

UN Communication Process and Free Speech

Paul Reidy and Kate Fitzgerald examine the workings of the United Nations Human Rights Committee, particularly in the light of recent petitions against Australia.

INTRODUCTION

Mr William Alpert, a Dow Jones journalist, has lodged a complaint with the United Nations Human Rights Committee (Committee) alleging that the decision of the High Court of Australia in *Dow Jones & Company Inc v Gutnick*¹ infringes his right to freedom of expression.

Mr Alpert's communication is the first matter submitted to the Committee alleging violation of freedom of expression against Australia and it has attracted the attention of international publishers and lawyers as that international body will now have an opportunity to consider the unique challenges that the 'new economy' presents to traditional legal principles.

This article summarises the result of some recent petitions made to the Committee against Australia, considers the way in which the Committee has dealt with previous complaints alleging violation of freedom of speech and outlines broadly the way in which a complaint is made to the Committee.

PREVIOUS COMMUNICATIONS AGAINST AUSTRALIA UNDER THE ICCPR

Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)* and the *First Optional Protocol to the International Covenant on Civil and Political Rights (First Optional Protocol)* on 25 December 1991. As a result, Australia has agreed to be bound by the terms of the ICCPR and individuals can complain directly to the UN Human Rights

Committee about their treatment in Australia.

53 communications have been lodged against Australia. To date, 36 communications have been finalised by the Committee: 7 of these were discontinued, 21 were held to be inadmissible, 3 were held not to have violated the ICCPR, and 5 were successful for the complainant.²

Recent examples include *Toonen v Australia* (1994). That case resulted in changes to Australian laws. In *Toonen*, the Committee held that the Tasmanian Criminal Code provision criminalising various forms of sexual contact between men contravened Mr Toonen's right to privacy under Article 17 of the ICCPR. As a result, the *Human Rights (Sexual Conduct) Act 1994 (Cth)* was enacted which gave legislative effect to the terms of Article 17 of the ICCPR.

By comparison, in the later case of *A v Australia* (1997), Australia has rejected the views and recommendations of the Committee in relation to the rights of an asylum seeker³.

PREVIOUS COMMUNICATIONS INVOLVING FREE SPEECH

The ICCPR guarantees a number of civil and political rights, including freedom of expression under Article 19.

None of the 53 communications made to the Committee against Australia have specifically addressed the right to free expression. Mr Alpert's communication is the first lodged against Australia with respect to Article 19 of the ICCPR. However, the Committee has considered a number of communications made against

INSIDE THIS ISSUE

UN Communication Process and Free Speech

Copyright in 'Thumbnail' Images

The Price of Fame : Protection of Personality Rights in Australia

The End of Spam?

Update: Cybercrime Code of Practice for ISPs

New Australian Right to Protection From 'Highly Offensive' Invasions of Privacy

Telecommunications Networks – Carriers' Powers Again Under Review

CONTENTS

UN Communication Process and Free Speech

Paul Reidy and Kate Fitzgerald examine the workings of the United Nations Human Rights Committee, particularly in the light of recent petitions against Australia.

Copyright in 'Thumbnail' Images

The United States Court of Appeals for the Ninth Circuit recently held that the unauthorised creation and use of 'thumbnail' images in an internet search engine was not actionable by the owner of copyright in the images. Anthony Selleck reports on the case.

The Price of Fame : Protection of Personality Rights in Australia

David Bowman examines the current status of personality rights in Australia and argues for reform.

The End of Spam?

Nick Abrahams and Colin Chang consider Australia's current approach to spam, and the proposals of a recent NOIE report.

Update: Cybercrime Code of Practice for ISPs

Elizabeth Levinson and Natalie Ceola provide an update on the Internet Industry Association's *Cybercrime Code of Practice*.

New Australian Right to Protection From 'Highly Offensive' Invasions of Privacy

Duncan Giles & Gayle Hill examine the impact of the recent decision in *Grosse v Purvis*.

Telecommunications Networks – Carriers' Powers Again Under Review

Shane Barber reviews the results of a recent appeal brought by Hurstville City Council against the Land and Environment Court of NSW's confirmation of telecommunications carriers' powers.

other countries claiming an infringement of rights protected by Article 19 of the ICCPR.

Freedom of expression is a derogable civil and political right. The special importance of the right to freedom of expression in a democratic society is widely recognised in international law. In *Handyside v United Kingdom* (1976), the European Court of Human Rights stated:

*"Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man... it is applicable not only to information or ideas that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."*⁴

A similar view has been adopted by the UN Human Rights Committee. In *Tae-Hoon Park v Republic of Korea*⁵ the Committee held that:

"The right to freedom of expression is of paramount importance in any democratic society and any restrictions to the exercise of this right must meet a strict test of justification."

Further, in *Gauthier v Canada*⁶ the Committee stated:

"The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."

Article 19 does contain an inherent qualification. Freedom of speech may be restricted if it meets three requirements. First, the restriction must be prescribed by law. The legislation which prescribes the restriction must itself be in accordance with human rights principles set out in the ICCPR.⁷

Second, the restriction must serve the legitimate purpose of respecting the rights or reputations of others, or protecting national security, public order, public health or morals. And finally, the restriction must be necessary to achieve this purpose.⁸ This requirement of necessity is a high barrier to restrictions on freedom of expression. For instance in *Mukong v Cameron* the Committee accepted that maintaining public order and national unity in difficult political circumstances was a legitimate objective, but that attempting to silence the complainant's advocacy of democratic reform could not be considered 'necessary' to achieving it.⁹

An example where such measures were held to be necessary was in *Faurisson v France*¹⁰. The Committee declared that a French enactment making it a criminal offence to deny the holocaust did not

violate the right of free expression. The complainant in that case was an academic who denied the existence and use of gas chambers for extermination purposes at Auschwitz and in other Nazi concentration camps during World War II. The complainant submitted that the French enactment promoted the Nuremberg trial and judgment to the status of dogma, by imposing criminal sanctions on those who dare to challenge its findings and premises. The Committee justified its declaration as protecting the right of the Jewish community to live free from the fear of anti-Semitism. The Committee noted that its function is not to criticise the abstract laws of States, but to "ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it"¹¹. As a result, the Committee decided unanimously that there was no violation on the academic's freedom of expression.

UNITED NATIONS HUMAN RIGHTS COMMITTEE PROCESS

The Committee is petitioned by way of a communication to it. There is no fee for this process.

A communication must be made in writing and must set out all of the background giving rise to the violation. It must allege a specific breach of an article contained in the ICCPR by a federal, state or local government department or agency. Generalised allegations are not admissible.

The Communications And Media Law Association Incorporated (CAMLA)

PO Box 545 Glebe NSW 2037 Australia

CAMLA ***Essay Prize***

The Communications and Media Law Association is holding an essay competition in 2003.

The purpose of the competition is:

- to encourage high quality work in communications and media law courses; and
- to improve links between those studying and practising in the area.

The prize will be given for:

- a previously unpublished essay which is the original work of the author;
- an essay completed by a student enrolled in an undergraduate or postgraduate course, possibly as part of that course;
- an essay on a subject relating to communications or media law;
- an essay of 1,000-3,000 words. The 3,000 word limit (inclusive of all footnotes, annexures, attachments and bibliographies, etc) is not to be exceeded.

A prize of \$1,000 and a one year membership of CAMLA will be awarded to the winner.

The winning essay, edited in consultation with the author, will be published in the Communications Law Bulletin.

The winning entry, to be selected by a panel of experienced communications and media law practitioners, is likely to demonstrate original research, analysis or ideas. The panel will not necessarily be seeking detailed works of scholarship.

The award will be made at the annual CAMLA Christmas function.

Only one essay per student may be submitted. Entries will be accepted by email or by post. Entries WILL NOT be accepted by fax. Entries submitted by post should include three (3) copies of the entry, typed well-spaced on A4 paper. The name, address, email, telephone and fax contacts and the tertiary institution and course in which the author is enrolled should be included on a separate, detachable sheet. Entries submitted by email should include the same details in a separate email from the entry. The author's name should not appear on the pages of the essay.

