionalist approach to defining journalism. Given that shield laws introduced in several Australian jurisdictions over the past few years largely follow the New Zealand model, the decision should be noted by Australian journalists and media lawyers.

Legislative framework

New Zealand's shield law is found in section 68 of the Evidence Act 2006, which provides that:

> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.

A judge may order that subsection (1) is not to apply if satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of an informant's identity outweighs both any likely adverse effect of the disclosure on the informant or another person, and 'the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts'.[3] 'Journalist' is defined as 'a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium'.[4] 'News medium' is defined as 'a medium for the dissemination to the public or a section of the public of news and observations on news'.[5]

The Commonwealth introduced Australia's vanguard shield laws in 2011, through the *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth). The legislation was directly modelled on New Zealand's section 68.[6] Similar legislation has now been enacted in New South Wales,[7] Victoria,[8] the Australian Capital Territory,[9] and Western Australia.[10] In the Commonwealth and Australian Capital Territory legislation, a 'journalist' is defined similarly to the New Zealand

1 See: *Obsidian Finance Group LLC v Crystal Cox,* Nos. 12-35238 & 12-35319 (9th Cir. Jan 17, 2014); *The Mortgage Specialists Inc v Implode-Explode Heavy Industries Inc,* 160 N.H. 227 (N.H. 2010); Sara Phung, 'Function Not Form: Protecting Sources of Bloggers' (2012) 17(1) *Media and Arts Law Review* 121; Linda L. Berg, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 *Houston Law Review* 1371; Randall D. Eliason, 'Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege' (2006) 24 *Cardozo Arts & Entertainment* 385; Anne M. Macrander, 'Bloggers as Newsmen: Expanding the Testimonial Privilege' (2008) 88 *Boston University Law Review* 1075.

2 See: Media Entertainment & Arts Alliance, Journalists' Code of Ethics <http://www.alliance.org.au/code-of-ethics.html>, clause 3.

3 *Evidence Act 2006* (NZ), s 68(2).

4 *Evidence Act 2006* (NZ), s 68(5).

5 *Evidence Act 2006* (NZ), s 68(5).

6 Kirsty Magarey, *Bills Digest*, Nos 38-39 of 2010-11, 11 November 2010, 4; Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2011 (Cth), notes on clauses, [9].

7 *Evidence Act 1995* (NSW), s 126K.

8 *Evidence Act 2008* (Vic), s 126K.

9 *Evidence Act 2011* (ACT), s 126K.

10 *Evidence Act 1906* (WA), s 20I.

legislation as a person who is 'engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium'.[11] In contrast, Western Australia, New South Wales and Victoria require that a journalist be 'engaged in the profession or occupation of journalism'.[12]

Slater v Blomfield

Although New Zealand's shield laws have been in place for several years, the meaning of 'journalist' did not receive judicial consideration until this year's decision in *Slater v Blomfield*.[13] The case arose from a dispute between Cameron Slater, a well-known right-wing commentator in New Zealand and operator of a blog called 'Whale Oil', and Auckland businessman Matthew Blomfield, who was associated with a charity known as 'KidsCan'. Slater published a series of posts on Whale Oil relating to Blomfield, suggesting among other things that he had conspired to steal charitable funds. Blomfield initiated defamation proceedings. Slater admitted that the articles were defamatory but relied on the defences of truth and honest opinion. Blomfield then applied for discovery of email correspondence between Slater and several people allegedly involved in the supply of material for Slater's article. This was accompanied by a notice to answer interrogatories including: 'Who supplied the defendant with the hard drive and other information referred to on the Whale Oil website?'

Slater refused to comply with the discovery request and interrogatory, on the basis that the information was privileged under section 68. In order to enjoy that privilege, Slater needed to establish that Whale Oil was a news medium and he was a journalist. He was unsuccessful at first instance. Blackie J found that, as Whale Oil was 'a blog site', it was 'not a means for the dissemination to the public or a section of the public of news and observations on news.'[14] On this view, a blog, by definition, could not be a news medium.

Slater enjoyed more success on appeal to the High Court. Significantly, Asher J found that a blog *could* be a news medium for the purposes of section 68, and indeed that Whale Oil was such a news medium. Similarly, Slater could be considered a 'journalist' and was therefore presumptively entitled to the protection in section 68(1). However, in this case the public interest in the disclosure of the identity of the informant outweighed the other considerations identified in section 68, and the presumption of non-compellability was displaced.

The judgment suggests that not all blogs will be considered news media and not all bloggers are journalists. Instead, determining whether a publication is a news medium and whether a person is a journalist will be a multifactorial inquiry. Asher J identified several features of Whale Oil and Slater's work that meant the former was properly to be considered a news medium and the latter a journalist. First, it was necessary that Whale Oil's posts be of such a standard that they could be regarded as 'news'.[15] That is, material presented on a blog should be accurate and reliable in order for the blog to be a 'news medium', otherwise it cannot be considered to be news.[16] It was significant that Whale Oil frequently published articles with an element of breaking news.[17] Implicitly, then, a blog that posts only commentary is very unlikely to be considered a 'news medium'.[18] Further, the judge suggested that the publication of news had to be regular.[19] It was also relevant that Whale Oil enjoyed a large audience and was popular with the public.[20] The combination of these features meant that the blog's 'particular political perspective'[21] and 'dramatic and abusive' style were immaterial.[22] What was determinative was the 'element of regularly providing new or recent information of public interest'.[23]

Determining whether a publication is a news medium and whether a person is a journalist will be a multifactorial inquiry

Whether Slater could be considered to be a journalist was approached as a related, but separate, inquiry to the news medium question. The fact that Slater was not employed as a journalist was largely irrelevant.[24] Instead, Asher J looked to the work that he carried out. That work was defined to be the 'mental and physical effort involved in obtaining information on news topics and transforming it into readable prose which coherently disseminates the information to a reader'.[25] In concluding that Slater was in fact a journalist, it was significant that he regularly received and disseminated news through a news medium, that this involved significant time on a frequent basis, he derived some revenue from Whale Oil and it involved the application of journalistic skill.[26] The latter was the most important consideration.[27]

Consideration

If the rationale of shield laws is to protect the free flow of information by encouraging sources to volunteer information to those who will disseminate it, the approach adopted in *Slater v Blomfield* is a sensible one. By focusing on the *function* of journalism, rather than its traditional *form*, this approach ensures that those who are find-

11 *Evidence Act 1995* (Cth), s 126G; *Evidence Act 2011* (ACT), s 126J.

12 *Evidence Act 2008* (Vic), s 126J; *Evidence Act 1906* (WA), s 20G; *Evidence Act 1995* (NSW), s 126J.

13 [2014] NZHC 2221.

14 *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 26 September 2013, 15 (Blackie J).

