LYING THROUGH LEGISLATION? COMMUNICATIONS REGULATION AND DUTIES OF IMPERFECT OBLIGATION

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I. INTRODUCTION

The legislative regimes governing telecommunications and broadcasting services in Australia are fraught with an abundance of unenforceable statutory duties that divert civic attention away from the inadequacies of the communications regulatory system itself. Both the *Telecommunications Act 1997* (Cth) and the *Broadcasting Services Act 1992* (Cth) provide often elaborate explanations of regulatory policy and legislative objectives that are neither followed in nor achieved by the substance of the statutory provisions that follow. Such statements of object and policy act as a smokescreen for legislation which does not accomplish what it was said to do. They represent a kind of legislative dishonesty, promising regulation that does not in fact exist.

Administrative law has provided little respite for individuals deceived by these regulatory facades. A very restrictive approach has been taken by Australian courts to the enforcement of certain kinds of duties through the judicial system. In particular, 'imperfect' laws – which are statutory duties of general application containing significant elements of discretion – have become entirely unenforceable through administrative law processes. It seems that the law has developed in a manner which seems intended to circumvent rather than establish an identifiable law to deal with these public duties. This is a particularly interesting development when it is borne in mind that such duties have become endemic throughout Australian legislation.

This paper seeks to address the nature and impact of this lack of enforcement of statutory duties in relation to communications regulation. Initially, the status of 'imperfect' laws found in current telecommunications and broadcasting legislation within modern jurisprudence will be discussed. It will then be demonstrated that such laws impose important and far-reaching statutory duties on the Australian Communications and Media Authority ('ACMA') that have come to be regarded as entirely unenforceable by the courts. An explanation of the case law on point, in addition to a foray into the public choice theory of administration, will explain how regulation has been permitted to develop in this manner. Finally, whether the enforcement of such public duties would improve the regulatory system for telecommunications and broadcasting will be considered, as well as the possibility that other methods of regulation would be more appropriate in this field to correct the problems that lack of enforcement of public duties engenders. On the whole, this paper will attempt to discover the means by which to bring to an end the age we live in where 'Parliament…place[s] statutory duties on government departments and public authorities – for the benefit of the public – but has provided no remedy for the breach of them'.[1]

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II. DUTIES OF IMPERFECT OBLIGATION

ACMA has been conferred with the responsibility of regulating telecommunications and broadcasting services in accordance with the *Telecommunications Act 1997* (Cth)[2] and the *Broadcasting Services Act 1992* (Cth)[3] respectively. This includes the obligation to regulate in compliance with the objectives[4] and regulatory policies[5] of each of the Acts. These objectives include ensuring that standard telephone services, payphones and other carriage services of social importance are reasonably accessible to all people in Australia on an equitable basis and are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;[6] promoting the availability of a diverse range of radio and television services;[7] and promoting the provision of high quality and innovative programming by providers of broadcasting services.[8]

Such objectives, which ACMA must take into account in regulating the communications industries, cannot be regarded as discretionary powers conferred upon ACMA because the language used seems more obligatory than permissive.[9] However, these objectives do not appear to be entirely obligatory either, due to the vague manner in which they are expressed and the lack of any remedy that could be used to enforce them. They are not the standard statutory command we associate with the word 'duty'. In fact, these regulatory objectives seem to be a duty-power hybrid, imposing some duty upon ACMA to ensure that certain services are operated, but simultaneously granting complete discretion upon the authority to determine the appropriate scope and nature of those services.[10]

These hybrid obligations have come to be known as imperfect laws, or 'duties of imperfect obligation'.[11] They are 'laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions'.[12] They merely create duties, without any correlating rights, and as such are in reality 'exactly equivalent to no obligation at all'.[13] It is clear that the objectives and statements of policy found in communications legislation are examples of these duties of imperfect obligation. They are unconditional general directives; they go to the root of the authority's activities in the provision of services; and they contain significant elements of discretion – these are the hallmarks of an imperfect duty.[14]

III. ISSUES OF ENFORCEMENT OF SUCH DUTIES

The question of enforceability seems to have been approached by the courts in four different yet interrelated ways – as an issue of justiciability, breach of a duty, the limits of mandamus and the ambit of standing to sue.

(a) Justiciability

Courts have held that duties such as these are non-justiciable, considering them to be political duties, rather than legal duties, which cannot be enforced by a court of law.[15] In *Yarmirr v Australian Telecommunications Corporation*,[16] applicants representing two aboriginal communities sought mandamus to enforce what they believed to be Telecom's obligation to provide them with interim satellite telephone services to replace their current system, which was unreliable and lacked a duplex speech path. The provision they relied upon was almost identical to the objective in the current *Telecommunications Act 1997* (Cth)[17] that the performance standards of telephone services accessible to Australians meet the social, industrial and commercial needs of the Australian community. The Federal Court of Australia found that:

> When Parliament imposes on a functionary a broad duty involving the development and application of policy, to be performed nationally, the fulfilment of which must be subject to many constraints and may be achieved in many different ways…but cannot be achieved absolutely, if only because it involves an

> ideal, detailed supervision by the courts of the manner of performance of the duty is not likely to have been intended.[18]

As Parliament had imposed on Telecom a plethora of functions, and provided discretion as to the resources to be made available in the discharge of those functions, an order of mandamus to provide the communities with satellite technology would necessarily involve making policy decisions to allocate resources, and thus the issue was not justiciable by the court.

