CAMLA COMMUNICATIONS LAW
BULLETIN
Communications & Media Law Association Incorporated
Volume 37, No 2. May 2018

# Interview with Geoffrey Robertson QC

It is difficult to introduce a person who requires no introduction. It compounds my difficulty to do so while, in that most lawyerly fashion, avoiding any use of superlatives. So permit me please this "one" editorial indulgence. Give or take Doc Evatt, as one doesn't, Geoffrey Robertson QC may well have achieved more for the causes of human rights and free speech globally than any Australian lawyer to date. Geoffrey is one of the primary authors of Media Law – and I'm not just referring to his textbook of that name.

His resume reads as but a succulent synopsis to his brilliant memoirs, released in February this year, *Rather His Own Man*, which are truly required reading.

After completing his law degree at Sydney University, Geoffrey followed a Rhodes Scholarship to Oxford, and was called to the UK bar shortly after. He would go on to found, and continues to head, Doughty Street Chambers, chambers, which are now second best known for their ground-breaking human rights work. He has appeared as leading counsel in over 200 reported cases, many in the European Court of Human Rights, the House of Lords, the UK Court of Appeal, the UK High Court and the Privy Council, as well as in appellate courts in Singapore, Trinidad, Malawi, Mauritius, New Zealand, Fiji, Malaysia and the Eastern Caribbean – and here in Australia (more about that below). Throughout his illustrious career, Geoffrey has consistently been involved in some of the most high-profile media law cases internationally. He has acted for CBS, Dow Jones, The Sunday Telegraph, Forbes Magazine, the New York Times, Time Magazine and Fortune Magazine. He was also called to defend Salman Rushdie in blasphemy proceedings, and Julian Assange in extradition proceedings in the UK. And yet, we are barely scratching the surface.

**FISHER:** Geoffrey, thank you so much for taking the time to sit down and discuss all things media law with me. On behalf of our readers, I'm grateful for your insights!

**ROBERTSON:** Well, thank you for that overkind introduction. I'm just a jobbing barrister, really. But I do go back a long way – when I wrote the first edition of 'Media Law,' over 30 years ago, it is amazing to think that the title had never been used before. There was defamation and contempt, and obscenity and copyright, and so on, but they were entirely different legal subjects ununified by principles like freedom of expression and open justice.

**FISHER:** You write in *Rather His Own Man* that you have always been a journalist manqué. I suspect that tossing up between a life in the media and one in media law is not an uncommon dilemma for media lawyers. Can you tell us more about what drove you to media law?

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# Editors' Note

Well, first, may we wish you all a merry Privacy Awareness Week and a happy World Intellectual Property Day!

In early March of this year, we published the previous edition - the first of 2018. And, what a few months it has been since!

The EU's game-changing privacy law, the **GDPR**, is coming into effect on 25 May 2018, and it affects Australian businesses. More about that inside. The Government responded to the **Productivity Commission**'s report on data availability and use. The OAIC released its report on **Data Analytics and the APPs**, and its first quarterly report on the mandatory notifiable data breach scheme, finding that in about two months, 63 data breaches had been notified, as compared to 114 on a voluntary basis for the whole 16-17 financial year. Almost a quarter of notifications came from the **health service providers** industry. More about that inside.

Information came to light about the way **Cambridge Analytica** was processing information collected from **Facebook**, which caused a bit of stir. Users moved to publicly #DeleteFacebook in a protest. Class action suits were commenced. Mark Zuckerberg was summoned to testify before Congress. Regulators around the world are investigating. Here, the Privacy Commissioner opened an investigation on 5 April 2018, and the Australian Competition and Consumer Commission is shifting the focus of its digital platforms inquiry to privacy protection and the fairness of Facebook's terms and conditions. Facebook shares plummeted in the week and a half after the revelations, proving once and for all how costly it is to not comply with privacy law. Then, a couple of months later, they went back up to what they were previously - proving that there either is or isn't a moral to this story. More about Facebook inside.

On the topic of the **ACCC inquiry into digital platforms**, submissions have been published. There were 57 in total, including contributions from most major Australian media organisations, industry bodies, unions and advertisers. In a 144-page submission, **News Corp** submitted that a number of digital platforms possess substantial market power and are engaging in anti-competitive practices that prevent publishers from competing on the merits. The **MEAA** estimated that since 2011, a quarter of all journalists in Australia have been made redundant. **Foxtel** complained of "unauthorised hosting and distribution of copyright material by digital platforms, material that is created and paid for by the platforms' competitors", and gave examples of Fox Sports content available on YouTube.

In the Government's **competitive neutrality inquiry**, the expansion of the ABC's online news service, ABC iView, SBS On Demand and other services, is being examined in light of complaints from Foxtel, News Corp and Fairfax about taxpayer-funded media crowding them out.

