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Australian Media Law and Regulation – An Overview

Mainz Media Forum
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The Australian Media Landscape

PBL

Publishing and Broadcasting Ltd
NINE Network, NBN

ABC

TV/Radio

SBS

TV/Radio

News Corporation ("Murdoch")

Sky News, Fox Tel, Fox Sports,
Print: Daily Telegraph,
The Australian

Fairfax Media

Print:
Sydney Morning Herald,
The Age, Canberra Times

Seven Media Group

Seven TV network,
stakes in other media
companies (KKR &
Kerry Stokes)

Southern Cross Broadcasting

Regional Television
and Radio



Constitutional Power and Regulation

Section 51(v) Commonwealth Constitution

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

[...]

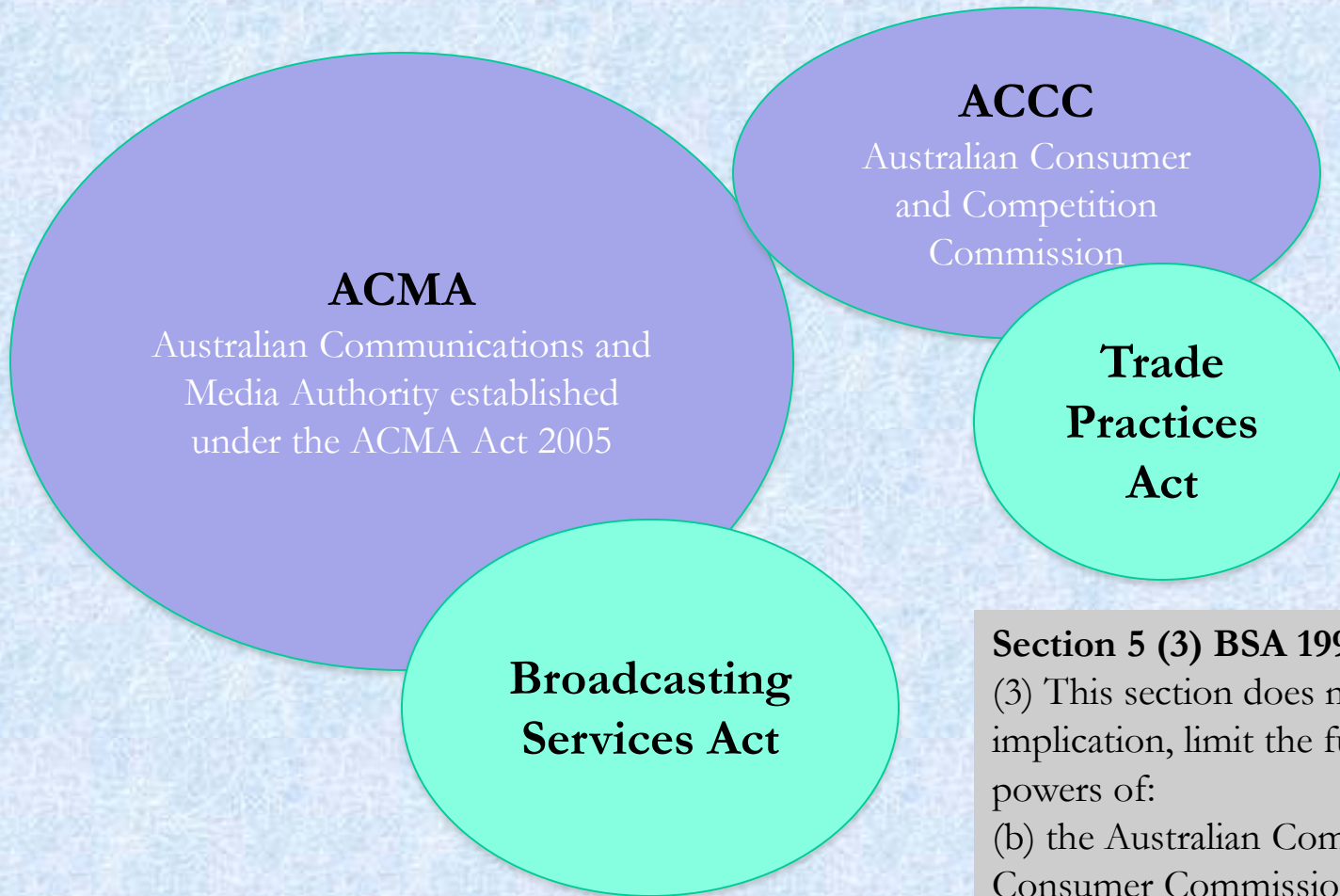
(v) postal, telegraphic, telephonic, and other like services;

[...]

