

## Balancing the Right to Free Speech with the Right to a Fair Trial

*X v General Television Corporation Pty Ltd & Ors* [2008] VSC 344 (8 September 2008)

In this case Vickery J decided that it was appropriate in a free and democratic society to temporarily curtail freedom of media expression to guarantee X the right to a fair trial.

### Facts

X sought orders against General Television Corporation Pty Ltd prohibiting the publication, broadcasting or exhibition of the television show *Underbelly* until X's criminal trials were complete. *Underbelly* was based on the Gangland Wars in Melbourne between 1995 and 2004. X brought the application over concerns about the effect *Underbelly* would have on his trials.

An edited version of the show was produced for the Victorian audience to address concerns raised by the Victorian Director of Public Prosecutions. Vickery J viewed the six episodes before making the judgment.

### Importance of a fair trial

Vickery J considered X's right to a fair and unprejudiced trial, which is 'a touchstone of the existence of the rule of law' (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 58 per Deane J). He also drew on s 24 of the *Charter*, which deals with the right to a fair hearing and art 14 of the *ICCPR* which provides for the right to a fair trial. Article 14 includes the right to have the press or the public excluded from all or part of a trial to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

### Right of free speech

Vickery J also considered the right to freedom of speech, which is entrenched in s 15 of the *Charter* and set out in art 19(2) of the *ICCPR*. However, this right is not absolute; an important caveat that finds expression in ss 15(3) and 7 of the *Charter* and art 19(3) of the *ICCPR*.

### Decision

Vickery J concluded that the Victorian public has a very limited public interest in the information and the ideas in *Underbelly*. As such, X's right to a fair trial outweighed General Television's right to free speech.

In support of this Vickery J considered television's persuasive power, which arises from its compelling images, music and dramatic narrative, in leading viewers to a particular conclusion. While a book, newspaper and even the internet have to be read and processed by the mind before the information contained in them can be assimilated, what is seen on television enters directly into the mind of the audience with little opportunity for analysis.

Vickery J also drew on the decision of King J in *R v A* [2008] VSC 73, stating: 'This is not the reporting of an event, this is a television series made for entertainment. Channel 9's interests are commercial...they seek to air this at an appropriate ratings period to ensure they get good ratings. From those good ratings they would hope to receive good advertising revenue. In my

view it is far more important that the criminal justice power works, than that a channel make a profit.'

### **Consideration of the Victorian *Charter***

Justice Vickery's judgment highlights the difficulties which can arise where rights under the *Charter* conflict with one another. In this case, Vickery J addressed the inherent tension between the right to a fair trial and the right to freedom of speech, which is particularly acute where pre-trial publicity is concerned.

Superior Courts have always had the inherent jurisdiction to ensure that the right to a fair trial is respected, and this fundamental common law right is further 'reinforced' by s 24 of the *Charter* which protects the right to a 'fair hearing'. The right to freedom of speech (in this case freedom of the press) is also protected under s 15 of the *Charter*. However, his Honour notes that the right to freedom of speech is by no means absolute. It can, and should, be limited in certain circumstances. In balancing competing rights under the *Charter*, Vickery J noted that s 7 is 'also instructive', in that it provides guidance on when human rights may be limited.

In this case, a material factor was, in the words of Vickery J, the 'very limited public interest' in the screening of the series. The balancing of the two rights might have been differently determined had there been a greater 'public interest' in the disclosure of the relevant material or information.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2008/344.html>.

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