superimpose the defamation law of NSW on every other state, territory or country of the world and therefore would exceed the proper limits of the court's injunctive power.

If Justice Simpson's decision is followed, then it will be even more difficult to obtain injunctions restraining publication of defamatory material on the internet than it is to obtain such injunctions for material to be published in more traditional media, such as television and newspapers.

However, in many cases, a person defamed on the internet may achieve a similar result by simply notifying Australian internet service providers of the defamatory material. Internet content hosts and internet service providers are likely to be immune from defamation liability for content that they have seen and that they do not know the nature of under Clause 91(1) of Schedule 5 of the *Broadcasting Services Act 1992* (Cth). Clause 91(1) provides that State and Territory laws and rules of common law and equity have no effect to the extent that they would subject an internet content host or internet service provider to liability in respect of content hosted or carried by it in a case in which it was not aware of the nature of the content. Defamation laws have not been exempted from this immunity. By notifying an ISP of defamatory material, the person defamed could deprive the ISP of this protection, thereby giving the ISP an incentive to take down or block the material if it cannot be defended under Australian defamation laws.

PRACTICAL IMPLICATIONS

Justice Hedigan's decision is likely to be of most concern to internet publishers in the United States and other countries in which defamation laws are more favourable to publishers than those in Australia. The risk of being sued in Australia will be particularly great for those internet publishers which have assets or do business here. Sports people, Hollywood stars and others that rely in part upon their reputations in Australia for their livelihoods may well choose to sue here for material placed on the internet in the US.

Publishers should consider whether an article is defamatory not only under Australian law, but also under the legal systems of any other countries which may be able to assume jurisdiction over defamation proceedings, such as places where the person defamed resides, does business, or has a reputation. Particular care should be taken with respect to the jurisdictions in which the publisher has assets.

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The New Privacy Obligations and the Media Exemption

Glen Sauer reviews how the new privacy regime deals with the media.

Since 21 December 2001, new privacy laws have applied to most private sector organisations, including most media organisations. An exemption applies in respect of acts and practices "in the course of journalism" by media organisations which have publicly committed to standards dealing with privacy in the media context. Activities of media organisations that do not constitute "journalism", such as marketing, will be caught by the legislation. The next few years are likely to bring some interesting debates before the Courts as to what does and does not constitute "journalism".

THE NEW PROVISIONS AND THE JOURNALISM EXCEPTION

The new private sector privacy laws are contained in the *Privacy Act 1988* (Cth) (the **Act**). Most important, from the private sector's perspective, are the National Privacy Principles (**NPPs**), which contain rules governing collection, use, and disclosure of "personal information" (defined as matters relating to information and opinions about individuals).

The NPPs do not apply to acts and practices of a "media organisation" carried out in the course of "journalism" so long as that media organisation has publicly committed to standards dealing with privacy in the media context.

By providing this exemption, the Act recognises the role of the media in keeping the Australian public informed. The exemption aims to balance the public interest in privacy against the public interest in allowing a free flow of information. Frequently, the media provides the public with information about individuals which the individuals may prefer not to be known. Without the exemption, individuals might, in certain circumstances, be able to prevent the media from collecting or using such information.

Organisations which disseminate information to the public need to consider three issues in relation to the exemption First, whether the organisation is a "media organisation". Second, which of its acts and practices are and are not "journalism". Third, whether or not the organisation has publicly committed to standards that deal with privacy in the media context and that are sufficient to trigger the exemption.

WHAT IS A MEDIA ORGANISATION?

"Media organisation" is defined in the Act as an organisation whose activities consist of or include collecting, preparing or disseminating to the public, news, current affairs, information or documentaries, or commentary, opinion or analysis of such material. "Organisations" include individuals as well as corporations, partnerships, associations and trusts.

Broadcasters and magazine and

newspaper publishers obviously fall within the definition. Individuals who publish material of the requisite type on the internet are also likely to fall within it. As a matter of common sense, it appears likely that organisations which disseminate material only to those members of the public who subscribe to their services, such as pay television services, will also be included.

There are, however, some types of organisation which do not so obviously fall within or without the "media organisation" definition. For example, it will be interesting to see whether organisations which operate business information services, such as Reuters and Dun & Bradstreet, will be found to be media organisations. This will depend, to some extent on the breadth of meaning given to "information" in the definition above. It could be interpreted narrowly to mean only information in a form similar to news, current affairs or documentaries. Such an interpretation would be based on a principle of statutory interpretation known as *Ejusdem Generis*.

Alternatively, "information" could be given a broader meaning, on the basis that a narrow interpretation would not provide the balance between privacy and the free flow of information which Parliament sought to achieve.

WHAT IS "JOURNALISM"?[1]

There is even greater doubt as to what "Journalism" means for the purposes of the Act. This word is the key to the media exemption and is not defined. The Commonwealth Attorney General has stated that the term is intended to have its everyday meaning and to apply in a technology neutral way.[2,3] The problem is, of course, that different people attach different "everyday meanings" to the term. For example, one person might consider that interviews conducted by "Borat" on the Da Ali G Show fall squarely within the ambit of journalism and another may consider them to fall outside it. Drama, comedy, infotainment and information services all fall within the potential grey area.

The Macquarie Dictionary, which is the dictionary of preference for Australian Courts, does not answer these questions.

It defines "journalism" as:

> *"1. the occupation of writing for, editing, and producing newspapers and other periodicals, and television and radio shows. 2. such productions viewed collectively."*

This definition is so general in its terms that courts may not find it helpful. It could, perhaps, support an argument that all material made available to the public by media organisations should be treated as "journalism" for the purpose of the exemption. Such an interpretation would be consistent with the objective of ensuring a free flow of information to the public.

