

# CAMLA COMMUNICATIONS LAW BULLETIN

Communications & Media Law Association Incorporated

Volume 37, No 3. September 2018

## Growing Pains: The Modern "Grapevine Effect"

The "grapevine effect" has featured prominently in recent defamation decisions such as *Bauer Media Pty Ltd v Wilson [No 2]*.<sup>1</sup> **Sophie Dawson** and **Joel Parsons** provide a brief look at this judicial shorthand.

### 1. Introduction

A favourable judgment provides a defamation plaintiff with vindication. The plaintiff can point to the victory, showing bystanders they were defamed. However, as the years pass, and the courtroom theatrics dissipate, perhaps the plaintiff will unexpectedly encounter the defamatory sting once more. It is only a matter of time until the plaintiff is ostracised in a distant social situation because of a lie "nailed" years prior. Perhaps the plaintiff will be denied a table at a restaurant, or passed over for a job, and the stain on their reputation will never be fully removed.

Such sentiments provide the conceptual foundation for what is known as the "grapevine effect". The grapevine effect has been described as "no more than the realistic recognition by the law that, by ordinary function of human nature",<sup>2</sup> defamatory material is usually disseminated more broadly than the initial recipients. Historically, plaintiffs rely on the grapevine effect to bolster their award of general damages in defamation, in circumstances where there is evidence to suggest the publication had the propensity to percolate through the plaintiff's community. The

decisions of *Wilson v Bauer Media Pty Ltd & Anor*<sup>3</sup> and *Bauer Media Pty Ltd v Wilson [No 2]*,<sup>4</sup> however, illustrate that in an internet age, the grapevine effect has the potential to take on new significance in defamation cases.

### 2. Origins

The grapevine effect is closely related to the idea that even after success in litigation, unbeknownst to the defamed, the slander or libel continues to spread throughout the plaintiff's community. The ominously named "lurking place observation" of Lord Hailsham in *Cassell & Co Ltd v Broome*,<sup>5</sup> is illustrative, identifying the nexus between the "lurking" nature of a defamatory imputation and the function of damages in refuting that imputation:

...[I]n case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.

In *Ley v Hamilton*,<sup>6</sup> Lord Atkin said that one cannot assess the "real" damage of defamation - it is "...impossible to track the scandal, to know what quarters the poison may reach".<sup>7</sup> While

Continued on page 2 >

## Contents

Growing Pains: The Modern "Grapevine Effect"	1
Catch Up at the Bar: Recent Developments in Defamation Law	5
Old media, New media, Not media: Rethinking policy for the public interest	7
Not-so-fair Comments - The Risks of Playing Host to Other People's Views	10
Case Note: <i>Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd</i> [2017] FCA 1305	13
Australian Class Actions in the Privacy Arena	21
<b>Profile:</b> Peter Campbell Partner in the Adelaide office of HWL Ebsworth	24
A Guide to Your First Date With a Start-up	26
CAMLA - Production Law Seminar - 21/6/18	29
"Secondary Publisher Blues": Online Platforms and Liability in Defamation	31
Legal Issues Arising from Use of Open Source Software Components	34

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### Editors

Victoria Wark & Eli Fisher

### Editorial Assistant

Imogen Yates

### Design | Printing | Distribution

MKR Productions

1 [2018] VSCA 154.  
2 *Belbin & Ors v Lower Murray Urban & Rural Water Corporation* [2012] VSC 535, [217], per Kaye J.  
3 [2017] VSC 521.  
4 Above n 1.  
5 [1972] AC 1027, 1071.  
6 (1935) 153 LT 384.  
7 *Ibid*, 386.

## Editors' Note

I know I say this every edition - but what a quarter it's been in the CAMLA space!

**Fairfax** and **Nine** have announced a \$4 billion merger that will create a massive integrated media organisation providing TV, online video streaming, print, digital and real estate advertising. **TPG Telecom** and **Vodafone Hutchison Australia**, Australia's third and fourth largest telcos, have confirmed their intention to merge. In the US, the DOJ is appealing the merger approval given to **AT&T** and **Time Warner**.

On the defamation front, following a seven-week trial, the Queensland Supreme Court ordered that **Alan Jones**, **2GB** and **4BC** pay \$3.75 million for defaming the **Wagner** family. **Rebel Wilson's** own massive defamation award from **Bauer Media** was reduced substantially by the Court of Appeal, in a decision that prompted her to seek special leave to appeal to the High Court. That court allowed **Milorad Trkulja's** appeal of a Victorian Court of Appeal decision on whether a search engine can be held liable for defamation from the results of a search. The High Court ruled unanimously that **Google** published the search results, and that the search results could convey one or more of the defamatory imputations alleged. And the **ABC** and **Fairfax's** truth defence in the defamation claim brought by Chinese-Australian businessman **Chau Chak Wing** was thrown out in its entirety, a decision that the media outlets have appealed.

The Federal Court ordered **Apple** to pay \$9 million in penalties for making false or misleading representations to customers with faulty iPhones and iPads about their rights under the ACL. **EU antitrust regulators** fined **Google** a record €4.34 billion and ordered it to stop using its **Android** mobile operating system (which powers about 80% of the world's smartphones) to block rivals, a ruling that **Google** has indicated it will appeal. **EU antitrust regulators** now have **Amazon** in their sights, investigating whether Amazon was using its merchants' data illegally to promote the sale of Amazon's own brand products similar to those of its merchants. This all, while **Apple** won the race against **Amazon**, **Alphabet** and **Microsoft** to become the world's only \$1 trillion company.

**EU** lawmakers have approved new **copyright** laws, which could force **Google**, **Facebook** and other tech companies to share more revenues with European media, publishers and other rightsholders, in a move that French President described as a "great advance for Europe".

In this edition, we follow up last edition's interview with Geoffrey Robertson QC with **Ashleigh Fehrenbach's** interview with another favourite British/Australian media barrister, **Tim Senior** of Banco Chambers. Our friends at Bird & Bird, **Sophie Dawson** and **Joel Parsons** talk us through **online platforms** and liability in defamation, as well as the "grapevine effect" which has received a fair amount of attention since the **Rebel Wilson** cases. **HWL Ebsworth's Amy Campbell** takes us through consumer law issues with **online reviews**, in light of the ACCC's case against **Meriton**. Some would say that two Campbells from HWL in one edition is too much; but not us. **Ishan Karunanayake** profiles Adelaide's media law legend, **Peter Campbell**. **Hall & Wilcox's James Bull**, **Dan Poole** and **James Morvell** guide us through a first date with a start-up, sharing some insight from their Frank Lab. **Minters' Michelle Hamlyn** describes the risks of playing host to other people's views online, in light of the recent judgment in the South Australian District Court involving Facebook posts, and **Bakers' Paul Forbes** and **Ann Hartnett** discuss class actions in the privacy arena. Shadow Minister for Communications, **Michelle Rowland MP**, gives us her views media policy. We're apolitical here at the CLB - of course - but we do enjoy politicians who quote heavily from old issues of this esteemed publication. And **HWL's Luke Dale** and **Niomi Abeywardena** talk us through legal issues arising from use of open source software components. We report on CAMLA's film and TV production seminar and the Young Lawyers' privacy essentials seminar. We advertise the Young Lawyers' **Speed Mentoring** and the **CAMLA AGM and EOY drinks** and we have photos from the **CAMLA Cup trivia night!**

Told you we look after you.

Victoria and Eli

seemingly drawn from the realms of science fiction, rather than from the courtroom, these statements are continually deployed in the assessment of damages in defamation litigation.

*Crampton v Nugawela*<sup>8</sup> is sometimes referenced as the origin of the phrase "grapevine effect".<sup>9</sup> That case concerned a letter provided to a small group of medical professionals defaming Dr Nugawela. Dr Nugawela, awarded \$600,000 by a jury, for both economic loss, and general damages, had relied on the grapevine effect in respect of the assessment of general damages. The defendant appealed, claiming the quantum of damages was manifestly excessive. Mahoney A-CJ said that in a professional grouping such as medicine, word travels fast. Formal allegations of lying and untrustworthiness of a member

of the profession would receive extensive coverage within that group, as it is a matter in which professional colleagues have a legitimate interest. A significant damages award was required to convince that group of individuals, amongst whom the defamatory message was transmitted, that the allegations were false, if the plaintiff was to face them again in future. This is the context in which the "grapevine effect" and "lurking place" observation were relevant, and they supported the large damages award.

### 3. How to grow a grapevine

There are several questions pertinent to the operation of a grapevine effect. Foremost, what is the evidentiary bar required to be met to establish a grapevine effect? Can it simply be inferred that some things will spread amongst members of particular communities, or need a plaintiff

adduce evidence from individuals who actually participated in republication? In practice, it appears to be subject to some flexibility.

The issue arose in *Roberts v Prendergast*,<sup>10</sup> where there was a direct challenge to the finding of a grapevine effect due to want of evidence. There was no reference to evidence of dissemination broader than the three individuals who read the initial defamatory statements. One of the three individuals who heard the defamatory statement, and conducted business with the plaintiff, expressed concern about the potential damage to his own business if word got out about the allegations concerning the claimant's business practices.<sup>11</sup> There was also evidence suggesting that the defendant had said he would be "telling everyone".<sup>12</sup> The witness's concern of word getting out,

8 (1996) 41 NSWLR 176.

9 See for example, *Seafolly v Madden (No 4)* [2014] FCA 980, [28].

10 [2013] QCA 47.

11 Ibid, [34].

and hearsay regarding the plaintiff's intentions, were sufficient to give rise to an inference of a grapevine effect (in circumstances where all the individuals were operating in the construction industry within a "provincial city").<sup>13</sup>

In *Lower Murray Urban & Rural Water Corporation v Di Masi*,<sup>14</sup> detailed evidence was adduced to indicate discussion amongst members of the local community in Mildura of the original publication. The evidence showed that individuals had spoken at council meetings and had chatted with neighbours about the libellous letter the subject of the defamation claim, such that it was *likely* that subsequent similar discussions would spread the subject matter further within the community. While this was said to establish the grapevine effect,<sup>15</sup> the Court said it was not necessary for there to be evidence adduced that those individuals had actually stated, or endorsed the defamatory stings – this was precisely the point of Lord Atkin's observation that the poison is said to nefariously seep into unknown quarters.<sup>16</sup>

Roberts and *Di Masi* indicate that definitive evidence of further dissemination of the material is not necessarily required to establish a grapevine effect. It can simply be inferred in the right circumstances – given its apparent resilience, the "grapevine" metaphor is apt. This should perhaps, however, be balanced against comments made in the High Court decision of *Palmer Bruyn & Parker Pty Ltd v Parsons*.<sup>17</sup> Albeit in the context of an injurious falsehood claim, Gummow J said that the "grapevine effect" does not operate in all cases to show that republication is the "natural and probable" result of the original publication.<sup>18</sup> While the "grapevine effect" can provide the "... means by which a court may conclude that a given result was 'natural and

probable'",<sup>19</sup> this depends on many factors such as the circumstances in which it was published. The grapevine effect should not be regarded as a "... doctrine of law, or phenomenon of life, operating independently of evidence."<sup>20</sup> The evidence in *Palmer Bruyn* was of publication of the impugned letter from one person to another. While the evidence suggested the publication was "in house and for the attention of a small number of people",<sup>21</sup> eventually the nature of that letter made its way into news reporting. This was not sufficient, however, to establish a grapevine effect.

A further area of consideration concerns the type of damages sought. The grapevine effect is typically deployed in respect of "general damages", but is it so restricted? *Crompton* involved a claim for economic loss, but the "grapevine effect" is not directly mentioned in connection with the assessment of damages addressing any such loss, and is seemingly restricted to the assessment of general damages. In *Palmer Bruyn*, Gummow J, citing *Crompton*, referred to the grapevine effect as having been used to help explain the basis on which "general damage may be recovered in defamation actions".<sup>22</sup>

In *Seafolly v Madden (No 4)*,<sup>23</sup> Tracey J considered a submission that the "grapevine effect" was relevant to the assessment of damages awardable pursuant to s 82 of the *Trade Practices Act 1974* (Cth), arising from misleading representations. Section 82 concerned compensation for actual loss or damage (although, not limited to economic loss). Tracey J characterised the "grapevine effect" as directed toward addressing "...the risk of false allegations resurfacing at some future date", and the need for the "victim" to be able to exhibit the damages award as a means of "stifling

any suggestion that the allegation might have had substance."<sup>24</sup> This suggests the grapevine effect is a metaphor concerned with vindication, rather than a "supplement" to guard against future economic loss.

#### 4. The Wilson Decisions

Against this background, the grapevine effect explored in the *Wilson* decisions takes on particular importance. The *Wilson* decisions explore both the evidentiary bar to be met, and how the grapevine effect can interact with the assessment of special damages, but there are also further implications for the media arising.

In *Wilson v Bauer Media Pty Ltd*<sup>25</sup> Dixon J found that the defendants' publications "...formed the roots of grapevine"<sup>26</sup> that spread the defamatory sting into the USA, such that it had caused a loss of opportunity, assessed in the amount of \$3,917,472. On appeal, however, this award fell away. How could there have been such a reversal of fortune?

At first instance, Dixon J found that the grapevine effect, extending across the globe, gave rise to an inference that it had brought the defamatory imputations to the attention of important individuals in Hollywood, causing the plaintiff to suffer a downturn in her career. Dixon J was of the view that this was entirely foreseeable, even if "the process of repetition could not be identified."<sup>27</sup> This was particularly so in relation to online articles published by the defendants, given the nature and capacity for proliferation of communications on social media and by internet publication.<sup>28</sup> Witnesses, including the plaintiff, gave evidence of having heard or seen reporting of the defamatory imputations in the United States.<sup>29</sup>

The Court of Appeal said, however, that any evidence of an "unprecedented

<sup>12</sup> Ibid, [36].

<sup>13</sup> Ibid, [37].

<sup>14</sup> [2014] VSCA 104.

<sup>15</sup> Ibid, [111].

<sup>16</sup> Ibid, [112].

<sup>17</sup> (2001) 208 CLR 388.

<sup>18</sup> [89].

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, [86].

<sup>22</sup> Ibid, [88].

<sup>23</sup> [2014] FCA 980.

<sup>24</sup> Ibid, [27].

<sup>25</sup> Above n 3.

<sup>26</sup> Ibid, [234].

<sup>27</sup> Ibid, [155].

