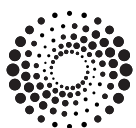


The Law Handbook

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Media Law

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[31.10] Media and telecommunications are regulated in Australia by a number of different laws, some of which are enforced by governments or government regulators, and some of which rely on industry self-regulation.

These regulations affect not only large companies like News Corp Australia (which sells newspapers, pay television and other services)

but also community organisations and individuals who operate a community radio station, set up an internet home page or write an article for a newsletter.

This chapter looks at the laws that regulate broadcasting services (radio and television) and print media organisations. Online services are covered in Chapter 30, Internet Law.

REGULATION OF THE MEDIA

Legal requirements

[31.20] Radio and television

Historically, governments saw broadcasting services as having a role in civil society that is different from the supply of other goods and services, and they have set certain cultural and social goals for broadcasting.

As a result, there are substantial legal requirements for television and radio. There have also been public interest objectives established for the regulation of broadcast media ownership.

The principal legislation dealing with television and radio is the *Broadcasting Services Act 1992* (Cth).

Broadcasting licences

Under the Act, all commercial and community television and radio broadcasters in Australia must hold a licence issued by the government regulator, the Australian Communications and Media Authority.

Allocating radiofrequency

One of the functions of broadcasting regulation is the allocation of radiofrequency.

Radio, television and mobile phones all function through the *radiofrequency spectrum*. As the space within this spectrum is limited, careful planning is

required in the allocation of frequencies for various purposes. Since the merger of the Australian Communications Authority and the Australian Broadcasting Authority in 2005, one government regulator, the Australian Communications and Media Authority, is responsible for spectrum planning.

Planning and licence allocation

The Australian Communications and Media Authority (ACMA) has an *Australian Radiofrequency Spectrum Plan* which covers broadcasting services nationally. However, broadcasting regulation in Australia is largely based on local licence areas. Each licence area is a designated geographical area for which the ACMA will develop a *Licence Area Plan*. These help to determine how many licences will be issued for commercial operators or community operators in a given region.

The authority licenses individual operators to provide services in specific licence areas. Licences are allocated in different ways, depending on the type of service.

Rules about ownership of commercial television, commercial radio and newspapers are also made with reference to licence areas. Even though we speak of national networks, such as the Seven Network, generally licences are issued for specific areas, not for the whole of Australia. An important exception is the category of *subscription broadcasting services* (pay TV).

Broadcasting services

Broadcasting licences are allocated under the *Broadcasting Services Act* in several categories listed in Pt 2 of the Act. The major categories of broadcasting service are:

- the national broadcasters (the ABC and SBS);
 - commercial broadcasters (such as 2-Day FM or the stations that make up the Nine Network);
 - community broadcasters (such as 2SER or Radio Northern Beaches);
 - subscription broadcasters (pay TV providers, such as Foxtel).
-

Class licences

Some providers do not need a specific licence because they are covered by *class licences*, which amount to an ongoing authority for some types of broadcaster to operate as long as they comply with certain conditions.

Subscription radio and *narrowcasting* television and radio services operate under class licences. Narrowcasting services are intended to serve only a very small geographical area, such as a particular hospital or university campus. Nevertheless, these services still need a transmitter licence from the ACMA.

How licences are allocated

The ABC and SBS operate under their own Acts of parliament (the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth)) and do not need broadcasting licences allocated by the ACMA.

Licences for community radio and television stations are allocated on the basis of merit. These stations are intended to appeal to specific audiences. New community broadcasters can apply for access to a frequency for test broadcasts.

Other types of new licence are allocated by auction.

[31.30] Media ownership

Ownership and control of media organisations in Australia is regulated by several federal Acts, including:

- the *Broadcasting Services Act*;
- the *Competition and Consumer Act 2010* (Cth).

The most controversial aspects of media ownership relate to foreign investment and cross-media ownership. Important amendments to broadcasting legislation made in 2006 (which took effect in

2007) repealed most of the laws relating to foreign ownership and cross-media ownership in Australia. This was replaced by the *Register of Controlled Media Groups* and the media diversity rules.

Media diversity rules

The *Broadcasting Services Act* lays down rules intended to promote diversity in media ownership. These were relaxed in 2007 and again in 2017. The most important change introduced in 2017 was the abolition of the restriction whereby no commercial television network could broadcast to more than 75% of the Australian population. Other rules, relating to individual television and radio licence areas, were amended to permit greater concentration of ownership of local media. For instance, it is now possible for a radio licence area to be served by a commercial television station, a commercial radio station and a local daily newspaper, all controlled by the same media organisation. Generally speaking that was not possible prior to 2017.

Other rules continue to apply. For example, no one may exercise control over – more than one commercial television station in any one television licence area; more than two commercial radio licences in any one radio licence area.

There are additional rules intended to prevent one person from taking exclusive control over all radio, television and print media in any given radio licence area. The ACMA awards points to each radio licence area depending on the extent to which the media outlets covering that area are separately controlled: the more points, the greater the diversity of media ownership. The ACMA will not allow a media operator to take over licences owned by another media operator if doing so will reduce the number of points (and thereby diversity of media ownership) below a certain threshold. Even so, the number of commercial media outlets serving a region will ultimately be limited by what is commercially viable.

The Register of Controlled Media Groups

The government regulator, the ACMA, is required to maintain a Register of Controlled Media Groups that lists the media groups in all radio licence areas in Australia. The Media Control Database is publicly accessible via the ACMA's website.

[31.40] Print media

The print media in Australia (newspapers, magazines and other publications) is regulated differently from radio and television.

Unlike with broadcasting, there are few rules specifically governing print media. Most laws that affect the print media affect all media outlets (such as defamation, see [31.110]). Part of the reason is that the Australian Constitution grants the federal government fewer controls over print media compared with its powers over broadcasting services.

Even so, laws exist in some states, including New South Wales, which specifically affect print media. They cover notification of certain particulars (*imprint requirements*) and deposit requirements for certain kinds of publications. The main purpose of these laws is to prevent the distribution of printed matter by unknown persons.

Who can produce print publications?

Generally, any person, company or other organisation can publish and distribute newspapers, magazines, newsletters, books, monographs and so on without a special licence.

Imprint requirements

New South Wales' imprint requirements are contained in its *Printing and Newspapers Act 1973* (NSW). Most printed documents that are offered for sale, distributed or publicly displayed must include the printer's name and business address, the name and business address of the person for whom the document was printed (if different), as well as the year in which it was printed. Notices relating to the sale of property are exempt. The printer is required to retain a copy for six months and surrender it to the police if requested.

What is a document and what is "printing"?

These terms are defined very broadly. Documents are defined to include books, pamphlets, leaflets, circulars, advertisements, posters, magazines and other periodical publications (but not newspapers).

Regulation of content

[31.50] Classification and censorship

It is generally thought that regulation of obscene or offensive content in Australia has largely moved away from a *censorship* model and towards a *classification* model.

"Printing" is not a term limited to massive print runs but can include photocopying or the printing out of a single copy from a home computer.

Newspapers

In NSW, a "newspaper" is defined as any paper containing public news, or observations on the news or on political matters, which is sold or distributed for free at intervals not exceeding 26 days. Newspapers must bear the names and addresses of the publisher and printer on the front cover, or on the first or last page.

