Communications LAW B•U•L•L•E•T•I•N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED

Print Post Approved PP: 234093/00011 EDITED BY SHANE BARBER AND PAGE HENTY Vol 23 No 4 2004

Separating Telstra: Legal Issues Surrounding the Divestment of Foxtel and the HFC Cable Network

Daniel Yap, in this CAMLA Essay Prize winning entry, examines the legal issues that arise from the ACCC's recommendation that Telstra divests its hybrid fibre coaxial (HFC) network and 50 per cent ownership of Foxtel to encourage competition across the pay tv, telephony and broadband sectors.

In June 2003, the Australian Competition and Consumer Commission (**ACCC**) released a report on the wider competition effects of emerging structures in the pay tv market.[1] The report recommended Telstra divest its hybrid fibre coaxial (**HFC**) network and 50 per cent ownership of Foxtel to encourage competition across the pay tv, telephony and broadband sectors. At the time, the Federal Government rejected this recommendation, arguing that the costs of the divestiture outweighed the perceived benefits.[2] In contrast, the Australian Labor Party strongly endorsed the ACCC recommendations. Although the recent Coalition victory greatly diminishes the prospect of Telstra being forced to divest its HFC cable and Foxtel shareholding, this paper provides an analysis of the regulatory issues the government faces in the event of such a scheme.

BACKGROUND

Telstra is the dominant telecommunications player in Australia and one of the most vertically and horizontally integrated operators in the world[3]. It owns both the public switched telecommunications network (**PSTN**) and the largest HRC cable network in Australia. The PSTN is a ubiquitous network, reaching almost every Australian home[4] and is primarily used for fixed line telephony. The Telstra HFC network was built as a defensive ploy to duplicate the area covered by its competitor, Optus, and passes through 2.5 million homes. Telstra currently offers pay tv and broadband services over its HFC network while Optus also offers voice telephony on its cable.

Telstra owns 50 per cent of Foxtel, the pre-eminent pay tv operator in Australia, with approximately 880,000 retail subscribers and 200,000 wholesale subscribers[5]. The dominance of Foxtel in the pay tv market and Telstra's dominance in the telecommunications market serves to reinforce each other[6]. Telstra has the incentive to restrict the supply of content and access to the HFC network from those competing with its supply of telecommunications. Moreover, Telstra has refrained from introducing services on the PSTN network that would cannibalise revenues from the HFC network[7].

In order to address these concerns, the ACCC recommended the separation of the pay tv business and HFC cable. The divestitures would increase Telstra's and Foxtel's willingness to supply

INSIDE THIS ISSUE

CONTENTS

content and carriage services and thereby encourage competition and the development of new technology platforms for consumer benefit.

DIVESTITURE POWERS OF THE GOVERNMENT

Although the Federal Government owns 50.1 per cent of Telstra, the power to manage the business and affairs of the company is vested in the board of directors[8]. Telstra directors are unlikely to instigate the ACCC recommendations without government intervention[9]. Telstra has made significant investments in both assets, recently upgrading the HFC network to provide digital tv and Foxtel is yet to break even[10]. The pay tv provider is a key defensive and a strategic investment for the future. Foxtel allows Telstra to bundle services to reduce customer loss, while providing access to premium content should internet data services become commonplace.

The government may be able to force a sale through the obligations imposed by the *Telstra Corporations Act 1991*,[11] which limits the power of Telstra directors[12].Under section 9, the Minister could give written directions to Telstra to dispose of its shareholding in Foxtel and the HFC cable because it is necessary in the "public interest"[13].

However, it is uncertain whether the scope of the power can extend to such a drastic action as no directions have been issued under section 9 to date[14]. A greater concern is whether the divestitures would be in the best interests of shareholders. Although Telstra directors would be acting under the Ministerial direction, they would still appear to be subject to statutory and general law duties[15]. It would be difficult for directors to discharge these duties unless a scheme delivered fair compensation for Telstra shareholders.

