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Australia's Right to Know

On Monday, 21 October 2019, a coalition of media organisations - AAP, ABC, Australian Community Media, ASTRA, Bauer Media Group, Community Broadcasting Association of Australia, Commercial Radio Australia, Daily Mail Australia, FreeTV, the Media Entertainment and Arts Alliance (MEAA), News Corp Australia, Nine, Prime Media Group, SBC, Seven West Media, Sky News, Ten, Guardian Australia and WIN Network - launched a major campaign agitating for legal changes restricting the media's ability to report freely on matters in the public interest. On that day, consumers of newspapers woke to newsstands filled with competing publications, each of which with a front page filled with redactions. The media had had enough.

Eli Fisher, co-editor, sits down with some of the individuals at the forefront of Australian investigative reporting and press freedom. Unlike his interviewees, Eli has not won any Walkleys; but, after his segue in introducing Andrew Stewart on page 3, he is pretty confident that next year won't be his year either.

FISHER: Thank you all for speaking with us about this important campaign, and the issues surrounding it. First, for each of you, what does the latest campaign mean to you, and why is it so important right now?

FERGUSON: The campaign highlights how important it is to fix our system to help get stories that are in the public interest out. Defamation laws, weak whistleblowing protections and restrictive freedom of information requests are just a few of the battles we regularly face when trying to expose wrongdoing. The media isn't above the law but the pendulum has swung too far and is making it hard to do our job. I exposed an aggressive debt collection culture at the ATO in 2018 with the help of a whistleblower, Richard Boyle, who is now facing 66 charges, equivalent to 161 years, if found guilty. This has had a chilling effect on whistleblowers coming forward. This campaign has included

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Editors' Note

What an enormous year it has been!

This year, two thousand and nineteen years into this common era of ours, has brought us in the media and communications space a seemingly endless (the year is actually shortly to end) buffet of intrigues. We had orders suppressing the publication of 's trial details, the allegedly contemptuous alleged failure to comply with which led 36 media organisations and journalists to be brought before a Court for a pretty serious talking to. This year gave us the ACCC's final report in its **digital platforms** inquiry, and subsequent consultation and the Government's response. It brought us **Voller**, and its appeal. It brought us **Hanson-Young** and **Leyonhjelm** with all its stop-shagging-men-ness. It brought us an appeal of the **Rush** record damages award, and the introduction of **abhorrent violent material** laws. It brought us long-awaited **defamation reform** (discussions), and **ACCC v Google**. Our sports lawyers are barely catching their breath following a **Folau-ARU** settlement, when it was announced that **Russia** has been banned from international competitions for doping. Nice news for Essendon, I suppose.

Our **AFP** raided Our **ABC**'s offices and the home of News' investigative journalist **Annika Smethurst**. The journalists didn't like that much, and asked the judges of High Court to weigh in. We talk about it within.

This edition, we bring you such generous gifts. We're basically Santa, except we do it all year round. Minters' **Tess Maguire** discusses the ACCC's digital platforms final report. **Cheng Vuong** the winner of CAMLA's **Essay Prize** competition presents his paper on defamation law and the search engine exception. **Drs Derek Wilding** and **Karen Lee** (we got you a couple of PhD authors this time, you're welcome) discuss their recent study into self-regulation in the communications sector.

Dr Martyn Taylor (we're turning into The Conversation) gives an annual wrap-up of CAMLA's year, and **Katherine Sessions** tells us about the activities of the CAMLA Young Lawyers. **Chief Justice Bathurst** gives you his Honour's timely thoughts on open justice, for those unlucky enough to have missed his Honour's recent presentation at the CAMLA seminar (and for those who wish to relive it, we're inclusive like that). Marque's **Sophie Ciufo** and **Hannah Marshall** talk to us about publishing laws in a social media context. **Claire Roberts** of Eight Selborne Chambers gets us up to speed on the Royals and the right to privacy, commenting on the recent claim by **Prince Harry** and **Rachel Zane**.

And I have a bit of a sit-down to discuss the **Australia's Right To Know** campaign with a couple of friends who could give just about anyone some serious professional insecurities. Human Rights Commissioner **Ed Santow**; Head of the litigation team at the ABC, **Grant McAvaney;** superstar legal affairs reporter for the SMH **Michaela Whitbourn**; Head of Policy and Government Affairs at News Corp, **Georgia-Kate Schubert**; Baker McKenzie media guru **Andrew Stewart**; and investigative reporting royalty **Adele Ferguson** and **Nick McKenzie** come around to chat all things press freedom. Roping Michaela, Adele and Nick into this is *not* a crass ploy to score a Walkley nod for the CLB (but they've never written anything and not received a Walkley for it, so wait and see how this plays out).

Many thanks to **Cath Hill** for, well, everything, and to **Michael Ritchie** at MKR Productions for making us look so good.

On behalf of all of us at CAMLA, we wish you a safe and relaxing holiday, and a successful and happy new year in 2020! See you then!

Ash and Eli

Boyle's revelations, which were in the public interest. Hopefully the campaign will put pressure on governments to about change.

SANTOW: It's a good time to ask how effective are Australia's human rights protections. Since 2001, few if any countries have passed more counter-terrorism and national security laws than Australia. Those laws have progressively increased the powers of our police and security agencies and created a raft of new offences for people who receive or might have received information that falls within a broad understanding of 'national security'.

Australia now has several laws that make whistleblowing in the public interest more difficult and dangerous. We have been assured that such powers would be used sparingly. But the AFP raids have shown that when our security and law enforcement agencies are given new powers, they can, and do, use them. It is of course legitimate for the government to take steps that are necessary and reasonable—even robust—to protect us from genuine threats to national security. But national security cannot simply be used as a trump card to justify all measures restricting a free press and freedom of expression more generally. In particular, adequate protections for journalists and their sources are essential to foster informed public debate, including about matters affecting fundamental human rights.

McKENZIE: It's vital because the public is being denied information they need to know about to hold politicians, government agencies and other powerful interests to account. Our jobs as journalists are about serving the public interest and this campaign is aimed at empowering our ability to do this.

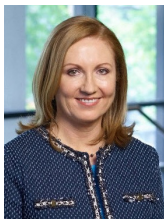
McAVANEY: The campaign is of significant personal and professional importance to me (and of course the ABC). Having spent much of my legal career acting for media defendants, I am well aware that any and all media regulation requires careful consideration of rights or freedoms that might compete with free speech – privacy, reputation, national security and fair trials are but four examples. But more often than not when you look at the hundreds of legal examples where these interests are purportedly balanced, often the 'importance of a free media' takes the form of often-echoed starting-position rhetoric that then gives away to something else; put another way, the law as a whole tends to take a 'well it's just this once' kind of

attitude in so many legal areas that the law chips away at media protections and undermines the utility of the role the media serves in a democratic society.

The campaign has I believe, presented an opportunity for the media as a whole to unite and present to the public the importance of protections for the media and its sources (whether whistleblowers or otherwise) so that it is a topic which is front of mind for all Australians. We don't want this opportunity to be eventually lost to yet another passing news cycle as thoughts about the AFP raids fade into memory. Full respect to the News Limited/Fairfax redacted front page campaign – a total stroke of brilliance. More than anything, I hope that the campaign will lead to meaningful reforms to protect investigative journalism on our shores; you only need to see the political reform that has followed the outcomes of shows such as *Four Corners* over the years to see that an open media ensuring our government bodies remain transparent and accountable is a completely non-bipartisan issue.

WHITBOURN: The ARTK campaign is about the growing culture of secrecy in Australia that makes it difficult for stories in the public interest to be told. That includes the raft of national security laws that criminalise the conduct of some people seeking to act as whistleblowers, as well as the recipients of that information. Non-publication orders also prevent people knowing what happened in many court proceedings across the country. This is not to say that the public's right to know trumps all other interests. There are many cases where it is quite legitimate for non-publication orders to be made, but there are some cases where media outlets have to fight ill-conceived suppression orders at great expense in order to report on matters that are squarely in the public interest.

STEWART: The regulation of media is complex and it is necessary for governments to take into account divergent interests. It is also difficult to enact legislation to appropriately balance those interests. However, as the State seeks greater powers of investigation, it is critical that the media be able to fulfil its critical function of critiquing and, where necessary in the public interest, exposing executive conduct. But what we've seen in the last few months, with the raids on Annika Smethurst's home and the ABC offices, is the clearest indication of how unbearable the legal position has become for the media. There have been approximately 75 national security and counter terrorism laws passed since 2001, more than in any other Western country. We have also witnessed an exponential growth in the use of specific suppression orders, particularly in Victoria. With each individual restriction - often, minor and obscure to the voting public - the burden on the media grows. Some of these will of course be sensible, but so much of this increased regulation of the press and of public discourse happens without meaningful scrutiny. It is to be hoped that for this action there is an equal and opposite reaction, and that the raids on both the ABC and News will be a watershed moment for the better. It is important for us all to retain perspective and that what is central to these issues is balance: one series of rights against another. Unfortunately, especially from the perspective of the media, right now things do not feel balance. The ARTK campaign seems to be gaining some real traction and shedding light on the range of restrictions that make it difficult for the media to perform their important role.



Adele Ferguson is a journalist with The Age, the SMH and the AFR. Her investigations have focused on serious corporate wrongdoing, including scandals at the banks, which helped lead to a royal commission into financial services, wage fraud scandals at 7-Eleven, Domino's and Caltex and misconduct at retirement villages. She has won eight Walkley Awards, including a Gold Walkley, two Gold Quill Awards, two Gold Kennedy Awards, a Logie and the Graham Perkin Journalist of the Year award. This year, she was awarded a member of the Order of Australia.

Michaela Whitbourn is a legal affairs reporter at the Sydney Morning Herald, having previously reported on NSW politics at the AFR. Prior to that, she practised as a lawyer, both within the Courts system and in private practice at what is now King & Wood Mallesons.

Nick McKenzie is an Australian investigative journalist, writing for The Age, the SMH and the AFR. He has won seven Walkley Awards and two Gold Quill Awards. In 2010, with his colleague Richard Baker, Nick was awarded the prestigious George Munster Prize for Independent Journalism, and in 2017, the two of them won won the Graham Perkin Journalist of the Year award.

Speaking of Baker & McKenzie, **Andrew Stewart** is a partner at Baker McKenzie, where he heads the Australian Media & Content Group and serves as a member of the Global Media Steering Committee. He advises a range of traditional and new media clients, in respect of what they can and cannot publish.

Grant McAvaney is a senior media and entertainment lawyer with extensive litigation and commercial law experience. Grant heads the litigation team at the ABC. He has just returned to this position after spending 18 months as the CEO of the Australian Copyright Council where he remains as the Company Secretary. Prior to joining the ABC the first time, Grant held positions as both a Partner of Minter Ellison, and Senior Legal Counsel of Ninemsn.

Edward Santow has been Human Rights Commissioner at the Australian Human Rights Commission since August 2016. Here he leads the Commission's work on a range of human rights issues, including in respect of freedom of expression and counter-terrorism and national security. Edward previously served as the chief executive of the Public Interest Advocacy Centre.

Georgia-Kate Schubert is the Head of Policy and Government Affairs at News Corp Australia, a role she has had for over seven years. GK leads Australia's Right To Know (ARTK) coalition of media companies. She is quick to declare that she is not and has never been a lawyer.

SCHUBERT: For many years ARTK has put well-formed arguments to governments across Australia – including the Federal Government – about the impact that laws that restrict news reporting have on the Australian public's right to know. Unfortunately, the smog of secrecy continues to permeate all levels of government across Australia and we are all impacted. The AFP raids on the home of News Corp journalist Annika Smethurst and the ABC headquarters on sequential days in June was the straw that broke the camel's back.

As the campaign and subsequent editorial coverage has clearly shown, this issue is not limited to national security matters. It's about the unnecessary limitations that laws place on reporting what the public has the right to know. Some of the matters ARTK is pursuing are the ability for survivors of sexual assaults to choose to tell their stories without having to apply to a Court to seek permission (TAS and NT); open justice – or the lack of it – is a big issue in NSW as CAMLA members know; Queensland still does not have a journalist shield law; the start point of the Federal Court regarding juries in defamation matters is no; the number of suppression orders remains sky high in Victoria and disproportionately high in SA on a per capita basis; in Victoria there is significant number of journalists facing contempt charges; and, at the Commonwealth level there's the list of recommendations for law reform presented to the Government by CEOs at the National Press Club event in June. That list includes contestable hearings before a higher authority for any warrant associated with a journalist or media company in their professional capacity, exemptions from laws that criminalise journalists doing their jobs starting with those offences introduced over the last seven years, better protections for Commonwealth public sector whistleblowers, a properly functioning FOI Act and limiting documents that can be stamped secret. Updating defamation laws is hugely important. There's many many more but I will pause there for now.

FISHER: How, most gravely, has the current state of the law affected your work? Can you give us examples of the sorts of important pieces that have been restricted, which have particularly bothered you?

STEWART: If I look at other common law countries, I feel that Australia is falling behind in the protection of speech in the public interests. An inflexible approach to qualified privilege is at the heart of the problem. The talked-about reforms may assist but, as ever, the Courts will be the crucible. The current laws do not enable, let alone protect, speech that is in all our interests. That is before we begin to look at the more difficult issues of protection at the fundamental endeavour of investigative journalism.

WHITBOURN: The country's uniform defamation laws pose probably the greatest threat, day to day, to our ability to report on matters in the public interest. Journalists are not above the law and should rigorously fact-check stories, as we do. The ARTK campaign is not about eroding journalists' accountability. But Australia's defamation laws are out of step with developments in other countries, including the broader public interest defence that already exists in the UK, and it can make it hard for us to defend legitimate reports. I think about those restrictions every time I receive a tip about a high profile individual. It does not stop me reporting those cases, but it does make my job much harder in ways that do not serve the public interest.

McKENZIE: The combination of crippling defamation laws, broken FOI laws and a pervasive culture of secrecy and, on occasion, source witchunts have combined to make it harder to practise journalism in any time in my almost two decades reporting. I've had my phones tapped, I've been called to secret coercive hearings, I've been raided - and on all these occasions, there was never a suggestion I wasn't doing my job properly or responsibly. It was about agencies trying to find the source of information about something that had been reported that had embarrassed a government or agency. While this behaviour slows or stalls investigative journalism, it doesn't cripple reporting like defamation proceedings. These are heavily weighted to the plaintiff, regardless of the merit of the claim, are can be used to stop important reporting.

SCHUBERT: The Foreign Influence Transparency Scheme law, as it was originally introduced to Parliament, was burdened with multiple, material unintended consequences that would have had insurmountable impact on businesses it applied to – in that case not just news reporting. I point this out to illustrate it's not just laws on the statute books but laws as they pass through the Parliamentary process that require vigilance. Many laws look benign from the title, but on closer inspection there's clauses that prohibit or restrict information disclosure or conduct that is the usual part of reporting. Most recently we saw this in the Commonwealth's agriculture protection bill. There are still concerns with that law and how it may be applied, particularly in light of the recent decision in NSW about liability for third party comments on publisher's Facebook pages.

