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The Role of Media Satire in Australia and its Relation to Defamation Law

Paul Satouris, winner of the 2002 CAMLA essay competition, discusses the potential dangers of regulating the use of satire.

*"Everything is funny as long as
it is happening to someone else"*

Will Rogers

Society has defined satire as a composition in which vice, folly or a foolish person is held up to ridicule¹. However, as modern law has evolved, the concept of ridicule has been developed into a legal defence, as a subsection of defamation law. Consequently, the question must be asked: has society indeed lost its sense of humour? The concept of freedom of speech, which is so prevalent in US society, as emblematised in their Bill of Rights, lacks validity in Australia, as it is only an implied freedom in our constitution. As such, careful consideration must be given to how suitable the judiciary is as an authority of social values, and furthermore, how essential humour is in modern society. Satire is just one method of expression, and to limit its usage would be to limit the rights of society to make comments on community issues. As George Orwell has stated, "*if liberty means anything at all, it means the right to tell people what they do not want to hear*".

Satire has encountered many difficulties in our current legal environment as it juxtaposes the deeply entrenched legal concept of defamation. The basic comedic notion behind satire is by exaggerating fact or rumour and consequently placing the object or situation up to ridicule in a parodic or humorous way. However, there has been a great disparity in the law internationally with regard to where satire becomes ridicule. In Australia, a cartoon captioned 'News Flash'², which featured Anne Fulwood seated naked from the waist down at a news desk was withdrawn

from publication in 1993 when defamation action was threatened. The publisher, *Australian Penthouse*, also publicly apologised to the newsreader for the cartoon's offensive treatment of her, and consented to a court order, which directed that the originals of the cartoon be handed over to her. This stands in stark contrast to recent rulings in the US. For example, *Hustler Magazine* printed a satirical cartoon depicting the Reverend Jerry Falwell as a drunk who indulged in sexual relations with his mother in an outhouse. Reverend Falwell's attempt to retract the cartoon under defamation law failed in Court, as the trial judge believed that the most "precious privilege" of a democracy was "open political debate". The trial judge went further and said:

"Satire is particularly well suited for social criticism because it tears down facades, deflates stuffed shirts and

unmasks hypocrisy by cutting through the constraints imposed by pomp and ceremony, it is a form of irrelevance as welcome as fresh air...Nothing is more thoroughly democratic than to have the high and mighty lampooned and spoofed."

The contrast in US and Australian rulings with regard to satire is based principally in the absence of an Australian Bill of Rights. There are no general rights of freedom of speech in Australia; rather, the common law has identified an implied guarantee of freedom of political communication. Thus it can be seen that freedom of speech is also qualified as it does not include commercial speech or satire, but is based purely on political or government matters. This lack of an articulated freedom of expression restricts the exercise of parliamentary powers to curtail the freedom of political communication. It can also be argued that