**Dodo**, **iPrimus** and **Commander** have undertaken to offer remedies to customers who couldn't receive the internet speeds they bought because their **NBN** connection was incapable of delivering it. The **ACCC** has separately commenced proceedings against **Telstra**, alleging that false or misleading representations were made to consumers in relation to its third-party billing service known as Premium Direct Billing. It appears the parties have agreed to consent orders, which involve Telstra paying pecuniary penalties totalling $10 million.

On the defamation front, the jury in **Sophie Mirabella**'s claim against the **Benalla Ensign** held that an article that she pushed **Cathy McGowan** was defamatory. **Geoffrey Rush** succeeded in preventing **Nationwide News** joining the **Sydney Theatre Company** as a co-defendant in the proceedings, although the Court did not rule out Nationwide News seeking to pursue the Sydney Theatre Company for contribution by way of separate proceedings. And **Stormy Daniels** is suing **Donald Trump**.

In this edition, we have a chat with **Geoffrey Robertson QC** about free speech, censorship and defamation. **Demetrios Christou** and **Eva Lu** from Thomson Geer discuss the Cambridge Analytica story. **Peter Leonard** from Data Synergies gives us the second part of his thoughts on the new data breach law, this time taking us through data breach laws around the world. Over at Allens **Valeska Bloch** sets out some of the issues to arise out of the mandatory data breach notification scheme, and **Gavin Smith**, **Jessica Selby** and **Claudia Hall** discuss the implications of the Federal Government's response to the Productivity Commission's report on data availability and use. **Michael Boland** interviews Seven's commercial director, **Bruce McWilliam**. We have two pieces from our friends at MinterEllison, the first by **Veronica Scott** and **Ashleigh Fehrenbach** on the GDPR, and the second piece about the cabinet papers scandal from **Katherine Giles**. Two of our essay competition's finalists are published: **Penelope Bristow** on the challenges of defamation law in a social media environment, and **Claudia Carr** on Net Neutrality in Australia.

**Victoria and Eli**

**ROBERTSON:** I was always – from my teenage years – fighting against censorship, and at the same time I was interested in journalism. I wrote for 'The New Statesman' and 'The Guardian' whilst studying for bar exams. I guess I was interested in exploring the similarities between these apparently disparate subjects – obscenity, defamation, contempt and so on. I began with obscenity – the OZ case – and then moved on to contempt and libel, always trying to argue, sometimes to create, public interest defences. My most important client was the Wall Street Journal – 'The American Lawyer' called me 'Dow Jones man about the Commonwealth' – and they were very principled about fighting for free speech, even in Singapore where it was impossible to win against Lee Kuan Yew.

**FISHER:** Was your passion for human rights born from your work in defence of free speech and a free press, or was it simply a separate devotion for you?

**ROBERTSON:** I don't think you can separate freedom of expression from other human rights. I started doing death penalty cases at the same time, and some of my most important appellate victories have concerned due process. They are all, in a way, about life, liberty and the pursuit of happiness.

**FISHER:** You talk of your "pommified" accent in your book. But you have always proudly considered yourself Australian as well, especially during the Ashes (current tumults in Australian cricket notwithstanding). What impact did your upbringing in Australia have on your life in law, practising predominantly in the UK?

**ROBERTSON:** That's a good question, and I am not sure of the answer, other than that my American clients - journalists and editors – found it strangely reassuring that despite my accent and my English QC-ship, I was really Australian. English barristers tend to come across as upper-class, snobbish and stiff-shirt, traits Americans do not associate with Australians.

**FISHER:** The title of your memoirs "Rather His Own Man" derives from a comment, intended but not quite received as derogatory, which a Permanent Secretary made to a Minister who was intending to propose your appointment to an important European judicial position. In other words, you could not be trusted always to do what the government might want. Later in your book, you liken one of your clients Julian Assange – another Australian – to "that swagman in 'Waltzing Matilda', determined not to be taken alive, even if it means living in a converted toilet in the Ecuadorian embassy. Is there, in your experience, something inherently Australian about nonconformism?

**ROBERTSON:** Australians like to think so, but when I grew up there we seemed to be the most conformist country of all. It's really a myth, like thinking we are an egalitarian country because we ride in the front seat of taxis. It's a delusion really.

**FISHER:** You consulted to the Australian Government on defamation law reform in 1984, and have been involved in defamation work in Australia throughout your career, starting out sitting behind the likes of Tony Larkins and Clive Evatt as an articled clerk, and arguing for Dow Jones in the High Court, in the case brought by Joe Gutnick in 2003. There are some lingering irritants about Australian defamation law for you though. In particular, there is no public interest defence in defamation. Based on your experience, why is such a defence so important and how should it work?

