

# CAMLA COMMUNICATIONS LAW BULLETIN

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Special Digital Platforms Edition

## The NSW Government Discussion Paper on Defamation Law Reform

Judge Judith Gibson<sup>1</sup>

### A cyber-age reboot of defamation law

On 26 February 2019, the Attorney-General for New South Wales, the Hon Mark Speakman SC, called on interested participants to “have your say on defamation law”<sup>2</sup> in relation to a series of defamation law proposals set out in the NSW Department of Justice Discussion Paper entitled *Review of Model Defamation Provisions* (‘Discussion Paper’)<sup>3</sup> issued that same day.

This Discussion Paper is the latest step in a series of steps taken by the New South Wales Government to give defamation legislation a “cyber-age reboot”<sup>4</sup> to bring it up to date with the modern technology.

### The Discussion Paper - an overview

The Discussion Paper identifies 17 major areas for inquiry:

- the policy behind the legislation (Question 1);
- the entitlement of corporations currently not permitted to bring defamation actions to have their right to sue restored (Question 2);
- the single publication rule (Question 3);
- offers to make amends (Questions 4–6);
- the role of the jury and the use of juries in the Federal Court (Questions 7 and 8);
- defences: contextual truth, fair report, honest opinion (Questions 9–13);
- serious harm and triviality (Question 14);
- innocent dissemination (Question 15); and
- damages (Questions 16–17).

Continued on page 3 >

1 Judge, District Court of New South Wales, 2001–present. Some of the issues discussed in this paper are referred to in ‘Defamation in Australia: Rearranging the Deckchairs’, published in the *Gazette of Law and Journalism* (4 March 2019) and in *Inform* (7 March 2019) <<https://inform.org/2019/03/07/defamation-reform-in-australia-rearranging-the-deckchairs-judith-gibson/>>. Thanks to Olivia Ronan and to my associate Mr Vincent Mok for editorial assistance.

2 Mark Speakman, ‘Have your say on national defamation law’ (Media Release, 26 February 2019) <<https://www.justice.nsw.gov.au/Documents/Media%20Releases/2019/have-your-say-on-national-defamation-law.pdf>>.

3 Council of Attorneys-General, ‘Review of Model Defamation Provisions’ (Discussion Paper, New South Wales Department of Justice, February 2019) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>> (‘Discussion Paper’). Details of the entitlement to comment on the Discussion Paper by 30 April 2019 are set out at ‘Review of Model Defamation Provisions’, *Justice NSW* (Web Page) <<https://www.justice.nsw.gov.au/defamationreview>>.

4 Mark Speakman, ‘Review recommends defamation cyber-age reboot’ (Media Release, 7 June 2018) <<https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/review-recommends-defamation-cyber-age-reboot.aspx>>.

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CAMLA

### Editors

Ashleigh Fehrenbach and Eli Fisher

### Editorial Assistant

Imogen Yates

### Design | Printing | Distribution

MKR Productions

## Editors' Note

Welcome to 2019! If the first few months are anything to go by, it's going to be a big year ahead!

This edition is a special digital platforms edition, following the release by the **ACCC** of the Preliminary Report of the **Digital Platforms Inquiry** at the end of last year. While recognising the significant benefits to consumers and businesses that digital platforms have introduced, the ACCC also identified concerns with the ability and incentive of key digital platforms – for the most part, **Google** and **Facebook** – to favour their own business interests, through their market power and presence across multiple markets. There were concerns regarding the digital platforms' impact on the ability of **content creators** to monetise their content, and the lack of transparency in digital platforms' operations for **advertisers, media businesses** and **consumers**. The ACCC also expressed its concerns about consumers' awareness and understanding of the extensive amount of information about them collected by digital platforms, and their concerns regarding the **privacy** of their data. Further the ACCC looked into the role of digital platforms in determining what **news** and information is accessed by Australians, how this information is provided, and its range and reliability.

Following the release of the Preliminary Report, there will be further consultation and discussion, prior to the release of the final report due 30 June 2019. Obviously none of it will be more intelligent, enlightening and authoritative than what follows in these pages. We have the team at Bird & Bird – **Sophie Dawson, Joel Parsons** and **Eleanor Grounds** – comment on the Preliminary Report's recommendation in respect of copyright. **Adam Zwi**, former CAMLA Young Lawyer superstar, gives us his thoughts on the proposed algorithm regulator. **Jess Milner** from Minters tackles the Preliminary Report's

comments on fake news. **Eva Lu** from Thomson Geer summarises the privacy and data related recommendations from Preliminary Report. And newly appointed CLB co-editor **Ashleigh Fehrenbach** interviews **Rachel Launders**, General Counsel and Company Secretary at **Nine**, about working at a major Australian news organisation and the effect of Preliminary Report on that organisation.

Congratulations go out from the CAMLA community to Joel Parsons and Eva Lu for their respective nominations in the TMT field for Lawyers Weekly's **30 Under 30**. (See what happens, kids, when you regularly contribute articles to CLB.)

Of course, the ACCC's Digital Platforms Inquiry is not the only major inquiry being undertaken in this area relevant to digital platforms. The NSW Department of Justice Discussion Paper, titled **Review of Model Defamation Provisions** was issued at the end of February this year. CAMLA held an event at **JWS** (report within) on the topic, and **Judge Judith Gibson** gives you her thoughts in this edition about the issues that should be considered in the next round of reforms.

CAMLA held another event, at **HWL Ebsworth**, on the subject of integrity in sports, focusing on sports organisations, players, and advertisers (report within). And, on the subject of sports, CAMLA Young Lawyer, **Calli Tshipidis**, profiles **Les Wigan**, COO at **Kayo Sports** following the launch of that multi-sports streaming service at the end of 2018.

It's an action-packed edition, and we hope you enjoy it as much as we have!

Ashleigh and Eli

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The tension between defamation law reform and the impact of online technology is clearly the principal issue of concern in relation to all of these issues, and in particular to questions 1, 3, 14 and 15.

The *Defamation Act 2013* (UK) is referred to by the Discussion Paper's authors as a useful guide to reform, particularly in relation to proposed reforms such as the single publication rule, qualified privilege issues and the serious harm test.

In broad terms, the proposed reforms in these 17 areas can be summarised as follows:

- The objectives of the policy aims of the legislation remain appropriate, with some minor exceptions, but would benefit from some amendment to clarify the application of terms, reduce ambiguity and better articulate how the legal principles apply.<sup>5</sup>
- The narrowing of the rights of corporation to sue is an important reform which should be preserved.<sup>6</sup>
- The difficulties caused by online technology to the legislation generally should be answered; these answers include consideration of the introduction of a single publication rule and a serious harm test.<sup>7</sup> In particular, the impact of online technology on

traditional publication methods means that the defence of innocent dissemination and safe harbour provisions require careful review.<sup>8</sup>

- Early resolution of claims should be encouraged by review of the procedure for offers to make amends.<sup>9</sup>
- Amendments should be made to certain of the main defences, and in particular to the defence of contextual truth (to overcome unwelcome judicial determinations such as *Besser v Kermode*<sup>10</sup>), the "reasonableness test" in s 30 and honest opinion. There should be consideration of limited extensions to absolute privilege for statements made at press conferences and publications in peer-reviewed journals. In addition, the future of the defence of triviality requires consideration.<sup>11</sup>
- As to procedural issues, consideration should be given to appropriate jury case management issues and to consistency of jury provisions for trials conducted in the Federal Court.<sup>12</sup>
- The provisions concerning the role of the cap on damages and its interaction with aggravated damages should be reviewed.<sup>13</sup>

As well as the 17 areas for discussion identified in the Discussion Paper, the final question, question 18, invites consideration of topics not dealt with in earlier questions.

## The background to the Discussion Paper

It should first be acknowledged that the problems facing the Discussion Paper's authors in identifying the areas for reform were considerable.

When the uniform defamation legislation<sup>14</sup> was enacted in 2005, a key feature was the five-year review process provided for in s 49<sup>15</sup> of the New South Wales statute. Although due by 26 October 2011, the date the five years expired, the s 49 review report remained uncompleted for over six years.

It is easy to be critical of a delay of this extent, but the long-standing problems of effecting defamation law reform are as well-known as they are widely discussed.<sup>16</sup>

The NSW Attorney-General Mark Speakman SC announced on 31 March 2018 that the next stage of the defamation law reform process would be a consultative process:

"The timetable is designed to allow the reform process to be as expeditious as possible, while providing opportunity for extensive engagement by

5 Discussion Paper (n 3) 1.14.

6 Ibid 2.9.

7 Ibid 2.10–2.16, 5.46–5.48.

8 Ibid 5.51–5.64.

9 Ibid 3.2–3.21.

10 (2011) 282 ALR 314.

11 Discussion Paper (n 3) 5.1–5.46.

12 Ibid 4.1–4.9, 4.10–4.14.

13 Ibid.

14 *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Amendment Act 2006* (ACT) (amending the *Civil Law (Wrongs) Act 2002* (ACT)); *Defamation Act 2006* (NT) (collectively referred to as 'the uniform legislation').

15 Section 49 provides:

#### 49 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) **A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.** [Emphasis added]

16 Academic commentary identifying these problems has been extensive. As to problems arising from State/Federal demarcation issues, see David Rolph, *Defamation Law* (Thomson Reuters, 1st ed, 2015) [1.40] and David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207. As to protection of freedom of speech, see 'Australian Press Council calls for urgent reform of defamation laws', *RN Breakfast* (ABC Radio National, 2 July 2015) <<http://www.abc.net.au/radionational/programs/breakfast/australian-press-council-calls-for-urgent-reform-of/6589058>>. As to defects in the drafting of the defences, see Andrew Kenyon, 'Six years of Australian defamation Law' (2012) 31 *UNSW Law Journal* 31. As to the absence of adequate provisions for online technology, see Daniel Joyce, 'Searching for defamation law reform', *Australian Human Rights Centre* (Web Page, 17 August 2017) <<http://archive.ahrcentre.org/news/2017/08/22/931>>.

community and stakeholder groups to help determine how our new defamation law should function,” Mr Speakman said in a statement.

He said the two rounds of public consultation, including stakeholder roundtables, would “allow considered contributions on nationally consistent defamation law”.

Reforming the laws would be “complex and demanding” but the timetable provided a framework “to deliver reforms to ensure the right balance between protecting reputations and freedom of speech”, Mr Speakman said.<sup>17</sup>

In accordance with that timetable, the New South Wales Government’s *Statutory Review: Defamation Act 2005* provided for by s 49 (‘the Review’)<sup>18</sup> was published on 7 June 2018. It acknowledged that no fresh submissions had been sought since 2011 and that the impact of online publication social media<sup>19</sup> as well as legislative reform in the United Kingdom had resulted in a very different law reform landscape.

Between June and December 2018, discussion in the media and some journal reports<sup>20</sup> considered issues raised in the Review pending the next stage in the process, namely the release of the Discussion Paper on 26 February 2019.<sup>21</sup> Submissions are invited, with a deadline of 30 April 2018.

The 17 areas of defamation law reform selected by the authors of the Discussion Paper all raise interesting and important issues. However, the most interesting of the 18 questions is question 18 itself, namely:

Are there any other areas of defamation law that should be considered?

This is the question which this seminar paper attempts to answer.

### Ten new topics in answer to Question 18

In answer to the Discussion Paper’s call for other issues in defamation law that should be considered, I have set out ten potential problem areas for legislators which are not the subject of consideration in the Discussion Paper.

Some of these proposals, such as another s 49 review clause and the inclusion of injurious falsehood provisions in the legislation, may seem obvious, but nevertheless these have not been put forward to date and are worth noting. Other proposals, such as limiting the jurisdiction of certain courts and proposing remedies other than damages, may be more controversial.

#### 1. Another section 49 review provision

The first issue which requires consideration is the inclusion of a fresh provision for statutory review in future legislation. This is necessary for three reasons.

The first of these is the unsatisfactory history of defamation legislative reform in Australia<sup>22</sup> and the six and a half year delay in publication of the s 49 Review, both of which have exacerbated already complex issues of defamation law reform. To give one example, the authors of the Discussion Paper are to be commended for their frank acknowledgement<sup>23</sup> that the contextual justification defence in s 26 had been “intended to mirror former section 16” and that “the current wording of clause 26 appears to have clear unintended consequences”. However, this had been a known problem since it was drawn to the Attorney-General’s attention by Simpson J in 2010.<sup>24</sup>

This brings me to the second reason, namely that this kind of delay in rectifying a legislative drafting problem should be guarded against in future, particularly given the unwieldiness of the legislative reform process, which requires the meetings of the Attorneys-General for the states and territories of Australia (and, if the Federal Court of Australia is to claim an entitlement to jurisdiction, any involvement of the Commonwealth Government, which will hopefully also be clarified).

The third reason is that the pace of technology grows ever faster.

All of these factors point to the desirability of a review clause in the revised uniform legislation for another five years – and perhaps even on a regular five-year basis.

17 Michaela Whitbourn, ‘Ambitious 18-month timetable for defamation law reform’, *Sydney Morning Herald* (online, 31 January 2019) <<https://www.smh.com.au/national/nsw/ambitious-18-month-timetable-unveiled-for-defamation-law-reform-20190130-p5oukf.html>>.

18 New South Wales Department of Justice, *Statutory Review: Defamation Act 2005* (2018) <<http://www.justice.nsw.gov.au/justicepolicy/Documents/defamation-act-statutory-review-report.pdf>> (‘the Review’). The Review was released by the Hon Mark Speakman SC, Attorney-General for New South Wales, on 7 June 2018. The due date of 26 October 2011 arises because Defamation Act 2005 (NSW) provided for the five-year Review to be tabled within one year of the date of assent (that is, 26 October 2005).

19 For statistics on social media, see ‘Number of social media users worldwide 2010–17 with forecasts to 2021’, *European Commission* (Web Page, 2018) <[https://ec.europa.eu/knowledge4policy/visualisation/number-social-media-users-worldwide-2010-17-forecasts-2021\\_en](https://ec.europa.eu/knowledge4policy/visualisation/number-social-media-users-worldwide-2010-17-forecasts-2021_en)>; for a discussion on the rise of the number of defamation actions based on social media posts, see Stephen Smiley and Angela Lavoipierre, ‘Why dozens of Australians are suing over emails and posts on Facebook or Twitter’, *ABC News* (online, 7 November 2018) <<https://www.abc.net.au/news/2018-11-07/social-media-defamation-cases-costly-and-time-consuming/10470924>>.

20 Media publications included David Rolph, ‘Australia’s defamation laws are ripe for overhaul’, *Sydney Morning Herald* (online, 9 December 2018) <<https://www.smh.com.au/national/australia-s-defamation-laws-are-ripe-for-overhaul-20181207-p5okwk.html>> and Matt Collins QC, ‘Let’s end the defamation law horror story’, *The Australian* (online, 29 October 2018) (subscription required). Articles published in journals include Michael Douglas, ‘Defamatory Capacity in the Digital Age’ (2018) 26 *Tort Law Review* 3; J C Gibson, ‘Adapting defamation law reform to online publication’ (2018) 22 *Media Arts Law Review* 1.

21 Discussion Paper (n 3).

22 This reform process has been described as one of ‘piecemeal reform and comparative neglect’: Rolph, *Defamation Law* (n 16) [1.40].

23 Discussion Paper (n 3) 5.6, 5.8.

24 *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 85.

## 2. Jurisdiction issues

The Discussion Paper acknowledges that many defamation cases are now being conducted in the Federal Court and that applications for juries have been refused on procedural grounds.<sup>25</sup> The Federal Court is not a party to the Intergovernmental Agreement. This has led to complaints of forum-shopping, as the Discussion Paper acknowledges.<sup>26</sup> In practical terms, the Federal Court will continue to hear defamation actions and the issue seems to be whether that Court will do so in a manner consistent with other jurisdictions.

However, the question of the interaction between the uniform legislation and Federal Court procedural preferences is only the first of a series of jurisdictional problems in relation to jurisdiction for courts hearing defamation proceedings.

The increase in the number of defamation actions commenced in magistrates courts and administrative tribunals is evident from the judgments emanating from these courts. In many of these cases, litigants are self-represented, and the judgments often report many days of hearing. Where one or both parties are unrepresented, this places a heavy burden on the presiding judicial officer at first instance as well as on appeal, and the potential for injustice is increased.

