

# CAMLA COMMUNICATIONS LAW BULLETIN

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## COVID Communications: How Fake News Fanned Coronavirus Hysteria And should intermediaries be held responsible for online falsehoods?

**Rachel Baker**, Lawyer, Clayton Utz, discusses fake news and disinformation in the coronavirus context, and looks at the legal responsibilities of internet intermediaries.

As the novel coronavirus spread around the world in early 2020, online falsehoods about the pandemic were also going viral. Some of these falsehoods (such as whether smoking cannabis could prevent the virus) were little more than light entertainment, but others increased the hysteria in already tense communities, prompting individuals to engage in dangerous and even criminal behaviour. In Australia, there is legislation creating obligations in relation to electoral advertising and there is of course the risk of a suit for defamation or other civil wrongs. However, there is no prohibition on producing or distributing material whose only harm is that it is untrue. Regulators around the world are concerned at the growing influence of online falsehoods, sometimes referred to as “fake news” and some governments are considering whether internet intermediaries can be held liable for their role as platforms on which this material is published. Part of the challenge involves defining “fake news”; while it is a term used in various contexts to convey a range of meanings, it is popularly understood as meaning deliberately false information spread via traditional or social media that intends to manipulate the public,

and this article uses that meaning. Regulators are concerned that, unlike other types of falsehood, fake news has heightened power to cause social harm and justifies special legal treatment. Such sentiment raises questions not only about the practicality of enforcement but also whether banning fake news would come at the price of placing an unbearably high burden on free speech.

### 5G network and coronavirus

One prominent piece of fake news during the coronavirus pandemic has been that the 5G mobile network causes the virus. More specifically, this is a cluster of theories: that coronavirus is not contagious but is an illness caused by exposure to radiation from the 5G network, that the 5G network weakens your immune system and makes you more vulnerable to the effects of coronavirus, and that lockdowns are being used as cover to install 5G networks. The link between 5G and the virus appears to have first been made by a Belgian doctor in January. Newspaper *Het Laatste Nieuws* published an interview with general practitioner Dr Kris Van Kerckhoven who said that 5G was dangerous and might be linked to coronavirus.<sup>1</sup>

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<sup>1</sup> 'How the 5G coronavirus conspiracy theory tore through the internet', Wired, 6 April 2020, accessed online at <https://www.wired.co.uk/article/5g-coronavirus-conspiracy-theory>.

## Editors' Note

2020 is certainly shaping up to be a year for the record books. This rather unique year in Australia is also seeing exciting developments in the privacy and defamation spaces. The June edition of the CLB features **Katherine Sainty** and **Belyndy Rowe's** (Sainty Law) take on the Privacy Commissioner's claim against Facebook in relation to Cambridge Analytica and the platform's alleged "serious and/or repeated interferences" with privacy in contravention of Australian privacy law. **Rachel Baker** (Clayton Utz) takes us through the recent bouts of fake news and disinformation in the coronavirus context, and looks at the legal responsibilities of internet intermediaries. **Will Sharpe** (HWL Ebsworth) discusses the recent *Smethurst v Commissioner of Police* decision where the High Court weighed up confidentiality, privacy and public interest considerations in refusing an order for destruction of material seized under warrant. This case makes some important observations on what practical recourse is available to a private citizen when a Commonwealth official exceeds its powers.

Defamation suits and injurious falsehood claims are also having their time in the sun. **Adaena Sinclair-Blakemore** (Baker McKenzie) analyses the recent *Omega Plumbing v Harbour Radio*

judgment, which looks at establishing malice in injurious falsehood proceedings and **Nicole Phillips** (Arnold Bloch Leibler) discusses the rise of Google review defamation suits in Australia. Big tech companies are not the only ones experiencing some pivots in this area. **Marlia Saunders** (News Corp Australia) takes us through the lessons from the recent Hubba Bubba case and why not to sue for defamation (or, at least, to settle early). Daniel Johns of Silverchair fame may have utilised these learnings in his recent stoush with the Sunday Telegraph case against him, which has since been settled with an apology.

Our CLB editor **Eli Fisher** (Baker McKenzie), profiles **Melissa Sequeira** Legal Manager and Company Secretary at ViacomCBS Networks (Pay) ANZ, to chat about her career and her reflections on this unique time. And we provide details within for the **CAMLA Young Lawyers Prepub 101 webinar on 25 June 2020** and the **CAMLA Essay Competition**.

We hope you enjoy the read as much as we enjoyed putting it together.

