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Law and Technology:
A Discussion with the Honourable Justice Michael Kirby

The **Honourable Justice Michael Kirby** is best known for his time on the Federal Court and High Court bench. Throughout his career, he has also held a number of high profile positions that have overseen and shaped the face of Australia's data, privacy and technology legal landscapes. Some of these include being inaugural Chair of the ALRC and Chair of the OECD Expert Groups on Transborder Data Barriers and the Protection of Privacy and Data Security.

Our **CLB Co-Editor Ashleigh Fehrenbach** reports on his reflections on these roles, as well as his thoughts on technology, privacy and defamation in Australia.

Ashleigh Fehrenbach: Thank you so much for taking the time to speak with the Communications Law Bulletin. What led you to gravitate towards these roles in the spaces of data, privacy and technology?

Michael Kirby: My work in this field grew out of my appointment, from January 1975, to be the Inaugural Chairman of the Australian Law Reform Commission. At the end of 1975, the incoming Fraser Government announced that it would give the commission a reference to prepare recommendations on the better protection of the law of privacy in Australia. In the course of that investigation I was sent to the OECD in Paris and was elected Chair of an Expert Group examining Transborder Data Barriers and the Protection of Privacy. My election to chair the expert group was in 1978. Its report was delivered to the Council of the OECD in 1980. That body adopted the *OECD Principles on the Protection of Privacy.* Those principles state the basic norms that should be applied by OECD member countries to data flows between those countries and thus to the laws applicable within them. The OECD principles have been very influential. They have resulted in legislation, judicial decisions and voluntary guidelines in most of the countries of the OECD. Those countries comprise substantially democratic advanced economies.

Fehrenbach: 2020 signalled the 31st anniversary of the internet in Australia. To touch on your experience as chair of the OECD Expert Groups, what do you see as being the advantages (or disadvantages) in Australia having an open and free access to the internet? What might be some challenges in achieving this going forward?

Kirby: The internet has revolutionised the spread and use of information and knowledge in Australia and worldwide. Potentially it has enhanced the knowledge base that is available to sustain democratic accountability. However, with these advantages have come risks and dangers. These include the development of social networks with many disadvantages in terms of the

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Editors' Note

Our dear CLB readers,

It's here. The final edition for 2020, and what a year it has been!

We will do our best not to mention what a wildly *unprecedented* year it has been for everyone, including us here at the CLB. We have certainly seen exciting developments across the board on defamation, technology and communication law issues.

In this edition, we're delighted to bring you the annual wrap up from Dr Martyn Taylor, who reflects on CAMLA's year, what events were held and how CAMLA is moving into 2021. We also hear from CAMLA Young Lawyers Committee Chair, Calli Tsipidis, on the exceptionally well received events, webinars and most recently, the newly launched podcast brought to you by the CAMLA Young Lawyers Committee.

COVID-19 has demonstrated the need to adapt and change with technology, and the legal industry is no exception. In a highly anticipated interview, Justice Michael Kirby shares his timely thoughts on developments in technology and how lawyers should utilise these advancements to better address problems in the Australian legal system. His Honour also discusses defamation, privacy and data security in his interview with **Ashleigh Fehrenbach**.

Speaking of privacy, **Gina Tresidder** and the team at Russell Kennedy Lawyers report on lessons from the Digital Platforms Inquiry 12 months on and what business need to do to ensure privacy and ACL compliance. And our **Eli Fisher** interviews dynamic dad-daughter duo, **John Gray** (Hall & Wilcox) and **Camille Gray** (Initiative Australia) in his first instalment of the CLB's Intergenerational Interesting Interviews.

We also hear from **Caitlin Whale** (Baker McKenzie) who speaks with **Rachael Zavodnyik**, Head of Legal APAC at Infosys.

On the defamation side, Australia's Model Defamation Provisions have created waves of activity and discussion. In October, CAMLA held its Defamation Reform Panel Discussion to capture some of this activity with presentations from experts **Robert Todd** (Ashurst), the **Hon. Mark Speakman SC MP**, **Associate Professor Jason Bosland** (Melbourne University)**, Marlia Saunders** (News Corp Australia) and defamation barrister **Lyndelle Barnett** (Level 22 Chambers). We're pleased to be able to include a report from what was a fantastically insightful event. For more on this issue, **Peter Bartlett** and the team at MinterEllison share their insights on the reforms and the recent passage of the *Defamation Amendment Bill 2020* (NSW). **Dom Keenan** also looks into the new public interest defence to defamation in New South Wales.

Also inside, we have reports from a number of the CAMLA Young Lawyers Committee representatives. **Tom Barkl** (ACMA) reports on the CAMLA Breakfast Seminar with the Hon. Paul Fletcher MP, who discussed a staged approach to media reform, where we are and the road ahead. **Jessica Norgard** (NBN Co) fills us in on the CAMLA Streaming Services 101 event.

The Courts have been kept busy in the lead up to the end of the year with important developments in both media and consumer law spaces. **Gina McWilliams** (News Corp Australia) shares her insights on the *F v Crime and Corruption Commission* (QSC) case. **Kirsten Webb, Damiano Fritz** and the team at Clayton Utz share the Federal Court's view on misleading and deceptive conduct in advertising in the *Telstra v Optus* case.

So, to say the least, 2020 has been a big one and we're already poised for an exciting and intriguing 2021. We will kick off the new year with an announcement of the winner of the CAMLA Essay Competition at the CAMLA Young Lawyers Networking event. We look forward to publishing the entries of the top three finalists, Kate Mani (*Social media and suppression orders: the end of e-secrecy?*); Anna Kretowicz (*Don't Ask Journalists To Keep Your Secret: Source Confidentiality In Australian Media*); and Isabella Barrett (*Comment is free, but at what cost?: An evaluation of the impacts of Voller on the concept of defamatory publication*). Well done to everyone who entered the competition!

Many thanks to Cath Hill for pretty much everything this year, and to Michael Ritchie at MKR Productions for making us look so good (even when we're WFH).

Finally, thank you to all the contributors and to you, our readers for sticking with us in this unprecedented time (well, we tried). We wish you all the best for the festive season. Here's to 2021!

Eli Fisher and Ashleigh Fehrenbach

spread of hostile and unwelcome information and opinions about others. The development of mass-media and the scrutiny by governments of mega data have also enhanced the risks to individual freedom. The introduction of artificial intelligence and automated scrutiny of data to impose control and restrictions on individual freedoms, including upon privacy, have also presented urgent new problems. With the enhancement of information systems have come significant dangers and challenges. Responses to those dangers and challenges have often been extremely slow and hesitant. Misuse is inescapable. Misuse by government and large corporations can be dangerous. What is needed is a more effective response by the law-making institutions of society so as to protect and preserve fundamental human rights, including privacy, honour and reputation, public health and similar values.

Fehrenbach: There have been significant global shifts throughout Europe in respect of privacy and data security, demonstrated in particular by the General Data Protection Regulation. You helped to develop the 1980 OECD Privacy Guidelines, which were highly influential in developing Australia's own Privacy Principles. How does Australia's privacy landscape today compare to the recent international developments?

Kirby: Australia has been lagging behind in the development of privacy and data security laws such as the general *Data Protection Regulation* of Europe. The OECD Guidelines of 1980 have, to some extent, been overtaken by new information technology. The determination in those Guidelines that personal data collected for one purpose might only be used for another purpose with the consent of the data subject or by (specific) authority of law is difficult to reconcile with the search engines that permit data to be scanned for purposes that were not considered and might not even have existed at the time of the original collection. However, the international community, including OECD, has not been able to agree on modifications of the OECD Guidelines. A new Privacy Commissioner has been created by the United Nations Human Rights Council for the purpose of developing principles in the context of the United Nations more generally. It was difficult enough to formulate the OECD Guidelines in a substantially uniform political and economic context of the OECD in 1980. Doing so for an organisation that serves almost 200 member states of the United Nations is an even greater challenge. It seems inevitable that global developments for better privacy protection will be patchy and slow.

Fehrenbach: In 1998, you wrote about the impact of technology on human rights. As we set our sights on 2021, do you still consider one of the chief challenges to human rights in the coming years to be the impact of technology on who we are, how we are governed and how we live?

Kirby: It will be apparent from what I have already said that I do believe that the impacts of technology on the human species constitute many of the greatest challenges. For example, these can be seen in the impact of the stockpiles of nuclear weapons and the failure to prevent proliferation of nuclear weapons technology. The recent ratification by the 50th member country to join the *Nuclear Weapons Ban Treaty,* which will come into force in January 2021, indicates the growing recognition of the seriousness of this failure. Likewise there is the impact of the modern technology of energy supply that has contributed to global climate change. Fracking is another potentially dangerous technology. Unless this problem can be addressed quickly, the impact on climate change may be irreversible. In addition to these technological developments, those in the field of informatics present many risks and dangers, some of which are mentioned above. Although the internet potentially releases the spread of information from control by limited media outlets, it also releases "fake news", misuse of information and risks of far greater governmental surveillance of individual human lives. The fundamental problem has been the failure of modern democratic

countries to keep pace with the needs for new regulations to control or supervise the distribution of knowledge and opinions in a way compatible with democratic governance and accountability.

Fehrenbach: Reflecting on your time as the inaugural chair of the ALRC, you saw the introduction of the internet and a gradual digitisation of court system. What recent technology do you consider to have been of greatest benefit to the Australian legal system?

Kirby: The Australian legal system, and particularly its judicial system could not have survived to the extent that it has during the COVID-19 crisis without the availability of audio visual links (**AVL**) (Zoom, Teams etc) to permit the argument of cases before courts in a way compatible with maintaining social distances and preventing the avoidable spread of the COVID-19 virus. AVL has been a successful innovation and it points the way to further innovations in court practice. However, suggestions by Professor Richard Susskind (UK) that much more radical technological change will be necessary to permit digitisation of official decision-making based on automated scrutiny of facts through algorithms of data need to be approached with caution. The requirement of maintaining human values and upholding justice remains a major necessity of the independent judge who is guardian both of the rules of legal system and their fundamental justice. Justice is a human value that cannot easily be automatically produced by machines.

Fehrenbach: What role should lawyers play in the development of innovation and technology within the legal system?

Kirby: Lawyers are becoming more technologically experienced and accomplished. They should assist governments, administrators and corporations to address the two principal problems and weaknesses of the present Australian legal system. These are cost and delay. To some extent, at least with some decisions, automated processing of data may be justifiable in order for society to render decisions more promptly and economically. Costs, delays and inefficiencies of the legal system can bring no satisfaction to the modern lawyer. The challenge will be to retain a legal system that observes democratic accountability (at least in a general way) and accessibility and affordability (at least in essential respects) constitute the major challenge facing the Australian legal system today. Fortunately, the technology promises many benefits, as we have seen through AVL during the COVID-19 crisis. However, technology also presents problems and some dangers. The challenge will be to take advantage of the advantages whilst responding effectively to the dangers and difficulties. Lawyers and their representative societies must be forthright in upholding universal human rights. This is rendered more difficult in Australia because of our failure (almost uniquely) to agree upon, enact and provide a constitutional, national or statutory charter of rights and freedoms. The lack of such a charter at such a time of radical technological change is a serious wound upon the body politic of the Australian Commonwealth.

Fehrenbach: Shifting the discussion to defamation, this year Australian states have agreed to a dramatic overhaul of its defamation laws. In 1977, you penned an article where you posited "Defamation actions show up Australian law at its worst". Where are we today? Is this still the case?

Kirby: Defamation law is a classic instance of an area of the law of importance to fundamental human rights. However, defamation litigation is now beyond the pocket of virtually every ordinary citizen who claims to be defamed. I hesitate to suggest it, but it might be timely to seek another national inquiry into the law of defamation by the Australian Law Reform Commission. The *International Convenant on Civil and Political Rights*, art 19(3)(a) acknowledges the need for protection of honour and reputation. This is a basic human right. However, past efforts to secure more cost effective and appropriate remedies for such wrongs have often failed because of the power and resistance of media interests and their influence on political decision-makers.

Fehrenbach: As the year begins to wrap up, some of our readers are looking to wind down with a book. What book are you reading at the moment?

Kirby: Following my work as Chair of the Commission of Inquiry of the Human Rights Council of the United Nations on North Korea, I have become interested in the origins of the international crimes of genocide and crimes against humanity. Also in the conduct of the Nuremburg Trials of 1945-6. At the moment I am reading the excellent and gripping book by Philippe Sands *East West Street* (Weidenfeld and Nicolson, 2016). It sounds a bit heavy; but it is truly an arresting story made personal by the fact that the two competing concepts (genocide and crimes against humanity) originated and were developed by two brilliant Jewish lawyers who grew up in the same city of Lemburg, later Lwov (Poland), still later, Lviv (Ukraine). The book shows that, despite the problems, human beings can grapple with huge challenges and devise just solutions for the international legal system. If Philippe Sands' book gets too heavy, I will reach out to a new Australian book relevant to the themes of this dialogue: Felicity Ruby and Peter Cronav (eds) *A Secret Australia – Revealed by the Wikileaks Exposés* (Monash University Publishing, 2020). It tells the story of Wikileaks and presents the challenge over Julian Assange, scoundrel or hero, that we should all be pondering. Let us look on 2021 optimistically as the beginning of a new age where humanity learns how to address the legal challenges caused by technology effectively with justice.

The New Defamation Laws: 2021 and Beyond

On 20 August 2020, CAMLA hosted a webinar for its members on the new defamation law reforms, moderated by **Robert Todd,** Partner at Ashurst. The following is a transcript of the event.

Panel

Robert Todd
Partner at Ashurst **(TODD)**

The Hon. Mark Speakman SC MP
Attorney-General and Minister for the Prevention of Domestic Violence, New South Wales **(AG)**

Associate Professor Jason Bosland
Director of the Centre for Media and Communications Law at University of Melbourne Law School **(BOSLAND)**

Marlia Saunders
Senior Litigation Counsel at News Corp Australia **(SAUNDERS)**

Lyndelle Barnett
Leading defamation barrister, Level 22 Chambers, Sydney **(BARNETT)**

TODD: First of all, Mr Attorney has some comments I think he'd like to make and deserves to make after all the effort he's put in so I'll hand straight over to the Attorney.

AG: Thank you Robert.

Thank you also to the Communications and Media Law Association and Ashurst for hosting today's seminar.

I would like to acknowledge the traditional custodians of this land, the Gadigal of the Eora Nation, and I pay my respects to their Elders, past, present and emerging.

The context for reform

These reforms come at a difficult time for media professionals. We have seen often savage changes to newsrooms across the country.

News journalism is more important now than ever. As governments take extraordinary measures to steer communities through the COVID-19 pandemic, we need a legal framework that supports journalists and lawyers holding governments and powerful individuals to account.

Pleasingly late last month the Council of Attorneys-General (**CAG**) agreed to the Stage 1 reforms to Australia's Model Defamation Provisions (**MDPs**).

The new provisions strike a better balance between, on the one hand, providing fair remedies for a person whose reputation is harmed by a publication and, on the other hand, ensuring defamation law does not place unreasonable limits on freedom of expression, particularly about matters of public interest.

Much has changed since the MDPs were introduced in 2005. Social media has democratised defamation.

In 2005, Myspace turned down an offer from Mark Zuckerberg to purchase Facebook for US$75 million.[1] Today, Facebook's market capitalisation is US$744.22 billion[2] - 10,000 times greater.

The 2005 laws came several months before the first ever tweet, before you could defame someone in 140 characters, or 280 characters these days.

Social media has paralleled an increase in defamation suits.

In September 2019, in an address to the National Press Club, Matt Collins QC noted that, on a per capita basis, superior courts in Sydney considered defamation cases more than 10 times as frequently as courts in London.[3]

Kate McClymont of The Sydney Morning Herald said recently that she spent 25 per cent of her working life in 2019 with lawyers about defamation suits.[4] This seems excessive.

The steps so far to reform

In February 2018, the former NSW Department of Justice conducted a statutory review of the state's Defamation Act 2005. The review identified a number of areas in the Act – and by implication, the MDPs – which would benefit from amendment or modernisation.

In June 2018, I asked the CAG to agree to the review's recommendation that the intergovernmental Defamation Law Working Party (**DWP**) be reconvened to review the model laws.

1 Sam Thielman, 'MySpace: site that once could have bought Facebook acquired by Time Inc' The Guardian (online, 12 February 2016) <https://www.theguardian.com/technology/2016/feb/11/myspace-time-inc-facebook-acquisition-ownership>.

2 Bloomberg (web page, 20 August 2020) <https://www.bloomberg.com/quote/FB:US>.

3 Interview with Matt Collins QC (Sabra Lane, National Press Club, 4 September 2019).

4 Zoe Samios, '"You just feel physically ill": Kate McClymont on a career of exposing Sydney's dark secrets' The Sydney Morning Herald (online, 25 January 2020) <https://www.smh.com.au/business/companies/you-just-feel-physically-ill-kate-mcclymont-on-a-career-of-exposing-sydney-s-dark-secrets-20200125-p53upb.html>.

The CAG agreed to target parliament-ready legislation by mid-2020. While it might sound surprising, the CAG considered a two-year uniform law reform process ambitious. This is because there are numerous steps involved in reforming model law.

In February 2019, the DWP released a discussion paper setting out issues affecting the MDPs and asking stakeholders to identify matters requiring reform. 44 submissions were received.

Based on stakeholder feedback, the DWP prepared draft amendments to the MDPs.

In November 2019, these draft amendments were released for public consultation. 36 submissions were received in response.

This work formed the basis of the amendments that each state and territory agreed in late July to introduce.

Within 15 days of the CAG agreeing to the amendments, NSW Parliament passed the reforms, which have since received royal assent.[5]

However, other states and territories have advised they cannot move as quickly, for example because they have elections coming up or because due to COVID-19 they do not have capacity.

The DWP is seeking agreement between members about a feasible common commencement date.

