privacy provisions in the broadcasting codes of practice. However, guidelines in both sectors are likely to assist in establishing systems to prevent privacy violations. As with educating the providers of social networking sites, guidelines and the proposed media standards template can perform a valuable educative role for media providers.

Michael Coonan is a Senior Advisor in the Codes, Content and Education Branch at the Australian Communications and Media Authority. Any views expressed in this article are the author's own and not those of the Australian Communications and Media Authority. The recommendations of the Australian Law Reform Commission have not yet been accepted or rejected by the Government. The comments in this article should not be taken as an endorsement by the Australian Communications and Media Authority of the Australian Law Reform Commission recommendations.

(Endnotes)

1 'Recommendation 42–3 The Privacy Act should be amended to provide that media privacy standards must deal adequately with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters)'. Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice (The Privacy Report), Vol 2, p 1471.

2 The Privacy Report, Vol 2, p 1468.

3 'Recommendation 42–4 The Office of the Privacy Commissioner, in consultation with the Australian Communications and Media Authority and peak media representative bodies, should develop and publish:
(a) criteria for adequate media privacy standards; and
(b) a template for media privacy standards that may be adopted by media organisations'.
The Privacy Report, Vol 2, p 1471.

4 The Privacy Report, Vol 2, p 1469.

5 ACMA, *Privacy Guidelines for Broadcasters*, http://www.acma.gov.au/webwr/_assets/main/lib100084/privacy_guidelines.pdf.

6 Karen Curtis, Privacy Commissioner, *Presentation to the Australian Communications and Media Authority's Information Communications Entertainment Conference*, 23 November 2006, p 9, http://privacy.gov.au/news/speeches/sp07_06.doc.

7 Australian Press Council, *Privacy Standards for the Print Media*, http://www.presscouncil.org.au/pcsite/complaints/priv_stand.html.

8 The Privacy Report, Vol 2, pp 1458–1459.

9 In the Privacy Report it is noted that '[g]uidance is the third part of the regulatory approach adopted by the ALRC. It should be seen as sitting at the base of the regulatory model, in the sense that it is non-binding and, unlike primary and subordinate legislation, does not set out rules or obligations'. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*. The Privacy Report, Vol 1, p 246.

10 For example, Communications Alliance's *Telecommunications Consumer Protections Industry Guideline (G631: 2007)*, released on 18 May 2008 with the registration by the Australian Communications and Media Authority of the *Telecommunications Consumer Protections Code C628: 2007.* Available at http://www.commsalliance.com.au/documents/guidelines/G631.

11 For example, the ACMA's *Privacy Guidelines for Broadcasters.*

12 The Privacy Report, Vol 1, p 235.

13 The Privacy Report, Vol 1, p 235.

14 Citing Dr Christine Parker: '…the first step of compliance-oriented regulation is 'providing incentives and encouragement to voluntary compliance and nurturing the ability for private actors to secure compliance through self-regulation, internal management systems, and market mechanisms where possible". The Privacy Report, Vol 1, p 238.

15 The Privacy Report, Vol 3, p 2249.

16 Lyn Maddock, *Launch of ACMA Privacy Guidelines for Broadcasters: Speech by Lyn Maddock, Act Chair*, 23 August 2005, http://www.acma.gov.au/webwr/aba/newspubs/speeches/documents/23aug05-lmaddock-privacyguidelines.rtf.

17 The Privacy Report, Vol 1, p 248.

18 ACMA Investigation Report 1813, http://www.acma.gov.au/webwr/_assets/main/lib101072/tnt-report_1813.pdf.

19 The Privacy Report, Vol 3, p 2238.

20 The Privacy Report, Vol 3, p 2250.

21 *Good practice guidance for the providers of social networking and other user interactive services 2008* (**Social Networking Guidance**), developed on behalf of the Task Force on Child Protection on the Internet, http://police.homeoffice.gov.uk/publications/operational-policing/social-networking-guidance.

22 Social Networking Guidance, p 10.

23 The Privacy Report, Vol 3, p 2246.

24 The Privacy Report, Vol 3, p 2250.

A Question of Malice

Chris Chapman provides a case note on Australand Holdings Limited v Transparency & Accountability Council Inc & Anor [2008] NSWSC 669 which considered the requirements of publication and malice in an action for injurious falsehood.