Main Regulatory Framework

- Broadcasting Services Act 1992 (Cth)
- Telecommunications Act 1997 (Cth)
- Radiocommunications Act 1992 (Cth)
- Trade Practices Act 1974 (Cth)
- Foreign Acquisitions and Takeovers Act 1975
(regulating foreign ownership of broadcasters)

The Regulatory Framework



Section 5 (3) BSA 1992:

(3) This section does not, by implication, limit the functions and powers of:

- (b) the Australian Competition and Consumer Commission [ACCC]; or
- (c) any other body or person who has regulatory responsibilities in relation to the internet industry.

ABC Act 1983 – Section 6 (Charter)

- (1) The functions of the Corporation are:
 - (a) to **provide within Australia innovative and comprehensive broadcasting** services of a high standard as part of the Australian broadcasting system consisting of national, commercial and community sectors and, without limiting the generality of the foregoing, to provide:
 - (i) **broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and**
 - (ii) **broadcasting programs of an educational nature;**
 - (b) to transmit to countries outside Australia broadcasting programs of news, current affairs, entertainment and cultural enrichment that will:
 - (i) **encourage awareness of Australia and an international understanding of Australian attitudes on world affairs; and**
 - (ii) **enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs and Australian attitudes on world affairs; and**
 - (c) **to encourage and promote the musical, dramatic and other performing arts in Australia.**

SBS Act 1991 – Section 6 (Charter)

- (1) The principal function of the SBS is to **provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society.**
- (2) The SBS, in performing its principal function, must:
 - (a) contribute to meeting the communications needs of Australia's **multicultural society**, including ethnic, Aboriginal and Torres Strait Islander communities; and
 - (b) increase awareness of the contribution of a diversity of cultures to the continuing development of Australian society; and
 - (c) promote understanding and acceptance of the **cultural, linguistic and ethnic diversity** of the Australian people; and
 - (d) contribute to the retention and continuing development of language and other cultural skills; and
 - (e) as far as practicable, inform, educate and entertain Australians in their preferred languages; and
 - (f) make use of Australia's diverse creative resources; and
 - (g) contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the [ABC] and the community broadcasting sector; and
 - (h) contribute to extending the range of Australian television and radio services, and reflect the changing nature of Australian society, by presenting
many points of view and using innovative forms of expression.

Examples of co-regulation (with ACMA)

- Commercial television code of practice
- Commercial radio code of practice
- Australian Communications Industry Forum consumer codes/billing code
- IIA – Internet Industry Association Codes of Practice, e.g.
 - IIA Content Code of Practice
 - IIA Interactive Gambling Code
 - IIA Spam Code

Examples of Self Regulation

- [AANA Code of Ethics](#) includes a code for advertising for children
- [MEAA Code of Ethics](#) for journalists
- Advertising Standards Board hears complaints about advertisements
- Australian Record Industry Association governs a code of practice for explicit lyrics
- Alcoholic beverages code

AANA = Australian Association of National Advertisers
MEAA = Media Entertainment and Arts Alliance

Categories of broadcasting licences

There are **different categories of licences under the BSA**, including:

- National broadcasting services (eg the ABC, SBS);
- Commercial broadcasting services (eg Channel 9, 2GB);
- Community broadcasting services (eg 2XX Canberra);
- Subscription services (eg satellite or cable TV); and
- Narrowcasting services.

Commercial broadcasting services:

- Are for-profit (“commercial”)
- Usually funded through advertising revenue
- Provide programs of general appeal
- Free to air
- Can be sold for a profit
- Usually allocated via a price-based auction.

National broadcasting services:

- Government-owned services (ABC, SBS)
- Established to fulfill particular cultural functions.

