

available official information to the media.

However the current provision in the Crimes Act is worded in the negative.<sup>22</sup> Under this provision it is an offence to communicate a prescribed sketch, plan, photograph, model, cipher, note, document or article or prescribed information, or to permit access to such things, unless the communication or access is to either (a) a person to whom he is authorised to communicate it; or (b) a person to whom it is in the interest of the Commonwealth or part of the Queen's dominions, his duty to communicate it. Therefore, as a whistleblower who discloses 'secret' information to the media can argue that it was their duty to do so in the interest of the Commonwealth, they have not committed an offence under current law.

This raises the question of whether there is an error in drafting in relation to the Bill, or if there is a change of intention on behalf of the Government. The EM does not indicate an intention to criminalise behaviour or limit freedom of press. This clearly illustrates the dangers involved in re-drafting provisions. As of March 13, the disclosure provisions has been excised from the Bill.

#### 4) Receiving Information

With regard to the offence of 'receiving' information, the Bill does differ to the Crimes Act. The current law prescribes that the defendant must have known or

had reasonable grounds to believe at the time when they receive the information, that it is in contravention of the legislation. Under the proposed Bill the mere possession of such information brings you within the scope of the provisions. Therefore, an offence under the Crimes Act for 'receiving' information is narrower.

### CONCLUSION

It is clear from the above analysis that the Bill did impose penalties both on whistleblowers who divulged government secrets and upon unauthorised recipients of such information. Given the crisis faced by the Government over the past few years, including the Tampa crisis, the Collin class submarine project disclosure and the attempts by Mr Wispelaere who stole and planned to sell hundreds of top-secret US documents provided to Australia under defence agreements, it is not surprising that they Government may have wanted to restrict the flow of government information. However, any restriction on the ability of the press to scrutinise the government on matters that do not prejudice security or defence, chips away at the democratic foundations our society is built on. For these reasons it is the authors conclusion that the objections to the Bill were well-founded and that the unauthorised disclosure offence was correctly removed.

1 Clause 81.1(1)

2 Clause 81.1(2)

3 Clause 81.1(3)

4 Clause 81.1(4)

5 See above clauses

6 Clause 82.1(1)(b)

7 Clause 82.1(1)(c)

8 Clause 82.1(1)(d)

9 Clause 82.2(1)(e)

10 Clause 80.1(1)

11 6 months imprisonment

12 The Age; Media Chief Takes Aim At Howard on Several Fronts, Annabel Crabb, 28/2/02

13 Sydney Morning Herald: Gags Go On: Expose A Porky, Go Directly To Jail, Richard Ackland, 22/2/02

14 Australian Financial Review, Gagging Communication, Tony Harris 12/2/02

15 Sydney Morning Herald: Spy bill to go under the spotlight; Andrew Stevenson, 4/2/02

16 ibid

17 ibid: citing Democrat's Law and Justice Spokesman, Senator Brian Greig.

18 The Age; Media Chief Takes Aim At Howard on Several Fronts, Annabel Crabb, 28/2/02

19 see: 82.3(1)(a) and 82.4(3) of the Bill.

20 Attorney-General News Release Government Gets Tough on Spies – Not Freedom of Speech 3/2/02

20 Clause 82.3(1)

20 s79(3)

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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## Gutnick Goes to the High Court

**Glen Sauer analyses the recent Gutnick case dealing with internet defamation.**

This year, the High Court will consider jurisdictional issues that arise when material that is placed on the internet overseas is read by people in Australia. Dow Jones has obtained special leave to appeal to the High Court in relation to the Supreme Court of Victoria's decision that in *Gutnick + Dow Jones Inc [2001] USC (Gutnick)* material placed on the internet in the US and read in Victoria was published, and is therefore actionable, in Victoria.

The case is a timely reminder that people who publish on the internet overseas may find themselves liable under Australian law for material that would not be

actionable in the jurisdiction in which it was posted. In particular, people who post defamatory material in the US, where libel laws are more favourable to publishers, could well find themselves liable for publication of the material in Australia. This risk will be particularly great if the person who publishes the material has assets or does business in Australia and the person defamed lives or is known in Australia.

