programming in Australian Content Standard TPS14 may be in breach of Australia's Services Protocol obligations. I would hope that the ABA can quickly reconsider the Australian Content Standard."

The ABA argued in the Federal and High Courts that this intention had not been adequately translated to law. The Full Federal Court agreed but the High Court did not.

CONCLUSION

It is particularly appropriate that the regulation of broadcasting has regard to Australia's international obligations because broadcasting is a globalized industry. For example, for the ABA to have regard to the number of international agreements that address the use of satellites for international communication is entirely appropriate, but to be instructed to carry out a diverse range of functions in a manner consistent with 900 odd treaties is not.

A considerable period of time and effort has been invested over the past five years in determining a matter that could have been clearly spelt out in legislation. The Protocol to the CER could have been mentioned or a regulation power put in place which allowed treaties to be specified which the ABA had to either observe or have regard to. Then again, if it had been, the provision may not have made it through the Parliament because the real effect of the provision may have been clear. But this is entirely the point. Parliament should be able to clearly know the implications of laws that it considers passing. The implications of the effect of s.160 (d) of the BSA were not capable of being known in advance. Section 160 (d) of the BSA is a swingeing provision the implications of which are yet to be fully explored. It will continue to be a fertile ground for lawyers.

The High Court decision provides an opportunity for Government to amend s.160 (d) to bring it into line with the way Australia's international obligations are dealt with in other Commonwealth legislation. In future, it is hoped that our draftsmen and women, when incorporating Australia's international obligations into domestic legislation, do so in a more measured and specific way than was done by inserting s.160 (d) into the BSA.

1 Angela Bowne, Barrister, 'Treaties can transform local law', *AFR*, 1 May 1998, pp.30 and 31 and Professor David Flint, Chairman, Australian Broadcasting Authority, *AFR*, 1 May 1998, p.31 both make this point.

2 S.580 *Telecommunications Act 1997* requires ACA to have regard only to those agreements notified by the Minister. S.299 of the *Radiocommunications Act 1992* requires the ACA to have regard only to those agreements that relate to radio emission. S.70(2) of the *Nuclear Non Proliferation (Safeguards) Act 1987* requires a person exercising powers under the Act to have regard to specified agreements and indicates that decisions made inconsistent with Australia's obligations have no effect.

3 The *Civil Aviation Authority Act* is an Act that requires the CAA to act in a manner consistent with agreements but restricts these to any agreement relating to *the safety of air navigation.*

4 S.69 of the National Parks and Wildlife Conservation Act 1975 gives power to make regulations giving effect to a specified agreement.

5 High Court judgment, para. 98

6 Ibid. para. 96

7 S.123(2)(d) of the BSA - a matter for a code of practice to address, or a standard if a code is not operating to provide appropriate community safeguards.

8 S.158 (h) and (j), which set out the ABA functions in these areas.

John Corker is a legal officer at the Australian Broadcasting Authority.

First Impressions - Lessons From Chakravarti

How do ordinary people 'read' the media? How is meaning construed by the reasonable reader or viewer? Anne Flahvin considers some recent judicial pronouncements which offer an insight into how judges think this process works, and detects an increasing willingness to hold the media responsible for harm to reputation caused by the audience jumping to hasty conclusions.

In its attempt to tread a tightrope between protection of reputation and freedom of the press, the law of defamation has tended to imagine the ordinary person as a fair minded individual, unlikely to jump to conclusions without reading the whole of an article, and not inclined to conclude that the laying of criminal charges necessarily suggests a likelihood of guilt. Those more jaundiced observers of human nature might have concluded that this was less a reflection of reality than a recognition that a free and robust press must be given some latitude if it is not to be chilled unduly.

That recognition was reflected in two principles of defamation law which, in practice if not in theory, would seem to be under attack.

The first, which came under the spotlight in the High Court earlier this year in *Chakravarti v Advertiser Newspapers Ltd* (unreported, High Court 20 May 1998) is that the ordinary reader is taken to read material as a whole - not just a headline, for example - before forming a view about its meaning. The second principle is that a media report that charges have been laid does not, without more, give rise to an imputation of guilt. Ordinary readers or viewers are taken to eschew the 'where there is smoke there is fire' view of the world in favour of the presumption of innocence. To hold otherwise would, of course, severely restrict media reporting of the criminal justice system.

MATERIAL TAKEN AS A WHOLE

The principle, confirmed by the High Court in *Mirror Newspapers v World Hosts Pty Ltd* (1979) 141 CLR 632, that in assessing whether material carries a defamatory meaning it is taken to have been read, heard or listened to as a whole, is an illustration of the fiction on which defamation law is based. As with many other areas of the law, the law of defamation is to a large extent normative. Whether or not 'ordinary' people are likely to jump to conclusions on the barest glance at a headline, the law has operated on the assumption that they take a little more care than this. So while account is able to be taken of the likely impact of a sensational headline in forming a view

about what meaning is being conveyed, the better view has been that the reader must be taken to have read to the bitter end. The question then becomes whether taken as a whole any sting contained in the headline or first few paragraphs is sufficiently neutralised by the context when viewed as a whole.

This approach to assessing meaning is thought by some - Kirby J amongst them - to defy the reality of consumption of the media in the 1990's in which many readers, "including not a few judges", will fail to take in more than the headlines and photographs and in which channel surfing has been raised to an art form.

In *Chakravarti*, the plaintiff sued on the headline, a heading on the second page, a graphic and parts of an article. Gaudron and Gummow JJ, with whom Brennan CJ and McHugh agreed, held that the Advertiser was correct in its contention that even if, standing alone, the graphic conveyed a meaning defamatory of the plaintiff, the article must be read as a whole. Kirby J, on the other hand, declared that it should not be, and in fact was not, a principle of the common law - in Australia at least - that a publication must be read as a whole and that a headline or photograph if defamatory in isolation but not in context was incapable of grounding an action in defamation. The classic English statement of the principle that material must be read as a whole, *Chalmers v Payne*, was out of step with the modern age. *"It ignores the realities of the way in which ordinary people receive, and are intended to receive, communications of this kind"* according to Kirby J.

Kirby was also critical of the House of Lords decision in *Charleston v News Group Newspapers* [1995] 2 AC 65 in which the court declined to accept that it was legitimate to identify a group of readers who read only part of a publication and allow a plaintiff to sue for meanings conveyed in this way. In *Charleston*, the publication complained of was a photograph of a man and woman nearly naked with a headline: *Porn Shock for Neighbours Stars*. The photograph was a digitally altered composition of the heads of the plaintiffs - actors in the soapie Neighbours - attached to the naked bodies of somebody else. In deciding whether the material was capable of being defamatory the court held that it was impermissible to take into account the meaning which would have been apparent to a reader who had read the headline and seen the photograph but read no further.

In argument before the Court, McHugh J joined Kirby J in the charge against the defendant on this point - admitting *"I must be the most unreasonable reader in the community because 90 per cent of articles I read, I just look at the headlines and maybe the first paragraph and if it does not interest me I do not read any more"* - although he did not address the question in his joint judgment with Chief Justice Brennan. Having suggested during argument that if most people in the community read newspapers in the same superficial way he had admitted to himself, then *"newspapers have got to wear [the consequences]"* in the form of liability for headlines and graphics detached from their context. McHugh J, except for two reservations not relevant to this question, agreed with the judgment of Gaudron and Gummow JJ.

WHAT MEANING ARISES WHEN CHARGES ARE REPORTED?

The principle, established by the High Court in *Mirror Newspapers v Harrison* (1982) 149 CLR 293, that a report that charges have been laid does not, without more, give rise to an imputation of guilt is another illustration of the juggling act undertaken by the courts in respect of reputation and freedom of the press. While it would seem quite clear that many 'ordinary' readers and viewers *would* in fact conclude from a report that someone had been charged that they are probably guilty, it is equally clear that if effect were given to this by the courts the public interest in being informed about the workings of the criminal justice system would be severely undermined. The compromise reached by the court in *Harrison* was to hold that a report which does no more than state that an arrest has been made and charges laid is incapable of bearing an imputation of guilt, but that such an imputation could arise if the report contained material which suggested the charges were well founded.

The difficulty for the media is that while this *principle* remains good law, in applying it the NSW Court of Appeal - like Kirby in *Chakravarti* - would seem intent on extracting a price from the media for reporting which exceeds a sedate statement of the bare facts. The material complained of in *Harrison* - a report of charges laid against suspects in the bashing of Labor MP Peter Baldwin - included a picture of Mr Baldwin clearly worse-for-wear, described his suffering and outlined the detective work which had led to the arrests. Notwithstanding that the report was more than simply a 'bare statement of the charge', it was held to be incapable of giving rise to an imputation of guilt.

In *Rigby v John Fairfax Group Pty Ltd* (unreported, Supreme Court of NSW Court of Appeal 1996) the court considered whether a report in the *Sydney Morning Herald* that two school teachers had - after a lengthy police investigation - been charged with sexually assaulting students and suspended pending the hearing of the case against them, was capable of imputing guilt. The *principle* in Harrison was approved by the court, but journalists could be forgiven for thinking that in its *application* it has been rendered quite useless.

In *Rigby*, Kirby J indicated impatience with *"the complaint that this approach would unduly impede the reportage of matters of public interest, specifically in court proceedings of criminal cases." In many "civilised countries reports of arrest may be given but, until the accused is convicted, he or she is described only by initials."* Such societies, according to Kirby J, put a greater store than we do upon defending the presumption of innocence and confining trials to court-rooms. Kirby agreed with Priestly J that 'embellishments' in the *Herald* article before the court in *Rigby* - including the report that the allegations stretched back to 1983, that there had been a lengthy investigation by police and that the plaintiff had been transferred from a boys school to a girls school - were enough to take the report outside the bounds of the *Harrison* principle.

LESSONS FOR THE MEDIA?

In both *Rigby* and *Chakravarti*, Kirby J vents his distaste for the sensational excesses of the mass media. In *Rigby*, he suggests that a price should be extracted for reporting of charges which exceeds the most sedate statement of the bare facts. In *Chakravarti* he suggests that ordinary readers are doing anything but reading - looking at the pictures more like it. Should alarm bells be ringing in newsrooms?

Certainly they should be - and they are - ringing in relation to the Court of Appeal's decision in *Rigby* which has injected considerable uncertainty into the decision as to what is safe to publish in relation to the laying of charges. There might be those who think that this is no bad thing. But uncertainty about the limits of the law relating to prohibited

publications carries a cost in terms of freedom of the press.

As for the views expressed in *Chakravarti* about the way meaning is extracted from media reports, Kirby J's views should be - with respect - of great concern to the media. While his was only one voice among five, given the strong terms in which he doubted the correctness of what was thought to be a firmly entrenched principle, the failure of his brethren to elaborate on this point is to be regretted. It is difficult enough for the media to employ irony or satire and remain within the bounds of the law of defamation without being held responsible for defamatory meanings arising in the mind of a reader glancing over the shoulder of another at a headline or simply looking at the pictures.

Anne Flahvin is an Associate at Baker & McKenzie and teaches law part time.

E-commerce and Mankind's Last & Greatest Hope on Earth

Ira Magaziner, President Clinton's Special Advisor for policy development for the Internet outlines the issues facing e-commerce, the development of the Internet and the principles governments' should adopt to deal with them.

I would like to talk to you about a study that we released in the United States which documents the impact that information technology and electronic commerce are already beginning to have on our economy.

We have had quite a good economy in the United States these past couple of years, and what we have found is the building out of the Internet - which has gone from four million users to about a hundred million users - already accounts for about a third of the real growth of the US economy.

THE IT INDUSTRY

Information technology industries have gone from 4 to 8 percent of our economy in the past decade, even though prices in those industries have fallen dramatically. And when you look at just the direct contribution of these industries to our economic growth, they account for over a third of our real economic growth, not including any indirect effects.

IT industries are also creating significant jobs. We now have over seven million information technology related jobs in the United States. On average, those jobs are paying about $46,000 a year, compared to an average of only $28,000 a year for private sector jobs in the US economy, meaning the jobs being created are high wage jobs.

We are also finding now that 45 percent of all business equipment investment in the United States is in information technology, up from 3 percent just fifteen years ago.

THE GROWTH OF THE INTERNET ECONOMY

The development of the building out of the Internet has given new life to the information technology industries, and that is now giving our economy a significant boost. As the Internet goes from having a hundred million people to a billion people over the next decade, we think the importance of information technology industries in our economy is only going to accelerate.

In addition to the information technology industries themselves, we have this new phenomenon of electronic commerce which only began a couple years ago. It is just beginning to have an impact but the impact is dramatic. When we speak about electronic commerce, we mean a couple of things. The first is business-to-business use of electronic commerce. These are cases where companies' purchasing, supply team management, inventory, management, customer relations and logistics are made available on the Internet.

That piece, we now believe, will grow from $6 billion to $300 billion by the year 2002 just in the United States alone. I think the reason why there is so much disparity seen among projected growth figures for the Internet is the projections themselves become outmoded after three or four months. As we have observed over the past couple of years, they have to be adjusted upward because things are growing so quickly.

BUSINESS-BUSINESS

We think these business-to-business applications will grow to over $300 billion in the United States alone. Companies like General Electric that just went on to the Internet about a year ago already are doing about a billion dollars in business-to-business commerce. They're realizing significant productivity improvements and, therefore, driving the use of e-commerce throughout their corporations.

Not including sales to consumers, GE alone expects to do $5 billion of business on the Internet by the year 2000 in business-to-business commerce doing things like putting its purchasing online. You'll hear similar reports from companies like Cisco, Federal Express and IBM and they too are experiencing very dramatic growth rates. These growth rates are now spreading throughout the economy because the productivity improvements of business-to-business commerce are so great.

RETAIL OF GOODS VIA THE NET

The second area of electronic commerce - which has grown much more rapidly than any of us predicted - is the retailing of physical goods. That is where the sale is made on the Internet but the goods are then physically delivered to the buyer. I'm sure you're all aware of the stories about how the Internet has changed the way people buy books, automobiles, flowers, clothing and a whole range of other products.

Amazon.com, for example, went from selling $16 million in books its first year up to a $150 million company its second year. Its major competitors are now going online as well. By the year 2000, we