The sale of the HFC cable would be a huge loss for Telstra because it has made a significant investment in the network with an estimated cost value of $3 to $4 billion[16]. Telstra's ability to extract synergies from its investment in the network and Foxtel through bundling suggests it is not economically viable for a stand alone pay tv service provider to purchase the infrastructure at its value to Telstra. Potential buyers of the businesses are unlikely to pay the cost value[17] which would be close to a fair level of compensation.

The Government is advised to obtain an independent expert's report to establish a reasonable value for the assets. The report would probably find a shortfall between the value of the assets to Telstra and the bidder's purchase price. There is a strong likelihood government would have to make up the difference and pay Telstra compensation to avoid shareholder litigation.

SALES OBSTACLES

Although the government may have power to force a sale of Telstra's assets, the divestitures could be blocked by other parts of the current regulatory regime. This section examines ownership structures where such regulatory issues may arise.

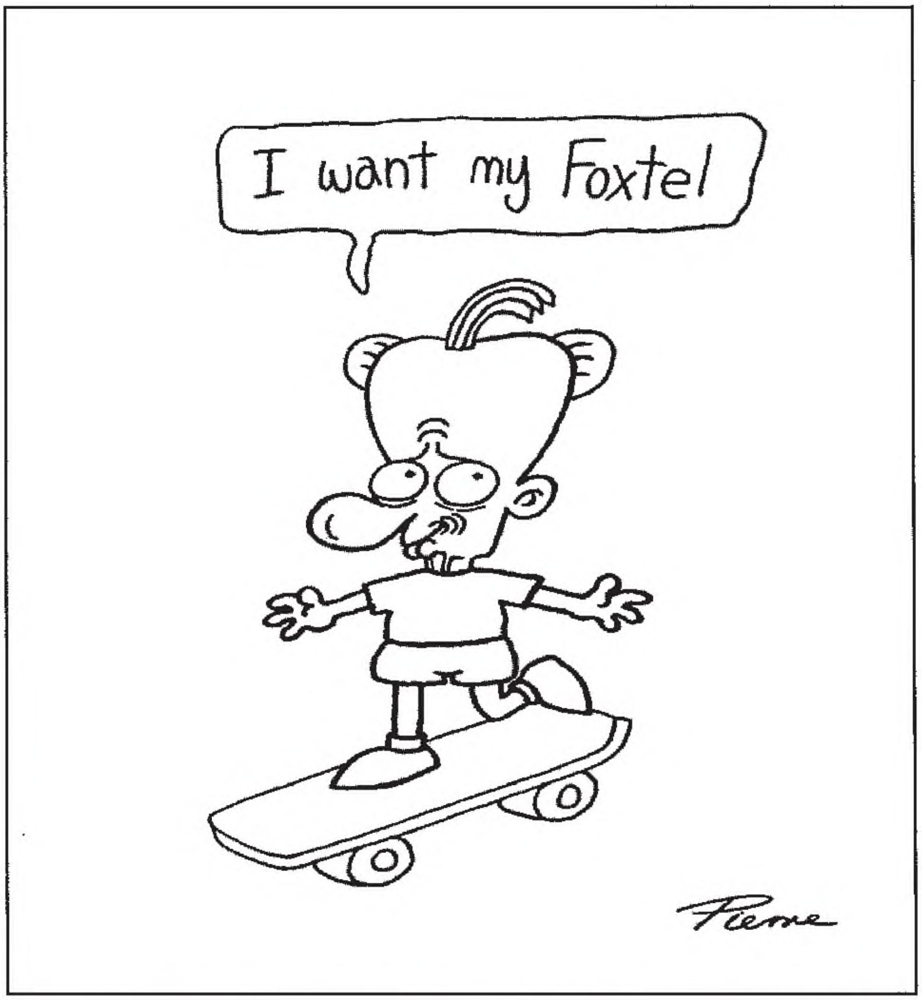
Sale of HFC Infrastructure to Foxtel

Foxtel is the only party capable of extracting synergies to pay the highest price for the network. However, the purchase is probably not even technically viable for Foxtel because it can operate at a much lower cost by renting the capacity from Telstra and/or Optus cable.[18]

The ACCC has power under section 50 of the *Trade Practices Act 1974 (Cth)* (**TPA**)[19] to prevent acquisitions that would have the effect, or likely effect, of substantially lessening competition.[20] While the sale of the HFC network will encourage infrastructure competition[21], the divestment to Foxtel will only entrench its position as the pre-eminent pay tv service provider in Australia. Foxtel's direct control of both carriage and content introduces incentives for the company to restrict access to the HFC cable and its pay tv channels from other networks. This situation can be distinguished from Optus' ownership of a HFC network and pay tv service because of Foxtel's stronger market position and its direct control over content (Optus uses Foxtel content). Therefore, the ACCC is unlikely to allow the divestment of the HFC cable to Foxtel.