FERGUSON: Many of my stories have come about thanks to whistleblowers who take a huge risk coming forward. Recent events including raids and the charges facing ATO whistleblower Richard Boyle have discouraged people from coming forward and speaking out. I have had some stories collapse when the whistleblower got cold feet and withdrew. Corporate and public sector whistleblowing laws need to be improved and we need a separate agency set up to assess their claims..

McAVANEY: Firstly, when it comes to incredibly important investigative pieces (especially those in the form of long-form content), the inconsistent State/Territory legal approaches to maintaining a public interest defence for the use of surveillance devices

makes outing wrongdoing incredibly difficult. Couple that with what I see as technical absurdities that repeatedly arise in the context of defamation cases, and you can quickly see that we have a legal system that works against the outing of dishonesty, malfeasance, and improper conduct by those who should be accountable. Secondly, our journalists have reported experiencing many whistleblowers pulling out of stories, scared off because of the fear of raids and prosecution. The intimidation that journalists and whistleblowers feel as a result of laws that largely promote and protect the tracing of their activities by investigative bodies, and the apparent willingness of authorities and regulatory bodies to use those laws, has a direct impact on the ability to defend a matter – certainly, the media also needs (whether in defamation matters or otherwise) witnesses who can give supporting evidence without fear of reprisal or prosecution. It's hard to blame whistleblowers for being scared away.

FISHER: Restricting freedom of the press is often justified by other competing priorities - for example, national security, the administration of justice or the protection of an individual's good reputation. Which laws are frustrating your freedom to get important information to the public in the most unjustifiable ways?

SCHUBERT: Perhaps I could peel the onion a different way, from a policy perspective. News media organisations report the news. They curate and apply an editorial process to what is published and broadcast: on TV, radio and in print, and on the digital properties of those companies. Governments are making laws – like the abhorrent violent material law passed in response to the Christchurch terror attack – that apply to content online. The AVM offence does not differentiate between user generated content uploaded to platforms and material used in news reporting by professional news media organisations. This is an emerging issue, and one to keep an eye on.

McAVANEY: Let me quote an American lawyer who, at a conference I attended recently, posed the following question to UK and Australian lawyers: "do you guys still have the problem of courts rewriting your stories after the fact?" In real terms, the law as it relates to the capacity of certain alleged defamatory meanings to arise can often prove incredibly difficult when it comes to crafting news and current affairs stories. While I accept that intention should be largely irrelevant when it comes to considering what a story may mean, the technical and at-times artificial cross-referencing process involved with arguments about alleged defamatory imputations only serves to increase the chance that a media organisation is expected to defend meanings completely outside of what were intended; that difficulty is only further heightened by the fact that in the new popular choice for defamation claims, the Federal Court, juries do not form part of the process and a recently issued practice notice now requires any defence to be filed within 28 days of service of the Statement of Claim and *prior* to the first case management hearing. The closest thing to a 'public interest' defence in Australia, the defence of qualified privilege, has been repeatedly shown up as a weak, theoretical defence at best. Without serious reform, free discussion of serious matters, particularly by way of long-form investigative content, is going to be harmed significantly.

At the risk of talking for too long, I would just quickly add that the ability to protect sources – both legally and practically – should be of paramount importance. Not only will that require strengthening of the laws nationally, but some serious practical issues need careful consideration as well. For instance, some tech companies well-versed in the issue take the view that the only way to truly protect sources is to make initial contact with a burner phone and burner computer, that should then be destroyed without any further contact being made via machines again. That is worrying, to say the least.

FERGUSON: Whistleblower laws as they offer few protections and no rewards and draconian defamation laws, which are expensive and out of date. I am also finding that freedom of information requests are getting harder as the default position is to deny on the basis it isn't in the public interest or redact most of the information which makes it virtually useless. I feel that sometimes this is being abused.

STEWART: The current defamation laws are probably the greatest issue. As a central part of the media's efforts to obtain meaningful reform in 2005, it is disheartening to seek to assist journalists to get their stories to the public in ways that are meaningful, especially when stories are clearly in the public interest. I have personally felt the extreme frustration of clever, well-researched journalists work diligently to research a story, particularly in the #metoo area, only for me to be part of a decision-making process which prevents the story from seeing the light of day. There are many dark corners for the well-resourced to hide, and they do.

WHITBOURN: Australia's defamation laws pose the single greatest obstacle to reporting on matters in the public interest. Many experts have observed that the balance appears to have tipped in favour of protecting individuals' reputations at the expense of freedom of speech. In November the Council of Attorneys-General approved draft amendments to the country's uniform national defamation laws that are said to redress that imbalance, and submissions on those proposals are open until January 24, 2020. Those changes include a new public interest style defence modelled on the law in New Zealand, but it is not clear to me or to media law experts that this defence will provide more protection to journalists than the existing defence of qualified privilege. The latter has not been of assistance to media outlets in defending public interest reports.

My ability to inform readers about matters in court in real time can also be affected by a range of factors including non-publication orders and the speed with which applications made by me to access court documents can be processed by court staff. The latter seems quite banal, but if courts are under-resourced and cannot deal in a timely manner with applications for court documents, I can only report part of the story and that doesn't serve the public or the parties particularly well.

FISHER: Let's talk about the AFP raids. What effect, if any, did it have on how you operate, on your workplace, and how whisteblowers and other informants deal with you?

FERGUSON: It certainly had a chilling effect on informants coming forward. There is a lot more fear around, that is for sure.

McKENZIE: Several of my sources, including people overseas, suddenly became concerned they might be targeted or exposed. It had the effect of making people more hesitant about exposing important public interest information— information whose reporting would not jeapordise national security but rather inform the national debate.

SCHUBERT: It's undeniable that it has and will continue to have a chilling effect on whistleblowers and reporting. Most concerningly is that we will never know the stories that won't be told as a result, what will remain secret that should be told.

FISHER: Adele and Nick, you are experienced in investigative reporting into corporate wrongdoing. How do efforts to intimidate reporters digging around the corporate world compare to efforts by governments to restrict or discourage reporters digging around the political world?

McKENZIE: The corporates tend to be more ruthless using the law to shut down reporting, issuing breach of confidence actions or defamation actions. If money is no object, a company can frustrate a report via baseless legal claims that also work to warn off other media companies.

FERGUSON: The corporate world tends to hire expensive external PR companies who conduct sophisticated smear campaigns. This can be against myself, whistleblowers, the victims, all aimed at diverting attention from the misconduct. Threats of millions of dollars of advertising being pulled is another lever some of them use as well as expensive law suits. I have been spied on and recently a senior executive in a financial services institution was overheard at a pub making physical threats against me.

FISHER: Edward, did the Human Rights Commission hold a view about the AFP raids on journalists? And how do you think those developments, and the subsequent legal challenge, position Australia internationally in terms of protecting free speech and journalists?

SANTOW: The Commission was deeply concerned about the AFP raids. The journalists involved in these raids were reporting on important issues that go to the heart of our liberal democracy.

National security may sometimes be a legitimate ground for limiting our human rights, but overreach in the name of national security is not. Protecting national security shouldn't mean journalists face severe criminal penalties for reporting matters that are genuinely in the public interest.

When Parliament fails to strike the right balance on national security and human rights, harm to individuals cannot be later undone.

Australia is unusual among liberal democratic countries in missing key checks and balances, such as a national human rights act or charter, to stop such national security laws from over-reaching.

FISHER: Do laws need to be changed in light of the AFP raids? What sort of protections would you like to see?

McKENZIE: I'd like to see agencies use their discretion when contemplating a raid to consider if a raid will be targeting responsible and public interest reporting. I'm not saying journalists should be above the law. But I think if active consideration was given to the critical role of the press, and the impact raids would have on responsible reporting, 99 times out of 100 police would decide not to raid. If some sort of legislative protection can aid this, then that would be useful.

SANTOW: Since 2001, the Australian Parliament has continued to expand coercive powers and criminal laws said to be directed towards the protection of national security. For example, on the last parliamentary sitting day of 2018, the so-called 'encryption bill' was passed. It dramatically increased the power of Australia's intelligence and law enforcement agencies to access the private communications of ordinary Australians, with implications for our right to privacy, freedom of expression and media freedom.

There have even been media reports that the Government had been considering an expansion of powers to allow the Australian Signals Directorate to obtain information covertly against Australians.

I'd like to see a comprehensive review of Australia's national security laws, instead of the creation of yet more government legislation to keep up with the rapid development of communications technology.

It's time to take a step back and fully review the inter-relationship of the existing laws and whether all those laws go absolutely further than they need to in impacting on our basic human rights.

SCHUBERT: ARTK has set out a clear set of asks. We are seeking contestable warrants to a higher authority, exemptions from the laws passed that criminalise journalists for doing their jobs – there's a list of those we are pursuing, adequate protections for public sector whistleblowers, and properly functioning FOI regime, limitations and clear rules about what can be stamped secret, and

updating defamation laws. The first five of those are inter-related and are all necessary. There's already a process well underway for updating defamation laws. ARTK is optimistic that CAG process will meet the timeframe to have amending legislation ready by the middle of 2020.

WHITBOURN: I am keen to see the result of the ABC's Federal Court challenge to the raid on its Sydney premises and the High Court challenge mounted by News Corp journalist Annika Smethurst and her employer to the raid on her Canberra home, and whether the courts find that the implied freedom of political communication does act as a handbrake on any of these powers. I would also be supportive of a review of national security laws, including the desirability of stronger public interest protections for journalists.

McAVANEY: Yes. I appreciate that legislative change is not always an easy process, but as ARTK has made clear, those changes are all manageable without adversely affecting Australia's ability to protect itself. Specifically in relation to search warrants, there is no doubt that the laws need to be tweaked to allow proper discussion of relevant factors such as source protection, public interest, and national security – but *prior* to the execution of a search warrant. It is simply not enough to argue that the current system is fine because aggrieved parties may, for instance, commence proceedings challenging a search warrant after the event. The damage is done; actions will have already been taken by authorities with huge investigative powers that strike fear in the heart of whistleblowers and stress and anxiety to journalists who have just been doing their job (and doing that job very well!).

FERGUSON: I want to see changes to corporate and public sector whistleblower laws. The corporate sector whistleblower protections were recently changed but they don't go far enough. I want changes to defamation laws in line with the UK and I want the Attorney General to intervene and use his powers to stop the prosecution of ATO whistleblower Richard Boyle.

FISHER: Beyond those changes, what sorts of legal reforms do you think are necessary, if any, to ensure that the press is freer to perform its important duties? Let's start with FOI, whistleblowers and secrecy.

SCHUBERT: Those are all part of the ARTK law reform ask. It should be emphasised that law reform in those areas is required to change the culture of secrecy. Without law reform the risks and incentives for behavioural change across government is limited and unlikely to be long-term.

McKENZIE: Much reform is needed. FOI is broken and those deciding what to release are no longer acting within the spirit or intent of the law. Whistleblowers need far stronger legislative protection to protect them from the fall out caused by coming forward and to reward them - even financially - for doing so. I think we need a cultural change across government to encourage more accountability. The new commissioner of the AFP has recently endorsed such an approach but the proof will be in the pudding. More than anything else, we need a major overhaul of defamation. It is killing the media in Australia.

SANTOW: A good starting point would be to ensure that 'outsiders', including journalists, are not liable under secrecy offence provisions unless it's proved that their disclosures have led to concrete harms to our security interests. That is, harm should be an element of secrecy offences insofar as they apply to people who aren't employed in our security and law enforcement agencies.

Secondly, there should be robust defences available for disclosures that are genuinely in the public interest – and especially where those disclosures reveal violations of human rights.

STEWART: I agree with the point GK makes, that the laws are in many respects secondary to the culture of the government wielding them. Law reform is one thing, but it's a cultural reform within government that is most essential. Here are some findings from a study by the Guardian Australia from early this year, which really highlight the issue. FOI refusals are at their highest level since records began in 2010-11; more than 2000 FOI requests have taken more than 3 months longer than the statutory timeframe to respond (often rendering any produced documents irrelevant by the time they are released, if they are; FOI teams have shrunk in at least 20 government departments or agencies, and the OAIC is operating with two-thirds of the 100 staff minimum needed to do its job. These are failures not only in respect of the Government's abiding by FOI law: they are failures reflecting a Government's questionable commitment to abide by the spirit of FOI laws too. Cultural and political change are why the ARTK campaign is so important.

WHITBOURN: FOI applications can be expensive, time-consuming and ultimately fruitless. I would like to see a comprehensive review of the FOI system and whether government agencies are frustrating the objects of laws designed to enhance the public's access to information.

McAVANEY: Other than some of the reforms I've mentioned already, I think we need to look at broad protections for whistleblowers. This is a slight oversimplification, but at the moment the protections for whistleblowers in Australia do not apply to everyone, do not apply to telling the world at large, do not apply to outing all kinds of wrongdoing, and are inconsistent between the States/Territories. Protections need strengthening: just look at the example of ATO whistleblower Richard Boyle who assisted a joint Fairfax/*Four Corners* investigation and has been charged as a result, notwithstanding that the program itself, which looked at

alleged heavy-handed enforcement practices against small businesses and individuals, leading to the Senate Economics Legislation Committee resolving to conduct an Inquiry into the performance of the Inspector-General of Taxation statutory office.

From a national security perspective, there appears to be a problem in the way documents are classified that hinders reporting significantly. I would suggest examination of the information that government and bureaucrats consider 'secret' and whether it matches up with community expectations.

FERGUSON: I would also like to see an overhaul of the FOI system as it is being abused by government agencies.

FISHER: And defamation law reform? ARTK is concerned to adapt defamation law to the digital era. What sort of changes are you keen to see implemented? What involvement are you having with the defamation law reform currently underway?

WHITBOURN: Defamation law reform is something of a hobby horse for me. I write on the topic fairly regularly, including the high volume of cases in Sydney, and am also tracking the current reform process. I fear that the current process may result only in tweaks to the *Defamation Act 2005* rather than the root and branch reform that is required. But I welcome the proposal to adopt the "serious harm" threshold that already exists in the UK to weed out trivial cases before they proceed to the time and expense of a trial. That would be particularly useful for litigants in person, so it's not a reform I would advocate as a solution to the problems encountered by the media in defending major investigative reports in the public interest. I would also like to see a broader public interest defence introduced in Australia, but I am not optimistic that this will eventuate. The current proposal modelled on New Zealand law may not be the answer.

McKENZIE: The police raids on media organisations have rightly sparked a debate about the role of a free press in a democracy and what limits might be drawn around the powers of security agencies. But Australia's defamation laws pose a more immediate, daily threat to everyone's free speech.

Most Australians would find it hard to believe that a judge could remove the right to plead truth as a defence in a defamation case. Yet that is what happened in the Federal Court in Wing v The Australian Broadcasting Corporation.

