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Observations on the High Court's *Voller* Judgment

Introduction

On 8 September 2021, the High Court of Australia handed down its decision in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (***Voller***). The Court held that a person may be a publisher of third party comments on their social media posts for the purposes of defamation. The decision is likely to have significant implications for businesses and organisations in Australia that run public Facebook pages. **Eli Fisher**, Network Ten ViacomCBS, and **Dominic Keenan**, Allens, have summarised the judgment and called on some of the leading defamation lawyers in the country for their comments on this important judgment.

The Factual Background

The respondent in this matter was Dylan Voller, a young man who attracted national attention after *Four Corners* aired footage of abuse he had suffered at Don Dale Youth Detention Centre. The appellants in this matter were Fairfax Media Publications Pty Ltd, Nationwide News Pty Limited and Australian News Channel Pty Ltd.

The appellants operate public Facebook pages in relation to their respective outlets. Posts made by the appellants on these pages may be 'liked', 'shared' and importantly commented on by third parties. Between December 2016 and February 2017, the appellants posted content relating to the respondent's incarceration. The content posted by the appellants was not itself defamatory of the respondent. However, the respondent sued the appellants for defamation based on third party user comments on these posts.

The Procedural History

The respondent initiated defamation proceedings in the Supreme Court of New South Wales. The parties agreed that the question of whether the appellants were publishers of the third party comments should be decided separately.

At first instance, the Court held that publication by the appellants could be established in this case. On appeal, the New South Wales Court of Appeal found in favour of the respondent and upheld the first instance decision on the question of publication.

The appellants appealed the decision to the High Court.

The Appellants' Argument

The appellants argued that publication requires an intention to communicate the matter complained of. In making this argument the appellants relied on a line of cases involving the defence of innocent dissemination which they argued support the conclusion that publication is dissemination with intention.

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Ashleigh Fehrenbach and Eli Fisher

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Editors' Note

Our dear CLB readers,

Welcome to the final edition of the CLB for 2021.

In this edition, we're pleased to bring you the annual wrap-ups from **Martyn Taylor**, President of CAMLA, and **Calli Tsipidis**, Chair of the CAMLA Young Lawyers Committee, reflecting on CAMLA's year, the events we held, the content we distributed and how CAMLA is moving into 2022. As Martyn steps down from the role of President after a number of years, the CAMLA board would like to thank him for his leadership as President of CAMLA, including during the uncertain years of the pandemic, and welcome Gilbert + Tobin's **Rebecca Dunn** to the role in 2022.

In this edition, **Eli Fisher** (Network Ten ViacomCBS, co-editor) hosts a panel on the two major privacy reforms sweeping Australia – the exposure draft of the Online Privacy Bill and a Discussion Paper on the review of the Privacy Act that commenced in October 2020. The star-studded panel features Sainty Law's **Katherine Sainty**, Bird & Bird's **Sophie Dawson**, Norton Rose Fulbright's **Ross Phillipson**, RPC's **Ashleigh Fehrenbach**, Macquarie Group's **Olga Ganopolsky**, Salinger Privacy's **Anna Johnston** and McCullough Robertson's **Rebecca Lindhout**. In an in-depth panel piece, our experts explain what these changes may mean for organisations that collect and use personal information, and where Australia stands from an international perspective.

We have an assortment of brilliant, insightful articles to keep you going over the holidays. Thomson Geer's **Conor O'Beirne** takes us through the drama of the urgent application for judicial review of the CASA decision to prevent the Melbourne Media Helicopter from flying above the Melbourne CBD during the recent protests there. **Ian Bloemendahl** and his team at Clayton Utz consider the protection of anonymous sources in a social media context, following the recent *Kumova v Davison* decision. **Sarah Gilkes** and **Ben Cameron** at Hamilton Locke summarise the latest developments in the *Epic Games v Apple* dispute. Salinger Privacy's **Anna Johnston** comments on the OAIC's recent 7-Eleven decision. And Banki Haddock Fiora's **Ben Regattieri** and **Marina Olsen** take us through the scope of the Federal Court's jurisdiction in defamation matters.

The Courts have been kept busy in the lead up to the end of the year with important developments in the media, defamation and data arenas. Eli Fisher and **Dominic Keenan** (Allens), along with a crew of defamation gurus have analysed the outcome of the High Court's decision in *Voller,* sharing their perspectives on what this means for the meaning of a "publisher" for the purposes of defamation law. Be sure to check out the observations on this important judgment of USYD's **David Rolph**, Thomson Geer's **Marlia Saunders**, Senior Counsel **Matt Collins AM QC**, JWS's **Kevin Lynch**, Senior Counsel **Sue Chrysanthou SC**, Addisons' **Justine Munsie**, Network Ten ViacomCBS's **Ali Kerr**, and Bird & Bird's **Sophie Dawson**.

MinterEllison's **Tess McGuire** and **Annabelle Ritchie** share the latest on the *Dutton v Bazzi* case and in the UK, the team at **RPC** dive into the Supreme Court's decision on *Lloyd v Google*, a case which will have significant ramifications for UK data protection.

Also inside, we have reports from a number of the CAMLA Young Lawyers Committee representatives. We report on the CAMLA AdTech webinar, hosted by **Eli Fisher** and **Sophie Dawson** (Bird & Bird). We also report on the "Governing in the Internet Age" webinar with the **Hon. Paul Fletcher MP** and moderated by **Rebecca Lindhout**, Special Counsel at McCullough Robertson.

We are especially excited to provide a summary transcript from the excellent Defamation Law: Judges Panel seminar moderated by **Dauid Sibtain** (Level 22 Chambers) and **Marina Olsen** (Banki Haddock Fiora) for those who are unable to attend. Thank you to Dauid and Marina, and to Banki Haddock Fiora for hosting this fascinating discussion with **Judge John Sackar**, **Judge Judith Gibson** and **Judge Michael Lee**. If you were unable to attend the seminar, be sure to check out the summary transcript inside.

COVID-19 has continued to demonstrate a need to adapt and change with technology. In an interview, **Zeina Milicevic**, IP Partner at MinterEllison, shares her insights with **Ashleigh Fehrenbach** (RPC, co-editor) on how both law firms and the courts have had to adapt to a new environment. Zeina also discusses the recent developments in artificial intelligence and virtual hearings – along with some sound career advice.

Before we move into 2022 and all the promise that the new year brings, CAMLA was saddened to hear of the recent loss of **Ian Angus**, a powerhouse in the media law world. We have included an obituary from long-time colleague **Leanne Norman**. Our thoughts are with Ian's family, and we hope that they truly appreciate the great, positive and enduring impact that Ian had on generations of media lawyers in Australia.

We're already looking forward to 2022 and will kick off the new year with an announcement of the winner of the **CAMLA Essay Competition** at the **CAMLA Young Lawyers Networking Event**. There's still time to enter with entries closing on 21 January 2022. Well done to everyone who has already entered!

We take this opportunity to thank and acknowledge both CAMLA's **Cath Hill** and MKR Productions' **Michael Ritchie** for their huge amounts of work this year in helping us produce this publication. You two are a major force driving the ongoing success of the CLB.

Finally, thank you to all the contributors and our readers.

All the best for the festive season. See you next year!

Eli Fisher and Ashleigh Fehrenbach

The Majority Decisions

The majority in two separate judgments dismissed the appeal.[1] The majority rejected the argument that publication requires intention. They held that facilitating, encouraging and assisting the posting of comments by third-party users rendered the appellants publishers.[2] Crucially, this means that businesses may be held liable for third party comments on their social media posts.

Their Honours considered the case law identified on innocent dissemination. In doing so, they rejected the contention that a successful defence of innocent dissemination negates the element of publication in a claim for defamation.[3] Properly understood as a defence, innocent dissemination protects a defendant from liability where the elements of the cause of action would otherwise be made out.

The Dissenting Judgments

Edelman and Steward JJ wrote separate dissenting judgments. Both concluded that the parties had erred in their assumption that the appellants were either publishers of all comments on their posts, or publishers of none.

Edelman J held that to establish publication, the respondent would need to prove that any third party comment had a connection to the subject matter of the post made by the appellant that was more than remote or tenuous.[4] This approach would protect an alleged tortfeasor from liability where the third party comment is completely unrelated to the original post.

In contrast, Steward J held that publication of third party comments could only be found where the comments had been 'procured, provoked or conduced' by posts made by the appellants.[5]

The Observations

DAVID ROLPH (Professor, University of Sydney)

The High Court's decision in *Voller* was not entirely unexpected. Liability for publication in defamation law has always been broad and strict and the High Court's decision confirms that. *Voller* shows the perils of using a separate question to determine an issue. The question of publication in this case is arguably connected to other issues, such as the effect of the *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91 The fact that the media outlets were unaware of the third party comments at the time they were posted was not made as central an issue in the courts below as it should have been. So before the High Court, the media outlets had to argue that liability for publication required an intention to publish, which they argued they could not have had, given their absence of actual knowledge. Given the weight of authority supported the proposition that liability for publication in defamation is strict, not fault-based, this was always going to be a difficult argument to make.

From a doctrinal perspective, the High Court's decision in *Voller* clarifies some basic points, which seemed to have caused considerable confusion in recent years: that liability for publication is strict and that innocent dissemination is a defence at common law, not a plea of no publication. Dicta to the contrary in lower court decisions, such as in the *Duffy v Google* litigation in the Supreme Court of South Australia, are inconsistent with the High Court's decision in *Voller*. From a practical perspective, *Voller* raises many questions about the extent of the application of the principle it identifies. Clearly, it applies to media outlets which use social media pages to post content and encourage and invite third party engagement. How it applies beyond commercial outlets, to other organisations and even private individuals, remains to be established, although many organisations and individuals are already taking steps to manage the risk that they may be publishers of third party comments. What constitutes encouragement and invitation, whether it is subjective or objective, whether it has to be express or may be implied: all of these are questions which will need to be worked out. Courts have struggled with the application of established principles of defamation law to internet technologies. Given the uncertainty about the extent of application of the principle in *Voller*, it may be that legislative intervention is required.

SOPHIE DAWSON (Partner, Bird & Bird)

The problems which Australia is grappling with are not new. Voller represents an orthodox application of defamation law principles, to internet intermediaries, but as the experience of other jurisdictions shows, there has long been a need consider legislative reform in this area. In the early 1990s, when the internet was still in its relative infancy, the question of internet intermediary liability was already starting to confront US Courts. Cubby, Inc. v. CompuService Inc., a case decided in 1991, determined an internet service provider which hosted defamatory content on a forum, could be liable for that material on the basis of traditional innocent dissemination principles. This case ultimately drove the enactment of a statutory immunity for internet intermediaries via section 230 of the Communications Decency Act, providing protection to platforms for material not produced by them. The US digital economy flourished in the wake of that reform. It has now also been several years since the 2013 UK reforms, which provided a safe harbour for internet platforms. From a policy standpoint, Australia has only really started engaging with these issues in the last few years - most recently with the Social Media (Anti-Trolling) Bill 2021, about which we could easily write a separate article. If for no other reason than clarity one hopes this is just the start of the conversation around defamation reform in relation to the internet.

1 The primary judgment was written by Kiefel CJ, Keane and Gleenson JJ. Gagler and Gordon JJ agreed with the primary decision and provided additional comments.
2 Voller [55] (Kiefel CJ, Keane and Gleeson JJ).
3 Voller [49] (Kiefel CJ, Keane and Gleeson JJ); [76] (Gageler and Gordon JJ).
4 Voller [144] (Edelman J).
5 Voller [184] (Steward J).

MARLIA SAUNDERS (Partner, Thomson Geer)

I agree with David that the outcome in *Voller* was not entirely unexpected, but it is disappointing. The result is that media organisations are publishers of third party comments on their Facebook pages, even though they had no knowledge of the comments, had no ability to disable the "comments" function or pre-moderate the comments, and were not notified of the existence of the comments before the legal proceedings were commenced. The lack of knowledge issue was emphasised at length in the courts below, with counsel for the media outlets before Justice Rothman making submissions to illustrate the impact of imposing of liability for third party comments on page owners by reference to the NSW Supreme Court's own Facebook page which, unbeknownst to the Court, featured a number of defamatory comments in response to sentencing judgments posted by the Court. However, both Justice Rothman and the majority in the High Court seemed more persuaded by the fact that Facebook pages are run for the commercial benefit of the media organisations, with Justices Gageler and Gordon saying "Having taken action to secure the commercial benefit of the Facebook functionality, the appellants bear the legal consequences". In my view, whether or not the page is used for a commercial purpose should not be a relevant consideration to establish whether the page owner is a publisher.

I agree with Justice Steward's observation that the outcome of the majority's position in this case is that "all Facebook page owners, whether public or private, would be publishers of third party comments posted on their Facebook pages, even those which were unwanted, unsolicited and entirely unpredicted". Unless or until the legislature steps in to fix this, I think that courts will apply the decision to many different types of Facebook pages. The majority held that creating and providing a Facebook page, posting content on the page and giving third party users the option to comment on the content amounts to sufficient participation in the process of publication to be a publisher of a third party comments posted on their page as soon as the comment appears and is accessed and comprehended by another person. Now that Facebook provides the functionality to switch off comments on individual posts, it's likely that page owners will be using this regularly in an attempt to mitigate risk. Unfortunately, this will have a chilling effect on freedom of expression and legitimate public debate. A solution that forces the original commentator to take primary responsibility for what they post would be a better outcome from a public policy perspective.

ALI KERR (Senior Legal Counsel, Network Ten ViacomCBS)

"Disappointing", you say, Marlia? I wholeheartedly agree. And I have it on good authority that the sentiment in newsrooms and production meetings around the country was even stronger. Distribution of news, and reality content in particular, via social media is central to meeting our audience's demand for information. Dare I say: it's not possible to compete in the local media market unless your brand and content are everywhere, easily accessible and always up to date, 24/7.

Sue, you may feel that there is nothing to see here, but having to wait till a final hearing to determine if an innocent dissemination defence is available for third party comments leaves the media in limbo. Potentially very expensive limbo. In the absence of legislative reform, the tools available to limit exposure include: making an assessment of the likelihood that a particular story will generate defamatory comments and possibly not posting it to socials; limiting news coverage; turning comments off on social platforms that offer that functionality; limiting free speech; and ticking off faithful followers; or perhaps utilising key word filters, which as I type are currently not working on Facebook and won't be reinstated till the glitch is fixed. Trying to bring a cross-claim against Joe Public for his/her comment has to date not been pursued presumably on the basis that it would be time consuming, costly and requires Joe Public to exist and have a pot of gold. The High Court's *Voller* decision has led to CNN taking the bold step of denying Australian Facebook users access to its page to avoid defamation exposure. Who will be next?

As Dr Collins QC articulated, the internet is a communications revolution, not just the next cog in the evolution of communication and content distribution. And at the current rate of evolution, a revolution has never been more attractive.

KEVIN LYNCH (Partner, Johnson Winter & Slattery)

I agree with Marlia – the *Voller* decision confirms it is possible to be both disappointed and unsurprised at the same time. It's a bit like getting socks on Father's Day.

There are two practical observations that follow.

Firstly, the law as regards publication is much the same now as it was before the decision was handed down in September, or indeed when someone posted a notice on a bus shelter in the 1990s, stuck a poem on a golf club wall in the 1930s, or pointed to a roadside placard in the 1890s. These are some of the parallels that were drawn upon in establishing liability for the publication of third party Facebook comments concerning Mr Voller. Disappointing, yes, but also a call to arms for Stage 2 of the review of the uniform defamation legislation.

Secondly (and relatedly), it follows from the legal orthodoxy of the *Voller* decision that it may not be the paradigm-shifting decision that much of the reaction and commentary would suggest. It is understandable that administrators of commercial Facebook pages are concerned about the potential liability highlighted by the *Voller* decisions and are seeking advice to balance the risks. But at the same time, to risk a half-baked observation, the two years since his Honour Justice Rothman's first instance decision do not seem to have seen a flood of social media comment cases.

This might be because there are aspects of a successful defamation action that are still ahead of Mr Voller which also need to be assessed by any person considering an action over a social media comment. Defences (including innocent dissemination, which I suspect will be a live issue), the extent of publication and the quantum of damages may yet chip away at Voller's prominent separate question win.

DR MATT COLLINS AM QC (Senior Counsel, Aickin Chambers)

The genius of the common law has always been that it evolves to accommodate changed circumstances.

Defamation law is no exception. Duty and interest qualified privilege emerged to protect the publication of false statements without malice on occasions warranted by the common convenience and welfare of society. Innocent dissemination developed because of the harshness of holding secondary distributors liable for the innocent publication of others' defamatory content. More recently, courts across the common law world have developed, at least in form, liberalised defences for reasonable or responsible communications on matters of public interest.

As a matter of legal orthodoxy, the reasoning of the majority in *Voller* is impeccable—it is a correct application of the test for publication as it was stated by Sir Isaac Isaacs in *Webb v Bloch* (1928) 41 CLR 331. But intermediaries in the publication of online content cannot be sensibly equated to the committee that commissioned the defamatory circulars with which Sir Isaac was concerned. The internet is a communications revolution, not merely the latest evolution of antecedent media of communication.

For so long as courts reason by reference to flawed analogies—email as the equivalent of the postcard from the seaside; search engines as the modern-day card catalogue at the public library, etc—the common law will remain hopelessly behind the technology and the application of principle will continue to generate dubious results. Reforms to recalibrate the cause of action with a view to achieving its objective of balancing the protection of reputation with freedom of expression will continue to be hostage to legislative reform projects that come about, if we are lucky, once in a generation.

It did not need to be this way. More than a decade ago in England, Sir David Eady persuasively reasoned that to be held responsible as a publisher in modern circumstances, there needed to be human participation in the process of publication (or continuing publication) of the relevant words: *Bunt v Tilley* [2007] 1 WLR 1243; *Metropolitan International Schools Ltd v Designtechnica Corp* [2011] 1 WLR 1743. To my mind, that solution is preferable to the outcome in *Voller*: elegant, and achieving both certainty and justice.

SUE CHRYSANTHOU SC (Senior Counsel, 153 Phillip Barristers)

The decisions in *Voller* in the Supreme Court of New South Wales, the Court of Appeal and finally the High Court of Australia each contain recitations of the law of publication as it has been known in Australia and other common law jurisdictions for over a century. The outcome of the question posed as to whether media organisations are liable as publishers of material appearing on their own Facebook pages was predictable and predicted by defamation lawyers - the application of those principles to the medium of Facebook was obvious and has come as no surprise to persons who are familiar with the relevant principles. Importantly, the overreaction to the case in certain circles is misguided and mischievous given the decision has no impact on the defence of innocent dissemination and the statutory protection under the *Broadcasting Services Act*. In *Voller* the plaintiff did not put the media defendants on notice that third party comments on their Facebook pages were defamatory prior to commencing the proceedings. If the comments were deleted shortly after proceedings were served, the media organisations have arguable defences and the High Court has not deprived them of those defences which may well yet succeed. If the third party comments were not immediately deleted, the position is really no different to letters to the Editor which have been included in newspapers for centuries and for which media organisations have always been held to account - subject to defences such as comment of a stranger. So really, not much to see here folks.

JUSTINE MUNSIE (Partner, Addisons)

Sue Chrysanthou's comments refer to the truly unresolved issue in *Voller*; one that is yet to raise its head at all in the case so far. While the High Court decision for many, or on many levels, might be seen as orthodoxy 2.0, the consideration of the media's available defences is apt to create truly new ground. Assuming some or all of the plaintiff's imputations survive any challenge by the media defendants, then the time will come for the media to file their defences and the real question of liability will come to be considered. Given that the plaintiff did not notify the media defendants about the offending Facebook comments prior to commencing the proceedings, it is likely the defendants were unaware of the comments. In those circumstances, they may be able to rely on either or both of the defences of innocent dissemination (at common law and as provided in the Uniform Defamation Law) or the defence for internet content hosts set out in the Broadcasting Services Act. The defences apply to certain types of publishers who have no knowledge of the defamatory content which has been published. The Broadcasting Services Act provisions go further by making clear that internet content hosts are not required to monitor for such content.

In the continuation of the *Voller* case, the NSW Supreme Court is therefore likely to determine issues such as whether the media defendants were merely "subordinate distributors", not primary distributors of the Facebook comments, whether they are "internet content hosts" for the purpose of the Broadcasting Services Act and whether they were in fact unaware of the defamatory nature of the content published by third party users. While we wait for this second part of the case to run, media publishers must decide how best to limit their liability for third party comments on social media in the meantime. Do they now use new Facebook functionality and turn off comments altogether on their posts and therefore shut down discussion and debate? Or do they allow comments to continue unmonitored so they claim down the track that they were unaware of any offensive comments? Or do they continue to bear the risk and cost of walking the tightrope of freedom of expression by allowing third party comments but monitoring and moderating in the hope that problematic material is weeded out?

2021 at CAMLA

A Message from the President, Martyn Taylor

For those of you in Sydney and Melbourne, the last 6 months have been particularly tough given the impact of lockdowns. Calendar 2021 has in some respects been even more difficult than calendar 2020.

For COVID, we can draw an analogy to a hurricane. The first part of COVID in 2021 had the pandemic winds blowing from one direction and taking us unawares. Then we had the eye of the storm where we had some months of normality. We even had a board meeting in person in early June for the first time in some 18 months. However, we then had the second part of the COVID storm with the winds of the Delta variant blowing with greater intensity from another direction. However, I am kind of hoping we are now through the worst of the storm – and the sun will be shining as we enter 2022.

Throughout that COVID hurricane of 2020 and 2021, CAMLA has emerged relatively financially secure. We have continued to deliver high quality content to our members. We have kept operating and kept smiling.

So my objective as President for the last 12 months has been to ensure that CAMLA remains a vibrant, interesting and successful association for the benefit of media and communications lawyers. Notwithstanding all the insanity that 2020 and 2021 have thrown at us, we have again met this objective.

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

So I cannot say that CAMLA has fulfilled its objectives without mentioning the support of the great many people that have been heavily involved in CAMLA over the last 12 months. Those of you have contributed your valuable time to make CAMLA the success that it is. I thank you all from the heart.

CAMLA Members

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

We now have 411 people who are current members. We continued to increase our membership during 2021 after an increase in 2020. At 411 members, this means CAMLA remains a relatively large association.

Around 17% of our membership are students and "new lawyers", around 26% are standard individual memberships, and the remaining 57% are individual members through corporate memberships.

We have some 29 firms and organisations who have corporate memberships. This includes a wide range of media companies, government agencies, law firms, industry associations, and content companies.

It is a credit to CAMLA that we have continued to increase our membership over two very difficult years. Thanks to all of you for renewing your memberships and welcome to our new members.

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

In my view, we have done so over the last 12 months, assisted by many of our events being held free to CAMLA members. I will shortly talk through some of the highlights.

CAMLA Board

However, before I do so, I will mention the CAMLA Board. We have had 18 members of the Board over the 2021 calendar year. I could shower praise on each of you and you each certainly deserve that, but I would like to make special mention of those in the executive positions:

- First **Katherine Giles,** who has continued to have the hot seat as Treasurer and Public Officer. Over the last 12 months, she has continued to successfully navigate our finances through the COVID economic crisis.

  Katherine has indicated she will be retiring from the role as Treasurer and Public Officer today after taking over that role from me some 4 years ago in November 2017 when I became President. **Julie Cheeseman** will be taking over as the new Treasurer and Public Officer.

  I would like to say Katherine, on behalf of the Board and members, thank you so much for all your time and effort as Treasurer and Public Officer, particularly through all the COVID dramas of the last 2 years. We are all incredibly appreciative and you have probably had the most difficult task of all of us. As Public Officer, you have also been the legal face of CAMLA throughout that period.

- Second, **Rebecca Dunn** who has performed an amazing role as Secretary in keeping the CAMLA tradition of well-organised meetings with high quality minutes and records. Rebecca became secretary of CAMLA in November 2017, taking over from Page Henty. Rebecca has therefore also had 4 years in the role.

  From today, Rebecca will be taking over from me as the new President of CAMLA while I step back to a role as Vice President. Welcome to the new role Rebecca and we look forward to working with you as President after today. Rebecca will be replaced as Secretary by **Ryan Grant** - so welcome to the new role Ryan.
- Next, the two CLB Editors, **Eli Fisher** and **Ashleigh Fehrenbach.** The content produced for the Communications Law Bulletin over the last 12 months has continued to be truly outstanding. I will come to that in due course.
- Finally **Debra Richards** and **Ryan Grant,** who been the two Vice Presidents of CAMLA for the last 12 months. Both of them have been instrumental in organising events. Many thanks both. Debra will be continuing as a Vice President in 2022 as one of the longest serving members of CAMLA on the Board. I will be stepping down as President to be the other Vice President for 2022.

CAMLA Young Lawyers Committee

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

As you will know, CAMLA Young Lawyers is an official sub-committee of CAMLA. In 2021, that sub-committee comprised 15 young lawyers who represented the interests of young lawyers working in, or who have an interest in, communications and media law in Australia.

The contribution of the Young Lawyers Committee over the last 12 months has been outstanding. The Board and I have been impressed and very grateful for the time and effort of each of the members of the CAMLA Young Lawyers Committee and the very high quality of the contributions made.

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

I would like to give particular thanks to Calli Tsipidis for continuing to chair the Young Lawyers Committee over the 2021 year and to Belyndy Rowe for acting again as secretary. Calli has provided a summary of 2021 in this edition of the CLB too, which I strongly recommend.

CAMLA Events

That brings me to the CAMLA Events. I'll just provide a quick overview as the full details are in the Schedule to my report.

We have held a record 12 events in 2021 and most of these have been online:

- In March, the CAMLA Young Lawyers Networking Event
- In May, a Privacy 101 breakfast seminar and a webinar on Stage 2 of the Defamation Law Reforms
- In August, an Injurious Falsehood 101 webinar
- In September, a Sports Law 101 webinar and a webinar on Developments in Ad Tech
- In October, a webinar with the Telecommunications Industry Ombudsman and a webinar on Sports Rights
- In November, Minister Paul Fletcher spoke on governing in the Internet age and we also had the Imputations 101 webinar and yesterday a webinar on the Internet of Things
- In December, a judge's panel on defamation law

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

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

We have opportunities in 2022 to hold some great events, many of which are already being organised. The media and communications landscape in Australia continues to change rapidly. It is a very interesting time to be a media and communications lawyer.

Communications Law Bulletin

That brings me to the Communications Law Bulletin. In my view the CLB Editors have again topped in 2021 the impressive record that they had set in 2019 and 2020.

Many thanks to Eli and Ash for their incredible effort in very difficult circumstances. Many thanks particularly to Ash for continuing as CLB Editor from her role as a Senior Associate in the IP & Technology team at Reynolds Porter Chamberlain in London at a COVID social distance of some 17,000 km.

I have included a detailed list of the content in the CLB in the Schedule to this report. The contributions are of a very high quality on many cutting-edge issues, including several fascinating interviews.

The March CLB featured interviews with over 30 prominent women lawyers working in communications and media in the first special International Women's Day edition. The July issue celebrated the 40th anniversary of the CLB including a conversation with seven of the community's most noteworthy legal veterans about the practice of media, IP and technology law over the last 40 years. In the third edition, the editors focussed on the music industry and the law in another excellent special issue.

And in this, the final edition of the year, they have collected the combined wisdom of some of the

leading practitioners of privacy law in relation to the ongoing law reform proposals and some of the leading defamation lawyers in relation to the important Voller decision.

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

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

CAMLA Administration

I now turn quickly to the CAMLA administration and finances.

Of course, as always, our huge, huge (huge) thanks to **Cath Hill** for her incredible effort over the course of the last 12 months in keeping us all organised as the administrative secretary.

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

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

I am not intending to spoil the excitement by giving too much away about our plans for the next 12 months - you will all just have to wait and see. We have plenty of great ideas. Rebecca Dunn will take over from me to assist to translate those ideas into reality.

