Telemarketers who fail to take heed of the Register may find themselves subject to a range of enforcement actions, including fines of up to $1.1 million.[10]

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(Footnotes)

[1] Australian Communications and Media Authority, 'Do Not Call registrations reach 200,000', 4 May 2007 at http://www.acma.gov.au/WEB/STANDARD??pc=PC_310170.

[2] Australian Communications and Media Authority, 18 May 2007.

[3] The exemptions are set out in the *Do Not Call Register Act*, schedule 1, and are addressed later in the article.

[4] *Do Not Call Register Regulations 2006*, reg 4, s2-7.

[5] *Do Not Call Register* Act, s5(1)(e)-(o).

[6] *Do Not Call Register Regulations 2006*, reg 5.

[7] *Do Not Call Register Act*, schedule 1.

[8] *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2006,* s5(2).

[9] Precise details of the fees can be found at: http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/FE147C8CB78FF4FBCA2572CF001483C1/$file/Do+Not+Call+Register+(Access+Fees)+Determination+2007+FRLI.doc.

[10] *Do Not Call Register* Act, s25(5)(b)(i).

Marsden, Ethics and Defamation

Marcus Power, re-reads Marsden v Amalgamated Television Services in light of Uniform Defamation Legislation, and Media Codes of Ethics. This essay won the 2006 CAMLA essay competition.

No amount of money, no matter what it could be, can compensate me for the anguish, the pain, the humiliation of the past few years[1]

The statement above was made by John Marsden, the day he won the lengthiest defamation case in Australian legal history against the Seven network.[2] The case spanned some 229 days.[3] Defamation law and its application presents one of the most challenging and frustrating areas for journalists. While their United States counterparts enjoy their First Amendment right to freedom of speech, Australian reporters have had to navigate a web of varying defamation laws across our states and territories. The new Uniform Defamation Acts (***UDAs***)[4] have improved this situation somewhat by providing a degree of the standardisation suggested in their name, but defamation remains a cause for caution and even angst for journalists. As Marsden could have confirmed, it also remains a mixed blessing even for those who obtain a legal remedy.

The phrase 'High profile' is often used in media reports about Marsden, a Sydney lawyer, a member of the Order of Australia and a man well connected in New South Wales society. In the mid 1990s, two reports screened by Channel Seven current affairs programs, *Today Tonight* and *Witness*, alleged that Marsden had paid under-aged boys for sex.[5] In Marsden's view, the programs caused immense damage to his reputation and social standing. Yet the court case itself was more harmful, with lurid details concerning the sexual habits and lifestyle of the Sydney lawyer taking up much of the proceedings. For Channel Seven, the case was expensive and ultimately futile, Levine J ruling that their defence of qualified privilege could not be sustained under the defamation law of the time. This essay examines Marsden's case and how the new UDAs, and relevant media ethics codes would apply to it.

Background

In March 1995, *Today Tonight* screened a report by journalist Greg Quail, alleging that John Marsden had on several occasions solicited male teenage prostitutes for sex. In May 1996 another Seven current affairs program, *Witness*, aired further allegations along the same lines, despite Marsden attempting to stop the broadcast of both programs by obtaining court orders. The stories aired in the wake of the NSW Royal Commission into its police force, when, as David Brearley noted 'ranking MPs were using parliament to name alleged paedophiles, and any whisper of the subject could find a captive audience'.[6]

Marsden had openly discussed his homosexuality in previous media interviews, and was well known as a gay rights activist. He had served on the New South Wales Council for Civil Liberties for a number of years. It was against this background that Marsden claimed Channel Seven had defamed him by naming him as a pederast. Meanwhile, Seven claimed the sources for its story were reliable, that its reporters had ensured that their stories checked out, and that as a serving member on a government board, it was in the public interest that their stories about Marsden be aired.

Relevant Codes

The actions of the Channel Seven journalists and producers responsible for the stories could potentially come under two ethical codes. The *Commercial Television Industry Code of Practice*. (***CTI Code***) and the Media, Entertainment and Arts Alliance Code (***MEAA Code***).

The CTI Code

The CTI Code was developed by the commercial broadcasting industry and is administered by Free TV Australia. The Code relevantly includes provisions for the regulation of broadcast content of news and current affairs programs. Section 4.3.1 of the CTI Code states, broadcasters 'must present factual material accurately and represent viewpoints fairly.'[7]

Justice Levine was critical of *Today Tonight* executive producer Alan Hall for denying Marsden adequate opportunity to respond to claims made in that program's report. As Ackland points out, *Today Tonight*'s attempt to represent Marsden's side was to give him the opportunity to view the broadcast tape at 4pm the day it aired, then interview him at 4.30pm.[8] Though the reporter and producers could claim they gave Marsden the opportunity to reply, it was without warning of the report's exact claims, and at best only technically fulfils the requirement of the CTI Code to represent views fairly. The *Today Tonight* 'breach' is similar to a

case brought before the then Australian Broadcasting Authority (***ABA***), involving a 60 Minutes report on an insurance company and public liability. In that investigation, the ABA ruled that the accuracy requirement of the previous version of the CTI Code had been breached, because 60 Minutes had interviewed a dissatisfied customer of the company but had not sought the company's version of the story.[9]