(b) Breach of duty

The question of whether a duty on the defendant body to provide certain services or facilities to the plaintiff has been breached is also often regarded by the courts as a matter of statutory construction. It is to the scope – the required or permitted methods of performance – of particular statutory duties that this enquiry is directed. Imperfect duties involve obligations of general application; the courts interpret such vagueness (in combination with the lack of enforcement measures) as representing Parliament's intention to confer on the public authority a wide discretion as to how these obligations are carried out.[19] Nevertheless,

> whatever latitude is given to the authority, the mere assertion of a discretion as to performance of the duty will not be allowed to outweigh the fact that a duty, not a power, is in question, and can never therefore excuse complete failure to perform it.[20]

Consequently, it seems that without an absolute refusal on the part of the public authority to comply with the obligation conferred by Parliament, the courts are reluctant to find any breach of duty.

In fact, even if all the authority does in performing their duty is to, without lifting a finger, admit that they have a duty and that they are attempting to perform it, the courts will find that there has been no neglect or refusal to do their duty sufficient to render them in breach of that duty.[21] Add to this judicial generosity the fact that, as these duties are couched in the language of ambiguity and indefiniteness, the public body will be able to point to some small activity, no matter how tangential or trivial, that falls within the ambit of that duty; this would negate any absolute refusal or neglect. Thus, even if the case was justiciable, it would be difficult for the court, relying on the law as it stands now, to find a public authority in breach of any duty of imperfect obligation.

(c) The limits of mandamus

The principal judicial remedy for enforcement of any public duty is the writ of mandamus,[22] which can be sought either through the common law or under statute.[23] The award of mandamus is entirely discretionary.[24] A court can find that there may have been a breach of duty on the part of a public authority, but in its discretion refuse relief to the plaintiff on a number of grounds.[25] In some cases, the court does not even deal with the question of whether there has been a breach, making a decision based on the inapplicability of mandamus to the particular circumstances of the case.

The reasons why mandamus may not be obtainable for breaches of public duties are threefold. The first is impossibility of performance. Remedy will not be denied merely because compliance with the court's order would be difficult;[26] however, it will be denied if it would be impossible to abide by the order for mandamus.[27] Impossibility has also been held to encompass *legal* impossibility, which would exist, for example, where the authority concerned has ceased to exist.[28] The notion of impossibility, however, does not merely comprise total physical impossibility – the threshold is significantly lower than that. For example, mandamus has also been refused where the performance of the duty would entail

overwhelming hardship or inconvenience. In *Glossop v Heston and Isleworth Local Board*,[29] the plaintiff brought an action against his local sanitary authority to compel them to drain and clean a stream passing near his residence that had become filled with sewage. Although the defendants were found to have a duty to drain the stream, the Court refused to grant mandamus. One reason stated for denying the plaintiff any remedy was that the defendants only controlled one district through which the stream passed; to remedy the defect, the defendants would have to 'make arrangements with the authorities of other districts so as to have some combined effort by which to get the sewage away to some considerable and safe distance'.[30] Taking into account 'the difficulty of their position and the magnitude of the operations they must perform', the court believed it was 'bound to look at [the defendants'] conduct with the greatest indulgence'.[31] The court determined that the imposition of any order would be too difficult and inconvenient for the authority to perform in this situation and denied the plaintiff any remedy. It thus seems that mandamus will not be granted for breach of a public duty where the respondent can establish impossibility of compliance by *any* means, or overwhelming inconvenience by the only means open.

It has been suggested that inconvenience can also encompass unreasonable expenditure in performing a duty. However, it is not conclusively accepted that lack of funds will be sufficient to excuse a public authority from being the subject of mandamus. In some cases, mandamus has not been granted where the performance of a public duty would necessitate funds unavailable to the public body;[32] in other cases, having insufficient money to do what is needed to remedy a breach of duty has been held not to be a relevant consideration for a court exercising their discretion to award mandamus.[33] The best approach for the courts to take on this issue would be to insist on performance and leave the funding consequences to be rectified by the executive or the legislature;[34] otherwise, the public authority would be encouraged 'to disregard prudent limitations upon their expenses and them permit them to rely upon their own improvidence as an excuse for non-fulfilment of their statutory duties'.[35]

However, it seems Australian courts are moving in the opposite direction. Judgments have been emerging[36] which view monetary constraints on public authorities as an exemplar of the impossibility of performance ground for refusal of mandamus,[37] which in fact they are not. It is an incorrect assumption to make that a deficiency in funds is precisely equivalent to impossibility of performance – often there are means by which more money can be sought; or the duties of the authority could be altered so as not to require those funds. As stated previously, 'impossibility' involves considerations very different to those currently being employed by courts in cases where an order for mandamus would require some expenditure to be made by the public body. Nevertheless, the state of the law as it stands at present is that courts will often use their discretion to deny remedy by way of mandamus where a public authority argues it does not have the funds required to comply with the order.

Finally, courts are reluctant to compel performance of imperfect public duties through an order for mandamus where the duty involves the provision of services and facilities on a continuing basis, because of their inability to supervise the execution of the order.[38] This basis for refusing mandamus is relied upon in cases where the plaintiff is arguing, not merely that in a particular instance the public authority failed to perform a duty, but rather that the authority is consistently failing to perform a certain obligation to provide services or facilities.[39] In such situations, compliance would involve detailed procedures to be put in place and operated well into the future; an order of mandamus is considered futile because the court does not have the means, nor the power, to continue to supervise such activities for an indefinite period.