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

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

Schedule – Events in 2021

1. CAMLA YOUNG LAWYERS: NETWORKING EVENT 29 March 2021, Clayton Utz

CAMLA Young Lawyers held an in-person networking event for young lawyers and law students with an interest in the media and communications industry. The evening included a panel discussion, where the accomplished speakers discussed their career paths, professional highlights and challenges and their advice for young lawyers looking to break into, and progress, in the industry. The finalists of the CAMLA essay competition were also announced.

Panel:

- Timothy Webb, Clayton Utz
- Sarah Woolcott, BMG Music
- Michael Bradley, Marque Lawyers
- Claire Roberts, Eleven Wentworth

2. CAMLA YOUNG LAWYERS: PRIVACY 101 – BREAKFAST SEMINAR 11 May 2021, Bird & Bird

The CAMLA Young Lawyers went back to basics to explore the latest and greatest updates in privacy law. Our esteemed panel provided practical insights into privacy law, including discussing the general framework of privacy law in Australia, as well as the issues relevant to reform during the Attorney-General's Department's review of the Privacy Act 1988.

Panel:

- Peter Leonard, Data Synergies
- Sophie Dawson, Bird & Bird
- Veronica Scott, KPMG
- Kelly Matheson, MinterEllison

3. DEFAMATION LAW REFORM – STAGE 2 WEBINAR 12 May 2021, Johnson Winter & Slattery

With the release of Stage 2 of the Review of Model Defamation Provisions, centred upon the question of internet intermediary liability, CAMLA and JWS brought together a panel of defamation experts for a webinar discussion. This webinar provided an opportunity to join with leading tech players, expert counsel, an academic and an eminent defamation Judge in considering the next round of changes during the consultation period for Stage 2.

Panel:

- Kieran Smark SC
- Clayton Noble, Microsoft Australia and New Zealand
- Her Honour Judge Judith Gibson
- Dr Daniel Joyce, UNSW Law & Justice
- Moderated by Kevin Lynch, Media Partner at Johnson Winter & Slattery

4. CAMLA YOUNG LAWYERS: INJURIOUS FALSEHOOD 101 WEBINAR 9 August 2021

This webinar posed the following questions: Is injurious falsehood similar to defamation, or not at all? Is pleading injurious falsehood "going out of fashion"? Just how difficult is to establish actual damage? A back to basics" session with two of the country's leading experts:

Panel:

- Sue Chrysanthou SC, 153 Phillip Barristers
- Dauid Sibtain, Level 22 Chambers

5. CAMLA YOUNG LAWYERS: SPORTS LAW 101 22 September 2021

The Sports Law 101 webinar addressed questions like: What is sports law? What does a 'sports lawyer' do? The expert panel took us through a day in the life practising sports law and we discuss some of the trending topics in the industry.

Panel:

- Tim Fuller, Special Counsel, Gadens
- Simon Merritt, Senior Associate, Lander & Rogers
- Calli Tsipidis, Legal Counsel, Foxtel Group

6. DEVELOPMENTS IN ADTECH WEBINAR 30 September 2021, Bird & Bird

A webinar discussion with experts in the AdTech industry relating to recent developments in digital advertising, including:

- Apple's ATT campaign
- Cookiepocalypse
- ACCC inquiry into AdTech
- ACCC inquiry into app marketplaces
- Privacy law reforms

Digital and app-based businesses, including streaming platforms, social media networks, video game creators and news publishers, are experiencing an upheaval in the way they monetise their offerings. Our panel explored the challenges that the industry is facing, offer some solutions currently being considering, and have the benefit of local and global perspectives. This webinar was of interest to lawyers as well as AdTech professionals who are not lawyers.

Panel:

- Eli Fisher, Network 10 ViacomCBS
- Sophie Dawson, Partner at Bird & Bird
- Josh Slighting, Head of Data and Digital Audience at Network 10 ViacomCBS
- Joey Nguyen, Co-founder and Head of Technology at Venntifact
- Alex Dixie, Partner at Bird & Bird (London) and Head of the AdTech practice
- Thomas Jones, Partner at Bird & Bird

7. OUT OF THE COURTROOM: WEBINAR - RESOLVING DISPUTES AT THE TELECOMMUNICATIONS INDUSTRY OMBUDSMAN 20 October 2021, Clayton Utz (RSVPs: 54)

In 2020-21 the Telecommunications Industry Ombudsman, Judi Jones dealt with complaints and enquiries from over 119,000 people and small businesses. In her capacity as the leader of the nation's highest volume complaint handling service, Ombudsman Judi Jones discussed how the TIO resolves disputes out of the courtroom through conciliation and investigation and their work in identifying and resolving systemic problems. She also discussed the regulatory and legislative prospects sitting on the horizon of an ever-changing telecommunications landscape. This includes the Digital Platforms Ombudsman, Statutory Infrastructure Providers regime, and the Consumer Data Right.

8. SPORTS RIGHTS: THEN AND NOW - WEBINAR 27 October 2021, Marque Lawyers (RSVPs: 76)

Emma Johnsen, Marque Lawyers, joined by a panel of three speakers from the sports broadcasting and events industry to discuss challenges the industry has faced both at the start of the pandemic, and now, as it hopefully returns to a new normal.

Panel:

- Emily Jackson, FIFA Women's World Cup Australia - New Zealand 2023™
- Rohin Sharma, Fox Sports Australia
- Sam Stitcher, IMG

9. GOVERNING IN THE INTERNET AGE WITH THE HON. PAUL FLETCHER MP – WEBINAR 10 November 2021, McCullough Robertson (RSVPs: 74)

The Hon. Paul Fletcher MP, Minister for Communications, Cyber Safety & the Arts spoke with Rebecca Lindhout, Special Counsel, McCullough Robertson to discuss the Minister's new book, Governing in the Internet Age.

Paul Fletcher has worked on internet policy issues for twenty-five years. In Governing in the Internet Age, he outlines the key challenges the internet has posed for governments as they seek to preserve their sovereignty, protect their citizens from harm, and regulate neutrally between traditional and online business models.

10. CAMLA YOUNG LAWYERS: IMPUTATIONS 101 WEBINAR 11 November 2021, Level 22 Chambers (RSVPs: 97)

A refresher on one of the most fundamental and complex aspects of defamation litigation with two of Australia's leading defamation junior counsel.

Panel:

- Nicholas Olson, Level 22 Chambers
- Tim Senior, Level 22 Chambers

11. INTERNET OF THINGS – THREE DIFFERENT PERSPECTIVES WEBINAR 24 November 2021, McCullough Robertson (RSVPs: TBA)

An online panel event to hear three different perspectives relating to the application of IoT in the telco, media and sports space, including the challenges and opportunities for each of the panellists and their teams.

Panel:

- Lisa Goodman – Business Partner, Internet of Things and Industry Solutions, Telstra
- Jaco Pretorius – Chief Technology Officer, Divinio – makers of the Smart Bat
- Michael Wells – Melbourne Rebels Rugby Player

The interactive panel event was moderated by Rebecca Lindhout, Special Counsel, McCullough Robertson.

12. DEFAMATION LAW: JUDGES' PANEL – UPCOMING SEMINAR AND WEBINAR 7 December 2021, Level 22 Chambers and Banki Haddock Fiora (RSVPs: TBA)

Defamation cases are rarely out of the public eye, over publications ranging from nasty Facebook posts to serious investigative journalism pieces. At a time when Courts are grappling with the meaning of defamatory publication on social media and online platforms, and are faced with applying the recently updated defamation legislation, we look forward to hosting what should be an illuminating panel discussion with judges from the three main Courts hearing these cases in Australia:

Panel:

- Judge Judith Gibson, District Court of NSW
- Justice Michael Lee, Federal Court of Australia
- Justice John Sackar, Supreme Court of NSW

Moderated by Dauid Sibtain, a barrister at Level 22 Chambers, and Marina Olsen, a partner at Banki Haddock Fiora.

CAMLA Webinar Report

Governing in the Internet Age with The Hon. Paul Fletcher MP

By **Calli Tsipidis** (Chair, 2021 CAMLA Young Lawyers Committee & Legal Counsel at Foxtel Group)

On 10 November 2021, CAMLA were delighted to host The Hon **Paul Fletcher** MP – Minister for Communications, Cyber Safety & the Arts – to discuss the Minister's new book 'Governing in the Internet Age'. The webinar was moderated by **Rebecca Lindhout**, Special Counsel at McCullough Robertson, and hosted virtually by **McCullough Robertson Lawyers**.

The Minister commenced the webinar by reflecting on the ways in which the internet has evolved (or, in the words of the Minister 'exploded') over the past 25 or so years. The increased accessibility of the internet, via modems in homes, to smart phones, to the nbn most recently, has meant that several billion people across the globe are now easily connected. Consequently, government responsibilities have also evolved. However, it has taken some time for governments catch up on – and recognise – how the internet has transformed their responsibilities.

Whilst the internet has posed, and continues to pose, challenges for governments as they seek to preserve sovereignty, protect citizens from harm and neutrally regulate both online and 'regular' business models, the Minister acknowledged that with challenges have also come opportunities.

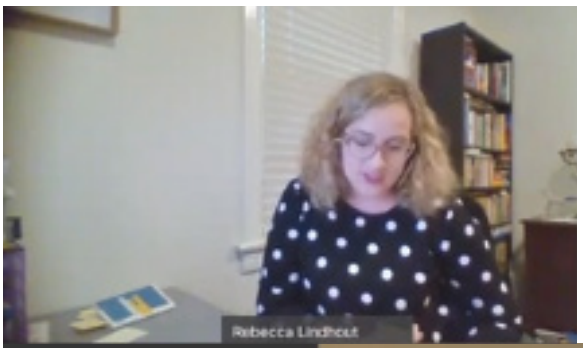
Attendees submitted questions to the Minister in relation to the impacts of social media on political decision-making, the ability of mandatory codes to manage online misinformation and disinformation, the need to craft regulations carefully when regulating new online industries (for example, streaming services) and the challenges that organisations with recognisable market power have unearthed in the digital age.

The Minister outlined four key principles of which he believed governments should take account when regulating, and generally conducting themselves, in the internet age:

1. use the internet to better serve the public,
2. use the internet to provide greater transparency in governance,
3. embrace the fact that the internet enables an open economy, and
4. resist the proposition that the internet cannot be regulated.

When queried on the 'next big priority' for regulators in the digital age, the Minister noted that, whilst it is difficult to predict what will play out in the market, the physical networks over which internet services are delivered is an area that will require some focus, in particular given the costs of maintenance, delivery (especially in rural areas) and the reliance on such networks for other practices across the country.

On behalf of CAMLA, we would like to extend our sincere thanks to the Minister for lending us his valuable time and providing insights into the many challenges which the internet continues to produce for the media, communications, and telecommunications sectors. Many thanks to Rebecca Lindhout and McCullough Robertson for moderating and hosting this webinar.



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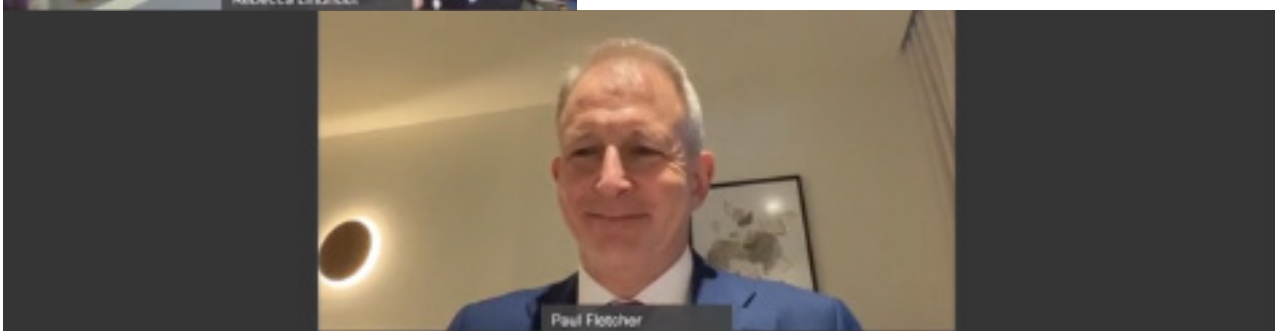


CAMLA Defamation Judges Panel Discussion

Defamation cases are rarely out of the public eye, over publications ranging from nasty Facebook posts to serious investigative journalism pieces. Now more than ever, Courts are grappling with the meaning of defamatory publication on social media and online platforms, and are faced with the new and unenviable task of applying the recently updated defamation legislation.

On the evening of 7 December, CAMLA members were treated to an enlightening and invaluable panel discussion with judges from the three main Courts hearing defamation cases in Australia: **Justice Michael Lee** from the Federal Court of Australia, **Justice John Sackar** from the Supreme Court of NSW and **Judge Judith Gibson** from the District Court of NSW. Moderated by Dauid Sibtain, a barrister at Level 22 Chambers, and **Marina Olsen,** a partner at Banki Haddock Fiora, we have reproduced below a transcript* of the evening.

**Please note that this is not an official transcript and, while every effort has been made to reproduce the words spoken accurately, it is provided for educational purposes only and should not be relied upon in any formal way.*

M Olsen: Let's jump right in at the deep end and start with the question of serious harm and the new test that applies under section 10A with the new amendments. Judge Gibson, can I please start with you? You handed down a comprehensive decision recently, in which you were required to apply the UK test, the UK serious harm test, that was in *Raider v Haines*. Do you think that when the time comes to consider the test under Australia's section 10A in your Court, it will be applied in any significantly different way to the UK test? And procedurally speaking, how and when do you see the issue being ventilated?

Gibson DCJ: Can I expand that by saying, although I don't want to talk about serious harm, because I've handed down a judgment on the topic recently, I wanted to talk about how it is that I see judges in Australia are going to approach these areas of the law. And what particularly concerned me was actually a passing remark by one of the judges on appeal in the case of *Mrad*, where one of the judges commented that there was no place in Australian defamation law for English concepts such as fatal variance, this being an English doctrine in relation to the law of slander.

I think that one of the things we have to be very cautious of here is that there is something of a history of reluctance by the judiciary around Australia, particularly at appellate level, to embrace English inventions, such as *Jameel*, there's *Thornton v Daily Telegraph*, there's *Reynolds*. Need I go on? I mean, basically, if I was sitting in crime, I would say there is a long prior history of recalcitrant behavior. I think that the first thing we need to bear in mind when we're looking at this issue, is I think that judges might have to think about not only the law reform process but also, perhaps revisiting some of their own ideas on judicial method and what Professor David Rolph likes to call judicial receptivity. So I'm hoping that one of the changes that this new legislation will bring about is the renewed interest in new ideas as opposed to referring to the absence of a suitable vehicle.

The second thing I would like to see is I would like to see judges, and I'm sure they will be, embracing technology more, understanding technology more, receiving more assistance from the bar in this regard, and avoiding what the Supreme Court in the United States has been accused of, which is a terrible word. It's technofogeyism. So we don't want any of that here. Another area of the law that I would like to see judges looking at, perhaps a little differently, is avoiding loophole thinking. 'Aha! I found a loophole. Look, this section doesn't work'. In particular, I'm hoping that the methods of statutory analysis will be approached with a degree of flexibility. I'm still worried about the decision in the *Mohareb* case which, again, I can't discuss, where it was decided that a statement of claim amounted to a concern notice. That does trouble me because I thought the whole purpose of a concerns notice was to avoid a statement of claim. So having noted those points, and also having noted that I'm hoping the judges will be aware of the costs issues, because if I can come back to serious harm, the single biggest reason for the introduction of the serious harm test in the United Kingdom was the blowout in costs. Because the blowout there was amazing. I have spoken many times about the study in 2008, at Oxford University, which found that it cost 140 times more in 2008 to run a defamation case in England than it did in civil law jurisdictions on the Continent. It gave a lot of people a good big fright. Now, that's probably the longest speech I'll make all night. So I'm now going to hand over to my colleagues, what do you think about the new way that we approach this legislation?

Lee J: I think I'll address the two issues, I can do that at a relatively high level of generality, that have been raised in that question. The first is, procedurally speaking, how and when will the issue of serious harm be ventilated in the Federal Court. As those of you who have practised in the Federal Court in relation to defamation matters over the last few years would well understand, there is a reluctance to engage in what the Court perceives as unnecessary interlocutory disputation. Now, minds differ about that. But there is certainly a clear admonition in the Practice Note to ensure that interlocutory disputation is minimised. When it comes, though, to the question of serious harm, it does become an interesting question as to how that issue is to be ventilated. One of the sections of the *Federal Court of Australia Act* which I think is under-utilised and not really thought about is section 31A. In section 31A, you have a section which has created a

Marina Olsen

new element in the cause of action. Section 31A of the *Federal Court of Australia Act* was supposed to get away from the *General Steel* test and lower the bar for applications for summary dismissal and summary judgment. Perhaps picking up on what Judge Gibson said, there may have been a bit of traditional reluctance to giving full effect to that provision over the years and there are two lines of authority which perhaps have some degree of tension in them about how low the threshold is in section 31A. But if one gives effect to one of those lines of cases, which does seem to me at least arguably more in the spirit of the reform that was supposed to be reflected in section 31A, it may provide a mechanism by which serious harm could be considered by a judge. Now, that then gives rise to the very interesting question about what happens when consideration of the serious harm threshold changes. For example, are there issues going to be ventilated at trial which may bear upon the question? Now all that will have to be worked out.

And the last question, is there a role for a proportionality challenge now that the series harm test has been introduced? Without expressing a definitive view, it's very difficult to see how, given an element of the cause of action is now serious harm to the reputation of the plaintiff, it's difficult to see why that proportionality challenge fits comfortably into the legislative reform.

M Olsen: Justice Sackar, did you have any comments on the serious harm test or the other comments from Judge Gibson or Justice Lee?

Sackar J: There are a number of points that should be made. The first one is that the English provision in section 1 of their *Defamation Act 2013*, and ours in NSW, is differently worded. I won't dwell on that for the moment, but there are differences in the terminology. The provision in NSW is also much more prescriptive about a number of things. For example, it's a judge-alone issue, and subsection 3 of section 10A makes that clear.

There are other provisions in the NSW section 10A which, unlike the English provision, do purport to deal with procedural issues. The bottom line is this: if you're acting for a media proprietor, and you have an issue about the seriousness of the libel, my view is that we will see an upswing in section 10A applications, in the alternative, proportionality arguments running as the second or an alternative argument. They do have a tendency to run hand in glove, at least in theory, and it does seem to me that, as happened in the UK, I do think they will be preliminary points because in NSW particularly where, let's say, a trial is going to be a jury trial, serious harm is going to be a judge-alone question. It lends itself much more to a preliminary debate. In England, where it's already being looked at, and Judge Gibson has comprehensively dealt with the English authorities, in the development up to *Lachaux*. The preliminary argument there before Justice Warby in Queen's Bench took two days. And it took two days because, ultimately, whether or not there is a serious harm issue is a question of fact.

It also, as far as the UK Supreme Court is concerned, the UK legislation, and this is yet to be determined if I may say so, apart from Judge Gibson's valuable contribution - the question is whether the Australian legislative provision will be seen to have affected the common law, as the UK Supreme Court says it has by, as it were tweaking, or rather putting into a different context, the question of presumption of damage. So to sum all that up, it's a bit like section 7A. I think it will be a bright, shiny object. I think there is very little doubt that media proprietors in the appropriate case in NSW will seek to have the matter determined at an early stage. It's a factual dispute so I can see the matter taking a couple of days perhaps, potentially – it depends on the case. So I do think it will become a preliminary point. And I think it'll be, arguably, in the appropriate case, the new replacement section 7A as a preliminary issue. Because the

amount of time that it would save, having a fullblown trial if there is no serious harm, subject as I've said to the fact that both pieces of legislation are differently worded, and they are yet to be looked at in that context.

D Sibtain: Thank you Justice Sackar, now in the interests of keeping this in a sequential fashion, I'm going to jump around, and I'm going to move over to case management. Because I think certainly what Justice Sackar was saying, and what Justice Lee was saying at the very least in relation to how interlocutory disputes that are capable of disposing of the whole proceedings might be entertained. Can I move to the topic of case management more generally? Case management has been something that has been institutional in the District Court and institutional in the Supreme Court. But in the Federal Court, as Justice Lee indicated, there has been a reluctance to deal with interlocutory matters in advance. Now, that reluctance has been the rule, but there have been frequent departures from it. For example, in the recent decision of Justice White in *Gould v Jordan* this year where there were a number of issues that were determined separately and in advance, albeit where there were matters that could be determined on a documentary basis. But there have been other cases where there are interlocutory determinations of matters, whether by separate question or interlocutory determination. My question then, I might start with Justice Lee because the Federal Court is the Court that probably operates in a way less likely to manage them on an interlocutory basis. Is there room for it? Is it a good idea?

Lee J: Well, the answer to that question is yes, but it depends. I think what you have to understand when it comes to this question of matters in the Federal Court is the different history of that Court, compared to the more established procedures in the Supreme Court and the District Court. And, in particular, the fact that the Federal Court has always been a case, subject to something we might touch on later, where all issues are going to be determined by a judge. And, in particular, at the early stages of the development of the defamation work in the Federal Court there were judges, with the possible exception of Justice Rares, who had come out of a tradition where trials were also conducted by judges alone. And so it was thought by those judges that there is some efficiency, particularly in a docket system, for the judge determining all issues as quickly as they can at a trial. And, like all discretions in the Federal Court, it's supposed to be exercised conformably with part 5B of the *Federal Court of Australia Act*, and that is the efficient disposition of the case.

My bias is to try to get on trials as quickly as possible, but if there are sound reasons in an individual case, then the parties should raise it at the first case management hearing. The first case management hearing will generally occur immediately after the filing of the defence. One will understand what I'll describe as the architecture of the case, the likely defences which are going to be run. If there is a perceived real utility, for example, in determining issues of meaning early on, because that's going to vastly decrease the scope of any trial, then that should be fairly evident early on. And I don't think you'll find, particularly as we go forward, I don't think you'll find judges who will be so obsessed about the idea of avoiding interlocutory disputation that they will not adopt proportionate and sensible approaches to dealing with issues discretely if the bespoke circumstances of the case commend it.

Judge Judith Gibson

D Sibtain: So Justice Sackar, in response to that, you sit as the list judge in the defamation list in the Supreme Court, which has a long history of case management to bring matters by one judge efficiently up to trial. Why has that worked as a system or not worked?

Sackar J: Well, I think it does work. But the complication in NSW in libel is the presence potentially of the jury. And that's why I think that the serious harm defence or serious harm point, and given the fact that it's a judgealone determination anyway lends itself to, whatever else one might think about it, a determination. Now of course it can be determined on the first day or two of a trial, but you wouldn't want the parties, if there's a serious point to be made there, pardon the pun, it's best to be determined sooner rather than later

Judge Michael Lee

because the jury trial will take longer, will cost more, and it creates greater uncertainty for everyone concerned. Now, it won't be every case… that fits into that mould, but I do think that there is a very great prospect, that is these points being raised, as they have in the UK, being raised as preliminary issues. And I think that factor will be case managed accordingly.

D Sibtain: Perhaps broadening the topic to general case management or, should I say, the determination of separate questions early. In a judge alone trial where there has not been an election for a jury, do you see any utility in separate determinations on meaning?

Sackar J: Well, the problem with separate determinations in the context. If it's judgealone, yes, of course. The judgealone is a paradise in the sense that one isn't burdened by putting juries in and out of a room as Judge Gibson is obviously incredibly familiar with. But if there is a jury involved or likely to be involved, one problem you have about determining in advance are factual questions, which may be their domain. And in NSW, that is more complicated. In a Federal Court system where there is no jury, then by consent and otherwise, the factual issues relevant to the particular issue can be and are susceptible of determination in a confined way. I presume that's what Justice White did in *Gould v Jordan*. Obviously, it was a consent regime, the parties clearly participated in it. It's a novel one from my point of view. But equally, I can see that if the factual issues are not controversial, or are within a narrow ambit. It's very difficult reading that judgment to see how much factual material was in fact involved, although I think the hearing took two days, on the 30th of November and 1st of December. There must have been some factual material, but the impression one gets is that there must not have been much factual controversy. So on that basis, yes, it's clearly an efficient way of dealing with it.

D Sibtain: So Judge Gibson in cases where there isn't an election made for a jury and the parties are happy to do that, do you see any attraction in having a separate determination of meaning in advance of the rest of the issues in the trial?

Gibson DCJ: Well, while I was reading a lot of English cases recently, I also read some articles which suggested that increasingly, these applications are being brought at trial rather than as an interlocutory application beforehand. That seems to be an increasing trend. I don't know if that will be the case here. Can I say this about jury trials? I'm not sure that they do take longer and cost more. They're certainly much more reliable. This is the time when I start saying to people 'bring out your perverse jury case, come on, where is it?' And there's only been one under the new legislation, that's that *Kencian v Watney* case up in Queensland, and the jury went back the second time and found for the defendant all over again. So who do you think was right, the jury or the Court of Appeal? But having got that off my chest. Look, I agree with everything that my colleagues have said. I think that these are very good points, I think this is going to be important. In terms of case management, the problem with the docket system is that it can be expensive, it's the same judge all the time. Whereas if you've got a case management list, where – and also I have the advantage, if I'm running the list, if I do seem to express a view or an opinion, or look as if I

favour one over the other, I won't be the trial judge, you see. So that's the attraction. I see those as being relevant issues in relation to case management. But each system, of course, has a lot to offer to practitioners wanting to consult the system which has got the best result.

Lee J: Can I just pick up on something that Justice Sackar just said which I think is important, and that is what occurred before Justice White was something which evolved out of a highly cooperative and sensible approach taken by practitioners. And if experienced practitioners come along to a judge and say 'an early determination of this issue is going to assist not only in the curial resolution, but perhaps in the noncurial resolution of the case', then a judge will take that terribly seriously. And so, one of the things we try to do before the case management hearings is ensure that practitioners speak together and think of ways to, you know, properly calibrate the procedures, depending upon the issues thrown up by the pleadings.

M Olsen: Can I just ask one followup question that I think arises from both of those comments. Judge Gibson, you talked about how sometimes separate questions are determined during the trial, and I was going to ask a question about the *Elaine Stead* case, Justice Lee. In that case, with the consent of the parties, you determined meaning at the close of the applicant's case. Do you think if there is a separate question put to the judge on meaning, do you have any views on when that is best to be determined? Whether earlier, after, is there a benefit to hearing the applicant's case?

Lee J: Well, it seemed to me a sensible idea in that case because I thought meaning was as plain as a pikestaff. And I always thought that, and it was going to make writing a judgment a lot easier. More importantly, it was going to reduce the hearing time because a whole series of defences to imputations that I just thought weren't going to be carried didn't need to be run. But,

Judge John Sackar

look, it just depends upon the case. I raised it in another case that I'm hearing at the end of January. I said to both parties, 'if you wish me to determine [meaning]', I think it was sort of last week. I was quite happy to do that in the context of a case management hearing if both parties agreed. They didn't. And therefore I said, 'well, I'll just leave it for trial'. So I've got no *a priori* views about when it should occur. It just depends upon the circumstances of the case.

M Olsen: And I think that leads to another question, which is about, you know, what benefit you gain from submissions on meaning and how, as a matter of practice, and this is for all the judges, how you determine meaning. Is it a matter of first impressions?

Gibson DCJ: I have to be the ordinary reasonable reader, viewer, whatever. And I always start with, of course, Justice Hunt's classic explanation of how to do this in the *Marsden* decision. I read it regularly because it really is the last word in how to deal with these issues. I try and think of myself as being, not quite sitting on the Clapham omnibus, but sitting there, being somebody who's read this in a bit of a hurry, perhaps gone back and seen it again, or if it's on the radio, I'm conscious that it's transient. So that's what I always do. I try and pretend I'm the ordinary reasonable reader, or whatever.