People would also be surprised to learn that under Australian defamation law what must be defended is not the ordinary meaning of the words in a story but the imputations crafted by the plaintiff's lawyers. This means that defendants must play on the field marked out by the plaintiff and must seek to prove the truth of an imputation that the plaintiff argues arises, rather than what was in fact reported. All of this is built on a foundation of laws that presume all publications that are defamatory are false and place the burden of proof on the defendant.

It is little wonder then that Australia has been described as having the worst defamation laws in the free world.

I do not believe the media is above the law and am not arguing for special media laws. But it is time to insert a public interest defence of "reasonable belief" into the law to restore some balance to those who want a robust public debate around matters of national importance. The proposed change will not prevent someone who has been wronged from seeking redress in court but it will allow the public, Parliamentarians, and the media to debate without fear of being dragged into a punitive legal fight against a cashed up opponent.

FERGUSON: I agree with Michaela. We need to see Australia come into line with the UK as our defamation laws are stifling journalism. Anyone with deep pockets can abuse the system and it works in their favour. This shouldn't be allowed to happen. Too many stories are killed or watered down due to our costly defamation laws, which is not in the public interest.

STEWART: As I mentioned above, having been directly involved in the 2005 reforms, it is disappointing to see the lack of progress in Australia compared, for example, to the UK. Qualified privilege is alive and kicking there but remains a defence of last resort in Australia. Also, in 2005, the digital age was almost a toddler, still looking for its feet. Now it is a fully-grown adult, with defamation law suffering the growing pains. The law has not kept up, while businesses have come and gone and some have become gargantuan. So you can imagine that the uniform defamation laws were not drafted with social media as a central consideration. And this year's Voller judgment demonstrates that the Courts are still struggling to apply these laws to the current framework. What would I like to see enacted? A UK-style single-publication rule is a no-brainer. That would mean that the statutory limitation period commences from the date of upload rather than the date of download. There should also be a UK-style serious harm threshold. Most of all, I would like Santa to deliver my clients the best Christmas present of all: a workable public interest defence. Without it, the media remains at peril.

SCHUBERT: ARTK has made a number of submissions to the review. There's two key streams of work to update defamation laws. The first is to update the laws to be fit for purpose in the digital age which requires a single publication rule and a serious harm test. The second is to fix the parts of the existing law that, after 14 years of road-testing, are not fit for purpose. A number of the defences fit into this category including qualified privilege and contextual truth. We are hopeful that the timeline set out by the CAG working group, being

led by NSW, will be met. That would mean that amending legislation will be drafted and ready to go by mid 2020. By that time we will have blown the candles out on the 15th birthday cake of the current law. That's long enough. I should say we are also seeking a two-year review mechanism be built in so anything that is still not working can be triaged quickly and not wait another 15 years for amendment.

McAVANEY: Georgia-Kate and the ARTK continue to fly the flag for the ABC's interests in defamation law. If Australia wants a stronger responsible media, then in my view we need at the very least to see reform by way of the introduction of the single publication rule, serious harm test, righting the wrongs that have developed over the years when it comes to variant and contextual imputations, and introduce an *actual* fully-functioning public interest test that works in practice.

FISHER: What's the response you have been hearing from Government in relation to the ARTK campaign? Is there support for the changes being sought?

SCHUBERT: The PJCIS reports on 16 December. We will see what the Committee reports, and how the Government responds.During and since the campaign, members of the community have been coming forward with their stories of secrecy and governments hiding things from the people. Pink batts and kerosene baths are the types of things people have a right to know about.

McAVANEY: I try to make it a habit not to add extraneous information when Georgia-Kate has already given a helpful answer.

WHITBOURN: My understanding is that media executives involved in the campaign have been buoyed by recent discussions with the government, but talks are ongoing.

McKENZIE: I've been heartened by interactions with Attorney-General Porter and Mark Dreyfus but the feds can only do so much. I think it is a big ask for COAG backing of reforms given the difficulty getting states to all come on board and the desire of so many politicians to have a weak press. The debate is heartening but I'm not holding my breath.

FERGUSON: There has been a lot of talk but no action as yet.

STEWART: So far we have heard that a single-publication rule and a serious harm threshold are likely, as will be a NZ-style public interest defence. So far so good. Further reforms related to digital platforms, an issue I will be watching very closely, is still being negotiated. We are expecting draft proposals for public comment by early 2020 and new laws to be introduced in the middle of next year.

FISHER: Is anything short of a federal Human Rights Act that expressly protects free speech going to be inadequate?

SANTOW: Australia's current human rights framework is inadequate and needs an overhaul. At a federal level, we have a number of anti-discrimination laws, but these don't include protection of all human rights. We would welcome better protection for freedom of expression. It's important to remember that freedom of expression is protected along with a range of other human rights in international law, and these rights are interrelated.

The Commission has been calling for a human rights charter since our inception. Mid-next year, the Commission will release a roadmap for national human rights reform and we are currently consulting on this as part of our 'National Conversation on Human Rights' project (you can read the discussion paper for the project here: https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law)

McKENZIE: I think plenty can be achieved by discrete legislative reform. We can't make perfect the enemy of better.

FERGUSON: A Federal Human Rights Act that expresses proection for free speech would be hugely welcome but there are other things we can do to help get stories that are in the public interest told. They include an overhaul of our whistleblowing laws, including a reward system, an independent agency, improved defamation laws and a better freedom of information system.

STEWART: Probably not. Smaller measures of progress are desirable in the interim. But it should be a source of national embarrassment that Australia does not have express protections for such basic liberties as free speech and freedom of the press. In the current climate, both domestically and abroad, it is clear why we cannot rely on the Government to behave sensibly in relation to regulating the media and free speech.

WHITBOURN: I think express protection for free speech is desirable but a range of other changes could be made that would assist public interest journalism. A major overhaul of our defamation laws is one such change, but I am not holding my breath.

McAVANEY: There is plenty that can be done, and reasonably quickly, to improve the position to existing legislation.

SCHUBERT: ARTK is trying to achieve meaningful change, and put the public's right to know, upfront – rather than at the end – of what we think we can change now. The Australian public cannot continue to be kept in the dark.

FISHER: Thanks everyone for talking with us. On behalf of our readers, I am very grateful for all your insights. You can go back now to fighting corruption and preserving our freedoms.

"Something More, Something Less": The Contemporary Meaning of Open Justice

The Hon T F Bathurst AC, Chief Justice of New South Wales

This is the text of a speech given by the Chief Justice at a CAMLA seminar on 16 October 2019.

I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. For many years, our legal system failed to recognise their unique culture and connection with this land, leading to a cycle of oppression and disadvantage from which escape was difficult. Change was slow in coming, and even now, is ongoing. As a result, many Indigenous Australians today will, unfortunately, still face harsh treatment at the hands of our system of justice.

The reality of the treatment of Indigenous people can be confronting. But it is not something which will improve by being ignored. While it may be uncomfortable to acknowledge, the visible presence of injustice should challenge us to do better. Indeed, it is only when we are content for injustice to remain invisible that the truly pernicious problems emerge. The invisibility of the treatment of Indigenous Australians over many years led to not only to a lack of general public knowledge of the manner in which they had been mistreated, but to a perpetuation of such mistreatment.

I do not think anyone here needs to be reminded of this history. But, I think it does have something to say about the significance of "open justice" for our legal system at large and its importance. Just as a lack of transparency contributed to a significant extent to a lack of knowledge about the mistreatment of Indigenous Australians, in more recent times, publication of their ongoing mistreatment in the media has led to a better appreciation of the injustice perpetrated on them and places a real pressure on those who have the power to do so to remedy those injustices. This demonstrates that "open justice" is more than a rather technocratic notion about "transparency" and "accountability" in how the courts administer justice, concerned only with how material filed or produced in court should be made available to the media.[1] To be sure, "transparency" and "accountability" are important, but I do not think they lie at the heart of the concept.

Rather, these values depend upon the unstated assumption that those who will be responsible for the administration of justice will be courts. This may be true now. In fact, it is almost trite.[2] But it is important to retain a sense of perspective. It was not always the case in this country, and it is still not the case in many places around the world. As we see in our own history, there is a great temptation for governments to keep the administration of justice "hidden", not simply by closing the courts to the public, but by finding a way to take a dispute outside the purview of courts altogether. This "justice" may be of a more summary or arbitrary form than that dispensed by a court applying rules of law. Inevitably, in the absence of any fixed rules or outside scrutiny, it becomes perverted.

It was these circumstances which enabled the relationship between Indigenous Australians and European settlers to be governed by prejudice rather than law. No doubt encouraged by the inflammatory rhetoric of the press at the time, as well as the acquiescence of the government, the settlers were uninhibited from dispensing their own vigilante justice with senseless violence on a scale the size of which may never be known. There was a failure of "transparency" and "accountability", not just because this was done out of the public view, but because it was done without any semblance of due process or commitment to the rule of law and in circumstances where the perpetrators escaped with impunity.[3]

We are fortunate that we live in a society where we, on the whole, no longer tolerate this kind of behaviour. Where it has been found to occur, we expect that it will be punished through the courts. The alternative is not something which we often contemplate. But that does not mean that it is something which it is safe to forget. To avoid the possibility of temptation, we insist that justice will be administered by courts who are obliged to apply the law and that they will do so in public. It is only through the union of both of these ideas that we can ensure that the public can be confident that their society recognises and respects the rights of individuals and groups who are subject to its laws.

1 See, eg, Supreme Court of New South Wales, *Practice Note SC Gen 2: Access to Court Files*, 4 October 2019.

2 At the federal level, this is made clear by *Commonwealth Constitution* s 71; see also *New South Wales v Commonwealth* (1915) 20 CLR 54. At the state level, the position is less clear, but due to the number of matters arising in federal jurisdiction, the same principle will often apply: see *Attorney-General (NSW) v Gatsby* [2018] NSWCA 254.

3 The "Myall Creek Massacre" was one of the few cases where there was condign punishment: see *R v Kilmeister (No 1)* [1838] NSWSupC 105; *R v Kilmeister (No 2)* [1838] NSWSupC 110.

It seems to me that this is the true consideration which motivates reliance on the principle of "open justice", and the real reason why it has been described, on a number of occasions, as a "constitutional principle"[4] which goes to the heart of our conception of judicial power.[5] Now, I do not mean to say that this motivation or rationale has the status of a legal principle which ought to be directly applied in lieu of the more traditional definition of "open justice". I merely aim to point out that, when we look beyond our immediate circumstances, the idea has a wider significance than we normally appreciate. In short, I would say that it reminds us that the antithesis of "open justice" is not, as some might assume, a courtroom which closes its doors to the public in a particular case. Rather, it is a state, or any other entity with a significant degree of power or influence, which attempts to resolve disputes in secret outside the courts charged with applying the law.

I have placed some emphasis on this idea, not as a sign of eccentricity, but to help keep things in perspective. Fortunately, in Australia, we are not presently in danger of falling into a situation where the state can dispense an arbitrary and summary form of justice to its citizens in secret outside the reach of the law.[6] We have a robust and independent system of courts which has proven capable of resisting attempts by the government to place its exercises of power beyond review.[7] In this task, the courts are aided, in no small part, by the media and whistleblowers who are prepared to call out overreach, abuse of power, and maladministration when it occurs, whether by the government or others, including the courts, and bring it to the attention of the public. Together, we ensure that they can have confidence that their rights and interests will be protected from arbitrary interference.

Against this background, I think that the principle of "open justice" risks becoming something of a cliché if, as sometimes occurs, it is treated as simply guaranteeing an unbridled right of access to everything that occurs or is filed in a court.[8] A right of this kind is far removed from the motivation or rationale I have identified as underlying the principle, and has never been accepted as an accurate statement of the law in this country. Many of the appeals to "open justice" which are made before the courts often fall into the trap of assuming that the right does extend so far, and there is a real possibility that this could dilute or devalue the force of the principle. Its value is cheapened if it simply becomes seen as a means for the media to attract more viewers, or for commercial parties to gain access to documents of their competitors filed in court.

What, then, is the relevance of the principle of "open justice" in a society which has a strong, established system of courts resolving disputes by applying the law? We find the answer to this question in the language of the *Court Suppression and Non-publication Orders Act 2010* (NSW). Section 6 requires a court considering making an order under the Act to take "open justice" into account as "*a* primary objective" of the administration of justice. Section 8 requires an order to be "necessary" for the achievement of one or more overlapping purposes, all of which are related, broadly speaking, to the integrity of the justice system. In other words, the Act contemplates that there may be "objectives" of the administration of justice other than the principle of "open justice" and that achieving some of these objectives may mean that it is "necessary" to make a suppression or non-publication order.[9]

I think that this assumption is fundamental to the operation of the Act, and relates to the motivation or rationale for the principle of "open justice" which I outlined earlier. It exists to maintain the confidence of the public that their rights and interests under the law will be protected by the courts. This does not require freedom of access to the courts and freedom to publish everything that occurs in them in every conceivable circumstance. Indeed, there will be occasions where freedom of access and publication will directly undermine the confidence of the public, such as, most commonly, when it might prejudice the right of an accused to a fair trial,[10] might expose child victims to unnecessary distress,[11] or might disclose confidential commercial information.[12] To the extent freedom of access and publication will infringe such a right in a way which cannot be avoided by other means, it will become "necessary" to make an order restricting that freedom in order to preserve that right.

This much should be familiar and uncontroversial. And yet, it still seems to be treated with, at best, grudging acceptance by media

4 *R (Miller) v Prime Minister* [2019] UKSC 41, [40], citing *Scott v Scott* [1913] AC 417.

5 See *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *Hogan v Hinch* (2011) 243 CLR 506, 530–5 [20]–[27], 541–2 [46] (French CJ), 552–4 [85]–[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

6 Cf *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

7 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *South Australia v Totani* (2010) 242 CLR 1; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.

8 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 520–1 [27]–[32] (Spigelman CJ).

9 *Rinehart v Welker* (2011) 93 NSWLR 311, 320–1 [27]–[31] (Bathurst CJ and McColl JA); *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 65–7 [45]–[51] (Basten JA).

10 Cf *R v Glennon* (1992) 173 CLR 592. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, 142–3 [124] (Hayne and Bell JJ).

11 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(d).

12 See, eg, *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228, 235 (Bowen CJ).

organisations, particularly when the material subject to a restriction on publication has a high profile among the public.[13] However, I do not find this reluctant attitude, whether or not truly motivated by a pious concern about "open justice", to be justified. Courts do accept the intrinsic value of "open justice" as a broad principle underlying the administration of justice in our society in the manner I have outlined above. But this comes with a corollary. If "open justice" is important for its *systemic* value, equally applicable whenever judicial power is exercised, it is difficult to say that it should be given more weight in a particular case because its subject matter already has a high public profile.