The benefits of divesting the HFC cable are reduced if Telstra sells the Foxtel shareholding. Although Telstra's continued ownership of the PSTN and HFC networks reduces opportunities for infrastructure competition between these two networks, it encourages other forms of competition. The willingness of Telstra and Foxtel to supply key inputs to competitors will increase and Telstra's bundling ability and market power will be diminished. Importantly, the divestiture of Foxtel will remove incentives for Telstra to discourage other pay tv operators from accessing the HFC network and prevent Telstra from restricting access to Foxtel content to other operators.

The economic and legal analyses suggest that ownership of the HFC network should remain with Telstra.



Sale of Telstra's shareholding in Foxtel - News Ltd and/or PBL

News Ltd and PBL are the most likely bidders for Telstra's 50 per cent shareholding in Foxtel because they each own a 25 per cent stake and have first right of refusal over Telstra's holding[22]. Both companies have contributed significantly towards the $8 billion invested in the subscription television industry since 1995[23] and will be keen to see some return from Foxtel, which is yet to reach profitability. News Ltd and PBL are in the best position to offer the highest price because their control of pay tv content provides them with leverage to extract synergies from Foxtel, unlike other media players.

The Foxtel sale will also be assessed under the anti-competitive provisions in the TPA. The removal of Telstra increases the concentration of media ownership in Australia[24]. Cross media ownership laws regard subscription tv as a separate arena from the traditional print, commercial radio, broadcasting and commercial television markets and place no restrictions on the ownership of a pay tv service[25]. Nevertheless, section 50 of the TPA may prevent an increased shareholding in Foxtel by News Ltd or PBL.

One option is the purchase of Telstra's shareholding in Foxtel by PBL. PBL's ownership of the Nine Network and Foxtel would give it control over the dominant free-to-air network and pay tv provider. The ACCC notes that the joint ownership gives Foxtel the incentive to discriminate in favour of the Nine Network when retransmitting FTA channels on the pay tv platform. Moreover, PBL would have the ability to jointly purchase FTA and pay tv rights, to the exclusion of other FTA providers. PBL will also have strong incentives to restrict other pay tv providers from gaining access to Foxtel content because of its interest in Fox sports.

Another option is the purchase of Telstra's shareholding jointly by News Ltd and PBL or by News Ltd alone. PBL's influence would be reduced and any significant discriminatory treatment favouring retransmission to the Nine Network would have to be acceptable to News Ltd[26]. In this situation, there are less cogent reasons for the ACCC to block increased control by News Ltd. Nevertheless, the motivation for Foxtel to restrict access to pay tv content (produced by News Ltd) from other providers exists.

There could be an impediment against the sale of Telstra's holding to News Ltd or another foreign company imposed by the *Broadcasting Services Act 1992* (**BSA**)[27]. News Ltd is planning to reincorporate in the U.S although it will retain a secondary Australian listing[28]. Under section 109 of the BSA, a foreign person is not permitted to have company interests of more than 20 per cent in a subscription television broadcasting license[29]. News Ltd would become a foreign person under the BSA. Since the primary listing of News Ltd will be in the U.S, natural persons who are not Australian citizens will hold interests in the company exceeding 50 per cent. Nonetheless it could be possible for News Ltd to circumvent the BSA restrictions on foreign ownership by creative corporate structuring[30]. Otherwise the government could also consider amendments to the BSA to permit News Ltd's holding.

Foreign acquisitions can also be prohibited by the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)*[31], if deemed contrary to "national interest"[32]. However, as a matter of practice, the ownership restrictions in the BSA are regarded as conclusive, and foreign acquisitions that contravene these limits are treated by the Treasurer as contrary to national interest[33].