### THE PROCEEDINGS

Dow Jones was the publisher of *Barron's Magazine*. *Barron's Magazine* published

an article entitled "*Unholy Gains*" (the article) which described the plaintiff, Joseph Gutnick as the biggest customer of Nachum Goldberg, a gaoled money launderer and tax evader.

A very small number of print copies of *Barron's Magazine* were sold in Victoria. The article was also published on the Internet in *Barron's Online*, a website operated by Dow Jones on a web server in New Jersey. A number of subscribers to the website downloaded and read the article in Victoria.

Gutnick commenced defamation proceedings in the Supreme Court of

Victoria. Gutnick argued that the article imputed that he was masquerading as a reputable citizen when he was a tax evader who had laundered large amounts of money through Goldberg and had bought his silence. Gutnick's claims for defamation were in relation to both the Internet version of the article published in *Barron's Online* and the sale of the paper edition of *Barron's Magazine* in Victoria.

Dow Jones argued that the Supreme Court did not have jurisdiction because the article was published in New Jersey and not in Victoria. It also argued that the Supreme Court should decline jurisdiction on the basis that New Jersey, not Victoria, was the appropriate forum.

Justice Hedigan rejected both Dow Jones' arguments and found that defamation law has, for centuries, considered that publication occurs at the time and place that the material is seen or heard. On this basis, his Honour upheld Gutnick's argument that the article was published in Victoria, where it was downloaded, and read by Dow Jones' subscribers.

Dow Jones' argument that the article was published when it was uploaded to a web server (in New Jersey) was rejected. His Honour added that, even if the place of uploading was considered to be the place of publication (despite the fact that its meaning, at the point of uploading, was incomprehensible), he was of the view that it was published, for the purposes of defamation law, in both New Jersey and Victoria. Uploading from the web server in New Jersey and arrival in Victoria were virtually simultaneous, and for the law's purpose, indivisible.

His Honour also considered the problem of whether the Victorian Supreme Court ought to put a foreigner (Dow Jones) to the inconvenience, cost and annoyance of having to take part in proceedings in Victoria. In finding that Victoria was an appropriate and convenient forum his Honour noted that, at the end of the day, it was significant that the proceedings were commenced by a Victorian resident conducting his business and social affairs in Victoria in respect of a defamatory publication published in Victoria, suing only on the publication in Victoria and not pursuing any form of damages in any other place.



### HIGH COURT APPEAL

On 14 December 2001, Chief Justice Gleeson granted Dow Jones special leave to appeal to the High Court in relation to Justice Hedigan's decision. The Victorian Court of Appeal had refused leave to appeal on 21 September 2001.

Publishers will need to wait for the High Court's judgment to find out whether Justice Hedigan's decision is correct. If Justice McHugh's views are any indication, Justice Hedigan's decision may well be upheld. On 14 November 2001, before special leave was granted, Justice McHugh said that:

*"I might also mention that it does not seem to me that Dow Jones' prospects of succeeding in an appeal are high. It is possible that Dow Jones may be granted special leave to appeal to enable this Court to authoritatively declare the law on the point of jurisdiction. Although I have not had the advantage of detailed argument from Dow Jones' counsel on the various points, the reasons of Justice*

*Hedigan and my own understanding of the law suggests that the prospects of success in an appeal are relatively low. I think it would require a fundamental departure from orthodox principle for Dow Jones to succeed in the appeal."*

### INJUNCTIONS FOR DEFAMATORY MATERIAL PUBLISHED ON THE INTERNET

The decision in *Gutnick* can be contrasted with the decision of the New South Wales Supreme Court in *Macquarie Bank Limited v Berg* [1999] NSWSC 526 (2 June 1999). In that case, Justice Simpson refused to allow an order restraining the defendant from publishing certain material about Macquarie Bank on the internet because such an order would restrain the defendant from publishing that material anywhere in the world, including places where the defendant might well have an unfettered right to publish it.

