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The Concerns and Competing Interests Surrounding Australia's New Social Media Legislation

Sophie Dawson[1], Partner at Bird + Bird, considers the changes to the Criminal Code following the Sharing of Abhorrent Violent Material amendment in April this year.

Key takeouts:

Internet content services and hosts should:

- review their take down procedures to ensure they are consistent with the new law;
- ensure that their staff are trained in relation to compliance with the new law;
- consider in advance their position in relation to various likely types of content that could trigger this law; and
- ensure that their procedures take into account other media and internet laws, including statutory restrictions on publication.

Introduction

Australia's internet and media laws have just become even more complex. A further element of complexity was added with the passage of, and assent to, the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (**Act**). The Act was passed through both Houses of Parliament on Thursday, 4 April 2019, and given royal assent on Friday, 5 April 2019. This law comes as a response to the horrific, 17-minute-long livestream of the Christchurch massacre on Facebook on 15 March 2019, which was widely shared across a myriad of online platforms.

Existing regulatory landscape

Australia already has a large number of publication laws. Many of them are under state and territory legislation. Clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) protects internet service providers and internet content hosts from liability under state and territory laws until the host or ISP is aware of the "nature of" the content in question.

There are also relevant offences already in the Commonwealth Criminal Code. For example, section 474.17 makes it an offence to use a carriage service in a way that reasonable persons would consider to be menacing, harassing

1 With thanks to Hamish Fraser and Rohit Dighe for their contributions to an earlier version of this article.

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Editors' Note

In amongst EOFY parties, AFP raids and end of season sales, June also brings to you the mid-year edition of the CLB for 2019.

Much has happened since our April publication, including the recent **Australian Federal Police raids** of the ABC's headquarters in Sydney which caused quite a stir. The raids resulted in wildly divergent views and we have canvassed some of those from high-profile commentators inside, with many thanks to **Marlia Saunders**. On the subject of media rights, CAMLA Young Lawyer representative **Antonia Rosen**, from Bankis, interviews **Larina Alick**, at Nine, on the future of suppression orders and our friends at **Ashurst** get us up to speed on defamation law reform and the recent amendments to s115A of the Copyright Act. Bird and Bird's **Sophie Dawson** provides an insight into the world of violent and abhorrent material and HWL's **Rebecca Lindhout** and **Andrew Miers** look at the recent statistics from the OAIC on data breaches. **Eli Fisher** chats with **Anna Johnston**, privacy guru at Salinger, about all things data. And **Dr Mitchell Landrigan** gives us his thoughts about the Folau/ARU stoush. Despite revving up over Redbubble's use of its copyright, Hells Angels were met with nominal recourse by the Federal Court as discussed by HWL's **Laksha Prasad**.

Further to these developments, both **Jetstar** and **Sony** have felt the early sting of the **ACCC**, both for allegedly making false or misleading representations to consumers on their respective websites regarding refunds and in Sony's case, replacement or repairs for faulty games. In the world of privacy, **ANU**, **Westpac** and the **Australian Catholic University** have become embroiled in data breach territory.

Following on from our December 2019 edition, **Geoffrey Rush** has been awarded $2.9million in his defamation case against The Daily Telegraph. It is the largest ever defamation payout to a single person in Australia after the Victorian court of appeal last year significantly dropped the actor **Rebel Wilson's** damages over defamatory articles in Woman's Day magazine. Before you ask, yes, there has been an **appeal** which will be heard August this year. Stay tuned!

In amongst all this action, the CAMLA **Young Lawyers** committee held their annual **networking event** at **MinterEllison**, where the winners of the CAMLA **essay competition** were also announced. CAMLA Young Lawyer representative **Madeleine James** provides her report on the sold-out event. Lastly, save the date - 29 August 2019 - for this year's **CAMLA Cup**. Tickets are now on sale for everyone's favourite trivia night!

For more, read on.

Eli and Ashleigh

***Correction**: We would like to acknowledge Jess Millner and her article "Stranger Than Fiction: The Truth Behind 'Fake News.'" The author's details were omitted in our April 2019 edition.

or offensive. Section 474.22 makes it an offence to access, publish or transmit child abuse material. And section 474.25 makes it an offence for an internet content provider or internet content host to fail to report child pornography material to the Australian Federal Police within a reasonable time after becoming aware of it.

What does the Act apply to?

The Act contains offences which apply to internet service providers, content services and hosting services in relation to a failure to remove or report 'abhorrent violent material'.

Material will only be "Abhorrent violent material" if it meets four criteria. First, the material must be in the nature of streamed or recorded audio, visual or audio-visual material.

Second, it must record or stream "Abhorrent Violent Conduct" which is defined to include terrorist acts, murder, attempts to murder, torture, rape and kidnap.