I think that this is well-illustrated by the recent case involving Cardinal George Pell. For some years now, but especially since the McClelland Royal Commission,[14] allegations of child sexual abuse have attracted intense interest from the public. There could be no doubt that the fact that such allegations had been made against Cardinal Pell, who already had a high public profile as the most senior member of the Catholic Church within Australia, would attract almost universal interest and generate widespread discussion. This was certainly the opinion of most media organisations around the country, if the deluge of coverage with which the public was inundated after the non-publication orders were finally lifted is anything to judge by. But does this degree of interest, on an issue which admittedly might be described as one of "public importance", mean that the principle of "open justice" has any greater weight in making a non-publication order?

I do not think that it does. The importance of "open justice" does not vary with the desire of the public to know about the details of a particular case, at least for the purposes of the law. If it did, then the principle would pose little obstacle to the closure of the vast majority of trials and hearings in all courts around the country, which is an outcome clearly contrary to its motivation and rationale. It is for this reason that I think that statements to the effect that derogations from the principle of "open justice" should be "exceptional" or "unlikely" are apt to mislead.[15] They tend to overemphasise the importance of the principle in the circumstances of a particular case, at the expense of any countervailing right or interest said to justify a departure from the principle. It is the latter which, under both the common law and statute, ought to be the proper focus of the inquiry.[16]

Again, I think that the case of Cardinal Pell provides a good example of the correct approach to be applied by a court considering whether to make a non-publication order. In his initial judgment,[17] Chief Judge Kidd focused, with respect, entirely properly, only on the question of whether any restraint on publication was "necessary" to prevent a "real and substantial risk to the proper administration of justice" in the form of an infringement of the right of the accused to a fair trial,[18] where two trials were being held substantially "back-to-back".[19] Answering this question involved no need for an encomium on "open justice", or to balance this principle against the right of the accused.[20] The balance had already been struck by the legislature in determining that any restraint on publication must be "necessary".[21] An express consideration of the relative importance of the principle and the right in the circumstances of the particular case would have been irrelevant.[22]

The real issue which arose for determination at this initial stage was not even whether an order should be made, but what *scope* of order was "necessary".[23] A group of media interests contended that a non-publication order should be limited to Victoria, while the Crown and defence counsel supported an order applying throughout the Commonwealth.[24] The limitation on the scope of the order was supported by a submission that an order applying only in Victoria would be sufficient to quarantine the "vast majority" of potential jurors for the second trial from any information arising out of the first trial, and that any additional risk to the proper administration of justice arising from interstate contamination was

13 See, eg, Amanda Meade, 'Up to 100 Journalists Accused of Breaking Pell Suppression Order Face Possible Jail Terms', *The Guardian* (online, 26 February 2019) <https://www.theguardian.com/media/2019/feb/26/dozens-of-journalists-accused-of-breakingpell-trial-suppression-order-face-possible-jail-terms>.

14 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Web Page) https://www.childabuseroyalcommission.gov.au/final-report>.

15 Cf *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 353 [21], 360 [59] (Spigelman CJ).

16 See *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–7 (McHugh JA); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1).

17 *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 905.

18 Ibid [36].

19 *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 360 [63] (Spigelman CJ); *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384, 392–3 [35]–[36] (Bathurst CJ, Beazley P, Hoeben CJ at CL).

20 *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 905, [38]–[44].

21 *Open Courts Act 2013* (Vic) s 18(1); cf *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1). See also *Rinehart v Welker* (2011) 93 NSWLR 311, 321 [31] (Bathurst CJ and McColl JA), quoting *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [31] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

22 *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 905, [52].

23 Ibid [55].

24 Ibid [56]–[57].

25 Ibid [58].

not so significant that it could not be managed by appropriate directions.[25]

This submission was ultimately unsuccessful, but what is important to note is that it was both put and rejected, not on the basis of any abstract appeal to "open justice", but upon a close consideration of the relevant facts about the Australian media environment and how this might affect the right of the accused to a fair trial.[26] Indeed, the intense interest from the public in the case was a factor which was relevant only insofar as it tended *against* not making a non-publication order, rather than in favour of "open justice", by reason of the additional notoriety, and thus, likelihood of contamination, which this lent to the proceedings.[27] Thus, looking at the judgment as a whole, I do not think that there could be a clearer affirmation that, while the principle of "open justice" is the background against which it must be "necessary" for a restraint on publication to be imposed, it is not the place of the court to assess its importance in the circumstances of the particular case.

I find it difficult to disagree with either the approach adopted by the Chief Judge or, subject to one caveat, with the result itself. The circumstances were, as he put it, a "perfect storm",[28] involving a

defendant who was a prominent public figure accused of a very topical offence, and hence, a very great risk to the proper administration of justice if one trial was allowed to contaminate the other. I was a member of a Court of Criminal Appeal which affirmed the making of non-publication orders in similar, but not identical, circumstances involving "back-to-back" trials in *Nationwide*

Caption?

News Pty Ltd v Qaumi,[29] and, I would submit, the results in these two cases are consistent. Ultimately, there is nothing in the principle of "open justice" which requires the public to have real-time updates on the progress of a trial, or knowledge of its outcome, where doing so would result in unavoidable prejudice to a trial scheduled to commence shortly after.[30]

The caveat to which I have referred is the possible futility of the non-publication orders made by Chief Judge Kidd.[31] I was able to read all about Cardinal Pell's trial simply by going to *The Washington Post* website.[32] *The Washington Post* did not consider itself bound by the order, and could have had a good constitutional defence if its publication of the trial had been challenged in the United States.[33] Courts will increasingly have to grapple with this problem. All I will say at the moment is that one thing that courts should not do is to overreact and seek even more stringent restrictions on transparency such as the complete closure of a court where there is international interest.

The central purpose of my remarks this evening has been to discuss the possibility that "open justice" perhaps means both something more and something less than we commonly appreciate today. The concept means something more in that it goes beyond the mere "transparency" or "accountability" of the courts, and extends to the confidence of the public that their rights and interests will be protected by courts according to law. It means something less in that it does not itself provide the operative criterion for determining whether a restriction on publication is justified. To be sure, it is part of the background against which we apply the touchstone of "necessity", but we should be careful to ensure that we do not confuse it with a more general voyeuristic desire on the part of the public when other, more pressing rights might be at stake. As a systemic value of our legal system, "open justice" is something more certain, more fixed, and more important than that.

26 Ibid [58]–[59].

27 Ibid [59](a).

28 Ibid [47].

29 *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384.

30 Cf *Chaarani v Director of Public Prosecutions (Cth)* [2018] VSCA 299, [41], [46] (Maxwell P, Beach JA, Hargave JA).

31 See *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 2125, [35] ff.

32 See, eg, Chico Harlan, 'Australian Court Convicts Once-powerful Vatican Official on Sex abuse-related Charges', *The Washington Post* (online, 13 December 2018) <https://www.washingtonpost.com/world/australian-court-convicts-once-powerful-vaticanofficial-on-sex-abuse-related-charges/2018/12/12/da0d909c-fe20-11e8-a17e-162b712e8fc2_story.html>.

33 *United States Constitution* amend I. See *Sheppard v Maxwell*, 384 US 333 (1966); *Nebraska Press Association v Stuart*, 427 US 539 (1976).

Please Takedown Facebook
(strike that, reverse it)

Hannah Marshall and Sophie Ciufo, Marque Lawyers, survey the social media landscape.

The EU (and the rest of the world, really) is popping currently with directives, cases and calls for reform and regulation addressing the legal, social and political obligations of digital platforms.

Recently, the Court of Justice of the European Union (ECJ) ruled that an individual has a legally enforceable right to be forgotten and France passed new copyright laws requiring service providers like Google to pay publishers for showing snippets of news articles in search results. Earlier this year, the UK released an Online Harms White Paper considering legislative measures to make digital platforms more responsible for online safety, illegal content and harmful behaviour, including imposing a statutory duty of care on digital platforms and setting up an independent regulator. Also, we can't go without mentioning Mark Zuckerberg's recent testimonial before US Congress, where he was pressed multiple times about Facebook's decision not to take down political ads, followed by Jack Dorsey's not-so-subtle announcement soon after that Twitter will ban political advertising globally.

The latest EU case has global implications. At the beginning of October, the ECJ held that the EU's e-commerce directive (Directive 2000/31/EC) can have global application.

We begin in Austria, where a politician sought an injunction against Facebook Ireland (which operates Facebook outside the United States and Canada, because #tax) after it refused to take down a statement publicly posted by another user that the politician claimed was defamatory. Eva Glawischnig-Piesczek wanted Facebook to take down the original post, as well as other posts with 'equivalent remarks', from the platform in Austria and worldwide.

The Vienna Commercial Court sided with Glawischnig-Piesczek and Facebook complied, but only in Austria. On appeal to the Austrian Supreme Court, the parties referred the case to the ECJ for guidance. The ECJ ruled that service providers, such as Facebook, can be ordered by a court of an EU Member State to remove or block illegal content (including defamatory content), worldwide.

This is problematic for social media providers, because other countries are also passing their own laws regulating social media that may have conflicting effects. So, it is clear we are in a time where social media platforms are increasingly under the global microscope for their legal, social and political obligations, as are the media companies using them.

Back in Australia, there have been a heap of legal developments applying to digital platforms in the last year.

In February, the Council of State Attorneys-General formed a working group to conduct a review of the model defamation provisions and released a discussion paper that considered a variety of issues related to online and digital platforms and defamation, including whether to adopt the UK's 'single publication' rule and amending the innocent dissemination defence to deal with digital platforms.

In April, the Government swiftly passed (without debate, amendment, or input from anyone who may have had even a morsel of value to add) the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019, making it a criminal offence for platforms not to report 'abhorrent material' to the Australian Federal Police once aware that the material is on their platform, and not to expeditiously remove the material.

The Act was passed after the livestreaming of the horrific attack in Christchurch, New Zealand. The Law Council of Australia reacted to the passing of the Act, calling it a 'knee-jerk reaction to a tragic event', stating that laws formulated in such circumstances 'do not necessarily equate to good legislation'. While platforms should wear some social and legal responsibility for the materials they allow to be published (acknowledging the significant power these platforms wield), the Government should also address the underlying issue of where and from who this content is coming, and why. The Act only deals with the fallout of the dissemination of such content and does not address underlying issues, for example, of hate speech and incitement of violence that we are increasingly seeing in society, both online and offline.

In June, the Supreme Court of New South Wales held media companies liable for defamatory comments made on new stories on their Facebook pages, in the case of *Dylan Voller v Nationwide News, Fairfax Media Publications and the Australian News Channel*. The court determined that media companies were liable from the moment of the comment's posting, based on a hypothetical ability to filter and review, and if necessary block, each comment prior to it being made public. The decision is under appeal.

In July, the ACCC released its final report in the Digital Platforms Inquiry. It proposes a truckload of new regulatory measures targeted at Google, Facebook, and other platforms. They include changes to merger laws, codes of conduct, a code to counter disinformation, copyright take-down rules, and a bunch of general and targeted privacy reforms.

Needless to say, these cases and the continued attempts at reform and regulation will keep swirling around in Australia and the rest of the world, and the law's attempt to regulate the behaviour of social media platforms will only continue to develop into a complex and unnavigable mess.

The only effective approach would be a coordinated global one. As if that's going to happen.

Anyway, the robots are coming so does any of this even matter?

Defamation Law and the Search Engine Operator Exception

Cheng Vuong, sessional academic at Swinburne Law School, presents his paper which won the 2019 CAMLA Essay Competition.

I. Introduction

The cornerstone of the action for defamation is the publication of defamatory matter.[1] In previous times, this has normally been through traditional media. However, the advent of the internet has been met with defamation against various internet intermediaries.[2] One such internet intermediary is the search engine. The question that arises is that given search engines throw up search results from other sources, can they be liable for defamation?

This paper canvasses the position with respect to search engine liability in the United Kingdom and Australia, and then discusses whether search engines should be liable for defamation. Ultimately, it is concluded that search engine providers should not be liable for defamatory content that appears in search results of their search engines.

II. Defamation Law and Internet Intermediaries

Defamation law aims to protect the reputation of the person defamed. The cause of action is the publication of defamatory matter.[3] '[A] person who communicates defamatory matter to another is liable only if the communication is intentional or negligent'[4] so accidental publication does not attract liability.[5] However, anyone who 'takes part in'[6] to whatever degree or authorises[7] the publication of defamatory matter may attract liability as a publisher for the purposes of defamation law. The author of the defamatory matter is clearly a publisher but it has been held that newspaper vendors,[8] circulating libraries,[9] a printer's servant[10] and television stations[11] are also liable as publishers because these parties have some involvement in communicating the defamatory matter as intermediaries.

It should also follow that internet intermediaries are liable for the publication of defamatory matter; internet intermediaries have taken part in communicating defamatory matter because the services that they provide are complicit in publication, which is arguably analogous to the newspaper vendor, circulating library or television station. In some cases, this is not in doubt. In the leading case of *Godfrey v Demon Internet Ltd* (***Demon Internet***),[12] the defendant was an Internet Service Provider (**ISP**). Among the services it provided to its customers was access to the USENET bulletin board (**Bulletin Board**). A defamatory message was posted on the Bulletin Board by an unknown author accessible from the defendant's news server. The plaintiff sent a letter to the defendant's managing director requesting removal of the message from its news server. The defendant did not remove the message, and it remained accessible on its news server until it was removed automatically. Morland J held that the defendant was a publisher of the defamatory message because each transmission from their news server was considered a publication of the posting.[13]

His Honour also held that the defendant's actual knowledge of the defamatory posting meant that they could not avail themselves of a statutory defence under the *Defamation Act 1996* (UK) (**UK Act**)[14] to absolve themselves of liability.[15]

However, not all internet intermediaries are analogous to the internet content host in *Demon*

1 *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 59.

2 These are discussed in this paper.

3 *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 59.

4 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 596 (Gummow J).

5 Ibid 595 (Gaudron J).

6 Legal commentators have used this term to describe the act that attracts liability for publication under defamation law: see David Lindsay, 'Liability for the Publication of Defamatory Material via the Internet' (Research Paper No 10, Centre for Media, Communications and Information Technology Law, University of Melbourne, March 2000).

7 *Webb v Bloch* (1928) 41 CLR 331, 364 (Issacs J).

8 See *Emmens v Pottle* (1885) 16 QBD 354; *Bottomley v FW Woolworth & Co Ltd* (1932) 48 TLR 521; *Sun Life Assurance Co of Canada v WH Smith & Son Ltd* [1933] All ER 432; *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566.

9 *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QBD 170; *Weldon v "The Times"Book Co Ltd* (1912) 28 TLR 143.

10 *R v Clerk* (1728) 94 ER 207.

11 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

12 [2001] QB 201.

13 Ibid 208-9.

14 Section 1.

15 [2001] QB 201, 212.

