

## The ALRC Inquiry into Copyright and the Digital Economy

The ALRC published its report on the inquiry into 'Copyright and the Digital Economy' earlier this year. Professor Jill McKeough provided an overview of the ALRC Inquiry at a recent CAMLA seminar addressing the ALRC's considerations in this crucial report including the key issues, feedback and decisions made through the Inquiry process. This is the edited transcript.

Thank you very much and thank you all for coming on a cold wet night. It's lovely to see some familiar faces here as well. Thanks again for the invitation.

As you know, I'm going to talk about the recent ALRC Inquiry on 'Copyright and the Digital Economy' and give you a snapshot of what we did and what we concluded, including a little overview of the timetable for the Inquiry. There were three documents issued during the Inquiry; the Issues Paper, Discussion Paper and of course the Report. Submissions were called for both after the Issues Paper and Discussion Paper. Furthermore, unusually but not uniquely for an ALRC Inquiry, the terms of reference also went out for consultation before the Inquiry began and there were some minor changes made as a result of that consultation.

We received a total of 870 submissions and conducted 109 consultations. The context of the review is captured by the issues contained in Chapter 3 of the Report. One of the things we were asked was whether or not the role of copyright had changed. We asked the question, we didn't presuppose anything, we wanted to know what the community and stakeholders thought. Of course the role of copyright has not changed and we try to give a snapshot of that in the Report. What we try and do is to ensure that copyright can continue to fulfil its role within its broader context.

The Issues Paper contained 55 questions based on the issues identified through research and stakeholder consultation. However, the Inquiry was only half of the equation. We were asked not to replicate work being done on enforcement, technological protection measures, Internet service provider liability and international developments, such as the Marrakesh Treaty for readers with visual impairments, which actually was concluded during the course of the Inquiry. So we were really only considering half of the copyright issues in a sense and not the other half. There were independent discussions and negotiations going on around all those issues I've just mentioned. Some stakeholders were concerned that we didn't look at these issues and felt that it was a bit one-sided. However, the Inquiry's terms of reference explicitly said not to consider those issues. Now of course one of the big issues was fair use. This was explicitly referred to in the terms of reference. In particular, we were asked to review whether an exception for fair use should be introduced into Australian copyright law and the Report does recommend the introduction of fair use.

There is much anxiety about 'freeing up' copyright. We don't actually see our recommendations as doing this. We see fair use as being a way of asking the right questions to allow copyright to do what it should be doing. Of course fair use does have a very good reputation for having served well in this country and we know that the main objections to law reform

Volume 33 N°3  
September 2014

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## Open Justice versus Suppression Orders: A Battle of Attrition

Larina Mullins considers the impact of recent legislation and court practices in granting suppression orders on the public interest in 'open justice'.

## US Supreme Court Turns Off TV Streaming Service

The US Supreme Court recently handed down its decision in the Aereo case, making the television streaming service illegal under US copyright law. Jesse Gleeson and Flora Ma provide a summary of the Supreme Court's decision and compare it with the Optus TV Now decisions in Australia.

## Profile: Michael Rowe and Tim Holden

Alex Morrissey recently caught up with two experienced lawyers working in sports broadcasting, Michael Rowe and Tim Holden to chat about how they came to work in the area, some key issues facing the industry and some tips for young lawyers wanting to move into sport or media organisations.

Michael Rowe is a senior sports media rights consultant with 22 years' experience including four years as the Head of Broadcast for the Women's Tennis Association Tour.

Tim Holden is the Senior Legal Counsel (Commercial) with Football Federation Australia.

are transaction costs and uncertainty. The key question is how much uncertainty does fair use introduce as compared with fair dealing, which is discussed in the Report.

## 1. Statutory Licences

Another big issue is of course statutory licences. We were explicitly asked to look at whether statutory licences were standing up in the digital environment. I know there are some people here from collecting societies this evening, and I want to say that we were enormously well served by those and other stakeholders in terms of submissions. I feel quite guilty about some of the work that stakeholders have put in. We also know that many of the same stakeholders also have to engage with the Privacy Inquiry that's going on at the moment as well as the previous Classification Inquiry, so let me apologise to you on behalf of the ALRC. The government gives us the references. We don't set out to torture you and we know it's a lot of work to prepare submissions, but we did appreciate it. So of course statutory licences is one of the big issues. In the Discussion Paper we asked the question 'what would it be like if we didn't have statutory licences?' In the Report we did not recommend the abolition of statutory licences but we did recommend a great deal of freeing up of some of the conditions around them.

Okay, so one of the important questions of course is what does success look like? What does a successful digital economy look like? We needed to engage with stakeholders to know what was thought here and what I've got up on the presentation are some of the comments that were made to us in consultations leading up to the Issues Paper.

Now let me just tell you a little bit about what the Hargreaves Review said about these three points in the UK. One of the things about this Inquiry of course was that it was taking place in the context of a lot of discussion around the world. The UK Hargreaves Review was conducted. Our Inquiry started at just about the time they reported. The Irish Review of copyright was also released in October last year. We reported to the Attorney-General at the end of November giving us

a chance to make sure we had referenced the Irish Review correctly. The European Community announced a review at the beginning of this year and the US is also reviewing copyright in a number of ways, so it's all happening. In the UK it's been said that reform is necessary to allow increased access to information, knowledge and cultural resources, and to make full use of the opportunities created by new technologies.

The Hargreaves Review was told, as we were, that substantial quantities of knowledge are inaccessible due to copyright law. A lot of that is around author works and that copyright is losing credibility in the absence of reform. All of these comments can be found in the Hargreaves Review which we also found reflected to our Inquiry and stakeholder input.

## 2. Fair use

So let me show you something about fair use. How do we know if use of copyright material is 'fair'? Well, as you would all know, there are five or six fair dealing exceptions currently in the Copyright Act. I say five or six because conduct of judicial proceedings is not actually classified as fair dealing in the Act, but you would know of course that reporting the news, research and study, parody and satire, criticism and review and the giving of professional advice by lawyers or patent attorneys are already regarded as fair dealing in the Act. There are also some specific exceptions which allow, for example, the parliamentary library to copy for the purposes of Parliament and for libraries to supply documents for research purposes. Many of these exceptions, including fair dealing of course, have developed around an understanding of what is 'fair'; so we say fair use allows the right questions to be asked, not 'is this particular purpose fair?', but 'is this use generally fair given the considerations to be applied?'

So there are four factors here. They already exist in the Act as relevant to an assessment of whether research and study is fair dealing. These four factors are shared by a number of successful hi-tech economies who have introduced fair use into copyright law. This includes Singapore, Israel, South Korea, the United States and also the Philippines.

### The four 'fairness' factors:

- (a) the purpose and character of the use;
- (b) the nature of the copyrighted work, adaptation, audio visual item or performance;
- (c) the effect of the use upon the potential market for or value of the copyright work, adaptation, audiovisual item or authorised recordings of the performance; and
- (d) the amount and substantiality of the portion of the copyright copied in relation to the whole work, adaptation, item or performance.

Fair use does not require any specific purpose. The question is, would this use be fair, given the four factors. The market is also a very important consideration. Asking whether there is a market for the material is essential. However, humans love certainty and even the people that love fair use the most responded by saying 'yes, but when can we use it?' The Report therefore gives 11 illustrative purposes which reflect a distillation of what is needed and what would be useful in Australian copyright law.