M Olsen: Justice Sackar, do you have any comments on that, anything to add?

Dauid Sibtain

Sackar J: Not really but you must bear in mind that the section 7A regime operated for a very long time in NSW. That was a preliminary determination by the jury of the meaning. And it was done of course because of the history of long trials, particularly *Parker v 2UE*, having taken weeks at the end of which the jury came to a view that the imputations simply didn't arise. And the Court of Appeal was incensed that so much time had been taken, circling a number of issues, which ultimately proved to be irrelevant. It's clear that in some cases, if there is no factual issue concerning identity, if there is no factual issue concerning publication, as there is in a slander case, or often is in a slander case, determination of meaning, in the absence of a true innuendo, where you are simply talking about natural and ordinary meaning cries out for determination. The meaning is not going to get better or worse, depends upon whether qualified privilege, comment or justification is on the landscape. It is divorced from those issues, because the first step the plaintiff has to take is to prove: (a) that the meanings arise and (b) that they were defamatory. And that's why 7A operated fairly successfully. And if it's a judge alone determination of meaning, then you've got the reasoning process of the judge, which can be scrutinised by an appellate court. Of course, if you've got a jury determination under 7A, the appellate jurisdiction in those years was devoted to whether the judge misdirected the jury on that issue, and/or whether in advance, it could be regarded as perversity. But in terms of determination of the natural and ordinary meaning, it is clearly cost effective in the absence of any other issues such as identification and publication, and even then it can be confined factually and very often should be.

D Sibtain: I think it's over to you, Justice Lee.

Lee J: Well, I don't think I don't think there's anything I can usefully add to those two very learned descriptions of how one should approach it. Save to say this, which picks up specifically on something you've said, that is the use of submissions. The extensive written submissions that I have seen on meaning deconstructing the publication, as I described it in a judgment, like one was deconstructing a haiku, are really of very limited use. As both judges have said, it is something which ought not be over-complicated.

D Sibtain: So we don't assist you very much?

Lee J: No, not really [laughs].

D Sibtain: Fair enough, just wanted to get that off my chest. We've got to move on to another topic of juries, which has been raised, which is a topic that applies to all Courts, probably with more of a leaning in the District Court because there are more District Court jury trials perhaps than in other places. But I might start with Judge Gibson on the question. Are there fewer jury trials in the District Court? Are you hearing more trials on your own?

Gibson DCJ: No, no, there are far fewer, we've had really about four or five over the last, we were lucky to get one a year. But can I say this about juries? That we trust them with enormously complex, and often quite distressing cases in crime. If it weren't for the jury system, our criminal law system would collapse. We'd have to triple the number of judges we had, just so that we could run them the way some civil law countries do. So, every time you say 'I don't like juries', I sound like Wendy and Peter Pan, I'm not saying a fairy dies. But, really, you make a criminal somewhere very happy. So, juries do have a place, they have an

important place. And I think being on a jury also has a very important educative factor for members of the community. I never tire of seeing them come into the witness box looking terrified. And by the end of the jury trial, they've worked something out. They've been judges, it means something. I think there is an important part of freedom of speech that is protected by having juries. And I'm not referring to the fact that politicians notoriously do badly in front of them, I'm referring to the fact that there's a lot of history there. So, I'm hoping that there will still be some role for the jury in appropriate cases. And I mean, obviously, you know, the Eddie Obeid-type case, that sort of thing, the big case involving freedom of speech, yes. Not, however, the little backyarder where two neighbors have fallen out over who should pay for the fence.

D Sibtain: Why do you think there's been an election for more judge-alone trials in your Court?

Gibson DCJ: There are two kinds of lawyers, there are trial lawyers, and there are what Americans call discovery lawyers. We don't have so many trial lawyers now. But I can tell you that the lawyers in the District Court, or the barristers who consider that they are good with juries, are increasingly asking for juries. I've really noticed this over the last year, I'm having an increasing number of requests, and I'm having them from plaintiffs too, most unusually, they want to go before a jury.

D Sibtain: Well to mix it up, I'll ask Justice Lee next, because a jury is a dispensation from the usual practice of the Federal Court. What's your view on juries and their utility?

Lee J: Well, as you know, the combined effect of sections 39 and 40 of the *Federal Court of Australia Act* is the usual mode of trial in the Federal Court is by judge alone, and a jury will only be ordered if a judge thinks the interests of justice render it expedient to do so. It's fair to say that no judge, [laughs], that very rarely has a judge considered it expedient to order a jury. There are a few isolated examples. Now, having said that, thinking about it, the increase in pure defamation matters in the Federal Court is relatively recent. There, I think, is a prevailing view amongst the profession that the result of the Full Court's decision in *Wing* is the Federal Court will never order a jury. That's not what *Wing* says, if you read it. There are cases where, depending upon what I think you could properly describe as exceptional circumstances or unusual circumstances, it would be appropriate to order that there be a trial by jury. The quintessential example, of course, would be something which involves evolving community standards, and one can only see what's been happening in the community over the last few years concerning a certain aspect of human interactions which may involve circumstances where it would be appropriate to order a jury. So if there was an appropriate case, I wouldn't suggest that people not make an application notwithstanding the historical fetters. Such an application will be successful.

The other two quick points I'd make concerning the Federal Court and juries are this: being a national Court, and this is touching upon something I mentioned earlier, there is a different tradition towards jury trials in various states. South Australians, West Australians, Queenslanders, New South Welshmen and Victorians all have very different experiences about civil juries. And, of course, we pick up the state systems under section 79 of the *Judiciary Act* if a jury was awarded. I noticed recently, for example, if there was a civil jury in a Federal Court defamation case in Tasmania it would involve seven jurors. So it's that national… a lot of the reluctance in defamation cases comes out of that very varying history of juries in respect of defamation cases throughout Australia.

D Sibtain: Justice Sackar, in a previous life you were a jury advocate and appeared before many juries in defamation trials. Now, sitting on the other side of the fence, do they remain as good and essential as they always were?

Sackar J: I don't think they do. Juries give rise to philosophical differences amongst practitioners. Some of the philosophical differences are based on purely romantic notions. Patrick Devlin once described the jury as 'the lamp that chose that freedom lives.' And that's all very interesting, but the problem is this: judges are obliged to give reasons. They're obliged to state clearly, concisely and comprehensively why someone wins and why someone loses. The jury doesn't have to do anything of the sort. Now, there's a slight qualification, which Judge Gibson would be incredibly familiar with, and that is, many defamation juries are given a series of questions, almost like a multiple-choice HSC paper. That, in and of itself, can be regarded as fairly superficial. Over the period of time that I've been thinking about the law of libel and practising in it both as a counsel and as a judge, I've come to the view that I do think these days juries do not really make any contribution to any issue in a libel case. The old idea that a jury was more reflective of community standards, more in tune with the language is just, it's simply not tenable these days because of modern judicial method. And so, consequently, for my part, I know Judge Gibson disagrees with me, I do regard juries as more difficult, and as I've said they don't give reasons, which is antithetical to a democratic system in my view.

And, secondly, the litigation over the years has become labour intensive, it always perhaps was, but it's hugely expensive. To worry about the discharge of the jury, and let's face it, it has happened. And when it does happen, it has dramatic consequences on the litigants involved, both their stress levels, and of course their pockets. I just think that, as a risk factor alone, in a highly technical area like libel, should be removed from being a risk factor at

all. So, my view, I've come the full circle. I would have had an entirely romantic notion of juries when I practised years ago, but my views have changed dramatically in that field.

M Olsen: Thank you Justice Sackar, that was an interesting insight. Dauid's asking me to jump around just a little, which is making me freak out, but now we're jumping to damages. I was going to ask, and maybe I'll ask you first Judge Gibson, how do you assess damages from a practical perspective? We know that the recent amendments to section 35 require that aggravated damages are awarded separately from general compensatory damages. When you're approaching the question practically, how do you do that? And will the new changes, where the aggravated damages are required to be awarded separately, have any impact on that practice?

Gibson DCJ: Well, if you read the judgments that I've handed down where I've talked about damages, you may have picked up a hint of my concern that so many judgments just consist of setting out in often less than a paragraph, sometimes little more than a sentence, 'doing the best I can, I'll give the plaintiff X dollars, inclusive of aggravated damages.' I find this to be antithetical to the kind of careful analysis that used to be the case in personal injury cases about 30 years ago and which has really gone by the board generally. I think that there's a lot to be said for giving careful and cogent reasons for the very reasons that John Sackar has referred to, the need for somebody to see why it is that that sum of money was awarded. Because that's often the most important part of the judgment, as some of the English judges have commented, they say 'well people want to know, yes, but what did he get?' you see. So, that's why it's important to set out… so I go through and I emphasise the evidence of hurt to feelings, any specific feature that's unusual or different. One case I had, the plaintiff had to explain to his children because something had been said at school, that sort of thing. So that's the personal touch. If there's evidence of that sort, I think it's important to put that in. In terms of aggravation, I've never been a fan of having separate sums for general and aggravated lumped in together so you don't know the difference. It just creates problems on appeal. So, I'll probably continue my naughty habit of setting out, 'well this is the general damages, but I would add X for aggravated damages' and waiting for the Court of Appeal to shake its head and say no. Well, but the thing is that at least they know, and I've never had a judgment set aside because I did that, even though they keep saying that people don't do it.

M Olsen: Justice Lee, I know that in some judgments you've awarded a lump sum, is that…?

Lee J: Well, I always have because they're compensatory damages. But there's much to be said for what Judge Gibson just said and, in these reforms if one picks up on what Justice Sackar said, and that is transparency. There is an ability to fudge the issue when one's rewarding a lump sum for compensatory damages, being pure compensatory damages and aggravated damages. The one thing about this reform will be to introduce some degree of transparency in the reasoning process by which you have, or perhaps reasoning process is putting it too highly, about how one has come to the figure that one has come to.

M Olsen: There was one aspect of section 35, I think [there] has not been much commentary on it. And that is that, now the cap can come off for all aggravatory circumstances. So previously, the position was that it had to be aggravation based on the circumstances of publication. That's not the case now. Do you think that that will have any significant impact on the award of aggravated damages, but also the cap coming off, given that they're quite a different nature in a way?

Lee J: Well, I suppose anything which allows you to have regard to a broader range of circumstances is going to be of significance. How that plays out in the case law, who knows.

M Olsen: And Justice Sackar, did you have any comments on the award of aggravated damages separately to general compensatory damages, and your general practice about assessing damages?

Sackar J: No, no, I think that in every award of damages the award is very largely impressionistic, and it is always a balance between, as section 34 states itself, the appropriate and rational relationship between the harm sustained, and the particular person and his or her reputation. It's always a balancing act, and it's a balancing act, an impressionistic one, about which reasonable minds differ. Hence, the Court of Appeal will often differ on the issue. But I think at the end of the day, it's an idiosyncratic approach, although there are obvious pointers that one has to take into account. So the answer is no, I think it will just simply, it's a cliche, but it will turn on the facts of the particular case. And in a case where there is a resounding need for aggravated damages for whatever reason, then it'll be appropriate and rational.

D Sibtain: Thank you Justice Sackar. Now, can I move on to something that precedes damages, namely, a defence, the responsible journalism defence. Statutory qualified privilege, many tears have been shed over that by media defendants trying to convince judges that their conduct was reasonable. How do you think, and I might start this time with you Justice Sackar, how do you think the responsible journalism defence is going to provide for the media a defence, and do you think there's going to be a greater chance of success for media defendants?

Sackar J: Well, I think it's going to turn on the individual journalists, as it always has historically. It's going to turn on what he or she has done. And the fact that there are certain factors in the Act which obviously, as the Court is in New South Wales

bound to take into account, it's going to be very, very factually specific. And so, again, it's going to be a juxtaposition - what is the nature of the imputation, or imputations, how much investigation has taken place? How many opportunities, or not as the case may be, has the plaintiff been given to respond? And so there'll be a checklist, and I think most judges will... Historically, I think many judges have been reluctant to apply with a certain liberal attitude, qualified privilege, particularly common law qualified privilege, and even section 22 in the old days, in a mass media environment. The legislation now will require a judge, appropriately, to go through a checklist and to consider these matters. But it's going to turn upon the old, old story of how your journalist scrubs up in the witness box. And if and when the person is called, how plausible is the proposition placed by the journalist on the table as to the extent to which he or she has gone through the various checklists. And I think the Act itself is going to require re-education in some media outlets as to precisely what is required if they want to have a responsible journalism defence held up.

D Sibtain: Appellate decisions frequently say that, in the context of the statutory qualified privilege defence, a counsel of perfection isn't required. But invariably, or more often than not, those defences don't succeed. Applying that absence of counsel of perfection, Justice Lee, how do you see the responsible journalism defence, perhaps, allowing even less perfection?

Lee J: Well, it's not going to be as significant as it would have been if the 2013 UK model had been adopted as some people were advocating, particularly given the way Courts in Australia have approached the issue of public interest quite narrowly. It may be that the joy that some people were hoping to receive from the responsible journalism defence may not be reflected by the reality. It's a little unclear when it comes to the way in which it's been enacted, how far it really has departed, given it's very much a hybrid from what was originally intended by those advocating for it. So, again, it'll just have to play out in the cases, but… if I had a degree of intuition and prognostication here, I don't think you're going to find it as radical a change as one would have originally thought may have been the case.

D Sibtain: Judge Gibson?

Gibson DCJ: Oh, I agree with what you both said, and I really don't have anything to add.

M Olsen: I might ask about what remains for section 30. So, assuming the media won't be relying on that section, how do you see it being used? It's been pared back so that the public interest and responsible journalism elements have come out. Might it be used in cases where a common law qualified privilege defence is also available, or maybe it will sit on a spectrum between a reply to attack defence being available in a very small audience, and then a large audience with the mass media? Is there somewhere where it might sit in the middle of that? Justice Sackar, maybe you have some views on where section 30 can assist in future?

Sackar J: Well, I can only say this. The tort of defamation has had more statutory tweaking, innovations and fiddling than almost any other cause of action in the history of the law. And, to have a common law dynamic where the factors can be developed case by case, as opposed to a statutory formula, will inevitably cause a problem because it raises for the judge and for the parties concerned, particularly those who are running or wanting to consider these defences. I think it is perplexing, frankly, and I'm not quite sure that the delineation between the two is going to be all that clear. It'll just have to be worked out on a case-by-case basis. That sounds like I'm dodging the issue, and I sure am, because I don't think there is a clear answer to it. And the more statutory innovations you have, especially in this area, certainly the more complications you create notwithstanding the best will in the world. And I think Lord Sumption said something about this in the judgment of *Lachaux* that in the UK they had the similar experience, the more tweaking is done by the legislature, particularly when it is not entirely clear, explicitly, that the common law is being displaced, to what extent it's being displaced, to what extent it's being placed in a different context. The legislators sometimes leave things a little bit up in the air, and I think this is one example.

M Olsen: Justice Lee, do you have any views on any lasting role for section 30?

Lee J: Justice Sackar said at one stage during his remarks that it might be thought that he was dodging the question, but I am going to dodge the question because I have to look at this specifically in about three months and given Chatham House rules don't apply I think I should dodge the question.

M Olsen: Understood, thank you.

Gibson DCJ: Me too.

M Olsen: Understood, thank you [laughs].

D Sibtain: Well there we are.

Gibson DCJ: Now let's cut to the chase. Let's get to the *Social Media Anti-Trolling Bill 2021*. Because I think that's something that we're all interested in and concerned about. So having taken over…

D Sibtain: Keep going.

Gibson DCJ: Well, I'm looking forward very much to hearing what my colleagues have to say about that. Would you like to tell us what you think?

Lee J: Well, I printed off the exposure draft yesterday but I really haven't had the opportunity of looking at it in any detail. I will make one comment about it. This will mean that any defamatory material which is posted on any social media will be

a matter within federal jurisdiction, because… it'll be a matter arising under an Act of Parliament. Look, I think there's a lot of water under the bridge that will occur before that becomes enacted. How closely any final legislative reform will have to the exposure draft is something which we'll see in due course. Social media defamation is a big issue in our Court, we have seen a rash of applications under… the preliminary discovery rules… One of the reforms, as you'll recall, when this was announced was the notion of getting orders to require revelation of information concerning people who have posted a comment. Of course, preliminary discovery which has been available in the Federal Court for a long time, it's also available under the UCPR. It's already been a mechanism by which well-heeled people have taken advantage in order to obtain access to information or to allow them to bring a proceeding.

One of the problems we have in our Court is there have been, unlike the Supreme Court and the District Court where practitioners have often made a choice depending upon what they regard as their likely damages award as to whether they commence proceeding in one or another Court. There has been a bit of a rush over the course of the last six or eight months where cases have been commenced in the Federal Court which really ought not be there. One of the difficulties we have, of course, is that we have nowhere to transfer them other than what was the Federal Circuit Court, now the Family and Federal Circuit Court. One of the things that I think will happen over the course of the next couple of years is there will be a couple of specialist… particularly I think this has been a real problem in Melbourne… a couple of specialist practitioners who may well take over a defamation list in those Courts.

But this is a real challenge for, I imagine, all Courts, these sort of social media cases and they do present some real challenges.

M Olsen: Judge Gibson, one of the quirks of the proposed legislation is that it refers to 'trolls' in the title, but I don't think you'll find a reference to trolls in the body of it.

Gibson DCJ: Not a one. 44 mentions of 'defamation', not a one. But the other problem is whoever drafted this forgot something. They forgot that abuse is not defamatory. I had a case on this recently, I had one of those YouTube jolly singing cases where somebody was (pardon the language) an "ass licker", someone else was "the Terminator", you know. And of course, this is the trouble, vulgar abuse is not defamatory. This is *Mundey v Askin*. So the first problem is that if this is aimed at stopping people who send anonymous insults to the mother of that dear little girl who was missing for so long, it's not going to work.

I had the good fortune on the way down here to run into Professor David Rolph on the street. And I think what I can say safely is that basically all of the concerns that he has raised, which have been the subject of quite extensive media report, and also the concerns of Michael Douglas, who's written an excellent piece in *The Conversation*, I have to say, I endorse. I think it's going to be a disaster, and the Federal Court is going to have a tsunami of litigants in person, you're going to have people on social media saying, 'Well, look, why should we bother vetting? Why should we bother even looking, because basically we don't need to worry anymore because ISPs are liable, full stop.' So you see the ISPs are going to, they're just going to retreat into laziness. And that's the difficulty that we've got, you're going to have a loss of pre-checking. And of course, then you've got all of the inconsistencies where you have different rules for liability on the Internet resulting from copyright, misleading and deceptive conduct, contempt, you've got a whole different concept of who's liable in those areas of the law. So, I just go back to something that I always quote on this, every time I'm asked to speak at a seminar I refer them to the without peer, excellent report of Kylie Pappalardo and Nicolas Suzor who say, in their best scientific language, online intermediary liability law in Australia is a mess, remains a mess. And it's just become an even bigger mess thanks to this particular proposed piece of legislation.

It also shows a complete lack of understanding of how the Internet functions. I mean, what's Peter Dutton going to do? Is he going to ask every single one of the thousands of people who called him an apologist for rape, is he going to sue them all? Has anybody mentioned Barbra Streisand to him? I mean, it's a recipe for disaster. And, also, if they're not doing this in Canada, New Zealand, the UK and the other common law jurisdictions, chances are it's not the simple answer it looks like being.

M Olsen: Justice Sackar, you were commenting earlier on defamation being an area where there's been a lot of legislative intervention with common law principles that have developed. One of the aspects of the new legislation is deeming provisions about publication. One aspect of that is deeming social media page operators *not* publishers, which is overriding I suppose the recent *Voller* decision. And then another aspect is deeming social media platforms publishers, although most people would say that doesn't really change the current position. Do you think there is any danger in prescriptive legislation regulating who is a publisher and who is not?

Sackar J: Well, I think there is because I think it'll be progressive, it'll be a work in progress for obvious reasons. So social media, which dominates our lives, is one of the most potent innovations in the media in the history of the planet. And it's still early days in terms of how Courts best grapple with the potency of social media and social media platforms. So, the answer to the question, I think, has to be seriously qualified. I think it has to be regarded as a work in progress. Because I

think we are yet to discover the full depths of how social media can operate and deeming provisions are very interesting but they tend to be a little restrictive. And so the difficulty with that is it may not fit the justice of every single case. And I think it'll just have to be reviewed. There'll be examples no doubt in the future which will require the legislators to have another look at it, but certainly I think it's a work in progress.

D Sibtain: We've probably got time for one more question and I'm going to ask an esoteric and wishy washy one. Is defamation law tying up Court resources? Is it an important matter that needs determination by the Courts, every single little backyarder, every single media publication? How important is it?

Gibson DCJ: In my spare time, I sit on a committee which looks at costs law, under the LPUL. My interest in legal costs comes from my very great concern about the enormous impact that I see on a day to day basis of defamation actions on ordinary members of the community who have to sell their home, who come to my Court in tears. To me, the cost is terrible. I think if we have a justice system where it costs half a million dollars to run an interlocutory application, we have a justice system that is not working. I have very strong views on this, and I remain deeply concerned. I am particularly concerned with how changes have been made to the costs assessment system which mean that, if you like, the lid's been taken off. Practitioners tell me with great concern that actions are becoming increasingly expensive. There are silks who are charging unimaginable figures per day in terms of what they're doing. I'm very troubled by it. Are we really the sort of country where we want to be the libel centre of the world? Is it attractive that we hear more defamation cases in this country than the UK and the US combined? Is this what we want to be? Why are we so sensitive about our reputations? David Levine told me he thought when social media was invented, that that would be the end of defamation because everybody would be able to just express their point of view. How wrong he was.

D Sibtain: Justice Sackar, how important is defamation?

Sackar J: It depends if you're defamed or not. And if you get defamed it's terribly important. But one of the things which, in my view, is much to the credit of the Federal Court is the promptness with which these matters are dealt. There is very little point, if vindication is to play as important a role as the award of damages or anything else, it's very important that the person defamed is able to be vindicated sooner rather than later. And I mean, very much sooner rather than later. So, the efficiency of the Court, I think makes it relevant. And as I said, it depends if you're defamed or not. Reputations can be trashed, and with serious consequences and serious financial consequences. That's plain and obvious from the case law over the many years. And I think one of the great advantages of the docket system, if I may say so, is the ability of the judge to grapple with the case, move it along quickly, give parties a hearing date, determine case management issues without the concern of the spectre of a possible jury trial at the end of a long road. And, to that extent, I think of course it's an important tort, you're not going to get rid of it because every taxi driver in Sydney will have a view about that as they have done for many, many years about defamation law reform. So, I don't think it's going to go away in a hurry. It needs to be put into context, but I think promptness in determination is fundamental.

D Sibtain: Justice Lee?

Lee J: I've got to comment on both of the principal remarks that have been made by Judge Gibson and Justice Sackar. It does concern me that in such an important individual cause of action, the ability to commence a proceeding in order to obtain vindication is out of reach to most even relatively wealthy individuals. And any justice system which has allowed itself to become so complex and so expensive will alienate itself from the people it's supposed to serve if that is required to continue. And that's linked to the point that Justice Sackar made. One of the things that I would like to see, and one thing that I'm trying to do in defamation cases, is fix the hearing date at the first case management hearing and fashion procedures to move back from that date. That's not going to be the approach that some docket judges make but the more time that you allow to pass between the case commencing and the case being determined at first instance, or alternatively going to a mediation where it hopefully can be resolved, the more time that elapses, experience shows the more costs will be expended, and the more unnecessary costs will be expended. So, the desire is, consistently with the dictates of justice, to try to ensure that practitioners approach these cases in a proportionate and efficient way in order to minimise costs as much as possible and get the cases on.

And that's why I commend anyone who's commencing proceedings in the Federal Court to read carefully the Practice Note, both the General Practice Note and the Defamation Practice Note, which encourages people to think about how this case can be best run and resolved in accordance with the overarching purpose. This is not mere rhetoric. Sometimes I feel, and perhaps defamation law is a quintessential example of this, that getting practitioners to think in a new way about how litigation is run is a bit like turning a battleship around. But we've got to do it because these problems will just continue to mean the legal system is alienated, as I said before, from people it's supposed to serve.

D Sibtain: I think that probably brings us to our time. I'd like to thank our learned panel of judges. It was wonderful to hear all of your insights as frankly as you're able to do pending reserved judgments or cases to be heard.

Choppergate: The Urgent Application to Get the Melbourne Media Helicopter Back in the Sky

Conor O'Beirne, Associate, Thomson Geer, tells the story of the urgent application to oppose CASA's designation of the Melbourne CBD as a no fly zone, preventing the Melbourne media helicopter from being able to cover the COVID protests.

The last week of September is one of the best weeks of the year to be in Melbourne. Finals fever grips the city. The CBD buzzes. And even if you're not a footy fan, it's the first long weekend since early June.

Enter COVID. 2020 was a write off. 2021 too. Our holy day, the last Saturday in September (cruelly now the first Saturday in October) was ripped away from us. First Brisbane, now Perth.

As if losing the AFL Grand Final wasn't a bitter enough pill, over what is meant to be one of the best, most enjoyable weeks of the year, the city was gripped by disgraceful and violent protests.

With patience, unity and decency at an all-time low, the city erupted.

This isn't an article about the protests, nor the protesters. This is an article about something else that should never have happened.

This is an article about how the Melbourne media chopper – whose footage is shared between Channel Nine Channel Seven and the ABC – was grounded.

As Melbourne descended into an angry stupor, careful, considered and transparent coverage of the protests wasn't just required, it was essential.

The shameful footage of Paul Dowsley being hit in the head by a can of energy drink is, in the worst possible way, iconic. It captured the city at its worst.

As coverage of the protests extended into Wednesday, Victoria Police put in a request to the airspace regulator – the Civil Aviation Safety Authority (**CASA**) – for the city to be declared a no fly zone.

They said live streaming of the protests from the media chopper was giving protesters on the ground who were watching the footage on their phones an unfair advantage and exposing their members to risk.

CASA agreed. A Notice to Airmen (**NOTAM**) was issued, and the airspace within 3 nautical miles of the Melbourne CBD was off-limits. No aircraft were allowed in without the clearance of Victoria Police.

Those familiar with Australia's airspace laws and regulations may find this odd. Given the CBD is what is known as "controlled airspace", shouldn't that be handed over to Airservices Australia, the statutory body set up to control and oversee the regulation of "controlled airspace"?

A great question. Which was promptly answered with a second NOTAM, which revoked the first. Now, no aircraft were allowed in the "controlled airspace" without the clearance of Airservices Australia, or the "uncontrolled airspace" without the clearance of Victoria Police.

We digress. The term unprecedented has been abused these past two years. Unprecedented this, unprecedented that. It's an ugly term, often used incorrectly and as a filler. Well, we're going to go there. CASA's decision was unprecedented.

This was a disaster unfolding in the middle of Melbourne, and all of a sudden the media weren't able to cover it from the sky.

Footage of protests from the sky gives a sense of scale. You might be told, "here's footage of the protests as the protesters walk down Flinders Street, past the T-intersection with Elizabeth Street, as they head towards the Westgate Bridge." Footage on the ground can't tell that story – you can't roll an extended clip to show the swell of protesters as they fan out along Flinders Street. Much like reporting a name in the context of a criminal proceeding, vision matters. If nothing else it's important for context: words alone don't capture the scale of a protest, let alone the one in Melbourne that week.

So, with the second NOTAM in force and the media chopper unable to capture any footage, we needed to work out a way in. Live streaming the footage was the non-negotiable. File or delayed footage wasn't the tonic. Melbournians needed to see what was unfolding in their city in real time.

From late on Tuesday afternoon our deep dive into the murky and technical world of airspace regulation began. Counsel were briefed – the inimitable and long-time friend of the media, Will Houghton QC, and administrative law guru Collette Mintz – and we set to work.

Judicial review. That was our way in. Reviewing the decision of the CASA to issue the second NOTAM.

An urgent Federal Court listing for 9am Wednesday morning sought. The application and supporting affidavit were drawn up overnight.

The documents went in not long before 9am and our application was underway.

3 and a half hours later, we obtained interim relief. The second NOTAM was stayed, pending final determination.

The chopper was back in the sky.

Upon receipt of the Court's decision, CASA decided to permanently withdraw the NOTAM in the interests of safety. A new NOTAM wasn't issued.

The chopper was back in the sky for good.

After the NOTAM was withdrawn, there was nothing left to litigate. Precedential value of a decision on the question of CASA's delegation aside, a final determination of a thing no longer in force was neither an efficient nor appropriate use of the Court's time or resources.

Questions remain about the legality and appropriateness of any delegation under Australia's airspace laws remain, but the primary objective was realised.

The now petering-out protests were once again able to be covered from the sky: public backlash against the protests and the protesters grew and Melbourne's healing started.

We won't be quite whole again until the MCG hosts the AFL Grand Final, but we're getting there.

Report: CAMLA AdTech Seminar

By **Amy Riley,** Senior Associate – Allens

As policy makers around the world seek to regulate AdTech and as the 'tech giants' proactively make their own changes as 'custodians' or simply react to the regulatory landscape, it is important for consumers, businesses and their advisors to understand what these changes actually mean for how they do business and how data is sold, collected and used. To the benefit of attendees, on 29 September 2021 CAMLA's **Eli Fisher** (10ViacomCBS and co-editor) and **Sophie Dawson** (Bird & Bird) facilitated a panel of experts to explain changes and developments from legal, regulatory, commercial, domestic and international perspectives.

The panel comprised:

- **Alex Dixie**, Partner of Bird & Bird – Head of AdTech (London)
- **Francine Cunningham**, Regulatory and Public Affairs Direction at Bird & Bird (Brussels)
- **Joey Nguyen**, Co-Founder and Head of Technology at Venntifact
- **Josh Slighting**, Head of Data & Digital Audience for 10ViacomCBS
- **Thomas Jones**, Partner of Bird & Bird (Sydney)

Alex Dixie provided an overview of the developments of the Apple and Google AdTech ecosystems and how their various changes are reshaping the flow of data from users to advertisers. Key take-aways included below:

- Apple's AdTech ecosystem has fundamentally changed as a result of the iOS 14.5 and iOS 15 updates. The pre-iOS 14.5 world included the IDFA feature – an identifier for advertisers to identify a device, track the user's activity and target content based on that activity. Advertisers could then share that IDFA with data partners. However, the flow and richness of data that existed in the mobile ad supply chain before iOS 14.5 has slowly been cut off.
- With the 'App Tracking Transparency' update introduced with iOS 14.5, Apple has introduced a process on privacy that has had fundamental changes to the ecosystem requiring apps to request opt-in consent before 'tracking' a user. This has resulted in high opt-out rates by users despite being done previously without notice so, for the majority of users, app publishers and advertisers do not have access to an IDFA or device identifier that has been critical to revenue in the mobile ad supply chain, such as tracking conversions and behaviour across devices.
- The iOS 15 update is focused on email privacy, including 'Hide my Email' functionality and blocks to email tracking, so could result in reduced data available from email marketing.
- Alex deciphered what Google's recent privacy "sandbox"/ Federate Learning of Cohorts (***FLoC***) actually means – a process by which Google has taken third party cookies off the table and will only feed advertisers from sandboxes of no fewer than 1000 users per bucket. This means that advertisers no longer receive individual data and insights…but Google does.

Thomas Jones later provided a competition law perspective on the consequences of these 'fearsomely' complex changes that advertisers and publishers have to navigate and how the 'tech giants' may be able to entrench their dominance through barriers to data.

Francine Cunningham provided a timely 'postcard from Brussels', setting out the developments regarding the proposed EU 'Digital Services Act' tabled to amend the e-Commerce Directive. Law makers in Europe are seeking new laws that target 'very large online platform services' (***VLOPS***) (ie, tech companies with more than 45 million active users per month) and include new market practices that require online platforms to make clear to users if information displayed is an ad and on whose behalf an ad is being displayed (to give meaningful information to the recipient but why they are receiving the ad).

From an enforcement perspective, European policy-makers are seeking maximum penalties that equate to 6% of annual income and extraterritorial scope so that these laws will apply to all companies that supply services to EU citizens even if a company is not incorporated in the EU. At the time of the seminar, there were over 3000 amendments proposed with a goal for the legislation to be adopted in 2022 and implemented in 2023. Francine also noted that there may be a further Digital Markets Act to address the perceived insufficiencies of competition law in regulating 'gatekeeper' platforms.

Following on from the observations from their international colleagues, **Sophie Dawson** and **Thomas Jones** provided a local update on matters including potential legal reforms to expand the scope of Personal Information following the Full Federal Court's interpretation of 'personal information' in *Privacy Commission v Telstra Corporation Limited*; changes to penalties for breaches the *Privacy Act*; and observations of the ACCC's findings from its Digital Advertising Services Inquiry. Thomas noted the significance of the ACCC's conclusion in its Report that Google has dominance (from its access to data, vertical integration

and strategic acquisitions), the ACCC's dissatisfaction with *ex poste* litigation and the corresponding recommendation to the Government that it be given more *ex ante* regulation powers (including such powers to develop a code for the Adtech supply chain and the recommendation that merger reforms specifically address 'big tech').

Having heard from our legal and policy panellists, **Joey Nguyen** (Head of Technology at Venntifact) and **Josh Slighting** (Head of Data & Digital Audience for 10ViacomCBS) shared commercial and industry perspectives that provided practical insights about what the changes introduced or proposed by Apple, Google and regulators mean for business. For example:

- sophisticated players are trying to frame what needs to change and define a clear roadmap for the future;
- companies are increasingly trying to understand what data they are capturing, where it came from and where it is being sent – 'what is under the hood' – and working out what data they actually need to measure and track;
- beyond privacy policies, there is an increasing sense of corporate awareness and concern about whether customers would be happy with the extent of their data being tracked; and
- rapid changes create a 'new frontier' for business that can render certain business projects unviable – educating technical subject matter experts about the consequences of getting it wrong is key so they don't invest in tools that need be thrown away.

There was also discussion about how AdTech reform (or lack of reform) reflecting the perceived philosophies of Apple 'privacy custodian – privacy is a right', Google 'privacy is a choice' and Facebook 'privacy is a trade-off' and how, in practice these 'philosophies' depend on the degree to which money is made from advertising.

CAMLA again thanks the excellent panellists for sharing their time and insight, the moderations Sophie Dawson and Eli Fisher who coordinated the event with James Hoy, and to Bird & Bird for its support in hosting another excellent CAMLA event.

Ian Angus - 1948-2021

The media law world lost one its most experienced and respected practitioners with the unexpected passing of Ian Angus on 31 October 2021.

Ian was born in Bedford, England on 6 September 1948. After finishing his schooling in Hertfordshire, he studied law at Manchester University, before commencing his legal career in London. A desire for travel and adventure saw him come to Australia in the mid 1970s, where he landed a job at Stephen Jaques and Stephen, as the firm now known as King & Wood Mallesons then was. After a couple of sojourns back to England, Ian finally settled permanently in Australia, and at Stephen Jacques & Stephen, in 1980.

The firm had acted for *The Sydney Morning Herald* since the early colonial days and, by the time Ian came on board, the Fairfax empire included the Seven Network and the Macquarie Radio group. These clients formed the basis of a thriving practice for Ian, together with the firm's other media partner, Graham Bates, but there were many other media clients who had the benefit of their services along the way, including AAP and Sky News, to name just a couple.

Among Ian's more prominent cases was his defence of the proceedings brought by John Marsden against Channel 7, culminating in a lengthy and highly publicised trial and, in one of his rare forays into the world of plaintiffs, his representation of Andrew Ettingshausen when he famously sued HQ Magazine over the publication of photos of him naked in the shower.

Ian had a sharp intellect and a kind and gentlemanly manner. He trained and nurtured numerous of today's media lawyers with his wisdom, superior legal skills and good humour.

After retiring from Mallesons Stephen Jaques (as it had become), he joined Banki Haddock Fiora as a part-time consultant in 2011, giving a whole new generation of media lawyers the benefit of his mentorship and guidance, and continuing to provide clients with his expertise and wise counsel. He was still retained by the firm until his sad passing some 10 years later. He will be sorely missed.

Leanne Norman, Partner, Banki Haddock Fiora
Leanne worked with Ian at Mallesons Stephen Jacques from 1984 to 1992 and then at Banki Haddock Fiora from 2012 to 2021.

The UK Supreme Court Hands Down Judgment in *Lloyd v Google*

David Cran, Head of IP and Tech, **Olly Bray,** Senior Partner, and **Alex Vakil,** Senior Associate, RPC comment on the recent *Lloyd v Google* judgment.

On 10 November 2021, in a keenly anticipated judgment that has significant ramifications for UK data protection, the Supreme Court overturned the Court of Appeal's decision in *Lloyd v Google* and restored the original order made by the High Court, refusing the claimant's application for permission to serve proceedings on Google outside the jurisdiction.[1]

In this article, we provide a summary of the High Court and Court of Appeal decisions, then delve into the key points arising from the Supreme Court judgment of Lord Leggatt (with whom the other justices agreed).

Background

In May 2017, Mr Richard Lloyd (the **Claimant**), a former executive director of Which, filed a class action against Google for its use of the so called "Safari Workaround" during 2011 and 2012.

The Safari Workaround circumvented the privacy settings in place on the browser and allowed Google to place a third-party cookie on the iPhone of any user that visited a website containing "DoubleClickAd" content. Information on the individual's browsing habits (browser generated information (**BGI**)) would be collected via the cookie. BGI was then sold to third parties, enabling them to target their advertising towards consumers with specific interests or attributes.

Google was fined $22.5m by the United States Federal Trade Commission for its use of the Safari Workaround. Mr Lloyd brought the opt-out class action in the English courts on behalf of approximately 4.4m iPhone users. In order to bring the claim against Delaware-based Google, Mr Lloyd had to obtain permission of the court to serve proceedings out of the jurisdiction.

High Court Decision

At first instance, Warby J of the High Court refused the application. The reasoning for the decision was three-fold:

1. the Claimants in the representative class had not suffered damage within the meaning of s13 of the *Data Protection Act 1998* (**DPA**);
2. the Claimants did not have the "same interest" for the purpose of Civil Practice Rule 19.6(1) because they were likely to have suffered different types of harm (if any at all);
3. Warby J exercised his own discretion under Civil Practice Rule 19.6(2) to prevent the claim from proceeding. He considered it *"officious litigation on behalf of others who have little to gain from it, and have not authorised the pursuit of the claim, nor indicated any concern"*.

Court of Appeal Decision

In 2019, the Court of Appeal unanimously overturned the decision of the High Court.

The Court found that it was possible to award damages for "loss of control" of an individual's data, despite the Claimants not having suffered pecuniary loss or distress. Whilst data was not property, it had economic value as it had been sold to third parties. Following that reasoning, losing control of your data has a value. In reaching its conclusion, the Court looked to previous case law on loss of control of private information.

The Court ruled that the Claimants in the representative class had the same interest. Each had suffered the same harm, as they had experienced loss of control of their data. However, the loss suffered by each in the class was the "lowest common denominator".

In relation to the final point, the Court exercised its discretion and allowed the claim to proceed. The fact that the Claimants had not been specifically identified or authorised the claim did not mean that the claim should be halted.

On 11 March 2020, the Supreme Court granted Google permission to appeal against the Court of Appeal's decision.

Supreme Court Decision

Monetary Compensation

The Claimant's case was that an individual is entitled to recover compensation under section 13 of the DPA without proof of material damage or distress whenever a data controller fails to comply with any of the requirements of the DPA in relation to any of that individual's personal data, provided only that the breach is not trivial or de minimis. This was presented as "loss of control" or "user" damages; a lowest common denominator of loss suffered by each and every individual by reason of the breach.

Reversing the Court of Appeal's decision, the Supreme Court held that, to recover compensation, it is not enough to merely prove a breach by a data controller of its statutory

1 *Lloyd v Google LLC [2021] UKSC 50*

duty under section 4(4) of the DPA: an individual is only entitled to compensation under section 13 where "damage" - or in some circumstances "distress" - is suffered as a consequence of such a breach of duty. It is therefore necessary to prove that the breach of the DPA has caused material damage or distress to the individual concerned. The Claimant's construct of "loss of control" or "user" damages was rejected.

Takeaway: In order to bring a claim for compensation for breach of data protection legislation, it is necessary for a data subject to prove that they suffered "damage" or "distress" – a contravention by a data controller of the requirements of data protection legislation alone is not sufficient.

Representative claim

Lord Leggatt could see no legitimate objection to a representative claim brought to establish whether Google was in breach of the DPA, and, if so, seeking a declaration that any member of the represented class who has suffered damage by reason of the breach is entitled to be paid compensation. However, the Claimant had not proposed such process given that success at the first stage would not itself generate any financial return for the litigation funders or the persons represented. Both courts below accepted that a representative action is the only way the claims could be pursued.

Takeaway: A representative action remains an appropriate mechanism for seeking a declaration that each member of class has suffered damage and could also be used where each member of the class has suffered the same damage (although the latter is likely to be difficult in a data claim).

De minimis threshold

The Claimant accepted that there is a threshold of seriousness which must be crossed before a breach of the DPA will give rise to an entitlement to compensation. The Supreme Court held that the position that the Claimant asserted in each individual case was not sufficient to surmount the threshold and held that it was "impossible to characterise such damages as more than trivial."

Takeaway: The Supreme Court did not provide any further guidance on what constitutes a de minimis or trivial contravention of data protection legislation. There is likely to be further debate as to this threshold when claims are asserted against data controllers, although the mere fact of a breach will not be sufficient.

Relevance of GDPR

The Supreme Court acknowledged that the parties and the interveners had made frequent references to the provisions of the General Data Protection Regulation and the Data Protection Act 2018 in their submissions but given that the meaning and effect of the DPA and the Data Protection Directive could not be affected by the subsequent legislation, it was not considered.

Takeaway: Although GDPR and the Data Protection Act 2018 were not considered capable of helping to resolve the particular issues raised on the appeal, given the wording of the provisions concerning compensation are substantively replicated in Article 82 GDPR, the Supreme Court's judgment will have future application.

Comment

The Supreme Court's judgment will be warmly welcomed by data controllers who, following the Court of Appeal's judgment, were exposed to very significant potential liability arising from data claims, even if no specific damage was shown to have been suffered by any individual.

The judgment has firmly rejected the basis of this class action and many others that were waiting in the wings (some of which had been stayed pending handing down of this judgment). It is likely to have a very significant impact on UK industry across many different sectors that handle customer data, as well as the UK legal market, including claimant firms, litigation funders and ATE insurers.

Although the Supreme Court has left the door open for representative actions to proceed in relation to claims for breaches of data protection legislation, the rejection of the concept of "loss of control" damages and the requirement that individuals must prove they have suffered damage means that a representative action is unlikely to be a financially viable option for legal advisers and funders in most data claims.

The Battle (royale) Continues Between Epic and Apple

Sarah Gilkes, Partner, and **Ben Cameron,** Senior Associate, Hamilton Locke, comment on the *Epic Games v Apple* stoush.

Epic Games (**Epic**) runs the wildly successful battle royale game *Fortnite* across a variety of platforms, including on Apple's mobile iOS. *Fortnite* on Apple devices was until August last year distributed through the App Store. In exchange, Apple took a 30% commission of all sales through iOS versions of *Fortnite*.

Last year, Epic changed the code of *Fortnite* to allow iOS users to purchase in-game credits directly from Epic thereby bypassing Apple's commission. In response, Apple removed *Fortnite* from the App Store within 24 hours.

The contract between Epic (a North Carolina-based company) and Apple (a California-based company) required all disputes to be resolved under Californian law.

Litigation in America

In August 2020, Epic commenced proceedings against Apple in California after Apple pulled *Fortnite* from the App Store. Apple filed a countersuit alleging breach of contract. The day after commencing its proceedings, and in an apparent attempt to garner public support for its stance, Epic released the video *Nineteen Eighty-Fortnite* spoofing Apple's 1984 advertisement.[1]

Separately, on 16 November 2020, Epic also commenced proceedings in the Australian Federal Court alleging that the conduct of Apple (and its Australian subsidiary, Apple Pty Ltd) amounted to contraventions of the *Competition and Consumer Act* (**CCA**) and Australian Consumer Law (**ACL**), including unconscionable conduct, engaging in conduct which substantially lessens competition and exclusive dealing.

If successful, Epic's Australian claim would permit Australian iOS users to download apps to their iOS devices from locations other than the App Store.

Original decision

Apple sought a stay[2] of the proceedings on the basis the litigation should be carried out in California given the exclusive jurisdiction clause in the contract between Epic and Apple. This stay was granted which Epic appealed.

Appeal

On 9 July 2021, the Federal Court allowed Epic's appeal,[3] finding that the primary judge should not have granted the stay.

This means that Epic's case against Apple and its local subsidiary can proceed in Australia (pending any further appeals). That is, even though the parties had a contractual agreement to deal with disputes in California, the Federal Court held that Epic's claims under the CCA (which were based on a right under Australian legislation, rather than a right under the contract with Apple) could proceed in Australia. This is a reminder to parties negotiating cross-border agreements that while a jurisdiction clause will govern disputes arising out of the contract, it will not necessarily prevent parties from bringing statute-based claims in other jurisdictions.

Legal reasoning

The primary judge's decision was overturned due to three errors, each of which would have been sufficient to vitiate the original decision.

Error 1: Public policy considerations[4]

The primary judge did not make a cumulative assessment of the public policy considerations.

The considerations in favour of the proceedings being moved to California included:

- minimising the possibility of divergent findings;
- holding contractual parties accountable to the terms of the contract; and
- avoiding multiple international cases giving rise to potentially conflicting findings of fact.

On the other hand, in favour of the proceedings staying under the Federal Court's jurisdiction:

- there are public policy considerations arising from the scope and purpose of the CCA and the jurisdiction granted to the Federal Court and the specialist judges there which prevents the risk that Australian law would be misconstrued in foreign courts;
- certain remedies under the platform provisions (ss 83 and 87(1A) of the CCA) are only available in respect of findings made by Australian courts;

1 The District Court of the Northern District of California issued a decision on 10 September 2021 in respect of this case which found that that Apple did not have a monopoly in the relevant market of 'mobile game transactions', but that Apple could not prohibit app developers from notifying users of other stores or purchase options. This judgment has been appealed by both Apple and Epic.

2 *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338.

3 *Epic Games, Inc v Apple Inc* [2021] FCAFC 122 ('*Epic v Apple*').

4 Ibid 51 – 57.

- the ACCC has statutory rights to intervene in Australian proceedings;
- an Australian case will contribute to further Australian jurisprudence; and
- the proceedings will impact Australian consumers.

On the balance, the Court considered that public policy considerations were in favour of the proceedings continuing under the Federal Court's jurisdiction and there were strong reasons to refuse the grant of stay.

Interestingly, the Court did not consider it was sufficient to rely on the ACCC's right to bring such action in Australia free of contractual restraint nor did the risk of fragmentation of litigation raise an issue of public policy.

Error 2: The disadvantage to Epic in proceeding in the US[5]

The primary judge did not give sufficient weight to the disadvantages to Epic if the case proceeded in the US. These included that:

- the CCA has remedies that would not apply under California law; and
- it was expected to be more difficult to obtain an injunction under Californian law.

Error 3: Failure to properly consider the role of the local Apple subsidiary[6]

The primary judge assessed that the Australian subsidiary's role was merely 'ornamental', but this was not correct. The current proceeding involved claims under Australian laws (the CCA and ACL) against an Australian company (Apple Pty Ltd) which was not a party to the exclusive jurisdiction clause in respect of conduct undertaken in Australia affecting Australian consumers (the operation of the App Store).

Together, these points were sufficient for the Court to agree that the proceedings should continue in Australia, although it did make clear that there is no statutory mandate for proceedings such as these to be heard in Australia.

Forum non conveniens

For completeness, the Federal Court also confirmed that Australia was not a clearly inappropriate forum given that the cause of action relates to Australian competition law involving the Australian App Store, Australian users, and developers for that market, as well as an Australian entity.[7]

5 Ibid 58 – 67.
6 Ibid 68 – 79.
7 Ibid 125.

Privacy Panel

Introduction

When, in June 2019, the ACCC published its final report in the Digital Platforms Inquiry, it made several game-changing recommendations regarding privacy law. Among the recommendations were that:

- the definition of "personal information" be updated to clarify that it captures technical data such as IP addresses, device identifiers, location data and any other online identifiers that may be used to identify an individual;
- notification and consent requirements be strengthened;
- APP entities be required to erase personal information on request;
- individuals be given direct rights to bring actions and class actions against APP entities to seek compensation for interferences with their privacy; and
- penalties be increased to the levels adopted in the Australian Consumer Law.

The ACCC also recommended that a broader review of the Australian Privacy Law be undertaken, which should consider:

- the objectives of the Act;
- the scope of the Act's applicability (including removing some of the exemptions);
- adopting a higher standard of protection, such as requiring all use and disclosure of personal information to be by fair and lawful means;
- better protecting inferred information, particularly where inferred information includes sensitive information;
- better protecting deidentified information;
- amending the Australian Privacy Law with a view to becoming "adequate" to facilitate the flow of information to and from overseas jurisdictions such as the EU; and
- introducing a third party certification scheme.

The ACCC further recommended that an enforceable code of practice be developed by the OAIC in consultation with industry stakeholders to enable proactive and targeted regulation of digital platforms' data practices. The ACCC recommended that the code should apply to all digital platforms supplying online search, social media and content aggregation services to Australian consumers and which meet an objective threshold regarding the collection of Australian consumers' personal information. The ACCC set out the sorts of requirements that it expected to see in such a code, including:

- requirements to provide and maintain multi-layered notices regarding key areas of concern for consumers;
- requirements to provide consumers with specific opt-in controls for any data collection that is for a purpose other than the purpose of supplying the core consumer-facing service;
- requirements to give consumers the ability to select global opt-outs or opt-ins such as collecting personal information for online profiling purposes;
- additional restrictions for processing children's personal information;
- additional requirements regarding security management systems;
- requirements to establish a time period for the retention of personal information that is not required for providing the core consumer-facing service; and
- requirements to establish effective and timely complaints-handling mechanisms.

The ACCC additionally recommended that Australia introduce a statutory tort for serious invasions of privacy.

Of those recommendations, the Federal Government expressed support for all except the erasure of personal information and a statutory tort for serious invasions of privacy. It noted both recommendations and said that they would need to be considered in the course of the general Privacy Law review.

In October 2020, the Attorney-General's Department commenced the broad review of the Privacy Act and, in October 2021, the Attorney-General's Department released a Discussion Paper, which addresses the issues above. And to help us make sense of what's being proposed, and the strengths and limitations in these proposals, we've assembled some of the leading privacy lawyers in our CAMLA community:

Katherine Sainty is the founder and team leader at Sainty Law. Katherine is a corporate and commercial lawyer who specialises in digital, technology and media law. A partner at Allens Linklaters for many years, Katherine gained significant experience advising clients from major technology, internet and media companies as well as Government departments and agencies.

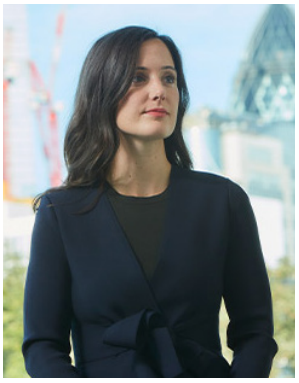
Sophie Dawson is head of Bird & Bird's dispute resolution practice in Australia and specialises in media, privacy and technology advice and disputes. A co-author of Thomson Reuter's *Media and Internet Law & Practice*, privacy law is a key part of her practice. Sophie has assisted high profile clients with submissions in relation to each of the privacy law reform processes since 2000, including the current reform processes. She regularly supports clients who have suffered data breaches, including across national borders.

Olga Ganopolsky is the General Counsel (Privacy and Data) at Macquarie Group, a role she has held since around the time the APPs were implemented. She was previously General Counsel at Veda (now Equifax), Australia's leading credit reporting agency and a provider of data to most of Australia and New Zealand's financial institutions. Olga's role typically involves giving advice on the privacy impact of new technologies, new acquisitions or restructuring businesses.

Anna Johnston is the founder and principal of Salinger Privacy, and one of Australia's most respected experts in privacy law and practice. Anna was the Deputy Privacy Commissioner for NSW and brings both a regulator's perspective to privacy law, as well as that of a private practitioner who has of wealth of experience dealing with clients' privacy and data governance challenges. Anna has been called upon to provide expert testimony before various Parliamentary inquiries and the Productivity Commission, spoken at numerous conferences, and is regularly asked to comment on privacy issues in the media. She is a lifetime member of the Australian Privacy Foundation, a member of the International Association of Privacy Professionals (IAPP) since 2008, and in 2019 was recognised as an industry veteran by the IAPP with the designation of Fellow of Information Privacy (FIP).

Ross Phillipson is a senior consultant in Norton Rose Fulbright's risk advisory practice. He provides risk and operational consultancy services with a focus on technology, data and cybersecurity. Based in Perth, Ross joined NRF after nearly 19 years working for global multinational Procter & Gamble in London and Geneva. From the end of 2012, Ross led P&G's European and APAC Data Protection, Privacy and Cybersecurity practice, guiding P&G through its GDPR and cybersecurity journey, as well as business tech law counselling and enterprise privacy and cybersecurity issues.

Rebecca Lindhout is a Special Counsel at McCullough Robertson. She specialises in procurement, technology, media and telecommunications, intellectual property and privacy and data-protection. Rebecca has acted for a broad range of clients including media and technology companies, for financial services providers including Big 4 Banks, clients in health care and aged care services as well as clients in the public sector. Rebecca was recently recognised by Best Lawyers Australia for Privacy and Data Security Law.



Ashleigh Fehrenbach is a Senior Associate at RPC in London, specialising in privacy and data law, intellectual property law, technology and brand protection. Ashleigh co-edits the *Communications Law Bulletin* and is firmly exercising her control over how much more I may embarrass her by singing her praises.

ELI FISHER: Thanks everyone for this. Let's jump right into the deep end. Let's talk notice and consent. One of the key themes of submissions following the Issues Paper was that transparency is essential. Another of the key themes was that we should be wary of overreliance on notice and consent mechanisms. There have been changes proposed to the APP5 notice regime and to the definition of consent. Can you talk us through those proposals?

OLGA GANOPOLSKY: The clear policy intent expressed by many of the contributors to the Discussion Paper is the need for greater transparency and a strong acceptance that individuals must make genuinely informed choices about the use of information that relates to them or is about them. Put simply, the driver is the need for agency. Without agency it is difficult to build a genuine case for legitimacy for the various uses of data and, in turn, trust in the data and the organisation seeking to use or otherwise process such data for commercial or other purposes. The complex debate now is *how* best to address this without compromising on the need for some flexibility and preserving technological neutrality. This is especially challenging a digital environment.

The Discussion Paper canvases ideas such as setting pro-privacy defaults, potentially on an industry basis, and/or for APP entities to provide individuals with a clear

way to set all privacy controls to the most restrictive by restricting the use of opt out mechanisms and instead replacing these with opt in mechanisms. It also seeks to remove some of the qualifications currently in APP 5.

We'll talk through the detail in the course of this discussion. The only rider I would add at this stage is that in considering the various options it will be important to test if they genuinely support agency, flexibility and technological neutrality. It would be, in my view, counterproductive to end up with a very prescriptive regime. This would not be conducive to agency of individuals or to the free follow of data, so critical in a digital global economy.