Defamation proceedings are now brought in nearly every magistrates court and tribunal in Australia:

- **Magistrates courts:** While s 33 *Local Courts Act 2007* (NSW) has prevented the defamation proceedings being commenced in the magistrates courts in New South Wales, there is no cognate provision in other states and territories.<sup>27</sup> While it is unclear whether the apparent increase in defamation actions brought at the magistrate court level is the result of an increase in publication of decisions or for other reasons, the complexity of issues raised and the potential for error are readily apparent.<sup>28</sup> Appeals leading to fresh trials demonstrate these errors, and the fresh trials add to the cost to the litigants as well as to the burdens on the court hearing the appeals.<sup>29</sup>
- **Federal Magistrates Courts:** One of the unlooked-for consequences of the Federal Court's claim of jurisdiction for defamation actions has been that claims could arguably now be brought in the Federal Magistrates Courts. In *Merrett v Marinakos*,<sup>30</sup> the applicant brought a claim for damages on the basis that since 2014 the respondent "did breach my privacy and defame me", as

well as sending "a criminally defaming letter". His Honour Judge J D Wilson QC robustly dismissed the defamation claim, in terms which deserve wider circulation than may otherwise be the case<sup>31</sup> However, the fact that such claims may be brought requires consideration of the basis upon which Federal Courts should exercise jurisdiction as well as the desirability of busy court<sup>32</sup> such as the Federal Magistrates Court being burdened with claims of this nature.

- **Administrative tribunals:** In *GP v Mackenzie & Ors (Appeal)*,<sup>33</sup> Presidential Member E Symons describes the "long history" of a defamation case arising from the placing of a table on public land which "has taken up an extraordinary amount of time in the tribunal due to the sheer volume of applications for interim or other orders since the filing of the application commencing this action" (at [3]). This is an unacceptable burden on tribunals designed to provide quick and effective relief in straightforward claims where members of the public are encouraged to act for themselves. These burdens do not stop at claims for defamation; these administrative tribunals have also had to deal with allegations of perjury,<sup>34</sup> requests

25 Discussion Paper (n 3) 4.10-4.14.

26 Ibid.

27 That has not, however, stopped litigants in person from attempting to commence proceedings in New South Wales at the Local Court level; Dr Ghosh commenced her proceedings in the Local Court at Newcastle: *Ghosh v Miller* [2013] NSWDC 194.

28 *Sangare v Northern Territory of Australia* [2018] NTCA 10 was commenced in the Supreme Court by a litigant in person. After the plaintiff's claim was dismissed, it was appealed to the Court of Appeal and the High Court of Australia then dismissed an application for special leave to appeal. Recent judgments in the magistrates courts in Victoria include *Yuanjun Holdings Pty Ltd v Min Luo* [2018] VMC 7 (damages of \$3,500 were awarded). Recent decisions in the Queensland Magistrates Court include *Walden v Danieletto* [2018] QMC 10 and *Kelly v Levick* [2016] QMC 11. Recent decisions in the ACT Magistrates Court include the proceedings the subject of an application for transfer in *Small v Small* [2018] ACTSC 231.

29 As well as *Sangare v Northern Territory of Australia* [2018] NTCA 10, see *Berge v Thanarattanabodee* [2018] QDC 121, *Ferguson v South Australia* [2018] SASC 90, *Machado v Underwood (No 2)* [2016] SASFC 123 (concerning the costs of an appeal from a magistrate) and *Crinis v Commissioner of Queensland Police Service* [2018] QCA 150, [13].

30 [2019] FCCA 541, [5].

31 His Honour stated at [17]-[18]:

This court has accrued jurisdiction to deal with claims that are associated with claims validly within its jurisdiction. The High Court pronounced on the accrued jurisdiction of the Federal Court in largely similar terms in *Fencott v Muller* and in *Stack v Coastal Securities (No 9) Pty Ltd*. In this case, the Federal Circuit Court of Australia does not have power to determine defamation litigation. Whether or not a defamation claim is part of this court's accrued jurisdiction need not be considered as there is presently no valid claim falling for this court's consideration in this litigation. It follows that there is no valid claim on foot in this case to which anything can be appended or accrued, in particular a defamation proceeding as the applicant wished to agitate.

This litigation is fundamentally flawed. It is wholly misconceived. It smacks of an abuse of the court process. It should be stopped in its tracks immediately. I hereby make such an order. I order the applicant to pay the respondents' costs." [citations omitted]

32 Michael Koziol, 'Overhaul of Family Court system seeks to reduce delays and clear backlogs', *Sydney Morning Herald* (online, 29 May 2018) <<https://www.smh.com.au/politics/federal/overhaul-of-family-court-system-seeks-to-reduce-delays-and-clear-backlogs-20180529-p4zi4h.html>>.

33 [2018] ACAT 96.

34 *Toogood v Cassowary Coast Regional Council* [2018] QCAT 319; *More atf Cleopatra Skin Discretionary Trust v Ford* [2018] QCAT 19.

for referral to the Director of Public Prosecutions<sup>35</sup> and/or complaints of bias by Tribunal members<sup>36</sup>. The degree to which such courts have jurisdiction at all is uncertain; administrative tribunals in Queensland, Victoria and New South Wales have refused to hear defamation claims.<sup>37</sup>

Amendments to the uniform legislation should exclude the hearing of defamation actions in these courts.

### 3. Regulation of injurious falsehood and other non-defamation reputation torts

The NSW Attorney-General has publicly announced<sup>38</sup> that the principal anti-abuse of process reform in the uniform legislation, namely the limitations on the rights of corporations to bring actions for defamation, will be retained. This was certainly the position taken by the Review,<sup>39</sup> which noted that:

[C]orporations have other options to defend their corporate reputations, such as making complaints to the Press Council of Australia, and pursuing other types of legal actions,

including under provisions in the Competition and Consumer Act 2010 (Cth) (CCA) and for the tort of injurious falsehood.

Prior to this reform, there was a longstanding debate as to whether corporations could claim aggravated damages as a corporation could not recover damages for increased hurt to feelings caused by the falsity of the claim.<sup>40</sup> The impetus for reform arose following assertions of corporate SLAPP suits<sup>41</sup> and attempts to silence whistleblowers and environmentalists.<sup>42</sup> However, it should be noted that some of the more successful actions of this kind were brought by company directors.<sup>43</sup>

There are four areas for consideration:

- injurious falsehood;
- use of other legislation, such as the so-called “anti-SLAPP” legislation such as the *Protection of Public Participation Act 2008* (ACT);
- the New Zealand defamation legislation’s requirements for all corporations to demonstrate pecuniary loss; and

- the question of who is a “prescribed information provider” for claims for misleading and deceptive conduct in the course of trade or commerce.

#### Injurious falsehood

Should the proposed reforms to defamation law include statutory regulation of injurious falsehood and other actions for slander of title to goods? If amendments to defamation legislation such as the single publication rule make defamation actions less attractive, it is likely that claims for injurious falsehood may become more common.

The six-year limitation period, the absence of a single publication rule and the potential for exemplary damages make claims of this kind very attractive, and not only to corporations. At the very least, the limitation period for slander of title and injurious falsehood claims should be limited in the same way as is the case in the United Kingdom.<sup>44</sup> There are also provisions relating to malicious falsehood claims in the *Defamation Act 1992* (NZ) (described as “An Act to amend the law relating to defamation and other malicious falsehoods”<sup>45</sup>): see ss 5 and 48.

35 *Payne v APN News & Media* [2016] QCATA 140.

36 *Chen v Premier Motor Services Pty Ltd t/as Premier Illawarra* [2018] NSWCATAP 142.

37 An attempt to bring a claim for defamation was dismissed in *Singh v AusHomes Pty Ltd* [2018] QCAT 312, [4]. This was put by way of counter-claim to a claim for damages for defective building which failed on its merits. The same position was taken in *Liang v University of Technology at Sydney* [2018] NSWSC 1740. However, the Administrative Tribunal in the Australian Capital Territory considers that it has jurisdiction and recently awarded \$400 damages for defamation: *Bottrill v Bailey* [2018] ACAT 45.

38 Mark Speakman, ‘Corporations should not be allowed to sue for defamation, says Attorney-General’, *Australian Financial Review* (online, 9 August 2018) <<https://www.afr.com/business/legal/companies-should-not-be-allowed-to-sue-for-defamation-says-attorney-general-20180801-h13fwb>>.

39 The Review (n 1) [2.5]. The Review goes on to note that obtaining an injunction may therefore be easier for a corporation as a result: [2.6].

40 *Royal Society for the Prevention of Cruelty to Animals (NSW) v 2KY Broadcasters Pty Ltd* (1988) A Def R 50,030; *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1; *Australian Medical Association (WA) Inc v McEvoy (No 2)* [2012] WASC 416. See also the discussion of this issue in Law Commission of Ontario, *Defamation in the Internet Age* (Consultation Paper Executive Summary, November 2017) <<https://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/consultation-paper/>> V.C.

41 See the examples cited by Bruce Donald, ‘Current state of SLAPP litigation in Australia’ Walkley Foundation (Paper, Walkley Foundation for Journalism National Public Affairs Convention, Sydney, 18–19 May 2009) <[https://www.sourcewatch.org/images/2/28/SLAPP\\_law\\_fin.pdf](https://www.sourcewatch.org/images/2/28/SLAPP_law_fin.pdf)> and Greg Ogle, ‘Beating a SLAPP suit’ (2007) 32 *Alternative Law Journal* 71. SourceWatch maintains a list of asserted SLAPP suits in Australia: ‘SLAPPs in Australia’, *SourceWatch* (Web Page) <[https://www.sourcewatch.org/index.php/SLAPP's\\_in\\_Australia](https://www.sourcewatch.org/index.php/SLAPP's_in_Australia)>.

42 Mark Parnell, ‘The Hindmarsh Island Bridge Defamation Case’, *Environmental Defenders’ Office* (Web Page) <[https://web.archive.org/web/20120410073855/http://www.ccsa.asn.au/HIB/latest/Hindmarsh\\_Isld\\_def\\_Parnell.htm](https://web.archive.org/web/20120410073855/http://www.ccsa.asn.au/HIB/latest/Hindmarsh_Isld_def_Parnell.htm)>; Bruce Donald, ‘Hindmarsh Island Defamation’, *ABC Radio National* (14 December 2003) <<https://www.abc.net.au/radionational/programs/archived/nationalinterest/hindmarsh-island-defamation/3375456#transcript>>.

43 There were 14 “defamation fireball” claims (to use the term employed by the solicitor for the plaintiffs) brought against individuals and corporations in relation to the Hindmarsh Island Bridge: see Greg Ogle, ‘Defamation Processes and the Hindmarsh Bridge Campaign’ (2000) 4(26) *Indigenous Law Bulletin* 7. However, members of the Chapman family later received \$850,000 damages for defamation, principally for allegations that they had brought SLAPP suits to silence opponents: *Chapman v Conservation Council (SA)* (2002) 82 SASR 44.

44 In the United Kingdom, the one-year period is extended also to slander of goods and other malicious falsehood claims: see *Limitation Act 1980* (UK) s 4A:

**Time limit for actions for defamation or malicious falsehood.**

The time limit under section 2 of this Act shall not apply to an action for—

(a) libel or slander, or

(b) slander of title, slander of goods or other malicious falsehood, but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.

45 *Defamation Act 1992* (UK) Long Title.

## SLAPP legislation

It is sometimes claimed that politicians, themselves prone to bring defamation claims,<sup>46</sup> tend to favour corporate lobbyists over truthsaying whistleblowers and investigative journalists. There are defamation proceedings the length and complexity of which, as Bruce Donald<sup>47</sup> pointed out a decade ago, suggest the use of legal action to chill public interest debate (or ‘SLAPP suits’, namely ‘strategic litigation against public participation’).<sup>48</sup> The question is whether online technology has made this kind of litigation more likely to occur. If SLAPP suits are a significant issue in Australia, particularly if the rights for companies to sue are restored across the board, should there be special legislation to control litigation asserted to be of a SLAPP nature?

Only the Australian Capital Territory responded to calls for this kind of legislation, by introducing the *Protection of Public Participation Act 2008* (ACT). The Attorney-General for New South Wales at the time, Mr Bob Debus, rejected the legislation as unnecessary because of the reform of defamation law to exclude corporations from suit.<sup>49</sup> The then-Premier, Mr Bob Carr, considered that the restriction on corporations to sue was a sufficient protection for the following reasons:

Well, big corporations have got enough power as it is in our society. The head of BHP, or an insurance company, can convene a press conference, buy a one page advertisement in *The Financial Review*. They’ve got enough clout in our society and the capacity

of the media to report corporate shenanigans has got to be just about uninhibited.<sup>50</sup>

The only time this legislation has been invoked as a potential defence to a defamation action occurred in *Batemen v Idomeneo (No 123) Pty Ltd v Fairfax Media Publications Pty Ltd*.<sup>51</sup> Refshauge J noted that the legislation existed in the Australian Capital Territory but that there was no cognate legislation in New South Wales. Nevertheless, his Honour transferred the proceedings to New South Wales, some three years after the proceedings had been commenced in the Australian Capital Territory.

It is an interesting question of law as to whether this statute may be of assistance to defendants in the Federal Court, given the special basis upon which the Federal Court claims original jurisdiction derived from the Australian Capital Territory to hear defamation proceedings. Perhaps this legislation deserves wider recognition by practitioners, regardless of whether it is the subject of consideration by the authors of the discussion paper.

However, Bruce Donald<sup>52</sup> points to some significant defects in its provisions. First, the remedy is a civil penalty which requires government enforcement. Since no private right is expressed and the offence is not a crime, there may be an argument that a private person could not seek an injunction or lay an information against the SLAPP. Second, the main purpose must be against public participation; courts may readily accept a private litigant’s argument that they are protecting legitimate rights.

## A requirement to prove special damage?

Another potential area for reform in relation to corporations generally, whether they sue for defamation or injurious falsehood, could be a provision along the lines of s 6 of the *Defamation Act 1992* (NZ), which provides:

### 6. Proceedings for defamation brought by body corporate

Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings -

- (a) has caused pecuniary loss; or
- (b) is likely to cause pecuniary loss to that body corporate.<sup>53</sup>

Whether a provision of this kind is appropriate would largely depend on whether the existing restrictions are preserved.

### Prescribed information providers – preventing misuse of misleading and deceptive conduct and other alternatives to defamation

Another alternative to defamation is the commencement of a claim for misleading and deceptive conduct claim pursuant to s 18 of the *Australian Consumer Law* (‘ACL’), contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth) (formerly s 52 of the *Trade Practices Act 1974* (Cth)). Section 19 of the ACL (formerly s 65A of the *Trade Practices Act*) significantly limited its application to media organisations but its applicability to social media tweets, blogs or posts is less clear. In addition, the single publication rule would be restricted to claims for defamation.

Continued on page 9 >

46 For a list of politicians who brought defamation proceedings in 2018, see Emily Watkins, ‘The politicians who sued for defamation in 2018’, *Crikey* (online, 12 December 2018) <<https://www.crikey.com.au/2018/12/12/australian-politicians-defamation-2018/>>. For an earlier list, see ‘Crikey list: politicians who have sued for defamation’, *Crikey* (online, 28 January 2015) <<https://www.crikey.com.au/2015/01/28/crikey-list-politicians-who-have-sued-media-outlets-for-defamation/>>. For academic commentary, see Brendan Edgeworth and Michael Newcity, ‘Politicians, Defamation Law and the “Public Figure” Defence’ (1992) 10 *Law in Context* 39 and Adrienne Stone and George Williams, ‘Freedom of Speech and Defamation: Developments in the Common Law World’ (2000) 26 *Monash University Law Review* 362.

47 Donald (n 40 and 41).

48 See the definition of ‘SLAPP suit’ and list of cases in ‘Gunning for Change’ Greg Ogle, *Gunning for Change: The Need for Public Participation Law Reform* (Wilderness Society, 2005) <[http://users.senet.com.au/~gregogle/images/Gunning\\_for\\_Change\\_web.pdf](http://users.senet.com.au/~gregogle/images/Gunning_for_Change_web.pdf)>.

49 Donald (n 40); see also Thalia Anthony, ‘Quantum of strategic litigation: quashing public participation’ (2009) 14 *Australian Journal of Human Rights* 1.

50 Cited in Donald (n 40).

51 [2013] ACTSC 72.

52 Donald (n 40 and 41).

53 Note that the NSW Bar Association, in its 2011 submission, stated that other common law jurisdictions did not trammel the rights of corporations to sue, but did not refer to this provision: Bar Association of NSW, ‘Attorney-General’s Review of the *Defamation Act 2005* (NSW)’ (Submission to Attorney-General) 1.10. <https://www.nswbar.asn.au/circulars/2011/may/defamation.pdf>.

# CAMLA Integrity in Sports Seminar: Ensuring Fair Play for Our Sports, Our Players and Our Brands

Report by Calli Tspidis, Junior Legal Counsel at FOX SPORTS Australia

On Thursday 21 March, CAMLA held its Integrity in Sports Seminar at the offices of HWL Ebsworth Lawyers. The event was proudly organised by the CAMLA Board and moderated by Rebecca Lindhout (HWL Ebsworth Lawyers and CAMLA Board Member 2019). The speakers for the Seminar included **Joe Collins** (General Manager Integrity & Senior Legal Counsel, NRL), **Simon Hill** (Football Commentator and Journalist, Fox Sports Australia) and **Melissa Hopkins** (Head of Consumer Marketing, Optus).

In the wake of numerous off-field incidents across sporting codes and the release of the Government's response to the Wood Review, the timely seminar provided attendees with unique insights into the interplay between commerciality, legality, brand and geopolitical influences – particularly, how these factors have shaped,

and continue to shape, decision-making within sporting bodies and partner entities.

Joe, Simon and Melissa each brought a unique flavour to the Seminar, drawing on their personal and professional experiences, inciting a flurry of questions from attendees – making for a captivating panel/audience discussion. The seminar ultimately highlighted how the power of the public, media and leadership (both political and within sporting bodies) has a significant impact on how, and whether, standards of integrity in the professional sporting area are upheld and protected...or not.

The CAMLA Board would like to extend its thanks to the speakers for sharing their time, insights and expertise, and to HWL Ebsworth who hosted the event.

## Defamation Seminar 28 March 2019

Report by Antonia Rosen, Banki Haddock Fiora

On 28 March 2019, CAMLA presented its defamation reform seminar, hosted by Johnson Winter & Slattery. The focus of the seminar was the February 2019 Review of Model Defamation Provisions Discussion Paper by the Attorneys-General Defamation Working Party. The paper sets out a series of questions which seek to address the continued validity of the policy objectives of the Model Defamation Provisions. The seminar was conducted under Chatham House Rules.

The seminar was led by a panel of esteemed persons within the field, consisting of Gail Hambly, General Counsel of Fairfax for 20 years, her Honour Judge Judith Gibson of the District Court of New South Wales, Professor David Rolph of the Sydney University Law School, Larina Alick, editorial counsel at Nine, and Matthew Lewis, specialist defamation counsel at Five Wentworth Chambers. The moderator was Kevin Lynch, a partner at Johnson Winter & Slattery, who guided the panel with interesting questions interspersed with comic relief.

The seminar was well attended with many notable figures within the field present. The NSW Department of Justice was also represented and made some brief comments at the outset in respect of the timetable for public consultation and drafting. The current objective is that an agreement be achieved on the new national law by mid-2020. Further information is available on the Department of Justice website.

The panelists were given the opportunity to express their views in respect of the various areas of reform. In this respect, the discussion was largely guided by the

18 questions posed in the Discussion Paper, including the catchall in question 18. The usual suspects were addressed including, the ability of corporations to sue, the impotence of the current contextual truth and statutory qualified privilege provisions, as well as the prospect of a serious harm threshold and a single publication rule. It was suggested that the statutory cap on damages is sufficient and the recent headline cases such as *Wagner & Ors v Harbour Radio*, *Wilson v Bauer Media* and *Rayney v State of WA* were, on their facts, exceptions rather than the rule.

The catchall question gave rise to some interesting comments. It was noted that notwithstanding the uniform law, inconsistencies between the State jurisdictions remained, for example with respect to the Hore-Lacey defence (there may also have been a joke about dead people in Tasmania). Of course, the current trend of commencing cases in the Federal Court was addressed, including the inconsistencies between the Federal and State jurisdictions with respect to juries, the docket system and the case law. It was suggested that perhaps these issues may be dealt with by Federal legislation. It was also noted that the current legislation in respect of defamation is insufficient (and perhaps not the right vehicle) to address the manner in which the internet is increasingly being used by often unaccountable individuals to harass others.

The seminar provided some excellent insights into the kind of reforms that should be considered. The insights will no doubt be the subject of many submissions to the Working Party.



In conclusion, reforms in relation to defamation should consider the inclusion of actions for injurious falsehood and care should be taken to ensure that similar reputation-based claims based on online publications have similar protections such as the single publication rule.

#### 4. Freedom of speech: *Durie v Gardiner*, *Lange v ABC*, the implied right of freedom of speech and other constitutional issues

The Discussion Paper contains no reference to *Lange v Australian Broadcasting Corporation*,<sup>54</sup> *Durie v Gardiner*<sup>55</sup> or to any consideration of statutory amendment to render the effectively useless<sup>56</sup> defence of the implied right of freedom of speech more effective.

It has long been recognized that “the comparative lack of legal protections for ‘responsible’ media stories published in the public interest”<sup>57</sup> must be remedied.

This is a significant oversight, particularly given the clear-sighted judgment of the New Zealand Court of Appeal in *Gardiner v Durie* leading to the description of a neutral reportage defence.

One of the impacts that online publication will have on defamation is that publication is not merely State-based, or even national, but international. Where a country does not have an adequate defence of reportage, that is a matter for concern not only on a national but an international basis.

#### 5. Protection of the complaints process and tribunals by an overhaul of absolute privilege defences

The sole areas of consideration for the extension of protection<sup>58</sup> are peer-reviewed publications (an increasing rarity in today’s blog-driven academic world) and press conferences (although even in the United Kingdom statements at a press conference are protected only by qualified privilege).

The entitlement to make a complaint or to draw wrongdoing to the attention of the relevant authorities is capable of misuse, but that does not mean that the complaints process should be unprotected. Examples of problem areas are as follows:

- There has been an extensive consideration in the United Kingdom about whether complaints to the police should benefit from absolute privilege. In an age of concern about public safety, this is an issue which should be considered in Australia.
- The inconsistent and unsatisfactory state of the law concerning complaints about professionals such as medical practitioners (see *Lucire v Parmegiani*<sup>59</sup>) warrants closer consideration.
- The limiting of absolute privilege to court proceedings is based on traditional concepts of courts with the result that publications made to employment tribunals and the like are unprotected.

The facts in *Lucire v Parmegiani* are an example of this problem. A medical

practitioner raised the conduct of another medical practitioner with the relevant complaints body and was sued for defamation for the contents of his complaint. Largely because of apparent omissions in the legislation, the complaint was found to be protected by a defence of qualified privilege only. This meant that the question of defamation (as well as the associated claims of injurious falsehood and misleading and deceptive conduct) would have to go all the way to trial. That operates as a chilling effect not only on defamation, but on the complaints process.

There has long been a hodge-podge of statutory attempts at absolute or qualified protection in relation to a number of government and quasi-government complaints bodies<sup>60</sup>. This can be remedied by a “tidying up” process of identifying current legislation (or lack of legislation) where these have been identified in judgments where claims of absolute privilege have been raised.

#### 6. Common law defences: *Hore-Lacy*; common law justification and comment; consent

Some common law defences are the subject of controversy; none of them is included in the legislation.

##### The Hore-Lacy defence

The inconsistency between New South Wales and Victorian appellate decisions<sup>61</sup> concerning the Hore-Lacy defence<sup>62</sup> has been exacerbated by the Federal Court’s apparent unawareness of these views.<sup>63</sup> There is a need for uniformity in relation to the availability of this defence.

54 (1997) 189 CLR 520.

55 [2017] 3 NZLR 72.

56 The Hon Justice Peter Applegarth, ‘Distorting the Law of Defamation’ (2011) *University of Queensland Law Journal* 99.

57 Law Commission of Ontario (n 40) 4.

58 Discussion Paper (n 3) 5.9–5.16.

59 *Lucire v Parmegiani* [2012] NSWCA 86.

60 For a list of such provisions in legislation prior to 1990, see J C Gibson (ed), *Aspects of the Law of Defamation in New South Wales* (Law Society of NSW, 1990) 125–30. However, many potentially protected occasions are not the subject of express provisions. For example, publications made in the course of employment-related inquiries have long created difficulty; see the discussion of *Bahonko v Sterjov* [2007] FCA 1244 and 1556 at n 62 below and of *Cush v Dillon*; *Boland v Dillon* (2011) 243 CLR 298 under the heading “Consent” in section 6 of this discussion paper. A claim based on statements made by a witness to the Fair Work Commission was struck out on the basis of absolute privilege in *Tull v Wolfe* [2016] WASC 65; however, only a defence of qualified privilege was raised in *Gmitrovic v Commonwealth of Australia* [2016] NSWSC 418 for an investigation report in relation to the plaintiff’s asserted misconduct at work.

61 *Bateman v Fairfax Media Publications Pty Ltd* (No 2) [2014] NSWSC 1380; *Fairfax Media Publications v Bateman* (2015) 90 NSWLR 79; *Setka v Abbott* [2014] VSCA 287.

62 *David Syme & Co v Hore-Lacy* [2000] 1 VR 667.

63 *Wing v Fairfax Media Publications Pty Ltd* [2018] FCA 1340.

## Consent

Although rarely used, the defence of consent may be of assistance as an alternative to extensions of absolute privilege in relation to complaints to complaint review bodies such as the Press Council, employment tribunals<sup>64</sup> and mediators of disputes such as the Finance Industry Ombudsman,<sup>65</sup> as a kind of “eBay-style” method of requiring parties who have a dispute to use the dispute resolution body to resolve it, and not as a gold mine for documents to sue upon if the result is not to their liking.

The defence of consent would relate to the provision and use of the publications for the purposes of that dispute. Wider publication (for example, on social media) could still be actionable.

There are strong public policy reasons for protection of the complaints process:

First, even those tasked with investigating the complaint may be the subject of suit, as occurred in *Cush v Dillon; Boland v Dillon*,<sup>66</sup> where the only publication sued on was a statement by one of the investigators to the other.

Second, actions based on information provided to investigators may amount to a canvassing of the findings of the tribunal.

Third, parties to an investigation should be as entitled to speak just as frankly as parties to litigation.

## Common law comment and justification defences

The rationale for these rarely pleaded defences remaining available seems tenuous. Should consideration be given to a “cover the field” provision?

## 7. Declarations and other alternatives to damages

One of the significant changes caused to the relationship of plaintiff and defendant by online publication is that everyone can be a publisher to a broad audience, as opposed to the pre-internet media where the cost of publication was a significant barrier to entry. In addition, judgments at first instance, rarely published in the era of authorized law reports, are now available online and around the world.

What is the point of a financially capped remedy for defamation where the real remedy is (as is often the case in claims for misleading and deceptive conduct claims) either the taking down of the publication in question and/or corrective advertising?

The potential for awards other than for financial compensation is not referred to in the Discussion Paper, although this would demonstrate a constructive use of the power of the internet to correct errors in a way that was not really possible in the age of print media.

The concept of alternative remedies to damages has a distinguished pedigree. For decades there has

been extensive academic writing about the potential for use of a declaration of falsity or similar alternative to damages<sup>67</sup>, culminating in recommendations in 1995 by the NSW Law Reform Commission<sup>68</sup> that such a remedy should be considered. That recommendation was perhaps fortuitous, in that there is no mention at all of the internet,<sup>69</sup> which had begun to encroach on world publishing in the years shortly beforehand.<sup>70</sup> More recently, Dr Matt Collins QC, the President of the Victorian Bar and the author of “Defamation Law and the Internet” (first published in 2001), has publicly raised these issues.<sup>71</sup>

The need for effective remedies for defamation needs to be seen in the larger context of online publication generally.

## A postscript on damages: why should judges determine this issue?

It seems ironic that the task of awarding damages was taken away from juries given the concern expressed by the Discussion Paper at the judicial attitude taken to the cap and its interaction with aggravated damages.<sup>72</sup>

Where there is a judge-alone trial the same judge determines liability and damages. The rationale for withholding damages awards from juries arises from the concern that juries award excessive damages and would not be held back from doing

64 The defence of consent is widely used in the United States in relation to employment grievance bodies: see Raymond E Brown (ed), *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)* (Thomson Reuters, 2nd ed, 1994) Ch 11. A good example of the utility of this defence may be seen in *Bahonko v Sterjov* [2007] FCA 1244 and [2007] FCA 1556, where the applicant was awarded \$50 for a report prepared for a report produced at her insistence in the course of conciliation proceedings. The case went all the way to the High Court; special leave was refused in *Bahonko v Sterjov* [2007] HCA Trans 666. Another example is *Zaghoul v Woodside Energy Ltd* [2018] WASC 191, where the plaintiff sued his employer and other employees for the contents of statements they made to an investigator for the purpose of a workplace report. The extensive nature of the subsequent litigation is referred to in *Zaghoul v Woodside Energy Ltd* [2018] WASC 191; special leave was refused in *Zaghoul v Woodside Energy Ltd* [2019] HCASL 30.

65 There is already a specific procedure in place for the Financial Industry Ombudsman (see *Imielska v Morgan* [2017] NSWDC 329) but many other complaints procedures remain unprotected.

66 (2011) 243 CLR 298.

67 See the list of articles set out in Gibson (ed) (n 60) 141–42. More recent examples over the past three decades include Michael Chesterman, ‘The Money or the Truth: Defamation Law Reform in Australia and the USA’ (1995) 18 *UNSW Law Journal* 300. For a discussion of the unavailability of such a remedy at common law, see ‘Libel, Damages and the “Remedial Gap”: a declaration of falsity?’, *Inform*, 20 July 2013.

68 ‘NSW Law Reform Commission, *Defamation* (Report No 75, 1995) <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-75.pdf>>

69 The Report does, however, refer in one place to the potential of computers in relation to secondary liability for publication, when it notes: ‘The NSW Court of Appeal has recently been asked to consider whether developments in computer technology have converted printers into reproducers rather than compositors and thus assigning them a subordinate role which should entitle them to rely on the defence of innocent dissemination’, citing *McPhersons Ltd v Hickie* (1995) Aust Torts Reports ¶181–348.

70 The date sometimes given for the birth of the internet is 1989, but a more realistic date is September 1994, when Sir Tim Berners-Lee founded the first World Wide Web consortium: see ‘Facts About W3’, *World Wide Web Consortium* (Web Page) <<https://www.w3.org/Consortium/facts/>>

71 See, eg, Matt Collins, ‘Frankenstein’s Monster: The State of Australian Defamation Law’ (Speech, Melbourne Law School, October 2018) <[http://static1.1.sqspcdn.com/static/f/556710/28029196/1542690476160/Collins\\_Frankenstein\\_Monster.pdf?token=vt1SbcjRlpxiq3iNDxLiWp6DAs](http://static1.1.sqspcdn.com/static/f/556710/28029196/1542690476160/Collins_Frankenstein_Monster.pdf?token=vt1SbcjRlpxiq3iNDxLiWp6DAs)>. The Law Commission of Ontario report (n 40) has also recommended consideration of such a reform (at G).

72 Discussion Paper (n 3) 6.2–6.9.

so even by the imposition of a cap. Given the judicial response to the limits of the cap and its interaction with aggravated damages, perhaps damages are better left to the jury. This will save time and money, avoid two trials and reduce the tinkering with damages that so commonly occurs on appeal.

## 8. An effective summary dismissal procedure

More than any other cause of action, defamation claims are capable of being misused in circumstances amounting to abuse of process. An effective summary dismissal procedure to prevent these claims going to a full hearing is an essential part of defamation law in the United States, Canada<sup>73</sup> and the United Kingdom, and is not restricted to issues such as proportionality or serious harm.

Concern about the disproportionality of legal costs to the damages awarded has long been publicly expressed, but Australian courts, particularly at appellate level, have been reluctant to accept or apply the principles of proportionality.<sup>74</sup> As to the concept of serious harm, although support for these principles may be found in *Kostov v Nationwide News Pty Ltd*,<sup>75</sup> this decision is controversial, in that it runs contrary to appellate authority, as Michael Douglas notes:

“Previously, in *Lesses v Maras*, the Full Court of the Supreme Court of South Australia assessed *Thornton* as “merely an elucidation of the requirement that, to be defamatory, an imputation must tend to lower the estimation of the plaintiff by the community and an emphasis that an adverse opinion may be expressed about a person without its having such a tendency”. With respect, her Honour ought to have followed the Full Court, as required by *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.<sup>76</sup>

There needs to be a recognized procedure for the early dismissal of claims, first because of the known risk of actions being brought as a form of abuse of process and second of the judicial preference for increasingly outdated case management systems such as the docket (or early trial date) and simple callover case management systems, both of which require issues to be dealt with at trial: see for example *Herron v HarperCollins Publishers Australia Pty Ltd*.<sup>77</sup> Examples of issues going all the way to trial when they could arguably have been resolved summarily include *Nyoni v Pharmaceutical Board of Australia (No 6)*<sup>78</sup> and *Hockey v Fairfax Media Publications Pty Ltd*.<sup>79</sup> This is despite a perfectly adequate provision permitting the

striking out of unmeritorious cases which has in fact been applied in appropriate cases<sup>80</sup>, including defamation claims<sup>81</sup>.