Media Ownership Rules under the BSA After 2007

Pre 2007 Cross-ownership rules repealed:

- ➔ Looked only at local cross-ownership; did not look at national market; did not restrict vertical integration (➔ production, distribution, marketing, advertising); **did not take into account convergence** ➔ Repealed 2007

Broadcasting Licensing Controls under Sec. 53 et seq.:

- ➔ No one person to control more than one commercial TV broadcasting licence or more than two commercial radio licences in the same licence area.
- ➔ No person to own commercial television licences that reach more than 75% of the Australian population

Media Diversity under Sec. 61:

- ➔ At least 5 independent voices in metropolitan markets and 4 independent voices in regional markets (“voices-test”)
- ➔ determined on a point-system
- ➔ ABC, SBS, free local papers, narrowcasting, subscription and community broadcasting and online media do not count
- ➔ prohibits three-way control in a given license area (radio, TV, paper)

New Developments:

Measures to Improve Safety of the Internet for families

The Government will introduce legislative amendments to the Broadcasting Services Act:

- Introduction of mandatory ISP-level filtering of Refused Classification (RC) –rated content.
- A grants program to encourage the introduction of optional filtering by ISPs, to block additional content as requested by households.
- An expansion of the cyber-safety outreach program run by the ACMA and the Cyber-Safety Online Helpline – to improve education and awareness of online safety.

RC-rated material includes child sex abuse content, bestiality, sexual violence including rape, and the detailed instruction of crime or drug use.

The Development of an Implied Constitutional Freedom of Communication

Broader Constitutional Framework

Section 51(v) Commonwealth Constitution

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

[...]

(v) postal, telegraphic, telephonic, and other like services;

[...]

Sections 7 and 26 Commonwealth Constitution

Section 7:

The Senate shall be composed of senators for each State, **directly chosen by the people of the State**, voting, until the Parliament otherwise provides, as one electorate.

Section 26:

The House of Representatives shall be composed of members **directly chosen by the people of the Commonwealth [...]**

Nationwide News Pty Ltd v Wills

(1992) 177 CLR 1

Facts:

Publisher of The Australian newspaper prosecuted under s.299(1)(d)(ii) of the Industrial Relations Act 1988 (Cth):

“(1) A person shall not: [...] (d) by writing or speech use words calculated: (ii) to bring a member of the Commission or the Commission into disrepute.”

Because of an article stating:

“The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.”

Nationwide News Pty Ltd v Wills

(1992) 177 CLR 1

Dean and Toohey JJ:

There are at least three main general doctrines of government which underlie the Constitution and are implemented by its provisions:

1.The doctrine or concept of a federal system

2.The doctrine of a separation of legislative, executive and judicial powers and

3.The doctrine of representative government

➔ Ultimate power of governmental control for the people

➔ By way of electoral process (houses of parliament and by way of control of executive power through parliamentary majority

➔ By direct vote as pouvoir constituant

Nationwide News Pty Ltd v Wills

(1992) 177 CLR 1

Dean and Toohey JJ:

Therefore:

The people [...] would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. **The actual discharge of the very function of voting in an election or referendum involves communication.** [...] The ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, [...]. Moreover, **the doctrine of representative government which the Constitution incorporates is not concerned merely with electoral processes.** [...] [The] **relationship, between representatives and represented, [which] is a continuing one.** The doctrine presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf.

Australian Capital Television Pty Ltd & New South Wales v Commonwealth

[1992] HCA 45; (1992) 177 CLR 106 (30 September 1992)

Facts:

Challenge to the validity of the [Political Broadcasts and Political Disclosures Act 1991](#) which added new Part IIID “Political Broadcasts” to an older Broadcasting Act.

Section 95B imposed a **blanket prohibition on political advertisement** on radio or television during federal election periods. Exceptions were made for policy launches, news and current affairs, talkback radio and advertisements for charities that did not “explicitly advocate” a vote for a specific candidate or party.

Div. 3 of Part IIID imposed on broadcasters an **obligation to make available free of charge units of "free time" for election broadcasts** to a political party, person or group to whom the Australian Broadcasting Tribunal ("the Tribunal") has granted such free time plus relevant criteria for the selection and detailed provisions of what could be shown and who had to speak .

Australian Capital Television Pty Ltd & New South Wales v Commonwealth

[1992] HCA 45; (1992) 177 CLR 106 (30 September 1992)

Dawson J.:

(On creating fundamental rights by implication)

[186] Indeed, those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine. Not only that, but the heresy of importing into the Constitution, by way of implication, preconceptions having their origin outside the Constitution has been exposed and decisively rejected in the Engineers' Case. [...] To say as much is not for one moment to express disagreement with the view expressed by Murphy J. that freedom of movement and freedom of communication are indispensable to any free society. It is merely to differ as to the institutions in which the founding fathers placed their faith for the protection of those freedoms.