International numbering systems

Although not compulsory, it is highly advisable to register publications with the international books or serials numbering systems (ISBN and ISSN). This can be done on the internet by visiting www.bowker.com/international/Thorpe-Bowker.html.

Registration enables the title to be identified and its publisher tracked from anywhere in the world. This is particularly useful for specialised titles published by small organisations without significant marketing resources.

Registration

Newspapers and printing presses need not be registered in NSW.

Deposit copies

The *Copyright Act 1968* (Cth) requires that a copy of all published material (books, pamphlets and so on) be deposited with the National Library of Australia. In NSW, various Acts also require copies to be lodged with:

- the State Library of NSW;
- the NSW Parliamentary Library;
- the University of Sydney Library.

This means that, generally speaking, classifiers do not seek to ban products. Instead they aim to:

- provide labelling to inform audiences and readers of the content;
- restrict access to some products so that they will not be freely available to children and teenagers.

Banning publications

Occasionally some publications, films and computer games are banned outright – that is, they are rated “RC” (Refused Classification). Decisions around whether to refuse classification are often highly controversial.

Developments in technology

In the past, classifiers approached material differently depending on whether it took the form of a television or radio program, internet content, video game, cinema release or print. Convergence of technology presents new problems for classifiers. Largely, different formats are still treated separately, although a review of two sets of guidelines used in classification of film and computer games resulted in their combination in 2003.

A further challenge for the industry is presented by the availability of “media” content on mobile phones.

[31.60] Classification schemes

There are three major (and separate) schemes for classification in Australia.

Television and radio

The *Broadcasting Services Act* and various industry codes of practice deal with classification of television and radio programs.

Internet content

The online content regulation scheme (set out in *Broadcasting Services Act*, Schs 5, 7 and in industry codes) deals with internet content. This is considered in Chapter 30, Internet Law.

Other media

The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and corresponding state and territory legislation make up the classification system for films, videos, DVDs, computer games, magazines and other print publications. The federal Act establishes the National Classification Code. This is supplemented by three sets of guidelines, dealing respectively with films, computer games and print publications.

Films, videotapes, DVDs, computer games and certain print publications must be classified by the Classification Board before they can be sold, hired or shown publicly.

The Classification Board

The basis for all classification systems is the principle of applying current community standards.

Members of the Classification Board (which classifies material required under the Act to be submitted) are drawn from the community.

Classifiers take into account contemporary community standards as well as other matters associated with the category of the work.

Classification principles

The classification guidelines set out certain principles that underlie the work of the Board.

These principles are that:

- adults should be able to read, hear and see what they want;
- minors (ie, people under 18 or, in some cases, people under 15) should be protected from material likely to harm or disturb them;
- people should be protected from unsolicited material that they find offensive;
- there is a need to take into account community concerns about:
 - depictions that condone or incite violence, particularly sexual violence;
 - the portrayal of people in a way that demeans them.

Determined markings

There is a system of *determined markings* under which symbols and warnings must be displayed on certain films, film trailers, CDs, DVDs, computer discs and games, amusement arcade machines and printed publications, as well as advertisements for any of these.

Appeals

There is an appeal body, the Classification Review Board, which conducts reviews when requested by:

- the Attorney-General;
- the person who submitted the item for classification;
- the person who published the item;
- certain other “aggrieved persons” who might have an interest in the matter.

An aggrieved person is:

- someone whose research interests or activities relate to the contentious aspects of the theme or subject matter of the film, game or publication; or

- an organisation whose objects or purposes include, and whose activities relate to, the contentious aspects of the theme or subject matter of the film, game or publication.

Film classifications

Classifications for films, videos and DVDs are:

- G (general);
- PG (parental guidance recommended);
- M (recommended for mature audiences);

- MA15+ (mature accompanied – not suitable for people under 15, who must be accompanied to a cinema viewing by a parent or adult guardian);
- R18+ (restricted to people 18 and over);
- X18+ (containing “consensual sexually explicit activity” – restricted to people 18 and over);
- RC (refused classification).

A film classified X18+ can be sold or hired only in the ACT and the Northern Territory.

Material refused classification cannot be exhibited, sold or hired.

Hannibal and Baise-moi

These two films provide good illustrations of the degrees of separation between films given restricted access ratings and films that are banned.

Both films were classified by the Classification Board, then released for exhibition, then classified again by the Classification Review Board after a few complaints about their content.

Hannibal first received an MA15+ rating, meaning that people under 15 would not be admitted to see it unless accompanied by an adult. It played at multiplex cinemas and was seen by large numbers of people.

Baise-moi was released with an R18+ rating, meaning that people under 18 would not be admitted. It played at a small number of cinemas and was seen by approximately 50,000 people.

In both cases, the Attorney-General acted on complaints received about violence (and, in the case of *Baise-moi*, sex and sexual violence) in the films.

What the Classification Review Board decided

In reviewing the decisions, the Classification Review Board (see Appeals at [31.60]) came to the conclusion that *Hannibal* contained material that might disturb or offend people under 18, and changed the film’s rating to R18+, so that henceforth only people 18 or over could see it.

The Review Board decided that *Baise-moi* had some artistic merit, but given the graphic nature of some scenes, their duration and the frequency of sex, violence and dark themes, on the whole the film could be said to offend against the standards of morality, decency and propriety generally accepted by reasonable adults. The film’s R18+ rating was revoked and it was refused classification, meaning that it cannot be publicly exhibited or offered for sale or hire in Australia.

Classification of print publications

Most print publications do not need to be submitted for classification. Print publications such as magazines only need to be submitted if:

- they are likely to be refused classification;
- they are likely to cause such offence to a reasonable adult that their sale or display should be restricted; or
- they are unsuitable for minors.

Print publications are classified as follows:

- unrestricted;
- category 1 – not available to persons under 18; to be distributed in a sealed wrapper;

- category 2 – not available to persons under 18; to be displayed only in premises restricted to adults;
- RC – refused classification.

Rabelais

The editors of a student newspaper, *Rabelais*, were prosecuted for publishing an article called “The Art of Shoplifting”. It fell into the refused classification category because it told readers how to commit a crime, including a step-by-step guide to effective shoplifting.

The editors argued that the article was satirical and political. The Full Federal Court rejected

the argument that the article was, on that basis, protected by the implied constitutional freedom for political speech. In December 1998, the High Court refused leave to appeal this decision. The charges were later dropped.

“Hate books”

In July 2006, the national classification scheme was used to ban two publications for reasons associated with the promotion of terrorism:

- *Defence of the Muslim Lands* was refused classification by the Classification Board on the grounds that it “promotes and incites in matters of crime, specifically terrorism acts, including the plan, action and execution of martyrdom operations”.
 - *Join the Caravan* was refused classification on the grounds that it “has the objective purpose of promoting and inciting acts of terrorism against ‘disbelievers’ and is a real and genuine call to specific action by Muslims to fight for Allah and engage in acts of violence”.
-

Computer game classification

Computer games are classified using the same ratings and the same guidelines as films, videos and DVDs, except that there is no R18+ or X18+ category.