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.



sweep of the grapevine effect” was “seriously lacking”.<sup>30</sup> The Court of Appeal’s view can be regarded as requiring substantive evidence of some form of dissemination of the initial publication, to determine the scope of a grapevine effect. For instance, the Plaintiff’s witnesses, being “Hollywood people”, including the plaintiff’s principal US agent,<sup>31</sup> and another Hollywood agent, did not seem to have been aware of the original defamatory publications.<sup>32</sup> There was no evidence whether and to what extent ‘hits’ on the online publications originated in the United States, and there was “scant evidence of any discussion within the United States about the articles outside a two-week period”, or that they had circulated in Hollywood at all in the relevant period.<sup>33</sup> Evidence supporting an inference of causation of the plaintiff’s economic loss was “exceedingly weak” and there was evidence of “competing hypothesis of equal or greater persuasion”.<sup>34</sup>

At first instance, the Defendants had raised the question as to whether the grapevine effect was relevant at all to the assessment of special damages for economic loss.<sup>35</sup> Significantly, Dixon J found however, that:

there is no fundamental incompatibility between the ordinary principles of causation and remoteness and the concept of a grapevine effect where a publication in one jurisdiction has potentially occasioned economic loss in another....the plaintiff’s reliance on the grapevine effect in proof of special damages is not bad in law.<sup>36</sup>

The Court of Appeal was not asked however, to consider whether in principle, the grapevine effect could form the basis for a claim in special damages.<sup>37</sup> Accordingly, that finding stands, despite the award being overturned.

## 5. The global grapevine

If in principle, a global grapevine can extend, via the internet into other jurisdictions, and such a circumstance is relevant for the assessment of special damages, the implications for media are potentially significant. It appears to remain open to a defamation plaintiff with an international reputation, to seek compensation in Australia for economic loss manifesting in a foreign jurisdiction by way of the grapevine effect over the internet (should they have sufficient evidence to demonstrate it). Such an application of the “grapevine effect” serves to underscore that in an internet age, Australian publishers must increasingly be alive to the possibility of liability for economic loss crystallising in foreign jurisdictions.

Intriguingly, this could raise choice of law issues in future. For example, if loss is said to arise in a foreign jurisdiction, on the basis of a grapevine effect, and there is supportive evidence suggesting dissemination of that material within that jurisdiction, where is the place of the wrong, and therefore what is the law to be applied? In *Dow Jones & Company Inc v Gutnick*,<sup>38</sup> it was said that “...defamation is to be located at the place where the damage to reputation occurs”,<sup>39</sup> and ordinarily that place is where the defamatory material is available to be comprehended and the person has a reputation.<sup>40</sup> Damage is the “gist” of a defamation action,<sup>41</sup> which is why at common law the cause of action arises upon comprehension by the reader, and arises in the place at which the reader is situated. This common law rule has been replaced within Australia by the Uniform Defamation Acts (which apply the law of the place with the closest connection with the harm), but continues to apply in relation to international choice of law issues. Kirby J, in a separate judgment, suggested that locating the tort of defamation in the place of publication,

could lead to problems where the plaintiff has a substantial reputation in more than one jurisdiction and seeks to recover the damage arising in all such jurisdictions in a single proceeding.<sup>42</sup>

In *Wilson*, Dixon J held that defences to defamation under US law were irrelevant. The plaintiff’s claim was not for damages caused by publications (or re-publications) of the defamatory articles in the USA, but for damages resulting from a tort committed wholly in Australia – this caused economic loss in the US via the grapevine effect.<sup>43</sup> In such a scenario, the choice of law issue is rendered moot. It is interesting to consider whether definitive evidence of republication in a foreign jurisdiction would effectively rule out a grapevine effect (and compensation for loss flowing from publication in that jurisdiction), in circumstances where that republication gives rise to a separate cause of action to which the foreign law applies.

## 6. Conclusion

The *Wilson* decisions highlight the continually evolving interaction between the internet and defamation law. The concept of the grapevine effect originated in a pre-internet age as a shorthand to describe the tendency of defamatory material to move through society (usually within a specific profession or local community) in unforeseen ways, and to manifest when the plaintiff unexpectedly faces ill-treatment from peers at a later date. The grapevine effect, however, appears to have taken on new significance in a digital age when communications can quickly travel across the world via the internet.

**Sophie Dawson** is a partner, and **Joel Parsons** an Associate, at Bird & Bird, in the Dispute Resolution and Media, Entertainment and Sports groups. The views expressed in this article are the views of the authors only and do not represent the views of any organisation.

30 Above n 1, [521].

31 Ibid, [473].

32 Ibid, [429].

33 Ibid, [472]–[476].

34 Ibid, [526].

35 Above n 26, [146].

36 [157].

37 Appeal decisions, [289].

38 [2002] 210 CLR 575.

39 Ibid, 606.

40 Ibid, 602.

41 Above n 39, 606, per Gleeson CJ, McHugh, Gummow and Hayne JJ.

42 Ibid, 639.

43 Above n 1, [152].

# Catch Up at the Bar: Recent Developments in Defamation Law

**Ashleigh Fehrenbach, Senior Associate at Minter Ellison, interviews Tim Senior, a specialist media barrister at Banco Chambers, about recent developments in defamation law.**

Tim Senior joined Banki Haddock Fiora after practising for five years in London at David Price Solicitors & Advocates, a leading boutique media law firm. Whilst at BHF, Tim was a specialist in media and defamation and has been involved in some key media litigation including:

- *Trad v Harbour Radio Pty Limited*,
- *Qureshi v John Fairfax Publications Pty Limited*,
- *McMahon v John Fairfax Publications Pty Limited*.

This year, Tim was recognised as a Legal 500 Asia Pacific next generation lawyer in media and entertainment law. He has joined the bar, where his focus remains on defamation and media related matters.

**FEHRENBACH:** Tim, thank you so much for your time. You've recently gone to the bar, congratulations! What has been the biggest challenge you've faced so far in this new role?

**SENIOR:** Thank you! While I'm continuing to practise defamation and media law, the biggest challenge so far has probably been working across the new and varied areas of law that come my way every day. But that variety of work and the opportunity to develop your practice are great things about coming to the bar.

**FEHRENBACH:** You have been a defamation lawyer for approximately ten years. Prior to that, you studied archaeology before law. Can you tell us a little bit about your career so far, and how your earlier degree might (or might not) have played a role in what you do today?

**SENIOR:** I've always been interested in media law, particularly the way defamation law seeks to strike a balance between freedom of speech and the right to protect reputation. At the time I was practising in the UK, London was the libel capital of the world and privacy law was

taking off following decisions like *Campbell*, *Douglas* and *Mosley*. While archaeology and law might sound worlds apart, there are parallels in the skills you learn. The weeks spent carefully examining different coloured soil for evidence of human activity prepared me well for the patience and attention to detail you need as a lawyer wading through folders of documents! Towards the end of my degree, I started focusing on a career in law and my dissertation was on the protection of archaeology in the UK town planning framework. I went on to complete a postgraduate diploma in law and my training contract with David Price Solicitors & Advocates. David Price QC is renowned as one of the UK's top media and defamation specialists, and it was a great time to be practising in London and be involved in some of the leading privacy cases (including *McKennitt v Ash*). I went on to qualify as a solicitor-advocate. I came to Sydney about eight years ago and qualified in New South Wales. I think statistically Sydney has now taken the title of libel capital of the world – nothing to do with my arrival! – so career wise, I guess I followed the libel!

**FEHRENBACH:** Given that you made the move to Australia after practising in London for five years, can you comment on some of the cultural differences that you see playing a role in Australian media companies, compared to those in the UK? For example, some say that the press in the UK are more invasive compared to in Australia. What has been your experience in that regard?

**SENIOR:** I haven't lived in the UK for a number of years now, but the print media industry used to be huge and have a lot of influence. There were a lot of titles dedicated to celebrity stories that were pretty sensational and often fairly invasive. My sense is that things have changed. There



Tim Senior

are fewer of these titles, and the ones that still exist don't have the same freedom. The Leveson inquiry and phone hacking scandal, which saw a number of journalists jailed, combined with the way in which privacy law has evolved in the UK and a general decline in print media across the world have all had an impact. In Australia, magazine and newspaper journalism has traditionally been more conservative and less celebrity focused than in the UK.

**FEHRENBACH:** It's certainly been an exciting time for defamation law over the last couple of months. There has been much talk of the proposed 'cyber aged reboot' for defamation law in New South Wales. One of the proposals made by the NSW government is for large corporations to be able to sue for defamation. What are your thoughts on this proposal? Are there other specific reforms you would like to see made to the Defamation Act?

**SENIOR:** The current law prevents companies from suing for defamation unless they are excluded (i.e. a small or non-profit company). The thinking was that allowing large and well-resourced companies to sue for defamation might

deter the publication of material that was in the public interest but critical of a company. It also flowed from the notion that reputation is primarily a personal right. The recent review received a range of responses. Some suggested that the relevant section of the Defamation Act should be narrowed to stop all corporations from suing. Others said that the prohibition should be done away with completely, allowing any company to sue. I can see both sides of the argument. I certainly understand that corporate reputations are important and need protecting. In other jurisdictions there are no restrictions on companies suing for defamation. However, I can also understand concerns about the potential chilling-effect on freedom of expression and public scrutiny if all companies were able to sue. As I said before, the law of defamation is always seeking to strike a balance between the two competing rights of freedom of expression and the right to protect reputation. Overall, I think the current law in relation to corporations strikes a fairly good balance between those competing rights. Of course defamation is not the only cause of action, and corporations can still sue on other grounds such as injurious falsehood.

As to the other areas the NSW Government has recommended for review, I'm interested in the idea of introducing a single publication rule, perhaps something along the lines of section 8 of the Defamation Act 2013 (UK). That would prevent plaintiffs suing after the one year limitation period on the basis that the relevant publication is still available for download in an archived form on a publisher's website. I also think it's worth considering the introduction of a "serious harm" threshold to deter trivial claims. I think everyone is agreed that the defence of contextual truth also needs to be amended to properly reflect section 16 of the old Defamation Act 1974 (NSW) on which it was meant to be modelled.

**FEHRENBACH:** Shortly after the "reboot" was announced, the High Court delivered its judgment in *Trkulja v Google LLC [2018] HCA 25*, striking down a Victorian Supreme Court case. This decision paved the way for Milorad Trkulja to pursue

a defamation claim against Google over search results and search term auto-completions. The Court found that search term auto-completions are capable of being defamatory, and that search engines should not be immune from defamation claims. Do you think this case will have significant implications for media organisations in Australia?

**SENIOR:** The High Court decision followed Google's application to summarily dismiss the proceedings. It focused on the second ground of the application, namely whether the matters complained of were capable of being defamatory of the plaintiff (it found they were). The Trkulja decisions more generally have considered a number of interesting questions concerning the interplay between traditional principles of defamation law and the modern digital world. As the case moves forward, my understanding is that one of the issues likely to arise is the availability and operation of the innocent dissemination defence in a digital context. That is something that will be of particular interest not only to ISPs, but to media organisations more generally. The innocent dissemination defence, and whether it requires amendment to better reflect the operation of ISPs, internet content hosts and search engines as publishers is also something that the NSW Government has recommended for review.

**FEHRENBACH:** The next case that rocked the defamation space was the Victorian Court of Appeal allowing media giant Bauer to appeal the judgment that had awarded Rebel Wilson \$4.5 million in damages. Did this decision come as a surprise to you?

**SENIOR:** The Court of Appeal's decision to set aside the big award of around \$3.9 million for economic loss turned on its review of the relevant evidence adduced by the plaintiff at trial. I'm not sure there were too many surprises about the way in which the Court interpreted section 35 of the Defamation Act 2005 (Vic) which deals with the cap on damages for non-economic loss. It rejected Bauer's challenge to the way in which the trial judge had construed the operation of

section 35, and accepted that where a court is satisfied that an award of aggravated damages is appropriate, it is entitled to make an order for damages for non-economic loss that exceeds the statutory cap in respect of both pure compensatory damages and aggravated compensatory damages.

**FEHRENBACH:** For our readers who are interested in moving into, or launching their careers, in the defamation and media law space, what are two pieces of advice you would give to them?

**SENIOR:** For a more direct route into a career in media law I would recommend skipping a degree in archaeology. In all seriousness, an interest in news, current affairs and the media is obviously important. It's a fairly small and competitive area of practice so perseverance is essential, and I'd recommend getting as much experience working with a specialist law firm or perhaps working in-house with a media company. There is usually a defamation trial happening somewhere, and I would definitely recommend going along to watch. I think defamation and media law are more important than ever in a world of fake news and where freedom of expression is increasingly under threat. It's an intellectually challenging area of the law and all about people, which makes it particularly interesting. I would definitely encourage any of your readers who are interested to get involved.



**Ashleigh Fehrenbach** is a Senior Associate at Minter Ellison and a member of the CAMLA Young Lawyers committee.



# Old media, New media, Not media: Rethinking policy for the public interest

CAMLA has a long and distinguished history of informing debate on media and communications in Australia; sectors which play a critical role in our economy and society and, more fundamentally, our democracy.

The Communications Law Bulletin has been published by CAMLA for over 37 years, since April 1981, tracking developments across free speech, defamation, privacy, competition, copyright, broadcasting, telecommunications and the internet, amongst other issues.

The CAMLA community needs no convincing or reminding that the regulatory framework for media and communications is no longer appropriate and in need of reform.

Indeed, this understanding was old hat when the infamous ‘Turkey slap’ incident brought the issue to prominence, care of *Big Brother*, over a decade ago.

To continue with the Big Brother theme, the September 1992 issue of the Communications Law Bulletin contains an article by Professor Mark Armstrong, which said of Australia’s then recently enacted *Broadcasting Services Act 1992*:

“The laws we have are not suited to the new media environment. For example, old media like broadcasting which attracted separate rules are combining with new services like telecommunications. ... “Yet “letting nature take its course” may produce Orwellian results. The natural economies of telecommunications and media transmission are towards concentration”.

About a decade later, the March 2001 issue of the Communications Law Bulletin contained a piece by

Suzanne Shipard asking whether new legislation was required to accommodate the rapid convergence of broadcasting technologies.

Yet another decade later, in 2011, the ACMA released its Broken Concepts paper, highlighting how many legislative concepts – the building blocks of communications and media regulation – are broken or strained as a result of convergence pressures.

Over 25 years since it was enacted, the BSA is still with us, straddling the worlds of old media and new media; as well as being tinkered with, here and there, in recognition of the impact of that which is argued not to be media – the digital platforms and the data and algorithms that underpin them.

The BSA continues to be subject to the September 2000 Ministerial Direction which decrees that ‘internet services’ are not ‘broadcasting services’, yet a number of its Schedules do regulate the internet, to a limited degree, and it’s about to have a brand new Part tacked on for the administration of grants for the publishing industry.

Over roughly the same 25 year period in the EU, by contrast, the Television Without Frontiers Directive has been introduced and superseded by the Audio-visual Media Services Directive – which in turn is being revised as part of the Digital Single Market strategy.

This framework covers both traditional television broadcasts and on-demand audiovisual media services, including online platforms disseminating audiovisual content, and imposes a set of minimum rules on both types of services to achieve a balance between competitiveness and consumer protection.