There is clearly a need for such a provision in the legislation given the very high number of actions which are summarily dismissed. These include:

- where a person is not entitled to bring defamation proceedings (for example, a deceased person (*Defamation Act* s 10), or certain corporations (s 9));
- where a defence of absolute privilege is raised, such as for statements made concerning court proceedings;
- where other proceedings have been brought for the same publication;<sup>82</sup>
- issues of proportionality;<sup>83</sup>
- where proceedings have been commenced out of time;
- claims which are hopeless on their face (perhaps the most common of these applications);<sup>84</sup>
- claims brought by “reluctant gladiators” whose Fabian tactics provoke the suspicion that the action could be an abuse of process;<sup>85</sup> and
- where, on the face of the publication, there is arguably no defamatory meaning.<sup>86</sup>

73 Law Commission of Ontario (n 40) F.

74 See the cases collected in *Khalil v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 126, [40].

75 [2018] NSWSC 858.

76 Douglas (n 7) (citations omitted).

77 [2018] FCA 1495.

78 [2018] FCA 526. This was a 5-day trial which took three years from start to finish. As Mr Nyoni, a litigant in person, is bankrupt, he has been ordered to pay security for costs: *Nyoni v Pharmacy Board of Australia* [2018] FCA 1313.

79 (2015) 237 FCR 33; (2015) 332 ALR 257. There was no separate ruling on capacity and at the trial the applicant failed in 8 of the 11 claims, resulting in significant costs set-offs.

80 Although not a defamation case, *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290 and [2005] FCA 1307 possessed many of the features of a ‘SLAPP’ suit, such as the proposed joinder of another 103 applicants and multiple respondents. The proceedings were struck out but a second pleading was allowed where a claim for misleading and deceptive conduct was added. According to Donald (n 41), a director of AWI was reported to have said to *The Age*: ...suggests his group will seek to wear PETA down financially. “If we have a massive bill, so have they got a massive bill, this industry is extremely well financed and these sorts of crises are catered for.” Other cases where misleading and deceptive conduct were successfully relied upon to silence criticism include *Schwabe Pharma (Aust) Pty Ltd v AusPharm.Net.Au Pty Ltd* [2006] FCA 868 and complaints about regulators (*Merman Pty Ltd v Cockburn Cement Pty Ltd* (1989) ATPR 40-920). For an examination of SLAPP suits in Canada, see Law Commission of Ontario (n 40) G.

81 *Thomson v Luxford* [2014] FCA 342.

82 *Bracks v Smyth-Kirk* (2009) 263 ALR 522.

83 *Bleyer v Google Inc* (2014) 88 NSWLR 670.

84 *McGrane v Channel Seven Brisbane Pty Ltd* [2012] QSC 133; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd (No 3)* [2013] NSWSC 1850, [28]; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288, [101]-[103]; *Trkilja v Dobrijevic (No 2)* [2014] VSC 594.

85 *Kang v Australian Broadcasting Corporation* [2015] NSWSC 893 is one of many of these cases.

86 *Korolak v Bauer Media Pty Ltd* [2016] NSWDC 98; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65; cf *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652, where the issue was reserved to the trial which caused significant costs problems for all parties.

The successful use of summary procedures in the United Kingdom and the United States warrants consideration of specific legislative provisions for such a process. This has the added advantage of warning parties bringing unmeritorious proceedings (or conducting them in a dilatory or oppressive way) that the consequences of such action may be swift, as opposed to a lengthy process of going all the way to trial in the hope of bankrupting the opponent.

## 9. Costs

This brings me to perhaps the single greatest problem in defamation proceedings, namely the extremely high legal costs generated by such actions, especially where there is a docket system. As the most significant impact online technology has had on defamation law is to render ordinary members of the public putting material online (or being the target of material online) vulnerable to suit, these costs no longer fall upon publishers with deep pockets but upon ordinary working families who may find themselves having to sell their homes and/or go bankrupt, whether plaintiff or defendant, even if they are successful in the litigation.

The United Kingdom has conducted a series of inquiries into the costs of defamation litigation, the most recent of which, “Controlling the costs of defamation actions”,<sup>87</sup> was set up on 29 November 2018, the same day that the UK Government published its response to the 2013 consultation, “Costs protection in defamation and privacy claims: the Government’s proposals”.<sup>88</sup>

These inquiries are only the latest in a series of governmental<sup>89</sup> and private<sup>90</sup> studies in the United Kingdom demonstrating that the cost of defamation actions has grown out of proportion to the value of the action to the extent that actions may amount to an abuse of process.

In Australia, concern about legal costs in defamation proceedings has led to attempts at law reform going back even before Federation. On 30 April 1886, Mr George Reid MLA moved a second reading of a bill to limit costs in defamation actions to verdicts of more than 40 shillings.<sup>91</sup> His Bill was passed, and remained a costs provision applicable to defamation proceedings until the *Defamation Act 1957* (NSW), when this portion was omitted.<sup>92</sup> From that time onwards, defamation costs (and the number of actions) began to increase dramatically. For example, in one trial where there were two

limited publications (one to one person and the other in the Serbian language)<sup>93</sup>, the costs certificate for the trial totalled \$941,444.77.<sup>94</sup> Part of the problem was that a wealthy litigant could force on litigation by simply refusing to settle even when offered a very reasonable amount, as occurred in *Antoniadis v TCN Channel Nine Pty Ltd*,<sup>95</sup> where Levine J awarded indemnity costs at the third trial of these proceedings to the plaintiff following rejection of her offer of compromise of \$5,000, noting the two earlier trials had been discharged because of “the fault of the defendant”<sup>96</sup>.

It was to overcome problems such as these that Mr David Barr, the Member for Manly, introduced the *Defamation Amendment (Costs) Bill 2002*<sup>97</sup>, which sought to restrict costs orders to the quantum of damages awarded. The amendment was unsuccessful, but following the defeat of this bill s 40A(1)(b) (which was the precursor to s 40 in the uniform legislation) was introduced into the *Defamation Act 1974* (NSW).<sup>98</sup>

A further Bill was brought by Mr David Barr MLA to prevent the amendment to Pt 52A r 33 of the *Supreme Court Rules 1970* (NSW) (‘Supreme Court Rules’) and was defeated.<sup>99</sup> The rule (now *Uniform*

87 David Gauke, ‘Controlling the costs of defamation cases’ (Ministerial Statement, 29 November 2018) <<https://www.gov.uk/government/speeches/controlling-the-costs-of-defamation-cases>>.

88 United Kingdom Ministry of Justice, ‘Costs protection in defamation and privacy claims: The government’s proposals’ (Consultation Outcome, 13 September 2013) <<https://www.gov.uk/government/consultations/costs-protection-in-defamation-and-privacy-claims-the-governments-proposals>>.

89 See the list of prior inquiries set out in the government reports above (n 87), (n 88).

90 The high cost of defamation actions in the common law system was demonstrated in a 2008 study which found that the cost of defamation actions in the United Kingdom was 140 times greater than civil law systems in Europe: Norma Patterson, *A comparative Study of Defamation Costs Across Europe* (University of Oxford, Centre for Socio-Legal Studies, 2008) <<http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf>>. The main contributing factor to these costs is the conditional fee agreement: Ben Dowell, ‘High cost of libel studies shackling newspapers, says study’, *The Guardian* (online, 19 February 2009) <<https://www.theguardian.com/media/2009/feb/19/no-win-no-fee-lawyers-shackling-newspapers>>.

91 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 April 1886, 1609. Mr Reid stated: ‘I do not think that I need apologise to the House for introducing a measure with reference to the law relating to libel and slander, because I think that it is generally admitted, and there have been striking instances of the fact, that the law is not at all in a satisfactory condition at the present time.’

92 The full story of Mr Reid’s defamation costs law reform is set out by David Barr MLA in his second reading speech of the *Defamation Amendment (Costs) Bill* (2002): New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 October 2003, 4027–31.

93 In *Skalkos v Assaf* [2002] NSWCA 14, the Court of Appeal dismissed an appeal which included grounds that the defence of unlikelihood of harm should not have been withheld from the jury. An application for special leave to the High Court was refused.

94 *Skalkos v T S Recoveries Pty Ltd* [2004] NSWCA 281.

95 (Supreme Court of New South Wales, Levine J, 24 April 1997).

96 *Ibid* 11.

97 New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 October 2003, 4027–31 (David Barr MLA). The impetus for this proposed reform was the proceedings brought by one councillor against another for two slanders to a handful of other councillors. Judgment for the defendant on the basis of unlikelihood of harm was set aside on appeal but the court made special costs orders on the basis that the action was clearly politically motivated: *Jones v Sutton* (2004) 61 NSWLR 614; (No 2) [2005] NSWCA 203. As was the case in the *Skalkos v Assaf* application for leave, special leave was refused by the High Court.

98 Phillipa Alexander, ‘Costs issues in defamation proceedings’ (2009) 92 *Precedent* 38.

99 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2003, 7134.

*Civil Procedure Rules* Pt 42 r 34<sup>100</sup>) was amended in 2003 to remove defamation from the list of actions which required an application for recovery of costs for proceedings where the damages were less than \$225,000 (this sum has now increased to \$500,000). This provision was introduced after a costs application was made in *West v Nationwide News Pty Ltd*<sup>101</sup> where a plaintiff was awarded \$50,000 and the defendant argued that the litigation could have been conducted more appropriately in the District Court. Simpson J made a reduction in the costs but warned that this might lead to more defamation cases being commenced in the District Court. Part 52A r 33 of the Supreme Court Rules was then amended to exempt defamation actions from this requirement. The result has been that the higher scale of costs has been applied to defamation actions in the Supreme Court no matter what the size of the judgment, which has been a significant factor in making defamation cases more expensive.

The efficacy of s 40 appears uncertain, as its role has effectively been reduced to being merely a factor in costs cases. For example, the lengthy series of offers of compromise and Calderbank offers in *Hyndes v Nationwide News Pty Ltd*<sup>102</sup> showed a seriousness of purpose in terms of settlement offers in circumstances where the plaintiff failed entirely in the claim,

as opposed to receiving a lower amount. Instead of operating as an incentive to settle, s 40 has become (perhaps as a result of judicial interpretation rather than bad drafting) a positive handicap in that it is neutering offers that may well have succeeded under the offer of compromise or Calderbank system.

All of the above costs issues arise from judicial approaches to the legislation and it is difficult to see how this can be overcome. However, one way around the problem would be for the setting up of an inquiry into defamation costs, as has occurred in the United Kingdom, so that costs experts can contribute appropriate submissions. Costs assessors and specialists in costs litigation may find answers that elude academics and legislators.

#### 10. Effective remedies for online publication

Although the internet celebrates its 30<sup>th</sup> birthday this year, courts and legislators alike remain uncertain about the principles upon which online intermediaries may be held liable for publication across a range of areas and not merely to defamation, notably vilification, copyright<sup>103</sup>, content regulation and misleading and deceptive conduct.<sup>104</sup> In particular, and of relevance to the Discussion Paper, there is the problem, common to all these areas of law, of the litigant called the “recalcitrant defamer”<sup>105</sup> who,

in breach of any number of civil and criminal laws and regulations, maintains attacks on the reputation or property rights of others. These recalcitrant defamers may also be anonymous, a problem of increasing difficulty thanks to the internet.<sup>106</sup>

While defamation has to date been dealt with as a State-based tort, it seems evident, from the eagerness with which the Federal Court has determined it has jurisdiction and its preference for its own case management systems, that there will be significant Federal input into the new legislation. If so, the Commonwealth should step up to the plate and accept responsibility for research into effective remedies for plaintiffs the victim of internet abuse, privacy breaches and vilification, including but not limited to defamation, in the same way as has occurred in Canada.<sup>107</sup> This could be achieved by an ongoing inquiry set up by the Australian Law Reform Commission.

If the Intergovernmental Agreement includes the Commonwealth, the States could consider requiring, as part of the defamation reform package, that the Commonwealth Government not merely leave its role to being the continued participation of Federal Court judges in defamation trials – a role any State judge could perform – but that the real issues concerning internet use and abuse could finally be addressed

<sup>100</sup> This Rule provides:

**42.34 Costs order not to be made in proceedings in Supreme Court unless Court satisfied proceedings in appropriate court**

(1) This rule applies if:

- (a) in proceedings in the Supreme Court, other than defamation proceedings, a plaintiff has obtained a judgment against the defendant or, if more than one defendant, against all the defendants, in an amount of less than \$500,000, and
- (b) the plaintiff would, apart from this rule, be entitled to an order for costs against the defendant or defendants.

(2) An order for costs may be made, but will not ordinarily be made, unless the Supreme Court is satisfied that:

- (a) for proceedings that could have been commenced in the District Court--the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted, or

(b) for proceedings under Part 2 of Chapter 7 of the *Industrial Relations Act 1996* --the commencement and continuation of the proceedings in the Supreme Court, rather than the Local Court, was warranted.

<sup>101</sup> [2003] NSWSC 767.

<sup>102</sup> [2011] NSWSC 1443; [2012] NSWCA 349.

<sup>103</sup> The unwelcome results of *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42 has led to a series of attempts at legislative change: see the discussion in Kylie Pappadarlo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40 *Sydney L Rev* 470.

<sup>104</sup> See the explanation of the result in *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 in *Trkulja v Google Inc* (2018) 92 ALJR 619 at [57]–[60].

<sup>105</sup> Law Commission of Ontario (n 40) identifies the problem of ‘recalcitrant defamers maintaining a stubborn online campaign against a plaintiff regardless of court proceedings, injunctions, bankruptcy or even contempt proceedings’: [2].

<sup>106</sup> Law Commission of Ontario (n 40) at ‘Identifying Anonymous Defendants’.

<sup>107</sup> Law Commission of Ontario (n 40) [2].

in a coherent, Australia-wide fashion as opposed to differing positions (or inaction) by successive governments either unable or unwilling to confront the complexities of online legislation.

This will be the most intractable area for reform and there are no easy answers. To give one example, replacing the law of criminal libel by some form of digital equivalent does not appear to be the answer. In New Zealand, criminal libel (*Crimes Act 1961* (NZ) s 216) was repealed in 1993, before the internet had begun to make its presence known. An attempt to restore the balance *Harmful Digital Communications Act 2015* (NZ) has had little effect.<sup>108</sup> Legislation in France and Germany in relation to fake news and attempts in the United States to criminalise lies told during election campaigns<sup>109</sup> are complex issues too large for the scope of this paper.

## Conclusion

The biggest impact that online publication has had on the law may be in terms of the sociological issues underpinning law reform. This is relevant not only to legislative drafting issues, such as the single publication rule and the revision of defences such as qualified privilege, but to the changes in the way people communicate which have resulted from internet use.

Defamation law reform in Australia, in the context of an international communications system containing hate sites, internet rage-based publications and calls to commit violent crime, may seem to some to be inconsequential as an effective cause of action and, in the case of abuse of process, as a chill on the voice of the responsible media, especially where the claim is brought by the rich and famous

(or perhaps infamous). However, these issues require consideration because one of the most devastating results of online publication is that liability for defamation is increasingly hitting what could be called ‘the small end of town’, namely ordinary members of the community who have used social media or a blog site to make a comment, or who are themselves the subject of such comments, sometimes with devastating personal or professional results.

Another relevant factor, in sociological terms, is that there is what could be called a ‘widespread public concern’ that defamation proceedings may be brought to stop political criticism. This is not a new concern. In *Theophanous v Herald & Weekly Times Ltd*,<sup>110</sup> Deane J foresaw what he called ‘widespread public concern’ at ‘the extraordinary development and increased utilisation of the means of mass communication’, warning:

... the use of defamation proceedings in relation to political communication and discussion has expanded to the stage where there is a widespread public perception that such proceedings represent a valued source of tax-free profit for the holder of high public office who is defamed and an effective way to ‘stop’ political criticism, particularly at election times.

In addition to these concerns, the rapid way in which societal values are changing on issues such as gay marriage and sexual harassment (where such topics are often discussed in online publications) has also become an issue. When drafting reform legislation, it must be borne in mind that publications and especially social media are not

only available on an international scale, but are being used to discuss issues that have not been discussed on a wide public scale before, such as the sometimes intensely personal publications arising in the course of discussion in the #MeToo movement and sex abuse in institutions or by Church officials.

Then there is the method of internet communication, in that “internet rage”, hate speech, trolling and other forms of misuse of online publication coexist and may intersect with defamatory publications. Demarcations of the tort of defamation in the future will not be easy. In particular, as to the #MeToo movement, allegations of sexual harassment and/or sexual assault have long caused difficulties in relation to other areas of the law such as workplace disputes<sup>111</sup> and health and safety work guidelines<sup>112</sup> and there seems every likelihood that these difficulties will arise in relation to defamation proceedings as well.