The fact that “adult games” – or those with content unable to be accommodated in the categories up to MA15+ – are not legally available in Australia has been the source of some controversy over recent years.

Computer games banned in Australia

Recent decisions of the Classification Board or the Classification Review Board banning computer games, and the principal reasons for those decisions, include:

- *Valkyrie Drive: Bhikkuni* (August 2016) – implied sexual violence;
 - *The Bug Butcher* (July 2016) – drug use related to incentives or rewards;
 - *MeiQ: Labyrinth of Death* (June 2016) – sexual activity involving an apparent minor;
 - *Hotline Miami 2: Wrong Number* (January 2015) – sexual violence.
-

[31.70] Classification of television programs

The *Broadcasting Services Act* sets up a scheme of voluntary codes of practice that establish guidelines for what can be broadcast. Classification principles and ratings are based generally on those in the film classification scheme, modified for broadcast audiences.

Commercial television programs

The organising principle of classification of commercial television programs is that different audiences will be watching at different times of the day and that classification should be strictest at times when children are most likely to be watching.

The Commercial Television Code of Practice

The Commercial Television Code of Practice requires that at certain times of the day only specified types of material can be shown. For instance, film classified MA15+ may only be broadcast between 9.00 pm and 5.00 am. Exceptions are made for news, current affairs coverage and the broadcast of sporting events, as well as programs dealing with important moral or social issues in a responsible way.

The Usual Suspects

In December 2001, Channel Ten in Adelaide broadcast the film *The Usual Suspects* at 8.30 pm in the M (Mature) classification zone. The film had been classified MA by the Classification Board when it was released for public exhibition in 1995, with advice about “medium level coarse language” and “medium level violence”.

Afterwards, a complaint was received claiming that the violence in a particular scene was such that the classification and time were inappropriate.

The Australian Broadcasting Authority (the predecessor to the ACMA) noted that the station had already edited 10 seconds from the scene. However, it agreed that the scene was of such high impact as not to be suitable for audiences at that time, and that the violence took it out of the M classification.

The finding was that Ten had breached the Commercial Television Code of Practice. The authority noted that this was an isolated incident, and obtained agreement from Ten that if the film were to be shown again, it would be modified appropriately or shown at a different time.

Other restrictions

The *Broadcasting Services Act* prevents broadcasters from screening films:

- classified X18+;
- refused classification.

Films classified R18+ must be adapted to make them suitable for television audiences.

[31.80] Program content on television and radio

Material broadcast on radio and television is regulated by:

- compulsory broadcasting standards and licence conditions established by the ACMA;
- codes of practice, developed by industry and registered with the ACMA, to cover various categories of broadcasting.

Mandatory requirements

The mandatory requirements regulated by the ACMA for commercial television include:

- the Australian Content Standard;
- the Children's Television Standards; and
- the licence condition covering the broadcast of local content on regional commercial television.

Requirements relating to local content and presence are also imposed on regional commercial radio licensees.

New mandatory conditions can be imposed on licences issued by the ACMA. Usually, this action will only be taken if there is shown to be some real failing on the part of a licensee or a number of licensees.

The Australian Content Standard

The Australian Content Standard applies to commercial television broadcasters. In general terms, the standard says that at least 55% of a year's programming must be made using Australian or New Zealand talent. Other requirements apply to:

- first release Australian drama;
- children's programs;
- documentaries.

There is also a standard setting a maximum of 20% for overseas advertisements on Australian television.

The Children's Television Standards

The Children's Television Standards specify a minimum number of hours of programs for children and for preschool children, and broadly

when those programs can be shown. They also establish rules dealing with advertising and promotions during the programs.

Advertising to children

A controversial issue over recent years has been food advertising aimed at children. In 2009, the ACMA decided against a general ban on "junk food" advertising. Even so, the Children's Television Standard prohibits advertisers from providing misleading or incorrect information about the nutritional value of food products.

Local content requirements for regional commercial television

Licence conditions requiring regional television stations to broadcast local news and/or material of local significance were imposed from 2003, prompted by regional television stations' withdrawal of local services from some areas. Regional broadcasters in Queensland, Victoria, Tasmania and parts of NSW must now provide minimum coverage of local news or other matter.

Local content requirements for regional commercial radio

Local content requirements for regional radio were included in the package of legislation passed by parliament in 2006 repealing the cross-media rules and the foreign ownership rules.

Regional radio broadcasters are required to broadcast a minimum number of hours of local content and, following any changes in control of broadcasting licences, will be required to maintain existing levels of "local presence". "Local presence" may include aspects such as local production facilities and staff.

The ACMA is required to develop more specific rules, as well as to review these arrangements and report to the minister on their practicable application.

"Cash for comment"

Following the Commercial Radio Inquiry (the "cash for comment" affair) in 1999–2000, the Australian Broadcasting Authority developed new rules for the commercial radio industry dealing with the disclosure of commercial interests. These conditions were designed to address a "systemic failure to ensure the effective operation of the industry's self-regulatory codes of practice".

The three *commercial radio standards* require licensees to:

- ensure that advertisements are clearly distinguished from program material;
- disclose commercial agreements between presenters and sponsors;
- introduce compliance programs.

Political broadcasts

There are provisions in the *Broadcasting Services Act* and associated guidelines dealing with the broadcast of political matter. In particular, there is a prohibition on paid political broadcast advertising in the three days leading up to an election, as well as on election day itself.

Sports content – the anti-siphoning rules

The *Broadcasting Services Act* establishes *anti-siphoning* rules that deal with the screening of certain listed sporting and other events on free-to-air television. The principal aim is to ensure that coverage of these events is not monopolised by subscription services.

A pay television licensee can acquire rights to these events only if rights are also held by a commercial broadcaster or one of the national broadcasters (the ABC or SBS).

Television advertisements

Television advertisements must comply with:

- ACMA's program standards (see Other restrictions at [31.70]);
- federal and state laws;
- registered and voluntary codes of practice.

Codes of practice

Broadcast industry participants operate under codes of practice developed under the *Broadcasting Services Act*.

Commercial Television Code of Practice

This code covers issues such as:

- program classification and warnings about content;
- accuracy and fairness in news and current affairs;
- rules for advertisements;
- the handling of complaints;
- restrictions on gambling promotions in a live sporting event;
- the portrayal of various groups in the community.

Commercial Radio Codes of Practice

These codes cover issues such as:

- "unsuitable" material;
- accuracy, fairness and privacy in news and current affairs programs;
- advertising limits;
- percentage quotas for Australian music content;
- the handling of complaints;
- the identification of people in interviews and talkback;
- the portrayal of Indigenous Australians and women.

Other codes

Various codes cover community broadcasters and pay TV operators.

Codes developed under the *Australian Broadcasting Corporation Act 1983* cover the radio and television broadcast activities of the ABC.

Codes developed under the *Special Broadcasting Service Act 1991* cover the radio and television broadcast activities of SBS.

Complaints about the media

[31.90] Broadcast media

Making a complaint

Complaints about breaches of codes of practice go first to the broadcaster. The basic requirements are outlined below.

Commercial television

Formal complaints should normally be made in writing within 30 days of the broadcast. The

station must then reply within 30 days, and make every reasonable effort to resolve the complaint promptly.

