Contempt and Public Interest

Robin Bowley, in this paper which received an honourable mention in the 2005 CAMLA Assay Prize, advocates clearer rules regarding sub judice contempt.

Introduction

The law of sub judice contempt strivesto balance the right to freedom of speech and discussion of matters of public interest with the right for persons facing legal proceedings to have a fair trial, unprejudiced by media comment. Striking a balance between these two interests is a difficult task, which in Australia, has been addressed by the common law over time. While a number of decisions have considered how the balance should be maintained, no authoritative guidance has yet been developed in Australia, with considerable uncertainty still surrounding the questions of when a publication[1] will offend the sub judice rule, and when the "public interest" defence will be available. The present law of sub judice contempt raises more questions than answers.

In order to provide better guidance to the media and as a result, avoid costly and time-consuming litigation, and at the same time, allow the media to publish and broadcast with greater confidence and without fear of being found to be in contempt of court, greater certainty must be created. In essence, this article considers that prevention is better than cure, and that such prevention can only be achieved through making the rules on sub judice contempt clear and readily understood by the media, courts and the community alike.

Sub Judice Contempt: An overview of its development

The Sub Judice Rule

Essentially, the law of sub judice contempt aims to safeguard the public interest in the proper administration of justice through ensuring a fair trial.[2] The rule prohibits the publication of prejudicial information about a case that is currently being heard or is pending hearing in Court.[3] The principal source of sub judice contempt law in Australia remains the common law.[4] Commentator Sally Walker explains the operation of the sub judice rule:

> *"The conflict between freedom of speech and the proper administration of justice is most likely to arise when a media organisation publishes material which may interfere with the course of particular legal proceedings. Typically, those responsible will not intend to prejudice the proceedings. They may have been motivated solely by a desire to bring to the attention of the public matters of public interest and concern. Nonetheless, [in doing so] they may be guilty of a criminal offence under that branch of law in Australia known as sub judice contempt."*[5]

Examples of publications that might offend the sub judice rule include assertions that a person facing legal proceedings was innocent of the charges: *DPP v Wran* (1986) 7 NSWLR 616, or that he/she was guilty: *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15 (**Hinch**). However as this paper will show, the question of what publications will offend the sub judice rule is far from certain.

The "Public Interest" Defence

In light of the common laws recognition that freedom of speech is a highly valued principle, the public interest defence has developed.[6] Walker explains that 'the "public interest defence" allows Australian courts to make a finding that a media publication contains information that has a "real and substantial risk" of causing prejudice to the proceedings, but does not amount to a contempt because the information relates to a matter of great public importance and interest.'[7]

The first authoritative statement on the "public interest defence" in Australian sub judice law was enunciated by Jordan CJ in *Ex parte Bread Manufacturers Ltd* (1937) 37 SR(NSW) 242 (**Breadmakers**), who held that:

> *"[d]iscussion of public affairs and the detriment of public abuses actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant ... It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason of the fact that the matter in question has become the subject of litigation."*[8]

Walker explains that until the High Court's decision in Hinch, there was considerable uncertainty regarding the practical application of the *Breadmakers* principle, with some courts viewing the principle as an inflexible rule.[9] In *Hinch* it was held that courts must engage in a "balancing exercise" between the two competing interests to satisfy themselves beyond reasonable doubt that the public interest in freedom of speech outweighs the public interest in the administration of justice.[10] However, Courts are left with little (if any) guidance on how this balancing exercise should be undertaken. The test formulated by the majority of the High Court in *Hinch* to determine if a publication is prejudicial is that the publication must:

> *" ... have a "real and definite tendency" as a "matter of practical reality" to "preclude or prejudice the fair and effective administration of justice in the relevant trial."*[11]

In the *Hinch* decision, Mason CJ differed from the majority in his preference that:

> *" ... there was a substantial risk that the published material would come to the attention of one or more members of the jury in the relevant proceedings, and through so doing, would cause real or serious prejudice to the fair conduct of those proceedings."*[12]

The "substantial risk" test is the preferable test to be applied to determine if there is sub judice contempt. This is one of the major uncertainties in the Australian law of sub judice contempt, and Felicity Robinson explains that:

> *"The question that arises from the [five separate] judgments in Hinch v Attorney General (Victoria) (1997) is what constitutes a substantial public interest. The problem with the balancing approach is that what it gains in flexibility it loses in subjectivity. The*