FISHER: Is trying to fix notice and consent a futile exercise in trying to improve something that is inherently broken? Should we be moving past notice and consent and pursuing other models of regulating the processing of personal information? In some respects, privacy law relying on transparency, notice and consent places the burden more on consumers than on companies. Is there a better way?

ANNA JOHNSTON: There is a role for notice and consent, but in my view that role should be limited. Consent, in particular, should be seen as the last option for authorising a collection, use or disclosure, rather than an entity's first or default position. Organisations should not be constantly asking customers to 'consent' to routine business activities, because then everyone just suffers consent fatigue. Consent should be kept for non-routine matters, like asking someone if they want to participate in a research project. Especially when you consider that the Discussion Paper proposes to tighten the legal tests for what constitutes a valid consent, by building into the legislation what has to date been guidance from the OAIC: that consent must be voluntary, informed, specific and current, and requires an unambiguous indication through clear action.

My reading of the Discussion Paper is that there is an intention to reduce reliance on the 'notice and consent' self-management model of privacy regulation, in favour of stricter limits on collection, use and disclosure. So instead of shifting the burden of assessing privacy risks onto consumers by asking for their consent to all sorts of practices, the Discussion Paper proposes that organisations must first apply a 'fair and reasonable' test before they collect, use or disclose personal information.

The proposal includes factors which could be legislated as relevant to any application of the test. The draft list includes things like whether or not a person would reasonably expect their personal information to be collected, used or disclosed in the circumstances; how sensitive the information is; what harm might come from it; and whether any loss of privacy is proportionate to the benefits. Plus, if the information is about a child, it must be in the best interests of the child.

This is a welcome suggestion, but in my view it still needs some strengthening. Otherwise I can imagine some tech platforms for example could argue that the kinds of revenue-generating algorithms which push harmful content in the name of 'engagement' are proportionate to the benefits of delivering free services.

Nonetheless, when you take the reform about the elements of consent, and add this new 'fair and reasonable' test, and then add in another proposal, which is to require 'pro-privacy defaults' when choices are to be offered to users, when combined these proposals should spell the end of companies using dark patterns to trick people into sharing their personal information in ways that end up harming us as individuals or collectively as a society, but then claiming 'consent' as their lawful basis for collection, use or disclosure.

KATHERINE SAINTY: Anna and Rebecca, below, have covered off what's being proposed very clearly. So, I wanted to focus on what this means for business. I see this as a critical change for the way Australian organisations do business online. Businesses are going to need to look very carefully at their privacy notices, collection statements and their online collection practices to make sure they stop using the default settings that many have adopted in the past. We've all been caught out with automatic opt in for marketing or cookies even though it's not permitted. The new standards for collection of personal data will be high: voluntary, informed, specific and current, with an unambiguous indication through clear action.

Businesses are going to have to rethink their marketing strategies and scrub contact lists so that they are only communicating with people who have actively opted in. They must refresh marketing lists regularly to keep consents current. There may also be some impact on secondary use of data so that if your business has collected information for one purpose it will need to rethink before it automatically uses it for another purpose. If the laws change, it will be a game changer for data miners as the focus shifts from monetisation to protection of data.

The Online Privacy Code is to detail on how Online Privacy Organisations must comply with the APPs in relation to policies, notices, and consents. Hopefully codification of the APPs in relation to policies, notices, and consents in the proposed Online Privacy Code, for Online Privacy Organisations, will catalyse good privacy practices from other businesses.

From a consumer perspective, I think it is likely that people will feel more comfortable with the new approach, as they will be able to see clear privacy messages. Consumers won't need to wade through multiple links, complicated and ambiguous notices and settings to work out how their data may be used without their knowledge or choice. Hopefully this will help to improve consumers trust and improve their relationship with businesses.

FISHER: Speaking of privacy by default, can you talk us through what this looks like? What's being proposed here, and how does that impact on businesses?

REBECCA LINDHOUT: As Anna noted, the most common approach at the moment is to provide individuals with information through privacy notices and policies – and then place the onus on the individual to manage their privacy through their choices. Pro-privacy defaults would instead result in pre-selections (set to 'off') – with the ability for individuals to then opt-in to further collection, use and disclosure of their personal information. Examples of pro-privacy defaults are the newer cookie pop-ups we're seeing from European companies where only 'strictly necessary' cookies are used unless you select otherwise at the point of entry to the website.

As is often the case with privacy legislation, pro-privacy defaults are a good example of how a one-size fits all regime is unlikely to produce a desired outcome. While a restrictive default collection and use regime might be appropriate if I am online shopping (and so help limit the targeted advertising I'm getting), it is likely to produce a less-than-ideal user experience in other contexts such as online services where information such as your location – or having your user profile visible to others - is key to the experience.

Accordingly, the Discussion Paper considers two options – one which requires pro-privacy settings by default, and the other which requires that they are easily accessible by individuals. In my view, a combination of Options 1 and 2 is likely to be most appropriate both in terms of ensuring the user experience isn't too cumbersome and ensuring that there isn't unnecessary restriction on online services offered by businesses. For example, Option 1 could apply to higher risk scenarios (such as where sensitive information or information relating to children is being collected, used or disclosed) with Option 2 applying to lower risk scenarios.

ROSS PHILLIPSON: I agree with Anna's statement that consent should be really considered as the last resort – in effect, the Privacy Act should build in gateways for processing personal information that society, via legislators, has decided are suitable and appropriate without needing consent. Assuming an entity has assessed and rejected these options, the only path forward is choice for the individual – i.e. consent.

For much of the criticisms that can be levelled at the GDPR, its six gateways for processing personal information, including contractual necessity, compliance with law and legitimate interests, in addition to consent, are a very useful framework in which companies and government agencies alike can determine the appropriate and applicable mechanism. In my experience, Europe has an unhealthy obsession with consent as the "gold standard"; and I fear the same will develop here in Australia. In my opinion, I'm not sure "fair and reasonable" actually achieves the counter-balance to an over-reliance on consent, particularly because what is one person's "fair and reasonable" is another's "unfair and unreasonable". I would rather see better defined alternate mechanisms that are distinct, rather than attempts at catch-alls.

My one major concern about pro-privacy defaults is the level at which they are applied. If the approach is not tailored at the relationship level, then the platforms as owners and gatekeepers of the connection with the end user may end up setting the standards, to the disadvantage of market participants. In effect, "owning the rails" enables these few companies to decide what those defaults are and, whilst it is not the role of privacy laws to combat the competitive impact, it is an unintended consequence that should be watched for closely.

FISHER: Thanks Ross. On that note, there are quite a few GDPRisms in the proposed set of reforms. Can you talk us through the GDPR influence here, and also where you think we've taken things even further?

ASHLEIGH FEHRENBACH: The Discussion Paper proposes a number of significant reforms to the Privacy Act, many of which as you've rightly pointed out Eli are based on the GDPR - the gold standard of international privacy regulations. If the changes proposed in the Discussion Paper are passed, this will represent quite a transformation of our privacy laws, particularly by bringing them more in line with the GDPR.

The GDPR type proposals include things like amending the definition of personal information, introducing a right to object and a right to erasure of personal information in certain circumstances. I don't intend to go into those individual rights and the proposed expanded definition of personal information here as I have a feeling we'll get to them later in this paper! However, outlined below are a number of instances where we see the Discussion Paper basing certain proposals on specific articles in the GDPR.

A GDPR-ism that we see in the Discussion Paper is around whether entities should be required to handle personal information in a fair and reasonable manner or in accordance with the 'legitimate interest' test. The legitimate interests test is contained in Article 11 of the GDPR. Broadly, it requires entities to 'handle personal data in ways that people would reasonably expect and not use it in ways that have unjustified adverse effects on them.' The Discussion Paper considers that if this test were to be applied in Australia, a legitimate interests requirement would operate differently to the GDPR, in that it would consist of one factor to be considered within a broader test.

Another area is the conversation around an enhanced definition of consent. The GDPR requires consent to be a 'freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data' (Article 4 (11)). The Online Privacy Code will, very similarly to the GDPR, require that consent be "voluntary,

informed, current, specific, and an unambiguous indication through clear action". The Online Privacy code will only apply to organisations that provide social media services, data brokerage services and large online platforms with at least 2.5 million end users in Australia (provided that the organisation is an APP entity). The Discussion Paper has recommended that the Privacy Act, which would apply to all APP entities (i.e more broadly than the Online Privacy Code), mirror the provisions in the Online Privacy code.

A further GDPR-type consideration in the Discussion Paper are data protection impact assessments (**DPIAs**). These are required under the GDPR (Article 35) for prescribed forms of personal data processing, including the large-scale processing of sensitive data, the large scale and systemic monitoring of a publicly accessible area, and personal data processing that is likely to result in a high risk to individuals. Rather than adopting the exact same approach under the GDPR, the Discussion Paper considers whether entities that engage in certain specified high-risk practices (or "restricted practices") should be required to undertake additional organisational accountability measures to adequately identify and mitigate privacy risks. Depending on that level of risk, an entity may need to conduct a formal privacy impact assessment.

Quite interestingly, there was some concern expressed in the submissions to the Discussion Paper about entities adopting a "tick box" mentality when undertaking privacy impact assessments. Some stakeholders were concerned that doing so may lead to a failure of entities to build privacy into the design from the outset of a project –which is the overall aim of a privacy impact assessment. This hesitance could be a learning from website privacy policies, which are sometimes drafted, published and never looked at again.

International approaches to regulating automated decision making (**ADM**) is a further example of where the Discussion Paper has looked to the GDPR for direction**.** The GDPR regulates the use of personal data in ADM systems 'which produce legal or similarly significant effects' (Article 22). At present, Australia's Privacy Act does not expressly regulate the use of personal information by ADM systems or otherwise regulate ADM. The Discussion Paper has proposed that APP entities be required to state in their privacy policies whether an entity will use personal information for ADM that has a legal or similarly significant effect. The aim of the proposal is to increase transparency about when an individual's personal information is used in ADM that affects them. This is an example of where technology has developed since the Privacy Act was enacted and Australian privacy laws need to catch up.

Additionally, age and consent is considered in detail in the Discussion Paper. The GDPR requires data controllers to make reasonable efforts to verify that consent is given or authorised by the holder of parental responsibility over a child, taking into consideration available technology. In that regard, the Discussion Paper has suggested a change to the APP 5 notice obligations, requiring privacy notices to be clear, current and understandable and – importantly – emphasised in cases where the information is addressed specifically to a child. The proposed wording is modelled on Article 12(1) GDPR, i.e. "*The controller shall take appropriate measures to provide any information relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child*."

Despite what the above might suggest, the Discussion Paper does not by any means look at accepting the GDPR in its entirety. In fact, it reaches beyond the GDPR in a number of its proposals, for example the suggestion to create a direct right of action for individuals or group of individuals whose privacy has been interfered with by an APP entity as well as a statutory right for invasion of privacy. The UK deals with its direct right of action separately as claims for the misuse of private information, breach of confidence and/or breach of the GDPR / Data Protection Act 2018.

The Discussion Paper also refers to approaches adopted in countries with GDPR adequacy such as Canada and New Zealand. The requirement for consistency with other jurisdictions is justified in the paper to better facilitate cross border transfer of information, a necessary requirement in today's digital economy.

PHILLIPSON: There is little I can add to the substantive review provided by Ashleigh above, so I will focus on one element that I think is of strategic importance to how Australia's privacy laws develop in the near future – whether or not adequacy with Europe is a strategic goal. I raise this as I am not sure Australia should focus on adequacy as a goal, or whether we should seek to develop a privacy regime that takes the best from around the world, including Europe, whilst avoiding the mistakes, and adapting the principles to promote a balance between the protection of individual privacy rights and the growth of digital business and innovation in Australia.

If it is the latter, there is nothing that would prevent Australia from doing so and still achieving adequacy without adopting GDPR standards wholesale. This has been achieved in other jurisdictions such as Switzerland and given our unique global position, we may be better suited to looking towards other jurisdictions as well and ensuring our access to those digital markets is facilitated rather than necessarily focussing on European adequacy.

OLGA GANOPOLSKY: Just picking up on Ross's comment, in my view adequacy, or a similar form of recognition, provides APP entities with an economy wide mechanism to transfer personal data without the need to implement measures (such as Standard Contractual Clauses or Binding Corporate

Rules) at an entity or enterprise level. This is a significant benefit for those looking to cut red tape and especially for organisations that have a global footprint and regularly transfer personal data across borders. Noting that many of our neighbours and trading partners already enjoy the benefits of adequacy, (e.g. NZ and Japan) the current reform presents a good opportunity to update the Privacy Act to enable, or at least not to be an impediment to, a successful application should the decision be made to apply for adequacy in the near future.

FISHER: There is a special concern regarding the processing of the personal information of children. What's being proposed here, and do you think it's the right approach?

LINDHOUT: There are a number of proposals in the Discussion Paper which specifically address personal information relating to children and would see personal information relating to children given additional protections.

The first of these addresses who is able to provide consent in relation to the collection, use and disclosure of personal information relating to a child. The Discussion Paper proposes a baseline requirement for parent or guardian consent for people under the higher age of 16 (current OAIC guidance uses 15 as the default age). This age may also be the relevant age for determining whether a child exercise their privacy rights – including access, correction or erasure requests, independently.

Adopting a threshold of 16 would mean alignment with the age (under the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (**Online Privacy Bill**) – discussed further below) under which parent or guardian consent is required by social media services. In my view, a statutory position on the relevant age for a child to provide consent is a useful starting point, although I think that there should be room for APP entities to show that consent has been provided by a younger person in appropriate circumstances to ensure that the regime does not become unnecessarily restrictive. For example, consent may be able to be provided by a younger person where there is an ongoing personal relationship such as with a teenager's GP in the healthcare context, or where the nature of the personal information doesn't demand such maturity to provide consent.

The Discussion Paper also proposes a change to APP 5 so that collection notices are required to be clear, current and understandable, in particular for any information addressed specifically to a child. It is likely that the reforms will see changes to the way all collection notices operate so that they are able to be understood by the relevant audience, so this change feels consistent with the overall changes regarding informed consumers and valid consent.

Another of the proposals in the Discussion Paper is that there should be legislated factors to be taken into account in determining whether the collection, use and disclosure of personal information is fair and reasonable in the circumstances (i.e. for the purposes of the changes being considered in relation to APPs 3 and 6). One of the recommended factors is that where personal information relates to a child, that collection, use or disclosure is *in the best interests of the child*.

From the APP entity's perspective, although this wouldn't prevent commercial entities pursuing commercial or other interests, it's unlikely that commercial interests would outweigh a child's right to privacy.

From the consenting parent or guardian's perspective, while the concept of 'best interests of the child' sounds great in theory, and goes some way to avoiding a scenario where a parent or guardian provides consent which is for their own benefit and not of that of the child (e.g. where does the line lie between allowing the collection and use of phone location tracking which is for the safety of the child rather than snooping purposes). This is something that APP entities should keep in mind where getting parents/guardians to consent on behalf of their child.

The Discussion Paper goes on to consider options for managing certain 'restricted and prohibited acts and practices' including the collection, use or disclosure of children's personal information on a large scale – having regard to the 'best interests' test. Some submissions in the process so far have proposed 'no-go' zones such as the profiling and behavioural advertising knowingly targeted at children. The paper notes, however, that straight prohibitions may reduce beneficial and legitimate practices which pose little or no risk - such as the algorithm within Spotify that helpfully provides recommendations for my daughter based on her previous listening habits and puts us into a Wiggles and Disney loop.

Accordingly:

- Option 1 of the paper proposes that if an APP entity proposes to undertake such activities, they must take reasonable steps to identify privacy risks and implement measures to mitigate those risks – presumably this would take a similar form to privacy impact assessments which are now commonplace in Europe.
- Option 2 would see those risks being self-managed by the relevant individual.

It is unclear how Option 2 would operate where the relevant individual is a child and so is unable to provide meaningful consent themselves – instead it will likely impose additional burden on parents and guardians – which may be impractical in online settings particularly where the child doesn't seek parent or guardian consent. Provided that there is sufficient guidance around what reasonable steps are, and that the efficacy of those assessments is subject to review and assessment, Option 1

seems a more appropriate option as regards the protection of children in particular.

Other changes under consideration which indicate the additional protections to be provided to the personal information of children include:

- the fact that one of the limited circumstances in which a right to request the erasure of personal information is where the personal information relates to a child and the erasure is requested by a child, parent or authorised guardian; and
- the 'pro-privacy' default settings as they apply to children's services – including particular features/functions which should be disabled by default in relation to children such as their geo-data and the ability for services to share their personal information.

FISHER: These reforms will likely be the most major privacy reforms since the introduction of the APPs in 2014, and may even exceed that round of reforms in consequentiality given how the data economy has matured since then. So much has changed in that time in the ways that businesses – especially digital platforms – are using data. As the data economy evolves, what confidence can we have that these news reforms will be fit for purpose going forward?

SOPHIE DAWSON: The current regulatory changes are being considered in the middle of a time when the industry is finding new ways to manage privacy risks for individuals, for example, Apple's iOS 15 now provides users of Apple devices true anonymity in relation to third party cookies and software development kits (**SDKs**).

However, it does bring comfort that the Attorney-General's Department is undertaking extensive industry consultation as part of its review and that it has noted the "general view among submitters" that flexibility, industry-neutrality and technology-neutrality are key benefits of the APPs.

This is an important opportunity for media, IT and telecommunications companies to explain to regulators the various issues that could arise from various proposed reforms.

The issues also have wider importance for us as a society. There are important issues at play. Unlike defamation law, which regulates false and damaging speech, privacy law affects the ability to make communications which are true, even when the information is not in any way damaging. The important role which freedom of communication has, particularly in the media sector, in ensuring the integrity of our key institutions including courts, government and companies, needs to be firmly borne in mind when tailoring a path forward. Our clients in the IT sector also remind us that it is important to bear in mind Australia's interest in having a key place in the global information economy, which means that regulators need to think about the impact of the different approaches on the willingness of entities to store data, and base digital businesses, in Australia. The same is true in the research sector including in areas like AI, where changes in the definition of personal information or in the approach taken to de-identification could have a substantial impact. All of these different considerations need to be carefully considered and balanced when considering the right level of, and approach to, privacy protection in Australia.

SAINTY: Australian business has struggled with a privacy regime that does not meet the GDPR standards of adequacy. This makes it hard for Australian organisations to do business internationally, or even for Australian-based businesses to manage cross border data restrictions. We know that part of this phase of privacy reform is to bring the law in line with GDPR, which would help bring us in line with international standards. Putting the data economy to one side, this aspect of the reforms is a significant step in making Australian privacy law fit for purpose going forward.

The digital landscape is highly dynamic, and the way people are engaging and interacting online is changing, particularly in the last two years with the impact of COVID-19. This means more people are taking advantage of technology to work from home. More people use ecommerce for transacting business and, domestically, for goods, services and information.

I don't think we have yet seen the full effect of how this will change the way the data economy works. Privacy regulators are going to struggle to keep pace with the rate of change. Laws need to be sufficiently technology neutral and industry neutral to cope with that change. As more cross-industry collaboration and innovation happens, business is finding more creative ways to collect and use consumer data. So, having flexible, technology neutral principles that can cover these innovations is crucial.

There is always a tension in finding the balance between protecting individual privacy, allowing businesses to run effectively and economically, and the protection of other public interests such as public health and safety, national security, freedom of expression. The APPs currently allow for flexibility, not prescription, in the way organisations apply them. We have seen them applied inconsistently and consumers receive different levels of protection. The Discussion Paper is moving the Privacy Act to a place of more clearly articulated requirements for the protection of the privacy of individuals, with a balancing concept of public interest.

One of the key challenges to date has been that the OAIC has not been taken as seriously by business as some other regulators. Things would change radically if the Information Commissioner were given the powers proposed in the Online Privacy Bill which would align it with regulators like the ACCC. Of course, the OAIC would need to have a commensurate extension in funding to realise the potential of the legislation.

FISHER: One of the most key changes being proposed is to widen the scope of the Privacy Act, both by amending the definition of Personal Information, and by removing exemptions. Let's start first with the definition of Personal Information, and address the exemptions in a sec. Can you take us through the issues around the definition of PI?

JOHNSTON: By amending the definition to cover information that "relates to" an individual, instead of the current test which is "about" an individual, the proposed reforms will address some of the confusion caused by the *Grubb v Telstra* line of cases, as well as bring the Privacy Act into line with the newer Consumer Data Right scheme, and the GDPR. This is good news.

Another welcome development is a proposed list of what will make someone 'identifiable', with examples including location data, online identifiers, pseudonyms, and other factors specific to the identity or characteristics of a person.

Critically, the Discussion Paper states that the new definition will cover circumstances in which a person can be distinguished from others, despite not being named. This is a very important and positive development, to help address the types of digital harms enabled by individuation – that is, individualised profiling, targeted advertising or messaging, and personalised content which can cause harm, but which currently escapes regulation because organisations can claim that they don't know precisely who the recipient of their messaging is. This development will have significant implications for digital platforms and social media companies, as well as the AdTech and data broking industries.

PHILLIPSON: I'm not entirely sure I agree with Anna that this is a good development. It is important to remember that this is the most important definition for determining the application of the Act. If the information is not personal information, then the Act does not apply. If it is, then it does. Given the substantial regulatory burden and the slated increase in penalties to $10 million or 10% turnover for breaches, it is critical that the definition of personal information is both technology agnostic, but also clear.

From my perspective, there are significant unintended consequences of such an expansive definition of the single trigger for the application of the Act. The largest by far is just the sheer increase in data management and processing that will be covered by the Act and the regulatory burden that will entail, especially when combined with other changes such as the right to be forgotten, access and correction.

Further, the justification given, relating to addressing digital harms caused by individuation appears to me to expand the ambit of privacy law into consumer protection law. I think it would be preferable to address consumer protection and digital harms via laws specifically designed to deal with those, whether an individual is known or "only" singled out, rather than expanding the definition of personal information in such a manner.

DAWSON: These changes could have very significant impacts in a large range of contexts, and it is important for each sector to carefully think through them. In the AdTech environment, it means that practices currently treated as being outside the scope of the Act will squarely fall within it. There are concerns that this will require a variety of new notifications and consents, which could actually require more personal information to be collected in some circumstances. TMT companies need to be thinking about the impact these changes could have on their systems, processes and practices so that they can identify and communicate any concerns as part of the reform process.

FISHER: How are the changes proposed to deal with anonymous and deidentified information?

JOHNSTON: There's always a language problem here, because 'de-identified' means one thing to data scientists and statisticians, and another thing to lawyers. In law, it means that information has been treated, and the access environment controlled, in such a way that no individual is reasonably identifiable from this data, alone or in combination with any other data. That's a much higher standard than just 'oh well we stripped out the direct identifiers', or 'we used hashed emails to match up customer records'.

The Discussion Paper proposes to make this clearer. The proposal is to incorporate a definition that makes it clear that, to apply de-identification such as to fall outside the scope of the definition of 'personal information', an organisation must meet a test which is that there is only an "extremely remote or hypothetical risk of identification". It will also make clear, like the GDPR does, that pseudonymised information is still 'personal information'.

However, I believe that still leaves a gap between the test arising from the definition of personal information – which is effectively "not reasonably identifiable" - and the test in the proposed definition of de-identified data – which is "extremely remote or hypothetical risk of identification". This gap creates a legislative no-man's land of data which is not personal information in scope but nor is it de-identified and out of scope.

There should not be any gap between the two. The line between identifiable and not should be based on the "extremely remote or hypothetical risk of identification" test. Otherwise bad actors will continue to argue that because no one is 'reasonably' identifiable in their data, they are not regulated by the Act at all. So my submission will be that the word 'reasonably', as in 'reasonably identifiable' in the definition of personal information, needs to be removed. That would also bring the definition of personal information closer into line with the GDPR and other laws around the world.

PHILLIPSON: I see this debate as the flipside of the coin to the definition of personal information. Somewhat echoing Anna's remarks above, there cannot be a gap between the two terms, but it is one of the reasons I

have such a hard time accepting that the definition of personal information should be expanded to encompass the situation where a person can be singled out vs actually be identified or reasonably identifiable.

This is because the definition of de-identified effectively becomes redundant. So long as a data set retains individualised characteristics, then we have the ability to re-identify the individual, even if it is just by singling them out.

I would retain the "reasonably identifiable" test, but in my opinion it needs to be linked to actual identification, not individuation. This solves one of the major issues that GDPR has caused – as the internet and digital services operate by delivering digital information to addresses, so that the content that is delivered to individual devices, nothing can be anonymous anymore. This was built out of the desire to protect against individuation, but has created quite a high compliance burden on digital participants that, in my opinion, is not necessarily justified. By returning to privacy for the individual, the role of de-identification and anonymization in providing true privacy risk mitigation is returned, and it also improves the ability to innovate using real-world, but de-identified, data sets.

FISHER: That's really interesting. Somewhat connected, could you explain the changes proposed to deal with inferred information?

JOHNSTON: The Discussion Paper proposes to add a definition of 'collection' that expressly covers inferred or generated information about people. This would put into statute what the OAIC has been saying for years, that the act of inferring information about people needs to be treated as a fresh 'collection', and the Collection privacy principles therefore need to be applied to that practice.

However we've already seen some pushback on this from Facebook. In their submission to the earlier Issues Paper, Facebook argued that the information it infers about people is very valuable to them, it's their intellectual property not our personal information, and they want to be able to use and monetise that data free from having to comply with privacy protections, which it describes as "inappropriate interference".

FISHER: Thank you, Anna. So an expanded notion of Personal Information increases the applicability of the Act. So too does the removal of existing exemptions. Looking now at them – small businesses, employee records, political parties – what's being proposed and is it the right approach?

FEHRENBACH: The Discussion Paper considers whether in light of some of the other proposals made there is a need to modify or remove the exemptions currently in the Privacy Act for employee records, registered political parties and small businesses. No particular proposal has been put forward, with the Paper noting that further consideration on those issues is required. For the most part, the Discussion Paper is seeking further input on some suggested options to amend those exemptions - not to remove them entirely.

On small businesses, currently most small businesses are not covered by the Privacy Act. A small business is one with an annual turnover of $3 million or less. The Discussion Paper notes that removal of this exemption could prove burdensome and indeed costly to small business owners. Instead, it canvasses a range of options including a reduction of the annual turnover threshold, limiting the scope of the exemption to some of the APPs, and requiring small businesses to comply with more basic rules or only in relation to high risk activities.

Australia does seem to be kind of out of step here – no equivalent jurisdiction exempts small businesses in the same way from its general privacy laws. Indeed, the Discussion Paper notes that in the 20 years since the exemption was put into place, technology has developed in leaps and bounds with even the more simplistic of businesses operating websites which easily capture large amounts of personal data. At the very least, modifying (if not removing) the small business exemption would create greater transparency with an aim of fostering an environment of trust with individuals who engage those small businesses.

In a similar vein, the Discussion Paper notes that removing the current employee exemption entirely would make it difficult to administer employee – employer relationships. At present, a private sector employer's handling of employee records in relation to current and former employment relationships is exempt from the Privacy Act, in certain circumstances. The Discussion Paper suggests that instead of removing this exemption entirely, a modification to allow better protection of employee records while retaining sufficient flexibility would be a more favourable amendment. Examples provided include introducing a standalone exception into APPs 3 (collection of personal information) and 6 (use and disclosure of personal information) in relation to the collection, use and disclosure of an employee's personal and sensitive information by a current or former employer for any act or practice directly related to the employment relationship. It is argued that this would allow for enhanced protection of employee privacy through the application of other APPs, for example APPs 8 (cross-border disclosure of personal information) and 11 (security/retention of personal information), whilst still allowing for the fundamental administration in an employment relationship.

This is a complex area in circumstances where for many, the risks to privacy have increased with the rise of working from home arrangements. This has led to a shift in boundaries between employees' personal and professional lives which the Discussion Paper notes make it more difficult to easily discern whether what aspects of an individual's personal information is protected or exempted under the Act. With those developments in mind, it seems an apt time for a modification to the current position to make this clearer.