Commercial radio

Complaints made in writing within 30 days must be "conscientiously considered" by the licensee, and the station should respond within 30 days, with a final reply required within 45 days.

If the complaint is made more than 30 days after the relevant broadcast, the licensee is not obliged to comply with these requirements.

The ABC

The ABC must respond to written complaints within 60 days. Complainants who are dissatisfied with the ABC's response may pursue the matter through the ACMA.

Complaints must usually be made within six weeks of broadcast.

The Independent Complaints Review Panel

As an alternative to complaining to the ACMA, if a complaint is about allegations of serious bias, lack of balance, factual inaccuracy or unfair treatment, and there is no response within six weeks or the complainant is not satisfied with the response, the complainant can ask for it to be referred to the ABC's Independent Complaints Review Panel.

However, this will normally only occur if the complaint is received within six weeks of the broadcast.

SBS

General telephone complaints can be made, but usually only written complaints will get a written response.

SBS must investigate all formal complaints received within six weeks of broadcast. In some circumstances, the complaint may be referred to the SBS Complaints Committee.

Pay TV (subscription television broadcasting)

A telephone complaint may be made, but if it is not resolved the complainant may be asked to put it in writing.

Where the complaint is received within 30 days of broadcast, the licensee is required to use its best endeavours to ensure that a tape of the program is retained until the matter is resolved.

Community broadcasting

Licensees must ensure that complaints are conscientiously considered, investigated if necessary and responded to as soon as possible.

If the consumer is not satisfied

If a consumer considers a broadcaster's response to a complaint to be inadequate, or if they receive no response within 60 days, they can take the complaint to the ACMA, which must investigate

complaints that come to it after these procedures have been followed.

The power to impose program standards

If the ACMA notices a trend in the types of complaints, it can impose an enforceable program standard to replace the code of practice (*Broadcasting Services Act*, s 125). The authority does not have this power in relation to the ABC or SBS.

[31.100] Print media

A person who has a complaint about the content of any print media or the behaviour of a journalist should first raise the matter with the editor or other representative of the publication concerned.

Making a complaint to the Australian Press Council

If the person is not satisfied and the publisher is a member of the Australian Press Council, the complaint may be able to be taken to the Council.

The complaint should normally be in writing. It should set out specific details and enclose relevant documents. There is a complaint form on the Australian Press Council's website.

The complaint must usually be made within 30 days of publication of the material complained of and must not be the subject of legal action or possible legal action (unless the complainant signs a waiver).

What the council may do

On receipt of the complaint, the council secretariat may first try to mediate a settlement of the matter.

If such a settlement is not possible, the matter may go to the council for adjudication.

Making a complaint to the Media, Entertainment and Arts Alliance

Journalists who are members of the Media, Entertainment and Arts Alliance are bound by the journalists' code of ethics.

The Alliance will only hear complaints about journalists who are its members.

The journalists' code of ethics is available on the Media, Entertainment and Arts Alliance's website.

Where a complaint is upheld, a journalist may be reprimanded, fined or, in extreme cases, expelled from the union.

JOURNALISM AND THE LAW

[31.110] Generally speaking, journalists and media organisations are subject to the same laws as everyone else. This applies whether journalists publish in newspapers or on television, radio or the internet. Even so, laws in a number of areas, such as those dealing with defamation and contempt of court, have particular relevance for journalists.

Most individual journalists and their employers are also obliged to observe codes of conduct and other ethical standards that extend beyond the requirements of the law.

[31.120] Which laws?

Many of the laws regulating the activities of journalists are state rather than federal, and are a

mixture of common and statute law (see Chapter 1, About the Legal System).

The applicable law is usually that of the state where the publication is distributed, rather than the state where the media organisation is based.

[31.130] Freedom of speech

No single law gives or protects freedom of speech in Australia. The Australian Constitution, unlike that of the US with its First Amendment, has no specific provision guaranteeing free speech.

Implied rights to freedom of speech

The High Court has recognised that the Australian Constitution *implies* a small degree of protection. In two landmark 1992 cases about legislation limiting free political speech, the High Court recognised a constitutional implied guarantee of freedom of expression in relation to political and government matters.

The reasoning is that the Constitution sets up a democratic system with a government accountable to the people, who need free political discussion to make effective and responsible choices.

The extent to which this carries through to other areas is limited. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 clarified that the implied freedom of speech is restricted to what is necessary for the “effective operation” of our system of government.

A law is inconsistent with the Constitution if it burdens free speech and is not “reasonably appropriate and adapted to serve a legitimate end”.

In *Levy v The State of Victoria* (1997) 189 CLR 579, the High Court considered a regulation requiring that anti-duck shooting protesters keep off wetlands. This limitation on the protesters’ freedom of expression was ruled valid because it was based on safety concerns.

Balancing rights

Levy’s case illustrates the conflict between free speech and other interests reflected in many media content laws. Contempt laws balance free speech against the right to a fair trial. Vilification laws balance it against the undesirable effects of arousing hatred, while defamation laws balance it against the right to protection of good reputation.

Defamation

[31.140] The law of *defamation* regulates the extent to which material can be published that damages the reputation of others. Where reputation is injured, payment of money or *damages* can be ordered as compensation.

However, the law recognises that in some situations free speech is more important than protection of reputation, and there are a number of

recognised defences to defamation that effectively give legal “permission to defame”.

[31.150] Could there be an action in defamation?

Deciding whether a publication could give rise to an action in defamation means deciding:

- whether the published material is defamatory; and
- if it is, whether there is a legal defence allowing it to be published.

Is the publication defamatory?

What is a publication?

A *publication* is a communication by one person to at least one other person apart from the person defamed. (You cannot be sued for saying something nasty about a person to that person's face if no-one else hears.)

Defamation laws apply to both mass media and conversations, private letters, emails, internet chat and so on. In defamation law, all of these are called "publications", and the people writing or saying the words are called "publishers".

A publication need not even involve the written or spoken word; defamatory messages can be communicated by any means, including a photograph, gesture or facial expression.

Republishing

Publication includes republishing someone else's defamatory material.

What is defamatory?

A publication is defamatory if it tends to lower a person's or company's reputation in the eyes of the "ordinary reasonable person". For example, it can be defamatory to:

- say someone is corrupt, dishonest, or disloyal;
- say someone is suspected of committing or alleged to have committed a crime;
- hold a person up to ridicule;
- suggest a person has a contagious disease or is insane, if what is said is likely to cause the person to be shunned or avoided, even if there is no suggestion of bad character.

What standards apply?

Because standards change over time, the question of whether or not a statement is defamatory can be hard to judge. In 2001, a judge in the NSW Supreme Court held that it is no longer possible to defame a man by saying he is homosexual. In 2003, another judge of the same court disagreed. However, it may still be defamatory to suggest promiscuity or sexual hypocrisy.

"Goodbye Jerusalem"

In actions taken by politicians Tony Abbott and Peter Costello and their wives against the publishers of Bob

Ellis's book *Goodbye Jerusalem*, an ACT judge found it was defamatory to suggest a woman was "unchaste" (*Costello and Costello v Random House Australia Pty Ltd* (1999) ACTSC 13 (5 March 1999) and *Abbott and Abbott v Random House Australia Pty Ltd* (1999) ACTSC 13 (5 March 1999)), a finding which was upheld on appeal.

