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# The new privacy tort's contentious exemption: the 'character of news'

**BY MATTHEW RICHARDSON SC - JUN 06, 2025 9:00 AM AEST**

## SNAPSHOT

- This is the second of two articles dealing with Australia's new privacy tort, which is commencing 10 June 2025, and focuses on the exemption for traditional media.
- While validly aimed at protecting media organisations, it carries a high degree of subjectivity, especially in our modern media environment where the character of news is inherently disputable.
- This article will discuss the persons and organisations who are eligible for the exemption, before examining the nature of the material likely to be covered by the exemption.

Australia's first invasion of privacy tort has a curious exemption for traditional news media. This exemption, contained within clause 15 of Schedule 2 of the *Privacy and Other Legislation Amendment Act 2024* (Cth), undoubtedly provides significant protection for Australia's newspapers, television and radio stations, and their online product. However, aspects of the exemption are uncertain and subjective.

In particular, the criterion restricting the exemption to journalistic material with 'the character of news, current affairs or documentary' is an element likely to be contested before the courts. Are salacious stories about celebrities just pure gossip or do they have 'the character of news'? Do intimate or highly personal photographs or video material ascertain the character of news when employed to illustrate or accompany otherwise legitimate news stories?

## Who is covered?

Clause 15(1)(a) of Schedule 2 provides that journalists are covered by the exemption. The word 'journalist' is defined as follows in clause 15(2) as a person who:

a. works in a professional capacity as a journalist; and

b. is subject to:
   i. standards of professional conduct that apply to journalists; or

   ii. code of practice that applies to journalists.

It seems clear enough that professional journalists who are members of the Media Entertainment and Arts Alliance ('**MEAA**') and bound by its *Journalist Code of Ethics* will be eligible to claim the exemption.

A question arises as to those journalists who are not MEAA members and not bound by its code. They may instead typically be bound by conduct standards or a code of practice applying to them in their capacity as employees of a particular media company. Would such standards or a code of practice fall within clause 15(2)? In a literal sense, yes. However, there is at least an argument that, read broadly and because of the reference to the plural 'journalists', the clause is intending to catch some kind of industry code. This will be for the courts to resolve.

Over time, and in view of the very privileged position this exemption accords to traditional media, it is likely that other peddlers of online product, probably of varying degrees of credibility, will also attempt to access the exemption by declaring themselves journalists and asserting they are bound by a code. Obviously, in some instances, such an attempt may prove transparently slipshod but, over time, the imprecision of a term like 'journalist' could be exploited in a way that meaningfully broadens the exemption.

Clause 15(1)(b) extends eligibility to employers or persons engaging a journalist. Clause 15(1)(c) refers to 'a person assisting a journalist who is employed or engaged by either the journalist's employer or a person engaging the

journalist'. These provisions should ensure that freelancers and subcontractors working outside employment relationships have access to the exemption.

Clause 15(d) extends eligibility to 'a person assisting a journalist in the person's professional capacity'. That may cover a photographic agency selling, for instance, paparazzi style photographs. While such an agency may argue that its core business is to assist journalists, a plaintiff might counter that such an organisation and its employees often do not even meet or talk with journalists and simply on-sell product. Separately, clause 15(1)(c) would appear to cover a photographic agency or freelancer selling, for instance, paparazzi style photographs. However, it would not appear to extend to journalists' sources. Sources appear to stand outside the exemption and there is a possibility they could be sued for a privacy infringement even if the journalist to whom they provided information is exempt. Of course, as a practical matter, if the source is unknown and the journalist cites source confidentiality, it would likely be very difficult to get behind sections 126J-L of the *Evidence Act 1995* (NSW), which protect the confidentiality of journalists' sources, so as to uncover the identity of the source as a potential defendant in the first place.

For completeness, the Australian Broadcasting Corporation has access to an additional exemption under clause 16A. It covers staff members of agencies for the performance of the agency's functions in good faith.

## What is covered?

Clause 15(1) frames the exemption by stating the Schedule does not apply to an invasion of privacy to the extent it involves 'the collection, preparation for publication or publication of journalistic material'.

This form of words suggests there needs to be some sort of nexus between the invasion of privacy and an actual published work, article or report. It is not clear whether it would extend to the activities of journalists if they are performing investigative work which is ultimately not linked to any finished or published story. Nonetheless the breadth of the exemption is illustrated by the fact that even if a journalist undertook illegal activity, such as a trespass on a private property, so long as this occurred in the course of the collection or preparation for publication of journalistic material, it would still be protected.

Clause 15(1A) extends the exemption to 'the publication or *distribution* of journalistic material that was prepared for publication by a journalist' (emphasis added). It is significant because its effect is to permit the exemption to travel with the journalistic material as it is republished by, for instance, social media companies or search engines. Of course, in terms of material outside the exemption, those entities will become liable as intentional publishers once they are on notice of an invasion of privacy.

The central battleground for this exemption is likely to be found in clause 15(3)(a) which defines material as 'journalistic material' if it 'has the character of news, current affairs or a documentary'.

Clause 3(b) and 3(c) add to the definition by incorporating commentary, opinion or editorial content relating to news, current affairs or a documentary, but invasions of privacy in that context are likely to be rare. I now turn to analyse the three key concepts contained within the definition in clause 15(3)(a).

### *The character of news*

What is news? The word has been around since the Middle Ages and was, in fact, used by Shakespeare in a manner more or less reflecting a contemporary understanding. But, especially today, it can mean different things to different people. The news consumed by an upper-middle-class, university educated professional may be quite different to the news consumed by a person who did not complete tertiary studies and works in a trade or provides unskilled labour. The news consumed by a person in their twenties may be quite different to the news consumed by a person in their seventies. The news consumed by a member of one ethnic group may be quite different to the news consumed by another. There are right and left-leaning broadsheets, and solemn news programs on public broadcasters. There are tabloid websites with side reels which provide endless celebrity gossip but may, nonetheless, be understood by their readers to be providing 'news'.