Australia is barely playing catch-up when it comes to the design and implementation of a coherent, 21<sup>st</sup> century policy and regulatory framework that levels the playing field between content providers, sustains the broader ecosystem and utilises innovative data-driven advancements to enhance outcomes for industry, citizens and consumers.

What reform activity there has been, of late, has been characterised by inconsistency, delay and a lack of coherence – partly because the old questions still linger and the new questions are so many.

Working through the layers:

The second Exposure Draft of the Radiocommunications Bill is yet to emerge, and the broadcasting policy piece has been kicked into the long grass to be worked out later.

A trial of next generation broadcast technology has recently been announced by FreeTV and Broadcast Australia however there has been no clear signalling from Government around the planning or timing of broadcast standards evolution or related matters. While overseas jurisdictions have set dates for DVB-T2 switchover, there has been a distinct lack of activity on this front in Australia.

Media law changes, last year, were essentially in the nature of piecemeal deregulation or regulatory housekeeping. Labor supported all bar one of the measures, taking an evidence-based approach that supported industry while maintaining a key public interest safeguard in our democracy.

Labor opposed the repeal of the 2 out of 3 cross-media control rule

because Australia already has one of the most concentrated media markets in the world and evidence shows the majority of Australians still rely on traditional media for news and current affairs; the majority of the top ten news websites accessed by Australians are owned by traditional media platforms and the Department found 'the diversity-enhancing potential of the online space is yet to be fully realised'.

The Australian and Children's Screen Content Review is ongoing but, so far, there has been no public release of the report of the review, or its consultation. This Review is occurring in reference to an outdated regulatory framework and lacks a critical policy development step: public consultation on options, which might usefully have fostered a constructive dialogue on the way forward, with various interest groups advancing ideas beyond their opening positions.

Similarly, had the Government commenced an inquiry into competition in the Australian media market when Labor called for it, in August 2016, it could have been finished by now.

Coming up to two years ago, I publicly called for a thorough examination of the state of the Australian media landscape, noting there had not been a comprehensive inquiry into ownership, concentration and competition in the Australia media market since the late 1990s. I said that the government should ask an independent body, such as the ACCC or the Productivity Commission to assess the state of play so parliamentary decisions could be evidence-based. But the Minister for Communications rejected this suggestion, saying "All the relevant facts are known".

Given the ACCC's issues paper for the digital platforms inquiry contains around 48 questions on the digital media environment, and given the complexity of the fact-finding mission has been allowed 18 months to report, clearly all the facts were not known when the Government

embarked on changes to Australia's media laws and clearly Labor's call for evidence on the state of competition in the media industry had merit.

Finally, for a Government that says it wants to de-regulate and promote self-regulation it is curious indeed that they ran straight for the legislative drafters when presented with their first key test in bridging the regulatory divide between broadcasting and online services in the content space.

The Act to restrict gambling promotions during live sport, which passed Parliament earlier this year, enables the ACMA to make online content service provider rules that impose the restrictions on 'online content service providers' and then to decide who to exempt from those rules. A 'regulate first; exempt later' approach.

The Act goes so far as to regulate SBS directly, despite the legislated independence of the SBS, the distinct treatment of the national broadcasting services in the BSA and the fact the SBS already had a code of practice in place to regulate its online content.

As I've noted in other fora, the Government, now well into its fifth year in office, has failed to produce a Communications Policy Roadmap to guide the transition of the sector in this time of change, despite the Minister's acknowledgment of the need for one and statement that it's something the Government is working on.

A Government with a coherent vision for its industry, consumers and citizens would signal its intentions and lay out its program – particularly in a sector with such high value benefits at stake.

The Government has imposed this discipline on the ACMA when it comes to laying out a five year spectrum work plan, yet it doesn't lay out its own plan.

A Government with a vision would put its APS staff to work within the ecosystem, drawing on the best

expertise and ideas to progress the broad reform project that has lay before us for so long now.

But then, does a Government that knows what it stands for attempt to increase the level of advertising on SBS one day – then launch a broad-brush inquiry into its competitive neutrality the next?

Does a Government that knows what it stands for propose a Safe Harbour for Google and Facebook one year – then launch an inquiry into digital platforms the next?

Does a Government that knows what it stands for call for the abolition of section 18C on free speech grounds then threaten journalists with criminal sanctions simply for doing their jobs – as they did with the original Espionage and Foreign Interference Bill 2017?

At time of great upheaval, Government needs to promote the public interest as it supports industry.

It goes without saying that we need both a vibrant media sector to foster public interest objectives, but the public interest should neither be an afterthought to, nor a casualty of, reform to prop up commercial interests.

Unfortunately, the non-contestable grant of \$30 million to Fox Sports, the deliberate and ideological exclusion of certain outlets from the Regional and Small Publishers Fund and the questionable motivations of some behind the bills, cuts and inquiries now faced by the national broadcasters has done little to engender trust in Parliament or the media – indeed it is likely to have undermined it.

While private media groups, digital platforms and advertising companies answer to shareholders, the role of Government is to act in the public interest at large.

Labor is proud to have supported a number of sensible changes to media law to support commercial media – particularly given its key role in the Australian content ecosystem – but



shares concerns that other players in the value chain, similarly disrupted by digitisation, have been neglected and that the public interest has been actively undermined over recent years.

It is way past time the Federal Government commenced a public dialogue to promote public interest outcomes in the contemporary media environment.

With more players in the media and communications ecosystem, there are potentially a greater number of contributors, and new ways of achieving outcomes.

Are all players doing their bit?

Can policy and regulation help traditional players innovate and move out of sector silos?

And can policy and regulation help new players – whether new media or not media – contribute more to public interest outcomes?

Digital media platforms demand a rethink about what we are trying to achieve, and how, and some interesting ideas have been advanced overseas as well as in submissions to the digital platforms inquiry, which the ACCC is now examining.

Data has been collected and used to promote a range of interests since the Domesday Book of 1086, and the power of data and algorithms today presents a new suite of new tools to promote public interest objectives in ways we never imagined. Proposals around a new data right are now being explored, as questions of human rights and ethics in the era of artificial intelligence are coming to the fore.

Meanwhile, with 4G well-established and 5G on the near horizon, we need a sensible dialogue about the future of our media and how best to serve our communities with the suite of complementary platforms and new applications that will be available.

In all of this, Government needs to be guided by clear principles and values, and have a vision to help shape public interest outcomes in the Communications Portfolio

The Curtin Labor Government introduced the *Broadcasting and Television Act 1942* and, fifty years later, the Keating Labor Government introduced the *Broadcasting Services Act 1992*.

It is my sincere hope that a Shorten Labor Government will have the opportunity to introduce the next Act in the series – after drawing on the expertise of government, industry, the not-for-profit sector and academia – to craft a coherent, principled and evidence-based way forward.

There is plenty of work to be done to guide a transition in the sector where all players in the ecosystem do their bit, and I am confident CAMLA will continue to provide thought leadership.

## On 1 June 2018, CAMLA Young Lawyers held its annual CPD seminar with this year's topic on Privacy Law Essentials

Our speakers for the morning's seminar included a number of respected names in the data and privacy space: **Peter Leonard** (Principal, Data Synergies), **Veronica Scott** (Special Counsel, Minter Ellison) and **Anna Johnston** (Director, Salinger Privacy). The speakers were introduced by CAMLA Young Lawyers committee member **Ashleigh Fehrenbach** (Senior Associate, Minter Ellison).

In the spate of several recent privacy headlines (including the Cambridge Analytica scandal and the commencement of the application of the General Data Protection Regulation on 25 May 2018), the seminar provided attendees with practical insights into privacy law, including the general framework of privacy law in Australia, practical tips and traps in privacy law, and issues beyond the law including the ethical use of data.

Veronica Scott kicked off the seminar, taking attendees through what practitioners need to

know about privacy law, with a detailed walk through of the privacy framework in Australia and its practical application. Anna Johnston provided practical tips and dispelled the major sources of confusion and related traps relating to privacy policies, consents and notification statements. Peter Leonard's part of the seminar focused on the issue of the ethical use of data, and the importance of fostering public confidence in the use of personal data by businesses as against strict compliance.

Anna's blog post on her presentation topic can be accessed at: <https://www.salingerprivacy.com.au/2018/07/12/privacy-policy/>.

CAMLA Young Lawyers would like to extend its thanks the morning's speakers for providing their insights, and to Minter Ellison who hosted the morning's event.

# Not-so-fair Comments - The Risks of Playing Host to Other People's Views

Michelle Hamlyn, Senior Associate, MinterEllison

## Introduction

Facebook, LinkedIn, Twitter and other social media platforms have opened up a new world of opportunity to communicate and share with broad audiences. But with that opportunity comes responsibility, the scope of which is still being defined.

In addition to considering the legal implications of their own posts, social media users are obligated to monitor comments that other users leave on their posts and pages, and delete any that may be defamatory – as highlighted by a recent South Australian District Court decision. If they don't, they risk legal liability and damages awards as secondary publishers of those comments.

The District Court's decision is also a pertinent reminder of the legal responsibility administrators of social media 'group' pages have for posts made by members. It highlights the importance of implementing policies and procedures for monitoring and removing inappropriate posts.

## Social media publications

As social media publication continues to be tested in the Courts, we are gradually learning that posting on social networks is not quite as free of consequence as chatting with friends at the pub. It's now clear that social media is a permanent and provable form of publication that attracts legal responsibilities and consequences.

We have learned to take care in assessing the legal implications of our personal posts. But what about comments and posts that *other people* share with us, on our own pages and pages we host?

Defamation law in Australia has long imposed liability on parties who did not actively or intentionally author defamatory content, but were part of the chain of events that led to it being communicated to an audience.

The High Court confirmed as far back as *Lee v Wilson & McKinnon* (1934) 51 CLR 276<sup>1</sup> that '*the communication may be quite unintentional, and the publisher may be unaware of the defamatory matter. If, however, the publication is made in the ordinary exercise of some business or calling, such as that of booksellers, newsvendors, messengers, or letter carriers, and the defendant neither knows nor suspects, nor using reasonable diligence ought to know or suspect the defamatory contents of the writing, proof of which facts lies upon him, his act does not amount to publication of a libel*' (emphasis added).

This passage emphasises that a defendant considered to be a 'secondary or subordinate participant' in publication of defamatory matter must prove, in order to avoid liability, that she or he "*did not know and could not with the exercise of reasonable diligence have known of the defamatory matter*".<sup>2</sup> This has been confirmed and

enshrined since enactment of the national uniform defamation acts in the statutory innocent dissemination defence.<sup>3</sup>

These principles have been applied by the Courts to the modern age of online publication to find that "*a search engine operator or website forum host is only a secondary publisher*", and can avoid liability for defamatory publications it is involved in by proving that it had '*no actual or constructive knowledge of the defamatory matter*'.<sup>4</sup>

A number of cases have now confirmed these principles in respect of Google,<sup>5</sup> but Facebook and social media remain largely a frontier that lawyers can only advise on based on analogy and extension of principles.<sup>6</sup> This makes the recent South Australian decision in *Johnstone v Aldridge*<sup>7</sup>, while only a single judge decision of the State's secondary Court, noteworthy.

## The case

In this case, the plaintiff sued over two Facebook posts which were actively authored by the defendant on his personal Facebook profile, together with comments added by other users to the first post.

The defendant was considered liable for the comments as a secondary publisher, as they were published 'through the medium of the defendant's [Facebook] profile'. The Court held that '*by publishing the post with the comments box attached*

1 288 per Dixon J.

2 *Duffy v Google* (2015) 125 SASR 437, [169] – [170].

3 See, eg, section 30 of the *Defamation Act 2005* (SA).

4 *Ibid*, [236]–[237], citing *Murray v Wishart* [2014] 3 NZLR 722 and *Oriental Press Group Limited v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 336.

5 See, eg, *Duffy v Google* and *Trkulja v Google LLC* [2018] HCA 25.

6 Although interlocutory decisions in *Von Marburg v Aldred* [2015] VSC 467 and *Wishart v Murray* [2013] 3 NZLR 247 have confirmed the likelihood of that extension applying.

7 [2018] SADC 68.

*the defendant provided a forum for persons who might have been minded to add their comments to the post for others to read*<sup>8</sup>.

The Facebook profile was public, with almost 6000 followers, and the Facebook posts related to a development dispute between the parties.

The first post indicated that the plaintiff was:

- intent on closing all farmers markets in Australia to improve his own sales;
- would, if successful, cost thousands of good hardworking Australians their jobs, farms and businesses; and
- was greedy.

It was 'liked' 9,088 times, and 'shared' 12,959 times, and received approximately 4500 comments which were, in the words of the Court, "*critical of the plaintiff and some referred to him in contemptuous terms*" bordering on mere vulgar abuse. Critically, at least some of the comments were considered responsive to the post, which resulted in them '*adopting and emphasising*' the defamatory imputations carried by the post itself, and prevented them from being read as mere non-defamatory vulgar abuse or invective.<sup>9</sup>

The second post imputed, more seriously, that the plaintiff had made threats of violence, sexual assault and death to the defendant, his family and others. It received 149 'likes', 43 'shares' and 33 comments.

By the time of the trial, the defendant was self-represented. He denied publication, and accused third parties of 'tampering' with his posts, without evidence (and in fact, expert evidence made this claim inherently unlikely). The Court found that he was not a credible witness. He also ran fair comment and extended

political discussion qualified privilege defences, which were rejected.

He denied publication of the comments, saying that he had no control over their content and it was 'impracticable' for him to remove them. However, he conceded that he was aware of the potential for his posts to generate many comments, some of which may be inappropriate, and that he had a practice of delegating control of his Facebook page to his wife and an employee when he was unavailable to allow ongoing monitoring.

The Court accepted that the task of reviewing the comments would have been time consuming and might have involved considerable inconvenience, but considered that "*there was nothing physically preventing the defendant... from discovering the contemptuous and disparaging nature of at least some of the comments*", and the inconvenience "*was not so great as to make it unrealistic or unreasonable to expect [the Defendant] to do so, and particularly as he recognised that the post might attract inappropriate comments, the defendant must be taken to have accepted the responsibility to monitor them and to remove those which were inappropriate or suffer the consequences... Volume cannot create its own shield*".<sup>10</sup>

In those circumstances, it found that the defendant most likely knew that a proportion of the comments included material that was complained about. He was held liable for the publication of the comments as a secondary publisher.<sup>11</sup>

The Court awarded the plaintiff a single combined sum of \$100,000 in general damages in relation to the two posts and the comments, including aggravated damages. In reaching that figure, it took into account the extent of the publications, the gravity of the

imputations, the impact on the plaintiff, and the unjustifiability and impropriety of the defendant's conduct, noting that he appeared to be aware that they were false. While not expressly referenced in this context, the adverse credibility findings made against the defendant likely contributed to the Judge's preparedness to award aggravated damages. The judgment does not discuss the attribution of any portion of that sum to the various aspects of the publication, but it is clear that the posts themselves formed a very significant part of the overall liability. As a result, it is difficult to assess the level of damages that might have attached to publication of the comments alone (if the original post is defensible, for example).

## Implications

The Court's analysis in *Johnstone v Aldridge* provides some helpful lessons for social media users. In particular, it is clear that they cannot hide behind volume, or the onerousness of the task of monitoring comments and third party posts, in order to avoid their responsibility for those posts. Rather, only circumstances which '*physically prevent*' a host from monitoring comments appear to be considered a possible lawful excuse for failing to remove those that are defamatory.

Having said that, it is important not to overreact. This decision also suggests that a host who could show he or she *did* take objectively reasonable and diligent steps to monitor and address defamatory posts would likely be able to defend a claim in relation to any honest oversights (provided they were promptly addressed once drawn to his or her attention). As a result, it assists the vast majority of social media users, who act ethically and in good faith, to more confidently understand and mitigate risks and continue to enjoy the many benefits of social media responsibly.

<sup>8</sup> Ibid, [180].

<sup>9</sup> Ibid, [2070]-[208].

<sup>10</sup> Ibid, [185].

<sup>11</sup> Ibid, [186]-[188].



The New South Wales Supreme Court will have the opportunity to shed further light on this issue in the three *Voller* matters<sup>12</sup>, where the plaintiff has sued solely on comments posted by third parties on the Facebook pages of three media outlets, and the question of publication is intended to be determined as a preliminary issue. These matters are likely to provide further guidance to social media users, both commercial and private, on how much diligence is required to 'host' online discussions in order to avoid liability.

- In the meantime, prudent and responsible users of social media can protect themselves against risk of liability for comments posted by others by (in addition to avoiding defaming individuals, small business or not-for-profits in their own posts, of course!):
- setting up a regular schedule of reviewing 'alerts' generated by the platform for any comments on the users posts, or posts in which the user is 'tagged' that are of concern. Once daily should be considered an absolute minimum;
- either removing immediately, or adopt a system of allowing a user a finite and short time frame in which to themselves amend or retract, any inappropriate comments identified (with removal remaining a back-up option);
- ensuring that any messages, comments or other communications received which raise concerns about posts, comments or other content and considered, addressed and responded to;
- exploring the available settings within the social media platform and, if allowed by the platform:
  - requiring approval prior to comments or posts being published to the user's page, either for all posts or in circumstances considered likely to be controversial;
  - posting as a 'pinned' or permanent post a summary of the policies adopted to put users on notice as to the approach you will be adopting, which may include a preferred means of being contacted or notified of any concerns;
  - if administering a group, requiring group members to confirm acceptance of those policies prior to allowing them to join; and
- if particular users appear to cause frequent problems, consider blocking them, removing them from the group, or reporting them to the platform host.

For all of the fantastic opportunities to connect that social media presents, it also raises new situations where it's not always clear how the law might be applied. Cases like this one continue to clarify and confirm the practical implications of what have become day-to-day activities, and how people can best use social media ethically and responsibly.

<sup>12</sup> *Voller v Fairfax Media Publications Pty Ltd* (2017/219538); *Voller v Nationwide News Pty Ltd* (2017/219519); *Voller v Australian News Channel Pty Ltd* (2017/219556). See [2018] NSWSC 608.

# SAVE THE DATE

## CAMLA AGM AND END OF YEAR DRINKS

**Thursday 29th November, 2018**

### **Baker McKenzie**

Tower One - International Towers Sydney  
Level 46, 100 Barangaroo Avenue, Sydney

**5:45pm** CAMLA AGM

**6:30pm** End of Year Drinks

**Register your early interest at**  
**[camla@tpg.com.au](mailto:camla@tpg.com.au)**



# Case Note: *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305

**Amy Campbell, Associate at HWL Ebsworth, considers the Federal Court's decision that Meriton's practices in relation to its use of TripAdvisor's "Review Express" service, between November 2014 to October 2015, reduced the number of negative reviews posted on TripAdvisor about Meriton's Serviced Apartments. The Court found that Meriton's conduct did, or was likely to, mislead or deceive, and had the effect, or likely effect, of misleading the public as to the nature, characteristics or suitability of Meriton serviced apartments.**

## 1. Background

This case concerns Meriton Property Services Pty Ltd's (**Meriton**) use of "Review Express", a platform offered by TripAdvisor, Inc (**TripAdvisor**), in connection with 13 of its serviced apartments in Queensland and New South Wales (the **Meriton properties**) between November 2014 and October 2015 (**relevant period**).

Each of the Meriton properties appears on "www.tripadvisor.com.au" (the **TripAdvisor website**). The TripAdvisor website is an online travel site that allows customers who have stayed at a hotel or other accommodation (**guests**) to submit public reviews of accommodation properties. Guests can submit a review through their TripAdvisor account, Facebook account or may be invited by email to submit a review. These reviews comprise a title, a written review, an overall rating out of five and ratings with respect to particular aspects such as value, location and cleanliness. The most recently submitted reviews appear first on a property's

dedicated TripAdvisor page. TripAdvisor uses an algorithm to rate and rank properties on the basis of the quality, recency and quantity of reviews.<sup>1</sup> It then gives an overall rating out of five for each property and ranks all of the properties of a given type in a particular geographical area on the TripAdvisor website.<sup>2</sup>

TripAdvisor offers accommodation providers a service called "Review Express". It uses guests' email addresses, provided to it by an accommodation provider, to send those guests an email on behalf of the accommodation provider inviting them to post a review of their stay on the TripAdvisor website. During the relevant period, TripAdvisor's guidelines for using Review Express stated that participating accommodation providers should ask all guests for permission to email them, and send Review Express emails to everyone who consented. TripAdvisor also stated on the website that selectively emailing guests who are most likely to write positive reviews was considered to be a fraudulent practice.<sup>3</sup>

From around August 2013, Meriton participated in Review Express and, during the relevant period, sent the email addresses of its guests to TripAdvisor weekly. However, contrary to TripAdvisor's guidelines, Meriton did not send TripAdvisor the email addresses of all guests. Instead, it adopted the following two practices:

- (a) **MSA-masking practice:** from the beginning of the relevant period, Meriton staff were instructed to add the letters "MSA" (Meriton Serviced Apartments) to the front of the email addresses of certain guests who had made a complaint or were otherwise considered likely to have had a negative experience at a Meriton property. This was done to invalidate the relevant guests' email addresses. Towards the end of the relevant period, a field called "TA Mask" was included in Meriton's new property management system so that "MSA" could be inserted in this field causing that email address to be automatically excluded from the emails provided to TripAdvisor.

<sup>1</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [64].

<sup>2</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [3].

<sup>3</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [9].

(b) **Bulk withholding practice:** Meriton staff were instructed to withhold from TripAdvisor the email addresses of all guests who had stayed at a property during a period of time when there had been a major service disruption (such as the lifts not working, no hot water, etc). TripAdvisor did not receive the group of email addresses and so no emails were sent to those guests.

The effect of both practices was the same: the guest or guests did not receive an email invitation to post a review on TripAdvisor through the Review Express system.<sup>4</sup>

Meriton provided a list to the ACCC of all of the email addresses sent to TripAdvisor between 1 April 2015 and 31 December 2015. A total of 14,584 of those email addresses had been masked using the letters “MSA”.<sup>5</sup> The total number of emails sent by Meriton to TripAdvisor was not included in the judgement. The Court found that the overwhelming majority of these email addresses related to guests who made complaints.<sup>6</sup> The Court also accepted that the bulk withholding practice was employed on many occasions.<sup>7</sup>

On 19 October 2015, Minesh Shah, TripAdvisor’s Senior Director of Global Hotel Partnerships sent an email to Meriton, including Meriton’s then-National Manager Mr Thomas, stating:

*It has come to our attention that there may be certain systematic anomalies in usage of Review Express by your properties that may*

*lead to Review Express being biased in terms of who receives the Review Express email, which is against the usage terms of TripAdvisor in soliciting reviews.*<sup>8</sup>

That same month, an Australian Broadcasting Corporation program went to air raising issues about Meriton’s practices in relation to TripAdvisor. From 20 October until late November 2015, Meriton ceased using Review Express and staff were instructed to stop masking guest email addresses. Shortly after resuming its use of Review Express in late November, TripAdvisor suspended Meriton from using Review Express.

## 2. **Contravention of the Australian Consumer Law**

The ACCC alleged that by engaging in the MSA-masking practice and bulk withholding practice (the **Conduct**), Meriton contravened sections 18 and 34 of the Australian Consumer Law contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**).

Section 18(1) of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 34 provides that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

The ACCC alleged that the Conduct had the effect, or likely effect, of reducing the number of recent negative reviews and that, by doing so, Meriton: improved (or was

likely to have improved) the relative number of favourable compared to unfavourable reviews; and/or improved or maintained (or was likely to have improved or maintained) the ratings or rankings of Meriton properties on the TripAdvisor website. The ACCC alleged that Meriton thereby created (or was likely to have created) a more positive or favourable impression of the standard, quality or suitability of its accommodation services.

Meriton accepted that it engaged in the Conduct and that it ought not to have done so. Meriton also accepted that the Conduct was carried out for the purpose of preventing certain guests from receiving an invitation to review Meriton properties via Review Express, with the intention of reducing the likelihood that those guests would leave a review. However, Meriton disputed that the practices had the effect, or the likely effect, alleged by the ACCC. Meriton submitted that the ACCC had not established that the practices had this effect or likely effect.

Justice Moshinsky found in favour of the ACCC, concluding that the Conduct had the effect of:

- (a) reducing the number of negative reviews;
- (b) increasing the ratio of favourable to unfavourable reviews;
- (c) at least in some cases, improving the ranking; and
- (d) creating a more positive or favourable impression of the quality or amenity, of the Meriton properties appearing on the TripAdvisor website.

4 Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [7].

5 Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [107].

6 Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [107].

7 Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [8].

8 142



His Honour therefore concluded that the Conduct contravened sections 18 and 34 of the ACL. The Federal Court's reasons for its decision are considered below.

### 3. Decision

The Court accepted evidence that the use of Review Express substantially increases the number of reviews about a property.<sup>9</sup> The Court also inferred from statements included in a presentation by TripAdvisor to Meriton in November 2014 that by participating in Review Express, Meriton substantially increased the number of reviews on TripAdvisor of its properties.<sup>10</sup> According to TripAdvisor's presentation, the Meriton properties received an average of 23 reviews per month before Meriton commenced use of Review Express. This increased to 55 reviews per month afterwards. 67% of properties saw an increase in overall ranking, 5 Meriton properties were ranked at the top of their geographical area and, in a number of cases, the rank had improved significantly.<sup>11</sup> For example, Meriton World Tower had gone from a rank of "7 out of 188" to a rank of "3 out of 183".<sup>12</sup>

Mr Chan, Meriton's NSW Operations Manager during the relevant period, gave evidence that during the relevant period, Meriton received approximately 52,000 online guest reviews in relation to its properties, and that TripAdvisor accounted for 20% of these. Ms Nazha,

a Meriton employee who, during the relevant period, had responsibility for dealing with customer feedback, said it was her invariable practice to respond to every review of a Meriton property on TripAdvisor. If a review with a rating of less than four or a negative comment (**negative review**) was identified, Ms Nazha would forward the negative review to the hotel manager of the relevant property and ask the hotel manager to investigate the cause of the complaint and identify the relevant guest. The evidence included a number of cases where Meriton (usually the hotel manager) contacted a guest who had left a negative review. In some cases the guest was offered compensation to address the matter and, in some cases, the guest was asked to, and agreed to, amend or remove the review.<sup>13</sup>

#### MSA-masking practice

The Court accepted Ms Nazha's evidence that from May 2014, when she joined Meriton, the MSA-masking practice "was well under way".<sup>14</sup> She said that the responsibility of putting the letters "MSA" in front of a guest's email address (so as to invalidate it) was "everyone who was checking the guests in and out"<sup>15</sup> and that the MSA-masking practice "was common knowledge and practice across all management and front line staff".<sup>16</sup> Ms Nazha accepted during cross-examination that her understanding was that

Meriton's "policy" in relation to the MSA-masking practice existed "to prevent, so far as possible, these guests being invited by TripAdvisor, through the Review Express process, to submit reviews". She accepted that this was, to her knowledge, the understanding of everyone at Meriton.

On the basis of Ms Nazha's evidence summarised in paragraph 3.3, Justice Moshinsky found that:

- (a) From at least May 2014, Meriton adopted a practice of masking the email addresses of guests who complained.
- (b) Overwhelmingly the most common reason for masking email address was because the guest had complained.
- (c) The practice was standard across the whole of the organisation and adopted on the instructions of management.
- (d) The MSA-masking practice made the email address invalid. This meant that the guest would not receive an email invitation through Review Express to post a review on TripAdvisor.
- (e) Meriton's intention in adopting the practice was to reduce the likelihood of negative reviews being posted on TripAdvisor.<sup>17</sup>

The Court found that the MSA-masking practice was engaged in deliberately and systematically by Meriton. The MSA-masking practice

<sup>9</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [4].

<sup>10</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [74].

<sup>11</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [72]-[74].

<sup>12</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [73].

<sup>13</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [80].

<sup>14</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [86].

<sup>15</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [88].

<sup>16</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [88].

<sup>17</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [92].

was standard across the organisation and, from January 2015, was reflected in Meriton's standard operating procedure for guest check-out. If guest feedback was negative, staff were instructed to "mask guest email by adding MSA to the beginning of guest email address, and discuss concerns."<sup>18</sup>

Several internal email exchanges were considered in evidence as examples of Meriton staff implementing Meriton's policy in relation to the MSA-masking practice. On 20 November 2014, Ms Nazha sent an email to all hotel managers in NSW recommending they "add a(n) 'Email MSA'd' column in their duty log spreadsheet" to ensure "complaints are not carried onto TripAdvisor".<sup>19</sup> An email exchange on 11 April 2015 included an email from the hotel manager for Kent Street instructing staff to "please ensure everyone is aware of the importance of updating notes and masking bookings for even the smallest issues". The Court accepted Ms Nazha's evidence that this was the policy of Meriton at the time.<sup>20</sup> On 28 August 2015 in an email in relation to a "1 STAR TA Review" for Meriton's Bondi Junction apartments, the hotel manager stated "Staff have been advised that if they fail to msa a booking when they should have it will result in a warning".<sup>21</sup>

A new management system was introduced in around September 2015 with a field named "TA Mask".