Australian Capital Television Pty Ltd & New South Wales v Commonwealth

[1992] HCA 45; (1992) 177 CLR 106 (30 September 1992)

Dawson J.:

[182] Freedom of speech, for example, which is guaranteed in the United States by the First Amendment to the Constitution, **is a concept which finds no expression in our Constitution**, notwithstanding that it is as much the foundation of a free society here as it is there. **The right to freedom of speech exists here because there is nothing to prevent its exercise and because governments recognize that if they attempt to [183] limit it, save in accepted areas such as defamation or sedition, they must do so at their peril.**

Not only that, but courts recognize the importance of the basic immunities and require the clearest expression of intention before construing legislation in such a way as to interfere with them. The fact, however, remains that in this country **the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values.**

Australian Capital Television Pty Ltd & New South Wales v Commonwealth

[1992] HCA 45; (1992) 177 CLR 106 (30 September 1992)

Mason J.:

(on restrictions on the freedom of communication)

45. Hence, the concept of freedom of communication is not an absolute. The guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public. Thus, to take an example, Parliament may regulate the conduct of persons with regard to elections so as to prevent intimidation and undue influence, even though that regulation may fetter what otherwise would be free communication [...].

46. A **distinction** should perhaps be made between **restrictions on communication which target ideas or information** and those which **restrict an activity or mode of communication** by which ideas or information are transmitted. In the first class of case, **only a compelling justification** will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication.

Australian Capital Television Pty Ltd & New South Wales v Commonwealth

[1992] HCA 45; (1992) 177 CLR 106 (30 September 1992)

Mason J.:

(on restrictions on the freedom of communication)

47. On the other hand, restrictions imposed on an activity or mode of communication by which ideas or information are transmitted **are more susceptible of justification**. The regulation of radio and television broadcasting in the public interest generally involves some restrictions on the flow and dissemination of ideas and information. Whether those restrictions are justified calls for a **balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing public interest** [...]. If the restriction imposes a burden on free communication that is **disproportionate** to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication.

48. In weighing the respective interests involved and in assessing the necessity for the restriction imposed, **the Court will give weight to the legislative judgment** on these issues. But, in the ultimate analysis, it is for the Court to determine whether the constitutional guarantee has been infringed in a given case.

Lange v ABC

[1997] HCA 25; (1997) 189 CLR 52

Facts:

In April 1990 the ABC broadcast a report alleging that the New Zealand Labour Party, then in government, had come to be improperly under the influence of large business interests, as a result of those interests making large donations to New Zealand Labour's 1987 election campaign funds. The plaintiff was the Prime Minister of New Zealand at the relevant time. Lange held the report to convey the false and defamatory imputations that, as Prime Minister, he:

- a. had permitted big business donors to dictate government policy, and had allowed public assets to be sold to some of those donors in repayment for their donations;
- b. had abused, and was unfit to hold, public office in that he had permitted a debt incurred by his party in the election campaign to be written off by awarding a government contract to the creditor;
- c. was corrupt and deceitful in that he had accepted gifts of shares and profits on share trading from a leading business figure, and had permitted that figure to set up a share trading account on his behalf, all in return for permitting the business figure to influence government policy in favour of business interests.

Lange v ABC

[1997] HCA 25; (1997) 189 CLR 52

Questions:

1. Can the implied freedom of communication be used as a constitutional defense in a defamation claim?
2. Is freedom of communication a personal right or is it just a limitation to legislative and executive power?

Answers:

NO

Implications of Answer:

NONE (???)

Wide construction of constitutional limits on common law of defamation; technically this is not a matter of constitutional law but of the construction of common law, notwithstanding that the common law construction is constitutionally influenced (“objektive Funktion der Grundrechte”)

Lange v ABC

[1997] HCA 25; (1997) 189 CLR 52

Eingriff und Rechtfertigung (Verhältnismäßigkeit):

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by [ss 7, 24, 64](#) or [128](#) of the Constitution, two questions must be answered before the validity of the law can be determined.

First, does the law **effectively burden freedom of communication** about government or political matters either in its terms, operation or effect?

Second, if the law effectively burdens that freedom, **is the law reasonably appropriate and adapted to serve a legitimate end** the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by [s 128](#) for submitting a proposed amendment of the Constitution to the informed decision of the people?

If the first question is answered "yes" and the second is answered "no", the law is invalid.