Levine J also criticised *Today Tonight* reporters and producers for not thoroughly verifying the accuracy of the claims aired on their program. The report was largely built around the testimony of three men who alleged that Marsden had had underage sex with them. Details of the men's claims, such as locations referred to in their stories and, in the case of one man, whether or not the person he described was actually Marsden, were highly questionable, and not thoroughly substantiated by either program's story.[10] Levine J noted that Hall 'was consistent in the disdain he showed when issues of this kind were raised.'[11]

Measured against the current code, it would appear that *Today Tonight* and *Witness*, who used some of the same research material and made similar claims, did not adequately fulfill their obligation to ensure the accuracy of factual material presented.

Remedies available to a complainant under the CTI Code are limited. Complaints about broadcaster's conduct must be directed to the broadcaster of the program concerned (before, for instance, a complaint is made to the Australian Communications and Media Authority (***ACMA***)). The complainant must put their concerns in writing to the broadcaster, and the matter must be dealt with by the broadcaster within 30 days.[12] Presumably, there is some scope for broadcasters to issue apologies or other remedies to aggrieved persons, but this is not specified in the CTI Code. If the complainant is not satisfied with the response from the broadcaster, they may refer the matter to ACMA for investigation.[13] If the authority finds the relevant code has been breached, it may impose a compliance condition on the broadcaster's license; if in turn this directive is not followed, the authority may impose heavy fines or even revoke the broadcaster's license.[14]

The MEAA Code

The second relevant code is that of the Media Entertainment and Arts Alliance (***MEAA***), which incorporates the Australian Journalists Association. The MEAA

Code, however, only applies to MEAA members, and Pearson has observed that membership among commercial broadcasters is 'quite weak'.[15] Point 1 of the MEAA Code requires members to strive for accuracy, fairness and disclosure of relevant facts, and to do their 'utmost to give a fair opportunity for reply'.[16] On this score, given the points described above, it would seem *Today Tonight* and *Witness* journalists fell somewhat short of the mark. It is worth noting that Channel Seven sought to defend its journalists' actions by claiming there was an issue of public interest in revealing Marsden's status as a pederast. The guidance clause reminds reporters that only in the rarest of circumstances, where there is 'substantial advancement of the public interest', should the points of the MEAA Code be overridden.[17]

Uniform Defamation Laws

According to the requirements of the new UDAs, would John Marsden have been defamed? The Defamation Acts of each state do not include a definition of defamation, so the common law definition applies. Defamation is published material that exposes a person to hatred, contempt or ridicule; and/or causes right thinking members of society to avoid him or her; and/or tends to lower his or her reputation in the eyes of the world.[18]

The imputation contained in the reports was that John Marsden paid for sexual intercourse with minors. If the programs could not substantiate the truth of their claims he had engaged in such criminal activity – acts which are viewed with a particular level of contempt in the community – it could be established that, according the above definition, the Channel Seven stories were *potentially* defamatory.

To establish whether Marsden was *actually* defamed, the following must be satisfied: defamation in theory, as outlined above, must have occurred; the plaintiff must be identified in the published material; and the material must be distributed to at least one person other than the two parties contesting the case.

The second of these criteria is relatively easy to establish. The broadcasts were both explicitly about John Marsden's alleged

sexual activities. Neither of the programs attempted to conceal his identity or simply insinuate that the allegations were about him. He was named, and was accused of being a pederast. Seven screened interviews from people who claimed they had worked as rent boys for Marsden and that they were underage at the time.

The final question is whether the defamatory material was published or broadcast? Again this is not difficult to show; the defamatory material was part of two separate *Today Tonight* and *Witness* broadcasts, which went out to statewide and national audiences respectively. The allegations had been made in front of hundreds of thousands of 'third persons' around Australia.

