

Editors' Note

Spring has sprung and brought with it the September Special Edition CLB. This special edition on innovation canvasses the latest developments on deepfakes, defamation, artificial intelligence, the implications of 5G's arrival and industry views on press freedom in Australia.

In a novel decision, the Supreme Court of New South Wales held that media organisations can be liable as publishers of defamatory comments made by third parties on their public Facebook pages. We have collected the insights of leading defamation experts on this landmark decision, **Kevin Lynch**, **Justine Munsie**, **Marlia Saunders**, **Sophie Dawson** and **Robert Todd**.

Artificial intelligence gained more attention from industry bodies this year, in particular with the release of Australian Human Rights Commission's White Paper 'Artificial Intelligence: governance and leadership'. **Paul Kallenbach**, **Vanessa Mellis**, **Annabelle Ritchie** and **Siegfried Clarke** (MinterEllison) walk us through the ethical concerns identified in the paper. The MinterEllison team also look at the international developments in the AI space and where Australia sits among these changes. Meanwhile, **Ted Talas** and **Maggie Kearney** from Ashurst dive into efforts to regulate deep fakes and take us through the implications for the Australian legal landscape.

In further news, our representatives from CAMLA Young Lawyers have donned their journalism hats. **Patrick Tyson** from the ABC chats to **Richard Ackland** about press freedom, the recent AFP raids and innovation in the digital news space. **Madeline James** (Corrs) interviews **Matt Collins QC** for his views on freedom of speech, defamation and whether these laws fairly balance the interests of plaintiffs

and defendants. HWL Ebsworth's **Amy Campbell** reports on CAMLA's panel discussion on 'Challenges and Opportunities in the Telco Sector' held in August at Bird and Bird.

August also brought to us the 25th rendition of the CAMLA Cup, held once again at Sky Phoenix. CAMLA Young Lawyer representative **Tara Koh** (Addisons) provides us with a report on the well-attended event. A thank you to all attendees of the event – CAMLA looks forward to seeing you again next year! On behalf of CAMLA, we give tremendous thanks to **Deb Richards** (Netflix) and **Ryan Grant** (Baker McKenzie) for hosting the event.

For those eager for more reading material, the ACCC has released its 619-page final report on the **Digital Platforms Inquiry**. Its 23 recommendations have serious implications for the business models of digital platforms and news media businesses in Australia. Whether or not these recommendations will materially affect the value placed on news content remains to be seen. **HealthEngine**, an online health booking platform, has gained attention from the ACCC for sharing personal information with insurance brokers and publishing patient reviews and ratings. **Clive Palmer** is demanding \$500,000 from, and threatening to bring a defamation claim against, YouTube creator **FriendlyJordies** for calling him 'Fatty McF--Head' and a 'dense Humpty Dumpty'. Finally, the Federal Court has ordered **Birubi Art**, a seller of fake Indigenous Australian souvenirs, to pay AU\$2.3 million in penalties for contraventions of the Australian Consumer Law.

For more, read on.

Eli and Ashleigh

There are two aspects of this decision ("publisher" and "primary") which warrant separate consideration.

In relation to the first question, of whether the Page Owners were "publishers", the Court in *Voller* found that:

- publication of third-party comments to persons other than the Facebook friends of the commenter occurs by virtue of the fact that the owner of a public Facebook page allows access to the comment by the publication of the page; and
- the owner or administrator of a public Facebook page is capable of rendering all or substantially all comments hidden.

On that basis, the Court held that the extended publication of a third-party comment is wholly in the hands of the media company that owns the Facebook page.

The second aspect of this decision concerns whether a Page Owner is a primary or secondary publisher. In short, Justice Rothman said that the Page Owners are primary publishers which means that the defence is not available to them.

Eli: What's the consequence of being classified as a primary (or 'first'), as opposed to secondary (or 'subordinate'), publisher?

Robert Todd: The main consequence is that a primary publisher cannot rely on a defence of innocent dissemination. Secondary publishers can avail themselves of the defence of innocent dissemination if they did not know and could not reasonably have known that the defamatory material had been published or that the published material contained defamatory words. Justice Rothman held that knowledge of the existence of the defamatory material should

be presumed not only for primary publishers, but also secondary publishers. However, for secondary publishers the presumption is rebuttable. If a secondary publisher is able to rebut the presumption, they can rely on the innocent dissemination defence, and thereby completely absolve themselves of liability for the publication.

Eli: Can you place this judgment in context? Where are the parties up to in this dispute? What was this judgment addressing, and what was it not addressing?

Justine Munsie: Justice Rothman's judgment addressed a specific question on the preliminary issue of publication – namely, "whether the plaintiff had established the publication element of the cause of action of defamation against the media defendants in respect of each of the Facebook comments by third-party users?"