Meriton hotel managers were instructed as follows:

*All emails that need to be masked must have MSA in the TA Mask field as per below. When placing MSA in the TA field, this masks all emails in the respective booking.... Please reiterate to your teams that if the guest mentions any issue during their stay even if we have resolved it prior to check out, then still please mask the booking. If the guest did not report anything during their stay, we can still capture a masked email on check out when we ask them "How was your stay?" or "Did you enjoy your stay with us".<sup>22</sup>*

This new system meant that Meriton could suppress emails without inserting the letters "MSA" into guest email addresses, and that, as a result, a person receiving the email addresses would not know, by observing all of the MSA letters in front of guests' email addresses, that there had been any tampering with email addresses.<sup>23</sup> On occasion, the TA Mask field was not completed using "MSA". In one such example the hotel manager was asked to investigate a "1 Star review" and to remind staff of the importance of masking guests with issues such as this because "these 1 Star review(s) hurt us".<sup>24</sup> In this case, Meriton refunded the guest's total stay and the guest agreed to remove the review.<sup>25</sup>

The Court found that the internal email correspondence indicated that:

- (a) Meriton closely monitored, on a daily basis, the reviews of its hotels posted on TripAdvisor;
- (a) Meriton was very concerned about negative reviews;
- (a) (at least in some instances) Meriton considered that such reviews could have been avoided had the guest's email address been masked in accordance with the masking policy or practice; and
- (a) Meriton was so concerned about negative reviews that staff were instructed to mask email addresses for "even the smallest issues" and that, at least at some hotels, staff who failed to mask an email address when they should have were given a warning.<sup>26</sup>

#### **Bulk withholding practice**

Based on the evidence provided by Mr Chan and Ms Nazha under cross-examination, His Honour found that:

- (a) The bulk withholding practice was adopted by Meriton across all hotels and during the whole of the relevant period.
- (b) The practice was implemented at head office upon the request of the relevant hotel manager.
- (c) Requests to withhold email addresses were made approximately once a week, and most requests were approved.

<sup>18</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [96].

<sup>19</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [93].

<sup>20</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [103].

<sup>21</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [104].

<sup>22</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [129].

<sup>23</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [131].

<sup>24</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [136].

<sup>25</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [137].

<sup>26</sup> Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 [105].

- (d) The decision whether to withhold email addresses was made by the relevant State Manager.
- (e) Meriton's intention in adopting the practice was to reduce the likelihood of negative reviews being posted on TripAdvisor.<sup>27</sup>

Several examples of the bulk withholding practice and email correspondence regarding the practice were considered in evidence as examples of Meriton staff implementing the bulk withholding practice, including a request on 27 April 2015 in relation to the Bondi Junction property that no reviews be sent out "... from 16/4 until 27/4. Phone lines were down during this time and there were many other issues such as no hot water overnight, lift down on Saturday, leaks etc..."<sup>28</sup> Withholding of emails was extended until 1 May "due to not having water 2 nights in a row".<sup>29</sup>

#### Effect or likely effect

The ACCC and Meriton called expert witnesses to provide evidence in respect of the effect or likely effect of the Conduct. Justice Moshinsky accepted the view of the ACCC's expert, Professor Malthouse, that the Conduct had the effect of reducing the number of negative reviews of Meriton properties appearing on TripAdvisor.<sup>30</sup>

In applying the well-established principles of law to this case, Justice Moshinsky found that the

relevant class of customers was consumers accessing the TripAdvisor website to assist them in choosing suitable accommodation. The Court must have regard to the ordinary and reasonable members of the class in determining whether the Conduct was "likely to mislead or deceive" or was "liable to mislead the public" as to the nature, characteristics or the suitability of their purpose for the accommodation services provided by Meriton.<sup>31</sup>

His Honour accepted that while the Conduct did not prevent a self-motivated guest from posting a negative review on the TripAdvisor website, he found that the evidence established that there are many guests who will leave a review if prompted by an email invitation, but who would not otherwise post a review on TripAdvisor given the additional effort that is involved.<sup>32</sup> His Honour therefore found:

*...while it may be accepted that negative reviews may still have occurred, this does not detract from the proposition that the impugned practices had the effect of reducing the number of negative reviews.*<sup>33</sup>

His Honour went on to find that the Conduct had the effect of improving the relative number of favourable reviews of Meriton properties on the TripAdvisor website, compared to unfavourable reviews. He also found that

the most recent reviews would include fewer negative reviews as a result of the Conduct. While the Court did not find from the evidence that the Conduct affected the *rating* of the Meriton properties on TripAdvisor, the Court was satisfied that there was sufficient evidence that a single review or a small number of reviews may have affected the *ranking* of a property on the TripAdvisor website. This ranking may in turn influence a customer's decision in selecting accommodation. His Honour concluded that the Conduct created a more positive or favourable impression of the quality or amenity of the Meriton properties on the TripAdvisor website compared to the impression that would be created had the Conduct not been engaged in. The scale of the Conduct indicated that its effect was substantial.<sup>34</sup>

His Honour found that the effect or likely effect of the Conduct was that consumers were or were likely to have been led into error - the MSA-masking practices created an unduly favourable impression about the quality and amenity of the Meriton properties and the bulk withholding practice had the effect of reducing consumer awareness of the prevalence of service disruptions at the Meriton properties thereby creating an impression that was incomplete and inaccurate.<sup>35</sup> The reduced number of

Continued on Page 20 >

<sup>27</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [120].

<sup>28</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [122].

<sup>29</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [123].

<sup>30</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [176].

<sup>31</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [198]-[201].

<sup>32</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [179].

<sup>33</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [179].

<sup>34</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [182].

<sup>35</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [205].



# The CAMLA Cup 2018



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negative reviews as a result of the Conduct was likely to have a significant effect in shaping the impression of consumers about the quality and amenity of the Meriton properties.<sup>36</sup>

#### 4. Comment

This decision has provided helpful guidance on cases involving third party representation. Meriton submitted that, where an alleged contravention of section 18 concerns “half-truths”, it is necessary to show that the alleged contravenor has itself made a *representation* that contains the relevant inference. This was rejected by the Court - the focus of the provision is *conduct*; it is not confined to *representation*. The relevant question is therefore whether there is a sufficient causal connection between the conduct of an alleged contravenor and whether the effect or likely effect of that conduct is that consumers are or are likely to be led into error.<sup>37</sup>

It is of note that His Honour accepted into evidence “TrustYou” Reports obtained by Meriton from a service provider that collects and analyses guest reviews on the internet. Meriton’s expert witness sought to rely on these reports to establish as facts the ratings and number of new reviews for a particular property on the TripAdvisor website and “booking.com” website, during the relevant period. The ACCC submitted that these reports should be excluded on grounds of hearsay because the underlying data

in the TrustYou Reports were previous representations of guests. Nevertheless, His Honour found the reports to be admissible under the business records exception to the hearsay rule in s 69 of the *Evidence Act 1995* (Cth) because they were acquired for the purposes of Meriton’s business, were made by guests of the Meriton properties who had personal knowledge of the asserted facts and were not obtained in advance of, or in connection, with the proceeding.

On 31 July 2018, Justice Moshinsky made orders which included a penalty imposed on Meriton of \$3 million.<sup>38</sup> This penalty relates to a period in which the maximum penalty per contravention for a company under the ACL was \$1.1 million. As of 1 September 2018, the maximum penalty for a company for a contravention of relevant consumer laws increased dramatically to the greater of the following:

- (a) \$10,000,000;
- (b) 3 times the value of the benefit obtained from the contravention or offence (where the value can be calculated); or
- (c) if the value of the benefit cannot be determined, 10% of Australian connected group turnover.

The new consumer penalties are intended to deter companies from viewing penalties for breaches of the ACL as just a cost of doing business. To deter conduct similar to that considered

in this case, the court now has the power to impose substantially larger penalties. From the information available in the penalty judgement, the gross revenue from the Meriton properties during the relevant period (albeit directed to another company in the group) was approximately \$240 million.<sup>39</sup> Meriton Group’s turnover for the 2014 calendar year was approximately \$2 billion.<sup>40</sup> If Meriton’s maximum penalty was to be calculated under the new penalty regime, and benefit was found to be less than the group turnover or “incalculable”, Meriton’s maximum penalty per contravention would be 10% of the Meriton Group’s Australian connected turnover - approximately \$200 million.

The new penalty regime sets a much higher maximum than was previously imposed - in this case from \$1.1 million per contravention to \$200 million per contravention. We are therefore likely to see significant increases in the penalties imposed on companies for contraventions of the ACL, particularly for companies with annual group turnover in excess of \$100 million. Conduct similar to that considered in this case may attract substantially larger penalties in the future.

<sup>36</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [206].

<sup>37</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 [209].

<sup>38</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd (No 2)* [2018] FCA 1125.

<sup>39</sup> *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd (No 2)* [2018] FCA 1125 [80].

<sup>40</sup> Meriton Press Release “Meriton - 2014 In Review” dated 23 December 2014

[www.meriton.com.au-meriton-the-year-in-review](http://www.meriton.com.au-meriton-the-year-in-review)



# Australian Class Actions in the Privacy Arena

**Paul Forbes, Partner, Baker McKenzie and Ann-Maree Hartnett, Associate, Baker McKenzie** discuss class actions in the privacy arena.

## Introduction

The introduction of the mandatory data breach notification laws under the *Privacy Act 1988* (Cth) (the **Privacy Act**) in February 2018 has assisted with the ready identification of a plaintiff class.

It has also created new privacy related rights and obligations and speculation is now mounting that we will see a rise in class actions alleging interference with privacy in the short to medium term. This article considers the issues in play and the likelihood of this occurring.

## Mechanisms for seeking relief

### Under the Privacy Act

Representative complaints are made to the Information Commissioner of the Office of the Australian Information Commissioner (**OAIC**) under sections 36 and 38 under the Privacy Act and can be made against certain Australian Government agencies or private sector organisations when there has been an interference with privacy.

Compensation can be sought under the Privacy Act on a representative basis if the following criteria are satisfied:

- the class members have complaints against the same person or entity;

- all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
- all the complaints give rise to a substantial common issue of law or fact.<sup>1</sup>

An “interference with privacy” includes a breach of:<sup>2</sup>

- an Australian Privacy Principle or a registered APP privacy code;
- rules under s 17 in relation to tax file number information;
- a provision of Part IIIA or the registered CR code;
- prescribed mandatory data breach requirements;<sup>3</sup> and
- other legislation that provide specific provisions for the Information Commissioner to investigate a matter.<sup>4</sup>

The OAIC has wide investigation powers for investigating representative and other complaints, including attempts to conciliate the complaint and/or holding a hearing prior to making any determinations.<sup>5</sup>

The Privacy Act does not set out any specific timeframes or process in which a complaint (including a representative complaint) should be determined. The closest one gets is in section 43(2) which provides that “*An investigation under this*

*Division shall be conducted in such manner as the Commissioner thinks fit*”.

### Representative Proceedings in Court

A claimant may prefer to bring an action directly to Court rather than complain to the Information Commissioner under the Privacy Act. This is sometimes preferred as:

- the Privacy Act has been criticised for being too limited in terms of the compensation afforded;<sup>6</sup> and
- the Privacy Act does not apply in all circumstances. In particular, there are exceptions for:
  - individuals not operating a business;
  - businesses with an annual turnover of less than \$3 million (with some exceptions such as Health and Credit Providers);
  - members of a parliament, contractors for political representatives, and volunteers for registered political parties; and
  - media organisations.<sup>7</sup>

Potential causes of action for interference with privacy include claims in tort (including by way of a claim for breach of statutory duty), breach of confidence, misleading or

<sup>1</sup> Section 38 of the *Privacy Act 1988* (Cth)

<sup>2</sup> Section 13 of the *Privacy Act 1988* (Cth)

<sup>3</sup> See sections 26WH(2), 26WK(2), 26WL(3), and 26WR(10)

<sup>4</sup> For example, s 35L of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); section 73 of the *My Health Records Act 2012* (Cth); Part VIIC of the *Crimes Act 1914* (Cth)

<sup>5</sup> See, for example, sections 33E, 36(4), 40-50, 52, 55A, and 68 of the *Privacy Act 1988* (Cth)

<sup>6</sup> See, for example, the ALRC's Report on 'Serious Invasions of Privacy in the Digital Era' (ALRC Report 123); <https://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123>

<sup>7</sup> Sections 6C-6D and 7B of the *Privacy Act 1988* (Cth); <https://www.oaic.gov.au/privacy-law/rights-and-responsibilities>

deceptive conduct and/or breach of contract.

The decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 left open the possibility for the right to bring claims for breach of privacy in Australia. Further decisions in the District Court of Queensland<sup>8</sup> and in the County Court of Victoria<sup>9</sup> have recognised this right, and others have subsequently questioned its existence.<sup>10</sup> These cases and others involving a common law tort for invasion of privacy have demonstrated that the Courts are hesitant to strike out a cause of action involving breaches of privacy in circumstances where:

- there is an arguable case,<sup>11</sup> including for claims for both breach of confidence and invasion of privacy;<sup>12</sup>
- the law is continuing to develop in this area;<sup>13</sup> and/or
- the law is currently unclear and has not been fully addressed by the High Court of Australia.<sup>14</sup>

Ultimately, the likely direction of the future development of the common law tort of privacy remains uncertain. However, the Courts have not barred the bringing of a class action involving such claims and it is reasonable to expect that it will develop further in future.

Class actions may be commenced in Australia through the Courts by one (or more) of the persons representing the class under the

same conditions identified for representative complaints under the Privacy Act - except that a class action brought before the Courts must have at least seven or more persons which have claims against the same person.<sup>15</sup>

A representative proceeding brought before the Courts and a representative complaint under the Privacy Act otherwise have similar requirements when bringing a claim. For example, both representative proceedings and representative complaints:<sup>16</sup>

- must specify the name of the respondent, the nature of the complaint made, and the relief sought on behalf of the class;
- do not normally need to identify the class members by name or specify how many class members there are (other than to confirm that it is seven or more for Court representative proceedings); and
- can be lodged without the consent of the class members.

### How to quantify compensation claims for interference with privacy?

While it is largely untested, compensation is expected to be lower for representative complaints made under the Privacy Act. For example, in *PB' and United Super Pty Ltd as Trustee for Cbus*,<sup>17</sup> \$2.97 million was sought on behalf of 328 employees of a building sub-contractor. The superannuation details for the 328 sub-contractors was wrongfully sent to Cbus, the head contractor. The OAIC ultimately

held that Cbus must undertake a review of its procedures and issue a public apology. No award for financial compensation was provided. The OAIC determined in this case that:

- the payment of compensation is discretionary and the Privacy Act also contemplates other forms of redress in the ordinary course;
- the OAIC is not authorised under the Privacy Act to award compensation simply because an organisation has breached the Privacy Act. Unless an individual member of the class supplies evidence of actual loss or damage (not potential or future loss or damage), they are not entitled to a remedy;<sup>18</sup> and
- even where a complainant establishes loss or damage, a declaration for an award of compensation is not automatically provided.