(d) Standing to sue

The final (perhaps more rightly labelled the *preliminary*) impediment to the enforcement of imperfect public duties is the system in place which determines who is granted access to the

courts. The question of standing for mandamus is an independent and preliminary matter relating to the applicant's right to raise an argument, rather than to the merits of their argument. The applicant is said to need a 'legal specific right' to have standing to bring an action seeking mandamus.[40] However, what 'legal specific right' essentially means still remains ambiguous. Some cases have held that this threshold will be satisfied where the applicant can demonstrate a substantial interest, or an interest greater than that of an ordinary member of the public.[41] Other decisions have determined standing based on whether the duty sought to be enforced was in fact owed to the applicant.[42] A more comprehensive exploration of the confusion that is the law of standing in Australia is beyond the scope of this paper.[43] However, it should suffice to say that the requirements of standing only occasionally pose problems for plaintiffs seeking to enforce imperfect duties. It could be that the reason the courts rarely delve into the complexities of the laws of standing in such cases is that it is simpler for them to decide the case (against the plaintiff) on one of the three grounds previously mentioned.

When the courts have mentioned standing in relation to the enforcement of imperfect duties, they seem to struggle with the concept of a private individual being able to enforce a public duty where the duty is one owed to an indeterminate number of people. The problem with gaining standing to enforce these duties is that any public duty is one which is owed to the Crown and thus cannot give rise *directly* to a right in any one person to bring proceedings due to non-performance of it.[44] Where the court can glean from that duty a correlative right in a certain individual to have that duty performed, so that their 'connection with the impugned decision is stronger than that of the general public',[45] standing requirements will be satisfied.[46] If the first approach to standing espoused above[47] is followed by a court, some individuals may be 'sufficiently affected by the…non-performance of a duty cast upon a public officer or corporation to be recognised as having a sufficient interest to bring proceedings in his own name to secure its performance'.[48] However, if the test relied upon is the latter, where the duty must be owed to the applicant in particular, it is unlikely that any applicant seeking to enforce a duty owed to the public at large will be granted standing. An example of this latter approach can be discerned in *Glossop*, where Lord James stated that:

> If the neglect to perform a public duty for the whole district is to enable anybody and everybody to bring a distinct action or to file a distinct claim because he has not had the advantages he otherwise would have been entitled to have if the Act had been properly put into execution,…the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons…[49]

The success of an application for standing therefore depends on which approach the court relies on to determine standing; only if the approach, focusing on a sufficient interest on the part of the applicant, is relied on will a person affected by the non-performance of a public duty of general application be able to bring an action in mandamus to enforce that duty. However, as stated above, it seems that courts, to avoid the uncertainty of the law of standing, are inclined to grant the applicant standing in reliance on this test, but determine the case based on other considerations.

(e) The disparity in judicial reasoning

The differences in judicial reasoning evident in cases dealing with the enforcement of duties of imperfect obligation result from the judiciary's failure to recognise an identifiable law of public duties. This unwillingness on the part of the judiciary to do so is remarkable, considering the similarities between these categories of cases.[50] This has resulted in the confusing parallels of reasoning outlined above, which are based on similar factual matrixes yet diverge in both the law they apply and the precedents they rely upon.

The law needs to deal more purposively with the problems that this state of affairs engenders. Rather than addressing only one or two of the four paths of judicial reasoning outlined above, the courts need to begin to amalgamate the divergent case law. Those that regard the legal issue to be solely one of justiciability, the scope of mandamus or standing to sue seem to be avoiding the most fundamental issue that these cases raise and one that remains entirely unclear – whether imperfect duties have the capacity to be breached at all and, if so, whether they can ever be enforced. Other subsidiary issues that the courts need to address openly include whether these cases are justiciable in the first place; whether an individual can have standing to enforce a duty owed to an indeterminate group of people; and whether lack of funds is a sufficiently good reason to refuse to grant mandamus. The clarification of the law involving the enforcement of imperfect duties is absolutely essential if for no other reason than so, if a desirable outcome is unable to be gained through the legal system, the other branches of government can be certain that the responsibility lies with them to correct this unsatisfactory state of affairs.

IV. IMPERFECT DUTIES IN COMMUNICATIONS REGULATION

The existence of duties of imperfect obligation, and the improbability of their enforcement, is of particular concern in communications regulation because of the unique status of telecommunications and broadcasting in modern society. Australia, with a small population spread across a vast geographical area, relies heavily on communications technology to maintain a federal social, economic and cultural identity; these services are 'of a nature such that they are vitally essential to the continued function of the community governmentally, industrially, commercially, socially and otherwise'.[51] In addition, the importance of communications, information services and the media to overall economic activity has consistently grown – successful business in the modern age relies significantly on the availability of certain technologies, such as the internet, and access to up-to-date information from both around Australia and the world at large. The importance of broadcasting and the media also stems from the necessity of ensuring some level of freedom of information and speech to guarantee democracy can continue to thrive in Australia.[52] Thus, it is generally accepted that:

> postal and telephone services are among the most important amenities available to the people of the Commonwealth, and are essential to the conduct of trade and commerce as well as to the enjoyment of any real freedom in the dissemination of information and opinion.[53]

Yet to ensure that Australians gain these crucial benefits from their communications facilities and services, it is not sufficient that they be given the ability to communicate – they must have the capacity to communicate *effectively*. For example, is there any sense in providing rural communities with telephone facilities that only sporadically work, given that the utility of such facilities depends largely on the ability to communicate with others at *any* chosen time, such as in emergencies? Can information be free flowing in a society in which freedom of speech is possible but where freedom of the press is held in check[54] and established sources of information can no longer be trusted?[55] However, this fundamental ideal of effective communication is espoused solely through the objectives of both the *Telecommunications Act 1997* (Cth) and the *Broadcasting Services Act 1992* (Cth), and is therefore entirely unenforceable.[56] No matter how important the need for effective communication is in our society, the people of Australia have no enforceable right existing in legislation for it to be provided. There are no other legislative provisions in either Act which impose a duty on anyone to provide a certain standard of communications facility or service.[57] This is a fundamental failing of communications regulation in Australia.