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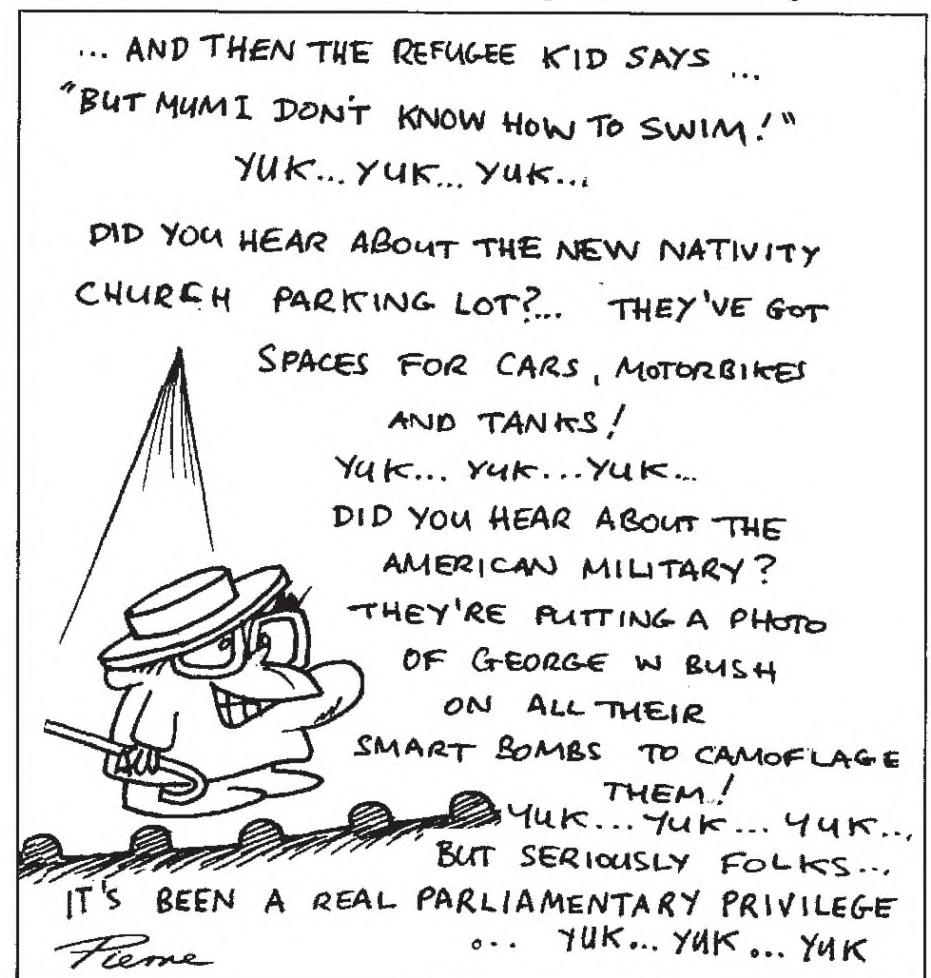
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this power to comment on politics is limited, as seen in the Pauline Pantsdown case⁴, where a controversial political figure and her policies were parodied, and ruled to be defamatory. Australia's lack of a constitutional right to free speech is a subject that is recognised by Article 19 of the International Covenant on Civil and Political Rights. As Ronald Dworkin said, "*Freedom of Speech...is the core of the choice modern democracies have made*"⁵. By Australia not embracing this fundamental freedom, it diminishes the efficacy of our democracy.

The overarching polemic faced by legal observers, is whether the judiciary is a suitable measure by which societal values are upheld. This problem is exacerbated by the incongruence of international ideals of democracy and free speech, and recent rulings in defamation in Australia. In *Morosi v Mirror Newspapers Ltd*⁶, the NSW Court of Appeal held that a cartoon published in the *Daily Telegraph* early in 1975 insinuated that there was a politically embarrassing romantic attachment between the then Federal Treasurer and his secretary. The Court held that such an allegation was capable of defaming the secretary. This precedent set in Australia is completely contradictory to international cases, which deal with common issues. For example in England, the case of *Chareleston v News Group Newspapers Ltd*⁷ considered the issue of

whether obviously fake photos of two popular soap stars, whose heads had been superimposed onto porn star bodies, were

defamatory. The fakery of the lewd photos was not concealed, with a warning that "Soap studs Harold and Madge's faces are



added to porn actors' bodies". Consequently this item was not defamatory as the ridiculous nature of the photo, coupled with the warning, were palpable. Satire is one method by which the public can make comment on issues and circumstances – to limit free speech in Australia is to deprive the nation of a powerful medium by which individuals can express themselves.

Finally, satirical humour is an integral component of society, as it allows humour to be integrated into less comic situations. Lewis has stated:

"The limit of what is permissible in the way of cartoons and satire are undefined. Words obviously intended only as a joke are not actionable...but serious imputations of fact lying behind the superficially jocular may well be".