### 11 illustrative purposes for fair use:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) professional advice;
- (f) quotation;
- (g) non-commercial private use;
- (h) incidental or technical use;
- (i) library or archive use;
- (j) education; and
- (k) access for people with disability.

You will see there is no mash-up use, social media purpose or transformative use purpose. The 11 illustrative purposes are at a higher level of abstraction than that and indicate what stakeholders said to

us would be really useful for policy reasons to have as indications of where fair use might apply. You'll notice that the first five already exist in the form of fair dealing albeit in a slightly more specific formulation in the Act.

We have proposed an alternative to fair use which is an expanded fair dealing. A lot of stakeholders said fair dealing is wonderful, we're used to it, we know how to apply it, why don't you just tidy that up and recommend that instead. So we have provided an alternative set of recommendations to introduce the 11 prescribed purposes as expanded fair dealing. It is felt that this would make the Copyright Act more useful and relevant. However, in our view fair dealing is not the gold standard for reform as it is less flexible and less adaptable to technological change than fair use. In other words, it's not technology neutral.

Some argue that fair use is less uncertain than fair dealing. In fact, the Law Council of Australia said to us in a submission that uncertainty comes from pigeonholing particular uses and a piecemeal approach is a very poor alternative which is likely to lead to much greater uncertainty. So, rather than asking whether a purpose is fair, asking whether these four factors mean that any use would be fair would be less uncertain according to the Law Council as well as many stakeholders.

### 3. Specific exceptions

The Report is not all about fair use. There are some specific exceptions to be retained and some more recommended. In the Discussion Paper we suggested that the parliamentary library exceptions might be dealt with under fair use. This provoked quite a reaction and we have gone back in the Report to recommending that many existing sections might just be retained. In theory, these are all fair. Some of these are suggested as just being covered under fair use. What is the difference between fair use and a specific exception? This really just results in a lower transaction cost in the sense that rather than going through the process of finding the four factors, let's just say it's fair. In addition, there are also some public policy reasons as well. Again, these are referred to in the Report; but this is along familiar lines that we've seen for fair dealing so in the interests of the administration of justice, running our democracy and making things that are obviously fair available, we just have some specific exceptions. Again we think this adds a little bit more certainty.

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One of the purposes that we've proposed is incidental or technical use. We did talk a lot about how many times in writing the Report we should repeat, over and over again, the phrase 'this purpose may indicate that it is fair but it is not prescriptive, it does not mean it will necessarily be fair'. You will find that phrase quite a lot in the Report. With the proviso that this is not necessarily going to be fair, the four factors have to be applied. We were guided with these illustrative purposes by overseas discussions as well as stakeholder views and what we've done really is adopt very much of what the Hargreaves Review said. So the incidental or technical use purpose would allow for some level of data or text mining which does not depend on the expression of the ideas or the information. In other words, it's non-expressive use and we agreed with Hargreaves that technological processes of analysis for non-commercial purposes and also the technical processes for running a computer should be allowed. Also you'll be aware, at the moment schools have a specific exception to allow this. It was agreed with collecting societies that this was needed because of uncertainty in the Act about whether this is actually copyright infringement or not. So there is some uncertainty around the copying processes that occur with allowing computers to work.

## **we agreed with Hargreaves that technological processes of analysis for non-commercial purposes and also the technical processes for running a computer should be allowed**

### **4. Contracting out**

Now, contracting out is another hot button topic. It's always an issue. In effect there's very little prohibition on contracting out in the present Act. The main scope for prohibition of contracting out is in the computer sections of the Act, and again this is something that stakeholders are very divided over. We noted that the US does not prohibit contracting out of their fair use exception and it seems important to a market based approach not to exclude it. Based on mediation of what is fair, the contractual provisions should be allowed to operate. Fair dealing of course is more closed, it's more prescriptive and the list of purposes is *prima facie* fair and so we felt there was more scope for prohibiting contractual arrangements denying fair dealing. Bright lines are very difficult here but we did hear the message that uncertainty is worse than bad law in some ways, so we said alright, we'll draw a line. We'll say you can contract out of fair use but you can't contract out of fair dealing. It's always a fraught question and as I said stakeholders are very divided. On one side it is said that if contracting out was allowed, that renders nugatory any exception. On the other hand, we do recognise that we want the market to operate and the four factors to apply in the section on fair use.

### **5. Orphan works**

With respect to orphan works, this is another area where the Report makes some recommendations. On the whole, apart from photographers there's not really much commercial significance with respect to the use of orphan works. However, because by definition no one knows who owns them, they're often very old and it's often quite low value material if you could find the owner, but this is a major issue for cultural institutions as well as of course for broadcasters. Some examples given to us in the Inquiry include World War I diaries, a very popular topic of discussion given the centenary of World War I starting this year. Another example is ration cards. Whether ration cards can be protected by copyright or not, I'm not sure given that the form and the expression might be too close together but the National Archives felt that their big stash of ration cards, which somebody had filled in, were not able to be as digitised as freely as

they would like to because they might have to think about whether they were protected by copyright and if so who might have filled them in. They are orphan works, old posters and documentary material.

We received some examples of orphan works which are discussed in the Report. It was stressed to us quite heavily that we should not require a diligent search, but most jurisdictions have it and we thought that it would be appropriate to require a diligent search. So what would this mean? It would vary depending on different factors. For cultural institutions it could be 'oh let's think about it and then let's not do anything', so it could be very minimal. As I said, the main problems here are for photographers whose works appear online and have the metadata stripped out so that identifying material is removed. We do acknowledge that this is a problem and we are not in any way condoning this practice, we're just saying that most orphan works really have very little commercial value. However if an owner does pop up there should be some recompense and we discuss in the Report that there should be some assessment of damages. We note that section 153 already limits damages if the infringement was unknowing, so we discuss some alternatives. We look at what the US does and we say that there should be a reasonable return as if there had been a licence arrangement rather than making exemplary damages available.

### **6. Retransmission of broadcast content**

As you know, retransmission is simultaneous and unaltered relaying of broadcast content, mainly for self-help purposes or in other words, to allow better reception. The ALRC therefore did not recommend any change to this, but the Report notes and discusses the fact that discussions on reform of retransmission are dependent on broader media policy which is outside the scope of the Inquiry. The Report discusses some anomalies with Internet retransmission, but we don't suggest any particular recommendations. We have some discussion and make some observations which we hope will be useful for government, but basically we backed away from making any particular recommendations about most of broadcasting and retransmission. I think we recommend that the government should think about it in light of our discussion. We do discuss whether some specific exceptions relating to broadcasters in the Copyright Act should be repealed but we do note that there is a lot of media policy about which is not concerned with copyright law. For example, Free TV asked that we recommend the introduction of a 'must carry' regime along with some other amendments that they would like. That is not really for us to do and we did not enquire into whether or not that would be a good idea. In fact, we think it's probably not, we think that's out of line with our market based approach on the whole. We all know that requirements for carrying Australian content apply to broadcasters and we are all aware of course of the anti-siphoning rules but again that's outside our terms of reference so for those reasons we did not interfere too much with the proposals. I mean some people say that whatever we recommend is not going to interfere at all in anything, but we didn't go so far as to make many recommendations about broadcasting or retransmission. We did look at them very seriously, we received a lot of submissions, we thought about it and we hope we have achieved some useful discussion about these issues.