The agreed reforms

The key reforms agreed by the CAG include:

- The introduction of a mandatory complaints notice procedure and serious harm threshold, to reduce the number of matters proceeding to litigation.
- Clarification of the cap on damages for non-economic loss.
- The introduction of a single publication rule.
- The introduction of a new defence for publication of matter on a topic of public interest.

For a start, the reforms will encourage out-of-court settlement.

The reforms make it mandatory for a prospective plaintiff to issue a concerns notice before commencing proceedings.[6] They also clarify the form, content and timing for concerns notices and related offers to make amends.[7] Proceedings cannot be commenced until the applicable period for an offer to make amends has elapsed (generally 28 days). This will assist early dispute resolution.

For those cases that are litigated, plaintiffs will need to show they have suffered, or are likely to suffer, serious harm to their reputation.[8] This will be an element of the cause of action, generally to be determined by the judicial officer as soon as practicable before the trial.

This was one of the key issues raised in stakeholder submissions. The Law Council's submission responding to the discussion paper argued that defamation litigation is often disproportionate to the damages awarded.[9]

The reforms adopt a provision similar to the approach taken in the *UK Defamation Act 2013*. Plaintiffs will be required to prove the publication caused, or is likely to cause, serious harm to their reputation.

A high profile issue affecting defamation law in Australia has been the quantum of damages in recent cases.[10] Two key issues include: whether the cap on damages for non-economic loss operates a scale or as a cut-off, and whether the cap still applies when a court is satisfied that aggravated damages should be awarded.

The reforms clarify that, first, the cap – currently $421,000 – operates as the upper limit of a scale (i.e. the cap should only be awarded in a most serious case); and second, aggravated damages are to be awarded separately from damages for non-economic loss, such that the cap for the latter is preserved.[11]

Although the damages payouts to, for example, Wilson and Rush were comprised largely of damages for economic loss, this reform will at least ensure the cap on damages for non-economic loss is preserved.

The reforms also bring the law in line with the digital age by introducing a single publication rule.[12]

A cause of action in defamation arises when defamatory matter is published by the defendant. In NSW, section 14B of the *Limitation Act 1969* (NSW) provides that a person has one year from the date of publication to commence proceedings. For online material, publication occurs each time a third-party downloads the material. This means that the limitation period effectively does not apply when there are subsequent downloads.

The reforms adopt an approach similar to that in the UK Defamation Act. Under the single publication rule, the date of the first publication will be treated as the start date for the limitation period for all subsequent publications, except if the manner of a subsequent publication is materially different from the first publication.

5 Defamation Amendment Bill 2020 (NSW).

6 Model Defamation Amendment Provisions 2020 cl 12B (**MDAPs**).

7 MDAPS cls 12A, 13-16.

8 MDAPs cl 10A.

9 Law Council of Australia, 'Review of Model Defamation Provisions', submission to the Defamation Working Party, 14 May 2019, 42.

10 *Bauer Media Pty Ltd v Wilson* (No. 2) [2018] VSCA 154; *Rush v Nationwide News Pty Ltd* (No. 7) [2019] FCA 550.

11 MDAPs cl 35.

12 MDAPs sch 4 cl 1A.

While the rule proposed is medium-neutral, for electronic publications the date of first publication is the date the publication was first uploaded for access or sent to a recipient.[13] This differs from the approach taken in the UK. However, the CAG agreed the date of upload is more readily identifiable.

The reform that has attracted probably the most attention is the new public interest defence.[14] The MDPs recognise the right to reasonably publish information to an interested recipient (the defence of qualified privilege). According to the Bar Association of NSW, the defence is rarely effective at trial, particularly in cases involving mass media publications.[15] I am not aware of the defence when in section 30 of the *Defamation Act 2005* having ever been successful.[16] This isn't to say that defendants ought always to succeed. But the rarity of successful news media defences on this ground is a clear signal that defamation law is inhibiting publication and discussion of matters of public interest, contrary to the objects of the 2005 Act.

The new defence is based on UK law, and will require a defendant to prove both that the statement was on a matter of public interest and the defendant reasonably believed that its publication was in the public interest.

There are a number of other reforms introduced, including:

- Clarifying which corporations may have a cause of action.[17]
- Clarifying that a defendant may plead back imputations relied on by the plaintiff to establish the defence of contextual truth.[18]
- Clarifying that plaintiffs are required to seek leave from the court to commence proceedings against associated defendants for claims relating to the same matter.[19]

Further reform

The discussion paper of February 2019 asked stakeholders to comment on whether the MDPs are appropriate for digital platforms. It became clear that this issue could not be resolved satisfactorily by mid-2020. Either the reforms could be delayed to proceed as a whole, or they could be split to avoid holding up the better-understood issues.

The DWP is currently preparing a discussion paper for the 'Stage 2' reforms, which will focus on the liability and responsibility of digital platforms for defamatory material published online. Decisions such as *Voller v Nationwide News Pty Ltd*[20] will be examined. The defence of innocent dissemination, safe harbour provisions and take down procedures will be considered too. This overlaps with the Commonwealth Government's response to the ACCC's Digital Platforms Inquiry.

The Victorian Attorney-General also requested that Stage 2 consider protections for victims of sexual assault who make complaints to police and investigative agencies.

Conclusion

The overall reaction to the Stage 1 reforms has been positive. Criticism has had more to do with courts diverging from parliamentary intent. Many of you – whether in media, law, academia or government – will have a role to play in the interpretation and application of these laws. That's an important position to be in and one that I value highly.

Justice David Ipp said that "Many of the problems [with defamation] are the product of legislation and improvements will be slow until the legislation is changed."[21] His Honour was probably right, but I believe these reforms go a fair way to remedying these issues.

TODD: Thank you Attorney. Now we're going to delve into some of the detail and I'd like to start first of all with the serious harm threshold.

A significant amendment is the introduction of a serious harm threshold.[22] The new test reframes the tort of defamation to make it an element of the cause of action that the publication has caused, or is likely to cause, serious harm to the reputation of the person.

In the case of excluded corporations, the test is whether the publication has caused, or is likely to cause, serious financial loss.

The decision regarding whether the threshold has been reached is a question for the judge, not the jury. The judge is also able to consider this question on their own motion: they need not wait for a party to make an application, although it seems more likely an application will be required.

Given a threshold test naturally lends itself to being heard early in proceedings, many stakeholders questioned at the time of the draft MDAPs how this new threshold would fit with the Federal Court's Defamation Practice Note, under

13 MDAPs sch 4 cl 1B.

14 MDAPs cl 29A.

15 New South Wales Bar Association, 'Council of Attorneys-General Review of Model Defamation Provisions', submission to the Defamation Working Party, 14 May 2019, 35.

16 The defence of qualified privilege in section 22 of the Defamation Act 1974 appears to have been relied on successfully in at least six cases. The defence in section 30 of the Defamation Act 2005 was raised in Feldman v Polaris Media (No. 2) [2018] NSWC 1035 however, because the defences of honest opinion and justification were successful, qualified privilege was dealt with merely in obiter.

17 MDAPs cl 9.

18 MDAPs cl 26.

19 MDAPs cl 23.

20 [2020] NSWCA 102.

21 Justice David Ipp, 'Themes in the Law of Torts' (2007) 87 Australian Law Journal 609.

22 MDAPs cl 10A.

which the Court seeks to limit the number of issues heard at an interlocutory stage, preferring to deal with such issues at trial. Frankly it doesn't fit with the practice note or the Court's disposition on interlocutory matters in defamation, as the final proposed amendments clarify that if a party applies for the serious harm element to be determined before the trial, the judge should determine the issue as soon as is practicable, rather than waiting until the trial.

The final drafting of the serious harm threshold provision invites it to be determined as a preliminary question, especially given it is now an element of the tort. A significant rise in the number of hearings involving preliminary questions can therefore be expected with the attendant costs of calling evidence on the issues.

Parties should also expect that they will be asked at the first directions or case management hearing whether the serious harm element is in issue. Thus early consideration of this element is essential. In cases where the threshold is not in issue (e.g. large circulation of a serious imputation), courts will expect the defendant/respondent to admit the element in their defence. However, in cases where there is a genuine question as to whether or not the serious harm threshold is met, a separate hearing on that issue is likely, and it may be appropriate for a defendant to seek an extension of time for service of the defence until after the separate issue is determined. Separate hearings on the threshold question will require plaintiffs/applicants to prepare and adduce evidence of the actual harm or loss caused or likely to be suffered, and that evidence will be tested by defendants/respondents at the hearing. The UK experience indicates that preliminary hearings in proceedings which involve a serious libel but only limited publication will raise significant evidentiary questions and take up valuable court time.[23]

The inclusion of this threshold is a response to the increase in "backyard fence" litigation: small disputes between individuals amplified into resource intensive court proceedings, which have proliferated in the age of social media. It seems likely that the introduction of this threshold will assist in reducing the amount of such litigation that proceeds to trial, and may also deter the commencement of some matters.

If a defendant/respondent applies early in proceedings to have the serious harm element determined and the judicial officer rules in the plaintiff/applicant's favour, a question that arises out of the proposed drafting is whether the defendant is able to raise the issue again later in proceedings if more information about the consequences of the publication becomes available. For example, evidence about the harm suffered as a consequence of the publication (or lack thereof) may be adduced from discovery, subpoenas and cross-examination of key witnesses during the trial. This question is particularly relevant in light of the decision to abolish the defence of triviality, which currently provides defendants with a defence at trial if they can establish that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

There is likely to be a period of transition as courts in Australia interpret the new threshold of serious harm (for example, whether it is an issue that can be raised more than once). With the introduction of the new threshold, it will be necessary for publishers to establish a strategy going forward for the preparation of evidence on seriousness, so that such evidence can be collated and deployed early in a proceeding in order to dispose of claims that don't meet the threshold quickly and cost-effectively. Similarly, prospective plaintiff/applicants will need to be mindful of the evidence required to establish sufficient harm prior to commencing proceedings.

TODD: We'll now move onto the new public interest defence in section 29A. Jason, what is pretty interesting, at least to me, is why there were two different approaches looked at. One was the New Zealand approach and the other was the UK approach. I'd like to get your perspective on the one with settled on. Do you think that's going to work as well in practice?

BOSLAND: Well I think it would certainly work as well as the New Zealand approach. I think it's probably better than the New Zealand approach.

The new section 29A broadly adopts the language of section 4 of the 2013 Act in the UK, in terms of reasonable belief of the defendant that the matter is in the public interest. But I think there are some significant differences that need to be pointed out that might affect its operation and in fact might result in it operating quite differently from the UK equivalent in some ways.

The first is the focus of the UK defence on the defendant's reasonable belief that publishing the "statement" was in the public interest. It is clear from the UK case law that a single publication can include multiple "statements" and that the term is used to delineate particular parts of a publication from which individual defamatory meanings are conveyed.[24] The new section 29A, on the other hand, focuses on the broader concept of "matter", which is defined under section 4 as, in essence, the publication *as a whole*.

This, I think, creates a tension between the focus on imputations in defamation litigation in Australia

23 *Lachaux v Independent Print* ([2015] EWHC 2242 (QB)), where the preliminary hearing before Warby J took two days.

24 See, eg, *Serafin v Makliewicz* [2020] UKSC 23, [27].

and the focus in section 29A on the public interest in the publication *as a whole*. Presumably, if it is found under the new provision that the matter concerns an issue of public interest, it must also be shown that the particular aspect of the matter from which an imputation arises is relevant to such public interest. The more difficult question will be whether – and to what degree – the reasonableness of the defendant's belief will be judged by reference to the precise imputations that have been conveyed or the statements from which they have arisen, rather than the publication as a whole. And, what will happen if a matter which on the whole is on an issue of public interest but is found to give rise to at least one imputation that does not contribute to such public interest – will this result in the defence being defeated in relation to all imputations?

The second key difference is that section 29A, unlike section 4 of the UK Act, contains a list of factors that can be broadly referred to as the "responsible journalism" factors. Some have suggested that the inclusion of the list will lead to a continuation of the practice in Australia developed under the existing reasonable publication defence in s 30 where Courts treat such factors as a checklist. For a number of reasons, I'm not sure that this will necessarily be the case. First, there is a clear legislative intention to move away from that approach. Indeed, section 29A(4) provides that the factors are not to operate as a checklist, nor are they exhaustive. Second, the question of the reasonableness of the defendant's belief that publishing the matter was in public interest will be a question of fact for the jury rather than the judge. I think that this will mitigate the potential risk that there will be an intense focus on the checklist.

However, I think it is important to mention that there is a potential price to be paid for placing this defence in the hands of the jury. The price is that we won't have reliable case law – at least not reasoned judgments – coming through indicating what will satisfy the defence and what will not. In other words, we won't have the "valuable corpus of case law" that Lord Nicholls spoke about in *Reynolds*.

The other possible issue is that the jury will have the task of determining whether the matter concerned an issue of public interest. However, under other defences – namely, fair comment and statutory honest opinion – the question of public interest remains a question for the judge. This gives rise the possibility that there might be conflicting determinations on the question of public interest in the same case and in relation to the same publication.

The final key difference between section 29A and section 4 of the UK Act is the omission in section 29A of a specific provision targeted at neutral reportage. I think this omission is a missed opportunity. The "reportage" defence as recognised under the common law and enshrined in s 4 provides such a strong, predictable and importance defence in the UK, allowing the media to neutrally report allegations being cast back and forth in the context of a dispute of public interest. It is key to addressing the sharp chilling effect of defamation law on responsible publishers and I am surprised it has not been included.

TODD: Can I just pick up on one thing, given that the vast bulk of cases are currently being issued in the Federal Court and thus not jury cases, absent some legislative change there, won't we get at least some degree of case law about the operation of 29A and how to approach the list itself?

BOSLAND: Yes, I think that's right. Obviously there will be cases that are tried without a jury, usually in the Federal Court of course. Those cases will be there to provide guidance. However, most cases will continue to be heard before a jury in the State Supreme Courts.

TODD: Thanks Jason.

Marlia, all of this is probably frightening for you as an in-house lawyer having to deal with something entirely new and guess how it will work. But one of the things you probably see a lot of is Concerns Notices and we saw how that had an impact when the 2005 Act came in, and quite a positive impact, I think. What are the main issues you have encountered with the previous Act and how are the new amendments going to change that process upfront, which obviously is a critical one in keeping costs down and keeping matters out of court?

SAUNDERS: Absolutely. I think the biggest frustration has been when plaintiffs don't send Concerns Notices at all prior to commencing proceedings or when they send them very, very late in the limitation period, so the limitation period is almost at its end. Obviously the best time for a plaintiff to raise a complaint is as soon as possible after the publication has occurred, which means that steps can be taken promptly to mitigate any loss or damage, such as taking down an online publication, amending it, publishing an apology or correction or clarification etc. If a Concerns Notice is received proximately to the publication it can really make an impact on mitigating any loss or damage.

It's also the time when a publication is fresh in the minds of a journalist, so evidence is more readily available and it's easier to assess whether a publication is defensible. The closer it gets to the end of the limitation period you start to question whether a plaintiff is truly concerned about damage to their reputation. The whole purpose of the offer to make amends regime is to encourage, as you said, the early resolution of disputes without recourse to expensive litigation. I think that more was needed in the legislation to encourage complainants to send Concerns Notices in a timely manner, and I think that the most significant amendment in this area, which is the new introduction of section 12B, achieves that.

Section 12B will now provide that a plaintiff cannot commence defamation proceedings unless they've first sent a Concerns Notice and the applicable period for making an offer to make amends has elapsed. A Statement of Claim can no longer be treated as a Concerns Notice and, in addition to specifying the defamatory imputations, a Concerns Notice will now have to include additional information which was not previously required, in order for it to be effective as a Concerns Notice, including details of where a matter complained of can be accessed (such as a URL), details of the alleged serious harm to a person's reputation, and in the case of an excluded corporation, the alleged serious financial loss.

If the Concerns Notice does not contain adequate particulars and the complainant does not provide those particulars within 14 days after the receipt of a further particulars notice from a publisher, the Concerns Notice is taken to have not been sent, and therefore proceedings can't be commenced.

I think this will be very helpful for mass media publishers, but also for "backyarder" type complaints, where the complainants are self-represented. It could reduce the incidence of vexatious claims being filed with the Courts, which often occurs without any prior notice at all, or at least it may provide a basis for the strike out of the claim at an early stage due to the lack of a compliant Concerns Notice having been provided.

Another recurring issue that came up a lot after the 2005 Act was introduced was confusion around the wording in section 18, which required that a publisher had to be "ready and willing" to carry out the terms of an offer "at any time before the trial".

Because an offer has to be reasonable in order to obtain the benefit of a section 18 defence, there was uncertainty about whether the offer had to be left open all the way up until the first day of the trial, or whether it could have a more limited duration and still be reasonable. And although this has been resolved to some extent in the case law, with Justice Nicholas in *Bushara v Nobananbas*[25], and the Court of Appeal in *Zoef v Nationwide News*[26], each holding that an offer of amends may be left open for a fixed term of reasonable duration, Justice McCallum did observe in *Vass v Nationwide News* at first instance[27] that it may be difficult to argue that an offer closed well before a trial could be reasonable. On appeal in that case, the Court of Appeal observed that the language in the Act was uncertain.[28]

So, clarifying what is a reasonable duration for an offer to remain open was a pretty important issue and that has been addressed now. Section 15 has been amended to clarify that an offer to make amends needs to be open for at least 28 days, which addresses the confusion around whether it needs to remain open until trial. And I think that change could also provide an indication to the Courts about the duration of offers considered by Parliament to be reasonable.

One other short issue that has been addressed is there was some inconsistency between the language in section 14, which provided for 28 days after the receipt of a Concerns Notice to make an offer to make amends, yet section 18 provided that an offer must be made as soon as possible after becoming aware that the matter may be defamatory. Some plaintiffs have argued that an awareness that something may be defamatory could predate receipt of a Concerns Notice. The language in section 18 has now been amended to clarify that for the purposes of the section 18 defence, the offer is to be made as soon as practicable after receiving a Concerns Notice.