The phrase 'the character of news' appears in the *Privacy Act 1988* (Cth), the *Victoria Police Act 2013* (Vic) and *Evidence Act 2008* (Vic) but does not appear to have been the subject of any detailed judicial consideration. There is a rough analogy with section 103B of the *Copyright Act 1968* (Cth) which contains a fair dealing exception for material that is 'for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical'. More than 20 years ago, a Court considered whether pieces of footage appearing on a Channel 10 TV show, *The Panel*, which had been lifted from Channel 9 qualified for this provision (*TCN Channel Nine Pty Limited v Network Ten Pty Limited* [2002] FCAFC 146 at [110]-[113] and [122]). Amongst other matters, the Court found segments mocking Boris Yeltsin and then Prime Minister, John Howard, did not have the purpose of reporting news. That is some thin basis for an argument that the 'concept' of news may not always apply to discussions of famous people.

How will the Courts interpret this very subjective term? First, in terms of what is most unlikely to be held to have the character of news, drawing on the UK experience, there are the photographs of celebrities undertaking ordinary family recreation such as in two cases discussed in my earlier article, *Murray v Express Newspapers*

[2008] EWCA Civ 446 and *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176. Moreover, the salacious details of of consensual activity between the sheets are unlikely to be held to have the character of news. An exception might be where the plaintiff has spoken publicly about their own sexual encounters and habits. The mere fact of a sexual relationship certainly could amount to news if, for instance, there is a conflict of interest, a breach of policy, some kind of prior public statement suggestive of hypocrisy or, possibly, if the context is an extra-marital relationship in a high-profile marriage.

Second, in terms of privacy invasions very likely to fall inside the exemption, UK courts have found a reasonable expectation of privacy exists in respect of reports of police investigations, arrests and searches prior to the laying of criminal charges. For instance, Sir Cliff Richard, who was never charged, recovered damages for a breach of privacy from the BBC in respect of a report of an investigation and search relating to child sex offences (*Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch) at [158] and [345]). Even if the Australian courts adopt that position, it seems almost certain that reports of this kind would fall comfortably under the exemption as they plainly have the 'character of news'.

The facts in the Naomi Campbell case (*Campbell v MGN Ltd* [2004] UKHL 22, discussed in my previous article) would also likely be caught by the exemption. Ms Campbell, a famous supermodel, had publicly denied involvement in illegal drugs and there seems little doubt a report she was receiving treatment for addiction would have adopted the 'character of news' in those circumstances. Indeed, Lord Hope observed, somewhat ironically in the context of the Australian journalistic material exemption, '[b]ut it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy' (at [120]). It could be argued that the photograph taken covertly of her on the street with other members of narcotics anonymous did not in itself have 'the character of news'. However, it seems artificial to accept the substance of a story has the 'character of news' but to deny that character to an accompanying photograph used as an illustration.

Third, there are situations where there are clear arguments both ways. Take the facts in *PJS v News Group Newspapers* [2016] UKSC 26 (discussed in my previous article), where the spouse of a pop star had a sexual encounter with two friends at a private residence. The Supreme Court agreed the story had no public interest whatsoever. Some might hold the view that an entirely private extra-marital sexual encounter does not have the 'character of news'. Others might point to the fame of the couple involved and the avalanche of publicity about their lives over some decades, and insist such a story plainly does possess the character of news. Some might argue that a tabloid style story enjoys the character of news and there is no warrant for imposing standards of taste, class or morality when assessing whether an item has the relevant character.

Another example at the margin might be footage of a well-known person having a mental health incident in a public place. On one view, even though the incident occurred in a public setting, it is difficult to imagine a more private aspect of a person's life. However, what if the footage also showed them taking illegal drugs and then driving a car? It is very difficult to predict how far courts would extend the 'character of news' concept in these circumstances.

In the most general sense, it can at least be predicted that the more obvious the public interest (namely, allegations involving criminal conduct, financial dishonesty, employment misconduct, double standards arising from previous public statements and so on) the more likely a court will find the material has the 'character of news'. The same can be said for the more senior the position of authority, the greater the power, wealth, influence and fame of the subject/s of the material. Nonetheless, the fundamental subjectivity of the language means it is hard to set clear rules.

### *The character of current affairs*

The meaning of the term 'current affairs' in 2025 is not particularly clear. The term traditionally applies to certain kinds of television and possibly radio programs. Such programs are not thriving in the digital age and appear to be in gradual decline, if not becoming extinct. My instinct is that the umbrella of 'current affairs' is narrower than 'news' and that the term will not meaningfully broaden the exemption. A possible qualification to that is the historical focus on neighbourhood type disputes by traditional current affairs programs. Another might be reality type programs following, for instance, a person who is questioned by police or immigration authorities but then revealed to be innocent. Such material just might fall within the 'current affairs' exemption even if it is sufficiently trivial not to enjoy the 'character of news'.

### *The character of documentary*

The ordinary understanding of a 'documentary' is a film, TV or radio program that provides a factual account of events. There is an interesting question as to whether a book written by a journalist could qualify as 'journalistic material' whether under the 'documentary' limb head or alternatively as having the character of news or current affairs.

## Conclusion

The exemption for journalistic material is significant, and privileges the traditional media over and above other collectors and publishers of information. The most significant battleground here is likely to be whether material

published in tabloid media in the nature of gossip about celebrities and high-profile persons has the 'character of news'. The concept is subjective and, in the coming years, different judges may take reasonable views that may not prove consistent.

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