The rapidity of technological and societal change is a challenge to legislative drafters in many areas, but perhaps none so evidently as defamation law reform. The authors of the Discussion Paper have a difficult task before them, and it is one which has been embarked upon much later in the day than should have been the case. It is to be hoped that members of the profession as well as academics, courts and governmental organisations around Australia come forward to provide the submissions sought and that the law reform debate can proceed in an efficient way to the next level of appropriate and uniform legislation.

<sup>108</sup> Its website is currently down for maintenance: see <<https://www.consumerprotection.govt.nz/general-help/laws-policies/online-safety/harmful-digital-communications-act/>>.

<sup>109</sup> Joshua Sellers, ‘Legislating against lying in campaigns and elections’ (2018) 71 *Oklahoma Law Review* 141.

<sup>110</sup> (1994) 124 ALR 1, 52.

<sup>111</sup> For a review of relevant cases, see Brook Hely, ‘Open all hours: The reach of vicarious liability in “off-duty” sexual harassment complaints’ (2008) 36(2) *Federal Law Review* 173.

<sup>112</sup> Lisa Heap, ‘Sexual harassment isn’t a women’s issue: it’s a workplace health and safety problem’, *ABC News* (online, 29 December 2017) <<https://www.abc.net.au/news/2017-12-29/treat-sexual-harassment-as-a-workplace-health-and-safety-issue/9222614>>.

# Send in the Take-downs

**Sophie Dawson, Joel Parsons and Eleanor Grounds take a look at preliminary Recommendation 7 which proposes a mandatory take-down standard, and consider how it will operate in the context of sections 36(1A), 101(1) and 115A of the Copyright Act.**

Your company has just produced the most popular drama in Australia. It's a runaway success. It was a boon for the Australian entertainment industry and enjoyed critical acclaim. A victim of its own success, a website called something along the lines of "Free+EZtvStreamZ4me.com" uploads the entire work for all and sundry to access free of charge. The investment of a literal cast of thousands is eroded in an instant by the actions of a solitary pirate.

Submissions to the ACCC from organisations in the culture and media industries have put the spotlight on a growing frustration with the "whack-a-mole" phenomenon of online copyright infringement: as soon as one pirate gets taken down, another pops up. There is a distinct view among content creators that the legislative regimes currently available to them to enforce their intellectual property rights in Australia are not "fit-for-purpose in the digital environment".<sup>1</sup>

The issue of how to get copyright-infringing material taken offline is at the heart of Preliminary Recommendation 7 (**Recommendation 7**) of the ACCC's Digital Platforms Inquiry (the **Inquiry**) Preliminary Report (the **Report**). In essence, the implementation of Recommendation 7 would see the introduction of a mandatory take-down standard for copyright-infringing content which digital platforms (namely social media platforms, search engines and digital content aggregation

platforms) would have to adhere to. There is not a great deal known about how a mandatory take-down standard would operate in practice and there are various questions concerning how it will work and what it will do. In particular, what is the potential interaction of such a standard with both the authorisation liability provisions in sections 36(1A) and 101(1A) of the *Copyright Act 1968* (Cth) (the **Copyright Act**) and the recently re-vamped s 115A of the Copyright Act, which is also designed to assist copyright holders with having copyright-infringing material taken down?

## Challenges for rights holders

Rights holders have long said they face significant difficulties in getting copyright-infringing content removed swiftly when it has been uploaded to, or streamed from, online platforms, before the damage is done.

Submissions made by mass media both to the Inquiry in 2018, and in response to the Report in 2019, expressed a uniform sentiment: the current legislative regime is not working. Free TV Australia noted in its submission to the Inquiry that "there is currently no streamlined take-down notice system or procedure in Australia that applies to the platforms and the ad hoc processes that exist or are negotiated between platforms and content owners are inadequate".<sup>2</sup> Moreover, content creators claim that these "inadequate" processes "devalue broadcasters' intellectual

property by allowing their content to be pirated".<sup>3</sup> One concern expressed by content creators is that large digital platforms in Australia model their take-down processes on those of their American parent companies. For example, Google Australia's terms provide that Google responds to notices of alleged copyright infringement and terminates accounts of repeat infringers according to the process set out in the U.S. Digital Millennium Copyright Act.<sup>4</sup> In its submission to the Inquiry, Foxtel argued that such processes do not appear to reflect the Copyright Act and criticised them as being "not set up to appropriately manage the prevalence of unauthorised content on their platforms, even where rights holders are proactive and invest heavily in seeking to have that content removed".<sup>5</sup>

Rights holders have expressed the view that these issues are particularly problematic in the case of live broadcasted events, such as sports matches. Rights holders have historically resorted to taking action against the infringer directly rather than seeking redress from the digital platform. In 2017, a Brisbane man who was livestreaming the highly anticipated boxing match between Danny Green and Anthony Mundine on Facebook to more than 100,000 viewers received a phone call from a Foxtel representative ordering him to stop the livestream.<sup>6</sup> Another man, whose livestream had reached more than 150,000 viewers, had the stream of content to his set-top box cut off.<sup>7</sup>

1. News Corp Australia, *Submission to the Australian Competition and Consumer Commission Digital Platforms Inquiry Issues Paper*, 20 April 2018, p 130.

2. Free TV Australia, *Supplementary submission by Free TV Australia*, September 2018, p 8.

3. Above n 2, p 12.

4. Google, *Google Terms of Service*, 25 October 2017, <<https://policies.google.com/terms?hl=en&gl=au>>.

5. Foxtel and Fox Sports, *Foxtel and Fox Sports Response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Issues Paper*, April 2018, p 6.

6. Lily Mayers and Riley Stuart, *Danny Green vs Anthony Mundine live streamers will face legal action from Foxtel*, 5 February 2017 <<https://www.abc.net.au/news/2017-02-04/green-v-mundine-live-streamers-warned-to-brace-for-legal-action/8241276>>.

Digital platforms have also been vocal throughout the submission process, particularly in detailing the significant investment they have made in developing their own infringement detection technologies and take-down processes which content creators can utilise to take action against infringers. For example, Google has invested over USD\$100 million in YouTube's Content ID system, which deploys matching software to scan videos for copyright infringement (for example, a homemade video set to a copyrighted song), and then notifies the rights holder and allows them to monetise, track or block the content. In its extensive submission in response to the Report, Google stated that, on average, YouTube answers Australian live stream copyright requests in two minutes and has paid more than USD\$3 billion to rights holders who have chosen to monetise content using Content ID.<sup>8</sup> Google also stated that Content ID has been used effectively to combat unauthorised live streams of events such as the music festivals and premier league football games.<sup>9</sup>

### The nuts and bolts: How does Recommendation 7 work?

Recommendation 7 provides:

“The ACCC proposes to recommend that the ACMA determine a Mandatory Standard regarding digital platforms' take-down procedures for copyright-infringing content to enable effective and timely take-down of copyright-infringing content. This may take the form of legislative amendments to the Telecommunications Act so that the ACMA has the power to set a mandatory industry standard applicable to digital

platforms under Part 6 of the Telecommunications Act.”

This presents as an elegant solution, being a single set of changes providing at least two important results: the regulation of digital platforms, as well as an increase in clarity of the operation of the Copyright Act's authoriser liability provisions, as discussed below.

The core proposal of Recommendation 7 is the implementation of a mandatory take-down standard applying to digital platforms that outlines effective take-down procedures.<sup>10</sup> As noted in the Report, “a mandatory code, unlike a voluntary regime, is more likely to incentivise the compliance of digital platforms as it would be supported by meaningful sanctions and subject to enforcement by a statutory authority”.<sup>11</sup> Importantly, the proposed standard provides for a civil penalty of up to \$250,000 per contravention to be imposed on a digital platform who does not comply with an industry standard.<sup>12</sup>

The ACMA has the power to set industry standards applicable to the telecommunications industry, thus it is proposed that legislative amendments to the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**) be made so that the ACMA be given the power to make industry standards in relation to digital platforms as well. Namely, Recommendation 7 proposes that the definition of ‘telecommunications industry’ in Part 6 of the Telecommunications Act be amended to include ‘an industry that involves carrying on business as a digital platform’.

That definition will itself prove to be a difficult drafting exercise. The

Report itself acknowledges that “the types of platforms ... can be broadly defined”.<sup>13</sup> In particular, the Australian Copyright Council has said that care needs to be taken in the drafting of this definition to ensure it “does not directly or indirectly capture Australian media organisations”.<sup>14</sup>

### Clearer position on authorisation liability of platforms

A mandatory standard could also serve to affect the operation of existing copyright infringement liability provisions in the Copyright Act. Depending on the circumstances, the conduct of digital platforms could be captured by sections 36(1A) and 101(1A) of the Copyright Act, which provide for copyright infringement by authorisation. However, there are complexities in relation to the application of these provisions as they're currently drafted to digital platforms. As noted in the Report, “a digital platform that merely ‘provides facilities’ for copyright-infringing communications would not be liable for the copyright-infringing acts of its users, unless there is ‘something more’ to show that the digital platform authorised the infringement”.<sup>15</sup>

Under s 36(1A) and s 101(1A) of the Copyright Act, in order for a Court to determine whether ‘something more’ has been done to authorise copyright infringement, it must take into account:

- (a) the extent (if any) of the digital platform's power to prevent the copyright infringement;
- (b) the nature of any relationship existing between the digital platform and the copyright infringer; and

7. Ibid.

8. Google Australia Pty Ltd, *Digital Platforms Inquiry: Submission in Response to the ACCC's Preliminary Report*, 18 February 2019, p 11.

9. Above n 8, p 54.

10. Australian Competition & Consumer Commission, *Digital Platforms Inquiry Preliminary Report*, December 2018, p 162.

11. Above n 10, p 161.

12. *Telecommunications Act 1997* (Cth) s 570(3)(b).

13. Above n 10, p 23.

14. Australian Copyright Council, *Response to the ACCC's Digital Platforms Inquiry Preliminary Report dated 10 December 2018*, 15 February 2019, p 4.

15. Above n 10, p 143; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, [401].



- (c) whether the digital platform took any reasonable steps to prevent or avoid the copyright infringement, **including whether the digital platform complied with any relevant industry code of practice** [our emphasis].<sup>16</sup>

While the High Court has held that an internet service provider (**ISP**) had no direct ability to prevent its customers from using an unlawful peer-to-peer file-sharing network to unlawfully download movies,<sup>17</sup> digital platforms are likely to have greater power to prevent their users from uploading copyright-infringing content.<sup>18</sup> The Report suggests that a mandatory take-down standard would provide more certainty in instances where content creators are seeking to pin liability on digital platforms for authorising copyright infringement.

### What would the mandatory take-down standard look like?

The precise content of the proposed mandatory take-down standard is currently unknown. No specific drafting has been proposed by the ACCC, making it difficult to analyse or predict the effectiveness of such a standard. However, this has not prevented industry stakeholders from making suggestions on what the standard should (or should not) look like. Suggestions include:

- a clear and realistic procedure for removing or disabling copyright-infringing content, “including a requirement to optimise technologies to detect infringing content, for example automated detection by technologies such as

Content ID, upload filters or other techniques”;<sup>19</sup>

- positive obligations on digital platforms to proactively monitor for and identify copyright-infringing content<sup>20</sup> and put mechanisms in place to prevent infringing content from being re-uploaded once it has been removed, including content with only minor variations to the original upload;<sup>21</sup>
- a specific process for engaging with rights holders, including timeframe limits on responding to inquiries and/or take-down requests;<sup>22</sup>
- a requirement that material be removed expeditiously or, in the case of live content, immediately;<sup>23</sup>
- a “three-strikes and you’re out” policy requiring digital platforms to terminate the account of a user who posts infringing material twice, receives a warning from the digital platform, and posts infringing material a third time;<sup>24</sup>
- a requirement that digital platforms automatically compensate rights holders for any advertising revenue generated by the platform as a result of the infringing content;<sup>25</sup> and
- making it clear that compliance with a mandatory code would not automatically block rights holders from pursuing a copyright claim, or supporting a conclusion that a digital platform has not authorised infringement.<sup>26</sup>

Free TV Australia argued in its response to the Report that “a ‘weak’ industry standard without clear obligations which sufficiently address rights holders’ concerns would risk further undermining authorisation liability”<sup>27</sup> and that a standard would only be effective if accompanied by an effective enforcement regime.

On the contrary, platforms like Google have argued that the introduction of a mandatory standard “would represent a departure from global best practices” and “will necessarily compromise the flexibility and efficiency of the existing tools ... resulting in a system that serves neither rights holders nor Australian consumers”.<sup>28</sup> In its submission to the Report, Google pointed to the extensive list of existing anti-piracy and anti-copyright infringement measures in place, arguing that “the proposal of a mandatory take-down standard could compromise the flexibility and efficiency of alternative approaches to combating copyright infringement”.<sup>29</sup> In addition to software like Content ID, Google employs a range of other protective measures, including demoting Google Search results which have received a large number of valid copyright take-down notices, the Trusted Copyright Removal Program (whereby rights holders can submit large volumes of take-down requests for webpages on a consistent basis) and preventing terms closely associated with piracy being suggested as part of the Autocomplete function on Google Search.

16. Copyright Act 1968 (Cth) s 36(1A), 101(1A).

17. *Roadshow Films v iiNet Limited* [2012] HCA 16.

18. Above n 10, p 143.

19. Free TV Australia, *Submission by Free TV Australia*, February 2019, p 31.

20. Above n 14, p 3.

21. *Ibid.*

22. Above n 19, p 32.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*

26. Above n 14, p 4.

27. Above n 19, p 30.

28. Above n 8, p 51.

29. Above n 8, p 53.

Google has advocated for the extension of the safe harbour scheme in the Copyright Act to digital platforms, in lieu of the mandatory take-down standard proposed in Recommendation 7. Whether it be the safe harbour scheme under Part V, Div 2AA or the site-blocking provisions in s 115A of the Copyright Act (as discussed below), it is evident that there is room for a conversation about whether an existing system could be adapted to incorporate digital platforms, as opposed to the introduction of a new system altogether.

### Cutting to the chase: Copyright Act, s 115A

As outlined above, the apparent policy aim of Recommendation 7 is to give content creators an efficient mechanism to have content which infringes their copyright removed from digital platforms. In theory, it would give content-creators further means of disrupting the online supply of copyright-infringing content.

That also happens to be a stated purpose of the *Copyright Amendment (Online Infringement) Bill 2018* (Cth),<sup>30</sup> which introduced several amendments to s 115A of the Copyright Act. This begs the question: how would a mandatory take-down standard interact with the site-blocking provisions in s 115A?

Section 115A of the Copyright Act provides rights holders with the ability to apply to the Federal Court to grant an injunction directing an ISP to disable an online location outside Australia that infringes, or facilitates an infringement of, copyright, and has the primary purpose or primary effect of infringing, or facilitating and infringement of, copyright. In essence, s 115A was introduced to target unlawful pirate movie and music streaming sites.

Rights holders wanting to rely on s 115A to get infringing content taken down from digital platforms the likes of which Recommendation 7 is concerned with may face a variety of challenges. Firstly, the requirement that the website hosting the infringing content is an online location *outside* Australia may pose difficulties if the digital platform page in question is hosted in Australia. Secondly, the task of proving that a global search engine or social media platform's primary purpose or effect is to facilitate the infringement of copyright is mammoth. Thirdly, the site-blocking regime operates through the courts. In contrast, it seems the proposed mandatory standard (as vague as it currently is) would not require the first two of these thresholds to be met. However, it may still fail to address the same timeliness issue as the site-blocking regime.

The amendments made to s 115A in 2018 included the introduction of s 115A(2), which allows for the Court to grant injunctions requiring online search engine providers to take reasonable steps to remove search results that provide access to online locations giving access to infringing conduct. To date, there has been no judicial consideration of this section.

The alignment of purpose between the search result-blocking regime under s 115A(2) and whatever is to come of Recommendation 7 raises the obvious questions whether the rights conferred under both will in substance overlap, and whether they will interact. Of particular concern is whether, if they operate concurrently, they each have the potential to affect the operation of the other. For example, in determining whether a search result-blocking injunction should be granted, the Court may consider various matters including the availability of other remedies under the Copyright Act,<sup>31</sup> and any other relevant matter.<sup>32</sup>

The extent to which a search engine is also liable as an authoriser of copyright infringement, and in turn the extent to which that search engine has complied with any mandatory standard, will undeniably be relevant to these matters. If it becomes clear that a search engine is liable as an authoriser, does that mean that a copyright owner is more or less likely to be successful in obtaining an injunction pursuant to s 115A?