15 *Slater v Blomfield* [2014] NZHC 2221, [61].

16 Ibid.

17 Ibid [59].

18 Ibid [63].

19 Ibid [54].

20 Ibid [55], [64].

21 Ibid [64].

22 Ibid [62].

23 Ibid [65].

24 Ibid [69], [73].

25 Ibid [66].

26 Ibid [74].

27 Ibid [82].

ing and disseminating information in the public interest, and their sources, are protected appropriately, whether or not they have the infrastructure of a large media organisation behind them. Accordingly, although a multifactorial inquiry is appropriate, the core focus should be on the kind of information disseminated by a publication, whether it is properly considered to be news, and the role of journalistic skill, methods and ethics in the work of the purported journalist. Elements such as the regularity of posts, the revenue earned by the website, and the size of the audience are secondary.

the New South Wales, Western Australian and Victorian shield laws still require a person to be engaged in the 'profession or occupation' of journalism in order to be protected from compellability

The decision should also be commended for its realistic recognition of the democratisation of news journalism fostered by the internet. As Asher J put it, '[t]he fact that those who operate websites are often not owned by large media corporates means that fresh perspectives are presented and the public have more choice.'[28] For these reasons, the Commonwealth and the Australian Capital Territory, with their similar definitions, should follow the New Zealand example when the question inevitably arises.

In light of the logical interpretation adopted by the New Zealand High Court, it is disappointing that some policymakers and legislators continue to promulgate a retrograde division between those who are employed as journalists and others who claim to be journalists, such as bloggers. While the Commonwealth purposely decided against a requirement that a person be employed as such to enjoy the benefit of shield laws,[29] the New South Wales, Western Australian and Victorian shield laws still require a person to be engaged in the 'profession or occupation' of journalism in order to be protected from compellability. More recently, the Commonwealth Parliamentary Joint Committee on Intelligence and Security recommended against providing an exemption for journalists from a proposed offence prohibiting the publication of details of certain intelligence operations. One reason was that:

> '…the term 'journalism' is increasingly difficult to define as digital technologies have made the publication of material easier.…it would be all too easy for an individual, calling themselves a 'journalist', to publish material on a social media page or website that had serious consequences for a sensitive intelligence operation. It is important for the individual who made such a disclosure to be subject to the same laws as any other individual.'[30]

The difficulty in defining journalism is undeniable. However, adopting functionalist considerations, rather than clinging to traditional forms, is the most principled approach. It is only by this method that the law can properly ensure that works, and their corresponding authors or journalists, which merit protection deservingly receive it.

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28 Ibid [49].

29 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2) (additional comments by the Australian Greens).

30 Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the National Security Legislation Amendment Bill (No. 1) (2014), [3.101].

Free Speech and Brown Paper Bags

Kieran Pender surveys the campaign finance regulation landscape in Australia post-Unions NSW v New South Wales and considers the potential impact of forthcoming litigation.

Introduction

If campaign finance regulation is the 'Vietnam' of free speech theory in the United States,[1] then war has broken out in Australia. Having vexed courts across the globe for several decades, the constitutionality of regulating electoral contributions and expenditure has finally confronted the judiciary in this country.

While initial skirmishes may have occurred in an early implied freedom of political communication case, *Australian Capital Television Pty Ltd v Commonwealth*,[2] the battleground has been relatively quiet for over 20 years. Now, after a string of amendments to the *Electoral Funding, Expenditure and Disclosures Act 1981 (NSW)*, several plaintiffs have recommenced the fight.

The *Unions NSW v New South Wales* litigation in 2013 brought to the fore several unresolved questions.[3] Does money constitute speech? Should political donations receive constitutional protection? Does any such protection extend to contributions from corporations as well as individuals?

Yet the High Court, as is often the case, did not directly address these key questions and delivered a narrow pronouncement with few hints at any broader jurisprudential trend. Not content to let academics squabble over the judgment's ramifications for another two decades, and perturbed by recent adverse Independent Commission Against Corruption hearings, former Newcastle Mayor Jeff McCloy has further challenged the legislation's validity.

While the *McCloy* litigation may result in nothing more than a limited decision with *Unions NSW*-underpinnings, the dilemma before the bench is normatively challenging and could provoke deeper judicial thinking, including perhaps an answer to the 'is money speech?' question.

Upholding a ban on political donations from property developers, in light of proven corruption, is unlikely to garner much public opprobrium. Yet Division 4A of the *Electoral Funding, Expenditure and Disclosures Act* – which prohibits electoral contributions from particular industries – is beset by a slew of practical enforcement difficulties, and appears to overstep the line between justifiable regulation and illegitimate encroachment on freedom of expression. It may be overly dramatic to declare that fundamental democratic values are at stake, but, at the very least, a judgment upholding Division 4A's validity would be troubling for proponents of free speech.

After providing a brief background to the topic, this article will focus on the forthcoming *McCloy v New South Wales* litigation and its potential ramifications.[4] It will suggest that the legislation in contention is not reasonably appropriate and adapted to serve a legitimate end.

From Buckley to Unions NSW

The origins of modern campaign finance controversy stem back to the 1976 post-Watergate US Supreme Court decision in *Buckley v Valeo*.[5] In that case a distinction was drawn between limitations on political donations and expenditure. The former, aimed at a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption',[6] was compatible with the First Amendment. The latter, on the other hand, 'fails to serve' any such interest, and was thus invalid.[7] While *Buckley* continues to provoke litigation in America (indeed it was only in April that the Supreme Court's latest decision on the matter was delivered in *McCutcheon v Federal Election Commission*),[8] until recently the High Court has been untroubled by such controversies.

The High Court equivocated in Unions NSW as to whether the act of donating money could be considered political communication

In *Unions NSW*, though, several plaintiffs sought to strike down amendments to the *Electoral Funding, Expenditure and Disclosures Act* that prohibited political donations 'unless the donor is an individual who is enrolled on the roll of electors'.[9] As the recent judgment has been discussed elsewhere in this edition (see article by Sophie Dawson and Rose Sanderson entitled 'Keeping it in proportion: recent cases on the implied freedom of speech'), this article will only briefly outline the decision's salient features.

In their submissions, the *Unions NSW* plaintiffs drew on the *Buckley* aphorism that donations serve 'as a general expression of support for the candidate and his views' to assert that 'both the making, and acceptance, of a "political donation" constitutes communication'.[10] In other words, the plaintiffs alleged that political donations were tantamount to expression,[11] and therefore deserved protection under the implied freedom of political communication. While

1 Robert Post, 'Regulating Election Speech Under the First Amendment' (1999) 77 *Texas Law Review* 1837, 1837.

2 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

3 (2013) 88 ALJR 227 ('*Unions NSW*').