The common law has in no way remedied this problem. It is surprising that in cases such as *Yarmirr*, which examine duties to provide communication facilities, the courts did not attempt to imply an overarching duty to provide a certain standard of service from the legislation. The

rationale for describing this omission as 'surprising' is founded upon an analogy that can be drawn between duties to provide telecommunications or broadcasting facilities and other duties to provide services or facilities of social import, such as that previously imposed on the Post-Master General (and the Postal Commission) to deliver mail and provide telephonic services.[58] In both *Bradley v Commonwealth*[59] and *John Fairfax Ltd v Australian Postal Commission*,[60] the Post-Master General and the Australian Postal Commission respectively withheld postal and telecommunications services from the plaintiffs. In determining whether the defendants had an implied obligation to provide certain telephonic and mail delivery services, the courts relied on the terms of each particular statute.[61] In interpreting the statute,

> when…it becomes necessary to resolve an ambiguity or obscurity, it is right to start from the assumption that if the Parliament intended to confer on the Postmaster-General an arbitrary power, subject to no conditions and to no review, to deprive any person of the liberty to use the postal and telephone services, with all the grave consequences that might ensue, it would use clear words for that purpose.[62]

The value of these services to society meant that clear language must be employed by Parliament to allow a service provider to deprive any person of those services. It was held that in both statutes there were no such provisions;[63] on the contrary, there existed numerous provisions which supported the inference that such duties were impliedly imposed by the Act and that they were enforceable by an individual by legal proceedings.[64]

This approach to the issue was decidedly different to that taken in *Yarmirr*. Interestingly, there was a prior judgment on point that was dismissed by these two cases as unauthoritative.[65] In *R v Arndel*, O'Connor J held that:

> taking the whole purview of the Act, it appears to be one of those Acts which, for the benefit of the public, empowers the Government by its officers to perform certain duties, but with no obligation on the part of the officers towards any member of the public. In these circumstances it is impossible to say that there is any duty owing by the Postmaster-General or by any officer of the Post Office to the applicants to receive transmit or deliver their correspondence which the Court could enforce by mandamus.[66]

This approach is remarkable for its similarity to that in *Yarmirr*. The question that needs to be asked is why, after a High Court case and a NSW Supreme Court case dismissing this reasoning, was it subsequently applied with such confidence in *Yarmirr*? This quandary is made more interesting by the noteworthy resemblance between the *Telecommunications Act 1997* (Cth) s 3(2)(a)[67] and the *Postal Services Act 1975* (Cth) s 7(1),[68] which provided that:

> The Commission shall perform its functions in such a manner as will best meet the social, industrial and commercial needs of the Australian people for postal services and shall, so far as it is, in its opinion, reasonably practicable to do so, make its postal services available throughout Australia for all people who reasonably require those services.

In *Fairfax v APC*, it was held that this section without question imposed on the Postal Commission a particular duty. Moffitt P also made it clear that these circumstances did not give rise to issues of enforceability because 'the function of operating the postal services, which led to the receipt for transmission to the respondents of postal matter had long been undertaken…Whatever duty the Act…places on the Commission to undertake a service, it *had* undertaken the function to operate the particular services'.[69] The court in this case distinctly said that, in a situation where a public authority has already undertaken a function conferred upon it by statute, enforceability of the broader function is *not* the issue; the issue is whether there is something else in the statute which either expressly or impliedly authorises the authority to deny the service or facility. This would suggest that the approach taken by the Federal Court in *Yarmirr* is erroneous – they should not have focused solely on the *Telecommunications Corporation Act 1989* (Cth) s 27(4) to define Telecom's potential

obligation, but rather interpreted the statute to discern any duty to provide a certain standard of service, in light of the great significance of this technology to people throughout Australia.

The contradictory case law – especially involving these industries of extreme social and economic import – on this issue suggests that something is amiss in the law of public duties. Not only are fundamental duties of imperfect obligation to ensure a certain standards of facilities and services unenforceable in the courts, but it seems the law is abandoning basic principles of statutory interpretation and refusing to even consider the possibility that the statute itself could imply such obligations. It is not suggested that a duty necessarily would have been implied in *Yarmirr*; merely that some attempt should have been made by the Court to endeavour to do so.

V. THE DICHOTOMY BETWEEN THE IDEALS AND ACTUAL OPERATION OF LEGISLATION

The explanation for the dichotomy in communications legislation between the ideals of a statute, as espoused in the unenforceable statements of objective, and its actual operation lies in an economic analysis of public law known as *public choice theory*. The basic assumption that this theory relies upon is that 'man' is rational and egocentric; it follows from this postulation that

> legislators, voters, leaders and members of political parties and bureaucrats act primarily out of self-interest (as rational maximisers of utility) and that legislative and bureaucratic outcomes can be understood and explained in terms of "the rational behaviour of those engaged in legislative and bureaucratic choice under prevailing political rules".[70]

The process of designing regulation is seen by public choice theorists as one in which politicians, to maximise support to guarantee their re-election, amalgamate the various interests of rival pressure groups in an 'attempt to customise law to maximise the total support they receive by alienating as few groups as possible'.[71] Regulation is not designed to meet the needs of the general public; rather, it is intended to benefit as many powerful interest groups as possible (through legislative compromise) so that more votes and other benefits can be obtained.[72] There are legitimate criticisms of public choice theory[73] that need not be delved into for the purposes of our discussion as they are not relevant or applicable to the particular state of affairs we are dealing with here.