Section 115A(2B)(b)(ii) allows for a rights holder who has secured a search result-blocking injunction to agree in writing with the search engine provider to block further search results that arise after the initial injunction has been granted. This is an attempt at a more dynamic approach to removing infringing content, but what is the difference between this and the user-driven process of complaints and take-downs described above? Furthermore, will the mandatory take-down standard operate to regulate the conduct of search engine providers where there has been an injunction granted under s 115A(2B)(b)(ii)?

Submissions to the Inquiry, the Report and responses to the Report have not discussed the potential interaction in any substantive way, probably because the amendments were implemented in parallel with the Inquiry, and are yet to be judicially considered. The extent to which stakeholder submissions will be taken into account in any redrafting of the recommendation remains to be seen. The ACCC's final report is due 3 June 2019.

30. Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2018* (Cth), p 6.

31. *Copyright Act 1968* (Cth), s 115A(5)(i).

32. *Copyright Act 1968* (Cth), s 115A(5)(k).

# The ACCC's Proposed Algorithm Regulator: The Right Level of Intervention?

## Adam Zwi considers the ACCC's recommendation to create an 'algorithm regulator'

In January 2018, Facebook announced a major change to its News Feed algorithm. Mark Zuckerberg said Facebook would shift its focus from "helping you find relevant content" to "helping you have more meaningful social interactions".<sup>1</sup> Following this change, users would "see less public content like posts from businesses, brands, and media".<sup>2</sup>

According to media publishers, the change had a dramatic effect on traffic to their websites. For instance, Seven West Media said that traffic from Facebook to some Pacific Magazines websites fell around 40% from between June 2017 and April 2018.<sup>3</sup> Similarly, Southern Cross Austereo said that traffic from Facebook to its *Hit* and *Triple M* websites fell by 65% and 56% respectively between July 2017 and March 2018, with the result that "revenue from the sale of display advertising on [SCA's] radio-related websites collapsed".<sup>4</sup>

In the years leading up to this change, Facebook had been criticised for (among other things) allowing misinformation to be disseminated on the platform,<sup>5</sup> and was facing growing calls for greater regulation. In this context, some saw Facebook's decision to de-prioritise media content as an effort to quiet these calls.<sup>6</sup>

If viewed this way, the algorithm change may have paradoxically *increased* the case for regulation. It was one of the main factors the ACCC relied on in recommending greater regulatory oversight of digital platforms' algorithms in its Digital Platforms Inquiry Preliminary Report.<sup>7</sup>

This article sets out the ACCC's analysis underpinning this recommendation. It then considers arguments for and against regulation of digital platforms' algorithms, and situates the ACCC's approach in the context of the wider debate on this topic. It concludes with some remaining issues flowing from the ACCC's recommendation.

### What did the ACCC recommend?

There are a number of steps to the ACCC's analysis. These broadly follow the steps of a typical competition assessment: defining markets, assessing market power, identifying harms, and imposing (or in this case recommending) remedies to address those harms.

First, the ACCC identified markets. It considered how the platforms monetise their services, analysing the complex relationships between platforms, businesses, media content

creators and consumers.<sup>8</sup> This enabled the ACCC to identify a set of markets. For present purposes, the relevant markets are those for the supply of:

- search advertising, i.e. the adverts that appear alongside the search results of general search engines (e.g. Google and Bing) and specialised search engines (e.g. Amazon and Expedia);<sup>9</sup>
- display advertising, i.e. banner and video adverts on websites and social media;<sup>10</sup> and
- news media referral services, i.e. links to news websites that appear on search results (e.g. on Google) or social media posts (e.g. on Facebook).<sup>11</sup>

Second, the ACCC assessed market power within those markets, and made the following findings:

- in the market for the supply of search advertising, Google has substantial market power. It supplies 96% of advertising on general search results,<sup>12</sup> and faces little competitive pressure from suppliers of advertising on specialised search engines;<sup>13</sup>
- in the market for the supply of display advertising, Facebook has

1 Mark Zuckerberg, Facebook post, 11 January 2018, <<https://www.facebook.com/zuck/posts/10104413015393571>>.

2 Ibid.

3 Seven West Media, submission to the ACCC Digital Platforms Inquiry, 23 April 2018, <<https://www.accc.gov.au/system/files/Seven%20West%20Media%20%28April%202018%29.pdf>>, p 25.

4 Southern Cross Austereo, submission to the ACCC Digital Platforms Inquiry, 20 April 2018, <<https://www.accc.gov.au/system/files/Southern%20Cross%20Austereo%20%28April%202018%29.pdf>>, p 7.

5 Mike Isaac, "Facebook Overhauls News Feed to Focus on What Friends and Family Share", New York Times, 11 January 2018, <<https://www.nytimes.com/2018/01/11/technology/facebook-news-feed.html>>.

6 Julia Carrie Wong, "Facebook overhauls News Feed in favour of 'meaningful social interactions'", The Guardian, 12 January 2018, <<https://www.theguardian.com/technology/2018/jan/11/facebook-news-feed-algorithm-overhaul-mark-zuckerberg>>.

7 ACCC, Digital Platforms Inquiry Preliminary Report, December 2018, <<https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf>>.

8 Ibid, pg 37-40.

9 Ibid, pg 54.

10 Ibid, pg 53, 59.

11 Ibid, pg 61.

12 Ibid, pg 57.

13 Ibid, pg 58.

substantial market power.<sup>14</sup> It has a market share of 46%, and the remainder of the market is highly fragmented;<sup>15</sup> and

- in the market for news media referral services, Google and Facebook each have substantial market power.<sup>16</sup> Together they account for more than 50% of traffic to news media websites and are “must have” sources of access.<sup>17</sup>

Third, the ACCC considered what harms could result from Google and Facebook’s market power. The ACCC distinguished the harms in advertising markets (display and search) from those in the news referral market.

In relation to advertising markets, the ACCC considered that Facebook and Google have an incentive to favour their own business interests rather than optimise outcomes for advertisers and websites.<sup>18</sup> This incentive stems from the fact that Google and Facebook are vertically integrated; i.e. they offer a range of products and services along the advertising supply chain.<sup>19</sup> While this supply chain is complex, the most intuitive examples of this risk are the following:

- Google and Facebook do not just sell advertising that appears on their own websites; they also sell advertising that appears on third parties’ websites.<sup>20</sup> They could

rank adverts for these third party websites (with whom they have a commercial relationship) above adverts for other websites;<sup>21</sup>

- Google and Facebook could rank ‘organic’ (i.e. unpaid for) content from companies that buy their advertising services over content from companies that do not;<sup>22</sup> and
- Google and Facebook could rank their own advertising services (e.g. Google Shopping or Facebook Marketplace) over those of others.<sup>23</sup>

Thus, the ACCC found that Facebook and Google may hinder competition.<sup>24</sup> They could maintain or advance their position along various points of the advertising supply chain by restricting or undermining their rivals’ ability to compete, rather than by offering a better product than their rivals.<sup>25</sup> This risk, coupled with the lack of transparency about how the platforms’ algorithms rank content and adverts,<sup>26</sup> could create “uncertainty and the inefficient allocation of resources” which could result in “poorer outcomes for consumers as resources are diverted”.<sup>27</sup>

The ACCC’s conclusions on harms in the news referral market were somewhat less definitive (perhaps reflecting the fact that these harms may not be purely economic). The

ACCC appeared to refrain from making explicit findings on harm, but referred to the two main concerns expressed by news publishers:

- There is a lack of warning around platforms’ changes to their algorithms which impact the way news content is displayed.<sup>28</sup> The ACCC accepted this has “some effect on news publishers’ ability to monetise their news content”.<sup>29</sup> In particular, Facebook’s decision in 2018 to change its algorithm, with little notice, significantly reduced traffic to publishers’ websites.<sup>30</sup> This required some news publishers to invest more in understanding the algorithm to reach the same level of referral traffic as previously;<sup>31</sup>
- Certain formats and policies may negatively impact publishers’ ability to monetise their content.<sup>32</sup> For instance, Google uses a format which enables fast loading of webpages on mobile devices.<sup>33</sup> Webpages in this format are hosted on Google’s servers rather than the original publisher’s, giving Google a degree of control over the content it would not otherwise have.<sup>34</sup> Importantly, this format limits the advertising appearing on the page, with the result that news publishers may be less able to generate revenue from pages in this format.<sup>35</sup>

14 Ibid, pg 59.

15 Ibid, pg 59-60.

16 Ibid, pg 61-63.

17 Ibid, pg 61-63. Interestingly, the ACCC found that Facebook has a particularly strong role in referring consumers to radio websites; two-thirds of traffic to these websites is from Facebook (pg 62).

18 Ibid, pg 80.

19 Ibid, pg 5.

20 Ibid, pg 71-72.

21 Ibid, pg 80.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid, pg 36, 80.

26 Ibid, pg 80.

27 Ibid.

28 Ibid, 125.

29 Ibid, pg 111.

30 Ibid, pg 110.

31 Ibid, pg 111.

32 Ibid, pg 125.

33 Ibid, pg 116-117.

34 Ibid, pg 117.

35 Ibid, pg 117-118.

However, although stakeholders complained that Google ranks pages in this format above other content, the ACCC did not make a finding to this effect.<sup>36</sup>

Fourth, the ACCC proposed remedies to address the harms above. Before turning to the ACCC's proposed remedies, it is worth noting that the harms mentioned above generally stem from the importance of ranking, i.e. the notion that content or adverts which are ranked highly in search results or social media news feeds is more likely to be seen or clicked on by consumers. This ranking is determined by the platforms' algorithms.

In light of this, the ACCC recommended that a regulatory authority be established to ensuring greater transparency of the platforms' algorithms.

In relation to advertising markets, the authority would "monitor, investigate and report on whether digital platforms ... are engaging in discriminatory conduct<sup>37</sup> ... by favouring their own business interests above those of advertisers or potentially competing businesses".<sup>38</sup> It could consider matters such as the "ranking and display of advertisements and also organic content" and whether purchasing a product or service from a platform "affects the display or ranking of advertisements or content".<sup>39</sup>

In relation to the news referral market, the authority would "monitor, investigate and report on

the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses."<sup>40</sup> It could also review the implications of changes to algorithms or the implementation of new policies or formats.<sup>41</sup>

The authority would have jurisdiction over digital platforms which generate more than AU\$100 million per annum in revenue in Australia.<sup>42</sup> It could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.<sup>43</sup>

### What about enforcement?

An important question is whether the regulator's powers would be limited to making the platforms' algorithms more *transparent*, or whether it would also *prohibit* discrimination and enforce breaches. Both transparency and non-discrimination are aimed at levelling the playing field, but "while transparency only tempers the benefit a platform can derive from favouring its own services over those of certain suppliers, non-discrimination limits or even eliminates this possibility".<sup>44</sup>

On the face of the report, the ACCC recommends that the authority has a transparency and advisory role only. It would "monitor", "investigate", "publish reports" and "make recommendations". According to UNSW's Katherine Kemp, "the most the regulator would do is introduce

some "sunshine" to the impacts of these algorithms which are currently hidden from view, and potentially refer the matter to the ACCC for investigation if this was perceived to amount to a misuse of market power".<sup>45</sup>

Is this enough? On the one hand, many argue that it would be inappropriate to impose additional enforceable rules on digital platforms (e.g. a non-discrimination obligation or a requirement that algorithm changes be pre-approved). The arguments supporting this view include:

- Competition law can address behaviour which is truly anti-competitive. For instance, in Europe, Google was found to have broken competition law by systematically promoting its own comparison shopping website while demoting those of rivals;<sup>46</sup>
- Search algorithms are complex and are tweaked hundreds of times a year. These factors mean that *ex ante* regulation (i.e. rules imposed prospectively to address future potential harms) is not feasible;<sup>47</sup>
- The lack of understanding about how platforms work provides reason to doubt that top-down regulation would be effective. It could lead to "ill-suited principles" that may "stifle innovation, ending up harming platforms and the economy"; and could lead to rules which "may not be enforceable or be very burdensome to enforce";<sup>48</sup>

36 Ibid, pg 119-111.

37 Including, but not limited to, conduct which may be anti-competitive.

38 Ibid, pg 81.

39 Ibid.

40 Ibid, pg 125.

41 Ibid.

42 Ibid, pg 81, 125.

43 Ibid.

44 Friso Bostoën, "Neutrality, fairness or freedom? Principles for platform regulation", Internet Policy Review, Volume 7 Issue 1, 31 March 2018, pg 12.

45 Katharine Kemp, "ACCC wants to curb digital platform power - but enforcement is tricky", The Conversation, 11 December 2018, <<http://theconversation.com/accc-wants-to-curb-digital-platform-power-but-enforcement-is-tricky-107791>>.

46 Bostoën, pg 7, referring to European Commission Summary Decision No 2018/C 9/08 (Case AT.39740 - *Google Search (Shopping)*), 2018 O.J. C 9/11. However, critics may argue that such investigations are hugely resource- and time-intensive. The *Google Search (Shopping)* decision was issued seven years after the investigation commenced.

47 Torsten Korber, "Common errors regarding search engine regulation - and how to avoid them", European Competition Law Review, 2015, 36(6), 239-244 at pg 243.

48 Michèle Finck, "Digital co-regulation: designing a supranational legal framework for the platform economy", European Law Review, 43(1), 47-68, pg 52 and the sources cited therein.

- Until economic research and decisions by competition authorities shows that competition law is insufficient, “it appears prudent to shy away from an *ex ante* obligation of non-discrimination for online platforms”.<sup>49</sup>

On the other hand, the concerns identified by the ACCC suggest that competition law alone may not be sufficient. If this is accepted, additional intervention appears necessary. Some have suggested that imposing transparency obligations on digital platforms could be an appropriate first step, and that enforceable obligations (which are more intrusive) should only be imposed if subsequently transparency proved ineffective.<sup>50</sup>

The ACCC’s proposal is consistent with this view. With its focus on transparency, it is tailored to levelling the playing field between platforms and their suppliers and could produce substantial efficiency benefits. For instance, it could give advertisers more information about the quality of the advertising opportunities offered by a particular platform, allowing them

to make more informed choices; and could allow advertisers and news publishers to divert resources away from understanding how the algorithms work and towards more productive activities. It could also help uncover anti-competitive conduct, which could then be referred to the ACCC.

### Remaining questions?

There are two remaining difficulties with the ACCC’s proposal. The first is a practical one: how will the proposed algorithm regulator strike a balance between providing enough information about the platforms’ algorithms to produce the benefits referred to above, while protecting the platforms’ confidential business information? The ACCC has asked for further submissions on this question, which no doubt will be addressed in its final report.<sup>51</sup>

The second relates to algorithm changes of the sort referred to at the start of this article. The ACCC recognised that such changes (without adequate notice) are a specific form of harm in the news referral market. Yet it is unclear how the ACCC’s proposed algorithm regulator would substantially

mitigate the harm caused by such changes. Its role would be limited to retrospectively reporting on the impact of such changes. One might argue this could indirectly increase pressure on the platforms to consult with publishers in advance of making future changes to their algorithms. However, this is unlikely to satisfy media organisations whose traffic was dramatically reduced following Facebook’s 2018 algorithm change. A secondary difficulty is that (as noted above) platforms’ algorithms are tweaked hundreds of times a year. It would be difficult for a regulator to monitor and report on all such changes. Therefore, any regulator tasked with oversight of the platforms’ algorithms will need to grapple with difficult questions of how material an algorithm change is, and whether it would be proportionate to investigate it.

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**Adam Zwi** is a solicitor at Ofcom, the UK’s media and telecommunications regulator. However, the views expressed here are his own and not Ofcom’s.

49 Bostoen, pg 14.

50 Ibid.

51 ACCC, pg 111.

# Electronic

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# Profile: Les Wigan

## Chief Operating Officer of Kayo Sports

CAMLA Young Lawyers representative and co-secretary for 2019, Calli Tsipidis, recently caught up with Les Wigan, to discuss his career, role as Chief Operating Officer of Kayo Sports in Sydney and the challenges of the digital landscape both past and present.



**CALLI TSIPIDIS: Congratulations on the (now not-so-recent) launch of Kayo! Can you give us an 'elevator pitch' – what is Kayo?**

**LES WIGAN:** Kayo Sports is a multi-sports streaming service that launched in November 2018 to provide Australians a new way to experience sport. It features over 50 sports live and instantly streamed, with the best from Australia including AFL, NRL, Cricket, A-League and Supercars as well as international favourites such as NBA, NFL, NHL, Formula 1, MLB, European football and plenty more. The service has game-changing features and a personalised experience, which enables fans to watch when and how they want, anywhere in Australia, at an affordable price point.