Courts may also look to the "media organisation" definition in seeking to define journalism. Depending upon the approach taken to the word "information"(discussed above), this could result in a broad or a narrow exemption.

STANDARDS FOR MEDIA ORGANISATIONS

The Act is also very general in relation to the standards to which media organisations must publicly commit to obtain the benefit of the exemption. It merely specifies that the standards must "*deal with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters)*" and must have been "*published in writing by the organisation or a person or body representing a class of media organisations*". The Explanatory Memorandum does not provide any guidance as to what will be sufficient to meet this requirement. The Office of the Privacy Commissioner has not expressed any views on this issue and says that it has received very few inquiries in relation to the media exemption. Those that it has received have been from some Public Relations companies, which have been informed that the exemption is not available to them because those particular companies had not publicly committed to *any* standards dealing with privacy.[5]

It will be necessary to wait for the Commissioner and the courts to consider this provision before we know whether a broad statement found in media codes of conduct to the effect that "privacy should

be respected"[6] would be sufficient. It is likely that more detailed rules relating to privacy will be required.

Other provisions also recognise the important role of the media in facilitating the free flow of information to the public. Importantly, it is not an offence for a journalist to refuse to give information, answer a question or produce a document or record which he or she would otherwise be required to give under the Act (eg. to the Privacy Commissioner) where this would tend to reveal the journalist's confidential source.[7]

The legislation also recognises[8] that the public interest in the free flow of information to the public through the media may compete with the right to privacy. The Privacy Commissioner and approved privacy code adjudicators will be required to take these competing interests into account when considering complaints.[9]

CONCLUSION

The Act contains provisions designed to preserve the ability of the media to provide information to the public. The most important of these provisions is the journalism exemption. Like other provisions in the Act, the journalism exemption is general in its terms. This gives the Act the flexibility to accommodate technological and other developments, but also means that much will depend upon interpretation of it by the Commissioner and the courts.

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[33] Attorney General Fact Sheet – Privacy and the Media, July 19 2001 http://law.gov.au/privacy/newfacts/Media.html.

[5] Office of the Federal Privacy Commissioner telephone hotline 7 January 2002.

[6] see, eg., clause 2.2(e) of the Commercial Radio Code of Practice ("In the preparation and presentation of current affairs programs, a licensee must ensure that respect is given to each person's legitimate right to protection from unjustified use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy"), clause 9 of the Australian Journalists' Code of Ethics ("They shall respect private grief and personal privacy and shall have the right to resist compulsion to intrude on them"), clause 3 of the Australian Press Council Statement of Principles ("Readers of publications are entitled to have news and comment presented to them honestly and fairly, and with respect for the privacy and sensibility of individuals. However the right to privacy should not prevent publication of matters of public record or obvious or significant public interest") and the MEAA Code of Ethics (MEAA members commit themselves to "respect private grief and personal privacy").

[7] section 66 (1A)

[8] sub-section 29(a).

Spam – Is Enough Being Done?

Ben Kuffer and Rebecca Sharman take a hard look at spamming issues.

On 30 May 2002, the European Parliament voted to approve an opt-in system for email, faxes and automated calling systems. The result of this is that European businesses and individuals should give permission for receiving unsolicited electronic communications for marketing purposes. The formal adoption of the directive by member States makes it illegal to send unsolicited email, text messages or other advertisements to individuals with whom companies do not have a pre-existing relationship.

CAUBE believes this will turn Europe into a virtual "spam free zone" by the end of 2003. However, may European politicians and lawyers have voiced doubt over the effectiveness of the new anti-spam laws. As Michael Cashman, MEP and Member of the Citizen's Freedoms and Rights, Justice and Home Affairs Committee points out "spammers do not abide by the law and the expectation that they will be caught under this new directive is crazy". Furthermore, the directive does nothing to curb spam coming from outside Europe and it will take years to restructure EU member States IT systems which presently operate on an opt-out approach.

The Federal Government announced in February 2002 that, with the continuing expansion of Internet usage in Australia, it wishes to ensure that "spamming does not get out of hand". This article considers the problem of spamming, the effectiveness of the current legislative and self-regulatory measures to limit spamming and what can be done to improve the current deluge of emails that hit your inbox on a daily basis.

WHAT IS SPAM?

Unsolicited bulk email, commonly referred to as "spam", is any electronic mail message that is transmitted to a large number of recipients where some or all of those recipients have not explicitly and knowingly requested those messages. Spam is now recognised by government, industry and consumer groups in Australia and overseas as a significant problem requiring urgent management.

Spam raises many issues, including breaches of privacy, illicit content, misleading and deceptive trade practices and increased costs to consumers and businesses for internet service provider access. Spammers are in effect taking resources away from users of valuable resources and the suppliers of these resources without compensation and/or authorisation.

How Prevalent is Spam?

Spam is growing at a rapid rate. Statistics compiled by Brightmail Inc, a spam filtering service, state that in the last 12 months, spam constituted 20% of all email screened by them. The Coalition Against Unsolicited Bulk Email (CAUBE) found that the number of unsolicited bulk email received by Australian Internet users in 2001, was six times more than that received in 2000. America Online have stated that spam accounts for half of all electronic mail they process.

In 1999 CAUBE conducted a 12 month spam survey, where addresses were 'planted' at internet sites where spammers were known to have harvested addresses. CAUBE found that of the spammers utilising the 'planted' email addresses, Australian based organisations accounted for 16% of the spammers caught.

PROBLEMS ASSOCIATED WITH SPAM

A number of problems are associated with spamming. It has been said that, the Internet relies on the cooperative use of private resources and that the sending of an email is a privilege not a right. These issues are described below.

No cost to the sender means unlimited spam

Spam enables a sender to advertise