One explanation for 'the divergence between the ostensible public interest goals and achievement (or lack of it)' in communications legislation could admittedly be that 'insufficient expertise and forethought was brought to bear on the methods of achieving the public interest goals'.[74] However, given that legislation with similar goals have been in force since federation, and from that time on the courts have declined on a continuing basis to enforce any public interest goals in the form of legislative objectives, this rationale for the current state of communications law seems inadequate. The 'legislative compromise' system of designing regulation advanced by public choice theorists, however, does seem to explain how telecommunications and broadcasting laws have withered away to become an empty shell flaunting non-existent ideals.

Public choice theorists envisage regulatory design as a process in which 'the initial motivation for legislation may have been dominated by ideological considerations, but narrow economic concerns motivate the special interest influence that does so much to determine its effect'.[75] In the process of legislative compromise, some things must be sacrificed. In designing our communications laws, our legislators relinquished enforceable standards of effective communication, in all likelihood due to the repeated assertions from private businesses that for business and competition to flourish, their metaphorical hands could not be tied by regulatory supervision of what is being supplied, and to whom. For all the possible inadequacies of public choice theory, it presents a very convincing argument

regarding the reasons for the degradation of our telecommunications and broadcasting legislation to regulatory regimes with lofty statements of ideals that are misleading, ineffectual and meaningless.

VI. WILL ENFORCING PUBLIC DUTIES IMPROVE THE REGULATORY SYSTEM FOR COMMUNICATIONS?

The imperfect duties enshrined in our communications legislation as 'objectives' of the Acts are the sole safeguards of fundamental societal needs such as that of effective communication. What is clear from the preceding discussion is that such duties ought to be enforceable. The remaining matter to be considered is the ideal approach by which this should be achieved.

(a) Enforcing imperfect duties already present in legislation

The first available option is that the duties of imperfect obligation already contained in communications legislation should be regarded as enforceable by the courts. It is possible that an amalgamation of the current case law[76] may have this effect; however, this cannot be guaranteed until an accretion of experience through case law engenders adequate guidance as to the proper nature and effect of these duties.

Without new case law on point, the enforcement of imperfect duties is problematic and should not be endorsed. If a court was to enforce any one of the legislative objectives in an order for mandamus, due to the generality of language in which those statements are couched, it would have to specify exactly what a public authority must do in order to satisfy the broad objectives, an activity which is extraordinarily complex. For example, the court would need to determine what effective communication entails, the reasonable requisite standards of telecommunication technology and access to broadcasting and the media, what resources are available and how they are to be apportioned, whilst taking into account considerations of geography, demography, budgetary constraints, and economic, social or cultural needs. However, this is the traditional role of the legislature – it is their responsibility to determine what should be made available to the general public, how it can be done and allocate the resources in furtherance of those aims. A fundamental doctrine of judicial review, existing since such review was established, has been that an issue is non-justiciable where it would involve the adjudication of political questions; that is, where it is the prerogative of another branch of government – legislative or executive – to make the determination.[77]

For a court to enforce the imperfect duties in Australian communications legislation, this established doctrine could not be adhered to. The question is whether this doctrine should be eliminated as an obstacle, or its significance reduced,[78] a development which has already taken place to some extent in the United States.

An affirmative answer to this question would involve the acceptance of judicial policy making. This can be contrasted with interpretation, in which a judge exercises their power on the basis of a pre-existing legal source that they deem authoritative:

> When judges engage in interpretation, they invoke the applicable legal text to determine the content of the decision, whether by examining the words of that text, the structure of the text, the intent of its drafters, or the inherent purpose that informs it. But when a judge engages in policy making, they invoke the text to establish their control over the subject matter, and then rely on nonauthoritative sources, and their own judgment, to generate a decision that is predominantly guided by the perceived desirability of its results.[79]

In Australia, it is evident that judges confine themselves to an interpretative function.[80] However, in the United States judicial policy making has become a common occurrence. For

example, by 1995, prisons in a total of 41 US States had been placed under some kind of comprehensive court order to restructure the institution, as had the entire correctional systems of at least 10 states. Many of these orders 'specified such details of institutional administration as the square footage of cells, the nutritional content of meals, the number of times each prisoner could shower, and the wattage of light bulbs in prisoners' cells'.[81] Compare this to the approach taken by the NSW Court of Appeal in *Smith v Commissioner of Corrective Services*,[82] in which the court refused to make an order in the nature of mandamus to alter prison facilities so that prisoners, when in confidential consultations with their lawyers, could witness and monitor the disabling of listening devices installed in consultation rooms.

So which approach should be preferred? Based on the essential principles of democracy, the Australian method is superior. Although the courts in the United States have produced much beneficial social change, the have undermined basic democratic tenets in doing so. Judicial policy making engenders a serious legitimacy problem in that they violate our constitutional separation of powers principle; it involves judges making the decisions that our Parliamentary representatives have been elected to make. The foundation of any democracy is that decisions such as these are made by the citizens of the nation, either directly or through elected representatives. The fact that the legislature is not doing their job in representing the people of Australia is an unsatisfactory argument to counter this principle; 'we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures'.[83] The legitimacy of judicial policy making is also undermined by the principle that judicial action should be guided and restricted by pre-existing law. If the court creates a substantive set of legal rules, as would be required if imperfect obligations were enforced, they would have to depart from this principle; although the court could 'base' the rules on duties implied from existing statutory provisions, the rules would just have be too detailed, and their development too sudden, for this explanation to be credible.[84]

Arguments have been proposed which contend that these long-standing principles of separation of powers and legal precedence are 'products of the eighteenth century and are now outdated or in need of significant reformulation'.[85] However, considering the separation of powers doctrine is enshrined in the *Australian Constitution* and that the importance of precedence in our legal system increases as the power of modern government expands, these propositions can be dismissed as inapplicable to the Australian judicial system. In general, it should be accepted that enforcing imperfect duties contained in communications legislation in their current form would be antithetical to fundamental notions of democracy and legal precedence and thus should not be supported as the proper approach to rectifying the problems inherent in communications regulation.