TODD: Marlia, you probably realise better than most the issue of publication is now incredibly vexed. The single publication rule will not apply to subsequent publication if the manner of that publication is materially different to the manner of the first publication. Now do you see any issues arising from that in practice?

SAUNDERS: I think there is some potential for confusion as to what is meant by the manner of publication being materially different. The new section provides, as it does in the UK, that in deciding that issue the Court may have regard to the level of prominence given to a matter complained of and the extent of subsequent publication.

The commentary on the UK section says that a possible example of this could be where a story has first appeared in a relatively obscure section of a website which takes multiple clicks to get through to and later it's put on the homepage. So the availability of the article, and the number of eyeballs on it, is materially increased and the suggestion is that the limitation period could be refreshed where the story is promoted in that way.

However, it's also been observed that if there is some change to a website in the background or by external forces unrelated to the publisher which causes a story to be promoted in some way, it should not be interpreted as amounting to it being published in a materially different form.

Another example of where this could arise and be problematic is where a television program is broadcast on television then years later is made

25 *Bushara v Nobananbas Pty Ltd* [2012] NSWSC 63
26 *Zoef v Nationwide News Pty Ltd* (2016) 92 NSWLR 570
27 *Vass v Nationwide News Pty Ltd* [2018] NSWSC 639;
28 *Nationwide News Pty Ltd v Vass* (2018) 98 NSWLR 672

available to download or stream on demand. Would that have the effect of refreshing the limitation period by making it more accessible to modern-day viewers even though there would be evidentiary difficulties if proceedings are commenced long after the material was created? I think we're likely to see some case law about this issue in the early stages after the legislation comes into effect.

TODD: Thanks Marlia. Lyndelle you've bravely agreed to wade into the quagmire that is contextual truth. That is brave indeed! Just as a starting point, do you think the amendments sufficiently clarify that the defendant can plead back the imputations relied on by the plaintiff as well as those it relies on to establish the defence of contextual truth under the Act?

BARNETT: I do. You describe it as brave, but I actually think this is one of the easier questions because section 26 was a section that was really screaming out for amendment. We had not only a number of judgments where Judges had called for this section to be looked at, but it was a case where the construction adopted of section 26 meant that the defence, as previously drafted, really didn't meet not only the legislature's intention, but it didn't meet the objects of what the section was directed towards.

The purpose of the contextual truth defence is to ensure that damage to a plaintiff's reputation is being assessed in the true context of what is said in the publication. And the tortured history we've lived through over the last few years, I think it will be really good to see that come to an end. As we know it started with *Kermode*[29] and I think you can really read in *Kermode* that it was a construction the Court didn't want to adopt, but was forced to because of the language in the previous section. I mean, there was just no way the Court could construe that legislation conformably with the legislature's intention.

And what we've seen since then is plaintiffs adopting really tactical decisions which has rendered the defence useless, really. It started with plaintiffs amending to adopt contextual imputations, and then defendants tried to meet that by saying *"Well alright, but if its proven to be true, we can have it back when we get to the assessment"*. And it was found that this wasn't permitted either.

We really got to a point where this defence was just useless and I would be advising defendants, "Don't plead it because all you're going to do is end up having to meet another plaintiff's imputation". I must say this is one of the amendments I was just so delighted to see that it got through because I think this wording does really make clear and it does fit with legislature's intention to make sure that a plaintiff's damages are assessed in their true context. What it clarifies is that the only two requirements of a contextual imputation are firstly that it is carried by the matter; and secondly that it's true. So there's no longer any requirement that it differ in substance from the plaintiff's imputation and that was with the vice of the previous section.

The other problem that we had with contextual truth that this drafting also fixes is it clarifies which imputations go into the plaintiff's basket and the defendant's basket when you're coming to the subsection (b) analysis. This wasn't so much of a problem in New South Wales as judges were generally declining to follow the Queensland Court of Appeal's decision in *Mizikovsky*[30], where it was found that in the assessment, the imputations that fell on the plaintiff's side included true imputations. But this drafting just clarifies that, so it's great to have a uniform national approach to that assessment task. It's now clear that when you are looking at the assessment you look at, on the one hand for the plaintiff, the imputations that aren't true, and against that to work out if there's any further harm from those, you look at all of the true imputations – plaintiff's or defendant's. It's great to see the insertion of subsection 2 just to ensure that this is adopted and the legislature have put it beyond doubt I think that a defendant is entitled to rely on a plaintiff's imputation as a contextual imputation.

So the section is, I think, well drafted and I don't really think there's any room for any interpretation contrary to the legislature's intention, although I very much hope I'm not proven wrong on that.

One of the benefits of having this section drafted this way is hopefully it will cut down interlocutory disputes. We did see a lot of interlocutory disputes arising from this defence. The one area where I can maybe see some dispute coming up, and I hope not, is that there's no requirement in the section for contextual imputations to differ from each other. I think it is possible that some defendants might plead nuance type imputations and a lot of them and that could be the kind of area where we might see objections taken, so I'd like to think that this defence is not used in that way and the defendants do plead the real imputations and don't plead multiple imputations where there's really no difference in substance.

TODD: Lyndelle, do you think that the amendments in section 35 bringing it back to where it is setting a scale and a range are going to work, particularly in light of the fact that aggravated damages are not capped, and must be awarded separately? Do you think we will still see what have been, at least in my view, large awards of aggravated damages going forward?

BARNETT: I don't think so; but I also don't think we'll see damages being awarded well within the range like we were prior to the

29 *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852; *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157.

30 *Mizikovsky v Queensland Television Ltd* [2014] Qd R 197.

Wilson decision.[31] This amendment is an important amendment for defendants. I mean, the *Wilson* decision and the verdicts that we've seen since that decision I think really did send a bit of a shockwave through the industry. It's always difficult to predict what damages might be awarded. But previously when the approach to section 35 was that section 35 set a scale - that's pre-*Wilson* when Courts generally applied Justice Bell's decision in *Attrill v Christie*[32] - you could have a fair go at guessing or estimating what the assessment would be and defendants could opt whether to take a risk and defend a story or not. Whereas post-*Wilson* it was almost impossible to estimate damages.

The intention of these amendments is to try and stop these large damages by separating out the assessment of general damages and aggravated damages. Certainly with general damages I think we will see those assessments come back to the pre-*Wilson* type assessments because section has clarified that this is intended to be a scale, so the cap really is for the worst case defamation and the others fit within that. I think for that component of damages we will see these awards coming down.

But aggravated damages, whilst they are to be awarded separately, they can exceed the cap. So it would be open for a Court to award a large award of aggravated damages and we might still see some of these large awards. I think that will be really interesting to see. Judgments where I've seen separate awards of aggravated damages, they're usually in the order of $10,000 or $20,000, not awards of several hundred-thousand dollars for aggravated damages. The benefit of that separate award for defendants will be that the reasoning in relation to the award will be exposed. If an award is so large that it appears to be punitive or manifestly excessive it will make it a bit easier for a defendant to appeal that. I mean, it's always difficult to appeal damages because they're an evaluative judgment, but if we start seeing judgments with that level of damages, I think that would be something that should be tested in the Court of Appeal.

SAUNDERS: Yes, large awards of aggravated damages could possibly be contrary to section 37, which provides that punitive or exemplary damages are not to be awarded. I'm bracing myself for an appeal on that point.

TODD: Mr Attorney, I assume it is the intention to do everything possible to discourage matters going before the Courts and that was the kind of reasoning behind resetting damages?

AG: Well everything reasonably possible. At the end of the day we still want to have legitimate protection of reputation. Although I note that in some of the celebrity cases that we've seen in recent years, most of the damages have been for economic loss, so this won't curtail that, but certainly the intention is to put downward pressure on damages awards where possible.

TODD: Would any of the other panellists like to comment on any of the other reforms?

BARNETT: One important aspect of the reforms that hasn't received much attention is the change to the defence of honest opinion. It has long been a bugbear of mine that the current statutory defence has been interpreted in a way that is quite burdensome in terms of the amount of factual material that needs to be included in the publication itself. In interpreting section 31, the courts have insisted that it incorporates the requirement under the common law defence of fair comment[33] that enough underlying facts – unless they are notorious – must be included to enable to the recipient of the publication to judge the comment for themselves.[34] This sets the standard so high that the defence is of extremely limited application, except in very clear 'review' cases (such as book reviews). The reform to section 31 will make the defence available where the underlying facts are set out in general terms, or accessible via a reference or hyperlink.

This is potentially a very significant change to section 31, not only when it comes publications conventionally classified as honest opinion, such as book reviews, but other publications as well, including investigative journalism. This is because 'opinion' can include factual allegations where such allegations are presented as conclusions, inferences, deductions, etc, from other facts. What has held this defence back in defending such 'factual' conclusions is the stringent requirement for the underlying facts to be stated to such a high degree of specificity. Therefore what appears to be a relatively insignificant tweak to section 31 could be quite an important reform.

TODD: Lyndelle, can I just ask you, when Jason was talking previously about the list of criteria in relation to the new public interest defence, do you have a particular view yourself about how the courts will approach that?

BARNETT: I think it's going to be really interesting to see how that is applied. The real benefit of this defence is that it tries to put the focus on the public interest and the importance of those public interest stories being written, as opposed to the previous section 30 defence where the focus was really on reasonableness as between the publisher and the plaintiff.

31 *Bauer Media Pty Ltd v Wilson* (No 2) (2018) 56 VR 674; (2018) 361 ALR 642.

32 *Attrill v Christie* [2007] NSWSC 1386.

33 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

34 See, eg, *Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661.

In terms of the list of factors in subsection 3, I can see an argument that they may put the focus a little bit back onto reasonableness as between the publisher and the plaintiff. For example, providing a reasonable opportunity to obtain a person's side of the story. I think time will tell. But the argument I think a defendant will put is: well you have to consider that in light of the importance in the public interest for this to be published. So the assessment whether those steps are adequate needs to take into account that it's accepted that there is a public interest in this story being published. I think it's very beneficial that it tries to put the focus back on that. I think there will be a tendency, particularly for plaintiffs, to argue that the previous case law under section 30, dealing with these factors, is applicable. And we may see a bit more of that level of perfection being required, that some argue section 30 is requiring. So I think it's going to be very interesting to see how those factors are construed in light of the elements of the defence in subsection 1.

SAUNDERS: I think it is good that there's been an additional factor included for the court to consider the importance of freedom of expression in the discussion of issues in the public interest as well. It does focus the court's attention on that issue in the list of factors that may be taken into account. One aspect of the UK provision which was not transported across into the section is that in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, the Court must make such allowance for editorial judgment as it considers appropriate. Even though it's not explicitly stated in our version of the defence, I would hope that in practice that is taken into account in applying the defence as well.

BOSLAND: There was one further thought I had about the operation of s 29A. Given that the question of whether the defendant *reasonably* believed that the publication was a matter of public interest is one for the jury and may be judged by reference to accepted standards of journalistic conduct, it may be that attempts will be made to rely upon expert evidence as to what would be expected of a journalist in the circumstances. I presume there'll be pushback against the use of this type of evidence. But I just wonder whether or not that might be something that we see come through the courts. I know it has been attempted in Canada where it is a question for the jury to determine whether a publication was responsible under the defence established in *Grant v Torstar Corp.*[35]

TODD: It was interesting to see in those cases how that evidence has been sought to be deployed in trials and it'll be just as interesting to see how the evidence is deployed in relation to section 10A.

We have a question: *"Are there any observations on whether the Concerns Notice will limit the imputations that can be pleaded in the Statement of Claim"*. He notes that Matt Collins has written an article suggesting pleadings will be restricted by the drafting of the Concerns Notice.

Maybe throw that, at least to you in the first instance, Marlia, if you have a view on that?

SAUNDERS: Section 12B requires that imputations be particularised in a Concerns Notice, then in any proceedings, a plaintiff can rely on some but not all of the imputations particularised, or imputations that are substantially the same as those particularised. So, yes, that does suggest that if an imputation has not been particularised in the Concerns Notice and it's materially different to the imputations specified in the Concerns Notice, it cannot form part of the pleading. That means the plaintiff has to try to nail the imputations upfront, which I think is a good thing from my perspective!

TODD: I have another question which is, *"Will the new provisions cover past publications"?* And I take that to mean this is a question about the effect of a single publication. Again Marlia, I think maybe you might like to say something about that.

SAUNDERS: It's intended that the amendments will apply to publications made after the amendments come into effect. However, in the case of the single publication rule there's a provision that says that if the original publication predated the amendment, then the single publication rule will apply such that the limitation period will be taken to have commenced from the date of that original publication.

TODD: And I think we have time for probably one last question: *"How, if at all, will the public interest offence change publisher's appetite to publish riskier stories and how will it or could it change the pre-publication advice provided to journalists"?*

And I'm afraid Marlia that's clearly a question for you.

SAUNDERS: That's me! [*Laughs*]. Well I think obviously the fact that publishers must have a reasonable belief that something is in the public interest means publishers aren't going to be publishing things without that in mind. In providing pre-publication advice, we will need to test that this is the case, and to consider the factors in the defence and make sure that the publishers have done what they need to do so that they have a really good shot of making out a section 29A defence. Particularly in the early stages before the defence has been tested in the courts, I think we will be going through that process carefully with our publishers and trying to give the defence the best shot at being argued successfully, so that it proves to be more useful to media publishers than the section 30 qualified privilege defence.

35 [2009] 3 SCR 640.

Profile: Rachael Zavodnyik, Head of Legal and Government Affairs APAC, Infosys

Caitlin Whale, Special Counsel, Baker McKenzie, sits down with **Rachael Zavodnyik,** Head of Legal and Government Affairs APAC, Infosys.

CAITLIN WHALE: Rachael - thanks for taking the time to talk with CAMLA today. Having reviewed your CV and seeing all the things that you have on I am particularly grateful. I can't imagine COVID is helping your workload.

RACHAEL ZAVODNYIK: Ah, the days are back to back and then the nights are just filled with reviewing documents and sending advices. I think every lawyer is experiencing the same sort of issue at the moment, that we're being tested at both ends.

WHALE: Your role as Head of Legal and Government Affairs sounds fascinating. Can you outline the work that you and your team do?

ZAVODNYIK: We support the business across a number of different industry verticals - everything's IT related obviously because that's what we do. We're IT services and software; software services and software provision.

We support industry verticals in banking, resources, energy and institutions, TMT, public sector and a variety of other retail businesses, so it's a really diverse portfolio. We support the contracting and deals that go along with those businesses.

In the last, I think, four years we have acquired a number of businesses across the world, and there's a lot of diverse work that comes out of this particular region associated with those businesses as well as a focus on process improvement, efficiencies and digital transformation.

WHALE: Unlike most in-house counsel, you have a role dealing with public officials and governments. How much of your work is involved in that and what's that experience like?

ZAVODNYIK: We have been building that function in Australia since the beginning of the year. I've been working a little bit longer in this space in a more ad hoc way but we are working with consultants to help us build this function out and develop networks with government.

We are members of industry leading bodies and, with other third party advisory people and we talk to institutions and we talk a lot to universities. We talk to state, federal and local governments. Our focus at the moment is with the Federal Government sector, that's where our business interests are. We also have an interest in enhancing the India-Australia relationship and there's a lot going on in that area at the moment. We've had great meetings with ministers, with backbenchers, with advisors; it's a fantastic opportunity to do something very different that is informed by the business that we are undertaking here in Australia.

It's not a marketing role, it is an informational role. So I'm well placed given what I do here in Australia internally to present Infosys externally in a way that's not pitching anything, it's all about education, about creating an understanding of what Infosys does in the community, what Infosys does within the industries that it's active in. So you have to understand what the government does - I'm a lawyer with an interest in government, I used to work in government and that's taken me down this path. I find that it's a natural synergy with what I do and I work with a group of lawyers internally, who also do the same thing just in different jurisdictions.

WHALE: You started out in a more traditional legal and contracting role within the business - how did your role develop into this legal and government affairs role?

ZAVODNYIK: It's been a very interesting journey and people don't often tell you that the best thing you can do is say "yes". So every time I was asked to take on something new I said "yes". Every time I was asked to volunteer for something I said "yes" and I was really interested and keen to learn about Infosys and the business and that's where opportunities arose.

WHALE: It sounds like your role has probably been more heavily affected by COVD-19 than a lot of us, given the amount of travel that you do. How are you working now and do you think that the changes that we have all made in the last few months will continue after we return to normal? If we return to normal?

ZAVODNYIK: Absolutely yes. We've been through a few iterations now. I used to travel, if not every week, every two weeks, internally in Australia or overseas. So yes, the entire landscape has changed radically and I've changed the way I run my team, the way I interact with my team, and the business has changed the way they interact with me. We still love meeting face to face and we're lucky that we can do a little bit of that in Sydney. But our offices have not reopened in Sydney or in Melbourne or in Brisbane.

In terms of how we work with customers, there was a shift prior to COVID to doing a lot less physical travel as companies hit quarter four their travel budgets seem to become contracted and you can't go anywhere. So in January we were already leveraging video conferencing and teleconferencing. It's very hard to balance children and work and just having a home life. I think it's become much harder in COVID because we live in our offices and you can't get away from the work. I finished work at 11 o'clock last night, not through any real desire to finish that late, but that's not unusual anyway in a global company where you've got meetings at all hours of day and night. I usually start my day at 5.30 in the morning so it's a very, very long day and I feel that that has intensified, my calendar is constantly full, if I don't block out chunks of time for myself to do actual work I'm constantly running behind the eight ball and that's really, really hard.

The thing that I've found interesting in the COVID environment is interacting with governments and elected officials. They have more time while you have to be somewhat flexible because they can cancel at any moment. I think that generally I've had a better interaction with them than when I was walking in the halls of Parliament House late last year. The opportunities to connect, the genuine focus on what they're doing with you in those meetings is very different - there's no lights going off in the corner, there's no bell sounding going "you've got to go and vote now" - it's a really different environment and different feeling and that's really fantastic.

WHALE: You've really got their full attention.