Entries should be submitted to:

Administrative Secretary, CAMLA, PO Box 545, GLEBE NSW 2037, Australia

Email: rosie@bigpond.net.au

by Friday 31 October 2003

Late entries will not be accepted.

In the case of Australia, the Commonwealth of Australia is the respondent to any complaint made to the Committee, regardless of whether it is a Commonwealth, state or local body that is alleged to have committed the violation.

There are two main prerequisites to the Committee's jurisdiction that must be satisfied before the Committee can review the merits of the communication, namely:

- the complaint must be made by an individual; and
- all available domestic remedies must have been first exhausted.

A communication to the Committee must come from an individual or his or her authorised representative (e.g. non-government organisations, legal representatives, etc). In the latter case, proof of the authorisation must be contained in the complaint. It is sufficient that the individual is subject to the jurisdiction of the State against whom the violation is alleged and the individual does not have to be a citizen or resident of that State.

A communication to the Committee is a mechanism of final resort. The complainant must first exhaust all domestic remedies because it is assumed that domestic laws are most likely to provide the best redress for an individual whose rights are violated. In addition, the complaint must not simultaneously be under consideration by another international investigatory body or involved in another settlement procedure.

Once the Committee assesses the preliminary matters set out above and determines the complaint to be admissible, the investigation or consideration of the merits commences. The Committee asks the State (i.e. the respondent) for its submissions to explain or clarify the alleged violation and to indicate whether there has been a resolution. The State must reply within six months. It cannot respond to the allegations by refuting them in general terms. It is implicit in Article 4(2) of the First Optional Protocol that the State concerned has a duty to investigate the matter in good faith and respond with satisfactory information.

The complainant is then given an opportunity to reply. The procedure is somewhat flexible – the Committee is able to receive further information from either party and each party is given an opportunity to respond to the contentions of the other party.



The Committee is not a court and does not have an independent fact-finding function. As such, the Committee does not hear oral testimony from witnesses, leaving the process solely based on written submissions. This makes the process fairly slow – in fact, a communication can take a number of years to be resolved.

The Committee does not have legally binding authority and can only provide one remedy. It will express a view or opinion as to whether a right has been violated and it is then left to the State to adopt or reject the Committee's views. The actions taken by the State to remedy the complaint are noted in the Committee's annual report to the UN General Assembly¹².

CONCLUSION

Mr Alpert's communication to the Committee is novel in the way it tackles the modern complexities of internet technology and appeals to fundamental human rights in the new economy. It is appropriate that it is being considered on the global stage by the United Nations.

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1 [2002] HCA 56, 10 December 2002

2 Human Rights Committee website: <http://www.unhchr.ch/html/menu2/8/stat2.htm> (accessed at 2 June 2003).

3 See www.unhchr.ch/tbs/doc.nsf/MasterFrameView/e1015b8a76fec400c125694900433654?Opendocument (accessed at 30 April 2003).

4 *Handyside v United Kingdom* (1976) Series A No. 24 before the European Court and Commission of Human Rights at par [49].

5 (1999) (633/1995) at par [13.9].

6 (1998) (628/1995) at par [10.3].

7 *Faurisson v France* (1996) (550/1993)

8 Article 19(3)(a) and (b) of the *International Covenant on Civil and Political Rights* and see, for example *Mukong v Cameron* (1994) (458/1991) at par [9.6] and [9.7].

9 *Mukong v Cameron* (1994) (458/1991) at par [9.7].

10 *Faurisson v France* (1996) (550/1993)

11 *Faurisson v France* (1996) (550/93) at par [9.3].

12 For further information: visit <http://www.austlii.edu.au/au/other/ahric/booklet/index.html>, Human Rights Committee website: <http://193.194.138.190/html/menu2/6/hrc.htm> (accessed at 30 April 2003).

Copyright in 'Thumbnail' Images

The United States Court of Appeals for the Ninth Circuit recently held that the unauthorised creation and use of 'thumbnail' images in an internet search engine was not actionable by the owner of copyright in the images. Anthony Selleck reports on the case.

On 7 July 2003, the United States Court of Appeals for the Ninth Circuit held in *Kelly v Arriba Soft Corporation* that the unauthorised creation and use of 'thumbnail' images in an Internet search engine was not actionable by the owner of copyright in the images. The court held that, while the thumbnails were a prima facie infringement, they were nevertheless a 'fair use' under US copyright law. The court, however, remanded for further proceedings the issue of copyright infringement by in-line linking to the original full-sized images.

THUMBNAIL IMAGE SEARCH ENGINES

Arriba Soft Corporation operated an Internet search engine that displays the results of user queries in the form of small pictures, called 'thumbnails', rather than displaying text, as with conventional search engines. Arriba used software agents to trawl the Internet in search of images from which the thumbnails would be created and included in a database. The thumbnails were smaller and of lower resolution to the full sized images which were deleted from Arriba's servers once the thumbnails had been created.

The search engine also allowed a user to click onto a thumbnail to display the original full-sized image. The displayed image would be surrounded by text that included a description of the size of the image, a link to the web site from which the image was taken and advertising. This functionality was implemented via 'in-line linking', that allows a graphic from one web page to be seamlessly incorporated into another web page, giving the impression that the graphic forms part of that web page rather than being copied from another web site.

Mr Kelly sued Arriba for copyright infringement after thumbnails of his photographs were included in the Arriba database. Mr Kelly's claim was twofold, contending infringement through Arriba's creation and use of thumbnails and through the practice of in-line linking

to the original full-sized images on Mr Kelly's website. These two acts, according to Mr Kelly, infringed his exclusive rights to display, reproduce and distribute his photographs granted under section 106 of the US Copyright Act.

FAIR USE

Arriba was granted summary judgement by the District Court, which held that although Mr Kelly established a prima facie case of infringement, Arriba had successfully shown that use of the thumbnails and the in-line linking was

should also be noted that there may still be a 'fair use', notwithstanding that the use was for commercial purposes.

Past applications of this consideration have reached the following conclusions: see *Table 1*.

In each case where fair use was found, the court held that the original copyright work had been sufficiently 'transformed' from its original purpose and context.

The court then cited the following grounds to support its ruling that Arriba's database of thumbnail images was a fair

Scenario	Conclusion
Re-transmission of radio broadcasts over telephone lines	No fair use
Reproduction of audio CD into mp3 format	No fair use
Reproducing news footage without editing the footage	No fair use
Copying a religious book to create a new book for use by a different church	No fair use
Copying a photograph intended to be used in a modelling portfolio and using it instead in a news article	Fair use
Using screen shots from computer games in comparative advertising	Fair use

Table 1

'fair use' under s107 of the Copyright Act. Mr Kelly appealed to the Ninth Circuit which upheld the District Court's decision on the thumbnails but, for procedural reasons, remanded the in-line linking issue to the District Court for further consideration.

US law permitted the Ninth Circuit to apply the relevant 'fair use' principles itself, rather than being limited to reviewing the correctness of the District Court's decision.

In deciding whether a use of a copyright work is a permissible 'fair use' the court must consider, among other things, the purpose and character of the use, including whether the use is for commercial purposes. According to earlier Supreme Court authority the purpose of this consideration is to see whether the new work 'adds something new, with a further purpose or different character, altering the first with new expression, meaning or message'. It

use of the original full-sized images from Mr Kelly's web site:

- Arriba was neither using Mr Kelly's images to directly promote its website nor trying to profit by selling Mr Kelly's images;
- the smaller, lower resolution thumbnails served an entirely different function to Mr Kelly's images, as Kelly's images served an aesthetic purpose, while Arriba used the thumbnails to help index and improve access to images on the Internet;
- the public derived a benefit by enhanced information-gathering techniques on the Internet;
- Arriba's thumbnails did not harm the market for Mr Kelly's images, indeed inclusion in the database may have directed more users to Mr Kelly's website.