The introduction of the uniform defamation laws definitively removed the right of a corporation with more than 10 employees to bring an action in defamation. As a result, a corporation which has its products or business publicly attacked must turn to other causes of action if it wishes to rely on the courts for assistance in defending such an attack. One cause of action which may be relied upon is an action for injurious falsehood.

Injurious falsehood is often viewed as related to defamation and it has previously been referred to as 'slander of goods.'[1] But there is a dearth of decided injurious falsehood cases in Australia, especially at the appellate level,[2] resulting in uncertainty as to the appropriate tests when seeking to establish a case. Decided in the middle of 2008, the decision in *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor*[3] (***Australand v TACI***) addresses the appropriateness of applying tests for publication and malice from the law of defamation to an action for injurious falsehood. The result was that, despite being characterised as an action for 'slander', proving a case for injurious falsehood requires meeting a different standard than is required in defamation actions.

Background – Injurious Falsehood

In the 1892 decision of *Ratcliffe v Evans*[4] Bowen LJ described the availability of an action as:

> *That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage is established law. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which will only lie in respect of such damage as has actually occurred.*[5]

The availability in New South Wales of the action described in *Ratcliffe v Evans* was confirmed by Hunt J in *Swimsure (Laboratories) Pty Limited v McDonald*[6] where His Honour described the action for injurious falsehood as:

> *an action on the case at common law consisting of a statement of and concerning the plaintiff's goods which is false (whether or not it is also defamatory of the plaintiff) published maliciously and resulting in actual damage.*[7]

Kirby J described the cause of action as having seven elements in *Palmer Bruyn & Parker v Parsons,*[8] but agreed with Gummow J that the essential elements are: (1) a false statement (2) made maliciously (3) of or concerning the plaintiffs' goods or business that (4) results in actual damage.[9]

For the purposes of the decision in *Australand v TACI*, McCallum J relied on Gummow's formulation of the required elements[10] but that did not resolve the questions of what, in the context of an action for injurious falsehood, the appropriate test for publication is; nor did it address the question of the

required malice. Before addressing how Her Honour resolved those questions, however, a brief review of the facts is in order.

Australand v TACI – The Facts

The plaintiff, Australand Holdings Limited (**Australand**), alleged that the defendants, Truth and Accountability Council Inc (**TACI**) and Mr Solon Baltinos (**Baltinos**), prepared and published three documents that contained various false statements about Australand's business, including that Australand and its employees had participated in a criminal conspiracy to defraud its clients and the Court. Australand further alleged that the publication was motivated by malice on the part of the defendants and that, if not restrained, the publications would result in damage to Australand's business.

Injunctive relief had been granted to Australand in early 2007 when copies of a document entitled 'Official warning from the Transparency and Accountability Council Inc and the Transparency and Accountability Council Investigation Committee TACIC Board of Inquiry' (the **Leaflet**) were allegedly discovered in various business locations of Australand including outside of display home villages. The Leaflet contained various allegations that were styled as findings of an exhaustive investigation. The allegations (all of which the defendants were restrained from publishing as a result of the interlocutory relief) included the above mentioned conspiracy and that: Australand had acted illegally in its dealings with Mr Baltinos and his wife; Australand had breached numerous pieces of legislation including the *Crimes Act 1900* (NSW) and the *Secret Commissions Act 1905* (NSW); and Australand, through its company secretary and general counsel, had misled the Consumer Trader and Tenancy Tribunal (**CTTT**) and made statements that were misleading and designed to pervert the course of justice.[11] The hearing before McCallum J was on the question of whether the injunction should be made permanent.

McCallum J required more than falsity to establish an improper purpose amounting to the required malice

The defendants denied the contents of the publications were false. The second defendant (Baltinos), who was the public officer of the first defendant (TACI), also denied any responsibility for publishing or composing the documents. Both defendants agreed that damage would inevitably flow from the publication of the information but this damage was an unavoidable result of publishing true statements about the plaintiff. As a result of the defendants' assertion that the allegations were true, much of the hearing was dedicated to exploring the truth of the allegations contained in the publications. These allegations centred on events surrounding the decision of Mr and Mrs Baltinos in 1998 to engage a builder to construct a home on a block of land owned by Mrs Baltinos and are not relevant in themselves to the questions of publication or malice.