4 Jeffery McCloy, 'Writ of Summons', Submission in *McCloy v New South Wales*, S211/2014, 28 July 2014 ('*McCloy*').

5 424 US 1 (1976) ('*Buckley*').

6 *Citizens United v Federal Election Commission*, 558 US 310, 339 (2010) (Kennedy J) ('*Citizens United*').

7 Ibid.

8 *McCutcheon v Federal Election Commission* (12-536, 2 April 2014) slip op ('*McCutcheon*').

9 s 96D(1).

10 Unions NSW, 'Plaintiffs' Written Submission', Submission in *Unions NSW v New South Wales*, S70/2013, 18 September 2013, 3 [15].

11 See, eg, *Buckley*, 424 US 1 (1976).

offering no emphatic rejection of this argument, the High Court in *Unions NSW* was unpersuaded.

Instead, the Court was prepared to accept that the donation prohibition constituted a communicative burden because donations enable recipients to engage in political communication. As public funding did not meet any shortfall, it followed that 'the freedom is effectively burdened'[12] and thus the first limb of *Lange v Australian Broadcasting Corporation* – the accepted test since that seminal 1997 case – was satisfied.[13] However, when applying the second element of *Lange:* that the law must be 'reasonably appropriate and adapted to serve a legitimate end' compatible with the constitutionally prescribed system of government,[14] the plurality judgment did not consider the relevant provisions as 'calculated to promote the achievement of those legitimate [anti-corruption] purposes.'[15] Without even venturing to the final stage of reasoning, French CJ, Hayne, Crennan, Kiefel and Bell JJ simply found that, in effect, 'the Emperor has no clothes'.[16]

While it may seem somewhat wishful thinking, the forthcoming litigation could perhaps necessitate a more developed examination of whether donations do, indeed, constitute speech

The other noteworthy aspect of the legislation under scrutiny in *Unions NSW* was its politically unbalanced nature: it prohibited union affiliation fees, and thus could be seen as an attack on the Australian Labour Party.[17] As Professor Anne Twomey observed, 'the case provides a lesson for governments not to try to be too clever in manipulating electoral laws to their advantage… [courts] do not take kindly to such action.'[18]

The Vexing Question: Is Money Speech?

Since *Buckley* the US Supreme Court has held that money constitutes speech, and therefore deserves First Amendment protection.[19] It is, effectively, 'a form of putting one's money where one's mouth is.'[20] This proposition was upheld most recently in *McCutcheon*,[21] and notwithstanding strident criticism from dissenters including that 'money is property; it is not speech',[22] the "contribution as communication equation" represents the current American position.

In Australia, the answer is not so clear. While expression does not need to be verbal to be protected – the display of dead ducks in *Levy v Victoria* is a good example[23] – the High Court equivocated in Unions NSW as to whether the act of donating money could be considered political communication.

The five-judge plurality judgment instead noted that the implied freedom is not a personal right, and continued that if the plaintiffs' proposition intimated otherwise, 'it may blur the distinction referred to above.'[24] Yet the decision failed to elucidate why a "money as speech" equation might necessarily be considered as a right, rather than a protection. Keane J, in concurrence, simply observed 'how [this] question is to be answered does not depend on the proposition that a political donation is a form of political expression.'[25]

This puzzling issue therefore remains unresolved. The High Court instead found that the legislation affected a communicative burden for other reasons, and thus perhaps 'in practical terms' the answer 'doesn't matter.'[26] The result is intellectually unsatisfying, however, and the dynamics of forthcoming litigation may force reconsideration.

McCloy

With the New South Wales government still smarting from its loss in *Unions NSW*, former Newcastle Mayor Mr McCloy lobbed a further salvo in the campaign finance war.[27] McCloy is challenging Division 4A of the *Electoral Funding, Expenditure and Disclosures Act*, which makes it 'unlawful for a prohibited donor to make a political donation',[28] and similarly unlawful to accept such donations. A prohibited donor is defined as a 'property developer', tobacco, liquor or gambling 'industry business entity', or representative organisation thereof, with broad definitions that encompass directors, officers, spouses and large shareholders.

McCloy alleges, per *Lange*, that this section 'is not reasonably appropriate and adapted to achieving a legitimate end in a manner compatible with the maintenance of the system of representative and responsible government'.[29] Alternatively, McCloy argues that

12 *Unions* (2013) 88 ALJR 227, 236 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

13 (1997) 189 CLR 520 ('*Lange*').

14 *Unions* (2013) 88 ALJR 227, 247 [115] (Keane J).

15 Ibid 238 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

16 Anne Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58' (Paper presented at Gilbert + Tobin Centre for Public Law Constitutional Law Conference, Sydney, 14 February 2014) 12.

17 Ibid 2.

18 Ibid 13.

19 See, eg, *McCutcheon* (12-536, 2 April 2014) slip op; *Citizens United*, 558 US 310 (2010).

20 Anne Twomey, 'Political Donations and Free Speech' (Paper presented at Free Speech 2014 Symposium, Sydney, 7 August 2014) 1.

21 McCutcheon (12-536, 2 April 2014) slip op.

22 *Nixon v Shrink Missouri Government PAC*, 528 US 377, 400 (2000) (Breyer J).

23 (1997) 189 CLR 579.

24 *Unions* (2013) 88 ALJR 227, 236 [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

25 Ibid 246 [112].

26 Twomey, '*Unions NSW*', above n 16, 6.

27 Jeffery McCloy, 'Statement of Claim', Submission in *McCloy*, S211/2014, 28 July 2014.

28 s 96GA.

29 McCloy, 'Statement of Claim', above n 27, 8.

the legislation 'has the effect of directing, limiting or otherwise interfering with' the constitutional requirement that parliament be 'directly chosen by the people',[30] and is therefore invalid.

The challenge is significant in several respects, but perhaps most prominently because it may force the Court to grapple once again with the 'is money speech?' question. The *Unions NSW* conclusion that the implied freedom was effectively burdened because access to donations was limited has been criticised. In particular Twomey has argued that although unions and corporations could not contribute under the impugned legislation, this still left a large pool of potential donors to fill the approximately 25% differential between the expenditure limit and public reimbursement.[31]

Such criticism is even more persuasive when the quantity of excluded donors is reduced solely to narrow categories of individuals and corporations. To suggest that the availability of campaign funds is still burdened in those reduced circumstances appears to be an abstract rather than practical analysis. Although *Unions NSW* attempted to parry these attacks – 'the defendant's submissions that s 96D places "no material burden" on the freedom … are beside the point. [Q]uestions as to the extent of the burden … arise later',[32] – it is unclear whether this approach can withstand continued scrutiny. Recent comments from Gageler J in *Tajjour v New South Wales*, that 'a law does not effectively burden such communication "unless … it *directly and not remo*tely restricts or limits"' the communication,[33] could assist such arguments. Thus while it may seem somewhat wishful thinking, the forthcoming litigation could perhaps necessitate a more developed examination of whether donations do, indeed, constitute speech.