IN-LINE LINKING

The Ninth Circuit remanded the issue of the in-line linking to the District Court for further consideration. It is interesting to note that the District Court's original decision was that the in-line linking was also a fair use of Mr Kelly's images. This ruling seems to be in spite of the fact that at least on the last 3 grounds noted above arguably would not apply to in-line-linking to full-sized images, as opposed to creating and using thumbnails of those images. A further appeal to the Ninth

Circuit may be imminent if the District Court reaches the same conclusion in the further proceedings.

THE AUSTRALIAN POSITION

Australia has limited 'fair use' defences to copyright infringement when compared to the more general 'fair use' doctrine of United States jurisprudence. The creation of a thumbnail from a full-sized image would be reproduction in a material form, and the delivery of that thumbnail over the Internet in response to a search query would be a

communication to the public. Thus, to avoid infringement, a specific defence would need to be raised. As many of the grounds relied on by the US court to find 'fair use' would not be relevant to defences under Australian copyright law, the case provides an example of where Australian copyright law may be more beneficial to copyright owners than in the United States.

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The Price of Fame : Protection of Personality Rights in Australia

David Bowman examines the current status of personality rights in Australia and argues for reform

An association of some desirable character with the product proceeds more subtly to foster favourable inclination towards it, a good feeling about it, an emotional attachment to it. No logic tells the consumer that boots are better because Crocodile Dundee wears them for a few seconds on the screen ... but the boots are better in his eyes, worn by his idol (Emphasis in original) ¹.

INTRODUCTION

According to the Honourable Justice Peter Heerey, Lord Horatio Nelson was probably the first celebrity in the modern sense ². Since that time the value of celebrity has grown exponentially due, in part, to the advent of television, the influence of Hollywood and the globalisation of sport. There has been a concomitant growth in the merchandising of celebrity for the reasons expressed so eloquently by Justice Burchett above.

It has been reported that Michael Jordan's endorsements have earned \$8 billion for Nike³ but as the value of celebrity has grown so too has its cost. The creation and maintenance of the modern celebrity usually involves considerable time, expense and expertise often involving personal trainers, dieticians, spin-doctors, make-up artists, and plastic surgeons just to name a few. Given the investment required in creating and maintaining a celebrity persona, and its enormous potential value, should Australian law formally acknowledge and protect so called

"personality rights" in a manner similar to the laws of the USA and Canada?

In addressing this issue one must first consider the current state of Australian law in this regard. Australia has no equivalent to the right of publicity that exists in the USA⁴. There are however a number of different legal mechanisms that have been used, with varying degrees of success in an attempt to prevent the unfair appropriation of a personality for commercial advantage.

The following is a review of each of the different mechanisms that have been used and those that might be used in order to protect personality rights in Australia. The intention is not to provide an in-depth analysis of each area but rather to provide an overview which will make apparent the inadequacy of the present system of inappropriately extended law.

PASSING OFF

For the sake of brevity this section considers actions under s52 of the *Trade Practices Act 1974* (Cth) as essentially the same as actions for passing off. While there are important distinctions between

the two, these do not arise in a personality rights action as considered below.

The common law tort of passing off was originally developed to protect a trader from rivals who seek to untruthfully purport that their goods are the goods of the trader⁵. Traditionally passing off actions have required a plaintiff to show three things⁶:

- that they have established a reputation or goodwill in the community;
- that as a result of some misrepresentation or deception on the part of the defendant;
- they have suffered damage to their reputation or goodwill.

The traditional role of the tort of passing off was extended in the *Henderson* case⁷ to protect a person who was not, at least in the traditional sense, a trader. The case involved two professional ballroom dancers who sued in respect of an unauthorised photograph which was used on record covers. The dancers were successful in spite of the fact that they were not in the business of endorsing record covers, the NSW Supreme Court ruling

that the album cover falsely implied a connection between the dancers and the record.

This extension of passing off, while perhaps appropriate in this case, by no means provides a “right of personality” as such. In the *Olivia Newton-John* case⁸ a lookalike of Ms Newton-John carried a disclaimer (“Olivia? No, Maybelline”) that was considered to be sufficiently prominent as to make the public realise that there was no actual connection to Ms Newton-John.

In the *Tabasco* case⁹ Lehane J. ruled that any perceived connection between an exhibition design service in Australia and the US manufacturer of a spicy chilli sauce would be too remote saying that the public would conclude ‘*the designer has - as the fact is - perhaps cheekily, used a name, which, by reference to its only other known use, conjures up “hot” associations.*’

These two cases limit the flexibility of passing off to be used to enforce personality rights and mean a passing off action would be unlikely to succeed in cases where it is clear there is no commercial connection with the actual personality or where there is a prominent and credible disclaimer of any connection or in situations where such a connection would simply not be believed by the public. To borrow a hypothetical example from Heene J:¹⁰

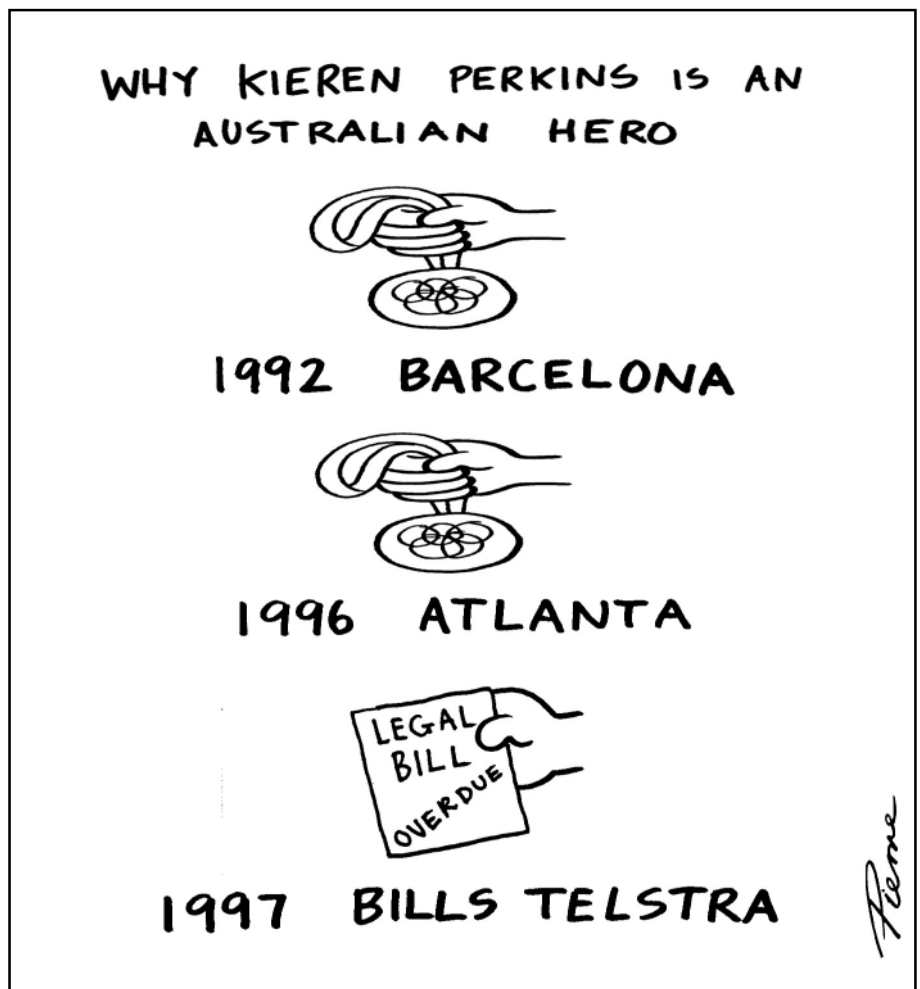
“*Suppose a sleazy nightclub publishes an advertisement including a picture of a well known clergyman and a statement ‘Reverend X would never visit our place’. Doubtless offensive but not defamatory, and it is hard to see a remedy under the TPA or in passing off*”