(b) Implying a duty to provide effective communication

As mentioned previously, a duty to deliver mail and provide telecommunications has been implied into statutes similar to the *Telecommunications Act 1997* (Cth).[86] It is possible that this approach could be imitated for duties to provide, for example, effective communication. In the mail-related cases, certain qualified powers had been conferred on the Post-Master General and the Postal Commission which would have been unnecessary to confer had the authorities had an unfettered power to determine when mail should not be delivered. In addition, the *Postal Services Act 1975* (Cth) s 7 included a provision that 'Nothing in this section shall be taken…to impose on the Commission a duty that is enforceable by proceedings in a Court'.[87] This subsection was held to be proof that s 7 did impose a particular duty on the Commission (although that duty could not be enforced).[88] Given that in the current *Telecommunications Act 1997* (Cth), the corresponding section to *Postal Services Act 1975* (Cth) s 7 does not include an equivalent to s 7(3)(b), and that there are no qualified powers granted to ACMA under the Act to ensure any communications facilities or

services are provided at a certain standard, it is unlikely that any duty to ensure the provision of effective communication services could be implied by the courts based on the principles espoused in these mail delivery cases.

In addition, we should have some reservations when applying these cases to our present system. This case law on the obligation to deliver mail does have limited, however significant, utility to our present discussion. First, these postal cases dealt with situations where services had been absolutely denied, whereas in cases like *Yarmirr*, only a certain *standard* of service had been denied; basic facilities continued to be provided. Secondly, every case previously discussed involved duties imposed on the providers of services; now, we find ourselves in the situation where duties are instead imposed on a *regulator* – this is one step removed from duties previously imposed on service providers. Regulators are being given these duties to ensure the provision of certain standards for services and facilities because the expansion of privatisation has rendered any former public duty unenforceable against the now private bodies providing the services. It is possible to assert that, if Parliament has elected to continue requiring the same objectives to be followed, despite changes occurring to the public authority obliged to follow those objectives, no real opposition to enforcing these duties against regulators, solely because of their position as a regulator, can be supported. However, such a shift in the type of public body subject to the imperfect duty should be sufficient to render these cases distinguishable from any situation that could arise under our present legislative regime.

It should also be acknowledged that looking to the courts to repair this omission in communications legislation is a wholly misguided approach. Regulatory systems should not be set up with courts in mind to supervise – the justice system should act as a fallback of last resort in the event that the regulatory design has unforeseen flaws. In determining the manner in which some right to effective communication be enshrined in statute, it is in fact the content of the legislation which must be altered in order to rectify the problems that imperfect duties raise in the context of communications regulation.

(c) Legislative intervention

The only other alternative to ensure the provision of effective communication is amending the regulatory regime in some way to impose a corresponding duty on service providers. There is a single argument against imposing any such restraint on telecommunications and broadcasting companies – that de-regulation would be more economically beneficial and efficient in ensuring a certain standard of effective communication is met. This line of reasoning is by no means authoritative, as it is equally probable that deregulation:

> undermines the service-based entitlements that went along with traditional regulation, entitlements which may have been inefficient in a strict economic reckoning, but which we have come to consider the public interest… deregulation may alleviate protectionism, regulatory ineptitude, and bureaucratic formalism. But, in time, it may also decrease established standards of operation and jeopardise the overall stability of infrastructure industries.[89]

In fact, empirically there is no hard and fast rule that countries with weak business regulation flourish in the world economy more than those with strong regulation.[90] The problem is that many theorists associate regulation of *competition* with regulation of *standards*, when in fact there should be a clear distinction between the two regulatory forms.[91] Regulation of competition 'destroys economic efficiency by placing restrictions on entry, restricting prices, restricting seat capacity in an industry like airlines, and the like'.[92] Regulation of standards, in contrast, can cultivate greater economic efficiency:

> Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage. They pressure firms to improve quality, upgrade technology, and provide features in areas of important customer (and social) concern . . .

> Particularly beneficial are stringent standards that anticipate standards that will spread internationally. These give a nation's firms a head start in developing products and services that will be valued elsewhere . . . Regulation undermines competitive advantage, however, if a nation's regulations lag behind those of other nations, or are anachronistic. Such regulations will retard innovation or channel innovation of domestic firms in the wrong direction.[93]

Thus, any view based on the theory that 'reducing all regulatory costs is a good thing' is unsatisfactory and inadequate.[94]

Some kind of regulation of this field would therefore be beneficial. However, regulating a field is not as simple as amending the head statute to include a new duty – there are other methods of regulation, such as self-regulation through industry codes. Self-regulation

> is frequently an attempt to deceive the public into believing in the responsibility of a irresponsible industry. Sometimes it is a strategy to give the government an excuse for not doing its job. Equally, however, sometimes it does work better than government regulation because the industry is more committed to it and because it is more flexible than the law.[95]

In our pursuit to ensure some level of protection for effective communication, neither legislative amendment nor self-regulation is sufficient on its own to secure such an ideal. To rely solely on one method of regulation would be 'the formula for a disastrous regulatory order'.[96] A two-pronged methodology thus appears to be essential. Some kind of legislative amendment by Parliament is probably needed to set the regulatory process in motion. However, given the track record of legislative decision-making in this area,[97] the regulatory detail should be supplied by the industries themselves through industry codes and the like, in order to arrive at enforceable standards which take into account both consumers and the providers of communication services. The legislation should therefore outline a general duty to provide effective communication but reserve the enforcement measures and details of the obligation to be determined by industry standards and codes of practice.