Ashleigh and Eli

News of a potential link became popular on Dutch speaking social media, then spread to the English speaking internet, but was mainly confined to relatively obscure talk show hosts and vloggers. What happened then – according to theories from some technology commentators – is that the engagement algorithms used by social media platforms detected that this content was becoming a viral trend, which propelled it to greater prominence.<sup>2</sup> Before long, Hollywood celebrities were passing on these rumours as fact. At one point, there were more than 50,000 posts about 5G and coronavirus within a 24 hour period.<sup>3</sup> An online disinformation specialist at Khalifa University in Qatar, Marc Owen Jones, claimed the rumour had the hallmarks of a state-backed campaign.<sup>4</sup> There is no confirmation yet of a state actor starting the 5G coronavirus rumour but *The New York Times* last year reported that Russian television network RT America has spread other falsehoods designed to undermine

5G technology (suggesting it causes brain cancer, infertility, autism and Alzheimer's disease), in an apparent effort to slow its rollout in the West (so that Russia can catch up and gain a competitive advantage).<sup>5</sup> The rumours struck a chord with the general public: in mid-April, more than 50 mobile towers were vandalised over one weekend alone in the United Kingdom;<sup>6</sup> there were similar incidents in other countries,<sup>7</sup> apparently in protest at the supposed health risks posed by the technology. Australian telecommunications company Telstra issued a statement seeking to dispel the myth.<sup>8</sup>

Platforms acted to remove the content. YouTube announced that videos linking 5G and coronavirus breached its policies against promoting unsubstantiated coronavirus prevention methods and in early April began actively removing all such content.<sup>9</sup> Soon after, Facebook followed suit.<sup>10</sup> Many platforms are prominently displaying authoritative health information

from sources such as the World Health Organisation and Australian Government in an effort to drive traffic towards more reliable sources.

### International regulation of fake news

Fake news of course pre-dates the coronavirus pandemic and many authorities have in recent years begun taking steps to reduce the harm it can cause. In some jurisdictions, this involves holding intermediaries responsible for false content that is not otherwise unlawful.

In May 2019 Singapore passed legislation criminalising the dissemination of false information online. The *Protection from Online Falsehoods and Manipulation Act 2019* makes it illegal to spread "false statements of fact" that compromise security or public safety. It gives any government Minister the power to direct an internet intermediary to disable access to false material and publish a correction notice. The legislation has been criticised by

<sup>2</sup> Ibid.

<sup>3</sup> '5G Virus Conspiracy Theory Fueled by Coordinated Effort', Bloomberg, 9 April 2020, accessed online at <https://www.bloomberg.com/news/articles/2020-04-09/covid-19-link-to-5g-technology-fueled-by-coordinated-effort>.

<sup>4</sup> Ibid.

<sup>5</sup> 'Your 5G Phone Won't Hurt You. But Russia Wants You to Think Otherwise', *New York Times*, 12 May 2019, <https://www.nytimes.com/2019/05/12/science/5g-phone-safety-health-russia.html>

<sup>6</sup> 'Over 50 Cell Towers Vandalized in UK Due to 5G Coronavirus Conspiracy Theories', *PC Mag*, 15 April 2020, accessed online at <https://au.pcmag.com/digital-life/66385/over-50-cell-towers-vandalized-in-uk-due-to-5g-coronavirus-conspiracy-theories>.

<sup>7</sup> 'Coronavirus: Far North cell tower vandalism linked to Covid-19 conspiracy theory', *stuff.co.nz*, 13 April 2020, accessed online at <https://www.stuff.co.nz/national/crime/120985809/coronavirus-far-north-cell-tower-vandalism-linked-to-covid19-conspiracy-theory>

<sup>8</sup> Telstra website: <https://exchange.telstra.com.au/5g-health-concerns-and-covid-19-the-facts/>

<sup>9</sup> 'YouTube will delete videos that falsely link 5G to the novel coronavirus after reports of people setting phone masts on fire', *Business Insider Australia*, 6 April 2020, accessed online at <https://www.businessinsider.com.au/youtube-delete-5g-coronavirus-conspiracy-2020-4?r=US&IR=T>.

<sup>10</sup> 'Facebook removes David Icke coronavirus-5G conspiracy video', *ITV Report*, 19 April 2020, accessed online at <https://www.itv.com/news/2020-04-09/facebook-removes-david-icke-coronavirus-5g-conspiracy-video/>.

human rights groups and journalists for restricting free speech and giving government ministers broad, discretionary powers to censor criticism.<sup>11</sup>

In the United States, after intelligence agencies confirmed interference by Russia in the 2016 Presidential election<sup>12</sup>, several states passed laws requiring schools to increase media literacy programs for students.<sup>13</sup> The *Honest Ads Act*, requiring greater transparency in political advertising on internet platforms, was introduced into the US Senate in 2017, but has not yet been made law.<sup>14</sup>

The United Kingdom has held an inquiry into Disinformation and Fake News which recommended that clear legal liabilities be established for technology companies to act against harmful content on their sites, coupled with independent regulation and a compulsory Code of Ethics, setting out what constitutes harmful content.<sup>15</sup> The UK Government has issued an Online Harms White Paper which sets out reforms to deal with a range of problematic content, including a statutory duty of care by technology companies to their users.<sup>16</sup> However, following a period of public consultation, the UK Government confirmed that the regulator will not require the removal of material that is legal but potentially harmful and will instead “require companies, where relevant, to explicitly state what content and behaviour they deem to be acceptable on their sites and enforce this consistently and transparently.”<sup>17</sup>