Further, even in circumstances where a misuse of personal information has occurred, any compensation from a Court or the OAIC may be limited in situations where:

- the wrongful recipient of the personal information offers to delete the relevant data and provide undertakings not to provide it to any third parties;
- as is common, the party losing control of the information offers to pay for credit monitoring for a specified period (e.g. to ensure that identity theft does/has not occurred);

8 *Grosse v Purvis* [2003] QDC 151

9 *Doe v Australian Broadcasting Corporation* [2007] VCC 281

10 See, for example, *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183; *Dye v Commonwealth* [2010] FCA 720; *Maynes v Casey* [2011] NSWCA 156; *Gee v Burger* [2009] NSWSC 149

11 *Gee v Burger* [2009] NSWSC 149

12 *Maynes v Casey* [2011] NSWCA 156

13 *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181

14 *Sands v State of South Australia* [2013] SASC 44; *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181; *Chan v Sellwood*; *Chan v Calvert* [2009] NSWSC 1335

15 Section 33C of the *Federal Court of Australia Act 1976* (Cth) and section 157 of the *Civil Procedure Act 2005* (NSW)

16 Section 36 and 38 of the *Privacy Act 1988* (Cth); Part IVA Division 2 of the *Federal Court of Australia Act 1976* (Cth); Part 10 Division 2 of the *Civil Procedure Act 2005* (NSW)

17 *PB' and United Super Pty Ltd as Trustee for Cbus (Privacy)* [2018] AICmr 51

18 Although the complaint against Cbus was substantiated, the Information Commissioner found that class members failed to establish actual loss or damage to warrant the payment of compensation.

- individuals have consented for relevant government agencies or organisations to provide their personal information to third parties under relevant terms and conditions;
- information is already public so that there may be no causal link to claims for economic loss or humiliation;
- it is difficult to establish substantiated loss or damage that goes beyond individuals feeling 'unhappy', 'angry', 'upset', 'disappointed' or 'uncomfortable';<sup>19</sup> and
- substantiated loss or damage will likely vary between the complainants to a class action. As such, loss or damage would need to be investigated on an individual basis based on the circumstances of each person.

### Current and proposed class action claims

Since 2017, at least three data breach class action claims have either commenced or are being investigated. These cases seek compensation either via the Court process or through the representative complaints mechanism provided for under the Privacy Act.

- On 20 November 2017, a class action against NSW Ambulance Service and Waqar Malik was filed in the Supreme Court of NSW on behalf of 130 ambulance employees for alleged breach of confidence, invasion of privacy, breach of contract, and misleading and deceptive conduct. The statement of claim alleges that Waqar Malik, a NSW Ambulance contractor, accessed and sold medical records without authorisation between 14 January 2013 and 1 February 2013. The loss or damage is said to be pain and suffering,

humiliation, psychological injuries and economic loss on the part of the ambulance employees.

- In June 2018, PageUp, a multinational software provider, notified affected individuals that their software had been hacked and that the security of the personal information (including potentially sensitive personal information) of thousands of job applicants may have been compromised. Investigations are underway to determine whether or not class action could be brought on behalf of interested participants who were affected by that data breach. It is not clear at this time if compensation is to be sought via the Court process or through the representative complaints mechanism under the Privacy Act.
- Finally, in July 2018, litigation funder IMF Bentham announced that it had commenced a representative complaint against Facebook seeking compensation on behalf of more than 300,000 Australian individuals whose data was allegedly obtained without authorisation by Cambridge Analytica.<sup>20</sup>

### Conclusion

Following previous positions taken by the Courts in Australia and the OAIC, there remains doubt as to the extent of compensation that might be awarded in the absence of properly substantiated claims for actual loss or damage.

So, while the avenues for complaint are clear and are likely to be developed in future, a real question remains as to whether or not class actions for interference with privacy brought either through the Courts or under the Privacy Act will yield much in the way of compensation. It seems unlikely that the pursuit of

such claims formally through Court processes will be economical in most cases.

However, with the advent of mandatory reporting, a greater opportunity now arises for plaintiff lawyers and potential claimants to identify cases involving a large number of group members which might be able to be brought economically by way of representative proceedings. It seems inevitable that such actions will, therefore, be brought with increasing regularity in future.



**Paul Forbes**

Partner  
Baker McKenzie  
paul.forbes@bakermckenzie.com



**Ann-Maree Harnett**

Associate  
Baker McKenzie  
ann-maree.harnett@bakermckenzie.com

<sup>19</sup> *PB' and United Super Pty Ltd as Trustee for Cbus (Privacy)* [2018] AICmr 51

<sup>20</sup> <https://www.imf.com.au/newsroom/press-releases/press-releases-full-post/press-releases/2018/07/10/imf-bentham-launches-representative-action-against-facebook-for-privacy-breaches>



# Profile: Peter Campbell

Partner in the Adelaide office of HWL Ebsworth

Ishan Karunanayake is the principal of Ishan Law, and a member of the CAMLA Young Lawyers committee.



**ISHAN KARUNANAYAKE:** Where do you work, and can you tell us a bit about your role?

**PETER CAMPBELL:** I am a partner in the Litigation Division of the Adelaide office of HWL Ebsworth. I specialise in media and communications, intellectual property, competition and consumer law and privacy. Those areas are all complementary. I am privileged to act for most of the major media organisations in Australia, particularly television networks and newspapers (print and electronic) as well as a number of international media clients. We do the full range of media work for those clients (eg, pre and post publication work, defamation, contempt, appearance on suppression hearings, copyright issues, code complaints and regulatory matters including content and ownership issues). We have also been heavily involved in law reform issues on behalf of our clients, Free TV Australia and the Law Council and made a large number of submissions and appeared at many Parliamentary hearings. Our “legal lobbying” efforts have been successful in ensuring that proposed legislative and regulatory reform has been far more media-friendly than would otherwise have been the case. We also do a lot on the entertainment side of the media industry, including production, finance and distribution arrangements for dozens of feature films, television series, documentaries and other projects and negotiate and document international content licensing and syndication deals.

**KARUNANAYAKE:** Where have you worked previously and what led you to your current role?

**CAMPBELL:** I have previously worked in the same legal areas at Fisher Jeffries, Minter Ellison and Kelly & Co. (which became part of HWL Ebsworth in 2014). I have been fortunate to do a significant amount of media work at all those firms. The media work started from the very first day of practice when I would regularly go to the news room of one of our television network clients and give advice about their stories as they were being edited or, in some cases, during the news broadcast itself. It certainly honed the decision-making skills. I had considered pursuing journalism as a career so was very happy to be heavily involved in the media industry from a legal perspective. When I appeared at suppression and other hearings for the media, one of the senior criminal barristers in SA (acting for murderers, rapists and child sex offenders) used to say she couldn’t understand how I slept at night acting for the clients I acted for - I think I chose the right side.

**KARUNANAYAKE:** What are some of the big legal and regulatory issues you see facing your clients?

**CAMPBELL:** The industry has changed so much since I started media work 33 years ago. The fragmentation of the industry and the dilution of advertising revenue has placed a lot of pressure on resources for clients. At the same time, the media is expected to deliver content on an instantaneous basis across several delivery platforms and is being constantly burdened with additional legislative and regulatory obligations and restrictions. For example, from a news reporting perspective, there are more and more obstacles to Court reporting and we have been seeing de facto privacy restrictions being introduced into all sorts of other legislation (eg, surveillance devices, filming offences etc) which interfere with normal news-gathering activities. I think there needs to be a recognition of the important role played by the media and consideration given to finding ways to protect that role.

**KARUNANAYAKE:** How have you found the culture of the legal profession in Adelaide to be different to other states?

**CAMPBELL:** I am fortunate in that I get the opportunity to do work right around Australia (and overseas) but it is great to be based in Adelaide. The local legal profession is still small enough to mean that you know (or know of) most people and often that means it is a bit easier to get things done as you are likely to have had a number of dealings with the person on the other side of the proceedings or negotiation. I had a media lawyer from London working with me for several years and, early on, he operated the same way he had in London where it didn’t really matter if you burnt the lawyer on the other side as you probably wouldn’t ever deal with them again. He soon learnt that didn’t work in Adelaide. Given it’s a fused profession in SA, I find that most of the lawyers will handle the substantive issues themselves and won’t feel the need to run off to counsel each time.

**KARUNANAYAKE:** What is a typical day in the office like for you as a partner at HWL Ebsworth?

**CAMPBELL:** In accordance with morning tradition, the corridors are strewn with rose petals as my team members carry me in my sedan chair to my office. Other than that, every day is very different. We always have a number of defamation proceedings for our media clients running at any particular time. There will be all the usual urgent pre-publication work throughout the day (and night). The rest of the day will be a mixture of advice

and letters on some of the plaintiff defamation work we also do, appearance at suppression hearings and other applications, liaising with the Courts and other authorities and agencies to obtain materials needed by our clients, reviewing advertising and other content for advertising and PR agency clients, responding to ACMA on various issues and work on production or entertainment projects in which we are involved. That is about a half of it. I love the diversity and immediacy of what we do and I am very lucky to have such a great local team and great media lawyers in our other offices.

**KARUNANAYAKE: How has your work with your TV and media clients changed over the years as content and its delivery has moved online?**

**CAMPBELL:** Everything has changed so much with technology. We used to spend a lot of time at clients' premises. I used to get print-outs of articles sent to me at night by taxi. I had a pager for years. Now I can deal with pretty much everything on my phone. From a client's perspective, they had a news cycle which allowed them to plan their reporting over a day. The Sunday papers would often bury stories for days to preserve them. Now, everything is for immediate publication. That introduces new issues and means reporting is an evolving process. Media organisations trying to engage with their online viewers/readers/listeners makes sense but adds an extra legal element when those viewers/readers/listeners express extreme views. Social media and the idea of every member of the public becoming a publisher has had a profound change.

**KARUNANAYAKE: What are the most interesting and challenging aspects of your role?**

**CAMPBELL:** I really enjoy the way a story will build over the course of a day or two and the advice we give and the way in which we can assist our clients will change over that time. The role has always demanded immediate service but, with reporters under pressure to post asap, the time element has become increasingly important. Trying to find answers to complaints or crafting defences to claims is always interesting and challenging. There is also unpredictability - having to front up on a blistering hot New Years Day after about one hour's sleep at the taping of the first episode of E! News in Australia so I could be interviewed to 'review' the Pamela Anderson sex tape was an unexpected surprise. I love appearing for the media in Court when the opportunity arises - I was counsel in a trial on my second day of practice - the client asked how often I appeared in Court and, not wanting to appear too green, I said 'about every second day'. We won so I thought my answer was fair enough.

**KARUNANAYAKE: Why did you choose to stay in private practice, versus moving in-house or an alternative career?**

**CAMPBELL:** Private practice allows me to have a direct relationship with the client and ensure I understand the commercial issues involved in what we do. I love being able to act for lots of clients in lots of areas and having lots of different things come through the door every day. I did step out of the partnership into an in-house role in

2000 and that was fascinating and gave me all sorts of insights but it taught me that private practice was where I belonged. I am challenged every day and never do the same thing twice. I also get to work with team members who have taken the skills they have learned and been offered some amazing national and international roles. I have had the opportunity to do lots of other things (including regular TV and radio interviews, having a morning TV segment for about 4 years, writing regular newspaper columns and singing in a band for the last 20 years) but they can't be classified as 'alternative careers'.

**KARUNANAYAKE: What have been some of your career highlights?**

**CAMPBELL:** We have the best clients who trust us to look after their interests. We have also been fortunate to have been involved in so many landmark cases over the years. They have all been so interesting. The media always starts a few steps back in any trial (whether because they are seen as the big corporation or because the Judge has an innate distrust of the media or just because the media has a bad reputation) so pulling things back onto an even footing and then demonstrating that the publication was okay is very satisfying. That has involved some amazing detective work at times but we have almost always managed to get what we wanted. Along the way I have been threatened and abused and cross-examined and almost run over. I was the subject of a two-page centre-spread in a national Vietnamese newspaper supposedly 'outing' me as a puppet of the Communist Government in Vietnam for daring to write a letter to them. It goes with the territory. On the entertainment front, you can't help but be excited when you witness the launch of a film or TV program or entertainment project in which you have been involved.

**What are some tips for young lawyers who are looking to work in this area of law?**

**CAMPBELL:** In the early days, it would have been don't go to a lunch with a newspaper editor who has an unlimited expense account unless you have comprehensive health insurance.

Nowadays, it would be get to know the industry and your clients. Understand their pressures and be as practically useful as possible. Be ready to adapt and get ahead of the curve as everything is changing so dramatically every year. Of course, maintaining good standards of personal hygiene can never be a bad idea.



**Ishan Karunanayake** is the principal of Ishan Law, and a member of the CAMLA Young Lawyers committee.

# A Guide to Your First Date With a Start-up

**James Bull, Dan Poole and James Morvell, Hall & Wilcox, discuss the key lessons for working with start-up clients.**

In many respects, start-ups and 'traditional' corporates/firms are polar opposites. Your typical start-up may adopt a 'shoot first, ask questions later' business philosophy which is often reflected in their flexibility and the speed in which they make decisions and iterate their value proposition. By contrast, your average suit and tie corporate can often be burdened by complex and hierarchical decision-making processes and the need to have regard to a large range of stakeholders and a complex risk matrix.

If large corporates and professional services firms are the slow-moving (yet steady) tankers of the business world, start-ups are the nimble speedboats riding the wave.

Despite their differences, the mutual benefit to be gained from corporates and start-ups working effectively together is enormous. For corporates, working with start-ups can be immensely rewarding as particularly with early stage start-ups, there is often the opportunity to have a huge impact in a short space of time. There's also the potential for corporates to learn from the new technologies and agile working practices employed by their start-up clients and business partners. For start-ups, having trusted advisors on your team with experience (and contacts) across a broad range of disciplines can be a major factor in ensuring that the start-up's growth is sustainable (even if at times it means coming to a stop, looking left and right, and then proceeding ahead!).

But why do so many corporates get it wrong when it comes to engaging with start-ups? What's the 'secret sauce' for a successful corporate-start-up relationship?

Our firm, Hall & Wilcox, (with very valuable input from some of our existing start-up clients) has recently designed and launched a start-up program, Frank Lab, which sits within our dedicated start-up practice, called Frank. The name 'Frank' reflects our philosophy in working with start-up clients: no nonsense or legal speak, we just provide frank advice. Here are some of the lessons we've learnt along the journey about how to forge meaningful long-term partnerships with start-ups.

## 1. Corporates need to change their mentality

Corporates need to be able to shift their mindset in a number of key areas in order to work effectively with start-ups, for instance:

### Relationships

Relationships between corporates and start-ups tend not to work when they are purely 'transactional'. It is crucial to invest time building genuine relationships with start-up clients, and developing a strong understanding of their business. Start-ups (like any clients) want to know that their trusted advisors 'get it' - so corporates need to take the time to understand how the start-up's business operates, and why. Start-ups want to work with people who are genuinely excited by the vision they're trying to bring to life.