High Court has only provided limited examples of what issues may tilt the scales in favour of the public interest defence, namely a 'major constitutional crisis' or 'imminent threat of nuclear disaster'.[13] *Consequently, media organisations are left in a situation of uncertainty because they are unable to gauge when a court may deem a particular topic to be of sufficient public interest to escape a charge of contempt."*[14]

Nature of the media industry

The "uncertainty" that Robinson refers to above is undesirable for the media, the courts and the community in general. It must be remembered that the media is a time sensitive organisation, which survives on publicizing "newsworthy" occurrences, and as most media organisations are run to make a profit, there will frequently be considerable pressure on media staff to find and publicise such occurrences.[15] Many staff within media organisations are not legally trained[16], and without the aid of expert legal advice may not be equipped to understand the presently complicated and haphazard Australian law of sub judice contempt.

Litigation resulting from avoidable contempt situations can be costly and time-consuming, and is therefore best avoided through making sub judice law clearer, more consistent and better understood by lawyers and lay people alike.

The most recent NSW decision on sub judice contempt - *Attorney-General for the State of New South Wales v X* (2000)[17] has not finally resolved the uncertainty of what should constitute a matter of "substantial public interest", although the majority judgment is indicative of a more even balance between the right to free speech and the right to a fair trial.[18]

However, Felicity Robinson concludes that 'despite the renewed scope for freedom of speech [resulting from this decision], the media must still be extremely cautious when publishing material, especially since there are limited guidelines[19] as to what subject matter courts will deem to be of "sufficient public interest" to escape a charge of contempt.'[20] The uncertainty inherent in the Australian law of sub judice contempt has lead Professor David Flint to contend that:

> *"The assumption that a jury, properly instructed, remains more susceptible than judges or lawyers to media reporting is unjustified today if ever it was. However, it is not suggested we [disregard sub judice contempt and] introduce "trial by media" just reform of the law of contempt."*[21]

It is to this question of reforming the law of sub judice contempt that the paper will now turn.

The Case for Law Reform

There is need for greater certainty and balance in the Australian law of sub judice contempt. Since 1980, there have been more than 20 cases where allegedly prejudicial material has been published which has necessitated the discharge of the jury after it has been empanelled.[22]

DP 43 and other publications both in Australia and overseas, while recommending that the sub judice rule be retained[23], have proposed a number of solutions, which are examined below. The following discussion focuses on three main issues, namely

- what constitutes a matter of "substantial public interest"
- what factors will determine when a publication is in breach of the sub judice rule, focusing on the recommendation to change the test from a "tendency to prejudice" to depend on a "substantial risk of prejudice"
- the necessity for there to be fault liability, and defences that should be available to publishers charged with sub judice contempt

What constitutes a matter of "substantial public interest"

As noted above, Australian common law to date fails to offer useful guidance on what may constitute a matter of "significant public interest"; the two examples referred to by Mason CJ in *Hinch* (1987) offer little effective guidance. Sally Walker notes that:

> *"Hinch goes some way towards remedying [the defects in sub judice law] but it creates its own uncertainty as it leaves it open to the courts in each case to weigh the competing claims of freedom of speech and the administration of justice. This must create uncertainty in the minds of publishers, who will react either by ignoring the law or engaging in over-cautious self-censorship."*[24]

Furthermore, in this situation there is obviously considerable discretion on whether to institute contempt proceedings. Walker explains:

> *"Relying on prosecutorial discretion is not conducive to clarity or certainty; publishers should be able to know in advance whether they will be prosecuted. Furthermore, the more general reliance placed on the exercise of prosecutorial discretion, the greater the likelihood of complaints of selective prosecution."*[25]

Better guidance is therefore needed. DP 43 attempts to remedy this void by providing some guidance on the practical meaning of the term "substantial public interest".

> ***PROPOSAL 20***
>
> *Legislation should provide for a defence to a charge of sub judice contempt on the basis that the publication the subject of the charge was reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal offence. The burden of proving this should be on the defendant in contempt proceedings, to prove on the balance of probabilities.*

It appears that this proposal would provide far more effective guidance than the present common law does, and ought to be adopted.