ZAVODNYIK: Yes and it makes a huge difference. While as lawyers were very used to getting on with the job of negotiating or finalising a deal or settling a matter or settling a dispute over the phone or via video conference, I don't think it was the same for politicians and it's amazing how they've actually changed the way in which they function to the benefit of the Australian public. We thought we would have no parliament for the rest of the year and they've managed to do it. While they can't vote face-to-face, they can actually do a lot of other things and I think transacting the business and getting the legislation through that they've managed to do in this really hard time is amazing. I think the way that COVID has impacted us can carry us through the future and that we should be actually campaigning for innovations that will give more flexibility and create better outcomes for the community to work in this way, going forward.

WHALE: What's your best working from home tip?

ZAVODNYIK: Routine then exercise. I walk every day - 30 minutes - I make that time "me time" and it's a regular time. I have a personal trainer as well and he calls me - I don't go into the gym because all these COVID hotspots seem to be generated out of gyms - and we do a lot of stuff at home. It's more focused on movement every day and diet.

So having a routine is really critical. Not getting into the trap of binge TV watching on the weekends, because that just kills your weekend and you stop doing things. I have a son who's very involved in scouting and he loves being outside. So we've tried to maintain that as best we can through COVID and it's very rewarding to make sure that you're grounded by the people around you and then having a routine, having exercise time.Sticking to it is really important.

WHALE: You've got a leadership role in your organization - you're part of the Australia-New Zealand strategic leadership - are there any insights that you can share about being in a leadership role and anything maybe that you see differently now that you're sitting at the big table?

ZAVODNYIK: I'm very fortunate that I've been sitting at that table for the better part of five years.

WHALE: I did wonder if it would be hard to remember what it was like before you had that role!

ZAVODNYIK: I guess the things that I take away every day is that I'm very fortunate to work with great people and there are great people in those roles. Not just within Infosys, but just business and industry generally and there's always something you can take away, there's always something that you can learn. Being alert to the fact that you don't know everything is really important; knowing that everyone has something to contribute and you can learn from every single person.

There are no small roles. It doesn't matter whether you're a leader or not, you bring your entire experience with you and everything contributes. The formative experiences I had as an ambulance chasing a lawyer in Albury still can help me identify risks and issues in the business today. So I'm very grateful for all of my experiences and coming into that strategic role and that strategic leadership function. I know I have something to contribute.

WHALE: What do you wish you had known when you started your career in law, and is there any advice that you'd give to young lawyers, particularly looking to work in the kind of IT, technology and software space.

ZAVODNYIK: I think one of the things is say "yes" to everything if people ask you to do something, if it's within your power to say yes, say "yes". Try something new.

Be prepared to fail because failure is not a failure; failure is a learning and growth experience.

Try and look for the best in everyone that you work with because it makes things easier. If you look for the negatives that's all you see; if you look for the positives, you'll be pleasantly surprised every single time. That's the biggest learning experience I've had at Infosys. I came in with my eyes wide shut. I had no idea what I was going to experience and I really took the experience with both hands and I shook it and I really have enjoyed every single moment and I hope it continues. There's more to do, and there's more to learn. I've been given great opportunities to be involved in operational things, I've been involved in global rollouts of different products internally. I've been involved in productivity improvement plans. We've even done design thinking on the legal team to see how we can benefit the business.

There have just been so many positive things that we've done that I've been able to contribute to because I'm not closed to it. Be open. In terms of young lawyers in an IT world, the sky's the limit. You can do anything.

The more you know about how the business works, how the products work, how software works, how things work, being interested, because curious, constantly learning is something that will take you to the next step. It doesn't matter whether you want to be a litigator, a barrister, the best negotiator or compliance professional, all of those things have the same basic recipe. You've got to keep learning.

WHALE: Thank you, that was fantastic. The pep talk I needed! My last question was what do you like best about your job?

ZAVODNYIK: Recently I've been able to recruit and work with people that I really know and respect and who are my friends. I feel privileged that I've got to develop a team where my colleagues are my friends and I work across a business and a global function where I've developed friendships and that has enriched the whole experience.

Having friendships within the business has made such a huge difference to the way I view every day. I get up and talk to one of my colleagues in the US daily almost and she's my rock - we're of a similar age and we like to throw things around together. And we've got a small group, a book club where we exchange the books that we read and the ideas that we have and that's an enriching experience.

WHALE: Thank you Rachael, I feel fortunate to have nabbed some of your precious time. That was quite life affirming for me to hear your responses to those questions particularly your advice to young lawyers, because I think that advice applies to anybody at any stage of their career.

ZAVODNYIK: Thanks Caitlin. Great to chat with you too!

Not Just the Crocodiles: Why Queensland Journalists Work in Australia's Riskiest Jurisdiction

Gina McWilliams, Senior Legal Counsel, News Corp Australia, considers journalists being required to reveal confidential sources under Queensland's Crime and Corruption Act 2001, following *F v Crime and Corruption Commission*.

The decision of His Honour Justice David Jackson in *F v Crime and Corruption Commission* [2020] QSC 245 (published 12 August 2020) has reinforced the need for a Queensland shield law to protect journalists from being forced to identify confidential sources. While Queensland remains the last Australian jurisdiction to legislate to protect this bastion of free speech, this might change in the near future.

Underlying Facts

F is an employee of an unnamed television station. At some time during 2018, F received a confidential tip from a source that caused him to send a crew to doorknock a particular premises and, a few days later, to return to film the occupant being arrested for murder. The Crime and Corruption Commission (**CCC**) subsequently commenced an investigation into whether a police officer had disclosed information without lawful authority and issued F with an attendance notice pursuant to s. 82 of the *Crime and Corruption Act 2001* (QLD) (**the CC Act**) requiring him to give evidence under oath. The attendance notice indicated that the CCC intended to ask F what he knew about the police investigation into the murder, a joint counter terrorism team investigation into the alleged terrorist activities of a second person and how the crew came to attend the arrest, including the name of F's confidential source.[1]

Unless a person has a reasonable excuse, it is an offence under the CC Act to fail to attend a hearing if given an attendance notice (ss. 82(5)), take an oath when required (s. 183) or answer a question when asked (s. 192), all of which are punishable by a 200 penalty unit fine[2] or 5 years' imprisonment. F did attend the CCC as required and was duly asked to identify the person who tipped him off about the murder arrest and who told him there were listening devices in the house at the time his crew doorknocked the premises. Section 192(2)(b) of the CC Act provides that a person cannot rely on confidentiality as a basis upon which to refuse to answer a question. That being the case, and because Queensland does not have a shield law overriding s. 192, the confidentiality F had promised to his source was not a reasonable excuse for F to stay silent. Legal professional privilege, public interest immunity or parliamentary privilege are all lawful grounds upon which to decline to answer a CCC question but since neither legal professional nor parliamentary privilege applied in the circumstances, F had to rely on public interest immunity when he declined to identify his source.[3]

A week after the CCC hearing, F applied to the Supreme Court to determine whether public interest immunity applied and could be relied on in his case and, as an alternative, whether he was entitled to a restraining injunction pursuant to s. 332 of the CC Act to stop the CCC from asking him any further questions. F subsequently amended his application to ask the Court to determine whether ss. 192 and 196[4] of the CC Act were invalid because they impermissibly burdened the constitutional freedom of communication about matters of government and politics. Several months after F filed his application – and without F having answered the questions to which he objected – a police officer was charged with two offences under s. 92A(1)(a) of the *Criminal Code* (QLD) (for dealing with information about the murder and the joint counter terrorism team raid) and a third offence under s. 352 of the *Police Powers and Responsibilities Act 2000* (QLD) for disclosing the existence of a surveillance device in circumstances where the officer was reckless as to whether the disclosure would endanger the health and safety of any person.

Public Interest Immunity?

Public interest immunity is not a term defined in the CC Act and there were no secondary materials Jackson J found useful in interpreting the term. Rather, His Honour noted that the context in which the words were used in the CC Act suggested that the common law meaning applied.[5] At common law, "crown privilege" was rebadged "public interest immunity" in *Alister v R* (1983) 154 CLR 404 by His Honour Chief Justice Gibbs following earlier comments he had made in *Sankey v Whitlam* (1978) 142 CLR 1 that the former term was "potentially wrong and possibly misleading". While the name changed, the privilege remained

1 The attendance notice also required F to produce his notes about the matters the CCC wanted to question him about but there was no argument about access to documents raised in the Supreme Court.

2 Which currently equates to $26,112.

3 s. 192(2A)(b) of the CC Act.

4 s. 196 provides that the Supreme Court is to decide claims of privilege under the CC Act.

5 F v CCC at [23].

the same as did the "critical point" that it pertained to immunity "from production of a governmental document or disclosing a governmental communication".[6] The starting point was, therefore, that any claim of confidentiality by a journalist falls outside the scope of public interest immunity.

F, nonetheless, argued that there is a public interest in maintaining an obligation of confidence given by a journalist and that that public interest is so important that, for the purposes of considering s. 192(2A)(b) of the CC Act, public interest immunity should be afforded a wider meaning than that recognised at common law. F submitted *John Fairfax & Sons Ltd v Cojuangco*[7] was authority for the existence of the relevant public interest in making that submission.[8] Unfortunately, Jackson J regarded the argument as "tepid" at best.[9] *Cojunagco* itself notes that "it is a fundamental principle of our law… that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice".[10] Moreover, in that case – which notoriously concerned a defamation claim – the court declined to accept that journalists had a wider immunity from disclosure for discovery purposes than the "newspaper rule" since to find otherwise "would enable irresponsible persons to shelter behind anonymous or even fictitious sources".[11] The court was also following the earlier authority of *McGuinness v Attorney-General (Vic)*[12] which held that a newspaper editor who refused to answer questions about his sources before a royal commission had no lawful excuse for doing so.

Jackson J found that the better source of public interest in a journalist maintaining confidentiality was statutory, citing as examples the shield laws in the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW).[13] His Honour noted that protection offered by those provisions is not absolute. In both cases, journalists are granted a qualified immunity as the court is empowered to rule that the public interest in disclosure outweighs the public interest in protecting the confidentiality of the source. Ultimately, notwithstanding His Honour's recognition that there is at least some "public interest" in maintaining an obligation of confidentiality extended by a journalist, "it is clear that the former "privilege" now known as public interest immunity at common law does not extend to a journalist's obligation of confidence not to disclose or reveal the sources of his or her information" and the argument failed.[14]

Restrictive Injunction?

Section 332(1) of the CC Act allows a person to apply to the Supreme Court for a restrictive injunction if a CCC investigation into corrupt conduct is being conducted unfairly or the complaint or information on which such an investigation is being conducted does not warrant an investigation. F made both arguments but both failed. In relation to unfairness, F submitted that being required to breach his obligation of confidence was unfair and pointed to various parts of the CC Act relating to the CCC's corruption functions in support of his argument. However, His Honour held:

> *Once it is accepted that the subjects of this investigation are within the power of the commission to investigate and that it is within its power to conduct a hearing as to the facts as previously set out, it is not unfair to ask the sources of information questions because to do so will breach a journalist's obligation of confidence, absent other factors. To conclude that to ask the sources of information questions is in itself to conduct the investigation unfairly would be to create an additional de facto category of journalist's privilege, under the rubric of unfairness, when it is not otherwise a recognisable category of privilege against answering the questions.*[15]

F also asserted that the CCC investigation was unwarranted because the source's disclosure did not meet the definition of "corrupt conduct" set out in s. 15(1) of the CC Act or otherwise fall within the CCC's functions set out in s. 33(2) of the CC Act. To meet the s. 15(1) definition, the disclosure by F's source to F had to constitute the performance or exercise of the source's functions or powers in a way that could involve "a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment".[16] F said it didn't; His Honour held it was "not inapt" to describe the disclosure that way.[17] In relation to the CCC's s. 33 functions, F submitted that since an officer had already been charged

6 F v CCC at [34].
7 (1988) 165 CLR 346.
8 F v CCC at [37].
9 Ibid.
10 F v CCC at [36].
11 F v CCC at [37].
12 (1940) 63 CLR 73.
13 F v CCC at [38].
14 F v CCC at [39].
15 F v CCC at [58].
16 S. 15(1)(b)(iii) of the CC Act.
17 F v CCC at [65].

there was no utility in the investigation continuing and requiring him to answer questions about his source. The CCC disagreed submitting that F's answers may provide information or evidence useful to its case against the officer charged or, alternatively, may indicate that some additional police officer was relevant to the CCC investigation. His Honour accepted that submission.[18]

Constitutionally Invalid?

Lastly, F submitted that if ss. 192 and/or 196 of the CC Act are to be interpreted as requiring a journalist to make a disclosure contrary to an obligation of confidentiality they impermissibly burden the implied freedom of political communication, having the practical effect of inhibiting the journalist's capacity to investigate and publish to the public information on matters of government and politics.[19] In relation to this issue, the parties agreed on a number of points. Both accepted that the approach of the High Court in *Comcare v Banerji*[20] was to be applied; the CCC did not contest that ss. 192 and 196 could burden the implied freedom; and, F did not contest that ss. 192 and 196 had a legitimate purpose.[21] That left Jackson J to determine whether or not the sections were "appropriate and adapted or proportionate to the achievement of their legitimate purpose consistent with the system of representative and responsible government having regard to the requirements of suitability, necessity and adequacy in balance".[22]

Sadly, F almost immediately ran into a brick wall: *A v Independent Commission Against Corruption* (***A v ICAC***).[23] In *A v ICAC,* the NSW Full Court had already been asked to decide the very question Jackson J was considering in relation to a summons to produce documents under s. 35 of the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**) which, together with other parts of the ICAC Act, also imposed obligations to produce and made noncompliance an offence.[24] Basten JA, with whom Bathurst CJ agreed, accepted that while s. 35 of the ICAC Act may indirectly burden political discourse, neither the purpose nor the effect of the ICAC Act imposed any direct burden. To the contrary, "like the implied freedom itself, the Act's principal purpose was to protect, maintain and strengthen the institutions of representative government".[25] Moreover, the powers set out in s. 35 were commonplace – routinely conferred upon investigative agencies – and although dealing with a power of disclosure incidental to the exercise of judicial power, the reasoning in *The Age Company Ltd v Liu*[26] supported the conclusion that s. 35 was appropriate and adapted to serve a legitimate end, being an end not merely compatible with, but directed to, the maintenance of representative government. His Honour also noted that the disclosure would be attended by a high degree of confidentiality because a hearing in relation to which a summons is issued under s. 35 must be conducted in private and the ICAC Act imposed significant limitations on how confidential information could be used.[27]

F accepted that, like the ICAC Act, neither the purpose nor the effect of the CC Act imposed any direct burden on political discourse and that the CC Act's principal purpose was also to safeguard the institutions of representative governments. F, otherwise, sought to distinguish his case from that of A's.

First, F submitted that the powers granted by ss. 192 and 196 were not commonplace. However, Jackson J held that submission did not engage with Basten JA's reasoning. Basten JA's commonplace powers were the powers to compel a person to give evidence or produce documents. Neither ss. 192 nor 196 were significantly dissimilar or at least not to an extent relevant to disclosure of a journalist's confidential sources of information or the freedom of communication about matters of government and politics.[28]

Secondly, F submitted that the reasoning in Liu does not support the conclusion that s. 192 is appropriate and adapted to serve the required legitimate end. Jackson J was critical of this submission:

> *[F] referred to the relevant passage in Liu as though the comparison to be made was between s 192 and the provision of the Defamation Act 1974 (NSW) considered in Lange v Australian Broadcasting Commission, or the rule of court considered in Liu, but that was not the point of the reference to Lange made by Bathurst CJ in Liu or the point of Basten JA's third reason, as I understand it. The point being made by Basten JA was that a provision that reduces the ability*

18 F v CCC at [66] – [68].

19 F v CCC at [69] – [70].

20 (2019) 372 ALR 42.

21 F v CCC [72]

22 F v CCC [73].

23 (2014) 88 NSWLR 240.

24 The NSW shield law – and whether it was overridden by s. 37(2) of the ICAC Act which provides that an obligation of confidence is not a lawful reason to decline to answer a question or produce a document once summonsed by the ICAC – were not raised at trial or on appeal in this case (see A v ICAC at [82].

25 F v CCC at [80].

26 [2013] NSWCA 26; 82 NSWLR 268 at [96]–[99] (Bathurst CJ).

27 With ICAC officers prohibited from divulging or communicating information obtained in the course of exercising his or her functions under the ICAC Act.

28 F v CCC at [83] – [84].

of a journalist to keep his or her sources of information confidential may be appropriate and adapted, as the provision in Liu's case was found to be, for the reasons given by Bathurst CJ.

Thirdly, F submitted that the fact the CCC is obliged to provide a defendant charged with an offence with anything stated at, or any document or thing produced at, a CCC hearing which is relevant to the defence of the charge[29] distinguishes the present case from the confidentiality regimes of the ICAC Act referred to by Basten JA. But Jackson J found that even if there had been no equivalent section in the ICAC Act at the time A v ICAC was decided (which there was) that difference alone would not cause him to part ways with *A v ICAC:*

As a judge sitting at first instance, it is enough to dispose of the constitutional argument in the present case to conclude that A v ICAC is persuasive authority of an intermediate appellate court on a similar question that I should follow, unless persuaded that it was wrongly decided or that the reasoning in substance is distinguishable from the present case. I was not persuaded of either proposition.[30]

F's application was, consequently, dismissed with no order as to costs.

Light at the end of the tunnel?

Despite the applaudable effort of F's legal team, it is clear from the judgment that F fought this battle with both hands tied behind his back. Now, more than ever, Queensland needs a shield law that is at least as effective as s. 126K of the *Evidence Act 1995* (Cth), protecting journalists from being compelled to answer questions or documents which would disclose the identity of a confidential source unless a court determines that the public interest requires otherwise.

Before mid-August, the Queensland government had made no attempt to engage with this issue. However, the day after the decision was handed down, the Labor government tabled a Bill which would have added two new offences to the CC Act, prohibiting a person from publishing allegations of corrupt conduct by a candidate in either a State or local government election during the election period. Due to the way "publish" was defined[31], the new offences would have prohibited both the general public and media entities from publishing such allegations, so clearly about government and political matters, at a time when they were most relevant to assisting voters in making their decision about who to support. Unsurprisingly, both the media and social commenters united in unanimously condemning the amendment and the Bill was withdrawn the next day. However, the furore served to focus attention on other shortcomings of the CC Act and on August 17, the LNP committed to enacting a shield law as an electoral promise. That move prompted the first sign that the Labor Party might do the same. Following the election in November, watch this space for updates.

29 s. 201 of the CC Act.

30 F v CCC at [86].

31 Disclosing the allegation, or causing the allegation to be publicly disclosed, by newspaper, radio, television, other electronic or printed media for communicating to the public or other media for social networking with the public.

President's Report by Martyn Taylor

It goes without saying that the last 12 months have been somewhat insane.

- In my previous President's Report, we were just entering the bush fire season. The scale of the subsequent Black Summer fires was horrifying. I visited the small town of Mogo, south of Batemans Bay, in 2019 to take my girls to Mogo Zoo. A delightful little town filled with amazing craft shops. But fire swept through Mogo on New Years' Eve causing utter devastation. It was deeply emotionally distressing to see this. My heart went out to all those affected throughout Australia.
- Then we had the severe floods in February 2020 caused by Tropical Cyclone Damien. We wondering what else 2020 would throw at us. The answer was the first global pandemic in a hundred years, COVID-19.
- In January, we watched on Twitter as all China went into a severe lockdown. I watched the images coming out of Wuhan in China with horror, including a run on supermarkets and hospitals totally overrun. People literally dying in the corridors. Military in the streets. By April, the whole world was in lockdown.
- As a result, we have had the first Australian recession in some 30 years. Many around Australia in 2020 have been suffering, including a surge in unemployment and many businesses going under. We also faced the emergence of social distancing – and zoom video calls.

But through that hurricane of 2020 events, CAMLA has emerged relatively financially secure. We have continued to deliver high quality content to our members. We have kept operating and kept smiling.

So 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.

Notwithstanding all the insanity that 2020 has thrown at us, we have again met this objective.

However, 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.

So 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. Those of you who have contributed your valuable time to make CAMLA the success that it is.

I thank you all from the heart.

However, in my role as President, it is also my prerogative to again bore you in one of the few speeches that you permit me to make over the year. However, I will try to keep this very succinct. So here goes…

I'll start with the most important people in CAMLA, namely all of the members of CAMLA.

We now have around 400 people who are current members. Our membership increased by around 15% over the year. This means CAMLA remains a relatively large association.

Around 20% of our membership are students and new lawyers, around 25% are standard individual memberships, and the remaining 55% are individual members through corporate memberships.

We now have some 30 firms and organisations who have corporate memberships, again a further increase on last year. This now includes a wide range of media companies, government agencies, law firms, industry associations, and content companies.

It is a credit to CAMLA that we have increased our memberships in a very difficult year. So many thanks to all of you for renewing your memberships and welcome to our new members.

However, in order to make a CAMLA membership worthwhile, it is absolutely imperative that we provide real value for money to our members.

In my view, we have done so over the last 12 months, assisted by many of our events being held for free to CAMLA members. I'll quickly take you through some of the highlights.

I'll next mention the CAMLA Board. We have had 17 members of the Board over the 2020 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:

- First **Katherine Giles,** who has really had the hot seat as Treasurer and Public Officer. Over the last 12 months, she has successfully navigated our finances through the COVID economic crisis. This included initiatives to reduce cost to offset the reduced revenue. Special thanks Katherine for all your hard work.
- Next, the two CLB Editors, **Eli Fisher** and **Ashleigh Fehrenbach.** The content produced for the Communications Law Bulletin over the last 12 months has been truly outstanding. I will come to that in due course.
- Next, **Rebecca Dunn** who has performed an amazing role as Secretary in keeping the CAMLA tradition of well-organised meetings with high quality minutes and records. She has also assisted me in managing the many twists and turns of 2020. Many thanks Bec.
- Finally **Debra Richards** and **Ryan Grant,** who been the two vice Presidents of CAMLA for the last 12 months. Both of them have been instrumental in organising events. Many thanks both.

The executive roles on the Board are unchanged for 2021 although this will probably be my final term as President. To all 18 board members, including myself, welcome to the new Board. I also welcome Marina Olsen to the Board as a new Board member.

Next, I'd like to mention the CAMLA Young Lawyers Committee.

As you will know, CAMLA Young Lawyers is an official sub-committee of CAMLA. In 2020, that sub-committee comprised 17 young lawyers who represented the interests of young lawyers working in, or who have an interest in, communications and media law in Australia.

The contribution of the Young Lawyers Committee over the last 12 months has 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.

Many of the events held over the last 12 months have been organised by the CAMLA Young Lawyers Committee. They are also responsible for several innovations, including the CAMLA podcast.

We very much welcome the continued participation of the CAMLA Young Lawyers Committee in board meetings and we again extend an invitation to the chair of the Young Lawyers Committee and two committee members to attend each CAMLA board meeting during 2021. Applications for membership of the new Committee for 2021 are due shortly. Please also encourage the Young Lawyers in your respective organisations to get involved.

I would like to give particular thanks to Calli Tsipidis for chairing the Young Lawyers Committee over the 2020 year and to Belyndy Rowe for acting as secretary. Calli has provided a copy of her report as Chair – and I'll hand to Calli next to give her overview as to what the Young Lawyer's Committee has been doing over the last year.

That brings me to the CAMLA Events.

We have held a record 10 events in the following year and I think almost all of these have been online:

- In February, the CAMLA Young Lawyers Networking Event
- In April, two seminars relating to the impact of COVID-19
- In June, a young lawyers event on prepublication
- In July, a webinar on the future of Australian content
- In August, a webinar on the future of defamation law and the Young Lawyers speed mentoring event
- In September, Minister Paul Fletcher gave an interesting address and he is giving a further address to CAMLA tomorrow
- Also in September, a further CAMLA Young Lawyers event on non-publication and suppression orders
- Earlier this month, a CAMLA Young Lawyers event on streaming services

We have received highly positive feedback in relation to each of these events. Many thanks to all of you who were involved. We had record attendances for many of these.

Our use of webinars has meant we have been able to serve our interstate membership base. I'm very keen going forward that we offer dual events that are both in person and online so we can continue to serve a wider community.

We have some opportunities in 2021 to hold some really great event, many of which are already being organised. The media and communications landscape in Australia continues to change rapidly. It is a very interesting time to be a media and communications lawyer.

That brings me to the Communications Law Bulletin. In my view the CLB Editors have again topped in 2020 the impressive record that they had set in 2019.

Many thanks to Eli and Ash for their incredible effort in very difficult circumstances. Many thanks particularly to Ash for continuing as CLB Editor from Oxford at a social distance of some 17,000 km.

In June 2020, we had a bonus edition of CLB in recognition of the fantastic content we have been receiving. In October 2020, we had a special edition focussed on the fashion industry.

For those of you that have not read the CLB over this year, you really should take the time to do so. The content is interesting, relevant and insightful – and it is well worth the time to read.

Again, 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.

Of course, our huge thanks to Cath Hill 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 smoothly.

It has been such a difficult year on so many fronts and all of us are grateful to Cath for always being there to provide support. So my personal thanks Cath, as always – and I'm sure I have the full support of the CAMLA Board in conveying our deep thanks from the heart for all your work over the last 12 months in very difficult circumstances.

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 2020 Report

'A year like no other', 'unprecedented times' and 'the new normal' – some of the most coined phrases of 2020, and all of which ring true when it comes to the year that was for the CAMLA Young Lawyers Committee.

We kicked off 2020 with the Young Lawyers sold-out networking event, hosting over 100 individuals at the offices of Clayton Utz. Attendees heard from an esteemed panel about career development and the different approaches to networking, followed by an opportunity to put their newly found networking tips and tricks to the test. Thank you again to Claudia Wallman (Senior Legal Counsel, Spotify), Monique Hennessy (Legal Counsel, NRL), Neil Murray SC (Tenth Floor Chambers) and Robyn Ayres (CEO, Arts Law Centre of Australia) for lending us your valuable time and insights.

Fast-forward to June, where mingling over canapes and drinks was very much a thing of the past. Following the Board's footsteps, the Young Lawyers hosted our first webinar – 'Prepublication 101', where we explored the basics of media content review processes with some of Australia's leading media lawyers, Larina Alick (Executive Counsel, Nine), Marlia Saunders (Senior Litigation Counsel, News Corp Australia), Prash Naik (General Counsel Doc Society, Principal at Prash Naik Consulting and member of Reviewed & Cleared) and Leah Jessup (Business and Legal Affairs Executive at Endemol Shine Australia). Over 115 people tuned in – and what an informative session it was. Thank you again to the panel for their time and efforts and for sharing some fantastic war stories with attendees.

In late August, the Young Lawyers brought back the time-honoured tradition of a 'speed mentoring' event, with a 2020-twist – all mentoring sessions were conducted over Zoom 'breakout groups'! The event was held over two evenings, where we were joined by a fantastic group of senior lawyers who spoke to several young lawyers throughout the evening. We'd like to extend a special thanks to all the mentors who participated – Jo Teng, Tim Fuller, Chris Hill, Jayne Treherne, Ashleigh Fehrenbach, Katherine Sainty, Michael Joffe, David Chin, Stephen Lawrence, Amy Campbell, Tracey Scott, Jessica Norgard, Rebecca Lindhout, Julie Cheeseman, Megan Evetts, Angus Cameron, Chris Chow and Jaimie Wolbers. Hosting multiple attendees in various breakout groups, and virtually moving these people around all evening, was no easy feat. It would be remiss of me not to include a special mention to the Young Lawyers working group who assisted with this very involved event. Thank you Belyndy Rowe, Jess Millner, Jessica Norgard and Kosta Hountalas.

In September, the CAMLA Young Lawyers hosted another successful 101 webinar on Non-Publication and Suppression Orders. Thank you Gina McWilliams, (Senior Legal Counsel, News Corp Australia) and Dauid Sibtain (Level 22 Chambers) for taking us through the underlying legal principles and sharing their experiences making (and defending) such orders.

The Young Lawyers rounded out their 2020 events calendar with a 'Streaming Services 101' webinar, where our expert panel discussed the opportunities and challenges facing the streaming industry. Many thanks to Debra Richards (Director, Production Policy, APAC, Netflix & CAMLA Board member), Emren Kara (General Counsel, Stan), Sophie Jackson (Principal Legal Counsel, Foxtel Group) and Rob Nicholls (Associate Professor, UNSW) for your participation on the panel and for your informative and engaging discussion.

I would also like to acknowledge and thank all the firms and organisations that generously hosted our events in 2020, particularly to those who assisted our integration into the webinar world. Excitingly, the shift to virtual events has allowed attendees from outside NSW to attend CAMLA Young Lawyer events this year and we look forward to welcoming our friends from across Australia to our seminars and webinars in 2021.

Throughout the year, the Young Lawyers contributed various articles, profile pieces on some incredible lawyers working in the communications and media law space, as well as event reports for the Communications Law Bulletin.

Following the technologically innovative traditions of 2020, the Young Lawyers also produced the inaugural 'CAMLA Podcast', a complementary publication to the Communications Law Bulletin, where we will discuss and explore the legal and regulatory issues facing the communications and media law industry. Thank you to our fabulous hosts, Belyndy Rowe (Sainty Law) and Joel Parsons (Bird & Bird) of the CAMLA Young Lawyers Committee, and to Ellen Anderson, Kosta Hountalas and Claire Roberts for their contributions to our pilot episode. The CAMLA Podcast will be available exclusively for members in the coming weeks and we hope will be a semi-regular publication for CAMLA Members in 2021 and beyond.

With five fantastic events under our belt, and a podcast to boot, the achievements of the Young Lawyers Committee in 2020 were manifold. It has truly been a pleasure to Chair such a passionate and diligent committee. I would like to extend a big thank you to the 2020 Young Lawyers for their outstanding efforts and enthusiasm in what was an incredibly challenging year:

- **Amy Campbell** (HWL Ebsworth)
- **Antonia Rosen** (Banki Haddock Fiora)
- **Belyndy Rowe** (Sainty Law)
- **Claire Roberts** (Eleven Wentworth)
- **Ellen Anderson** (Addisons)
- **Isabella Street** (Sony Music)
- **Jess Millner** (Minter Ellison)
- **Jessica Norgard** (nbn co)
- **Joel Parsons** (Bird & Bird)
- **Kosta Hountalas** (Bravura Solutions)
- **Madeleine James** (Corrs Chambers Westgarth)
- **Nicholas Perkins** (Ashurst)
- **Patrick Tyson** (formerly of ABC)
- **Tom Barkl** (ACMA)

I would like to give particular thanks to our Secretary Belyndy Rowe, who not only managed our meeting minutes and records but who was an integral member of the Young Lawyers Committee 'brains trust' throughout 2020. Thank you, Bel.

I would also like to extend thanks on behalf of the Young Lawyers Committee to CAMLA President Martyn Taylor, the CAMLA Board and to Cath Hill, who have provided us with tremendous support throughout the year.

I encourage any young lawyer with an interest in CAMLA to submit their interest in joining the 2021 Young Lawyers Committee to get involved with our fantastic projects. Or, if you aren't already a member, sign up today. Next year is sure to bring some more excellent memories and I am thoroughly looking forward to it.

Wishing you and your families all the best for the festive season.

Calli Tsipidis
Chair, CAMLA Young Lawyers Committee 2020

Legal Counsel
Foxtel Group – FOX SPORTS Australia, Foxtel and Streamotion

CAMLA Young Lawyers Committee

Streaming Services 101 Event

Report by **Jessica Norgard** (NBN Co)

2020 saw many parts of the world plunge into lockdown, compelling us to rely on developing baking habits and devouring a plethora of online content to keep us sane. It was also the year of a dramatic rise in importance of streaming services platforms - and never did we need it more!

CAMLA Young Lawyers final event of the year acknowledged the significance of this development and brought together a prestigious panel to reflect on the legal, regulatory and commercial world that is Streaming Services.

The star studded panel consisted of:

Emren Kara (General Counsel at Stan);

Sophie Jackson (Principal Legal Counsel at Foxtel, Binge and Kayo);

Dr Rob Nicholls (Associate Professor in regulation and governance at UNSW);

and

Debra Richards (Director of Production Policy for the APAC region at Netflix).

The panel presented many insights and predictions in the regulatory space (including content quotas and local investment reporting requirements, and overseas versus local regulation), and data privacy (with the recording of individual consumer streaming habits). Given the increasing number and specific nature of many platforms, the panel also provided some expert discussion of the complexity of licensing, assignment and exploitation of rights. Furthermore, it was excellent to hear the personal insights of each highly esteemed member of the panel share with the audience their personal journeys and tips for young players looking to establish a career in this space.

Special thanks to Amy Campbell for moderating the event, Madeleine James, Calli Tsipidis, Patrick Tyson and Katherine Sessions for their assistance in organising the event, and Corrs Chambers Westgarth for hosting.

"Context is all": Court Confirms Test and Principles for False, Misleading or Deceptive Conduct

By **Kirsten Webb, Mary Still, Kent Teague** and **Damiano Fritz,** Clayton Utz

A recent decision of the Federal Court confirms the "ordinary and reasonable" consumer test under the Australian Consumer Law and rejects the test of-whether a "not insignificant number" of reasonable consumers would be misled.

The Federal Court has confirmed the correct legal test to be applied in determining whether conduct is misleading or deceptive, or likely to mislead or deceive, in contravention of the Australian Consumer Law (**ACL**) in the recent decision in *Telstra Corporation Limited v Singtel Optus Pty Ltd* [2020] FCA 1372. Clayton Utz acted for the successful respondent, Optus.

In dismissing Telstra's application, Justice Jagot considered the effect of the relevant conduct on ordinary and reasonable members of the class of persons to whom the conduct was directed, and held that there was no contravention of the ACL by Optus. Although her Honour indicated the result would have been the same in this proceeding, Justice Jagot confirmed that the number of reasonable persons who might be misled is irrelevant to the test under the ACL.

All organisations doing business in Australia should see the judgment as a welcome confirmation that, provided the effect of their conduct and public statements on ordinary and reasonable consumers is not misleading or deceptive, they will not contravene the ACL.

A "strained and fanciful interpretation"

The proceeding concerned a series of advertisements promoting the Optus mobile network[1] that included the words "Covering more of Australia than ever before" (and similar variants for a number of States).

Telstra contended that the advertisements conveyed representations to the effect that the Optus network or networks cover more of Australia or the relevant State than any other network has ever covered before. Optus argued that all that was conveyed by the advertisements was that Optus' mobile network has more geographic coverage than it has ever had before - that is, that Optus' mobile network is covering more of Australia than it has ever covered before.

Justice Jagot agreed with Optus. Her Honour held that the advertisements did not convey any comparison between Optus' network and the network of any other telecommunications provider, including Telstra. Her Honour considered the representations alleged by Telstra were a "strained and fanciful interpretation" of the advertisements when considered in context.

Correctness of the "reasonable or ordinary member" test

Apart from the substance of the representations conveyed by the advertisements, the main debate between the parties concerned the correct legal test to be applied.

It is well established that, for the purposes of the false, misleading or deceptive conduct provisions of the ACL, it is necessary to identify the impugned conduct and then to consider whether that conduct, considered as a whole and in context, is misleading or deceptive or likely to mislead or deceive.

It is also well established that:

- to be misleading or deceptive, conduct must lead or be likely to lead into error;
- there must be a sufficient nexus between the conduct and an error or misconception on the part of another person;
- causing confusion or questioning is insufficient;
- where the conduct is directed at the public or a section of the public, it is necessary to identify the class of consumers likely to be affected by the conduct and assess whether a hypothetical representative, the ordinary or reasonable member of that class, would be misled or deceived; and
- reactions that are extreme or fanciful are excluded from the assessment.

Telstra submitted that the Court must consider whether a "not insignificant number of ordinary or reasonable consumers would be likely to be misled or deceived", relying on one line of lower court authorities which appeared to modify the settled principles set down by the High Court. In particular, Telstra quoted from a well-known passage in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1:

> "*Where, as in the present case, the advertisement is capable of more than one meaning, the question of whether the conduct [...] is misleading or deceptive conduct must be tested against each meaning which is reasonably open.*

1 https://www.youtube.com/watch?v=nxXRc4Yy8Ro

This is perhaps but another way of saying that the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error."

Rejecting Telstra's submissions, Justice Jagot confirmed that the "ordinary and reasonable" test established by the High Court is clear, and should be applied. Her Honour followed the recent decision of the Full Federal Court in *ACCC v TPG Internet Pty Ltd* [2020] FCAFC 130, where the Court confirmed that the test of whether a "*not insignificant number of reasonable persons" would be misled is, "at best, superfluous to the principles stated by the High Court…and, at worst, an erroneous gloss on the statutory provision*".

Importantly, her Honour clarified the meaning of the passage from Tobacco Institute that Telstra had sought to rely upon:

"*…the relevant passage must be read as a whole. Once that is done it is apparent that [the Tobacco Institute decision] is not suggesting that the meaning conveyed by the impugned conduct is to be determined outside of the context of ordinary and reasonable members of the class of persons to whom the conduct is directed.*"

"Context is all"

The decision is also a salient reminder that the relevant conduct must be considered as a whole and in context. It is wrong to analyse particular words or acts in isolation, when they may well convey a different meaning when viewed in context.

Justice Jagot emphasised that "context is all". In this case, that meant recognising that the advertisements were emblazoned with Optus' well-known branding throughout, before the final statement "Covering more of Australia than ever before" and the word OPTUS at the end of the advertisement. Her Honour found that the evidence established Optus' yellow "Yes" logo is strongly identifiable as Optus' brand, and featured prominently in the advertisements, being superimposed over each of the images in question. In context, her Honour determined that "the only reasonable meaning to be given to the advertisements" was that advanced by Optus.

Intergenerational Interesting Interview

Readers, we bring you our first instalment of our new, potentially one-part, series "Intergenerational Interesting Interviews" featuring a parent and child operating in the tech space. My mum telexed me this morning to let me know that things move pretty quickly in tech, but like the frog being boiled alive in a pot of water (who does that?) it can be hard to notice incremental changes in your environment. One of the best ways of learning from the experiences of tradition and the cutting edge of contemporary business is to put two intergenerational, interesting legends together and interrogate some of these in issues, and any differences in perspective. Before we commit to the series, we'll see how this pilot goes (hereafter, the Gray Test).

Camille Gray is a Strategist at Initiative Australia, where she specialises in digital marketing and retail strategy. Her role puts her at the forefront of digital advertising, especially for large multinational tech companies.

John Gray is a Technology and IP partner at Hall & Wilcox's Sydney office. John is named in *Best Lawyers™ Australia* for IT Law, IP Law, Outsourcing Law, Privacy and Data Security Law, Telecommunications Law, Commercial Law and Corporate Law, and was named Lawyer of the Year for Information Technology Law for 2021. He's what we in the industry call a one-trick pony.

Camille Gray

John Gray

ELI FISHER: Grays, on behalf of our readers, thanks for doing this. We're very Graytful - particularly because we find it so useful to look at the differences between the business and legal perspective of advertising. We're also discussing differences between generations, but the themes are timeless: truth, trust, originality, reputation and responsibility. You both have spent a lot of time thinking about these issues, and we're very glad to have you.

CAMILLE GRAY: Some big topics there Eli – and yes, lots of Gray areas to ponder.

JOHN GRAY: No puns about my evolving hair colour, please.

FISHER: Let's talk about truth in advertising. It's an issue that isn't black or white - but rather … ok, I'll stop.

There appears to have been a decline in the faith people place in advertisements over the years. In his letter to Nathaniel Macon Monticello dated 12 January 1819, Thomas Jefferson said that advertisements contain the only truths to be relied on in a newspaper. That was perhaps more a statement on the quality of the newspapers of the day, than it was an endorsement of advertisements. Nevertheless, a recent study looked at Australia's most trusted professions, and placed advertising people in 29th place, out of thirty, in between real estate agents (28th) and car salesmen (30th). And presumably that's because advertisers today are considered to bend the truth to achieve their desired outcomes. Camille, are we living in a post-truth world, and what does that mean in the world of advertising?

CAMILLE: I always take issue at advertising getting such a bad rap! Yes, undeniably, the role of advertising is to sell products but I always challenge people to remember the cultural products they love – for you, Eli, it's AFL. That entire code is made by advertising. I aim to take a less cynical view and celebrate the potential of advertising (I hope my boss is reading this). But back to truth and trust – it's fascinating because while the *profession* of advertising is deemed untrustworthy, the success of a brand is entirely linked to trust. In fact over the past three years, we've seen a rising percentage of people (currently around 64 per cent) claim that they will choose, switch or boycott a brand based on societal issues. Apple has topped every 'most trusted brand' list and is also the most valuable brand in the world. And it's no surprise Apple's latest advertising campaigns are all about trust – their iPhone slogan is literally "Privacy. That's iPhone," is a direct attack on other tech players like Facebook and Google.

FISHER: John, from a legal perspective, truth is important too. Businesses cannot engage in conduct that is likely to mislead or deceive. Can and should the law grapple with new understandings of the boundaries of truth?

JOHN: I don't know whether the law has much interest in whether truth is absolute or merely relative, but it certainly concerns itself with different understandings of meaning. The common law fastens on the 'reasonable' member of the public: to determine if conduct is misleading or deceptive, you don't examine it from all possible points of view, but instead look to what a reasonable consumer of the relevant class would have understood; to interpret the words of a contract, you ascertain the meaning that would be given by a reasonable person in the position of the parties. Defamation law is premised on the notion that words can have multiple meanings to an audience, depending on the context of their publication. Not all the advertised benefits of the smoke ball were to be taken literally.

FISHER: The ACCC's Digital Platforms inquiry considered, among other things, fake news. Following

that report, the Government has asked digital platforms to develop voluntary codes of practice to counter misinformation and help users to better identify the quality of online news and information. John, what can the law do to create a world that is more truthful, and what are the challenges there?

JOHN: The obvious challenge is digital technology, which enables any person with access to a device to propagate their own version of truth. As the ACCC explained in its report, social media is helping to create echo chambers, where the repeated exposure to the same perspectives as the user's own, as a result of algorithms curating content, are affirming a person's own beliefs, their own 'truths'. No one has yet come up with the answer to your question. I doubt that we can or should rely upon platforms to self-regulate. The pragmatist might say the law only needs to focus on doing what it's always done - that is, protecting the vulnerable, and outside of that, the law should tolerate 'harmless' dishonesty. So we continue to ban the practice of spruiking investment products online without a PDS or a prospectus, but (apart from controversial Twitter and Facebook warnings) we ignore what the former leader of the free world might happen to say on Twitter. It's not to say that digital platforms don't go to some effort to counter misinformation. But consider this. Earlier this month, the Federal Court ordered Kogan Australia to pay $350,000 as a penalty for making misleading representations about a tax time sales promotion. They had essentially increased the prices immediately before the promotion, and then 'discounted' them to their usual levels for the duration of the promotion. Rod Sims declared that "this decision sends a strong signal to businesses like Kogan, which regularly conduct online sales promotions, that they must not entice consumers to purchase products with a promise of discounts that are not genuine." And, that is a completely typical, commonplace occurrence. Misleading and deceptive behaviour *in trade or commerce* is something with which the law concerns itself. And in other fora as well: giving evidence, in election advertisements, in providing information to a public authority, and so on. But when you consider the potential consequences of a false claim made by a president or prime minister to millions of followers online, the legal remedies available don't quite reflect the harm that such a falsehood may cause. There are no Kogan-like penalties, no sending "strong signals". Truth is important, but perhaps only in certain contexts. Say what you like about a dead person, about a company with 10 employees, say what you like in the course of parliamentary proceedings.

Coming back to the 'ordinary reasonable person' who is so central a point of reference for the common law. Will the Courts even conceive of a reasonable person, in future, when such notions as a single entity representative of any class of people are increasingly dismissed as a product of social conditioning? Perhaps my musings are straying a little from the topic, but my point is that both the law and the advertising industry are built upon a quest to understand the "ordinary person". And it seems the law has a much harder time of it than the advertising world does. Perhaps Lord Devlin got it right when he wrote in *Lewis v Daily Telegraph* (1964): "what is the meaning of the words conveyed to the ordinary man—you cannot make a rule about that".

FISHER: Camille, is that right? Surely, through big data, machine learning and artificial intelligence all hyper-driven by the digital economy, the advertising world has a pretty good read of the ordinary person. What does she or he care about? How important is truth and trust in advertising? Does this environment of dubious claims made without regard to evidence, logic or facts but which feel intuitively true to the 'ordinary reasonable person' - or what Stephen Colbert would refer to as 'truthiness' - present unprecedented business opportunities?

CAMILLE: Well, the answer to that question fundamentally changed with the arrival of social media, which Dad touched upon a second ago. Over the past decade, we've witnessed an incredible power shift between brand and consumer. Brands were once shielded from the amplification of any negative feedback from consumers (outside of people on the streets rioting or physically boycotting), while today one poor customer service experience or deceptive practice can significantly hurt a brand, and consumers know it. When it comes to brands disingenuously attaching themselves to societal issues, that can have a particularly detrimental impact. Take Oscar Wylee's 'buy a pair, give a pair' initiative – outside the $3.5M fine they got for misleading conduct, they're now having to fight against a negative perception of their brand amongst a particular set of consumers.

You ask about business opportunities and yes, absolutely. Unintelligent brands will pretend it isn't happening or simply delete the negativity from view (e.g. hide the dodgy comments on their social pages). Modern, intelligent and crafty brands will see this challenge as an opportunity and own their mistakes, and endeavour to improve. This brings a humanity to your brand which can have a significantly positive effect, turning a negative into a positive.

FISHER: So let's talk social media more, then. Camille, you're a big fan of TikTok. That app has gotten a lot of traction with teenagers. What's going on behind the scenes from an advertiser's perspective? How should a business really capitalise on these avenues of communicating with consumers?

CAMILLE: Well, the first thing to note is that since March, every single social/video platform has rolled out major commerce features – whether it's Instagram going hard with Instagram Shops, Snapchat trialling live product launches or WhatsApp rolling out business options. This is naturally a big win for businesses who can set up online shops and sell products direct to consumer more easily than ever before. But the other side of the coin is the arrival of new players like TikTok. If you want an app that gives power to the consumer – it's TikTok. We already know consumers turn to each other to seek 'truth', by which I mean at least some degree of third party, independent verification, about products. Roughly 90% of consumers read and rely on reviews before making a purchase. TikTok is a short-form video platform that's following in the footsteps of its equivalent in China, where consumers are able to make their own product reviews in video form. There are currently 3.6 billion views against a hashtag called #TikTokReviews where consumers are actively speaking about brands and products. The majority of this is entirely unpaid for, and brands that attempt to create their own trends have to be very careful and creative in order to get the views they want, including disclosing that the video is #sponsored. For example if you want some fun, google 'Croctober TikTok' and see what Crocs did to get their shoes viral before Christmas.

FISHER: John, did you get all of that?

JOHN: I think so, especially the bit about having to disclose that a video is sponsored. Readers will be aware that the ACCC, and various advertising standards, state that influencers must clearly mark content if they are advertising sponsored goods or services. As an exercise in field research, Camille showed me how to sign up for TikTok. Within 24 hours, it had nailed my preferences. After a week of almost continuous viewing of golf videos, I had to go cold turkey. The technology is so incredibly powerful that I had stopped meeting budget. Again, there might be a role here for the law, to protect the vulnerable by regulating the availability of certain digital platforms.

FISHER: Yes, no doubt a regulatory priority given the electoral importance of the golfing demographic. How about intellectual property? Is it fair to say that no matter the generation, no matter the lens through which you're looking - be it legal or advertising - originality is still king? Or is creativity dead?

CAMILLE: Creativity is thriving! You have to remember that every social or video platform – particularly ones like Instagram, TikTok and YouTube – relies on great consumer-made content to keep people on the site. That means it's in these companies' interest to constantly improve the tools to get people creating content to share with friends. Very crudely put, the editing capabilities that were previously reserved for Hollywood are being handed to consumers. That can be really positive in terms of democratising the creation of new, original content. This also has a darker side. Deepfakes are one example of this. Deepfakes are incredibly realistic face swaps that use AI to replace faces on moving images – and it's quite terrifying to see how easy they are to make. A lot of the big players like Google and Facebook have banned deepfakes except in the case of satire or parody – and while it's very early days, deepfakes are a really clear example of a form of media that pushes the boundaries of truth and deception in ways we've never seen before. Check out Jordan Peele's deepfake Obama speech on YouTube to see what I mean, and remember that was two and a half years ago. This technology advances apace. It's worthwhile to note also that an app called DeepNude was released in Australia in June 2019, which enabled users to, in effect, remove clothing from images of women. The app had both a paid and unpaid version, with the paid version costing $50. The app was removed that month, but that should give you a feel for how available, cheap and sophisticated this technology will increasingly become in the future.

JOHN: I think the common refrain that intellectual property law is out of step with advances in digital technology is a bit lazy. Putting to one side questions about whether a machine can be an author for copyright purposes (as to which, legislators in the UK have found a fairly workable solution) or an inventor for patent purposes (the USPTO recently said no), existing IP laws can resolve most of the issues surrounding mash ups, deepfakes and the like. It's just that applying the current law to novel circumstances is intellectually demanding. On deepfakes, the existing laws of copyright and moral rights (as well as defamation, consumer law and criminal law) can already protect against most harms that deepfake technology can cause. The issue is - and always has been - that law is a heavy sword to wield. The consumption of time and money in pursuit of legal remedies makes the law less appealing, and probably inaccessible to most. And that means that whatever protections the law has to offer are often hypothetical, not practical. It's good that some of the mainstream platforms are taking steps to minimise the use of such technologies; these sorts of issues are best tackled at the platform level rather than the user level. The removal of the app Camille mentioned is positive, because it's tackling the problem at the app store level. But it may be that the best defence society will have against such fake content will be the evolution of the ordinary reasonable person: the digital native far more alert to online dangers and fake content than some of the digital immigrants of generations prior. The ACCC in its Digital Platforms Inquiry

final report talks about a generational difference to media literacy and misinformation, citing the 2019 Digital News Report, which found that older Australians (and those with lower levels of formal education) are least likely to take any steps to verify the accuracy of news online. And in my view that's not because older people are less intelligent. It's because they are used to being able to trust news sources. Even though, as the ACCC notes, 47% of news consumers under 23 use social media as their main news source, these users were more likely than other demographics to fact-check news they accessed online. The generational divide seems to be present across borders: as the ACCC notes, a 2019 study of false news sharing behaviour on social media in the United States found that users over the age of 65 were almost seven times as likely to share false news than those aged 30 to 44, and more than twice as likely to share false news than those aged 45 to 65. The ACCC's focus on developing regulation at the platforms level, and also media literacy at the community level, to combat misinformation is a clear sign that the law has a role to play - but other non-legal approaches are required concurrently.

FISHER: Camille, I have a question for you. The Government is currently conducting a wide-ranging review of privacy law in Australia, following recommendations made in the ACCC's final report on Digital Platforms. One of the issues currently being addressed is the expansion of the definition of "Personal Information". The ACCC recommended that the Government update the definition in line with current and likely future technology developments to capture any technical data relating to an identifiable individual, such as IP addresses, device identifiers, location data, and any other online identifiers that may be used identify an individual. Camille, if privacy law were to come to govern use of such data, what impact do you think that might have on your business?

CAMILLE: The rationale for this recommendation, as the Issues Paper said, is to ensure the definition is aligned with consumer expectations and reflects the realities of how data is used in digital markets. Advertisers and agencies alike have been preparing for a while for what some have called the 'cookiepocalypse' i.e. the total end of third party tracking through cookies. Given Google is spearheading this (and they have around 50% share in this market), the main impact on our business will be a change to the way we plan to target audiences. Almost every digital strategy (bar those for brands that advertise to children!) includes some level of personalised targeting using third-party data however such changes in the market puts a greater value on first party data. Publishers like SMH or The New York Times can use their rich audience insights to help advertisers understand the benefits of buying and advertising directly on their sites, but it also means such publishers need a strong and transparent relationship with their readers to comply.

FISHER: Thanks Camille. So having looked at some of the generational differences between the technological and regulatory issues we face, John, is it your view that the game has shifted so significantly that much of the acquired wisdom of the ages - ordinary reasonable men aboard the Clapham Omnibus, Lord Devlin, and old-school trust and authenticity - have been consigned to the dustbin of history?

JOHN: Yes, the game has shifted significantly. But, no, to my mind, we're still dealing with the same values. People are generally unforgiving of dishonesty and inauthenticity, and the public continues to champion creativity and credibility. It's just that, especially for digital immigrants, it can be harder to detect the difference between real and fake, honesty and lies. My work in privacy law really bears this out. For a very long time - albeit this is changing now - privacy law in Australia was really treated like guidance or regulatory suggestions, not as law in respect of which non-compliance posed a practical risk. But that's not to say that businesses didn't take it seriously; they did. Savvy businesses treated privacy law almost as a customer service guidebook - How Not To Irritate Our Customers - because spamming customers with marketing material, or overcommercialising a customer's personal information, was completely unconnected to the relationship the business has with the customer and was tacky, lacking in class, the conduct of a hustler. It hurt the brand. And over the years, it became clearer and clearer that relying on fake consents - the pre-ticked boxes, or the "I Agree" buttons following lengthy unread tomes of legal gibberish - were not protecting companies' reputations or relationships with their customers. They weren't real, and everyone knew it. If a customer were upset by a business processing personal information in a manner that did not accord with his or her wishes, it didn't assist the business to rely on the fake consents. The trick then is to having a genuine understanding of your customers, what they want, what they dislike, and catering for it authentically. Building trust and loyalty is hard work, but that's always been the key to business success and it still is. One final point on this, returning momentarily to misinformation on digital platforms. The ACCC noted (and the European Commission did too) that professional, traditional, journalism has an important role to play in a world laden with untrustworthy publishers. Instead of falling away, overtaken by new media, traditional media have become essential to serious consumers - and their credibility is highlighted in contrast to some of the new players. The more fake news abounds, the more important are traditional credible sources of information. I think that's the same with most things in the digital economy.