Unfortunately, common law has failed to appreciate this divide, which consequently has diminished the validity of the law in this regard. In other nations

such as the US, satire has been allowed to develop, shielded by the First Amendment. It has evolved to a medium, which can convey societal issues into a lower-brow context, while still being inherently intelligent. As Tony Fitzgerald states:

*"Satirical humour uniquely combines laughter with information and criticism, enlightens facts and ideas, and encourages iconoclasm in preference to reverence and acquiescence"*⁸.

Freedom of speech is an integral part of the democratic system of government that all western nations have embraced over the past century. The law of defamation has been inconsistently applied around Australia, and consequently is inherently flawed in its application; in some parts of the country it is codified, in others it is a fusion of statute and common law. The difficulties surrounding defamation law are indicative of their inapplicability to

modern societal notions of free speech. Satire is just one medium by which society can express itself and make comment on events, people and circumstances. To regulate satire, is to dictate what can and cannot be discussed by society. As Jim Morrison once stated, "Whoever controls the media, controls the mind".

1 Collins Gem English Dictionary, 1982

2 Sydney Morning Herald, 19 May 1993

3 Wilkinson J in *Falwell v Flynt*, 805 F2d 484 at 487

4 *ABC v Pauline Hanson* (Unreported, 28 September 1998, Supreme Court of QLD, Court of Appeal)

5 Dworkin, "Liberty and Pornography", *New York Review of Books*, 38:14 (August 15 1991)

6 [1977] 2 NSWLR 749

7 [1995] 2 AC 65

8 Justice Tony Fitzgerald, *Telling the Truth, Laughing*, Communications Law Centre, Sydney 1998

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Dow Jones v Gutnick – Certainty For Australian Defamation Law but Uncertainty For International Publishers and Content Providers

Catherine Dickson and Aaron Timms examine this recent headline grabbing case.

While the recent unanimous decision of the Australian High Court in *Dow Jones v Gutnick*¹ follows defamation authority in Australia, it highlights the fact that activity on the Internet is answerable to national laws around the world. It also raises questions regarding the current trends in international law in Australia and elsewhere.

BACKGROUND

Joseph Gutnick sued Dow Jones & Co Inc² in Victoria in respect of an article, "Unholy Gains", published in the October 2000 edition of *Barron's* magazine (both hard copy and online).

Dow Jones sought a stay of the Victorian proceedings, or for the service of process to be set aside, partly on the ground that publication (a key element in proving defamation) took place in New Jersey upon "uploading" and therefore the

Supreme Court of Victoria had no jurisdiction to hear the case. Gutnick argued that publication occurs when the defamatory material is made comprehensible to a third party, by being displayed on the subscriber's computer screen, i.e. on "downloading".

The High Court dismissed the appeal against the August 2001 interlocutory decision of Justice Hedigan of the Supreme Court of Victoria regarding the request for a stay of proceedings. It found that the Supreme Court of Victoria had jurisdiction to hear the case, even though Dow Jones uploaded the internet publication onto its web server in New Jersey.

The Court unanimously concluded that the trial judge was correct in finding that the tort of defamation in Australia is actionable where the publication is seen or heard and comprehended by the reader or hearer. The Court found that since the article was downloaded in Victoria,

publication had taken place there. Therefore the Victorian Court was able to exercise jurisdiction. We now examine some of the issues raised by such a finding.

JURISDICTION, CHOICE OF LAW AND THE DOCTRINE OF FORUM NON CONVENIENS

The decision of the Court, as well as the interrelation between the issues of jurisdiction, choice of law, and *forum non conveniens*, is summarised in the judgment of Kirby J:

"If Victoria is identified as the place of the tort, that finding would provide a strong foundation to support the jurisdiction of the Supreme Court of Victoria; and to sustain a conclusion that the law to be applied in the proceedings, as framed, is the law of Victoria. These conclusions would, in