Her Honour said that such an order would

superimpose the defamation law of NSW on every other state, territory or country of the world and therefore would exceed the proper limits of the court's injunctive power.

If Justice Simpson's decision is followed, then it will be even more difficult to obtain injunctions restraining publication of defamatory material on the internet than it is to obtain such injunctions for material to be published in more traditional media, such as television and newspapers.

However, in many cases, a person defamed on the internet may achieve a similar result by simply notifying Australian internet service providers of the defamatory material. Internet content hosts and internet service providers are likely to be immune from defamation liability for content that they have seen and that they do not know the nature of under Clause 91(1) of Schedule 5 of the *Broadcasting Services Act 1992* (Cth).

Clause 91(1) provides that State and Territory laws and rules of common law and equity have no effect to the extent that they would subject an internet content host or internet service provider to liability in respect of content hosted or carried by it in a case in which it was not aware of the nature of the content. Defamation laws have not been exempted from this immunity. By notifying an ISP of defamatory material, the person defamed could deprive the ISP of this protection, thereby giving the ISP an incentive to take down or block the material if it cannot be defended under Australian defamation laws.

### **PRACTICAL IMPLICATIONS**

Justice Hedigan's decision is likely to be of most concern to internet publishers in the United States and other countries in which defamation laws are more favourable to publishers than those in

Australia. The risk of being sued in Australia will be particularly great for those internet publishers which have assets or do business here. Sports people, Hollywood stars and others that rely in part upon their reputations in Australia for their livelihoods may well choose to sue here for material placed on the internet in the US.

Publishers should consider whether an article is defamatory not only under Australian law, but also under the legal systems of any other countries which may be able to assume jurisdiction over defamation proceedings, such as places where the person defamed resides, does business, or has a reputation. Particular care should be taken with respect to the jurisdictions in which the publisher has assets.

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## **The New Privacy Obligations and the Media Exemption**

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**Glen Sauer reviews how the new privacy regime deals with the media.**

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Since 21 December 2001, new privacy laws have applied to most private sector organisations, including most media organisations. An exemption applies in respect of acts and practices "in the course of journalism" by media organisations which have publicly committed to standards dealing with privacy in the media context. Activities of media organisations that do not constitute "journalism", such as marketing, will be caught by the legislation. The next few years are likely to bring some interesting debates before the Courts as to what does and does not constitute "journalism".

### **THE NEW PROVISIONS AND THE JOURNALISM EXCEPTION**

The new private sector privacy laws are contained in the *Privacy Act 1988* (Cth) (the Act). Most important, from the private sector's perspective, are the National Privacy Principles (NPPs), which contain rules governing collection,

use, and disclosure of "personal information" (defined as matters relating to information and opinions about individuals).

The NPPs do not apply to acts and practices of a "media organisation" carried out in the course of "journalism" so long as that media organisation has publicly committed to standards dealing with privacy in the media context.

By providing this exemption, the Act recognises the role of the media in keeping the Australian public informed. The exemption aims to balance the public interest in privacy against the public interest in allowing a free flow of information. Frequently, the media provides the public with information about individuals which the individuals may prefer not to be known. Without the exemption, individuals might, in certain circumstances, be able to prevent the media from collecting or using such information.

Organisations which disseminate information to the public need to consider three issues in relation to the exemption. First, whether the organisation is a "media organisation". Second, which of its acts and practices are and are not "journalism". Third, whether or not the organisation has publicly committed to standards that deal with privacy in the media context and that are sufficient to trigger the exemption.

### **WHAT IS A MEDIA ORGANISATION?**

"Media organisation" is defined in the Act as an organisation whose activities consist of or include collecting, preparing or disseminating to the public, news, current affairs, information or documentaries, or commentary, opinion or analysis of such material. "Organisations" include individuals as well as corporations, partnerships, associations and trusts.

Broadcasters and magazine and