Ramifications

Regardless of the Court's position on that question, the bench will be forced to seriously consider the difficult issue of whether Division 4A can be seen as reasonably appropriate and adapted to a legitimate end. Unlike in *Unions NSW*, the legislation has an unmistakeable connection to a legitimate anti-corruption purpose – an intent borne out in parliamentary debate and committee reports, and reasonably evident on its face. Division 4A is intended to prevent corruption brought about by contributions from prohibited donors, and it does so by preventing such donations. Evidently, the emperor in *McCloy* is not lacking for clothes.

However, the reasonably appropriate and adapted question is not so easily answered. On one hand, the legislation seems particularly targeted: it does not prohibit all corporate donations to rid the scourge of property developer donation corruption (demonstrated by ICAC with worrying regularity). Rather, it focuses solely on developers and several analogous industries. On this reading, Division 4A may withstand *Lange* scrutiny.

Yet such an approach ignores the troublesome impact the provisions have of excluding numerous individuals and entities from the political process. Whether viewed from a *Lange* perspective or considered from a more normative angle as to whether Division 4A legitimately balances competing anti-corruption and political participation values, the legislation in question appears heavy-handed. Excluding a spouse from involving themselves in the political process simply because their husband or wife is a property developer worryingly excludes citizens from the political process. The argument that they have other methods to demonstrate political support for a candidate, meanwhile, has not been accepted by courts as a valid defence.[34] Accordingly, counsel for Unions NSW Bret Walker SC submitted recently that 'there is something deeply anti-democratic about allowing a school teacher to donate $1,500 to a party but prohibiting his or her neighbour, who happens to be a real estate developer, from the same conduct.'[35]

The guns of war are likely to continue to fire over campaign finance regulation in Australia

Such a conclusion is supported by the availability of a less restrictive method for achieving this desired policy outcome. Noted electoral regulation expert Associate Professor Joo-Cheong Tham has commented that Division 2A's donation restrictions – which cap contributions at certain moderate amounts – render Division 4A 'redundant'[36], while several parliamentary committees echo this view[37]. Although Keane J in *Unions NSW* was troubled by the extent to which the *Lange* test might engage in this type of reasoning, which he alleged 'would seem to countenance a form of decision-making having more in common with legislative than judicial power',[38] the availability of less restrictive measures certainly indicates the chosen approach may not be considered reasonably appropriate and adapted. Although the presence or absence is not necessarily decisive, 'alternative means of achieving the end which are less burdensome on communication on governmental or political matter have long been recognised as relevant to the inquiry.'[39]

Division 4A is also beset by practical difficulties. The New South Wales Electoral Commissioner has labelled the determination of a prohibited donor as a 'tortuous process', which 'fails the compliance-oriented regulation test.[40]' This problem is amplified

30 Ibid 8–9.

31 Twomey, above n 20, 4.

32 (2013) 88 ALJR 227, 236 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

33 [2014] HCA 35 (8 October 2014) [146] (Gageler J); cf [105]–[107] (Crennan, Kiefel and Bell JJ).34 *Tajjour v New South Wales* [2014] HCA 35 (8 October 2014) [33] (French CJ); *Monis v The Queen* (2013) 249 CLR 92, 146 [122] (Hayne J); for an interesting comparative approach, see Wendy Wagner et al, 'Brief for Plaintiffs', Submission in *Wagner v Federal Election Commission*, 13/5162, 3 July 2013, 71.

35 Bret Walker, Submission No 24 to New South Wales Department of Premier and Cabinet, *Panel of Experts – Political Donations*, 17 September 2014, 8–9.

36 Joo-Cheong Tham, 'Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales' (Report, New South Wales Electoral Commission, November 2012) 153.

37 Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Public Funding of Election Campaigns* (2010) 7; Select Committee on Electoral and Political Party Funding, Legislative Council, *Electoral and Political Party Funding in New South Wales* (2008) 106; Panel of Experts – Political Donations, New South Wales Department of Premier and Cabinet, *Issues Paper* (2014) 18.

38 (2013) 88 ALJR 227, 248 [129] (Keane J).

39 *Tajjour v New South Wales* [2014] HCA 35 (8 October 2014) [152] (Gageler J).

40 New South Wales Electoral Commission, Submission No 18 to Joint Standing Committee on Electoral Matters, '*Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981'*, 12 June 2013, 95.

by indistinct legislative definitions plagued by over and under inclusiveness — they fail to catch corporations that may donate following a planning application yet are not in the development business[41], while prohibiting donations 'even when no conflict of interest' exists[42]. Moreover, the commercial activities of a donor may not be 'readily apparent to the recipient'[43], particularly given the troublesome definitions, creating a structural flaw which endangers any meaningful attempt at self-compliance[44]. While the role of the High Court is not to reprimand legislatures for poor drafting, the effectiveness of Division 4A nevertheless goes to the question of whether it can be considered reasonably appropriate and adapted.

As Warren CJ of the US Supreme Court has noted, 'every citizen has an *inalienable right to full and effective* participation in the political process.[45] Division 4A degrades the ability of citizens to engage with their parliamentary representatives to a seemingly impermissible degree. It appears not reasonably appropriate and adapted per *Lange*, nor, from a normative perspective, a legitimate balancing of two compelling ends.

Interestingly, an analogous challenge is currently before a US federal court with several government contractors seeking the invalidation of legislation that prevents them from making political contributions.[46] While *Unions NSW* cautioned against reliance on American jurisprudence in this sphere,[47] the eventual outcome will be an intriguing source of comparison.

Finally, the ramifications of *McCloy* could be even greater if the Court accepts the challenge Mr McCloy is reportedly bringing to the broader donation caps scheme. Although this article has drawn predominantly from the plaintiff's statement of claim, recent comments from Mr McCloy's counsel suggest that the action could encompass a wider challenge to the entire donation cap framework.[48] Evidently, if successful, such litigation would have widespread significance beyond the freedom of expression issues discussed here.

Conclusion

The Court in *McCloy* is confronted with legislation that is undoubtedly less politically-motivated than in *Unions NSW* and more targeted at a legitimate end. Notwithstanding its abundant faults, Division 4A does achieve a purpose that the majority of the population likely supports: preventing political corruption. The question, though, from either a *Lange* perspective of whether it is reasonably appropriate and adapted, or from a normative perspective, is not easily answered.

McCloy provides the Court with an opportunity to explore some of the vexing issues that were not addressed in *Unions NSW*. Whether the Court will look to do so is of course another matter entirely. Either way the judgment is likely to have significant consequences. This article has argued that the Court should accept Mr McCloy's challenge (at least in its narrow original form), not because the anti-corruption end is not legitimate, but because Division 4A has significant practical difficulties and imposes an overexpansive limitation on political expression.