### **7. Industry considerations**

Okay, so we're saying that fair use is a market based deregulated approach which allows the operation of competition factors. We note that much commercial behaviour is now agreed upon and we think that fair use allows greater scope for this. Of course, views differ as to whether transaction costs would be higher or lower if Australia moved into a fair use environment and I think the question would be how long would it take to get used to it? Another question is of course how would we know if something is fair use or not? There is a body of Australian case law which discusses some or all of the factors we discuss. Australian courts can and do have recourse to overseas precedent. Cogent guidelines have

been developed in the US and are already in place in some industries here, especially with regard to sport, for example. We heard a lot from sporting bodies about the fact that fair dealing is very uncertain. Peak sporting bodies use the phrase 'fair dealing creep' to reflect the fact that there is no settled understanding, except through agreement. There's a constant mediation and discussion about what is actually 'fair dealing' for the purposes of reporting the news amongst sporting entities and we see this continuing in a fair use environment. I would say it won't be any worse than it is in fair dealing. So it was interesting the number of consultations we had that started off with 'we understand fair dealing, we know it and love it but it's so uncertain, it's terrible, and fair use would be worse'. However, fair dealing is no panacea at the moment.

## 8. Inquiry process

I'm going to show you a bit about the process and how we went about what we did. We had 870 submissions plus 139 confidential submissions. We did get 400 form letters from teachers and I don't want to diminish the great amount of reading that you think I've done but 400 of the submissions or more were form letters. They were all very carefully and respectfully read. Some of them had more than just a form letter in them. Some of them went on to reveal even greater misapprehension and misunderstanding of what we were actually saying than the form letter did. But teachers and writers of educational materials were told quite a florid account, which in our view misrepresented what we were saying about how terrible their lives would be if we recommended fair use and also the abolition of statutory licences.

The ALRC received some criticism in this process. I think the Classification and Privacy Reviews were perhaps open to this as well but on the whole the ALRC is not usually criticised for its process. It has a 40 year long history of having developed a very good way of going about things. We did make a very conscientious effort to engage stakeholders and allow for submissions. We listened to everyone and our agenda was the terms of reference. However, some submissions included statements to the effect that the ALRC is dealing with a non-existent problem, is ideologically driven, has ignored evidence or has no evidence for the proposals in the Discussion Paper and is biased. As I said, the 'ideology' came from the terms of reference, which required us to enquire into amending copyright law so as to ensure the best interests of Australians and ensuring Australian creators, consumers, the business and the community are served in accessing copyright material and we tried to do just that. The Report discusses all of the available economic evidence that we found on fair use. All of it is partial, all of it relates only to certain industries, sectors or jurisdictions and most of it is commissioned by one stakeholder or another so we didn't ignore it, we looked at it, we assessed it, we couldn't necessarily follow all of it or any of it but we do note what we found.

As you'll see here we had 24 people on the Advisory Committee. This is the largest advisory committee ever for an ALRC Inquiry. The Advisory Committee was composed of people who are experts from a broad range of backgrounds. They are not meant to bring their own lobbying or representation to the Committee. They're meant to tell us whether or not what we're talking about is coherent and whether or not it hangs together and also to point out pitfalls to us. The Advisory Committee met three times and we did a lot of work leading up to those meetings. Members get a very short paper which has our proposals or our questions as the case may be and a very short comment on what we're thinking. Then we ask the Committee whether this is sensible, coherent and what we should be looking at or whether we have missed anything.

Now, one of the things that people say a lot is that copyright is very messy and when I said this at a conference once someone Tweeted hmm, the Commissioner says copyright is very messy, umm, isn't that a statement of the obvious. Well yes it is but that

is also what we heard a lot of; that it's incoherent, the operation of the Act is bizarre as between different subject matters and different rights holders, it's not convergence proof, some sections are never used and others simply cannot be understood. We have not dealt with all of that but we have tried to deal with a lot of it. Now we do understand that there are difficulties with reform, there are transaction costs. We were told quite a lot about difficulties that stakeholders perceived. We do discuss this in the Report, but we fully acknowledge that law reform does have costs and whether it's worth the time or not, there has to be an assessment made. We do know that this Report is intended to offer some opportunities for the future as to how to make full use of new technologies, how to allow the building of new business models and allow property right laws to be restricted. The Report has gone to government and the costs and benefits to the community will now have to be considered in formulating options for reform. Any law reform in Australia has to be considered to be effective in addressing identified problems and must be efficient in terms of maximising the benefits to the community taking part. This is the fourth time that fair use has been recommended. It surprised me a little bit - I genuinely did not have any intention to come out with a Report that recommended fair use. We just went in, spent a lot of time thinking about the terms of reference and what they were asking and we looked at everything again, from the beginning. So we didn't just say 'oh well, this CLRC recommended it, let's do it again'. We actually did a genuine inquiring process that looked at all of this. So, thank you very much and I'm happy to answer any questions.

## There's a constant mediation and discussion about what is actually 'fair dealing' for the purposes of reporting the news amongst sporting entities and we see this continuing in a fair use environment

## 9. Questions from the audience

### (a) What has been the attitude of the liberal government?

Yes, well interestingly we're now on our fourth Attorney-General. Robert McClelland first announced the Inquiry and drafted the terms of reference. Then the Optus case was handed down and everyone thought 'oh, what's going to happen here? That's when I first started thinking 'what on earth have I done saying I will leave my job and go to the Law Reform Commission?' I think the Optus TV Now case delayed things. Then, Nicola Roxton became Attorney-General and she wanted to review the terms of reference. Then she stepped down, Senator Dreyfus became Attorney-General and things continued. And then, of course, we had an election. When the Report was tabled, Senator Brandis said 'I remain to be convinced about fair use' and the next day he made some other comments at the Australian Digital Alliance Conference. He said that he did think that copyright law needed reform and that it should be a lot shorter and a lot simpler, the Act should not be so complicated. So his aims are exactly, I think, what the aims of our terms of reference were. As you know, he is concerned about the things that we didn't inquire into, including enforcement and piracy, but there has been work done on those things and the Attorney-General's department has been doing a lot of work on that. So I think the government - the current government - is committed to the same aims as our terms of reference. Now, whether or not they think that our Report has any relevance in achieving that remains to be seen. It would be hard to know what else they are going to do and if they're going to make it shorter, more comprehensive and decrease the regulatory burden and so on.

**(b) The one view of Senator Brandis' comments is that there is going to be a wholesale review of the Copyright Act. Has there been any feedback?**

I haven't heard anything specific about that, no. He said in comments that the Review has been the most comprehensive review in recent years, but I don't actually think it is. It's a review of some of the stuff in the Act and, of course the CLRC did a fantastic job of reviewing lots of parts of the Act including the whole simplification inquiry and indeed the jurisdiction of the Copyright Tribunal also. That's a very interesting report and in 2006 there were amendments made which I think are so far unexplored in their possibilities. We actually spent a bit of time looking the Copyright Tribunal's jurisdiction and how it could be used to more effectively deal with some of the problems stakeholders told us about. This doesn't appear in the Report because we felt it went beyond our terms of reference and there has to be a limit on the size of reports and how much work is done, but I think there are fertile areas for investigation.

**(c) What are your views on the transferability of precedent from other jurisdictions?**

We do talk about this quite a lot in the Report and we think that the US has many valuable lessons, but what we do know is that our judges are very adept with sifting and analysing overseas precedents. I think there is a lot of useful information from the US, not just in terms of court cases and not all of them, but certainly in terms of the codes and guidelines that have been developed. We know that the fair use guidelines for the movie industry allow the movie industry to get insurance in terms of being sued for copyright infringement so they do create a high level of certainty in that context.