**TSIPIDIS: Can you tell me bit about your role as Chief Operating Officer of Kayo? What is a 'normal day in the office' for you (if there is such a thing)?**

**WIGAN:** Well we are only a few months old so each day is still full of new and exciting challenges. My focus is working with individual teams to ensure we are giving our customers the best sports streaming experience possible. This can range from reviewing and implementing real-time feedback from customers, through to planning how we showcase upcoming sporting events.

**TSIPIDIS: Kayo is a real game-changer for sports fans, so we can only imagine the immense amount of work that went into the product before its successful launch last November. What was the most interesting part of your role leading up to Kayo's launch?**

**WIGAN:** We are really proud of the Kayo experience, it's taken a lot of hard work from many people across different teams. One of the most interesting and challenging aspects of my role was how we recruited and brought together a group of people and created the right team culture to take an idea and turn it into a reality over a short period of time.

**TSIPIDIS: You have previously worked across News Corp and Fox Sports looking over and managing the digital strategies of both organisations. The digital landscape has changed so much, even just in the last 5 years. What do you think has been the biggest challenger to the digital media landscape in recent times?**

**WIGAN:** That's a difficult question to answer as you are right, the landscape has changed so much, and it does feel like it's only going to accelerate. In terms of the digital media landscape, one of the biggest challenges is the competition for customers' time, they have so many more options, be it a broader range of media content, social media, and so on. Therefore getting and retaining their attention is becoming increasingly more challenging.

**TSIPIDIS: Your career has placed you at the centre of very significant developments in sports media. What do you think is on the horizon for Australian sports media, in particular?**

**WIGAN:** Australians love their sport and I think if we can keep investing and developing in how we get sports fans closer to the sports they love, then I am optimistic about the future of Australian sports media.

**TSIPIDIS: What are you most excited about in terms of upcoming digital and technological developments, in general and for Kayo, specifically?**

**WIGAN:** We are working on new ways to give sports fans a more immersive sports streaming experience. For example, we are the only place where you can watch up to four sports at once on a single screen, or deep dive into a Supercars or F1 race by using our new RaceView experience. We have big plans to create new experiences that will take sports fans even closer to the game.

**TSIPIDIS: Looking back over your career and, in particular, the last 12 months with the launch of Kayo, what is one piece of advice you would give to yourself?**

**WIGAN:** When building and launching a new business, never lose sight or compromise on the primary goal, which in Kayo's case was to deliver a world leading streaming experience with over 50 sports.

**TSIPIDIS: What is your favourite feature on Kayo?**

**WIGAN:** That's easy. Splitview. On a Friday night I can follow the Super Rugby, NRL, and AFL all at the same time.

**TSIPIDIS: Finally, with over 50 sports available, the all-important question: what are you watching on Kayo?**

**WIGAN:** I have been watching the Queensland Reds, they had a great come from behind win against the Sunwolves recently. My NRL team is the West Tigers, so it was great that they chalked up wins against Manly and the Warriors. I am a big F1 fan, so I am hoping Ricciardo and the Renault team can get some good results over the upcoming season. I'm also looking forward to seeing the Aussies in action at the Cricket World Cup in May and the Rugby World Cup later in the year.



**Calli Tsipidis** is Junior Legal Counsel at FOX SPORTS Australia

# Stranger Than Fiction: The Truth Behind “Fake News”

Over the past three years, ‘fake news’ has become something of a buzz word. Analysis by Google Trends shows that the term gained relevance in American Google searches and entered the mainstream discourse during the 2016 presidential elections.<sup>1</sup> The ‘fake news’ phenomenon has recently attracted much international attention with committees set up around the world to investigate the issue.

‘Fake news’ is not new. Rapid dissemination of false information arrived alongside the invention of the printing press in the 15th century.<sup>2</sup> The ACCC Inquiry into Digital Platforms (**ACCC Inquiry**) acknowledged that issues of ‘authenticity and quality news’ are not new but warned that ‘these problems are potentially magnified online’.<sup>3</sup> Similar conclusions have been made by governments around the world and this article takes a look at some of the international efforts to tackle this ‘fake news’ phenomenon.

## Defining “Fake News”

The term ‘fake news’ is tossed around with a myriad of meanings: to describe fabricated news stories; to identify misrepresentations; even to dismiss information one disagrees with, and short-circuit debate.<sup>4</sup> There is a hint of irony in the fact that this term wielded to identify misinformation and falsehood, does itself lack a settled definition.

A United Kingdom Government inquiry took a broad view of the term, finding that it could include: fabricated and manipulated content, imposter content, misleading content, accurate content shared in a misleading context and in some instances, satire and parody.<sup>5</sup> The UK inquiry concluded that the term ‘fake news’ is bandied around with so many meanings that it should in fact be rejected and replaced with settled definitions of ‘misinformation’ and ‘disinformation’.

The European Union has also rejected the term ‘fake news’, arguing it simplifies the complex problem of disinformation: ‘false information deliberately created and spread to influence public opinion or obscure the truth’.<sup>6</sup> A similar theme emerges from government inquiries in Singapore, which focus on ‘deliberate online falsehoods’ motivated by ideologies, politics and prejudices.<sup>7</sup>

The following definition succinctly captures the concept:

‘[Fake news] is the *dissemination of false information via media channels (print, broadcast, online). This can be deliberate (disinformation), but can also be the result of an honest mistake or negligence (misinformation)*’<sup>8</sup>

## Reasons for concern

News and journalism are widely recognised as providing significant public benefit. The ACCC Inquiry

noted that news ‘enables and influences consumers’ decision making and participation in social, economic and democratic processes’.<sup>9</sup> This purpose is reflected in the implied freedom of political communication recognised by the High Court as essential to the system of representative government enshrined in the constitution.<sup>10</sup>

The risks that ‘disinformation’ and ‘misinformation’ pose to quality news and journalism, as well as broader concerns such as national security, are recognised in the various inquiries into ‘fake news’ globally. The common causes identified for driving the increase in ‘disinformation’ and ‘misinformation’ include:

- (a) **‘Clickbait’:** the online news and media environment is a largely advertising driven model based on ‘clicks’. This environment encourages sensationalised or viral content and headline grabbers known as ‘clickbait’<sup>11</sup>;
- (b) **‘Filter bubbles’:** digital platforms often use algorithms to select the content its users see based on their previous behaviour and preferences. This can create a ‘filter bubble’, in which personalised content is shared among like-minded users heightening polarisation and strengthening disinformation;<sup>12</sup>

1 J Roozenbeek and S van der Linden, ‘The Fake News Game: Actively Inoculating Against the Risk of Misinformation’ (2018) [https://www.cam.ac.uk/sites/www.cam.ac.uk/files/fakenews\\_latest\\_jrr\\_aaas.pdf](https://www.cam.ac.uk/sites/www.cam.ac.uk/files/fakenews_latest_jrr_aaas.pdf).  
2 Ibid 13  
3 ACCC, Federal Government of Australia, *ACCC Digital Platform Inquiry Preliminary Report* (2018) 8.  
4 Jente Althuis and Leonie Haiden, (eds), *Fake News: A Roadmap* (Riga: The NATO StratCom Centre of Excellence, 2018) 19  
5 Digital Media and Sport Committee, *Disinformation and ‘fake news’: Interim Report*, HC 363 17/19 (2018) 7.  
6 European Commission *FactSheet: tackling the Spread of disinformation online*, (2018): <https://ec.europa.eu/digital-single-market/en/news/factsheet-tackling-online-disinformation>  
7 *Select Committee, Report of the Select Committee on Deliberate Online Falsehoods Executive Summary* (2018) 2  
8 Fake News: A Roadmap, NATO Strategic Centre for Strategic Communications, Riga and King’s Centre for Strategic Communications (KCSE), January 2018, 19.  
9 above n 3, 243  
10 *Lange v Australia Broadcasting Corporation* [1997] 145 ALR 96.  
11 See for example the ACCC Inquiry into Digital Platforms Interim report p 240 and the EU Tackling Online Disinformation: a European Approach p 5.  
12 European Commission, *Tackling Online Disinformation: a European Approach* (2018) 5.



- (c) **‘Bots’ and ‘Trolls’**: automated online services and fake or unauthentic accounts can fuel the spread of disinformation, colloquially called ‘bots’ and ‘trolls’;<sup>13</sup> and
- (d) **‘Foreign interference’**: efforts to intentionally fuel disinformation have been found to be a new and ‘unconventional warfare’. A UK Committee was presented with evidence of a sustained campaign by the Russian Government to influence UK elections<sup>14</sup> and it is well known that inquiries into similar issues are being made in the United States.

Global responses to these problems range from legislative and regulatory style solutions, to policy and education-focused interventions. This reflects the clear complexities in addressing the issue. On the one hand, a lack of regulation may negatively impact public debate and democratic processes by allowing widespread disinformation. On the other hand, excessive regulation of news and media could in itself stifle debate and freedom of expression.

The following sections provide a snapshot of the contrasting steps being taken in the EU, Singapore and the UK.

### European Union

The EU has taken steps to tackle disinformation with the 2019 European parliamentary elections in sight. These initiatives are intended to complement the General Data Protection Regulation (GDPR), which strengthened the protection of consumer data online.<sup>15</sup> EU recommendations ranged from consumer-focused programs, such as increasing media literacy skills, to regulatory efforts that target digital platforms. In this regard, the *EU Code of Practice to counter disinformation (Code)* was published on 26 September 2018.

The Code is voluntary and implements self-regulated standards. On 16 October 2018 the Code was signed by Google, Facebook, Twitter and Mozilla. Other signatories include European communication and advertising associations. The key elements to the Code are:

- (a) it defines ‘disinformation’ as ‘*verifiably false or misleading information which:*
  - (i) *is created, presented and disseminated for economic gain or to intentionally deceive the public; and*
  - (ii) *may cause public harm (threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens health, the environment or security)’*
- (b) the code includes a number of commitments, such as:
  - (i) creating policies to disrupt the monetisation incentives for misrepresenting information about oneself (commitment 1);
  - (ii) further efforts to clearly distinguish advertisements from news content (commitment 2);
  - (iii) putting in place clear policies regarding identity and the misuse of automated bots (commitment 5);
  - (iv) investing in technological means to prioritise relevant authentic and authoritative information in searches and feeds (commitment 8);
  - (v) supporting good faith independent efforts to track disinformation such as independent fact-checking bodies (commitment 12).

- (c) Measures taken under the Code must fit within the existing Charter of Fundamental Rights of the European Union, particularly, freedom of expression in article 11.
- (d) Signatories have published and agreed to follow a range of best practice policies, annexed to the code. These include: *Facebook ‘Fake News’ Policy, Google Policy on misrepresentation and Twitter Political Campaigning Policy.*

On 29 January this year, the Signatories published their first self-assessment reports setting out the measures they had taken to meet their commitments under the Code. The EU noted that these reports showed some progress, particularly in removing fake accounts, but additional action is still required.<sup>16</sup>

The effectiveness of this self-regulatory code remains to be seen but it does represent engagement with the issue of ‘fake news’ at a platform level. The EU will conduct a comprehensive assessment of the code at the end of this year, noting that if results are unsatisfactory, further regulatory measures will be considered.<sup>17</sup>

### Singapore

In Singapore, a parliamentary Select Committee took written submissions and conducted public hearings, concluding with a report that made 22 recommendations on disinformation. The report made similar recommendations to those made by the EU, regarding public education, upskilling journalists and establishing a media industry based fact-checking body.

However, in contrast to the EU efforts, the Select Committee report in Singapore has made clear that legislative action is required.<sup>18</sup> The legislative recommendations include:

<sup>13</sup> Ibid 5.

<sup>14</sup> Digital Media and Sport Committee, *Disinformation and ‘fake news’: Interim Report*, HC 363 17/19 (2018) 43.

<sup>15</sup> European Commission, *Tackling Online Disinformation: a European Approach* (2018) 1.

<sup>16</sup> European Commission, Brussels (2018): [https://ec.europa.eu/commission/news/code-practice-against-disinformation-2019-jan-29\\_en](https://ec.europa.eu/commission/news/code-practice-against-disinformation-2019-jan-29_en)

<sup>17</sup> Ibid.

<sup>18</sup> Select Committee of the Thirteen Parliament of Singapore *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences And Countermeasures* (2018) 164.

- (a) legislating a “de-monetisation regime” that would cut off digital advertising revenue against purveyors of online falsehoods (recommendation 15);
- (b) where a requisite of criminal culpability is met, impose criminal sanctions on perpetrators of deliberate online falsehoods, including use of inauthentic accounts or bots (recommendation 16); and
- (c) increase government powers to swiftly disrupt the spread of disinformation, such as take-down powers and access blocking, with judicial oversight (recommendation 12).

These measures are noticeably more forceful than those made in the UK and the EU, and the Select Committee did consider that these measures could harm free speech. However, the Committee concluded that the measures were necessary given ‘that online falsehoods undermine democracy and harm the democratic contestation of ideas, which freedom of speech serves to protect’.<sup>19</sup>

The exact form of the proposed legislation is not yet clear but reports suggest it will be tabled this year.

### United Kingdom

After an 18 month inquiry by a Committee of the House of Commons, on 14 February this year the ‘Disinformation and ‘fake news’: Final Report’ (UK Report) was published.

Like the inquiries in the EU and Singapore, this inquiry considered issues such as foreign interference, online advertising and the impact of algorithms used by digital platforms. Recommendations included making digital literacy a ‘fourth pillar of education’ and amending electoral and political advertising laws. However, the most unique of the recommendations are those aimed at what the UK Report calls ‘big tech companies’ such as Facebook.

A substantial part of the UK Report is dedicated to Facebook and the Cambridge Analytica scandal, in which Facebook ‘allowed applications and application developers to harvest the personal information of its customers who had not given their informed consent’.<sup>20</sup> Mark Zuckerberg was asked to appear before the Committee and the UK Report is critical of that fact he choose not to do so. While the report does make some comments about other platforms such as Google, the primary focus is Facebook.

The recommendations aimed at ‘big tech companies’ like Facebook seek to expand the potential scope of these companies legal liability and include:

- (a) developing a new category to cover tech companies that are neither ‘publishers’ nor passive ‘platforms’. The aim of this would be to catch social media platforms like Facebook and ensure they can assume

legal liability for content posted by users that is identified as harmful;

- (b) establishing an independent regulator to implement a compulsory code of ethics for tech companies that defines harmful content. This code would establish clear, legal liability for tech companies to act against agreed harmful and illegal content on their platform; and
- (c) imposing a levy on tech companies operating in the UK to help fund the work of the Information Commission Office, which could act as an effective “sheriff in the Wild West of the Internet”<sup>21</sup>.

The Final Report is a clear indication that efforts to tackle disinformation in the UK will target at digital platforms like Facebook. Like in the EU, it seems that efforts are intended to complement existing data protection regulations like the GDPR. The report was only recently release so it remains unclear which recommendations will be followed and the form any legislation would take. Questions that still need to be resolved include a definition of ‘harmful content’. The Final Report suggests ‘big tech companies’ should have legal responsibilities for ‘harmful content’ online but this term is not defined.

### Way Forward

International efforts to tackle disinformation are still in their infancy. There are clear challenges still ahead and it remains to be seen how effective the measures proposed will be. As we continue to watch this space, there are sure to be many lessons learnt from the successes, of lack thereof, of international efforts to address this ‘fake news’ phenomenon.

## 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)

<sup>19</sup> Select Committee of the Thirteen Parliament of Singapore *Report of the Select Committee on Deliberate Online Falsehoods Executive Summary* (2018) 10 [56].

<sup>20</sup> Digital Media and Sport Committee, *Disinformation and ‘fake news’: Final Report*, HC 1791 (2019) 21

<sup>21</sup> *Ibid* 18.

# CLB Interview: Rachel Launders

**Ashleigh Fehrenbach, Senior Associate at MinterEllison and co-editor, interviews Rachel Launders, General Counsel and Company Secretary at Nine to discuss working in-house at a major Australian news organisation and the effect of the ACCC's digital platform's inquiry. Prior to her current role, Rachel was a partner at Gilbert + Tobin.**

**FEHRENBACH:** As General Counsel and Company Secretary of Nine Entertainment Co. Holding Ltd, what does your role in the organisation involve?

**LAUNDERS:** Like most in-house roles, lots of variety on a daily basis. Over the last year, a large part of my role has been around our merger with Fairfax Media Limited – the due diligence and negotiations on the deal, all the work required to get the deal done (including extensive dealings with the ACCC which was interesting given they were deep into the Digital Platforms Inquiry and the merger raised some relevant issues), bringing the two businesses together, and now looking to divest the regional publishing, New Zealand and events businesses. As Company Secretary, I'm also the primary point of contact for the Board, ASIC and ASX.