CAMILLE: It's a very exciting time to be working in media – and while the technology is changing rapidly, the key is observing what behaviour *doesn't* change. In regards to truth, Dad's right: humans don't like being lied to. We tend to want to see the world in black and white, even though the technology is constantly pushing us to see something in between. Against all the criticism about the law not keeping up with media and technology, there are fundamental truths of human behaviour that haven't changed for centuries.

FISHER: Thanks so much to you both. You've both been Grayt.

Australian Media Law Reforms: The Regulatory Agenda for 2021

Alison Manvell, Special Counsel, and **Claudia Berman,** Associate, Baker McKenzie, comment on the media reform package proposed by the Federal Government in November.

As 2020 draws to a close, the Federal Government's staged media regulatory reform process continues to unfold with numerous reviews underway on aspects of both the Broadcasting Services Act 1992 (Cth) (**BSA**) and other related laws.

On 27 November 2020 the Australian Government released a Green Paper proposing a number of significant reforms namely:

- an option for commercial free-to-air television broadcasters to make a one-time irrevocable transition to a new form of broadcasting licence involving a reduced regulatory burden in return for a transition to using less radiofrequency spectrum in coming years
- if sufficient broadcasters take up the new licence, there is a proposed program for industry-wide rationalisation and reallocation of spectrum (including the ABC and SBS)
- a portion of the proceeds from resulting spectrum auctions would be used to create two funds to support content delivery - the Public Interest News Gathering Trust (**PING**) and the Create Australian Screen Trust (**CAST**)
- the introduction of Australian local content spend requirements for SVOD and AVOD services, as well as new Australian content obligations for the national broadcasters

Submissions are due by 7 March 2021. These changes form part of the broader staged reform process for media regulatory reform in Australia, which will continue into 2021.

Background

The Australian Competition and Consumer Commission's (**ACCC**) Digital Platforms Inquiry Final Report was published on 26 July 2019 making 23 broad ranging recommendations covering competition, consumer protection, privacy, copyright and media regulatory reform.

The Government responded to the Final Report at the end of 2019 with an implementation roadmap for reform activity in relation to those recommendations supported by the Government.

Amongst other things, the Government's response contained an immediate commitment to commence a staged process of media regulatory reform with the aim of achieving an appropriately platform-neutral regulatory framework.

As anticipated in the roadmap, the first stages of that reform process have this year included both a classification laws review process as well as changes to Australian local content obligations and the support framework for Australian content.

The consultation process regarding changes to the Australian content framework kicked off in April this year with the release of an Options Paper authored by the Australian Communications and Media Authority (**ACMA**) and Screen Australia.

The changes now proposed in the Green Paper relate to both Australian content reform and other aspects of the media regulatory agenda. They follow closely on from, and will operate in parallel with, changes to Australian local content obligations and Australian content support mechanisms previously announced in September.

Previously announced changes supporting Australian content (September 2020)

As part of its 2020-21 Federal Budget, the Australian Government announced a $53 million funding package to support the development and production of Australian content, alongside a variety of legislative changes.

Key takeaways

Funding:

- From 1 July 2021, the Australian Children's Television Foundation will receive $20 million over 2 years for the development, production and distribution of Australian children's content
- From 1 July 2021, Screen Australia will receive $30 million over 2 years to support Australian drama, children's and documentary film and television production
- Screen Australia will also receive $3 million over 3 years, to encourage Australian screenwriting and script development

Key changes to obligations included:

- Harmonising the Producer Offset rebate rate to 30% for all domestic film and television content, and other threshold amendments across the three film tax offsets
- Simplification of the Australian content obligations on commercial television broadcasters, with more flexibility given to broadcasters to choose the relevant mix of Australian drama, children's and documentary content to meet quotas
- Reducing the Australian content expenditure obligations on subscription broadcasters from 10% to 5%, for eligible drama spending, by mid-2021

In early November, the Minister issued the Broadcasting Services (Australian Content and Children's Television Standards) Direction 2020 to direct the ACMA to make necessary standards to implement the changes to obligations outlined above, with effect from 1 January 2021. Consultation on the resulting draft Broadcasting Services (Australian Content and Children's Television) Standards 2020 closed on 7 December 2020.

In addition, larger streaming video service providers will be asked to report to the ACMA on their level of investment in Australian content from the start of 2021.

Green Paper

The Green Paper seeks submissions on four main proposals:

New commercial FTA licence

Currently, commercial free to air (**FTA**) television broadcasters pay the commercial broadcasting tax in return for use of relevant radiofrequency spectrum.

Under the new proposal, FTA broadcasting licensees would be offered a one-time irrevocable choice to move to a new form of licence. It would not be mandatory for FTA broadcasters to transition to the new licence - broadcasters could choose to remain under the current arrangements. If licensees moved to the new form of commercial television broadcasting licence:

- that would commit them to pursuing a path towards use of less radiofrequency spectrum
- the licence holder would no longer have to pay a tax in return for use of spectrum
- other regulatory obligations would be reduced, such as removal of the Australian content transmission requirement for multichannels. However, it is proposed that other 'core' obligations would remain - for instance:
    - the Australian content primary transmission requirements for primary channels and the new flexible sub-quota arrangements
    - the majority of the standard conditions of licence in Schedule 2 of the BSA
    - the co-regulatory model for content regulation under industry codes of practice
    - requirements for regional broadcasters to provide material of local significance

  Submissions are sought on the list of regulatory obligations to be retained.

In connection with the above, the ACMA has subsequently commenced a consultation review of the Commercial Broadcasting (Tax) Act 2017 (Cth) consulting on its views as to whether to repeal or amend the legislation. Submissions on that consultation are due by 4 February 2021.

Industry-wide rationalisation and reallocation of spectrum

The path towards use of less radiofrequency spectrum by broadcasters is anticipated to take a number of years, but would require significant take-up of the new licence in order to proceed. At least two of the three commercial FTA broadcasters would need to transition to the new licence in all metropolitan licence areas (with a likelihood that minimum transition levels would also be needed regionally) for the proposed industry-wide rationalisation and reallocation of spectrum to occur.

In addition to the commercial FTA broadcasters, the rationalisation process would also include the ABC and SBS and rationalisation of unused broadcast spectrum, and would involve both spectrum usage reduction and multiplex sharing.

Spectrum no longer required by the FTA sector would be reallocated by means of spectrum auctions.

Timing would depend on the outcomes of the current consultation. However, a potential timeline is provided in the Green Paper:

- May 2021 - final details of reforms proposed in the Green Paper announced
- Second half of 2021 - legislation introduced
- Mid-2022 - elections by commercial FTA broadcasters as to whether to transition to the new licence
- Mid-2022 to Mid-2024 - ACMA to work with industry in planning for restack process
- Mid-2024 - commence restack
- 2025 - spectrum auctions
- December 2025 - completion of restack
- 2026 and later - reassignment of auctioned spectrum

PING and CAST

Some of the proceeds from the spectrum auctions would be used to capitalise two newly established funds:

- PING - to support provision of newspaper, radio, TV and online services in regional Australia
- CAST - to support creation and distribution of Australian content and the production sector. Two funding pools are envisaged - one for projects of cultural significance (funded either via grants or equity investments) and one for commercial investments (equity investments)

Each would be a trust fund established under legislation. CAST would be administered by Screen Australia.

Australian content changes

In addition to the previously announced changes, the Green Paper seeks comment in two areas:

- A proposal to introduce:
    - expectations that SVOD and AVOD services invest a percentage of Australian revenue in new Australian programming (produced under the creative control of Australians) with a potential 5% investment level flagged. Alternatively, SVOD and AVOD services could contribute an equivalent amount to CAST
    - reporting obligations for SVOD and AVOD businesses to enable monitoring by the

ACMA with a power for the Minister to implement formal regulatory requirements if an SVOD or AVOD services fails to meet expectations for two consecutive years

  - discoverability obligations for Australian content on SVOD and AVOD services

- A proposal to formalise the role of the ABC and SBS in commissioning and providing Australian content by setting explicit legislative requirements.

The obligations on SVOD and AVOD services would apply to commercial services meeting certain eligibility tests. A number of possible tests that could apply on their own, or in combination, are included for comment in the Green Paper including:

- a purpose test (a content service with the primary purpose of providing professionally produced scripted content to Australians)
- an Australian presence test (a service that offers its service in Australia to serve Australian audiences)
- a number of subscribers/ registered users test (potentially set at one million SVOD subscribers or AVOD registered users)
- a gross Australian revenue test (with a potential threshold of $100 million per annum derived from distribution of programming in Australia)

SVOD and AVOD services owned by an existing Australian commercial or subscription broadcaster (already subject to Australian content obligations) would be exempt from the proposed new SVOD and AVOD rules.

The proposals regarding the ABC and SBS acknowledge that they are already "significant commissioners of Australian content and are also important providers of this content to audiences across the country". The proposal is for a change from the way the public broadcasters' responsibilities are currently described in their respective charters to more prescriptive legislative requirements. Submissions are sought on a number of options in the Green Paper.

Next steps

These consultations will play out across the coming months, in parallel with various other continuing reform work streams including:

- classification and online safety reform
- other reform proposals and regulatory activity arising from the Digital Platforms Inquiry Final Report including introduction of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (Cth) and work to finalise a proposed Disinformation Code for digital platforms

2021 looks to be another busy year for media regulatory reform as these reform activities progress, and Phase 2 of the Government's media regulatory reform agenda commences, including a likely review of advertising regulation across all platforms.

National Defamation Law Reform

By **Peter Bartlett, Patrick Considine, Dean Levitan, Anabelle Ritchie, Dougal Hurley** and **Joshua Kaye,** MinterEllison

Australia's outdated defamation laws have long been slanted in favour of plaintiffs. However, the 'plaintiff's bonanza' may be somewhat tempered by the recent passage of the *Defamation Amendment Bill 2020* (NSW) (**Bill**) on 6 August 2020.[1] The Bill is based on a raft of reforms proposed by the Council of Attorneys-General in late July. It is expected that identical copies will be passed in all other states and territories. The Bill has also passed through the Victorian Parliament. NSW and Victoria will now decide whether the Bills will come in to operation 1 January 2021 or whether they will wait till 1 July 2021 to allow the other States and Territories to catch up. The amendments signal to the courts that the balance must shift towards freedom of expression.

Among the most significant inclusions are:

- a 'serious harm' element to weed out trivial claims;
- a dedicated public interest defence for reports on matters of public concern;
- a single publication rule so that the limitation period for online publications runs from the date the material is first uploaded rather than each time it is downloaded;
- clarification that a defendant may 'plead back' a plaintiff's imputations to establish a defence of contextual truth; and
- provisions aimed at clarifying the statutory cap for damages for non-economic loss.

Defamation law remains a *'Frankenstein's monster'* of *'countless complications and piecemeal reforms riveted to the rusting hulk of a centuries' old cause of action'*,[2] but these reforms represent a significant improvement. However, the effectiveness of the new provisions will largely hinge on how they are interpreted by courts.

1. Serious harm element (s 10A)

Background

There is no explicit 'threshold of seriousness' in Australian defamation law, as the courts have tended to reject attempts to recognise one.[3] Under the current laws, the filtering of spurious claims does not occur until trial – by which point significant time and costs have been incurred.

Section 10A of the Bill aims to change this by requiring the plaintiff to prove the defamatory publication *'has caused, or is likely to cause, serious harm to the reputation of the person'*. It also endeavours to similarly encourage the early resolution of disputes by making harm a threshold issue.[4]

The new provision requires the judge to determine whether serious harm has occurred. The issue can be determined at any time, either on the application of a party or the judge's own initiative. However, if a party raises the issue before trial, the judge must reach a decision as soon as possible, unless special circumstances warrant a delay. Subsection 10A(7), which was not included in an earlier draft of the amendments, allows a judge to determine the serious harm element *'on the pleadings without the need for further evidence if satisfied that the pleaded particulars are insufficient to establish the element'*.

Potential effect

The introduction of section 10A is largely positive, as it permits the courts to dismiss weak or frivolous cases at the outset, before considerable time and costs are wasted. It also means the defendant will no longer bear the burden of proving that the plaintiff suffered trivial harm.

It is likely the provision will be useful in knocking out low-level disputes between individuals, but not cases against large media organisations.[5] It may present case management challenges for judges and there is an element of unpredictability in how s 10A will be interpreted. Unlike the UK, the legislation does not build on pre-existing common law developments. It is hoped that judges will read the provision literally and refrain from tacitly lowering the threshold of seriousness to one of substantiality.

1 Latika Bourke, 'Copying UK defamation laws will fix Australia's 'plaintiff bonanza': Spycatcher silk' The Age (online, 2 August 2020) <https://www.smh.com.au/world/europe/copying-uk-defamation-laws-will-fix-australia-s-plaintiff-bonanza-spycatcher-silk-20200721-p55e7p.html>.

2 Matthew Collins, 'Reflections on the Defamation Act 2013, one year after Royal Assent', *Inforrm's Blog* (online, January 2020) <https://inforrm.org/2014/04/25/reflections-on-the-defamation-act-2013-one-year-after-royal-assent-matthew-collins/>.

3 See e.g. *Lesses v Maras* (2017) 128 SASR 292, 317-18 (per curiam); [2017] SASCFC 48. Cf. *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 at [31]-[42] per McCallum J. The Supreme Court of New South Wales decision in *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 is a notable exception. Instead of a threshold of seriousness, the defence of triviality under section 33 of the Defamation Act provides that *'it is a defence to a publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain harm'*.

4 Explanatory Note, Model Defamation Amendment Provisions 2020 (NSW), 4 <https://www.pcc.gov.au/uniform/2020/Model_Defamation_Amendment_Provisions_2020.pdf>.

5 See also Michael Douglas, 'Australia's "Outdated" Defamation Laws Are Changing: But There's No "Revolution" Yet', *International Forum for Responsible Media Blog* (online, 31 July 2020) <https://inforrm.org/2020/07/31/australias-outdated-defamation-laws-are-changing-but-theres-no-revolution-yet-michael-douglas/>.

Although the defence of triviality is to be abolished, MinterEllison considers that it should have been left on the books. It would have served as another tool at the court's disposal when dealing with marginal claims.

2. Public interest defence (s 29A)

Background

One of the notable inclusions in the Bill is a new public interest defence. Australian courts have repeatedly rejected a common law version of this defence, unlike our counterparts in the UK, Canada and New Zealand. The UK also enacted a statutory public interest defence in 2013. Yet in Australia, responsible investigative journalism that falls short of perfect reporting has not been adequately protected.

The new public interest defence aims to ensure that defamation law does not unreasonably limit freedom of expression and the discussion of matters of public interest. The Bill adopts similar wording to the UK statutory defence and is a significant improvement on an earlier draft based on New Zealand's defence.

Section 29A states that a defendant will not be liable if:

(a) the article concerned an issue of public interest; and

(b) the defendant reasonably believed that publication of the matter was in the public interest.

The jury (or if one is not empanelled, the judge) is responsible for deciding if the defence is established. All circumstances of the case must be considered. However, s 29A(3) provides the court with a list of factors that 'may' be taken into account. These factors include the seriousness of the imputations, the integrity of the journalist's sources, the steps taken to verify the claims, and whether the story contained the plaintiff's version of events.

Potential effect

The defence is a potentially significant development. It remains available to media publishers even if it is later proved the article contained factual errors. Further, unlike the statutory qualified privilege defence, it is not necessary for the defendant to prove the recipients had a specific interest in receiving the information. This will ensure the public interest defence remains available to large media companies who regularly publish stories to the wider population.

The defence is likely to assist in defending meticulously-prepared investigative pieces, such as those sued over by Joe Hockey and Eddie Obeid. This change will be cautiously welcomed by media organisations, who may take on significant defamation risk when they go to print based on information provided by whistleblowers and confidential sources.

However, a potential problem lies in the interpretation of s 29A(3), which specifies a list of factors the court may consider when reaching a determination. These factors are nearly identical to the criteria currently considered under the 'reasonableness' limb of statutory qualified privilege. In relation to qualified privilege, the criteria have been treated rigidly as a series of independent hurdles to be overcome, rather than optional or guiding factors. This approach has undermined the utility of the statutory qualified privilege defence and effectively neutered it for media defendants.

Should courts apply the statutory factors in a similar way, s 29A may also become difficult to establish. MinterEllison raised this issue during the consultation phase. Although the defence has been needlessly complicated by the factors, it includes some safeguards recommended in public submissions:

- unlike an earlier draft provision, there is no requirement that the court 'must' consider the factors;
- the Bill clarifies that s 29A(3) does not require each factor to be taken into account. Nor does it limit the matters that may be considered;[6]
- unlike the previous draft, the factors are no longer tied exclusively to one aspect of the defence ('reasonableness', or, in the earlier draft, 'responsible communication'); and
- an additional factor has been added to the list. The court may also consider 'the interest in freedom of expression and discussion of matters of public interest'.

The efficacy of these safeguards, and the defence overall, will depend largely on how the courts interpret s 29A(3) and how juries assess the errors of journalists.

Changes to statutory qualified privilege (s 30)

The most important change to statutory qualified privilege is that the Bill clarifies the court does not need to consider all the factors. A further provision has also been inserted, stating that it is the jury's responsibility to determine whether the defence is established. This change is welcome, but it is ultimately a matter of judicial discretion as to how much the existing approach to s 30(3) is relaxed.

Pleading back plaintiff's imputations for defence of contextual truth (s 26)

Background

The convoluted defence of contextual truth allows defendants to plead contextual imputations. The defendant is protected if the contextual imputation is *'substantially true'* and the imputations on which the plaintiff relies do not further harm his or her reputation *'because of the substantial truth of the contextual imputations'*.