Defamatory imputations

A publication is defamatory if it conveys one or more defamatory meanings, called *imputations*.

Publications are not judged from the perspective of what the publisher meant (subjectively speaking) to say or imply. Instead, they are interpreted on the basis of what they would mean to an "ordinary reasonable person" who has seen or heard the whole publication and so understands words in their context. Defamatory imputations can arise from the literal meaning of words ("John Smith is a murderer") or from ambiguities and inferences, as well as juxtaposed words, images and facts. For instance, the statements "Police were called to John Smith MP's office this morning" and "John Smith MP resigned at lunchtime" are separately innocent, but together they can carry the imputation "John Smith resigned as a result of misconduct".

Imputations can also arise from a combination of what is published and what readers know. Saying "Tom Brown is having an affair" to readers who know the man is a priest might suggest not only sexual misconduct but also hypocrisy.

Who is defamed?

Can the person be identified?

A person may be identified by their name, photograph, title or description. The phrase "a Sydney doctor" is too broad to identify a specific person, but talking about a doctor in a particular suburb might lead to problems.

Unintentional defamation

It is possible to unintentionally defame several people with one reference. Two policemen named Lee successfully sued over an article alleging corruption against a Detective Lee in the Victorian police force.

Defamation in fiction

A fictional story using a real person's name or other identifying features might be defamatory if ordinary readers take it as a reference to the real person.

Defamation of groups

An extravagant statement about a large group (“all lawyers are thieves”) does not entitle all members to sue. Particular individuals must be identified.

However, a broad reference to a smaller group (such as “the NSW Cabinet is corrupt”) may defame all members.

Who can be sued?

Anyone who is involved in, or who authorises, a defamatory publication can be sued. For a newspaper story, this may include:

- the author;
- the editor;
- the proprietor;
- the person providing the journalist with the defamatory material (the source).

When a quotation is defamatory

If someone’s defamatory statement is quoted in a newspaper, both the person quoted and the newspaper may be sued.

Who can sue?

Any individual identified as the subject of a defamatory statement can sue over it. This is judged objectively – a publisher may identify someone without meaning to.

It is not possible to sue to protect the reputations of the dead.

Organisations and their members

Federal, State, Territorial and local government organisations, including Aboriginal land councils, cannot sue for defamation. The only private corporations that can sue for defamation are those that:

- are not-for-profit; or
- have fewer than 10 employees and are not related to another corporation.

A member or employee of any company or government organisation may still sue to clear their reputation if a defamatory statement points to them specifically.

[31.160] Defences to defamation

Highly defamatory material is safely published every day, because the publishers can rely on one or more of the legal defences to defamation.

Justification (the defence of substantial truth)

Defamatory material can be published if the publisher can prove that it is substantially true (*Defamation Act 2005* (NSW), ss 25, 26).

It is up to the publisher to prove that imputations are substantially true. Plaintiffs need not prove falsity.

Proving truth

Proving substantial truth involves presenting a court of law with direct evidence, not just hearsay or speculation.

Defending the statement “Jane says Mary is dishonest” requires proof that Mary is in fact dishonest, not just that Jane made the allegation.

To safely say “John Smith resigned as minister after being visited by police”, it is necessary to prove not only that he resigned and that he was visited by police, but also that there is a connection between the events, since this is what the statement implies. If there is not, the defence will fail.

Contextual truth

If a publisher makes a number of separate allegations about a person, and can prove that some of the allegations are substantially true but not others, the publisher might still have a complete defence of contextual truth. Contextual truth requires the court to consider whether the false allegations do further harm to the person’s reputation in light of the allegations that the defendant can prove. If the false allegations do no further harm, then the publisher has a complete defence.

Proving contextual truth

If a publisher states that X has been arrested and charged with an offence (and can prove that it is true) and that X is guilty of the offence (which is false), the false allegation is more damaging to X’s reputation than the true one, so the publisher has no defence of contextual truth.

However, if a publisher states that X has been arrested and charged with an offence (which is false) and that X is guilty of the offence (and can prove that it is true), the true allegation is more damaging to X’s reputation than the false one, so the publisher has a defence of contextual truth.

Privilege

Sometimes publishers are relieved of the burden of having to prove the truth of defamatory imputations. When this occurs, their publication is said to be *privileged*.

There are two main categories of privilege.

Absolute privilege

The *Defamation Act* lists circumstances in which this can apply. They include parliamentary, judicial and quasi-judicial proceedings. For example, members of parliament cannot be sued over statements they make in parliament. Similarly, people involved in a court case – judges, barristers, jurors and witnesses – cannot be sued for defamatory statements they make in court.

The place and occasion of the statement are important. Privilege applies only to statements made in the course of proceedings while the court or parliament is sitting. A person who repeats defamatory material elsewhere can be sued.

Absolute privilege does not extend to media reports of what was said (s 27).

Qualified privilege

This form of privilege is said to be *qualified* because it can be lost in certain circumstances, most of which are to do with the motives behind the publication.

There are a number of types of qualified privilege. Two particularly important types are discussed in the box below.

Two important types of qualified privilege

Statutory qualified protection

Qualified privilege can apply where information is given to a person or persons with an interest or apparent interest in the information, provided the court recognises that interest. For example, the police have a recognised interest in receiving information about suspected crime, so you cannot be sued for defamation if you genuinely believe that a crime is about to be committed and your motivation in talking to the police is to prevent the crime from going ahead (s 30).

The publisher still needs to have behaved reasonably and not to have been motivated by, for example, personal spite.

More controversial is the question of whether this defence should apply to the media who publish to the general community about matters of public interest. When in the past the media have tried to argue that it should, generally courts have either rejected that

argument or have been very demanding in assessing what constitutes “reasonable” conduct by the media. The court can take into account all the circumstances, including:

- the extent to which the publication distinguishes between allegations and proven facts;
- what steps were taken to verify the information (often courts are very demanding in this regard);
- whether attempts were made to include the defamed person’s side of the story.

“Lange privilege”

This form of qualified privilege does not arise from the *Defamation Act* but from Australia’s constitutional protection of free speech (see [31.130]). It is often called “Lange privilege”, after the case of *Lange v Australian Broadcasting Corporation*, where the High Court decided that a type of privilege extends to communications on “government and political matters that affect the people of Australia”.

As with the statutory protection given to publications of genuine public interest, the publisher must not be motivated by malice. Those who publish to a large audience must also prove that they have behaved reasonably. The court will take into account all the circumstances, including whether the publisher has:

- reasonable grounds to believe the imputation is true;
- no belief that the imputation is untrue;
- taken proper steps to check their accuracy;
- given the person an opportunity to respond.

So far the media have generally been unsuccessful in using this defence.

Publishing “public documents”

A defence similar to that of qualified privilege applies to the publication of fair copies or summaries of, or extracts from, “public documents”, as well as the publication of the public documents themselves. Section 28 of the *Defamation Act* defines what is meant by “public documents”, which include:

- parliamentary reports;
- judgments of courts and various tribunals;
- public records and government publications intended to inform the public.

This defence will not usually apply to the publication of leaked documents.

The defence is defeated if the plaintiff can prove that the defamatory material was not published honestly for the information of the public or the advancement of education.

Fair reports of “proceedings of public concern”

This statutory defence is also similar to qualified privilege. Section 29 defines what constitute “proceedings of public concern”. They include:

- parliamentary and government (including local authority) proceedings;
- hearings in open court;
- public inquiries;
- shareholder meetings;
- any public meeting relating to a matter of public interest;
- some proceedings of learned societies, sport or recreation associations and trade associations.

Usually, the proceedings must have been public.

This defence can be defeated if the plaintiff can prove that the defamatory material was not published honestly for the information of the public or the advancement of education.

Publishers must also be able to demonstrate that they have been fair in their reporting, which includes being accurate and covering both sides to an issue.

Consent

Publishers have a defence if they can prove a defamed person consented to the publication.

The person must have consented to the specific imputations published. For instance, consent given to a broadcaster to film a doctor’s surgery does not include consent to later use the footage in a story about medical negligence.

Honest opinion

The law allows people to defame others if they are expressing an honest opinion on a matter of public interest based on “proper material”.

This important defence allows public criticism and debate about such matters as government, public interest and the arts (s 31).

Establishing an honest opinion

If what a publisher is saying is obviously a matter of taste (“I don’t like this restaurant’s food”; “that film is boring”), the defence of honest opinion is likely to be available. It is simply necessary to convince the court that the statement is *subjectively* true, meaning that it is an expression of the commentator’s honest opinion.

A lot more care is needed when expressing opinions on other matters. The key to using

the defence is to include in the publication the commentator’s reasons for holding the opinion. If this is not done, then the defence might not apply, and it will be necessary to prove that the statement is *objectively* true, meaning that any ordinary reasonable person would agree with it. This can occur even if the statement is preceded with phrases such as “I think” or “I believe”.

Take, for instance, the statement “I think John is cruel to his dog”. Unless details are given of what John does that the commentator thinks is cruel, the publisher will need to be able to prove that any ordinary reasonable person would consider the statement justified if they knew all the facts about John’s treatment of his dog that the publisher can prove to be true.

For that reason, it would be wiser for publishers to set out why the commentator thinks John’s treatment of his dog is cruel (for instance, that he takes it for a walk only once a day, etc). If the publishers have included details of what John does that the commentator believes to be cruel, it is more likely that they will be able to use the honest opinion defence. They will then have the simpler task of proving that the statement reflects the commentator’s honest opinion. It will not be necessary to argue that that opinion is one that a reasonable person would share.

Matters of public interest

It is necessary to prove that the opinion relates to a matter of public interest, although in this context “public interest” is interpreted widely. Unless something is a purely private matter, it is likely to be of public interest. For instance, it is in the public interest to know whether a café serves good food, or whether a professional offers good service.

Proper material

It is also necessary to show that the opinion is based on “proper material”, meaning that it is based on facts that the publisher can prove are substantially true or were published on an occasion of privilege (eg, they appear in a court report). So, in the above example, it would be necessary to show that John does indeed walk his dog only once a day, or, for instance, such a fact will have to have emerged from a court hearing.

Expressing the opinions of others

The defence applies not only to publishers who publish their own honestly held opinions, but also to those who publish the honestly held opinions

of other people, even when the publisher does not share them. If the opinion being expressed is not that of the publisher, the defence can be defeated if the plaintiff can prove that the publisher had reasonable grounds to believe that the opinion was not honestly held by the person expressing it.

Innocent dissemination

It is a defence to a defamation action that a person is a *subordinate distributor* of a publication, and neither knew nor ought to have known, that the publication was defamatory. The Act defines subordinate distributors, who are likely to include newsagents, libraries and broadcasters of live programs (if the broadcaster has no effective control over the person making the statement).

Website hosts

Internet website hosts (such as internet service providers) may be able to claim that they are subordinate distributors. Cases in the USA suggest that a host that monitors content may be liable as a primary publisher, while a host that does not monitor content may be treated as an innocent distributor on the basis that it is unreasonable to require it to do so.

Once a host becomes aware of defamatory material, it is probably liable if it fails to remove the material in a reasonable time. In Australia, the *Broadcasting Services Act* (particularly Sch 5, cl 91) offers some guidance (see below and Chapter 30, Internet Law).

Under the Broadcasting Services Act

The cl 91 of Sch 5 of the *Broadcasting Services Act* seems to give internet content hosts and service providers some protection from liability for hosting or carrying defamatory material. Exactly who can make use of this protection is not yet clear, although the clause definitely applies only to internet content. "Ordinary electronic email" and "information transmitted in the form of a broadcasting service" are excluded.

The defence is only available if the internet content host or service provider is unaware that the content is defamatory.

Triviality and unlikelihood of harm

This defence (*Defamation Act*, s 33) applies where the publisher can prove that the defamed person was unlikely to suffer harm to their reputation.

Where there was unlikelihood of harm, and where there was not

In *Burnett v Paterka* (unreported, NSWSC, 19 February 1993), a similar defence contained in the previous *Defamation Act* was available where a woman sent a letter to her brother-in-law saying that his brother was a neglectful father.

It did not apply to her newspaper advertisement saying the same thing.

Offer of amends

The *Defamation Act* provides a defence for publishers who promptly make a reasonable offer of amends (ss 12–19). The offer may include:

- the publication of a correction or apology;
- payment of damages.

The purpose of the defence is to encourage the early settlement of disputes.

[31.170] Taking legal action

Is it necessary to go to court?

If a person believes something defamatory and untrue is about to be published, the simplest way to deal with it is for them to approach the publisher directly. If it has already been published, the person may want the publication of a clarification or apology. In serious cases, compensation may be sought.

If a complaint is not resolved, it may go to court, which can be complicated, expensive and time consuming for all involved.

A complainant should get advice on the prospects of their case – defamation law is complex. A publisher should consider whether the matter can be resolved by negotiation.

What the courts can do

Injunctions

Courts are reluctant to interfere with free speech by issuing injunctions not to publish. In practical terms, it is almost impossible to obtain an injunction but courts do have a discretion in rare cases to grant one. Ordinarily, there must be no "real room for debate" about whether the proposed publication is defamatory, and no real prospect of the publisher successfully relying on a defence (*ABC v O'Neill* (2006) 227 CLR 57).

Damages

Damages compensate the defamed person for damage to reputation, hurt feelings and economic loss (such as a drop in profits). Damages for damage to reputation and hurt feelings are capped (*Defamation Act*, s 35). This stood at \$398,500 as at 29 June 2018. Damages for economic loss are not capped. Damages will not be awarded to punish the publisher or set an example (*Defamation Act*, s 37). The cap on damages for non-economic loss in defamation cases has a significant impact, as

this is usually the only head of damages sought (it encompasses damage to reputation and injury to feelings).

Generally, the wider the circulation of the material and the more serious the defamation, the higher the damages.

Damages may be increased (*aggravated*) by the publisher's unjustifiable or improper conduct (such as refusing to correct material known to be false). A timely apology published to a similar audience can reduce (*mitigate*) damages.

Vilification

Vilification differs from defamation in various ways. Vilification laws operate only in relation to attacks on a person or group on certain grounds, for example:

- race;
- nationality;
- sexuality;
- HIV/AIDS infection (actual or suspected).

Also, defamation involves an attack on an identifiable individual, whereas vilification can be of a group.

Defences

The media have at times been found guilty of committing vilification by what they publish. Even so, the media (like anyone else) may be able to use defences that apply to:

- fair reports of acts of vilification of others;
- reasonable discussion or debate about, and exposition of, public acts, when the discussion or debate is carried on in the public interest.

Contempt of court

[31.180] The idea of open justice is central to our court system. It is important that the public witness the workings of the criminal system and be informed of legal issues debated in civil courts. For this reason, most courts are generally open to the public and media.

However, the courts balance the right of the public to know against the rights of people in the court system – particularly those on trial.

Because the issues at stake are so important, the courts treat interference with justice very seriously. Contempt of court is a criminal offence, punishable by heavy fines and gaol.

Intention is irrelevant when it comes to contempt (although it may be taken into account in deciding on the appropriate penalty).

[31.190] “Subjudice”

A case is said to be *subjudice*, or pending, once it has entered the legal system.

When a case is subjudice, no material that has a “real and practical tendency” to interfere with a fair trial can be published.

What may and may not be published under these circumstances is discussed below.

When does a matter become subjudice?

Criminal cases

A criminal case is subjudice from when a person is arrested (or, perhaps, when a warrant for their arrest is issued) until the case has ended.

Civil cases

A civil case is subjudice from when the originating summons or statement of claim is issued until appeal rights are exhausted.

Prejudging civil cases

The law assumes that judges are unlikely to be swayed by the media. Since most civil cases are heard by a judge alone (the main exception being some defamation trials), the risk of being found guilty of prejudging civil matters is far less than in the case of criminal trials.

However, prejudging the outcome of a civil case should be avoided, especially where the public prejudgment could be seen as putting pressure on one of the parties to withdraw their claim.

What must not be published

While proceedings are pending in a NSW criminal case, certain material should not be published without legal advice, including the following.

Photographs or drawings of the accused

Photographs or drawings of the accused should generally not be published before or during a trial. Showing what the accused looks like could interfere with a witness's ability to properly remember what they saw (*Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (unreported, CA (NSW), 15 September 1994)).

Prior convictions or charges

Prior convictions or charges of the accused are evidence often excluded at trial because it is highly prejudicial and does not prove the accused committed the particular crime being tried.

Confessions

Confessions are a form of evidence often excluded because, for example, the accused later retracts the confession, saying it was made under duress.

Evidence not yet before the court

Evidence that has not yet come before the court should not be revealed by the media.

Prejudgment

Prejudgment of the outcome of a case violates the principle of "innocent until proven guilty". This principle means that until the case has been proved the media should refer only to the fact that guilt has been alleged.

Critical material

Any prejudicial material about or criticism of the accused or a witness should not be published in the interests of a fair trial.

Material not in open court

Material not in open court includes material raised in court when the jury is absent or material subject to a suppression order.

What material can be published?

Open justice allows the public to be kept informed about court cases. Material that can be published without risk of contempt includes the following.

The facts

The bare facts of the case that are not going to be in dispute at the trial may be published, such as the name of the person charged, what they have been charged with and, possibly, where and when the body was found (in a murder trial).

Reports of proceedings

A fair, accurate and contemporaneous report of proceedings in open court can be published.

A report of pre-trial proceedings (such as a committal hearing) can be published immediately after the proceedings, but should not be repeated closer to the trial. Reports of a trial should not be published shortly before a retrial.

Discussions on issues of public concern

Discussion on an issue of legitimate public concern can be published, even if it includes prejudicial material, provided that the publication of the prejudicial material is an "incidental by-product" of such discussion (*Hinch v Attorney-General (Vic)* (1987) 164 CLR 15). A media report about links between heroin addiction and crime can always be published, for example, even if heroin users are on trial at the time.

[31.200] Other reporting restrictions

There are strict legal restrictions on identifying or publishing information about certain people who find themselves in the justice system, including:

- alleged victims of sexual offences;
- people under 18 who are witnesses or otherwise involved in court proceedings;
- people involved in Family Court proceedings;

- jurors;
- people whose identity has been suppressed by order of a court.

A person should always get advice if they are publishing material that comes into these categories.

[31.210] Other types of contempt

Other types of contempt include:

- attempting to influence witnesses or parties to a case;
- in some situations, attacking a judge's integrity or suggesting the judge is biased.

What is not contempt

It is not contempt to publicly criticise a judge's decision in a case or to make general criticisms about, for example, the unrepresentative social make-up of the judiciary.

[31.220] Legal action for contempt

Prosecutions for subjudice contempt are brought by the NSW Director of Public Prosecutions.

For other types of contempt, prosecutions are initiated by the Director of Public Prosecutions or the court concerned.

Contempt of parliament

Contempt of parliament includes:

- publishing false reports about its proceedings;
- trying to improperly influence or obstruct a member;
- revealing secret proceedings of its committees.

Under the *Parliamentary Privileges Act 1987* (Cth), statements are not in contempt just because they are

defamatory or critical of the parliament, member or committee.

It is a contempt to pressure witnesses giving evidence to a parliamentary committee. There is no similar NSW Act, but the state parliament has inherent powers to safeguard itself.

Prosecutions, fines and imprisonment for contempt of parliament are rare.

Gathering media content

[31.230] Privacy

The courts are increasingly prepared to use a number of Acts and areas of common law to protect people's privacy. These include the following.

The Telecommunications Interception Act

The *Telecommunications (Interception and Access) Act 1979* (Cth) prohibits unauthorised phone tapping.

The Surveillance Devices Act

The *Surveillance Devices Act 2007* (NSW) regulates the use of various surveillance devices. For instance, it is an offence, subject to certain exceptions, to use devices to listen to or record private conversations without the consent of all

involved, or to track the movements of people or objects. It is also potentially an offence to use optical or data surveillance devices if their use involves entering premises or interfering with property without appropriate consent. It can also be an offence to communicate or even possess recordings of private conversations or activities.

Crimes Act 1900

The *Crimes Act 1900* (NSW) contains offences relating to voyeurism, including the installation or use of equipment to film others, without their consent, in places such as toilets or changing rooms. It also includes offences relating to the non-consensual sharing of intimate images, even when those shown in the image might have consented to its original creation.

Workplace Surveillance Act 2005

The *Workplace Surveillance Act 2005* (NSW) limits the ability of employers to lawfully monitor their workers using hidden cameras and the like.

The law of trespass

This prohibits a person from:

- entering a property without the express or implied consent of the occupier; or
- staying after being asked to leave.

While journalists (and other people) have implied permission to go to a front door or onto other parts of premises generally open to the public (like a petrol station forecourt), this permission can be withdrawn by the occupier.

The Inclosed Lands Protection Act

The *Inclosed Lands Protection Act 1901* (NSW) makes certain trespasses a criminal offence.

Taking photographs

Currently, there are no specific laws generally preventing people from taking photographs of a person or their property from outside the property (*Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479). However, the law is in a state of flux and courts are increasingly unlikely to tolerate serious breaches of privacy. Note also the statutory offences mentioned above relating to voyeurism.