Qualified Privilege under the UDAs

Seven argued a defence of qualified privilege. Differences in the UDA version of this defence would be a mixed bag for Seven. However, if they were unable to support the truth of their claims, it would appear to be the only defence available to them. Traditionally, qualified privilege applied to situations where the defendant passed on defamatory information to others because of some legal or ethical imperative to do so. Pearson cites examples such as teachers writing critical student reports, and middle managers justifying decisions to dismiss employees to their superiors.[19]

The UDAs follow a broader definition of qualified privilege, taken largely from the repealed law in NSW. The NSW law opened the way for publishers to apply this defence, though it's application was considerably narrowed in subsequent judgements. This notion of qualified privilege was based on two main conditions; that there was some demonstrable public interest in publishing the material in question, and; that the publisher's actions were reasonable in airing the story.[20] The UDAs' prescribed considerations for discerning reasonable action are broad, and include whether the matter is of public interest, the seriousness of defamatory information carried by the matter published, and integrity of the source involved.[21]

One possible positive in this for Channel Seven concerns another of these prescribed considerations of reasonableness. In determining reasonableness, the UDA requires that the court take into account the 'business environment' in which the defendant works.[22] As mentioned earlier, *Today Tonight's* Alan Hall came in for especially harsh criticism from Justice Levine on account of his not having adequately cross-checked the claims of the Marsden story. In his own defence, Hall said to the Judge:

> *…you have understand that I am running a program with six state offices, over 120 people. I am filling a gap of 30 minutes every night. If I had 120 reporters telling me to read the fine print of every story I wouldn't get a program to air* [23]

This was taken as evidence of his disregard for the truth or otherwise of his program's story, but consideration of the news industry 'environment' is an issue media commentator Mark Day believes should be given greater weight by the courts.

> *Journalists write for ordinary people, not judges and lawyers playing semantic games, and do so under pressure and in conditions that those in their lofty legal eyries would never understand.*[24]

It is possible that under the new laws, Hall's and his staff's working situations might have been given greater weight. However, most commentators, including Day, are skeptical as to whether this point will help journalists in defamation cases, or as they say is more likely, judges will interpret it very narrowly.[25]

Another of these reasonable action 'points' relevant to Seven's defences concerns the plaintiff's performance of a public function. In the Marsden case, Seven argued qualified privilege as it was defined in *Lange v Australian Broadcasting Corporation*[26] (***Lange***) In *Lange*, the High court established that all Australians have an implied right to comment freely on political issues and events.[27]

At the time of the *Today Tonight* broadcast, in 1995, John Marsden was a member of the NSW Police Board, a position he was appointed to by the NSW government.[28] Seven said that as a government appointed official, his fitness to hold this position was a matter of public interest. Levine, J accepted that the defence held for the *Today Tonight* story. Under the UDAs, the result would most likely be the same. However, the problem for Seven was that by the time *Witness* aired in 1996, he had resigned from this post, and thus the basis for the defence was gone. Other posts he held, such as membership of the NSW Law Society were not public offices and so deemed outside the scope of *Lange* qualified privilege.

Perhaps the most problematic of these 'reasonableness' points for Seven involves whether the matter in question gave adequate coverage of the other person's side of the story. As described above, Levine castigated Alan Hall for not giving Marsden sufficient time or opportunity to reply to *Today Tonight's* story. *Witness* likewise only screened excerpts from a 7.30 report interview with Marsden.[29] On this point alone, Seven claims as to the reasonableness of its conduct would be questionable. There are then the considerations also already outlined concerning the veracity of the stories given by Marsden's alleged victims, with the integrity of sources being another key consideration. Though there may have been some potential for Channel Seven to bring itself within the scope of qualified privilege, it would have had trouble arguing the reasonableness of its conduct.

Conclusions

John Marsden's case will be remembered, mostly, as an enormously futile exercise, and another example of the excesses of defamation law in this country. As has been observed elsewhere, in order to defend his reputation, he had to destroy it. Though uniform laws appear to be a significant advance on previous arrangements, it is unlikely they will prevent a repeat of litigation such as this, where the case itself is as damaging as the matter over which it is concerned.

Marcus Power's Essay won the CAMLA Essay Competition 2006.

(Footnotes)

[1] ABC Radio, *The World Today,* 27 June 2001 at para 11. Available at <http://www.abc.net.au/worldtoday/stories/s319864.htm>

[2] *Marsden v Amalgamated Television Services Ltd* [2001] NSWSC 510

[3] Id at para 1; Also see 'Reputation – Repaired or Wrecked' *Gazette of Law and Journalism* available at <www.http://www.lawpress.com.au.ezproxy.lib.deakin.edu.au/genews/ge131_M1_Intro.html>

[4] See for example the Uniform Defamation Act 2005 as enacted in the *Defamation Act 2005* (NSW).

[5] David Brearley, 'The Passion of John Marsden' *The Australian* (26 June 2001) at para 9.

[6] Ibid.

[7] *Commercial Television Industry Code of Practice* (2004) at 33.

[8] Richard Ackland, 'Marsden v Amalgamate Television Services Pty Ltd' (2001) *Gazette of*

Law and Journalism available at <http://www.lawpress.com.au.ezproxy.lib.deakin.edu.au/genews/ge131_M5_QP.html>

[9] Id at 337-338

[10] Id at para 38 -67

[11] Id at para 57)

[12] *Commercial Television Industry Code of Practice* (2004) s7.10

[13] *Commercial Television Industry Code of Practice* (2004) s7.12).