The emperor might have a bountiful wardrobe in *McCloy*, but will the clothes fit? Regardless, the guns of war are likely to continue to fire over campaign finance regulation in Australia.

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41 Tham, above n 36, 154.

42 Ibid.

43 Ibid 155.

44 Ibid; New South Wales Electoral Commission, above n 40.

45 *Reynolds v Sims*, 377 US 533, 565 (1964) (emphasis added).

46 Wendy Wagner et al, above n 34.

47 See, eg, (2013) 88 ALJR 227, 245 [102] (Keane J).

48 Panel of Experts – Political Donations, Report of Proceedings: Session Four – Constitutional Issues and reform of Election Funding Laws in the Wake of the *Unions NSW* Case (29 September 2014, Sydney) 12.

The Taxing Business of Taxing Bitcoin

The Australian Taxation Office recently handed down draft determinations on the tax consequences of the use of Bitcoin in Australia. David Rountree provides an overview of the draft rulings and the implications for domestic businesses operating with Bitcoin.

Introduction

On 20 August 2014, the Australian Tax Office (***ATO***) released several draft tax determinations considering the tax consequences of the use of Bitcoin.

The draft determinations and guidelines are significant for several reasons. First, it is the first serious and in-depth consideration of the digital currency (and its many associate cryptocurrencies) by an Australian regulator. They involved careful consideration of the tax consequences of using Bitcoin, and demonstrated that the ATO has taken steps to understand and come to grips with its unique technical aspects.

Despite this, the draft determinations issued are a disappointing outcome for Bitcoin in an Australian context. Fundamentally, the view of the ATO was that for the purposes of Australia's tax laws, Bitcoin is not to be considered "money" or foreign currency, but as simply property. The outcome of these rulings will pose serious challenges for the use of Bitcoins in the course of doing business in Australia, and may result in pushing Bitcoin entrepreneurs offshore.

Bitcoin is a form of decentralised digital currency, which is powered and protected by cryptography, and operates and is effected through a network of users

What is Bitcoin

For the uninitiated, Bitcoin is a form of decentralised digital currency, which is powered and protected by cryptography, and operates and is effected through a network of users. Effectively, it operates as software as cash,[1] which through the strength of its programming and its decentralised nature can be securely and anonymously exchanged. There is no central authority or entity which issues a Bitcoin, or regulates and clears transactions. Instead, every user of the Bitcoin network has a distributed copy of the Bitcoin "blockchain", which is used to verify transactions and prevent double spending. Bitcoins are obtained by the process known as "mining", or by purchasing pre-existing Bitcoins from marketplaces or exchanges which have developed.

There are hundreds of cryptocurrencies available, but Bitcoin is by far the most widely used and valuable.[2] While its value has fluctuated wildly over its short history, at the time of writing one Bitcoin is currently worth AUD$439.53, and was even worth more than US$1000 at one stage.[3]

The anonymous nature of Bitcoin has attracted significant attention for its potential use in illegal transactions, highlighted by its use by Silk Road, the former online black market. However, over the last year, more and more businesses in Australia and across the world have started to accept Bitcoin as a legitimate mechanism for payment, including significant web vendors like Expedia.[4] A range of start-up businesses have sprung up, both in Australia and overseas, operating Bitcoin exchanges, point of sale technology and other Bitcoin related services. Investment in Bitcoin and Bitcoin related start-ups has also increased greatly this year, with total investment expected to reach US$250 million.[5]

What are the tax rulings

The draft determinations by the ATO consider Bitcoin in a number of different taxation contexts. However, the fundamental questions considered by the ATO were:

- is Bitcoin property?;
- is Bitcoin foreign currency?; or
- is Bitcoin money?

Is Bitcoin "property"?

The ATO considered whether Bitcoin was "any kind of property" in the context of the *Income Tax Assessment Act 1997* (***ITA Act***) and the concept of "CGT asset".[6]

Unsurprisingly, the draft rulings considered that Bitcoin was "property". In doing so, the ATO considered definitions of what "property" is, as provided by the High Court in several judicial pronouncements.[7] Acknowledging that there is no single test for identifying whether a set of rights and relationships are "proprietary", the ATO considered that the following factors were relevant to considering Bitcoin as "property":

(a) the rights of control exercised over a Bitcoin in a Bitcoin wallet (eg the capacity to trade Bitcoin for other value or use it as payment);

(b) Bitcoin is treated as a valuable, transferable item of property by members of the community; and

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1 There are other uses for the blockchain technology underpinning cryptocurrencies and the innovation of creating digital scarcity. However, this article will focus on the use of Bitcoin as a money or currency, which was the prime consideration of the ATO.

2 See http://www.cryptocoincharts.info/coins/info for a list of different cryptocurrencies currently available. These coins have varying legitimacy, and range from the genuine to the genuinely amusing. One of the most popular cryptocurrencies outside of Bitcoin is Dogecoin, which, due to its association with the "Doge" internet meme, has made it a popular phenomenon, as have its catch phrases "Wow. Very currency. Many coin."

3 November 2013. See: Garrick Hileman, 'Bitcoin Price Hits $1,000 After Doubling in 7 Days. What Next?', *CoinDesk* (27 November 2013) <http://www.coindesk.com/bitcoin-price-1000-doubling-7-days/>.

4 Joon Ian Wong, 'Expedia Will Accept Bitcoin for Hotel Bookings', *CoinDesk* (11 June 2014) <http://www.coindesk.com/expedia-will-accept-bitcoin-hotel-bookings/>.

5 John Heggestuen, 'Bitcoin Startup Funding Is On Track More Than Double This Year', Business Insider Australia, 12 July 2014.

6 Australian Taxation Office, *Income tax: is Bitcoin a CGT asset for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997?*, Draft Taxation Determination TD 2014/D12 (2104); *Income Tax Assessment Act 1997* (Cth), s 108-5(1).

7 See ATO, TD 2014/D12, 2-4.

(c) Bitcoin is inherently excludable due to the nature of the software restricting control to the person in possession of the "private key".

Due to Bitcoin's decentralised nature, the ATO considered that the proprietary rights "do not amount to a chose in action as a Bitcoin holding does not give rise to a legal action or claim against anyone."[8] For example, when a Bitcoin is mined, this is a function of software, and does not give rise to rights against any natural or corporate person.

The conclusion that Bitcoin is property is not earth-shattering, though it does have consequences for capital gains tax, as set out in section 4 below.

Is Bitcoin "foreign currency"?