Internet.[16] In *Demon Internet*,[17] it was within the control of the defendant ISP to remove the defamatory posting. But not all internet intermediaries have control over the content that is viewed through the services that they provide. A search engine operator (**SEO**) is a type of internet intermediary that does not have total control over the content that its search engine displays. While the organic search results that a search engine generates depend partly on the web crawlers the search engine controls via a pre-programmed algorithm, search results are influenced largely by the search terms that the user enters. Given the differences between internet intermediaries that have control over the content they host, and SEOs, which arguably lack such control, the question that arises is whether SEOs can be considered publishers for the purposes of defamation law.

If an SEO were found to be a publisher under defamation law, it may be able to plead the defence of innocent dissemination.[18]

III. Search Engine Operator Liability

The liability of SEOs for defamatory matter that appears in the organic search results of their search engines centres on two questions:

(1) Can an SEO be considered a publisher under defamation law?

(2) If an SEO is a publisher, can it plead the defence of innocent dissemination?

In the UK and Australia, there are very few decided cases on the liability of SEOs for defamatory matter appearing in their search engines. However, the limited case law available shows a divergence in the approach of UK and Australian courts to these two questions.

A) United Kingdom

In the UK, the first and only case at present to examine the liability of SEOs for defamatory matter appearing in their search engines was that of *Metropolitan International Schools Ltd v Designtechnica Corp* (***Metropolitan Schools***).[19]

1. Metropolitan International Schools Ltd v Designtechnica Corp

The Facts

In *Metropolitan Schools*,[20] the plaintiff was a provider of adult distance learning courses in computer game design and development under the name 'Train2Game'. It brought proceedings for defamation against the first defendant, Designtechnica Corp, for allegedly defamatory postings made by third parties on bulletin boards hosted on its website and against Google UK and Google Inc (**Google**) as second and third defendants. The claim against Google UK and Google was that Google UK and/or Google published or caused to be published snippets of the allegedly defamatory material in search results on the search engines it operated in the respective jurisdictions.

Permission was granted for the plaintiff to serve Google outside of the jurisdiction. Google made various arguments in an application to set aside that order, including that it was not responsible for the publication of the allegedly defamatory snippet. In the course of considering whether to set aside that order, the Court considered whether Google, an SEO, could be considered a publisher for the purposes of defamation law.

The Decision

Eady J held that Google was not a publisher under defamation law. His Honour noted that the Google search engine operates automatically without any intervention from Google.[21] He reasoned that as the user - and not Google - formulates the search terms, it could not prevent the snippet from appearing.[22] Therefore, Google could not be considered a publisher as it had 'not authorised or caused the snippet to appear on the user's screen in any meaningful sense'.[23] In other words, Google lacked the intention to publish. His Honour considered that Google was merely a facilitator in the process of the snippet appearing in response to the user's search terms.[24]

His Honour also considered whether Google would incur liability after being informed of the defamatory content appearing in search returns. He distinguished the present case from the decision in *Demon Internet*[25] because an SEO lacks control to prevent defamatory content appearing in search returns because users effectively dictate what appears through their search terms whereas a website host does not.[26] According to Eady J, the fact that Google took steps to block certain Uniform Resource Locators (**URLs**) from where the defamatory content originated was a key factor in Google not incurring liability for publication on the basis of authorship or acquiescence.[27]

16 Ibid.

17 Ibid.

18 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 585 citing *Emmens v Pottle* (1885) 16 QBD 354. This is the common law defence of innocent dissemination. It has been effectively superseded by a statutory defence in various formulations: see, eg, *Defamation Act 2005* (NSW) ss 6, 32; *Defamation Act 2005* (Qld) ss 6, 32; *Defamation Act 2005* (Vic) ss 6, 32; *Defamation Act 1996* (UK) s 1.

19 [2010] 3 All ER 548.

20 Ibid.

21 Ibid 561.

22 Ibid.

23 Ibid.

24 Ibid.

25 [2001] QB 201.

26 [2010] 3 All ER 548, 562.

27 Ibid.

The finding that Google was not a publisher under defamation law meant that the application of the defence of innocent dissemination was not considered.[28] However, Eady J did make obiter comments about whether the defence of innocent dissemination under common law (**common law defence**) and statute (**statutory defence**)[29] would apply to Google. The statutory defence is made out if a person shows that:

- s/he was not the author, editor or publisher of the statement complained of;
- s/he took reasonable care in relation to its publication; and
- s/he did not know, and had no reason to believe, that what s/he did caused or contributed to the publication of a defamatory statement.[30]

His Honour noted the common law defence would not assist Google; a defendant who had notice that certain content was, or was likely to be defamatory could not avail themselves of the common law defence.[31] Although his Honour does not expressly state his reasons for this conclusion, given Google would need to be put on notice to take remedial action to block defamatory content from appearing in search returns, this would preclude it from relying on the common law defence.

Eady J also thought that Google could not avail themselves of the statutory defence for two reasons. First, he noted that it would be difficult for Google to make out the second limb of the defence relating to reasonable care because the defamatory snippet 'was brought about entirely by the search terms of the web user'.[32] Secondly, Google would not come within the definition of publisher under the first limb of the defence.[33] He notes that Google 'appear[s] to be a business which issues material to the public, or a section of the public', which comes under the definition of publisher in the UK Act[34] but later states that 'it is difficult to see how it would then qualify under [the first limb of the statutory defence]'.[35] It is submitted that Eady J's earlier interpretation is correct, which seems to make his Honour's conclusion contradictory. In any event, the difficulty in Google demonstrating that it has exercised 'reasonable care in relation to [the publication of the statement complained of]'[36] meant that Google could not rely on the statutory defence.

B) Australia

There have been a number of cases that have considered this issue.[37] In contrast to the UK, Australian courts appear to have adopted the view that SEOs are publishers for the purposes of defamation law. This discussion will focus on two cases that provide appellate court authority on this question.

1. First Trkulja Case

Milorad 'Michael' Trkulja has had a long-running battle with Google regarding material defaming him generated by Google's search engine.

In *Trkulja v Google Inc LLC (No 5)* (***Trkulja No 5***),[38] Trkulja sought damages from Google Inc (**Google**) and Google Australia Pty Ltd for allegedly defamatory material derived from image and web search results that suggested he was a criminal and a prominent figure in the Melbourne criminal underworld.

Beach J held that Google was a publisher even before it was notified of the defamatory material.[39] His Honour took the view that Google intended to publish the material the search engine produces because this was how its automated systems were designed to work.[40] His Honour contended that Google is much like a newsagent or library; such intermediaries have been held to be publishers for the purposes of defamation law.[41] The defence of innocent dissemination is not discussed in great detail but Google was able to establish the defence in respect of the web search results.[42]

Beach J distinguished *Metropolitan Schools*[43] on two points. First, his Honour noted that Eady J did not consider that search engines operate as intended despite their automated nature.[44] Secondly, the remedial actions that Google took in that case to block certain URLs from where

28 Ibid 568.
29 *Defamation Act 1996* (UK) s 1.
30 Ibid s 1(1).
31 Ibid 566.
32 Ibid 567.
33 Ibid.
34 Ibid; *Defamation Act 1996* (UK) s 2.
35 *Defamation Act 1996* (UK) s 1(1)(a).
36 Ibid s 1(1)(b).
37 *Trkulja v Yahoo! Inc LLC* [2012] VSC 88; *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533; *Rana v Google Australia Pty Ltd* [2013] FCA 60; *Bleyer v Google Inc* (2014) 88 NSWLR 670; *Duffy v Google Inc* (2015) 125 SASR 437; *Google Inc v Duffy* (2017) 129 SASR 304; *Trkulja v Google Inc* [2015] VSC 635; *Google Inc v Trkulja* (2016) 342 ALR 504; *Trkulja v Google Inc* (2018) 263 CLR 149.
38 [2012] VSC 533.
39 Ibid [18].
40 Ibid.
41 Ibid.
42 Ibid [12].
43 [2010] 3 All ER 548.
44 *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533, [27].

defamatory content originated were not applicable in the present case to determine the question about whether Google is a publisher.[45]

2. Second Trkulja Case

Trkulja commenced further defamation proceedings against Google five years later with this case reaching the High Court in *Trkulja v Google LLC* (***Trkulja***).[46] The allegedly defamatory material comprised:

(i) Google image results in response to search terms such as 'melbourne underworld crime photos'. Images of Trkulja were mixed with images of convicted criminals including Tony Mokbel and Carl Williams.

(ii) web results that generated image results similar to the above, and autocomplete predictions after a user typed in a portion of Trkulja's name. These predictions included 'milorad trkulja criminal' and 'michael trkulja melbourne underworld crime'.

Trkulja argued that the material conveyed various imputations including that he was a 'hardened and serious criminal', and associated with various underworld figures.

Google applied to set aside the proceeding because it had no real prospect of success for three reasons: (i) it is not a publisher; (ii) the search results were not defamatory;[47] and (iii) it was entitled to immunity from suit.

At first instance, McDonald J rejected all of Google's arguments.[48] His Honour followed Beach J's judgment in *Trkulja No 5*,[49] holding that it was 'strongly arguable that Google's *intentional* participation'[50] in publishing the search results meant it was a publisher. His Honour also held that it was 'certainly arguable' that the material was defamatory of Trkulja.[51] Google 'fell well short' of showing that Trkulja had no real prospect of success establishing that Google was a publisher and/or that the material was defamatory.[52]

Google advanced essentially the same arguments on appeal.[53] While Google's appeal was allowed on the ground that the search results were not defamatory of Trkulja,[54] the Victorian Court of Appeal considered at length whether Google was a publisher. The Court held that SEOs are publishers of the search results that they generate because they participate in the distribution of that defamatory material.[55] Their Honours considered SEOs should be classed as secondary publishers because they do not add anything to the material they disseminate[56] but that the defence of innocent dissemination would 'almost always, if not always' be applicable before notification of the defamatory matter.[57]

The High Court disagreed with the Court of Appeal's conclusion that Trkulja's claim had no prospect of success. The Court concurred with McDonald J that it was 'strongly arguable' that Google was a publisher because it intentionally participated in the communication of the allegedly defamatory material.[58] Their Honours were critical with the Court of Appeal's purportedly determinative findings on the issue of publication in the absence of evidence and before Google filed a defence.[59]

The Court held that the search results were capable of defaming Trkulja. Their Honours considered that the ordinary reasonable search engine user would contemplate a connection between the search terms and the results displayed.[60] As the impugned search terms related to the Melbourne criminal underworld, the ordinary reasonable search engine user would infer a connection between Trkulja and criminality.[61]

As the appeal centred on Google's application for summary judgment, the High Court did not come to definitive conclusions on the issues of publication and defamatory capacity of search engine results. Their Honours noted that the outcomes on these issues would depend on the evidence. The Court's judgment is nonetheless significant because its reasons indicate how future cases may resolve these issues.

45 Ibid.

46 (2018) 263 CLR 149.

47 It is beyond the scope of this paper to examine the defamatory capacity of search engine results, including autocomplete predictions. See generally David Rolph, 'The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in Trkulja v Google Inc' (2017) 39(4) *Sydney Law Review* 601.

48 *Trkulja v Google Inc* [2015] VSC 635, [6].

49 Ibid.

50 Ibid [67] (emphasis added).

51 Ibid [71].

52 Ibid [77].

53 *Google Inc v Trkulja* (2016) 342 ALR 504, 527 [96].

54 Ibid 597 [391], 598 [396].

55 Ibid 590 [348].

56 Ibid 590 [349].

57 Ibid 591 [353].

58 *Trkulja v Google LLC* (2018) 263 CLR 149, 163 [38].

59 Ibid 163-4 [39].

60 Ibid 171-2 [60].

61 Ibid 172 [61].

3. Duffy Litigation

The case of *Google Inc v Duffy* (***Duffy***)[62] concerned search engine results from a search of the respondent's name displaying extracts and hyperlinks to articles and comments on a website containing allegedly defamatory imputations, including that Duffy stalks and harasses psychics. Autocomplete predictions suggesting the phrase 'janice duffy psychic stalker' were also at issue. Google denied publication and pleaded various defences, including the defence of innocent dissemination.

At trial, Blue J held that Google was a secondary publisher of the extracts after notification and failed to remove them in a reasonable time.[63] His Honour followed *Trkulja No 5*,[64] finding Google 'played an active role' in generating and communicating the extracts to users which was not affected by the automated nature of their search engine.[65] The same finding was made in relation to the hyperlinks[66] (with the accompanying extracts)[67] and autocomplete predictions.[68] Once it was made aware of the offending material, the innocent dissemination defence[69] could not protect Google from liability.[70]

The Full Court of the South Australian Supreme Court dismissed Google's appeal.[71] The Court, also following *Trkulja No 5*,[72] held that Blue J was correct to find that Google was a secondary publisher of the defamatory material after notification.[73] Kourakis CJ explained that the inordinate number of searches Google conducted coupled with the vast amount of material on the internet meant that advance knowledge of the defamatory material was 'unrealistic'.[74] For this reason, the Court modified the common law innocent dissemination defence so that it ceases to operate after a reasonable time to remove the defamatory material has elapsed, and found it was not made out.[75]

IV. The Search Engine Operator Exception

Australian courts have tended to take an orthodox view about SEO liability for publication of defamatory content whereas UK courts have taken a very reformist view. In *Trkulja No 5*,[76] Beach J's conclusion that Google was a publisher appears correct as a matter of law. In *Urbanchich v Drummoyne Municipal Council*,[77] Hunt J noted that defamation law in the UK or Australia has never required a conscious intention to publish defamatory statements.[78] Beach J notes that Google did intend to publish the material that its automated search engines produced because this was how they were designed.[79] The judges in the *Duffy*[80] and *Trkulja*[81] cases observed that Google participates in the publication of the organic search results through the programmed operation of its search engine algorithm. Their Honours are technically not incorrect in their views, and given defamation is a tort of strict liability,[82] it appears correct that Google was found to be a publisher in *Trkulja No 5*,[83] *Duffy*[84] and *Trkulja*.[85]

However, as a matter of policy, the view taken by Eady J in *Metropolitan Schools*[86] about SEO liability for defamatory content is to be preferred. A pragmatic view is that SEOs do not intend to publish the material their search engines throw up because they have no control.[87] Indeed, this cannot be overlooked. Beach J in *Trkulja No 5*[88] took the view that SEOs were akin to newsagents and libraries in ascribing liability for publication to Google. However, a fact

62 (2017) 129 SASR 304.
63 *Duffy v Google Inc* (2015) 125 SASR 437, 496 [207], 497 [210]-[213].
64 [2012] VSC 533.
65 *Duffy v Google Inc* (2015) 125 SASR 437, 495-6 [204].
66 Ibid 499 [221].
67 Ibid 499-500 [225]-[230].
68 Ibid 503 [252].
69 At common law and statute: *Defamation Act 2005* (SA) s 30.
70 *Duffy v Google Inc* (2015) 125 SASR 437, 527-8 [380]-[387].
71 *Google Inc v Duffy* (2017) 129 SASR 304.
72 [2012] VSC 533.
73 *Google Inc v Duffy* (2017) 129 SASR 304, 358-9 [181]-[184] (Kourakis CJ), 401 [354] (Peek J), 456 [562], 465 [594], 467 [597]-[599] (Hinton J).
74 Ibid 359 [183]-[184].
75 Ibid 359 [184] (Kourakis CJ), 401 [354] (Peek J), 467 [598] (Hinton J).
76 [2012] VSC 533.
77 (Supreme Court of New South Wales, Hunt J, 22 December 1988).
78 Ibid 10.
79 *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533, [18].
80 *Duffy v Google Inc* (2015) 125 SASR 437; *Google Inc v Duffy* (2017) 129 SASR 304.
81 *Trkulja v Google Inc* [2015] VSC 635; *Google Inc v Trkulja* (2016) 342 ALR 504; *Trkulja v Google LLC* (2018) 263 CLR 149.
82 See Lindsay (n 6) 127.
83 [2012] VSC 533.
84 *Duffy v Google Inc* (2015) 125 SASR 437; *Google Inc v Duffy* (2017) 129 SASR 304.
85 It should be noted that the High Court concurred with Justice McDonald's finding on this question at first instance: *Trkulja v Google LLC* 263 CLR 149, 163 [38].
86 [2010] 3 All ER 548.
87 Joachim Dietrich, 'Clarifying the Meaning of 'Publication' of Defamatory Matter in the Age of the Internet' (2013) 18 *Media and Arts Law Review* 88, 102.
88 [2012] VSC 533.

that his Honour seems to overlook is that newsagents and libraries will exert control over the collections they house but SEOs do not have this ability given they operate in an automated fashion. The lack of human control an SEO has in the makeup of search returns[89] is one reason why the starting point should be that they are not classed as publishers.