The preceding discussion confirms it is "legally and technically tricky" [34] to force a sale of Telstra's Foxtel investment. While a sale to either PBL or News Ltd will achieve the highest price and reduce the need for government compensation, it could be blocked by the ACCC for substantially lessening competition. On the other hand, the sale of the Foxtel to a party not involved in pay tv content or carriage, or a public listing of Foxtel would ameliorate anti-competitive concerns. However under both situations, the price paid by another party or individual investors is unlikely to match the offers of PBL or News Ltd, leaving the government with the prospect of paying Telstra investors significant compensation.

The economic analysis suggests that Foxtel should be sold to News Ltd and/or PBL. The global pay tv industry has suffered financially and is yet to reach profitability. The high costs of content[35] suggest it is not viable for an independent operator to purchase Foxtel without access to content. On the other hand, the legal analysis indicates that an ownership structure involving News Ltd or PBL has the strong potential to substantially lessen competition. However, the current regulatory regime or changes to the regime can reduce these concerns and could encourage the ACCC to approve the transaction.

REGULATORY ISSUES AFTER DIVESTMENT

The full separation of Foxtel from content providers, News Ltd and PBL and platforms such as the HFC network reduce the need for government regulation. However, as this separation is unlikely, we assess whether the current regulatory framework encourages competition under the most likely ownership structure.

Access to carriage

Ownership of the HFC cable is expected to remain with Telstra and the sale of Foxtel will increase Telstra's willingness to allow access to the network. However, Foxtel can limit use of the infrastructure because it controls key access points including the set-top units (**STUs**) and service information[36]. The significant sunk costs in establishing the carriage supply chain means that pay tv service providers must go through the Foxtel access points.

Access regulation of the telecommunications industry is set out in Part XIC of the TPA. Under Part XIC, there is a basic right of access to "declared services" where the terms and conditions of access are determined by commercial negotiation or arbitration by the ACCC. Subscription tv is a service declared to be within the scope of Part XIC[37].

Part XIC offers content providers the opportunity to use the HFC network and Foxtel's access points. In December 2003, Foxtel was able to unilaterally set an access and pricing regime for the digital platform, which the ACCC approved[38]. Nonetheless, the terms of regime were a prohibitive factor against actual access[39]. At the time, even large operators such as Channel 7 and 10 stated that they would not proceed with applications to broadcast channels on the HFC network because of costs. However, in a recent decision, the Australian Competition Tribunal ruled that the third parties could challenge for terms better than the approved undertaking[40].

The overturning of the initial ACCC approval indicates the undertaking process is not perfect. Although Part XIC is geared towards commercially negotiated outcomes[41] the access undertaking allows the declared service provider to circumvent negotiations and unilaterally set prices. While the undertaking requires ACCC approval, it has no power to vary the undertaking[42]. One possible area of reform would be to give the ACCC power to negotiate with the access provider, after taking into account industry submissions. This reduces the possibility that undertakings will be anti competitive and restricting rather than promoting access.

Access to content

In 2002, the ACCC accepted section 87B undertakings[43] from Austar, Foxtel and Optus in relation to pay tv content. The subscription tv operators provided a framework including undertakings whereby Foxtel and Optus would not acquire premium movie channels exclusively and where Foxtel and Austar would supply infrastructure operators with their pay tv packages in their entirety upon requested. We suggest that the current access undertakings are sufficient to encourage competition should PBL and/or News Ltd increase their ownership in Foxtel.

Since the initial undertakings, the ACCC has recommended introducing a regime which provides access to individual premium sports and movie content, backed by legislative power. However, this regime would place Optus at a significant disadvantage to other parties because its contractual content sharing agreement (**CSA**) with Foxtel prevents it from "cherry picking" individual popular channels[44]. The structural separation of Foxtel and Telstra reduces the cogency of the ACCC recommendations. In the situation of Foxtel choosing to broadcast over the Optus HFC network, Telstra would be able to apply the access undertakings and supply the Foxtel package on its HFC network.