Such cases have, so far, not come before the courts. The usual claim made in a personality rights case heard under passing off is:¹¹

“*...that the use of the name, image or persona mislead a significant proportion of the public by implying:*

- (a) *that the personality approved of the advertiser or its product;*
- (b) *a connection between the personality and the advertiser;*
- (c) *that the advertiser was authorised by the personality.*”

Perhaps the best example of this is the *Kieren Perkins* case¹² where Telstra had used an unauthorised photograph of Mr



Perkins at the end of a swimming race. The court held that:

“*In summary, therefore, we are of opinion that the respondent’s publication misrepresented that Mr Perkins was sponsored by it, had consented to its use of his name, image and reputation in its advertising, and supported it in the forthcoming ‘preselection’ process.*”

This case highlights the difficulty of using the law of passing off, even in this extended way, to protect personality rights. What Mr Perkins is complaining of is not passing off in the traditional sense but something more closely resembling taking without permission. He, most likely, does not care whether the public thinks he supports Telstra or not, he is simply annoyed that he wasn’t paid for his implied support. That he should be paid does seem reasonable, clearly the public believes so, and it would appear in this, and in other similar cases, that the court has sought to distort the law in order to make an unfair situation into an unlawful one.

With respect, the judges’ reasoning in this case is circular. The public falsely assumes that Telstra must have Perkins’ consent to use his photo. Telstra is, in effect, held

liable for this widely believed falsehood and is ordered to compensate Perkins’ which, in turn, perpetuates the erroneous public assumption.

A similar situation arose in the case of *Pacific Dunlop v Hogan*¹³ where Sheppard J. said in his dissenting judgment

“*...the case brought against the appellant was a speculative one. It depended upon vague thoughts by members of the community concerning the legal rights film makers might have in ideas or characters and beliefs on the part of some people that in some general way permission was needed before use could be made of ideas or characters. To the extent that people have thought along these lines, they had done so because they were under a misapprehension. They had thus deceived themselves and they had not been misled by any conduct engaged in by the appellant.*”

The majority of the court however ruled that a television advertisement which drew on Hogan’s famous character “Crocodile Dundee” to advertise Grosby shoes would mislead the public into thinking there was a commercial arrangement between Hogan

and Grosby's parent Pacific Dunlop even though the actor in the commercial was clearly not Mr Hogan and the scene depicted was an obvious spoof. This ruling, while difficult to understand for the reasons mentioned above in regards to the *Kieren Perkins* case, is even more difficult to reconcile with the *Olivia Newton-John* case.

Similarly it is difficult to reconcile the *Henderson* and *Kieren Perkins* cases with the *Tracey Wickham* case¹⁴ where Ms Wickham sued to prevent her name and image being used in relation to swimming pools. In this case the court ruled that there was no common field of interest since Ms Wickham had no trade or business in swimming pools.

As shown, courts often struggle to find a misrepresentation in these cases but the assessment of damage is often difficult and to some extent artificial. Take, for example, the reasoning applied in the *Kieren Perkins* case:¹⁵

"No suggestion was made that any of the misrepresentations adversely affected Mr Perkins' reputation. Broadly stated, the damages claim was based upon the premise that the publication diminished the opportunity to commercially exploit his name, image and reputation. In general terms, it was said that it is disadvantageous to expend celebrity in promoting an entity, product or service on a single occasion; each association to which a famous person lends himself or herself utilises a part of his or her 'credibility' for advertising purposes. More specifically, the misrepresentation of an association between Mr Perkins and the respondent eliminated or diminished the prospect of an association between him and some other prospective 'clients'."

and the response to this argument from Heerey J¹⁶

*"This argument assumes that celebrity is a finite resource and that each exploitation, whether authorised or unauthorised, leaves a diminished residue. There may be some force in this if one is speaking of direct endorsements. A celebrity seen to be endorsing an endless range of goods and services would lose credibility. However if it is a case of suggested or indirect endorsement by association (as in *Talmax* [the *Kieren Perkins* case]) there is also the consideration*

that publicity itself is the very thing that sustains celebrity.

All in all, the lost royalty seems the most theoretically satisfactory basis of assessing damage. It is also more likely to be susceptible of rational quantification by probative evidence."

In conclusion the tort of passing off is clearly not suited to protecting celebrity rights. While it is relatively easy for a famous person to establish that they have significant goodwill in the community, the process of demonstrating a misrepresentation is difficult and often requires recourse to the sort of circular legal fiction outlined above. These difficulties are further compounded by the requirement to demonstrate damage which, once again, relies upon public misconception and is also, to some extent, fictitious.

DEFAMATION

It is even more difficult to use the law of defamation to protect personality rights than to use passing off. In part this is due to the fact that the law varies between the states and territories since some apply only the common law, some apply a combination of common law and state law and some apply state law exclusively¹⁷. However the major difficulty with the various defamation laws is the need to show that the impugned material would cause the public to think less of the plaintiff.

It may be possible to show that an association with a product or service is harmful to a plaintiff, as was held in the English case of *Tolley v Fry*¹⁸. In this case Fry, a chocolate manufacturer, used a cartoon of Tolley, a well known golfer, which featured a block of Fry's chocolate in his back pocket. This was found to be defamatory because it implied that Tolley, a strictly amateur golfer, had been paid for the endorsement. Once again this argument rests on the sort of circular legal fiction discussed above and, as in the case for passing off, could not be used if the advertisement made it clear that the person did not consent.

Defamation was also used in the quasi-personality rights case of *Ettingshausen v Australian Consolidated Press*¹⁹. In the case Mr Ettingshausen, a well known footballer, sued for defamation over publication of photograph of him in the shower. He successfully argued that the image damaged his reputation in the

community by implying that he was the sort of person who would consent to having such a photograph published. Again a case that relied on, and thus further reinforced, the public's misapprehension that such consent is required.

Like passing off, defamation law is not really suited to providing the sort of protection sought in cases like *Ettingshausen* and *Tolley*. Although successfully applied, the link to defamation or ridicule is somewhat tenuous. In both cases a sufficiently prominent disclaimer or in the case of *Ettingshausen* a more invasive and thus obviously not approved photograph, would probably remove any basis for action.

TRADE MARKS

Celebrities may seek to register aspects of their personality as trade marks in order to provide protection against their misappropriation. Indeed after the *Kieren Perkins* case Mr Perkins successfully registered images of his face in different orientations as trade marks²⁰. Without any binding precedent in Australia²¹ it is difficult to know how successful such moves will be although a number of difficulties can be foreseen.

Traditionally trade marks exist to denote the origin of goods and services. In Australia the *Trade Marks Act* 1995 (Cth) ("Act") at section 120 requires that any offending use must be use as a trade mark and, except in the case of well-known trade marks, the mark must have been used on goods or services of a similar description. Celebrities may also have difficulties in mounting an action because of the 'intention to use' requirements of the Act.

While it may be possible to argue under the provisions of s120(3)(c) of the Act that a mark such as Mr Perkins' face is a well known image and therefore cannot be used on any goods or services without his consent, such a registration is vulnerable to the argument that while Mr Perkins' face may be well known it is not well known as a trade mark and therefore is not covered by s120(3)(c). Further, even if such an argument were successful it would still be incumbent upon the plaintiff under s 120(3)(d) to show that he has sustained damages as a result of the unauthorised use. This would be difficult without resorting to the sorts of legal fictions already described.

The problem for a plaintiff in a case like this is the requirement to demonstrate that the offending use was, in fact, use as a trade

mark. In many cases celebrity merchandise carries images that are not used in order to indicate the origin of the goods but simply for their own innate appeal.

Some celebrities do use their persona as trade marks in the traditional sense, for example 'Elle Macpherson Intimates' underwear or 'Paul Newman's Own' range of condiments. These trade marks clearly give their owners more protection for their personality rights than they would otherwise have, especially as they may be able to establish that their names are well-known marks under the provisions of s120(3)(c). This protection however still suffers from the requirement that any offending use must be use as a trade mark.