We do like the notion of transformative use that the US has developed based on that famous article in the Harvard Law Review which the courts have now picked up there. Then of course we have our four criteria which are much more explicitly spelled out than they are in the US legislation and the US. As we know, the Copyright Act derives some of its authority from the US Constitution and the purpose of copyright is stated in the Acts might or might not be different for us, but we think our judges can cope with all that and apply what's relevant and sort it out.

**(d) I am interested in the reaction of the news media. Was any consideration given to aggregation of news items by websites?**

Unfortunately that was really outside our terms of reference. We thought about that carefully. In the first chapter there is a section on what stakeholders would like as to what we talked about and we felt we shouldn't deal with. I think people felt that they'd been overlooked, including those who submitted to us on news aggregators, but we didn't feel the introduction of such a new right was something that was part of our remit. However, in the Report we do briefly refer to that as an issue that was raised.

**(e) How do you deal with the fact that transmission, the way something's transmitted, actually makes a great difference in the way it's handled under the legislation and yet, just about everything that is transmitted can be transmitted in the same way now that it's all digital and it will all be transmitted in the same way and yet treated differently. Did you try to deal with that? Because that's going to be the implication of the digital economy.**

Yes, we make quite a few observations about that, including about the fact that the Act at the moment distinguishes oddly between subject matter, rights and rights holders so we did observe that. In our recommendations we try and set out a

platform that allows for technology neutrality and discuss that at some length not just with respect to fair use, but we think fair use is a major tool there. Of course that also allows for different contexts, so it might be fair in one context but not in another. The question of whether transmission over the Internet should be treated as broadcasts is discussed, but we do not make specific recommendations as broader issues of media policy are important here.

**(f) So you assumed that social media uses were not considered, or considered in much detail?**

No, we did consider them. It's just that we're not suggesting that there's any illustrative purpose of social use being an exemption from copyright infringement. That has always been a form of fair use, but we do talk about private, non-commercial use which would include that. As I said it's just pulled up a little bit, to a slightly higher level of abstraction so that there are not a thousand bullet points of examples. The Report does include a page and a half at least of examples that people would like included under fair use, but they are not all elevated to an illustrative purpose. Again this is something that some of the team thought we shouldn't include because it was just excess words, but I said that people want to see what other people think should be fair use so there is a list of bullet points of things that stakeholders would like to see. We're not saying they are or are not fair use, but certainly social media use is caught up in the private and domestic. Of course there's a big issue with that because of the anxiety we learnt about concerning fair use by a consumer, flowing on to fair use by a large corporation. We think we dealt with this. For example if your three year old is singing a One Direction song and you upload to the Internet, the issue becomes whether that then flows on to be fair use by that Internet service provider or specifically YouTube? So we have attempted a framework where it doesn't lead to prosecution of the person that loads it up, but it's not fair use by the platform.

**(g) It's interesting that you've indicated the element of personal use. Sometimes where people use a blog for personal use, it may grow larger and become a commercial venture so then that timing would become important at some stage as well.**

We have so many discussions about commercial and non-commercial and how to distinguish them apart. Basically, we haven't. At the end of the day one of the illustrative purposes refers to 'private non-commercial use' and that is a sort of belt and braces approach. We feel that non-commercial is inherent in the concept of fair use but we put it in there to give a bit of comfort because with respect to private use, we have some very big stakeholders who are very big copyright earners and they said to us 'we could live with fair use as long as it doesn't include private use because that means open slather and the public will read that as we can do whatever we want', so we tried to address that issue.

*Professor Jill McKeough was previously Dean of the Faculty of Law at the University of Technology, Sydney and was appointed as Commissioner in charge of the ALRC's Inquiry into Copyright Law. Professor McKeough is a highly regarded academic, researcher and writer with a special focus on intellectual property issues.*

# Open Justice versus Suppression Orders: A Battle of Attrition

Larina Mullins considers the impact of recent legislation and court practices in granting suppression orders on the public interest in 'open justice'.

*The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases.<sup>1</sup>*

Open justice is the cornerstone of the Australian judicial system. It is a principle so universally accepted and widely reported that this article does not need to extol its virtues. However, it is a principle that is slowly but surely under attack. Courts are routinely ordering the suppression of evidence, the concealment of identities and even shielding entire hearings from public view.

This battle of attrition against open justice has reached the point where there are more than 200 pieces of legislation granting powers to courts and tribunals to make suppression orders. The subject matter of the legislation is wide-ranging from witness protection<sup>2</sup>, to chemical weapons technology,<sup>3</sup> to a quaint provision regarding evidence that is likely to offend against public decency.<sup>4</sup> Some of this information is justifiably restricted but the enormous scope of the legislation and the multiple jurisdictions involved makes it practically impossible to monitor the impact of the legislation on the principle of open justice. That, in itself, is cause for concern.

Recent attempts to understand the impact of these restrictions on the principle of open justice have been undertaken in Victoria.<sup>5</sup> One empirical study of suppression orders relied on the courts procedure of notifying the media of such orders as its source. Even on that restricted basis, the study found that 1,501 suppression orders were made by Victorian courts from 2008 to 2012. A separate study indicated that the true number of suppression orders may be around double that figure.<sup>6</sup> Anecdotal evidence suggests that Victoria is the most prolific state when it comes to granting suppression orders, followed by South Australia and New South Wales. Orders from other states such as Queensland are not routinely provided by the courts to the media and so the total number of orders is simply unknown.

In 2010, the Standing Committee of Attorneys-General sought to introduce some order to the legislative chaos by proposing model legislation that standardises the considerations and procedures for suppression orders. The legislation was adopted by New South Wales in 2010,<sup>7</sup> in modified form at the federal level in 2012<sup>8</sup> and in a substantially amended form in Victoria in 2013.<sup>9</sup> This article focuses on these pieces of legislation and how they are being applied in practice.

## 1. What are Suppression Orders and Non-Publication Orders?

Suppression orders prohibit the disclosure of information that would otherwise be publicly available during an open hearing. For example, during a criminal proceeding a judge may suppress the police fact sheet that is tendered, which a media representative would otherwise be entitled to inspect.<sup>10</sup>

Non-publication orders only prohibit the further publication of information. This means that the information is disclosed to persons who attended the open hearing, but those persons must not disseminate that information to the general public. For example, a witness could give evidence in open court but the judge can prohibit the publication of the name or identity of the witness. Publication by any means is prohibited, which includes in a newspaper, a television broadcast or on the internet (so yes, 'tweeting' counts).

**This battle of attrition against open justice has reached the point where there are more than 200 pieces of legislation granting powers to courts and tribunals to make suppression orders.**

For the sake of brevity, this article will refer to both types of orders as suppression orders.