Although content providers owned by PBL/News Ltd have an incentive to restrict the supply of their channels from Foxtel competitors, the undertakings give competitors access to the content, albeit the whole pay tv packages rather than individual channels. Exclusive content agreements reward content producers, can reduce negative externalities and transaction costs and promote investment. Parties should be able to determine the commercial terms of access rather than have it dictated by legislation. There is no precedent in the FTA which requires commercial television broadcasters to onsupply programs or sporting events they have acquired and produced[45]. There are more cogent reasons why this situation should not be legislation in subscription television because of the unprofitable nature of the industry.

CONCLUSION

Although the Coalition has indicated no intention to divest Foxtel and/or the HFC network, the analyses provided above is useful should the government wish to revisit the matter in the future. Our discussion indicates a tension between economic and legal concerns. On the one hand, the government will aim to achieve the highest price for Foxtel shareholding and HFC cable, to ensure fairness for shareholders, and to reduce the possibility of government compensation. Invariably, this goal will deliver control of Foxtel and/or the HFC network to News Ltd and PBL. On the other hand, the structural separation of Foxtel from News Ltd and PBL decreases the need for government intervention but is not economically viable. Thus, to balance these competing considerations, we suggest a scheme whereby Telstra retains ownership of the HFC cable, while News Ltd and/or PBL increase its shareholding in Foxtel. Although the structural separation is incomplete, the current regulatory framework in the TPA is able to ameliorate most access concerns.

1 Australian Competition & Consumer Commission, report to Senator Alston, Minister for Communications, Information Technology and the Arts, "Emerging Market Structures in the Communication Sector", June 2003.

2 Alston R, Minister for Communications, Information Technology and the Arts, Media Release, "ACCC report on Pay tv competition". <http://www.dcita.gov.au/Article/0,,0_1-2_1-3_163-4_115441,00.html> (Accessed 28 September 2004)

3 Telstra's market power is demonstrated by its receipt of almost 60 per cent of total industry revenue, which is almost four times the revenue of its closest rival, Optus and it is reported to receive over 90 per cent of industry profits. See Note 1 at 30.

4 The Australian household penetration rate stands at 96.8 per cent. See Inquiry Into The Australian Telecommunications Network - Introduction And Preliminary Considerations., CEPU Submission.

<http://www.cepu.asn.au/comm.cepu/section_publications/submissions/sensub02.shtml>

(Accessed 3 October 2004).

5 Long R, Luciano M, "Aust/NZ Telecommunications Searching for a Signal" *Deutsche Bank Asia Pacific Equity Research Report*, 15 June 2004.

6 See note 1 at 39.

7 For example, unlike Optus, Telstra has not sought to supply telephony services on its HFC network which would reduce the revenue from its PSTN network. There is also scope for Telstra to develop its PSTN network to supply broadband and pay tv services.

8 Telstra Constitution (effective 14 November 2003), para 20.1.

9 Outgoing Telstra chief executive Ziggy Switkowski recently declared that his company's shareholding in Foxtel was "not negotiable". See Sainsbury M, "No sale of Foxtel, Telstra tells ALP", *The Australian*, 14 February 2004.

10 An estimated $550 million was been spent by Foxtel and Telstra, upgrading the HFC network, Foxtel televisions systems and set top units (STUs) to provide interactive content on digital tv. See Note 5 at 42 .

11 *Telstra Corporations Act 1991.*

12 The power of Telstra directions is limited by the *Telstra Corporations Act 1991* under the Telstra Constitution (effective 14 November 2003), para 20.2.

13 The only limitation on the power is that the Minister cannot give a direction in relation to the amounts to be charged for work done or services supplied by Telstra.

14 Telstra Annual Report 2004, 143.

15 These include the duty to act with "care and diligence" (s 180 *Corporations Act 2001)*, "in good faith in the best interests of the corporation" (s 181 *Corporations Act 2001)*, and not for an "improper purpose" (s 182 *Corporations Act 2001)*. See Garland J, Stapledon G, Watts T, Separating Telstra: Protecting the Interests of Minority Shareholders, Commissioned by the Chifley Research Centre, *Institutional Analysis Pty Ltd*, January 2003.