Trade marks legislation suffers from the same weakness as the other areas of law already discussed, it is not designed to protect personality rights and is fundamentally ill-equipped to do so.

CONCLUSION

Although personality rights do not exist in Australia it is long overdue for such rights to be formally introduced. The courts have introduced a de-facto basis for making personality rights claims by extending and distorting the laws of passing off and defamation. The rationale

for doing so, in nearly every case is that the public expects, perhaps out of some notion of fairness or natural justice, that such rights already exist. One of the many problems with this approach is that we are now left with a poorly equipped and inconsistent set of laws that try valiantly to enforce a set of rights that do not really exist. This not only results in difficulties for celebrities wishing to know their rights. It creates ludicrous inconsistencies such as the *Tracey Wickham* case and the *Kieren Perkins* case which tarnish one of the principle ideals of justice - consistency.

Clearly many courts in Australia feel that the law should protect against the misappropriation of one's personality and it is evident that the public assumes such rights already exist. Therefore the debate about whether they are necessary would already seem to be concluded. If we accept that such rights are necessary then surely it is better to enable them through properly drafted and well-thought through legislation than to continue with the present hodge-podge of inconsistent decisions and legal fictions.

David Bowman is a biomedical engineer and is currently a Masters of Intellectual Property student at the University of Technology Sydney.

- 1 *Pacific Dunlop v Hogan* (1989) 32 FCR 314
- 2 Heerey P "Character and Personality: Where to for Protection in the Intellectual Property Area?" (1999) *Intellectual Property Forum* 39 at 8
- 3 *Ibid*
- 4 McMullan J "Personality Rights in Australia" (1997) *Australian Intellectual Property Journal* 8 at 86
- 5 *Reddaway v Banham* (1896) AC 199
- 6 *Conagra Inc v McCain Foods (Aust) Pty Ltd* 23 IPR 193
- 7 *Radio Corp Pty Ltd v Henderson* (1960) 60 SR (NSW) 576
- 8 *Olivia Newton-John v Scholl-Plough (Aust) Ltd* (1986) ATPR 40, 697
- 9 *McIlhenny Co v Blue Yonder Holdings Pty Ltd* (1997) 30 IPR 187
- 10 op cit note 2 at p. 13
- 11 op cit note 4 at p. 87
- 12 *Talmax Pty Ltd v Telstra Corporation Ltd* 36 IPR 46
- 13 *Pacific Dunlop v Hogan* (1989) 23 FCR 553
- 14 *Wickham v Association of Pool Builders* (1988) 12 IPR 567
- 15 op cit note 12 at p 53
- 16 op cit note 2 at p 16
- 17 Slater A "Personality Rights in Australia" (2001) 20(1) *Communications Law Bulletin* 12 at 13
- 18 *Tolley v JS Fry & Sons Ltd* (1931) AC 533
- 19 (1991) 23 NSWLR 443
- 20 op cit note 2 at p 10
- 21 Weathered L "Trade Marking Celebrity Image: The Impact of Distinctiveness and use as a Trade Mark" <<http://www.bond.edu.au/law/blr/vol12-2/Weathered.doc>>

The End of Spam?

Nick Abrahams and Colin Chang consider Australia's current approach to spam, and the proposals of a recent NOIE report.

Spam has become enemy number one in enterprise IT. A serious threat to security and productivity, spam is a real headache for networking pros.

Spam is no longer merely an annoyance. The widespread proliferation of spam in recent years now threatens the very viability of email as a communications medium. It has been estimated that as much as 55% of all email traffic now consists of spam¹. According to Brightmail (a vendor of anti-spam solutions), the number of spam attacks detected on its network more than doubled from 2.7 million in the month of January 2002 to over 6 million in the month of January 2003².

Employers hate spam due to its impact on productivity whilst network providers hate spam due to the drain that it places on their limited resources. In a recent

survey by Silicon.com, 82% of respondents reported spending as much as one and a half hours per week dealing with spam³. It is estimated that spam will cost companies more than US\$20.5 billion this year and that this will blow out to more than US\$198 billion within the next 5 years⁴.

It will probably come as a surprise to many that 2003 marks the 25th anniversary of spam. The earliest recorded case of spam dates back to 1978 when Gary Thuerk, a sales representative with DEC, sent an email to every person with an ARPAnet (the precursor to today's Internet) address on the western seaboard of the United States advertising DEC's

latest products⁵. The result was, not surprisingly, a huge groundswell of complaints from within the ARPAnet community.

From these early beginnings, spam has grown to become one of the largest issues facing Internet users today. The attraction of spam to mass marketers is that, unlike traditional mail, it costs no more to send 1 million messages than it does to send a single message. Even if a spammer only receives a positive responses from 1% of recipients, the number of response in absolute terms can prove highly lucrative. In recent years, a whole industry has arisen to combat the increasing spam problem. It has been estimated that

revenues for anti-spam vendors will total US\$653 million this year and increase to over US\$2.4 billion in 5 years time⁶.

The call for governments to take action has grown louder as industry and users alike have struggled to cope with the increasing flood of unsolicited emails. Even direct marketing groups have joined in the call for legislation as fears grow that spammers will threaten the viability of legitimate bulk email as well. In the United States, twenty-six states have introduced legislation in various degrees to fight the spam epidemic. The European Union has recently joined suit⁷.

CURRENT SPAM REGULATION IN AUSTRALIA

Australia does not presently have any legislation in place which directly addresses spam. This deficiency was recently highlighted in a case in which a man sought to extract revenge against a former girlfriend as well as her flatmate by sending emails to thousands of addresses telling the recipients that they were the owner of an unclaimed bank account or the beneficiary under a deceased estate, and including a number to call - a number which belonged to the workplaces of the former girlfriend and her flatmate. The result was a flood of incoming calls to these two workplaces and interfering with the normal flow of business operations. At the time of writing, the spammer had yet to be charged as the police struggled to find an appropriate charge to lay against the spammer⁸.

Whilst legislation such as the *Privacy Act* 1988 and the *Crimes Act* 1914 have some application to spam, they were not drafted with the issue of spam in mind and hence their effectiveness in combating spam is far from ideal.

NOIE REPORT

In April 2003, the National Office for the Information Economy (NOIE) released a report titled "*The Spam Problem and How It Can Be Countered*." In it, NOIE called for a multifaceted approach in tackling spam which consisted of:

- **Legislation** – Existing legislation would be amended to handle spam. The crux of such amendments would be the prohibition of commercial electronic messaging without the consent of the end user (except where there was an existing business relationship), thus introducing an



“opt-in” mechanism. Furthermore, each email would be required to include the sender’s correct contact details. This approach is based loosely upon the European model.

- **Industry Assistance** – Bodies such as the Internet Industry Association (IIA) and the Australian Information Industries Association (AIIA) would be asked to encourage their members to take steps to establish both technical as well as contractual barriers to the transmission of spam.
- **International Cooperation** – Australia should cooperate with both multilateral bodies (such as the OECD and APEC) as well as partner country agencies to develop international guidelines and mechanisms in a joint bid to reduce the spam problem.
- **Partner Agency Cooperation** – Where appropriate, government agencies such as the ACCC, ASIC and the Office of the Federal Privacy Commissioner should ensure that the legislation are enforced against spammers.
- **Information and Education** – Educating the public on the nature of

spam and providing resources to assist in the reduction of such spam.

It is interesting to contrast the recommendations contained in NOIE’s final report against those contained in the interim report that it published in August 2002. The interim report did not favour a legislative route and stated that legislation would

... “not eradicate or minimise spam, given the difficulties in identifying spammers, the global nature of the Internet and the competing enforcement priorities faced by regulatory agencies.”

This approach was widely criticised by a number of stakeholders. The author of the interim report, Allan LeBusque, was replaced by Lyndsay Barton who subsequently rewrote the report from scratch⁹. There has been much speculation as to the reasons for the turnaround in NOIE’s position¹⁰, but the fact remains that the legislative approach advocated by the final report will provide another useful weapon in the fight against spam.