What is relevant is the manner in which the publications came to be made. It was common ground that Mr Baltinos was unsatisfied with the manner in which his wife's house had been constructed by the independent builder engaged to perform that task. It was also common ground the Mr Baltinos felt Australand should take some responsibility for the builder's failure to perform the works to Mr Baltinos' satisfaction as the builder had been introduced to the Baltinos couple through Australand. The evidence showed that Mr Baltinos' attempts to involve Australand included corresponding with Australand's managing director,[12] taking unsuccessful action in the CTTT,[13] and unsuccessfully appealing to the Supreme Court of New South Wales.[14]

The remaining publications of which Australand complained were two documents – one styled as an 'Interim Report' and the second entitled 'Final Report'. Both documents bore the name and letterhead of the TACI and were apparently designed to carry an impression of official findings of an authoritative body. Indeed, McCallum J placed great emphasis in her judgment on the fact that the interim report was presented in a manner that reflected 'the reasoned conclusions of an independent inquiry', which the defendants then deployed as part of a 'threat'[15] to publish. In fact, the evidence showed that TACI was incorporated by Mr Baltinos to "air his grievances under the cloak of limited liability".[16] Both reports contained the allegations complained of by Australand, repeated over many pages and in many different guises.

The Interim Report was provided to Australand under the cover of a letter inviting Australand to settle the Baltinos' grievance or suffer the Final Report being released to the public. The fact that the Baltinos were prepared to withhold publication if they received compensation was also a significant factor in Her Honour's finding of malice.[17]

The Issues Before the Court

McCallum J found the allegations contained in the publications were false. Her Honour also found that, while Australand had proven no special damage, the swiftness with which Australand had applied for an injunction and the concession by the defendants that damage would result from publishing the allegations combined to satisfy the requirement for damage.

This left the question of Mr Baltinos' responsibility for the publication of the statements and if, in the circumstances, the required malice was present.

The question of the Second Defendant's liability for publishing the statements was resolved by reference to the law of defamation. The Court noted that there is little authority on the issue of the appropriate test to apply in determining whether a person 'published' a statement for the purposes of injurious falsehood. McCallum J therefore applied the well known test from *Webb v Bloch*[18] and found that Mr Baltinos was responsible for the publication of the allegations.[19]

The more difficult question for the Court was if the publications were made with the required malice

The more difficult question for the Court was if the publications were made with the required malice. Counsel for Australand had submitted, relying on *Palmer Bruyn*[20] that malice exists where the defendant intends harm or harm is the natural and probable consequence of the publication. Approached in this manner, the publisher takes the risk of being found liable for injurious falsehood when statements it believes to be true, but are in fact false, are published with the intention or natural result of injuring the business of another. McCallum J did not accept this submission, noting that *Palmer Bruyn* dealt with the requirement to link the damage complained of to the statements made – not to the question of malice.[21]

The Court then considered the question of malice from the perspective of defamation law. It is well understood that, in a defamation action, malice can be alleged by a plaintiff to defeat a defence of qualified privilege. In such circumstances malice has been found to exist where the publication is made with the sole or dominant purpose of harming the plaintiff.[22] McCallum J held that this was not an appropriate test for the existence of malice in an action for injurious falsehood. Her Honour based her conclusion on defamation law's focus on the question of if the purpose was related to the occasion giving rise to the privilege (it being evidence of malice if it can be shown that the purpose was not so related). McCallum J stated that, while impropriety of purpose was the essence of malice, "*the parameters of impropriety of purpose in the context of the tort of injurious falsehood are more elusive*".[23]

Malice – Impropriety

Where the Court did find the necessary impropriety to establish malice on the part of both defendants was in the threat contained in their communications with Australand. McCallum J found that, despite the stated aims of exposing the misconduct of Australand, the probable purpose of the defendants in preparing the publications was to induce Australand to compensate Mr Baltinos. In addition, the threat communicated was not merely to 'go public' with its information but to publish a

document calculated to convey the impression that Mr Baltinos' allegations had been upheld in an independent and competent inquiry.[24]