Third, it must be material which reasonable people would regard in all the circumstances as being offensive. As further discussed below, this element of the offence may be construed restrictively in light of the High Court decision in *Monis.*

Fourthly, it must be "produced" by a person (or 2 or more persons) who engaged in, conspired to engage in, attempted to engage in, or aided, abetted, counselled or procured, or who was knowingly concerned in the Abhorrent Violent Conduct. It does not therefore apply in respect of material prepared by journalists (though it may apply in respect of any streaming by a journalist of footage originally produced by a perpetrator of the relevant conduct).

Failure to report

Section 474.33 makes it an offence for an internet service provider, content service or hosting service (together, the **Regulated Providers**) to fail to refer material to the Australian Federal Police where the relevant person:

- is aware that the service provided by the person can be used to access particular material that the person has reasonable ground to believe is abhorrent violent material that records or streams abhorrent violent conduct that has occurred, or is occurring, in Australia; and
- does not refer details of the material to the Australian Federal Police within a reasonable time after becoming aware of the existence of the material.

It is important to bear in mind that this is not the only offence relating to failure to report crime. For example, under section 316(1) of the *Crimes Act 1900* (NSW), it is a crime punishable by up to 2 years in prison to fail to report a serious indictable offence.

Failure to remove

Section 474.34 makes it an offence for a person to fail to ensure the expeditious removal of abhorrent violent material from a content service provided by that person.

The fault element in relation to such material being accessible through the service and in relation to failure to expeditiously remove it is recklessness.

This underlines the importance of ensuring that appropriate training and compliance procedures are in place.

Defences to this offence are expressly provided for in section 474.37(1) which provides that the offence in 474.34(1) does not apply where:

- the material relates to a news report, or a current affairs report that is in the public interest and is by a person working in a professional capacity as a journalist;
- the accessibility of the material relates to the development, performance, exhibition or distribution, in good faith, of an artistic work;
- the accessibility of the material is for the purpose of advocating the lawful procurement of a change to any matter established by law, policy or practice in an Australian or foreign jurisdiction and the accessibility of the material is reasonable in the circumstances for that purpose;
- the accessibility of the material is necessary for law enforcement purposes, or for monitoring compliance with, or investigating a contravention of a law;
- the accessibility of the material is for a court proceeding;
- the accessibility of the material is necessary and reasonable for scientific, medical, academic or historical research; or
- the accessibility of the material is in connection with and reasonable for the purpose of an individual assisting a public official in relation to the public official's duties or functions.

Constitutional considerations likely to affect construction of the Act

When construing the Act, Courts are likely to take into account the implied freedom of speech in relation to government and political matters.

The Act expressly provides that it does not apply to the extent that it would otherwise infringe the implied constitutional freedom of speech, and refers to section 15A of the *Acts Interpretation Act* which provides that "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

The test for whether a law is compatible with the implied constitutional freedom is as follows (see *McCloy v New South Wales* [2015] HCA 4):

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
3. If "yes" to 2, is the law reasonably appropriate and adapted to advance that legitimate object?

The High Court decision in *Monis v The Queen*[2] provides guidance to the approach likely to be taken by courts to the new offences contained in the Act. In that case, the High Court had to consider the meaning of 'offensive' in section 471.12 of the *Commonwealth Criminal Code*, which makes it an offence to use the postal service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

The High Court in that case found that the law in question did burden the freedom, such that the answer to the first part of the test above was "yes". There can be little doubt the same will be true in relation to the new offences.

The High Court also found that it had to construe "offensive" in 471.12 narrowly in order to ensure that the offence was compatible with the constitutional freedom. The communications sent by Mr Monis in that case were found not to be sufficiently offensive to meet the high bar set by that test.[3]

eSafety Commissioner Notices

The eSafety Commissioner can issue notices which have the effect of shifting the onus of proof in relation to the element of recklessness to the accused in certain circumstances where the material remains up at the time the notice is issued. There is a presumption of recklessness unless the person adduces or points to evidence that suggests a reasonable possibility that, at the time the notice was issued, the person was not reckless as to whether the specified material was abhorrent violent material.

Penalties

The criminal penalties under the law are significant. Failure to notify has a maximum penalty of 800 penalty units. Commonwealth Penalty units are currently $210, making the total penalty up to $168,000 for each offence.

The offence of failing to expeditiously remove or cease to host abhorrent violent material attracts a fine for a body corporate of not more than the greater of 50,000 penalty units (currently $10,500,000) or 10% of the annual turnover of the body corporate. For the same offence, an individual who is a content service provider or hosting service provider is punishable by imprisonment for a period of not more than 3 years or a fine of not more than 10,000 penalty units ($2,100,000) or both.

2 [2013] HCA 4

3 Media and Internet Law and Practice, Thomson Reuters, 1A.100