It should be noted that a legislative approach will not, in itself, eradicate the spam problem. Much of the spam

transmitted today originates from countries outside of Australia – countries in which Australian law has no jurisdiction. It has been estimated that as little as 16% of all spam sent globally originates from Australia¹¹. Furthermore, legislation is only likely to prove effective against legitimate marketers. Unscrupulous marketers are unlikely to take note and the majority of those who do will simply shift their activities to those jurisdictions which are more tolerant of such actions.

CONCLUSION

It is clear that the only way that spam

can be controlled is for a united approach to be taken by government, industry and users alike. Further, such an approach must be adopted not only in Australia, but also by governments in other jurisdictions as well. The fight against spam still has a long way to go. However, with the increased attention being given to the problem by governments worldwide, there is hope yet that we may eventually see a marked reduction, though not eradication, of spam in our everyday lives.

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1 www.smh.com.au/articles/2003/06/02/1054406110138.htmlwww.message-labs.com/viruseye/threats/

2 www.brightmail.com/press/state_of_spam.pdf

3 www.silicon.com/news/165-500001/1/4618.html

4 www.vnunet.com/News/1141508

5 www.templetons.com/brad/spamreact.html

6 www.vnunet.com/News/1141508

7 www.brightmail.com/press/state_of_spam.pdf

For more details about spam laws, visit David E Sorkin's web site: www.spamlaws.com/

8 www.smh.com.au/articles/2003/06/09/1055010929990.html

9 See "Choking on Spam" by Garth Montgomery in *Australian Personal Computer*, June 2003

10 See "Choking on Spam" by Garth Montgomery in *Australian Personal Computer*, June 2003

11 www.caube.org.au/australia.htm

Update: Cybercrime Code of Practice for ISPs

Elizabeth Levinson and Natalie Ceola provide an update on the Internet Industry Associations Cybercrime Code of Practice.

Following 18 months of development the Australian Internet Industry Association (IIA) released a draft Cybercrime Code of Practice (Code) in relation to cybercrime on Monday, 21 July 2003.

THE PROBLEM

While the Internet can deliver enormous efficiencies for business, cybercrime is proving to be an escalating cost for Internet Service Providers (ISPs), government and businesses. Crime involving computers and electronic communications is a big challenge facing organisations as crimes such as internet based fraud, hacking, card skimming and electronic money laundering are difficult to detect.

The 2003 *Computer Crime and Security Survey*, run in conjunction with the Australian Federal Police, Queensland Police, Western Australia Police and South Australia Police highlighted the extent of electronic crimes. This survey found that:

- total losses for organisations surveyed in 2003 were estimated at \$12 million, more than double the losses for 2002
- 42 per cent of organisations experienced one or more computer attacks which harmed network data or systems

- financial fraud, laptop theft and virus, worm and Trojan infections were the largest source of losses.

CYBERCRIME CODE OF PRACTICE

Improving the safety and security of the Internet depends on early detection of criminal activity. The Code attempts to balance differing concerns including the law enforcement agencies' need to identify, investigate and prosecute offences, the privacy of end users and costs to the industry in complying with the Code.

The objectives of the Code are to:

- facilitate cooperation between ISPs and law enforcement agencies and establish clear policies and procedures for investigations;
- provide transparent mechanism for the handling of law enforcement agency's investigations for the Internet industry and ensure both ISPs and law enforcement agencies understand the procedures;
- promote positive relationships between law enforcement agencies and the Internet industry; and

- ensure that the privacy of users of the Internet will be protected from unlawful intrusion by law enforcement agencies.

The Code stipulates that customer information collected by ISPs, must be retained for six or 12 months, depending on the type of information. Personal information such as a customer's name, username, email address, phone number, credit card details and address details, must be retained for the greater of six months from the date a customer ceases to be a customer or 12 months after the creation of the record. Operational data, such as dynamic IP allocations records, dates and time of log-ins and the total data transferred, must be retained for six months from the date of creation. ISPs, however, are not required to capture subscriber's phone numbers via caller line identification.

The Code was delayed in its release due to privacy concerns. However, after consultation with the Privacy Commissioner it was determined that ISPs were not bound by the *National Privacy Principles* which were introduced on 21 December 2001 under the *Privacy Act 1988 (Cth)* (**Privacy Act**).

However, the Code requires all ISPs wishing to be a party to the Code to be bound by the Privacy Act. This means

the Privacy Commissioner can exercise his power against ISPs bound by the Code who breach the *National Privacy Principles*.

The Code also reminds ISPs that if they disclose customer information to anyone

other than law enforcement agencies, they are at risk of breaching the *Telecommunications Act 1997* (Cth) and exposing themselves to the possibility of criminal penalties and up to two years imprisonment.

The IIA has also drafted an Industry Code of Practice for Internet Privacy.

Elizabeth Levinson is a senior associate and Natalie Ceola is an articulated clerk at Freehills.

New Australian Right to Protection From 'Highly Offensive' Invasions of Privacy

Duncan Giles & Gayle Hill examine the impact of the recent decision in *Grosse v Purvis*

In a very significant shift in Australian privacy law, the Queensland District Court has recently¹ found that a new common law right to compensation exists where a person's conduct intrudes on another's "privacy or seclusion in a manner which would be highly offensive to a reasonable person of ordinary sensibilities".

On 16 June, in the case of *Grosse v Purvis*², Senior Judge Tony Skoien of the Queensland District Court awarded the mayor of Maroochydore \$178,000 to compensate her, not for inappropriate dealing with her personal information, but for invasions of her privacy generally.

DEVELOPMENT OF THE TORT

The decision in *Grosse* is particularly significant because it does not rely on any legislative privacy obligation, instead it seeks to develop the independent tort hinted at by the High Court in its 2001 decision in *ABC v Lenah Game Meats*³.

In *Lenah*, Justice Michael Kirby noted that courts in a number of other jurisdictions have recently looked at the availability of such a common law actionable wrong of invasion of privacy. Justice Kirby's view was that this trend was stimulated in part by invasions (including by the media) deemed unacceptable to society and, in part, by the influence of modern human rights jurisprudence that recognises of a right to individual privacy. He went on (at page 278) to say:

"(W)hether...it would be appropriate for this Court to declare the existence of an actionable wrong of invasion of privacy is a difficult question. I would prefer to postpone an answer to the

question. Upon my analysis, no answer is now required."

The potential for the development of the *Grosse* right was therefore clearly signposted.

CHARACTERISTICS

The Australian *Privacy Act 1988*, and all other Australian state and territory privacy statutes, regulate the way in which 'personal information' can be collected, stored, used and disclosed. These laws therefore focus solely on regulating the appropriate processing of information about individuals (or from which their identity can reasonably be ascertained). The right formulated in *Grosse* provides a very different means of redress for those disturbed by conduct amounting to an 'invasion of privacy'.

In the judgment, which he admitted was a bold first step in Australia, and is subject to an appeal likely to be heard later this year, Judge Skoien declared that Australian law allows the recovery of damages for harm (including mental, psychological or emotional suffering), embarrassment, hurt, distress and post traumatic stress disorder, where a deliberate act intrudes on the private affairs or seclusion of another in a way which would be reasonably regarded as highly offensive. He also held that damages could be awarded for any enforced changes of lifestyle caused by such an intrusion.

Although Judge Skoien recognised his judgment was at the leading edge of Australian privacy law, he considered it to be both logical and desirable. He found that:

- following, watching, approaching or loitering near a person;

- contacting a person in any way, including by telephone, mail, fax, email or any other technology;
 - loitering near, watching, approaching or entering a place where a person lives, works or visits;
 - giving offensive material to a person or leaving it where it can be found by the person;
 - an intimidating, harassing or threatening act against a person, whether or not involving a threat of violence;
 - an act of violence, or a threat of violence, against any property;
- may justify an action for invasion of privacy if such conduct intruded on an individual's privacy or seclusion in a highly offensive way and caused harm or hindered them in doing an act they were lawfully entitled to do.