The ATO also considered whether Bitcoin was a foreign currency for the purpose of the ITA Act.[9]

First, the ATO considered whether, at general law, Bitcoin could be considered a currency. The draft determination acknowledged that there were arguments that Bitcoin satisfied the meaning of "money" at general law, as it could be considered a medium of exchange, a unit of account and a store of value. However, the Commissioner did not consider that current use and acceptance of Bitcoin through the community was sufficient to satisfy the test put forward in case law, such that it was accepted as a means of discharging debts and making payment.[10]

Secondly, the term "foreign currency" was considered in the context of the ITA Act itself. In the ITA Act, foreign currency is defined as a "currency other than Australian currency". The Australian dollar is recognised in the *Currency Act 1965 (Cth)* (the ***Currency Act***) as the "currency" of and the only legally recognised form of payment in Australia.[11] A currency of a country other than Australia must therefore be a currency legally recognised by another countries laws.[12] The ATO's determination interpreted the meaning of "foreign currency" in the same manner for the purposes of ITA Act. Therefore, as Bitcoin is not recognised as the currency of any foreign nation, it is not a "foreign currency".[13]

Is Bitcoin "money"?

Alongside the rulings on the ITA Act, the ATO also published a draft Goods and Services Tax Ruling (GSTR2014/D3) on the question of whether Bitcoin is money for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999* (***GST Act***). This is an important question, as a supply of "money" is exempt from the concept of a "supply for consideration" on which GST is payable.

The term "money" is expressly defined in section 195-1 of the GST Act as including the following:

(a) currency (of Australia or another country);
(b) promissory notes and bills of exchange;
(c) any negotiable instrument used or circulated as currency;
(d) postal notes and money orders; and
(e) whatever is supplied as payment by way of:
  (i) credit or debit card;
  (ii) crediting or debiting an account; or
  (iii) creation of transfer of debt.[14]

The Commissioner's view was that Bitcoin did not meet any of these requirements.

The currency analysis was consistent with the draft determination on the ITA Act.[15] The draft ruling also decided that Bitcoin did not fall within any of the meanings in sub paragraphs (b) to (e).

This analysis included rejecting an interpretation that Bitcoin use was akin to "crediting and debiting an account" (subparagraph (e)(ii)). Arguably, the decentralised Bitcoin ledger can be considered an "account", which is credited and debited with the transfer of Bitcoins from one Bitcoin wallet to another. However, the ruling took the term "account" to have its legal meaning, consisting of a "chose of action which the account holder can enforce against the account provider".[16]

The draft ruling also considered that the treatment of Bitcoin as money was not sufficient to make something money "in the absence of an 'exercise of monetary sovereignty by the State concerned'".[17] The draft ruling also sets out that a supply of a Bitcoin is not a "financial supply" for the purpose of the GST Act.[18]

As Bitcoin is not recognised as the currency of any foreign nation, it is not a "foreign currency"

What are the tax implications of the rulings?

CGT

For the purpose of the ITA Act, the ruling that Bitcoin (and other cryptocurrencies) are considered property will mean that they will be a CGT asset. This is particularly relevant for Bitcoin, with its history of rapidly fluctuating prices.[19] If, on the disposal of a Bitcoin, it is sold for an amount greater than it was purchased for, then this will be a capital gain on which capital gains tax may be payable.[20] This is not a controversial position, and practically may not make a difference for users of Bitcoin who wish to purchase goods and services using the cryptocurrency, as the personal use exception will apply, unless the value of a Bitcoin is greater than $10,000.[21]

GST

The analysis of the GST consequences of the draft ruling is far more complicated. The effect of the draft ruling regarding the status of Bitcoin is that that the supply of Bitcoin by a business will be a taxable supply and subject to GST.[22] Under the GST Act, a supply of "money" is exempt from the definition of a taxable "supply".[23] As Bitcoin is not considered to be money, a supply of Bitcoin will be treated as equivalent to a barter transaction, which will be subject to GST.

8 Ibid, 4.

9 Australian Taxation Office, *Income tax: is Bitcoin a 'foreign currency' for the purposes of Division 775 of the Income Tax Assessment Act 1997?*, Draft Taxation Determination TD 2014/D11 (2014), 4.

10 Ibid, 6.

11 *Currency Act 1965* (Cth) ss 8, 9 and 11.

12 ATO, TD 2014/D11, 8.

13 Ibid.

14 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ('GST Act') s 195-1.

15 ATO, TD 2014/D11.

16 Australian Taxation Office, *Goods and services tax: the GST implications of transactions involving bitcoin*, Draft Goods and Services Tax Ruling GSTR2014/D3 (2014), 14 para 64.

17 Ibid, 16 para 73.

18 Ibid, 18 para 80.

19 Timothy Lee, 'These four charts suggest that Bitcoin will stabilize in the future', *The Washington Post*, 3 February 2014.

20 *Income Tax Assessment Act 1997* (Cth) ('ITA Act') s 104-10.

21 ITA Act s 118-10(3).

22 ATO, GSTR2014/D3; GST Act s 9.5.

23 GST Act s 9.10(4).

This will be the case for business who are seeking to use Bitcoin as a means of transacting, as well as business which seek to supply Bitcoin to consumers (such as a Bitcoin exchange).

While this article will not go into detail on the operation of GST, given the availability of input tax credits to businesses, the actual impact of the imposition of GST on a supply of Bitcoin by a business will often be nil. Indeed, the ATO has itself stated that it does not expect to receive any significant additional revenue from this ruling.[24] However, the compliance and administrative burden associated with a business transacting using Bitcoin are greatly increased.

This draft ruling also results in some peculiar results. While a business making a supply of Bitcoin will be subject to GST, when an individual person who uses Bitcoin to purchase goods and services, this will not be subject to GST. Only when a person or company is registered for GST will it be required to pay GST on the supply.[25] This leads to the peculiar result that, where an individual purchases a computer from an Australian retailer using Bitcoin, this will not be subject to GST, but where a business registered for GST in Australia purchases a computer from that same retailer using Bitcoin, the supply of that Bitcoin will be a taxable supply, and subject to GST.

Other tax consequences

The ATO made two further draft tax rulings. These held that:

(a) the supply of a Bitcoin by an employer to an employee in respect of their employment is a property fringe benefit, subject to fringe benefits tax;[26] and

(b) where a business that retains Bitcoin for the purpose of sale of exchange in the course of its business, then such Bitcoin will be considered "trading stock" for the purpose of section 70-10(1) of the ITA Act.[27]

What are the practical impacts on businesses

There will be a number of important practical impacts of the tax rulings for Australian businesses seeking to use Bitcoin within their business operations. Such businesses will have to undergo careful consideration of how they are structuring their use of Bitcoin.

Some considerations are as follows:

(a) Businesses accepting Bitcoin for goods and services will need to include the Australian-dollar value of the Bitcoin received as part of their ordinary taxable income. The ATO suggests that this is the market value of the Bitcoin.[28] However, given the constantly fluctuating value, this represents some practical difficulties and questions for the business as to when to make such an assessment.