The other reason is that whatever control they can exercise, it is unlikely to be very effective. In *Metropolitan Schools*,[90] Eady J made the point that an SEO blocking certain URLs does not prevent that search result appearing on another search engine nor another URL for that matter to avoid the block.[91] In contrast, when a website host takes down offending content, there is no way to circumvent that.[92] Admittedly, that offending content may appear on another website in the near future. Nonetheless, the salient point is that the controls of some internet intermediaries will be more effective than others.

The Victorian Court of Appeal in *Trkulja*[93] found that the innocent dissemination defence 'would almost always, if not always, be maintainable…before notification'.[94] The Full Court of the South Australian Supreme Court in *Duffy*[95] went so far as to modify the common law innocent dissemination defence to fit the unique circumstances of SEOs.[96] While these statements indicate that the innocent dissemination defence is broad enough to shield SEOs from liability, they ignore the fact the defence is very fact-sensitive and will not act as a 'safe-harbour'. The policy reasons outlined above demonstrate why legislatures should institute one for SEOs.

V. Conclusion

SEOs are a unique type of internet intermediary because they do not have control over the content that appears in the search returns of their search engines because of their automated. Nonetheless, this has not prevented SEOs from being sued for defamation by aggrieved persons. Despite the very limited cases that have emerged, we can tentatively say that two views have emerged on the liability of SEOs for defamation. The salient question to ask is whether an SEO can be considered a publisher for the purposes of defamation law.

While it is somewhat fact-sensitive, in the UK, the view taken is that SEOs are not publishers for the purposes of defamation law. In contrast, the opposite view is taken in Australia. For particular policy reasons, the position in the UK is to be preferred. This recognises the special characteristics of search engines, their automated nature and the limited ability of SEOs to police their search engines.

89 See especially *Bleyer v Google Inc* (2014) 88 NSWLR 670, 685 [83] (McCallum J).
90 [2010] 3 All ER 548.
91 Ibid 564.
92 See, eg, *Godfrey v Demon Internet Ltd* [2001] QB 201.
93 (2016) 342 ALR 504.
94 Ibid 591 [353].
95 (2017) 129 SASR 304.
96 Ibid 359 [184] (Kourakis CJ), 401 [354] (Peek J), 467 [598] (Hinton J).

Contributions & Comments

Contibutions 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**

Royals and the Right to Privacy: Comment on the Recent Claim by the Duchess of Sussex

Claire Roberts, Eight Selborne

The recent decision by the Duchess of Sussex to sue the *Mail on Sunday* and its parent company came as a surprise to many people – including, it has been reported, senior members of her staff. The Duchess, Meghan Markle, is among the most prominent public figures in the UK; a new member of a family that does not often litigate.

The case has been filed in the midst of a protracted debate about what protections should, or should not, be afforded to the fourth estate. It may have important implications for the development of privacy law in England and Wales, and elsewhere.

The claim

The Duchess claims that the *Mail on Sunday's* publication of portions of a letter she wrote to her father: (1) was in breach of copyright, as she wrote the letter and did not agree to its publication; (2) invaded the right she has to a private life pursuant to the *Human Rights Act 1998* (UK) (which incorporates the rights set out in the *European Convention on Human Rights*); and (3) violated obligations regarding the handling of personal data pursuant to the *Data Protection Act 2018* (UK) (which generally reflects the European Union's *General Data Protection Regulations*). The paper is defending the claim and continues to host the relevant article on its website.

Media reports have suggested that the case was rushed on urgently so that it would be heard by the Chancery Division of the High Court of England and Wales (broadly similar to the Equity Division of the NSW Supreme Court).[1] A change to civil procedure rules at the Court means that it would likely have been allocated to a new 'Media and Communications List' in the Queen's Bench Division if filed after 1 October 2019;[2] commentators suggest that this List may be less claimant-friendly than the Chancery Division has been.

Prince Harry released a statement on a personal website in which he indicated support for 'media freedom' as a 'cornerstone of democracy' but claimed that his wife had fallen 'victim' to 'powerful forces' in a world in which '[o]ne day's coverage is no longer tomorrow's chip-paper.'[3] The *Mail on Sunday* published a long piece five days later with new quotes from Meghan Markle's father: 'I decided to release parts of the letter because of the article from Meghan's friends in *People* magazine [an earlier publication the *Mail on Sunday* is likely to rely on in defending the claim]. I have to defend myself. I only released parts of the letter because other parts were so painful. The letter didn't seem loving to me. I found it hurtful.'[4]

The case has received widespread global coverage. Seventy-six female UK politicians recently weighed in to the dispute by signing an open letter addressed to the Duchess: 'we wanted to express our solidarity with you in taking a stand against the often distasteful and misleading nature of the stories printed in a number of our national newspapers concerning you… we expect the national media to have the integrity to know when a story is in the national interest, and when it is seeking to tear a woman down for no apparent reason.'[5]

Prior litigation by the Royal Family

Members of British royalty – among the most prominent, and media-conscious, families in the world - have sued before.

Kate Middleton won a privacy claim against French magazine *Closer* for publishing photos of her sunbathing during 2012 that British media had declined to publish.[6] Earlier this year Prince Harry accepted a financial settlement from a photographic agency that had taken pictures of his house from a helicopter.[7] It has also recently been reported that Prince Harry has filed a 'voicemail interception' claim against two media organisations.[8]

However, the royal claim most similar to the Duchess's is probably one brought by her father-in-law in 2006. Prince Charles convinced the Court of Appeal (England and Wales) that his privacy interests in a personal journal outweighed the public interest in his unfiltered thoughts about a

1 See, eg, Alex Barker, 'Royal legal action against press was timed to pick where case heard', *Financial Times* (7 October 2019).

2 Ministry of Justice, *109th Update to the Civil Procedure Rules*, <https://www.justice.gov.uk/courts/procedure-rules/civil>.

3 Statement by His Royal Highness Prince Harry, Duke of Sussex (1 October 2019) <https://sussexofficial.uk/>.

4 Caroline Graham, 'Why I shared Meghan's 'hurtful' letter: Duchess's father Thomas Markle reveals he kept note secret for SIX MONTHS and never intended to share it until HER friends spoke to a US magazine about it and 'misrepresented' its contents', *Mail on Sunday* (6 October 2019).

5 Statement published by @HollyLynch5 on Twitter, reported eg in Alan Yuhas, '72 British Lawmakers Condemn 'Colonial' Coverage of Meghan' *New York Times* (29 October 2019).

6 Telegraph Reporters, 'French Closer magazine loses appeal over topless photos of Duchess of Cambridge', *The Telegraph* (19 September 2018).

7 'HRH the Duke of Sussex and Splash News and Picture Agency Limited – Unilateral Statement in Open Court' (16 May 2019), available at: <https://www.harbottle.com/wp-content/uploads/2019/05/Statement-in-Open-Court-16-May-2019.pdf>.

8 'Harry Sues *Sun* and *Mirror's* owners in phone-hacking claim', *BBC* (4 October 2019) <https://www.bbc.com/news/uk-49940905>.

state visit (a claim about copyright in the material did not ultimately require examination).[9] The Court was sympathetic to what it deemed the 'public interest in the observance of duties of confidence' – even if a 'disloyal typist' were to sell a copy of the federal budget, 'there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.'[10]

Why this case is interesting

There are many reasons why the Duchess's recent claim may be of interest to Australian media lawyers, even though, as Dr Matt Collins QC addressed in the last edition of the *CAMLA Bulletin*, Australia does not recognise a cause of action for invasions of privacy of the kind that has developed in the United Kingdom and elsewhere.[11]

As above, the *Mail on Sunday* is likely to argue that the Duchess first released information about the letter herself. Whether there was a public interest in the publication is a key consideration to both the privacy and data protection claims. The *Mail on Sunday's* sister paper, the *Daily Mail*, has also recently run stories about the Duchess's general efforts to court media attention.[12] Facts such as these may be deployed in a debate about the interaction between Article 8 of the European Convention on Human Rights, which provides a right to privacy, and Article 10, which provides a qualified right to freedom of expression and information.

The specific facts in this case, and the vigour with which both parties have expressed their desire for litigious vindication, mean that the dispute could lead to an important authority in an influential jurisdiction. It may also take place against the backdrop of the UK exiting the EU.

The possibility of an Australian cause of action for privacy has of course been the subject of public debate and inquiry for a long time. Invasions of privacy are already actionable in Australia in some circumstances – such as where they involve a breach of confidence.[13] The topic appears likely to remain of interest as our courts grapple with balancing rights in a rapidly changing media environment.

9 *HRH Prince of Wales v Associated Newspapers Limited* [2008] Ch 57.

10 *HRH Prince of Wales v Associated Newspapers Limited* [2008] Ch 57, 124.

11 Volume 38(3), at page 23.

12 See, eg, Katie Hind 'The Night Meghan Markle begged me to get her IN the tabloids: The Duchess of Sussex spoke movingly about the pressures of the media spotlight, but as KATIE HIND reveals, she wasn't always so reticent', *Daily Mail* (27 October 2019).

13 See generally, eg: Barbara McDonald, 'A statutory action for breach of privacy: Would it make a (beneficial) difference? (2013) *Australian Bar Review 241*, particularly at 245-248; Des Butler, 'Protecting personal privacy in Australia: Quo vadis?' (2016) 42 *Australian Bar Review* 107.

President's Report by Martyn Taylor

This annual president's report is the last of the 2010s and in a few weeks we have the turn of the decade and we move into the 2020s. It is amazing how much has changed over the last decade – and the constant rapid pace of innovation and change in the technology sector. We are very lucky as telecoms and media lawyers to work in such a dynamic and interesting sector.

My objective as President for the last 12 months has been to ensure that CAMLA remains a vibrant, interesting and successful association for the benefit of media and communications lawyers.

Hopefully you all agree that we have again met this objective. It has been another great 12 months.

As I said last year, CAMLA is a voluntary organisation. CAMLA succeeds because we collectively make the effort to translate ideas into reality. We arrange high quality, relevant and interesting events. We produce a topical publication with outstanding content. We provide a forum for networking and sharing news. The more we each contribute, the more valuable CAMLA becomes as an association for us all.

I can't say that CAMLA has fulfilled its objectives without mentioning the support of the great many people that have been heavily involved in CAMLA over the last 12 months. I thank you all.

I'll start with the most important people, namely all the members of CAMLA. We have 348 people who are currently members of CAMLA. This means CAMLA is a relatively large association. We have 28 firms and organisations who have corporate memberships including a range of media companies, government agencies, law firms, industry associations, and content companies.

I'll next mention the CAMLA Board. We had 17 members of the Board over the 2019 year. I could shower praise on each of you and you each certainly deserve that, but I would like to make special mention of those in the executive positions:

- **Rebecca Dunn,** who stepped into the role of Secretary last year taking over from Page Henty. Rebecca has performed an amazing role as Secretary in keeping the CAMLA tradition of well-organised meetings with high quality minutes and records. Many thanks Bec.
- **Katherine Giles,** who has continued in the hot seat as Treasurer and Public Officer and has ensured the organisation has been running smoothly and within budget. Many thanks Katherine.
- **Debra Richards and Gillian Clyde,** who have been the two vice Presidents of CAMLA for the last 12 months. Both of them have been instrumental in organising key events, including the CAMLA Cup and seminars. Many thanks Deb and Gillian.

I'll continue as President during 2020 for my third term. Rebecca Dunn is continuing as Secretary. Katherine Giles is continuing as Treasurer and Public Officer. Deb Richards is continuing as one of the Vice Presidents. Gillian Clyde is stepping down to give someone else a turn on the executive, so Ryan Grant will be a new Vice-President.

Next, I'd like to mention the CAMLA Young Lawyers Committee. The contribution of the Young Lawyers Committee over the last 12 months has again been outstanding. Myself and the Board have been impressed and very grateful for the time and effort of each of the members of the CAMLA Young Lawyers Committee and the very high quality of the contributions made to CAMLA. Applications for membership of the new Committee for 2020 are due shortly. Please also encourage the Young Lawyers in your respective organisations to get involved.

Again, I would like to give particular thanks to Katherine Sessions for again chairing the Young Lawyers Committee over the 2019 year.

That brings me to the CAMLA Events. We have held 7 events in 2019, each of an incredibly high quality and receiving extremely positive feedback:

- the Integrity in Sports event in March
- a defamation reform seminar also in March
- the CAMLA Young Lawyers Networking Event in June
- a telecommunications panel discussion in August
- the CAMLA Cup at the Sky Phoenix in August
- an Open Justice seminar by Chief Justice Bathurst in October
- a seminar by Rod Sims on the role of the ACCC into the 2020s

That brings me to the Communications Law Bulletin. In my view the Bulletin has again gone from strength to strength.

We have had many insightful and interesting articles, including on such topics as algorithms, fake news, online piracy, and artificial intelligence. We have interviewed some of the most interesting and impressive people in the Australian media and telco landscape. The quality of the CLB over the last 12 months has been just fantastic.

My hat off to our two editors, Eli Fisher and Ashleigh Fehrenbach. They have a difficult task in co-ordinating the CLB. They have both driven the CLB with huge energy and enthusiasm. The high quality of the CLB over the last 12 months is testimony to this. Many thanks to you both.