As a practical tip for how to build goodwill, it is good practice for firms to constantly ask: how can we maximise the value we offer? Who can we introduce the start-up to in order to help them solve problems (e.g. accountants, investors, customers, and even internal HR consultants)? What extra value can we offer them that costs us nothing (e.g. meeting rooms, tech support, introductions)?

### Risk

As many as 90% of start-ups fail.

For professional service firms, this statistic may naturally cause anxiety about a start-up's capacity to pay professional fees. However, from the start-ups that fail, many founders rise from the ashes with their next venture (it is the very nature of those brave enough to live the founder journey) - and if you've built a good relationship, they'll have you in mind when they need advice and support. Therefore, rather than insisting on upfront payment of retainers and the like, it is a nice gesture to discuss alternative payment timelines, such as deferred payment to be settled at the end of a capital raise.

The risky nature of many start-ups can (and, often, should) shape the character of the advice given by professional advisers. Because experimentation is often part and parcel of the start-up business model, avoiding risk may not be possible, nor even desirable. Mitigating risk will be a matter of judgement, central to which will be understanding your client's risk appetite, and, if necessary, embracing risk as an inherent part of the start-up's business before advising accordingly.

Of course no start-up is the same. Not all of them will have inherently risky business models, nor the same risk appetite.

## 2. Corporates need to rethink their role as business advisors

It is a common trap for professional services firms (particularly law firms) to conceptualise their role with respect to their start-up clients too narrowly. For instance, a tax or employment lawyer might naturally put the blinkers on and focus on the black letter law, without seeking to understand the commercial rationale behind a client's instructions, which might enable an easier or cheaper solution to be identified.



Another common pitfall is forgetting to consider the exact product or deliverable the start-up actually needs:

“Most start-ups have never worked with a lawyer before, and need to be guided through that process. They also often want a quick and dirty answer rather than a finely tuned piece of advice”, says Adam Dimac, a lawyer and start-up advisor at Hall & Wilcox.

Often it’s as simple as asking the client what they actually need. The risk involved in giving seemingly ‘incomplete’ advice can generally be mitigated through carefully ‘scoping out’ areas that have not been contemplated and communicating that clearly.

Ultimately, for professional services firms to work effectively with start-ups, they should see their role as broader than just accountants or lawyers - they are operating as business advisors. Start-ups want to work with advisors who are willing to go beyond the confines of what they’ve been instructed to do; good advisors will think laterally about things outside their immediate area of focus that might affect the start-up in some way, such as legislative and policy changes, new opportunities and broader macro-economic trends. As James Morvell, a partner at Hall & Wilcox who works with a number of start-up clients, as well as institutional clients, notes, “Sometimes, what a start-up client wants to hear is the answer to the question: what would you do if you were in my shoes. Getting this answer wrong is highly unlikely to ever lead to being sued for providing negligent legal advice, but being prepared to answer the question may well help forge an enduring relationship with your client.”

### 3. Corporates need to rethink how they deliver services to start-ups

In general, start-ups exercise tight control over their purse strings. They aren’t always broke, but they tend to be savvy to the tyranny of the billable hour. They, like many other clients now, will often expect fixed quotes

up front where pricing is based on output and/or value, rather than the number of hours spent on a project.

Speed is also crucial. Unlike, perhaps, larger institutional clients, where the corporate firm might be liaising with a mid-level manager with no skin in the game, often when working with start-ups the liaison is directly with the founder. For founders, their start-up is their baby. To give them peace of mind, it pays to invest a few extra minutes to provide progress updates even if a task can’t necessarily be completed in a short space of time.

And leave the jargon at home - start-ups aren’t dumb, they just don’t have the time or inclination to decode legal speak or other esotericisms particular to your industry.

### So, how do corporates meet start-ups?

If you don’t already work with start-ups and we’ve convinced you of the mutual benefit to be gained from corporates and start-ups working together, you might be left wondering how to go about actually meeting some of them.

Here are a few great ideas for meeting start-ups:

- sponsoring start-up hubs (for instance, Hall & Wilcox is a corporate sponsor of fintech hub, Stone & Chalk);
- starting a dedicated start-up practice within your firm (such as our Frank start-up practice) or an emerging business division within your corporate organisation;
- appointing an ‘entrepreneur in residence’ to provide dedicated business advice to start-up clients;
- investing in early-stage start-ups;
- participating in or hosting a hackathon; and
- incorporating start-ups into your service line - become their customer!

**Dan Poole** is a graduate lawyer at Hall & Wilcox, a member of our Frank startup practice and serial founder himself having founded social enterprises home. one, Crepes for Change and The Coffee Cart Changing Lives. **James Bull** is a senior associate at Hall & Wilcox and heads up the Frank start-up practice nationally. James Morvell is a partner at Hall & Wilcox, and is learning a lot from colleagues such as Dan and James!

DO	DON'T
Take an interest and get excited about the start-up's business - don't only talk business.	Generalise about the start-up's priorities, needs or assume they're 'broke'.
Speak their language - use concepts relevant to the start-up's business and industry.	Use jargon that is incomprehensible to the start-up, such as using legal, accounting or tax concepts.
Take a broad view of your role as a business advisor, always think: who can I introduce this start-up to, or what else can I do to help them?	Take a traditional view as to how you may be able to add value to a start-up.
Be proactive and communicate - don't wait for the start-up to get back to you, check in with them first.	Assume that start-ups work on the same time as you
Invite start-ups to your office - but be prepared to communicate over the phone or via video conferencing (start-ups are time poor).	Underestimate how rewarding it can be to work with start-ups as they grow and evolve.

# SAVE THE DATE:

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**Thursday 25th October 2018**

**5.30pm for a 6.00pm start**

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## Contributions & Comments

Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at:

**[clbeditors@gmail.com](mailto:clbeditors@gmail.com)**

# CAMLA - Production Law Seminar - 21/6/18

**Michael Boland, Regulatory Affairs Executive, Seven Network**

When a legal seminar commences with a sizzle reel for some of Australia's most popular screen productions, featuring couples meeting for the first time on their wedding day, and a group of complete strangers living out their very own 'Lord of the Flies', it's safe to say that you are in for a lively evening of discussion. That certainly proved to be the case at CAMLA's recent Production Law seminar, attended by a large and enthusiastic audience, and hosted by HWL Ebsworth on 21 June 2018.

Moderated by Felicity Harrison, Senior Business Affairs Manager from Matchbox Pictures, the seminar's panel featured the combined expertise of Scott Howard, Commercial Director at Endemol Shine Australia, John Butt, Head of Business and Legal Affairs at Endemol Shine Australia, Julia Pincus Senior Business Affairs Manager, ABC Business Affairs (Entertainment & Specialist), and Debra Richards Chief Executive Officer at Ausfilm.

Scott Howard was first to take the floor, drawing the room's attention to the significant contribution independent production makes to the national economy, with 2017 data indicating that the sector generated 1665 hours of program content, 22 500 jobs, \$M163 in export revenue and \$B1.2 in revenue overall.

Endemol Shine Australia is a significant player in that landscape, evolving as it did from the merging of Australian production companies Southern Star and Shine, prior to its merger with global powerhouse Endemol. The company's current slate is up to 95% unscripted content, and they hold significant expertise in reinventing formats to popular acclaim. Notably, reality cooking program Masterchef is a UK



format, however it is the Australian incarnation produced by Endemol Shine that provides the template for the production model globally. The company's achievements in producing content are only part of its skill set however; it is also very much a rights company, with format licensing and distribution a core part of its business.

Head of Business and Legal Affairs at Endemol Shine Australia, John Butt, was next to speak, highlighting that the bedrock of the company is most certainly its IP, and of course the creative talent that generates it. John also touched on the point that while program formats are certainly tradeable commodities, that is not to say that producing them in local markets is an exercise in cookie cutting, as the talent of local producers is critical to what eventually appears on screen.

John then provided an overview of the life cycle of a production and associated legal documentation, including the development phase with its focus on securing chain of title and rights acquisition,

the commissioning period and associated financing agreements, through to pre-production, production and post-production, and of course the distribution phase with its focus on sales and rights management. John also spoke of the duty of care that producers hold in relation to program participants. In addition to black letter law, he said good emotional intelligence and the capacity to manage personal relationships was equally relevant in-house.

The baton was then passed to Julia Pincus Senior Business Affairs Manager at the ABC, who informed the audience of the three broad realms into which the ABC is now divided, the first being News, Analysis and Investigations, the second Entertainment and Specialist, and the third Regional and Local. Ms Pincus agreed with the notion that lawyers in the production space must have a diverse skill set, with her role extending well into the terrain of project management.

Ms Pincus addressed the three core styles of programming deals



the ABC enters into: acquired content, in which a programming arrangement is licensed into; ABC internally produced content 100% owned by the ABC in most cases; and commissioned content, which is partially or fully funded by the ABC, in the form of a licensing and /or equity position.

Ms Pincus spoke to the way programming deals have evolved since the mass expansion of VOD services, with rights arrangements evolving from a limited number of broadcast runs with a 30 day online catch up, to a far more comprehensive online delivery component. Similarly, the converged media environment has impacted significantly on the traditional windows associated with FTA/ FVOD, Pay TV, DVD, SVOD, and TVOD, with greater pressure to reduce the holdback periods. She mentioned however that it would be inappropriate to see these changes as a rights grab by licensees, rather it is a case of simply keeping up with changing consumer viewing practice.

Clearly though, the ABC is doing a great deal right in terms of online delivery, with its iview platform performing very favourably in a crowded market, dominated by the behemoth which is Netflix. Tellingly, Ms Pincus finished with

the interesting point that reports of the death of broadcast TV may indeed be greatly exaggerated. The broadcast audience for its surprise Australian drama hit 'Mystery Road' swamped its online audience by a factor of ten.

Ausfilm Chief Executive Officer Debra Richards was next to take the floor. Ausfilm is a combined industry/ government organisation whose remit is to encourage international film productions to spend in Australia, thereby adding value to the local economy and building the industry generally. Its members are made up of the state and commonwealth film funding organisations, major studios located in Australia and major Australian post production houses. The organisation has a staff of five in Sydney, with another three officers based in Los Angeles. While major U.S. film production is conducted all around the world, the major decisions are still made in Los Angeles, so a presence in that city is vital.

Ms Richards spoke directly to the highly competitive nature of the film incentive business, with major U.S. studios often producing up to seven different budgets in accordance with the different incentives offered by countries around the world. Australia was one of the first countries to offer

an incentive program, with a 12.5% refundable tax offset in 2001, followed in 2007 with the Australian Screen Production Incentive Scheme which is now a 40% Producer Offset, a 30% Post, Visual and Digital Effects Offset (PDV), a 16.5% Location Offset, and a 20% Producer Offset for television. By 2009 however the Australian dollar was reaching above parity with the U.S., and with many other countries having introduced incentives Australia found itself in a very competitive playing field indeed. By way of example, with inclusion of its province based incentives, Canada currently offers an offset of 43.7%. The United Kingdom also offers extremely attractive incentives, with international production spend recently increasing in that territory by 400%.

Given U.S. footloose production is reportedly worth US\$B 4.6 annually, with Amazon further committing to spending US\$B 6 on original content, and Netflix committing to another US\$B 8, it is not surprising that territories around the world are looking for a piece of the action. Ms Richards spoke in glowing terms of Australia's capacity to attract those funds, citing our highly skilled and internationally recognised crews, competitive incentives, film friendly policies and excellent infrastructure.

Ms Richards also spoke to the significance of the Location Offset, given this rebate is available to foreign productions without having to satisfy Australian content requirements. While the standard Location Offset is only 16.5%, topping this up to 30% creates a very attractive proposition for international producers contemplating shooting in Australia. In July 2018, the federal government committed \$M 140 over four years to topping up the location offset for large scale international productions. Guidelines for this funding have been very recently released, and are available for review at the Australian Government's Grant Connect website.



# “Secondary Publisher Blues”: Online Platforms and Liability in Defamation

Amidst an increasing number of defamation claims against internet platforms, including a recent High Court judgment in *Trkulja v Google LLC*,<sup>1</sup> the NSW Department of Justice has issued a statutory review paper that recommends reform. Sophie Dawson and Joel Parsons consider the current state of play in this fraught area.

## 1. Introduction

Australian defamation law is widely regarded as a maze of arcane legal principles. The position of online platforms which “host” third party content is a particularly complex area which continues to evolve. However, the allocation of liability to those who do not create defamatory content, but somehow participate in its publication, is not a new phenomenon in defamation law. In the 1880s, it was the newspaper vendor, sued over the sale of newspapers containing defamatory articles (*Emmens v Pottle*).<sup>2</sup> In the 1980s, a local council found itself defending a defamation claim after failing to remove defamatory posters plastered on bus shelters in its locale by a third party (*Urbanchich v Drummoyne Municipal Council*).<sup>3</sup>

Against this background, Australian courts seem to be adopting a similar approach in relation to online platforms. Courts have determined that in certain circumstances, when defamatory content is generated on an internet platform, once the prospective plaintiff complains about it, the proprietor of the platform may become liable. However, despite thousands of

words of judicial contemplation, significant uncertainties remain. The decision in *Trkulja v Google LLC*<sup>4</sup> indicates that evidence in such cases is critical; where there are novel allegations of publication, there cannot be certainty as to the nature of a platform’s involvement in such publication, until at least after discovery.<sup>5</sup>

## 2. *Google Inc v Duffy*<sup>6</sup>

Much Australian judicial attention in the area of intermediary liability in recent times has been focused on defamation claims against search engines, one such example being *Google Inc v Duffy*.<sup>7</sup> The plaintiff in that case discovered that a Google search involving her name generated certain search results which she alleged defamed her. The plaintiff sued Google in relation to these search results (and autocomplete search terms), which were created by way of Google’s algorithm, from the content on various webpages of a third party website. At first instance, Blue J determined that Google had defamed the plaintiff,<sup>8</sup> however, Google appealed.

Each of the appellate judges delivered separate judgments. The Chief Justice, Kourakis CJ, decided that Google had a qualified

privilege defence, but he was in the minority on this point, and so Google’s appeal failed. There was, however, broad agreement as to the findings on publication, which can be summarised as follows:

- Google established the algorithm and the programs that generate search results, so Google is a participant in the publication of the material (although it is derived from content on another website written by a third person).<sup>9</sup>
- Google is a secondary participant because the words selected are electronically reproduced from other publications on the internet.<sup>10</sup>
- It is impossible to attribute to Google advance knowledge of the contents of search results on its search platform, but Google has knowledge of the likely content of future search results on its platform after it is notified of the existence of defamatory material in the search results.<sup>11</sup>
- Google is excused from liability for a reasonable time as is required to ‘take down’ references to the defamatory material.<sup>12</sup>

<sup>1</sup> [2018] HCA 25.