(b) Bitcoin exchanges - For Bitcoin exchanges seeking to operate as an Australian business, the ruling will impose a 10% premium on the price of the Bitcoins that they can offer. Since every supply of a Bitcoin (within Australia) would be a taxable supply, Australian based Bitcoin exchanges will have to charge an additional 10% to their Australian customers in order to offset the GST that would be owed. This places them at a major competitive disadvantage.

(c) Additional compliance burdens – the introduction of GST on supplies of Bitcoin will add additional compliance burdens on some Bitcoin transactions, where a similar transaction using money would not be subject to such obligations. These include obligations around supplying GST compliant invoices and including Bitcoin supplies in accounting for GST. This may prove a disincentive to use Bitcoin over traditional forms of value.

(d) Potential differential treatment of customers – where a business is accepting Bitcoins, it may need to consider differential treatment of customers, as accepting certain transactions may result in a GST supply, while other transactions may not.

What happens next

The result of the rulings has made the position for Australian businesses seeking to use or focus a business around Bitcoin a challenging one. One likely consequence of the ruling is that any businesses seeking to be closely involved with Bitcoin may seek to structure their operations to avoid these consequences – particularly by structuring their businesses so they are not operating in Australia. Given the essentially stateless nature of the internet and the abstract and incorporeal nature of Bitcoin, this will likely result in business facing their operations and having their infrastructure and services based and delivered outside of Australia. Indeed, while the US has reached a similar regulatory position on Bitcoin as being "property", not money,[29] the UK has gone the opposite direction, ruling that Bitcoin is money and not subject to VAT.[30] Indeed, the UK government has spoken about providing an open regulatory environment to encourage innovation, including for Bitcoin.[31] This raises the likelihood of forum shopping from people seeking a favourable taxation outcome (a well-trodden path by many bigger players along the way).

While disappointing for Bitcoin in Australia, the result of these rulings is not set in stone. Indeed, one of the central planks of the assessment of whether Bitcoin was money at general law was based on a factual assessment of the current usage of Bitcoin. The ATO has acknowledged that this may change over time.[32] There is also a prospect (even if remote), that some sovereign state may, for its own reasons, decide to adopt Bitcoin as its currency. If this were to occur, Bitcoin may become foreign currency overnight.

The ATO is not the only regulator who has Bitcoin on its horizons. On 2 October, the Australian Senate announced that it was undertaking an inquiry into digital currency, with a report due on 28 March 2015.[33] The Interim Report into the Financial System Inquiry also considered crypto-currencies (including Bitcoin).[34] The cautious view expressed in the Interim Report was that, while regulatory standards were important, the full weight of regulation may not be usefully applied to small players and start-ups, for the risk of stifling innovation. Ironically, the effect of the tax rulings may be to do just that, at least within Australia, for the time being. Bitcoin is still in its embryonic stage, and it is hard to predict what will happen next. Whatever it is though – it probably won't happen in Australia.

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24 Fran Foo, 'Bitcoins to be taxed like shares: ATO', *The Australian*, 20 August 2014.

25 GST Act s 9.5(d).

26 Australian Taxation Office, *Fringe benefits tax: is the provision of Bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136(1) of the Fringe Benefits Tax Assessment Act 1986?*, Draft Taxation Determination TD 2014/D14 (2014).

27 Australian Taxation Office, *Income tax: is Bitcoin trading stock for the purposes of subsection 70-10(1) of the Income Tax Assessment Act 1997?*, Draft Taxation Determination TD 2014/D13 (2014).

28 Australian Taxation Office, *Income Tax: Barter and Countertrade Transactions*, Taxation Ruling No. IT 2668 (2014), 4.

29 United States Internal Revenue Service, 'Virtual Currency Guidance', Notice 2014-21.

30 HM Revenue & Customs, 'Tax treatment of activities involving Bitcoin and other similar cryptocurrencies', Revenue & Customs Brief 09/14.

31 Nermin Hajdarbegovic, 'UK Financial Regulator's New Initiative Encourages Bitcoin Innovation', *CoinDesk* (3 June 2014) <http://www.coindesk.com/uk-financial-conduct-authority-fca-launches-bitcoin-initiative/>.

32 Paul Farrell, 'Bitcoin could be considered legal tender, Australian tax official says', *The Guardian*, 29 August 2014.

33 Senate Standing Committees on Economics, a http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Digital_currency

34 Financial System Inquiry, Interim Report, 4-46 (2014).

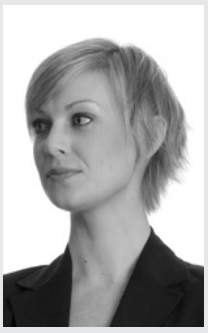
Profile

David Sullivan
Senior Legal Counsel, CNBC Asia Pacific

Nick O'Donnell
Director, APAC Public Policy, Yahoo!


David Sullivan


Nick O'Donnell


Mandy Chapman

CAMLA Young Lawyers representative, Mandy Chapman, caught up with David Sullivan and Nick O'Donnell, two senior in-house lawyers working in global media organisations, to discuss their roles and anticipated trends and challenges on the horizon for 2015.

Who do you work for?

David: As Senior Legal Counsel for CNBC Asia Pacific, I look after CNBC's legal function across the region, managing a small team based in Singapore. My role reports directly to CNBC International's Head of Legal and Business Affairs, who is based in London.

Nick: I'm the Director of Public Policy responsible for Yahoo's regulatory and government relations activities in the Asia Pacific region.

How would you summarise the scope and major responsibilities of your current role?

D**avid:** My role is broad by its nature. My team provides support to the business in a number of key areas, including editorial and regulatory, channel distribution across the region (Asia and Australia/New Zealand), advertising sales, sponsorships, compliance, and our general operations function, which includes managing the various broadcast studios across the region, and supporting procurement of global financial market data and the technical equipment used for production and distribution of our content.

Nick: I work as part of a small global Public Policy team which is headquartered in Washington DC. My main focus is tracking and responding to legislative and regulatory developments across the region that have the potential to impact Yahoo's business, our users and the technology industry more generally.

What prior career path led you to your current role?

David: I started my career at Baker & McKenzie, Melbourne, where I was an Associate in the Technology, Communications and Commercial group. After secondments at Melbourne IT and La Trobe University and a placement in Tokyo, my experience lent itself well to an in-house role and I moved to the Victoria Racing Club (**VRC**), where I had the great privilege of being part of the team delivering the Melbourne Cup Carnival, and the various events held at Flemington Racecourse throughout any given year. I was exposed to media advice work, specifically supporting the VRC's General Counsel negotiate the VRC's FTA, subscription television and digital rights domestically, as well as managing the international distribution of the Melbourne Cup Carnival rights. I then moved to Singapore to work in the professional golf industry, as Head of Legal and Business Affairs for the Asian Tour, where I had the opportunity to sit on the Board of Asian Tour Media – a joint venture between the Asian Tour and IMG. Earlier this year, I accepted my current role, so I am relatively new to the role.