Looking now to registered political parties, currently they are exempt entirely from the Privacy Act. A limited exemption applies for acts or practices done for any purpose in connection with an election, a referendum, the participation in another aspect of the political process or facilitating acts or practices of a registered political party by political representatives and their affiliates and by political parties' affiliates. The Discussion Paper is seeking further consideration and input on what impact there would be on the implied freedom of political communication and the operation of the electoral and political process if registered political parties were brought within scope of the more the limited exemption.

Requiring registered political parties to comply with the Privacy Act would bring Australia into line with the legislation across the pond in New Zealand. The Paper notes that some political parties in Australia already include privacy statements or policies on their website when they collect personal information, what information they collect and how they use it. Making this a requirement would at least, in my view, establish greater levels of transparency for how registered political parties deal with an individual's personal information, whilst not disturbing the implied freedom of political communication and the operation of the electoral and political process.

Overall, the Discussion Paper seems to be offering up a "if it ain't broke, don't remove it" position with respect to these exemptions, with a few tweaks here and there to bring them up to date with international legislation.

PHILLIPSON: From a privacy purist view, the small business exemption is an anachronism that I initially thought no longer had a place in a modern privacy regime when every business is a digital business. However, having spent some time considering the issue, I actually believe that there is a good argument for maintaining it, albeit with some modifications.

From my perspective, the key issue that should be focussed on is the risk of harm. It is right to state that a turnover threshold may no longer be appropriate if a small business is handling sensitive data of children, for example. So a proposal would be to create thresholds of data subjects and data types where, once exceeded or the data type is included, the exemption no longer applies. This would enable digital start-ups to innovate in a risk-based manner, with the risk of harm to individuals mitigated by either volume restrictions or not allowing sensitive or other high-risk data to be included.

If combined with limited application of some of the APPs across all personal information (for example APP 1 and 11), I think that such a regime would benefit Australia's digital ecosystem, balancing the private rights of individuals while promoting innovation. It would give Australian businesses access to the critical raw material (data) needed to develop new products and services whilst mitigating the overall societal risks. Further, it would not, in my opinion, be a barrier to international digital trade, as both the relevant laws of the exporting jurisdiction apply to such data and the relevant thresholds could be created such that it would be very rare that a small business would still be within them whilst expanding overseas in such a manner.

DAWSON: On the small business exemption, the presence of this exemption is one barrier to a GDPR adequacy decision being made in respect of Australia.

As Ashleigh noted, there are various reform options proposed in respect of the small business exemption, including:

- removing the small business exemption entirely;
- reducing the annual turnover threshold;
- replacing the annual turnover threshold with an employee number threshold;
- requiring small businesses to comply with some but not all of the APPs;
- developing simplified rules for small business;
- subjecting specific businesses, or specific acts and practices of small businesses that pose a higher risk to privacy and to the obligations set out in the Act irrespective of that business' annual turnover;
- providing small businesses with additional support; and/or
- introducing a voluntary domestic privacy certification scheme to allow small businesses that wish to differentiate themselves based on their privacy practices.

The lack of a GDPR adequacy decision impacts the decisions of EU-based companies to transfer to and/or store data in Australia, due to the additional compliance risks and costs, for example the requirement that a transfer impact assessment be undertaken. It also impacts Australia's ability to be a hub for data storage globally.

And on the employee records exemption, currently acts or practices involving the use and disclosure of personal information that directly relate to an employee record of a current or former employee are exempt from the Privacy Act, as Ashleigh touched upon. It is worth adding that in *Lee v Superior Wood* [2019] FWCFB 2946, the Fair Work Commission held that the exemption does not apply to collection of personal information. The discussion paper focuses on the application of the exemption to collection, with the following options being proposed:

- removing the employee records exemption entirely;
- modification of the exemption, for example by specifying that it only applies to APPs 3 and 6 (which govern collection, use and disclosure of personal information); or
- enhancing employee privacy protections in workplace relations legislation.

This is an important issue as regulators will need to balance employers' wishes to be able to manage employee information

without the constraints of the APPs against the implications of the exemption.

FISHER: One particular exemption that will be of interest to our readers is the Journalism exemption. Can you take us through it?

DAWSON: The journalism exemption is a critical provision of the Privacy Act. It is essential for the constitutional validity of the Act as it balances the right to privacy with the public interest in the free flow of information. As the Privacy Act currently stands, acts or practices carried out 'in the course of journalism' are exempt where the relevant organisation has publicly committed to deal with privacy by way of a public document.

Without the journalism exemption, media organisations would not be able to collect sensitive information without consent. Under the Privacy Act, 'sensitive information' includes philosophical and political beliefs. This could have a chilling effect on the freedom of political speech, for example where a politician privately expressed extremist views but refuses to consent to a journalist publishing such views.

As part of the Privacy Act review, the Attorney-General is considering:

- introducing a public interest test into the journalism exemption, so that it would only apply where journalism is, on balance, in the public interest;
- clarifying the definition of "journalism", for example by defining 'media organisation';
- specifying that APP 11 (which regulates information security and deletion/de-identification of personal information when it is no longer necessary) applies to media organisations; and/or
- strengthening the self-regulation model: by subjecting media and news organisations to a single standards scheme that would apply across different platforms, and would supported financially by digital platforms as distributors of news.

A key issue is whether to follow the broader journalism exemptions that apply overseas, for example under the GDPR, which reflect the need to embrace academic, artistic and literary expression.

FISHER: Let's shift our attention to individual rights, which also have a bit of a GDPR feel to them. Can you talk us through the right to object and portability?

FEHRENBACH: The Privacy Act does not currently include an equivalent right to 'data portability' or 'right to object' as we see in the GDPR throughout Articles 12, 20, 28 and 21.

In relation to data portability, the GDPR contains a right to receive data processed on the basis of contract or consent and processed by automated means, in a "structured, commonly used, and machine-readable format" and to transmit that data to another controller without hindrance.

Whilst the Privacy Act provides individuals with a right to request access to, and correction of, their personal information under APPs 12 and 13, the Act does not contain an equivalent portability right to the one we see in the GDPR. Interestingly, the Discussion Paper does not propose to introduce a general right of data portability under the Privacy Act, noting that doing so "may duplicate aspects of the Consumer Data Right (**CDR**), and create unnecessary complexity". The CDR so far has been implemented in the banking sector and provides data access/portability under a parallel regime to the Privacy Act. The energy and the telecommunications sectors will follow suit in time. On the basis that the CDR continues to expand across all industries over time, Australia may just have to wait a little longer for this individual right to apply.

Turning to another key individual right, under the GDPR the right to object

enables individuals to request that entities no longer process personal data in certain circumstances. It becomes available where personal data has been processed for the purpose of direct marketing, or for an entity's 'legitimate interests' or a 'public task' and the entity cannot demonstrate a 'compelling reason' to continue processing.

A key proposition of the Online Privacy Bill is to develop a code for online privacy organisations which may provide individuals the right to object to the further use or disclosure of their personal information. This would effectively allow individuals to stop or prevent others from processing their personal data, in certain circumstances.

A number of submissions highlighted the right to object under the GDPR and proposed that Australia should consider introducing something equivalent. The Discussion Paper proposes that an amendment to the Privacy Act be made such that an individual can object or withdraw their consent at any time to the collection, use or disclosure of their personal information. Upon receiving notice of an objection, an entity must take reasonable steps to stop collecting, using or disclosing the individual's personal information and must inform the individual of the consequences of the objection. In doing so, this would greatly expand an individual's control and power over their personal information.

FISHER: Thanks Ash. An Australian version of the right to erasure has been proposed. How does it differ from its EU cousin, and how is it likely to affect a business?

GANOPOLSKY: Much will tun on the detail as to how the new right is drafted and incorporated into the broader sets of rights being considered in the reform process.

Just to recap, under Article 17 of the GDPR, data subjects have a right to obtain from certain entities ("controllers") the erasure of their personal data, without undue delay, where:

i. the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; or

ii. the individual withdraws consent to use of their personal data; or

iii. the data subject objects to the processing of their personal data (subject to a certain procedure); or

iv. the personal data have been unlawfully processed; or

v. the personal data must be erased for compliance with a legal obligation in European Union law, or law of an EU Member State, to which the "controller" is subject; or

vi. the personal data have been collected in relation to certain services provided to a child.

In some cases, the right to process someone's data (by the entity) might override the individual's right to erasure. For example, where the data is being used to exercise the right of freedom of expression and information or is being used to comply with a legal ruling or obligation or is being used for the establishment of a legal defence or in the exercise of other legal claims. There are also exceptions for health related and public interest related purposes. For completeness, it is also important to note that in the EU, rights under Article 17 operate in the context of a developed body of law around the 'right to be forgotten' which is generally broader than the rights under Article 17.

As many readers will recall, the right was first articulated by the European Union Court of Justice in May 2014 in a case now known as the Google Spain case. The Court affirmed the existence of the right to have personal data deleted or de-referenced from search engines on request after a certain time upon fulfillment of certain conditions. For example, de-referencing of a link listed on a search engine when the page in question contains sensitive information such as information about religion, political opinion, or criminal conviction. This remains a developing area of the law in the EU, with some important differences as to how each supervisory authority applies the right in each context.

The 'right' being considered in section 15 of the Discussion Paper borrows from its 'cousin' but is different and potentially narrower than the rights applicable in the EU. I think these differences are important.

Regarding the scope of the information to be covered, the Australian principle will turn on what is 'personal information'. As Anna notes above, this definition is a key aspect of the pending reforms given that it impacts on the scope of the regime and its application to information rights of individuals, including erasure. It will be difficult, if not impossible, to give practical meaning to such a right in the absence of certainty as to what information is 'about' a person or 'relates' to a person.

The definition will, by necessity, impact on many technical and operational processes. APP entities will need to have robust processes in place to discern personal information from broader data sets. How each entity will address this will differ based on whether the entity operates a website, a communication service, or a social network. There may also be substantial variations based on industry practices. For example, in financial services there are prescribed requirements as to retention of customer data for regulatory purposes or in industries such a telecommunication, mandatory retention requirements on some types of personal information and meta data.

It will also be important to consider the right of erasure in light of important differences between the privacy regimes. In the EU, the right is to request and obtain the erasure 'from the controller'. Unless the 'controller' and 'processor' designations are introduced into the Privacy Act, the regime will need to address how the right will operate in the context of the supply chain and address the flow of information in the digital environment. It will be important to determine who has possession or control of the information in question. This raises issues as to who is deemed to be 'holding' the personal information and how responsibilities are addressed in the contract. Again, the industry involved, and type of information being processed, will be key as to how the right, as constituted, will apply in practice.

Lastly, we will need to be mindful that in the EU, the right of erasure arises in the context of human rights where privacy is a fundamental right, recognised in the European Convention for the Protection of Human Rights and Fundamental and Directive 95/46. There is no such corresponding right in Australia and the Discussion Paper does not propose to change this. I think this will have a direct bearing on how the right is understood and administered.

FISHER: Thanks Olga. There's a recommendation to create a direct right of action, and a separate recommendation to introduce a statutory right for invasion of privacy. To our private practice lawyers, would you say that you're licking your lips all the time these days or just constantly? Seriously, though, can you talk us through these proposals and how they will differ?

DAWSON: The direct right of action, if introduced, is set to cover 'interferences with privacy' by an APP entity (i.e. only those entities subject to the Privacy Act). Such complaints will be subject to a 'conciliation gateway' similar to claims brought under discrimination legislation, whereby the claimant would first need to make a complaint to the OAIC and have their complaint assessed for conciliation. The complainant could then elect to initiate action in court where the matter is deemed unsuitable for conciliation, conciliation has failed, or where the complainant chooses not to pursue conciliation. The complainant would need to seek leave of the court for it to be heard by the Federal Court or Federal Circuit Court.

By contrast, if a statutory tort were introduced, a claimant would have the choice to bring an action (against any entity liable to be sued in Australia, not just APP entities) directly in Court under either of two limbs:

- intrusion upon seclusion (usually involving intrusions into a person's physical private space, such as watching, listening to and recording another person's private activities, as opposed to information privacy, as regulated by the Privacy Act); or
- misuse of private information (which is defined by the ALRC to constitute unauthorised disclosure). While this may constitute an 'interference with privacy', as under the proposed direct right of action, interference is likely to be construed to be broader, to include various other interferences (such as poor security or collection practices). Also unlike under the proposed direct right of action, such a tort would also not likely be tied to the definition of personal information nor subject to the exemptions in the Privacy Act.

The statutory tort being contemplated would also require proof of the following elements:

- that the public interest in privacy outweighed any countervailing public interest;
- that the breach of privacy satisfied a seriousness threshold; and
- that the complainant had a reasonable expectation of privacy in all the circumstances.

GANOPOLSKY: I think the fact that the other common law jurisdictions have developed the tort and the post GDPR developments, mean that Australia is now out of step. Having a statutory tort will mean that the legislature will have a say in framing the right and can address the scope of the right in light of current circumstances and priorities.

FISHER: A great deal of focus in the Discussion Paper is on the way the law is enforced. The Privacy Commissioner is likely to receive some expanded powers, and the penalties are going to increase significantly. The Privacy Commissioner has traditionally been a more educative and collaborative regulator than a penaliser. But this may change. How important is this development?

JOHNSTON: I would love to think that all organisations care about the privacy of their customers and staff because they know it's a matter of trust and reputation, but there's nothing quite like the prospect of large fines to gain the attention of the C-suite and move privacy compliance up the 'to do' list!

In recent years the OAIC has done a remarkable job with the limited resources it has. It's been quite strategic in its choice of investigations into large companies and government agencies, and in the use of its Determination power. But to be an effective regulator with reach across the entire economy, it needs a full range of tools in its regulatory and enforcement toolkit. The proposals in the Discussion Paper, and in Schedules 2 and 3 of the Online Privacy Bill, are about finally giving the OAIC that full toolkit. But they will also need a significant funding boost to go with it.

FISHER: ...which brings us now to the Online Privacy Bill. Can you summarise its purpose and effect?

JOHNSTON: Schedule 1 of the Online Privacy Bill is about creating a space in the Privacy Act for the introduction of a binding 'Online Privacy Code'. The Code would create new obligations for certain kinds of bodies, namely social media companies, data brokers, and large online platforms, as Ashleigh mentioned earlier. Either the industry would need to develop the Code within 12 months, or the OAIC can step in and develop it.

The content of the Code would need to flesh out how some of the APPs will apply in practice to those industries, and would cover three broad areas: how to draft privacy policies and collection notices and what consent means; introducing a right to object, which means the ability for a consumer to ask a company to cease using or disclosing their personal information; and some requirements to protect children and other vulnerable groups.

The Discussion Paper for the main review process says that the Online Privacy Bill "addresses the unique and pressing privacy challenges posed by social media and online platforms". But in reality most of those issues, and the proposed solutions, like the role of notice and consent and how to protect children, are not unique to social media or online platforms, and in fact all but one of the issues proposed for the Code are already addressed in the broader Discussion Paper.

The one big thing that's proposed for the Code that's not also in the Discussion Paper is age verification for the use of social media, along with a requirement for parental consent to sign up users under 16. This means age verification for everyone, not just children. And age verification usually means identity verification, which means giving Big Tech *more* personal information, which in my view is not very privacy-friendly, for a Bill supposed to be about privacy.

SAINTY: From a practical point of view the Online Privacy Code, as described in the Bill, is an ambitious exercise.

It is a part of the Government's response to the Digital Platforms Inquiry which recommended enhanced privacy protections for individuals online. As Anna rightly points out the Online Privacy Code is to be developed and registered within 12 months. The relevant organisations to be governed by the Code (**Code Participants**) will have the first opportunity to do this – at the request of the Information Commissioner. However, if the Code is not suitable, the Commissioner may develop it herself. On that basis, it's hard to see an agreed Code in circulation within 12 months.

One challenge, besides the time frame, is that the Code Participants are likely to have many and varied views on the approach to and impact of such a Code. There is no current uniform view on the topics the Online Code is to cover – policies, collection notices and consents (including a right to object) – and very different vested interests among the Code Participants. The Code Participants themselves are not a clearly defined class.

FISHER: The Exposure Draft of the Bill and an accompanying Explanatory Paper were released at the same time as the Discussion Paper for the broader review of the Privacy Act. What are your thoughts about the timing? Why are these two related pieces of privacy law reform separate, and what are the risks and benefits with that approach?

DAWSON: Our discussions with the Attorney-General indicate that the reforms set out in the Code are likely to be passed in early 2022, with the broader reform to the Privacy Act occurring in late 2022, likely to come into effect at some point in 2023.

JOHNSTON: Politically, the government is keen to be seen to beat up on Big Tech ahead of the election. This is driven by reactive politics rather than sensible policy. That's my summary of the two strands: one is policy, the other is politics.

My concern is that the debate over age verification will prove to be a furphy which distracts from the bigger issues raised by the wider Act review. The Government should fix the Privacy Act for all regulated entities and all Australians, instead of introducing a two-tier regulatory system. Any new provisions for protecting children and vulnerable groups, or for clarifying the elements needed to gain a valid consent, should apply to all sectors, as is already proposed in the Discussion Paper as part of the broader review of the Privacy Act.

Plus, being pragmatic, in my view, none of the proposals for the Online Privacy Code will be effective at protecting privacy in practice until the definition of 'personal information' is first fixed, as is proposed in the Discussion Paper, but not included in the Bill.

FISHER: How will the Online Privacy Code impact on children's privacy?

LINDHOUT: Many people including parents like myself will be excited to see that the Online Privacy Code seeks to increase the protections available for children and vulnerable groups. I touched on increased protections for children in the general privacy law reform process; but this process is focused on social media providers, data brokers and large online platforms, where there is a special need for child protection. Presently, privacy protection for children is not something directly addressed in the Privacy Act, only in guidance from the OAIC. So the first step is to formalise protection for children in the Code rather than just guidance materials.

But more substantively, it is proposed that the Code will have two layers of privacy obligations: (a) the first for all Code Participants; and (b) a second layer of additional obligations for social media platforms. For all Code Participants, it's proposed that the Code will set out how various privacy obligations will apply specifically in relation to children. For example, there might need to be a children-specific privacy policy and collection notice. There would be greater clarity on the collection, use and disclosure obligations in relation to children's personal information. The point here is that if Code Participants are forced to set out specifically how they deal with children's personal information, there will be greater protection in turn.

The second layer of protection that is proposed to apply only in relation to social media platforms involves a stricter set of obligations for handling children's personal information, namely that social media service providers will need to:

- take all reasonable steps to verify the age of individuals who use the service;
- ensure that the collection, use and disclosure of a child's personal information is fair and reasonable in the circumstances, with the best interests of the child being the primary consideration when determining what is fair and reasonable; and
- obtain parental or guardian consent before collecting, using or disclosing the personal information of a child who is under the age of 16, and take all reasonable steps to verify the consent.

The stricter standard to be applied to social media service providers arises expressly because, as the Explanatory Paper puts it, the potential risks social media platforms pose to children are higher than those posed by data brokers or large online platforms due to: (a) the number of children who use social media services; (b) the nature of the interactions that can occur via social media platforms; and (c) the wide range and volume of personal information that social media platforms handle.

The next challenge will be addressing in the Code how you determine what reasonable steps are in the context of a social media platform assessing whether parental consent has actually been obtained. Given the very nature of online interactions which the Code is seeking to make safer, it's likely this will be a tricky one to bed down.

FISHER: Thanks Beck. So what are next steps in the privacy law reform process?

FEHRENBACH: On 6 December 2021, the Government closed submissions on the Online Privacy Bill and consultation Regulation Impact Statement. We are now waiting in anticipation for further developments on the Online Safety Bill before it is introduced to Parliament.

The government is inviting submissions and any feedback on the proposals in the Discussion Paper until 10 January 2022. This will inform the Privacy Act Review's final report. The Attorney General's website advises that Privacy Act Review seeks to build on the outcomes of the Online Privacy Bill "to ensure that Australia's privacy law framework empowers consumers, protects their data and best serves the whole of the Australian economy".

I don't need a crystal ball to tell you that 2022 will be another big year for developments in privacy in Australia.

Interview: Zeina Milicevic

Ashleigh Fehrenbach, co-editor, sits down with **Zeina Milicevic** to talk about her career as an IP private practice lawyer. Zeina is a Partner at MinterEllison in the Dispute Resolution, Intellectual Property Team. Zeina specialises in resolving complex intellectual property, advertising and branding disputes across a range of industries, including media, entertainment and education cosmetics. Zeina has successfully represented clients in copyright, trademark, confidential information, passing off, and Australian Consumer Law disputes, in the Federal Court, High Court, and Copyright Tribunal of Australia. Over the past two years Zeina was also the President of the Copyright Society of Australia.

ASHLEIGH FEHRENBACH: Hi Zeina – on behalf of all our readers, thank you so much for chatting IP law with us. Let's get started, what was one skill you learnt in your first few years of practice?

ZEINA MILICEVIC: The art of running (up and down the corridors in the office) when an urgent matter is on even if I had plenty of time to walk. It seems to fill people with confidence that you have appreciated the urgency of the task at hand and are taking it seriously. I used to do training for graduate lawyers on urgent interlocutory injunctions and that was one of my main tips! But in all seriousness, I think the one skill I learnt in those first few years was to take a step back from the task I was doing, think about the broader picture, think about how my task fitted in (and ask the question if it wasn't clear), and then approach the task with all of that in mind. The work you do has a lot more meaning (for yourself as well as the person you are doing it for) when you can understand and appreciate how it all fits into the bigger picture.

FEHRENBACH: What drew you to the world of IP?

MILICEVIC: Initially the people and then the work. I didn't study IP at university (on purpose - all the "cool kids" were doing it and I wanted to be different). I was going to be a tax or finance lawyer (so much cooler?). But then while on rotation as a graduate lawyer at MinterEllison I was picking groups for my third rotation and everyone kept talking about this lovely partner in IP, Charles Alexander, and I thought "why not!". This is the best decision I ever made. Charles was, and still is, a wonderful mentor to me. I then grew to love the work we do in IP. Every matter is so different and you have to understand the client, their goods and services, and how they work etc in order to advise. This means you get to work with people from all areas of a business, not just the lawyers. In my time as an IP lawyer I have learnt how music is selected for group fitness classes, how a satellite works, what a peptide is... I could go on!

FEHRENBACH: You have worked on a range of high-profile IP matters, particularly on copyright matters for schools, newspaper publishers, collecting societies and free-to-air and subscription television in both the Copyright Tribunal of Australia and the Federal Court – sounds like a really interesting area! I'd love to hear how you found yourself in that specialisation.

MILICEVIC: To be honest, I was very much in the right place at the right time. When I started in the IP team as a graduate lawyer at MinterEllison we were acting for the Australian Hotels Association in Copyright Tribunal proceedings to determine how much nightclubs should pay to play sound recordings. As you can imagine, as a young lawyer who at that time still frequented a

nightclub or two, it sounded like the perfect matter and I put my hand up to get involved. I do believe that when it comes to a career in a law firm a lot of it can be "right place, right time", but it is also what you do with those opportunities that present themselves. Having wonderful mentors who supported and encouraged me, gave me the confidence to see opportunities and embrace them.

FEHRENBACH: What was the biggest development you saw this year in the IP legal landscape?

MILICEVIC: The most talked about development in our team this year would have to be the first judicial determination that recognises artificial intelligence (AI) as an inventor. While it is on appeal, the decision could have far-reaching implications for industries utilising AI for research and development including the healthcare, pharma, biotech, financial services, e-commerce, telecommunications and manufacturing sectors.

Another big development, that I would love to see stay in some form, was virtual hearings. I did enjoy attending hearings in my active wear in close proximity to my fridge. While nothing beats a hearing in person, it would be great to see virtual hearings stay – at least for case management hearings. I think it would also help to have the option for people (particularly clients) to dial in by video if they can't make it in person. It goes a long way to ensuring access to the Courts and more flexibility in the ways that we work.

FEHRENBACH: How has the COVID pandemic changed client expectations and how lawyers deliver their work?

MILICEVIC: There has been an expectation that we are all available all the time (and we are often our own worst enemies and put that expectation on ourselves). Gone are the days of heading out of the office for a meeting and the break you get from emails and calls during that time. We are all glued to our phones and computers. The laptop is always there and it is always on.

Having said that, I think law firms have definitely become more flexible. It is now acceptable to take a break at 11am for an appointment, or to go and pick up the kids from school at 3pm. And there have been some great initiatives to promote flexibility and wellbeing in the workplace. At MinterEllison, for example, we now have Wellness Wednesdays where there are to be no internal meetings between 12pm and 2pm so people can take a proper break and there are health and wellbeing presentations offered during that time for those who are interested. There are pros and cons to all these changes. I think the ongoing challenge is learning to step away from work, to turn off the computer, and to turn off the email notifications on our phones. I heard a great tip from another partner not that long ago: at the end of his working from home day, he grabs his laptop, puts it in the boot of his car, drives around the block and then leaves his laptop in the car. He does this to signal the end of the working day and the beginning of his evening at home. We are all going to have to find clever ways of making sure there remains a clear divide between work and home life.

FEHRENBACH: You were made partner at MinterEllison in 2021 – a huge achievement. What was one challenge you noticed in progressing up to partnership?

MILICEVIC: As a then part time working mum one of my biggest challenges was self-doubt. I have, like a lot of people, imposter syndrome. The fear that everyone is going to realise I have no idea what I am doing. But I also doubted whether I could make it work: a partner in a top tier firm and a present mum to two young girls. I want to be able to take my kids to swimming lessons on a Tuesday, to attend the year 2 play in the park at 3pm on the last day of term, to go to the drama concerts and the school assemblies. All of that is really important to me. Thankfully having a firm, partners, colleagues and clients that believed in me and were willing to give me the chance to prove myself helped to push those doubts aside. Sadly it is an issue that a lot of people struggle with. I am hopeful that the new flexibility we now have in our working days thanks to COVID will mean that more people can see a way to make the juggle work.

FEHRENBACH: What do you consider to be one piece of advice you would share with your younger self in the early stages of your career?

MILICEVIC: It's a marathon, not a sprint. Find out what works for you to ensure that you have some balance in your life and can last the distance. One size doesn't fit all.

FEHRENBACH: It wouldn't be a CLB end of year wrap up without a question on Christmas anthems – who does "All I want for Christmas" better: Mariah (the original) or Michael Bublé (the cover)?

MILICEVIC: I am going to have to say Mariah. Don't get me wrong, I love Bublé and my mum may kill me for saying this, but there is something about the Mariah version. It puts me in the Christmas spirit!

Ashleigh Fehrenback, Senior Associate at RPC in London and co-editor for *Communcations Law Bulletin*

Journalism via Twitter, or Fake News?

Social Media and the Limits of Journalist Privilege and Anonymous Informants

Ian Bloemendal, partner, **Nick Josey,** senior associate, and **Fergus Rees,** Clayton Utz, explain why commentators on Twitter or other forms of social media must be cautious when using information received from anonymous sources.

In recent years, social media has become one of the accepted ways of receiving updates on what is happening in the world – whether via Facebook, Twitter or some other medium. News updates are also communicated through sources beyond recognised media organisations, with individual journalists establishing their own accounts where updates on happenings and events can be provided live.

The Federal Court recently considered how a privilege afforded to journalists to protect informant identity under section 126K(1) of the *Evidence Act 1995* (Cth) applies to social media in a pre-trial ruling in the matter of *Kumova v Davison* [2021] FCA 753. Specifically, the Court considered whether the Respondent Mr Alan Davison, (owner of the Twitter handle @StockSwami (**Twitter Handle**)), was protected against being compelled to disclose the identity of his "Corporate Advisor". The Court decided that the privilege did not apply to Mr Davison, and he was ordered to disclose the identity of his informant within 14 days.