Sweden is taking action on the consumer side, establishing a government agency tasked with developing the nation’s “psychological

defence”. The agency will seek to ensure that factual information can be communicated quickly and effectively. It will also seek to identify, analyse and confront influencing operations.<sup>18</sup>

### Regulation in Australia

In Australia, the Federal Government’s response to the Australian Competition and Consumer Commission’s Digital Platforms Inquiry final report indicated that it will ask major digital platforms to develop a voluntary code (or codes) of conduct for disinformation and news quality.<sup>19</sup> The codes will outline what steps the platforms will take to tackle disinformation on their services and help consumers assess the quality of news and information they access online. The government says the codes will be based on international examples, such as the European Union Code of Practice on Disinformation (EU code), which was agreed to by major digital platforms and advertisers in 2018.<sup>20</sup>

The EU code requires platforms to “disrupt advertising revenues” of accounts and sites known for spreading disinformation, provide users with more information about the origins of political and issue-based advertising, give greater prominence to authoritative content, and make it easier to report the occurrence of fake news.<sup>21</sup> Efforts to disrupt and provide greater transparency around paid content will no doubt assist the battle against fake news but will not address the phenomenon of disinformation gaining popularity in the community and being voluntarily spread through individual accounts without payment, as occurred with the 5G coronavirus fake news. Indeed, the prevalence of

5G disinformation makes clear that the EU code has not eradicated fake news in Europe.

If Australia were to seek further regulation of fake news, some of the challenges facing legislators will include the difficulty in determining what is false, and even greater difficulty in determining what is deliberately false and manipulative. Enforcement by way of suspending offending accounts can also be fraught when disinformation starts as an offline rumour which is then spread (without malicious intent) by individuals who believe it to be true.

Whichever method regulators seek to employ, it is important they remain cognisant of the fact that not all untruths are harmful. Even if it were practically possible to rid the internet of all lies (or more specifically all statements lacking factual basis), there is doubt as to whether that would be a desirable outcome. The expression of unsupported ideas that challenge orthodoxy can trigger debate, research and learning, all of which are vital in democratic societies. To stamp out the expression of views that cannot be proven true would be dangerous and undesirable. Achieving the best outcome, in terms of protecting society from false news, while allowing the community to enjoy the benefits of open communication in a thriving digital economy, will likely involve providing internet users with greater transparency about the origins of sponsored posts (as required under the EU code) coupled with education to encourage consumers to question the accuracy and motivations of material read online.

11 ‘Singapore’s fake news law: protecting the truth, or restricting free debate?’, *SCMP*, 21 December 2019, accessed online at <https://www.scmp.com/week-asia/politics/article/3043034/singapores-fake-news-law-protecting-truth-or-restricting-free>.

12 2016 Presidential Campaign Hacking Fast Facts, *CNN*, 31 October 2019, accessed online at <https://edition.cnn.com/2016/12/26/us/2016-presidential-campaign-hacking-fast-facts/index.html>.

13 ‘California now has a law to bolster media literacy in schools’, *The Press Democrat*, 18 September 2018, accessed online at <https://www.pressdemocrat.com/news/8754461-181/california-now-has-a-law>.

14 ‘Senators announce new bill that would regulate online political ads’, *The Verge*, 19 October 2017, accessed online at <https://www.theverge.com/2017/10/19/16502946/facebook-twitter-russia-honest-ads-act>; [https://en.wikipedia.org/wiki/Honest\\_Ads\\_Act](https://en.wikipedia.org/wiki/Honest_Ads_Act)

15 ‘Disinformation and ‘fake news’: Final Report’, Culture, Media and Sport Committee, chapter 2 [37], accessed online at [https://publications.parliament.uk/pa/cm201719/cmselect/cmcmcds/1791/179105.htm#\\_idTextAnchor006](https://publications.parliament.uk/pa/cm201719/cmselect/cmcmcds/1791/179105.htm#_idTextAnchor006).

16 ‘Online Harms White Paper’, UK Government (Department for Digital, Culture, Media and Sport and Home Office), updated 20 February 2020, page 41, accessed online at <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>.

17 Online Harms White Paper Initial Consultation Response, UK Government (Department for Digital, Culture, Media and Sport and Home Office), 12 February 2020, accessed online at <https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response>.

18 ‘Sweden to create new authority tasked with countering disinformation’, *The Local*, 15 January 2018, accessed online at <https://www.thelocal.se/20180115/sweden-to-create-new-authority-tasked-with-countering-disinformation>.

19 ‘Government Response and Implementation Roadmap for the Digital Platforms Inquiry’, 12 December 2019, Australian Government (Treasury), page 7, accessed online at <https://treasury.gov.au/publication/p2019-41708>.

20 European Commission website: <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>

21 European Commission Website: <https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation>