CAMLA COMMUNICATIONS LAW
BULLETIN
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40th Anniversary Edition

Forty Years of the Communications Law Bulletin

This year marks 40 years of the Communications Law Bulletin, easily the most prestigious law journal on the planet, if you don't count a few others. To commemorate the occasion, Ashleigh and Eli, co-editors, assembled seven of the community's most noteworthy veterans, for a chat about the practice of media, IP and technology law over the last 40 years. We acknowledge the generous hospitality of Clayton Utz, which kindly hosted this discussion.

Our seven practitioners were all chosen because they have been for many decades, and continue to be, leaders in our fields, and because over the last 40 years we have enjoyed publishing them, writing about the matters they are working on, and learning from their respective practices.

At risk of introducing people who need no introduction:

BRUCE BURKE

Bruce is a partner at Banki Haddock Fiora. Bruce graduated from the University of Sydney in Arts and Law (1970-1975), and subsequently completed a Masters Degree in Arts in Government and Public Administration and a Master of Laws from the same university while working full-time.

Gradually, media law in general and defamation law in particular occupied the majority of his time as he became the designated lawyer for the then Federation of Australian Radio Broadcasters, the Federation of Commercial Television Stations and some Press Associations and their insurers. Throughout his career, he has remained heavily involved in media matters throughout Australia and has regularly been recognised as a leading practitioner in his field. Bruce, writing for us three decades ago, is the author of the seminal 'The Westpac Letters case' [1991] *Communications Law Bulletin* 11(1), which has (now) been cited favourably in later law journals.

Continued on page 3 >

Contents

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Ashleigh Fehrenbach and Eli Fisher

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Editors' Note

We didn't start this flyer, we just write the hits, you know the news won't quit.
We didn't start this flyer, no we didn't light it but it's still ignited.

1980s: Space Invaders, Pacman, DPP v Neville Wran; Apple and Computer Edge, Amstrad and CBS;
Margaret Thatcher, Spycatcher, Miller and Channel 9, CDs, MTV, APRA and the ABC;
Morosi v 2GB, Blockbuster, G+T, Seidler and Fairfax, Freedom of Information Act;
Autodesk and Dyason, Joh Bjelke Petersen, walking with my Walkman, Pacific Dunlop Hogan;
Packer, Stokes and Alan Bond, Channel 9 and Hepburn, NPPs and IPPs, legislating privacy;
Polly Peck, Windows, MacIntosh, Cojuangco, Rank Film, VCRs, CCTV cameras.

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1990s: Communications Decency, Nintendo and Atari, Lange, Chakravarti, Blogging come and join the party;
Broadcasting, Radiocoms, Telstra replaces Telecom, Google, and Elon, Bezos and Amazon;
Data Access Powerflex, Reed Hastings, Netflix, ACP took a pic, showing Ettingshausen's;
De Garis and the fairness fight, Computer Programs copyright, Pell sues the gallery for Piss Christ blasphemy;
Blank Tapes, Foxtel, to foreign buyers we can't sell, Pay TV, Conrad Black, Listening Devices Act.

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2000s: Dow Jones and Diamond Joe, Michael Douglas sues Hello!, MSN Messenger, MySpace, Reddit, Tumblr

Sony and Stevens, EMI and Larrikin, Seven sues Foxtel, Nine and Ten The Panel;
Wiki, memes, Zuckerberg, ACMA, and Sandberg, Napster, and IceTV, David Syme v Hore-Lacey;
Vodafone and Hutchison, 2UE and Chesterton, Alan Jones, John Laws, Spotify, the Streaming Wars;
Cooper, Kazaa, C7, Howard gone and here's Kevin, Campbell sues MGN, now we have the NBN;
Facebook, Google Books, copyright in phone books, Microsoft Outlook, phone hacking, Rebekah Brooks.

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2010s: iiNet, IoT, Competitive Neutrality, The Leveson Inquiry, The Digital Economy;
Convergence, ownership, ever-smaller microchips, Nine acquires Fairfax, we need an Online Safety Act;
Duffy, Bleyer, Trkulja, AdWords can't fool ya, Siteblocking, TikToking, Seafolly, Joe Hockey;
Finkelstein, Instagram, APPs, and Max Schrems, PPCA and CRA, section 115A;
Telstra Optus TV Now, Keyser Trad's High Court row, Rush and Rebel damages, abhorrent violent images;
MeToo, Rinehart, GDPR is gonna start, platform damnation, newsfeed misinformation.

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THE HON. DR ANNABELLE BENNETT AC SC

Dr Bennett is a retired Judge of the Federal Court of Australia and was an additional judge of the Supreme Court of the ACT and a Deputy President of the Administrative Appeals Tribunal, having previously practised as a Senior Counsel specialising in intellectual property. She is currently Chancellor of Bond University; the Chair of the Australian Nuclear Science and Technology Organisation (ANSTO), an Arbitrator of the Court of Arbitration for Sport; President (part time) of the Anti-Discrimination Board of NSW; Member of the Board of Directors of the Garvan Institute; Chair of Gardior Pty Limited; Member and past President of Chief Executive Women; Chair of the Advisory Group of Judges to the World Intellectual Property Organisation; and Member of the Advisory Board of the Faculty of Law at The Chinese University of Hong Kong. She has also served as a Commissioner with the NSW Law Reform Commission and as a Royal Commissioner into National Natural Disaster Arrangements. Dr Bennett is a Fellow of both the Australian Academy of Science and Australian Academy of Law. Dr Bennett is a Member of the International Centre for Settlement of Investment Disputes Panel of Arbitrators (ICSID), a Member of the WIPO Mediation and Arbitration List of Neutrals and a Member of the indicative List of Government and Non-Governmental Panellists for the World Trade Organisation (WTO) Disputes Settlement Process. She also practises as a barrister, in an advisory role, and as a mediator and arbitrator.

CHARLES ALEXANDER

Charles practised for over 40 years, principally as an intellectual property specialist. He is best known for his work in the areas of copyright and privacy, with a passion for the media, broadcasting, telecommunications and entertainment industries. Charles has made a name for himself locally and internationally providing advice and strategic guidance on issues that impact a rapidly changing landscape. Clients he has acted for include Singtel Optus, Qantas, the Nielsen Company, News Ltd, Fairfax Media, Fitness Australia, Live Performance Australia, Sony Pictures Home Entertainment, Foxtel, Motion Picture Association, the Copyright Advisory Group for Australian Schools, Commercial Radio Australia, the Association of Independent Schools of NSW and the Catholic Education Commission. Formerly a partner at MinterEllison, Charles is now a legal consultant. He was named for a number of years as a leading lawyer in Chambers Asia Pacific, the APL 500 and Best Lawyers in Australia. He was Highly Recommended in the area of Intellectual Property in PLC Which Lawyer. He was a member of the Law Council of Australia Intellectual Property committee and is currently a member of its Primary Committee. Charles' influential treatise in our pages, 'Journalists' Copyright' [1992] *Communications Law Bulletin* 70 12(3), remains the leading text on the subject three decades later.

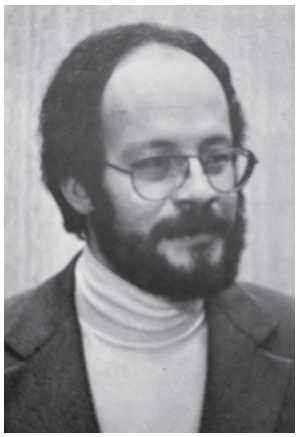
PETER BARTLETT

Peter Bartlett is partner at MinterEllison and one of Australia's leading media and communications law experts. Peter's areas of expertise include regulatory compliance, breach of confidentiality, defamation/libel, freedom of information, data and personal privacy, and reputational risk management. Having graduated from Monash Law School in 1972, Peter began his career in law at Gillott Moir & Winneke, where he made partnership in 1974 and led the discussions for that firm and two others to form Minter Ellison in 1987. Peter was on the Board of MinterEllison for over 20 years and served two terms as the firm's Chairman. Peter is the Chair of the Legal Practice Division of the International Bar Association. Peter is a past Chair of the International Bar Association Media Committee, the Media and Technology Committee of the Law Council of Australia and the Communications and Technology Committee of LAWASIA. Peter is a past President of Barwon Heads Golf Club, Deputy President of the Melbourne Press Club (having held that role for about 18 years) and Life Member as well as chair of the Advisory Board at Melbourne University's Centre for Advancing Journalism. Peter, writing for us almost three decades ago, is the author of the classic 'Uniform Defamation Bill 1991' [1992] *Communications Law Bulletin* 8 11(4).

MARY STILL

Mary has had an illustrious career at Clayton Utz (1986 to the present), and at Allens prior. She is an experienced commercial litigator, and one of Australia's best known intellectual property lawyers. With over 30 years' litigation experience, she acts for clients in commercial litigation matters and specialises in litigation relating to infringement of trade marks, patents, designs and copyright as well as passing off, breach of confidentiality and breaches of the Australian Consumer Law. She also advises a range of clients on broadcasting issues. Mary's celebrated exposition on the principles for false, misleading or deceptive conduct 'Context is All' which appeared in the *Communications Law Bulletin* [2020] 39(5) 24, has been described as the most important development in law since Blackstone.

PETER BANKI AM



Peter is one of Australia's most respected intellectual property practitioners. He has extensive experience in advising on, negotiating and documenting commercial transactions involving intellectual property and in areas of related law; in particular, in the publishing, digital, media and entertainment industries. Having graduated from the University of Sydney in 1972, Peter has represented parties in a number of landmark cases in the Federal Court and High Court of Australia and the Australian Copyright Tribunal and given expert evidence on Australian law in litigation in foreign jurisdictions. He is a CEDR Accredited Mediator. Peter was a founding partner of the Banki Haddock Fiora partnership in 1995, where he continues to practise, and has been a member of Australian and international committees on the practice and reform of the copyright law. Peter is consistently ranked as a leading lawyer in his field by legal directories, including Chambers Global, Managing Intellectual Property Handbook, Legal 500 Asia Pacific and Best Lawyers of Australia in The Australian Financial Review. Peter and the *Communications Law Bulletin* have been instrumental in each other's respective histories, with Peter, then a Legal Research Officer at the Australian Copyright Council, an inaugural author in the Communications Law Bulletin, in April 1981 Volume 1, Issue 1, in the illustrious piece, '*Copyright Amendment Act 1980*'.

JAMES (JIM) DWYER AM

Jim has had a long and successful legal career at Allens, where he served as a partner for 35 years from 1977 to 2011. He has many years of litigation experience in large commercial disputes. In addition, he practised extensively in the intellectual property field and was regarded as one of the leading practitioners in the country. Jim has acted for a range of clients, including major Australian and multi-national corporations in the following industries: music, entertainment, broadcasting, electronics, banking, manufacturing, computing and hotels. He has acted for national and international sporting bodies. For many years, he represented The Bradman Foundation of Bowral. He serves as the Permanent Secretary of the Court of Arbitration for Sport, Oceania Registry and has done since 2003. Jim was appointed in 2008 as the first General Counsel of Allens and served until June 2017. He also served on the Board of the Firm for six years. In addition, he was on the Boards of a number of corporations, including Arena Management and Sony Music Australia. Jim has been very active in the community. He was the inaugural Chairman of the Allens' Charity Committee, a position he held for 18 years. He has served on the Boards of a number of not-for-profit organisations, including Sony Foundation Australia (as Chairman for eight years), and St Vincent's Hospital, Sydney. Jim also reflects fondly on an article he wrote for this publication almost three decades ago, 'Bootlegs Revisited', [1993] *Communications Law Bulletin* 24.

FEHRENBACH: What were you doing this time 40 years ago?

BENNETT: 40 years ago, I had just come to the Bar. So I was a barrister of just one year standing. In those days, you weren't allowed to advertise, so no-one knew I had a science background. So I came to the bar, and read with Keith Mason and started doing general equity and commercial work. I had obviously heard of intellectual property, but back then it was a little esoteric area of the law, and no one gave me any cases and no one knew I had any scientific qualifications. I just went in and was a junior barrister like all the others, with the added difficulty that I was female, at that stage.

ALEXANDER: Would you like to rephrase that? [Laughter]

BENNETT: I was the 33rd woman to be admitted to the NSW bar, so being a female barrister was not easy in terms of establishing a practice.

ALEXANDER: What was I doing 40 years ago? It was a transition stage. I was a solicitor at Piggott Stinson. At that stage, I was an employment solicitor becoming an intellectual property solicitor.

BARTLETT: So 40 years ago – that was 1981. I was a partner at Gillott Moir & Winneke, which was one of the three firms that joined in 1987 to form MinterEllison. I was doing media law with Tony Smith, who was then one of the leading media solicitors in Australia, before he went to the Bench, and working with Michael Winneke, who was from a very prominent legal family in Victoria. 1981 was actually a very interesting year, because that was the year of *Commonwealth v Fairfax*, where the Commonwealth got an emergency injunction against Fairfax to stop the publication of Defence Department documents. We had Tom Hughes QC for Fairfax and Jeff Sher QC for the Melbourne Age, appearing before Justice Anthony Mason. So that was a highlight for me of that time. I'm now still at MinterEllison, heading up the Media practice. I'm very busy with this huge Ben Roberts-Smith trial, which some commentators are calling the trial of the century and might go for 10+ weeks in the Federal Court in Sydney.

DWYER: I was a partner at Allens, 40 years ago, working with a very able colleague, who is our hostess tonight, Mary. I described myself in those days as a litigation partner, in the litigation department where we did the IP work. I had a blend of commercial litigation and IP. In 1981, we were preparing for a Copyright Tribunal case on behalf of the record industry against the FM radio stations that some of you may remember – a pay for play proceeding. And also, at that time, we were doing a lot of work for the character merchandising industry – the Muppets, Sesame Street, Snoopy, various sporting individuals. The character merchandising or licensing, we all take for granted now; but in the late 70s and early 80s, it took a bit of convincing of the judiciary that that was a business that the tort of passing off would cover (and later on, s52). That was a growth area. And Bacardi Rum. Bacardi Rum was on the war path in Australia about the problem of substitution in bars and restaurants. A lot of work was done, catching out the spivs substituting cheaper brands of rum. And they were fun times.

BENNETT: I can't believe that I'm the baby of this group.

DWYER: I think you are.

BANKI: In 1981, I was a Legal Research Officer at the Copyright Council. And that was the year that David Catterns, with whom I had worked at the Copyright Council, left and went to the Bar.

DWYER: Yes, I gave him his first case.

BANKI: Yes, I remember that. After he went and saw you, and got the case, he came back and said to me, "Well Dwyer has offered me this case. What do you reckon I should charge?" He was thinking of something like $50 an hour. And he must've gone and said that to you, Jim. And then he came back to me the next day and said, "No, $50 is no good. Dwyer said I can't possibly be that cheap. I've got to double it at least, otherwise I'll make Jim look overpriced."

DWYER: That's true!

BANKI: And in 1986, I was transitioning from the Copyright Council to private practice. I remember that too. I went to Phillips Fox. And it involved – what we don't have anymore – a long lunch. A really long lunch, with the then Managing Partner. Started at noon and finished at midnight, and at which a lot of French champagne had been drunk. And I agreed that it would be a good idea to move into private practice, and that's what I did. And that's when I started being a practising solicitor. It was very early days for me.

STILL: You were a baby.

BANKI: I was. I reckon I'm the baby of the group in terms of years practising as a lawyer. Although if you go by age, it's probably different.

BENNETT: I was literally just starting then. You were already established and moving from one fabulous job to another. I was just beginning.

BARTLETT: I hate to tell you that I was a partner in 1974. That's a long time ago.

STILL: You must have been made a partner while you were still at school!

BARTLETT: I was a first year lawyer, I might say.

ALEXANDER: I was a partner in 1976, a third year lawyer or something.

BENNETT: I just finished Law School in 1980.

FISHER: What was it like being a partner in your first year of practice?

BARTLETT: I was a little different from the others. I was the first partner there to have not gone to Scotch College. I went through a country school. I was the first male partner that was not called Mister. And it wasn't too long before me – maybe the late 60s – that partners stopped wearing hats.

BENNETT: Was that just because it was Melbourne? [Laughter from everyone except Eli, who still has knee-jerk reactions of defensiveness about his hometown.]

ALEXANDER: My father who was a lawyer at Pigott Stinson wore a hat whenever he went out.

STILL: 40 years ago, James Dwyer had three female assistants. Robyn Durie, Carmen Champion and me. And we worked for you for years, doing various IP matters. I can't recall precisely what I was doing in 1981, but I do recall at that time copyright was by far the most populous of

the matters we acted on. It was the height of piracy. Infringing cassettes at the Royal Easter Show. Infringing towels, Snoopy dogs. I had an entire cupboard full of infringing products. And it was all based on copyright, which is very different to now where I think that there are many more trade mark cases than there are copyright cases.

BANKI: That's true.

STILL: But ultimately, Robyn went to London and became a partner at Linklaters. And Carmen went to the Bar. They're both now retired. I haven't. But soon.

BURKE: It's a little bit hard to remember what I was doing 40 years ago, except that I know I was working for a firm called Dare, Reed, Martin & Grant. I remember this because almost exactly 40 years ago, my son was born. I remember going into the office on the 7th floor of 25 Bligh Street. It's the one thing I'll never forget: being in the office one day, holding my head up with my hands, thinking "I don't think I can survive this". It had nothing to do with the legal work. It was the fact that I wasn't getting any sleep at all with a newborn child at home for the first time in my life. So I know exactly what I was doing on the 22nd of June. I was just a member of that law firm, which at the time was a medium sized law firm. That would be laughable today, because we had about six partners. I think I became the seventh. In those days, we were the second firm in Australia to have a Telex machine, and we thought we were good stuff. We had the technology. We also had an office in Hong Kong, which made things a little different and interesting. That's what I was doing 40 years ago. I was the young guy trying to work around the clock and having a newborn baby prevent me from doing so.

FISHER: You are all quite well known to each other, having operated in the same sphere for at least four decades. Talk us through some of the connections, just within this group. What are some of your early memories of each other?

STILL: I worked with James. I'm related by marriage to Charlie. I've known Annabelle for almost the entire time she's been at the Bar, and I've known Peter Banki for as long as I've been practising as a solicitor.

BENNETT: I feel like I met Mary by osmosis, really. I don't know when or how I met Mary, but I feel like I've always known her. And then I eventually met Peter, although Peter and I probably met more tangentially, really. Peter and David Catterns were always joined at the hip, so I don't think I ever got briefed by him. [Laughter].

BURKE: I've known Mary since the 1970s, we were in university together. We go back a long way. I know Annabelle and Charles by reputation. Peter Bartlett and I go a long way back, doing the same sort of work for the same clients for many years. I've referred people to Peter [Bartlett] and we often work together on cases, when our respective clients are in the same boat. And Peter Banki, I can't remember exactly when I came across him. But he was a friendly chap and we've always had a really good relationship.

DWYER: Banki and I, and Catterns – we were all in the same year. And I remember when Peter and David worked for the Copyright Council and I think our partner Reg Barrett was doing the commercial side of work for Gus O'Donnell in setting up the Copyright Council. When I started practising in 1971, there were very few copyright cases. Banki, Catterns and Gus O'Donnell deserve a great deal of credit for many things: educating lawyers and students about copyright law, about the different rights that rightsholders held, etc. And they heightened the awareness of all of us, I think. David went to the Bar and Peter went to private practice. I've known the two of them for a long time. Mary, I've known since the mid-70s, and I'm proud to be the godfather of her eldest daughter Georgina. And her long-suffering husband is one of the funniest guys on the planet. Annabelle and I had a close connection in recent years, through the Court of Arbitration for Sport, where Annabelle is a very sought-after Tribunal member and loved by the head office in Switzerland. Peter [Bartlett], I read about his achievements in the Press.

FISHER: We'll get to professional and legal things in a second – but what things, generally, do you miss about the 80s? The hair, the music, the clothes, the movies, the food. Taste-wise, stylistically, what are Ash and I just getting wrong?

BARTLETT: Well, the wonderful thing about the 80s was that things moved so much more slowly in those days. We dealt with clients when they would phone up or they would come into the office. We would post a letter and expect to get a response maybe a week later. Now, everything is instantaneous and the technology is extraordinary. Clients expect everything to happen yesterday. It's a totally different environment.

BURKE: That's exactly my experience too, Peter. I remember back in the 70s, I could go to the Supreme Court for a matter involving millions of dollars, and I could carry the stuff myself. These days, we need trolley boys just to get the stuff up there for an interlocutory application. The technology now means there's vastly more stuff to sift through. I used to be able to take everything down to Court myself.

BARTLETT: It's also similar dealing with investigative reporters, where 40 years ago you would look at articles and they would give you a couple of letters or other supporting materials. Now, they're leaked millions of documents online, which somehow you need to get a grip of before these large investigative reports get published. It's a totally different environment.

BURKE: At the same time, as you say, everyone expects your response yesterday.

ALEXANDER: What I do miss also are lovely libraries. Full of books. They don't get used anymore and I find that very sad.

BARTLETT: Agreed.

BENNETT: I can say that I had two of my children in the mid 70s and one in the 80s, and being a professional woman pregnant in the mid 80s was very different then from how it would be now. I had people back then tell me in Court that it was disgusting that I turned up to Court pregnant. On the other hand, I appeared at the

High Court at 8.5 months pregnant, pro bono. The Chief Justice said, "whatever you want, anything you want – it's fine, it's fine – just don't have the baby here." [Laughter].

STILL: Yes, that's right. Things are very different. I can remember being stopped on an escalator, being told that I shouldn't be outside while pregnant, I should be staying at home. I had my babies in the late 80s and early 90s. I think it was much more expected that women would have children, and be with them full time. But I found it perfectly accepted here at Clayton Utz that women would have children. Clayton Utz were quite collaborative about it. I never felt that it had a negative impact on my practice to have children. And many women here have children, and probably ten years before my pregnancies, it would have been very different.

ALEXANDER: You're a testament to all mothers who are lawyers, Mary. Because not being able to see you very often has made them grow up to be wonderful people.

STILL: Ha! One of them even became a lawyer.

BENNETT: At the Bar at that time, there were very few women with children.

BARTLETT: I remember being on the Board of MinterEllison 30 years ago when for the first time we introduced a rule that we could have part-time partners, obviously having women in mind. Somewhat to our amazement, the first partner to apply was a male partner. That male who applied is now a Federal Court judge.

BANKI: Picking up on what a couple of you have said about the changing way we practise. When I joined Phillips Fox, at a dinner welcoming me and farewelling the then Senior Partner, he told a story about how he copied things in those days, with this machine. He explained how he put the paper in the machine and twisted the thing and pressed it down – that's how you made your copies. And obviously things have changed enormously since then. People got excited about technology and what it can do. When we first got the fax machine, someone would fax you something from another country. You'd be on the phone to them, and they'd ask whether you got their fax. That died out. Even though the technology enables all this fast stuff, we might in the next few years see people being game enough to say "hang on a minute, I can answer that in an hour, but you know what? I'm going to think about it because it's complicated."

FISHER: How does working from home fit into that forecast Peter? Do you see that loss of boundary between the workplace and the home as forcing lawyers to push back against that immediacy?

BANKI: Obviously the working from home thing will continue. But almost everyone in our office has been back for ages, and I think for a lot of people it doesn't work satisfactorily. Particularly junior people. But for senior people, yes, they may not need to be in the office as much.

STILL: The one thing that everyone here has had the benefit of is a senior practitioner who helped them in those early years, who trained them, who sat opposite them and criticised their documents. You cannot train someone satisfactorily at home over a Zoom call. Working remotely, it becomes very easy to just mark up a document and send it back. That's not training somebody. I think that that's why we'll come back to work – because the juniors are really suffering because they won't have the training that we all had, or the enjoyment that we all had in practising.

DWYER: I agree with Peter and Mary. I think the really important things that I learned as a junior, were learned sitting in an office opposite Bill Gummow, or Hugh Jamieson or Adrian Henchman or other supervisors. The red ink all over the draft documents. There's no substitute for that. Or watching and listening to someone over the telephone. The telephone manner, how they break bad news to the client. That's not always an easy job. I agree: working as a member of a team, face to face in an office is terribly important. The other thing about those days is that there was a bit of a shift in the late 70s and early 80s by the Bench. They became more aware of the commercial ramifications of breaches of IP rights. There was a much greater willingness to grant interlocutory injunctions. My earliest days as a litigator were dominated by interlocutory injunctions. Now you rarely hear of one. The response from the Bench is that the Court will give the claimant a speedy trial. I can understand that sort of a direction most likely comes from the top. But interlocutory injunctions were very real in passing off, copyright and trade mark cases. On a lighter note, I remember as a junior woodchuck lawyer before becoming a partner, we would brief silks. And the expectation was that the Great Man would walk to Court with his hands in his pockets. And the Great Man would not carry anything. I enquired about this: "why doesn't he carry a folder or a Law Report, or some bloody thing?" At some point, that practice changed. And I think it's a damn good thing.

BENNETT: I think it's fair to say that the rituals have changed. Picking up on what Jim said, I think he's right. I remember when, pregnant at 7 or 8 months, I was staggering along with a pile of books behind the silk who was walking with nothing in his arms. And a book fell off the top of this pile I was carrying. And the silk bent down very nicely and retrieved the book. And put it back on my pile. [Laughter.]

STILL: I don't know if you remember the champagne case. On the appeal, Michael McHugh was the silk, Robyn Durie was the junior, and I was instructing. Michael had all these books. And Robyn and I were really struggling to carry his bags. And Michael turned around, as we walked down the corridor, and said "I don't care about the rules. Just give me those bags and the rules will be changed." And they were.

BENNETT: I had a number of experiences like that. Alan Goldberg, when he was leading me, refused to let me carry all the books, he just said that it was ridiculous. That did happen a lot, with a lot of different silks. But generally speaking, a lot of the traditions have gone. That's the big change from the 80s to today. For example, there used to be a tradition at the Bar that you enter the lift in order of seniority.

DWYER: Oh no!

BENNETT: Well that changed. All of the men would stand back waiting for me to get in and I would stand back, waiting for them because I was junior, and then the lift would leave without any of us. [Laughter] I think that a big cause of these changes has been the volume of paper, which was referred to earlier. The days of the short brief tied in pink ribbon are long gone. The advances in photocopying have changed the practicalities of some of these traditions.

BARTLETT: I remember a trial I was involved in, in New South Wales, back then. I had come up from Melbourne for it. And the judge had this quaint New South Wales tradition of inviting all the barristers into his chambers for a morning coffee. And I was furious, because the solicitors were not invited. I had come all the way up to Sydney, and I was the only one left outside. I instructed my silk to tell the Judge that I wasn't happy, and after that I got invited.

STILL: I got stopped one day in Court by a barrister who told me that it was my job to curtsey to the Judge, not bow. [Laughter.] "Madam! Madam! You curtsey to a Judge, not bow!" It's absolutely true.

FISHER: Which milestone over the course of your career do you reflect upon now as a much bigger deal than you thought it was at the time? What do you wish you celebrated more? Peter Banki, let's start with you. You don't have to say moving my admission, although you can if you want.

BANKI: Ha! Well I did spend about a week learning how to pronounce all your names! For me, part of working at the Copyright Council was that we were funded by government grant in those days; not so much anymore. And we got a grant to go to China. There was an exchange between us organised by the Australia China Council. We went there, and they came here. That was back in the mid-80s. Looking back on it, I could have made a lot more out of that connection. I've been back a couple of times, but given how the world has changed and how important China has become in our field of intellectual property, I could've made more of that. I regret that.

DWYER: I can't point to any particular case that had a significant impact on me, but in the 80s there was a recognition by business people that IP was valuable. Other parts of the world were way ahead of Australia in that recognition. Accountants were valuing IP rights and were discovering that for major companies, the greatest assets they had were their trade marks, patents, copyrights. There was a groundswell of recognition and awareness that led to more lawyers getting involved in this area. It became in the minds of students in University a sexy area. People wanted to get into it. I can understand that, because when I recall our last year at University, you had three choices in the final year of an optional subject. One was tax, which for reasons I've never ever understood was thought to be a sexy subject. 285 of the roughly 300 kids at Sydney University did tax. The second subject was Roman law, about 5 people did that.

BANKI: Ha! There were 4 of us!

DWYER: I hadn't realised you were one of them, I was about to defame you. But I won't. [Laughter] The third option was a subject called Industrial and Commercial Property taught by an Allens partner, by the name of Bill Gummow. We're talking about 1970. There were about 12 students in that class. Bill Gummow was, in my view, the best lecturer I ever had in my six years at university. He motivated me. He and Jim Lahore, with his textbooks, contributed to educating all of us about the different IP rights.

ALEXANDER: I had an interesting career. As I mentioned earlier, I started off as an industrial lawyer. One of our clients was John Fairfax & Sons, and in the late 70s and early 80s, Fairfax was changing from hot metal to cold type. That was a massive change in how things were done. We had industrial dispute after industrial dispute with the printing union over everything. I learned without realising a hell of a lot about negotiating, although in an entirely different area. Funnily enough, around this time, there was a massive change in the education industry. There was a lot of photocopying going on, which you couldn't do before. And rapacious organisations represented by Peter Banki and others, wanted to get money for it.

DWYER: Absolutely!

ALEXANDER: And because I was acting for a lot of schools and associations, they thought I might like to take this on. I knew nothing at the time about copyright law, so I purchased Jim Lahore's book and I carried it with me everywhere I went for quite a long time, as I was trying to work out what all this was about. We ended up in in the Copyright Tribunal in the famous Two-Cent case before Justice Sheppard, briefing Bill Gummow. And that taught me an enormous amount about how to run copyright cases, which was very different to industrial cases. Awful sometimes, with people like Banki against you. [Laughter].

BANKI: I was going to say something nice about you, Charles!

ALEXANDER: Different in many ways, but it still involved negotiations over rights. In the first case, it was employees' rights to a wage. In the second case, it was a person's right to reimbursement for their intellectual property. And so, it was an interesting way into it. Having done that important case, it led to a lot more cases in the copyright space.

BENNETT: A career milestone that I look back upon now fondly, but perhaps did not appreciate at the time, was the first major patent case I did. I was being instructed by a female partner at a patent law firm. It was my first patent case, *Phillips v Mirabella*. We went to trial; just the two of us against a whole massive team from Phillips. We won. I brought David Catterns in for the appeal and in the High Court, where we won. This was my first foray in intellectual property, and I probably didn't appreciate what impact that would have on my career. But also, it was the first time that we introduced the concept of manner of manufacture, which has bedevilled patent law ever since. I hated the concept as a judge because I had to decide it. It raised argument upon argument, and it has become worse and worse. So yes, I didn't appreciate this at the time, and I wish that I had celebrated it more because it was a terrific result. And it had an enormous impact because it was probably the thing that started me off in my patent career.

STILL: I haven't got anything really specific. But a couple of real highlights, though. One was negotiating with another partner dozens of agreements for the Olympic Games in Sydney. The negotiations which went on, on the IP aspects of all those agreements, were massive. It was a massive effort. That was amazing, to have finally gotten to Day 1 of the Olympic Games and not one of them had fallen over. And even better, we got to the end of the Games, and had only been in court three times. In fact, one day I was watching the beach volleyball. I got a call from someone in the office saying that I'm on at 2:00pm, someone is alleging that we're infringing their copyright. I had on a pair of leggings, a t-shirt and a sunhat. I had no time to get changed. I had to go in, in that. We had to deal with the interlocutory application. And as I was walking down the corridor, I saw Richard Cobden and John Ireland. I asked them what they were doing, because they were holding a folder labelled somebody or other versus Seven Network Limited. They said that they're just getting an interlocutory judgment, and I said 'Oh no, you're not'. And I turned around and went back in again. And we sorted that out. So that was a lot of fun. And it shows you that you can do it. It proves you can work collaboratively with the client to achieve a sensible result. And we all had a lot of fun doing it!