I now turn quickly to the CAMLA administration and finances.

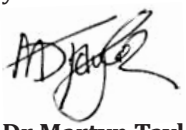
Of course, our huge thanks to Cath Hill on behalf of all of us on the CAMLA Board for her incredible effort over the course of the last 12 months in keeping us all organised as the administrative secretary.

CAMLA would not function without the efforts of Cath and it makes it a lot easier for those of us on the Board to ensure CAMLA and the events that we hold work like clockwork.

I'm not intending to spoil the excitement by giving too much away about our plans for the next 12 months - you will all just have to wait and see. We have plenty of great ideas.

The changes in the telecoms and media sector continue to provide many opportunities for interesting seminars and content.

For those of you involved in CAMLA - many thanks indeed from all of us and I look forward to working with you all over the next 12 months!



Dr Martyn Taylor
Partner, Norton Rose Fulbright

President
Communications and Media Law Association Incorporated

CAMLA Young Lawyers Committee 2019 Report

What a year! Mixing with industry was a large focus of the CAMLA Young Lawyers activity in 2019 and was achieved with great success!

Attendees at the sold-out Networking Event heard from an esteemed panel about career development for young lawyers and approaches to networking, participated in interactive app-based sharing of networking experiences and connected with other professionals over drinks.

Thank you again to our Networking Event panellists Ben Cividin (Head of HR, Kayo Sports), Ben Kay (Partner, Kay & Hughes, Art and Entertainment Lawyers), Nick Pascoe (Partner, MinterEllison), Sophie Malloch (Associate General Counsel, Facebook Australia and New Zealand) and Rebecca Sandel (Senior Director, Legal & Business Affairs, Universal Music Australia), for sharing their time and wonderful insights, which we have used throughout the year.

Challenges and Opportunities facing the Telecommunications Sector was also a sell-out event with the panellists discussing trending topics facing the telecommunications sector from 5G to national security reforms and mergers to convergence.

The CAMLA Young Lawyers again thank panellists Cameron Cross (General Counsel, nbn), Thomas Jones (Partner, Bird&Bird), Simone Sant (Deputy General Counsel, Vodafone) and Dr Martyn Taylor (Partner, Norton Rose Fullbright).

Throughout the year the Young Lawyers contributed various articles and event report backs for the Communications Law Bulletin, as well as profiling Dr Martyn Taylor, Larina Alick, Dr Matthew Collins QC, Richard Ackland and many more!

We had many opportunities to mingle with the Board in attending CAMLA Board meetings, sharing dinners and drinks, as well as a table at the CAMLA Cup - an event which was a great success yet again in 2019.

We would like to acknowledge and thank all the firms and companies that generously hosted our meetings throughout the year, and to Fox Sports and the ABC for the unique opportunities of having us in your live studio audiences.

Our achievements would not have been possible without such wonderfully collaborative CAMLA Young Lawyers Committee, comprising

- **Christian Keogh** (Webb Henderson) Co-secretary
- **Calli Tsipidis** (Fox Sports) Co-secretary
- **Michael Boland** (DVM law)
- **Amy Campbell** (HWL Ebsworth)
- **Tarah Koh** (Addisons)
- **Alexander Latu (**Addisons)
- **Eva Lu** (Thomson Geer)
- **Joel Parsons** (Bird & Bird)
- **Nicholas Perkins** (Ashurst)
- **Antonia Rosen** (Banki Haddock Fiora)
- **Belyndy Rowe** (Sainty Law)
- **Madeline James** (Corrs Chambers Westgarth)
- **Isabella Street** (Sony)
- **Patrick Tyson** (ABC)

Thank you to this year's team, with particular thanks to our co-secretaries Christian Keogh and Calli Tsipidis. Thank you also to CAMLA Board President Martyn Taylor, the CAMLA Board and Cath Hill, who have provided us with tremendous support throughout the year.

There is so much great work happening as we move into the new decade! We have a wealth of exciting and innovative CAMLA Young Lawyers events and activities under way for 2020 – including our annual Networking Event, an event focused on streaming services and an event focused on innovative tech.

If you would like to get involved in the 2020 CAMLA Young Lawyers Committee, please keep an eye out on the CAMLA website https://www.camla.org.au/ for nomination details, which will be opening up in December 2019.

Wishing you and yours all the best for the holiday season!

Katherine Sessions, Chair
CAMLA Young Lawyers Committee
eSafety Commissioner

ACCC Seeks to Restore Balance in the Media Industry

Tess McGuire, graduate at MinterEllison, discusses the final report of the ACCC's Digital Platform Inquiry.

The ACCC's Digital Platforms Inquiry Final Report (**Report**) has made recommendations that could significantly impact the regulation of the media industry and digital platforms, and the future for media organisations in the digital era.

Key takeouts:

- Digital platforms such as Google and Facebook could be required to 'fairly negotiate' with media organisations and apportion revenue they receive from their original content.
- The ACCC found that digital platforms are subject to virtually no media regulation, and have recommended the introduction of a platform-neutral regulatory framework to address this imbalance.
- The ACCC has proposed that digital platforms also develop an industry code of conduct that addresses the dissemination of harmful disinformation.

The ACCC's Digital Platforms Inquiry Final Report (**Report**) has delved into the disruption that digital platforms – largely, Facebook and Google – have prompted within the media industry. It seeks to shine a light on the costs and consequences, as well as ways we can embolden traditional media and journalism to survive in the digital era.

The ACCC's findings

The Terms of Reference for the Inquiry specifically requested the ACCC consider the impact of digital platforms on the level of choice and quality of news and journalistic content to consumers, and the broader impact on media and advertising markets. As a consequence, the Report provides insights into the operation of the modern media industry.

Some of these findings include:

- **Platforms are a news gateway:** Many Australians access news websites through digital platforms, with 32 per cent using Google, and 18 per cent using Facebook as a gateway.
- **Advertising revenue decline:** Commercial media has suffered from the reduction in advertising revenue over the past 20 years. The decline has been significant – from AU$2 billion in classified advertising revenue in 2001 to AU$200 million in 2016. This contrasts with digital platforms such as Google and Facebook which have grown to together account for nearly two-thirds of online advertising expenditure.
- **Reduction in professional journalists:** From 2006 to 2016, the number of Australian journalists working for traditional print and online news media businesses fell by 26 per cent.
- **Reduced regional coverage:** Between 2008 and 2018, 106 local and regional newspaper titles closed across Australia. This represents a net 15 per cent decrease, and has left 21 local government areas without coverage from a single local newspaper, 16 of which are in regional Australia.
- **Reduced public interest coverage:** Over the past 15 years, there has been a reduction of reporting relating to local government, local court, and health and science issues. For example, in 2018 Australia's major metropolitan newspapers published 40 per cent fewer articles on local court matters than at the peak of local court reporting in 2005, and 42 per cent fewer articles on science issues than at the peak of science reporting in 2006.

Many of the ACCC's recommendations focus on bolstering the commercial media industry in the face of these challenges and creating a more effective and consistent competition and regulatory landscape.

Recommendations addressing the imbalance

1. Codes of conduct

One of the more significant recommendations that could lead to practical ramifications for the bottom line of media companies is that designated digital platforms provide codes of conduct governing their relationships with media businesses to the Australian Communications and Media Authority (**ACMA**).

This stems from particular concerns the ACCC states were raised during the Inquiry, regarding the ability of digital platforms to alter key algorithms with no notice, and introduce policies or modifications that have the potential to significantly impact the dissemination of news and journalism (and the consequential monetisation).

The ACCC states that each platform's code of conduct should ensure that they treat news media businesses fairly, reasonably and transparently in their dealings with them, and contain at least the following commitments:

- the **sharing of data** with news media businesses;
- the early **notification of changes** to the ranking or display of news content;

- that the digital platform's actions will not impede news media businesses' opportunities to **monetise their content** appropriately on the digital platform's sites or apps, or on the media businesses' own sites or apps; and

where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to the how that **revenue should be shared**, or how the news media businesses should be **compensated**.

The final point is significant and even radical, as it introduces the prospect of revenue-sharing or compensation going from digital platforms to news media organisations – a proposal with potential to realign the trajectory of the media industry.

The ACCC has tasked the ACMA with the role of designating which digital platforms should be required to implement a code, creating guidelines regarding how platforms should develop a code and what should be included, approving proposed codes and dealing with breaches.

The Report recommends a strong enforcement mechanism be introduced, vesting the ACMA with power to impose sufficiently large sanctions that will act as an incentive for digital platforms to comply, and lead to real change.

2. Harmonised media regulatory framework

As a consequence, the ACCC proposes a process to implement a platform-neutral regulatory framework that would have oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms.

Again, the underlying purpose of this recommendation is to create a level playing field in our markets where current regulatory codes have failed to keep pace with technological changes that have revolutionised our consumption of news and media content more broadly.

The Report recognises that moving from disparate regulatory systems for publishers and broadcasters to a platform-neutral framework that sees obsolete regulations repealed is a significant reform. In light of this, a staged approach is recommended, but one that sees disparities of immediate concern addressed as a priority. These include the differences in election advertising restrictions and local content obligations that particularly, TV and radio broadcasters must adhere to.

3. Other targeted initiatives

The Report also recommends adjusting the tax settings to encourage philanthropic support for journalism. This would be through establishing new categories of charitable purpose and deductible gift recipient (**DGR**) status for not-for-profit organisations that create, promote or assist the production of public interest journalism.

Other proposals to improve the standard of media content include a grants program that supports the production of original local and regional journalism, as well as stable and adequate funding for the public broadcasters, the ABC and SBS.

What about #FakeNews?

A critical issue facing digital platforms in recent years has been the active dissemination of disinformation, colloquially dubbed 'fake news'. This has generated global discussion, as governments have had to consider the impacts on the free-flow of communication any regulation could have.

The ACCC has addressed this through a recommendation that would see digital platforms implement an industry code of conduct to govern the handling of complaints about disinformation (which is defined as 'inaccurate information created and spread with the intent to cause harm') in relation to news and journalism.

In order to avoid the abuse of such a regulatory system, the application of the code would be restricted to complaints about disinformation that meet a 'serious public detriment' threshold. The code would outline suitable responses to complaints of disinformation.

This recommendation is coupled with proposals that digital media literacy in both schools and the community more broadly is improved, and that the ACMA be directed to monitor the initiatives of digital platforms to implement credibility signalling to their users – allowing more trustworthy news sources to be recognised and relied upon.

Going forward

The ACCC's recommendations clearly have the potential to impact the nature of the relationships between digital platforms and media organisations, as well as how each are regulated. The federal government has committed to responding to the Report, in full, by the end of 2019.

Notable announcements since the Report include Google updating their algorithm to better promote and prioritise original journalism in the search results, as well as Facebook rolling out the 'Facebook News' tab in the United States which is intended to host content from quality journalistic sources. Facebook has also committed to paying some (but not all) participating publishers for their work – a response that goes directly to the issue of revenue imbalance. Perhaps 'Facebook News' is coming to Australia soon?

Tess McGuire is a graduate at MinterEllison. For further advice on these issues, please reach out to MinterEllison's Media Partner, Peter Bartlett, or Competition Risk & Regulatory Partners, Miranda Noble and Paul Kallenbach.

Consumer and Citizen Engagement in Self-regulation and Co-regulation: An Industry Stock Take

Karen Lee and **Derek Wilding,** University of Technology Sydney, **report on their research into the ways consumers and citizens have been involved in rule-making in the Australian advertising, media, online and telecommunications sectors.**

The industry and regulatory environment

Self- and co-regulation have become important components of the framework used to regulate the Australian communications industry. Despite the use of government regulation to promote a less fraught transition of consumers to the NBN and a November 2018 statement by the Department of Communications and the Arts that consumer safeguards for voice and broadband services are best delivered through direct regulation, both tools are likely to be used as the framework is adapted for the converged communications industry. Indeed, in the Final Report of its Digital Platforms Inquiry, the Australian Competition and Consumer Commission proposed new co-regulatory codes of practice for designated digital platforms such as Google and Facebook, as well as a 'disinformation' co-regulatory code for digital platforms generally.

Consumer and citizen engagement

Reliance on self- and co-regulation raises the issue of consumer and citizen engagement in the processes the converged communications industry will use to formulate rules. However, research into consumer and citizen engagement in industry rule-making has been limited, and there has been no attempt to map the mechanisms industry bodies and schemes (collectively referred to as 'schemes') use to engage with consumers and citizens or to assess how they may best be deployed to ensure self- and co-regulation within the converged sector is responsive and effective.

In this article, we present some of the findings of our 18-month long research project, which began the process of addressing the complex issues surrounding consumer and public engagement in industry rule-making.[1]

First, we briefly set out the scope of our research, including the 20 industry bodies and schemes that were its focus, and the methodology we used. We then identify the 22 public engagement mechanisms used by the various industry schemes. We conclude by presenting some insights gathered during three Round Tables with consumers, industry and regulators where their experiences with these engagement mechanisms were discussed.

The schemes we reviewed

Our project consisted of two stages.

In Stage 1 of the project, in addition to undertaking literature reviews, we mapped consumer and public engagement within the existing industry rule-making frameworks of the Australian advertising, media, online and telecommunications sectors (collectively referred to as the 'communications industry'). This resulted in a preliminary report, which was the basis for Stage 2 of the project.

In Stage 2 of the project, we ran three semi-structured Round Tables to explore aspects of the preliminary report with consumers, industry and regulators. We then reviewed the information and analysis in the preliminary report and produced a final report.

The 20 self- and co-regulatory schemes we identified in the communications industry are:

- Alcohol Beverages Advertising Code scheme (ABAC scheme)
- .au Domain Administration Limited (auDA)
- Australian Association of National Advertisers (AANA)
- Australian Broadcasting Corporation (ABC)
- Australian Community Television Alliance (ACTA)
- Australian Direct Marketing Association (ADMA)
- Australian Food and Grocery Council (AFGC)
- Australian Narrowcast Radio Association (ANRA)
- Australian Press Council (APC)
- Australian Subscription Television and Radio Association (ASTRA)
- Communications Alliance (Comms Alliance)
- Community Broadcasting Association of Australia (CBAA)
- Commercial Radio Australia (CRA)
- Federal Chamber of Automotive Industries (FCAI)
- Free TV Australia (Free TV)
- Independent Media Council (IMC)
- Interactive Advertising Bureau Australia (IAB)
- Media, Entertainment and Arts Alliance (MEAA)
- Special Broadcasting Service (SBS)
- Standards Australia

The overall functions of these schemes vary greatly and include industry peak bodies (eg Comms Alliance, CRA), broadcasters (the ABC and SBS) and a trade union (MEAA). Not all of the 20 schemes considered in this report are privately owned or developed. The ABC and SBS are created by statute and funded by government. The

1 The findings set out in this article are based on the published report, *Responsive Engagement: Involving Consumers and Citizens in Industry Rule-making*, a copy of which may be found at http://accan.org.au/grants/completed-grants/1431-responsive-engagement.

remaining 18 bodies and schemes are companies limited by guarantee, incorporated associations or other entities. Similarly, government involvement in their rule-making processes differs significantly between them. Some of their rule-making processes are subject to government or statutory regulation, which mandates consumer and/or public consultation; others are not.