CONSEQUENCES

A non-statutory, common law right to the protection of private matters opens a large and unexplored new area for Australian privacy law. If the right survives the appeal process, or other similar actions are successful, it can be expected that a considerable body of new jurisprudence will evolve which will be very different for the statutory rights available under existing legislation.

The new right to take action at common law also has significant implications in a number of specific areas including the media and employment.

It is likely, for example, that if journalists and media organisation engage in highly offensive intrusions into people's personal affairs, they may be exposed to new actions for damages for any emotional

harm and distress caused. As the new law is unrelated to the *Privacy Act*, the defences and exemptions in that Act do not apply, although a defence of public interest may be available.

Also, under Australia's current employment laws, the types of conduct that Judge Skoien found to constitute invasion of privacy, are dealt with under equal opportunity legislation (harassment and discrimination) and occupational health and safety legislation (bullying).

It is unlikely that an employer would be found vicariously liable for the tort of invasion of privacy, as such behaviour is unlikely to be in the ordinary course of conduct as an employee. However, Australian employers should consider their general duty under the law of negligence to prevent reasonably foreseeable harm. An employer who had reason to suspect that an employee was engaged in a highly offensive invasion of privacy that related to the workplace in some way, and took no steps to prevent

it would risk incurring liability in negligence, as well as under equal opportunity and occupational health and safety legislation.

Duncan Giles and Gayle Hill are both special counsel at the Sydney Office of Freehills.

1 16 June 2003

2 [2003] QDC 151

3 (2001) 208 CLR 199

Telecommunications Networks – Carriers' Powers Again Under Review

Shane Barber reviews the results of a recent appeal brought by Hurstville City Council against the Land and Environment Court of NSW's confirmation of telecommunications carriers' powers

In the previous edition of this bulletin, we examined a recent decision of the New South Wales Land and Environment Court in the case of *Hurstville City Council v Hutchison 3G Australia Pty Limited* [2003] NSWLEC 52. In that case, the Land and Environment Court confirmed the powers of telecommunications carriers to maintain and install their networks using certain powers and immunities in Schedule 3 of the *Telecommunications Act 1997 (Act)*.

Hurstville City Council (**Council**) has since brought an appeal in the New South Wales Court of Appeal against the judgment of the Land and Environment Court. On 8 July 2003, the Court of Appeal delivered a judgment which effectively reversed the decision of the Land and Environment Court.¹

The issue of telecommunications carriers' powers to maintain and install networks has been the subject of much recent contention. In order to clarify these powers, Hutchison 3G Australia Pty Limited (**H3GA**) has applied to the High Court of Australia for special leave to appeal. The High Court has granted expedition to consider this application in early October 2003.

BACKGROUND

As noted in the previous edition of this bulletin, telecommunications carriers are granted certain powers and immunities under:

- Schedule 3 of the Act; and

- the associated *Telecommunications Code of Practice 1997 (Code)*; and
- the *Telecommunications (Low-Impact Facilities) Determination 1997 (Determination)*.

The combined effect of the Act, Code and Determination is to give telecommunications carriers certain powers to:

- inspect land;
- install certain facilities; and
- maintain certain facilities.

The expression "facilities" is defined in section 7 of the Act to mean:

- “(a) any part of the infrastructure of a telecommunications network; or
- (b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.”

Provided that the strict requirements of the Act, Code and Determination are complied with by carriers, clause 37 of Schedule 3 of the Act will serve to exempt them from complying with many State and Territory laws when rolling out their networks.

In the present case, H3GA had examined several sites in the Oatley area of NSW for a suitable location to install infrastructure to be used as a part of its proposed 3G network. H3GA determined that a sports light pole located in Oatley Park would be the most appropriate location for some panel antennas and a

parabolic dish to be placed atop the pole. This pole was owned by the Council.

Using the powers and immunities granted under Schedule 3 of the Act, H3GA proposed to carry out two activities. The first was to "maintain" the existing pole in the Park by making it strong enough to support the infrastructure at the top of the pole. This involved removing the existing pole and replacing it with one that was of the same height and apparent volume. That pole would remain owned by the Council. H3GA was of the view that this "maintenance activity" complied with clause 7 of Schedule 3 of the Act, which expressly permits the removal and replacement of a pole in certain circumstances.

The second activity, which was not in contention in the Court of Appeal, was the installation of "low impact facilities" (as defined in the Determination) at the top of the pole, in addition to a low impact equipment shelter in close proximity to the pole.

Council did not lodge any formal objection, as provided for by the Code, to the statutory notice issued by H3GA to Council regarding these activities. Instead, Council removed the pole in what the Court of Appeal considered as an attempt to frustrate H3GA's ability to undertake the maintenance activity.

H3GA continued with the activity and undertook to replace the pole anyway. This prompted the Council to bring an action in the New South Wales Land and Environment Court in order to prevent the activity being completed.

SUMMARY OF LAND AND ENVIRONMENT COURT DECISION

Pain J in the New South Wales Land and Environment Court essentially made four findings being:

- Clause 37 of Schedule 3 of the Act was wide enough to ensure that any local environment plan of the Council that sought to regulate the activities of H3GA would not be effective. Rather, the activities of H3GA will be regulated by the Commonwealth regime set out in the Act, Code and the Determination.
- The notice given by H3GA to Council complied in all respects with the requirements of the Act, Code and the Determination, contrary to the assertions of Council that it contained inadequacies as to the level of detail. This issue was not further contested by the Council in the Court of Appeal.
- When applying the maintenance power found in clause 7 of Schedule 3 of the Act, the Court found that the first pre-requisite, that the pole had to be a “facility” for the purposes of the Act, was met. Importantly, the Court found that the pole was a pole “for use” (albeit not “used”) in or in connection with the telecommunications network. H3GA argued that it had, after detailed analysis, chosen the pole as the platform for the installation of its low impact facilities, and as a result it had become “for use”. The Court held that H3GA’s interpretation of the expression “for use” was preferred as a wide range of structures or things can be used, or be for use, in or in connection with the telecommunications network including buildings etc. The Act anticipates that new telecommunications infrastructure will be placed on existing structures that are not already used by carriers. Carriers would therefore need to maintain those existing structures before they can undertake some of their installation works. When H3GA provided the notices required by the Act and the Code to the Council, it manifested its intention to use Council’s existing pole in its telecommunications network and therefore satisfied the requirements of the definition of “facility” in the Act.
- Finally, in another issue which was not pursued by the Council in the

Court of Appeal, the Court confirmed that the low impact installations to be placed on top of the pole met the requirements of the Determination, particularly in relation to the extent of protrusion from the existing pole.

COURT OF APPEAL DECISION

(a) Effect of Council’s Removal of the Pole

The Court of Appeal agreed with the New South Wales Land and Environment Court that Council’s removal of the pole did not have any impact per se on H3GA’s maintenance activities. Indeed the Court noted:

“In all likelihood, it probably also follows that, if the respondent [H3GA] had by the notice duly embarked on the activities formally notified to the Council, the Council was not entitled to defeat or frustrate its endeavours by pulling down the original pole – as it did on 30 January 2003...”

(b) The “for use” Argument

The Court noted that H3GA’s “maintenance” power could not be invoked unless and until the carrier had decided to treat a particular thing, in this case Council’s existing pole, as a facility in its telecommunications networks. H3GA contended that the notice they had issued to the Council demonstrated their intention in relation to the existing pole. It was also argued that H3GA had sufficiently indicated its intention in relation to the existing pole before the notice was served. As a result, H3GA argued it was clear that the pole was “for use” in relation to a telecommunications network.

It was argued that it did not matter that H3GA did not own the pole or have any contractual or other rights in relation to it. Indeed, this may well be a key reason why the legislature gave telecommunications carriers this maintenance power: to ensure the integrity of telecommunications network where the owner of relevant supporting infrastructure did not provide its consent to such maintenance.