VII. CONCLUSION

Parliament has been entirely dishonest in its description of the scope of communications legislation in Australia. Overindulgence in the use of duties of imperfect obligation render much of the intrinsic social value contained in the legislation unenforceable and hence useless. It is particularly worrying that these unenforceable duties represent the sole manifestation of an obligation to ensure the provision of effective means of communication. This state of affairs cannot be allowed to continue. Not only are imperfect duties deceptive in their intended operation, but they prevent vital reforms from being identified by functioning as a façade, behind which regulatory design failures can be concealed. The courts are ill-equipped – and incapable – of rectifying these regulatory flaws. Like the judiciary, on this topic we must defer decision to the legislature in the hope that finally they will represent the public interest and endow ACMA with measures to enforce these duties of imperfect obligation, which are imperfect in their operation but not in their conception.

Endnotes

1 *Attorney General, ex rel. McWhirter v Independent Broadcasting Authority* [1973] QB 629, 646 (Lord Denning MR).
2 *Australian Communications and Media Authority Act 2005* (Cth) s 8(1)(a).
3 *Australian Communications and Media Authority Act 2005* (Cth) s 10(1)(a).
4 *Telecommunications Act 1997* (Cth) s 3; *Broadcasting Services Act 1992* (Cth) s 3.
5 *Telecommunications Act 1997* (Cth) s 4; *Broadcasting Services Act 1992* (Cth) s 4.
6 *Telecommunications Act 1997* (Cth) s 3(2)(a)(i) and (iii).
7 *Broadcasting Services Act 1992* (Cth) s 3(1)(a).
8 *Broadcasting Services Act 1992* (Cth) s 3(1)(f).

9 William Wade and Christopher Forsyth, *Administrative Law* (9th ed, 2004) 233.
10 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 131-2.
11 David Campbell and Philip Thomas (eds), *The Province of Jurisprudence Determined by John Austin* (1988) 20-22.
12 Ibid 21.
13 Ibid.
14 AJ Harding, *Public Duties and Public Law* (1989) 26-7.
15 See, eg, *Attorney General v Tomline* (1880) 14 Ch D 58, 66; *China Navigation Co Ltd v Attorney General* (1931) 40 L1 LR 110, 112-3; *Mutasa v Attorney General* [1979] 3 All ER 257, 261-2; *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739, 749.
16 (1990) 96 ALR 739 (*'Yarmirr'*).
17 *Telecommunications Act 1997* (Cth) ss 3, 8CM; *Telecommunications Corporation Act 1989* (Cth) s 27(4).
18 *Yarmirr* (1990) 96 ALR 739, 749.
19 See, eg, *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 144, 151 (Mahoney JA).
20 Harding, above n 14, 52.
21 *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102, 119 (*'Glossop'*).
22 No equitable mandatory injunction will be granted to enforce compliance with a statutory enactment prescribing a positive duty; the proper remedy is the common law remedy of mandamus: *Glossop* (1879) 12 Ch D 102, 115 (James LJ), 117 (Brett LJ).
23 *Supreme Court Act 1970* (NSW) s 65; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16 (under which orders in the nature of mandamus can be sought).
24 This is a consequence of the position of prerogative writs as writs of grace, not of right: Harding, above n 14, 84.
25 There must be 'good reason' shown for a discretionary refusal to occur: *R v Kelly; Ex parte Victorian Chamber of Manufacturers* (1953) 88 CLR 285, 309 (Fullager J).
26 *Bradbury v Enfield London Borough Council* [1967] 1 WLR 1311, 1324-5.
27 This doctrine is sometimes expressed as *lex non cogit ad impossibilia*: see, eg, *Re Bristol & North Somerset Railway Co* (1877) 3 QBD 10.
28 See, eg, *Tebbutt v Egg Marketing Board (NSW)* [1976] 2 NSWLR 179.
29 (1879) 12 Ch D 102.
30 *Glossop* (1879) 12 Ch D 102, 119.
31 Ibid.
32 *Re Bristol & North Somerset Railway Co* (1877) 3 QBD 10; *R (ex Rel Connelly) v Publicover* [1940] 4 DLR 43.
33 *R v Luton Roads Trustees* (1841) 1 QB 860; *R v Poplar Borough Council; Ex parte London County Council (No 1)* [1922] 1 KB 72, 74, 84.
34 Harding, above n 14, 117-8.
35 *McLeod v Salmon Arm School Trustees* (1952) 4 WWR (NS) 385, 386 (Sloan CJ) as cited in Harding, above n 14, 118.
36 See, eg, *Hicks v Aboriginal Legal Service of Western Australia* (2001) 185 ALR 689, 697 (where the court believed the authority did not have the means to make the grant of money sought under the order); *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR 317 (where a remedy was refused because it would entail making alterations to parts of prison facilities).
37 Sometimes these cases refer to 'futility' rather than 'impossibility'.
38 Enid Campbell, 'Enforcement of Public Duties which are Impossible to Perform' (2003) 10 *Australian Journal of Administrative Law* 201, 207.
39 'Mandamus is at its least effective where the gist of the complaint is that there has been a systemic failure to perform a public duty, rather than an isolated failure': Aronson, Dyer and Groves, above n 21, 733.
40 Mark Aronson, Bruce Dyer and Andrew Groves, *Judicial Review of Administrative Action* (2004, 3rd ed) 677. See, eg, *R v Whiteway; Ex parte Stephenson* [1961] VR 168; *Ex parte Northern Rivers Rutile Pty Ltd; Re Claye* (1968) 72 SR (NSW) 165, 173. The *Supreme Court Act 1970* s 65 was read as liberalising the mandamus standing test by dispensing with the requirement that an applicant have a 'legal specific right'; however, the common law has reached the same position: Aronson, Dyer and Groves at 751.
41 Ibid 677-8.
42 Ibid 678.
43 For more thorough discussions on this topic, see, eg, Harding, above n 14, 194; P F Cane, 'Standing, Legality and the Limits of Public Law' [1981] *Public Law* 322; P F Cane, 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303; G D S Taylor, 'Individual Standing and the Public Interest: Australian Developments' (1983) 2 *Civil Justice Quarterly* 353.
44 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 141.
45 Aronson, Dyer and Groves, above n 40, 646.
46 Ibid.
47 Above n 41.
48 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 141. See also *Bradley v the Commonwealth* (1973) 1 ALR 241.
49 *Glossop* (1879) 12 Ch D 102, 115.

