

# Intergenerational Interesting Interview

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

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

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



Camille Gray



John Gray

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

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

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

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

There appears to have been a decline in the faith people place in advertisements over the years. In his letter to Nathaniel Macon Monticello dated 12 January 1819, Thomas Jefferson said that advertisements contain the only truths to be relied on in a newspaper. That was perhaps

more a statement on the quality of the newspapers of the day, than it was an endorsement of advertisements. Nevertheless, a recent study looked at Australia’s most trusted professions, and placed advertising people in 29<sup>th</sup> place, out of thirty, in between real estate agents (28<sup>th</sup>) and car salesmen (30<sup>th</sup>). And presumably that’s because advertisers today are considered to bend the truth to achieve their desired outcomes. Camille, are we living in a post-truth world, and what does that mean in the world of advertising?

**CAMILLE:** I always take issue at advertising getting such a bad rap! Yes, undeniably, the role of advertising is to sell products but I always challenge people to remember the cultural products they love – for you, Eli, it’s AFL. That entire code is made by advertising. I aim to take a less cynical view and celebrate the potential of advertising (I hope my boss is reading this). But back to truth and trust – it’s fascinating because while the *profession* of advertising is deemed untrustworthy, the success of a brand is entirely linked to trust. In fact over the past three years, we’ve seen a rising percentage of people (currently

around 64 per cent) claim that they will choose, switch or boycott a brand based on societal issues. Apple has topped every ‘most trusted brand’ list and is also the most valuable brand in the world. And it’s no surprise Apple’s latest advertising campaigns are all about trust – their iPhone slogan is literally “Privacy. That’s iPhone,” is a direct attack on other tech players like Facebook and Google.

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

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

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

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

**JOHN:** The obvious challenge is digital technology, which enables any person with access to a device to propagate their own version of truth. As the ACCC explained in its report, social media is helping to create echo chambers, where the repeated exposure to the same perspectives as the user's own, as a result of algorithms curating content, are affirming a person's own beliefs, their own 'truths'. No one has yet come up with the answer to your question. I doubt that we can or should rely upon platforms to self-regulate. The pragmatist might say the law only needs to focus on doing what it's always done - that is, protecting the vulnerable, and outside of that, the law should tolerate 'harmless' dishonesty. So we continue to ban the practice of spruiking investment products online without a PDS or a prospectus, but (apart from controversial Twitter and Facebook warnings) we ignore what the former leader of the free world might happen to say on Twitter. It's not to say that digital platforms don't go to some

effort to counter misinformation. But consider this. Earlier this month, the Federal Court ordered Kogan Australia to pay \$350,000 as a penalty for making misleading representations about a tax time sales promotion. They had essentially increased the prices immediately before the promotion, and then 'discounted' them to their usual levels for the duration of the promotion. Rod Sims declared that "this decision sends a strong signal to businesses like Kogan, which regularly conduct online sales promotions, that they must not entice consumers to purchase products with a promise of discounts that are not genuine." And, that is a completely typical, commonplace occurrence. Misleading and deceptive behaviour *in trade or commerce* is something with which the law concerns itself. And in other fora as well: giving evidence, in election advertisements, in providing information to a public authority, and so on. But when you consider the potential consequences of a false claim made by a president or prime minister to millions of followers online, the legal remedies available don't quite reflect the harm that such a falsehood may cause. There are no Kogan-like penalties, no sending "strong signals". Truth is important, but perhaps only in certain contexts. Say what you like about a dead person, about a company with 10 employees, say what you like in the course of parliamentary proceedings.

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

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

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



**Donald J. Trump** ✓  
@realDonaldTrump



We won Michigan by a lot!

⚠ **Multiple sources called this election differently**



**The Epoch Times** ✓ @EpochTimes

"Dominion alone is responsible for the injection, or fabrication, of 290,000 illegal votes in Michigan, that must be disregarded."

#Michigan: An expert witness for @SidneyPowell1 says there were 4 "physically impossible" spikes of about 385,000 #Ballots.  
theepochtimes.com/michigan-compl...



**This claim about election fraud is disputed**

12:59 AM · Dec 2, 2020



175.7K



60.2K people are Tweeting about this

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

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

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

**FISHER:** John, did you get all of that?

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

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

**CAMILLE:** Creativity is thriving! You have to remember that every social or video platform – particularly ones like Instagram, TikTok and YouTube – relies on great consumer-made content to keep people on the site. That means it's in these companies' interest to constantly improve the tools to get people creating content to share with friends. Very crudely put, the editing capabilities that were previously reserved for Hollywood are being handed to consumers. That can be really positive in terms of democratising the creation of new, original content. This also has a darker side. Deepfakes are one example of this. Deepfakes are incredibly realistic face swaps that use AI to replace faces on moving images – and it's quite terrifying to see how easy they are to make. A lot of the big players like Google and Facebook have banned deepfakes except in the case of satire or parody – and while it's very early days, deepfakes are a really clear example of a form of media that pushes the boundaries of truth and deception in ways we've never seen before. Check out Jordan Peele's deepfake Obama speech on YouTube

to see what I mean, and remember that was two and a half years ago. This technology advances apace. It's worthwhile to note also that an app called DeepNude was released in Australia in June 2019, which enabled users to, in effect, remove clothing from images of women. The app had both a paid and unpaid version, with the paid version costing \$50. The app was removed that month, but that should give you a feel for how available, cheap and sophisticated this technology will increasingly become in the future.

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



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

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

**CAMILLE:** The rationale for this recommendation, as the Issues Paper said, is to ensure the definition is aligned with consumer expectations and reflects the realities of how data

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

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

**JOHN:** Yes, the game has shifted significantly. But, no, to my mind, we're still dealing with the same values. People are generally unforgiving of dishonesty and inauthenticity, and the public continues to champion creativity and credibility. It's just that, especially for digital immigrants, it can be harder to detect the difference between real and fake, honesty and lies. My work in privacy law really bears this out. For a very long time - albeit this is changing now - privacy law in Australia was really treated like guidance or regulatory suggestions, not as law in respect of which non-compliance posed a practical risk. But that's not to say that businesses didn't take it seriously; they did. Savvy businesses treated privacy law almost as a customer service guidebook - How Not To Irritate Our Customers - because spamming customers with marketing material, or overcommercialising a customer's

personal information, was completely unconnected to the relationship the business has with the customer and was tacky, lacking in class, the conduct of a hustler. It hurt the brand. And over the years, it became clearer and clearer that relying on fake consents - the pre-ticked boxes, or the "I Agree" buttons following lengthy unread tomes of legal gibberish - were not protecting companies' reputations or relationships with their customers. They weren't real, and everyone knew it. If a customer were upset by a business processing personal information in a manner that did not accord with his or her wishes, it didn't assist the business to rely on the fake consents. The trick then is to having a genuine understanding of your customers, what they want, what they dislike, and catering for it authentically. Building trust and loyalty is hard work, but that's always been the key to business success and it still is. One final point on this, returning momentarily to misinformation on digital platforms. The ACCC noted (and the European Commission did too) that professional, traditional, journalism has an important role to play in a world laden with untrustworthy publishers. Instead of falling away, overtaken by new media, traditional media have become essential to serious consumers - and their credibility is highlighted in contrast to some of the new players. The more fake news abounds, the more important are traditional credible sources of information. I think that's the same with most things in the digital economy.

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

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