The information we gathered

Each scheme was relevant to the project because it formulates codes of conduct, ethics or practice, guidance notes, guidelines, initiatives, policies, principles, specifications, standards or other forms of rules that have or are likely to have an effect on consumers or citizens. Table 1 lists the name of each scheme for which we were able to find information about rule-making and engagement practices, a brief summary of its functions and its rules relevant to the project.[2]

In 2018, we sent summaries of rule-making and engagement practices to the industry schemes for comment. Fifteen of the nineteen schemes responded.[3] In May 2019 we held Round Tables with three groups – consumer, industry and regulator representatives. In total, there were 29 participants in our Round Tables.[4]

Our findings: current mechanisms of public engagement

Of the schemes reviewed, it appeared that only the AFGC (which has developed the Responsible Children's Marketing Initiative for the Australian Food and Beverage Industry and the Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children) and IAB (which has developed best practice guidelines relating to internet-based advertising) had not incorporated some form of consumer or public engagement mechanism when they formulated or reviewed their initiatives.

Two other schemes – ADMA and FCAI – permit consumer and/or public engagement in their rule-making processes in some form, but the nature of these engagement practices is not apparent. FCAI commented on the summary we provided, but it did not elaborate on these issues. ADMA did not comment on its summary.

The other 15 schemes have used one or more of 22 mechanisms of consumer and public engagement in their rule-making activities, including, for example, advisory committees, audience feedback, relying on a consumer body to solicit the views of its members, focus groups, round tables, appointing consumer representatives to working committees responsible for rule drafting and/or holding meetings with organisations representing consumer and citizens. Table 2 lists the 22 mechanisms and the schemes that have used them.

In most cases, all mechanisms have been adopted voluntarily by the 15 schemes. It should also be emphasised that many of these mechanisms have not always been used by these schemes. Indeed, several bodies that participated in the Industry Round Table reported the precise public engagement mechanisms used were determined on a 'case-by-case' or 'needs' basis – decisions that reflected seven different factors, including:

1. the importance of the proposed rule or the change to existing rules;
2. the number of proposed rules or changes to existing rules;
3. the complexity of the underlying subject matter;
4. anticipated receipt of competing consumer viewpoints on specific issues;
5. government scrutiny;
6. expectations of relevant regulatory bodies;
7. cost and other resource-related implications.

However, some schemes have regularly used particular mechanisms. For example, Communications Alliance appoints consumer representatives to the working committees that draft new rules; Free TV seeks written comment on rules its member organisations have drafted; the Australian Press Council holds round tables to discuss issues and approaches; and AANA uses focus groups and surveys undertaken by the complaint-handling body, Ad Standards.

Providing an opportunity to make written submissions on draft rules was overwhelmingly the most common method used to engage with the public, although we found evidence that only a few consumers, citizens and organisations representing their interests make written submissions on draft rules when industry schemes provide them with such opportunities, despite industry efforts to publicise them. For example, CRA advised us that it now receives fewer than 10 submissions in response to draft codes published during its code review process.

Using complaints data to inform the development and revision of rules was the second most commonly used public engagement tool.

Insights from Round Tables

1 Experience with specific engagement mechanisms

Complaints data

There were mixed views on the efficacy of complaints data as a public engagement mechanism. ACMA and Australian Communications Consumer Action Network (ACCAN) representatives saw TIO complaints data as valuable, although ACCAN expressed some concern that the data 'can give a false picture of what's really happening' because the TIO collects information about escalated complaints, not all complaints made to telecommunications service providers.

However, complaints data gathered in the advertising and media sectors was seen as much less useful for several reasons. First, 'people don't generally put the effort into making complaints'.

2 Despite several attempts to contact ACTA, we were unable to find any information about its rule-making processes and its mechanisms of consumer and public participation.

3 The three schemes that did not respond to our request for comment on the summaries were ADMA, AFGC and IAB.

4 To obtain a copy of our summaries (as amended), go to https://www.uts.edu.au/sites/default/files/article/downloads/Industry%20Bodies%20and%20Schemes%20in%20the%20Communications%20sector%20-%20Summaries.pdf.

Second, individuals often do not complain because they believe their complaints will not be taken seriously. Third, complaints processes assume people 'feel empowered enough' and 'have the time and know the skills' to complain.

Written submissions

Several participants, including representatives from consumer organisations, believed written submissions can be helpful. However, many participants from each of the three Round Tables questioned their utility.

The ABAC representative stated 'the general public are very unlikely to engage in that way'. The auDA representative observed, 'we've averaged between 20 to 50 submissions over the length of policy review processes, which is in no way reflective or has any great scalability and probably doesn't influence the process to any great extent.'

Several consumer representatives drew attention to 'motivational barriers' and other obstacles to participation that made it difficult for individual consumers, consumer organisations and members of the public to make written submissions. One such barrier was 'submission fatigue'. Other barriers mentioned by consumer representatives at the Round Table included: the lack of 'trust that if you're going to put time into doing a submission … that anything is going to come out of it' and the absence of feedback from industry following submission of written comments. Several consumer representatives also agreed with this statement made by one such representative:

> the main downfall of written submissions is that often you get the impression that it's already a bit of a done deal, because something's already been drafted by people who think they know what we need …

Working committees

An ACMA representative (who spoke in his individual capacity) saw the appointment of consumer delegates to working committees as a 'superior tool' for consumer and public engagement. However, participation on working committees requires a 'significant time commitment', especially when issues are complex and contentious, and few organisations can afford to put in the time and resources needed. It was also suggested that the power balance on industry working committees, which formulate rules by consensus, may affect the dynamics of issues under discussion.

Among consumer representatives, there were mixed views about whether consumer participation on working committees improves the development of Comms Alliance codes of practice.

Surveys, focus groups and round tables

The ACMA representative commented that surveys and focus groups tend to be used as alternatives to working committees if a body still wants to draw in 'a wide circuit of participation' without a heavy time commitment. However, the Ad Standards representative pointed out that it is important to have participants who are open to new ideas involved in focus groups and/or round tables in order to justify their time and cost.

Use of social media

Several participants at the Regulator Round Table noted social media comments can be useful, but they have their limitations. However, many industry representatives expressed strong reservations about using social media to engage with citizens and consumers. Employing Facebook was seen as 'prohibitively expensive', and it was reported the company was reluctant to give out demographic information, making it difficult for industry schemes to find their target audiences. The difficulty in cutting through the now widespread use of Facebook, LinkedIn and Instagram was also seen as another drawback. Another concern was scepticism about whether active and frequent contributors on social media platforms accurately reflected the views of the general public.

2. Missing stakeholders and barriers to participation

Consumer representatives stated numerous stakeholders from vulnerable communities were missing from industry public engagement exercises. These missing stakeholders included: women escaping domestic violence, homeless individuals, young people, people exiting prison, individuals from regional, rural and other remote communities, people who do not speak English, recently-arrived refugees, people with disabilities, victims of privacy violations and young people. Small businesses were also identified as a particularly difficult group to engage.

Industry and regulators attributed industry's inability to engage with individuals other than the 'usual suspects' to several factors, including the technical complexity of the rules and/or decisions, the 'remoteness' of the issues 'to most people's lives', a lack of interest in the underlying subject matter and the limited funding consumer organisations receive from government. 'Exhaustion' also played a significant role.

Consumer organisations agreed that many of these factors are significant barriers to participation, but identified others, including:

- The belief that industry was engaged in 'issues management' when it undertook consultation rather than a 'discussion of the real issues'.
- A failure to recognise the cost of participation by individuals and compensate them for their time.
- The lack of time that individuals and organisations have to engage with the various issues.
- The use of technical and/or complex language.
- A failure to engage with consumers, citizens and related organisations early on in the rule-making process, eg when issues were identified and described.

Conclusion

The key issue that emerges from these findings is whether current consumer and public engagement practices are responsive. Responsiveness remains a highly influential principle of regulatory design that underpins many of the best known approaches to regulation (eg, 'responsive regulation', 'smart regulation and 'collaborative governance') and has served as a justification for the use of self- and co-regulation by governments, legislators

and policy-makers in Australia and worldwide.[5] It includes four essential elements:

- deliberation - the weighing up of alternatives and determination of what, on balance, meets the needs of all stakeholders
- impartiality - the exercise of some independent judgement by industry
- transparency - the disclosure by industry to participants in the rule-making process of information necessary to hold; and
- accountability - the explanation and justification by industry of its position to others.

Our research has found that the engagement mechanisms and practices of some industry schemes facilitate the achievement of responsiveness. With some persuasion, assistance and greater attention to regulatory design, the remaining schemes could accomplish the same objective.

The implications of our findings are discussed at length in our report *Responsive Engagement:*

Table 1: The schemes, their functions and relevant rules

Industry Body or Scheme	Functions	Relevant Rules
Alcohol Beverages Advertising Code scheme (ABAC scheme)	Scheme consists of ABAC Alcohol Marketing Code, the Alcohol Advertising Pre-vetting Service and a complaints adjudication process.	ABAC Responsible Alcohol Marketing Code
.au Domain Administration Limited (auDA)	Administers the .au domain and associated second-level domains.	21 policies
Australian Association of National Advertisers (AANA)	Represents advertisers.	Code of Ethics; Code for Advertising and Marketing Communications to Children; Food and Beverage Code Advertising and Marketing Code; Environmental Claims Code; Wagering Advertising and Marketing Communications Code
Australian Broadcasting Corporation (ABC)	Various functions, including providing within Australia innovative and comprehensive broadcasting services of a high standard.	ABC Code of Practice
Australian Community Television Alliance (ACTA)	Represents free-to-air community television channels.	Community Television Broadcasting Codes of Practice
Australian Direct Marketing Association (ADMA)	'Data-driven marketing and advertising'; one of four organisations of the Australian Alliance for Data Leadership Limited.	ADMA Code of Practice
Australian Food and Grocery Council (AFGC)	Represents Australia's food, drink and grocery manufacturing industry. Members include Coca-Cola, Kellogg and Arnott's.	Responsible Children's Marketing Initiative for the Australian Food and Beverage Industry; Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children
Australian Narrowcast Radio Association (ANRA)	'Peak industry body representing Low Power Open Narrowcast (LPON) Radio services and the High Power Open Narrowcast (HPON) Radio services located across all States and Territories of Australia.'	Open Narrowcast Radio Codes of Practice
Australian Press Council (APC)	'Setting standards and responding to complaints about material in Australian newspapers, magazines, their associated digital outlets, as well as a growing number of online-only publications.'	Statement of General Principles; Statement of Privacy Principles; Specific Standards (Coverage of Suicide; Contacting Patients) and 13 non-binding Advisory Guidelines.
Australian Subscription Television and Radio Association (ASTRA)	Represents the Australian subscription media industry in Australia.	Subscription Broadcast Television Code of Practice 2013; Subscription Narrowcast Code of Practice 2013; Subscription Narrowcast Radio Code of Practice 2013
Communications Alliance (Comms Alliance)	The primary industry body and industry co-regulatory body in the Australian communications sector.	Various, including the Telecommunications Consumer Protections Code
Community Broadcasting Association of Australia (CBAA)	Represents the interests of community radio broadcasters.	Community Radio Broadcasting Codes of Practice
Commercial Radio Australia (CRA)	Represents Australia's commercial radio industry.	Commercial Radio Code of Practice (15 March 2017)
Federal Chamber of Automotive Industries (FCAI)	Peak industry organisation for manufacturers & importers of passenger vehicles, light commercial vehicles and motorcycles in Australia.	Voluntary Code of Practice for Motor Vehicle Advertising in Australia
Free TV Australia (Free TV)	Represents all of Australia's commercial free-to-air television licensees.	Commercial Television Industry Code of Practice 2015
Independent Media Council (IMC)	Established by Seven West Media in 2012 to address reader complaints by publisher members.	Code of Conduct
Interactive Advertising Bureau Australia (IAB)	Administers the Relevant Rules (see next box), which are developed by members of the Australia Digital Advertising Alliance.	Australian Best Practice Guidelines Interest Based Advertising (or online behavioural advertising) (September 2014); Social Advertising Best Practice Guidelines 2013
Media, Entertainment and Arts Alliance (MEAA)	Union representing journalists and other media workers.	Journalist's Code of Ethics
Standards Australia	Development of Australian standards, including standards relating to communications, information technology and e-commerce services	Various standards
Special Broadcasting Service (SBS)	Multilingual and multicultural radio, television and digital media services.	SBS Codes of Practice

Involving Consumers and Citizens in Industry Rule-making, where we also make recommendations to promote responsive regulation through enhanced consumer and citizen engagement. We hope the research can contribute to the adaptation of the regulatory framework for Australia's converged communications industry and the review processes related to potential regulation of digital platforms.

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5 The concept of responsiveness is explored in Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Karen Lee, *The Legitimacy and Responsiveness of Industry Rule-making* (Hart, 2018) and Seung-Hun Hong and Jong-sung You, 'Limits of Regulatory Responsiveness: Democratic Credentials of Responsive Regulation' (2018) 12 *Regulation & Governance* 413.

Table 1: Engagement mechanisms

Mechanism	ABAC	auDA	AANA	ABC	ACTA	ADMA^	AFGC^	ANRA	APC	ASTRA	Comms Alliance	CBAA	CRA	FCAI	Free TV	IMC	IAB^	MEAA	Standards Australia	SBS
Advisory committee				YES							YES*									YES
Advisory council				YES																
Audience feedback				YES																YES
Complaints data	YES		YES	YES					YES	YES	YES	YES	YES	YES	YES	YES		YES		YES
Consumer views solicited by consumer body											YES									
Discussion at proposal stage		N/A									YES									
Focus group	YES	YES	YES	YES							YES									
Information dissemination		YES	YES	YES	YES			YES		YES	YES	YES	YES		YES	YES#		YES	YES	YES
Meeting with person conducting review			YES						YES		YES					YES				
Meeting with scheme's staff during proposal stage											YES									
Meeting with scheme's staff to discuss draft rules												YES			YES					
Phone submissions												YES								
Public fora		YES																		
Review of research by regulator			YES							YES		YES	YES		YES					
Review of previous submissions	YES																			
Round table									YES		YES									
Sentiment index			YES																	
Surveys of consumers or public	YES	YES	YES								YES									
Working committee		YES							YES		YES							YES	YES	
Written submissions at proposal stage																				YES
Written submissions on issues paper		YES	YES								YES							YES		
Written submissions on draft rules		YES			YES			YES		YES	YES	YES	YES		YES			YES	YES	YES

* Until 2008-2009 | # Provided to groups and individuals who meet with council members | ^ Information not available

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

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

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

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

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