BURKE: Looking back over my career, I do regret that I never stopped to smell the roses. I never really celebrated the wins. Whenever I finished a matter, I always raced back to the office to attend to a million other cases that I needed to deal with. I've probably only gone to lunch with barristers after a win only a couple of times in my career, not because we haven't had a lot of wins, but because I've always had a lot of other things that were urgently calling. So yes, if I could go back, I would probably say yes to a lot of those invitations. Looking back, I have always been too busy.

FEHRENBACH: Which person has made the biggest impact on the success of your career?

BARTLETT: Michael Winneke. As I mentioned, I went through school in a small country town called Warburton in the Upper Yarra Valley. When I was in the first year of Law School, my father and brother played golf at the Flinders Golf Club tournament. They played with Michael Winneke. I don't think I had ever met a lawyer, I had rarely been to the city of Melbourne. But Michael invited me around for a coffee, and he offered me Articles. I went back to Monash University, and told all the students from Melbourne Grammar, and Scotch and Xavier and everywhere else that I had Articles. They couldn't believe it. I then started Articles in 1972. Admitted in 1973. Michael offered me partnership in '74. So he made a huge difference to my career. My admission was moved by John Winneke, who went on to be the President of the Court of Appeal. I got admitted at 3pm. Tony Smith and Michael and John Winneke took me for a good lunch prior. We raced up to court at five minutes to 3pm, when I was being admitted. Because my surname starts with B, I was one of the first to be moved. The three judges were furious that we had held them up. As soon as the ceremony had finished, the Associate came down and told John and Michael that the Chief Justice expected them in his chambers now and he was not pleased. But yes, Michael made my career.

STILL: I would say James, to be perfectly honest. I started in Finance, and it was Robyn Durie who suggested that James needed an assistant and that I should go speak to him, which I did. I had never studied IP, because it wasn't available in my year. So James suggested I read the Copyright Act. Just to get that practical experience of an urgent interlocutory injunction, a letter of advice, and to have Robyn Durie there as well who was very clever and had been doing it for a couple of years longer than me, was very good. And then Carmen came along. Phillip Kerr was in that group, Hugh Jamieson – we had a lot of fun. We had a really wonderful group of people. It was very collegiate. The FBT hadn't come in yet, so we could go to Friday lunches – and they were quite long. [Laughter] I was very privileged.

DWYER: Well, it's very kind of Mary to say that. Mary was a fantastic assistant. And working at that time, we worked very hard. But yes, we did have fun. One of the sad features of practice today is that it's all so serious. Big Brother is there, watching the hours, and sending rockets to people who don't achieve the number of hours. And people at all levels of firms – whether they're partners with grey hair, or paralegals – are worried. And I think that that's very sad, because it's gone from a profession to a business. And it's really sad. For me, there wasn't one individual. I feel very privileged to have gone to Allens and to work predominantly for Bill Gummow, Adrian Henchman and Hugh Jamieson. Adrian was a Rhodes Scholar, and a great commercial lawyer – but also a very humble man with a great sense of humour. So I felt very lucky to have worked for them before becoming a partner, and then I felt extremely lucky to have had fabulous assistants: Richard Cobden, Tony Bannon, David Studdy – a number of people who have gone on to dizzy heights at the Bar. And I had a lot of fun along the way. I don't think that practising law in a firm should be all work and being miserable. There should be some lighter moments. That's my view.

ALEXANDER: I had a partner at Pigott Stinson, who moved with me to MinterEllison, called Julian Small, who was the most outstanding lawyer I've ever worked with.

BARTLETT: Wonderful!

ALEXANDER: He was an industrial lawyer, he was the go-to person for the newspaper industry, for the television industry, for many other industries. He taught me how to deal with clients, how to deal with a problem, how to analyse it, and I have always been so grateful to him.

BENNETT: The first is my husband David, who was always there for me to ask questions – really stupid questions that you can't ask anyone else. He was terrific. John O'Connor, from Spruson & Ferguson, who gave me my first ever patent case in the Patent Office, having seen an article saying I had a science degree. Kate Johnson, of Sprusons, who briefed me – which was not always easy to do because clients did not necessarily want to see female barristers in cases. David Catterns, who despite the fact that some people – I don't think so myself – thought that

I was going to be competition for him eventually, supported me at the Bar. When I applied for silk, he supported me. Before that, in Melbourne they were calling people "Dr", but in Sydney it wasn't done – but David insisted on calling me Dr Bennett, even though he was helping my career not his. But he was always such a generous person that he made every effort to support my career all the way through. And that's in the best tradition of the Bar. And of course some amazing Juniors I worked with. Those people each played an important role, both subjectively toward me and objectively in the finest traditions of the profession.

BARTLETT: I think it's really interesting, with me being in Melbourne, that so many of the names you're all mentioning are really the icons of the profession. I recognise so many of those names, even though I'm not in the IP area and not actively practising in Sydney. Such national importance.

BURKE: First, let me echo James's sentiments about the practice of law being a profession not a business. I have worked in environments that have focused too much on the business side of legal practice. That's how I ended up with Banki. I was looking for an environment that reflected what Annabelle refers to as the finest traditions of the profession. In terms of people who have had an impact on my career, on my final day at the College of Law In 1976, I was anticipating that I would go back to Newcastle where I had my roots. I happened to see a notice looking for someone to work for a mid-size firm in Sydney for three months. I thought I may as well go to the interview before I leave Sydney; it can't do any harm. I went to the interview on Friday, and was given the job that day. I started on the Monday. The chap who gave me the job was Tony Martin. He'd been a WW2 fighter pilot, and was also quite an amazing lawyer. It was possible in those days to be across lots of things. He was across taxation, company law, and a range of other areas. But he trusted me with defamation matters. After the three months, he kept me on and that's what started me on defamation law. That took over my life, and from that point on, the people who had the most influence were the barristers who helped and guided me. I can never thank enough people like Tim Studdart, who was such a lovely human being. John Sackar, David Levine, Henric Nicholas – each of those people were always not just very good lawyers but really decent people. I think I owe the fact that I'm still going to the fact that I had the help of those people back in the day when I really didn't know too much about defamation. And also, because there were people like that for me over the years, I try to be helpful to other people, especially young people.

BANKI: For me, it was definitely Gus O'Donnell. He was an author, and was very active in the Society of Authors. He started the Copyright Council, and David Catterns and I went to work there. Gus was a fabulous guy with a background as a Patrol Officer in New Guinea during the War. He won some prizes as an author, but wasn't commercially successful. However, he had a lot of energy and was very motivated to improve the lot of authors – hence his interest in copyright. And what he taught me was not the law because our work was policy development – it was tone, which I reckon is very important. When I think of the way I practise and the way our firm works, the tone we adopt with our clients and our opponents, Is very important. I was going to say something nice about Charles: he's the sort of guy that I had on the other side of many matters over the years, and it was always a pleasure to deal with him because you could have a conversation with Charles that was off the record and you could depend that it would stay that way. Sadly, you can't do that as often these days. Anyway, the tonal approach to things is what Gus taught me. If you think of the job of a lawyer as being your client's trusted advisor, then tone is critical.

DWYER: Peter is so right about Gus O'Donnell. And I endorse his reference to tone. I remember Hugh Jamieson. You couldn't send a letter out as an employee, it had to be reviewed and signed by a partner. If someone had written to us an insulting and angry letter, and you wanted to get square, you would prepare a draft response addressing the criticisms. Hugh would in his gentlemanly way, say "I think we might just pop that into the bottom drawer and we'll have a look at that tomorrow or the next day." [Laughter] When this first happened to me, I thought I wanted to fire back straight away. Hugh was so wise. We all understood what the bottom drawer reference meant. We prepared a draft, and it had to be toned down. It was not to be insulting or hysterical. Certain solicitors, in Melbourne and Sydney, made a point of writing hysterical and insulting letters. They thought it was their job.

BARTLETT: I think that only happens in Sydney. [Laughter]

DWYER: That was a very important lesson. When I had to lecture the kids, when they came to our firm, I always used to stress to them that no matter which client we're acting for we have to play the hand we've been dealt. Big-noting yourself or putting another firm down is not to be encouraged, I think it's appalling. There are good lawyers in a lot of firms, large and small. Always treat opponents with respect. It's important that this point gets drummed into the new lawyers, so that they don't get jumbo sized egos. At Allens, one of the things I was involved with which helped to keep the kids grounded, was that we had a charity committee. We made it compulsory for summer clerks in their first week to go out to the Neurology Department at the Sydney Children's Hospital in Randwick, where we fund a fellowship. The Professor would give the summer clerks a tour of the ward and she would explain the condition of each of the patients and they would chat with the patients. It's a very confronting experience. I did it for many years, and almost fainted a few times. Some of the kids did faint on these visits. When these buses came back to the office, the change in the individual personalities was quite noticeable. I like to think that that exercise, which continues to this day, helped ground these kids just to remind them that although we have smart offices, and act for big companies, we're part of the community and we have a role to play. There are things that we should be doing outside the firm to lend a hand to those who need it.

FISHER: Are there any matters or clients that other people in this room have been involved in, that you just wish you were involved in? Are there any professional jealousies in the room?

BANKI: I've got one. I've been harbouring this for thirty years. And I'm glad that Dwyer is here, because it involves him. I remember going to Paris with Victoria Rubensohn who was the CEO of ARIA at the time. Victoria had organised that we would go and say hi to Jim at the Ritz, because he was involved in the Ritz case. I was in the most elegant outfit I had, but I did not have a tie.

DWYER: Ohhh.

BANKI: And they would not let me in.

DWYER: Oh. No.

BANKI: And I thought: "Dwyer has got clients like this, and he's in Paris. At the Ritz." And I thought to myself, "where have I gone wrong?" [Laughter]

STILL: It was wonderful there.

BANKI: Oh, you were there too!

DWYER: It was a great client. The Ritz of Paris doesn't come along every day. But one day they asked us to run some trade mark searches, and that turned into a large global battle for the brand. We ended up running the case and overseeing the battle in 12 countries within our region. You never know where a good client might come from. It occupied my life for about six years. And yes, it was very comfortable at the hotel, Banki. I just want you to know.

BANKI: I wouldn't know. They didn't let me in. [Laughter]

FEHRENBACH: What legal decisions and law reforms just drive you nuts? What are some of the biggest errors by lawmakers – whether legislative or judicial – over your career?

STILL: One of the decisions that did have quite a bit impact was one that Annabelle heard – which was whether or not there is copyright in a digital signal.

BENNETT: And it was upheld on appeal!

ALL: Well done! [Laughter]

STILL: It involved the Olympics and the allegation that the Tax Office was making was that a cameraman with a digital camera standing by a playing field "recording" – the noughts and ones would go up the cable – and it would not be in a material form until it was broadcast into your sitting room – whether or not withholding tax was payable.[1] So it was a copyright case which had a tax outcome. And that was hugely important and the Tax Office was beside itself. It went up to the High Court on special leave and we were successful the whole way through. It has been a line in the sand for sports rights. Places like South Africa actually have copyright in a digital signal whereas Australia has not gone that far.

BENNETT: I have two cases. One was the Omeprazole case, where the High Court changed the whole rules about obviousness and obvious to try, which made obviousness almost an argument you couldn't run in Australia – and it has finally been changed by legislation because it was a ridiculous decision.[2] Then, I have to say, the decision where the High Court said that DNA is not a chemical compound.[3] A breathtaking concept – it can be denatured, it can be chemically manipulated, it can be substituted – but as far as the High Court is concerned deoxyribonucleic acid is not a chemical compound. I thought that was an extraordinary decision. I think it was a totally incorrect decision; I have said so before and I will say so again. It went further even than the US Supreme Court because it said that a manmade construct, cDNA was not patentable because it contained "information". It has put Australia, in my view, in a class of its own in the world.

BARTLETT: I think the defamation space is very similar. When I started in the mid-70s we had a group – I think Michael Kirby was at the Law Reform Commission and we had others fighting for reform. It took until 2005 to get uniformity, but even today – where a hard copy article is published there is a limitation period but the same article published online will not have a limitation. That should change on 1 July. But the judiciary does have some things to answer for – for example, qualified privilege and reasonableness have been written down. So the defamation space is very frustrating and a real challenge for the media where the legal costs are just extraordinary. You can go to a mediation a few months after proceedings are issued and the other side says they have legal costs of $100,000 and that is a starting point. For a lot of media that is a huge amount of money. I imagine Bruce agrees with me wholeheartedly.

BURKE: Yes, but I think all of this is worthy of repetition. The only thing I would add is the *Gutnick* decision.[4] It struck me at the time that many of my clients are journalists who might just get off a plane abroad and anything could happen. From Australia's perspective I thought it was short-sighted to allow that sort of ruling to come into our law – which could be thrown back in our faces by totalitarian regimes anywhere. But this is not likely to change unless and until there is legislation.

DWYER: I don't have any gripes. I think the Australian government over the decades has been very responsive. I think of the *Apple* case in 1984 and the amendments to the Copyright Act that were made in world-record time as I recall.[5] Peter had a lot more regular contact with the Attorney-General's Department than I had but the contact I had was all very responsive. We all have gripes about judges but I think generally the scorecard in my career is that the judges are of an incredibly high standard. By and large I think the right decisions have come down. There was an article I was asked to write in the early 80s and the question was: "where is the best place to sue in the world, for IP?" I foolishly took on writing it – I looked at Canada, the United States, Australia, New Zealand and the UK.

1 *Seven Network Ltd v Commissioner of Taxation* (2014) 324 ALR 13; [2014] FCA 1411 (per Bennett J); upheld in *Commissioner of Taxation v Seven Network Ltd* (2016) 241 FCR 1; [2016] FCAFC 70 (per Kenny, Perram and Davies JJ).
2 *Aktiebolaget Hässle v Alphapharm Pty Limited* (2002) 212 CLR 411; [2002] HCA 59.
3 *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334; [2015] HCA 35.
4 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; [2002] HCA 56.
5 *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 1 FCR 549.

In the Federal Court at that time you could get an IP case filed and a first-instance judgment in, on average, about 18 months – sometimes quicker. You could get the appeal dealt with in three to five years. When that was compared to the other countries we were so far out in front that there was no contest. This article was of interest to General Counsel sitting in different cities in Australia and around the world as to whether they should come to Australia and, if so, should they go to a court? That's why I recall at that time in the early 80s there was a big shift from the State courts to the Federal Court.

STILL: From a community's perspective, legal costs are a huge issue in all sorts of cases, including IP cases. Small players in the market are reluctant to enforce their rights because of costs of running this sort of litigation. There is also a bit of an issue about the length of judgments and consequently the time between trial and judgement. I know the workloads are terrible but it is very hard on litigants, and particularly small organisations. I wonder if further thought could be given to whether we need long, detailed judgments.

BENNETT: If you look at the UK, they hear just as complex cases and the judges come down with decisions much, much faster. I think that part of the problem for us is that appellate courts have said that all issues in a case must be determined, even if one disposes of the case. To speed things up, appellate courts would have to permit the old system, which is that if you think one issue decides the case, you give a decision on that. Instead, appellate courts and particularly the High Court come in on a theoretical basis saying that if there are twenty issues you have to decide all twenty just in case it has to go back. My view is that the possibility of a matter needing to go back to be reheard because a primary judge did not determine an issue is outweighed by the fact that judges feel they need to analyse every issue raised, even where one is determinative and some are clearly unarguable.

BANKI: One issue that springs to my mind is moral rights under The Copyright Act. It could have been done in a paragraph or two, as it is in some other countries. We have got something like twenty pages. I think that means that something has gone wrong in the policy development phase. You can't cover every instance – you need to leave it to judges, really. It could be simplified. There have been over 1500 changes to the Copyright Act in the life of the Communications Law Bulletin.

FEHRENBACH: What much-discussed, long-expected reform staggers you that it has not been implemented yet? What are we still waiting for? A bill of rights, a tort of privacy?

BARTLETT: Well, I have never thought we should have a tort of privacy.

BURKE: Peter and I were together in opposing that. Some people thought it was going to be a really good idea and judges would be able to apply the same principles for damages as they do for defamation. I had to explain that one of the reasons I am still working, basically, is because of all these people who get sued by a bully with money – or, a straw man with no money – for defamation. They can lose their house fighting the case and even if they win hands-down they will never get their costs back out of the person. If suddenly you entered the mix with a privacy tort and someone could have a go at that, well there would inevitably be many disasters and lives ruined. This isn't true only in relation to defending the media. I spend a lot of time defending mums and dads who come across a bully who threatens to sue everybody. Add a privacy tort to that and people would be suing about everything. It would not improve society one iota.

FISHER: What positive things about practice in the 80s have unfortunately been lost along the way? What do you miss about the way things were?

STILL: People thinking about what they're doing. When you get an email these days people respond to it often by about five different emails: starts off with saying "thanks, I'll get back to you"; then they'll answer one question; then they'll answer another. In the 80s you would get a letter and you would actually think about it. You would respond to every bit of that letter. The risk with an email is that the tone can be ill-considered, or the facts just aren't right – and it can just lead to more, and more, and more, correspondence. A proper considered response is often brief and to the point and disposes of a lot of issues.

BARTLETT: In the 70s we had a lot more personal interaction with clients. Though I don't miss the long lunches, not at all. But there was a lot more personal interaction with clients in those days.

BURKE: I found when I joined the profession there were a couple of thousand lawyers in New South Wales. When I last looked a long time ago there were 30, or 40, or 50 thousand. In the early days when I walked down the street I would know people everywhere, and everyone would sort of know each other and there was a sense of camaraderie. That is sadly not the case anymore.

FISHER: Any concluding remarks?

BURKE: I think the profession is in safe hands while you remain in position, Eli. [Laughter].

DWYER: I have had a blast. I have loved the work opportunities I have had, I have loved working with the people I have. By and large, I have no regrets. Organisations like CAMLA I think have been very helpful in pulling us all together and removing any potential stress between practitioners. I see a great need for organisations like CAMLA and the Copyright Society and the other bodies.

STILL: I absolutely agree. I think the friendships that you develop from being in these societies are incredibly important to how you run your matters and how you respond to difficult issues. You can always have confidential discussions with people you know.

BENNETT: I think that this discussion is terrific. That you, today, would look to what people who have been in the profession for 40 years think and how they assess things and what they have gained and their opinions – that is unusual, and it is a wonderful concept and wonderful to see it valued.

BARTLETT: I agree. I feel privileged to be with all of these icons in the profession. An organisation like CAMLA is so important to the profession, as are others. We really should be encouraging junior lawyers, senior associates and young partners to get active in these organisations.

FEHRENBACH: Thank you all very much. We are delighted that you agreed to do this.

Comment is Free[1], But at What Cost?
An Evaluation of the Impacts of *Voller* on the Concept of Defamatory Publication

By **Isabella Barrett,** University of Sydney

In June 2020, the NSWCA in Voller[2] upheld the finding at first instance that media entities are publishers of comments made by the general public on their Facebook posts. This paper evaluates this finding by exploring the complex interaction between the strict liability of publication in defamation and general tort principles concerning the imposition of liability for acts and omissions regarding the comments of third parties. It queries whether imposing a presumption of liability for the comments of third parties is both principally and practically sound. It advocates for an approach that is inclusive of both the modern nature of the internet and the longstanding concepts of defamation law.

Introduction

Prior to the rise of the internet, the law of publication in defamation had received little academic attention. As elucidated in the unanimous High Court judgment of *Trkulja v Google LLC ('Trkulja')*, concerning the liability of search engines as publishers, '[i]n point of principle, the law as to publication is tolerably clear. It is the application of it to the particular facts of the case which tends to be difficult.'[3] Professor David Rolph suggests that as publication has tended to be an uncontroversial issue, the principles are not 'as well-understood as they might be.'[4] This essay attempts to address these concerns by returning to the fundamental principles of publication and applying them to the case of *Voller.*[5] It aims to add to the conversation *Voller* has generated in the media[6] and legal[7] industries with a theoretical examination of the imposition of tortious liability for the comments of third parties. It does so in four parts. First, it explores the principles of publication with reference to the liability of entities for the comments of third parties, separating this analysis into liability for omissions and positive acts. Second, it sets out the findings and reasonings of the *Voller* trial and evaluates the possibility that emerged from the judgment as imposing liability for publication due to omission. Third, it examines the principle and practical consequences arising from the finding in the appeal judgment that liability for publication was established by the positive act of issuing invitations. Fourth, it suggests that the way forward for dealing with the complex issue of liability for publishing the comments of third parties is to return to fundamental principles.

Part 1: Concepts of publication in a digital age

In order for the tort of defamation to be complete, there must be publication of the defamatory matter, consisting of communication in a comprehensible form to a person other than the plaintiff.[8] The common law imposes strict liability for the publication of defamatory matter[9]: any person who voluntarily disseminates defamatory matter is prima facie liable as a publisher.[10] This liability clearly and frequently

1 In 1921, the Manchester Guardian editor CP Scott wrote to mark the centenary of the paper: 'Comment is free, but facts are sacred.' See CP Scott, 'CP Scott's Centenary Essay,' *The Guardian,* (online, 24 October 2017) <https://www.theguardian.com/sustainability/cp-scott-centenary-essay>

2 Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller (2020) 380 ALR 700 ('*Voller No 2*').

3 *Trkulja v Google LLC* (2018) 263 CLR 149, 163-164 [39] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); cited in *Voller No 2* 380 ALR 700, 713 [48] (Basten JA).

4 David Rolph, 'Deconstructing Rothman's Voller decision' *Gazette of Law and Journalism* (online, 12 July 2019) [3] <http://glj.com.au.ezproxy2.library.usyd.edu.au/deconstructing-rothmans-voller-decision/>

5 *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766 ('*Voller No 1*'); *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* (2020) 380 ALR 700 ('*Voller No 2*') (Collectively '*Voller*'). At the time of publication, the most recent appeal is currently awaiting judgment before the High Court of Australia: See *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Ltd v Voller; Australian News Channel Pty Ltd v Voller* (High Court of Australia, Case No S236/2020, S237/2020, S238/2020) ('*HCA Appeal*'). In the *HCA Appeal,* the media entities raised for the first time the argument that proof of intention is required to establish publication of the defamatory matter. This is at odds with the approach taken in this essay: that the publication requirement of the tort of defamation is one of strict liability. Professor David Rolph, considering the issue in light of the submissions to the HCA, also prefers the view that liability for publication is strict: see David Rolph, 'Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*' (2021) 43(2) *Sydney Law Review* (advance).

6 See e.g. Michael Bradley, 'Voller case keeps giving media companies reasons to hate social media,' *Crikey* (online, 03 June 2020) <https://www.crikey.com.au/2020/06/03/dylan-voller-facebook-defamation-appeal/>; Nick Bonyhady, 'A chilling effect': Media companies forced to keep stories off Facebook,' *Sydney Morning Herald* (online, 8 December 2019) <https://www.smh.com.au/politics/federal/a-chilling-effect-media-companies-forced-to-keep-stories-off-facebook-20191204-p53gx5.html>; Venessa Paech, 'The Voller case emphasises the power imbalance between publishers and platforms, but publishers aren't trying hard enough,' *Mumbrella* (online, 04 June 2020) <https://mumbrella.com.au/the-voller-case-emphasises-the-power-imbalance-between-publishers-and-platforms-but-publishers-arent-trying-hard-enough-630210>

7 See e.g. Brett Walker, 'Voller defamation case highlights law's struggle to keep pace in digital age, says ANU Law expert', *Australian National University* (online, 11 July 2019) <https://law.anu.edu.au/news-and-events/news/voller-defamation-case-highlights-law%E2%80%99s-struggle-keep-pace-digital-age-says-anu>; Paul Dimitriadis and Imogen Loxton, 'No Comment: The Decision in Voller and liability for comments on public Facebook pages,' *Ashurst* (online, 27 August 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/no-comment---the-decision-in-voller-and-liability-for-comments-on-public-facebook-pages/>;

8 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Webb v Bloch* (1928) 41 CLR 331, 363.

9 *Godfrey v Demon Internet Ltd* [2001] QB 201, 207 (Morland J), citing *Day v Bream* (1837) 174 ER 212; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [25] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

10 *Goldsmith v Sperrings* [1977] 1 WLR 478, 505 (Bridge J); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 647 (Callinan J).

arises from positive conduct.[11] It is also possible to arise from omissions in failing to prevent the dissemination of defamatory matter.[12] It is crucial to examine liability for both omissions and positive acts distinctly in relation to internet intermediaries; the relevance of such will become apparent when examining the reasoning in *Voller*.

Publication of third party communication by omission

The long-standing principle of publication by omission was established *Byrne v Deane*, where the majority of the English Court of Appeal found that the proprietors of a golf club could be held liable as publishers of an allegedly defamatory matter anonymously posted to the clubroom wall.[13] Central to this finding of liability was the fact that Byrne had made the proprietors aware of the statement, they had the power to remove it, they failed to do so within a reasonable time, and as a result they consented to and were responsible for the publication.[14]

With the proliferation of actors and therefore potential publishers in the online sphere, the principle in *Byrne v Deane*[15] and the ability to impose tortious liability for the statements of third parties is particularly relevant. Prior to *Voller*[16], this issue had manifested in the form of claims against internet service providers (ISPs). The finding of liability extends back to the English case of *Godfrey v Demon Internet Ltd*, where Morland J held that the ISP was a publisher of defamatory comments posted anonymously on a newsgroup, where the ISP refused the plaintiff's requests to take down the comments.[17] Central to the reasoning was the knowledge of the ISP and the ability to take down the matter – this extended their liability from a mere passive facilitator of internet services to a host of the content.[18] In contrast, it has been found by the English court that where ISPs host the websites containing the defamatory material, but do not host or control the defamatory material itself, they are mere passive facilitators and not liable as publishers.[19]

Publication of third party communication by positive conduct

The issue of imposing liability for publication by search engines 'straddles the divide between publication by omission and positive act.'[20] Generally, the conduct of disseminating search results has been identified as a positive act.[21] There have also been differing and somewhat conflicting outcomes on the finding of liability: liability was not found where the search engine possessed a lack of control of user's search terms,[22] compared to the finding of liability where search terms were automated.[23] In *Trkulja*, the court found Google was a publisher as Google set up the search engine system to work precisely as it intended.[24] In the prevailing NSW case of *Bleyer v Google,*[25] McCallum J disagreed with this approach and instead applied the English authority of *Tamiz v Google ('Tamiz')*[26] to find that Google is not liable as a publisher for results produced by a search engine *prior to notification*.[27] The aspect of notification therefore has been emphasised as crucial to establishing liability for positive acts as well as omissions.

A way forward

An examination of the case law demonstrates that there is no blanket rule as to whether an internet intermediary is a publisher of third-party defamatory matter.[28] The relevant question in determining liability should not be if the entity is or is not a publisher, but rather: did the entity engage in conduct that constitutes publication?[29] Emanating from this is the need to identify whether the conduct was an act or an omission.[30] The need to apply this question with precision becomes particularly relevant when examining the *Voller* decisions.

Part 2: The Voller Trial

The facts

Dylan Voller, the plaintiff, is a former detainee of Don Dale Youth Detention Centre. He was a subject of the *Four Corners* program 'Australia's Shame',

11 *Webb v Bloch* (1928) 41 CLR 331, 364; See also David Rolph, 'Publication, Innocent Dissemination And The Internet After Dow Jones & Co Inc v Gutnick' (2010) 33(2) *UNSW Law Journal* 562, 569; David Rolph et al*, Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 214.

12 *Byrne v Deane* [1937] 1 KB 818; See also David Rolph, 'Publication, Innocent Dissemination And The Internet After Dow Jones & Co Inc v Gutnick' (2010) 33(2) *UNSW Law Journal* 56, 569; David Rolph et al, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 214.

13 *Byrne v Deane* [1937] 1 KB 818.

14 See *Byrne v Deane* [1937] 1 KB 818, 829-30 (Greer LJ), 838 (Greene LJ).

15 [1937] 1 KB 818.

16 *Voller No 1* [2019] NSWSC 766; *Voller No 2* (2020) 380 ALR 700.

17 [2001] QB 201.

18 Ibid 205 (Morland J).

19 *Bunt v Tilley* [2007] 1 WLR 1243.

20 Ryan J Turner, 'Internet Defamation Law And Publication By Omission: A Multi-Jurisdictional Analysis' (2014) 37(1) *UNSW Law Journal* 34, 37.

21 *Bleyer v Google* (2014) 88 NSWLR 670; *Trkulja v Google (No 5)* [2012] VSC 533 (Beach J); c.f. *Trkulja v Google LLC* (2018) 263 CLR 149.

22 *Metropolitan International Schools Ltd (t/a Skillstrain and / or Train2Game) v Designtechnica Corporation (t/a Digital Trends)* [2011] 1 WLR 1743.

23 *Trkulja v Google (No 5)* [2012] VSC 533; c.f. *Trkulja v Google LLC* (2018) 263 CLR 149.

24 *Trkulja v Google (No 5)* [2012] VSC 533 [16] (Beach J).

25 (2014) 88 NSWLR 670.

26 [2013] 1 WLR 2151.

27 *Bleyer v Google* (2014) 88 NSWLR 670, 685 [83] (McCallum J).

28 See *Tamiz v Google Inc* [2013] 1 WLR 2151.

29 *Tamiz v Google Inc* [2013] 1 WLR 2151; David Rolph et al, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 15; Turner (n 20) 35.

30 In *Frawley v New South Wales* [2007] NSWSC 1379, [8]–[9] Berman J describes publication as committed 'intentionally' and through 'inactivity'; Turner (n 20) 35.

31 Caro Meldrum-Hanna, 'Australia's Shame', *Four Corners* (online, 25 July 2016) <https://www.abc.net.au/4corners/australias-shame-promo/7649462>

which broadcasted graphic footage of the mistreatment of Mr Voller in detention.[31] Subsequently, Mr Voller received significant media attention, including articles published by the defendants — Nationwide News, Fairfax Media and the Australian News Channel ('the media entities') — and posted to their respective Facebook pages.[32] Mr Voller sued the media entities for allegedly defamatory comments made on these posts by members of the general public in 2016 and 2017.[33] The case raised the novel issue of whether owners of public Facebook pages are liable as publishers for comments made by third parties on their Facebook posts.[34] This question was answered in the affirmative at first instance[35] and on appeal.[36]

The Judgment: Justice Rothman

Rothman J held that it was the media entities who published the comments as the entities made the defamatory statements available in a comprehensible form.[37] Referring directly to the principles in *Byrne v Deane*[38], his Honour stated '[w]hen a defendant commercially operates an electronic bulletin board and posts material that, more probably than not, will result in defamatory material, the commercial operator is 'promoting' defamatory material and ratifying its presence and publication.'[39]

His Honour's judgment on publication, integrated with his consideration on the availability of a defence of innocent dissemination,[40] focused substantially on evidence given at trial regarding the *ability* of Facebook pages to control comments of third parties by deleting, hiding and filtering them.[41] His Honour emphasized that the existence of a commercial benefit received by the media entities in posting on Facebook constituted an assumption of risk.[42] Further, his Honour stated that a media entity can determine before posting which articles are likely to generate controversy, and that in these circumstances the defendant was aware that comments on the post would *likely include* defamatory material.[43] By this reasoning, liability appears to attach before the entities have specific awareness of the exact defamatory comments that were complained of. His Honour also found that the media entities were primary publishers and therefore could not argue innocent dissemination.[44]

The Impacts: Publication by omission?

With respect, his Honour's judgment did not consider the precise act of publication and whether it consisted of a positive act or omission.[45] The judgment did not contain specific discussion regarding whether the media entities had knowledge as to the presence of the specific defamatory comments.[46] This resulted in the judgment being interpreted as imposing liability for the *omissions* of media entities in failing to monitor comments generally.[47] Without the element of knowledge essential to the precedential establishment of liability for third party communications, his Honour's judgment 'appear[ed] to create the only form of strict liability for the tort of a stranger known to the common law.'[48] With respect, further issues with the imposition of liability arise when considering the emphasis placed by his Honour on commerciality.[49] A tort of strict liability does not consider the intention of the defendant, therefore to impose liability connected to the consideration of the commercial purpose of the media entities is at odds with the notion of strict liability for publication at its core.

Part 3: Voller on Appeal

On appeal, all three judges upheld the finding that the media entities were publishers.[50] Their Honours found that the primary judge erred in considering innocent dissemination and that it should be available for consideration as a defence.[51]

The Judgment: Justice of Appeal Basten

Basten JA concluded that the media entities were publishers.[52] His Honour applied the Hong Kong judgment of *Oriental Press*[53], stating it was cited with approval in *Trkulja,*[54] to distinguish occupier cases from the present circumstances of an internet

32 *Voller No 1* [2019] NSWSC 766.
33 Ibid.
34 Ibid.
35 Ibid.
36 *Voller No 2* (2020) 380 ALR 700.
37 Ibid [99], [105], referring to *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [26].
38 [1937] 1 KB 818.
39 *Voller No 1* [2019] NSWSC 766 [230].
40 *Defamation Act 2005* (NSW) s 32.
41 *Voller No 1* [2019] NSWSC 766 [19]–[24], [57], [205].
42 Ibid [209], [232].
43 Ibid [225].
44 Ibid [6]-[7].
45 Rolph, 'Deconstructing Rothman's Voller decision' (n 4).
46 Raised at appeal: *Voller No 2* (2020) 380 ALR 700, 724 [108].
47 Rolph, 'Deconstructing Rothman's Voller decision' (n 4).
48 Ibid [11].
49 *Voller No 1* [2019] NSWSC 766 [209], [232].
50 *Voller No 2* (2020) 380 ALR 700, 700 (Meagher JA and Simpson AJA, Basten JA agreeing).
51 Ibid.
52 Ibid 712 [45] – [47].
53 *Oriental Press Group Ltd v Fevaworks Solutions Ltd (2013) 16 HKFAR 366* [50] – [54].
54 *Trkulja v Google LLC* (2018) 263 CLR 149.

provider, holding a discussion forum.[55] In doing so, his Honour rejected the defendant's argument that a crucial requirement in the occupier cases was knowledge of the defamatory statement.[56] Although his Honour did not state this explicitly, this seems to imply that his Honour found that by virtue of being an internet platform provider hosting a discussion forum, knowledge was not required to establish liability for the comments of third parties.[57] There was little engagement from his Honour as to the precise conduct of the media entities, with the finding that liability attached to the facilitation of posting of comments and having sufficient control over the platform to be able to delete comments.[58]

The Judgment: Justice of Appeal Meagher and Acting Judge of Appeal Simpson

Their Honours found that the media entities were publishers by virtue of their act in subscribing for the Facebook page and encouraging the making of comments by third parties, 'which when posted on the page were made available to Facebook users generally.'[59] Their Honours analogised the role of internet liabilities to a talk-back radio station broadcasting live commentary from listeners[60] and rejected the argument of the media entities that the imposition of liability was a novel one.[61] Their Honours distinguished the circumstances from the occupier cases such as *Urbanchich*[62] and *Frawley*[63] where the occupier had not expressly or impliedly *invited* the use of its property as a means of communication.[64] The media entities, on the other hand, actively invited the public to comment on their news items and as a result accepted liability from the time they made their Facebook pages available.[65] Liability therefore arose not from an *omission* in failing to moderate the comments, but in the *positive act* of setting up the Facebook pages from the outset.[66]

Returning to the key issue

It was crucial for the judgments in *Voller* to precisely identify the act or omission amounting to publication.[67] The relevant question therefore is not: is a news page liable for the comments of third parties? The question should be conceived as: what conduct did the news organisations (i.e. the media entities) engage in to justify the imposition of liability for publication? With respect to their Honours, making broad statements about the liability of internet intermediaries more generally, and comparing this broadly to occupiers[68], and even radio shows,[69] is directed at the first question, not the second. The judgment of Meagher JA and Simpson AJA did identify the act of setting up the page and inviting comments. With respect to their Honours however, this involved a broad reference to the entity as a Facebook page as opposed to the specific acts of the media entities, most notably the fact that they did not have specific knowledge of the defamatory comments.

The Aftermath: Principle and practical concerns with publication by invitation

The concept of publication by invitation raises both principle and practical concerns. Theoretical issues can be traced back to the longstanding tortious principles concerning the imposition of liability for the acts of third parties.[70] As a general rule, holding an individual liable for a harm committed by another is 'incompatible with basic moral and legal principles.'[71] Exceptions to this rule need to be justified not only as a matter of principle, but within the particular context of the tort system.[72] Within the context of defamation as a tort, the common law has avoided imposing liability for the publication of others, unless specific criteria can be satisfied.[73] The result of *Voller* is to invert this trend to establish a presumption of liability for third party comments on public Facebook pages.

There are range of practical effects that flow from this presumption of publication by invitation. First, the judgment establishes a presumption of liability for *any* public Facebook page for *any* comment on *any* post. This is because, as the High Court elucidated in *Dow Jones & Co Inc v Gutnick,* the principles of publication are medium-neutral.[74]

55 *Voller No 2* (2020) 380 ALR 700, 712 [45] – [46].
56 Ibid.
57 Ibid.
58 Ibid 712 [47].
59 Ibid 725 [112].
60 Ibid, 722 [93].
61 Ibid, 724 [105].
62 *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81–127 ('*Urbanchich*').
63 *Frawley v New South Wales* [2007] NSWSC 1379.
64 Ibid 724 [107].
65 Ibid 724-725 [109].
66 Ibid 725 [111]; David Rolph, 'Voller unpacked,' *Gazette of Law and Journalism* (online, July 7 2020) <https://glj-com-au.ezproxy2.library.usyd.edu.au/voller-unpacked>
67 *Tamiz v Google Inc* [2013] 1 WLR 2151; David Rolph et al*, Media Law: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015) 15; Turner (n 20) 35.
68 *Voller No 2* (2020) 380 ALR 700, 712 [45] – [46] (Basten JA).
69 *Voller No 2* (2020) 380 ALR 700, 722 [93].
70 Rolph, 'Voller unpacked' (n 69).
71 Claire McIvor, *Third Party Liability in Tort* (Hart Publishing, 2006) 2.
72 Ibid.
73 *Speight v Gosnay* (1891) 60 LJQB 231.
74 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 630 [125] (Kirby J).

The Court's focus on the commercial benefit received by the media entities therefore does not preclude future courts applying *Voller* from establishing liability for those who do not receive such a commercial benefit. Second, the publication by invitation concept establishes liability from the outset of setting up a Facebook page or post. If media entities and other owners of Facebook pages therefore are liable for third party comments before they are even commented, surely this would disincentivise them to moderate comments as doing so would not absolve them from liability?[75]

Third, issues arise as to what constitutes an invitation.[76] If the relevant act is setting up a public Facebook page from the outset as opposed to failing to deal with comments, have the Facebook pages also 'invited' the general public to post on their wall? Does the comment need to be tied to a post of the Facebook page? Do individual, as opposed to public Facebook pages not 'invite' their friends to comment by adding them, setting up a profile and posting? Applying this concept of invitation extending back to *Byrne v Deane*, would simply the provision of a noticeboard in a clubhouse constitute an invitation, and therefore liability be established even without the central element of knowledge?[77]

Fourth, the finding brings into question whether a defence of innocent dissemination[78] would apply. The finding that it was the media entities who rendered the comments in a comprehensible form through their positive act will surely present difficulties in the attempt to prove that they were subordinate distributors.[79]

Internet publication cases

Theoretical issues also arise in relation to the application of case law specific to publication in an internet age. The emphasis placed on setting up Facebook pages from the outset and inviting comments as the sole basis for imposing liability is in line with the reasoning in *Trulkjia* that liability attached to Google setting up the search result system.[80] This is contrary to the NSW approach in *Bleyer v Google*[81], which disagreed with this reasoning of Beach J in *Trulkjia*[82] and emphasized the requirement of notice in establishing liability.[83]

Part 4: Applying the fundamentals to deal with the future

This essay contends therefore, that there must be a crucial element to establish liability for the comments of third parties: notification of their presence. To have such a requirement does not align with the publication by act analysis in *Voller*, as it has been demonstrated that liability is established before the comments themselves are posted. The way going forward therefore, should be to invert the presumption of liability and revert to the fundamental concepts regarding publication of the statements of third parties by omission. The appropriate starting point should be to return to the very basic principles in *Byrne v Deane* and a standard of knowledge short of actual knowledge should not be accepted.[84] On this basis, with respect, liability should not have been imposed in *Voller.* Classifying third party comments as an omission requiring notification aligns practically with the mandatory requirement of issuing a concerns notice before commencing litigation, to come into effect with the *Defamation Amendment Bill 2020* (NSW).[85] It also appears to be consistent with the knowledge requirement in Sch 5 cl 91 the *Broadcasting Services Act 1992* (Cth). It is possible therefore, to return to the fundamental principles of publication to ensure that the imposition of liability in the age of the internet reflects the very purpose of defamation as a tort.

Conclusion

This essay has demonstrated that the requirement of actual knowledge is crucial to ensure that the strict liability element of publication in a cause of action for defamation adheres to the fundamental principles of tort law. In determining liability for the comments of third parties on Facebook, it is crucial to identify precisely the conduct that amounts to publication. In cases analogous to *Voller,* identifying the conduct as publication by invitation presents a range of principle and practical issues. The correct approach therefore should be to return to the fundamental principles of publication by omission, requiring knowledge to establish liability. With the *Voller* appeal awaiting judgment in the High Court of Australia, we may soon receive some clarity on the issues the case presents.[86] In the meantime, the author contends that returning to the fundamentals is the best method to move to the future, as it encompasses both the modern nature of the internet and longstanding concepts of defamation law.

75 Rolph, 'Voller unpacked' (n 69) [43].

76 Ibid [36].

77 *Byrne v Deane* [1937] 1 KB 818; similar analogy posited in Rolph,'Voller unpacked' (n 69) [34].

78 *Defamation Act 2005* (NSW) s 32.

79 Ibid s 32(1).

80 *Trkulja v Google (No 5)* [2012] VSC 533 [16] (Beach J); c.f. *Trkulja v Google LLC* (2018) 263 CLR 149.

81 (2014) 88 NSWLR 670.

82 *Trkulja v Google (No 5)* [2012] VSC 533 [16].

83 *Bleyer v Google* (2014) 88 NSWLR 670, 685 [83] (McCallum J).

84 *Byrne v Deane* [1937] 1 KB 818; Turner (n 20) 52.

85 s 12B. The Bill has received royal assent but not yet come into force.

86 *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Ltd v Voller; Australian News Channel Pty Ltd v Voller* (High Court of Australia, Case No S236/2020, S237/2020, S238/2020).

The Concerns Notice Prerequisite - An Early Escalation of Cost and Formality

By **Kevin Lynch** and **Heather Pym**[1]

The Model Defamation Amendment Provisions (**new UDL**) commenced in some States on 1 July 2021.[2] Amongst a bundle of other reforms is the introduction of a mandatory requirement that an aggrieved person issue a concerns notice prior to commencing defamation proceedings.

The stated objective of this reform is to promote speedy and non-litigious methods of dispute resolution.[3] Stakeholders, including the Law Society of New South Wales, formed a view that without a mandatory concerns notice "the offer to make amends process may lack potency".[4]

This article considers whether aspects of the mandatory concerns notice reform may have the unintentional consequence of frustrating that objective. It also considers the value of the concerns notice process itself, with reference to the operation of the non-mandatory concerns notice process since the 2005 uniform defamation laws (**2005 UDL**) were enacted.

The concerns notice and offer to make amends

The 2005 UDL allowed an aggrieved person to issue a concerns notice prior to commencing proceedings.[5] A concerns notice is a written notification sent to a person alleged to have published allegedly defamatory material, identifying that material and outlining the imputations of concern.

A person receiving a concerns notice could make a formal written offer to make amends, typically within 28 days, including an offer to publish a reasonable correction, pay costs and potentially an offer to pay compensation and an apology. If an offer to make amends is accepted and carried out on its terms, that is the end of the matter. If an offer to make amends was not accepted and it was found at trial to have been made as soon as practicable after the becoming aware of the defamation, by a publisher who was ready and willing to carry out its terms be reasonable in all of the circumstances, the offer would establishe a complete defence to the action.

The 2005 UDL did not require a plaintiff to issue a concerns notice. In many cases proceedings were commenced without a concerns notice at all.[6]

The new uniform defamation laws – mandatory concerns notices which enshrine the imputations for trial

The new UDL provides that a person subject to an alleged defamation *must* serve a concerns notice before they are able to commence proceedings.[7] The concerns notice moves from being an option to a mandate. Amongst other requirements, the concerns notice must include details of the defamatory meanings that the aggrieved person *intends to rely on in proceedings*.[8]

The concern that arises here is that a person who has a defamation complaint, typically an individual, is likely to require legal advice in order to prepare a concerns notice which meets the requirements of the legislation.[9] The requirement that the concerns notice include imputations that will need to be in a form that could be taken to trial is enough to intimidate an inexperienced plaintiff's lawyer and even challenge an experienced defamation solicitor.

The result of all of this is that an individual who wishes to formalise a complaint will expend legal costs that may extend to the involvement of senior counsel, before a concerns notice is ready to go out.

Whilst a publisher may well be assisted by a clearly articulated and presented outline of concerns (or, on the other hand, the failure to formulate a valid concerns notice at all), the preparation of the mandatory concerns notice will come with a sunk costs payload that can frustrate attempts at early settlement. Having retained a solicitor and counsel to settle imputations that are trial-ready, along with an articulation of serious harm,[10] a plaintiff may be more inclined to press ahead with an action.

In many cases, a potential defendant, the alleged publisher and the interests of early resolution of

1 Kevin Lynch is a Partner at Johnson Winter & Slattery, where Heather Pym is a Law Clerk. Thanks also to Suzanne Cole, Nadeesha Indigahawela and Liz Tang for their assistance.

2 The new UDL came into effect in New South Wales, South Australia, Victoria and Queensland on 1 July 2021. At the time of writing the Northern Territory, Western Australia and the Australian Capital Territory are yet to action the agreement made by the Counsel of Attorneys-General in July 2020 to introduce the uniform amendments.

3 See for example, Defamation Amendment Bill 2020, Second Reading Speech, Hansard, 6 August 2020 at 3020.

4 Defamation Amendment Bill 2020, Second Reading Speech, Hansard, 6 August 2020 at 3020.

5 See for example section 14 of the *Defamation Act* 2005 (NSW). Statutory references for the 2005 UDL are consistent for NSW, VIC, QLD, TAS, SA and WA.

6 A recent example was *Rush v Nationwide News Pty Limited* (No 7) [2019] FCA 496.

7 See section 12B of the new UDL.

8 See section 12A of the new UDL.

9 This article does not consider the real questions of disadvantage and access to justice that this might pose.

10 See for example section 14(2)(b) of the *Defamation Act* 2005 (NSW)

complaints are all well served by a notification of a grievance that is inexpert or even informal.[11] The push towards formality and cost may impose upon the opportunity for early settlement.

It is also foreseeable that a complainant, in conference with solicitor and/or counsel, will err towards stretching a claim to encompass all conceivable imputations in the concerns notice, in case the imputations may be required at trial.[12] If this shopping list of imputations makes its way into the Statement of Claim, there is the likelihood of interlocutory challenge. If a plaintiff attempts to depart from the imputations in his or her concerns notice, costs will be front-loaded with a preliminary argument as to whether or not the imputations in a Statement of Claim are substantially the same as those particularised in the concerns notice.[13]

There may also be preliminary skirmishes as to whether or not a concerns notice was defective or satisfied the prerequisites to bring a defamation claim.

The track record of the concerns notice and offer to make amends

In assessing the potential of the mandatory concerns notice regime, particularly given the drawbacks discussed in this article, some consideration can be given to the operation of the optional process under the 2005 UDL.

It is impossible to assess how many disputes employed the regime for "resolution of civil disputes without litigation" in the 2005 UDL or the size of the subset that met that objective. Many matters are resolved without a formal concerns notice. There are also likely to have been matters that were resolved prior to litigation via an offer to make amends or offers made outside of the statutory regime. The statutory steps may also have formed a part of a more protracted fruitful negotiation.

Anecdotally, the offer to make amends is most usefully deployed where a publisher has made an error or regrettable publication and wants to put its best foot forward in attempting to resolve the matter via a compelling early offer. More frequently, a prospective defendant is reluctant to make the concessions required to formulate a reasonable offer to make amends within the 28 day period, at a time that the publisher wants to manage a complainant's expectations and test their opponents resolve in the face of potential litigation defences.

The one thing we do know is that the number of matters where a concerns notice was met with an offer to make amends and later assessed by the Court were comparatively few. On one of the very few occasions where the defence was upheld,[14] Her Honour Justice Gibson noted that such an outcome was "the exception, not the norm". At the time of that decision, some 8 years after the 2005 UDL, Justice Gibson noted that the defence had yet to be relied upon successfully in Australia. That poor strike rate has been maintained in the years since. Reported cases that raised the defence under the 2005 UDL barely exceed double digits Australia-wide. Among these, the rate of success in establishing the defence is less than 10%.

Whilst this is by no means the only measure by which the concerns notice/offer to make amends process can be evaluated, it does suggest that a process that starts with what is now to be a mandatory step tends to fade to obscurity on occasions where it is taken up by a publisher and tested as a defence.

Concerns that the offer to make amends process lacks potency might be better addressed by stronger prospects at the end point, rather than a mandatory commencement.

11 The mandatory concerns notice does not, of course, preclude an informal complaint or notice, but it does ratchet-up the formality of any communication that is able to meet the new pre-requisites for bringing proceedings.

12 A plaintiff is not bound to persist with all of the imputations particularised in a concerns notice – see section 12B(2)(a) of the new UDL which allows "some, but not all" of the proposed imputations to be relied upon in the proceedings.

13 See section 12B(2)(b) of the new UDL.

14 *Sleeman v Tuloch Pty Limited T/as Palms on Oxford (No. 4)* [2013] NSW DC 111 at 45.

The New Public Interest Defence to Defamation

By **Jake Blundell,** Senior Associate, Banki Haddock Fiora

One of the most significant reforms to Australia's uniform defamation laws due to take effect on 1 July 2021[1] will be the introduction of a new public interest defence. In this article, we consider how the new defence will operate and whether it is likely to live up to the aim of providing protection for the media and others in relation to the publication of matter in the public interest which would otherwise give rise to liability in defamation.

Background

A new public interest defence will be enacted in a new section 29A to be inserted into the uniform defamation provisions. The new defence is aimed at remedying the shortcomings of the current statutory qualified privilege defence.

The current statutory qualified privilege defence was introduced as part of the uniform defamation provisions in 2005, based on the defence in section 22 of the *Defamation Act 1974* (NSW). In 2005, the NSW Attorney-General at the time said that statutory qualified privilege was a particularly important defence, providing protection in a range of situations.

Despite the initial optimism, the statutory qualified privilege defence proved to be an abject failure, having been "frequently pleaded but rarely successful".[2] The defence has almost never been successfully argued by a mass media defendant since it was introduced, in the absence of a successful alternative substantive defence or where the imputations contended for by the plaintiff were found not to be conveyed.[3]

It has been said that statutory qualified privilege's requirement of reasonableness "lives in the shadow of truth",[4] given that in practical terms, satisfying the requirement of reasonableness often requires the truth of imputations to also be made out. Consequently, it has been widely acknowledged, including by various state governments, that the current section 30 defence does not adequately protect public interest journalism,[5] or guard against the potential "chilling effect" defamation laws have on debates of matters of legitimate public interest.[6]

Section 29A

The new public interest defence in section 29A provides a complete defence to the publication of "defamatory matter" if the defendant proves that the matter concerns an issue of public interest, and the defendant reasonably believed that the publication of the matter was in the public interest (s 29A(1)). In determining whether the defence is established, the tribunal of fact (whether a jury or the judge) must take into account all of the circumstances of the case (s 29A(2)).

Section 29A(3) then sets out a list of factors that the Court *may* take into account in determining whether the defence is made out. Those factors are similar to the factors that are currently contained in section 30(3) of the uniform laws, which were adapted from the United Kingdom case of *Reynolds v Times Newspapers Ltd*,[7] concerning a comparable defence of qualified privilege under the common law of the UK.

Section 29A modelled on the UK public interest defence

The new defence is modelled on section 4 of the *Defamation Act 2013* (UK). Key differences between the UK defence and section 29A include the omission of a statutory "reportage" defence, the reference in the new provision to "defamatory matter" rather than the "statement complained of" referred to in the UK version, and that s 29A contains the list of adapted *Reynolds*-style factors which have not been included in the UK version of the defence.

There has been surprisingly little case law addressing the UK public interest defence in the eight years since its enactment. In the leading decision in *Serafin v Malkiewicz*,[8] the UK Supreme Court held that although the common law defence stated by the House of Lords in *Reynolds* was abolished by section 4(6) of the *Defamation Act 2013* (UK), the *Reynolds* defence and the section 4 defence are not materially different. In particular, the Court held that the *Reynolds* factors should not be seen as a checklist but as a non-exhaustive list of factors to which reference ought to be made, in particular in order to check whether a preliminary conclusion should be confirmed.

In arriving at that view, Lord Wilson in *Serafin* affirmed the statements of Lady Justice Sharp in the UK High Court decision of *Economou v De Freitas*,[9] that although the new defence directs attention to the publisher's belief (which Wilson LJ notes should have referred to the publisher's *reasonable* belief), the

1 The amendments to the uniform defamation provisions are due to take effect on 1 July 2021 in NSW, South Australia, Victoria and Queensland, with the other Australia states and territories expected to follow.
2 David Rolph, 'A critique of the national, uniform defamation laws' (2008) 16(3) *Torts Law Journal* 207, 230.
3 See, for example, *Herron v HarperCollins Publishers Australia Pty Ltd (No 3)* [2020] FCA 1687.
4 Kim Gould, 'Statutory qualified privilege succeeds, but too early for the media to go "dancing in the streets"' (2011) 16(3) *Media And Arts Law Review* 241, 260.
5 Hansard, NSW Legislative Assembly, 29 July 2020, Second Reading Speech to the Defamation Amendment Bill 2020 (NSW).
6 Hansard, Queensland Parliament, 20 April 2020, Second Reading Speech to the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 (Qld).
7 (2001) 2 AC 127.
8 *Serafin v Malkiewicz and others* [2020] UKSC 23, [2020] WLR 2455, [2020] 4 All ER 711.
9 *Economou v De Freitas* [2018] EWCA Civ 2591, [2019] EMLR 7.

rationale for each of the defences is not materially different and the principles which underpinned the *Reynolds* defence (namely, that a fair balance should be held between freedom of expression on matters of public interest and the reputation of individuals[10]) are also relevant to the interpretation of the statutory defence.[11]

Application of the new defence

Opening the floodgates to irresponsible journalism?

It has been argued that there is a real danger that the new public interest defence will result in journalists or "pseudo-journalists" irresponsibly and unreasonably publishing untrue stories about individuals that would not be published under traditional journalistic standards.[12]

But this contention ignores the requirement that it must be reasonable *in all the circumstances* for the defendant to have formed the relevant belief. For example, the extent to which a media defendant complied with the applicable professional standards and ethical obligations will very likely be taken into account in considering the reasonableness of their belief. The Court will in fact have to take any and all relevant matters into account in determining whether the defendant's belief was reasonable, including any of the factors in s 29A(3) that may be relevant in the circumstances.

By contrast, it has also been suggested that the inclusion of the series of factors in section 29A(3) will result in the new defence being treated virtually the same way as the current section 30(3) considerations, as requiring a "counsel of perfection" (notwithstanding Justice White's comments to the contrary in *Hockey v Fairfax Media Publications*[13]), or as a series of "trip-wires" or hurdles, each of which must be overcome by the defendant in order to make out the defence.[14]

Given the uncertainty as to how the defence will be applied by the tribunal of fact (given that the new provision expressly provides that it is for the jury (where applicable) to determine whether the defence is established[15]), it seems unlikely that there will be any significant loosening of journalistic standards, at least in the short term. With respect to non-mass media publications, the standard of discourse evident on social media is unlikely to drastically deteriorate because of the availability of a public interest defence, given that it would be very difficult to argue that the bulk of the more objectionable material published on social media was published in circumstances in which the publisher reasonably believed that its publication was in the public interest.

The requirement that the publisher's belief must be reasonable will require the tribunal of fact to engage in an assessment that includes both subjective and objective elements. For the defence to succeed, not only must the jury find that the defendant did in fact hold the relevant belief, but that holding that belief was reasonable, from the perspective of a reasonable observer.

Publication of defamatory matter

The new provision provides a defence to the publication of "defamatory matter". This differs from the UK version which refers to the "statement complained of". This departure from the wording of the UK defence may have been for the sake of consistency with the other statutory defences (other than justification and contextual truth, which relate to the imputations carried by the matter and complained of by the plaintiff). Nevertheless, the reference to "defamatory matter" will likely mean that both limbs of the defence will be considered through the lens, or prism, of the imputations ultimately found to be conveyed by the matter complained of.

The tribunal of fact will be required to determine both the extent to which the matter complained of (insofar as it conveys defamatory imputations) concerns a matter of public interest, and the extent to which the defendant's belief that it was in the public interest to publish the matter was reasonable (insofar as it conveyed those imputations). Similarly, in the context of the honest opinion defence, in *Channel Seven Adelaide Ltd v Manock,* the High Court held that the meaning pleaded by the plaintiff is relevant to the defence, not least because it is the meaning found by the Court that is to be scrutinised for its fairness.[16]

However, the form of the imputation should not be treated as being synonymous with the matter complained of, nor should it be permitted to "hijack" the task of determining whether the defence applies.[17] As is the case with the honest opinion defence, the inquiry that the tribunal of fact will be required to undertake in determining whether the new s 29A defence applies is contextual in nature, and not focused solely on the imputations conveyed by the matter complained of.[18]

10 *Economou* at [110].
11 *Serafin* at [68], citing *Economou* at [86].
12 *Briefing Paper from Defamation Lawyers Regarding the Proposed Changes to the Uniform Defamation Law 2005,* Sue Chrysanthou & others, 1 April 2021.
13 [2015] FCA 652; 237 FCR 33
14 *Supplementary submissions to the Council of Attorneys General in relation to the Draft Model Defamation Amendment Provisions and Recommendations*, Banki Haddock Fiora, 24 January 2020; *Submission to the Council of Attorneys-General Defamation Working Party Regarding the Model Defamation Amendment Provisions 2020 (Consultation Draft),* Australia's Right to Know Coalition, 24 January 2020.
15 Section 29A(5).
16 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 per Gummow, Hayne and Heydon JJ [83]
17 *Harbour Radio Pty Ltd v Ahmed* [2015] NSWCA 290; 90 NSWLR 695; *Feldman v Polaris Media Pty Ltd as trustee of the Polaris Media Trust Trading as the Australian Jewish News (No 2)* [2018] NSWSC 1035.
18 *O'Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 at [45] [46].

What is in the public interest?

One of the guiding factors set out in the new defence is the importance of freedom of expression in the discussion of issues of public interest (s 29A(3)(i)). The principles arising from the earlier cases in relation to what constitutes a matter of public interest are likely to be relevant to the consideration of the new public interest defence.

It is generally accepted that defining "public interest" is a notoriously difficult task, although it has been accepted by the Courts that *"there is a world of difference between what is in the public interest and what is of interest to the public"*.[19]

What constitutes public interest can be broadly or narrowly construed,[20] and an infinite variety of matters may be of public interest.[21] Nevertheless, Courts often prefer a concrete articulation of what constitutes a matter of public interest.[22]

An important formulation of what constitutes a "subject of public interest" was enunciated by the High Court in the 1996 decision of *Bellino v Australian Broadcasting Corporation*,[23] where the majority stated (in the context of a fair comment defence):

> A subject of public interest meant the actions or omissions of a person or institution engaged in activities that either inherently, expressly or inferentially invited public criticism or discussion.

More recent cases have continued to apply the formulation from *Bellino* as to what constitutes a subject of public interest, not only in the context of a fair comment or honest opinion defence, but more broadly.[24] For example in *Green v Schneller*, Justice Simpson accepted that proceedings in Courts probably of themselves and without more fall into the category of matters of public interest, notwithstanding that the focus must be on whether the imputations established relate to that matter of public interest.[25]

Does the defence go far enough?

The Defamation Working Group declined to codify the category of common-law qualified privilege known in the UK as "reportage", which has now been enshrined in section 4(3) of the UK Defamation Act. The reportage defence arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made.[26] Where the defendant has taken proper steps to verify the making of the allegation, they are protected by the defence of reportage. It is perhaps regrettable that in undertaking once-in-a-generation reform to strike a better balance between providing fair remedies for a person whose reputation is harmed by a publication and ensuring defamation law does not place unreasonable limits on freedom of expression about matters of public interest,[27] the opportunity to introduce reportage into Australian law was not taken.

In the consultation phase of the reform process, several stakeholders called for a standalone requirement to be included in the public interest defence for the Court to have regard to the importance of the principle of freedom of expression, in considering whether the defence applies. It was noted by stakeholders that the objects of the uniform defamation provisions emphasise the importance of freedom of expression, and in particular the discussion of matters of public interest, but that the principle is not mentioned anywhere else in the uniform laws and the Court is not at any point required to take the principle into account.

There was also a strong view expressed by stakeholders during the consultation process that the new defence should not include the *Reynolds*-style factors, because their inclusion would likely encourage a "check-list" approach, which had undermined the effectiveness of the statutory qualified privilege defence. In *Serafin,* Lord McNally quoted the then-Minister responsible for the *Defamation Act 2013* (UK), saying that the omission from section 4 of the *Reynolds* factors was a deliberate decision to allow "flexibility", whereby those factors may well be relevant to determining the extent to which the belief held by the defendant was reasonable.

Conclusion

The new public interest defence is certainly an important reform, which seeks to strike a better balance between freedom of expression on matters of public interest and the protection of a person's reputation. There is disagreement, however as to how successfully that balance has been struck, given the strongly held views among stakeholders, on the one hand that the new defence may open the floodgates to irresponsible journalism, and on the other that it will be plagued with the same difficulties as the current statutory qualified privilege defence and provide limited protection for the publication of defamatory matter in the public interest. In any event, it will be some time before it becomes clear precisely how the new defence will be interpreted by the Courts.

19 *Lion Laboratories Ltd v Evans* [1985] QB 526, at 553, cited in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183.
20 *Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254 at 262 per Higgins J, citing *London Artists Ltd v Littler* [1969] 2 QB 375 at 391 per Lord Denning MR.
21 *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484; [2007] NSWCA 364 at 487 per Ipp JA.
22 see *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 220.
23 *Bellino* at 215.
24 For example, *Green v Schneller* [2000] NSWSC 548; *Hitchcock v John Fairfax Publications Pty Ltd* [2007] NSWSC 7; *Eustice v Channel Seven Adelaide Pty Ltd & Ors* [2020] SASC 4; *Noone v Brown* [2019] QDC 133; *Habib v Radio 2UE Sydney Pty Ltd & Anor (No 4)* [2012] NSWDC 12; *Haddon v Forsyth* [2011] NSWSC 123; *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 at [141].
25 *Green* at [27].
26 *Flood v Times Newspapers Ltd* [2012] UKSC 11.
27 Hansard, NSW Legislative Assembly, 29 July 2020, Second Reading Speech to the Defamation Amendment Bill 2020 (NSW).

CAMLA Networking Event 2021

By **Belyndy Rowe** (CAMLA YL Representative, Sainty Law)

CAMLA Young Lawyers were very excited to hold an in-person networking event for young lawyers and law students with an interest in the media and communications industry.

The event was held in March at Clayton Utz, Sydney and featured a panel discussion, followed by announcements, drinks and networking.

Our very accomplished speakers were Tim Webb from Clayton Utz, Sarah Woollcott from BMG, Michael Bradley from Marque Lawyers, and Claire Roberts, Eleven Wentworth.

The panellists discuss their career paths, professional highlights and challenges, and their advice for young lawyers looking to break into, and progress, in the industry.

Highlights included Tim's advice to engage deeply with your area of law by reading newspapers, attending events, and achieving a thorough understanding of how the industry operates; Michael's advice to take opportunities to speak up and advocate for your firm or business to reshape the way things are done and not be afraid to challenge the assumptions we hold; Sarah's advice to look outside the expected areas for a mentor, and that you don't have to be the loudest or most confident person in the room to be great at networking. Claire encouraged us to look for opportunities to get involved, set measurable goals such as making a conscious effort to ask a question when you attend a seminar, and find the activities and people that match our interests.

Above all, the panellists encouraged us to show we are engaged and think of networking not as a daunting thing you must do for your job, but as an opportunity to make valuable, human connections.

The winners of the 2020 CAMLA essay competition were announced at the event. Congratulations to first placed Isabella Barrett of University of Sydney, second placed Kate Mani from Monash University, and third placed Anna Kretowicz from the University of Queensland. We look forward to reading your essays!

Thank you to the panellists for your time and invaluable guidance, and for staying around after the event to show us how networking is done. Thank you to Clayton Utz, Sydney for hosting us. The event was expertly run and hosted by Cath Hill from CAMLA, and CAMLA Young Lawyers Isabella Boag Taylor and Nicola McLaughlin and Calli Tsipidis. Well done team.

It's the Name of the Game:
The Relationship Between Goodwill and Branding

By **Tara Koh,** Solicitor, Addisons

Last year's surge of re-branding of iconic brands is spilling into 2021, many of which have been around for decades with generations of consumers buying their products. If a brand is so well established in the minds of its consumers what would drive it to change its name or logo? The Black Lives Matter (**BLM**) movement saw consumers petitioning companies to evaluate the appropriateness of their brands in 2020. The responses of the target companies exemplify the relationship between goodwill and branding, and the underlying influence of brand friendships.

What is goodwill?

The concept of goodwill is difficult to define in concrete terms. It has been described as "the benefit and advantage of the good name, reputation and connection of a business" and "the attractive force which brings in custom".[1] Sources of goodwill may include manufacturing and distribution techniques, superior management practices, competitive pricing, the extent of advertising and promotion and even geographical location.[2]

Goodwill is a valuable intangible asset of a business which is able to be protected from wrongful appropriation through the tort of passing off and closely-related actions under the Australian Consumer Law. Goodwill is a unique asset in that it is inseparable from the business to which it adds value, and cannot be dealt with except in conjunction with the sale of that business.[3]

In *FCT v Krakos Investments Pty Ltd*[4] Hill J identified at least four sources of goodwill: (1) site goodwill; (2) personal goodwill; (3) monopoly goodwill; and (4) name goodwill. "Name goodwill" encompasses a company's brand, name and reputation. Justice Hill described it as:

> "*[A] particular reputation in a name which the law will protect. In such a case, custom may be attracted to the business by the very use of the name. In turn, the value of that name may be turned to account by its proprietor*".[5]

Such is the "attractive force" of a successful brand that consumers might not even be actual purchasers, yet they will still associate themselves with the brand. For example, it is unlikely that all 23.7 million of Louis Vuitton's Facebook followers have purchased Louis Vuitton products.

The power of branding

A valuable brand has high "salience"; in other words, it is likely to be remembered in the moment of making a purchase decision. Salience is generated through marketing tools, trade marks, logos, names and other distinctive assets, such as colour. Individuals are so impressionable to branding that even babies as young as six months are capable of forming mental images of logos, and by the time they reach three years of age 20% of children will directly request specific brand name products.[6]

Salient brands can prompt strong emotional responses from consumers. History is littered with examples of "marketing fails" resulting in consumer backlash. In the early 2000's British Royal Mail embarked on a £2 million, two year long process to re-brand as "Consignia" which lasted only 16 months before it bowed to public pressure and reverted to its original name.

Brand friendships

A "brand friendship" is where a brand embeds itself into a community whose members define their identity by, and find meaning in, their shared enjoyment of the brand. Because brand friendships are emotionally asymmetrical (that is, consumers project and graft their emotions onto brands) consumer perceptions of loyalty will be greater when consumers and brands share the same "conscience".[7]

An excellent example of a successful brand friendship is Coca-Cola. In 2008, two fans started their own Facebook Coca-Cola fan page which quickly accumulated millions of "spontaneous" followers. Instead of shutting it down Coca-Cola collaborated with the two fans, resulting in the most popular Facebook page of 2009 second only to President Obama. Since then,

1 *The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] AC 217 (per Lord MacNaghten).

2 *Commissioner of Taxation v Murry* (1998) 193 CLR 605, [25]-[28]

3 *Kraft Foods Group Brands LLC v Bega Cheese Limited (No 8)* [2019] FCA 593, 401 [105].

4 (1995) 61 FCR 489.

5 Ibid 497.

6 Jonathan A J Wilson and Joseph E Morgan, 'Friends or Freeloaders? Encouraging Brand Conscience and Introducing the Concept of Emotion-Based Consumer Loss Mitigation' (2011) 18(9) *Journal of Brand Management* 1, 2, quoting M J Dotson and E M Hyatt, 'Major Influence Factors in Major Children's Consumer Socialization' (2005) 22 *Journal of Consumer Marketing* 35, 35.

7 Wilson and Morgan (n 5) 4.

the Coca-Cola Facebook page has employed many consumer driven marketing techniques, such as Expedition 206, where selected fans travelled to 206 countries to promote the Coca-Cola brand, and the "#ShareaCoke" campaign involving customised Coke bottles. Instead of posting its own content, Coca-Cola asks its fans to share their own thoughts and feelings about Coke to create "a collection of your stories showing how people from around the world have helped make Coke into what it is today".[8]

Brand friendships demand responsibility from the brand to act with sincerity and integrity so as not to isolate or sideline its consumers. The BLM movement has agitated consumers' animosity towards outdated brands and illustrates how a brand friendship can turn sour. On the international stage for example, since the 1940s Mars' "Uncle Ben's" brand of rice has featured an African American man. In 2007 Uncle Ben,[9] a rice farmer, was re-marketed as the "chairman". At the time Mars said it did not want to make significant modifications because consumers described Uncle Ben as having "a timeless element to him".[10] At the height of the BLM movement in 2020, Mars announced plans to "evolve" the Uncle Ben's brand.[11]

In the Australian context, "COON" cheese – a brand with an 85 year history – will be rebranding as "CHEER" cheese following a 21 year-long campaign led by an Indigenous activist; and Nestlé will be renaming its Allen's confectionary "Red Skins" and "Chicos" to "Red Ripper" and "Cheekies" after acknowledging the names have "overtones" which are "out of step".[12]

These cases illustrate the importance of a brand's need to pre-empt consumer sentiment and engage proactively if consumer loyalty is to be preserved.

The relationship between goodwill and branding

As can be seen, a brand's relationship with its consumers, its salience and its goodwill are interdependent. For this reason, companies are reluctant to make significant alternations to their brands and will at a minimum try to retain the key elements that consumers recognise.

For instance, Uncle Ben's will be rebranded as "Ben's Original" and the distinctive orange packaging will remain, presumably because Mars' market research revealed that the name "Ben" and the colour orange are what consumers associate with the brand and recognise at the point of purchase. In doing so Mars will appease consumers, retain salience and minimise impact on the brand's goodwill.

Saputo, the owners of COON, have stated:

> "*We wanted to ensure we listened to all the concerns surrounding the Coon brand name, while also considering comments from consumers who cherish the brand and recognise the origin of its founder Edward William Coon, which they feel connected to*".[13]

> "*The name change follows Saputo's careful and diligent review to honour the brand-affinity felt by our consumers.*"[14]

The "cherishment", "connection" and "brand-affinity" said to be felt by COON's consumers is a clear reference to the goodwill and salience that COON has established over its 85 years on the Australian market. Interestingly Dr Stephen Hagan, the activist leading the campaign, responded that "…it's just a little piece of cheese … [it] will still taste the same."[15] However technically correct Dr Hagan's statement may be, it does not take into account the emotional response that Saputo have astutely identified.

Similarly, in response to Allen's' post announcing the change of its confectionary one Facebook user said:

> "*Change the name. Change the packaging. As long as the taste is still the same why would it matter. You don't buy the lollies cause of what they are called. You buy them for the flavour…*"

As Uncle Ben's, COON and Allen's would all appreciate, this is not true. Consumers' purchasing decisions are not guided purely on taste or quality. They are influenced, whether consciously or not, by the goodwill or "pull" of the brand. Many of Allen's' Facebook followers called to boycott the brand because they were upset at losing the entrenched and endearing associations they have with the confectionary:

> "*It's a lolly name, that has been around for Generations. Please wake up and get over it.*"

> "*Allen's as you obviously don't care about generation after generation of customers I will be boycotting your products.*"

8 Coca-Cola, Facebook – About <https://www.facebook.com/pg/Coca-Cola/about/?ref=page_internal>.

9 The titles "aunt" and "uncle" were historically used to avoid referring to African American persons as missus or mister.

10 Stuart Elliot, 'Uncle Ben, Board Chairman', *The New York Times* (online, 30 March 2007) <https://www.nytimes.com/2007/03/30/business/media/30adco.html>.

11 Mars, 'Uncle Ben's Brand Evolution' (Web Page, 17 June 2020) <https://www.mars.com/news-and-stories/press-releases/uncle-bens-brand-evolution>.

12 Allen's Lollies (Facebook) 22 June 2020 9:03pm AEDT <https://www.facebook.com/allens.lollies/posts/at-allens-we-are-about-creating-smiles-today-we-announced-that-we-will-change-th/3027777277338058/>; Nestlé, 'Nestlé announces new product names' (Web Page, 16 November 2020) <https://www.nestle.com.au/en/media/news/nestle-announces-new-product-names>.

13 Saputo Dairy Australia, 'COON Cheese Statement' (Web Page, 24 July 2020) <https://www.saputodairyaustralia.com.au/en/our-company/newsroom/coon-cheese-statement>.

14 Saputo Dairy Australia, 'Introducing CHEER™ Cheese' (Web Page, 13 January 2012) <https://www.saputodairyaustralia.com.au/en/our-company/newsroom/introducing-cheer-cheese>.

15 Elias Visontay, 'Australia's Coon Cheese to Change Name in Effort to Help "Eliminate Racism"', *The Guardian* (online, 24 July 2020) <https://www.theguardian.com/australia-news/2020/jul/24/australias-coon-cheese-to-change-name-in-effort-to-help-eliminate-racism>.

"How ridiculous, I do not understand the need to change a name of a [lolly] that has been around for a long [time]."

The difficulty that these companies faced amid the BLM movement was the risk of sidelining consumers and disturbing the goodwill which had been established over many decades.

An example of the correlation between branding and goodwill in the legal sphere is the 1996 *Duff Beer* case.[16] A South Australian brewery launched a beer under the name "Duff Beer". Twentieth Century Fox, producers of "The Simpsons", sued the brewery for passing off. One of the elements of the tort of passing off is that the plaintiff must have a distinct reputation or goodwill attached to its product or service. "The Simpsons" Duff Beer, an imaginary product, had only featured on the show for a total of less than seven minutes out of almost 3,000 minutes over 132 episodes.[17] The brewery claimed that the fictional Duff Beer could not have garnered adequate goodwill or reputation of its own. Ironically, it was the brewery's own market evidence that revealed that consumers only associated the word "Duff" with concepts such as "fun", "trendy" and "cool" because of their association of the word with the show, and that "Duff" was impressed in consumers' consciousness as "The Simpsons" beer.

The Court found that not only was "Duff Beer" a component of the goodwill of "The Simpsons", but that Duff Beer of itself had sufficient reputation to ground an action in passing off. The Court also found that a substantial section of the public would assume that Twentieth Century Fox or its licensees had some form of commercial arrangement in place with the South Australian brewery, and that the brewery had engaged in a course of deceptive conduct in seeking to exploit the strong association between the name "Duff Beer" and "The Simpsons". *Duff Beer* shows that even a fictional and derivative brand can elicit a strong emotional response from consumers, generating valuable goodwill.

Key points to note

The social issues raised by the BLM movement are persuading companies to re-consider their values and re-connect with their consumers. It is clear that consumer sentiment has shifted, and what used to be considered traditional and comforting is no longer appropriate.

At the risk of undermining significant investment and marketing, re-branding may be necessary in order to maintain brand friendships going into the future. By retaining the most salient features and responding to consumers' genuine concerns, companies will be in the best position to recuperate any damage to their goodwill and value to the brand caused by the re-branding.

After all, when it comes to branding and goodwill, it is important not to lose sight of the end game: to create a profitable and valuable asset.

16 *Twentieth Century Fox Film Corporation & Anor v South Australian Brewing Co Ltd & Anor* (1996) 34 IPR 225 ("*Duff Beer*").

17 In addition to two episodes in which repeated references were made to Duff Beer: ibid 240.

Profile: Alison Shilkin Principal Legal Counsel, Foxtel

Co-editor, **Eli Fisher,** recently caught up with **Alison Shilkin,** Principal Legal Counsel at Foxtel, to discuss Ali's career and thoughts on the media landscape.

ELI FISHER: Hi Ali, thanks for chatting with us. Where do you work, and can you tell us a little bit about your role in the organisation?

ALISON SHILKIN: I work at Foxtel and our legal team covers the whole business, being Foxtel TV (and broadband), Fox Sports, Foxtel Media and our Streamotion businesses, Kayo and Binge. I am a Principal Legal Counsel, and largely look after our Foxtel Media; broadband; product strategy; and content partnerships streams of the business from a commercial point of view. I also have a focus on consumer and regulatory aspects of those business units. I'm also currently Foxtel's Privacy Officer (while she is on maternity leave). That's the thing about being a lawyer at Foxtel, there is always something new and different to do – and probably why I've been working here for 10+ years!

FISHER: Where have you worked previously, and what (apart from it being an obvious dream job) led you to your current role?

SHILKIN: I worked at a few law firms (Phillips Fox, Deacons and Mallesons as they used to be called) before realising that the thing that made me interested in law was working with the clients and being embedded with a transaction. I was working on a large media merger (I was part of the competition team of my firm at the time) and was really invested in our client and their outcomes. It was then that I realised I wanted to be working for a company that I had a passion for and work side by side with the business decision makers. I initially started my first in-house role at Austar Management (the regional subscription TV provider), which was a really small inhouse team where we did everything – and after 3 years there, Austar was bought by Foxtel, and I've been here ever since.

FISHER: What do you wish you had known about the legal profession before becoming a lawyer? What are some tips for young lawyers looking to work in this area of law?

SHILKIN: I think it's very hard to know what you want to do when you first start working at a law firm. You are largely on the periphery of big transactions, and it can be hard to get a feel for the work. That said, I think law firms give you amazing training and skills which you often can't get going straight into an in-house role, so I think it's the best pathway straight out of uni. Often in-house roles are so fast moving that you're making quick risk assessments, and if you haven't had that law firm experience, it can be daunting. My only tip is that you need to find something that keeps you engaged and interested – the media industry is changing all the time, and Foxtel is trying many new things to keep up with its competitors – which means as lawyers we're always involved in different projects and evolving work, which keeps you motivated.

FISHER: What is a typical day at the office like for you?

SHILKIN: Well, at the moment it involves walking to my study and logging on! With working from home, there's obviously a lot of Teams calls – check-ins with my own team, with the broader legal team and with my business stakeholders. From a work point of view, my day can involve anything from reviewing and drafting contracts, dealing with customer complaints, reviewing new legislation and how it may impact Foxtel, working with our tech teams on new product requirements or advising our marketing team on privacy issues.

FISHER: What do you consider to be some of the most interesting and challenging aspects of your role?

SHILKIN: Probably the variety – one minute you're dealing with a regulatory investigation, and the next you're working on a strategically important contract that had to be signed yesterday. It can be challenging dealing with different stakeholders' competing priorities, but that's what keeps it interesting. Also, Foxtel is really in a very competitive space right now, so the work we're doing is very innovative and stimulating.

FISHER: What's your favourite thing on Foxtel right now, and what show are you most looking forward to coming?

SHILKIN: *Mare of Eastown* was brilliant – Kate Winslet was impeccably cast. I'm looking forward to *The White Lotus* – it's on HBO on Foxtel.

FISHER: What are some trends that you are seeing in the media and entertainment industry that will have the most impact on the way the business operates going forward? What are some of the most urgent challenges for the Australian media landscape, and do they differ from those in other Western democracies?

SHILKIN: I think it's the disaggregation of content – there are now so many players with content split up amongst all of them. Consumers need a multitude of apps to get all the content they're looking for and it's expensive (for the consumer and the content creators)! So really, we're back to a place where the re-aggregation of content becomes key (which hopefully is a good thing for Foxtel).

FISHER: Does the legal status quo enable you to overcome these challenges? If the law reform genie granted you one wish, what would it be?

SHILKIN: Ha. An equal playing field for all content providers. Subscription TV regulation remains a relic of a very old Broadcasting Services Act, that doesn't contemplate all the OTT providers currently in market. A great example is the anti-siphoning list – which wouldn't prevent an OTT player swooping in and buying relevant sports, but still prevents Foxtel from doing this. Recently, there has been some very small progress on media reform, but the law always seems to be behind the 8-ball with what actually is happening in the market.

FISHER: How has COVID-19 affected the industry and our role?

SHILKIN: Well obviously it's evident in more people being at home, so more people are staying in to watch TV. So from a content point of view, having the best content available is critical – and has meant we're trying to strike new deals all the time. Business units are also trying to save costs and find new ways of doing things. So, as a legal team, we've probably never been busier. At least we're saving on the commute time!

FISHER: Thanks Ali! On behalf of all our readers, we are really grateful for your insights.

CAMLA YL Privacy Seminar 101: The Recap

By **Jessica Norgard** (CAMLA YL Representative, nbnco)

In a world where the local and international privacy landscape is becoming more regulated and complex, and we are increasingly spending more time online often trading our data and personal information for convenience and social freedoms, there has never been a better time for a privacy 101 refresher. As such, back by popular demand, CAMLA Young Lawyers was proud to host an updated privacy seminar to unpack recent developments in the space. The esteemed panellists, Sophie Dawson (Bird & Bird), Peter Leonard (Data Synergies), Veronica Scott (KPMG Law), and Kelly Matheson (MinterEllison) provided expert insights with a focus on the impact of data and technology.

Some topics of discussion included:

- A helicopter view of the Privacy Act, the Australian Privacy Principles, the Data Availability and Transparency Bill, Notifiable Data Breaches, privacy impact assessments and algorithmic impact assessments;
- The way businesses exploit and share data, and the empowerment of individuals;
- The regulatory environment – with a special mention to the ACCC's recent case against Google in relation to location data, and the Privacy Commissioner making it clear that the gloves are off when it comes to privacy non-compliance;
- The importance of looking at not just at the Privacy Act and APPs but also any "known unknowns" (for example, surveillance or Telco Act considerations) and operating within a social governance framework; and
- The difference in privacy and data regulation in different jurisdictions (which often use similar language but have divergent definitions and applications of the law).

CAMLA YL would also like to thank the sponsors for the event, Bird & Bird. For those who missed it, the seminar is available online for CAMLA members through the CAMLA website.

Google v Oracle: The Evisceration of Copyright?

Emma Johnsen, Senior Associate at Marque Lawyers, discusses the US Supreme Court's Google v Oracle decision

Back in April 2021, the Supreme Court of the United States sided with Google in its long running dispute with Oracle which centred around Google using Oracle's source code without permission, ending a decade-long multibillion dollar legal battle.

The decision won't have any direct effect on copyright law here in Australia, however, it has been labelled by some as a huge victory for computer programmers and users, at the same time being slated as a decision that eviscerates copyright in the US.

The two central issues in the fight between the two tech industry heavy weights were

a. whether Oracle can claim a copyright on Java APIs; and
b. if so, whether Google had infringed these copyrights.

The first point didn't arise in the Supreme Court decision, and instead, which dealt only with the latter.

Background

The Goliath and Goliath fight stretches back to 2005, when Google included some 11,500 lines of code from an Application Programming Interface (API) in its mobile Android operating system. For those of us who don't speak programming jargon fluently, APIs are specifications that allow different programs to communicate with each other. For example, when you read an article on a news website, and click on the "Share to LinkedIn" icon to share that article to LinkedIn, you will be using a LinkedIn API that the news site's developer obtained from LinkedIn directly.

When Google implemented the Android operating system, Google wrote and developed its own version of Java, however, to allow developers to write their own programs for Android, Google's implementation used the same names and functionality as the Java APIs.

The API at the centre of this dispute had been developed by Sun Microsystems, which Oracle purchased in 2010. The argument put forth by Google was that it needed to use these lines of code to allow programmers that are familiar with the Java programming language to work with Google's Android platform. Google used the API to make a whole new, and now and much more popular, mobile operating system.

In 2010, Oracle sued Google, seeking close to $9 billion in damages. Google fought back, stating that the use was covered by fair use.

The dispute, previously known as Oracle v Google, has a long procedural history, however the short version is as follows. Initially, two District Court trials found in Google's favour, namely that there was no copyright in the APIs and that Google's use was fair use. Following this, the Federal Circuit court reversed these decisions. Google then petitioned to the Supreme Court and in April 2021, the Supreme Court ruled in a 6–2 decision that Google's use of the Java APIs fell within the four factors of fair use, bypassing the question on the copyrightability of the APIs.

Fair Use and Fair Dealing

One of the key legal issues in the case was the doctrine of Fair Use, which exists in the US. Essentially this means that copyright infringement will not be found if the respondent can make out that the use was "fair" by reference to a number of factors. In the USA, one of the factors in assessing whether the use is fair a consideration of '*the effect of the use upon the potential market for or value of the copyrighted work*.' This was the element that got Google over the line.

By contrast, here in Australia, the *Copyright Act* provides for 'fair dealing' defences. The fair dealing provisions of the *Copyright Act* allow a limited number of exceptions to copyright infringement, including that a copyright work can be used for the purposes of 'research or study' or 'criticism and review'. The fair dealing exceptions are narrow in scope, and if the usage falls outside that scope, the fair dealing exceptions will not apply.

The US doctrine of Fair Use is much more flexible than the Australian fair dealing exceptions. Prior to 2015, Fair Use had been traditionally characterised by the US Supreme Court as a positive defence, however, following the "dancing baby case" *(Lenz v Universal Music Corp*) the U.S. Court of Appeals for the Ninth Circuit concluded that fair use was an express right and therefore an exception to the exclusive rights held by the owner of the copyright.

The concepts of fair use and fair dealing are quite different, and because of this, an outcome such as the one that prevailed in the *Google v Oracle* case would be unlikely to occur here in Australia due to the limited scope of the fair dealing exceptions, however, the decision is likely to have a flow on effect for the broader computer programming industry.

What happened?

The ruling means copyright holders for software can't maintain a monopoly over critical interface aspects. The problem is, where a company has as much market power as Google, the strength of a claim of Fair Use based on the "effect of the use upon the potential market" test is much greater than an equivalent claim made by a small developer.

In this controversial decision, which some programmers see as a win for innovation, and others see as a degradation of copyright, the Court wrote that fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."

Notably, Justice Clarence Thomas, in dissent, opined (and rightly so) that the majority transforms the definition of transformative use into nothing more than "a use that will help others 'create new products'" which is, simply put, a new definition that eviscerates copyright. Justice Stephen Breyer, who was in the majority of the 6-2 decision, stated that it is difficult to apply traditional copyright concepts in that technological world. Stating the words that every copyright lawyer mutters on most days.

Don't Ask Journalists to Keep Your Secret: Source Confidentiality In Australian Media

By **Anna Kretowicz,** University of Queensland

I Introduction

Dubbed the 'Fourth Estate', the media plays a vital role in representing the interests of individuals in a society, holding government to account and facilitating a healthy democracy.[1] Especially in this context, sources are the 'wellspring of journalist's work' and provide information on the assurance of confidentiality.[2] Source confidentiality and press freedom are thus inextricably linked.[3] It is also more than just a promise; journalists are bound under the Media, Entertainment & Arts Alliance Code of Ethics to 'respect [source confidences] in *all circumstances*'.[4] Journalists take this seriously, often subjecting themselves to curial punishment in upholding it.[5] However, the 2019 raids by the Australian Federal Police (AFP), culminating in the cases of *Smethurst v Commissioner of Police*[6] and *Australian Broadcasting Corporation v Kane and Others (No 2)*,[7] demonstrated that police powers of search and seizure pose both an unjustified and disproportionate threat to these principles. Those powers operate as a loophole to existing protections for source confidentiality and more concerningly, rest on provisions that effectively criminalise public interest journalism. The result is that our own executive is a greater threat to our democracy than any foreign power, and proposals for reform must be acted upon.

II The Legislative Framework

Police powers of search and seizure are commonly invoked pursuant to secrecy and espionage offences, when exercised against journalists. Since 2001, the federal Parliament has enacted some 82 (and counting) pieces of national security legislation.[8] What has resulted is a complex, unclear and even inconsistent regime criminalising various forms of unauthorised dealings with information, where it is or may be prejudicial to national security.[9] These offences are defined by reference to broad concepts: 'national security' includes 'carrying out the country's responsibilities to any other country' and 'political, military or economic relations with another country',[10] while 'security' encompasses behaviour from outright 'sabotage' to more general 'politically motivated violence' and 'acts of foreign interference'.[11] The Parliamentary Joint Committee on Intelligence and Security (PJCIS) observed that these laws could therefore easily capture journalists in the course of public interest journalism, despite being far removed from the terrorism or military operations that the laws intend to target.[12]

To investigate the alleged commission of these offences, law enforcement agencies have complementary powers of search and seizure. The legislation creates a smorgasbord of warrants: the classic search warrant,[13] to modern-day computer access warrants,[14] to the peculiar Journalistic Information Warrant (JIW).[15] They are issued by senior officers, judges, Magistrates

1 Martin Hirst, 'Right To Know: The 'Nation', The 'People' and the Fourth Estate', *The Conversation* (News Article, 11 December 2013) <https://theconversation.com/right-to-know-the-nation-the-people-and-the-fourth-estate-21253>; Public Interest Journalism Initiative, Submission No 18 to Senate Standing Committee on Environment and Communications, *Inquiry into Press Freedom* (30 August 2019) 1.

2 Des Butler and Sharon Rodrick, *Australian Media Law* (5th edn, Thomson Reuters, 2015) 689.

3 Rebecca Ananian-Welsh, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 2.

4 'MEAA Journalist Code of Ethics', *Media, Entertainment & Arts Alliance* (Web Page, 2020) <https://www.meaa.org/meaa-media/code-of-ethics/> (emphasis added).

5 Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Final Report, August 2020) 128 [3.300]. See, eg, *R v Barrass* (District Court of Western Australia, Kennedy J, 7 August 1990).

6 (2020) 376 ALR 575.

7 (2020) 377 ALR 711 (*'Kane (No 2)'*).

8 Parliamentary Joint Committee on Intelligence and Security (n 5) 15 [2.13]; Nicola McGarrity and Jessie Blackbourn, 'Australia Has Enacted 82 Anti-Terror Laws Alone Since 2001. But Tough Laws Alone Can't Eliminate Terrorism', *The Conversation* (News Article, 30 September 2019) <https://theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-cant-eliminate-terrorism-123521>; Daniel Hurst, '"Chilling Attack on Democracy": Proposed ASIO Powers Could be Used Against Journalists', *The Guardian* (News Article, 20 October 2020) <https://www.theguardian.com/media/2020/oct/20/chilling-attack-on-democracy-proposed-asio-powers-could-be-used-against-journalists>.

9 See, eg, *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18(2), 18A(1), 18B(1), 35P, 92; *Crimes Act 1914* (Cth) ss 3ZZHA, 15HK; *Criminal Code Act 1995* (Cth) ss 91.1-92A, 131.1, 132.1; *Defence Act 1903* (Cth) ss 73A(2), 73F; Parliamentary Joint Committee on Intelligence and Security (n 5) 22-3 [2.49], [2.52].

10 *Criminal Code Act 1995* (Cth) s 90.4(1)(d), (e).

11 *Australian Security Intelligence Organisation Act 1979* (Cth) s 4; *Crimes Act 1914* (Cth) ss 15GD, 15GE(2).

12 Parliamentary Joint Committee on Intelligence and Security (n 5) 25 [2.58].

13 *Crimes Act 1914* (Cth) ss 3E, 3F, 3LA, 3ZQN.

14 *Australian Security Intelligence Organisation Act 1979* (Cth) s 25A; *Surveillance Devices Act* 2004 (Cth) s 27A.

15 *Telecommunications (Interception and Access) Act 1979* (Cth) Ch 4, Part 4-1, Div 4C. See further *Australian Security Intelligence Organisation Act 1979* (Cth) ss 25, 26, 27; *Surveillance Devices Act 2004* (Cth) s 14; *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9, 9A, 46, 46A, 109, 110; *Crimes Act 1914* (Cth) s 3ZA; Rebecca Ananian-Welsh, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 9.

and other legally qualified issuing authorities, upon application by the law enforcement agencies, with the key criterion generally being whether it is necessary for some purpose in furthering an investigation, often by the seizure of evidential material.[16] Search warrants typically allow access to persons of interest or particular premises,[17] but more recently the government introduced data surveillance schemes that reach deeper into journalists' communications. There is the mandatory 'data retention scheme', which obliges all telecommunications providers operating in Australia to retain customers' (including journalists') metadata, potentially revealing phone numbers, the time and length of calls, and even the location of callers.[18] That can be accessed by a range of government agencies without a warrant, although a JIW is required if a law enforcement agency wishes to access a journalists' or their employers' metadata for the purpose of identifying a source.[19] Additionally, there is the 'industry assistance scheme', that goes beyond metadata and allows policing and intelligence agencies to compel, with a warrant, 'Designated Communications Providers' to do a broad range of 'acts or things' to assist them in their objectives, such as removing a form of encryption.[20] Together, this plethora of warrants leaves journalists vulnerable to being searched, like Smethurst, 'from [their] mobile phone and computer, to [their] underwear drawer and cookbooks'.[21] As the following analysis will demonstrate, this represents a fundamental imbalance between two competing public interests, as Attorney-General Christian Porter pithily described: 'a free press, against keeping Australians safe'.[22]

III Exploiting Loopholes

The first problem, and indication of the imbalance, is that these powers cut behind existing protections for source confidentiality. At common law, judges generally have a discretion to uphold a journalist's claim to immunity from disclosing a source's identity, even if that information is 'relevant and proper'.[23] And although media organisations will incur an equitable obligation to disclose information, including a source's identity, if it amounts to an actionable wrong, that is only required if it is necessary in the interests of justice.[24] There is also the 'newspaper rule', which protects journalists from having to reveal their sources' identity at the interlocutory stage in defamation proceedings, unless disclosure is necessary in the interests of justice, or would otherwise not reveal their identity.[25] However, these common-law protections are weak. They are highly discretionary, operate either only in trial or pre-trial situations, and the newspaper rule is confined to defamation proceedings and is court practice, rather than a rule of evidence.[26] For example, they could provide no relief in *Smethurst* and *Kane (No 2)*, neither involving defamation proceedings or disclosure at trial stage.

Most Australian jurisdictions now have 'shield laws', which create a rebuttable presumption of non-disclosure of an informant's identity. Enacted with the specific goal of 'foster[ing] freedom of the press and better access to information for the Australian public', they are a statutory recognition of journalists' ethical obligations.[27] Positively, shield laws strengthen the common-law position in allowing journalists to make a prima facie claim to privilege.[28] It is not absolute, but explicitly requires consideration of the public interest in press freedom.[29] However, they are far from adequate in fully recognising the extent that obligation. Where they exist, they are not uniform, and Queensland lacks them entirely.[30] Relatedly, they only apply to a 'journalist' and that is defined differently in each

16 Rebecca Ananian-Welsh, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 9.

17 See, eg, *Crimes Act 1914* (Cth) s 3E.

18 Rebecca Ananian-Welsh, 'Journalistic Confidentiality in An Age of Data Surveillance' (2019) 41 *Australian Journalism Review* 225, 226-7; *Telecommunications (Interpretation and Access) Amendment (Data Retention) Act 2015* (Cth).

19 *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) s 5(1), Chapter 4, Pt 4-1, Div 4C; Ananian-Welsh (n 18) 227-8.

20 *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) ('*TOLAA*'), ss 317A, 317E(1)(a), 317B, 317ZH; Ananian-Welsh (n 18) 230-2.

21 Rebecca Ananian-Welsh, 'Explainer: What Did the High Court find in the Annika Smethurst v AFP Case?', *The Conversation* (News Article, 15 April 2020) <https://theconversation.com/explainer-what-did-the-high-court-find-in-the-annika-smethurst-v-afp-case-136176>.

22 Letter from The Hon Christian Porter MP, Attorney-General to the Chair of the Parliamentary Joint Committee on Intelligence and Security, 4 July 2019, 1.

23 Butler and Rodrick (n 2) 500-1 [7.530]. See, eg, *Attorney-General v Clough* [1963] 1 QB 773, 792; *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 354-5.

24 Butler and Rodrick (n 2) 508-9 [7.600].

25 Ibid 504 [7.580]; *Tony Madafferi v The Age* [2015] VSC 687, [28]; Patrick George, 'Free Speech and Protecting Journalists' Sources: Preliminary Discovery, the Newspaper Rule and the Evidence Act' (2017) 36 *Communications Law Bulletin* 24, 26; *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 354; *Hodder v Queensland Newspapers Pty Ltd* [1994] 1 Qd R 49, 57; *Liu v The Age Company Ltd* [2010] NSWSC 1176, [45]; *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241, 252-3; *Liu v The Age Company Ltd* [2016] NSWCA 115, [122].

26 *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 352, 354; *West Australian Newspapers Ltd v Bond* (2009) 40 WAR 16, 180; *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290, [78]; *Isbey v New Zealand Broadcasting Corporation (No 2)* [1975] 2 NZLR 237; George (n 24) 26, 30.

27 Parliamentary Joint Committee on Intelligence and Security (n 5) 129 [3.306]. See *Evidence Act 1995* (Cth) ss 126J, 126K, 131A, 131B; *Evidence Act 2011* (ACT) ss 126J-126L, 131A; *Evidence Act 1995* (NSW) ss 126J-126L, 131A; *Evidence Act 2008* (Vic) ss 126J, 126K, 131A; *Evidence Act 1906* (WA) ss 20G-20M.

28 *Ashby v Commonwealth of Australia* [2012] FCA 766, [18]; Butler and Rodrick (n 2) 516 [7.660].

29 See, eg, *Evidence Act 1995* (Cth) s 126K(2)(b).

30 Parliamentary Joint Committee on Intelligence and Security (n 5) 129 [3.306].

jurisdiction. Only two jurisdictions, the Commonwealth and Australian Capital Territory, give a definition that encompasses non-traditional forms of journalism, which is arguably necessary to reflect the modern environment.[31] Most problematically, they only cover any 'process or order of a court that requires disclosure of information or a document'.[32] That deficiency was highlighted in *Kane (No 2)*, where Abraham J entertained no possibility of the Commonwealth iteration extending to search warrants.[33] Victoria is exceptional in extending them to search warrants, although the JIW scheme circumvents that and is imperfect.[34] Although a JIW will only be issued if it is for a specified law enforcement purpose and is in the public interest, and a Public Interest Advocate (PIA) assists on these matters, the purpose test is easy to satisfy given the broad scope of offences and the public interest test does not always apply.[35] The PIA is also 'under no obligation to champion the journalist's position', potentially swayed by the government that appointed them.[36]

The disproportionate nature of this regime is underscored by the availability of clear, reasonable alternatives. Shield laws should be harmonised Australia-wide (with Queensland enacting mirror legislation), and extended to include search warrants. More radically, there have been calls for a contested warrants process, similar to the UK,[37] whereby journalists or media organisations have the opportunity to object at an early stage to the issuing of warrants; essentially a more robust JIW scheme. It would cover all warrant types and have an independent third-party, ideally a senior judge, deciding whether or not to authorise the issuing of the warrant considering necessity, and the competing public interests in accessing the information against press freedom.[38] It is no argument that there are existing avenues, like urgent injunctions to halt the execution of warrants and the availability of judicial review to challenge their validity,[39] because those ignore the crux of the problem: once a source is identified (or at risk of identification) through investigatory processes, the cat is out of the bag and the damage done. And as the High Court recently ruled, albeit by a slim majority, there is no scope for unlawfully seized material to be returned or destroyed.[40] Although Abraham J thought that '[i]dentifying the evidential material says nothing about whether there is… any risk of identifying the confidential source',[41] with respect that is difficult to avoid, as the very goal of a search warrant investigating secrecy offences is to pinpoint the unauthorised disclosure.

IV Fruit of the Poisoned Tree

The second problem arises in relation to the framework of secrecy and national security offences that the powers operate on. Secrecy of government information has long been acknowledged as productive to our Westminster system of government and the need to protect national security, particularly since the rise in terror attacks since September 11, 2001.[42] Secrecy and national security offences, which criminalise the unauthorised disclosure of information pertaining to these interests, therefore serve the important purpose of not just protecting the persons directly involved in national security and related operations, but the integrity and efficiency of those mechanisms.[43] Relatedly, police powers to search and seize are 'important and legitimate tool[s] in the detection and prosecution of criminal offences'.[44] *Kane (No 2)* and *Smethurst* reflect this, as the courts in both cases took a 'a largely orthodox approach' to assessing the validity of the warrants (despite it being struck down in the latter),[45] essentially reflecting the 400-year old common-law principle that prohibits only *general* warrants.[46] It was affirmed that warrants need not be precise, given that they are issued for an investigative purpose, and all that is required is that they inform the subject why the search

31 Ibid 129-130 [3.303], [3.307]; Commonwealth, Parliamentary Debates, House of Representatives, 21 March 2011, 2393-4; Sara Phung, 'Function Not Form: Protecting Sources of Bloggers' (2012) 17 *Media and Arts Law Review* 121. See *Evidence Act 1995* (Cth) s 126J(1); *Evidence Act 2011* (ACT) s 126J.

32 *Evidence Act 1995* (Cth) s 131A(2); *Evidence Act 2008* (Vic) s 131A(2); *Evidence Act 1995* (NSW) s 131A(2); *Evidence Act 2011* (ACT) s 131A(2); *Evidence Act 1906* (WA) s 20H.

33 *Kane (No 2)* (2020) 377 ALR 711, 755-9 (Abraham J).

34 *Evidence Act 2008* (Vic) s 131A(2)(g); Parliamentary Joint Committee on Intelligence and Security (n 5) 129 [3.303]; Ananian-Welsh (n 18) 228-9.

35 Ananian-Welsh (n 18) 227-9; *Telecommunications (Interception and Access) Act 1979* (Cth) ss 178-180(4); 180J-180L, 180T.

36 Sal Humphreys and Melissa de Zwart, 'Data Retention, Journalist Freedoms and Whistleblowers' (2017) 165 *Media International Australia* 103, 106; *Telecommunications (Interception and Access) Act 1979* (Cth) s 180X(1); Paddy Manning, 'Dissent in Press Freedom Inquiries', *The Saturday Paper* (News Article, August 15 2020) <https://www.thesaturdaypaper.com.au/news/media/2020/08/15/dissent-press-freedom-inquiries/159741360010279?cb=1602675859>.

37 See, eg, *Police and Criminal Evidence Act 1984* (UK) ss 8(1)(d), 9, 11, 13, 14.

38 Parliamentary Joint Committee on Intelligence and Security (n 5) 50-1, 60-1 [3.15], [3.52]; Ananian-Welsh (n 16) 13-4; Australia's Right to Know, Submission No 23 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (31 July 2019) 5.

39 Parliamentary Joint Committee on Intelligence and Security (n 5) 59 [3.49].

40 *Smethurst v Commissioner of Police* (2020) 376 ALR 575,

41 *Kane (No 2)* (2020) 377 ALR 711, 782 (Abraham J).

42 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 98; Butler and Rodrick (n 2) 677-8 [10.10].

43 Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014 (Cth) [553]; Australian Law Reform Commission (n 39) 103.

44 *Kane (No 2)* (2020) 377 ALR 711, 730, citing *Hart v Commissioner, Australian Federal Police* (2002) 124 FCR 384, 401.

45 Bradley Dean, 'Search Warrants and the 'Fourth Estate': Recent Judgments' (2020) 67 *Law Society of NSW Journal* 78, 78.

46 *Semayne's Case* (1604) 77 ER 194.

is being conducted, state the nature of the offences, and have a 'real and meaningful perimeter' as to its scope.[47] That allows a balance between precision and complying with the rule of law, while keeping the 'operational realities' of investigations in mind.[48] So on one side of the equation sits the effective functioning of the executive, and the public interest in protecting national security.

On the other side of the equation sits the competing public interest in press freedom and source confidentiality. Search warrants and the offences they rest on, legitimate as they may be, are an incursion on that and freedom of speech more generally, and the UN Human Rights Committee has implored that such restrictions must be clearly and properly justified.[49] While Australia has no federal bill of rights to enforce this, the implied constitutional freedom of political communication has instead been called upon. In *Kane (No 2)*, it was argued that the discretion to issue a search warrant pursuant to s 3E *Crimes Act 1914* (Cth) unduly infringed that freedom.[50] Applying the three-stage test from *McCloy v New South Wales*,[51] it was accepted that s 3E 'may indirectly' burden the freedom, because 'information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to its sources'.[52] Yet the countervailing interest, as described above, was given primacy; warrants are a particular investigatory method for gathering evidence in criminal cases, which serves a purpose 'plainly compatible with the maintenance of the prescribed system of representative government'.[53] The warrant was also not framed wider than necessary and there were no reasonably practicable alternatives available for investigating serious breaches of the offence provisions.[54]

On its face it seems settled; search and seizure powers do not infringe the implied freedom. But with respect, that proceeds on a mistaken assumption. While it is true that warrants investigate criminal offences, that assumes the underlying offence is itself legitimate and justified. This is the question that remains unanswered following *Smethurst* and sits at the heart of the problem. As addressed in Section II, the secrecy and national security offences that the warrants piggy-back off are overly complex and operate by reference to vague definitions. This is inconsistent with the rule of law, which requires that laws be 'accessible, and so far as possible, intelligible, clear and predictable'.[55] The consequence is that activities which arguably pose little to no harm to national security and are thus unconnected to the purpose of those laws, namely public interest journalism, are criminalised.[56] As Peter Greste observed, 'nobody has ever suggested national security suffered as a result of [Smethurst's] story'.[57] Indeed, many professional journalists actually acknowledge the gravity of the information they handle and aim to have a cooperative relationship with authorities when publishing it.[58] Recognising this, there have been calls for review of the secrecy laws and more defences for public interest journalism.[59] So, it is arguable that the underlying offences are an unjustified intrusion on the implied freedom of political communication, and therefore press freedom. Indeed, recent external legal advice warns that newly proposed powers to expand ASIO's questioning powers may cross this line.[60] If the offence 'trees' are tainted, so must be the warrant 'fruit' that grow from them.

V The Real Threat to our Democracy

The practical effect of this framework is a 'chilling effect' on the Fourth Estate and their freedom of speech, which is detrimental to our democracy. As raised in Section III, freedom of speech may be restricted, so long as it is clearly justified and there is a direct connection between the threat and restriction. Indeed, absolute press freedom is not desirable; there have been several instances where unauthorised disclosure, ostensibly in the public interest, has harmed it - think WikiLeaks and Edward Snowden.[61] Further, the rise of new media and 'citizen journalism'

47 *Kane (No 2)* (2020) 377 ALR 711, 730-1, 737-41 (Abraham J); *Smethurst v Commissioner of Police* (2020) 376 ALR 575, 628 (Edelman J).

48 *Kane (No 2)* (2020) 377 ALR 711, 730 (Abraham J), citing *Caratti v Commissioner of Australian Federal Police* (2017) 257 FCR 166, 177.

49 Australian Law Reform Commission (n 39) 90-1; United Nations Human Rights Committee, General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (12 September 2011) [35].

50 *Kane (No 2)* (2020) 377 ALR 711, 763-4, 771, 775 (Abraham J).

51 (2015) 257 CLR 178; *Kane (No 2)* (2020) 377 ALR 711, 770 (Abraham J).

52 *Kane (No 2)* (2020) 377 ALR 711, 778-9 (Abraham J).

53 Ibid (Abraham J).

54 Ibid 780-2 (Abraham J).

55 Lord Bingham, 'The Rule of Law' (2007) 66 *The Cambridge Law Journal* 67, 69.

56 Rebecca Ananian-Welsh (n 16) 5; Australia's Right to Know (n 38) 2.

57 Peter Greste, 'The High Court Rules in Favour of News Corp, But Against Press Freedom', *The Conversation* (News Article, 15 April 2020) <https://theconversation.com/the-high-court-rules-in-favour-of-news-corp-but-against-press-freedom-136177>. See also Australian Law Reform Commission (n 39) 100.

58 Parliamentary Joint Committee on Intelligence and Security (n 5) 36, 37 [2.99].

59 Ibid 100 [3.194]; Australia's Right to Know (n 38) 9-15.

60 Daniel Hurst, '"Chilling Attack on Democracy": Proposed ASIO Powers Could be Used Against Journalists', *The Guardian* (News Article, 20 October 2020) <https://www.theguardian.com/media/2020/oct/20/chilling-attack-on-democracy-proposed-asio-powers-could-be-used-against-journalists>.

61 Butler and Rodrick (n 2) 499 [7.520].

creates a risk of 'fake news' and mistrust in democracy.[62] But as argued, the current framework is premised on unjustifiably broad offences and search and seizure powers that disproportionately favour security interests over press freedom. Consequently, faced with the risk of criminal prosecution and identities being leaked, journalists restrain themselves from fully and frankly engaging in their work and sources are hesitant to come forward. For example, one journalist described that in response to the 2019 raids, he 'did an immediate stocktake of what was at [his] desk because I thought Jesus, am I going to be next?'[63]

A degree of free speech is an intrinsic good, promoting the self-fulfilment of individuals in society, the search for truth, and is 'the lifeblood of democracy'.[64] That is because it is a 'vital ingredient' of investigative journalism, and thus facilitates the role of the Fourth Estate.[65] These principles are so important that, in addition to the aforementioned reforms, there have been calls for a 'Media Freedom Act'. It would enshrine principles of press freedom in our legal system and affirm the role of the Fourth Estate, require transparency from government and protect 'legitimate journalism' from the scope of criminal offences.[66] Again, without this protection the current framework of police powers of search and seizure are an unjustified and disproportionate incursion on journalists' ethical obligations and press freedom.

VI Conclusion

The 2019 raids and subsequent court battles have revealed the imbalance between two core public interests: national security and secrecy, against press freedom and source confidentiality. In operating as a loophole to, and therefore undermining, existing protections for source confidentiality, and piggy-backing off offences that criminalise legitimate public interest journalism, journalists struggle to uphold their ethical obligations. This would be unacceptable for a lawyer or doctor, so what makes a journalist different?

62 See, eg, Miguel Paisana, Ana Pinto-Martinho and Gustavo Cardoso, 'Trust and Fake News: Exploratory Analysis of the Impact of News Literacy on the Relationship with News Content in Portugal' (2020) 33 *Communication & Society* 105; Vian Bakir and Andrew McStay, 'Fake News and the Economy of Emotions' (2018) 6 *Digital Journalism* 154.

63 Parliamentary Joint Committee on Intelligence and Security (n 5) 30 [2.74]. See also Rebecca Ananian-Welsh, 'Why the Raids on Australian Media Present a Clear Threat to Democracy' (2019) 11 *Australian Policing* 12, 12.

64 *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).

65 *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 354. See, eg, Shyamal K Chowdhury, 'The Effect of Democracy and Press Freedom on Corruption: An Empirical Test' (2004) 85 *Economics Letters* 3; Christine Kalenborn and Christian Lessmann, 'The Impact of Democracy and Press Freedom on Corruption: Conditionality Matters' (2013) 35 *Journal of Policy Modelling* 857.

66 Rebecca Ananian-Welsh, 'Australia Needs a Media Freedom Act. Here's How it Could Work', *The Conversation* (News Article, 22 October 2019) <https://theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>; Greste (n 55).

Stage 2 of the Australian Defamation Law Reform Process - Report

By **Joel Parsons** (CAMLA YL Representative, Bird and Bird)

On 12 May 2021, CAMLA and Johnson Winter & Slattery hosted a webinar on Stage 2 of the Australian defamation law reform process. The event broadly focused on the question of internet intermediary liability for defamation tackled in the Defamation Working Party's Discussion Paper. Moderated by Kevin Lynch, Partner, Johnson Winter & Slattery, the webinar brought together a panel of eminent defamation experts, comprising Kieran Smark SC, Clayton Noble (Microsoft), her Honour Judge Judith Gibson (District Court of NSW), and Dr Daniel Joyce (UNSW Law & Justice).

The panel discussion facilitated an engaging and thought-provoking exploration of different perspectives on the key issues, such as the desirability of the U.S. approach (via an immunity similar to that provided by section 203 of the United States' Communications Decency Act) and innocent dissemination in the age of social media. The panel also had an opportunity to reflect on the Stage 1 reforms.

The webinar was well attended and CAMLA is grateful to Johnson Winter & Slattery for hosting an excellent event.

Stage 2 of the Defamation Reform Process:
A Can of Digital Worms is Opened

By **Marlia Saunders,** Senior Litigation Counsel, News Corp Australia
(soon to be Media Law Partner at Thomson Geer)

Stage 2 of the national defamation reforms is officially underway. While the period for submissions in response to the discussion paper has closed, it remains to be seen which approach the Model Defamation Law Working Party will adopt.

The discussion paper seeks stakeholder input on the conundrum that is liability for the publication of defamatory material on the internet. There are no easy answers, and the submissions received are likely to diverge significantly in the solutions proposed. There is a reason why this issue has been left until Stage 2: it's tricky.

The Uniform Defamation Acts came into effect on 1 January 2006, at a time when social media platforms were only just emerging. Facebook was not open to the public until September 2006, having only had a university presence before that time. Twitter didn't take off in Australia until 2009. Australia's seminal appellate authority on publication was handed down by the High Court in 2002 – publication of the type engaged in on social media, where anonymous strangers behind keyboards can share their opinions very publicly, was not even within contemplation.

The law has not kept up with technological developments. The broad definition of publication under defamation law, espoused in the judgment of Isaacs J in *Webb v Bloch* [1928] HCA 50; 41 CLR 331, provides that a publisher is anyone who has "without reference to the precise degree in which the defendant has been instrumental to such publication, if he has intentionally lent his assistance to its existence for the purpose of it being published". This includes anyone who has assisted, conduced, concurred, assented to, approved, authorised, encouraged, induced and has been an accessory to the publication.

Online publication involves a range of actors, from the originator, to the host of the webpage or forum, to the platform owner or operator, to the search engine that provides searchable access to online content, each of whom may be liable as a publisher of defamatory material. Whether this is appropriate or desirable in practice is another matter. There are confusing policy-based and legal considerations involved in deciding what their respective responsibilities and liabilities should be.

To date, stakeholders representing internet intermediaries have argued that there is insufficient protection from liability for content that they have not authored. Internet intermediaries, it is submitted, are not and cannot be aware of all content posted by third parties that appears on their webpages or in search results and are not in a position to assess whether content is defamatory. There is a concern that intermediaries may simply remove content to avoid potential liability when notified of a complaint, which would have a chilling effect on freedom of expression. Even worse, intermediaries may be held liable without either notice or knowledge, as in *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102.

Other stakeholders, including academics and peak legal bodies, have argued that defamation law should be updated to reflect the nature of digital publications while balancing this with the need to ensure that complainants have access to a remedy. Others have submitted that, given the ease with which online material can spread or "go viral", there should be quick, easily accessible and low cost avenues for complainants to have content modified or removed, including where the originator's identity is unknown, or if the originator refuses to comply with a request or court order.

After considering the approaches that have been adopted in the United Kingdom, the United States and Canada, the discussion paper poses four options for reform (which are expressed to not be mutually exclusive and a number of options could potentially operate together):

- Option 1: Retain the status quo with some minor changes to the defamation legislation to clarify the role of internet intermediaries;
- Option 2: Clarify the innocent dissemination defence in relation to digital platforms and forum administrators;
- Option 3: Safe harbour – subject to a complaints notice process (such as that in effect in the United Kingdom and as per the recommendations of the Law Commission of Ontario); and/or
- Option 4: Immunity for internet intermediaries for user-generated content unless the internet intermediary materially contributes to the unlawfulness of the publication (such as the immunity under section 230 of the *Communications Decency Act 1996* (US)).

The option which is likely to be advocated for by many stakeholders is the introduction of a new defence to defamation actions brought against internet intermediaries where the intermediaries comply with a prescribed process for addressing complaints about third party defamatory content on their websites, including by acting as a go-between between a complainant and an originator or by removing the content.

The discussion paper states that the complaints notice procedure could apply to a broad range of

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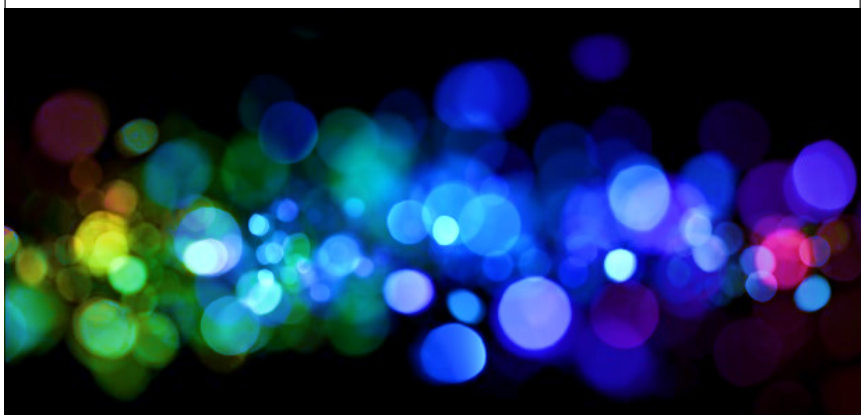

digital platforms, including social media services, search engines, digital content aggregators, messaging services and some forum administrators. Digital platforms that are not considered publishers, and therefore don't require a safe harbour, would not need to comply with the complaints notice process. It is noted that some digital platforms may not hold the relevant information required in order to complete the process, such as the contact details of originators of third party content, so would be unable to connect a complainant with an originator.

In the Working Party's assessment of this option, the discussion paper notes that the defence has the potential to provide a fast and simple path for a complainant achieve a solution when their reputation has been harmed online. The Working Party observes that the extent to which the defence and complaints notice process is effective would likely depend on how straightforward and cost effective it is to use. However, there is a risk that the complaints notice process could be abused by complainants who want to have content removed from the internet which is critical or unflattering (but not defamatory) of them. It is important that digital platforms, which are generally not in a position to assess the merits of a complaint, are not incentivised to simply remove content once a complaints notice is received rather than follow the requirements of the process, which may have a chilling effect on freedom of expression.

All of these issues would need to be considered in the design of any complaints notice process for Australia. The discussion paper notes that: "One of the key challenges of law reform in this area is to address the need for certainty at the same time as providing sufficient flexibility to accommodate the wide range of internet intermediary functions – both existing and emerging. Focusing on functions of internet intermediaries provides flexibility to address new and emerging technologies, while also outlining expectations on internet intermediaries if they want to gain the benefit of new defences and immunities. If designed well, the reforms may prompt reconsideration of business models to better protect users from the risk of harm to reputation, in order to reduce risk of liability of internet intermediaries."

Social Media and Suppression Orders: The End of e-secrecy?

By **Kate Mani,** Law Graduate, at Corrs Chambers Westgarth

I Introduction

11:00am, 26 February 2019. Digital news sites, TV bulletins and radio stations across the country rushed to break the news that Cardinal George Pell had been convicted of historical child sexual offences. Many Australians, however, already knew the verdict.

Throughout the previous year, a suppression order had prohibited media organisations from reporting on the case of *DPP v Pell* ('*Pell*')[1] and publishing its December 2018 verdict. However, immediately following the trial decision, news of Pell's conviction (since overturned by the High Court of Australia),[2] was published on international news websites and shared extensively across Australia through social media. The situation led then President of the Law Council of Australia, Arthur Moses, to recommend that the Australian Law Reform Commission review 'whether suppression orders have kept up with the digital age'.[3]

This essay examines when the wide dissemination of online material should be deemed to hinder the efficacy of proceeding suppression orders and to deny their ability to meet the requisite necessity test. It outlines the current operation of Victorian proceeding suppression orders, the legal principles which clash in granting orders and the high threshold courts must meet to curtail open justice. This essay then argues that the decision to maintain the *Pell* suppression order underestimated the accessibility of international publications and the capacity of social media to expose users to information. It contends that in high profile cases, courts must recognise how publication of suppressed material by international sources can deny suppression orders' efficacy. Equally, the impact and spread of information via social media cannot be considered as secondary to the power of mainstream media. This essay endorses the court's approach in *AB v CD & EF,* which recognised how 'very little effort' is required to obtain information online.[4]

A Proceeding suppression orders

Proceeding suppression orders prevent publication of trial proceedings as they occur in court. Victoria's *Open Courts Act* ('*OCA*')[5] empowers the Magistrates and County Courts to restrict publication of information relating to court proceedings in certain circumstances.[6] This essay focuses on s 18(1)(a) which permits courts to make orders where it is 'necessary to prevent a real or substantial risk of prejudice to the proper administration of justice which cannot be prevented by other reasonably available means'.[7] Courts in Victoria and New South Wales, where a similar necessity requirement applies in granting suppression orders,[8] have equated an order's necessity with its practical efficacy since 'logic dictates that a futile order cannot possibly be characterised as one of necessity'.[9] The *OCA* also maintains the Supreme Court's inherent jurisdiction to restrict publication of information in connection with proceedings.[10]

B Competing principles

Proceeding suppression orders see a conflict between the principle of open justice and the right to a fair trial. Open justice upholds that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done',[11] through a courtroom open to the public.[12] The

1 *Director of Public Prosecutions v Pell* (sentence) [2019] VCC 260.

2 *Pell v R* (2020) 376 ALR 478 (*'Pell v R'*).

3 ABC Radio National, 'Law Council of Australia calls for inquiry into suppression orders', *RN Breakfast,* 27 February 2019 (Arthur Moses) <https://www.abc.net.au/radionational/programs/breakfast/law-council-calls-for-inquiry-into-suppression-orders/10852398> ; Arthur Moses 'Law Council calls for ALRC Review of suppression orders, uniformity across jurisdictions' (Media release, Law Council of Australia, 27 February 2019) <https://www.lawcouncil.asn.au/media/media-releases/law-council-calls-for-alrc-review-of-suppression-orders-uniformity-across-jurisdictions>.

4 *AB v CD & EF* [2019] VSCA 28, 73 (*'AB v CD & EF'*).

5 *Open Courts Act 2013* (Vic) (*'Open Courts Act'*) s 17(a); (b).

6 Ibid s 17.

7 Ibid s 18(1)(a).

8 *Court Suppression and Non-Publication Orders Act 2010* NSW ss 7; 8(1)(a).

9 Jason Bosland, 'Suppression Orders Vs Open Justice', *The University of Melbourne Centre for Media and Communications Law* (Article, 1 March 2017) <https://pursuit.unimelb.edu.au/articles/suppression-orders-vs-open-justice>; see also: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 72 [76]-[78].

10 *Open Courts Act* (n 5) s 5.

11 *R v Sussex Justices* [1924] 1 KB 256, 259 quoted in Roxanne Burd, 'Is there a case for suppression orders in an online world?' (2012) 17 *Media and Arts Law Review* 107, 108 *('I*s there a case for suppression orders in an online world?*')*.

12 *John Fairfax Publications Pty Ltd v District Court* (NSW) (2004) 61 NSWLR 344 cited in Burd, 'Is there a case for suppression orders in an online world?' (n 11) 109. For further analysis on open justice see: Frank Vincent, *Open Courts Act Review* (Legislative Review, September 2017) 27 [95]; *Scott v Scott* [1913] AC 417 cited in Burd, 'Is there a case for suppression orders in an online world?' (n 11) 109.

media's right to report fairly and accurately on court proceedings is 'an adjunct' to this principle,[13] as citizens rely on the media as 'the primary channel through which the work of the courts is made known'.[14]

The *OCA* 'expressly reflects the importance of…open justice'.[15] Following the 2017 *OCA Review*,[16] an amended s 4 requires courts to give greater 'regard to the primacy of the principle of open justice… in determining whether to make a suppression order'.[17] Under the new s 14A,[18] courts must give reasons for an order's necessity which are 'sufficient to explain and justify the decision'.[19] These amendments reinforce that 'open justice and freedom of communication are the default position and can only be displaced in specific circumstances where it is necessary.'[20]

Proceeding suppression orders should therefore be made cautiously, to derogate from open justice only in 'exceptional circumstances',[21] such as when 'observance' of open justice would 'frustrate the administration of justice'.[22] This essay considers where such frustration occurs because an accused's right to a fair trial, a 'human right'[23] enshrined in case law[24] and legislation,[25] is prejudiced. Suppression orders can assist in achieving an unbiased, fair trial for an accused. Restricting the publication of information which could influence or prejudice a jury aims to ensure jurors' decisions are based solely on admissible, court-room evidence.[26]

II International Dissemination of Suppressed Information

Following the lifting of the *Pell* suppression order, academic Jason Bosland described how there are 'certain cases where it is predictable that suppression orders are likely to not be effective…usually where there is some kind of international media interest'.[27] In 2018, Cardinal George Pell (who has since been acquitted)[28] was committed to stand trial in Victoria's County Court in relation to historical child sexual offences involving multiple complainants.[29] The charges were to be heard over two separate trials, relating to different events and allegations.

Kidd CJ deemed a proceeding suppression order 'necessary' for the first trial, 'to preserve the integrity of the jury pools for two trials and to ensure the accused man receive[d] a fair and impartial trial'.[30] The order, applicable to any electronic or broadcast format accessible in Australia,[31] prohibited publication of any part of the trial or verdict.[32] It was to last until the second trial's commencement to ensure the future jury would remain uninfluenced by the first trial.[33] Kidd CJ accepted 'international exposure ha[d] the capacity to undermine, to some degree, the efficacy of any order.'[34] However, his Honour held that 'the fact…an order does not guarantee perfect impartiality does not mean that such an order is unnecessary' in protecting an accused's interests.[35]

When the verdict was delivered on 12 December 2018, the risk of its publication by international media and subsequent spread via 'social media chatter'[36] was realised. A

13 *R (On the Application of the DPP (Vic)) v The Herald & Weekly Times Ltd* (2007) 19 VR 248, 260 [38], cited in Jason Bosland, 'Restraining "Extraneous" Prejudicial Publicity: Victoria and New South Wales Compared' (2018) 41(4) *UNSW Law Journal* 1263, 1265.

14 Sharon Rodrick, 'Achieving the aims of open justice? The relationship between the courts, the media and the public' (2014) 19 *Deakin Law Review* 123, 131.

15 *Director of Public Prosecutions* (Cth) *v Brady & Others* (2015) 252 A Crim R 50, 59 ('*Brady*').

16 Frank Vincent, *Open Courts Act Review* (Legislative Review, September 2017) 108 [434].

17 *Open Courts Act* (n 5) s 4 amended through Explanatory Memorandum, Open Courts and Other Acts Amendment Bill 2019 (Vic) cls 5 ('Explanatory Memorandum, Open Courts and Other Acts Amendment Bill') implementing 'Recommendation 1', Vincent (n 16) 108 [434].

18 *Open Courts Act* (n 5) s 14A.

19 Explanatory Memorandum, Open Courts and Other Acts Amendment Bill (n 17) cls 9.

20 Ibid cls 5.

21 *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ) cited in Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) 10.43.

22 *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing) ('*John Fairfax & Sons Limited v Police Tribunal of NSW*') cited in ALRC (n 21) 10.48.

23 *X v General TV Corporation Pty Ltd and Others* (2008) 187 A Crim R 533, 539 [40] ('*X v General TV Corporation*'); *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384, 393 [29].

24 See for example: *Dietrich v The Queen* (1992) 117 CLR 292, 299-300.

25 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24 cited in *X v General TV Corporation* (n 23) 536-537 [29] – [30]; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, UNTS 999 (entered into force 23 March 1976) art 14.

26 Victorian Law Reform Commission, *Jury empanelment*, Consultation Paper (2013) 2.10 <https://www.lawreform.vic.gov.au/content/2-jury-trials-victoria#footnote-1282-2-backlink>.

27 ABC Radio National, 'Cardinal George Pell found guilty of child sex offences' *Law Report*, 26 February 2019 (Jason Bosland) <https://www.abc.net.au/radionational/programs/lawreport/2019-02-26/10850390> ('Cardinal George Pell found guilty of child sex offences').

28 *Pell v R* (n 2).

29 *DPP v Pell* (Suppression Order) [2018] VCC 905 (25 June 2018), 2 ('*DPP v Pell (Suppression Order)*').

30 Ibid 8.

31 Ibid 19.

32 Ibid.

33 Ibid.

34 Ibid 15.

35 Ibid.

36 Ibid 13.

13 December mention hearing discussed the 'most egregious', potential suppression order breaches that had occurred, referring specifically to overseas publications which raised 'issues in terms of jurisdiction'.[37]

When local media organisations subsequently sought review of the order,[38] Kidd CJ determined it could still prevent a substantial risk of prejudice to the second trial, despite the presence of international, online publications and communications about the verdict. His Honour reasoned that the order was not futile as the publicity accessible within Australia was 'largely confined to social media' and publication by local, mainstream media had 'not risen to saturation level'.[39] His Honour stated that learning of the verdict via social media, (such as through platforms like Facebook or Twitter),[40] required internet users to 'access the website in question and conduct some active level of investigation or enquiry'.[41] This was distinguished from mainstream media (such as print, television and radio)[42] which would leave viewers 'confronted by [the verdict] without any action on their part'.[43] Kidd CJ ultimately held that, while the order's effect was somewhat diminished by the overseas publicity and social media exposure, this did not render the order unnecessary in preventing what would otherwise be 'an extreme level of publicity'.[44]

Kidd CJ's reasoning included that there was no evidence before the court of the number of Victorians who may have been exposed to online publicity in the verdict's aftermath.[45] An analysis of web and social media data undertaken by Which-50 Media has since revealed 'hundreds of thousands of Australians' were circumventing the suppression order by searching for and reading details of the verdict.[46] Additionally, 'thousands more Australians appear[ed] to be directly in breach of the order' by tweeting, retweeting or sharing online relevant articles or information.[47] The study showed, through data provided by three US-based Catholic publications which published the verdict online, that '24 hours after publication those sites generated more than 300,000 views — of which 51 per cent were from Australian IP addresses.'[48] Which-50 believes this figure is 'very conservative' as it did not receive data from larger, mainstream publications which ran *Pell* stories, including *The Washington post, The Daily Beast* and *Slate.*[49] Streem Media Monitoring also recorded 144 'global news articles' published outside Australia in 24 hours.[50]

Some international publishers sought to "geoblock" their articles from Australian readers. "Geoblocking" allows companies to 'block…access to content according to a user's physical location'.[51] However, commentators have suggested these approaches can be 'easily circumvented'[52] and 'in an era of online "churnalism", it wasn't long before other sites copied the story and Facebook and Twitter were awash with news of Pell's conviction.'[53] The Australian Law Journal has specifically described how 'geoblocking has its limits when

37 Transcript of Proceedings, *Director of Public Prosecution v George Pell* (County Court of Victoria, Kidd CJ, 13 December 2018) 3 [22] located at Michael Smith, 'Chief Judge of Vic County Court releases transcript of today's hearing on media reporting', *Michael Smith News* (transcript of proceedings, 13 December 2018) <https://www.michaelsmithnews.com/2018/12/chief-judge-of-vic-county-court-releases-transcript-of-todays-hearing-on-media-reporting.html>.

38 *DPP v Pell* (Review of Suppression Order) [2018] VCC 2125 ('*Pell Review of Suppression Order*').

39 Ibid 10 [43].

40 Caroline Fisher, Sora Park, Jee Young Lee et al. *Digital News Report: Australia 2019* (University of Canberra, 17 June 2019) 95 < https://apo.org.au/sites/default/files/resource-files/2019-06/apo-nid240786.pdf>;
Derek Wilding, Peter Fray, Sacha Molitorisz et al. *The Impact of Digital Platforms on News and Journalistic Content* (University of Technology Sydney Report, 2018) 25 <https://www.uts.edu.au/node/247996/projects-and-research/impact-digital-platforms-news-journalistic-content>.

41 *Pell Review of Suppression Order* (n 38) 11 [45].

42 *DPP v Pell (Suppression Order)* (n 29) 7; Derek Wilding, Peter Fray, Sacha Molitorisz et al. (n 40) 25.

43 *Pell Review of Suppression Order* (n 38) 11 [46].

44 Ibid 11 [49].

45 Ibid 10 [44].

46 Andrew Birmingham and Tess Bennett, 'Data Reveals over 150,000 Australians Circumvented A Victorian Suppression Order Last Week', *Which 50* (online) 17 December 2018 < https://which-50.com/cover-story-data-reveals-over-150000-australians-circumvented-a-victorian-suppression-order-last-week/>;
Email from Which 50 editor Tess Bennett to author, 30 January 2020.

47 Ibid.

48 Ibid.

49 Ibid.

50 Mark Schliebs and Tessa Akerman, 'Suppression order failed to block overseas reports' *The Weekend Australian* (online) 27 February 2019 < https://www.theaustralian.com.au/search-results?q=Suppression+order+failed+to+block+overseas+reports>.
For examples of overseas publications see: Margaret Sullivan, 'A top cardinal's sex-abuse conviction is huge news in Australia. But the media can't report it there.' *The Washington Post* (online) 12 December 2018 <https://www.washingtonpost.com/lifestyle/style/a-top-cardinals-sex-abuse-conviction-is-huge-news-in-australia-but-the-media-cant-report-it-there/2018/12/12/49c0eb68-fe27-11e8-83c0-b06139e540e5_story.html>;
Lachlan Cartwright, 'Vatican No. 3 George Pell Convicted of Sexually Abusing Choir Boy' *Daily Beast* (online) 11 December 2019 < https://www.thedailybeast.com/vatican-no-3-cardinal-george-pell-on-trial-for-historical-child-sex-charges>.

51 Marketa Trimble, 'Copyright and Geoblocking: The Consequences of Eliminating Geoblocking' (2019) 25, *Boston University Journal of Science and Technology Law,* 476, 477; see also: Thomas Burke, 'Jumping the Wall: Geoblocking, Circumvention and The Law' (2017) 42(2) *University of Western Australia Law Review* 56; Karl Schaffarczyk, 'Explainer: what is geoblocking?' *The Conversation* (online) 17 April 2013 <https://theconversation.com/explainer-what-is-geoblocking-13057>.

52 Birmingham and Bennett (n 46); see also, Crispin Hull, 'Suppression orders lift the lid on fallible jurors', *The Age* (online, 2 March 2019) < https://www.theage.com.au/national/suppression-orders-lift-the-lid-on-fallible-jurors-20190228-p510ye.html >.

53 Stephen Brook, 'Pell's trial still casts a long shadow over freedom to report the truth', *Crikey* (online, 6 May 2020) < https://www.crikey.com.au/2020/05/06/pell-trial-media-freedom/>.

many internet users have access to virtual private network apps which disguise the user's location.'[54]

In response to his publication's decision to publish the verdict in print and not online, New York Times' journalist Damien Cave described how the publication considered geo-blocking. However, the paper ultimately concluded that its 'broad readership made it hard to imagine a scenario in which someone in Australia didn't see the online version and start sharing it on social media.'[55] Contrary to Kidd CJ's prediction that international exposure could merely undermine the suppression order's efficacy 'to some degree',[56] Cave's comment reflects the practical reality that online information can be shared across different jurisdictions easily, swiftly and indiscriminately.

This essay therefore contends that the dissemination of news by overseas sources described above, and the practical inability to stop their internet spread, meant the efficacy of the *Pell* order was lost. Its attempts to restrict potential jurors from learning of the conviction were drastically weakened, suggesting it could no longer be considered 'necessary' to prevent risk of prejudice to the administration of justice.[57] When considering whether an order can operate effectively, courts must give greater weight to the pervasive, real impact of international digital publications given that 'the internet has no borders'.[58]

The 2015 case of *DPP v Brady* ('*Brady*')[59] also affirmed how an inability to enforce suppression orders against international digital publications can deny an order's necessity. In *Brady,* Hollingworth J of Victoria's Supreme Court revoked an order suppressing the names of 14 influential, Southeast Asian government officials, their relatives and three political officers. The suppression order was deemed necessary to prevent prejudice to the proper administration of justice,[60] and to protect Australia's national security interests[61] in relation to charges of conspiracy to bribe foreign officials brought against Reserve Bank of Australia subsidiaries.[62]

Subsequent publication of the order's content on Twitter by Wikileaks, which specifically referred to suppressed information and reached its 2.3 million followers,[63] 'had the effect of rendering the order futile'.[64] The leak prompted international media to publish the information (evidence of which was listed in the *Brady* judgment),[65] while Australian media encouraged their audiences to access the information via WikiLeaks.[66] In revoking the order, Hollingworth J emphasised the impossibility of enforcing the order against international media in breach, as courts 'cannot make orders controlling publication… outside Australia'.[67] The ongoing, damaging effect of the order's presence online led Hollingworth J to conclude its continuation could not be 'necessary' under s 18(1).[68]

In *Pell,* online publication of the conviction overseas, which could be accessed in Australia, constituted a breach of the order.[69] However, to pursue a publication for contempt of court due to breaches of an order,[70] the media must have a presence in the Australian jurisdiction[71] (understood as carrying on business through a bureau or body).[72] This demonstrates how suppression orders can become futile through lack of enforceability against media operating outside the jurisdiction. Revoking orders which have been undermined by the spread of information from international media, as occurred in *Brady,* is therefore essential to ensure orders do not persist when they can no longer be effective in their practical application or legal enforcement.

54 Justice Francois Kunc (editor), 'Current Issues' *Australian Law Journal* 98 2019 79, 80.

55 Damien Cave and Livia Albeck-Ripka, 'How we reported on the Cardinal Pell Sex Abuse Case that for Months Was Kept Secret from the Public', *New York Times (online) 13 March 2019 <https://www.nytimes.com/2019/03/13/reader-center/cardinal-pell-sex-abuse-reporting.html?module=inline>.*

56 *DPP v Pell (Suppression Order)* (n 29) 15.

57 *Open Courts Act* (n 5) s 18(1)(a).

58 Arthur Moses (n 3).

59 *Brady* (n 15).

60 *Open Courts Act* (n 5) s 18(1)(a).

61 Ibid s 18(1)(b).

62 *Brady* (n 15) 52 [6].

63 Ibid 57 [44].

64 Jason Bosland, 'WikiLeaks and the not-so-super injunction: The suppression order in DPP (Cth) v Brady' (2016) 21 *Media and Arts Law Review* 34, 34 ('Wikileaks and the not-so-super injunction').

65 *Brady* (n 15) 57 [43].

66 Bosland, 'Wikileaks and the not-so-super injunction' (n 64) 35.

67 *Brady* (n 15) 62 [75].

68 Ibid 63 [78].

69 *DPP v Pell (Suppression Order)* (n 29) 19.

70 *Open Courts Act* (n 5) s 23.

71 See footnote no. 20 in Jane Johnston et al, *Juries and Social Media* (Report Victorian Department of Justice, 2013) 6<https://www.researchgate.net/publication/275037791_Juries_and_Social_Media_A_report_prepared_for_the_Victorian_Department_of_Justice> ; Cave and Albeck-Ripka (n 55); Birmingham and Bennett (n 46).

72 ABC Radio National, 'Cardinal George Pell found guilty of child sex offences' (n 27); Cave and Albeck-Ripka (n 55).

III Social Media "Confronting" Users With Information

Twitter data obtained following the *Pell* verdict suggests that information being 'confined to social media'[73] does not safeguard against such publicity reaching 'saturation level'[74] and denying the efficacy of suppression attempts. Courts cannot dismiss the capacity for internet users to be 'confronted' by restricted news from overseas sources via social media, even when they do not conduct an 'active level of investigation' to obtain suppressed information.[75]

Media company Kinship Digital's analysis of Australian tweets revealed that following the verdict, the *Pell* decision was mentioned in 4,977 tweets, retweeted 4,723 times (with 3,734 retweets containing a link to an article on the topic).[76] The relevant tweets were "liked" 8,605 times.[77] The report's authors believe 'the actual number [of Australians who tweeted] is likely to be much higher', as the data was based on tweeters whose bio or tweet location revealed they were Australian and 'up to 80 per cent of tweets are often not identified with any form of location data'.[78] The expansive spread of this Twitter ripple effect is evidenced in the report's statement that 'the tweets…had a potential reach in the tens of thousands, and six of the top twenty had a potential reach of over a million users each.'[79]

This essay therefore argues that Kidd CJ's distinction between mainstream media and social media in their ability to confront viewers with information is outdated and artificial. As acknowledged in the Tasmanian Law Reform Institute 2019 Paper *Juries, Social Media and the Right to a Fair Trial,* 'social media…has changed the way the majority of Australians now consume news and current affairs' and 'the role and impact of traditional media outlets have diminished.'[80] The Paper explains how an 'active level of inquiry'[81] is not required to find news online, with 'passive news consumption now considered to be a by-product of social media use. By merely logging on and gaining access to many social media platforms, the user is exposed to "incidental news".'[82]

Evidencing 'just how little control a juror has over avoiding prejudicial material on social media,' the Paper cites an Ohio case where the sister of an empanelled juror 'liked' a Facebook page which supported the conviction of an accused murderer.[83] This caused prejudicial material to appear on the juror's Facebook page 'without the juror doing anything',[84] demonstrating how information 'may simply appear because of the activity of a user's friend'.[85] The Victorian Law Reform Commission's 2019 *Contempt of Court Consultation Paper* also discussed jurors being 'unwittingly exposed to prejudicial material' online and the 'struggle' of courts to 'shield jurors from material that is now so easy to access and share'.[86]

According to the University of Canberra's *Digital News Report*, in 2019, 58% of Australian consumers used mobile phones to access news.[87] Eighteen percent of Australians used social media as their main source of news.[88] Unsurprisingly, 'social media is increasingly becoming the main source of news for Gen Z and Y,' with 47% and 33% respectively using it as their main news source.[89] The Report did record a drop in consumers "sharing" news stories via social media or email.[90] It maintains, however, that 'the rapid growth in the use of social media platforms for accessing news is continually creating an environment where social endorsements or so-called social signals such as comments, "likes", or shares play a key role in the sharing and consumption of online news.'[91] This accords with academic Pamela D Schulz's observations that 'the concept of mass media, where a passive audience would receive and respond to messages whether from news or from marketers, has been overshadowed by the interactive form.'[92]

73 *Pell Review of Suppression Order* (n 38) 10 [43]; 11 [46].
74 Ibid 10 [43].
75 Ibid 11 [45]-[46].
76 Email from Which 50 editor Tess Bennett to author, 30 January 2020 attaching Kingship Digital report *George Pell Twitter Retweets from Australia containing Link*.
77 Ibid.
78 Ibid.
79 Ibid.
80 Tasmania Law Reform Institute, *Social Media, Jurors and the Right of an Accused to a Fair Trial* (Issues Paper No 30, August 2019) 16 [1.3.9].
81 *Pell Review of Suppression Order* (n 38) 11 [45].
82 TLRI (n 80) 29 [2.2.2]; see also Jemma Holt, 'Updated and improved juror education recommended to address juror's use of social media and the internet' (2020) 1 *Bulletin (Law Society of South Australia)* 14, 14.
83 TLRI (n 80) 32 [2.2.12] citing Eric Robinson, 'The Wired Jury: An Early Examination of Courts' Reactance to Jurors' Use of Electronic Extrinsic Evidence' (2013) 14 *Florida Coastal Law Review* 131, 180-1.
84 Ibid.
85 Ibid 32 [2.2.24].
86 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 63, 5.25 ('VLRC Contempt of Court Consultation Paper').
87 Caroline Fisher, Sora Park, Jee Young Lee et al. (n 40) 8.
88 Ibid 13.
89 Ibid 96.
90 Ibid 97.
91 Ibid 100.
92 Pamela D Schultz, 'Trial by Tweet? Social media innovation or degradation? The future and challenge for courts' (2012) 22, *Journal of Judicial Administration* 29, 31.

This essay therefore argues that its frequent use and 'interactive'[93] nature makes social media more likely to confront users with potentially prejudicial material than was conceded in *Pell.* Characterising social media platforms as a news source which requires 'investigation or enquiry'[94] creates a risk that critical threats to suppression orders' efficacy and necessity will be overlooked purely because they do not arise from traditional media sources.

The 2019 case of *AB v CD & EF*[95] appreciated how the ease of access to online information can render orders futile, when dealing with online material revealing the identity of Victoria's 'Lawyer X'.[96] Victoria's Court of Appeal revoked a suppression order which had been considered necessary to protect the safety of a former police informant.[97] In doing so it reinforced how a 'high standard of satisfaction' is required to grant orders under the *OCA*.[98]

This court held that due to knowledge in the legal profession and the wider community about EF's role, 'anyone with an interest in knowing EF's real name, or obtaining an image of her, [could], by the rudimentary use of a computer, do so with very little effort.'[99] Following the orders' revocation, Victorian media commented how 'the true identity of…Lawyer X was arguably the worst kept secret in Melbourne' and 'a quick internet search would reveal it – a fact Ms Gobbo [EF] herself was acutely aware of'.[100] This essay endorses the case's suggestion that the ability to easily locate suppressed information, where it is already in the online public domain, should constitute grounds for finding an order futile and lacking necessity.

IV Conclusion

The 2017 *OCA* Review described suppression orders as being 'of substantially reduced value' due to accessibility of information online, stating this issue should be addressed 'if the system of suppression orders is to maintain credibility'.[101] Internet and social media data documented since *Pell* exemplifies just how an order's value can become 'substantially reduced'[102] and suggests differentiation in risk between publicity arising through mainstream or social media is unjustified. Following *Brady,*[103] where overseas publications make information widely available through social media in a suppressed jurisdiction, this futility should deny an order's necessity. Courts must also recognise that exposure to suppressed material through social media has the potential to influence any internet user, not solely those who pursue an 'active level of enquiry'.[104]

Alternative mechanisms for protecting fair trials must therefore be considered, to prevent curtailment of open justice in high profile cases where the internet renders suppression orders ineffective. While it is beyond the scope of this essay to consider such options, consideration should be given to questioning potential jurors before a case commences[105] to test their awareness of prejudicial, pre-trial information.[106] Judge-alone trials, which have recently been permitted in Victoria,[107] should also be available where cases are so high profile they are likely to attract international media coverage and negate the utility of nation-wide suppression orders.[108] Without such recognition and action, the 'credibility of suppression orders' will be undermined even further.[109]

93 Ibid.

94 *Pell Review of Suppression Order* (n 38) 10 [43].

95 *AB v CD & EF* (n 4).

96 Natalie Hickey and Matt Collins 'What does the "Barrister X" saga mean for us' 2019 165 *Victorian Bar News* 40, 41.

97 *Open Courts Act* (n 5) s 18(1)(c).

98 *AB v CD & EF* (n 4) 68. See also *Brady* (n 15) 60 [59]; *John Fairfax & Sons Ltd v Police Tribunal* (n 22) 465.

99 *AB v CD & EF* (n 4) 73.

100 Sarah Farnsworth, 'Lawyer X identified as Nicola Gobbo after court lifts suppression order on Informer 3838', *ABC News* (online) 1 March 2019 <https://www.abc.net.au/news/2019-03-01/lawyer-x-informer-3838-identity-revealed-nicola-gobbo/10826958>.

101 Vincent (n 16) 112, 451.

102 Ibid.

103 *Brady* (n 15).

104 *Pell Review of Suppression Order* (n 38) 11 [45].

105 Rachel Hews and Nicholas Suzor, '"Scum of the Earth": An analysis of prejudicial Twitter conversations during the Bayden-Clay murder trial' (2017) 40(4) *UNSW Law Journal* 1604, 1606 citing *R v Patel [No 4]* (2013) 2 Qd R 544; *R v Baden-Clay* [2014] QSC 156.

106 For further discussion see, for example: VLRC Contempt of Court Consultation Paper (n 86) 108; *R v Patel [No 4]* (2013) 2 Qd R 544, 547 [51] – 551[20]; Jane Johnston et al (n 71) 23 [4.30] ; Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 142 [10.36]; TLRI (n 80) 56 [3.6.6].

107 Adam Cooper, 'Victoria's first judge-only trial ends in not-guilty verdicts', *The Age* (online) 17 July 2020 <https://www.theage.com.au/national/victoria/victoria-s-first-judge-only-trial-ends-in-not-guilty-verdicts-20200717-p55d49.html>.

108 For further discussion see, for example: Elizabeth Greene and Jodie O'Leary, "Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia" in Patrick Keyzer, Jane Johnston and Mark Pearson (ed), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2007) 101, 109-119; Jodie O'Leary, 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) 35 Crim LJ 154; Roxanne Burd and Jacqueline Horan, 'Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the world wide web?' (2012) 36 Crim LJ 103; R v Ferguson [2008] QCA 227; R v Fardon [2010] QCA 317, 13 [45]; Criminal Code and Jury and Another Act Amendment Bill 2008 (Qld).

109 Vincent (n 16) 112, 451.

ACCC Finds 'Significant Issues' With Operation of App Marketplaces by Apple and Google

Luke Dale, Partner, and **Daniel Kiley,** Special Counsel, HWL Ebsworth, consider the ACCC's report into App marketplaces.

On 28 April 2021, the ACCC issued its interim report into the operation of the Apple App Store and Google Play Store. In its report, the ACCC identified *'significant issues'* with the manner in which these marketplaces are operated, and made a number of recommendations as a result.

The ACCC had called for feedback from app developers on these marketplaces late last year, with this report drawing on the responses received.

The ACCC's findings included that:

- there is a *'duopoly'* in the market for smartphone operating systems, with significant barriers to entry, providing *'each of Google and Apple significant market power'*; and
- because Apple and Google '*control the key gateways through which app developers can access consumers on mobile devices'*, they have *'market power in mobile app distribution in Australia, and the ACCC considers it likely that this market power is significant*'.

Merely possessing *'significant market power'* is not contrary to Australian law, but there are provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**) which only apply once a business operator has a requisite degree of market power. For example, under section 46 of the CCA, a corporation that has a *'substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in'* that market, or any other market in which the corporation acquires or supplies (or is likely to acquire or supply) goods or services.

The ACCC accordingly went on to consider relevant markets which might be influenced by Apple and Google, looking not only at competition between their operating systems, but also the market for supply of apps on those platforms.

In the latter market, developers raised concerns with the ACCC about the gatekeeper role played by Apple and Google, including:

- *'a lack of transparency in the policies and processes governing Apple and Google's app review'*;
- perceived incentives for Apple and Google to *'favour their own first-party apps at the expense of rival third-party apps'*; and
- commissions taken by Apple and Google on in-app payments, which are typically charged at 30% (though both platforms reduce this rate to 15% in certain scenarios). These commissions are of particular concern to many developers on the basis of restrictions on the use of alternative in-app payment mechanisms.

Given the control that Apple and Google have over their respective app marketplaces, the ACCC also took the view that they each *'should do more to address the risks associated with harmful or malicious apps'*, with *'more than one in five respondents'* to the ACCC's survey reporting having observed *'misleading'* or *'scam'* apps, including *'subscription traps'*, *'bait and switch features'* and prize scams.

The ACCC declined to suggest specific regulation is required, instead outlining a number of *'steps that could be undertaken by Apple and Google'* to address issues raised. However, the ACCC does suggest that *'regulation may be required'* if Apple and Google fail to take appropriate steps, also noting that *'a number of jurisdictions have already, or are proposing to, put in place rules'*.

Key steps proposed by the ACCC include:

- allowing apps to alert users to alternative payment mechanisms available – some categories of app are already allowed to have purchases or subscriptions made via external websites, but marketplace rules prevent the app from directing users to those channels;
- greater transparency around marketplace discovery processes, including search algorithms and editorial placement, which the ACCC considers would also help to address concerns that Apple and Google may be providing preferential listings for their own apps;
- ensuring that consumers are able to leave reviews and ratings for Apple and Google's own apps;
- providing or improving mechanisms to allow users to choose their default apps;
- taking stronger steps to *'address the risks of malicious, exploitative or otherwise harmful apps'*, including via proactive monitoring and intervention; and
- ring-fencing information collected by Apple and Google in their role as app marketplace operators from their other operations and business decisions, to *'minimise the risk of this information being used to provide Apple and Google with an unfair competitive advantage over third-party app developers'*.

Notably, these steps do not necessarily include more radical measures often sought by third party app developers, such as:

- allowing third-party payment mechanisms to be used 'in-app';
- reducing commissions taken; or
- in the case of Apple, allowing third party app marketplace platforms and/or 'sideloaded' apps to operate on iOS (as is already the case on Android, although the report notes that, notwithstanding this, around *'90% of apps available on Android mobile devices are downloaded using the Play Store'*).

Recent legal action taken by Epic Games against Apple essentially alleges that Apple's failure to take these kinds of steps is contrary to competition laws in a number of jurisdictions, including Part IV of the Australian CCA. The Federal Court of Australia has declined to decide those questions at this stage, leaving the matter to be considered by US Courts in the first instance.

Both Apple and Google have taken steps over the past year which seem to be designed to appease developers and regulatory bodies, including:

- both Apple and Google reducing commissions payable on apps published by small businesses; and
- Apple announcing new mechanisms to appeal app review issues, and processes to ensure that policy issues do not delay developers from issuing 'bug fix' updates to existing apps.

Those changes though do not go as far as the ACCC's suggestions, nor do they address the issues raised by Epic Games.

The ACCC's interim report notes that the issues considered apply globally, and are being assessed by regulators and lawmakers elsewhere, noting specific action in the United States, Germany, Japan, South Korea, European Union, United Kingdom and the Netherlands.

Mere days after the ACCC released its interim report, the European Commission on Friday issued a Statement of Objections to Apple, outlining its '*preliminary view that* [Apple] *distorted competition in the music streaming market as it abused its dominant position for the distribution of music streaming apps through its App Store*'.

The European Commission's concerns arise from the combination of two of the rules that Apple imposes on developers, being:

- the mandatory use of Apple's proprietary in-app purchase system, on which Apple charges a 30% commission; and
- limitations on the ability of app developers to inform users of alternative purchasing possibilities.

The Commission's preliminary view is therefore that *'Apple's rules distort competition in the market for music streaming services by raising the costs of*' services which compete with Apple's own Apple Music product.

Per the Commission's Executive Vice-President Margrethe Vestager:

App stores play a central role in today's digital economy. We can now do our shopping, access news, music or movies via apps instead of visiting websites. Our preliminary finding is that Apple is a gatekeeper to users of iPhones and iPads via the App Store. With Apple Music, Apple also competes with music streaming providers. By setting strict rules on the App store that disadvantage competing music streaming services, Apple deprives users of cheaper music streaming choices and distorts competition. This is done by charging high commission fees on each transaction in the App store for rivals and by forbidding them from informing their customers of alternative subscription options.

While the Commission's opinion is only preliminary at this stage, if the claims are substantiated then Apple could be in breach of European laws prohibiting the abuse of a dominant position in a market.

The European Commission also has a broader review into Apple's App Store rules underway.

The timing of the interim report comes less than a fortnight after the ACCC's Federal Court win over Google, wherein the Federal Court found that Google had engaged in misleading or deceptive conduct by virtue of statements made to users about collection of location data.

This is the second report arising from the ACCC's digital platform services inquiry project, commenced last year following the ACCC's Digital Platforms Report in 2019.

The next interim report from the digital platform services inquiry is due in September, and will be *'examining the provision of web browsers and general search services to Australian consumers and the effectiveness of choice screens in facilitating competition and improving consumer choice'*. As part of this, the ACCC will be assessing the effectiveness of steps taken by Google in Europe to provide Android users with a screen to choose between a number of different default search providers, not only Google's own search engine, following a €4.34 billion fine issued by the European Commission.

With another Court case from the ACCC against Google currently pending, along with one from the Office of the Australian Information Commissioner against Facebook, and further reports from the ACCC to come, Australian regulators are continuing to show an appetite to grapple with the role these digital giants have come to play in our modern economy.

Enhancing Press Freedom in Australia:
Establishing a Media Freedom Act with Coordinated National Security Law Reform

By **Mia Herrman,** UNSW Law Graduate at Legal Vision

I Introduction

Australia requires a legal framework that comprehensively upholds national security upon: terrorism prospects; a widely shifting global political climate; malicious use of technology; and covert foreign interference. The September 11 2001 terrorist attacks prompted overwhelming legislative reform, which reinforced national security protections to address heightened security threat.[1] Protective national security rationalisation has equally empowered successive governments to confine the public's practical access to many of the rights and liberties that these legal frameworks intended to preserve.[2] Prioritisation of discretionary national security legislation and operational confidentiality can restrain governmental transparency and accountability. This article proposes that a functional 'Media Freedom Act' ('Act') requires adjacent national security reform in relation to: metadata privacy; disclosure offences; and espionage offences. Cogent legislative reform enables the Act to functionally safeguard press freedom, while recognising principal Commonwealth responsibilities, such as, national security protection and the confidentiality of stipulated Commonwealth personnel.[3]

This article will examine the key public interest role that journalists assume relative to the investigation and disclosure of governmental and systemic institutional misconduct. A Media Freedom Act would sanction legislative review and reform to moderate wide statutory discretion for Commonwealth national security objectives. Accountability provisions could direct penalties if Commonwealth conduct is determined to unreasonably restrain press freedom. Provisions ought to protect verified publishers from overbearing law enforcement powers and civil proceedings. Consequently, the Act may reasonably extend defences for journalists to restrain prosecution where conduct meets a prescribed journalistic threshold. Any proposed Media Freedom Act must preface journalistic protections in relation to legitimate professional action, to ensure that rogue publishers do not exploit this enactment. The Act should conditionally qualify journalists to publish misconduct amid security and intelligence organisation in a manner that does not compromise national security. In summary, Australia requires a Media Freedom Act to enshrine definitive and operational press freedom.

II Media Freedom Standing in Australia

A) International Law

Freedom of the press is a principal right in democratic society, which is widely affirmed by Article 19(2) of the *International Covenant on Civil and Political Rights* ('*ICCPR*') on freedom of expression:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[4]

Press freedom must enable media establishments to 'comment on public issues without censorship or restraint', while maintaining 'independence and editorial freedom'.[5] The public preserve a corresponding right to freely consume information from a variety of sources.[6] Press freedom does not merely regard a journalistic right to broadcast information – it infers that the entire public is ensured a right to access imperative material to democratic decision-making. *ICCPR* Article 19(3) acknowledges press freedom conditionality upon valid national security reasoning. Press freedom exceptions must be specified by law and essential towards 'the protection of national security or of public order, or of public health or morals'.[7]

UN Committee recognition for national security congruently declares that criminal offences must not excessively confine the publication of material that supports 'legitimate public interest'.[8] The UN Committee has unequivocally specified that *ICCPR*

1 Alliance for Journalists' Freedom, *Press Freedom in Australia White Paper* (Report, May 2019) 8 ('*Press Freedom in Australia White Paper*').
2 George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136.
3 George Williams, Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 3 ('*Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security*').
4 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2) ('*International Covenant on Civil and Political Rights*').
5 United Nations Human Rights Committee, *General Comment No 34: Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) 4 ('*General Comment No 34*').
6 Ibid.
7 *International Covenant on Civil and Political Rights* (n 4) art 19(3).
8 *General Comment No 34* (n 5) 7.

Article 19(12) does not authorise Member States to pursue legal action against journalists, when material in question does not impair national security and rather supports public interest.[9] UN Committee compliance does not principally concern the standing of press freedom in relation to national security. The Committee rather reviews whether Member States' domestic legislation, plainly or in effect, encumbers expression through press freedom, and whether relevant legislation assumes proportionate and reasonable national security objectives.[10]

B) Commonwealth Interpretation

Australia does not legally recognise nor protect press freedom, which deviates from other western democratic nations, whereby rights to free speech comprise press freedom. Australia is the only nation within the *Five Eyes* intelligence alliance that has enacted powers to issue and perform search warrants on journalists and media organisations on a public interest basis – to apprehend whistleblowers for national security purposes.[11] At present, freedom of speech and freedom of the press are not unequivocally upheld by Commonwealth legislation.[12] Federal Parliament is subsequently empowered to legislate national security and other matters without due consideration for press freedom. As a result, a vast portion of legislation defies fundamental democratic principles.[13] *Kane* verifies that implied freedom of political communication is an incompetent protection scheme for press freedom in Australia.[14] Professor Adrienne Stone reasoned that devising statutory protections for journalists and whistleblowers is a more critical than an expansive freedom of speech constitutional review.[15]

The *ICCPR*'s proportionality framework is coherent with the High Court's approach to implied freedom of political communication.[16] This derives from ss 7 and 24 of the *Australian Constitution*, which compels express public election of all members of Parliament.[17] However, Commonwealth legislation does not offer meticulous and certain protection for freedom of speech and press freedom in harmony with *ICCPR* Article 19.[18] Parliament may subsequently enact legislation through national security and alternate frameworks, without requiring Parliament to fairly consider ratified freedoms. A disconcerting extent of Australian legislation has emerged in conflict with fundamental democratic values including press freedom.[19] A Media Freedom Act must resultantly confine the interpretation and implementation of national security and additional laws that oppose press freedom. Ideological and statutory corrosion of press freedom has restricted journalists' critical public interest role, which requires rectification through Commonwealth enactment of media freedom protections. Operative press freedom compels enforced cooperation from national security and other public agencies that currently wield precarious power that can defy critical press freedoms.

C) Applied Press Freedom Impacts in Australia

In June 2019, press freedom in Australia drew global attention after the Australian Federal Police ('AFP') directed two raids on journalists. The day after an initial raid on News Corp journalist Annika Smethurst, the AFP executed a warrant over the Australian Broadcasting Corporation ('ABC') Sydney headquarters.[20] Wide public and media condemnation of the ABC raid deterred a third AFP raid on News Corp's Sydney office.[21] This AFP raid series has crucially initiated debate regarding the acknowledgement, protection and accessibility of press freedom in Australia. In the recent evaluation from Reporters Without Borders, Australia's ranking in the World Press Freedom Index has dropped five positions to 26th place.[22] This shift was the fifth largest decline in a one year period, alongside nations including Benin, Singapore and Djibouti.[23] Reporters Without Borders unequivocally associated Australia's

9 Ibid.

10 Ibid.

11 Max Mason, 'Look to Five Eyes partners on press freedom, says Dreyfus', *Australian Financial Review* (online, 29 August 2019) < https://www.afr.com/companies/media-and-marketing/look-to-five-eyes-partners-on-press-freedom-says-dreyfus-20190829-p52mod>.

12 'Information concerning Australia's compliance with the International Covenant on Civil and Political Rights (2017)', *Australian Human Rights Commission* (Web Page, 18 September 2017) <https://humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-international-covenant-civil>.

13 *General Comment No 34* (n 5) 3.

14 *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133 ('*Kane*').

15 Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (University of Melbourne Law School Research Paper 476) 12.

16 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

17 *Australian Constitution* ss 7, 24.

18 Australian Government, *International Covenant on Civil and Political Rights: Australia's Sixth Report to the United Nations Human Rights Committee* (2016).

19 Media, Entertainment and Arts Alliance, 'MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia', *Media, Entertainment and Arts Alliance Media Room* (Web Page, 26 September 2014) < https://www.meaa.org/mediaroom/meaa-says-national-security-law-an-outrageous-attack-on-press-freedom-in-australia/> ('*MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia*').

20 Paul Karp, 'Federal Police Raid Home of News Corp Journalist Annika Smethurst', *The Guardian* (online, 4 June 2019) <https://www.theguardian.com/australia-news/2019/jun/04/federal-police-raid-home-of-news-corpjournalist-annika-smethurst>; *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

21 John Lyons, 'AFP Raid on ABC Reveals Investigative Journalism Being Put in Same Category as Criminality', *ABC News* (online, 15 July 2019) <www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>.

22 'Australia's slip in world press freedom index a reminder that we need a Charter of Human Rights and Freedoms', *Human Rights Law Centre* (Web Page, 24 April 2020) <https://www.hrlc.org.au/news/2020/4/24/australias-slip-in-world-press-freedom-index-a-reminder-that-we-need-a-charter-of-human-rights-and-freedoms>.

23 'World Press Freedom Report 2020', *Reporters Without Borders* (online) <https://rsf.org/en/ranking>.

decline with aforementioned AFP raids, which exposed how national security 'is used to intimidate investigative reporters'.[24] These raids determine that law enforcement divisions preserve a lawful ability to probe journalists and their sources under extensive provisions. National security prioritisation has subsequently cast doubt on Australia's status as a leading protector of press freedom in the Asia-Pacific. Reports that prompted AFP investigations did not specify whether pertinent disclosures and articles presented enduring national security risk. Ambiguous justification and vague evidentiary standards may subsequently corroborate extensive investigations by law enforcement agencies. Media, Entertainment and Arts Alliance's 2020 press freedom survey detailed that when asked whether press freedom in Australia had improved or declined throughout the past decade, 98 percent of respondents claimed press freedom declined, relative to 90.9 percent in 2019.[25]

Justice Abraham ruled that the AFP raid on the ABC offices was lawful due to warrant compliance.[26] The ABC conversely contended, among other arguments, that Commonwealth 'shield laws' safeguarded sources in question.[27] The ABC additionally urged that the implied freedom of political communication had been contravened, an argument that was dismissed by Justice Abraham.[28] Shield laws were instead considered unrelated to the warrant's legitimacy. Justice Abraham additionally held that the basis of s 3E of the *Crimes Act*, which reinforced the warrant, upheld any encumbrance on the implied freedom, 'There is no reasonably practical alternative available for investigating these serious breaches of the offence provisions'.[29] Therefore, political will has directed legislative enactments that empower disproportionate law enforcement powers throughout investigations. The Law Council of Australia reacted to associated High Court and Federal Court judgements by encouraging law reform – President Pauline Wright noted,

Any similar case in the future could be avoided through law reform measures to protect and recognise the importance of public interest journalism and to incorporate greater accountability mechanisms. Protections might include contested hearings, the involvement of a Public Interest Advocate to test the warrant process, and a requirement that warrants may only be issued by a judge of a superior court of record.[30]

The tenuousness of press freedom in Australia emerges as journalists considerably face indeterminate raids by Commonwealth agencies. This justifies imperative need for measured law reform to uphold press freedom and the rule of law more broadly, as fundamental tenants of liberal democracy. The raids identify multifaceted concerns regarding the function of law in defending and corroding press freedom in Australia.

In 2018, numerous intergovernmental expert agencies delivered a joint statement on media independence, affirming trepidation as, 'Contemporary legal threats to freedom of expression and the media, including broadening and often ambiguous notions of national security'.[31]A cumulative chilling effect persuades journalists and media organisations to resultantly shelve meaningful investigations due to untenable prosecutorial and subsequent financial risks.[32] An unknown share of discarded publications may reveal genuine misconduct or corruption, with convincing public interest outcomes. Prospective sources and whistleblowers may resultantly opt to guard public interest information to abate conviction prospects, with the presumption that journalists cannot legally preserve source privacy.[33] This chilling effect collectively reduces broad democracy through the decline of free speech and governmental accountability. Chilling does not necessarily require mass prosecutorial action against journalists, as emerging silencing culture can independently dissuade reporting action.[34] A collection of bipartisan Australian campaigns that address challenges to press freedom have generated significant momentum, including the recent petition for a Royal Commission to 'Ensure a strong, diverse Australian news media amid growing media ownership concentration'.[35] Former Attorney-General George Brandis opposed an induction of 'blanket rules' for journalists, which include statutory exemptions and rebuttable warrants. Mr Brandis rather sought potential reform within freedom of information laws and court suppression orders.[36]

24 'Australia', *Reporters Without Borders* (online) <https://rsf.org/en/australia> ('*Australia*').
25 'World Press Freedom Day 2020: reforms needed to reverse criminalisation of journalism', *Media, Entertainment and Arts Alliance* (Web Page, 5 March 2020) <https://www.meaa.org/mediaroom/world-press-freedom-day-2020-reforms-needed-to-reverse-criminalisation-of-journalism/>.
26 *Kane* (n 14) [387] (Abraham J).
27 Ibid [37] (Abraham J).
28 Ibid [246] (Abraham J).
29 *Crimes Act 1914* (Cth) s 3E; *Kane* (n 14).
30 Fiona Wade, 'High Court decision highlights ongoing vulnerability' *Law Council of Australia* (Web Page, 16 April 2020) <https://www.lawcouncil.asn.au/media/media-releases/high-court-decision-highlights-ongoing-vulnerability>.
31 'Joint Declaration on Media Independence and Diversity in the Digital Age', *Organisation for Security and Co-operation in Europe* (Web Page, 2 May 2018) <'https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf>.
32 Human Rights Council, *Report of the special rapporteur on the situation of human rights defenders on his mission to Australia,* 28 February 2018 (A/HRC/37/51/Add.3) 7 ('*Report of the special rapporteur on the situation of human rights defenders on his mission to Australia*').
33 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (Report, September 2017).
34 *MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia* (n 19).
35 Jack Snape, 'Petition calling for media royal commission and setting Australian record tabled in Parliament', *ABC News* (online, 9 November 2020) <https://www.abc.net.au/news/2020-11-09/media-diversity-petition-started-by-kevin-rudd-lodged-parliament/12863982>.
36 Attorney-General's Department, Submission No 6.1 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (7 June 2018) 6.

D) Scope of 'Media Freedom' Protection in Australia

Statutory definitions of a 'journalist' are crucial to the context and application of a Media Freedom Act as powers to prosecute journalists are contingent upon the acquiescent interpretation of 'journalist'. All Australian states except Queensland and Tasmania have passed shield laws, which protect press freedom by enabling a journalistic right to request protection source privacy, on the basis that identity publication would result in a serious professional ethical contravention.[37] The inclusive scope of protections for journalists and subsequent sources is significantly impacted by definitional provisions. When definitions are too narrow in an evolving media landscape, journalists and their sources can face reputational, prosecutorial and privacy risks.[38] This can motivate citizen journalists and underground publishers to preference operation in more protective jurisdictions.

Federal shield laws provide key protections for bloggers – in New South Wales journalists are defined as, 'A person engaged in the profession or occupation of journalism'.[39] This classification excludes bloggers, which serves to confine frivolous requests for protections.[40] The *Evidence Act*, further clarifies conditions that utilise the profession or occupation of journalism.[41] This broadens definitional inclusion by connecting, 'The publication of information, comment, opinion or analysis in a news medium...For the dissemination to the public or a section of the public of news and observations on news'.[42] Commonwealth shield laws may apply to any individual engaged in the distribution of public information and news, hence bloggers are legally entitled to claim protections.[43] Mass news media diversification suggests that an over-inclusive definition of 'journalist' could exponentially increase application requests, while reducing the overall credibility of protections.[44] Since many whistleblowers with public interest significance now opt to share material with bloggers and other 'citizen journalists', key shield protections may require qualified statutory broadening.

In August 2020, the Parliamentary Joint Committee on Intelligence and Security's 'Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press' recommended that the Commonwealth government consider the harmonisation of State and Territory shield laws through National Cabinet, with relevant updates to expand public interest consideration, and reflect the variable digital media landscape.[45] However, this Inquiry failed to advocate that journalistic privilege extend to police investigations.[46] A perceivable gap in the law ensues, through which police can access and employ material that would otherwise be protected in court. The Committee rationalised its stance on shield laws in relation to the 'public interest advocate'.[47] It appears that the 'advocate' faces the impacts of upholding the 'balance' between national security and public interest journalism, throughout public intelligence or law enforcement examinations of the media.[48]

Commonwealth and South Australian shield laws congruently determine that a court may direct a journalist to reveal the identity of a source if public interest refutes any probable detriment to the source.[49] 'Shield' provisions under the *Privacy Act* additionally affirm that a journalist may face pecuniary penalties or imprisonment for declining to: disclose information; provide a response to the Court; or deliver a document – except when the journalist testifies that the document would divulge the identify of a source that supplied the material on a classified basis.[50] A uniform shield law regime in Australia is likely to assist the consolidation of press freedom. Australia would still remain significantly behind other western democratic nations in defending source discretion and press freedom in a law enforcement context.[51] An effective Media Freedom Act requires greater regularity throughout shield law regimes through a standardised or more consistent definition of 'journalist'. Otherwise, a proposed Media Freedom Act could feature a national shield law scheme to optimise the Act's scope and extend protections for diversified press freedom.

37 *Press Freedom in Australia White Paper* (n 1) 20.

38 Ibid 16.

39 *Evidence Amendment (Journalist Privilege) Act 2011* (NSW) s 126J.

40 'Legal Issues for Bloggers', *Arts Law Centre of Australia* (Web Page, 2016) <https://www.artslaw.com.au/wp-content/uploads/2019/04/Legal_Issues_for_Bloggers_2016.pdf>.

41 *Evidence Act 2008* (Vic) s 126J.

42 Ibid.

43 Joseph Fernandez and Mark Pearson, 'Shield laws in Australia: Legal and ethical implications for journalists and their confidential sources' (2015) 21(1) *Pacific Journalism Review* 78.

44 Derek Wilding et al, 'The Impact of Digital Platforms on News and Journalistic Content', *Centre for Media Transition* (Web Page, 2018) <https://www.accc.gov.au/system/files/ACCC%20commissioned%20report%20-%20The%20impact%20of%20digital%20platforms%20on%20news%20and%20journalistic%20content%2C%20Centre%20for%20Media%20Transition%20%282%29.pdf>.

45 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry Into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Final Report, August 2020) xxii.

46 Ibid 63.

47 Ibid 82.

48 Ibid.

49 Rick Sarre, 'Why shield laws can be ineffective in protecting journalists' sources', *The Conversation* (online, 13 August 2018) <https://theconversation.com/why-shield-laws-can-be-ineffective-in-protecting-journalists-sources-101106>.

50 *Privacy Act 1988* (Cth) s 66.

51 *Australia* (n 24).

III Enhancing a Media Freedom Act in Practice

A) National Security Interpretation

The general definition of national security though amended espionage laws directs a further challenge to press freedom and a conceivable Media Freedom Act. The established definition of 'security' in the *Australian Security Intelligence Organisation Act* ('*ASIO Act*') is additionally wide-ranging to include violence that is 'politically motivated' and 'communal' – this spans beyond standard national security, defence and border control themes.[52] Conduct meets this definition of 'security' when it does not regard terrorism nor generate national consequences.[53] The updated espionage and foreign interference legislative regimes define national security more inclusively to incorporate any matter regarding Australia's 'political, military or economic relations' with foreign nations.[54] Journalists may resultantly be prosecuted for violating espionage laws if they accept or retain undamaging material that may be indistinctly related to Australia's foreign or economic matters. This threshold imposes excessive penalties for minor matters regarding military action or terrorism reports. Aforementioned enactments objectionably extend the concept of national security under Commonwealth law. Deliberation for foreign affairs and economics may impact national security, yet it is unreasonable to assume that all foreign affairs and economic issues resultantly implicate national security. To constrain the dubious capacity of espionage offences in relation to journalists, this article proposes that s 90.4(1)(e) of the *Criminal Code* regarding political, military or economic relations with foreign nations necessitates repeal in conjunction with a Media Freedom Act.[55]

A Media Freedom Act does not nor should necessarily demand complete transparency for national security organisation. In conjunction with surrounding reform, the Act could rather support the public's active entitlement to distinguish dubious conduct by representative government. It is imperative that the public engage informed sources to review whether legislation is upholding a concealment of unlawful conduct. Alice Drury of the *Human Rights Law Centre* addresses relative concerns, 'The Government might not like scrutiny or having wrongdoing exposed, but we all have a fundamental right to know what our Government is doing in our name and journalists must be able to do their jobs without fear of being prosecuted or having their homes raided'.[56] Governmental discretion may permit unidentified secrecy through 'national security' privileges. However, unjustified discretion fosters mistrust, hence governmental concealment can additionally conceal error, legal infringements and support partisan directives. Peter Greste confirms that, 'Our press might look free and fearless, but without significant reforms that remains a dangerously fragile illusion'.[57] When Commonwealth agencies are entitled to perform without accountability requirements, protected individuals are more inclined to unlawfully exploit authority.

B) Metadata Review

In 2015, the metadata retention framework anticipated a narrow application, by conferring few Commonwealth agencies access to support investigations of serious crimes.[58] Currently, up to 80 agencies, including the industry commission for taxi services, feature amid approximately 350,000 applications for metadata access per annum.[59] Secrecy offences remain under police investigation, hence journalists' intelligence has been frequently accessed by widespread agencies, occasionally without a requisite warrant.[60] The journalist information warrant scheme is subsequently a weak framework for the significant protection of privacy for sources.[61] *The Telecommunications (Interception and Access) Act* ('*TIA Act*') obliges a two year metadata retention period from communications service providers.[62] This is not inconsequential information, as metadata can expose critical private and detection matter concerning an individual's communications, undertakings, and whereabouts.[63] The Australian Security Intelligence Organisation ('ASIO') and alternating enforcement agencies can access this material without a warrant.[64] A recent Ombudsman report determined that frequent metadata access has been processed through the *TIA Act* without procedural authorisation. ACT police

52 *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') s 4.

53 Ibid.

54 *Criminal Code Act 1995* (Cth) ('*Criminal Code*') s 90.4(1)(e).

55 Ibid.

56 'Privacy invasion laws must be scaled back', *Human Rights Law Centre* (Web Page, 14 February 2020) <https://www.hrlc.org.au/news/2020/2/14/privacy-invasion-laws-must-be-scaled-back> ('*Privacy invasion laws must be scaled back*').

57 Peter Greste, 'The High Court rules in favour of News Corp, but against press freedom', *The Conversation* (online, 15 April 2020) <https://theconversation.com/the-high-court-rules-in-favour-of-news-corp-but-against-press-freedom-136177> ('*The High Court rules in favour of News Corp, but against press freedom*').

58 *Telecommunications (Interception and Access) Act 1979* (Cth) ss 187A, 187C ('*TIA Act*').

59 *Privacy invasion laws must be scaled back* (n 56).

60 Paul Karp and Josh Taylor, 'Police made illegal metadata searches and obtained invalid warrants targeting journalists', *The Guardian* (online, 23 July 2019) <https://www.theguardian.com/australia-news/2019/jul/23/police-made-illegal-metadata-searches-and-obtained-invalid-warrants-targeting-journalists>.

61 Adele Ferguson, Lesley Robinson, Lucy Carter, 'Whistleblower exposes ATO "cash grab" targeting small businesses' *ABC News* (online, 9 April 2018) <https://www.abc.net.au/news/2018-04-09/whistleblower-exposes-ato-cash-grab-targeting-small-businesses/9633140?nw=0>.

62 *TIA Act* (n 58) ss 187A, 187C.

63 Will Ockenden, 'What reporter Will Ockenden's metadata reveals about his life', *ABC News* (online, 24 August 2015) <https://www.abc.net.au/news/2015-08-24/metadata-what-you-found-will-ockenden/6703626?nw=0>.

64 *TIA Act* (n 58) ss 177-180.

misused metadata access on 116 occasions.[65] These details corroborate numerous concerns noted prior to the confirmation of metadata laws.

Since access to journalists' metadata may disclose classified sources, the *TIA Act* devises a Journalist Information Warrant ('JIW').[66] A JIW requires an evidenced application for judicial consent to permit metadata access – the public interest outcome in issuing the warrant should counteract public interest concerning the protection of journalistic sources.[67] A JIW may be pursued for information access – specifically, to further ASIO investigations, administer criminal sanctions, locate a missing person in question, or impose statute that executes a pecuniary penalty or preserves public remuneration.[68] Journalists are unable to challenge a JIW, partly because journalists do not have a statutory right to notice upon the discharge of a JIW.[69] Journalists may initially become aware of ASIO or law enforcement metadata access when advised of an ongoing criminal investigation – namely, through a raid of a journalist's premises.[70] Indefinite investigatory procedures reduce journalistic access to due process and press freedom, when facing unforeseen Commonwealth raids. Lacking JIW notice requirements additionally empower investigations with limited evidentiary support to expose classified sources, despite reduced public interest outcomes if charges are later dismissed.

The *TIA Act* does not adequately prevent its misapplication or individual error which urges reform to enforce accountability schemes within JIW procedure. Journalists' metadata is widely accessible as lawful access spans beyond investigations of serious criminal offences – any agency that asserts an enforcement title is entitled to request a JIW.[71] JIWs should solely be granted in the context of serious crimes, considering instances when journalists intend to confront national security through the dissemination of confidential intelligence – acquiescent to metadata retrieval processes in the *TIA Act*.[72] Access ought to be additionally confined to ASIO and criminal law enforcement agencies. Notice to the editor-in-chief or equivalent head of a media company should mandatorily accompany warrants. Fair notice would optimise access to suitable legal counsel and warrant details, including its basis and scope. Protections must additionally ensure that journalists are provided opportunity to contest warrants within a judicial forum. Legislative reform would assist procedural fairness for journalists, and consolidate balanced consideration for national security requirements and press freedom.

C) Disclosure Offence Reform

In 2018, the UN Special Rapporteur on the Situation of Human Rights Defenders conveyed that Australian journalists tend to self-censor due to hesitation as to whether publication material concerns a security intelligence organisation.[73] Wide intelligence operational secrecy determines that journalists without ASIO corroboration are limited when evaluating whether relevant action qualifies as a Special Intelligence Operation ('SIO').[74] A majority of disclosure offences intend to preserve operational privacy, for instance, ASIO's Preventative Detention Orders ('PDO') and special warrant powers may coercively intimidate legitimate journalistic activities.[75] Section 35P of the *ASIO Act* was addended in 2014 and extends state and federal bans on the release of information in relation to anti-terrorist undertakings.[76] The provision imposes a five year imprisonment penalty, upon the disclosure of material concerning a SIO which, 'Will endanger the health or safety of any person or prejudice the effective conduct of a SIO'.[77] This strict liability framework solely requires 'recklessness' to ascertain that the disclosure generates harm and does not accept a defence that the journalist lacked knowledge of a SIO.[78] The imprisonment duration is extended to a decade, should an offender demonstrate premeditation or prior knowledge of resultant harm.[79] This low statutory threshold and exclusion of a 'public interest' defence will likely propagate further chilling on media reporting. Public ability to perceptively evaluate whether Commonwealth actions lawfully apply state power is directly impeded.

D) Espionage Offence Reform

Additional limitations for press freedom have emerged upon recent espionage offence revisions. Section 91.1(2) of the *Criminal Code* directs a penalty of 25 years imprisonment if an offender 'deals' with information that 'concerns Australia's national

65 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979* (Report, November 2018).

66 *TIA Act* (n 58) ss 180L, 180T.

67 Ibid.

68 Ibid.

69 *Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security* (n 3) 6.

70 *TIA Act* (n 58) ss 180L, 180T.

71 Ibid s 176A.

72 Ibid s 180.

73 *Report of the special rapporteur on the situation of human rights defenders on his mission to Australia* (n 32) 7.

74 Ibid.

75 *Criminal Code* (n 54) s 105.4.

76 *ASIO Act* (n 52) s 35P.

77 Ibid s 35P(1).

78 *Criminal Code* (n 54) s 91.1(2).

79 *ASIO Act* (n 52) Ibid s 35P(1B).

security' and is 'reckless' through resultant implications towards national security.[80] 'Dealing' with information involves: communicating; broadcasting; receiving; holding; reproducing; or; creating an information record.[81] A penalty of 20 years imprisonment is enforceable, regardless of whether the information in question does not regard national security or retains a security classification.[82] Journalists among others are subsequently exposed to criminal penalties for solely receiving or holding sensitive data, prior to any publication decision. A newsroom or media office could be admissibly raided to avert the release of material uncovered by journalists in connection to a Commonwealth staffer. Although raids on ABC headquarters concerned reports that were published two years earlier, the *Criminal Code* reasonably entitles anticipatory raids to impede publication altogether – this establishes complete abandonment of press freedom despite Australia's assumed liberal democratic organisation.[83] Offences under the *Intelligence Services Act* ('*ISA*') in relation to intelligence officers similarly convey 'unauthorised dealing with records' and disclosures.[84] Although journalists are not liable under these sections, journalists' metadata may be retrieved and media offices may be examined to determine the foundation of an intelligence agency leak.[85]

Espionage and disclosure breaches ought to consider restricted whistleblower protections for journalists and intelligence officers. The *Public Interest Disclosure Act* ('*PID Act*') constructs a whistleblower framework for Commonwealth personnel, however, this *Act* does not affect journalists.[86] Deficient protections subsequently reject intelligence material in the public interest.[87] Yet a lawful disclosure process for intelligence officers to reveal information in good faith is non-existent. For example, intelligence officers are prohibited from internally reporting details about covert operations that reference unethical torture. The recent 'Inspector-General of the Australian Defence Force Afghanistan Inquiry Report' determines the extreme implications upon lacking internal reporting and accountability procedures – limited transparency propagates institutionalised culture that incites malpractice.[88] Admissions about internal transgressions should be initially disclosed within the agency or organisation, or to the Inspector-General of Intelligence and Security ('IGIS').[89] These discrete procedures can be suitable in certain contexts, yet independent support for ethical whistleblowers is not available when this protocol does not provide adequate resolution. Commonwealth employees that disclose information in good faith, which does not compromise critical national security interests should be exempt if they receive a provably unsatisfactory response to internal and IGIS disclosure schemes. This does not endorse deliberate disclosures by intelligence agents that intentionally dispute Australia's national security.

E) Public Interest Defence for Ethical Whistleblowing

Professor AJ Brown contends that Australia's whistleblowing statute 'currently amounts to a well-motivated but largely dysfunctional mess'.[90] Brown's 'Plan for restoring public confidence in Commonwealth whistleblower protection' features: complete reform or substitution of the *PID Act*; restructuring standards for whistleblowing protection external to internal schemes; reviewing crucial legislative definitions; reinforcing shield laws; revising 'anti-detriment protections' to implement best international procedures; renewing legislative thresholds for whistleblowing guidelines; founding a whistleblower protection power; directing incentives for public interest whistleblowing; and initiating a broad public interest defence.[91] Therefore, an effective Media Freedom Act must be supported by substantive systemic reform. Disclosure offences each require a controlled public interest defence to preserve press freedom – this includes intelligence disclosure offences, espionage legislation, and violations amid ASIO's special warrant powers and PDOs.[92] Intelligence officers must express an applied belief that genuine internal and IGIS disclosure attempts were futile, conditioned by the information's 'public interest' value.[93]

'Public interest' must be subsequently defined for this purpose, to ensure

80 *Criminal Code* (n 54) s 91.1(2)

81 Ibid s 90.1.

82 Ibid 91.2(2).

83 *Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security* (n 3) 9.

84 *Intelligence Services Act 2001* (Cth) ss 39-40M.

85 Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information' (2014) 37 *University of New South Wales Law Journal* 784 ('*Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information*').

86 *Public Interest Disclosure Act 2013* (Cth) s 29 ('*Public Interest Disclosure Act*').

87 Ibid.

88 Matthew Doran, 'Afghanistan war crimes report released by Defence Chief Angus Campbell includes evidence of 39 murders by special forces', *ABC News* (online, 19 November 2020) <https://www.abc.net.au/news/2020-11-19/afghanistan-war-crimes-report-igadf-paul-brereton-released/12896234>.

89 *Public Interest Disclosure Act* (n 86) s 34.

90 AJ Brown, 'Safeguarding Our Democracy: Whistleblower Protection After the Australian Federal Police Raids' (Speech, 130th Anniversary Henry Parkes Oration, Tenterfield, 26 October 2019).

91 Parliamentary Joint Committee on Human Rights, *16th Report of the 44th Parliament*, October 2014, 56-57.

92 *ASIO Act* (n 52) ss 34E, 34G, 35P; *Criminal Code* (n 54) s 91.1(2).

93 *Public Interest Disclosure Act* (n 86) s 26(1).

clear scope for protections, while preventing improper disclosure. Section 29 of the *PID Act* offers a classification framework, which permits the dissemination of material that regards serious misconduct.[94] 'Disclosable conduct' concerns government action that: breaches a law; alters the passage of justice; establishes maladministration; exploits public confidence; misspends public funds; unduly produces a danger to health or safety; or escalates environmental hazardous risk.[95] Statutory offences for reasonably obtaining, holding and reproducing information require reform to considerably confine penalties in contrast to intentional information disclosure – the *ISA* currently applies this proposal.[96] The all-inclusive classification of 'dealing' with information necessitates an amendment to clarify the ambiguous scope of 'seriousness'.[97] Additional offences ensure strict operative confidentiality for PDOs and ASIO's interrogation and detention warrant entitlements.[98] Legislation confines journalists' capacity to document national security material as no exemptions authorise information disclosed in the public interest. *PID Act* protections for whistleblowers solely pertain to Commonwealth staffers, which resultantly excludes journalists, civilians and private employees.[99] Legislation does not necessarily depict overt prejudice against journalists, yet it rather signifies a clampdown on intelligence disclosures. Mounting public support for whistleblowers considers timely discoveries from Edward Snowden and WikiLeaks.[100]

The Commonwealth's enforcement strategy appears opportune, justifying secrecy legislation as an apparatus to mitigate terrorism risks. Hence challenges to press freedom are perceived as a means to assist democratic freedoms. The Federal government has upheld that it will not apply aforementioned laws to restrict routine journalistic function, yet this pledge does not adequately uphold press freedom.[101] Unsubstantiated protective claims can generate journalistic dependence on discretionary governmental review to evade prosecution – despite material in question often comprising details that could harm or inconvenience government and/or public agencies.[102] A Media Freedom Act would provide journalists with a functioning protective framework to minimise trepidation for reporting on critical national security matters in the public interest. This Act requires accompanied review of disclosure provisions in the *ASIO Act* to ensure that criminal penalties cannot intimidate critical journalistic procedure.[103] Accordingly, an addended defence for 'public interest' information regarding intelligence disclosure offences would assist ethical journalistic practices.

IV Conclusion

Liberal democratic organisation fundamentally enshrines representative and accountable government, which is dependent on media freedom and journalistic protection. Wide enactment of national security counterterrorism laws in Australia exposes a troubling shortage of consideration for the standing of press freedom and accountable governance. Australia's laws are subsequently retreating from UN Human Rights Committee sentiment that open media is 'one of the cornerstones of a liberal democracy'.[104] A Media Freedom Act would secure greater access to public policy details, to ensure that a broader range of secure national security subjects can be unreservedly discussed between individuals and political representatives. Publication capacity must not be restrained by overbearing Commonwealth disclosure restrictions that confine access to critical public interest information. Legislative protections for journalists that support transparency in relation to governmental misconduct and corruption are additionally critical to functional democracy. Public reporting regarding the conduct of elected representatives ensures that constituents are able to nominate candidates with accurate and well-informed knowledge.

Press freedom and protections must encompass sources and whistleblowers, who disclose information in legitimate public interest. Severe imprisonment and pecuniary penalties for journalists with a low or 'reckless' threshold significantly challenges important access to key public interest information. Slowing the chilling effect upon limited press freedom would be supported by broader exemptions for journalists, to confine the ambit of criminal and civil penalties. Harmonious reform collectively assists a continuation of crucial public interest journalism by mitigating severe risks to professional standing and source privacy. A Media Freedom Act would consolidate surrounding legal reform to assist Australia's declining international standing, by enshrining democratic principles that value operative protection for press freedom.

94 Ibid s 29.
95 Ibid.
96 *Criminal Code* (n 54) s 90.1.
97 Ibid.
98 *ASIO Act* (n 52) ss 34E, 34G; *Criminal Code* (n 54) s 105.4.
99 *Public Interest Disclosure Act* (n 86) s 69(1).
100 *Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information* (n 85) 784.
101 Ibid 816.
102 *The High Court rules in favour of News Corp, but against press freedom* (n 57).
103 *ASIO Act* (n 52) ss 35P, 34ZS.
104 *General Comment No 34* (n 5) 3.

Suing Google, Facebook or Twitter for Defamation

By **Michael Douglas,** Bennett & Co

A person defamed on the internet has choices. They can ignore it. They can throw flames back at their antagonist. Or they can go the legal route and consider defamation litigation.

In that event, the defamed person may have a choice of who to sue. In many cases, they will be able to sue a person—human or corporate—other than the original author of the defamatory content. They might sue the individual author and the company the individual author works for; this is what happens in many cases where a defamed person sues both a journalist and the media organisation that published the journalist's content.

This article focuses on defamation on the internet and suing the entities behind the digital platforms that have become essential to our lives. By 'digital platforms', I mean the likes of Google, Facebook, Twitter and so on. Sometimes, these platforms are called 'internet intermediaries' or simply 'intermediaries'[1]—terms that connote that these platforms connect internet users to content created by others.

In the content that follows I explain the principles that are relevant to a defamation claim against an intermediary for content 'authored', or created, by others. Suing intermediaries like Google and Facebook for defamation is more difficult than suing others but not impossible.

The subject is currently under consideration by those empowered by the Council of Attorneys-General to make further amendments to Australia's defamation laws.[2] Here, I also make some comments on law reform and float an idea for making it easier for defamed persons to protect themselves against serious reputational harm without spending their life savings: a right for defamation to be forgotten.

Publication by intermediaries

An essential element of a claim for defamation is that the defendant published the defamatory matter.[3] 'Publication' is a bilateral act, by which a person communicates defamatory matter to a person other than the plaintiff.[4] Anyone who participates in dissemination of the defamation is a publisher.[5] The concept of 'publication' has been distinct from that of 'authorship' for many decades.[6]

By making content available to others, intermediaries 'publish' that content.[7] However, some would say that the manner in which intermediaries publish defamation is distinguishable from the way that others publish defamation. Some have made a distinction between 'primary' and 'secondary' publishers, with intermediaries usually being the latter.[8] With respect, those views are based on a misunderstanding of the law.

Other than for the purposes of analysis of an innocent dissemination defence, which distinguishes 'primary' from 'subordinate' distributors,[9] the distinction is one without a difference. Decisions to the contrary conflate the law on publication—which the High Court has described as 'tolerably clear'[10]—with the requirements of the defence.[11] Those decisions also misrepresent defamation as a tort other than one of strict liability.[12] The point is implicit in the transcript of the High Court hearing of the *Voller* appeal, of 18 May 2021:[13]

> MR YOUNG: But the point I was going to make, your Honour, is that it cannot be said, in our respectful submission, that the appellants, simply by operating this page have intentionally lent their assistance to the communication of this particular set of posts containing allegedly defamatory material. They did not have sufficient knowledge to have that sheeted

1 See Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469.

2 Specifically, they are considering further amendments to the Uniform Defamation Acts: *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

3 See generally Michael Douglas and Martin Bennett, '"Publication" of Defamation in the Digital Era' (2020) 47(7) *Brief* 6.

4 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [26]; see also [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

5 *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, 505 (Bridge LJ).

6 See *Byrne v Deane* [1937] 1 KB 818; *Webb v Bloch* (1928) 41 CLR 331.

7 See, eg, *Defteros v Google LLC* [2020] VSC 219.

8 NSW Government, *Discussion Paper – Attorneys-General Review of Model Defamation Provisions – Stage 2* (2021) (**DP**) DP 16 [2.7].

9 Eg, *Defamation Act 2005* (WA) s 32(2).

10 *Trkulja v Google LLC* (2018) 263 CLR 149, [39].

11 Eg, *Google Inc v Duffy* (2017) 129 SASR 304. The point is made by Basten JA in *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700, 712–4 [48]–[49]; see David Rolph, 'Before the High Court – Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*' (2021) 43(2) *Sydney Law Review* (Advance) 4.

12 See Alastair Mullis and Richard Parkes (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) [1.8].

13 *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCATrans 88 (18 May 2021).

home to them, in our submission. And it is really no different than the public noticeboard case.

KIEFEL CJ: As in Byrne v Deane?

MR YOUNG: As in Byrne v Deane.

KIEFEL CJ: But there, the defamatory material was forced upon the alleged publisher. It is not a case of actively encouraging people to use facilities which enable publication. That is a distinction, is it not?

MR YOUNG: Yes – I mean, to some extent I agree with your Honour because the golf club rules did not permit - - -

KIEFEL CJ: Made them a trespasser, in effect.

MR YOUNG: - - - third-party comments. But the case turned on applying a concept of knowledge and inferred intention.

KIEFEL CJ: But where you are coming close to here is really a discussion of whether or not a host of a site should be given some particular application of the innocent dissemination defence. We are not really in the realms of publication, are we? It is really what you are discussing is innocent dissemination defence and that is not really a matter – a topic for us, is it?

The authors of a Discussion Paper on proposed defamation law reform recently asked whether intermediaries should be shielded from liability unless they 'materially contribute' to the publication.[14] The premise implicit in that question is false. When an intermediary publishes matter according to common law standards—for example, by providing a social media platform which disseminates defamatory matter to users—the intermediary does materially contribute to the publication. When the matter is consumed via social media in this way, the intermediary is *the* cause of the publication, in the sense that publication could not have occurred in the way that it did but for the intermediary's service.[15]

The language of 'materially contribute' conflates causal concepts with what is essentially a normative issue.[16] The real question is: *should* intermediaries be held liable for content they publish (according to common law principles) that they do not author?[17] The current defences available to intermediaries for defamation claims provide a justifiable basis by which intermediaries may avoid liability.

Key defences for intermediaries

The Uniform Defamation Acts contain a defence of innocent dissemination.[18] Intermediaries will not be liable for defamation where they facilitate the publication of defamatory matter created by authors; and where they neither knew, nor ought reasonably to have known, that the matter was defamatory, provided their lack of knowledge was not due to any negligence on their part.

The innocent dissemination defence is a defence to liability rather than a denial of the publication element. However, it does provide Google and intermediary publishers with some protection where they are unaware of the existence of the defamation.

Another important defence is contained in clause 91 of Schedule 5 to the *Broadcasting Services Act 1992* (Cth) (**BSA**). This defence was described by the authors of the recent Discussion Paper as follows:

> Clause 91(1) of Schedule 5 to the BSA, inserted in 1999, provides an immunity for 'internet service providers' and 'internet content hosts' in certain circumstances in relation to third-party material.
>
> It provides that a law of a state or territory, or a rule of common law or equity, has no effect to the extent that it:
>
> - subjects an internet content host or internet service provider to liability for hosting or carrying 'internet content' where they are not aware of the nature of the internet content, or
> - requires the internet content host or internet service provider to monitor, make inquiries about, or keep records of, internet content that is hosted or carried.[19]

With regard to the text, context and purpose of the BSA, intermediaries ought to be properly considered 'internet content hosts'.[20] Accordingly, where intermediaries are not aware of the existence of defamatory content which they publish according to common law standards, they will not be liable in defamation.

It is not difficult to put such publishers on notice of the defamatory content.[21] A quick email to a generic company email account, or completing the platform's reporting feature, may suffice. In *Defteros*, Richards J considered that a reasonable time for Google to consider a notice and remove content was 7 days; that finding may guide courts' consideration in future cases.[22]

14 DP 63, Question 10.

15 See, eg, *Civil Liability Act 2002* (WA) s 5C(1)(a). Anyway, the 'but for' test is not even necessary for defamation. The principles of causation of special damage in the context of defamation will be considered shortly in the appeal from: *Rayney v Western Australia [No 9]* [2017] WASC 367.

16 See James Edelman, 'Unnecessary Causation' (2015) 89 *Australian Law Journal* 20. David Lewis recognised this in his scholarship on causation: 'We sometimes single out one among all the causes of some event and call it "the cause", as if there were no others... I have nothing to say about these principles of invidious discrimination': David Lewis, 'Causation' (1973) 70(17) *Journal of Philosophy* 556.

17 This is analogous to the 'scope of liability' issue for negligence, which is bound up with principles of remoteness. See, eg, *Civil Liability Act 2002* (WA) s 5C(1)(b). It is a question on which educated people can disagree. I have changed my position on the issue over time, after reading more analyses and witnessing Facebook's early 2021 tantrum in response in the proposed media bargaining code.

18 See *Defamation Act 2005* (WA) s 32.

19 DP 31.

20 See *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102.

21 This para is seen in: Michael Douglas and Martin Bennett, '"Publication" of Defamation in the Digital Era' (2020) 47(7) *Brief* 6, 8.

22 *Defteros v Google LLC* [2020] VSC 219, [64].

What this means is that, under the current law, Facebook, Google et al will have no liability for defamation they publish unless the defamed person tells them about it. In some cases, this might be abused: a person who is not really defamed may cry defamation to remove content they find objectionable. I propose reform to respond to this situation below.

The transnational character of litigation against intermediaries

The content above speaks of suing 'intermediaries', which are also described as 'digital platforms'. In reality, it is companies that may be sued. Intermediaries are often comprised of several companies. To sue 'Facebook' for example, may require naming multiple defendants: like the American Facebook Inc and the entity in the tax haven, Facebook Ireland Ltd.

The corporate groups that underpin intermediaries straddle nation states. They have a transnational character. Therefore, litigation involving intermediaries may engage principles of private international law.[23]

Foreign companies behind intermediaries do not always accept the authority of Australian courts. There is a need to reform Australian law to better adapt to internet intermediaries taking a recalcitrant approach to the jurisdiction and power of Australian courts, in whose geography these intermediaries derive millions of dollars. For examples of intermediaries' behaviour that warrants the reform I have in mind:

- *Australian Information Commission v Facebook Inc (No 2)* [2020] FCA 1307:[24] the American company challenged the court's jurisdiction over a claim related to the Cambridge Analytica privacy scandal, as it affected Australian Facebook users.
- *X v Twitter* (2017) 95 NSWLR 301: the American and Irish corporate defendants did not even bother to enter an appearance or make substantive submissions on the issue of jurisdiction.
- *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 867:[25] following the Supreme Court of Canada's judgment, the American Google obtained relief from a comparatively inferior US court purporting to nullify the effect of the judgment of Canada's top court.
- *KT v Google LLC* [2019] NSWSC 1015: the American Google was briefly in contempt after failing to comply with an interlocutory injunction that enjoined removal of defamatory reviews, following frequent requests by the defamed person to Google for the content to be removed.

These cases demonstrate how transnational businesses complex multi-national corporate structures to shield their operations from liability via a 'jurisdictional veil'.[26] These structures depend on the historical premise that 'jurisdiction is territorial'. That premise is a pre-internet creature. The law has moved on; it is now quite easy for an Australian court to claim jurisdiction over a company overseas.[27]

The contemporary approach to generous long-arm jurisdiction of common law courts is represented by this dictum of Lord Sumption:

> In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an "exorbitant" jurisdiction… This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation… Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries… It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.[28]

Sumption referred to 'modern commercial life'. In the *Digital Platforms Inquiry*, the ACCC described how digital platforms are now 'an integral part of life for most Australians'.[29] As part of the 'modern life' of most Australians, some Australians will suffer harm. They ought to be able to obtain a remedy for that harm, in a court of their own country, according to Australian law—no matter where the entities that caused that harm are based. Australian law should adapt to our modern digital lives.

Addressing practical barriers: jurisdiction, power and enforcement

To understand how the law should be adapted, it is necessary to understand the distinction between jurisdiction and power.

23 Or the 'conflict of laws'. See generally Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019).

24 Noted in: Michael Douglas, 'Facebook's further attempts to resist the jurisdiction of the Federal Court of Australia futile',*ConflictofLaws.net* (online), 18 September 2020.

25 Noted in: Michael Douglas, 'A Global Injunction Against Google' (2018) 134 *Law Quarterly Review* 181.

26 Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 66–9, quoting Peter Muchlinksi, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 *International & Comparative Law Quarterly* 1, 17.

27 See Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019) pt II ; Michael Douglas, 'The Decline of "Exorbitant Jurisdiction"?' (2019) 93(4) *Australian Law Journal* 278; Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

28 *Abela v Badraani* [2013] 1 WLR 2043, 2062–3 [53].

29 ACCC, *Digital Platforms Inquiry: Final Report* (2019) 40.

'Jurisdiction' is a term used in a variety of senses, including authority to decide. 'Power' is a distinct concept[30] that is sometimes confused with jurisdiction in scholarship.[31] Jurisdiction provides the anterior legal justification for the exercise of power; a court may use its powers in exercise of its jurisdiction.[32]

Superior courts are said to have auxiliary equitable jurisdiction in aid of the legal rights[33] the subject of a defamation action to enjoin removal of defamatory content. But this is better understood as a *power* of a court of equity. Some courts also possess statutory powers to the same effect;[34] and in many cases, inherent powers which may bind a third-party in order to protect the administration of justice.[35] Rules regulating injunctions are not a source of power; they are the court's regulation of a power, either express, inherent, or implied/incidental, that they would possess anyway, even if the rule were not there. This is to say: an Australian court has power to order an intermediary to remove defamatory content around the globe.[36]

Whether a court has jurisdiction over an intermediary is an anterior issue. It will be determined by jurisdictional rules concerning service, among other things.

For corporations, like those behind intermediaries, rules on service are affected by the *Corporations Act 2001* (Cth). It is easy to serve a local corporation. Foreign corporations that carry on business in Australia are required to register, which then makes it easy to serve them.[37]

Foreign companies behind intermediaries often do not consider that they 'carry on business' in Australia. They are wrong. By deriving data and income from Australia—either directly or through artificial corporate structures—they absolutely carry on business in Australia.

For examples of reasoning of courts on how foreign companies carry on business in the forum despite their objections, see:

- *Australian Information Commission v Facebook Inc (No 2)* [2020] FCA 1307.
- *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548.
- *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; ACCC v Valve (No 3) (2016) 337 ALR 647 (Edelman J).
- *Google Inc v Equustek Solutions Inc [2017] 1 SCR 814; Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224; *Equustek Solutions Inc v Jack* (2014) 374 DLR (4th) 537; *Equustek Solutions Inc v Jack* [2012] BCSC 1490.

In the absence of registration, foreign companies are still amenable to the jurisdiction of Australian courts under long-arm rules. But these principles on service often lead to expensive jurisdictional fights.

Foreign companies behind internet intermediaries—like Google LLC—should be compelled to either register as carrying on business in Australia, or as accepting service in Australia. That would avoid jurisdictional fights that increase costs for people seeking access to justice.

However, even if an Australian court has jurisdiction, a resulting judgment may have little practical use unless it can be enforced. Enforcing a monetary remedy overseas—in a jurisdiction in which a company behind an intermediary is based—is often difficult. It depends on the private international law of the foreign jurisdiction in which enforcement is sought. The HCCH Judgments Convention has sought to remedy this situation, but it is not in force and it would not apply to defamation.

The laws of the United States—where many intermediaries are based—make it particularly difficult, if not impossible, to enforce Australian orders made in a defamation proceeding in that jurisdiction.[38]

This situation could be remedied by law reform making enforcement easier. Options include:

- Explicit provisions allowing Australian subsidiaries of foreign companies behind intermediaries, and their employees, liable in contempt as if they were in the shoes of a foreign company that would otherwise be in contempt for failing to comply with an Australian court order.[39]
- Allowing money judgments against foreign intermediaries to be enforced against Australian subsidiaries.
- Requiring foreign parent companies of intermediaries to keep a percentage of liquid assets in Australia, taken from income derived from Australians, to be used to compensate those who are harmed by intermediaries'

30 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377 [6].

31 Eg, Dan Jerker B Svantesson, 'Jurisdiction in 3D – "Scope of (Remedial) Jurisdiction" as a Third Dimension of Jurisdiction' (2016) 12(1) *Journal of Private International Law* 60.

32 *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 353 [31] (French CJ, Kiefel, Bell and Keane JJ); see further Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 14.

33 See Michael Douglas, 'Anti-Suit Injunctions in Australia' (2017) 41(1) *Melbourne University Law Review* 66.

34 Eg, *Federal Court of Australia Act 1976* (Cth) s 23.

35 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

36 See Michael Douglas, 'A Global Injunction Against Google' (2018) 134 *Law Quarterly Review* 181; Michael Douglas, 'Extraterritorial Injunctions Affecting the Internet' (2018) 12(1) *Journal of Equity* 34, cited in: Law Commission of Ontario, *Defamation Law in the Internet Age* (Final Report, 2020); *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (Case C18/18).

37 *Corporations Act 2001* (Cth) s 601CD; *Corporations Act 2001* (Cth) s 601CX(1).

38 See, eg, *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act* 28 USC 4101- 4105 ('SPEECH Act'); First Amendment of the US Constitution. See further Richard Garnett and Megan Richardson, 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Freedom of Speech in Cross-Border Libel Cases' (2009) 5 *Journal of Private International Law* 47; David Rolph, 'Splendid Isolation? Australia as a Destination for "Libel Tourism"' (2012) 19 *Australian International Law Journal* 79.

39 Courts may have this power in a variety of contexts; see, eg, *KT v Google LLC* [2019] NSWSC 1015.

functions.[40] The assets could reside in an Australian subsidiary against whom the judgment is enforceable, making foreign anti-enforcement orders more difficult.

A right for defamation to be forgotten?

This article has explained how a necessary condition of an intermediary's liability for defamation is that the corporate person behind the intermediary is put on notice of the existence of the defamation.

The trigger to put an internet intermediary on notice that they are publishing defamatory matter should be quick and inexpensive. A defamed person should not need to go to a lawyer like me before they can protect their reputation via defamation law.[41]

There are many different ways in which the value of a 'quick and cheap' defamation notice/trigger for intermediaries' publications could be put into effect in a way that puts the interests of Australian consumers first. Here is me roughly spitballing a potential process:

- Intermediaries are required to develop a tailored 'Report defamation of an Australian person' feature into every aspect of their platform.
- Natural persons, and those with capacity to sue under the incoming changes, can utilise the feature without going to a lawyer or issuing a concerns notice.
- The feature requires the reporting person to (1) briefly describe what is wrong with the content, and (2) provide their contact details.
- The impugned content is reviewed by an employee of the intermediary for basic legibility. If it makes sense, and seems genuine, the content is immediately taken down, pending review.
- An independent 'defamation commissioner' reviews the complaint ASAP and within 7 days. If it is prima facie defamatory (not having regard to defences), the intermediary's content stays down. Of course, if the intermediary's publication is linking to some other website, that content would remain online; but its visibility, and so propensity to cause damage via the grapevine effect, would be diminished.
- The intermediary then has an obligation to use best endeavours to notify the author of the removed publication of the outcome. The author has standing to challenge the defamation commissioner's decision via merits review, at that stage noting any defences to defamation. (Cf the process for challenging a decision of the Privacy Commissioner.)[42]
- If the intermediary does not take the content down after initial review, prior to determination of the defamation commissioner, it does not have a defence to defamation.
- This whole system—and the office of the defamation commissioner—is funded by intermediaries.

The proposal is not that novel. It is a rough defamation version of the GDPR's right to erasure. We may see an equivalent law in the *Privacy Act 1988* (Cth) soon anyway.[43] Both privacy and reputation are human rights which Australia must protect as part of its international obligations.[44] The value of each lies in basic human dignity and personal autonomy. Businesses—like internet intermediaries—ought to adapt to ensure these values are protected. There ought to be a right for defamation to be forgotten.

Conclusion

I love Google. Google made my phone. At home, Google tells me the news in the morning and controls my music. Gmail is great. But I don't love Google so much that I think that the foreign companies behind it should not have to comply with the same law as everyone else.

The enormous power of digital platforms is the subject of a great deal of academic attention around the world.[45] Some of that literature deals with black letter law;[46] a lot of it does not. Balkin, a law professor at Yale, has explained the phenomenon in terms of 'information fiduciaries': a category of persons and businesses who collect, analyse, use, sell, and distribute personal information. He argues that '[b]ecause of their special power over others and their special relationships to others, information fiduciaries have special duties to act in ways that do not harm the interests of the people whose information [they deal with]'.[47]

The special power of digital platforms informed the *Digital Platforms Inquiry*, and other recent Australian law reform proposals.[48] It should shape the future direction of Australian laws with respect to defamation. If intermediaries want to avoid liability for defamation, then they ought to take a more active role in protecting reputations from unjustified harm. Until then, it will be possible—although difficult—to sue them for defamation in an Australian court.

40 A hybrid of an insurance scheme deployed for other torts and the Media Bargaining Code.

41 On that issue, the new mandate that a concerns notice of a particular form be issued before proceedings can be commenced is a retrograde step that will inhibit access to justice for many Australians with legitimate claims.

42 Eg, *Ben Grubb and Telstra Corporation Limited* [2015] AICmr 35; *Telstra Corporation Ltd v Privacy Commissioner* [2015] AATA 991; (2015) 254 IR 83; *Privacy Commissioner v Telstra Corporation Limited* (2017) 249 FCR 24.

43 Australian Government, Attorney-General's Department, *Privacy Act Review – Issues Paper* (October 2020) 11; ACCC, *Digital Platforms Inquiry: Final Report* (2019) 470–1.

44 See ICCPR art 17. See *Australian Associated Press Pty Limited and Secretary, Department of Home Affairs (Freedom of information)* [2018] AATA 741, [134].

45 This para is derived from a draft of a chapter of a forthcoming text I am co-authoring: David Rolph et al, *Media Law – Cases, Materials and Commentary* (Oxford University Press, 2021, forthcoming) ch 11.

46 See generally, for example, Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469.

47 Jack M Balkin, 'Information Fiduciaries and the First Amendment' (2016) 49 UC *Davis Law Review* 1183, 1186.

48 See Australian Government, Attorney-General's Department, *Privacy Act Review – Issues Paper* (October 2020) 18, questions 48–52.

The ACCC Continues its Foray into Data Privacy in ACCC v Google

By **Edmond Lau, Michael Thomas, Paul Kallenbach** and **Miranda Noble,** MinterEllison

The ACCC has partially succeeded in its action against Google for misleading consumers about the collection and use of user location data, in a decision that may encourage further enforcement action in the context of data and privacy.

Key Take Outs

- In April, the Court found that that Google had misled consumers in the collection of their location data through Android devices.
- The ACCC's partial success in this case is likely to increase its willingness to take enforcement action against organisations for misleading and deceptive conduct (and other related offences) in the context of data and privacy.
- When preparing privacy policies, notices and other privacy related resources (particularly where customer facing) it is increasingly important for organisations to not only focus on technical compliance, but also making the resource accessible and 'user friendly' to avoid inadvertently misleading consumers.

On 16 April 2021, the Federal Court of Australia handed down its decision in *Australian Competition and Consumer Commission v Google LLC* (ACCC v Google).[1] The Court found that the ACCC had successfully shown that Google had misled consumers in the collection of their location data through Android devices.

The case: how Google allegedly misled consumers

The ACCC alleged that Google LLC and Google Australia (collectively, **Google**) misled consumers about the collection and use of location data and various stages during the use of Android devices and the creation of Google accounts. The allegations revolved around two OS level settings, '*Location History*' and '*Web App Activity*', which together allowed a user to control whether Google was able to collect the user's personal data, including location history data.

The crux of the ACCC's case was that Google had misled consumers into believing that when Location History was turned off, Google would not obtain, retain or use personal data about the user's location. However, Google also collected personal data relating to the user's location when the user had enabled the Web App Activity setting. When a new user set up a Google Account on their Android phone, Location History would default to 'off' and Web App Activity would default to 'on'.

Key issues

The ACCC contended that Google had misled its consumers in three specific scenarios:

- first, when a user initially set-up the device and was presented with the opportunity through the 'more options' link within the Privacy and Terms screen, to enable or disable the Location History or Web App Activity settings
- second, where a user had turned the Location History setting to '*on*' and then later decided to turn it back off; and
- third, where a user considered turning off the Web & App Activity setting after initial set-up of their device.

In each of these scenarios, the Court considered whether Google had:

- engaged in misleading or deceptive conduct pursuant to section 18 of the Australian Consumer Law (**ACL**);
- made false or misleading representations contravening section 29(g)(1) of the ACL; and
- engaged in conduct that was liable to mislead the public regarding their goods (section 33 of the ACL) or services (section 34 of the ACL).

Outcome

The Court found that in all three scenarios, the ACCC had **partially** made out its case. This involved a consideration of hypothetical members of the relevant classes of users, as well as multiple potential responses from members of these classes of users, with the Court stating:

> *"... where the effect of conduct on a class of person ... was in issue ... the section must be regarded as contemplating the effect of the conduct on all reasonable members of the class ..... It may be that reasonable members of the class cannot be distilled into a single hypothetical person".*

The Court further held that the identified hypothetical person is not capable of just one response or reaction:

> *"There may be situations where a hypothetical person might reasonably have been misled and might reasonably not have been misled".*

The Court emphasised that confining a hypothetical member of the class to one response was artificial:

> *"one would not condone misleading conduct directed to the public at large just because 51% of consumers ... would not be misled".*

Each scenario then, in effect, considered **the particular stage** in the process of navigating Google's privacy documentation at which

1 *Australian Competition and Consumer Commission v Google LLC* (No 2) [2021] FCA 367

certain people would decide to cease navigating Google's systems – and if, at that point, they would have been misled or deceived. For example, whether a user initially setting up their Google Account and device may have been relatively easily misled or deceived. This is in contrast to whether a person was deciding to turn Location History off at a later date, and was particularly interested in their privacy and management of their data, was likely to take a greater interest in the documentation presented by Google, and only in some circumstances would be misled or deceived.

For Google, the risk exposure highlighted by these proceedings arose from the complex nature of the documentation through which Google informed consumers of how they would use their personal information.

For the ACCC, the partial findings do not mean the ACCC's case was lacking in a particular area, but rather that different consumers interact with particular information differently, and that where some consumers in a class of people may be misled, others will not.

Implications of the case

The ACCC's partial success in this case may bolster its foray into regulating, through the Competition and Consumer Act, the intersection between data, privacy and consumer law. The ACCC has already emphasised the need to regulate the interaction with consumer data in the Digital Platforms Inquiry Report,[2] which was one of the documents which led to the Review of the Privacy Act (**Privacy Act Review**)[3] currently being conducted by the Attorney-General's Department.

This case also follows other enforcement action against Google for allegedly misleading 'consumers about expanded use of their personal data'[4] and proceedings against Facebook for misleading and deceptive conduct when promoting Facebook's Onavo Protect Mobile VPN.[5] The ACCC was previously successful against HealthEngine[6] for misuse of patient data when it shared patient data with third party insurance brokers.

Depending on the progress and outcome of the Privacy Act Review and any additional privacy and data specific regulatory powers that emerge from that review, the ACCC may feel encouraged by the decision and look to take further action. Although this decision is being hailed as a 'world first',[7] the prosecution against Google follows a trend of a number of cases around the world prosecuting digital platforms for the alleged misuse of consumer data.

Potential risks are not limited to large organisations. Smaller organisations, or organisations that do not necessarily have the collection, storage and use of personal information at the core of their business, should ignore these regulatory trends at their peril.

To this end, it is important for organisations to regularly review privacy policies, collection notices and other privacy-related documents and their digital infrastructure more broadly. As part of such reviews, it is not only important to ensure technical compliance with Australian and global privacy regimes (such as the *Privacy Act 1988* (Cth) in Australia, and the General Data Protection Regulation in the European Union), but to also ensure that the organisation's privacy policies and notices are fit for purpose and accessible. A key factor in the case against Google was that the manner in which Google informed consumers of how their location information would be managed was confusing to the extent that a reasonable consumer was likely to be misled or deceived when engaging with Google's systems.

Organisations need to consider whether the manner in which they inform consumers as to how their personal information is collected, used, stored and disclosed is sufficiently transparent so as to minimise the risk of similar ACCC enforcement action.

2 https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report

3 https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988

4 https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data

5 https://www.accc.gov.au/media-release/accc-alleges-facebook-misled-consumers-when-promoting-app-to-protect-users-data

6 https://www.accc.gov.au/media-release/healthengine-in-court-for-allegedly-misusing-patient-data-and-manipulating-reviews

7 https://www.law.unsw.edu.au/news/a-world-first-federal-court-rules-google-has-misled-users-on-personal-location-data

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