How a publication will offend the sub judice rule: replacing the "tendency to prejudice" requirement with "substantial risk of prejudice"

As noted above, the present common law test of whether a publication will offend the sub judice rule is expressed quite generally in terms of "tendency to prejudice" the proceedings: *Hinch* (1987)[26]. DP 43 recommends that the present common law test clarify and narrow the test for sub judice liability in order to depend on a "substantial risk of prejudice", rather than the majority test of "tendency to prejudice" as held in *Hinch.*[27] As noted above, Mason CJ preferred this test, but he was in the minority.

DP 43 argues that re-formulating the test for when a publication would offend the sub judice rule:

> *" ... would raise the threshold of liability, thereby widening the scope of material which can be published without being in contempt. It can be argued that this tipping of the scales in favour of freedom of speech allows for the counterbalance provided by applying the rule to circumstances in which there is some danger of prejudice. On this basis, retention of the sub judice rule to apply to influence on witnesses can be justified."*[28]

DP 43 also notes that

> *"the Australian Law Reform Commission, the Phillimore Committee in Great Britain, and the Irish Law Reform Commission have all recommended a test for liability which was formulated in terms of substantial risk of prejudice, as opposed to mere tendency to prejudice."*[29]

This proposed change from tendency to substantial risk has also received support from within academia.[30]

This considerations have lead DP 43 to propose that:

> ***PROPOSAL 3***
>
> *"A publication should constitute a contempt if it creates a substantial risk, according to the circumstances at the time of publication, that:*
>
> *(a) members, or potential members, of a jury (other than a jury empanelled under s 7A of the Defamation Act 1974 (NSW)), or a witness or witnesses, or potential witness or witnesses, in legal proceedings could:*
>
> *(i) encounter the publication; and*
>
> *(ii) recall the contents of the publication at the material time; and*
>
> *(iii) by virtue of those facts, the fairness of the proceedings would be prejudiced."*[31]

I believe that this proposal would be a valid one, as the very question of whether juries actually recall and are influenced by media information, has been seriously questioned in many quarters[32], but this questioning has been dismissed by Australian courts[33]. This consideration, however, is beyond the scope of this paper.

DP 43 goes further and offers a non-exhaustive list of statements that may have the capacity to offend the sub judice rule.

> ***PROPOSAL 4***
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> *Legislation should set out the following as an illustrative list of statements that may constitute sub judice contempt if they also comply with the requirements set out in Proposal 3:*
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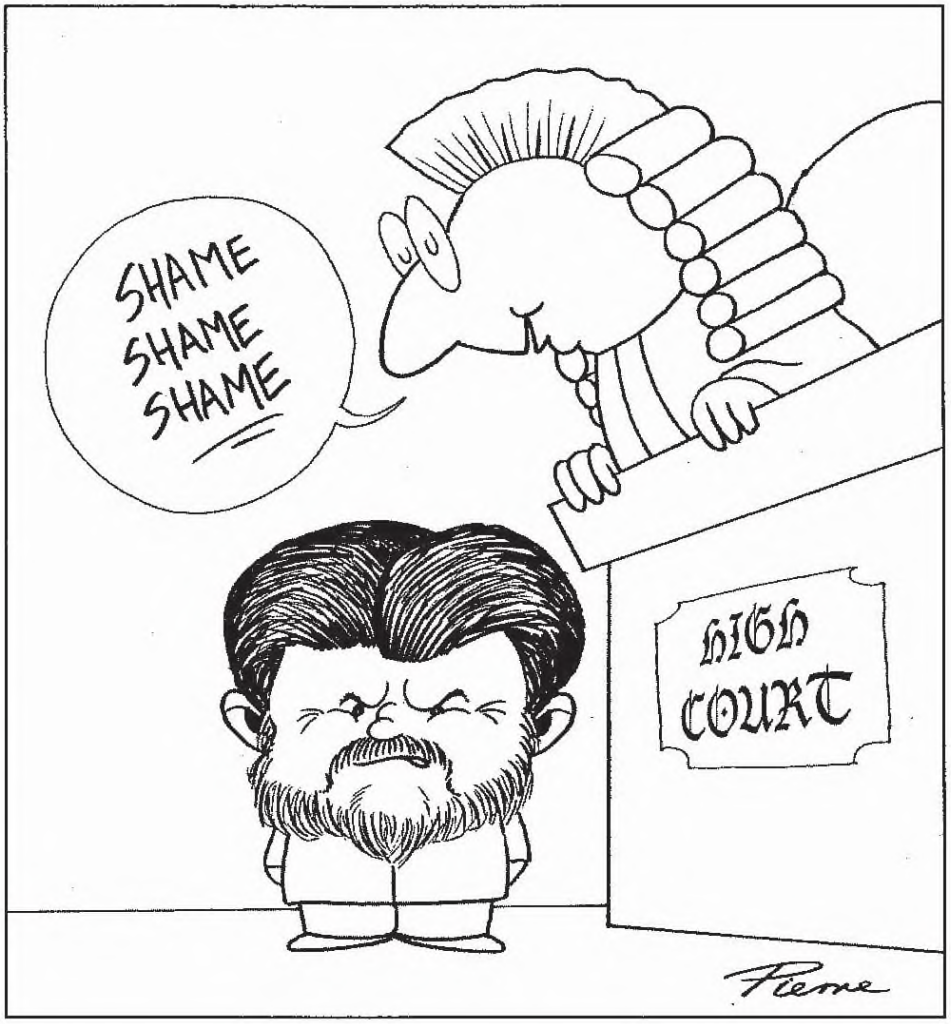
> - *A statement that suggests, or from which it could reasonably be inferred, that the accused has a previous criminal conviction, has been previously charged for committing an offence and/or previously acquitted, or been otherwise involved in other criminal activity;*
> - *A statement that suggests, or from which it could reasonably be inferred, that the accused has confessed to committing the crime in question;*
> - *A statement that suggests, or from which it could reasonably be inferred, that the accused is guilty[34] or innocent[35] of the crime for which he or she is charged, or that the jury should convict or acquit the accused;*
> - *A statement that could reasonably be regarded to incite sympathy or antipathy for the accused and/or to disparage the prosecution, or to make favourable or unfavourable references to the character or credibility of the accused or of a witness;*
> - *A photograph, sketch or other likeness of the accused, or a physical description of the accused.*