The law of nuisance

This can give rise to civil action to stop people from unreasonable interference with someone's enjoyment of their property, for example, by harassment through repeated telephone calls.

The law of copyright

This might be used to prevent publication of, for example, private diaries or letters.

See Chapter 12, Copyright, for more information.

The Privacy Act

The *Privacy Act 1988* (Cth) contains a number of principles called the National Privacy Principles. These relate to the collection and use of personal

information. As a general rule, all individuals and organisations are bound by these.

Exemptions for media organisations

Section 7B(4) of the *Privacy Act 1988* provides an exemption for acts or practices engaged in by a media organisation in the course of journalism. To qualify for the exemption, the media organisation must publicly commit to a published code of practice dealing with privacy.

A common law right to privacy?

Privacy is a developing area in Australian law. The Queensland District Court case of *Grosse v Purvis* [2003] QDC 151 was the first in Australia to unequivocally declare that there is a common law right of privacy, but this argument is yet to be followed in any higher court. Essentially, that case involved alleged stalking by an individual (not the media), and the judge thought an intrusion into privacy would have to be considered highly offensive to be unlawful. The Victorian County Court in *Doe v ABC* [2007] VCC 281 also found that there is a common law right to privacy. The case involved the naming on radio of a victim of sexual assault. Under legislation, the victim was entitled to anonymity. The judge found that identifying the victim would be considered highly offensive to the reasonable person.

Media codes of practice

In practice, many media companies, rather than devising their own codes, have simply subscribed to the code of practice set up by whichever body represents their sector of the media industry.

For example:

- many newspapers are members of the Australian Press Council and have committed themselves to observing the council's privacy standards;
- many commercial broadcasters subscribe to the privacy codes of Free TV Australia or Commercial Radio Australia;
- radio and television broadcasters are bound by codes and guidelines, covering privacy, prescribed by the ACMA.

The ABC and SBS both have their own codes of practice.

Journalists' ethics and media codes of conduct

Many journalists and media organisations follow ethical guidelines and codes of conduct as well as legal rules.

What to do if there is a breach?

While a breach of the guidelines or codes is not necessarily a breach of the law, people can complain to the media organisation concerned and, if they are not satisfied, to the industry self-regulatory body.

For broadcasters and online content, the regulatory body is the Australian Communications and Media Authority. For newspapers and other print media periodicals, it is likely to be the Australian Press Council.

See [31.90] for how to make a complaint.

[31.240] Confidentiality

The law relating to breach of confidence protects information given by one person to another in confidence. Its more general application has been in the area of trade secrets and certain professional relationships.

What is confidential information?

Confidential information is difficult to define. The law does not generally recognise property rights in information as such – it is the relationship of confidence that gets legal protection, not the information itself.

This means that if a journalist comes upon publicly accessible information (eg, by seeing something while walking down the street), even if the information seems private in nature, the law of confidentiality will probably not apply.

The situation might be different if the journalist obtains the information from a tip-off.

Remedies for breach of confidence

A person who alleges that there has been a breach of confidence may:

- seek injunctions to prevent disclosure or further disclosure; or
- sue for compensation or an account of profits.

What must be established

To succeed in an action for breach of confidence, a person must establish three things.

Confidentiality of the information

The information must have the necessary quality of confidence or secrecy about it. This means:

- it cannot already be publicly known;
- it is the type of information that a reasonable person would realise should be kept secret.

This can cover a range of information, including:

- trade secrets (such as customer lists);
- personal information (such as marital secrets);
- ideas such as the concept for a new TV show.

It need not be a secret between only two people – many employees may be aware of a company's trade secrets.

Obligation of confidence

It must be shown that the information was disclosed where there was an obligation of confidence, either explicit (as in a contract) or implied (eg, in an employer–employee or a doctor–patient relationship).

Detriment to the plaintiff

It must be shown that there is, or could be, unauthorised use of the information to the plaintiff's detriment (*Coco v AN Clark (Engineers) Ltd* (1969) RPC 41 at 47).

Protecting information

A person who has information that they want kept confidential but who needs to tell it to someone for some reason should clearly communicate their requirements to the person receiving the confidence, in writing if possible, specifying the purposes for which they may use or disclose the information and stating that further disclosure is subject to consent.

Government secrets

Government secrets are treated differently from those of private individuals.

Courts determine government claims to confidentiality by referring to the public interest. Unless disclosure is likely to injure the public interest, it is not protected.

A secret that was not protected

In *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39, the Commonwealth sought to restrain the release of Defence Department documents that had apparently been leaked. Justice Mason, as he then was, said:

It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.

Confidentiality of a journalist's source

If a person passes on confidential information to a journalist who agrees that the person will not be identified as the source, the laws relating to confidence will normally mean that the journalist must respect their desire for anonymity.

If there is a court order

This legal obligation ceases once a court orders the journalist to divulge the name of the source. This often happens when journalists are called on to give evidence in court.

It will then be largely up to the journalist's conscience whether to:

- obey the court's order; or
- adhere to a journalist's ethical responsibility to protect sources (set out in the Media, Entertainment and Arts Alliance journalists' code of ethics; see Making a complaint to the Media, Entertainment and Arts Alliance at [31.100]).

Often journalists try to challenge the court order, but many such challenges are unsuccessful.

Some journalists have gone further and have refused to obey the court order. When they do so, they commit contempt of court and are often punished with a fine or short prison sentence.

Contact points

[31.250] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Arts Law Centre of Australia

www.artslaw.com.au

ph: 1800 221 457 or 9356 2566

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australian Communications and Media Authority (ACMA)

www.acma.gov.au

ph: 1300 850 115 or 9334 7700

Australian Competition and Consumer Commission (ACCC)

www.accc.gov.au

ph: 1300 302 502

Australian Copyright Council

www.copyright.org.au

Australian Press Council

www.presscouncil.org.au

ph: 1800 025 712 or 9261 1930

Communication and the Arts, Department of (NBN, Digital Economy, Broadband)

www.communications.gov.au

ph: 1800 254 649 or 6271 1000

Classification Board (Australian Classification)

www.classification.gov.au

ph: 9289 7100

Commercial Radio Australia

www.commercialradio.com.au

ph: 9281 6577

Communications Alliance

www.commsalliance.com.au

ph: 9959 9111

Communications and Media Law Association (CAMLA)

www.camla.org.au

ph: 4294 8059

Copyright Agency

www.copyright.com.au

ph: 1800 066 844 or 9394 7600

Free TV Australia

www.freetv.com.au

ph: 8968 7100

Commercials Advice

ph: 8968 7200

Information and Privacy Commission NSW

www.ipc.nsw.gov.au

ph: 1800 472 679

Law and Justice Foundation of NSW

www.lawfoundation.net.au

ph: 8227 3200

Media, Entertainment and Arts Alliance

www.meaa.org

ph: 1300 656 513

Information Commissioner, Office of the Australian

www.oaic.gov.au

ph: 1300 363 992

Ombudsman, Commonwealth

www.ombudsman.gov.au

ph: 1300 362 072

Telecommunications Industry Ombudsman (TIO)

www.tio.com.au

ph: 1800 062 058