Mr Davison joins Twitter

When a person joins Twitter, the social media site requests that you provide a short biography to be displayed at the top of your Twitter Feed. Mr Davison's Twitter Handle read substantially as follows:

> Cyncial and Cranky take on the ASX professional company operators making a play on Retail.
>
> They can Block but they can't stop the Swamo.

In January 2021, he added the tag "Citizen Journalist" to the end of this biography.

Mr Davison asserted that he has used the Twitter Handle since 2016 to present his honest opinions on shares and share promoters, and to present his research on shares and the people standing behind online accounts promoting those shares.

The substantive proceedings related to six tweets by Mr Davison that Mr Kumova alleged were defamatory of him by suggesting that he had engaged in insider trading, misleading the market, and the provision of inside information in relation to New Century Resource's planned acquisition of the Goro Nickel Mine. Mr Davison denied that those allegations arose from the natural and ordinary meaning of the tweets and he pleaded a series of defences including justification and contextual truth.

Relevant to the pre-trial application was the fact that Mr Davison had engaged in discussions with a "corporate advisor" prior to at least one of the relevant tweets. Those discussions informed a tweet published on 20 May 2020 which stated:

> $NCZ in trading halt to ann [sic] an acquisition. It's no secret he's been telling all his mates pre $IGO merger that Goro Nickel project was a planned acquisition. Makes a Mockery of this cleansing statement @ASX @asicmedia

The Court noted that the information provided by the "corporate advisor" could legitimately be characterised as commercially sensitive and "inside" information, and information presumably not then otherwise known in the market.

As part of his defence, Mr Davison asserted that he was entitled to withhold the identity of this "corporate advisor" on the basis of journalist privilege. Mr Kumova argued that Mr Davison did not have access to this privilege, for a number of reasons:

- first, he alleged that Mr Davison was not a journalist;
- second, Mr Davison's Twitter Handle did not provide "news"; and
- third, the information communicated to Mr Davison by the "corporate advisor" was not given pursuant to a "promise" not to disclose the identity of that person, being a "promise" given before the information was in fact provided.

Mr Kumova therefore applied under section 126K(2) of the Act for an order that Mr Davison provide details of the "corporate advisor".

What is "Journalist Privilege?"

Section 126K(1) of the Act states (subject to a public interest test in subsection 2) that:

If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.

Essentially, it can protect journalist sources against disclosure in circumstances where information relevant to a story or update is provided to the journalist on the basis of a promise to protect confidence or similar.

The terms "informant", "journalist", and "news medium" are relevantly defined within section 126J of the Act:

> **informant** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium.

journalist means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.

news medium means any medium for the dissemination to the public or a section of the public of news and observations on news.

These definitions were considered by the Court in determining the application brought by Mr Kumova.

Who is a journalist?

The Court noted that a "journalist" need not be formally engaged in a profession or business as a "journalist" or remunerated for the dissemination of that which is published. Those requirements are not expressly required by the statutory definition, nor are they impliedly required from the phrase "engaged and active in the publication of News".

What was important, however, was how Mr Davison regarded the account, the manner in which the information was communicated to him by the "corporate advisor", and the nature and character of what else could be found by those accessing the Twitter Handle feed.

In considering these matters, the Court found that Mr Davison was **not** a journalist, basing its findings on the following:

- first, the Court held that the biography for the Twitter Handle was "not the hallmark of a "journalist", as that term is normally understood, to publish – not "news" – but a "cynical and cranky take" on information and to publish material – not for the purpose of publishing "news" – but for the purpose of "defending and vindicating [oneself]."
- second, the entirety of the publications subject to complaint and the character and nature of other material that could be accessed on the Twitter Handle suggested that Mr Davison was not acting as a "journalist" – rather, he simply provided commentary on the market as an interested observer.

The Court also briefly considered the tagline of "Citizen Journalist" and noted that it was, at best, a "loose self-description". (Saying it about yourself doesn't make it so).

The Twitter Feed as a "News Medium"

As to whether the Twitter Handle was a "news medium", the Court observed that the relevant considerations were how Mr Davison regarded his account, the manner in which the information was communicated to him by the "corporate advisor"; and the nature and character of what else can be found by those accessing the Twitter Handle's feed.

Having regard to those considerations, the Court held that the Twitter Handle's feed was not a "news medium" for the purposes of the Act for several reasons:

- first, the Twitter Handle biography indicated that the account was "far from objective" and it was not the purpose of the Mr Davison's Twitter feed to be a "news medium". The profile also lacked any express statement that the purpose of the feed was disseminating "news".
- second, there was a significant amount of material on Mr Davison's Twitter feed that could not be described as "news". The Court noted that, while some tweets had the hallmarks of journalism, the account fell short of being a "news medium" because:
- …a "news medium" must remain a medium which is routinely or regularly used by journalists as a medium primarily, or at least substantially, for the publication of "news" as opposed to a medium which may from time to time be the source of "news"

Importantly, it was also noted that, although the conclusion with respect to "news medium" overlaps with the former conclusion that Mr Davison was not a "journalist", the two are separate considerations. The Court held that this is made self-evident from the separate definitions of "journalist" and "news medium" in the Act.

A promise not to disclose an informant's identity

The Court held that under section 126K(1) of the Act, any promise not to disclose the identity of an informant must be:

- made anterior to the provision of the information; and
- must be an express "promise" in respect to the provision of identifiable information (as opposed to any promise that may otherwise be inferred, or any promise that could be implied by reference to, for example, the character of the information being disclosed).

Mr Davison failed to prove that any such promise made to his informant before he was provided the relevant information. While the evidence indicated that there was a "promise" not to disclose the identity of the "corporate advisor" it was inadequate to establish that it was made prior to receipt of the commercially sensitive information.

What it means for you

The Court did not make a general ruling that a social media or Twitter feed could **not** be considered a "news medium" under the Act. Rather, the Court confined its ruling to Mr Davison's Twitter Handle only. A person's Twitter feed could still be considered "news" for the purposes of the application of the journalist privilege under the Act.

That said, commentators on Twitter or other forms of social media must be cautious when using information received from anonymous sources. They will only be able to protect their sources under the Act, if they can prove that they are "journalists" operating on a "news medium" and received the confidential information from the informant only after first making a promise that their identity would not be disclosed.

It is therefore important to consider the Twitter or social media feed as a **whole** – not purely viewing it through the lens of the relevant tweet, or a person's self-description as a journalist.

Sources of information also need to be careful if they are publishing information to a commentator or 'journalist" that is potentially defamatory. If their identity is discovered they may find themselves named as a defendant to a defamation action.

CAMLA Young Lawyers Committee
2021 Chair Report from Calli Tsipidis

Another year around the sun, and what a year it has been for the CAMLA Young Lawyers Committee. It is a credit to the Young Lawyers for not only matching their stellar accomplishments from 2020 again in 2021, but for continuing to seek to innovate and improve the CAMLA experience for young lawyers, students and CAMLA members alike.

2021 EVENTS

Networking Event

The CAMLA Young Lawyers Committee started 2021 with a bang, hosting the annual Networking Event in late March. We were grateful to be joined by over 50 eager attendees at the offices of Clatyon Utz.

Timothy Webb (Clayton Utz and 2021 CAMLA Board member), Sarah Woolcott (BMG Music), Michael Bradley (Marque) and Claire Roberts (Eleven Wentworth and 2021 CAMLA Young Lawyers Committee member) discussed their career paths, professional highlights and challenges, and provided sound advice. Fittingly, the panel encouraged attendees to think of networking not as a daunting 'tick the box' exercise required for your job, but as an opportunity to make valuable, human connections.

Thank you again to the panel for lending us your very valuable time and insights – and to Clayton Utz for hosting us.

Privacy 101

Kicking off the Young Lawyers '101' series of events for the year was the 'Privacy Law 101', a breakfast seminar at the offices of Bird & Bird. Our expert panel of Peter Leonard (Data Synergies), Sophie Dawson (Bird & Bird and 2021 CAMLA Board member), Veronica Scott (KPMG) and Kelly Matheson (Minter Ellison) provided a high-level analysis of developments in the privacy and data security space and explored how privacy practitioners can best assist clients in navigating these complexities.

We are very grateful to the panel and to Bird & Bird for hosting.

Injurious Falsehood 101 Webinar

Next on the calendar was the Injurious Falsehood 101 – our first of many webinars. We were fortunate to be joined by the knowledgeable and engaging Sue Chrysanthou (153 Phillip Barristers) and Dauid Sibtain (Level 22 Chambers), who took our attendees through the elements of the injurious falsehood, as well as provide a very practical look at the day-to-day issues that practitioners face.

Sports Law 101

Footy finals season was in full swing when the CAMLA Young Lawyers Committee rounded up sports fanatics Tim Fuller (Gadens) and Simon Merritt (Lander & Rogers) to join us for Sports Law 101, which I was very grateful to have also featured in. The panel discussed the intricacies of doping matters, duty of care of sports governing bodies, disciplinary matters and sponsorship and ambassador arrangements.

Thank you to Tim and Simon for joining us and lending us your valuable insights.

Imputations 101

Finally, the Imputations 101 event rounded out the Young Lawyers calendar for 2021. We were thrilled to be joined by Nicholas Olson and Tim Senior of Level 22 Chambers, two experts in the field, addressing issues such as how to frame imputations in a pleading, and how to respond to them (generally in a defence, and by evidence) – and sharing a candid view of Australia's approach to imputations.

Thank you to our panel who provided excellent insights– and to Corrs Chambers Westgarth for hosting this event.

I would also like to thank the wonderful CAMLA Young Lawyers Committee members who worked on each of these events, whose success is very much a testament to their diligence and hard work. The shift to virtual events did allow attendees from States and Territories other than NSW to attend CAMLA Young Lawyer Committee events this year. We look forward to continuing to welcome our friends from across Australia to our seminars and webinars in 2022.

OTHER CONTRIBUTIONS

Throughout the year, the CAMLA Young Lawyers Committee Young Lawyers contributed various works to the Communications Law Bulletin. Specifically, the Young Lawyers were very grateful to have participated in the inaugural International Women's Day Edition. Thank you to Eli Fisher and Ashleigh Fehrenbach for allowing us the privilege and opportunity to contribute to a game-changing edition. I'd also like to extend a thank you to the CLB liaisons from the CAMLA Young Lawyers Committee – Claire Roberts (Eleven Wentworth) and Dominic Keenan (Allens) – for your fantastic work helping coordinate the young lawyer contributions in 2021.

I would like to thank our fabulous hosts and coordinators, Belyndy Rowe (Sainty Law) and Joel Parsons (Bird & Bird) of the CAMLA Young Lawyers Committee. I encourage all members to tune in, it is an excellent initiative and one I am grateful to the Young Lawyers for taking on and continuing to master.

Excitingly, the CAMLA Young Lawyers Committee are also planning a campaign to increase engagement amongst young lawyers and university students. We are thoroughly looking forward to continuing to help break down the invisible barriers between studying and practising law.

It has truly been a pleasure to Chair such a passionate, genuine, and conscientious group of young lawyers. I would like to extend a big thank you to the 2021 Committee for their outstanding efforts and enthusiasm in what was another challenging year:

- **Amy Riley** (Allens)
- **Antonia Rosen** (News Corp)
- **Belyndy Rowe** (Sainty Law)
- **Claire Roberts** (Eleven Wentworth)
- **Dominic Keenan** (Allens)
- **Ellen Anderson** (Addisons)
- **Isabella Boag-Taylor** (Bird & Bird)
- **Jess Millner** (Minter Ellison)
- **Jessica Norgard** (nbn co)
- **Joel Parsons** (Bird & Bird)
- **Kosta Hountalas** (Herbert Smith Freehills)
- **Madeleine James** (Corrs Chambers Westgarth)
- **Nicholas Perkins** (Ashurst)
- **Nicola McLaughlin** (Kay & Hughes)

I would like to give particular thanks to our Secretary Belyndy Rowe, who not only managed our meeting minutes and records but who was an integral member of the CAMLA Young Lawyers Committee throughout 2021. We would not have had the successes we had in 2021 without her involvement in the Committee.

I would also like to extend sincere thank you on behalf of the Young Lawyers to 2021 CAMLA President Martyn Taylor, the CAMLA Board and Executive who have provided us with tremendous support throughout the year. I would also like to call out the wonderful Cath Hill for all of the incredible work she does for us behind the scenes. The success of CAMLA, and the Young Lawyers Committee, is very much thanks to Cath and her contributions to all of our initiatives.

I am exceedingly proud of the accomplishments of the Young Lawyers 2021 and am looking forward to a bigger and better 2022, hopefully one we can all enjoy with events and meetings returning to in person!

I encourage any young lawyer with an interest in communications and media law to submit their interest in joining the 2022 CAMLA Young Lawyers Committee, or, if you aren't already a member, sign up today.

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

Calli Tsipidis
Chair, CAMLA Young Lawyers Committee 2021

Legal Counsel, Foxtel Group (FOX SPORTS Australia, Kayo Sports, BINGE, Flash & Foxtel)

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The Metes and Bounds of the Federal Court's Jurisdiction in Defamation Matters - How Far Does it Extend?

Ben Regattieri, Lawyer, and **Marina Olsen,** Partner, Banki Haddock Fiora, consider the jurisdiction of the Federal Court to hear defamation matters.

While often glossed over or assumed to be satisfied by lawyers, the issue of jurisdiction is an important and necessary matter to consider before bringing, or when responding to, an action. The question must always be asked: does this Court have the power to adjudicate upon this dispute? Whether a Court has jurisdiction to hear a matter cannot be resolved or conferred by agreement between the parties, however as Griffith CJ explained more than 100 years ago, the "first duty of every judicial officer is to satisfy … [themselves] that … [they have] jurisdiction".[1]

The issue of federal jurisdiction in defamation actions, including cases involving a "pure" defamation claim (that is, one that exists without an ancillary cause of action or defence arising under a federal statute), has received extensive consideration in the last few years. This has particularly been the case since the influx of defamation cases into the Federal Court of Australia following the decision in *Crosby v Kelly*[2] in 2012. However, the stampede of applicants towards the Federal Court since then may also have induced some applicants (particularly those who are selfrepresented) to incorrectly assume that the Court always has jurisdiction over defamation matters.

In a recent judgment of Justice Lee in *Mulley v Hayes*,[3] his Honour summarised the main grounds upon which federal jurisdiction is enlivened in defamation claims, quoting his well-known, earlier survey of the area in *Oliver v Nine Network Australia Pty Ltd*.[4] Many are familiar with the *Crosby v Kelly* basis, where there has been publication (or alleged publication) in an Australian territory. However, it is worth remembering that there are other avenues available, particularly in the context of a claim involving multiple causes of action. Resort to these avenues is usually not required in mass media cases, as there will generally be national publication (including in a territory).

Advantages of the Federal Court for applicants in defamation cases

Whilst not the focus of this article, it should be noted that most applicants consider the Federal Court a more favourable Court in which to sue than the traditional defamation Courts, being the Supreme Courts of the states and territories, and the various District Courts. One reason for this is the Court's default position that civil matters are not to be tried by a jury, and applicants' perception that they enjoy better prospects before a judge alone.

In *Chau Chak Wing v Fairfax Media Publications Pty Ltd*,[5] the media respondents were unsuccessful in bringing an application for the matter to be heard by a jury. The *Defamation Act 2005* (NSW) (**Defamation Act**) (and its analogues) makes it clear that parties have a right to have a defamation claim heard by a jury, with section 21 providing for the election for proceedings to be tried by a jury and section 22 outlining the roles of judges and juries in such proceedings. However, the Court in *Chau Chak Wing* confirmed (and the parties agreed) that those provisions are inconsistent with the *Federal Court Act 1976* (Cth) (**FCA**), section 39 of which sets out the Federal Court's default position that trials shall be heard by a judge unless the Court orders otherwise and section 40 of which provides that the Court may direct that a suit or an issue or fact be heard by a jury "in any suit in which the ends of justice appear to render it expedient to do so".

The *Chau Chak Wing* respondents accepted that the Defamation Act provisions are invalid to the extent of that inconsistency by reason of section 109 of the Constitution. However, they contended that, in exercising its discretion under section 40 of the FCA, the Court may have regard to sections 21 and 22 of the Defamation Act. This argument was rejected by the Full Court and, as such, respondents in Federal Court defamation cases must now seek to persuade a Court that orders should be made for a jury under the ordinary principles of section 40.

Although *Chau Chak Wing* has certainly made the prospect of a Federal Court defamation jury trial less likely, and no such trial has proceeded to date, Allsop CJ and Besanko stated in that case:

> *We note that we can envisage cases where there might be good reason to have a jury. For example, although not this case, there might*

1 *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583 (**Oliver**) citing *Federated Engine-Drivers and Firemen's Association of Australasia v The Broken Hill Proprietary Company Limited* (1911) 12 CLR 398, 415.

2 (2012) 203 FCR 451.

3 [2021] FCA 1111.

4 *Oliver* at [10]-[16].

5 (2017) 255 FCR 61 at [37].

> *be a case where there is a real issue as to whether changing community standards mean that the words considered defamatory of a person, say 30 years ago, would no longer be considered defamatory. There may be other circumstances and it is neither possible nor desirable for us to state in advance the cases that might call for an order for a jury.*[6]

In *Ra v Nationwide News Pty Ltd*,[7] which preceded *Chau Chak Wing* by several years, Justice Rares ordered the first ever jury trial in the Federal Court, however the matter settled at mediation before trial. In that case, Ms Ra, a brothel owner, sued the publisher of *The Daily Telegraph* for defamation and misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth). Ms Ra pleaded several imputations and representations, which included that she was accused of a despicable crime of keeping foreign women as sex slaves in her brothel. Rares J reasoned that the matter before him raised "issues that very much involve giving effect to moral and social values of the community",[8] and therefore he was satisfied that a jury would be a better mode of trial than judge-alone.

More recently, in *Barilaro v Shanks-Markovina (No 3)*,[9] Rares J refused an application to have a defamation matter heard by a jury based on the complexities arising from having a case straddling two different versions of the Defamation Act (which was amended with effect from 1 July 2021), and the uncertainty created by the COVID pandemic. However, his Honour described the matter as "finely balanced", stating "perhaps with a simpler case it would be appropriate to make such an order".[10]

In the recent hearing for broadcaster Erin Molan's defamation proceedings against the *Daily Mail*, according to a report in *The Sydney Morning Herald* Justice Bromwich admitted that the prospect of him personally needing to decide what constitutes racism to a reasonable person was challenging given that, according to his Honour, he was an "older male white judge". Whilst no application for a jury was made, his Honour described the proceedings as "a particularly worthy case for a jury".[11]

Another reason applicants prefer the Federal Court is the efficiency and speed at which matters are resolved. The Court's docket system is arguably more efficient in the sense that it generally brings proceedings to a final resolution far more quickly than state Courts, appealing to those seeking rapid vindication.[12] The Federal Court's focus on minimising the interlocutory disputes that have traditionally been fought in defamation cases also shortens the time between commencement and disposition. Lee J stated in *Nationwide News Pty Limited v Rush*:[13]

> *The predilection for interlocutory disputation in this area of the law should not be encouraged by the ready grant of leave. To do otherwise would fail to pay sufficient heed to the warning of Jordan CJ that cases could be delayed "interminably" and "costs heaped up indefinitely" if a litigant could, in effect, transfer all exercises of discretion in interlocutory applications to the Full Court.*

On one view, the reluctance to hear interlocutory disputes and the practice of letting matters proceed rapidly to trial with minimal pre-trial skirmishes can be *less* effective in facilitating the just, quick and cheap resolution of proceedings. Defamation matters might proceed to final hearing, and to final judgment, only for the applicant to fail in making out the fundamental ingredients of their claim. This can have costs consequences for both an applicant (who might sue on multiple publications, but only succeed on some) and a respondent (who might spend significant sums seeking to defend imputations that are ultimately found not to have been conveyed). For example, in *Hockey v Fairfax Media Publications Pty Ltd*,[14] the applicant sued on multiple articles in *The Sydney Morning Herald*, *The Age* and *The Canberra Times* (published in print and electronic formats) but succeeded only in proving that a poster promoting one of the print articles, and two tweets, conveyed defamatory imputations.

Federal Court jurisdiction generally

The starting point for the Federal Court's jurisdiction is to be found in section 39B(1A) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), which reads:

> *The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:*
>
> *(a) in which the Commonwealth is seeking an injunction or a declaration; or*
>
> *(b) arising under the Constitution, or involving its interpretation; or*
>
> *(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.*

Since 1997, the Federal Court has been a Court of general federal civil jurisdiction, having moved beyond its status as a Court of limited specific jurisdiction. The conferral of this

6 At [45].
7 [2009] FCA 1308 (**Ra**).
8 Ra at [26].
9 [2021] FCA 1100.
10 At [51], [52].
11 Jenny Noyes, 'Judge in Molan defamation case "challenged" by racism definition', *The Sydney Morning Herald* (https://www.smh.com.au/national/nsw/judge-in-molan-defamation-case-challenged-by-racism-definition-20210930-p58w32.html).
12 See the Federal Court's *Central Practice Note: National Court Framework and Case Management (CPN-1)*, clause 7.1.
13 [2018] FCAFC 70 at [5].
14 [2015] FCA 652; 237 FCR 33.

general jurisdiction was effected by section 39B(1A)(c) above (discussed further below).

As noted above, in *Oliver*, Justice Lee usefully canvassed the key grounds upon which jurisdiction may be attracted in defamation cases:

- where the proceedings would be within the jurisdiction of the Australian Capital Territory or the Northern Territory Supreme Courts on the basis of publication within a territory;
- where there has been publication across multiple states so that the interaction between the choice of law provisions in the various state Defamation Acts potentially engages the "full faith and credit" provision in section 118 of the Constitution;
- where the publication involves the consideration of the implied constitutional freedom of communication on governmental and political matters;
- in any matter arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter; and
- where a right, duty or obligation in issue in the matter "owes its existence to federal law or depends upon federal law for its enforcement", including where the right claimed is in respect of a right or property that is the creation of federal law.

Publication in a territory

Crosby v Kelly involved a claim for defamation regarding a publication alleged to have been published in the ACT, as well in other areas of Australia. The applicants, Lynton Crosby and Mark Textor, were directors of a political advisory firm and sued Michael Kelly, a member of the House of Representatives, for certain comments about them made by Mr Kelly on his Twitter account. The proceedings were commenced in the ACT registry of the Federal Court. The Full Court (Bennett, Perram and Robertson JJ) held that, once a claim of publication in the ACT is made, the Federal Court has jurisdiction over the matter. This is because the effect of section 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) is that the Federal Court has original jurisdiction over a proceeding that would be within the jurisdiction of the ACT or NT Supreme Courts.

The effect of *Crosby v Kelly* is that virtually all claims in respect of mass media publications are actionable in the Federal Court, because almost invariably they are published in the ACT or NT. However, all that is needed is a *bona fide* allegation of publication in a territory. If such an allegation is made, federal jurisdiction is attracted even if, upon consideration of the evidence, there is no proof of publication in a territory.[15] Similarly, federal jurisdiction remains "even if the non-colourable allegation was unnecessary to decide, abandoned, struck out, or otherwise rejected on the evidence adduced at trial".[16] As Allsop CJ stated in an article cited in *Oliver*,[17] "[once] a non-colourable assertion is made, that clothes the court with federal jurisdiction, which, once gained, is never lost". The concept of colourability is discussed further below.

As it turned out in *Oliver*, no evidence was adduced by the applicant to prove publication in a territory. As a consequence, the allegation failed for want of proof, "but this does not mean that federal jurisdiction, properly invoked upon the *bona fide* making of the allegation, somehow disappeared like a will-o'-the-wisp".[18]

Publication across multiple states

As noted above, section 39B(1A)(b) of the Judiciary Act provides for federal jurisdiction in any matter "arising under the Constitution, or involving its interpretation". One of the lesser-known grounds by which federal jurisdiction may be attracted under this sub-section, as referred to by Lee J in *Oliver*,[19] is where there has been intranational publication, in other words one *between* states. In noting this line of argument, Lee J seemed to be promoting a concept similar to that described by Justice Rares in a paper presented in 2006 at the University of New South Wales.[20] In that paper, Rares J posited that, where an applicant sues upon an intranational publication, the interaction between the respective choice of law provisions of the Uniform Defamation Acts (**UDA**) on the one hand, and the "full faith and credit" provision of the Constitution on the other, may give rise to federal jurisdiction.

Where publications in more than one Australian jurisdictional area (in other words, each state[21]) are sued upon, the law of each place of publication will create a substantive right to sue on that publication in that jurisdiction, as confirmed in *Dow Jones & Co Inc v Gutnick*.[22] However, the choice of law provisions in the UDAs designate which law is to be applied in particular proceedings. For example, section 11(2) of the *Defamation Act 2005* (Cth) provides:

If there is a multiple publication of matter in more than one Australian jurisdictional area, the substantive law applicable in the Australian

15 *Oliver* at [17], citing *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219.

16 *Oliver* at [18].

17 (2002) 23 Aust Bar Rev 29 at 45, cited in *Oliver* at [17].

18 At [18].

19 At [15].

20 Rares, J, *"Uniform National Laws and the Federal Court of Australia"*, presented at the University of New South Wales law faculty "*Defamation & Media Law Update 2006*" seminar on 23 March 2006. Available at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/Rares-J-20060323.rtf.

21 See section 11(5) of the *Defamation Act 2005* (NSW) and its equivalents.

22 [2002] HCA 56; (2002) 210 CLR 575. Cited by Lee J in *Oliver* at [15].

jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication.

In such situations, although a cause of action might exist in multiple states, the states *without* the closest connection to the harm have determined to apply the law of another state (the state with the closest connection to the harm) and are, in effect, acquiescing to that other state. Section 118 of the Constitution provides that "[full] faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State". This provision is therefore engaged "so as to enable courts to recognise and apply the provisions of the various uniform Defamation Acts as modifications of the laws of each [state] and the common law of Australia".[23]

Rares J's analysis, as far as the authors are aware, has not been tested in any proceedings but raises interesting issues and certainly appears to have been embraced by Justice Lee in *Oliver*. In today's day and age, intranational publications almost invariably attract *Crosby v Kelly* jurisdiction, which would remove the need to run an argument that a matter arises under this limb.

Implied freedom of political communication

The Federal Court will also have original jurisdiction to hear a "pure" defamation action where the publication somehow involves the application of the implied constitutional freedom of communication on governmental and political matters (as a matter arising under the Constitution pursuant to section 39B(1A)(b) of the Judiciary Act). The recognition of that freedom has its origin in the decision in *Lange v Australian Broadcasting Corporation*,[24] where the High Court delivered a unanimous joint judgment stating:

[Sections] 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.[25]

The *Lange* decision is generally raised as a form of non-statutory qualified privilege defence, as opposed to being relied upon by an applicant in their claim. In *Oliver*, Lee J confirmed that federal jurisdiction will be enlivened by the freedom being relied upon by a party, even if it is only raised by way of defence by a respondent.[26] Notably, in Christian Porter's case against the Australian Broadcasting Corporation, the respondents relied upon the implied freedom by way of constitutional defence but also contended that it should affect findings on identification and damages.

Matters arising under a law of the Commonwealth

Section 39B(1A)(c) of the Judiciary Act provides for federal jurisdiction in any matter "arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter". In *Oliver*, Lee J noted that the introduction of this section marked the Parliament's extension of the Court's reach "to all controversies or 'matters' across all areas with respect to which the Parliament of the Commonwealth has made laws".[27] In this context, 'matter' means the "justiciable controversy between the actors involved, comprised of the substratum of facts representing or amounting to the dispute or controversy between them".[28] The concept of 'matter' is distinct from the cause of action and exists independently from the proceedings ultimately brought for determination.[29]

In *Rana v Google Inc*[30], the Full Court was faced with an appeal from a first instance decision dismissing Rana's case against Google for want of jurisdiction. Rana had pleaded, as against Google, contraventions of the Australian Consumer Law[31] (**ACL**), defamation and negligence. At first instance, the ACL claim was struck out, and the Court concluded that it lacked the jurisdiction to hear the defamation matter as there was no longer a core federal matter pleaded. However, on appeal, the Full Court disagreed. Chief Justice Allsop, together with Justices Besanko and White, found it could not be said that the ACL and the defamation claims were distinct and separate matters. While both claims were "less than coherently pleaded",[32] one could discern a common substratum of facts from which the claims arose. Further, while the ACL claim was embarrassing, this did not mean it was colourable. Once the Court had jurisdiction over the ACL claim, it had accrued jurisdiction over the nonfederal matter.