## 2. What information can be suppressed?

Under the NSW Act suppression orders can be made in relation to any information (including documents) that:

- (a) tends to reveal the identity of any party to or witness in proceedings or any related person; or
- (b) comprises evidence, or information about evidence, given in proceedings.<sup>11</sup>

1 *R v Legal Aid Board, ex parte Kaim Todner* 7 [1998] QB 966 at 977 per Lord Woolf MR

2 s 28 *Witness Protection Act 2004* (Cth) and similar state legislation

3 s 82 *Chemical Weapons (Prohibition) Act 1994* (Cth)

4 s57 *Evidence Act* (NT)

5 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35(4) *Sydney Law Review* 671

6 Andrea Petrie and Adrian Lowe for the Media, Entertainment and Arts Alliance, 'Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia' (Report, May 2012) 58

7 *Court Suppression and Non-publication Orders Act 2010* (NSW) (the '**NSW Act**')

8 Schedule 2, *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) (the '**CTH Act**')

9 *Open Courts Act 2013* (Vic) (the '**VIC Act**')

10 s 314, *Criminal Procedure Act 1986* (NSW)

11 s 7 NSW Act

The CTH Act goes slightly further to include information obtained by the process of discovery, produced under a subpoena, or lodged with or filed in the federal courts.<sup>12</sup>

The VIC Act goes further still. It broadly defines information without any qualifying reference to identities or evidence, and adds a power to prohibit reports of the whole proceeding or any specified material relevant to a proceeding, and to close the court.<sup>13</sup>

### 3. What do courts take into account in granting a suppression order?

Under the NSW Act and the CTH Act, the courts must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.<sup>14</sup> In the VIC Act, there is a presumption in favour of disclosure, to strengthen and promote the principles of open justice and free communication of information.<sup>15</sup> However, these provisions appear to pay little more than lip service to these principles when they are followed by numerous and detailed provisions permitting suppression and prohibition on disclosure of information.

The grounds for courts to grant suppression orders vary between the jurisdictions, as shown in the table below:

No.	NSW Act	CTH Act	VIC Act
1.	To prevent prejudice to the proper administration of justice	Same as NSW	To prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means
2.	To prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security	Same as NSW	Same as NSW
3.	To protect the safety of any person	Same as NSW	Same as NSW
4.	To avoid causing undue distress or embarrassment to a <b>party</b> to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)	Same as NSW	To avoid causing undue distress or embarrassment to a <b>complainant</b> or witness in any criminal proceeding involving a sexual offence or a family violence offence
5.	Where necessary in the <b>public interest</b> for the order to be made and that public interest significantly outweighs the public interest in open justice	No equivalent provision	To avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding

The New South Wales and federal legislation referred to in item 4 above provides for a suppression order to be made to avoid causing undue distress or embarrassment to any party, including the party accused of a sexual offence. The Victorian equivalent, however, limits this scope to refer to the complainant, not the accused.

The New South Wales legislation referred to in 5 above provides for a balancing exercise between 'the public interest for the order to be made' and the public interest in open justice. This part of the model legislation is notably absent from the CTH Act and VIC Act.

### 4. Two-Stage Process in New South Wales

The NSW Act was only intended to be the second stage of a two-stage process. The first stage was the passage of the *Court Information Act 2010* (NSW), which set a clear statutory entitlement to access to documents and other court information.<sup>19</sup> In introducing the *Court Information Act*, the then Parliamentary Secretary for Justice noted that it was the product of an extensive and comprehensive consultation process and had been broadly supported by the Chief Justice of New South Wales, the Chief Judge of the New South Wales District Court, the Chief Magistrate, the Law Society of New South Wales, the New South Wales Bar Association and media organisations such as Australia's Right to Know Coalition and the Australian Press Council.<sup>20</sup>

Despite this overwhelming support and despite receiving the legislature's assent on 26 May 2010, the *Court Information Act* is awaiting executive proclamation to come into effect and has therefore not yet commenced.<sup>21</sup> In January 2014, the Attorney-General stated that he was considering his options including amending the *Court Information Act* to address 'a range of practical concerns that have been identified' in implementing the Act including developing the necessary court rules, the regulation, and practices and procedures.<sup>22</sup>

The result is a clear imbalance. The Act enshrining an entitlement to court information has fallen by the wayside, while the Act permitting the suppression of information has been in effect for years.

### 5. How are Suppression Orders made in practice?

News media organisations have standing to oppose suppression orders but in practice, they rarely exercise this right.<sup>23</sup> Typically these organisations do not receive any notice of an application for a suppression order and usually they are only informed of the order if the court's media liaison emails a notification after the fact.<sup>24</sup> Furthermore, often the court reporter covering the proceedings is the only representative from a news media organisation in court and this person is typically unaware of their organisation's standing to intervene or understandably unwilling to interrupt the proceedings to advocate for open justice. In even the most fortuitous circumstances (such as an application being stood over for the luncheon adjournment), the organisation's lawyers may have less than an hour to obtain instructions and get to the court.

News media organisations also have standing to seek a review of a suppression order after it has been made.<sup>25</sup> However, in light of the well-publicised budget pressures of such organisations, these legal costs can be difficult to justify.

12 Schedule 2 CTH Act)

13 Parts 3-5 VIC Act

14 s 6 NSW Act and Schedule 2 Cth Act

15 s 4 VIC ACT

16 s 8 NSW Act

17 Schedule 2 Cth Act

18 s 18 VIC Act

19 Second reading speech, *Court Suppression and Non-publication Orders Act 2010* (NSW) 23 November 2010

20 NSW Legislative Assembly debate *Hansard* 19 March 2010.

21 As at the time of writing this article( July 2014)

22 Legislative Council Questions and Answers No. 185 dated 30 January 2014

23 s 9 NSW Act, Schedule 2 CTH Act, s 19 VIC Act

24 Despite ss 10-11 VIC Act requiring the applicant give the court three days' notice, with the exceptions thereto being regularly invoked

25 s 13 NSW Act; Schedule 2 CTH Act; s 15 VIC Act



## Publication by any means is prohibited, which includes in a newspaper, a television broadcast or on the internet (so yes, 'tweeting' counts).

Finally, suppression orders are also often granted in circumstances when other legal regimes or principles apply. In particular, some suppression orders are encroaching on the realm of *sub judice* contempt, as recently stated by the Hon. P.D. Cummins:

Many orders are properly made; others not so. It is clear that some orders are wrongly made, because legislation already prohibits publication, or because the principle of *sub judice* already governs the situation. It would be seriously retrograde if that powerful principle came to be supplanted by suppression orders. On other occasions, therapeutic, prophylactic or prudential grounds falling short of necessity are the occasion for suppression orders. And on other occasions, inadequate understanding of the integrity and discipline of the jury system founds suppression orders. Long experience of the jury system shows that juries, when given proper and full instruction by judges, are well able to put aside extrinsic material and to act solely on evidence led in court.

In law, the touchstone of issuance of suppression orders is, and must be, necessity. Nothing less. We must be astute to the tendency of multiple issuance of suppression orders eroding that critical test. We must resist a tendency to resile from necessity to convenience. Suppression orders should only be a last resort and should never be a first resort.<sup>26</sup>

### 6. Silent Listings

On 12 March 2014, the Magistrates' Court of Victoria issued a practice direction regarding *silent listings*.<sup>27</sup> This permits a hearing to occur without the name of the accused person appearing on any court list. The practice direction refers to this being necessary in some cases for the safety of the accused. However, this does not limit the grounds upon which a silent listing could be arranged.

An application is made by completing a form and providing a supporting affidavit to the Chief Magistrate. The media has no opportunity to oppose the application, and the Chief Magistrate does not publish any reasons for judgment that could otherwise be the subject of an appeal.

The result is that there is no public record of the hearing taking place and the media cannot discover where or when the hearing will be held. This circumvents the procedures and considerations required for closing the court. The court is, instead, closed by default because only the parties and Magistrate know the hearing's time and location.