The legislation should make it clear that this list is not exhaustive and that a statement may amount to contempt even though it does not fall within one of the categories listed above.'



Fault liability for sub judice contempt, and defences to sub judice contempt

Another major shortcoming of the Australian law of sub judice contempt is that it is cast in terms of absolute, rather than strict liability. Publishers may be found in contempt even if they had no intention to prejudice the proceedings at hand.[36] DP 43 notes that since sub judice contempt imposes criminal sanctions, the strict liability approach, rather than the current absolute liability approach, should apply.[37] When present situation of absolute liability is considered alongside the current, highly generalised "tendency to prejudice" test, and secondly, the lack of guidance on what constitutes a matter of "significant public interest", the shortcomings of the haphazard Australian law of sub judice contempt become all the more apparent.

Walker proposes that:

> *"A more satisfactory way of balancing the relevant public interests would be to alter the law so that a publisher*

who does not intend to interfere with the administration of justice would be liable for contempt only if the publisher can be shown to have acted recklessly. This would balance the public interest in the administration of justice and the public interest in freedom of speech and make relevant the publisher's motive for publishing the material."[38]

Another of the recommendations of DP 43 was to widen the scope for defences to sub judice contempt - the Commission proposes that where it can be shown that no one was at fault, there should be no liability for sub judice contempt.[39]

PROPOSAL 7

Legislation should provide that it is a defence to a charge of sub judice contempt, proven on the balance of probabilities, that the person or organisation charged with contempt:

(a) did not know a fact that caused the publication to breach the sub judice rule; and

(b) before the publication was made, took all reasonable steps to ascertain any fact that would cause the publication to breach the sub judice rule.

DP 43 goes further to list a number of possible defences to a charge of sub judice contempt.

PROPOSAL 8

Legislation should provide that it is a defence to a charge of sub judice contempt if the accused can show, on the balance of probabilities:

(a) that it, as well as any person for whose conduct in the matter it is responsible, had no control of the content of the publication which contains the offending material; and

(b) either:

(i) at the time of the publication, they did not know (having taken all reasonable care) that it contained such matter and had no reason to suspect that it was likely to do so;

or

(ii) they became aware of such material before publication and on becoming so aware, took such steps as were reasonably available to them to endeavour to prevent the material from being published.

Necessity of codification

Codification of these changes would be a key step towards remedying the current uncertainty in Australian sub judice law. I would recommend that such codification take place in across all Australian states and territories, through a process of "alignment" of the laws in each state. Although DP 43 did not support full codification of the sub judice rule in New South Wales[40] (which it believed would lead to confusion and variance with other Australian jurisdictions), the focus of this paper is the Australian law of sub judice contempt in Australia as a whole. I believe that codification is necessary due to the significant pervasiveness of media publications today, and their ability to cross state boundaries.[41] Given the significant interaction and interdependence of the Australian media, I believe it is a less than desirable outcome for state laws on sub judice contempt to be at variance with other jurisdictions.[42]

Such a process would accord with the recommendations of the Australian Law Reform Commission's 1987 report, which recommended that Australia's law of contempt should be in statutory form.[43] It is true that the 1987 ALRC report dealt with Australian contempt law as a whole, but I believe that its recommendation for codification is valid.

Sally Walker explains that:

> *"Owing to constitutional limitations on the Commonwealth Parliament's legislative power ... the common law regarding unintentional sub judice contempt would continue to apply in respect of proceedings conducted by the High Court and, unless the State and Territory legislatures enacted mirror legislation, the common law would continue to apply in respect of proceedings conducted by state and territory courts. The lack of uniformity which would result [if mirroring legislation was not enacted] would only add to the uncertainty in this area."*[44]

The uncertainty resulting from lack of uniformity has been recognised by DP 43[45], which also recognised that any such reform has to come about through the co-operative efforts of state and territory legislatures.[46] In my opinion, the present challenge is for Australian law-makers to recognise that the present Australian law of sub judice contempt has a number of significant flaws, and take a co-operative approach towards implementing laws based upon the recommendations discussed in this paper.

Conclusion

The law of sub judice contempt is intended to serve an important purpose, balancing the right to a fair trial with the right to free and open communication, but at present in Australia, it does not achieve this purpose in a systematic and consistent manner. There is still considerable uncertainty on when a publication will be in contempt of court, and when it can be excused from being so on the grounds of protecting a public interest. Furthermore, publishers can be found to be in contempt of this haphazard rule even if they were not aware of its operation, or even if they took reasonable steps to control publication.

The media is essentially a reactive, news-driven, time sensitive organisation where material published can often offend different interests, including the interest in preventing prejudice to legal proceedings. The only effective way to prevent this from occurring in the majority of cases is to have carefully formulated laws that balance both the interest in maintaining the right to a fair and unprejudiced trial with the interest to free and open communication.

The reforms proposed by DP 43, and other publications discussed in this paper, are a promising way of achieving certainty and consistency in the law of sub judice contempt in Australia. This would in turn result in an environment where the media can publish with the knowledge and confidence that they will not be likely to be found in contempt of court, and as a result, avoid the prospect of costly and time-consuming litigation. The challenge is for law-makers to put these recommendations into practice.

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[1] For the purposes of this paper, the terms "publication" and "publish" will be construed broadly to include both written material in newspapers etc, and spoken transmissions on radio and television

[2] S. Walker *Media Law: Commentary and Materials* (2000), p. 528. Cited in F. Robinson '"No, No! Sentence First Î Verdict Afterwards": Freedom of the Press and Contempt by Publication in *Attorney-General for the State of New South Wales v X*' (2001) 23 *Sydney Law Review* 261 at 262

[3] *James v Robinson* (1963) 109 CLR 593, *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540. Cited in F. Robinson '"No, No! Sentence First Î Verdict Afterwards": Freedom of the Press and Contempt

by Publication in *Attorney-General for the State of New South Wales v X* (2001) 23 *Sydney Law Review* 261 at 262

[4] S. Walker 'Freedom of Speech and Contempt of Court' at 585

[5] Ibid at 583

[6] F. Robinson '"No, No! Sentence First Î Verdict Afterwards at 263

[7] Ibid at 264

[8] *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* 91937) SR(NSW) 242 at 249. Cited in Ibid at 263

[9] Ibid at 264

[10] Ibid

[11] *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15. Per Wilson and Deane JJ at 34; Tohey J at 70. Cited in Ibid at 262

[12] (1987) 164 CLR 15 at 27-28. Cited in M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 81

[13] (1987) 164 CLR 15 Per Mason CJ at 26

[14] F. Robinson '"No, No! Sentence First Î Verdict Afterwards"at 265

[15] D. Williams 'The Courts and the Media: What Reforms Are Needed and Why?' (1999) 1 *UTS Law Review* 13 at 15

[16] Ibid

[17] (2000) 49 NSWLR 653

[18] F. Robinson '"No, No! Sentence First Î Verdict Afterwards" at 261

[19] Mason CJ's reference to 'major constitutional crisis' or 'imminent threat of nuclear disaster' at 26 is the only guidance that has been developed by the High Court to date.