16 Austar United Communications Submission to the ACCC Report on Emerging Market Structures in the Communications Sector, Aug 2003 < http://www.dcita.gov.au/download/0,2720,4_116126,00.doc>

(Accessed 20 September 2004).

17 Meridian Connections Submission to the ACCC Report on Emerging Market Structures in the Communications Sector, 30 July 2003 <http://www.dcita.gov.au/download/0,2720,4_116125,00.doc>

(Accessed 20 September 2004).

18 See note 16.

19 *Trade Practices Act 1974* (Cth), hereinafter "*TPA*".

20 s 4G *TPA* states that the term "substantially lessen competition" includes "preventing or hindering competition".

21 Telstra would have incentives to invest and upgrade copper access network to provide broadband services and pay tv service. The market power of Telstra will be diminished as the opportunity to bundle Foxtel with Telstra is reduced.

22 Ferguson A, "Ziggy's last chance", *Business Review Weekly*, 8 July 2004.

23 Foxtel Submission to the ACCC Report on Emerging Market Structures in the Communications Sector, 24 Sep 2003 < http://www.dcita.gov.au/download/0,2720,4_116067,00.pdf>

(Accessed 20 September 2004).

24 News Ltd is the largest newspaper proprietor and magazine publisher in Australia while PBL owns the highest rating FTA broadcaster, the Nine Network. News Ltd and PBL are major content providers with ownership in the following producers: Fox Sports (50/50 News Ltd/PBL), XYZ (50/50 Foxtel/Austar), Fox Studios (News Ltd), NRL (50% News Ltd). See Seven Network Submission to the ACCC Report on Emerging Market Structures in the Communications Sector, 13 Nov 2003

http://www.dcita.gov.au/download/0,2720,4_116186,00.pdf>

(Accessed 20 September 2004).

25 There are three cross media ownership provisions relating to being in a position to exercise control of a commercial television broadcasting license, a commercial radio broadcasting license and a newspaper in the same area. *Broadcasting Services Act:* s 60.

26 See note 1 at 56.

27 *Broadcasting Services Act 1992.*

28 News Corporation Information Memorandum in relation to a proposal to "re-incorporate" in the United States and to acquire from Murdoch family interests their shareholding in Queensland Press Pty Limited, 15 September 2004.

29 Additionally, a foreign person must not have company interests in a subscription television broadcasting licence that, when added to the company interests in that licence held by other foreign persons, exceeds 35 per cent.

30 The foreign ownership limit is a test that applies to company interests rather than the degree of actual control exercised by foreign persons. News Ltd may have to adopt creative corporate restructuring, even if it does not increase its shareholding in Foxtel because it currently owns 25 per cent.

31 *Foreign Acquisitions and Takeovers Act 1975* (Cth).

32 *Foreign Acquisitions and Takeovers Act 1975* (Cth): s 19

33 Butler D, Rodrick S, *Australian Media Law* 1st ed (Law Book Co., 1999) 597.

34 Wright S, "Update: Telstra Awaits Vote, Ready To Talk With Labor", *Dow Jones Newswires*, Monday September 27 2004 <http://asia.news.yahoo.com/040927/5/1ow4i.html> (Accessed 30 September 2004)

35 Foxtel has paid hundreds of millions of dollars in licence fees for its movie channels. It has been reported that Optus has Hollywood movie content liabilities worth $300 million. See note 22.

36 See note 23.

37 ACCC, Deeming of Telecommunications Services, p.iv (Table A),152.

38 Foxtel was granted an exemption from the *TPA* that meant the ACCC could not regulate how it opened its digital platform to third parties until 2015. Under s 152ATA, the *TPA* enables an access provider to apply for an exemption from the standard access obligations before an investment in a telecommunications service is made or that service becomes an active declared service.

39 "The channel's reserve price is $750,000 a year and it's estimated accessing Foxtel's set-top box infrastructure would cost a would-be pay tv channel operator about $250 a subscriber. In addition, a channel operator would need to have tv-production facilities to produce content as well as its own customer call centres and billing operations. Industry sources say that all up, running just one channel would cost at least $35 million...also...any new channel would not be included by Foxtel in its basic digital package, meaning the channel operator would have to market and advertise the channel to prospective subscribers itself": Nicholas K, "Seven, Ten 'no' To New Channels" , *Australian Financial Review,* 12 May 2004.