There is no way of knowing how many silent listings have taken place, or on what grounds they have been granted. This is a troubling development that flies in the face of the principle of open justice, and could have wide ranging ramifications if other courts implement silent listings – if they have not done so already.

### 7. Conclusion

There is growing concern amongst legal practitioners and academics that the principle of open justice is being eroded by the practices set out above.

The media represents the general public when it comes to access to court information.<sup>28</sup> It is often in individual proceedings and single hearings that suppression orders are being made and it is on these small battlegrounds, when the opportunity arises, that the media must act to defend the public interest in open justice. Otherwise applications and arguments in favour of suppression orders day after day will be met by nothing more than resounding silence.

**Larina Mullins is a Legal Counsel at News Corp Australia and a member of the board of the Communications & Media Law Association.**

26 The Hon. P.D. Cummins, chair of the Victorian Law Reform Commission, '*Open Courts: who guards the guardians?*' paper delivered at the '*Justice Open and Shut*' seminar organised by the Australian Centre for Independent Journalism at UTS and the Rule of Law Institute of Australia on 4 June 2014, and published by the Gazette of Law and Journalism on 16 July 2014. *Sub judice* contempt is the offence of publishing material while proceedings are still to be determined by the court where that material has a tendency to interfere with the administration of justice

27 Magistrates' Court of Victoria, *Practice Direction 3 of 2014: Silent Listings* 11 March 2014

28 *Richmond Newspapers Inc. et al v Virginia et al* 448 US 555 (1980) at 572-3 (Burger CJ)

## CAMLA CUP 2014

The 2014 CAMLA Cup was once again a night of great fun, frivolity and healthy competition. The event was over-subscribed this year and more than 150 of Sydney's best media and communications law packed into the NSW Leagues Club to catch up with colleagues and battle it out for trivia honours.

Congratulations to this year's winning team, NSW Young Lawyers, Communications, Entertainment and Technology (CET) Law Committee.

CAMLA thanks and pays tribute to Debra Richards, quiz master extraordinaire whose endless enthusiasm and effort for trivia ensures the night is a success.

Thanks also to CAMLA board members Page Henty, Cath Hill, Gulley Shimeld and to CAMLA young lawyers committee members Maggie Chan and Raeshell Tang for their work in staging a great event.

### CAMLA acknowledges and thanks the following law firms and organisations for contributing generous prizes to the CAMLA Cup:

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# US Supreme Court Turns Off TV Streaming Service

The US Supreme Court recently handed down its decision in the *Aereo* case, making the television streaming service illegal under US copyright law. Jesse Gleeson and Flora Ma provide a summary of the Supreme Court's decision and compare it with the *Optus TV Now* decisions in Australia.

## 1. Introduction

The US Supreme Court has recently handed down its long-awaited decision in the *Aereo* case, reversing the 2013 decision of the US Court of Appeals for the Second Circuit. This decision makes *Aereo*'s free-to-air television streaming service illegal under US copyright law, following in the similar footsteps of the earlier *Optus TV Now* decisions in Australia. Both the US and Australia have held certain TV streaming services to be illegal and in breach of copyright laws in both countries respectively.

## 2. Background: The Internet streaming landscape so far

The *Aereo* case in the US has been followed with great interest throughout its development, particularly in the lead up to the recent US Supreme Court decision.

**The court held that even if *Aereo* only transmitted the signal from an aerial to a single subscriber, in aggregate it would transmit the same broadcast signal to multiple persons simultaneously**

*Aereo* was a US service that rented tiny television antennas to individual subscribers. The antennas received free-to-air television broadcast and streamed that content live to web browser and mobile devices. *Aereo* also provided dedicated personal video recorder functionality for each customer. Various US TV networks commenced copyright infringement proceedings against *Aereo*.

In 2013, the US Court of Appeals for the Second Circuit denied preliminary injunctive relief against *Aereo*, holding that *Aereo* did not infringe US Copyright Law.<sup>1</sup> This was mainly as the transmission of the television signal was held not to be 'to the public' – the transmission was made to each individual subscriber from their own aerial.

The judgement relied heavily on the court's previous decision in *Cartoon Network LP v CSC Holdings*<sup>2</sup> in 2008. There, the court held that creating temporary buffer copies for customers, creating permanent copies for customers and transmitting the broadcast to customers did not infringe copyright as the transmissions were provided to individual customers and not "to the public".

In *Aereo*, the Court of Appeals for the Second Circuit similarly held that *Aereo*'s service recorded and transmitted content for each sub-

scriber on an individual basis, and did not constitute transmission to the public. As a result, the *Aereo* service continued to operate legally in the US.

The 2013 *Aereo* decision was similar to the decision at first instance concerning the *Optus 'TV Now'* service in Australia.

## 3. Australia: *Optus TV Now*

In 2011, *Optus* developed a service called 'TV Now' which allowed users to record certain television programs and view them later on up to four devices. The recordings were stored at *Optus*' data centre and were streamed to a user's device upon request. *Optus* retained possession and control of the recordings at all times, deleting them after 30 days.

The Australian Football League (**AFL**), National Rugby League (**NRL**) and *Telstra* began proceedings after several AFL and NRL games broadcast on television were recorded and viewed by TV Now subscribers alleging that the service infringed AFL and NRL's copyright in the television broadcasts of its games, as well as *Telstra*'s exclusive licence to broadcast the games via Internet and mobile technologies.

At first instance, the TV Now service was held not to infringe copyright in the television program.<sup>3</sup> Justice Rares found that the copies of the television program were made by the individual service subscriber, not *Optus*, and that their use fell within the 'time-shift exception' in section 111 of the *Copyright Act*<sup>4</sup> which allows a person to make a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.

However, in 2012, the Full Court of the Federal Court unanimously upheld an appeal concerning the TV Now service.<sup>5</sup> The court held that the *Optus* service infringed *Telstra*'s copyright in the television programs by recording them and making them available to its subscribers. The copies of the cinematograph films and sound recordings were found to have been made jointly by *Optus* and their subscribers. The section 111 'time-shift exception' was found not to be available on the facts, applying only for private and domestic use and not to cover commercial copyright carried out for the benefit of others. The High Court denied special leave to appeal, leaving the Full Court of the Federal Court's judgement as the final decision on the matter.

At the time, the 2013 *Aereo* decision contrasted with the landscape in Australia in light of *Optus TV Now*. This raised uncertainties as to whether *Optus*' banned service in Australia would be legal in the US. However, the recent *Aereo* decision puts some of these uncertainties to rest.

1 *WNET v. Aereo, Inc.*, 106 U.S.P.Q.2d 1341 (2d Circuit, 2013).

2 536 F.3d 121 (2nd Circuit, 2008).

3 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34.

4 1968 (Cth).

5 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

#### 4. US Supreme Court: Aereo

Following a similar path to the Optus TV Now proceedings, the US Supreme Court has recently reversed the 2013 Aereo decision making Aereo's free-to-air television streaming service illegal under US copyright law.<sup>6</sup>

In reaching their decision, six justices of the US Supreme Court, with three justices dissenting, focused heavily on the strong resemblance between community antenna television (CATV) providers and Aereo. CATV providers provided shared antennas in optimal reception locations and transmitted free-to-air broadcasts to viewers over cables. In response to a US Supreme Court decision that CATV providers did not infringe copyright, in 1976 the US Congress amended the US Copyright Act with the express aim of making CATV transmissions illegal unless licensed pursuant to a statutory licensing regime for re-transmission of broadcasts.