6 This is similar to the approach taken by the UK Supreme Court in the recent decision of *Serafin v Malkiewicz* [2020] UKSC 23.

Changes to s 26 reformulate the defence of contextual truth to make it clear that, in order to establish the defence, a defendant may 'plead back' any substantially true imputations originally pleaded by the plaintiff.

Potential effect

This change resolves confusion around whether defendants may 'plead back' and justify any of the plaintiff's imputations to establish the defence. It should end the practice of plaintiffs applying to amend and 'adopt' contextual imputations pleaded by the defendant, thereby depriving the defendant of the ability to rely upon them. However, we think a more radical solution exists. Incorporating contextual truth into the defence of justification would do even more to reduce confusion (especially for juries).

Damages (s 35)

Background

Section 35 of the *Defamation Act* provides for a maximum amount of damages for non-economic loss, but inconsistent interpretations have led to controversy in cases involving high damages awards.

The interpretation which honours the intended effect of the provision holds that s 35 sets a scale or range of damages, with the maximum amount reserved for the worst kinds of damage.[7] However, in *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154, the Victorian Court of Appeal adopted a different approach. It held that s 35 did not fix the upper limit of a range or scale, but rather acted as a cap that could be set aside when aggravated damages are awarded. This had the effect of 'blowing open' the limit on damages for non-economic loss.

The Bill makes it clear that the maximum amount of damages for non-economic loss operates as scale or range of damages, rather than a cap. It states that the maximum amount should only be awarded in the most serious cases. Second, it requires awards of aggravated damages to be made separately to any award for non-economic loss.

Potential effect

These changes will reduce general damages awards,[8] give defendants greater certainty about their financial risk exposure in defamation litigation and help clarify the true 'cost' of aggravation. The changes also guard against aggravated damages becoming punitive (despite this being prohibited).

Extension of limitation period and single publication rule (Schedule 4)

Background

Presently, a defamation action must be brought within 1 year of the date of publication. Publication occurs when the material is received by a third party. The 'multiple publication rule' provides that each publication gives rise to a separate cause of action, subject to its own limitation period. This means that the limitation period for online publications is effectively open-ended, as the period is extended each time a new person views the publication.

Under the Bill, the one-year limitation period for bringing a defamation claim remains, but two salient changes have been made:

- first, the Bill inserts a 'single publication rule' similar to that in the UK. Where a defendant publishes an article and, at a later date, the defendant or an associate republishes substantially the same matter, time will have started running from publication of the first article; and
- second, a plaintiff is granted an automatic 56-day extension if they file a Concerns Notice in the final 56 days of the limitation period. The extension starts running from the date the Concerns Notice is filed. This additional period is aimed at giving the proposed defendant time to consider the concerns notice and also allows the aggrieved person to consider any offer to make amends.

Potential effect

The single publication rule will stop plaintiffs getting around the purpose of the limitation period by relying on later downloads of the same matter. The new rule is medium neutral but, as far as electronic material is concerned, publication will have occurred when the material was first uploaded or sent to a recipient.

The single publication rule differs from the UK equivalent because it extends not only to subsequent publications by the publisher, but to subsequent publications of substantially the same matter by associates of the publisher (such as employees and contractors).

7 See e.g. *Murray v Raynor* [2019] NSWCA 274 at [92] and [93].

8 For instance, in *Rush v Nationwide News Pty Ltd* (No 7) [2019] FCA 496, Wigney J awarded Geoffrey Rush damages for non-economic loss (including aggravated damages) in the amount of $850,000. Rush also received $1.98 million for loss of earnings. A court would no longer be able to set aside the maximum amount for non-economic loss or refrain from specifying an amount for aggravation.

The ACCC's Clear Warning - The Time is Now to Perfect Privacy Policies and Procedures

By **Gina Tresidder, Kate Littlewood** and **Ellena Kouris,** Russell Kennedy Lawyers

In the 12 months since the Australian Competition and Consumer Commission (**ACCC**) released its final report on its Digital Platforms Inquiry (**DPI**), the ACCC has filed two law suits against Google with regard to its handling of personal data. In October 2019, ACCC alleged that Google had breached the Australian Consumer Law (**ACL**) through its undisclosed collection of users' location data (**October 2019 Proceeding**). In late-July this year, the ACCC launched fresh proceedings alleging that Google misled customers by failing to obtain informed consent for changes to the way consumers' personal data was being collected and used (**July 2020 Proceeding**). With the trial in the earlier proceeding set to commence on 30 November 2020, it is timely to consider the ramifications for Australian businesses.

In light of the DPI recommendations and the ACCC's crack down on Google, it is clear that it is just a matter of time before the ACCC turns its attention to Australian businesses. This article explains what needs to be done to ensure businesses are ACL compliant and will not be next in the firing line.

What is the DPI and why is it significant?

The DPI Final Report (**the Report**) is the culmination of the ACCC's 18 month inquiry into the impact of online search engines, social media and digital platforms, on competition and advertising. The Report contains widespread recommendations to strengthen privacy legislation and improve data handling practices. Most notably, the Report recommended prohibiting unfair trading practices that induce consumers to agree to the release of their data without fully appreciating the consequences of their consent.

This recommendation is significant as it indicates that the ACCC sees its consumer protection role as evolving to include the regulation of data handling practices online. As such, what was once reserved for the Office of the Australian Information Commissioner (**OAIC**) via the *Privacy Act 1988* (Cth) (**Privacy Act**) is now squarely within the ambit of the ACCC. The ACCC is willing to use the provisions within the ACL to address privacy and data law issues, and is doing just that in its two suits against Google.

The ACCC v Google Proceedings

October 2019 Proceeding

In this proceeding, the ACCC alleges that between January 2017 and late-2018 when Android users were setting up their Google accounts, they were not advised that they had to switch off two settings, not just one, if they did not want Google collecting their location data. Google directed the users to switch off "Location History" if they did not want their location data collected, but remained silent on the fact that if "Web & App Activity" remained switched on, Google would still be able to obtain, retain and use personal data about the user's location.

Furthermore, the ACCC claims that during certain timeframes, Google failed to disclose that location data would be used for more than just facilitating Google's services to the user in question. For example, the data would also be used to personalise advertisements for other users, and infer demographic information.

The ACCC considers both these claims to be a breach of section 18 of the ACL, in that the conduct of Google was misleading or deceptive, or likely to mislead or deceive consumers.

July 2020 Proceeding

In this proceeding, the ACCC alleges that Google failed to gain explicit consent to combine user's personal information in their Google accounts, with information about their activity on non-Google sites that use Google ad technology. Prior to 2016, this information was kept separate. Google sought consent to the change from consumers, via a pop-up notification that prompted account holders to simply click "I agree". An extract of the notification is as follows:

> *Some new features for your Google Account*
>
> *We've introduced some optional features for your account, giving you more control over the data Google collects and how it's used, while allowing Google to show you more relevant ads.*

The ACCC alleges that the "I agree" notification did not inform the consumer of the true extent of the change. As a result, the ACCC considers that consumers are likely to have been misled and Google has again fallen foul of section 18 of the ACL (misleading or deceptive conduct).

At the time of writing, this matter is yet to be set down for trial.

What does this all mean for Australian businesses?

The Report and the ACCC's proceedings against Google sends a clear signal to Australian businesses that the ACCC is steadfast about carrying out enforcement action against companies that deal with consumer data in a misleading or deceptive way.

The fact that the ACCC is relying on section 18 of the ACL means that Australian businesses of all sizes

are at risk of falling foul, considering "trade or commerce" with section 18 of the ACL is defined broadly to include any business or professional activity whether or not carried on for profit, and regardless of size.

Accordingly, the time is now to consider the accuracy and transparency of data collection practices and procedures. Privacy policies and collection notices must explain to consumers what personal data is being collected, why it is being collected and how it will be used, or Australian businesses may risk a hefty fine and legal proceedings.

Gone are the days where the maximum civil penalty under the *Privacy Act* for privacy breach was capped at $2.1 million. Now, with the ACCC having the power under the ACL to enforce privacy obligations, the maximum penalty for mishandling consumer data has increased by almost 500% to being the greater of:

- $10 million;
- three times the value of the benefit received; or
- 10% of annual turnover in the preceding 12 months, if the benefit obtained from the offence cannot be determined.

Moreover, the Australian government has announced its intention to revise the penalty provisions of the Privacy Act so that the maximum civil penalties for data breaches align with the ACL. Accordingly, soon Australian businesses could be facing hefty fines for data breaches from all angles.

CAMLA Breakfast Seminar

The Hon. Paul Fletcher MP: A Staged Approach to Media Reform: Where We Are and the Road Ahead

Friday, 27 November 2020

Report by **Tom Barkl** (ACMA)

CAMLA welcomed the Hon Paul Fletcher MP to speak at Bird & Bird, Sydney, to outline the Government's staged approach to media reform and announce the release of a green paper for modernising television regulation in Australia.

Mr Fletcher noted that Australians still largely rely upon free-to-air television to access quality news and to experience and enjoy Australian stories. However, weakening regulatory frameworks, financial impacts of the COVID-19 pandemic, and the arrival of new on-demand video streaming services, have put a significant strain on our local media and production sectors. This presents the Government with a unique public policy issue and an opportunity to reform Australia's content landscape.

The Government is proposing to introduce spending obligations on both subscription and advertising-funded on-demand video streaming providers. These providers (who exceed a certain revenue threshold) would be required to spend a certain proportion of locally-earned revenue to commission new shows, co-productions, content acquisitions or through contribution to a new trust for local programming. The Government is seeking input on what the percentage level of revenue should be in this new structure.

The Media Reform Green Paper also seeks views on a number of other proposed measures, including:

- offering commercial broadcasters the choice to operate under a new kind of commercial television broadcasting licence, with a reduced regulatory burden provided they agree to move at a future point to using less radiofrequency spectrum;
- promoting the public interest by using proceeds from freed-up spectrum to invest in Australian news and screen content; and
- formalising the role of national broadcasters as key providers of Australian content.

CAMLA thanks Mr Fletcher for his insights into the Government's proposals. We will be watching the developments with great interest.

Further comment on this reform package can be found within this edition of the Communications Law Bulletin.

Defamation in the Public Interest: A New Defence to Defamation in NSW

Dominic Keenan

Introduction

On 6 August 2020, the NSW Parliament passed the *Defamation Amendment Act 2020* (NSW) which introduces a public interest defence to defamation in section 29A. The reform is part of a national effort to uniformly update Australia's defamation laws, with other jurisdictions likely to follow suit.[1] The defence is intended to provide publishers with greater protection when reporting on matters of public interest, filling the gap left by qualified privilege.

The new provision has been modelled on section 4 of the *Defamation Act 2013* (UK), which has been successful in providing media organisations with a functional public interest defence. A number of differences in the text and context of the provision import considerable uncertainty into the precise operation of the defence in NSW. Due to these differences, Australian courts are likely to take an approach that places greater weight on protection of reputation than has been seen in the UK. Consequently, the NSW provision may be more difficult to rely upon successfully than its UK counterpart. Despite this, the public interest defence will provide publishers with a more flexible defence than qualified privilege.

The public interest defence

The defence as enacted in NSW consists of two elements. First, the publisher must prove that the defamatory matter concerns an issue of 'public interest'.[2] Once this is established, the publisher must then prove that they 'reasonably believed' that publication of the defamatory matter was in the public interest.[3] These two elements call for both an objective and subjective analysis of the circumstances in which the defamatory matter was published.

The provision closely mirrors the UK defence which consists of the same two elements, similarly worded. Under each provision, the court must take into account all relevant circumstances in determining whether the publisher 'reasonably believed' that the publication was in the public interest.

Issues of public interest

The concept of 'public interest' has been broadly construed in the UK. Courts have construed the term to mean matters relating to the 'public life of the community' which necessarily includes the administration of government, major institutions and in some circumstances, companies.[4] While private matters are excluded, other issues of public concern like the commission of serious crimes, for example, may fall within scope.[5] The UK's broad and inclusive approach to public interest promotes the availability of the defence by widening its applicability.

From an interpretative standpoint, it is likely that Australian courts will seek consistency with other pre-existing provisions in Australian defamation regimes. In NSW, the defence of honest opinion includes a public interest requirement.[6] A relatively expansive approach has been taken to public interest in that defence, which covers matters that legitimately interest segments of the public or activities that 'inherently… invite public criticism or discussion'.[7] A similarly expansive approach to public interest has also been taken to the common law defence of fair comment.[8] On this basis, Australian courts are likely to take a broad approach to public interest that extends beyond government and political matters to issues of legitimate interest to the public at large. This suggests that the public interest defence will also be widely applicable to a range of publications and topics, as seen in the UK.

Reasonable belief

The key textual difference between the NSW and UK provisions concerns the assessment of whether the publisher's belief was reasonable. The UK provision includes a single mandatory consideration. A court in the UK must make 'such allowance for editorial judgment as it considers appropriate'.[9]

In contrast, section 29A(3) sets out a list of nine non-mandatory considerations, which broadly reflect

1 The Council of Attorneys-General supports the enactment of the *Model Defamation Amendment Provisions 2020* by each State and Territory. At the time of writing, South Australia has already enacted the model amendments.

2 *Defamation Amendment Act 2020* (NSW) s 29A.

3 Ibid.

4 *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852, [33] (Lord Justice Haddon-Cave) citing *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 176-177 (Lord Nicholls).

5 See eg, *Economou v de Freitas* [2018] EWCA Civ 2591.

6 *Defamation Act 2005* (NSW) s 31.

7 *Tabbaa v Nine Network Pty Ltd* [2018]NSWSC 468, [34]-[35] (Fagan J).

8 See eg, *Bellino v Australian Broadcasting Corp* (1996) 185 CLR 183; *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43.

9 *Defamation Act 2013* (UK) s 4(4).

the factors identified in the 2001 case *Reynolds v Times Newspapers Ltd*[10] (known as the *Reynolds* factors):

- the seriousness of the defamatory imputation;
- the extent to which the publication distinguishes between allegations and proven facts;
- whether it was in the public interest to publish the matter expeditiously;
- the sources of information and their integrity;
- whether there is a good reason to keep the name of an anonymous source confidential;
- whether the defendant was given a right of reply;
- any steps taken to verify the information; and
- the importance of freedom of expression.

These textual differences raise a question as to how much guidance UK authorities truly provide in the Australian context. There is significant uncertainty concerning the weight Australian courts will give to the listed factors and the way in which they will be applied, especially to non-traditional publishers. While the factors are non-mandatory, they are likely to create some minimum threshold of reasonableness that varies according to the publisher. Precisely how these factors are considered by the courts, and the impact on the availability of the defence, remains to be seen.

This is not to say that UK authority provides no guidance as to how Australian courts might approach reasonable belief. While section 4(6) of the UK provision expressly abolishes the *Reynolds* defence, the factors set out in it remain important in assessing whether the publisher has reasonable belief.[11] Despite the relevance of these factors, UK courts have stepped away from the strict checklist approach previously used and have adopted considerable flexibility in assessing reasonable belief.

In NSW, the non-mandatory language and crossover between the enumerated factors and *Reynolds* factors is sure to give publishers some comfort. Given these similarities, it is likely that Australian courts will take a flexible approach similar to that seen in the UK, even if the defence does operate somewhat differently.

Balancing freedom of expression and protection of reputation

Fundamentally, the public interest defence seeks to find a balance between freedom of expression and protection of reputation. In the UK, freedom of expression is a right under Article 10 of the *European Convention of Human Rights*. Article 10 informs the interpretative landscape in which the UK provision has been construed. UK courts have expressly recognised that 'the approach to [the public interest defence] must be consistent with the protections for freedom of expression provided by Article 10'.[12] While it is difficult to quantify the impact of Article 10 on the interpretative lens of judges, it is commonly referred to throughout cases in which the defence is relied on.[13] The presence of an enshrined freedom of expression in the UK is sure to shift the balance in favour of freedom of expression.

In contrast, Australia has no express right to freedom of expression. An implied right to political communication has been inferred from the structure of the Constitution,[14] but this is a substantially more limited right that applies only to political and governmental matters. Freedom of expression is one of the non-mandatory factors that courts may take into account. However, they are explicitly not required to do so.[15] This calls into question the weight with which Australian courts are likely to consider freedom of expression when assessing reasonable belief.

The lack of an enshrined explicit right to freedom of expression is sure to impact the way that Australian courts balance these competing interests. It is prudent to expect that Australian courts will reach a balance that favours protection of reputation to a greater degree than in the UK. In practice, this may mean that the availability of the defence is more greatly restricted in the Australian context, particularly where the publication does not concern government or political matters.

Conclusion

The introduction of a new public interest defence is a significant development in Australian defamation law. Departures from the text of the UK provision have created uncertainty as to precisely how courts will assess the reasonable belief and apply the enumerated factors. Similarly, with no right to freedom of expression, NSW courts are likely to place more weight on protection of reputation than seen in the UK. Whether these factors limit the availability of the defence remains to be seen. Despite this, the defence will be a welcome change for publishers and is likely to provide considerably more protection than was previously available at common law or under statute.

10 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

11 *Economou v de Freitas* [2018] EWCA Civ 2591, [75]-[86] (Lady Justice Sharp); see also *Shikil-Ur-Rahman v ARY Network Ltd* [2016] EWHC 3110 (QB), [50] (Sir David Eady).

12 *Burgen MP v News Group Newspapers & Anor* [2019] EWHC 195 (QB) [82] (Justice Dingemans).

13 See eg, *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852; *Yeo v Times Newspapers Ltd* [2015] EWHC 209 (QB); *Doyle v Smith* [2018] EWHC 2935 (QB); *Economou v De Freitas* [2018] EWCA Civ 2591; *Turley v Unite the Union* [2019] EWHC 3547 (QB).

14 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

15 *Defamation Amendment Act 2020* (NSW) s 29A(4)(a).

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

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

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

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

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