on the ACCC's website at www.accc.gov.au/content/index.phtml/itemId/793062.

2 See *Trade Practices Amendment (Telecommunications) Act 1997*.

3 The ULLS was most recently declared by the ACCC on 28 July 2006: see *Commonwealth of Australia Gazette*, No GN31, 9 August 2006.

4 Clause 8.9 of the ACIF Code in turn requires transactions associated with the ordering, provisioning and customer transfer of ULLS also to be in accordance with an industry guideline called ACIF G587:2002, *Unconditioned Local Loop Service IT Specification: Transaction Analysis*.

5 See the ACCC's supporting reasons, paras 24-27.

6 See the ACCC's supporting reasons, paras 2-3 and TPA s 152AR(3)(c), (4A).

7 ACCC's supporting reasons, para 32.

8 ACCC's supporting reasons, para 58ff.

9 ACCC's supporting reasons, paras 62, 64.

10 ACCC's final determination, cl 11.

11 Clause 10 is quoted in full in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at para 9.

12 ACIF Code cl 11.1.1(c).

13 The application was filed on 28 December 2007.

14 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [48]ff, following *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 398-399 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 566 [458] per Weinberg J; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 437-439 [659]-[666] per Tamberlin J.

15 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [52].

16 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [120].

17 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [117].

18 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [118].

19 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [119]. His Honour referred in this context to *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [68] per McHugh, Gummow and Hayne JJ.

20 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [124].

21 ACCC's supporting reasons, para 69ff.

22 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [133]-[138].

23 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [35]-[45].

24 *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68 at [49] per the Court (Ryan, Jacobson and Foster JJ).

25 *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68 at [66] per the Court.

26 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [173].

27 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [181]. In the same context, Rares J also referred to *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at 120 per McHugh and Gummow JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 223-224 [39] per Gleeson CJ, Gummow and Heydon JJ; and *Avon Downs Pty Limited v Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J.

28 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [183].

29 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [189].

30 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [191].

31 Tickner v Chapman (1995) 57 FCR 451 at 462 C-D per Black CJ, quoted by Rares J in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [106].

32 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [119].

33 In so far as this can be done consistently with confidentiality requirements: see for example TPA s 152CZ.

The Future of the 'Multiple Publication' Rule

Anne Flahvin discusses proposals to introduce a 'single publication rule' for internet publications in the UK and whether Australian defamation law might also move in this direction.

The UK Government is considering abandoning the 'multiple publication' rule in favour of a 'single publication' rule with respect to defamatory internet publications.

Such a reform, which would bring UK law in line with US law, has long been urged by online publishers in Australia and the UK. If adopted in the UK it could be expected to lead for calls for a similar reform to Australian law.

What is the 'multiple publication' rule?

The multiple publication rule stems from the 19th century case of *Duke of Brunswick v Harmer*, in which the Duke of Brunswick sent his servant to purchase a back issue of a newspaper published 17 years earlier, thus triggering an action for defamation by the Duke with respect to material contained in the newspaper. The court held that the delivery of the newspaper to the Duke's agent constituted a separate publication of the newspaper for the purposes of defamation law entitling the Duke to sue. The case remains authority for the proposition that defamatory material is published wherever and whenever it is read, seen or heard.

While the rule was relatively uncontroversial in the context of hard copy publications, its application to online publications has attracted much criticism.

One effect of the rule that has caused particular concern to publishers of online archives is its effect on the statute of limitations. Like Australia, the statute of limitations for defamation in the UK is 12 months from the date of publication. When material is available online, the limitation period is effectively open-ended, with a fresh limitation period starting to run each and every time defamatory material is accessed online.[1]

While the rule was relatively uncontroversial in the context of hard copy publications, its application to online publications has attracted much criticism.

Courts in the UK have also held that an online publisher who becomes aware that the truth of an article is disputed, and fails to bring readers' attention to that fact, cannot rely on a defence of qualified privilege if sued for defamation: *Loutchansky v Times Newspapers Ltd.*[2] A qualified privilege that arose in respect of the hardcopy original – based on a duty to publish material in the public interest – was not available with respect to successive online publications. By then there was no public interest to warrant publication.