While the US Supreme Court's decision recognises that Aereo differs from CATV providers in that it had a dedicated aerial per subscriber and did not transmit from that aerial until receiving a customer request to do so, it held that those 'behind the scenes technological differences' did not sufficiently distinguish Aereo. Aereo was held to fall within the US Copyright Act, as amended to catch the CATV providers. The court held that even if Aereo only transmitted the signal from an aerial to a single subscriber, in aggregate it would transmit the same broadcast signal to multiple persons simultaneously – each through their own respective aerials. This was held to be sufficient to constitute 'public broadcast'.

The Supreme Court also held that both the user and Aereo transmitted the television signal, as they both 'show a television program's images and make audible the program's sounds'. As a result, Aereo was held to be a direct infringer.

#### 5. What now?

Although both Optus TV Now and Aereo have been held to infringe copyright under Australian and US copyright law respectively, the basis for each decision is different. Perhaps anticipating issues in relation to re-transmission of live broadcasts and likely lacking Aereo's technology for using tiny antennas, Optus TV Now was designed to provide recordings of past broadcasts upon demand as early as 2 minutes after the commencement of an original broadcast, whereas Aereo's service sought to provide near-live transmissions with a delay of a few seconds from the over-the-air broadcast.

The courts in both instances held that both the service providers and their customers could be held accountable for the relevant acts of recording and re-transmission and that it will be difficult for providers to avoid liability by relying solely on user or subscriber actions and requests.

Although the Optus TV Now cases considered only the making of cinematograph films and sound recordings of the broadcast,<sup>7</sup> the re-transmission provision relied upon in the recent Aereo decision has an Australian equivalent which can be found in Part VC of the Copyright Act.

##### 5.1. ALRC Inquiry into 'Copyright and the Digital Economy'

There was some speculation after the TV Now decisions that the ALRC Inquiry into 'Copyright and the Digital Economy' may present an opportunity to review the exception under section 111 sought to be relied on by Optus. The Inquiry Report has now been delivered with the ALRC recommending the repeal of the exception stating instead that the recommended fair use or expanded fair dealing exception should be applied when determining whether a private use infringes copyright.<sup>8</sup>

The recommendation for fair use is for this new exception to replace the existing provisions relating to fair dealing. Alternatively, if fair use is not enacted, the ALRC has recommended expanding the fair dealing exceptions. The recommendations

for fair use centre around consideration of four 'fairness' factors rather than the specific purpose of the use of copyright material. These fairness factors are based upon the factors that are common to both the US fair use provision and the existing Australian provisions for fair dealing for the purpose of research or study. It has also been recommended that these be accompanied by 11 non-exhaustive illustrative purposes that may be considered 'fair'. The alternative recommendation for an expanded fair dealing is to introduce 11 new fair dealing purposes and provide that the same four 'fairness' factors be considered. However, neither of these recommended exceptions requiring the use or dealing to be 'fair' are likely to cover commercial services such as the Optus TV Now service.

**The courts in both instances held that both the service providers and their customers could be held accountable for the relevant acts of recording and re-transmission and that it will be difficult for providers to avoid liability by relying solely on user or subscriber actions and requests**

#### 5.2. Alternatives

While Aereo customers are likely to be disappointed by the Supreme Court's decision, as Optus customers were by the TV Now decision, given the wide proliferation of free catch-up services, commercial streaming services and online content stores, consumers are unlikely to want for legal alternatives to sate their desire for online television content. At the same time, the Supreme Court's decision will make it that little bit easier for the creative minds behind our current golden age of television to be paid their due.

***Jesse Gleeson is a Senior Associate at Allens specialising in technology, media and telecommunications and intellectual property. Flora Ma is a Senior Paralegal at Allens in the technology, media and telecommunications practice group. This article represents the views of the authors only and does not represent the interests of any organisation.***

6 *American Broadcasting Companies, Inc v Aereo, Inc* 573 US \_\_ (2014).

7 *Copyright Act 1968* (Cth), ss87(a) and 87(b).

8 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report, Report No 122 (2014) 247.

## ELECTRONIC COMMUNICATIONS LAW BULLETIN

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# Profile

## Michael Rowe

Senior sports media rights consultant and lawyer



Michael Rowe



Tim Holden



Alex Morrissey

## Tim Holden

Senior Legal Counsel (Commercial)  
Football Federation Australia

CAMLA Young Lawyers representative, Alex Morrissey, recently caught up with two experienced lawyers working in sports broadcasting, Michael Rowe and Tim Holden to chat about some key issues facing the industry and some tips for young lawyers wanting to move into sport or media organisations.

Michael Rowe is a senior sports media rights consultant with 22 years' experience including four years as the Head of Broadcast for the Women's Tennis Association Tour.

Tim Holden is the Senior Legal Counsel (Commercial) at Football Federation Australia.

### 1. How and where did your career start?

**Michael:** My legal career started at the Commonwealth Director of Public Prosecutions office where I worked for 8 years. Late in that period I started to consider what it would be like to work in the sports industry given I have a love and enjoyment of sport. I started a Masters in Sports Management at Deakin University in Melbourne. That gave me exposure to people who were either already in the industry looking to further themselves or like me, trying to gain entry into the industry. Early on in my time studying, I was approached by an existing sports law practice in Melbourne which had a broad base of national sporting organisations as clients. I accepted a role as a Senior Associate essentially providing advice and services to national sporting organisations, predominately Olympic sports. During this time Tennis Australia became a major client. Eventually I left private practice to become the inaugural General Counsel setting up the legal department at Tennis Australia.

**Tim:** I started my legal career with Allens as a Paralegal while I was at the University of Sydney law school. I then started as a graduate lawyer with Allens in the Litigation and Dispute Resolution department and later moved to the Intellectual Property group. All up, I was there as a lawyer for about 4 years before an opportunity came up to join FFA as an in-house counsel. I've been here for about 5 and a half years now.

### 2. What do you enjoy most about working in the sports media industry?

**Michael:** I'm a fan of most sports, in particular international competition. For me the opportunity of bringing together my love of sport with my life as a lawyer and later as a sports media rights manager was a major attraction.

**Tim:** There are a number of things. I am very fortunate to be able to practice as a lawyer and have the sport of football as the subject matter of the work I do. This always makes the work a little more interesting. The FFA legal team is involved

in all aspects of FFA's business – including the commercial and regulatory side of governing football in Australia and administering the various Australian National Teams and professional competitions such as the Hyundai A-League – so the variety of work is fantastic. It keeps you on your toes and I really enjoy the fact that I am not pigeon-holed into one practice area.

### 3. Michael, sports rights deals can involve intense bidding and negotiation processes – what are some of the reasons for this?

**Michael:** My general experience is that intensity arises out of competition for a sporting organisation's broadcast rights. Competition should create a better outcome for the sporting organisation licensing the rights. An open bidding process via a Request for Proposal is preferable but might not best suit the incumbent broadcaster who might seek to rely on existing relationship to retain the rights. This can also create an intense environment as all parties seek to obtain the best deal.

### 4. The importance of commerciality is often emphasised to young lawyers. Michael, how do you think young lawyers, especially those in private practice, can develop commercial skills?