The Court of Appeal rejected the appropriation argument. In doing so, the Court expressed the view that deeming a supporting structure that

holds up the actual telecommunications transmission equipment to be a “facility” for the purposes of the Act was not necessary. If this was permitted, it would be possible for telecommunications carriers to “appropriate” items such as “a bridge, a steeple, building or possibly even a tree”. This concern appears to have been a significant motivation behind that Court’s decision to overturn the decision of the Land and Environment Court.

It appears that in reaching their conclusion, the Court has not invoked the *ejusdem generis* rules to interpret the statutory powers. That is, the Court did not look at the characteristics of the other items listed in the definition of “facility” in section 7 of the Act. None of the other items reflect the extreme examples that were of concern to the Court.

Similarly, the Court of Appeal appeared unconvinced by H3GA’s argument that Schedule 3 of the Act contained a number of safeguards, checks and balances that would serve to limit a carrier’s powers to remove and replace certain things such as the Sydney Harbour Bridge. An example of this was the obligation of a carrier to pay compensation for financial loss or damage in relation to its maintenance activities.

(c) Tortious Act

In examining the maintenance power contained in clause 7 of Schedule 3 of the Act more closely, the Court noted that carriers were given the core right to “at any time maintain a facility”. The Court observed that this right should only be construed as operating in situations where the carrier’s maintenance of the original facility would not constitute a trespass or other wrong. This was because it could not find a clearly expressed authority in unmistakable or unambiguous language to engage in what would otherwise be a tortious conduct.

A problem that arises from this aspect of the decision is that the Court pointed to the installation power of carriers contained in clause 6 of Schedule 3 of the Act and contended that that clause did contain explicit powers to commit what would otherwise be a trespass. However, the relevant wording of clauses 6 and 7 is essentially the same and it is difficult to determine exactly why the Court came to this conclusion.

(d) Ambiguity of the Definition of Facility

The Court noted that H3GA was relying on part b of the definition of “facility” which states that a facility means any:

“pole or other structure or thing used, or for use, in or in connection with a telecommunications network.”

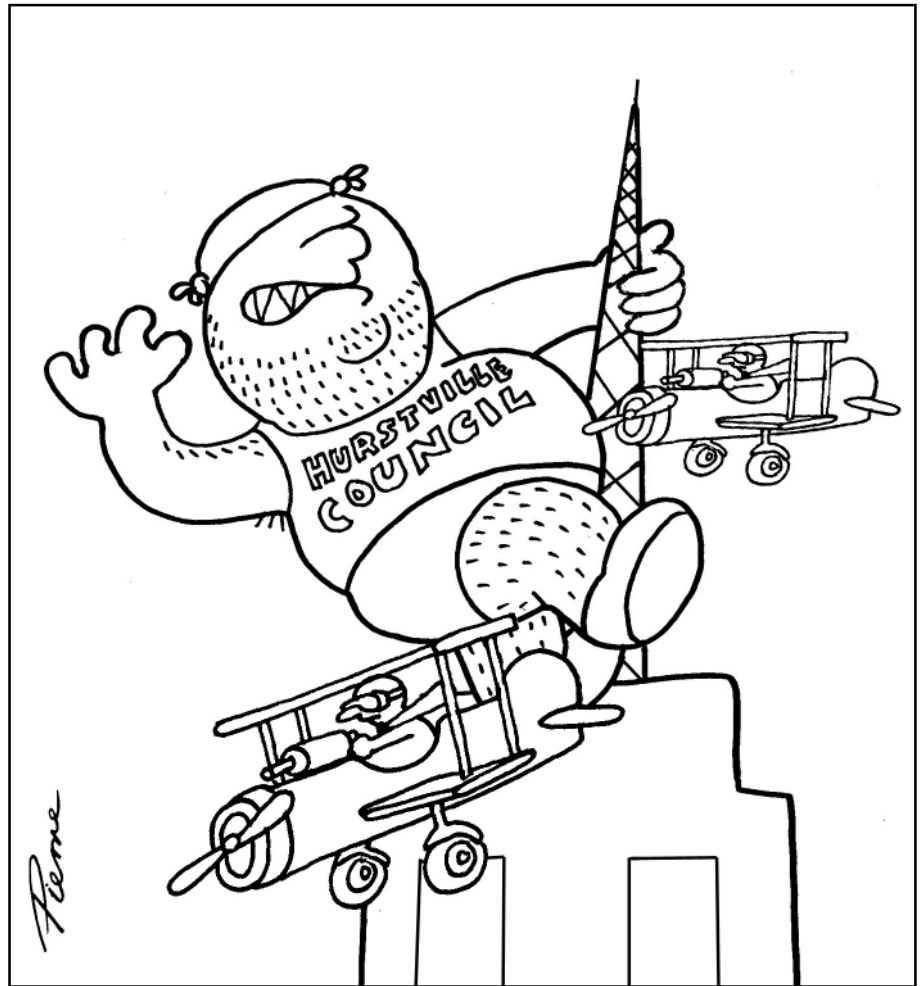
It was held by the Court of Appeal that the wording of the definition did not evidence any contrary intention of the legislature to this expansive view, nor was there any real argument to read down the definition itself. However, the Court maintained that when applying the definition to clause 7 of Schedule 3 of the Act, clause 7 should be read down. The crux of the Court’s decision was:

It makes perfect sense to say that the Harbour Bridge remains a bridge and does not itself become a facility even though facilities, low impact or otherwise, might be installed upon or affixed to it. Likewise with existing buildings erected as residences etc. but which have facilities attached to their rooftop. The definition of “facility” can operate to its full literal extent in such situations without turning the bridge or building into part of the facility itself. Part b of the definition makes perfect sense if construed as being confined to any line, equipment etc. or thing that is purpose built or dedicated by its inherent nature for use in or in connection with a telecommunications network or which is actually used accordingly. It is not necessary to treat an existing (non-purpose built) pole, structure or thing upon which a “facility” is placed as the facility itself.”

In the Court’s opinion, to do so would allow a carrier to, by indirect means, achieve something that it couldn’t achieve under the installation power contained in clause 6 of Schedule 3 of the Act, given that installation of towers and poles were expressly prohibited by that clause.

ISSUES ARISING FROM THE COURT OF APPEAL’S DECISION

The Court of Appeal’s decision is subject to an expedited application for special



leave to appeal which will be heard by the High Court of Australia in early October 2003.

The concerns raised by carriers regarding the decision of the Court of Appeal have attracted considerable media coverage and can be summarised as follows:

- The Court does not appear to have considered *ejusdem generis* arguments when considering extreme hypothetical examples of infrastructure which may be removed and replaced by carriers under the maintenance power.
- The Court does not appear to have taken into account the need for carriers, once infrastructure has (in accordance with the legislature’s policy contained in the Act) being located on the infrastructure of others, to be able to maintain that infrastructure sometimes without the consent of the owner of that infrastructure.
- The Court does not appear to have placed weight on the fact that the legislature expressly provided for the removal and replacement of a pole as a maintenance activity, whatever the

colloquial understanding of the word “maintenance”. As a result, the Court of Appeal was unnecessarily concerned that if installation of a new tower is not permitted then removal and replacement as a maintenance activity should not also be permitted.

- The Court has not given any weight to the legislature’s significant endeavours to create its own limitations on the powers and immunities of carriers contained in Schedule 3 of the Act and has sought to create additional limitations of its own. The outcome in the High Court is keenly awaited by all of the stakeholders in this issue.

Shane Barber is a partner in the Sydney office of corporate and communications law firm, Truman Hoyle. Truman Hoyle acts for a number of telecommunications carriers, including Hutchison 3G Australia Pty Limited in relation to this issue.

1 Hurstville City Council v Hutchison 3G Australia Pty Ltd [2003] NSWCA 179

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

Contributions and Comments

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 on disk and comments should be forwarded to:

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Communications and Media Law Association

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

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