I'm fortunate to work with a great team who manage our pre-publication and post-publication risks and dealings with the ACMA, and work with the business on acquiring content and rights to iconic events like the Australian Open, making shows such as *The Block*, putting together joint ventures, monetising rights to content, dealing with the technology issues needed to launch and expand our AVOD service 9Now and the amazing products we're developing to make buying advertising from Nine easier, and generally managing our risks on a myriad of other issues.

Over the last 12 months, I've also been involved in our response to the Digital Platforms Inquiry, which was largely driven by the Regulatory Affairs and legal teams working closely with the business, with our CEO very engaged in the direction of our submissions.



**FEHRENBACH:** Rachel, you spent a number of years at Gilbert +Tobin as a partner, what led you to your current role at Nine?

**LAUNDERS:** Spending a number of years at Gilbert + Tobin! I went on secondment to Nine twice when the previous GC had maternity leave and from that experience, I spent an increasing amount of my time on Nine work, primarily corporate work but also some sports rights and other commercial work. In late 2014, when the previous GC was moving into a mainly commercial role, Nine asked me whether I'd like to join the team. The time was right for me to make a move and it was a very easy transition after 16 years at Gilbert + Tobin given I'd worked so closely with the Nine business over many years, so here I am.

**FEHRENBACH:** On 10 December 2018, the ACCC released its preliminary report on the Digital Platforms Inquiry, outlining a range of findings and recommendations that will impact business, the media and consumer privacy rights. The report included 11 preliminary recommendations and identified eight areas for further analysis. Having worked in both private practice and now as in-house counsel for a major news organisation, do you think that the Report has come at the right time for Australian media organisations?

**LAUNDERS:** In some ways, it would have been an excellent thing for the ACCC to do that study five or more years ago. Perhaps it would have saved media organisations from

some of the experiences that we've gone through in adapting to the new world in which digital platforms play such a pivotal role in terms of access to professionally produced content and monetisation of that content. But given the pace of change, the results would have looked very different five years ago so perhaps we'd still have a system that doesn't quite work for us. I'm hoping that the need for sensible regulatory reform in this area may compel the Government to act quickly in response to the recommendations which they'll receive from the ACCC in June.

The various facets of operation of the digital platforms are now highly evolved. We have a situation with a small number of global players, controlling a number of the most popular platforms (eg Facebook and Instagram under common ownership, Google and YouTube similarly). By conducting the inquiry when it did, the ACCC was able to see the ways in which the digital platforms have set unfavourable prices and terms and conditions for premium content and can preference some businesses over others, given their presence across the advertising supply chain. This sets a solid basis for the ACCC to form the views in its Preliminary Report that each of Facebook and Google has market power and they are unavoidable business partners. So perhaps the time is right – certainly better now than never.

**FEHRENBACH:** Nine is faced with the complex circumstance of having both Facebook and Google being suppliers, competitors and distributors to Nine, all at the same time. Do you think that the recommendations made in the Inquiry propose to make this arrangement any less challenging for Nine?

**LAUNDERS:** The multi-dimensional relationship Nine has with the platforms is complex. On the one hand they are a valuable business partner to our metro publishing business and on the other they are strong competitors for audiences and

advertisers. Meaningful regulatory reform from the Digital Platforms Inquiry will hopefully deliver a more level playing field, such as through the access framework which FreeTV has proposed to the ACCC or other measures which support content creators having greater control of how content is used and monetised, or through ensuring the way in which algorithms operate to surface content are fair and transparent. While that will not necessarily make the negotiations we have with the digital platforms simple, it should help to reset the rules of engagement, so media organisations and other content creators can proceed with more confidence that their content is going to be treated fairly and rewarded appropriately (or in ways they have more control over setting).

The situation will remain complex and challenging, given the multiple roles which Facebook and Google play and the different benefits which their platforms offer to us and to consumers of our content. This dynamic will continue to evolve as business models and consumer habits and preferences for content consumption change, so the relationships are never likely to be static.

**FEHRENBACH:** In its recent submission to the Inquiry, Nine raises that neither Google nor Facebook are required to meet the same standards of trust or care as a regulated platform such as Nine. How do you see the ACCC's recommendation for a regulator to be responsible for monitoring, investigating and reporting on the ranking of news and journalistic content by digital platforms working in a practical sense?

**LAUNDERS:** Nine supports regulation of ranking of news and journalistic content, and the other recommendations made by the ACCC about tax offsets for news production and tax deductibility for news subscriptions, all of which will support the continued production of great Australian news content.

However, I don't believe we need for a new regulator to take on this role.

There may be challenges in defining which news sources qualify for priority or badging so it will be important that any codes or other instruments which give effect to the ACCC's recommendations take a clear approach to that issue. It also needs to be platform agnostic – the world of television, radio and newspapers being the source of news is long gone, but some of our industry regulation is still based around those platforms only.

**FEHRENBACH:** Throughout your career, you would have seen the shift from print news move into the digital space. In Nine's submission to the Inquiry, it is raised that a growing proportion of Nine's audience are also choosing to view online rather than linear television, and that digital platforms control the gateway to the internet. What kind of challenges does this create for Nine?

**LAUNDERS:** The challenges are multi-faceted. Viewers want to watch quality, professionally made content (not all the time – cat videos on YouTube will always have a special place). With the proliferation of content sources as alternatives to linear television, we need to help viewers find our quality content and continue making it available when and where viewers want. We're not expecting that everyone will sit down at 7.30pm to watch *Married at First Sight* on the television – we know it's being watched at different times and on different platforms and we have to make that easy for consumers to do.

We also need to educate advertisers to help them see the value of advertising on television (that is, advertising with high quality, professionally made content) and the value that can flow from being more than an advertiser. Finding creative ways to be an integral part of our content rather than advertising around the content can be incredibly effective for the advertiser (and not skippable). This includes important issues such as knowing your product

and advertising is going to be placed with brand safe content – our content is classified and regulated so an advertiser knows what they are going to be associated with. Television’s viewer numbers are measured by a third party with a respected history and credibility too, which allows for more certain return on investment than other platforms might offer.

The AVOD platforms that linear broadcasters offer (9Now in our case) are part of the response to the challenge of viewers moving to online – that offers the combination of data driven advertising together with the same quality, regulated content as seen on FTA television, and measurement of those viewers, so advertisers can get the real picture about how many people are seeing their advertising. Our investment in Stan is also part of our response – recognising that advertising supported content isn’t the only way to generate revenue from content.

There’s also the challenge of having to work with the digital platforms as we recognise that they are a key way in which audience can discover our content. We need to make sure that audience then sticks with Nine’s platforms, rather than defaulting back to the other platforms. That brings us back to the quality of our content. The challenge, and one of the issues which the Digital Platforms Inquiry has shone a light on, is to be able to monetise the content that we’ve invested in, rather than having the digital platforms monetise our content, from which we get no or little return.

**FEHRENBACH:** How do you see the landscape of Australian digital media changing over the next 5 years?

**LAUNDERS:** That’s just too long a period to make predictions – the landscape is changing so quickly.

I think we’re likely to see more regulation after the Digital Platforms Enquiry final report, and then a period of adjusting to whatever that new regime may be.

AI will get smarter than it is now, so we’ll be seeing content and advertising which is even more personalised and targeted than now. That’s a mixed blessing – it offers great opportunities to engage with an audience in a very direct way, with the greater ability to generate premium returns from that. However, the more “Big Brother” (the Nineteen Eighty-Four one, not the one that made Chrissie Swan famous) that becomes, the greater the concerns around privacy and data security. So, I think data and privacy will continue to be a focus in the coming years with potentially more regulation around those issues to protect consumers.

**FEHRENBACH:** Any final thoughts about the Inquiry?

**LAUNDERS:** This has been a very thorough and detailed process with many preliminary recommendations. It’s important that the regulator prioritises the recommendations that will make material changes for the sustainability of public interest journalism and Australian content.

Nine sees these priorities as fair access to the platforms on fair and reasonable terms, the industry support measures and addressing copyright issues.

I’m confident that the work and recommendations from the ACCC’s report will resonate with the Government (regardless of the result on 18 May) because both sides of politics recognise the importance journalism plays in our democracy and the contribution which Australian content makes to our sense of identity.

It’s been an incredibly important study for the ACCC to undertake, given the influence of the digital platforms on news and media in so many different ways. This is clearly not just an Australian issue, so I’m very proud that our regulator has been the one to undertake this study ahead of many other countries who will no doubt benefit from the work the ACCC has done.

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# The ACCC Takes a Bite of the Privacy Pie

Eva Lu, Associate, at Thomson Geer, provides a summary of the privacy and data related recommendations from the ACCC's Digital Platform Inquiry Preliminary Report.

The Australian Competition and Consumer Commission (ACCC) Preliminary Report on the Digital Platforms Inquiry (**Report**) contains 11 preliminary recommendations and nine areas for further analysis. Four of those recommendations seek to better inform consumers when dealing with digital platforms and to improve their bargaining power by making amendments to existing laws around privacy. If the proposed recommendations made in the Report are implemented, it is likely to have significant implications not only on the digital platforms or the media and advertising industry, but for businesses across all sectors.

One of the key findings in relation to privacy for digital platform consumers, in the ACCC's own words, is that "(t)he existing Australian regulatory framework over the collection, use and disclosure of user data and personal information does not effectively deter certain data practices that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers."<sup>1</sup> To combat this, the ACCC proposes to recommend enacting several amendments to the *Privacy Act 1988* (Cth) (**Privacy Act**), increasing penalties for breaches of the Privacy Act, increasing resources for the Office of the Australian Information Commissioner (**OAIC**), adopting the Australian Law Reform Commission's recommendation to introduce a statutory cause of action for serious invasions of privacy and making unfair contract terms illegal under the Australian Consumer Law (**ACL**) in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

## Preliminary Recommendations

### Preliminary Recommendation 8 – use and collection of personal information

The ACCC proposes to recommend a range of amendments to the Privacy

Act to better enable consumers to make informed decisions in relation to, and have greater control over, privacy and the collection of personal information. Recommendation 8 is intended to apply broadly and to mitigate concerns regarding data practices by all businesses within the remit of the Privacy Act. The proposed recommendations are:

- (a) Introduce an express requirement that the collection of consumers' personal information directly or by a third party is accompanied by a notification of this collection that is concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge.
- (b) Require certain businesses, which meet identified objective thresholds regarding the collection of Australian consumers' personal information, to undergo external audits to monitor and publicly demonstrate compliance with these privacy regulations, through the use of a privacy seal or mark. The parties carrying out such audits would first be certified by the OAIC.
- (c) Amend the definition of consent to require express, opt-in consent and incorporate requirements into the Australian Privacy Principles (**APPs**) that consent must be adequately informed (including about the consequences of providing consent), voluntarily given, current and specific. The consent must also be given by an individual or an individual's guardian who has the capacity to understand and communicate their consent.
- (d) Enable consumers to require erasure of their personal

information where they have withdrawn their consent and the personal information is no longer necessary to provide the consumer with a service.

- (e) Increase the maximum penalty for serious or repeated interference with privacy to at least mirror the increased penalties for breaches of the ACL, that is, the higher of \$10 million, three times the value of the benefit received or, if a court is not able to determine the benefit obtained from an offence, 10% of the entity's annual turnover in the last 12 months.
- (f) Give individual consumers a direct right to bring actions for breach of their privacy under the Privacy Act without having to rely on representation by the OAIC.
- (g) Provide increased resources to equip the OAIC to deal with increasing volume, significance, and complexity of privacy-related complaints.

Although some of the ACCC's proposed amendments are already good privacy practices recommended in the OAIC's Australian Privacy Principles Guidelines,<sup>2</sup> the ACCC's proposed amendments to the Privacy Act, such as external audits and certification process, are likely to increase the regulatory burden and costs for all businesses within the remit of the Privacy Act that collect the personal information of Australian consumers.

### Preliminary Recommendation 9 – OAIC Code of Practice for digital platforms

The ACCC proposes to recommend that the OAIC engage with key digital platforms operating in Australia to develop an enforceable code of practice to provide Australians with

<sup>1</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Preliminary Report (2018) 164.

<sup>2</sup> Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines – Combined set out APP guidelines (as at 2 March 2018)* <[https://www.oaic.gov.au/resources/agencies-and-organisations/app-guidelines/APP\\_guidelines\\_complete\\_version\\_2\\_March\\_2018.pdf](https://www.oaic.gov.au/resources/agencies-and-organisations/app-guidelines/APP_guidelines_complete_version_2_March_2018.pdf)>.

greater transparency and control over how their personal information is collected, used and disclosed by digital platforms. Part IIIB of the Privacy Act empowers the OAIC to approve and register enforceable codes of practice. The code of practice would likely contain specific obligations on how digital platforms must inform consumers and how to obtain consumers' informed consent, as well as appropriate consumer controls over digital platforms' data practices.

### **Preliminary Recommendation 10 – serious invasions of privacy**

The ACCC has renewed calls and proposes to recommend that the Government adopt the Australian Law Reform Commission's recommendation to introduce a statutory cause of action for serious invasions of privacy (by intrusion into seclusion or misuse of private information) to increase the accountability of businesses for their data practices and give consumers greater control over their personal information. Such a statutory cause of action would also have the potential to enable individuals to take action where unauthorised surveillance and serious privacy concerns need to be addressed.

### **Preliminary Recommendation 11 – unfair contract terms**

The ACCC proposes to recommend that unfair contract terms should be illegal under the ACL, and that civil pecuniary penalties should apply to their use, to more effectively deter digital platforms, as well as other businesses, from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use or privacy policies. Currently, if a contract term in a standard form consumer or small contract is declared unfair, the term is void and unenforceable. The term is not a contravention of the ACL and the ACCC cannot seek pecuniary penalties for breach. However, the effectiveness of the proposed recommendation on

privacy and data practices is unclear as privacy policies are generally not considered to be contracts. If the proposed recommendation is implemented, it is likely to trigger a more conservative approach to unfair contract terms for businesses across all sectors.

The ACCC notes that one of the consumer protections under the ACL, along with unfair contract terms, is the prohibition of businesses from engaging in misleading or deceptive conduct and false or misleading representations.<sup>3</sup> The ACCC does not comment on whether it considers it can use the prohibition against misleading or deceptive conduct and false or misleading representations in circumstances where it is concerned that digital platforms are misleading or confusing consumers in their privacy policies and the lack of transparency in their data practices.

### **Areas for Further Analysis**

The ACCC also identifies four areas for further analysis that may have an impact on privacy.

#### **1. A digital platforms ombudsman**

The ACCC is considering whether an ombudsman could be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms. The ACCC notes that it does not intend for any of the functions of such an ombudsman to duplicate those proposed elsewhere for a regulatory authority.

The OAIC currently handles complaints in relation to privacy and should continue to do so. If the recommendation is implemented, any potential areas of overlap between the OAIC and the new ombudsman would need to be reviewed to avoid duplication, minimise confusion, enable streamlining of resources and provide clarity of the complaint avenues, processes and expected outcomes for consumers.<sup>4</sup>

#### **2. Deletion of user data**

The ACCC is considering whether there should be an explicit obligation to delete all user data associated with an Australian consumer once that user ceases to use the digital platform's services or whether user data should automatically be required to be deleted after a set period of time. This is said to prevent open ended retention of data without requiring a user to actively request the deletion. It is however unclear how such an additional obligation would override or complement APP 11.2 of the Privacy Act which requires an entity to destroy or de-identify information that the entity no longer needs for any purpose.

#### **3. Opt-in targeted advertising**

The ACCC is considering whether consumer consents in relation to targeted advertising should be further strengthened by prohibiting entities from collection, using, or disclosing personal information of Australians for targeted advertising purposes unless consumers have provided express, opt-in consent. The ACCC acknowledges that this proposed recommendation is likely to have a significant impact on businesses in the advertising services markets.<sup>5</sup>

#### **4. Prohibition against unfair practices**

The ACCC is considering whether there is a need for a general prohibition against the use of unfair practices in the ACL. Such a prohibition could deter digital platforms and other businesses from engaging in conduct that falls short of societal norms, but which is not currently captured under the ACL. Whether an objective standard for "unfair practices" or "societal norms" can be determined is unclear.

Submissions in response to the Report have closed and can be located at <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report-submissions>. The ACCC's final report is due by 3 June 2019.

3 Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Preliminary Report (2018) 216.

4 Law Council of Australia, Submission to the Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Preliminary Report*, 14 February 2019, 19.

5 Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Preliminary Report (2018) 230.

## About CAMLA

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:

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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.

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