When material is available online, the limitation period is effectively open-ended

Another effect of the multiple publication rule is to enable a plaintiff to commence an action in any jurisdiction in which the matter complained of was read, seen or heard, subject only to considerations of forum non conveniens. In *Dow Jones v Gutnick*,[3] US publisher Dow Jones urged the Australian High Court to apply a single publication rule, the effect of which would have been to enable Dow Jones to avoid having to defend defamation proceedings in Australia with respect to material made available on a US-based server. The High Court held instead that the multiple publication rule was firmly entrenched in Australian defamation law.

How might a single publication rule operate?

In the US, the single publication rule has been applied by the courts to determine both the place of publication and the time of publication. The Consultation Paper released by the UK Ministry of Justice appears only to canvass the question of *when* publication should be taken to have occurred.

One question canvassed in the Consultation Paper is what would constitute a new publication under a single publication rule. The Paper notes that in the US, in relation to hard copy publications, morning and afternoon editions of a newspaper have been held to constitute separate publications, as have hard copy and paperback editions of a book, but the reprinting of a magazine in response to public demand has been held not to constitute a new publication.

The Paper also asks whether modification of online material should suffice to trigger a fresh publication. In *Firth v State of New York*,[4] it was held that unrelated modifications made to a website did not result in a new publication with respect to a report that had published on the website.

Extending qualified privilege to material in online archives

The UK Consultation Paper has also raised the possibility of maintaining the multiple publication rule, but extending a defence of qualified privilege to online archives outside of the one year limitation period "unless the publisher refuses or neglects to update the electronic version, on request, with a reasonable letter or statement by the claimant by way of explanation or contradiction".

Interaction with limitation periods

Finally, the Consultation Paper seeks comment as to whether it is appropriate to reform limitation periods for defamation.

A 2001 report on Limitation of Actions by the UK Law Council recommended extending the limitation period for defamation to three years.[5] A study by the Commission in 2002 reiterated that recommendation, suggesting that the current short (one year) limitation period combined with a multiple publication rule was disadvantageous for both claimants *and* defendants.

Issues raised for consideration by the Consultation Paper include not only the time period for any new limitation period, but also the question of whether time should begin to run from the date of publication or from the date that the claimant first becomes aware, or could reasonably be expected to become aware, of the publication.

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(Endnotes)

1 *Loutchansky v Times Newspapers Ltd* [2002] 1 All ER 652.
2 Ibid.
3 (2002) 210 CLR 575.
4 (2002) NY int 88.
5 Report No 270.

Pre-paid Calling Cards Industry Update:
Federal Court Proceedings, ACCC Investigations and Recent Communications Alliance Industry Guidelines

Mitch Kelly looks at the increased regulatory attention being paid to pre-paid calling cards.

Background

In recent years, a growing telecommunications market has been the provision of pre-paid calling cards (**Calling Cards**). Using a dedicated card number and a PIN, Calling Cards provide a method for accessing either locally or remotely stored credit for the purpose of making telephone calls (predominantly to international locations).

Increased consumer demand has seen service providers utilising more aggressive marketing strategies to improve their market share. Such strategies have tended to focus on price and value as key differentiators in comparison to competitor products. Historically, these strategies have focused on utilising one, or a combination, of the following:

- advertising that Calling Cards have "No Connection Fee[s]", "24 Hour Great Rates", "Flat Rates" or "No Service Fees";
- advertising that a stipulated number of minutes of calls are available on a Calling Card; and/or
- advertising that a Calling Card can be used for "up to" a specified number of minutes.

However, in practice the use of Calling Cards may involve a wide range of charges in addition to the per-minute calling charge predominantly advertised. These charges may include: connection or disconnection fees; service fees; surcharge fees; as well as calls being charged in blocks of minutes. While a Calling Card may advertise low per-minute call charges (e.g. 3 cents per minute to the UK), in practice these additional charges may range from tens of cents to many dollars, and therefore could significantly diminish the value available using the Calling Card within only a handful of short calls.

The marketing strategies identified above, when viewed in light of the reality of charges applied to use of a Calling Card, have the potential to mislead or deceive customers if not appropriately prepared. It is this potential which was a factor in the industry recently coming to the attention of the Australian Competition and Consumer Commission (**ACCC**). Specifically, the ACCC began querying whether the marketing strategies used by the industry could constitute false, misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth) (**Act**).