[20] F. Robinson '"No, No! Sentence First Î Verdict Afterwards at 276

[21] D. Flint 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* 30 at 31

[22] M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 72

[23] DP 43 Proposal 1

[24] S. Walker 'Freedom of Speech and Contempt of Court: The Australian and English Approaches Compared' (1991) 40 *ILCQ* 583 at 606

[25] S. Walker 'Freedom of Speech and Contempt of Court' at 588

[26] *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15. Per Wilson and Deane JJ at 34; Tohey J at 70. Cited in F. Robinson '"No, No! Sentence First Î Verdict Afterwards" at 262

[27] DP 43 para 2.42

[28] DP 43 para 2.56

[29] DP 43 para 4.22

[30] M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 81

[31] DP 43 Proposal 3

[32] DP 43 Paras 2.55 Î 2.67

[33] *Attorney General (NSW) v John Fairfax Publications* [1999] NSWSC 318 at para 95 per Barr J

[34] See *Hinch* (1987)

[35] See *DPP v Wran* (1986)

[36] DP 43 para 5.8

[37] DP 43 para 5.14

[38] S. Walker 'Freedom of Speech and Contempt of Court' at 606

[39] DP 43 para 2.36

[40] DP 43 para 1.45

[41] D. Flint 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* 30 at 33

[42] DP 43 para 2.94

[43] S. Walker 'Freedom of Speech and Contempt of Court' at 585

[44] Ibid

[45] DP 43 para 1.46

[46] DP 43 para 1.46. DP 43 also recognised that ' ... the Standing Committee of Attorneys General considered, during the early 1990s, a uniform law on contempt of court or partially uniform contempt laws dealing only with publication, but it appears that there was little enthusiasm at that time for a common statutory approach by the States and Territories.' DP 43 para 1.46

Unfair Terms in Consumer Contracts - The New Benchmark

Robert Neely and Olivia Kwok take a more detailed look at new Victorian requirements

Introduction

The 'unfair terms' provisions in Victoria's *Fair Trading Act 1999* (Vic) (**FTA**) now set the benchmark in terms of consumer-friendly contracts in Australia.

The FTA provisions have particular relevance to suppliers who use standard form contracts across Australia, such as those commonly offered online by banks, telecommunications companies and internet service providers. Although the provisions have been in force since 9 October 2003, and some industry sectors have led the way in ensuring their consumer contracts comply, the implications of the provisions for suppliers generally is yet to be properly appreciated.

It is suggested that it would be pragmatic for companies supplying goods and services to consumers in Australia to adopt the FTA provisions as a standard when formulating end-user contracts and sign-up procedures. The reasons are threefold: compliance with the FTA will generally ensure compliance with other existing regulations concerning the 'fairness' of consumer contracts; it is quite likely that other States and Territories will follow Victoria and introduce similar legislation;[1] and it is generally not practicable to have different contracts and procedures for different Australian jurisdictions.

The good news for telecommunications and internet service providers is that compliance with the Australian Communications Industry Forum (**ACIF**) Consumer Contracts Code, which sets minimum standards for consumer contracts in the telecommunications industry,[2] is likely to mean compliance with the FTA provisions.

Background

The unfair contracts provisions in the FTA are based on equivalent UK regulations, the *Unfair Terms in Consumer Contracts Regulations 1999 (UK)* (**UK Regulations**), which in turn are drawn from a 1993 European Union directive. The provisions are aimed at addressing substantive, as opposed to procedural, unfairness in consumer contracts.

The provisions have obvious application to telecommunications, pay TV and internet services. When the legislation was introduced, Consumer Affairs Victoria (**CAV**) identified telecommunications contracts as one of its initial targets. After significant compliance activity in 2004, in December 2004, CAV commenced proceedings against AAPT in relation to AAPT's mobile and pre-paid mobile phone contracts. A decision by the Victorian Civil and Administrative Tribunal (**VCAT**) in that matter has been reserved (the action is discussed below). CAV recently announced that priorities for 2005/06 will include pay TV and Internet service providers' contracts.[3]

It is notable that the 2005 ACIF Consumer Contracts Code[4] (**CC Code**) drew heavily from the UK Regulations and the amendments to the FTA. Its central requirement mirrors section 32W of the FTA and prohibits unfair terms in consumer contracts.