23 *Oliver* at [15].

24 (1997) 189 CLR 520.

25 At [540].

26 At [14].

27 At [13].

28 See *Oliver* at [12]; also see Allsop J (as the Chief Justice then was), 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Australian Bar Review* 29.

29 *Fencott v Muller* (1983) 152 CLR 570 at 603-608; *Australian Securities and Investments Commission v Edensor Nominees Pty Limited* [2001] HCA 1; (2001) 204 CLR 559 at 584-585 [50], both cited in *Oliver* at [12].

30 [2017] FCAFC 156.

31 Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

32 At [37].

Rana demonstrates the oft-stated principle in this area of the law that once a matter is within federal jurisdiction, the entire matter is within federal jurisdiction and, once gained, jurisdiction is not lost. This is still the case if the cause of action which brought the matter within federal jurisdiction is struck out with no leave to replead, leaving only the non-federal matters remaining.

A right, duty or obligation in issue in the matter owes its existence to federal law

In *Oliver*, Lee J referred to the decision of *LNC Industries Limited v BMW (Australia) Limited,* where it was confirmed that a federal matter arises if a right, duty or obligation in issue in the matter "owes its existence to federal law or depends upon federal law for its enforcement".[33] This includes where the right claimed is in respect of a right or property that is the creation of federal law. The question whether the federal matter arises in this context does not depend upon the form of the relief sought. In *LNC Industries*, an example given is of a claim for damages for breach or specific performance of a contract. The claim for relief is of a kind which is available under state law, but if the contract is in respect of a right or property that is the creation of federal law, the claim arises under federal law. The subject matter of the contract in such a case exists because of the federal law.[34]

This limb is seen as merely an expansion (or, on another view, a subset) of the limb discussed directly above – that is, an expansion (or sub-set) of what it means for a matter to arise under a law of the Commonwealth.[35] Take, for example, a dispute arising in relation to the warranties given by the assignor/assignee under a contract effecting an assignment of copyright. Although the dispute does not arise under the *Copyright Act 1968* (Cth) in the literal sense, the right, duty or obligation in dispute arguably owes its existence to that Act.

Jurisdiction arose under this limb in *Mulley v Hayes*. There, Justice Lee was required to decide whether the Court had jurisdiction to hear proceedings that could not be characterised as "pure" defamation proceedings where the publications comprised two Facebook Messenger messages: the first sent in January 2020 from the respondent to the applicant (**January Message**); and the second sent in February 2020 from the respondent to the applicant's wife and later seen by the applicant (**February Message**). The separate question for determination, pursuant to 37P of the FCA, was whether federal jurisdiction had been properly invoked.

There was no publication in a territory (Mr Hayes' message was sent from Queensland to Mr Mulley's wife, presumably in New South Wales), and therefore the avenue of jurisdiction established in *Crosby v Kelly* was unavailable. However, Lee J ultimately found federal jurisdiction arising from a right, duty or obligation in issue owing its existence to federal law. The applicant originally pleaded four separate claims, but did not press two of them, leaving two causes of action remaining. One was for defamation in respect of the February Message (sent to the applicant's wife only) and alleged to carry an imputation that the applicant is a paedophile. The other claim was for damages "for alleged psychological injury caused by the January Message and the February Message".[36] Mr Mulley sought relief by way of common law damages based on a novel claim for tortious liability for harm caused by unlawful acts, being the sending of messages by Mr Hayes contrary to section 474.17 of the *Criminal Code 1995* (Cth) (which makes it a criminal offence to use a carriage service to menace, harass or cause offence).

To answer the question of jurisdiction, Lee J explored the case law post*LNC Industries*. His Honour found that the cause of action met the *LNC Industries* test – the applicant asserted that the respondent's conduct was unlawful because it constituted conduct contrary to a norm created by, and owing its existence to, a law of the Commonwealth. Therefore, his Honour reasoned, the "entire controversy out of which this fourth pleaded claim arises is one "arising under" a law of the Parliament".[37]

Lee J found that the other remaining claim, the defamation matter, was also within the Court's jurisdiction since it arose out of a common substratum of facts. The claim for unlawful conduct under the Commonwealth Code related to both messages, and the claim for defamation arose out of one of them. Lee J relied upon the judgment of *Hunt Australia Pty Ltd v Davidson's Arnhemland Safaris Pty Ltd* where Spender, Drummond and Kiefel JJ (as her Honour then was) stated:

> *In this case the defamation claim is not "a completely disparate claim constituting in substance a separate proceeding", nor is it "a non-federal matter which is completely separate and distinct from the matter which attracted federal jurisdiction". The claim for defamation arises out of the first letter in a series of correspondence … It is the dissemination of the requested response from the Minister which founds the federal claim. It was well open to the primary judge to conclude, "as a matter of impression and practical judgment", that there was a common substratum of facts, and that the non-federal defamation matter was not "completely separate and distinct" from the Trade Practices Act matter.*[38]

33 (1983) 151 CLR 575 at 581 Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ at [7] citing *Ex parte Barrett* (1945) 70 CLR 141, at p 154.
34 At [8].
35 Allsop, J, *An Introduction to the Jurisdiction of the Federal Court of Australia* (FCA) [2007] *FedJSchol* 15, available at http://www5.austlii.edu.au/au/journals/FedJSchol/2007/15.html.
36 At [17].
37 At [60].
38 [2000] FCA 1690; (2000) 179 ALR 738 at [30].

Therefore, where there is a common substratum of facts between a defamation matter and a matter that is within the Court's jurisdiction, the Federal Court will gain jurisdiction over the non-federal matter. An obvious example of this concept in practice is the one given in *Hunt Australia* – an alleged contravention of section 18 of the ACL (section 52 of the *Trade Practices Act 1974* (Cth) at the time *Hunt Australia* was decided) and a defamation claim in relation to the same publication.

However, even where a non-federal claim is brought within federal jurisdiction by reason of its association with a federal claim, that is not the end of the matter and the Federal Court can still be found *not* to have jurisdiction. In *Mulley v Hayes*, the respondent made a submission that the Commonwealth Code claim was "colourable", being a claim made for the "the improper purpose of 'fabricating' jurisdiction"[39] by making a claim with a federal issue for the purpose of bringing the nonfederal issue within the Federal Court's jurisdiction. A court will not have jurisdiction where there is such a finding.[40]

In considering the submission, Lee J discussed the principles relevant to allegations of colourability. His Honour noted that the weakness of a case may be relevant to the issue, but only to the extent that it can rationally inform an assessment as to whether the claim was advanced for an improper purpose to fabricate jurisdiction.[41] Additionally, a colourable claim is not the same as a weak or infirm claim.[42] While Mr Mulley had added the Commonwealth Code claim after Lee J has raised the issue of jurisdiction, it was never put to Mr Mulley that he had added this claim for an improper purpose, nor was there any cross-examination on the issue. In those circumstances, his Honour could not make a finding or draw an inference that Mr Mulley's claim attracting the jurisdiction of the Court was colourable or artificial.

Does corporate status attract federal jurisdiction?

Although not necessary to decide, Lee J mused in *Oliver* that it might be arguable that federal jurisdiction is attracted under the 'right, duty or obligation' limb wherever a respondent is a corporation (which would obviously significantly expand federal jurisdiction) because the ability to sue a corporate entity arises under and depends upon a Commonwealth law:

> *Chapter 2B of the* Corporations Act 2001 *(Cth) provides for the basic features of a company. As is explained in Ford, Austin & Ramsay's Principles of Corporations Law (Lexis) at [4,050], the capacity of a company created under the Corporations Act, including its ability to be sued, is to be found in s 119 when it provides that a company on registration comes into existence as a body corporate. It is s 124(1) which gives the entity powers of a body corporate (as to a company registered before the commencement of the relevant Commonwealth law, being the Corporations Act, s 1378 provides that registration under earlier state law has effect as if it were registration under Pt 2A.2 of the Corporations Act). The ability to sue the respondent as an entity now arises under and depends upon a law of the Commonwealth.*[43]

On this view, the Court would always have jurisdiction in any claim in which the respondent is a corporation created under the *Corporations Act 2001* (Cth). It should be noted that alternative views have been expressed in other Federal Court cases.[44]

Conclusion

Jurisdiction can be a complicated matter. As the cases make clear, it is important when bringing and defending a defamation claim in the Federal Court that it comes within one of the avenues of jurisdiction (helpfully set out by Lee J in *Oliver*). In most instances, mass media and online publications will attract *Crosby v Kelly*-type jurisdiction. However, the decision in *Mulley v Hayes* is a useful reminder that other avenues exist for invoking the Court's jurisdiction.

As a final note, it is worth considering the potential further expansion of the Court's jurisdiction in defamation cases if the Federal Government's recently released *Social Media (Anti-Trolling) Bill 2021*[45] is enacted. Firstly, the Bill empowers the Federal Court to grant 'end user disclosure orders' to uncover the identity of posters of anonymous comments on social media, and further any case relating to a social media post would likely involve a matter arising under a federal law (and therefore enliven federal jurisdiction under section 39B(1A)(c) of the Judiciary Act). That forum may well find itself flooded with 'backyarder' social media cases between individuals, or we may see an increase in such matters being heard in the Federal Circuit Court.[46]

39 At [70], citing *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219 per Bowen CJ, Morling and Beaumont JJ.

40 See *Tucker v McKee* [2021] FCA 828 at [37]-[38], where the Court did not have jurisdiction because a federal claim was found to be colourable.

41 At [73], citing *Qantas Airways Limited v Lustig* [2015] FCA 253; (2015) 228 FCR 148 (at 169 [88]):

42 *Macteldir Pty Ltd v Dimovski* [2005] FCA 1528.

43 At [16].

44 See *Seven Network v Cricket Australia* [2021] FCA 1031; 393 ALR 53 at [61]; although cf *Hafertepen v Network Ten Pty Limited* [2020] FCA 1456 at [44].

45 Exposure draft available at https://www.ag.gov.au/system/files/2021-11/social-media-anti-trolling-bill-2021-exposure-draft.PDF.

46 Defamation cases in Federal Circuit Court (now Federal Circuit and Family Court of Australia) are rare, but see discussion of the Court's jurisdiction in relation to defamation in *Sarina & Anor v O'Shannassy* [2019] FCCA 732.

Lessons for Social Media Users:
One Defamatory Tweet Can Cost You $35,000

Tess McGuire, Lawyer, and **Annabelle Ritchie,** Associate, MinterEllison, comment on the recent *Dutton v Bazzi* judgment.

Social media users frequently post negative criticisms or opinions about politicians. What happens when you're sued over a tweet?

Key take-aways:

1. Whether or not a tweet is defamatory is a matter of 'impression'
2. Twitter users are taken not to have read a linked article
3. The 'serious harm' threshold introduced with the stage 1 defamation reforms may have changed the outcome

Content warning: mention of rape and abortion

Background to *Dutton v Bazzi*

Defence Minister Peter Dutton has won his defamation claim against refugee advocate Shane Bazzi over a tweet that labelled him "a rape apologist".

Mr Dutton claimed this Tweet was defamatory of him and sought damages, including aggravated damages, and an injunction restraining Mr Bazzi from further publishing the Tweet or its allegation.

Mr Bazzi relied on the statutory defence of 'honest opinion' and, in the alternative, the common law defence of 'fair comment'.

Ultimately, both defences failed to protect the publication of the Tweet, and Justice White of the Federal Court found that it conveyed the defamatory imputation that 'Mr Dutton excuses rape'.

Justice White ordered damages of $35,000 for Mr Dutton but declined the request for aggravated damages and an injunction to prevent Mr Bazzi further tweeting.

Defamatory meaning: what's in a tweet?

In assessing the nature of tweets generally, Justice White drew the following conclusions:

1. the ordinary reasonable readers were members of the class of users of social media;
3. Twitter is a conversational medium through which the ordinary reasonable reader tends to scroll quickly with the consequence that an impressionistic rather than a closely analytical approach is appropriate; and
3. in determining the meaning conveyed to the ordinary reasonable reader, account should be taken of the whole tweet and the context in which it is read by that reader.

Applied to the tweet in question, regard was had to the whole of the tweet, including the title and caption of *The Guardian* article linked, but not to the full content of article.

The defamatory meaning that was found to arise from the tweet in this case was consequential for the failure of Mr Bazzi's defences. The Court accepted that the Tweet conveyed that 'Mr Dutton excused rape'.

Why did Mr Bazzi's defences fail?

Mr Bazzi's principal, substantive defence was that the tweet was of 'honest opinion' pursuant to section 31 of the *Defamation Act*. To be successful, this requires proof of three elements:

1. the defamatory matter was an expression of opinion rather than a statement of fact;
2. the opinion related to a matter of public interest; and
3. the opinion was based on "proper material".

Justice White accepted that the tweet was an expression of opinion based on several factors, including:

- the statement was an 'evaluative judgment';
- juxtaposing "Peter Dutton is a rape apologist" with the link to *The Guardian* article added to readers' understanding that an opinion was being expressed; and
- "Mr Dutton's status as a high profile politician is significant" as the ordinary reasonable reader of the Tweet would have understood that it is commonplace for such politicians to attract criticism.

Mr Bazzi also succeeded in demonstrating that the opinion related to a matter of public interest.

The defence failed at the final hurdle. Justice White noted that:

- section 31 requires "that the proper material on which the opinion is based be stated in or, referred to, in the impugned matter or be otherwise notorious";
- although there was "no reason in principle why the provision of a single link, accompanied by some indication of what is to be found in the link, may not constitute a sufficient indication of the facts on which the opinion is based", it was not enough to substantiate the 'material facts' that Mr Bazzi pleaded as the proper material on which his opinion was based;
- critically, the term "based on" is used in the sense of "having its foundation in" the proper material, and requires a rational connection between the material relied on and the opinion; and

- it is not required that the reasonable reader reach the *same* opinion as the commentator, and in fact, the opinion may be extreme or even insulting, but nevertheless capable of being rationally based on the proper material.

In trying to draw this connection, counsel for Mr Bazzi referred to a sentence within the linked article, which stated, "In 2016 a federal court judge found Dutton had breached his duty of care to a woman who became pregnant as a result of rape, and exposed her to serious medical and legal risks in trying to avoid bringing her to Australia for an abortion."

In response, Justice White stated it was "difficult to discern any rational relationship between the finding by this Court in *Plaintiff S99/2016* of a breach of the duty of care to a rape victim, on the one hand, and the imputation that Mr Dutton *excuses* rape".

Similarly, the statements that Mr Dutton had previously made accusing some women refugees in Nauru of "trying it on" by claiming they have been raped to come to Australia to seek an abortion, was found to be "a different subject matter than diminishing the significance of rape, or not treating it seriously when it occurs, or any action which involves excusing rape".

Accordingly, the 'rational relationship' was found to be lacking between the statements of Mr Dutton and "the opinion that Mr Dutton excuses rape itself when it occurs, or that he is a rape apologist more generally".

Justice White found the common law defence of fair comment was also not made out for "much the same reasons" as the statutory defence of honest opinion.

Did the Tweet cause 'serious harm'?

This case was initiated prior to the commencement of stage one of reforms to the *Defamation Act* across the states and territories of Australia.

A substantial reform that now applies is the 'serious harm' threshold. What constitutes serious harm is not defined in the legislation, and a defendant can apply for the question to be heard separately prior to the trial.

There is yet to be case law on what constitutes serious harm in Australia, but the UK's Supreme Court has held (in the context of their similar legislation) that the new requirement to show "serious harm" requires its application to be determined by reference to actual facts regarding the impact of the statement and not just to the meaning of the words: *Lachaux v Independent Print Limited & Anor [2019] UKSC 27* (**Lachaux**).

The key factors in *Lachaux* were the scale of publication, whether the statement had been read by people in the jurisdiction who knew the plaintiff, the likelihood of the publication being read by others who knew or would come to know the plaintiff in the future and the gravity of the statements made.

In the *Dutton* decision, some of these factors were discussed in the context of the damages assessment. As such, it is possible to speculate how the serious harm threshold would have affected Justice White's decision.

Relevantly, the extent of publication was small, and it did not appear in mainstream media. The Tweet received 1,221 "Impressions" (the number of times persons viewed the Tweet) and there were only 155 "total engagements" with the Tweet (being the number of times people interacted with it).

Mr Bazzi removed the Tweet shortly after receiving the Concerns Notice. Justice White noted that it was therefore "seen by relatively few readers".

With regards to the gravity of the statement made, Justice White characterised it as a "serious defamation", and accepted Mr Dutton found the statement offensive and hurtful.

However, in weighing these factors, Justice White stated that "a sense of perspective does have to be brought to the assessment of the seriousness of the defamation", and in addition to the above factors, noted that readers would not have perceived it as the measured assessment of a serious political commentator.

It was also noted there was no suggestion that the Tweet affected Mr Dutton in his day-to-day political or Ministerial activities, or in his relationships with other people. Accordingly, a relatively low award of $35,000 was deemed appropriate compensation.

If the serious harm threshold had been implemented at the time this case was initiated, and it was assessed through an examination of the *impact* of the statement and not just the meaning of the words, it may have been a different outcome and may provide protection for tweeters in the future.

Even still, this case, as well as the High Court's recent *Voller* decision, serves as a reminder that a tweet or comments on a Facebook page can result in a defamation lawsuit.

Between 7 and 11 Lessons You Can Learn from the Latest OAIC Privacy Case

Anna Johnston, Principal, Salinger Privacy, tells us why a case involving facial recognition technology and customer satisfaction surveys offers plenty of lessons in how privacy law applies to Australian businesses.

In June 2020, the 7-Eleven chain of convenience stores began using a new customer feedback survey system in 700 stores across Australia. Each store had a tablet device which enabled customers to complete a voluntary survey about their experience in the store. Each tablet had a built-in camera that took images of the customer's face as they completed the survey.

Those facial images were stored on the tablet for around 20 seconds, before being uploaded to a server in the cloud. A third party service provider converted each facial image to a 'faceprint', which is an encrypted algorithmic representation of the face. The faceprint was used to infer information about the customer's approximate age and gender. The faceprint was also used to detect if the same person was leaving multiple survey responses within a 20 hour period on the same tablet; if multiple responses were detected, they were excluded from the survey results.

In other words, the company was using a facial recognition technology on its customers, to prevent its employees gaming a customer satisfaction survey by leaving multiple positive survey responses about their own performance. At least 1.6 million survey responses were completed. It is not known how many unique customers this represents.

The Office of the Australian Information Commissioner (**OAIC**) launched an investigation, and on 14 October published the final **determination by the Privacy Commissioner** Angelene Falk. Falk found that 7-Eleven had breached APP 3.3 by collecting 'sensitive information' (namely, biometric templates) unnecessarily and without consent; and APP 5 by failing to provide proper notice.

The implications of this case extend beyond just the use of facial recognition technology, and offer salient lessons for organisations of all shapes and sizes.

Here are my top takeaways for businesses:

1. You can't contract out of your privacy obligations

You will be on the hook for what your tech provider is doing with your customers' data.

7-Eleven tried arguing that it had not 'collected' any personal information because the information stored in the cloud was handled by its service provider, and that it had no access to the data. The OAIC found that the retail company did 'collect' the personal information via its service provider, because the data was collected on behalf of 7-Eleven, and it had contractual control over the data.

The lesson here is that both you and your technology provider must comply with the Privacy Act.

2. You can't escape your privacy obligations by arguing that you couldn't identify anyone

Sometimes you just have to laugh. 7-Eleven argued that the facial images and faceprints were not 'personal information' because they were not used to identify, monitor or track any individual. But the whole *point* of facial recognition technology is to identify individuals, in the sense of being able to distinguish one person from another! (Otherwise, what was the tech vendor selling – photos for the fun of it?)

Further, its deployment in this case *was* to monitor individuals: to see if anyone was entering multiple survey responses within short spaces of time.

The OAIC made short shrift of 7-Eleven's claim, and found that the faceprints were 'personal information', because the facial images and the faceprints were 'about' individuals, who were 'reasonably identifiable'.

('Personal information' is defined in the Act to mean: "information or an opinion about an identified individual, or an individual who is reasonably identifiable".)

3. You can invade someone's privacy without knowing who they are

If your service provider can identify individuals, then in law so can you. No hiding behind your tech vendor; you're handling personal information.

Your data is not to be considered in a vacuum; the test is whether it is possible to identify an individual "from available information, including, but not limited to, the information in issue" (at [37]). If your data can be linked to other available data to identify someone, you're handling personal information.

The test for identifiability is not whether or not you can figure out a person's name or legal identity; it is whether one individual can be "distinguished from other individuals" (at [38]). If your system can single out people to interact with them at an individual level, you're handling personal information.

4. The collection of any type of personal information, no matter how benign, must be reasonably necessary

Under APP 3, collecting personal information because it will be "helpful, desirable or convenient" is not enough (at [58]); your collection of personal information must be "reasonably necessary" for one of your organisation's "functions or activities".

The OAIC in this case formulated this test as involving consideration as to whether the impact on individuals' privacy is "proportionate to a legitimate aim sought" (at [59]). While the OAIC noted that "implementing systems to understand and improve customers' in-store experience" (at [102]) was a legitimate aim of the business, the collection of biometric templates was not a proportionate way to achieve that aim.

In other words, the risk posed to the individuals must be weighed against the business objectives, and serious consideration must be applied to determining whether those objectives could be achieved in a less privacy-invasive manner.

Is using facial recognition to infer age and gender a proportionate response? No; as the OAIC noted, if such data was necessary 7-Eleven could have simply asked for age range and gender as part of the survey questions. (Which reminds me: sometimes you don't need to know about gender at all.)

Is using facial recognition a proportionate response to the desire to improve the accuracy of a customer satisfaction survey? The OAIC said no: "Any benefit to the respondent was disproportionate to, and failed to justify, the potential harms associated with the collection and handling of sensitive biometric information" (at [105]).

5. Plus if it is sensitive information, you also need consent

In addition to the 'reasonably necessary' test, if the personal information you want to collect is in a sub-category known as 'sensitive information', under APP 3.3 you will also need the consent of the individual. Sensitive information includes biometric information and biometric templates, as well as information about a person's health or disability, ethnicity, religion or sexuality, amongst other categories.

While consent may either be express or implied, the OAIC noted that generally speaking, when seeking to collect 'sensitive information', organisations should aim for *express* consent, given the greater privacy impact which could arise from the handling of these special types of data.

6. A valid consent is hard to get

All stores had a notice outside with an image of a surveillance camera. Some of the notices also had text next to the image, which said "By entering the store you consent to facial recognition cameras capturing and storing your image".

The 7-Eleven Privacy Policy said "By acquiring or using a 7-Eleven product or service or providing your personal information directly to us, you consent to 7-Eleven collecting, storing, using, maintaining and disclosing your personal information for the purposes set out in this Privacy Policy".

So 7-Eleven argued to the OAIC that "if a customer did not consent to the use of this technology, the customer could elect to not enter the store or not use the tablet".

Yeah, they really said that.

(By the way, by reading this article, you consent to give me a million dollars, which I may or may not have spelled out in another document you probably did not see before you began reading this article. What, not happy? You were completely free to not read this article, what's your problem?)

Except that's not the way consent works in privacy law.

As formulated by the OAIC, the four key elements which are needed to obtain a valid consent are:

- The individual must be adequately informed before giving consent
- The individual must give consent voluntarily
- The consent must be current and specific; and
- The individual must have the capacity to understand and communicate their consent.

So let's spell this out.

Consent is the 'would you like sauce with that?' question. The question must be very specific about what is being proposed, the question must be asked about only one thing at a time, and the customer must be free to say yes or no (or say nothing, which means 'no'), and *still get their sausage roll*.

Entering a store does not mean your customer consented to you collecting their personal information.

Answering a survey does not mean your customer consented to you collecting their personal information.

And importantly, your Privacy Policy is not a tool for obtaining consent. Also, your Privacy Policy is not magic. It cannot authorise a company to do anything that the privacy principles don't already allow. A Privacy Policy is solely there to inform people, in general terms, how your organisation handles personal information.

No surprise, the OAIC found that customers' consent could not be implied by 7-Eleven.

7. That lame sign in the window is not a collection notice

APP 5 requires organisations to take reasonable steps to notify people about the collection of their personal information – the who, what, when, where, how and why – at or before the time of the collection. (Offering a clear notice also happens to help you meet the 'informed' element of consent, as mentioned above. But you need to give notice *regardless* of whether you are also seeking consent for something.)

7-Eleven had signs at the entry to its shops, only some of them with text. Even those with text did not explain that facial recognition would be used on customers answering the survey. Even astute customers could have understood the signage to be about CCTV security cameras, not cameras on the tablets used for the customer satisfaction survey.

The OAIC found the signs insufficient to meet the requirements of APP 5, and noted that an easy approach to notice could have been taken: 7-Eleven "should have included a collection notice on, or in the vicinity of, the tablet screen. The collection notice should have notified customers … before the start of the survey, and crucially, before the first facial image of the customer was captured. This was a practical and cost-effective step that the respondent could reasonably have taken in the circumstances, to draw customers' attention to the collection of their sensitive biometric information and the purpose of that collection".

The lesson here: don't let your big tech spend be undone by the failure to include a cheap solution to your privacy notice obligations.

8. Taking a casual approach to using new tech is a legal risk

Companies need to be finely attuned to the risks that come from collecting personal information without care. 'Move fast and break things' should not be your mantra. A finding that there has been an unlawful collection by a retailer of biometric information about Australians at a large scale should cause company boards and Audit & Risk committees to ask questions about their own data practices.

And facial recognition technology? Well, that's a whole other world of pain and risk.

When facial recognition technology is attracting calls for a moratorium, or stricter regulation, and when a Bill to use the technology for law enforcement can't even get through Parliament because it is so controversial, and when some vendors of the technology are even re-thinking its use, and when the technology is criticised by the computer science profession for its problems with racial and gender bias, maybe don't go around casually implementing facial recognition software for trivial purposes.

Just… don't.

9. Do proper risk assessments

One of the most striking aspects of this case is that 7-Eleven was only one month into its rollout of the new technology when the OAIC began making preliminary inquiries about the company's compliance with the law. Yet the retailer continued with the program for another 13 months before pulling the plug, just before the Privacy Commissioner made her final determination.

That's some pretty brave risk-taking.

The OAIC noted that a better approach would have been to conduct a Privacy Impact Assessment in advance of the program starting, which could have identified "options for avoiding, minimising or mitigating adverse privacy impacts (including by identifying potential alternatives for achieving the goals of the project without collecting such information)", and "assisted in assessing the proportionality of collecting biometrics for the purpose of understanding customers' in-store experience" (at [103]).

Conclusion

So beware, organisations of all shapes and sizes – you have been put on notice by the OAIC. You can't hide behind your tech vendors.

You need careful, risk-based consideration of all projects which will collect or use personal information. The scope of what is regulated as 'personal information' is broad. Your collection must be reasonably necessary for a legitimate purpose, and you must be able to justify the potential harms to individuals as proportionate when measured against your business objective. Plus, if the personal information is one of the types of personal information defined as 'sensitive', you will also need an informed, voluntary, specific and current consent to collect it.

The days of "By entering our store/accessing this website you are consenting to whatever we put in our Privacy Policy" are over.

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