40 Catalano C, "Pay tv ruling in Seven's favour", *The Sydney Morning Herald,* 1 October 2004.

41 Grant A (Ed), *The Communications Law Centre Guide Australian Telecommunications Regulation* 3rd Ed (UNSW Press, 2004) at 113.

42 See note 40.

43 s 87B of the *Trade Practise Act 1974 (TPA)* provides that the ACCC is able to accept a written undertaking in relation to a matter which it has power under the *TPA*. Undertakings given under s 87B are court enforceable through the ACCC applying to the Court when it considers the undertaking has been breached. Orders the Court may given include compensation and damages in addition to any other order that the court considers appropriate.

44 Optus Submission to the ACCC Report on Emerging Market Structures in the Communications Sector,07 Aug 2003

<http://www.dcita.gov.au/download/0,2720,4_116267,00.doc>

(Accessed 20 September 2004).

45 See note 44.

University student Daniel Yap is the Winner of the 2004 CAMLA Essay Prize Competition.

Defamation Law and the Fairness of the Objective Test

Sarah Krasnostein, highly commended in the 2004 CAMLA Essay Prize, discusses whether it is appropriate for defamation law to apply objective tests to determine liability in circumstances where the meaning of the text is subjective.

The law of defamation is particularly concerned with constructing meaning. This occurs at two stages. First, when determining the meaning of the contested words, the law "mimic[s] the ordinary publishee's response"[1]. Second, when determining whether that meaning is defamatory, the law anticipates the reaction it will elicit. However, both stages assume an idealised homogeneity of reader response in a society that is fundamentally heterogeneous in terms of, inter alia, age, language, ethnicity, experience and morality. If meaning is subjective, is it fair for defamation law to have such objective tests for determining the meaning of an imputation and whether it is defamatory?

IMPUTATIONS: MEANINGS AND DEFAMATION

The meaning of an imputation is determined by asking "*what an ordinary, reasonable publishee would understand from the material*"[2]. This question is, however, fundamentally at odds with postmodern literary and cultural theory which denies objectivity and the possibility of a homogenous reader response to a particular text. Current literary theory seems focused on asking, "What is the meaning of a text?" and "Is objective understanding possible, or is all understanding relative to a reader's particular situation?"[3]. Possible legal liability for defamation rests on the law's answers to these seemingly academic questions.

The same philosophical problems plague the second test for determining whether an imputation is defamatory. While there is no comprehensive definition provided by the case law, the suggested tests assume the same unrealistic homogenous reader response by asking "would the words tend to lower the plaintiff in estimation of right-thinking members of society generally?"[4]. Yet, while literary theories highlight problems with the way the law constructs meaning, they offer no pragmatic solutions to redress the clash of rights[5] at the heart of defamation law. Perhaps their value lies in highlighting alternative ways of understanding imputations, thus encouraging judges and juries to proceed self-consciously in selecting and justifying a text's dominant meaning and effect. This would be useful in exposing and understanding the policy behind defamation decisions by explicitly articulating why the right to reputation will sometimes trump freedom of speech.

TEST FOR DETERMINING MEANING

Unlike postmodern literary theory, the legal approach to determining the meaning of an imputation emphasises points of convergence in our understanding of language. These shared understandings come from living together in a liberal-democratic society. However, the impact of cultural differences on understanding may be relevant in that the term 'imputation' includes non-literal meanings. Natural and ordinary meanings (as distinguished from legal innuendoes) may not be 'natural and ordinary' to many in the community. This type of imputation is conveyed by inference. Such inferential meanings are called 'popular' or 'false' innuendoes and "depend on general community knowledge, such as knowing a common slang expression". However, given the diversity of the community, cultural and language barriers mean that slang may not be common and that certain types of knowledge may be absent in large sectors of the community.

Consequently, the role of evidence in determining meaning seems lacking.