**ROBERTSON:** I think Australian law really lags here, in this respect. The High Court did a great thing by drawing 'democratic implications' out of the constitution, permitting free speech in 'political matters,' but we need free speech in other areas, especially about business. Countries like Britain and New Zealand and Canada have public interest defences based on freedom of expression clauses in their Bill of Rights – we have no such equivalent. But I think the other systemic problem in Anglo-Australian libel law is the burden of proof being placed on the media defendant. In every other

branch of civil law those who bring the claim have to prove it. That is why US courts will not enforce Australian libel judgements, thanks to a case – *Bachchan v India Abroad* – in which I gave expert evidence and the judge said that forcing the defendant to prove truth, fair comment, etc. was 'antipathetic to the first amendment.' We will never get defamation law right in this country until the burden of proof is placed on the plaintiff.

**FISHER:** Another source of frustration for you is the relative lack of protection for a journalist's sources. What experiences have you had in other jurisdictions that reinforce how important such protections can be?

**ROBERTSON:** Well, I argued *Goodwin v UK*, the most important case on the subject, in which the European Court of Human Rights accepted that there would be a lot less news of public interest if journalists could not protect their sources. The rule applies now in 47 European countries, but not in Australia – another aspect in which media law in Australia is defective.

**FISHER:** Coming back to *Gutnick v Dow Jones,* a decade and a half down the track, and with the internet considerably more developed and better understood, was it the right decision?

**ROBERTSON:** No, and it's been politely 'distinguished' by courts in other countries. The judges on the High Court at the time could not distinguish between a newspaper and the internet, and I failed to enlighten them.

**FISHER:** You were involved in the *Spycatcher* case, with another talented Australian media lawyer. Can you tell us the story there, and what that has taught you about attempts by the state to censor works of art and literature?

**ROBERTSON:** I gave Malcom Turnbull the case, which was the making of him and so I guess I am responsible for his rise and rise. But you know why I gave him the case? Because all the other so called 'media lawyers' we tried, in Melbourne and Sydney, were utterly hopeless. They were ignorant of the free speech principles, and they said we had no chance in Australia. I hope they are better now, 30 years on. The 'Spycatcher' effect now stands for the proposition that censorship is counter-productive: it just sells more books.

**FISHER:** Part of the curse of a legal trailblazer is having to make arguments without being able to rely on precedent. In fact, you have been criticised by some courts for bringing what they consider to be airy-fairy arguments about free speech without reliance on precedent or statute. How do you advise clients about the merits of an untested argument, and how do you personally deal with the stress of making it?

**ROBERTSON:** It's less of a problem nowadays because most counties in which I appear have Bills of Rights or constitutional guarantees of free speech, and even in Australia we are party to UN treaties and can cite judgments from the UN Human Rights Commission and so on. Some judges remain absurdly insular, like the fellow I struck in Victoria in the *Gutnick* case, but most are receptive and prepared to consider ways that other courts in other countries have approached the same problem.

**FISHER:** You were inspired to be a barrister by the *Trial of Lady Chatterley.* An aversion to censorship, especially of works of a sexual nature, has driven you to defend the freedoms of artists and authors throughout your career, which included you writing your text on the matter, *Obscenity.* Your protest against censorship famously caused the Canadian authorities some embarrassment, if memory serves me. Why is censorship such a concern for you – and where should the line be drawn?

**ROBERTSON:** Censorship issues have changed. When I started, the battle was against the wowsers, the puritans in power around the world, whose decisions might be challenged by a jury verdict. We won freedom for good literature and then for bad or amateur literature, but now with Snowden and Assange the battle is over information. There are still too many areas covered up by Freedom of Information exemptions.

**FISHER:** Why was *Jameel* so important for you, and what do you hope develops in its wake?

**ROBERTSON:** There are two *Jameel* cases. One – which has caught on – is that disproportionate claims should be stayed, or struck out. The other, more important, is that a public interest privilege defence should apply to incidental defamation – i.e. when the story itself has public interest and the defamatory statement is reported not because the imputation is true but because the statement was made and was newsworthy. In the UK, *Jameel* has led to useful changes in the law – a new defamation act which excludes inconsequential libels and a reasonably strong public interest defence. It was a case we lost at Trial and in the Court of Appeal – thank goodness we had clients like the Wall Street Journal prepared to hazard millions on a win in the House of Lords! Free speech can be expensive speech.

**FISHER:** What challenges lie ahead for free speech? What work will media lawyers be consumed by in the coming years?

**ROBERTSON:** The problem now in Europe and the US is privacy, and the role of journalism as propaganda, and the ability of propagandists to sway democratic choice – see the Cambridge Analytica scandal. There will be plenty for media lawyers to do in the future!

**FISHER:** Geoffrey, thank you so much for your time. We are grateful for the work you do, and for your spending the time to tell us about it.

**ROBERTSON:** My pleasure.