50 The majority of proceedings in which duties of imperfect obligation are sought to be enforced involve the faulty provision of some service or facility, each of which is vital to the social and economic wellbeing of citizens; for example, sanitation and sewage disposal, postal services and telecommunications.
51 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 135.
52 See generally J Lichtenberg, *Democracy and the Mass Media: A Collection of Essays* (1990).
53 *Bradley v the Commonwealth* (1973) 1 ALR 241, 247.
54 See especially Jack R Herman, 'Freedom of the Press: Under Threat?' (2005) 28 *UNSW Law Journal* 909.
55 Quentin Dempster, 'Free Speech, The Commercialisation of News Value Judgments and the Future of the ABC' (2005) 28 *UNSW Law Journal* 924.
56 See Part III above.
57 The stipulations closest to comprising a duty to provide effective communication are those contained in the *Commercial Television Industry Code of Practice* s 4, which attempt to ensure impartial, fair and accurate content of news and current affairs programs: (2004) Free TV Australia <http://www.freetvaust.co.au/SiteMedia/w3svc087/Uploads/Documents/73931737-4d3f-4002-bf0c-aaafc9a5f900.pdf> at 6 October 2006.
58 But note the limited utility of these cases, discussed below at Part VI(b).
59 (1973) 1 ALR 241 (*'Bradley'*).
60 [1977] 2 NSWLR 124 (*'Fairfax v APC'*).
61 In *Bradley*, the statute concerned was the *Post and Telegraph Act 1901* (Com); in *Fairfax v APC*, it was the *Postal Services Act 1975* (Cth).
62 *Bradley* (1973) 1 ALR 241, 247.
63 *Bradley* (1973) 1 ALR 241, 248-9; *Fairfax v APC* [1977] 2 NSWLR 124, 132.
64 *Bradley* (1973) 1 ALR 241, 249-251.
65 It was said that the majority did not accept the reasoning of O'Connor J and thus that this statement cannot be authoritative: *Bradley* (1973) 1 ALR 241, 254.
66 (1906) 3 CLR 557, 581.
67 Formerly the *Telecommunications Corporation Act 1989* (Cth) s 27(4): see above n 17.
68 This section was discussed in *Fairfax v APC* [1977] 2 NSWLR 124, 132.
69 *Fairfax v APC* [1977] 2 NSWLR 124, 132 (emphasis added).
70 Neil Gunningham, 'Public Choice: The Economic Analysis of Public Law' (1992) 21 *Federal Law Review* 117, 121, quoting N Mercuro and T P Ryan, *Law, Economics and Public Policy* (1984) 143.
71 Jonathan Macey, 'Public Choice: The Theory of the Firm and the Theory of Market Exchange' (1988) 74 *Cornell Law Review* 52.
72 Gunningham, above n 70, 124.
73 See, eg, Gunningham, above n 70, 130-4; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994) 73-5.
74 Ogus, ibid 56.
75 Gunningham, above n 70, 127.
76 See above III(e).
77 See, eg, *Marbury v Madison* 5 U.S. (1 Cranch) 137, 164-66 (1803).
78 Ralph J Bean, 'The Supreme Court and the Political Question: Affirmation or Abdication?' (1969) 71(2) *West Virginia Law Review* 97, 99.
79 Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State* (1998) 5.
80 It should be noted that the categories of 'interpretation' and 'policy making' do overlap; for example, where judges rely on social policy to interpret texts. However, 'the mere fact that there is no bright line between them does not defeat the assertion that policy making is a distinct judicial function': ibid 8.
81 Ibid 13.
82 [1978] 1 NSWLR 317.
83 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 67.
84 Feeley and Rubin, above n 79, 18.
85 Ibid 20.
86 See above Part IV.
87 *Postal Services Act 1975* (Cth) s 7(3)(b).
88 *Fairfax v APC* [1977] 2 NSWLR 124, 132.
89 R B Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (1989) 284.
90 Michael Porter, *The Competitive Advantage of Nations* (1990).
91 John Braithwaite, 'Responsive Regulation for Australia' in Peter Grabosky and John Braithwaite (eds), *Business Regulation and Australia's Future* (1993) Australian Institute of Criminology, Canberra, 81, 86.
92 Ibid.
93 Porter, above n 90, 647-9.
94 Braithwaite, above n 91, 85. It has even been suggested that the 'government's retreat from regulation constitutes a retreat from democratic process': Horwitz, above n 89.
95 Braithwaite, above n 91, 93.
96 Ibid 94.
97 See the discussion on public choice theory: above Part V.