Conclusion

Injurious falsehood is a cause of action relied upon much less frequently than defamation or actions for misrepresentation under the *Trade Practices Act 1974* (Cth). The relative rarity of injurious falsehood actions is directly related to the difficulty that a potential plaintiff faces in proving malice, and *Australand v TACI* is a good example of the difficulty of establishing this malice. Even when faced with outrageous statements that had been determined on several occasions by competent courts and tribunals to be false, McCallum J required more to establish an improper purpose amounting to the required malice. On the facts, the impropriety required to establish malice was probably the promise to withhold publication if compensation was paid. Assuming similar offers are not regularly made by editors, it would appear unlikely that media organisations would be held to account in injurious falsehood for their activities.

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(Endnotes)

1 LSJ October 2008 page 69
2 *Palmer Bruyn & Paker v Parson* [2001] 208 CLR 388 per Kirby J at 419.
3 [2008] NSWSC 669
4 *Ratcliffe v Evans* 2 QB 524.
5 *Ratcliffe v Evans* 2 QB 524 at 527.
6 *Swimsure (Laboratories) Pty Limited v McDonald* [1972] 2 NSWLR 796.
7 *Swimsure (Laboratories) Pty Limited v McDonald* [1972] 2 NSWLR 796 at 799D.
8 *Palmer Bruyn & Parker v Parsons* [2001] 208 CLR 388 per Kirby at 425.
9 *Palmer Bruyn & Parker v Parsons* [2001] 208 CLR 388 per Gummow J at [52].
10 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [96].
11 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [7].
12 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [67].
13 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [144].
14 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2003] NSWSC 1163.
15 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [165].
16 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [78].
17 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [167].
18 *Webb v Bloch* (1928) 41 CLR 331.
19 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [99].
20 *Palmer Bruyn & Paker v Parson* [2001] 208 CLR 388 per Gummow J at 397.
21 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [150-151].
22 *Horrocks v Lowe* [1975] AC 135 at 150 per Diplock, LJ.
23 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [156].
24 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [164].

Classroom Use of Multimedia Materials – Copyright Infringement or a 'Special Case'?

Alex Farrar examines the impact of amendments to the Copyright Act 1968 (Cth) on the use of multimedia content in classrooms and questions whether these amendments have achieved their intention of providing greater flexibility in the use of copyright materials.

The use of multimedia content in the classroom has strong pedagogical justifications.[1] It offers an alternative to traditional classroom teaching methods, which are not geared towards visual learners,[2] whilst students regard the medium as being more current and relevant to their interests and experience.[3] New classroom technology – such as interactive whiteboards[4] – promote classroom use of multimedia content, and, when coupled with high-quality online multimedia libraries, such as the National Film and Sound Archive,[5] create opportunities for its effective integration into curricula. However, the use of multimedia content in a classroom necessitates dealing with the copyright in the material in ways traditionally reserved exclusively for the copyright holder.

In 2006, the *Copyright Amendment Act* (Cth) (**CAA**) made changes to Australia's copyright law designed to permit limited, unlicensed 'flexible' dealings in copyright digital and multimedia materials for certain educational purposes. However, because the drafters of the amendments were focused on technology-neutrality and flexibility, the amendments have failed to establish bright-line rules.[6] This essay contrasts the Government's intention in enacting the 'flexible dealing' provision, with its effect. The very flexibility introduced in order to permit innovative, socially-beneficial use of copyright materials creates such uncertainty as to be a disincentive to use.

Use of Multimedia in the Classroom

Recent trials and pilots by State and Territory Departments of Education provide two examples of the ways in which schools and teachers are encouraged to use multimedia works in the classroom. The first example is the display of multimedia DVD ROMs (for example) on a communal interactive whiteboard to promote group learning.[7] The second is the development by teachers of their own multimedia resources for use in a specific lesson,[8] or in support of particular learning objectives.

In relation to this first type of use, delivery mechanisms like *Clickview* provide schools with centralised hardware for storage of digital or multimedia content.[9] Typical use of a multimedia DVD ROM in a school would

the use of multimedia content in a classroom necessitates dealing with the copyright in the material in ways traditionally reserved exclusively for the copyright holder