<sup>2</sup> (1885) 16 QBD 354.

<sup>3</sup> (1991) Aust Tort Reports 81-127.

<sup>4</sup> Above n 1.

<sup>5</sup> Ibid, [39].

<sup>6</sup> [2017] SASFC 130.

<sup>7</sup> Ibid.

<sup>8</sup> *Duffy v Google Inc* (2015) 125 SASR 437.

<sup>9</sup> *Google Inc v Duffy* [2017] SASFC 130, [181].

<sup>10</sup> Ibid.

<sup>11</sup> Ibid, [183].

<sup>12</sup> Ibid, [184].

Accordingly, in *Duffy*, Google was found to be a secondary publisher of the search results complained of, but was not liable for defamatory material in those search results, until (1) it has been notified of them, and (2) a reasonable period of time for the removal of the offending search results has passed.

A further question arose as to whether Google is liable, as a publisher of the webpages “underlying” the search results. While clearly Google does not replicate the entire text of the webpages upon which search results are based, hyperlinks to those webpages are included in those search results. Search results can point to the defamatory material on the underlying webpage, meaning that Google might become liable for the webpage itself. Kourakis CJ confirmed that Google can be liable for such webpages if there is “incorporation” of the defamatory material into the search snippet.<sup>13</sup> The question appears to be whether the search snippet includes enough of the defamatory material from the linked webpage, and whether the level of facilitation of the reading of the linked webpage is both “substantial and proximate”.<sup>14</sup> It was expressed by way of analogy:

A Google search paragraph is the electronic analogue of the person who places a post-it note on a book which reads ‘go to page 56 to read interesting gossip about X’.<sup>15</sup>

Interestingly, in a recent Victorian defamation claim against Google,<sup>16</sup> the plaintiff sought to rely on the findings in *Duffy*, to strike out Google’s pleading to the effect that

it was not a publisher of allegedly defamatory search results. The Victorian Supreme Court of Appeal said, however, that *Duffy* does not stand for the proposition that the owner of an internet search engine, as a matter of law, is a publisher of material produced in response to a search undertaken by a user.<sup>17</sup>

### 3. *Trkulja v Google*<sup>18</sup>

One of the plaintiff’s witnesses in the *Duffy* case, Milorad Trkulja, has himself successfully sued search engines over defamatory search results, winning against both Yahoo! and Google in 2012. Mr Trkulja currently has another claim pending against Google, which involves allegations that the appearance of his photo in a Google image search, amongst images of certain third parties, is defamatory. Google sought summary judgment on the basis that the claim had no real prospect of success. That application failed at first instance,<sup>19</sup> but succeeded before the Supreme Court of Victoria Court of Appeal,<sup>20</sup> before failing again before the High Court in *Trkulja v Google LLC*.<sup>21</sup>

The Court of Appeal had found that the “images matter” did not have the capacity to convey the defamatory imputations. This was largely because it agreed with Google that the ordinary reasonable user of Google image search understands the context of a search engine - many search results are generated at extreme speed, from a vast array of source material, such that they could not be produced manually. So the user would recognise that “the search results in their entirety did not reflect the meaning of inputted words considered as a phrase”.<sup>22</sup>

The High Court heard Mr. Trkulja’s appeal. It was arguably, however, not the best vehicle for the determination of platform liability issues, because the question before the High Court was essentially limited to whether the case should have been dismissed summarily, and didn’t invite definitive adjudication of outstanding legal issues. Ultimately, the High Court concluded that there was no reason why the claim had no prospects of success, and it should have had the benefit of a full trial.<sup>23</sup> For example, it is by no means a forgone conclusion that everyone understands how Google works, and the user’s ability to navigate Google, the comprehension of how it works, and what it produces, may vary significantly.<sup>24</sup> The case simply serves to underscore the complexity of online publication, and indicates that courts will continue to apply the well-established defamation principles, but with close reference to the evidence of the particular circumstances of internet publication in the case (as this will determine how those principles should apply).

### 4. Beyond search engines

The proliferation of defamation claims faced by search engines is extending to other online platforms. Webpages inviting comments can very easily become places in which defamatory comments are made, and on many platforms, interactivity and user-generated content are enthusiastically encouraged. Many different individuals or entities can be said to have a hand in publication. Consider for example, a Facebook group - Facebook provides the

<sup>13</sup> Ibid, [187].

<sup>14</sup> Ibid, [173].

<sup>15</sup> Ibid.

<sup>16</sup> *Defteros v Google Inc LLC* [2018] VSCA 176.

<sup>17</sup> Ibid, [8].

<sup>18</sup> Above n 1.

<sup>19</sup> *Trkulja v Google Inc* [2015] VSC 635.

<sup>20</sup> *Google Inc v Trkulja* [2016] VSCA 333.

<sup>21</sup> Above n 1.

<sup>22</sup> Above n 18, [151].

<sup>23</sup> Above n 1, [39].

<sup>24</sup> Ibid, [54].



platform, a particular user creates the group (being a place for comments), and members of the group comment.

There are now several decisions considering the liability of intermediaries on social media that have somehow participated in the dissemination of other users' defamatory content, and the precise time at which that liability arose. In *Murray v Wishart*,<sup>25</sup> the New Zealand Court of Appeal was asked to consider whether it was arguable that the administrator of a Facebook page was a publisher of defamatory third party comments on the page. The Court preferred the "actual knowledge" test,<sup>26</sup> that is, the administrator would only be liable, if they had actual knowledge of the defamatory post, rather than simply "constructive knowledge" (where the circumstances are such that the defendant administrator "ought to have known" of the defamatory material).

In *Von Marburg v Aldred & Anor*,<sup>27</sup> Dixon J considered the position of a Facebook group administrator of a page on which an allegedly defamatory comment was posted. Dixon J said that "awareness of the existence of the impugned material is a precondition before an internet intermediary such as an administrator or sponsor of a Facebook page will be held to be a publisher",<sup>28</sup> before immediately approving of the approach in *Wishart*, suggesting that merely "constructive knowledge" would not be sufficient.

In the recent decision of *Johnston v Aldridge*<sup>29</sup>, however, Judge Brebner of the South Australian District Court, found that the publisher of certain Facebook

posts, was a secondary publisher of the defamatory comments subsequently added to those posts by other users, apparently on the basis of constructive knowledge. Although the comments were "streaming in"<sup>30</sup> and running into the thousands, "volume cannot create its own shield".<sup>31</sup> While it was not established that the defendant actually knew of the existence of each of the defamatory comments, the posts were of a character that might attract inappropriate comments.<sup>32</sup> Because the defendant could, with reasonable diligence, have known of the existence of the comments the defendant was liable. It is not clear whether that outcome is entirely consistent with the views expressed in *Wishart* or *Von Marburg*, but it is a clear application of the reasoning in *Duffy*.<sup>33</sup> The reasoning in *Aldridge* seems to require people posting controversial material on Facebook to diligently monitor subsequent user interactions with that content, lest those users defame someone.

There has been, however, comparatively little defamation litigation in Australia involving other types of online platforms, where the platform itself is a defendant. This is probably because in many instances the actual author of the libel is readily identifiable, and is the immediate focus of the plaintiff's frustration, rather than the platform. Recent cases such as *Hockey v Fairfax Media Publications Pty Limited*,<sup>34</sup> where the plaintiff claimed against Fairfax Media (as author of the tweets), illustrate the continued prevalence of the mass media as defendant on social media platforms. On a secondary publisher/innocent disseminator analysis, however,

there is no reason why a social media platform operator, in certain circumstances, might not also be drawn into such a claim.

## 5. Reform

Platform operators may be able to argue for the novel application of traditional defamation defences (such as the qualified privilege defence advanced in *Duffy*), but it remains to be seen whether these are likely to provide any real comfort to these defendants. Any reprieve may arise from legal reform, but that is also some way off.

In June 2018, a New South Wales Statutory Review delivered a report on the current state of defamation law. The report does note the existence of some protections for platforms, such as that under the *Broadcasting Services Act 1992* (Cth), which protects an "internet content host" ("ICH") from liability for hosting or carrying particular content where the ICH is not aware of the nature of the content. The operation of this section, with respect to platforms, is still unclear.

The Review did identify that the administrative burden placed on search engine operators, in requiring them to act promptly on all blocking requests, has significant potential to obstruct freedom of expression. Recommendation 15 is that a reconvened Defamation Working Party consider whether the existing protections for digital publishers are sufficient, and whether safe harbour provisions would be beneficial. It has taken almost 10 years for this report to be delivered. It will be some time before any reform is implemented. In the meantime, defamation claims against platforms continue to arise.

25 [2014] NZCA 461.

26 [2014] NZCA 461, [114].

27 [2015] VSC 467, [37].

28 *Ibid*, [37].

29 [2018] SADC 68.

30 *Ibid*, [180].

31 *Ibid* [185].

32 *Ibid*.

33 *Ibid*, [181].

34 [2015] FCA 652.

# Legal Issues Arising from Use of Open Source Software Components

**Luke Dale, Partner, and Niomi Abeywardena, Special Counsel, HWL Ebsworth consider some of the legal issues arising from use of open source software components.**

## What is open source software

The term "open source" refers to material that people are able to modify, access and share freely because its components/design/underlying elements are publicly accessible.

Open source software (OSS) is software that has its source code publicly released under the terms of a copyright licence that allow for the general use, inspection, modification and enhancement of source code by anyone. Such a licence is called an open source licence. Open source licensing is commonly associated with software, but its application is broader than this - the "Free Beer" open source beer project (being a beer recipe and brand that is freely available for use under an open source licence) provides an interesting non-software example.

OSS can be contrasted with proprietary (closed source) software, which is software whose source code is kept as proprietary by its owner, and is not publicly available for anyone to access, modify or further develop. The source code of proprietary software is only available to parties other than the software owner in limited circumstances, and any such entitlements are set out in a licence agreement entered into between the party wishing to use the software (and often involving remuneration in the form of a licence fee or royalty scheme) and the software owner/licensor. Licence agreements relating to proprietary software also set out what (limited) use the licensee is permitted to make of the software (e.g. install the software for use on X number of machines for use by a maximum of Y users, for

internal business purposes only). Anything that is not permitted by the terms of the licensing arrangement is an unauthorised use that the licensor is entitled to take legal action to prevent/obtain damages in respect of.

## Open source licences

There are a range of open source licences that have achieved general popularity and are widely used. These include:

- Apache Licence 2.0;
- GNU General Public Licence 3.0;
- GNU Library or "Lesser" General Public Licence;
- MIT Licence;
- Mozilla Public Licence 2.2; and
- Common Development and Distribution Licence.

All of these licences vary in their terms and requirements, but they all have certain essential elements in common including:

- No royalties or fees are payable to the owner of the licensed software;
- There is no restriction on selling or giving away the licensed software as part of another software distribution;
- There are no restrictions on the applications of the software;
- Source code must be supplied with the software; and
- Creation of modifications and derivative works is permitted, and these can be freely distributed under the same open source licence terms as the original software.

The entire purpose of open source licensing is to limit restrictions

and promote public availability; accordingly there is no restriction on OSS being used for commercial purposes. It is therefore increasingly common for OSS components to be utilised by software developers when creating proprietary software, proposed to be used for internal business use or commercialisation.

## OSS and legal issues

Use of OSS components when creating proprietary software seems like an obvious choice - someone else has done all the work (hence a saving in development effort and costs), and the components are free to use. While there are obvious benefits associated with OSS, software owners are often unaware that by using OSS components in their proprietary software, they may be subject to a range of obligations depending on the licensing terms under which the utilised OSS components are made available.

One notable obligation imposed by various open source licences is a requirement to include copyright notices, and in some instances, to make available certain code.

The current version of the Apache Licence, for example, permits the creation of derivative works and free re-distribution of the original material, and any derivative works that may be created, in source or object code form, provided that:

- Recipients are provided with a copy of the Apache Licence terms;
- Any modified files must carry prominent notices stating that the files have been changed;
- Source code versions must retain any included attribution, copyright, patent or trade mark notices; and

- If the original work included a NOTICE text file, the derivative works that are distributed must include a readable copy of those notices.

There is no restriction on the inclusion of additional copyright/attribution notices for new additions, or the use of different licence terms for any developed modifications as a whole - provided the Apache Licence terms are complied with.

As another example, the GNU General Public Licence includes detailed notice requirements also, for original and derivative works, and is an open source licence that permits conveyance of a work in object code form provided that the corresponding source code is also made generally available, free of charge, in one of the stipulated ways.

### Practical implications for businesses

Though use of OSS components when developing software for internal or commercial use is an initially attractive option, businesses that do so must take all necessary steps to comply with the terms of the licences under which the OSS components are made available to them. The time and effort that can go into ensuring compliance means that there are hidden costs associated with the use of OSS components. Given this,

and coupled with the fact that compliance may require the source code of any developed derivatives to be made publicly available, businesses may wish to think twice about using OSS.

If OSS components have been used in proprietary software, businesses should undertake the necessary steps to review the licence terms and ensure that all necessary notices are included, and all source code is made available as needed. This may require the assistance of legal advisers, to confirm obligations under the relevant licence terms.

In a due diligence investigation, for example, if it is the case that OSS is used in the business being investigated, the party undertaking the due diligence will require confirmation that all applicable licence terms have been complied with.

Compliance can be a tricky and time consuming process - in one matter we assisted a client with, approximately 60 separate OSS components were utilised in software developed by the client, requiring us to individually consider the licence terms applicable to each and resulting in the client having to make adjustments to its software to comply with the notice requirements and make certain source code publicly available.

Failure to comply with OSS requirements can potentially result in legal action by the original licensors, as well as negative publicity and other reputational impacts. It is an important issue, and should not be overlooked by businesses. Due to the potential complexities associated with use of OSS, we recommend that the issue of licence term compliance be tackled concurrently with the software development process, so all notices can be included, and source code that is required to be made publicly available easily identified, as the development process is undertaken (rather than having to backtrack and re-work software to ensure compliance). If a business routinely uses OSS in its software development activities, an internal compliance protocol may be warranted.

We have extensive expertise in assisting clients with understanding their obligations arising from use of materials made available under open source licence terms. Please contact a member of our team for further information on how we can assist you.

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This article was written by **Luke Dale**, Partner, and **Niomi Abeywardena**, Special Counsel, at HWL Ebsworth.

## Electronic COMMUNICATIONS LAW BULLETIN

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The Communications and Media Law Association Incorporated (CAMLA) brings together a wide range of people interested in law and policy relating to communications and the media. CAMLA includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants. Issues of interest to CAMLA members include:

- defamation
- broadcasting
- copyright
- advertising
- information technology
- freedom of information
- contempt
- privacy
- censorship
- film law
- telecommunications
- the Internet & online services

In order to debate and discuss these issues CAMLA organises a range of seminars featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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