[14] Mark Pearson, *The Journalists Guide to Media Law* (2004) at 337.

[15] Id at 333

[16] MEAA Code (2006) point 1

[17] Id, guidance clause

[18] Megan Ashford, *Legislation Note: Defamation Act 2005 (WA)* (2006) at para 9, Available at <https://elaw.murdoch.edu.au/ issues/2006/1/eLaw_Ashford_13_2006_02.pdf>;Pearson above n13 at 169; Arts Law Centre of Australia, *The Law of Defamation – For Material Published after 1 January 2006* (2006) at para 3. Available at <http://www.artslaw.com.au/LegalInformation/Defamation/DefamationLawsAfterJan06.asp>

[19] Pearson, above n13 at 203

[20] Minter Ellison Lawyers, *News Alert – New Uniform Defamation Laws* (1 February 2006), at para 16.

[21] Paul Svilans, *The Uniform Defamation Laws* (30 March 2006), at para 39. Available at <http://www.gtlaw.com.au/gt/site/articleIDs/C7DDE6199CC75FD4CA25714100192572?open&ui=dom&template=domGT>

[22] Ibid.

[23] Ackland above n8 at para 48.

[24] Mark Day, 'Freedom of Speech Undefined' *The Australian* (12 April 2006) at para 11.

[25] Id at paras 11, 12.

[26] (1997) 189 CLR 211

[27] Pearson, above n13 at 212.

[28] Ackland above n8 at para 8.

[29] Id at para 63)

Reasserting Technological Neutrality

Matt Vitins and Andrew Ailwood search for a technologically neutral definition of television.

While creating a dynamic media environment, the processes of convergence are highly inconvenient for regulators. Broadcasting and telecommunications are both subject to carefully considered, sector specific legislative regimes and the once clear distinctions that organise these bodies of law are under fire. As boundaries are crossed, similar media experiences are being inconsistently regulated and according to capricious criteria.

The European Commission has recently suggested an update to its *Television Without Frontiers Directive*[1] in an explicit attempt to address the 'increasingly unjustifiable differences in regulatory treatment between the various forms of distributing identical or similar media content.'[2] The directive goes back to first principles in updating the definitions that structure European broadcasting law. The fundamental question asked and addressed is *what media experiences are sufficiently analogous to 'television' that they should be regulated as such?*

In the foreseeable future Australian regulators will similarly have to revisit the fundamental definitions of the *Broadcasting Services Act 1992* (Cth) (***BSA***). It is argued here that the foundations of Australian broadcasting law have become unstable as the regulatory principle of technological neutrality has been steadily eroded. The piece then continues to summarise some of the key features of the European proposal.

Stable Platforms, Unstable Technology

History suggests that once a media platform becomes established it remains a permanent part of the landscape. Even while showing adolescent contempt for the territorial boundaries of traditional institutions, the metaphors that structure new media experiences tend to reflect legacy formats. This might provide a reassuring sense of stability in an industry that is more often described as dizzying, however, while platforms remain reasonably constant, the technical methods associated with them do not. Consider for example, radio is approaching its centenary (constant), but it may be delivered by analogue or digital broadcast, or in an even more 'new media' manner, could be streamed or podcast (not constant). Television is evolving along similar lines.

The current challenge for media regulators is to maintain a consistent legal response while media platforms busily evolve their devices and delivery mechanisms. With all things technical in flux, the target of media regulation is some sort of ephemeral idea or concept of a particular platform.

Technological Neutrality

In light of the above, it may be overstating the point to say that technological neutrality is the holy grail of modern media regulation – but it is certainly a very good idea.

The principle of technological neutrality states that media laws should be expressed in terms that are indifferent to the technical means by which content is delivered to a particular platform. Free-to-air television should be consistently regulated whether delivered by satellite, terrestrial broadcast or cable; internet content should be consistently regulated whether delivered by DSL, a dial up connection or a 3G network.

The BSA

The BSA was originally intended to be technologically neutral.[3] The definition of 'broadcasting', for example, covers any service that 'delivers television programs' to 'equipment appropriate for receiving that service', and is thus not limited by the mode of carriage or means of reception.[4] The BSA also adopts a regulatory structure that is platform centric. The traditional media 'silos' of print, radio, free-to-air TV and pay TV,[5] are the organising concepts that shape the Act.

It is important to articulate the interaction between these two regulatory tenets. Technological neutrality is directed at the technical means of delivery *within* a platform – it says that similar experiences should be similarly regulated. Platform based regulation allows for different media experiences to be differently regulated. The regulatory coherence of the BSA is failing as it moves away from these foundations.

The principle of technological neutrality has been steadily compromised with specific territory being reserved for internet content,[6] and for mobile devices.[7] In addition, point-to-point services are spe-