Nick: I was lucky enough to start my legal career at the Seven Network where I had the opportunity to work in a small group of experienced in-house legal professionals working across the many and varied media assets of the Seven West Media group. Ultimately I ended up focusing on regulatory compliance and government relations issues associated with the highly regulated commercial FTA television business. This led to my desire to follow a more specialized public policy path. I joined Yahoo in early 2012, initially dealing with policy issues in Australia and New Zealand. That role has since expanded to capture our businesses across the APAC region.

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

David: Advising editorial is an element of my role that I find most engaging. We operate in a fast pace news-environment, where we are presented with a raft of interesting legal issues such as queries relating to segments about to go on air. In my view, this is where our team adds the most value to the business. Our product is ultimately what appears on screen, so it is imperative that our content is not only fair, but accurate, and reflects the editorial values of the CNBC brand. We also need to ensure that the content adheres to the laws across our broadcast territories.

Nick: I find dealing with emerging policy issues across diverse jurisdictions both interesting and rewarding. It can definitely be challenging at times; requiring us to be across a wide range of issues complicated by different political and legislative frameworks. Adding to the complexity is the need to be mindful of the cultural nuances driving certain issues, and the protocol or convention guiding interactions with governments. It's these nuances which also make for extremely varied and interesting work. You just never know what you are going to be dealing with on any particular day, from meeting with government ministers in Vietnam on the impact of laws relating to freedom of expression, to responding to sweeping national security reforms in Australia, and everything in between. Working in a truly global, yet small and highly collaborative team is an enjoyable aspect to my role, as it allows great exposure to and understanding of what's happening around the globe on technology-related issues.

We constantly engage policy makers with the aim to develop well thought-out and balanced solutions, while at the same time providing a regulatory environment which encourages innovation. In recent years, governments have paid increasing attention to issues around technology and how it has disrupted existing, and often outdated regulations. The pace of change means that governments often seek to enact legislation or regulations on the fly to deal with emerging issues. However, the nature of the global internet means that responses are rarely simple or clear cut.

In short, what, in your view, are some of the big issues you are seeing which are currently facing the industry?

David: From my point of view, the current digital landscape presents many challenges, but it also creates opportunities. Standalone OTT providers in the marketplace have not only had an impact on Pay TV channels, but also on subscription TV platforms and media regulators. There are certainly new players in the market disrupting standard linear television models. There is less regulation in the digital space and more accessibility of content for the user.

While it is a constant challenge in the industry, I'd like to think that it is also an opportunity to evolve, and we must constantly embrace developments in digital and social media platforms to stay relevant to consumers. We realise the need to be nimble to address the changing demands of consumers.

Nick: The rapid pace of innovation and evolution in the technology sphere is unprecedented and it is very hard to expect government and legislation to keep up. As legislation affects how we can continue to innovate, it is important to build good relationships with policy makers around the world to promote the benefits of new technologies and also highlight where legislative developments impact our businesses and of course, the interests of our users.

Today users are increasingly more informed and discerning. For Yahoo, we've worked hard to build and maintain the loyalty and trust of our over 800M global daily users. We take a 'Users First' approach defined by the three pillars: security, privacy and safety. We aim to deliver innovative products that become part of our users' daily habits and to do this in a socially responsible and transparent manner.

Yahoo is constantly innovating to deliver the best user experience. That constant cycle of innovation impacts the public policy dynamic and requires a network of strong relationships with key stakeholders – that includes regulators, governments and our industry colleagues.

Are there any general legal or regulatory issues your organisations face on a regular basis here in Australia or abroad you can discuss which may be of interest to CAMLA members and bulletin readers?

David: Australia is generally a straightforward jurisdiction for us in terms of regulation, as opposed to other parts of Asia. Across Asia, alcohol advertising seems to be an area that we spend quite a bit of time advising on, which reflects the fact that a number of territories have banned such advertising. Balancing this against other jurisdictions with disparate laws requires us to tailor advice to where the highest risk is. As a pan-regional network, we have to consider the laws and regulations of multiple jurisdictions at all times.

Nick: Technology has absolutely outpaced the law. Analog laws in a digital world mean governments around the world are playing catch-up. This has the potential to create knee-jerk legislative responses that rarely stand the test of time. A major challenge for Yahoo and other companies in the technology field is to ensure the regulatory environment does not restrict future innovation or close down the borders of the global digital economy. Some of the greatest challenges we see as multi-jurisdictional entities relate to conflict of laws or extraterritorial assertion of domestic laws. This can be in the form of decrees that require the forced localization of data centers, or operating licenses that have spurious content standards, monitoring and moderation components. These issues threaten intermediary liability protections and are a challenge to the preservation of the internet as a platform for creativity, free and vibrant expression and unimpeded access to all levels of society.

In your opinion, what are likely to be some of the prominent issues facing global media organisations in 2015?

David: As internet speeds increase across emerging markets, pressure on traditional platforms will continue to drive a real push from industry players and regulators to ensure that the digital players are not getting a free ride. I expect to see news programs further integrate social media platforms into their broadcasts, and also behind the scenes, in terms of the data that such platforms are able to collect on audiences. There are great opportunities for networks like CNBC to better engage with audiences, and understand viewers, which did not formerly exist.

Nick: In terms of trends, it's not new but privacy will once again be front and center. This is because privacy is at the heart of many of the personalised products now offered by technology companies which rely on users voluntarily and openly sharing personal information. It's trust, control and transparency that fire this issue. There are real and serious challenges for companies dealing in personalisation, including an increased focus by governments on user data security and access. We are intently focused on the protection of our users' data and the security of the Yahoo platform.

We can't talk about 2015 without mentioning Internet Governance which I think encapsulates in one word all of these issues. How individual governments choose to accept the multi-stakeholder, free and open governance of the web will determine what it will look like and how we can use it in years to come. It's not too dramatic to say that we are at a crossroad.

Do you have any hot tips for junior lawyers considering a career in media law?

David: Once you have a broad idea that you want to work in the media industry, building your industry network is really important. I'd recommend joining industry associations and networking at industry events to help build your profile.

Nick: Background in legal, compliance or regulation is obviously a bonus, but just as important is the ability to develop and maintain constructive relationships with governments and other industry stakeholders. To be able to position your company as a trusted contributor. It doesn't mean you always agree with government policy but at least it means you will be in the conversation. You'd also want to be pretty interested in the field in which you are working. Oh, and join CAMLA.

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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 hard copy and electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at editor@camla.org.au or to

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Communications & Media Law Association Incorporated

The Communications and Media Law Association (**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 & on-line services

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches 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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