**Michael:** Commercial experience is gained by having a presence early in the negotiation process. Yes lawyers write contracts setting out the negotiated terms, but lawyers can also bring to the table skills that assist in the negotiation. If a private practice lawyer or an in-house lawyer can become involved earlier in the negotiation process, that is before deal terms are agreed, then this will help with the development of the lawyer's commercial skills.

The larger broadcast rights deals in Australia are often negotiated by a team of people which includes a lawyer. The lawyer not only provides legal input but can also provide advice and expertise relevant to the commercial aspects of the deal. This can only be to the benefit of the client.

**5. Tim, we recently witnessed the spectacle of the World Cup in Brazil and the Asian Cup is going to be held in Australia next year. What type of involvement do the lawyers at FFA have with these types of events and what impact do events like these have on your workload as a lawyer?**

**Tim:** The FIFA World Cup does have a big impact on my workload but I'm not complaining! It really is rewarding to be involved in sending our National Team to compete in that tournament. There are a few different aspects to my involvement. The collective bargaining agreement with the players association, which governs each player's participation in the National Team, is a key aspect. There's a lot of work that happens in the year leading up to the event to support the business through various service relationships to address our operational and logistical requirements. The FIFA World Cup was in Brazil this time around so we had a lot of dealings with Brazilian companies which introduced some new challenges as we were working outside of the Australian context. We also had a lot to do with FIFA around the rules and regulations that govern participating and commercial rights.

The AFC Asian Cup Australia 2015 is going to be a fantastic event. My involvement to date has primarily been around the broadcast side of things. FFA acquired the broadcast rights for the tournament a couple of years ago so I was involved in that deal as well as our subsequent agreement to grant the broadcast rights to Fox Sports Australia. I have also worked with our Local Organising Committee to contract a host broadcaster to produce the broadcast feed for the event. Otherwise, we have an excellent team of lawyers at the LOC who are doing a great job!

**6. Tim, you've been involved in some intellectual property disputes whilst at the FFA. Do you think the current IP laws provide adequate protection for sports rights holders?**

**Tim:** That's a good question. Copyright is fundamental to the commercialisation and exploitation of the audio-visual coverage of our events. The revenue that FFA receives from the exploitation of its rights, including its online and digital rights, is crucial for football.

As part of the recent ALRC review [into Copyright and the Digital Economy], I was involved in a submission on behalf of the Coalition of Major Professional and Participation Sports (COMPPS) that argued against the introduction of a fair use exception in the form recommended by the ALRC. As I see it, such an exception may negatively impact our ability to protect the copyright in one of our most valuable assets. So I'm a bit concerned about where that may go.

I also think that the rise of social media has made it difficult for rights holders to protect their IP rights. It is so easy to infringe IP on social media and as things progress I can see that many users are losing sight of the fact that what they are doing online may be wrong. From a rights holders' perspective, I can see that there may be circumstances where a rights holder may elect not to enforce its IP rights – for example, to increase brand awareness. But when there is a commercial angle to the use – and content sharing sites with built in commercialisation models makes this particularly challenging – it can really become an issue. This is an area that created some difficulties for us around the FIFA World Cup. I've found that traditional enforcement options are less effective in the digital age and I would probably say that stronger deterrents are necessary to deal with the rise of social media.

**7. Michael, how did you make the move from legal counsel to a commercial role and what inspired the change?**

**Michael:** During my time at Tennis Australia I was providing legal services across the breadth of the business for instance from player development, commercial, governance, event management and policy work. Eventually given the importance, I became more closely associated with commercial dealings of the Australian Open, more specifically both broadcast and sponsorship. In addition to my role as GC, I also filled the role as an interim manager in Broadcast for approximately 12 months until a permanent Head of Broadcast was appointed. Negotiating international deals gave me further insight into sports media which eventually led to me taking a role as Head of Broadcast for the Women's Tennis Association Tour in London where I worked for 4 years.

The broadcast position had a variety of aspects to it which I was attracted to including developing strategies, negotiating deals, managing relationships but also the legal aspects. I wasn't walking away completely from my prior life as a lawyer as broadcast deals invariably are documented within a contract so my acquired legal knowledge was still very useful.

**8. Tim, you have worked in-house and in private practice lawyer, what is the biggest difference or challenge that you have noticed?**

**Tim:** I really enjoyed working at Allens but I think that I enjoy the in-house setting a little more. I am fortunate to work very close to the business and I can see firsthand how my advice can shape what is going on. You don't often get that close in a private practice. In my experience, the most noticeable difference or challenge is probably the lack of resources. In an in-house environment you obviously don't have the benefits of the big firm support system.

**9. For young lawyers looking to pursue an in-house legal role in sport or media organisations what would you recommend?**

**Michael:** It is important to understand the media and its changes as it evolves from the traditional television form to digital. Digital distribution across various forms is important to understand for all types of sports. It can help some sports achieve distribution where it might not otherwise do so via television alone. Keeping abreast of broadcast deals and the manner in which they are structured is important. Education via publications and industry networking is also very important.

**Tim:** A solid understanding of the sporting industry is really important. This could come from playing sport or following the business side of the industry, or both, and ideally in multiple sports. It would also be beneficial to get involved with a club or association in some way. Sports administration experience is really valuable. I think it is really important to develop your skills in private practice for a period of time too. I have found my commercial litigation and IP experience to be particularly beneficial to my role at FFA. I also think that organisations such as ANZSLA and CAMLA are very helpful in terms of making contacts within the legal profession and sporting industry and I would encourage others to get involved.

**Alex Morrissey is a legal counsel at Fox Sports and member of the CAMLA Young Lawyer Committee.**

Michael Rowe can be contacted at: [mjrowe20@gmail.com](mailto:mjrowe20@gmail.com)

Tim Holden can be contacted at: [Tim.Holden@footballaustralia.com.au](mailto:Tim.Holden@footballaustralia.com.au)

**If you have someone you would like us to interview, drop us a line at [camla@tpg](mailto:camla@tpg.com.au).**

# Seminar

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## Communications Policy Settings in a Time of Unprecedented Technological Change

Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, will discuss the impact that unprecedented technological change is having on traditional policy assumptions in the communications sector. The disruption of industry after industry by a better, internet based offering is one of the great constants of modern economics. This rapid rate of technological change creates a profound challenge for policy makers, in the communications sector particularly. Mr Fletcher will discuss these challenges and the policy approaches of the Abbott Government.



### Mr Paul Fletcher MP

Paul Fletcher was first elected to the Federal Parliament as the Member for Bradfield at a by-election in December 2009 and was subsequently re-elected with an increased majority in August 2010 and again in September 2013. He was appointed Parliamentary Secretary to the Minister for Communications on 16 September 2013 by Prime Minister the Hon Tony Abbott MHR. Prior to entering Parliament, Paul was the principal of a strategic consulting firm serving the communications sector and before that was Director, Corporate and Regulatory Affairs, at Optus for eight years. He is a well-known figure in communications policy in Australia and recently wrote a highly regarded book on broadband and telecommunications, *Wired Brown Land*. Paul previously worked as Senior Advisor, and then Chief of Staff to the Minister for Communications, Information Technology and the Arts, Senator Richard Alston, during the Howard Government.

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Contributions 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](mailto:editor@camla.org.au) or to

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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
- contempt
- broadcasting
- privacy
- copyright
- censorship
- advertising
- film law
- information technology
- telecommunications
- freedom of information
- 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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